

POPULISM and MILITANT DEMOCRACY

Case study of Germany, Bulgaria and jurisprudence of the European Court of Human Rights

by

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ABSTRACT

Populism nowadays is maybe the most popular word in the world of politics. Populists influence is becoming serious, but their politics is bringing worries. They are against diversity, pluralism, and multiculturalism. Besides that, populism is the new movement which takes advantage of political emotionalism. Therefore, a debate on the threats that populism poses on democracy is open. Coming to the question of the danger posed to democracy, this thesis connects populism and the theory of militant democracy as a concept which aims to protect the democratic system from enemies that want to destroy it. Hence, the thesis question is “does populism in politics pose a threat to democracy and if yes, can militant democracy measures be utilized to address or neutralize this threat.”

In answering the thesis question, the thesis provides an analysis on the jurisprudence of the European Court of Human Rights and case studies of Germany and Bulgaria. This thesis examines both, the theoretical and the practical application of the theory. The theoretical foundations are covered in the first chapter, whereas the chapter on the European Court of Human Rights jurisprudence and the case studies of Germany and Bulgaria, provide an examination of the practical application of the concept. The concept of militant democracy in this thesis is connected to populism through a mix of legal and political approach. This presents on the one hand the political situation in the selected countries and on the other hand, the relevant constitutional and legal provisions and case law for addressing the question of populism.

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LIST OF ABBREVIATIONS

AfD – Alternative for Germany

BL – the Basic Law

CDU – Christian Democratic Union of Germany

CoE – The Council of Europe

CSU – Christian Socialist Union of Germany

ECHR – European Convention on Human Rights

ECRI – European Commission against Racism and Intolerance

ECtHR – European Court of Human Rights

EU – The European Union

FCC – German Constitutional Court

GERB – Citizens for European Development of Bulgaria

NFSB – National Front of Salvation of Bulgaria

NPD – National Democratic Party of Germany

SPD – Social Democratic Party of Germany

UP – United Patriots

VMRO – Internal Macedonian Revolutionary Organization

INTRODUCTION

Populism nowadays is maybe the most popular word in the world of politics. That movement succeeded in gaining media attention, popular votes and it is on its way to make a stable place in politics. Some political parties even went further, in entering Parliaments or even being part of the governmental structure. Their influence is becoming serious, but their politics is bringing worries. Populists are anti-liberal, mainly nationalist and aim to preserve national unity. Their actions and rhetoric show anti-minority and anti-immigrant sentiments. They are against diversity, pluralism, and multiculturalism.¹ Moreover, examples are showing that they are often xenophobic and use racist rhetoric.² That poses a danger to the progress of human rights and preservation of democracy. Considering the question of danger, this thesis makes a connection between populism and militant democracy.

Militant democracy aims to protect the constitutional and democratic system from enemies that have the purpose of destroying it.³ Apart from that, this theory is a dynamic concept able to “accommodate different types of threats.”⁴ Therefore, considering that populists are capable of being targeted as enemies of democracy, this thesis’s research question is “*does populism in politics pose a threat to democracy and if yes, can militant democracy measures be utilized to address or neutralize this threat.*” By answering the thesis question, this thesis aims to contribute to the academic debate on militant democracy and its practical application. Hence, an additional

¹¹ Bryder, Tom. “Populism – a Threat or a Challenge for the Democratic System?” University of Copenhagen Faculty of Social Science, 2009. Available at: http://politicalscience.ku.dk/international_students/present_international_students/taking_exams/past_papers/Populism___a_threat_or_a_challenge_for_the_democratic_system.pdf

² Ibid. page 11.

³ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Page 267.

⁴⁴ Ibid. 348.

contribution is the analysis on the militant democracy application in Bulgaria, a country which is rarely elaborated under this concept. The concept of militant democracy in this thesis is connected to populism through a mix of a legal and political approach. This presents on the one hand, the political situation in the selected countries and on the other hand, the relevant constitutional and legal provisions and case law for addressing the question of populism.

This thesis contains four chapters. Chapter one begins with the theoretical and practical foundations of militant democracy, concentrating as well on the different author's contribution in extending the application of the theory. Chapter one also assesses the phenomenon of emotionalism and its close ties to militant democracy and populism, the part where these two concepts meet. Further, it elaborates on populism and its influence in the democratic system.

The second chapter elaborates the jurisprudence of the European Court of Human Rights under article 11 and article 17. Chapter two focuses on the case-law on banning political parties, the notion of captive audience and abuse of rights clause. The end of the chapter also includes a short part of Council of Europe's soft law.

The third chapter represents the analysis on Germany, the traditional jurisprudence of the German Constitutional Court, the attempts of banning the National Democratic Party and the rise of populism in the country. This chapter also brings a discussion of the influence from the rise of populism in Germany by the entrance of Alternative for Germany in the political scene. Following this debate, the chapter ends with a conclusion which reflects on the thesis question.

The last chapter of the thesis is the analysis on Bulgaria. This chapter firstly presents arguments that Bulgaria is a militant democracy and after the chapter turns to the rise of populism in Bulgaria. This chapter ends with a conclusion on the main issues regarding populism and the

power of Bulgarian militancy to neutralize the populist influence. Finally, the thesis ends with concluding remarks on the whole elaboration, several answers on the thesis question and a proposal for extension of the militant democracy limitations.

CHAPTER 1: MILITANT DEMOCRACY AND POPULISM

1. Karl Loewenstein's concept of militant democracy

“Perhaps the time has come when it is no longer wise to close one’s eyes to the fact that liberal democracy is beginning to lose the day to the awakened masses.”⁵ This is a sentence that was written by Karl Loewenstein⁶ in 1937 in his essay *Militant democracy and fundamental rights II*.⁷ Karl Loewenstein’s work can be said that is *a must* in every piece of work that elaborates on militant democracy because he is the one who coined the term but also gave light to the concept that is still remarkably elaborated from different authors. In these two articles, he developed his idea of militant democracy motivated by fascism, or how he called it “the world movement or universal movement.”⁸

In his view, militant democracy means self-defense or self-protection of the democratic system which can be realized “on political and legislative lines”⁹ Democracy cannot be left blindness and led be taken by the enemy who wants to destroy the principles on which the system is based. This means that democracy cannot be left as a system which may give to its enemy (undemocratic political parties) the means under which it can be destroyed. Democracy should protect itself, and that protection should be organized under the legal norms. Additionally, he asked a very crucial question: “How can democracy curtail the ground on which it is based such as free

⁵ Loewenstein, Karl. “Militant Democracy and Fundamental Rights, II.” *American Political Science Association*, No. 4, 31 (August 1937): 638–58. Page 657.

⁶ . Karl Loewenstein wrote two articles: *Militant democracy and fundamental rights I* and *Militant democracy and fundamental rights II*.

⁷ Loewenstein, Karl. “Militant Democracy and Fundamental Rights, II.” *American Political Science Association*, No.4, 31 (August 1937): 638–58. Page 657.

⁸ Loewenstein, Karl. “Militant Democracy and Fundamental Rights, I.” *American Political Science Association*, No. 3, 31 (June 1937): 417–32. page 417.

⁹ Ibid. page 428.

speech, press, assembly and fair play of opinions?”¹⁰ He answered this question by giving an overall analysis of the fascist movement elaborating the programmatic and ideological features of the movement on an international level thoughtfully. His findings are that the ingredients of the movement, like the recruitment and involvement of the middle class and mainly young generation, are a common or even uniform feature of fascism at that time with some slight national differences. Further, he defined fascism as a political technique for mobilizing masses by using emotional approach.¹¹ The approach that he presented says that once the enemy of democracy is recognized, the second step is analyzing the tactics used by the enemy. Therefore, Loewenstein provides a list of legislative measures from different countries which can help democracies in their fight against fascism (anti-fascist legislation). By revising the countries’ legislation, he provided a list of legislative measures grouping them into 14 sections.¹²

He pointed out that fascist leaders relayed not on rational means, but on the combination of constitutional and emotional methods.¹³ Moreover, he makes a significant request in establishing “a closer cooperation of democracies internationally” and makes a further step in his study of the fascist technique by discovering and establishing the concept under which a democratic system can be protected (the concept of militant democracy).¹⁴ The triggering event from which the whole discussion starts is the creation of the Weimar’s Constitution which is as well the initial point of Karl Loewenstein in his analysis. The collapse of Weimar Republic and its weaknesses are the practical examples under which Loewenstein argues for militant security against anti-democratic

¹⁰ Ibid. Page 431.

¹¹ Ibid. Page 428.

¹² Loewenstein, Karl. “Militant Democracy and Fundamental Rights, II.” *American Political Science Association*, No. 4, 31 (August 1937): 638–58.

¹³ Loewenstein, Karl. “Militant Democracy and Fundamental Rights, I.” *American Political Science Association*, No. 3, 31 (June 1937): 417–32. Page 428.

¹⁴ Ibid. Page 430.

fractions or movements.¹⁵ Hence, referring to the consequences, apart from the mass violation of human rights and the World War II, what we got from that experience it's a "never-ending debate" about democracy, its guarantees, and deficiencies.¹⁶

2. Development of the theory of militant democracy

Karl Loewenstein was the one who coined the term, but there are also other scholars who discussed and developed the idea of the need for self-defense of democracy, hence contributed to the development of the theory. For example, *Karl Popper* in his work "*The open society and its enemies*," stated that there is no place for intolerance inside the law and that democracy should regulate the incitement of intolerance on a substantial level. This means that Karl Popper recognized the self-preservation role of the democratic system and the danger that it can be imposed on the democratic system if there are no means under which the democracy can stay safe.¹⁷

After the World War II, the idea of militant democracy become accepted, and scholars on militant democracy besides the theoretical framework started to analyze the practical implementation of the "militant" norms. Karl Loewenstein in his second article *Militant Democracy and fundamental rights II* gives an overview of several states and their implementation of the militant democracy theory.¹⁸

¹⁵ Ibid. Pages 426-428.

¹⁶ Loewenstein, Karl. "Militant Democracy and Fundamental Rights, II." *American Political Science Association*, No.4, 31 (August 1937): 638–58.

¹⁷ Popper, Karl R. *The Open Society and Its Enemies*. 5th ed. Vol. 2. Princeton University Press, 1966. https://isistatic.org/journal-archive/pr/08_01/germino.pdf.

¹⁸ See more: Loewenstein, Karl. "Militant Democracy and Fundamental Rights, II." *American Political Science Association*, No.4, 31 (August 1937): 638–58.

Otto Pfersmann in his article *Shaping militant democracy: Legal limits to democratic stability*, turns to questions concerns such as normative suitability of the rules in the countries and their constitutional design and elaborates on a theoretical level the corresponding of the norms with the purpose of defending democracy.¹⁹ His famous statement is that “democracies are always more or less militant.”²⁰ His explanations include not just legal, but as well as non-legal strategies. In revising the suitability of the norms to the theory of militant democracy its evident that legal analysis is always part of it, but what Otto Pfersmann includes also is, according to him, the statement that “militancy is inherent to democracy.”²¹ Therefore, after analyzing different dilemmas that come from the application of the theory of militant democracy, he concludes that democracy cannot survive only relying on constitutional provisions, but there is a need of political culture.²²

Contributing in the development of the theory of militant democracy, *Samuel Issacharoff* in his piece *Fragile Democracy* continues to explore the topic by making a comparison of the European approach of restricting political activities versus the US example. He includes jurisdictions such as Germany, India, Turkey, Ukraine and as previously stated US. Issacharoff in his work by using the comparative approach tries to dig deeper in the topic and to find answers to questions like: excluding political parties from political participation, limits and criteria of the ideological positions of the enemies, question of legal frame and mechanism for supervising the implementation of the “militant” provisions.²³

¹⁹ Pfersmann, Otto. “Shaping Militant Democracy: Legal Limits to Democratic Stability.” In *Militant Democracy*, Andras Sajo. Utrecht: Eleven International, 2004.

²⁰ Ibid. Page 53.

²¹ Ibid. page 60.

²² Ibid.

²³ Issacharoff, Samuel. “Fragile Democracies.” *The Harvard Law Review Association*, No.6, 120 (n.d.): 1407–66.

Andras Sajo is the one who gives a more practical approach to the way of analyzing the implementation of the “militant” norms. His contribution in the development of the theory is the analyses of the implementation of the militant democracy in Central and Eastern European states. His elaboration of the theory and the thinking that he has goes further than just defending democracy in period of elections or in relation to free elections. Besides political participation and banning political parties that can endanger the democracy in one state, Sajo has a wider view of state self-defense.²⁴ He sees the defense interrelated to people’s fundamental rights and states that “there is no democracy where individuals are denied fundamental choices in structuring their forms of social life”.²⁵ Therefore, militant democracy is not just about banning political parties, but “it refers foremost to restrictions of political parties – party formation, free speech and the right to assembly”.²⁶ Additionally, he is an editor of a book which encompasses several articles from different authors discussing the implementation of the theory in different countries.²⁷

Most recent development of the theory of militant democracy come from *Markus Thiel* and *Svetlana Tylkina*. Markus Thiel describes his book “*The militant democracy principle in modern democracies*” as spectrum of “militancy” owing to the fact that the book is compilation of different articles presenting the “militant norms” in different countries. This book as he describes it is boosted by the recent threats on democracy by religious fundamentalist, which opened a new discussion in the implementation of the theory.²⁸ The functioning of far-right political parties takes

²⁴ Sajo, Andras. “Militant Democracy and Transition towards Democracy.” In *Militant Democracy*, Andras Sajo. Utrecht: Eleven International, 2004.

²⁵ Ibid. page 210.

²⁶ Ibid. page 221.

²⁷ Ibid.

²⁸ *The Militant Democracy Principle in Modern Democracies*. Markus Thiel. New York, N.Y: Ashgate Publishing, 2016.

also part in the book and it is presented by professor *Renata Uitz* and the example of Hungary.²⁹ What this book presents is a comparative analysis regarding the theory and an analysis on the consensus and minimum asses of measures towards the treatment of threats posed on democracy.³⁰ Professor Svetlana Tytkina in her book “*Militant Democracy – Undemocratic political parties and beyond*” gives a comparative look of the concept of militant democracy, combining theoretical and practical application of the theory with a special focus and academic contribution on counter-terrorism policies, dangerous religious movements and threat of terrorism.³¹ A different analysis on the theory concentrating more in the philosophical background of militant democracy is presented by *Alexander S. Kirshner* who focuses on representative institutions, moral issues raised by the theory and threats to democracy coming from individual’s interest in political participation.³²

All these authors and others who are devoting their analysis and writing on this theory have placed militant democracy in a contractual way in their examples. Moreover, they have given an extension of the understanding of the concept. Therefore, a precise definition or one definition of militant democracy cannot be provided. That comes exactly from the fact that militant democracy functions in the political world which is dynamic. Additionally, the theory refers to internal enemies, and mainly authors are researching the enemies of one state. Consequently, the specificity and the history together with the political system of the county make the analysis on militant democracy topic even more specified. Nevertheless, new enemies might appear, and that requires

²⁹ Uitz, Renata. “Hungary – Chapter 7”. In *The Militant Democracy Principle in Modern Democracies*. Markus Thiel. New York, N.Y: Ashgate Publishing, 2016.

³⁰ *The Militant Democracy Principle in Modern Democracies*. Markus Thiel. New York, N.Y: Ashgate Publishing, 2016.

³¹ Tytkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015.

³² Kirshner, Alexander S. *A Theory of Militant Democracy: The Ethics of Combating Political Extremism*. New Haven and London: Yale University Press, 2014.

researching the topic under new circumstances. One is clear; militant democracy “provides democracy legal means to defend itself against the range of possible activities of non-democratic political actions.”³³ Hence, the leading aim would be institutions of democracy to be kept harmless and to not let them fall under “illiberal democracy” surrounding.³⁴

3. Classification of the theory of militant democracy

As it could be seen from the previous part of this chapter, militant democracy has been embedded in the theoretical discussions from different authors representing various examples of theory’s implementation. By the time, as the academic thinking on this specific topic continued to develop, scholars begun to classify the development of the concept in several groups. For example, the author *Peter Niesen* classified the justification of the theory as the following: anti-extremist, negative republicanism, and civil society.³⁵ The anti-extremist is rejecting the institutions and values, republicanism or enemies led up by identity features that also go back to the past and civil society or protection from violence, hate speech, and racist expression.³⁶ Sajo gives another classification, or he makes a classification of the triggering grounds which might call the activation of militant democracy. Those triggering properties are the return of communism, extreme nationalism and right-wing extremism.³⁷ An even more structural classification is given from Issacharoff who learning from the practical implementation of the theory, made the few clarification of possible restrictions. Following the example of Germany – prohibition on anti-

³³ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Introduction.

³⁴ Issacharoff, Samuel. “Fragile Democracies.” *The Harvard Law Review Association*, No.6, 120 (n.d.): 1407–66. Page 1409.

³⁵ Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties** - Part I, 3 *German Law Journal* (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=164>

³⁶ Ibid.

³⁷ Sajo, Andras. “Militant Democracy and Transition towards Democracy.” In *Militant Democracy*, Andras Sajo. Utrecht: Eleven International, 2004.

democrat parties; following the case of Turkey – restriction on political parties based on the principle of secularism; following the example of Israel – Jewish extremism and violence and following the example of Spain – violent and terrorist groups.³⁸ As a general classification, it can be noticed that when it comes to the periods of threats to democracy or returning of militant democracy analysis, it can be recognized two significant periods: the period during Cold War or post World War II and period post 9/11 of Islamic extremism. Whether populism is the third period for rethinking militant democracy, is something that triggered the writing of this thesis.

The different classification of the theoretical and practical application of the theory demonstrates the possible enemies of democracy. As could be seen, different countries might present different threats and enemies. Hence, considering that militant democracy discussion mainly refers to internal enemies, different classifications are more than justified. Moreover, the discussion on militant democracy gives us space for thinking on both, the theoretical and the practical application simply by the fact that there is no strictly accepted definition of the concept. Democracies encounter different enemies since the enactment of the theory. Fascism was the first movement against which democracy was fighting, but developments in the world create new enemies which means that fascism is not the only enemy. The discussion on the concept is not static and can be used other threats to democracy to be recognized and analyzed. That is precisely shown in both, the development of the theory and in the classification of the theoretical and practical implementation of militant democracy. Discussion on militant democracy will be reopening at least until some other system, much better, replace democracy.

³⁸ Pfersmann, Otto. "Shaping Militant Democracy: Legal Limits to Democratic Stability." In *Militant Democracy*, Andras Sajo. Utrecht: Eleven International, 2004, page 60.

