Militant Democracy and Eternity Clauses: A Comparative Analysis of France, Germany, and Turkey

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Abstract

This thesis examines the legal and theoretical frameworks that enable democracies to defend themselves against internal threats. Focusing on militant democracy and constitutional eternity clauses, the research explores how these mechanisms function to preserve core democratic principles while balancing the need for social flexibility and adherence to democratic norms. Through a comparative empirical analysis of France, Germany, and Turkey, the thesis investigates the historical and contemporary applications of these concepts, highlighting the different approaches and challenges faced by each country. The study delves into the role of the judiciary, the philosophical underpinnings of unamendability, and the practical implications of militant democracy in safeguarding democratic stability. By critically reflecting on the tension between protecting fundamental democratic values and allowing for constitutional evolution, this thesis provides a nuanced understanding of the effectiveness and limitations of militant democracy and eternity clauses in different political contexts.

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Introduction

As the third wave of democratization took hold after the Second World War (WWII), liberal constitutionalism became "a default design choice for political systems".[1] Liberal constitutionalism broadly aims to protect democracy and limit power, and rests on certain principles such as limited government, guaranteed individual rights, and rule of law. A commitment to liberal constitutionalism translates to the protection of states from arbitrary government by powerful factions or leaders and ensures autonomous and democratic decision-making processes. However, for this whole concept to be implemented, what is needed in the first place is a society that abides by the rule of law. The question is, then, what can constitutional law do to set the stage for such a society.

As we delve deeper into the complexities of liberal constitutionalism, which has become a prevalent framework for political systems post-World War II, it is crucial to understand how these democratic principles are safeguarded through mechanisms like limited government and the rule of law. For this reason, in the next chapter will explore militant democracy and eternity clauses. These concepts are critical for understanding how democracies attempt to defend themselves from internal threats and preserve core constitutional values, while balancing the need for flexibility and adherence to