4. Political emotionalism

Political emotionalism would be a technique for political mobilization using political manipulation.³⁹ Loewenstein recognized the link between militant democracy and emotionalism which is continuously accepted also by other scholars writing on the same problematic. As Tyulkina defined in her book, militant democracy is “a technique that may be relevant in all situations and jurisdiction where emotionalism takes over the political process.”⁴⁰ Considering the recent development regarding the rise of populist far-right political parties, a discussion on emotionalism is back to the stage, and it will be discussed in the following two parts of the chapter. One may ask why is political emotionalism a problem? Moreover, nowadays people are so used to that emotionalism that they even do not recognize the emotional structure behind it, they do not recognize that there is nothing rational. That question can be answered following the explanation of Andras Sajo, who has very thoughtfully elaborated on this topic. Sajo would say that “radical politics of emotions has a penchant for lying.”⁴¹ Sajo is also giving arguments that “no one has the monopoly of knowing the truth.”⁴² At first glances, this may not seem as an evident problem, but on a theoretical level, this means that the system is allowing masses and country systems to be led by emotions. Is not that what an organized country is against?

Karl Loewenstein viewed emotionalism as a contradiction to democracy. Emotional politics is not capable of giving solutions and presenting plans. It is capable of mobilizing masses, but what is certain is that the system of democracy “was designed as a characteristically non-

³⁹ Loewenstein, Karl. “Militant Democracy and Fundamental Rights, I.” *American Political Science Association*, No. 3, 31 (June 1937): 417–32. Page 428.

⁴⁰ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Page 14.

⁴¹ Sajo, Andras. “Militant Democracy and Transition towards Democracy.” In *Militant Democracy*, Andras Sajo. Utrecht: Eleven International, 2004. Page 212.

⁴² Ibid. Page 212.

emotional institution.”⁴³ What happens when something is not designed to survive under such political emotions? Well if not legally regulated, besides “the fundamental tension in the constitutional state,” “emotional politics runs the risk of irreversibly destroying democracy through the very means of democracy.”⁴⁴

Here we have a clash of a constitutional order build up under the values and rules of democracy and emotionalism (usually intentional emotionalism), and emotional manipulation which success may/is relying on democracy. Constitutional democracy follows the limits of reason / or rationalism (Weber), and when emotionalism come to play, it is skilled to pass the borders of rational decision – making process.⁴⁵ Emotions led fascism, and fascism is not the only movement/ideology that has embodied the emotionalism in its very functioning. Scholars have recognized several, and all of them match with the existing militant democracies’ classifications. The conclusion would be that militant democracy and political emotionalism are closely related or even that they follow each other. I would even say that their combination should be one and that militant democracy cannot be separated from political emotionalism.

4.1. Populism: political emotionalism in modern Europe

It can be called a reborn political emotionalism in modern Europe, but the real name of that movement and ideology is populism. In the words of Carmen Medina, “populism is a real emotionalism in politics.”⁴⁶ We are living the period when the electorate is making the choices

⁴³ Ibid.

⁴⁴ Sajo, Andras. “Militant Democracy and Emotional Politics.” *Constellations*. Accessed March 9, 2017. <http://dx.doi.org/10.1111/cons.12011>. Introduction.

⁴⁵ Ibid.

⁴⁶ Medina, Carmen. “Is Populism Another Name for Political Emotionalism?” June 8, 2017. Available at: <https://www.thecipherbrief.com/is-populism-another-name-for-political-emotionalism>.

based not on rational discussion but emotions. But what is populism? Authors tend to say that it is difficult to define populism. However, it can be defined as the following:

*“A populism is a movement where the common people, which usually means the non-elite and often means working class, feel they are being taken advantage of by elite structure of society, and they begin to become a more effective political and social force around that idea to seek redress.”*⁴⁷

What populists do and how are they becoming acceptable to the masses? As *Mark Fleurbaey* would describe them, they are a “radical form of majoritarian action” whose actions and claims are justified on “the will of people.”⁴⁸ *Ruth Wodak* recognizes four dimensions which are central in programs of right-wing populists and those are: nativist/ethnonationalism, anti-elitism, authoritarianism, conservative values, and identity politics.⁴⁹ Apart from that, what they usually do is also scapegoating. Turning the glass on the other side, or in other words, they do use the power of rights and usually have the narrative that “portray rights as protecting only terrorist suspect or asylum seekers at the expenses of safety, economic welfare, and cultural preferences of the presumed majority.”⁵⁰ Populist scapegoats usually are immigrant communities, minorities, and refugees and the whole narrative is making racism and Islamophobia in Europe to rise even more.

Considering that democracy is a *ratio* based system and that political emotionalism is not new, but old triggering and central driving force, (like in the explanation of Karl Loewenstein -

⁴⁷ Ibid.

⁴⁸ Fleurbaey, Mark. “Populism as a Challenge to Democracy from Within.” *Scholars Strategy Network*. Accessed July 10, 2017. Available at: <http://www.scholarsstrategynetwork.org/sites/default/files/ssn-basic-facts-fleurbaey-on-populism.pdf>.

⁴⁹ Wodak, Ruth. “Five Views: Is Populism Really a Threat to Democracy?” LSE, n.d., sec. Right-wing populist parties pose clear short and long-term dangers. Available at: <http://blogs.lse.ac.uk/europpblog/2017/07/24/is-populism-really-a-threat-to-democracy/#Four>.

⁵⁰ Ibid.

fascism) the discussion on political emotionalism should be twisted to the question how this form – populist emotionalism is endangering democracy. The answer to the elaboration of this question is already a topic of discussion, and several scholars have already agreed that the rise and development of populism is posing a threat to democracy. *Rosalind Dixon* states that populism poses a threat to democratic constitutionalism or to the “minimum core set of institutions.”⁵¹ *Marc Fleurbaey* is sharing the same view, but he includes the danger posed not just to the institutions but also to the democratic procedures.⁵² *Zsolt Enyedi* goes further with the dangers posed by populist. Here the list is extended, and it covers the defense mechanism of the functioning of one state, as Enyedi elaborates those are “freedoms, checks and balances, the rule of law, tolerance, autonomous social institutions, individual and groups rights, or pluralism.”⁵³

Populism is also about cultural and religious homogeneity from which comes the so-called “external enemies.” Multiculturalism is one of the principles of the modern world in which a lot of efforts has been dedicated, but multiculturalism is under threat considering the loudly propagated cultural and religious homogeneity. This leads us to an, even more, broader view of the impact of the development of populism. Populism is not affecting just the mechanism and the principles under which liberal democracy functions but “it also undermines the civility of the

⁵¹ Dixon, Rosalind. “Populism and Liberal Democratic Constitutionalism.” Accessed October 10, 2017. Available at: <http://verfassungsblog.de/introduction-constitutional-courts-and-populism/>

⁵² Fleubaey, Mark. “Populism as a Challenge to Democracy from Within.” *Scholars Strategy Network*. Accessed July 10, 2017. <http://www.scholarsstrategynetwork.org/sites/default/files/ssn-basic-facts-fleubaey-on-populism.pdf>.

⁵³ Enyedi, Zsolt. “Five Views: Is Populism Really a Threat to Democracy?” LSE, sec. Populism is indeed a threat to democracy – and the positive case for it is rather feeble. Accessed October 10, 2017. Available at: <http://blogs.lse.ac.uk/euoppblog/2017/07/24/is-populism-really-a-threat-to-democracy/#One>.

relations among citizens.”⁵⁴ The ruling in the name of majority pose a direct danger to minorities, and that narrative is visible from the scapegoats’ picked up by the populist.⁵⁵

As it can be seen the threat is real, far-right and far-right populist political parties are gaining more and more attention and publicity as well as support from the people. Maybe the narrative used by the populist during election time cannot be taken as a direct danger because similar narratives are used by the majority of political parties, but the reality is that although populist speak directly about people’s concerns, abuse and misinterpreted realities, after getting the wanted places they are not going to “pay a lot of attention on the common folk’s problems”.⁵⁶ Besides the politics on emotionalism in the populist movement, it can be recognized politics of fear with a combination of giving hope or saving the people.⁵⁷ Countries like Turkey and Poland are examples of systems which have suffered from destabilization (for instance in the sphere of justice and media) done by populist.⁵⁸

4.2. Populist emotionalism under militant democracy

In the previous part of the chapter, it was discussed the beginning and development of the theory of militant democracy together with its characteristics. The theory was developed as a response to the fascist movement, but later its theoretical and practical application was developed further because of the appearance of new threats to democracy. That implies that the theoretical understanding of the concept can be adjusted to new enemies of democracy. Apart from its first practical application in Germany under the Basic Law with the intention of keeping safe the

⁵⁴ Ibid.

⁵⁵ Roth, Kenneth. “The Dangerous Rise of Populism: Global Attacks on Human Rights Values,” March 15, 2017. Available at: <https://jia.sipa.columbia.edu/global-attacks-human-rights-values>.

⁵⁶ <https://jia.sipa.columbia.edu/global-attacks-human-rights-values>

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⁵⁸ Kenneth, Kenneth Roth. “The Dangerous Rise of Populism.” Human Rights Watch. Accessed November 10, 2017. Available at: <https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism>.

democratic basis order against post-war Nazi movements and political parties, the theory was also used against communism movement. The latest use of militant democracy concept was directed towards the threat of terrorism and religious extremism. Speaking about political extremism related to far-right political parties, the debate and discussion were always present, but the impression is that in the previous years the focus of the authors on militant democracy was religious extremism. In the main time, populism appears in the political scene. Today, populism is especially popular among scholars, bloggers, and authors. They work on developing an understanding of populist movements and political parties. Mainly they examine populist ideology, but as it could be seen from the previous section of the chapter, some authors devote academic thinking also on the question “whether populism is a threat to democracy.”⁵⁹

As elaborated in the previous section of the chapter, populism is a concept which uses emotionalism to gain votes of the electorate. The involvement of emotionalism seems that it is a winning strategy of populism. The crucial driving force of populists is the direct way of speaking about people’s concerns, rather than having a rational discussion.⁶⁰ Moreover, their narrative mainly involves scapegoating smaller groups and twisting the dangerous grounds relaying on identity and cultural homogeneity. Considering the explanation given by Sajo who defined emotional politics as “situation when politics is shaped by emotional manipulation of the masses”⁶¹

⁵⁹ Bryder, Tom. “Populism – a Threat or a Challenge for the Democratic System?” University of Copenhagen Faculty of Social Science, 2009. Available at: http://politicalscience.ku.dk/international_students/present_international_students/taking_exams/past_papers/Populism___a_threat_or_a_challenge_for_the_democratic_system.pdf.

⁶⁰ Medina, Carmen. “Is Populism Another Name for Political Emotionalism?” June 8, 2017. Available at: <https://www.thecipherbrief.com/is-populism-another-name-for-political-emotionalism>.

⁶¹ Sajo, Andras. “Militant Democracy and Emotional Politics.” *Constellations*. Accessed March 9, 2017. <http://dx.doi.org/10.1111/cons.12011>. Page 563.

it can be concluded populism is a movement which takes advantage of (called technique of mobilization) political emotionalism.

Fascism was also a movement led by emotions and a movement which motivated Loewenstein to assess the concept of militant democracy. Moreover, scholars on militant democracy agreed that militant democracy as a technique could be relevant in situations where emotionalism in politics prevail.⁶² Furthermore, militant democracy as an extended concept is established as well as a method to protect the idea of democracy including the existing constitutional system “by denying rights and freedoms to those who are presumed to be seeking abuse, destroy or damage the system.”⁶³ It is also certain that “emotionalism in politics generates a fundamental tension in the constitutional state.”⁶⁴

Is the rise of populism a threat to democracy? Opinions are divided. Looking at the bigger picture and seeing whether populist parties are part of governmental structures, there are opinions that there should not be worried about populist.⁶⁵ Populism might appear as an ideology of a more significant number of smaller political parties, but this period cannot be classified as a period where populism politics takes more votes than before.⁶⁶ Cas Mudde makes a point that populist popularity is just temporary and that if they do not succeed in making a safe place to themselves in the political scene than they soon will lose their popularity and support.⁶⁷ However, there are also other views

⁶² Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Introduction, page 14.

⁶³ Ibid. 217.

⁶⁴ Sajo, Andras. “Militant Democracy and Emotional Politics.” *Constellations*. Accessed March 9, 2017. <http://dx.doi.org/10.1111/cons.12011>. Page 563.

⁶⁵ Fernando, Casal Bértoa, and Caamaño José Rama. “No, the Populist Surge Does Not Mean European Democracy Is Collapsing.” *The Washington Post*, November 17, 2017. https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/17/no-the-populist-surge-does-not-mean-european-democracy-is-collapsing/?utm_term=.f8b0df8ed2af.

⁶⁶ Ibid.

⁶⁷ Child, David. “Austria, Europe and the Far Right: A Q&A with Cas Mudde,” October 13, 2017. <http://www.aljazeera.com/news/2017/10/austria-europe-qa-cas-mudde-171008122125853.html>.

which relate to the existence of populist parties and the dangers that they pose to democracy as has been presented in the section above.

To sum up, this thesis considers that populist far-right political parties pose a danger to democracy and the principles under which democracy functions. By using emotional politics, populists are lowering rational discussions. They might present people's concerns, but the way in which they are doing it is based on exaggeration. They are against pluralism and concentrate on nationalism. Certain groups, like minorities, migrants, refugees, religious groups (Muslims) and LGBT community are taken as scapegoats. This presents a threat to the "modern human rights movement."⁶⁸ Populist present homogeneity in a period where diversity is most present. Hence, as Enyedi specifies, they negatively affect the relations among people and endanger the mechanisms under which democracy functions.⁶⁹ Populist is against multiculturalism, and their exclusive nature shows examples of xenophobic and racist rhetoric.⁷⁰ Their specificity is maybe the fact that they are not violent (with exceptions), but in many cases, their strongest weapon is the "verbal violence."⁷¹ Additionally, they successfully relay and use freedom of expression and freedom of assembly to mobilize people and gain more votes. Are we talking about a movement which does not stand for liberal democracy and which after 80 years of the establishment of militant democracy succeeded in entering the main political stage? My answer is positive. Considering that populist far-right political parties pose a threat to liberal democracy, the thesis recalls the theory

⁶⁸ Kenneth, Kenneth Roth. "The Dangerous Rise of Populism." Human Rights Watch. Accessed November 10, 2017. Available at: <https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism>.

⁶⁹ Enyedi, Zolt. "Five Views: Is Populism Really a Threat to Democracy?" LSE, sec. Populism is indeed a threat to democracy – and the positive case for it is rather feeble. Accessed October 10, 2017. Available at: <http://blogs.lse.ac.uk/euoppblog/2017/07/24/is-populism-really-a-threat-to-democracy/#One>.

⁷⁰ Bryder, Tom. "Populism – a Threat or a Challenge for the Democratic System?" University of Copenhagen Faculty of Social Science, 2009. Available at: http://politicalscience.ku.dk/international_students/present_international_students/taking_exams/past_papers/Populism___a_threat_or_a_challenge_for_the_democratic_system.pdf

⁷¹ Ibid. page 11.

under which are provided norms for democratic self-defense. Can these norms be used in addressing the threats that come from populist? This answer requires not just theoretical, but also practical analysis. Therefore, next chapters are going to assess the practical implementation of the theory by the ECtHR, and two countries, Germany and Bulgaria.

CHAPTER 2: MILITANT DEMOCRACY UNDER THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Apart from being the most effective “human rights regime” in the world,⁷² the European Court of Human Rights (ECtHR) together with other Council of Europe (CoE) institutions creates a set of norms and recommendations which are of crucial importance for the development of European democracy. The ECtHR has even a more realistic influence into national laws than other CoE institutions, because the Court provides legal protection, decides on cases which decisions have to be implemented and revise the state law in an organize way following certain rules. The importance of the ECtHR case-law comes from the fact that the presented protection in the Court’s case-law is a minimum protection that state should afford. The European Convention on Human Rights (ECHR) through the interpretation done by the Court establishes “European standards of rights protection” and aims at harmonizing “rights at the minimum level.”⁷³ The Convention is known as a living instrument,⁷⁴ and therefore when assessing movements under a new frame, like populism under militant democracy, is fundamental to critically evaluate the relevant ECtHR’s case-law and withdraw lessons which can help in answering the thesis question.

⁷² Keller, Helen, and Alec Stone Sweet. *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford University Press, 2008. Page 3.

⁷³ Sweet, Alec Stone and Keller, Helen, "Assessing the Impact of the ECHR on National Legal Systems" (2008). Faculty Scholarship Series. Paper 88. http://digitalcommons.law.yale.edu/fss_papers/88. page 702

⁷⁴ *Tyrer v. The United Kingdom*, app. No. 5856/72, 1978 ECtHR. Para 31.

Therefore, this chapter critically assesses the jurisprudence of ECtHR, focusing on several issues. In the first section of the chapter, this thesis refers to the case-law on banning and rejecting the registration of political parties and associations. Further, in the second part of this chapter, this thesis presents the notion of captive audience as a possible response of the Court in neutralizing populist activities. The third part of this chapter assesses the cases under Article 17 or the clause of abuse of rights. Finally, the chapter ends with Council of Europe (CoE) recommendations from the soft law relevant documents and a general conclusion.

1. Dissolution of political parties and movements

1.1. Broad protection of political parties

Political parties by the ECtHR are recognized “as integral players in the democratic process”⁷⁵ with “an essential role in ensuring pluralism and proper functioning of democracy.”⁷⁶ Their primary function is to represent people and organize the functioning of one state. That gathering of people contains power, not just in organizing the state and leading politics, but also in influencing the general atmosphere in which the whole society in one country functions. Political parties have a crucial importance in the functioning of each State, and they make possible the representative democracy.

The functioning of political parties mainly falls within the freedom of association or Article 11. This right is not an absolute right, it is a qualified right, and therefore, it can be limited, but only under specific and already defined grounds which should be necessary in a democratic

⁷⁵ Venice Commission (2010). Venice Commission: Guidelines on political regulations by OSCE/ODHR and Venice Commission. Adopted by Venice Commission at its 84th Plenary Session, Venice. October 15-16. Page 18.

⁷⁶ The *United Communist Party v. Turkey*, app. no. 19392/92, (1998) ECHR, § 43.

society. Political parties are recognized as “internal players” and due to their specific features and abilities to represent individuals’ needs collectively, have a special role in the democratic society.⁷⁷ Due to that special role that political parties have, the criteria on limiting the rights related to political parties is even more complicated. States enjoy only a limited margin of appreciation in posing limitations on the freedom of association right which “goes hand by hand with rigorous European supervision.”⁷⁸ That means that States have to present “only convincing and compelling reasons” that can justify the restrictions on political parties’ freedom of association.⁷⁹ Hence, in those cases, the Court applies intensified scrutiny.⁸⁰ That implies that political parties although mainly regulated under Article 11 (a qualified right) enjoy a broad protection from the ECtHR. Considering the broad protection of political parties, the next subchapter is going to elaborate on the measure of dissolution of political parties and associations which implies the broad protection.

1.2. Dissolution as a measure of last resort

ECtHR has already dealt with the limitations on the right of freedom of association, especially with the question on prohibition and dissolution of political parties, which is the most discussed question under militant democracy when it comes to the ECtHR. The prohibition or dissolution of political parties is an exceptional measure which might be used by the Court.⁸¹ Nevertheless, according to the recommendations of the Parliamentary Assembly of the Council of Europe, instead of prohibition or dissolution of one political party “as far as possible, less radical

⁷⁷ OSCE/ODIHR. “Guidelines on Freedom of Association.” Warsaw: ODIHR, 2015. Page 32, para 56,57.

⁷⁸ *The United Communist Party v. Turkey*, app. no. 19392/92, (1998) ECHR, § 46.

⁷⁹ *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. no. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 ECHR, § 100.

⁸⁰ Ibid.

⁸¹ “Guidelines on Political Party Regulation.” OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2011. Available at: <http://www.osce.org/odihr/77812?download=true>. para 89.

measures than dissolution should be used.”⁸² The ECtHR has also demonstrated in its case-law that the dissolution of political parties, in line with the recommendations from CoE, should be a measure of last resort.

Therefore, the ECtHR has ruled that a political party cannot be dissolved solely by the name of the political party or only relying on party’s constitution and program.⁸³ When States decide on the question of dissolution of a political party, the rule is that they have to look both, on parties’ constitution, program and leader’s actions. That was decided in the case *United Communist Party of Turkey and Others v. Turkey* from 1998. The Turkish Constitutional Court dissolved this political party on the reasons that the party had: incorporated the term communist into its name and included in its program part which referred to solving the Kurdish problem stressing that it is a political problem. The Turkish Constitutional Court considered this political party as a threat to the territorial integrity and the unity of the nation (considering that the party openly proclaimed for the creation of Kurdish nation Kurdish). Hence, the political party was prohibited.⁸⁴ The ECtHR revised the reasons under which the political party was dissolved and decided that the usage of the term “communist” could not be a legitimate aim under which a political party can be dissolved. The Court look “in the light of the case as a whole” and whether the reasons were “relevant and sufficient.”⁸⁵ The dissolution of the political party could not be based solely on the party’s constitution and its program. The program of the political party did not make any other claim than recognizing the existence of the Kurdish nation. The Court stated that “one of the principal characteristics of democracy is resolving country’s problems through

⁸² See more: Resolution 1308 (2002), Parliamentary Assembly of the Council of Europe in “Guidelines on Political Party Regulation.” OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2011. Available at: <http://www.osce.org/odihr/77812?download=true>. para 51.

⁸³ The *United Communist Party v. Turkey*, app. no. 19392/92, (1998) ECHR.

⁸⁴ Ibid.

⁸⁵ Ibid. § 47.

dialogue, without recourse to violence, even when they are irksome.”⁸⁶ Consequently, the Court found that there has been a violation of the Article 11.

The ECtHR made the same decision in Socialist Party case which in its political messages referred to two nations, the Kurdish and the Turkish nation. The ECtHR found a violation of Article 11 stating that the political party did not encourage secession, but a higher recognition recalling on the right of self-determination.⁸⁷ The same situation happened in the Ozdep political party case (which although not dissolved by the Turkish Constitutional Court, they referred their question to the ECtHR considering that their case was under procedure in the Constitutional Court), the People’s Labour Party and the People’s Democratic Party. The right to self-determination, the rights of the national and religious minority and the recognition of language rights cannot undermine the principles of democracy and do not present a legitimate aim for dissolving a political party.⁸⁸

According to the Court’s case-law, calls for autonomy are also not a sufficient reason the political party to be dissolved in the name of security. In UMO Ilinden -PIRIN case, the Court once more stated that decision like the dissolution of a political party requires both, an analysis of party’s leader’s acts and party’s constitution and program. Additionally, the ECtHR did not find that the leaders of the political party called for violence or rejected the democratic values.⁸⁹ Which means that the Court stated that there were no practical actions that endangered the territorial

⁸⁶ Ibid. § 57

⁸⁷ Socialist Party of Turkey and Others v. Turkey, app. No. 26482/95, 2003 ECHR.

⁸⁸ The *United Communist Party v. Turkey*, app. no. 19392/92, (1998) ECHR; Socialist Party of Turkey and Others v. Turkey, app. No. 26482/95, 2003 ECHR; Freedom and Democracy Party (ÖZDEP) v. Turkey app. no. 23885/94, 1999 ECHR; *Yazar, Karataş, Aksoy and The People’s Labour Party (HEP) v. Turkey*, app. no. 22723/93, 22724/93, 2002 ECHR; and 22725/93 and *Hadev and Demir v. Turkey*, app. No. 28003/03, 2010.

⁸⁹ The United Macedonian Organization Ilinden – PIRIN and Others v. Bulgaria, app. No. 59489/00, final decision 20 October 2005 ECHR, § 58.

integrity.⁹⁰ The democratic system also includes political ideas which are challenging, and which realization can be possible if done peacefully and lawfully.⁹¹ An important statement of the Court is the following:

“The fact that the applicant party’s political programme was considered incompatible with the current principles and structures of the Bulgarian State does not make it incompatible with the rules and principles of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.”⁹²

1.3. Political parties and movement that pose a danger to the democratic society

According to the Court’s case-law, political parties which use, support and incite violence and violent activities are dangerous for the democratic society. A political party cannot claim protection under the Convention if its leaders “incite violence or propose a policy which does not comply with the rules of democracy, present destruction of democracy and infringe the rights of others.”⁹³ That means that, apart from the afforded broad protection, political parties can be dissolved. However, the grounds for dissolving are strict, but they can be divided in the three following sections.

⁹⁰ Ibid. para 58.

⁹¹ The United Macedonian Organization Ilinden – PIRIN and Others v. Bulgaria, app. No. 59489/00, final decision 20 October 2005 ECHR, § 61.

⁹² Ibid., § 61

⁹³ *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. no. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 ECHR, § 47.

a) Real chance of introducing changes criteria

In the Welfare case, the Court had a possibility deeply to analyze a situation when there is a threat of influencing the whole democratic system in the country with ideas which are contrary to the democratic principles, in this case, attack on the secular principle of the state.⁹⁴ Although, change in law or constitutional change can be possible if “the means used are legal and democratic” and “the change is compatible with fundamental democratic principles,”⁹⁵ introducing a new regime like sharia law, is incompatible with the idea of democratic society. Rafah political party was dissolved because it had real chances of introducing the propagated activities which were contrary to the principle of secularism.

b) Supporting violence

Supporting terrorist organizations can amount to incitement of violence enough one political party to be dissolved. Herri Batasuna and Batasuna, Spanish political parties, were dissolved by the Spanish Constitutional Court because they did not have “a clear and unequivocal stance against terrorist activities.” Moreover, the Spanish Constitutional Court stated that not condemning terrorism “constitutes a tacit or implicit manifestation of a certain attitude towards terror.”⁹⁶ The arguments on which the decision of their prohibition was made relayed on statements made by the leaders as well as attitudes which supported ETA (a terrorist organization). In assessing whether there has been a violation of Article 11 the Court considered that it could not rely solely on the constitution and the program of the political parties, but it must also consider party’s leader’s actions.⁹⁷ The preventive dissolution of these two political parties was justified

⁹⁴ Ibid.

⁹⁵ Ibid. § 47.

⁹⁶ Herri Batasuna and Batasuna v. Spain, app. No. 25803/04, 25817/04, 2009 ECHR, § 46.

⁹⁷ Ibid. § 79.

because if political parties support terrorist groups, then States have positive obligations to protect the rights of others and the democratic system.

c) Incitement of hatred

The ECtHR justified the dissolution of a paramilitary organization which organized several demonstrations to deliver messages which were found to be offensive and disturbing.⁹⁸ In the case *Vona v. Hungary*, the Court stated that dissolution is justified if “such a movement had started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention.”⁹⁹ That association and movement were spreading race-based messages condemning a whole minority on criminality. Although the case was not manifestly ill-founded under Article 17, it presents a situation of abuse of rights because the movement relayed on their rights and freedoms to undermine other’s rights and fundamental beliefs (a whole minority). Moreover, the case recalls the importance of associations and movements in a democratic society. Not just political parties, but social organizations such as Vona’s could play an important role in shaping the political life.¹⁰⁰ Therefore, as political parties, associations can also be dissolved on the same grounds (sufficiently imminent reasons).

1.4. Rejection of registration

Another restriction in the sphere of political activities is the denial of registration of political parties and associations. The refusal of registration is “a drastic measure which can be used only in the most serious cases.”¹⁰¹ The reasons under which the ECtHR would justify this measure are almost the same as in the dissolution of political parties and association cases.

⁹⁸ *Vona v. Hungary*, app.no. 35943/10, 2013 ECHR.

⁹⁹ *Ibid.* § 57.

¹⁰⁰ *Ibid.* ECHR § 56.

¹⁰¹ *Linkov v. the Czech Republic*, app. No. 105004/03, Legal Summary Available at: [https://hudoc.echr.coe.int/eng#{\"appno\":\[\"10504/03\"\],\"itemid\":\[\"002-3007\"\]}](https://hudoc.echr.coe.int/eng#{\)

Nevertheless, the case law of the ECtHR gives an impression that refusing a registration of a political party or association is even more protected by the Convention. That is due to the realistic situation of lack of evidence that the political party or the association could undermine the democratic system. If in the dissolution cases the Court could refer to both, the constitutions, programs and the actions of the leaders and members, together with the real possibility of implementing policies, in the cases regarding the denial of registration the Court has less reliable evidence. The Court may consider historical and political facts which because our assumptions, will not have sufficient probative value.¹⁰² An example from the Court's case-law is the case *United Macedonian Organization Ilinden v. Bulgaria*. In this case, the Court stated that "separatist views and demanding territorial changes in speeches, demonstrations, or program documents does not amount *per se* to a threat to a country's territorial integrity and national security."¹⁰³ Therefore, but also relying on the fact that the association had only three thousand supporters,¹⁰⁴ the ECtHR concluded that the denial of registration is contrary to the Convention. Apart from the lack of evidence, it is clear that small associations and political parties in the Court's view are not dangerous for the democratic system. Moreover, the realistic situation is that political parties and associations will always have a smaller number of members and supporters at their beginning which implies that there are fewer chances of denial of registration.

2. The notion of captive audience

Populism is bringing back the mobilization of masses. In that diverse political scene, it seems that populist do take advantage of all possible means and channels to mobilize bigger number of supporters. The key element in their success is the smart usage of communication rights.

¹⁰² Ibid.

¹⁰³ *The United Macedonian Organization – Ilinden and Others v. Bulgaria*, app. No. 59491/00, 2006 ECHR § 76.

¹⁰⁴ Ibid. § 81.

Populist know how effectively to communicate with society and to voice their politics using both, traditional and modern media and mobilization channels.¹⁰⁵ Demonstrations and protest are one of those means used by populist and the ECtHR in its case-law have ruled on specific limitations on the freedom of assembly which might neutralize the influence of populist movements.

The previously mentioned case, *Vona v. Hungary*, can bring into the discussion an element called captive audience. The rallies against Gipsy criminality were organized in villages inhabited by Roma population and protestors were demonstrating in front of their houses.¹⁰⁶ The ECtHR has found that the element of presence in that village is a feature which goes beyond the general borderline of offensive ideas and the Court distinguished it as a decision in making its judgments. In *Vona v. Hungary*, the population of the villages is “captive audience.”¹⁰⁷ That means that “captive audience” are the citizens who cannot avoid certain action which might offend and disturb them and also violate their human dignity. Those actions spread fear and create tension, especially in a situation when the affected are in their homes.¹⁰⁸ Since the concept of militant democracy is understood as a restriction on rights by safeguarding democracy and democratic values, the element of “captive audience” can be taken as one of the possible measures which would find a solution to a created intolerable situation during a demonstration.

Vona v. Hungary is not the only case where the notion of “captive audience” was applied. In *R.B. v. Hungary*¹⁰⁹ and *Kiraly and Domotor v. Hungary*,¹¹⁰ the Court also referred to that

¹⁰⁵ Mergenthaler, Stephan. “Countering Populist Mobilization - Response Strategies for the Political Mainstream.” Central European University, 2015. Available at: <https://spp.ceu.edu/sites/spp.ceu.hu/files/attachment/article/995/counteringpopulistmobilization.pdf> Page 12.

¹⁰⁶ *Vona v. Hungary*, app.no. 35943/10, 2013 ECHR.

¹⁰⁷ *Ibid.* § 61.

¹⁰⁸ *Vona v. Hungary*, app.no. 35943/10, 2013 ECHR § 66.

¹⁰⁹ *R.B. v. Hungary*, app. No. 64602/12, 2016 ECHR.

¹¹⁰ *Kiraly and Domotor v. Hungary*, app. No. 10851/13, 2017 ECHR.

understanding. *R.B. v. Hungary* is a case about demonstrations organized in Roma neighborhood by a right-wing political party. In this case, the Court did not include the concept of “captive audience” directly because the application was revised under Article 8.¹¹¹ However, since those demonstrations were anti -Roma and the demonstrators were present in the village it could be concluded that this is also a case where the concept could be used directly. *Kiraly and Domotor v. Hungary* is also a case about anti-Roma demonstrations in predominantly Roma villages. In this case, although the ECtHR did not base its decision on the notion of captive audience, the notion was mentioned. In addition, the Office of the Commissioner for Fundamental Rights related to the demonstrations, stated that the people living in village formed a “captive audience.”¹¹²

These cases are not just related to demonstrations in a certain place (village), but a crucial factor besides the presence is the used narrative. The demonstrators used a hostile, offensive and disturbing rhetoric. Racist statements were also recognized by the ECtHR involving “verbal assault and physical threats.”¹¹³ Additionally, judge Bosnjak in his separate concurring opinion stated that the speeches were “a clear example of hate speech and incitement to violence against minority group.”¹¹⁴ That means that the notion of captive audience depends from the language of the demonstrators. Nevertheless, disbanding or a prevention of demonstration in which a certain group might be captive audience, as demonstrated through the case-law may be an acceptable tool in protecting the right of others. This means that national states can also apply this notion and tool to protect a certain group of people from organized intimidation. Besides that, this notion can also be used in limiting marches, protest and demonstrations by movements which is known that can

¹¹¹ *R.B. v. Hungary*, app. No. 64602/12, 2016 ECHR.

¹¹² *Ibid.* ECHR §18.

¹¹³ *Ibid.* § 72.

¹¹⁴ *Ibid.* separate opinion judge Bosnjak § 5.

include hostile attitude towards a group of people. To sum up, the freedom of peaceful assembly is protected by the Convention which means that demonstrators should refrain from violence. However, respecting the rights of others and making a balance, violence is not the only limitation of freedom of peaceful assembly. “Intentional intimidation or harassment of a captive audience”¹¹⁵ can amount to the same consequences as the use of violence “for example, in a purely residential location may constitute a form of harassment where the assembly could be legitimately restricted to protect the rights of others”.¹¹⁶

3. Abuse of rights theory

Article 17 or the abuse of rights clause, historically seen has been adopted in the Convention as a result of the European tragic events and established facts that freedoms and rights can be abused.¹¹⁷ This article implies that rights cannot be abused, or “no one may be able to take advantage of the provisions of the Convention to perform acts aiming a destroying the rights guaranteed”¹¹⁸ Article 17 is also closely linked to the idea of democracy or to the so-called Wehrhafte Demokratie known in the German democratic system¹¹⁹, and its aim is nothing different than the aim of militant democracy – defense mechanism against internal enemies.¹²⁰

¹¹⁵ “Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States.” Warsaw: Office for Democratic Institutions and Human Rights, December 17, 2014. Available at: <http://www.osce.org/odihr/132281?download=true> para 46.

¹¹⁶ Ibid. para 46.

¹¹⁷ Tulkens, Françoise. “When to Say Is to Do Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights.” European Court of Human Rights – European Judicial Training Network, n.d., 7 July 2015.

¹¹⁸ See the first judgement in which the ECtHR has applied the Article 17, *Lawless (no.3) v. Ireland* 1 July 1961.

¹¹⁹ Brems, Eva, and Janneke Gerards. *Shaping Rights in the ECHR: The Role of the European Court of Human Rights*. Cambridge University Press, 2013.

¹²⁰ Losurdo, Federico. “The Prohibition of the Abuse of Rights in the Judicial Dialogue in Europe.” 1 SUMMER SCHOOL IN EUROPEAN PUBLIC LAW, 2009. http://www.academia.edu/3405707/THE_PROHIBITION_OF_THE_ABUSE_OF_RIGHTS_IN_THE_JUDICIAL_DIALOGUE_IN_EUROPE.

Debate exist about the application of the provision, and some of the presented arguments are that the implementation of Article 17 will not bring and produce a value to democracy and will not enhance and further develop the protection of human rights.¹²¹ What is essential to mention is that when the Court applies article 17, the case application is rejected due to the above mention reason, abuse of substantial right or rights. Hence, when the Court has to access and evaluate the application of a case which directly calls for violence or severe negative labeling can decide the application to be dismissed under Article 17.¹²²

However, some acts, especially speaking about hate speech, although are visibly abuse of the right to expression, are admitted by the Court and analyzed. Thinking on the theoretic debates or on the learning process that the Court can provide by elaborating on a case, it can be said that maybe the approach of elaborating and analyzing the topic of the case can be more useful than just rejecting the application. As the author Francoise Tulkens recognizes, “the Court prefers to analyze each case submitted to it on its own merits”.¹²³ Nevertheless, an assessment of the Court’s case-law under Article 17 can provide a view of further circumstances and actions that contrast with the Convention’s values and principles and in addition are significant for the militancy of the ECtHR. Assessing the case-law under Article 17 is crucial for understanding the core values and principles of the Convention because in that way this thesis can answer to its main question and additionally evaluate the actions which are in contrary to the Convention.

¹²¹ Tulkens, Francoise. “When to Say Is to Do Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights.” European Court of Human Rights – European Judicial Training Network, n.d., 7 July 2015.

¹²² Buyse, Antonine. “Dangerous Expressions: The ECHR, Violence and Free Speech” 63 (April 2014): 491–503. <https://doi.org/10.1017/S002058931400010>.

¹²³ Tulkens, Francoise. “When to Say Is to Do Freedom of Expression and Hate Speech in the Case-Law of the European Court of Human Rights.” European Court of Human Rights – European Judicial Training Network, n.d., 7 July 2015. Page 3.

3.1. Labeling a whole group of people amounts to abuse of rights

The Commission (before the Court) declared that advocacy national socialism is against the values of the Convention. Therefore, the application of an open Neo-Nazi politician and journalist who propagated anti-Semitic statements and called for racial pride was declared inadmissible.¹²⁴ That means that Convention's values cannot permit in the name of freedom of expression destruction of human rights to be justified. The same conclusion can be withdrawn from *Norwood v. the United Kingdom* case.¹²⁵ In this case, Court declared inadmissible the application of a person who was a regional organizer of the right-wing British political party called British National Party. His display of a photograph of the Twin Towers with written words 'Islam out of Britain – Protect the British People' and a symbol of a crescent and star in a prohibition sign" amounted to a general attack on the Muslim religious group in Britain."¹²⁶ Consequently, the Court detailed that "the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in a sense contrary to Article 17".¹²⁷ Regarding an open attack on an entire group, besides the above case which concerns a religious group, the ECtHR has also declared an application inadmissible based on an open ethnic hatred towards the Jewish nation.¹²⁸ The threat to democracy, public order, and protected values, according to the Court's case is also incitement of hatred towards minorities, as decided in the rejection of the application in *Molnar v. Romania* case.¹²⁹ Moreover, not just labeling an entire group of people, but what also the Court may see

¹²⁴ *Kuhnen v. The Federal Republic of Germany*, app. No. 12195/86, 12 May 1988 [European Commission of Human rights].

¹²⁵ *Norwood v. the United Kingdom*, App. no. 23131/03, 2004 ECtHR.

¹²⁶ *Ibid.* Page 4.

¹²⁷ *Norwood v. the United Kingdom*, App. no. 23131/03, 2004 ECtHR. Page 4.

¹²⁸ *Pavel Ivanov v. Russia*, App. No. 35222/04, 2007 ECtHR, Inadmissibility decision.

¹²⁹ *Molnar v. Romania*, app. No. 1663/7, 2012 ECtHR.

with the lance of abuse is the exclusion of other groups or as in the case of *Glimmerveen and Hagenbeek v. the Netherlands* - racial hatred followed by ethnically homogeneous statements.¹³⁰

3.2. Denial of Holocaust and glorification of Nazi ideology as abuse of rights

Denial of Holocaust is also considered against the values of the Convention. Questioning historical facts regarding Holocaust and the Nazi regime and denying already established facts and truths on the crimes against humanity to the Jewish community, amounted to a rejection of the application by the Court.¹³¹ Glorifying the Nazi ideology is also against the principles of the Convention. The Court can not protect an activity from getting familiarized members with the activities of the Nazi leaders with a positive narrative.¹³² Moreover, not just the Nazi ideology, but communist ideas which might lead to dictatorship system has also been rejected by the Commission in an application of the German Communist Party.¹³³

4. Council of Europe's soft law recommendations

Besides the case law of ECtHR, within CoE there are also other significant documents which regulate the functioning of political parties and give recommendations. Those documents are non-binding. Nevertheless, their importance comes from the commitment of the state to implement them.

Regarding democracy, human rights and the rule of law, the Venice Commission can be distinguished as a commission which provides legal advice for the member's states, and in that way, it creates European standards. Part of those standards is exclusively on the topic of

¹³⁰ *Glimmerveen and Hagenbeek v. the Netherlands*, App. No. 8348/78 and 8406/78, 1979 [European Commission of Human Rights]. Inadmissibility decision.

¹³¹ *Garaudy v. France* App. No. 65831/01, 2003 ECtHR Inadmissibility decision.

¹³² *Schimanek v. Austria*, app.no. 32307/96, 1 February 2000, ECtHR.

¹³³ *KPD v. FRG*, app. no. 250/57, 1957 [European Commission of Human Rights].

democratization and functioning of political parties.¹³⁴ Also, the Venice Commission relies on ECHR considering it as minimum standards.¹³⁵ Their collaboration is vis versa because the ECtHR uses Venice's reports as a source of information and the Court also invites the Commission to provide *amicus curiae* briefs as a third-party intervention in some of the cases.¹³⁶ Therefore, the work of the commission and the created guidelines can be considered as a valid source of how states should act towards the rise of populist far-right political parties.

The Venice Commission even back in 2000 has recognized the threat to the fundamental values and democracy in Europe from extremist parties and movements. In the Political Affairs Committee report it is stated that the political parties which “*encourage intolerance, xenophobia or racism*” are from the far-right block and although they do not incite violence directly, they create an environment in which the incensement of the negative climate can develop.¹³⁷ The Venice Commission has recognized five categories of political movements which create a danger to democracy, and two of them are precisely those with extremist ideology and xenophobic or racist tendencies. Political parties which have extremist ideologies are defined as “*those who are going to give to the people the what has been stolen from technocrats and financial oligarchies.*”¹³⁸ The second category which is mentioned, the political parties with xenophobic and racist tendencies, as described by the Venice Commission, tend to be hostile against specific groups, like immigrants, religious minorities or marginal social groups.¹³⁹

¹³⁴ Hoffmann-Riem, Worgang. “The Venice Commission of the Council of Europe - Standarts and Impact.” Oxford University Press; The European Journal of International Law, No.2, 25 (n.d.).

¹³⁵ Ibid. page 581.

¹³⁶ Ibid. page 586.

¹³⁷ “Threat Posed to Democracy by Extremist Parties and Movements in Europe.” Political Affairs Committee, January 3, 2000. Available at: <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8818&lang=en>.

¹³⁸ Ibid. Ideological classification A.

¹³⁹ Ibid. The far-right parties’ E (ii).

The Venice Commission has also published a guideline on prohibition and dissolution on political parties and analogous measures.¹⁴⁰ The guideline is in line with the ECtHR case-law and prescribes that only in cases of “*advocating the use of violence or use violence against the constitutional order*” political parties can be dissolved.¹⁴¹ However, if the political party advocates for constitutional change in a peaceful way then the party shall not be subjected to dissolution or prohibition.¹⁴²

Additionally, in the compilation of documents which explain and refer to the need of working further on the topics of discrimination, xenophobia, and intolerance in the European society exist also the Charter of European Political Parties for a Non-racist society.¹⁴³ The Charter was prepared and exist from 1998, but its effects and implementation are hard to access. Its core principles are defending human rights and democracy and “rejection of all forms of racist violence, incitement to racial hatred and harassment and any form of racial discrimination.”¹⁴⁴ The Charter is signed by all country members of European Union, and it is used by the Council of Europe bodies. The Charter in a revised version appeared this year, 2017 with the purpose of enlightening its existence and bringing back the concerns under which the Charter was written. The essential part that we can take from the Charter and make an analogy, are the different types of intolerance that appear in the society which are explicitly written in the Charter in a more extended list than usual:

¹⁴⁰ “GUIDELINES ON PROHIBITION AND DISSOLUTION OF POLITICAL PARTIES AND ANALOGOUS MEASURES.” Guideline. CDL-INF (2000) 1. Venice: Venice Commission, October 1, 2000.

¹⁴¹ Ibid. Page 4.

¹⁴² Ibid. Page 4.

¹⁴³ “Charter of European Political Parties for a Non-Racist Society (Revised).” Council of Europe, March 29, 2017. Available at: <https://rm.coe.int/16806fe48b>.

¹⁴⁴ Ibid.

*Europe derives from its history a duty of remembrance, vigilance and combat against the rise of racism, racial discrimination, gender-based discrimination, sexism, homophobia, transphobia, xenophobia, antisemitism, islamophobia, anti-Gypsyism and intolerance, as well as of crimes of genocide, crimes against humanity or war crimes and the public denial, trivialisation, justification or condoning of such crimes.*¹⁴⁵

Nevertheless, the most suitable one is maybe the General Policy Recommendations No.15 of CoE on combating hate speech which gives a slightly different approach. According to the recommendations, a ground for limitation can also be advocating racially motivated policies and intimidation, inciting hatred and discrimination and policies against pluralism.¹⁴⁶ This approach is in line with Article 17 of the Convention, which applies that political parties ‘rights can be limited in case if a party is hostile.

To sum up, European institutions are familiar with the threat, but still, there are no precise guidelines or recommendations how states should act towards the rise of far-right populism. The Venice commission refers to the same rules as the ECtHR which gives political parties broad protection and prescribes the dissolution as a measure of last resort. However, far-right parties can be dangerous for the society and can create a negative social environment. Therefore, where the restriction is not possible, the other way is a limitation. In fact, that is what the General Policy Recommendations on hate speech implied.¹⁴⁷ Those limitations are in line with the case-law and also might be seen as an effective legal tool.

¹⁴⁵ Ibid.

¹⁴⁶¹⁴⁶ Council of Europe. “GENERAL POLICY RECOMMENDATION NO. 15 ON COMBATING HATE SPEECH.” Strasbourg: European Commission against Racism and Intolerance (ECRI), 2016.

¹⁴⁷ Ibid.

5. Concluding remarks

Political parties enjoy broad protection under the Convention, and the measure of dissolution should be a decision of last resort. Moreover, smaller political parties seem to have an even higher protection under the Convention owing to their limited political power. Nevertheless, minority political parties and associations as appear from the case-law, have the support from the Convention. When the Court decides on dissolution regardless of the reason, shall look at both – party's constitution, program and leaders' actions. However, the most critical factor is the real danger posed by political parties and associations to democracy. Here, the Court mainly referred to the proposed and taken policies or the real chance of implementing the suggested policies. As it could be seen, a dissolution of political parties and associations can only be justified in exceptional cases, like affiliation with serious violent actions or in a situation when concrete steps are taken against accepted democratic principles. Denial of registration is even more protected under the Convention taking into consideration the lack of evidence and the real possibility of taking actions against the democratic system.

To sum up, dissolution and denial of registration of a political party and association is a rigorous measure which can be hardly justified under the Convention. Linking to the populist far-right political parties, that means that unless they are not supporting or becoming violent and strongly hostile, a dissolution cannot be decided against them. *Vona v. Hungary* set grounds on which a hostile movement can be dissolved, but whether the same grounds can be used in dissolving a political party is a question which shall be answered by the Court. Here the assumption would be that mainly that depends on the specific circumstances of the case as well as the period when the decision for dissolution or rejection is taken. The Court is always referring to the specific circumstances of the case taken together with country's political situation. In the case when a

political party is not hostile and violent, but openly wants to discuss critical and thought-provoking issues in a peaceful manner respecting laws, the protection of that political party and movement cannot be curtailed. Although, populist far-right parties pose a threat to liberal democracy, pluralism, diversity and negatively affect the movement of human rights, militant democracy through the safeguarding tool – dissolution and rejection of registering political parties and movement, now is not likely that can protect democracy against those movements. The protection afforded by the Convention is broad and unless political parties and movements have the power to implement changes which contrast the Conventions' values and done illegally, the protection of their existence is safeguarded.

Nevertheless, ECtHR provides other limitations which can be used against populist political parties and movements. As showed in the section on the notion of captive audience, demonstrations can be restricted and disbanded in places where they can be perceived as dangerous and against the rights of others. This ruling of the Court can be specifically relevant for populist movements which rely on scapegoating certain groups of people, considering that their rhetoric might pose a question the security of the group of people classified as captive audience.

Similar logic applies to the clause on abuse of rights which provides a view of the actions, or specific expressions which are in contrary to the Conventions 'values. The clause on abuse of rights is mainly used in cases which are related to freedom of expression because according to the case law "expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention."¹⁴⁸ The Court accepts that the political freedom of expression enjoys higher protection and that political parties have the right to express

¹⁴⁸ Jersild v. Denmark, Series A, No. 298, 1994 ECHR, para. 35

their views which might also be shocking, however, politicians must avoid statements and expressions which include racial discrimination, provoke and incite hatred and foster intolerance. Nevertheless, when speaking about political expression, the Court has accepted in the name of political debate that in this field there should be a “greater degree of tolerance.”¹⁴⁹ Looking at the case law of the Court, the protected freedom shall also include expressions and ideas which can “offend, shock or disturb.”¹⁵⁰

Both views are essential for the functioning of democracy and especially important for populist far-right political parties. Referring to the dangers that populist political parties and movement can pose to democracy, it can be concluded that the freedom of expression is their most powerful weapon. Therefore, what the clause of abuse can present is significant in concluding the populist political parties’ and movements approach and its justification under the Convention.

On the one hand politicians must avoid hate speech considering their role in the democratic system, but on the other hand freedom of expression of politicians and political debate should open the floor for criticism and free circulation of different ideas. Referring to the case-law under the Convention, it is evident that labeling an entire group of people is something which is against the values of the Convention. Denial of Holocaust and glorification of Nazis is also not acceptable under the Convention. The general conclusion would be that under the Convention there is not a specific regime or ideology which is against the Convention values. The fact that glorification of Nazi is unacceptable is a matter of historical fact mainly related to Europe’s history and shared European principle. Denial of Holocaust is also a historical fact which is established and proved.

¹⁴⁹ McGonagle, Tarlach. “The Council of Europe against Online Hate Speech: Conundrums and Challenges.” Institute for Information Law (IViR) Faculty of Law University of Amsterdam The Netherlands, n.d. Page 16.

¹⁵⁰ *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. no. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 ECHR, § 44.

Whereas labeling a whole group of people is something different which can also differ in its intensity. Labeling also depends on the country's history and political situation. Nevertheless, open attack on an entire group and incitement of hatred are against the established values and principles.

Finally, the same conclusion comes from the assessment of CoE's soft law. Dissolution should be a measure of last resort, and instead of restricting rights, limiting rights in a specific situation can be a reasonable response. Therefore, what the jurisprudence of ECtHR and the soft law of CoE can provide for neutralizing the influence of populism are measures of limiting speech which is in line with Article 17 of the Convention.

CHAPTER 3: THE CASE OF GERMANY

1. Introduction

Let it be called “sense of experientable approach” or historical experience. In a more simplified way, that would sound like “prevention” as a result from its own mistakes or a democratic discipline which does “nothing more” than limiting in the name of the “free democratic basic order” and dignity as the highest value.” We refer to Germany, the “homeland” of militant democracy. Militant democracy is a “fundamental element” in the Basic Law (BL) and German Federal Constitutional Court (FCC). Other names used for militant democracy when describing the application of the concept in Germany are “German tradition” or even “German Problem.”¹⁵¹ The words “free democratic basic order” which limit selected rights can be found in several articles in the Basic Law and its aim is “to exclude any form of tyranny or arbitrariness.”¹⁵²

One of the most theoretically important articles from the Basic Law for the theory of militant democracy is the Article 18 which refers to “abuse of rights and liberties.”¹⁵³ The forfeiture of those enumerated fundamental rights nevertheless has never been applied in practice. Therefore the provision is also known as a symbolic provision.¹⁵⁴ Another article like that would be the clause

¹⁵¹ *The Militant Democracy Principle in Modern Democracies*. Markus Thiel. New York, N. Y: Ashgate Publishing, 2016. Chapter 6 – introduction.

¹⁵² *Ibid.* page 224.

¹⁵³ The Basic Law of the Federal Republic of Germany. Article 21. Version 2012. available at:

https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf

Article 18 - Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of article 5), the freedom of teaching (paragraph (3) of article 5), the freedom of assembly (article 8), the freedom of association (article 9), the privacy of correspondence, posts and telecommunications (article 10), the rights of property (article 14), or the right of asylum (article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal constitutional court. Whoever misuses the liberties enumerated in Article 18 against the constitutional order will lose the right to invoke them.

¹⁵⁴ *The Militant Democracy Principle in Modern Democracies*. Markus Thiel. New York, N.Y: Ashgate Publishing, 2016. Chapter 6, page 118.

of eternity and the right of resistance in defense of democracy.¹⁵⁵ Nevertheless, the Constitution of Germany has applied the idea of democratic self-defense, and since the enactment of the new German democratic order [1949], the country system has been analyzed by many scholars.

Besides the militant character of the country, nowadays Germany has a slightly different political situation. The big wave of refugees contributed to the general rise of right-wing support.¹⁵⁶ The National Democratic Party (NPD) was not banned at the beginning of 2017 [more on this will be presented in the section about banning political parties in this chapter]. Moreover, the number of winning seats of the new populist far-right Alternative for Germany (AfD) [in total 94 out of 709 seats],¹⁵⁷ made the party the first populist right-wing party in the Bundestag in post-war Germany. That raised some concerns for the German political system [more on AfD in the section about populism in Germany]. All these facts give reasons militant democracy limitations to be recalled. The question is “whether German militant democracy can be used against populists” in the form established by BL? In answering the question, this chapter presents a case-study of German jurisprudence of banning and attempts of banning political parties. Further, this chapter also presents the populist rise and German responses in neutralizing their influence. The chapter ends with a conclusion which discusses populism under the frame of militant democracy and German’s alternative responses.

¹⁵⁵ The Basic Law [1949] Article 79 and article 20.

¹⁵⁶ Lochocki, Timo. “Will the German Center Hold?” *Journal of Democracy*; John Hopkins University Press, No. 4, 27 (October 2016): 37–46. Page 37.

¹⁵⁷ Eddy, Melisa. “Who Are They, and What They Want?” *The New York Times*. Accessed November 15, 2017. Available at: <https://www.nytimes.com/2017/09/25/world/europe/germany-election-afd.html>.

2. Banning political parties

In this section of the chapter on Germany, the thesis focuses on the two banned political parties and similar attempts regarding the (Nationaldemokratische Partei Deutschlands) NPD. An analysis of these cases can provide an understanding of the FCC logic and reasons on the question which political parties are dangerous to the democratic order. Those lessons are of crucial importance for answering the thesis question and concluding whether the traditional militant limitation [banning political parties] can be relevant for populist far-right political parties.

2.1. Banning political parties: early jurisprudence

The central provision of the German Basic Law so far and related to militant democracy is Article 21 (2) or the permission on banning political parties.¹⁵⁸ In fact, Germany has banned only two political parties, the Socialist Reich party in 1952 and the Communist party (Kommunistische Partei Deutschlands) in 1956.

The FCC in assessing the constitutionality of the first banned political party, the Socialist Reich Party, first of all, analyzed the history of the political parties in Germany, with an emphasis on the Hitler's political party.¹⁵⁹ In its assessment, the court found that the leadership of the political party were Nazis and those leaders remained with the same views, in the court's language "individuals who remained true to themselves."¹⁶⁰ Leadership means that they had the key positions and those were the ones who created the image of the political party. The court by examining the documents and correspondence of the political party found that many of the leaders

¹⁵⁸ Basic Law [1949] Article 21 (2).

¹⁵⁹ Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durhan and London: Duke University Press, 1997. Page 220.

¹⁶⁰ Ibid. Page 220.

of the political party held previous positions in SS and SA.¹⁶¹ The SA was a paramilitary Nazi organization¹⁶², and SS were recognized as Nazi soldiers.¹⁶³ The court examined the ideology, objectives and the program of the political party which highlighted “the German racial superiority.”¹⁶⁴ One critical approach which the court used in analyzing the political party was the internal structure of the political party, and the FCC found that the internal structure was similar to the internal organization of the Nazi party.¹⁶⁵ The court examined the behavior of the leaders and concluded that anti-Semitism was spread in the form of representing the murders and its relatives as innocent victims.¹⁶⁶ Therefore, the political party was dissolved.

The second banned political party is and the Communist party (Kommunistische Partei Deutschlands). The FCC used the same approach in accessing the constitutionality as in the first case. The FCC referred to the history of political parties, this time analyzing the Marxism – Leninism and the history of German communism.¹⁶⁷ The court included an examination of the internal structure of the political party and its leadership and found that the political party was centralized, which means that once a decision was made everyone had to follow it.¹⁶⁸ The court

¹⁶¹ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Page 68.

¹⁶² SA known as “Brownshirts” Nazi paramilitary organization formed in 1921 by Hitler. They are recognized as an organization which defended the Nazi ideology and protected the party meetings of Hitler. For more details see The Editors of Encyclopedia Britannica (2005). SA Encyclopedia Britannica, Encyclopedia Britannica. Inc. <https://www.britannica.com/topic/SA-Nazi-organization> accessed February 11, 2017.

¹⁶³ SS recognized as Nazi soldiers, formed in 1925 by Hitler and responsible for massive executions of Nazi opponents and were declared as criminal organization in 1946 by the Allied Tribunal in Nuremberg. For more details see The Editors of Encyclopedia Britannica (2015), “SS” Encyclopedia Britannica, Encyclopedia Britannica. Inc. <https://www.britannica.com/topic/SA-Nazi-organization> accessed February 11, 2017.

¹⁶⁴ Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durhan and London: Duke University Press, 1997. Page 222.

¹⁶⁵ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Page 68.

¹⁶⁶ Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durhan and London: Duke University Press, 1997. Page 221.

¹⁶⁷ Ibid. Page 222.

¹⁶⁸ Ibid. Page 221-222.

investigated the relationship of the party and its members with other political parties.¹⁶⁹ Their narratives involved sweeping statements against the existing constitutional system with a clear publicly stated aim of setting up a dictatorship of the proletariat.¹⁷⁰ An additional element in the test applied by the FCC, in this case, is the “fixed purpose” or “fixed plan” for realizing the political party’s goal,¹⁷¹ which might be an extension of the FCC assessment. This fixed object means words that indicate a real purpose of overthrowing the basic order.¹⁷² The importance, in this case, comes exactly from this used approach by the court. The FCC looked for a “fixed purpose” which should be constant and directed towards the “free democratic basic order.” This fixed purpose should be manifested in “political action according to a fixed plan.”¹⁷³ The courts’ approach in examining the purpose of the political party included an overall examination of the “party’s program, official documents, statements of leaders and educational materials.”¹⁷⁴ Moreover, the court declared that the existence of “a probable chance” the political party to realize its aims is the condition on which the court based its decision of unconstitutionality.¹⁷⁵ Apparently, they transferred the “need for certain danger” into a probable chance.”¹⁷⁶

To sum up, the FCC when deciding (decided) on the ban of these two political parties applied a deep analysis and looked at several elements significant for the parties’ organization and functioning. The FCC analyzed: the history of the political party and its connection to previous

¹⁶⁹ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Page 76.

¹⁷⁰ Ibid. Page 76.

¹⁷¹ Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durhan and London: Duke University Press, 1997. 223.

¹⁷² Ibid. Page 223.

¹⁷³ Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durhan and London: Duke University Press, 1997. Page 223.

¹⁷⁴ Ibid. Page 223.

¹⁷⁵ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Page 76.

¹⁷⁶ Ibid. Page 76.

political parties, the leadership's influence on the overall existence of the political parties and their connections to previous Nazi organizations. Further, the internal structure of the political party, the ideology and the program of the political party as well as the behavior of the leading members. Additionally, the FCC looked also on the used narratives and in the purpose of the political parties to overthrow the democratic regime. The approach of the FCC and their careful examination implies that although Germany is a militant democracy, the party ban is an exceptional measure.

In fact, these two cases are the only examples of banned political parties in Germany, although the FCC has given a number of reasons why and which political parties can be banned. The reasons for the dissolution of the Socialist Reich Party seems evident, but the judgment on the Communist Party is discussed among scholars as contradictory following the argument that the party was small and did not have sufficient political power to be successful.¹⁷⁷ However, the assessment of critical questions like party ban cannot be separated from the political situation in the country and the period when decisions are made. The fact that Germany banned only two political parties just rises an opinion that banning political parties in the 1950s was much easier since the memories of the Nazis were still fresh.¹⁷⁸ Nevertheless, these cases have also demonstrated the will of the FCC to practically implement a militant limitation and “declare the militancy as a constitutional value.”¹⁷⁹

¹⁷⁷ Tyulkina, Svetlana. “Militant Democracy.” Phd., Central European University, 2011. Pages 112-114.

¹⁷⁸ Tyulkina, Svetlana. *Militant Democracy: Undemocratic Political Parties and Beyond*. New York, N.Y: Routledge, 2015. Page 49.

¹⁷⁹ Tyulkina, Svetlana. “Militant Democracy.” Phd., Central European University, 2011. Pages page 114.

2.3. Banning political parties: recent developments'

After a long time, in 1993, there were two attempts to ban two political parties (National List and 'Free German Worker's Party). However, FCC dismissed the initiatives on the argument that they did not achieve significant results on the elections and could not be classified as political parties in the understanding of Article 21 considering that they lack internal structure and small membership.¹⁸⁰ In 1990 discussions to ban (Nationaldemokratische Partei Deutschlands) Nationalist Democratic Party (NPD) begun, but the question did not come to the FCC until 2002, after several incidents classified as hate crimes.¹⁸¹ The history of the party also includes a report published 1975 by the Interior Ministry in which the party was organized as "danger to the free democratic basic order."¹⁸²

Following xenophobic and anti- Semitic attacks on foreigners in 2000, the Federal Government, the Federal Parliament and the Federal Council of State opened the dilemma for the constitutionality of the party and fulfilled an application to the Federal Constitutional Court.¹⁸³ However, the procedure discontinues because between 1997 and 2002, leading members of the party operated for the intelligence agency.¹⁸⁴ Three judges out of eight were for the discontinuation of the procedure. Therefore, taking into consideration the rule of two-thirds of majority members

¹⁸⁰ *The Militant Democracy Principle in Modern Democracies*. Markus Thiel. New York, N.Y: Ashgate Publishing, 2016. Chapter 6, page 122.

¹⁸¹ Thilo Rensmann. *Procedural Fairness in a Militant Democracy: The "Uprising of the Decent Fails before the Federal Constitutional Court."* 4 German Law Journal, 2003. Pages 1117-1136.

¹⁸² Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durhan and London: Duke University Press, 1997. Page 224.

¹⁸³ Thilo Rensmann. *Procedural Fairness in a Militant Democracy: The "Uprising of the Decent Fails before the Federal Constitutional Court."* 4 German Law Journal, 2003. Pages 1117-1136.

¹⁸⁴ Ibid.

that have to vote for unconstitutionality, made a conclusion that since the application did not have the necessary support of six judges (majority out of eight), the procedure should be discontinued.¹⁸⁵

The issue with the National Democratic Party has not found its end with this decision of the court. The German Bundesrat has followed the political party throughout the years, and finally, the question of the constitutionality of the party in 2013 was raised again. Mudde by making a connection between the current political situation and the big wave of refugees welcomed in Germany, explains why the question of constitutionality of the party become again catchy in these years.¹⁸⁶ The political party according to Mudde, become more radicalized¹⁸⁷, and there has been media coverage about the “personal connections”¹⁸⁸ of the members of the party with members of National Socialistic Underground.¹⁸⁹ Although the procedure was initiated in March 2016 and the assumptions were that this procedure would take more years¹⁹⁰ the FCC already made its decision this January 2017. The court decided not to dissolve the political party because they did not find the party to “pose a danger to democracy.”¹⁹¹ The political party “intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined people’s community,”¹⁹² nevertheless, the court concluded that the existence of the party

¹⁸⁵ Ibid.

¹⁸⁶ Mudde, Cas. “Germany wants to ban the neo- Nazi of NPD again, but why now?” Deutsche Welle. March 4, 2016. Accessed February 14, 2017. <https://www.theguardian.com/world/commentisfree/2016/mar/04/germany-ban--neo-nazi-npd-refugees-far-right>

¹⁸⁷ Ibid.

¹⁸⁸ See more on Deutsche Welle <http://www.dw.com/en/neo-nazi-murders-more-questions-than-answers/a-16354018>

¹⁸⁹ Mudde, Cas. “Germany wants to ban the neo- Nazi of NPD again, but why now?” Deutsche Welle. March 4, 2016. Accessed February 14, 2017. <https://www.theguardian.com/world/commentisfree/2016/mar/04/germany-ban--neo-nazi-npd-refugees-far-right>

¹⁹⁰ Ibid.

¹⁹¹ Eddy, Melissa. “German court rejects effort to ban neo-Nazi party”. New York Times. January 17, 2017. Accessed February 10, 2017 https://www.nytimes.com/2017/01/17/world/europe/german-court-far-right.html?_r=0

¹⁹² The Guardian. “Germany’s top court rules against ban of far-right NDP”. January 17, 2017. Accessed February 10, 2017 <https://www.theguardian.com/world/2017/jan/17/germany-s-top-court-rules-against-ban-on-far-right-ndp>

does not impose a danger to the democratic system in the country.¹⁹³ Apparently, the FCC believes in the required 5% threshold for entering the Bundestag and relays on the assumption that the party will not succeed in passing the threshold. The court found that the aims of the party could not be achieved, and hence they ruled for not declaring the party unconstitutional. That is just in line with the critics that went on the banning of the Communist party. It seems that small parties cannot be considered as a threat. That might have been a sign to the world and to extremist groups that Germany is still a militant democracy, as Mudde also explains,¹⁹⁴ but the court decided not to ban the party, a decision which might influence the massive rise of populism and right-wing political parties positively generally in Europe.

A conclusion can be made that the FCC just strengthen its approach towards banning political parties. Apart from unacceptable ideas, the FCC in the NDP case relayed on the real situation and possibility of the party to achieve those aims. Consequently, for a party to be banned, it is not enough just to be ideologically different and to pursue ideas which are incompatible with democracy, rather the essential reason would be the party's chance to succeed in making the idea real. It can be said that German democracy is sending a message that its democracy is strong and cannot be endangered by small movements. Instead of applying militancy, the political party was left to function and enjoy the party privilege. In the meantime, a new political party appeared on the political scene in German, the AfD whose support grown enough to make the party successful on a federal level. The AfD is going to be analyzed in the next part of the chapter.

¹⁹³ Ibid.

¹⁹⁴ Mudde, Cas. *"Germany wants to ban the neo-Nazi of NPD again, but why now?"* Deutsche Welle. March 4, 2016. Accessed February 14, 2017. <https://www.theguardian.com/world/commentisfree/2016/mar/04/germany-ban--neo-nazi-npd-refugees-far-right>

3. The rise of populism in Germany: populist actions and Germany's response

Since the enactment of the Basic Law, the democracy and political environment in Germany remain stable. Far-right political parties and movement existed, but without huge media coverage and popularity. The NPD, although discussed as a populist far-right party which has based its politics on nationalism, has never passed the 5% threshold and therefore did not enter to the Bundestag.¹⁹⁵ NPD has only once, in the 1960s, been close to the required threshold, by gaining 4.3 percent of the electoral vote.¹⁹⁶ However, NPD was not banned, but that does not mean that its activities are not addressed. In the meantime, in the German political scene enters a new populist political party which politics is placed on the right-wing side. The fact that the political party entered in the Parliament opens a new debate about German politics.

Therefore, this part of the chapter firstly is going to access German responses towards NPD's activities. Secondly, this part of the chapter presents an analysis of AfD, its politics and influence and thirdly, this part also accesses the ways how Germany responded to the demonstrations of the populist Pegida. The taken steps are going to give an overall picture of German politics and their ways of neutralizing the influence of populism. An analysis of that kind will contribute to answering the main thesis question and give an additional and broader view of how, if not under militant democracy, populism can be naturalized.

¹⁹⁵ Lochocki, Timo. "Will the German Center Hold?" *Journal of Democracy*; John Hopkins University Press, No. 4, 27 (October 2016): 37–46.

¹⁹⁶ BERBUIR, NICOLE, MARCEL LEWANDOWSKY, and JASMIN SIRI. "The AfD and Its Sympathisers: Finally a Right-Wing Populist Movement in Germany?" *German Politics* 24, no. No. 2 (2015): 154–78. <https://doi.org/http://dx.doi.org/10.1080/09644008.2014.982546>. Page 158.

3.1. National Democratic Party's influence in changing laws

Back in March 2004, the NDP announced a plan to organize marches with a motto “Stop the buildings of the synagogue – 4 million for the people”.¹⁹⁷ However, the marches were prohibited by the local authorities, and the Administrative Court ruled that the planned assemblies “pose a threat to public safety.”¹⁹⁸ They stated that the motto is an incitement to hatred considering the anti-Semitic message. The FCC upheld this decision for the same reason. Nevertheless, the party again announced a demonstration but under a different motto - “No tax money for building the synagogue. For freedom of expression.”¹⁹⁹ The march was again prohibited by the local authorities on the reason that “changing the motto does not eliminate the prevention.”²⁰⁰ This time the FCC overruled the decision and stated that the content is protected under Article 5 (1) BL and further explained that the limitation should not be content-based because of Article 5 (1) BL. This implies that restrictions on speech can only be permitted under Article 5 (2) BL grounds which means that marches regarding the message that should be delivered, can only be prohibited if the speech can be limited under Article 5 (2).²⁰¹ Additionally, NPD aimed to organize a rally on May 8th, 2005 for the 60th anniversary of the capitulation of Nazi Germany in front of the Brandenburg Gate.²⁰²

Without going into details about the FCC decision, all these events triggered a debate which finished with amendments to the Federal Act on Assemblies and the Criminal Code.²⁰³ The

¹⁹⁷ Haupi, Claudia E. “The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany.” *Florida Journal of International Law*, n.d. page 186

¹⁹⁸ *Ibid.* page 187.

¹⁹⁹ *Ibid.* page 187.

²⁰⁰ *Ibid.* page 188.

²⁰¹ *Ibid.* page 189.

²⁰² *Ibid.* page 191.

²⁰³ Bell, Bernhard. “Freedom of Assembly in Germany,” n.d. Available at: <http://www.icnl.org/research/resources/assembly/FoA%20in%20Germany.pdf>. Section - restrictions on Assembly.

amendment of the Federal Act of Assemblies introduces a new restriction on the freedom of assembly. This restriction says that assemblies may be prohibited in memorial places of the victim of the National Socialist system. The restriction is possible in places which are of “a paramount historical importance,” and in case the assembly will affect the dignity of the victims.²⁰⁴ The only place explicitly mentioned in the Law is the Holocaust Memorial in Berlin.²⁰⁵ However, restrictions can be placed in other places as well if identified as relevant to protect the dignity of the victims.²⁰⁶ This restriction, considering that is a limitation on the place of the assembly, can be linked with the “the notion of captive audience” discussed in the ECtHR chapter. Although the notion of captive audience is introduced to protect a group of people, the same logic coming from the dignity of the people can be noticed. Nevertheless, with this restriction of freedom of assembly, Germany has shown a tendency to limit the activities of far-right groups. NPD was not banned, but other laws, such as this one, can be used the state to safeguard its principles and democratic order.

Moreover, another limitation introduced by Germany to limit the activities of populist right-wing movements is the possibility of authorities to restrict an assembly on the Holocaust Remembrance Day.²⁰⁷ This possibility was applied by the authorizes back in 2012 when the NPD

²⁰⁴ Anne Peters, and Isabelle Ley. “Comparative Study: Freedom of Peaceful Assembly in Europe.” Study requested by the European Commission for Democracy through Law – Venice Commission, March 2014. http://www.venice.coe.int/files/Assemblies_Report_12March2014.pdf. pages 54-62.

²⁰⁵ Haupi, Claudia E. “The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany.” *Florida Journal of International Law*, n.d. page192.

²⁰⁶ Haupi, Claudia E. “The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany.” *Florida Journal of International Law*, n.d. page192.

²⁰⁷ *Ibid.* page 194.

wanted to organize an assembly on that day.²⁰⁸ This represents another restriction on the right to assembly in line with Article 5 (2) or possible limitations on speech.

These limitations, however, cannot be seen as ordinary, but it has to be stated that Germany is effectively using its laws to address all possible “enemies” actions which can be targeted as against the German principles. Both limitations are also showing that such restrictions are exclusively linked to the history of the country and cannot be seen separately. Moreover, changes were also made in the German Criminal Code. Section 130 (4) explicitly criminalize the disturbance of public place done by “approving, glorifying, or justifying National Socialist rule.”²⁰⁹

3.2. The rise of the populist Alternative for Germany

In February 2013 in the German politics appears a new political party called Alternative for Germany (AfD) which gained popularity in a short period and became a widely discussed political party in the discussions targeting populism.²¹⁰ The party was surrounded by conservative economists which traced the development of the AfD politics towards anti-Euro position.²¹¹ AfD started as a political party with no anti-democratic tendencies focusing on Eurozone²¹² Nevertheless with the pick of the immigration issue in Germany; the political party focus was split into two sides, Euroscepticism and multiculturalism and immigration. In June 2015, Frauke Petry

²⁰⁸ Bell, Bernhard. “Freedom of Assembly in Germany,” n.d. Available at: <http://www.icnl.org/research/resources/assembly/FoA%20in%20Germany.pdf>. Section - restrictions on Assembly.

²⁰⁹ German Criminal Code, section 130 (4).

²¹⁰ BERBUIR, NICOLE, MARCEL LEWANDOWSKY, and JASMIN SIRI. “The AfD and Its Sympathisers: Finally a Right-Wing Populist Movement in Germany?” *German Politics* 24, no. No. 2 (2015): 154–78. <https://doi.org/http://dx.doi.org/10.1080/09644008.2014.982546>. Introduction.

²¹¹ Ibid. Page 155.

²¹² Lochocki, Timo. “Will the German Center Hold?” *Journal of Democracy*; John Hopkins University Press, No. 4, 27 (October 2016): 37–46. Page 43.

became the new leader of the party, and Bernd Lucke left the leadership of the AfD.²¹³ The immigrant wave affected positively the success of AfD which took seven seats in the European Parliament, nine legislators in subnational parliaments and enjoyed 12% support of public opinion in 2016 surveys.²¹⁴ Scholars were skeptical of AfD gaining support for the Parliamentary elections in 2017,²¹⁵ but the results from the elections brought the first populist and far-right political party into the German Bundestag.

In the last elections held September 2017, the AfD finished as the third biggest party gaining 94 seats out of 709.²¹⁶ The party won 12.6 % of the popular votes.²¹⁷ As reported, this is a “major shift” in the German politics owing to the reason that this “nationalist party” is the first party in postwar German politics to enter the Bundestag.²¹⁸ Taking into consideration that the Cristian Democratic Union, the Cristian Social Union (CDU/CSU) and the Social Democratic Party (SPD) lost votes, that means that AfD got many of their votes.²¹⁹ AfD also gained some of the supporters of NPD. The largest support for AfD comes from the East and from those voters who are opposing Merkel’s welcoming politics towards refugees.²²⁰

²¹³ Ibid. Page 44.

²¹⁴ Ibid. Page 37.

²¹⁵ Ibid. Page 46.

²¹⁶ “German Elections 2017: Full Results.” The Guardian. Accessed November 20, 2017.

<https://www.theguardian.com/world/ng-interactive/2017/sep/24/german-elections-2017-latest-results-live-merkel-bundestag-afd>.

²¹⁷ “Official Page of Deutscher Bundestag.” State official webside. Election Results, n.d. Available at:

<https://www.bundestag.de/en/#url=L2VuL2RvY3VtZW50cy90ZXh0YXJjaGl2ZS9lbGVjdGlubi0yMDE3LzUyNzI4NA==&mod=mod453306>.

²¹⁸ Henley, John. “German Elections 2017: Angela Merkel Wins Fourth Term but AfD Makes Gains – as It Happened,” September 24, 2017. Available at: <https://www.theguardian.com/world/live/2017/sep/24/german-elections-2017-angela-merkel-cdu-spd-afd-live-updates>.

²¹⁹ Mudde, Cas. “What the Stunning Success of AfD Means for Germany and Europe.” The Guardian, September 24, 2017. <https://www.theguardian.com/commentisfree/2017/sep/24/germany-elections-afd-europe-immigration-merkel-radical-right>

²²⁰ Ibid.

As we could see, the beginning of AfD politics focused on Euroscepticism, a party position led by Bern Lucke who abandon the party because it was becoming a political party with xenophobic views. However, the party's campaign slowly shifted and started to focus on Islam and migrations, including those views in their election campaign. The party's rhetoric is not that strong as other political parties in Europe, but their platform was concentrated on immigrant's issues. AfD has also been connected to the Pegida movement which is anti-immigrant movement.²²¹ "Islam does not belong to Germany" was a section in AfD's election manifesto.²²² Critics go to the party considering that some of the AfD leaders made controversial comments related to WWII.²²³ Their populist rhetoric cannot be taken as a sole factor which created the success for the party. Here also has to be noted that their fast rise is due to other factors as well, as noted above anti-governmental policies towards refugees and terrorist attacks by Islamist.²²⁴

Nevertheless, the conclusion is that AfD gained the lost votes of CDU/CSU and SPD and succeeded in entering the Bundestag by using anti-immigrant and anti-Islam rhetoric. Cass Mudde would classify those ties as "loosen ties" presuming that AfD success is mainly related to "the spirit of the time," referring to the fact that very few populist political parties have succeeded in creating a stable support.²²⁵ Moreover, AfD cannot be fully classified as an openly racist political party.²²⁶ AfD is a political party which policies are placed in the right-wing activities, and instead

²²¹ "German Election: How Right-Wing Is Nationalist AfD?" BBC News, October 13, 2017.
<http://www.bbc.com/news/world-europe-37274201>.

²²² Ibid.

²²³ Ibid.

²²⁴ See more about terrorist attacks in Germany at: 2016 REPORT ON THE PROTECTION OF THE CONSTITUTION Published by Federal Ministry of the Interior. Available at: <https://www.verfassungsschutz.de/embed/annual-report-2016-summary.pdf>

²²⁵ Child, David. "Austria, Europe and the Far Right: A Q&A with Cas Mudde," October 13, 2017.
<http://www.aljazeera.com/news/2017/10/austria-europe-qa-cas-mudde-171008122125853.html>.

²²⁶ BERBUIR, NICOLE, MARCEL LEWANDOWSKY, and JASMIN SIRI. "The AfD and Its Sympathisers: Finally a Right-Wing Populist Movement in Germany?" German Politics 24, no. No. 2 (2015): 154–78.
<https://doi.org/http://dx.doi.org/10.1080/09644008.2014.982546>.

of advancing national belonging, AfD is referring to values and customs.²²⁷ That makes the party antiliberal. Concerns were also raised regarding the party affiliation with the Pegida movement [populist movement which is going to be discussed in the following part] because AfD also supported the movement. Since we cannot fully target AfD as a right-wing political party, we are confronting to a more complicated case. On the one hand, the party is anti-liberal, and its policies can be placed on the side of right-wing ideology, and on the other hand, the party is not something that German post-war politics favor. At this point, the party has supporters and its running politics different than the traditional one, but legal grounds for banning the party would be hard to find.

3.3. Populist movement Pegida: Germany's response to populism

As a result of the welcoming politics regarding refugees, in October 2014 was formed a movement called “Patriotic Europeans against the Islamisation of the West” (Pegida). This movement is targeted as “a right-wing populist street movement” against Islamization and critics on German politics. The movement hometown is Dresden located in a state governed by CDU and three right oriented political parties, AfD, Free Democrats (FDP) and NPD.²²⁸ Pegida aims at protecting the German culture and opposes to immigration welcoming policies.²²⁹ The first march of the movement was organized in October 2014 in city Dresden, and as its support started to grow, marches were organized in other German cities as well.²³⁰ AfD supported the movement, but other politicians like Chancellor Angela Merkel and the ex-Chancellor Helmut Schmidt called for

²²⁷ Lochocki, Timo. “Will the German Center Hold?” *Journal of Democracy*; John Hopkins University Press, No. 4, 27 (October 2016): 37–46. Page 40

²²⁸ The Pegida Movement and German Political Culture: Is Right-Wing Populism Here to Stay?

²²⁹ Hoerner, Julian M. “Closer Cooperation between the AfD and the ‘Pegida’ Movement Could Reshape the German Right.” LSE (blog), May 1, 2015. <http://eprints.lse.ac.uk/71569/1/blogs.lse.ac.uk-Closer%20cooperation%20between%20the%20AfD%20and%20the%20Pegida%20movement%20could%20reshape%20the%20German%20right.pdf>.

²³⁰ Ibid.

support for diversity and tolerance. Moreover, the movement has been supported mainly by the AfD voters²³¹ Anti-Pagida movements or counterdemonstrations were organized as well, taking place in January 2015.²³² German Justice Minister has also joined to the demands the demonstrations of Pegida to be canceled.²³³ This time there was no official ban on the demonstrations, except the calls from politicians the demonstrations to be stopped.

However, the link between AfD and Pegida had been recognized. The leaders of AfD, Alexander Gauland, Bernd Lucke and Frauke Petry defended the movement.²³⁴ Moreover, both groups Pegida and AfD joined in a separate-but-joint demonstration in Dresden in March 2017.²³⁵ The movement also it is said that succeeded to mobilize neo-Nazis, supporters of NPD, football hooligans and supporters of AfD.²³⁶ This is not the first example of support and affiliation of populist far-right parties with populist and extremist movements, in the chapter on Bulgaria affiliations and direct support of populist far-right parties is also elaborated. These facts are showing [as presented in chapter II, section captive audience] that populists use and rely on both, traditional and modern channels for mobilization. After explaining the movement and what it stands for, it can be concluded that the movement is not in line with the political leader's opinion

²³¹ 57% of the Pegida demonstrators voted for AfD, statistic shown in a survey. Information taken from Causes and consequences of the rise of populist radical right parties and movements in Europe

²³² "Who Goes to German Pegida 'Anti-Islamisation' Rallies?" BBC News, January 13, 2015. <http://www.bbc.com/news/world-europe-30776182>.

²³³ "German Ministers Call on PEGIDA to Cancel Marches." DW, December 1, 2015. <http://www.dw.com/en/german-ministers-call-on-pegida-to-cancel-marches/a-18184837>.

²³⁴ Hoerner, Julian M. "Closer Cooperation between the AfD and the 'Pegida' Movement Could Reshape the German Right." LSE (blog), May 1, 2015. <http://eprints.lse.ac.uk/71569/1/blogs.lse.ac.uk-Closer%20cooperation%20between%20the%20AfD%20and%20the%20Pegida%20movement%20could%20reshape%20the%20German%20right.pdf>.

²³⁵ "AfD, PEGIDA Hold Side-by-Side Events in Dresden." DW, 05 2017. <http://www.dw.com/en/afd-pegida-hold-side-by-side-events-in-dresden/a-38761338>.

²³⁶ Bauchowitz, Stefan. "The Challenge of Responding to Extreme Political Views: Germany Struggles to Address Pegida's Anti-Islam Protest." LSE, 9 2015. <http://eprints.lse.ac.uk/77978/1/blogs.lse.ac.uk-The%20challenge%20of%20responding%20to%20extreme%20political%20views%20Germany%20struggles%20to%20address%20Pegidas%20anti-Islam.pdf>.

of Germany who did not support the populist movement and condemn it for been stereotypical.²³⁷ However, as stated before, the movement was not banned. Instead, other tactics were used.

Section 130 of the Criminal Code punishes incitement of hatred and also activities which can amount to an incitement of hatred related to assemblies. Additionally, the Act on Regulatory Offences punishes also behavior which is not covered by the Federal Law of Assemblies, such as unauthorized gathering regulated in section 113.²³⁸ Consequently, this fine was used against the leader of Pegida. The city of Dresden posed a ban on the leader of Pegida, Lutz Bachman to lead the demonstrations. Additionally, the deputy leader Siegfried Dabritz has also been banned from leading the demonstration together with Bachmann until 31st October 2021. If they oppose to this measure, they will have to pay a fine of 1,000 Euros.²³⁹ The leader of the movement has also been accused of inciting hatred on the internet towards asylum seekers.²⁴⁰

Furthermore, Germany is working on advancing its norms on hate speech considering that extremist views increased. This is another measure of the government for combating hate speech and most importantly far-right views. The new rule regarding freedom of expression and hate speech in Germany is in force since October. According to the new rule companies such as Facebook, Google, Twitter, etc. have to remove any content within 24 hours which is illegal in Germany, referring to Nazi symbols or Holocaust denial.²⁴¹ The laws have already received its critics, however, having the lens of militancy, the new rule might sound enough “German.”

²³⁷ “German Politicians Condemn PEGIDA Anti-Islamization Movement.” DW, June 1, 2015.

<http://www.dw.com/en/german-politicians-condemn-pegida-anti-islamization-movement/a-18172375>.

²³⁸ Act on Regulatory Offences, Section 113 – Unauthorized gatherings.

²³⁹ “Anti-Islam Pegida Leader Banned from Running Demos,” August 11, 2016.

<https://www.thelocal.de/20161108/anti-islam-pegida-leader-banned-from-running-demos>.

²⁴⁰ “PEGIDA Founder Lutz Bachmann Found Guilty of Inciting Hatred.” DW, March 5, 2016.

<http://www.dw.com/en/pegida-founder-lutz-bachmann-found-guilty-of-inciting-hatred/a-19232497>.

²⁴¹ “Delete Hate Speech or Pay Up, Germany Tells Social Media Companies.” The New York Times, June 30, 2017.

<https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html>.

4. Concluding remarks: Populism under the frame of militant democracy in Germany

As has been elaborated in this chapter, militant democracy in the German system is established to protect the democratic order and the constitutional system against those who attempt to destroy the system.²⁴² Germany has declared unconstitutional only two parties and recently [2017] declared that small parties are not posing a danger to the democratic order.²⁴³ However, in the political scene appears a new political party [Alternative for Germany] whose politics is different than the traditional liberal politics of Germany.²⁴⁴ As discussed in the previous part of the chapter, AfD is still not clearly a right-wing political party. The political party is antiliberal but is not openly racist.²⁴⁵ AfD refers to national values and national belonging, and most importantly the way how it does that cannot be targeted as illegal.²⁴⁶ Although the party is enough big and its part of the Bundestag, it is evident that the traditional militant limitation – banning political party, cannot be applied. However, this might change if populist became more radical [e.g., if AfD becomes radical or if NPD receives more support and becomes bigger]. AfD is anti-liberal, but is not declaring politics as extreme as the NDP which has stated that “intends to replace the existing constitutional system.”²⁴⁷ However, the fact that the party is antiliberal and runs politics different from the German post-war traditional views cannot be taken for granted. In fact, the activities of

²⁴² Tyulkina, Svetlana. “Militant Democracy.” Phd., Central European University, 2011. page 267.

²⁴³ Mudde, Cas. “Germany wants to ban the neo- Nazi of NPD again, but why now?” Deutsche Welle. March 4, 2016. Accessed February 14, 2017. <https://www.theguardian.com/world/commentisfree/2016/mar/04/germany-ban--neo-nazi-npd-refugees-far-right>.

²⁴⁴ Lochocki, Timo. “Will the German Center Hold?” Journal of Democracy; John Hopkins University Press, No. 4, 27 (October 2016): 37–46. Page 40

²⁴⁵ Child, David. “Austria, Europe and the Far Right: A Q&A with Cas Mudde,” October 13, 2017. <http://www.aljazeera.com/news/2017/10/austria-europe-qa-cas-mudde-171008122125853.html>.

²⁴⁶ Lochocki, Timo. “Will the German Center Hold?” Journal of Democracy; John Hopkins University Press, No. 4, 27 (October 2016): 37–46. Page 40

²⁴⁷ The Guardian. “Germany’s top court rules against ban of far-right NDP”. January 17, 2017. Accessed February 10, 2012 <https://www.theguardian.com/world/2017/jan/17/germany-s-top-court-rules-against-ban-on-far-right-ndp>

NPD are also not passing without responses. The same happened with the leaders of the populist movement Pegida.

This implies a conclusion that Germany is not passive, and the country is using its ordinary limitations to oppose to populist movements. The State authorities are not just weighing/balancing rights, but they are also balancing in the decisions which legal rules are going to be used. One might criticize this approach, but from a political view of point it can be understandable and justified. Protecting constitutional order is done by the theory of militant democracy, nevertheless in the example of a populist political party [like AfD] in the German politics, one might find a gap between anti-liberal and democratic political activities. Germany fulfilled that gap by referring to limitations of freedom of expression and freedom of assembly.

CHAPTER 4: THE CASE OF BULGARIA

1. Introduction

Since Bulgaria is not a typical country targeted as militant democracy, this chapter firstly elaborates on the question of Bulgarian militancy. Answering this question opens a space for debate in further analysis on the issue what militant Bulgaria can do in combating or neutralizing the political activities of the populists. However, in assessing that crucial question, the second section presents the rise of populism, populists activities and the critic by international organizations and international institutions towards the populist activities. Finally, the chapter ends with a conclusion which answers the question if militant norms can neutralize the rise of populism.

Bulgaria's pluralism is relatively new, and the political scene is turbulent, but Bulgaria is also a state which embraces the populist trend around Europe. Although the populism, far – right party ideology and nationalistic parties are a recent phenomenon, their power is not something which has to be taken for granted,²⁴⁸ especially now when the most influenceable called ultra-nationalist political parties are part of the governmental coalition.

Historically, between 1990 and 2010 Bulgarian democracy is described as fragile democracy and “shy” nationalism which was not forgotten but present by small parties.²⁴⁹ The accession in the European Union in 2007 was perceived as salvation. However, the country is still one of the poorest countries in the European Union (EU).²⁵⁰ Owing to the half a century communist

²⁴⁸ “Far-Right Nationalism and Populism in Europe: Assaults on Press Freedom.” *Media Governance and Industries Research Lab University of Vienna*, Series: Democracy Under Pressure, May 2017. Available at: http://mediagovernance.univie.ac.at/fileadmin/user_upload/p_mediagovernance/PDF/FarRightNationalism.pdf. Page 21.

²⁴⁹ Krasteva, Anna. “The Post Communist Rise of National Populism: Bulgarian Paradox.” Springer, July 2016.

²⁵⁰ “Public Attitudes towards Hate Speech in Bulgaria in 2016.” Open Society Foundation Sofia, July 2016. page 3.

regime, the state's process of transition has been complicated and followed by compromises.²⁵¹ One of those compromises between communists and democrats is also the Constitution adopted in 1991.²⁵² The constitutional order is described as robust, and despite the fact that the state is part of EU, Bulgaria has been facing with some already traditional problems like informal decision making, corruption and weak rule of law principle.²⁵³

As mentioned, the political turbulence is, in fact, a consequence of frequently organized parliamentary elections and unstable coalition governments²⁵⁴ The political system of Bulgaria allows small parties to be part of the Parliament based on the proportional model of representation which requires winning 4 percent of the national vote.²⁵⁵ Nevertheless, interesting point from the Bulgarian political turbulence is the fact that populist far-right have been in the Parliament since 2014 [more of populist far-right in the Parliament in the section on the rise of populism].²⁵⁶ Therefore, analyzing populism in Bulgaria can provide a different view of the influence and threats that these parties can present to the democratic state.

²⁵¹ Tchipev, Teodor. "Bulgarian Democracy in Transition." Review of Central and East European Law, Kluwer Academic Publishers, no. No.3 (2000): 343–50.

²⁵² Ibid.

²⁵³ Fruhstorfer, Anna, and Michael Hein. "Bulgaria." In Constitutional Politics in Central and Eastern Europe - from Post - Socialist Transition to the Reform of Political Systems. Springer, 2016. Page 166.

²⁵⁴ "Public Attitudes towards Hate Speech in Bulgaria in 2016." Open Society Foundation Sofia, July 2016. page 4.

²⁵⁵ Protsyk, Oleh, and Konstantin Sachariw. "Recruitment and Representation of Ethnic Minorities under Proportional Representation." *East European Politics and Societies; SAGE Publications XX* (2010).

²⁵⁶ Bulgarian Helsinki Committee. "WRITTEN COMMENTS of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at Its 92nd Session," March 2017. Available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf. Page 2/3.

3. Bulgaria as militant democracy

In answering and elaborating the question whether Bulgaria is a militant democracy, this section of the chapter refers to the constitutional and legislative norms and secondly, to the applied militancy in banning and rejecting from registration political parties and associations. The section ends with a conclusion that Bulgaria can be considered as a militant democracy.

The Bulgarian Constitution of 1991 was introduced to establish a new system – democracy. The Constitution was a compromise between communist and democrats. However, it succeeded (generally) to contribute in the transition process towards democracy.²⁵⁷ The Constitution cannot be compared to German Basic Law's stability and constitutional power, but its provisions remained "highly stable."²⁵⁸ However, the Bulgarian Constitution it is described as "rigid" and difficult to amend.²⁵⁹ Constitutional amending requires three-fourths majority [180 of 240].²⁶⁰ Although the Bulgarian Constitution does not have an eternity clause, it is defined as "legally more entrenched than any other in Eastern Europe."²⁶¹ Until 1997 there were no amendments to the Constitution, however, after that, the Constitution was amended several times, and those changes were mainly related to the accession process to EU.²⁶²

Moreover, Bulgaria is one of the only two countries in the world which constitutionally prohibits ethnical political parties. The Bulgarian Constitution, considering its provisions on

²⁵⁷ Fruhstorfer, Anna, and Michael Hein. "Bulgaria." In *Constitutional Politics in Central and Eastern Europe - from Post - Socialist Transition to the Reform of Political Systems*. Springer, 2016. Page 146.

²⁵⁸ Ibid. page 147.

²⁵⁹ Ibid. page 149.

²⁶⁰ Ibid. page 149.

²⁶¹ Defined by [original source] Stephen Holmes and Sunstein Cass in "*The Politics of Constitutional Revision in Eastern Europe. In Responding to Imperfection. The Theory and Practice of Constitutional Amendment*". Taken from Fruhstorfer, Anna, and Michael Hein. "Bulgaria." In *Constitutional Politics in Central and Eastern Europe - from Post - Socialist Transition to the Reform of Political Systems*. Springer, 2016. Page 150.

²⁶² Paskalev, Vesco. *Bulgarian Constitutionalism: Challenges, Reform, Resistance and ... Frustration*. Vol. 22. No.2. European Public Law, 2016.

political parties, is classified in the group of constitutions which did not change the rules regarding political parties since the moment of the promulgation.²⁶³ Bulgaria as a country also shows strong regulation on political parties and prescribes provisions which give space to the authorities to intervene in the internal party organization.²⁶⁴

3.1. Banning and rejection of registering political parties and associations

Bulgarian Constitution as previously mentioned has strong regulation on political parties and organizations located not just in the Constitution, but also in the laws regulating this matter. According to Article 11 of the Bulgarian Constitution:

(1) Political activity in the Republic of Bulgaria shall be founded on the principle of political pluralism.

(2) No political party or ideology shall be proclaimed or affirmed as a party or ideology of the State.

(3) All parties shall facilitate the formation and expression of the citizens' political will. The procedure applying to the formation and dissolution of political parties and the conditions about their activity shall be established by law.

*(4) There shall be no political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power.*²⁶⁵

²⁶³ Casal Bertoa, Fernando, and Ingrid Van Biezen. "Party Regulation and Party Politics in Postcommunist Europe." *East European Politics; Routledge* Vol.30, no. No.3 (2014): 295–314. <https://doi.org/https://doi.org/10.1080/21599165.2014.938738>. page 297.

²⁶⁴ Ibid. page 302.

²⁶⁵ The Constitution of the Republic of Bulgaria – Article 11 (1991) with Amendments through 2007.

The Bulgarian Constitution in article 44 also regulates the restrictions on political parties:

- (1) All citizens shall be free to associate.*
- (2) The organization/s activity shall not be contrary to the country's sovereignty and national integrity, or the unity of the nation, nor shall it incite racial, national, ethnic or religious enmity or an encroachment on the rights and freedoms of citizens; no organization shall establish clandestine or paramilitary structures or shall seek to attain its aims through violence.*
- (3) The law shall determine which organizations shall be subject to registration, the procedure for their termination, and their relationships with the State.*²⁶⁶

As it can be seen from the Constitutional provisions, Bulgarian Constitution prohibits political parties which are based on grounds and division like ethnicity, religion, and race. Political parties which deemed to use violence as a “weapon” to undertake the state power are also prohibited. A political party cannot be against national unity and sovereignty, and political parties shall not incite religious, racial, ethical, national hostility or pose an interference (intrusion) on the rights and freedoms of their citizens.²⁶⁷ The same applies to organizations.²⁶⁸ On the question of disputes concerning the constitutionality of political parties and associations decides the Constitutional Court of Bulgaria.²⁶⁹ The Constitutional Court decides on the question of constitutionality on the initiative of bodies and people, as regulated in Article 150 (1) of the Constitution.²⁷⁰ This represents that there are several grounds under which a political party or

²⁶⁶ The Constitution of the Republic of Bulgaria – Article 44 (1991) with Amendments through 2007.

²⁶⁷ The Constitution of the Republic of Bulgaria – Article 11 (1991) with Amendments through 2007.

²⁶⁸ The Constitution of the Republic of Bulgaria – Article 44 (1991) with Amendments through 2007.

²⁶⁹ Article 149 Constitution of Bulgaria and Article 12 of the Constitutional Court Act.

²⁷⁰ Article 150. Constitution of Bulgaria.

(1) The Constitutional Court shall act on an initiative from not fewer than one-fifth of all Members of the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative

organization can be declared unconstitutional, but whether the authorities apply all those grounds is a question which seeks an analysis of the existing examples of banning or rejecting applications from political parties.

Bulgaria is not a system and country which has generally been elaborated under the theory of militant democracy. Specific reasons to be attached to this does not exist and cannot be provided. Nevertheless, that opens the possibility militant norms to be accommodated in ordinary rights limitations.²⁷¹ Since the country is not conceptualized as militant democracy [e.g., Germany], considering the strong regulation of political parties, the militancy can also be found in the other [ordinary] laws.²⁷²

For instance, the Political Party Act of Bulgaria prescribes several requirements which must be fulfilled one political party to be registered. According to Article 3 of the Political Party Act of Bulgaria “political parties shall use democratic means and methods to achieve the political objectives.”²⁷³ They shall function respecting the laws and the Constitution and also shall act in accordance with their statutes.²⁷⁴ The Political Parties Act is also regulating the usage of symbols by prescribing that “political party symbols shall not infringe universal human rights and be contrary to good morals.”²⁷⁵ Simultaneous membership in two or more parties is prohibited.²⁷⁶ Those people constitute the Steering Committee which adopts a Declaration of Establishment, a document specifying the “principles and objectives of the political party.”²⁷⁷ According to the law,

Court or the Prosecutor General. A challenge to competence pursuant to para 1 item 3 of the preceding Article may further be filed by a municipal council.

²⁷¹ Tyulkina, Svetlana. “Militant Democracy.” Phd., Central European University, 2011.

²⁷² Ibid.

²⁷³ Political Party Act of Bulgaria [2009]. Article 3.

²⁷⁴ Ibid. Article 4.

²⁷⁵ Ibid. Article 5.

²⁷⁶ Ibid. Article 8.

²⁷⁷ Ibid. Article 10 (1), 10 (2), 10 (3).

there should be “no fewer” than 500 citizens holding electoral rights at the Constituent Meeting which shall be organized in a period within three months after the adoption of the Declaration.²⁷⁸ At the Constituent Meeting, the Statute of the political party shall be adopted.²⁷⁹ In case the application is rejected applicants have the right to complain in front of the Supreme Court of Cassation.²⁸⁰ Political parties shall be registered at the Sofia City Court following the requirements set in Article 15.²⁸¹ The Court revises the application with the participation of public prosecutor.²⁸²

An additional argument for the Bulgarian militancy is the provision regarding dissolving political parties prescribed in the Political Parties Act. Not only the Constitutional Court, but the Sofia City Court can also dissolve a political party. The Court can dissolve a political party if it commits systematic violations in contrary to the established principles of the Political Parties Act and if the activities of the political party conflict with the provision of the Constitution.²⁸³ Moreover, the provisions of the Act allow for internal interference into the functioning of the political party considering that an additional three situations are prescribed as grounds for dissolving parties:

- non-participation in elections for more than five years from the registrations,
- failing to submit annual financial records to the National Audit Office and
- failing to organize meetings of the supreme body²⁸⁴

²⁷⁸ Ibid. Article 12 (1), 12 (2).

²⁷⁹ Ibid. Article 13.

²⁸⁰ Ibid. Article 18.

²⁸¹ Ibid. Article 15.

²⁸² Ibid. Article 16.

²⁸³ Ibid. Article 40 (2).

²⁸⁴ Ibid. Article 40 (3)

3.2. Applied militancy

Apart from the Constitutional provisions and the regulations in the Political Parties Act, maybe the core argument of the militant character of Bulgaria, is the “compilation” of cases in front of ECtHR²⁸⁵ regarding article 11 (freedom of association and freedom of assembly). An assessment of the cases can provide a conclusion that Bulgarian authorities tend to restrict the rights of association and assembly of small political parties and association which are mainly formed by members of some minority group. In most of the cases, an association was refused from registration following the argumentation that spreading separatist ideas is against the Constitution.²⁸⁶ Other arguments for refusing registration are statutes and programs of associations which can be against the unity of the nation²⁸⁷ or promote minority rights.²⁸⁸

Additionally, associations which have political aims or present one group of people can also be prohibited.²⁸⁹ Compared to Germany, the discussed measures of party ban and the refusal of registration are maybe stricter in Bulgaria, because the number of supporters and members of political party or association is not an applied criteria [in the ECtHR Bulgarian cases] by the Bulgarian Constitutional Court. That means that even small political parties and associations can pose a danger to the Bulgarian democracy and unity. However, it seems that Bulgaria is respecting and applying Article 11 (4) from the Constitution “no political parties on ethnic, racial or religious lines” as its strongest limitation on political parties, hence in registering associations.

²⁸⁵ There are in total 12 regarding similar issues raised under Article 11.

²⁸⁶ *United Macedonian Organization Ilinden and Ivanov v. Bulgaria* (No.2), app. No. 37586/04, (2011) ECtHR ; *United Macedonian Organization and others v. Bulgaria* (No.2), app. No. 34960/04, (2011) ECtHR; *Singartiyski and Others v. Bulgaria*, app. No. 48284/07, (2011) ECtHR.

²⁸⁷ *United Macedonian Organization Ilinden and Ivanov v. Bulgaria*, app. No. 44079/98, (2005) ECtHR.

²⁸⁸ *National Turkish Union and Kungyn v. Bulgaria*, app. No. 4776/08, app. No. 4776/08, (2017) ECtHR.

²⁸⁹ *Zhechev v. Bulgaria*, app no. 57945/00, (2011) ECtHR.

3.3. Concluding remarks

Bulgaria, although not discussed as militant democracy, seems to apply strong protection to its constitutional order especially protected it from “dangerous” political parties and associations. First, the Constitution prescribes several grounds why the Constitutional Court can ban one political party or association. Second, the procedure of registering political parties requires several strictly regulated steps in registering. Third, the Sofia City Court can also dissolve a political party. Finally, there are several cases which can present the applied militancy. The conclusion is that Bulgaria is a militant democracy and that usually minority political parties and associations are seen as a threat to the unity of the state. An additional conclusion is that the most protected grounds in the Bulgarian militancy are: the unity of the nation and spreading separatist ideas. Here a critique can go to the selective grounds under which political parties and associations were dissolved. Without commenting the rightfulness of the decisions brought by the Constitutional Court, it seems that Article 44 from the Constitution which refers to the restriction of associations and political parties to “incite racial, national, ethnic or religious enmity or an encroachment on the rights and freedoms of citizens” was left behind. There are far-right political parties which had problematic programs and party constitutions, but they still function, and there was no limitation posed to them.

4. The rise of populism in Bulgaria

This section of the chapter is going to elaborate on the rise of the populism in Bulgaria. Firstly, it is going to be present a historical view of the rise of populism. Secondly, this section presents the political situation of Bulgaria, the problem of hate speech and populist demonstrations which endanger the democracy. Finally, the section ends with a conclusion which mainly elaborates on the critics that Bulgaria received by international organizations.

The rise of populism in Bulgaria can be divided into three periods, or as the Professor Daniel Smilov formulated it, three waves. The first wave started in 2001 with the return of the King Simeon II who run the elections not from his party (because the National Movement Simeon II (NMSII) was rejected from registration), but he used two small parties which were not popular. He won 40 % of the votes and half of the sets in the Parliament. The second wave is the appearance of “Ataka” in the political scene in Bulgaria. This political party was formed by a well-known journalist and media person, Volen Siderov. “Ataka” entered the political scene in 2005 and shortly after that became the biggest opposition political party. The third wave is the formation of a new political party named “Citizens for European Development of Bulgaria (GERB).”²⁹⁰

Nevertheless, the most popular one is Ataka. Ataka has been mainly concentrated on Roma scapegoating with politics against the “Roma crime” and “stopping Islamization,” joined with a strategic priority of saving Bulgaria from foreign influence.²⁹¹ Ataka is a nationalist party and represents the ethnic Bulgarians.²⁹² Moreover, their politics emphasize the ethnic groups as a threat to the Bulgarian society.²⁹³ The leader of the Ataka participated in the presidential elections and won 24.05 % of the popular votes, and in 2009 the political party won three MEP seats in the European Elections.²⁹⁴ The political party has been continuously active in the political scene since its establishment despite the internal divisions. Ataka took again part of the Presidential elections in 2016, this time in a coalition with NFSB and VMRO in the so-called, United Patriots(UP)

²⁹⁰ Smilov, Daniel, Olga Gyarmasova, and Gligorij Meseznikov. “Populist Politics and Liberal Democracy in Central and Eastern Europe.” *Institute for Public Affairs*, 2008. page. 23.

²⁹¹ Krasteva, Anna. “The Post Communist Rise of National Populism: Bulgarian Paradox.” *Springer*, July 2016. page 168

²⁹² Novakovic, Igor. “The Rise of Political Extremism in Bulgaria – The Political Party ‘Ataka.’” Portal on Central Eastern and Balkan Europe University of Bologna - Forlì Campus, n.d. page 120

²⁹³ Ibid. page 121

²⁹⁴ Krasteva, Anna. “The Post Communist Rise of National Populism: Bulgarian Paradox.” *Springer*, July 2016. page 169.

coalition. The United Patriots also participated as a coalition in the parliamentary elections in March 2017.²⁹⁵ The short presence of Ataka in the Bulgarian political functioning is fragmented and followed by a constant change of directions, but the political party managed to be part of the National Assembly and Bulgarian politics. The estimated number is that today they have only approximately 6 or 7 percent of the popular votes²⁹⁶ and currently with the UP coalition, in total 27 seats in the Parliament.

Ataka is maybe the most researched ideologically, but it is not the only political party which has been resembled with the ultranationalist block of political parties or populist far-right political parties. The National Front of Salvation of Bulgaria (NFSB) and the Internal Macedonian Revolutionary Organization (VMRO) are also known for their denial of democratic principles, human rights and rejection of minority rights with included anti-minority rhetoric.²⁹⁷ Their anti – Roma rhetoric was especially emphasized before the parliamentary elections in 2014, in their election programs.²⁹⁸ However, now these three political parties are in a coalition called United Patriots and the current government has appointed the leader of Ataka as the Deputy Prime Minister for Economic and Demographic Policy and President of the National Council for Cooperation on Ethnic and Integration Issues with the Council of Ministers.²⁹⁹ On this decision of

²⁹⁵ Bulgarian Helsinki Committee. "WRITTEN COMMENTS Of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at Its 92nd Session," March 2017. Available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf. page 3 and 4.

²⁹⁶ Todorov, Antoniy. "The Extreme Right Wing in Bulgaria." Friedrich Ebert Stiftung, January 2013.

²⁹⁷ Bulgarian Helsinki Committee. "WRITTEN COMMENTS Of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at Its 92nd Session," March 2017. Available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf.

²⁹⁸ Ibid.

²⁹⁹ "OSCE Supplementary Human Dimension Meeting" June 22, 2017. <http://www.osce.org/odihr/325081?download=true>.

the government OSCE reacted by sending an official letter in which they stated that his appointment on those positions (considering that he also should be in charge on supervising the implementation and development of minority integration policies) is not in line with his actions.³⁰⁰

The rising of populism in Bulgaria does not have any historical roots compared with those in Europe.³⁰¹ Bulgarian political parties in the past were always divided into political parties which attracted by Russian politics and political parties attracted to the Western ideology and principles.³⁰² Ideologically seen, Bulgaria as a democratic post-communist country was traditionally lead by anti-communist, socialist and there was also a minority representation. However, citizens were disappointed in the politics, perceptions of corruption prevail, there was a general lack of trust in the regime, and any new hope seems that was just embraced positively.³⁰³ The Euro-Atlantic integration brought strong and serious commitments, the political climate included political pluralism, but the mistrust of the traditional political parties did not stop to increase.³⁰⁴ Hence, populist political parties were given a chance. Populism nowadays is a trend in Europe, and Bulgaria indeed is one of the countries in Europe which can provide a long list of political parties and organizations which are maybe (slightly) ideologically different (extreme right, ultra-nationalist) but all use the same populist methods to gain attention, support, and votes. In fact, the two VMRO and NFSB were already part of the governing coalition from 2014 until

³⁰⁰ Ibid.

³⁰¹ "Far-Right Nationalism and Populism in Europe: Assaults on Press Freedom." *Media Governance and Industries Research Lab University of Vienna*, Series: Democracy Under Pressure, May 2017. http://mediagovernance.univie.ac.at/fileadmin/user_upload/p_mediagovernance/PDF/FarRightNationalism.pdf. page 22.

³⁰² Katsikas, Stefanos. *Bulgaria and Europe: Shifting Identities*. Anthem Press, 2010. page 9.

³⁰³ Krasteva, Anna. "The Post Communist Rise of National Populism: Bulgarian Paradox." Springer, July 2016.

³⁰⁴ Ibid.

2016. These two parties formed the Patriotic Front and participated in the governing coalition of GERB.³⁰⁵

The result from the early parliamentary elections in 2017 ended up with GERB winning 95 seats [from 240 seats], Bulgarian Socialist Party (BSP) 80 seats, the United Patriots coalition (VMRO, Ataka and NFSB) 27 seats, Movement of Rights and Freedoms (MRF) 26 seats and Volja 12 seats.³⁰⁶ The GERB although won most of the seats in the parliament, finished as a political party with most seats and had to decide with which political parties to form the government. Forming the government was the next step and therefore the decision on the coalition partners had to be made. The proposed options were a grand coalition with BSP and mainly stable government, coalition with MRF with 121 seats or coalition with United Patriots (UP) and Volja with 134 seats.³⁰⁷ Forming a grand coalition was encouraged by the European partners believing that it could form a full-term, stable and strong government, but both political parties were not interested in forming the government together.³⁰⁸ MRF (the Turkish ethnic party) was out of the Borisov's choices together with Volja.³⁰⁹ Despite the different policy agendas of GERB and UP and external disagreements, GERB made the decision to form a coalition just with UP. The result is that the ultra-nationalists are now part of the governmental coalition. UP is pro- Russian, claims changes

³⁰⁵305 Bulgarian Helsinki Committee. "WRITTEN COMMENTS Of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at Its 92nd Session," March 2017. Available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf. page 2 and 3.

³⁰⁶ "OSCE/ODIHR Limited Election Observation Mission Final Report." OSCE - Office for Democratic Institutions and Human Rights, June 30, 2017.

³⁰⁷ Barzachka, Nina. "Bulgaria's Government Will Include Far-Right Nationalist Parties for the First Time." *The Washington Post*, April 25, 2017. https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/25/bulgarias-government-will-include-nationalist-parties-on-the-far-right-heres-why-and-what-this-means/?utm_term=.c814b04756a4.

³⁰⁸ Zankina, Emilia. "The 2017 Bulgarian Elections: A Dead-End Street?" *Countering Populism and Political Disaffection*, April 28, 2017. <http://countering-populism.eu/zankina-bulgarian-elections/>.

³⁰⁹ Ibid.

regarding the policies towards refugees and it's a coalition of political parties which are known by their anti-minority behavior shown mainly by their political speech. The impact and the functioning of the government is going to be seen in the following years of their mandate, especially from the beginning of 2018 when Bulgaria will take the presidency of the Council of the European Union, which certainly requires a stable government.³¹⁰

The main difference in the Bulgarian case of populist far-right parties (even called ultranationalist) is that they are not just part of the government, but that they are in the governing coalition [United Patriots coalition]. Which means that they have more political and real power to bring up their policies and those policies to be adopted. In Germany, the populist AfD is also part of the Bundestag and NPD still functions, but the Bulgarian example of populism seems to be ahead owing to the above stated reason or the political power of the UP - being part of the governmental coalition.

Additionally, the UP coalition with the government already caused debates about the Bulgaria's EU Council presidency. The dangerous side is the challenge that this reality brings to the core values of the EU such as dignity, human rights, and values of equality.³¹¹ Moreover, the MEP and Co-President of ARDI, Soraya Post said:

"The Council presidency must show that there is no place for fascist ideas within the European Union. Therefore, I call on the EU to take up the issue with the Bulgarian government and prevent fascists groups from holding positions of high authority whilst

³¹⁰ Barzachka, Nina. "Bulgaria's Government Will Include Far-Right Nationalist Parties for the First Time." *The Washington Post*, April 25, 2017. https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/25/bulgarias-government-will-include-nationalist-parties-on-the-far-right-heres-why-and-what-this-means/?utm_term=.c814b04756a4.

³¹¹ "Far Right Political Party 'United Patriots' Worrying Role in Bulgaria's EU Council Presidency," October 2017. <https://www.ardi-ep.eu/far-right-political-party-united-patriots-worrying-role-in-bulgarias-eu-council-presidency/>.

they continue to violate principles of human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Human rights are indisputable; they belong to everyone.”³¹²

4.1. Hate speech: a problem in the Bulgarian political discourse

Even though the Constitution and the legislative norms condemn hate speech,³¹³ the reality is that hate speech in political discourse in Bulgaria in the recent years has been a continuing problem. As a consequence, several international organizations referred to the usage of hate speech in the political discourse. The European Commission against Racism and Intolerance (ECRI) has raised its concerns regarding the present hate speech in the political scene in its report in 2014 by stating that hate speech in political discourse is a serious problem. They specified “racist and intolerant hate speech in political discourse is escalating; the main target is now refugees.”³¹⁴ Hate expression, xenophobia, and racism were also expressed towards, as reported by ECRI, Turks, Roma, Muslims, and LGBT.³¹⁵

The Monitoring Committee of the Council of Europe has also voiced its concerns regarding hate speech and hate factor in the political discourse. They stated, “racism has become increasingly widespread in political discourse and the media, and extremist political parties have proliferated.”³¹⁶ OSCE reported that the election campaign for the early parliamentary election in

³¹² Ibid.

³¹³ Article 39 from the Bulgarian Constitution prescribes that the freedom of expression shall not be used “to the detriment of the rights and reputation of others, or for the incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of enmity or violence against anyone.” The Criminal Code under Article 162 (1) also regulates that “advocating racial, national or ethnic hostility, hatred or racial discrimination.”

³¹⁴ “ECRI REPORT ON BULGARIA.” European Commission against Racism and Intolerance (ECRI), 2014. Page 9.

³¹⁵ Ibid.

³¹⁶ “Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) Post-Monitoring Dialogue with Bulgaria.” Council of Europe, 2016. <http://website->

generally included cases of anti-minority (anti – Roma and anti – Turkish) rhetoric, racist and xenophobic tone and OSCE stated in its final report that those rhetorics are in contrary to the OSCE standards and commitments.³¹⁷ The incitement of hatred and racist discourse is also specified in the last report of CERD as a concern especially during the election campaign by politicians and political parties.³¹⁸

Hate speech in political discourse in the Bulgarian public is present both, by the populist political parties, but also by mainstream political parties.³¹⁹ Ataka is obviously the most cited political party from Bulgaria for inciting hatred against different groups of people. The political party also owned media, newspaper, and TV and propagated their views to the public.³²⁰ However, the governing coalition partners (2014) from the Patriotic Block, included anti – minority and anti – Roma rhetoric in their programs before the elections in 2014. VMRO proposed “compulsory labor for Roma,” and NFSB suggested, “detention closed camps where they could serve as “tourist attraction.”³²¹ Complaints were sent to the Prosecutor’s Office, and the proposal for investigation even came to the Supreme Cassation Prosecutor’s Office, but the complaints of Romani activist were refused. Hence, no one was held responsible for the written “policies” in the political parties’ programs.³²² One of the arguments of the prosecutors regarding the complaint about VMRO and

pace.net/documents/19887/2221584/AS-MON-2016-28-EN.pdf/165916c9-ecf5-44ad-aa5b-eb66f1798ae0. para 47.

³¹⁷ “OSCE/ODIHR Limited Election Observation Mission Final Report.” OSCE - Office for Democratic Institutions and Human Rights, June 30, 2017.

³¹⁸ “Concluding Observations on the Combined Twentieth to Twenty-Second Periodic Reports of Bulgaria.” Committee on the Elimination of Racial Discrimination, May 31, 2017.

³¹⁹ Bulgarian Helsinki Committee. “WRITTEN COMMENTS Of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at Its 92nd Session,” March 2017. Available at:

http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf.

³²⁰ Ibid.

³²¹ Ibid. page 3.

³²² Ibid. page 3

NFSB was the incapability according to the law, collective management bodies to be prosecuted because the liability can only be personal.³²³ As previously said, the election rhetoric included anti-minority, anti-immigrant and nationalistic statements, but that continued even after the election period. The same year, Peter Moskov the health minister of Bulgaria, post on social media a statement that medical teams should not respond to emergency calls from Roma settlements and neighborhoods. Following a reaction from the NGO sector, Moskov apologized, and the Sofia City Prosecutor's Office accepted the apology by stating that the statements did not amount to hatred and racial discrimination.³²⁴

The trend of expressing hate speech continuous, as reported by "Freedom House" – hate speech is present in the political scene especially and mainly against minority groups and foreigners.³²⁵ One positive remark is the resent judgment against the leader of NFSB who is also deputy prime minister and chair of the National Council for Cooperation on Ethnic and Integration Issues, on hate speech.³²⁶ After his speech in the Parliament on 14 December 2014, which contained offensive words, creating a hostile and degrading environment, the MP in late October 2017 was found guilty of Anti-Roma Speech or hate speech.³²⁷

International organizations, as presented, are frequently expressing the concern on the usage of hate speech in the political scene. Populist nationalist parties are using their freedom of expression even as a method to gain more public attention, but certainly, they do not choose the words and statements.

³²³ Ibid. page 3.

³²⁴ Ibid. page 12.

³²⁵ "Bulgaria." Freedom House, 2017. <https://freedomhouse.org/report/freedom-world/2017/bulgaria>.

³²⁶ Ibid.

³²⁷ See the statement on this link: <https://www.liberties.eu/en/news/valeri-simeonov-case-hate-speech/13328>

4.2. Populist assemblies

Frequent marches and demonstrations are also raising concerns about the activities and the influence of populism in Bulgaria. Many demonstrations organized by populist far-rights group took place in the state, and most of them targeted the already traditional groups such as Muslims, LGB, minorities – Roma and

Turks and refugees. The target of the far – right supporters were gay parades. In 2008 the extremists even threw a Molotov cocktail at the participants. However, the situation is getting better and gay parades gain more support in the last years.³²⁸ In May 2011 an organized assault of Muslims occurred in Sofia by the activist of Ataka.³²⁹ They were motivated to act against the prayers because of the external loudspeakers of the mosque. They assaulted the prayers with offensive words, and the gathering of the supporters of Ataka finished with physical attacks. The Parliament condemned the incident and adopted a declaration on the violence done by Ataka supporters and investigation on spreading religious and ethnic hatred was initiated.³³⁰ The same year in September, following an incident between Roma and Bulgarians in the village named Katounitza where a nineteen-year-old Bulgarian boy died, protests were organized in the village. Football fans came into the village with an intention to “restore the justice” and assaulted the citizens living in that place, mainly Roma and Turkish people. However, the police did not act to prevent the chaotic situation.³³¹

³²⁸ Todorov, Antoniy. “The Extreme Right Wing in Bulgaria.” Friedrich Ebert Stiftung, January 2013. Page 5

³²⁹ Ibid. page 6.

³³⁰ “Special Rapporteur Questionnaire on the Rights to Freedom of Peaceful Assembly and of Association - Bulgaria,” 2012. <http://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/NHRI/Bulgaria.pdf>.

³³¹ Todorov, Antoniy. “The Extreme Right Wing in Bulgaria.” Friedrich Ebert Stiftung, January 2013. Page 5.

Regarding the events, Rupert Colville, spokesman for the UN High Commissioner for Human Rights said:

*"The political leadership must take a strong stance against hate speech and ensure that police officers continue to be deployed in sufficient numbers to protect Roma neighborhoods from threats of retribution and harassment."*³³²

As reported, September 2016 was also a year with protests and demonstrations against the same groups of people who are already traditionally scapegoated or harassed. From the demonstration organized in that year, the one which was reported and can be mentioned is the protest organized by Ataka, NFSB, and VMRO against immigrants. In October the same year, another (this time) protest march was organized against refugees by the extremist group "National Resistance" organization.³³³ Demonstrations continued in 2017 as well, this time in the town Radnevo after a car accident that finished with beating between Roma and Bulgarians. Protests were organized in the town by extremist groups which made the Roma living in the town to leave their houses for several days. Roma from the "Cantona" neighborhood left their home, escaping from those groups who chanted "Bulgaria for Bulgarians" and "Gypsies into soap."³³⁴ In one occasion an Anti-gipsy protest was not allowed to take place – after a notification of the Ombudsman who notified the Prosecutor General that that kind of protest is about to be organized, so the major did not allow the demonstration.³³⁵ Apart from that far-right groups annually hold a

³³² "Special Rapporteur Questionnaire on the Rights to Freedom of Peaceful Assembly and of Association - Bulgaria," 2012. <http://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/NHRI/Bulgaria.pdf>.

³³³ Bulgarian Helsinki Committee. "WRITTEN COMMENTS Of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at Its 92nd Session," March 2017. Available at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf.

³³⁴ Ibid.

³³⁵ "Special Rapporteur Questionnaire on the Rights to Freedom of Peaceful Assembly and of Association - Bulgaria," 2012. <http://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/NHRI/Bulgaria.pdf>.

march in the capital city of Bulgaria, Sofia. The main organizer of the event is the Bulgarian National Union. The march is called Lunkov march, named after the General Lunkov who participated in the World War I and a person perceived as a symbol of the far – right-wing organizations. Various human rights organizations have condemned the gathering because of the messages delivered, which involve xenophobic, racist and neo-Nazis behavior.³³⁶

International and local organizations condemned the events. Examples are showing demonstrations where there was incitement of hatred on different ground and targeting various groups from the Bulgarian society. Most of the demonstrations were related to populist far-right parties, but a response why those events could not be regulated cannot be found. Populist far-right parties are using freedom of expression and freedom of association as their primary tool to gain support, become popular and gain political power. Rules exist, but their application seems critical. One might question what kind of influence those political parties can have in the Parliament, especially in a non-stable political situation. The overall view might be that freedom of expression and freedom of assembly were used just to gain votes, but even if they were used just for political purposes and not for bringing up political promises in the form of governmental policies, the damage was done. The first cost is on the democratic order of the country and the rule and the second one is the dignity and spreads fear to certain groups of people (citizens).

³³⁶ Todorov, Antony. "The Extreme Right Wing in Bulgaria." Friedrich Ebert Stiftung, January 2013.

6. Conclusion: Populism under the frame of militant democracy in

Bulgaria

The rise of populism in Bulgaria and the responses and critics of the international organizations are demonstrating that populism succeeded in influencing the political environment. They are part of the government and from recently, part of the governmental coalition. Apparently, nothing different than the populist parties in different countries, Bulgarian populist are also relying on different tools of mobilizations, and as can be seen and concluded, they efficiently use marches, demonstrations, and speeches to gain political votes. The problem is not there; the problem is in the increased usage of hate speech which is an evident problem in the political discourse. Moreover, their rhetoric is in contrast to international standards, EU values, human rights and last but not least, country's legislation. They are scapegoating minority groups and spread nationalism. Although concerns were raised by international organizations and other EU and international bodies, populist have a stable political position in the Bulgarian political scene. Can militant democracy do something to neutralize the dangers of a populist in Bulgaria?

As it has been concluded in section one of this chapter, Bulgaria is a militant democracy. Bulgarian militancy comes from the Constitution and its legislation, but also from the practical application of the constitutional provisions on political parties and associations. It seems that the most protected grounds are national unity and threat posed to the integrity of the state. However, the constitutional provisions do also condemn the "incitement of national, ethnic and religious enmity, but that part of the provision is mainly not implemented. Although not implemented, it can be concluded that this part of the Constitution theoretically can be used to address populist activities. Moreover, populist political parties are expressing nationalism and declare that they represent Bulgarians. One might link this with the prohibition of forming ethnic political parties, but

this argument seems weak because ECtHR case-law, especially in the Bulgarian cases, have already ruled the opposite. For instance, Bulgaria has ruled on the rejection of registration on ethnic association [e.g., *Zhechev v. Bulgaria*]³³⁷, but Bulgaria, in this case, relayed on several arguments, not just on the ethnic element, but also on the prohibition associations to pursue political. Nevertheless, the ECtHR found a violation of Article 11. Rational question to ask is whether the ECtHR would rule the same if the case concerned a political party which represents the majority and not a minority. Probably the Court will not find a violation. However, that question must be answered by the ECtHR because this thesis refers to already decided cases.

Additionally, the main problem with the populist political parties and movements is their rhetoric and the fact that there are many examples of incitement of hatred and hate speech. Clearly, freedom of expression and freedom of assembly are the rights which are efficiently used by the populist, but in a negative connotation. Banning Bulgarian populist political parties using militant norms is far away from reality, although theoretically possible. Therefore, considering that the main danger is the manner of speech, the most suitable way to neutralize the activities of populist seems the usage of other limitations, like limitations of freedom of speech and freedom of association.

³³⁷ *Zhechev v. Bulgaria*, app no. 57945/00, (2011) ECtHR.

Concluding remarks

This thesis looked at the theoretical and practical application of the theory of militant democracy and introduced the opportunity this theory to be extended to populist political parties. For answering the research question, this thesis assessed the jurisprudence of ECtHR and the relevant soft law of CoE. Further, this thesis opened a debate on populism and militant democracy in Germany and Bulgaria and the practical application of the theory.

Militant democracy is closely related to political emotionalism, and this is the first common feature that can be recognized between these two concepts. The conclusion is that populism is the new political emotionalism in modern Europe. Besides the incompatibility of the populist emotionalism with democracy, populists tend to be hostile to different groups in the society. This pose a threat to human rights and democratic order. Therefore, the thesis continued further turning on the ECtHR case-law. The jurisprudence of ECtHR gives broad protection to political parties and allows their dissolution only in cases of violence and evident threat to the constitutional order. The protection is strong, and the Court does not consider small political parties and association to pose a danger to the democratic system. For dissolving a political party, the Court looks on the party's constitution and program, but also on leader's actions. Additionally, the real chance of introducing changes or taking and supporting violent actions seems to be central arguments for banning political parties. Therefore, the traditional limitation of banning or refusing of registering political parties and association seems not relevant for populist political parties, unless they become violent or gain political power to introduce changes which are contrary to democracy.

However, the Court ruled several times that hostile attitude is against the values of the Convention. The notion of captive audience protects certain groups from intentional intimidation,

and the clause of abuse of rights give a view of the values which are protected under the Convention. The clause of abuse of rights is mainly related to freedom of expression and its' relevance in neutralizing populism comes from the cases related to hate speech towards a whole group of people. This means that other limitations can be relevant for neutralizing populism. Those limitations come from the ECtHR jurisprudence, as mentioned, from the clause of abuse of rights and from the notion of captive audience. These limitations are also in line with the CoE soft law recommendations.

Germany, the homeland of militant democracy, has practical examples of banning dangerous political parties. Germany has banned only two political parties back in 1952 and 1956, and the FCC applied strict and deep analysis for accessing the constitutionality of the political parties. However, the recent developments on the issue of banning political parties related to the attempts for banning the National Democratic Party provide a conclusion that the FCC does not consider small parties to pose a threat to the democratic order. From the analysis on the rise of populism in Germany, it seems that the activities of populists in this country are slightly different from other European countries. NPD continued to function, but Germany effectively uses its legislation to follow and prevent serious political obstructions and abuse of rights. Nevertheless, Alternative for Germany, the new political party with right-wing politics, entered in the Parliament. The politics of AfD differs from the traditional German politics, and right-wing supporters found a new "home" in AfD. However, AfD is currently far from being a political party that can fulfill all presented standards by the FCC in banning political parties. Although the traditional militant limitation – banning political party, cannot be applied in the case of the current wave of populism in Germany, it seems that the country is balancing its approach and carefully relies on other limitations of rights.

Bulgaria, as presented is a militant democracy which also has several times showed its militancy mainly towards small and minority political parties and associations. According to the practical application of the Bulgarian militant norms, political parties and associations which spread separatism, aim at infringing the unity of the nation and advancing minority rights are perceived as dangerous enough to be banned. Moreover, the grounds under which a political party can be banned include as well political parties which might be hostile and racist. However, the practical application of that ground is not used. In contrast to Germany, populism in Bulgaria is in a more advanced position with a real chance of introducing changes and implementing policies. This is due to the fact that the three biggest populist far-right political parties are currently part of the Bulgarian governmental coalition. Furthermore, populism in Bulgaria seems more present and active. Owing to that reason, hate speech is an evident problem in the Bulgarian political discourse. Populism in Bulgaria is linked to incitement of hatred, and hostile political attitude and Bulgaria presents a thought-provoking example especially having incorporated a prohibition of the existence of racist political parties. Nevertheless, as mentioned, that prohibition is just theoretical. This implies that militant democracy having the Bulgarian example theoretically can neutralize and prevent that kind of hostile populism, but it is just far away of the practical application of the theory.

The value of the theory cannot be underestimated, and a clear-cut answer to the thesis question cannot be provided. The conclusion of this thesis is that the application of traditional militant democracy on populist political parties can be different in different states and that depends on both, the way how the state is protecting its democracy and the character of populist political parties. As presented, the German AfD is anti-liberal and not racist which implies that there are no grounds for dissolution. Whereas in the case of Bulgaria, the stance of populist parties is different.

They are in the governing coalition and have bigger political power, and their profile is closer to the traditional militant limitations.

Nevertheless, it is clear that populist political parties tend to use effectively modern and traditional political tools for mobilizations, especially freedom of speech and freedom of assembly. Therefore, considering the threat that populism poses to democracy, this thesis refers to an extension of militant democracy to populism but with extended militant limitations which go beyond banning political parties.

Banning political parties and associations, as presented in this thesis is not the only solution. In order populism's dangers to be neutralized states may apply other limitations. If not restriction, then limiting rights can be a response to the threat. Considering that populist can pose a threat to democracy, human rights can be hostile and xenophobic, the proposal for extending the militant limitations is in line with the soft law of CoE. Going beyond traditional militant limitations means effective application of the limitations to freedom of expression and freedom of assembly. That practical application, in fact, that can be recognized in Germany and under the notion of captive audience and abuse of rights of ECtHR. An additional argument which can support this proposal besides the practical example of applying limitations on freedom of speech and assembly presented in the German part is the same militant logic. One might also ask about the borderline of militant logic applied to ordinary limitations, and my answer is that – that depends on the enemy which is linked to militant democracy's logic. The concept of militant democracy has been extended by many scholars, and the theory is still valuable and discussed, therefore in my understanding, the militant logic should also not be static, but rather extended at least to those rights which play a crucial role in the functioning of political movements. In fact, militant democracy should be a “dynamic concept, able to accommodate different type of threats in terms

of their ideological foundations.”³³⁸ Lastly, the rise of populism, their rhetoric and politics should not be undermined, rather it should be effectively followed and analyzed.

³³⁸ Tyulkina, Svetlana. “Militant Democracy.” Phd., Central European University, 2011. Page 348.

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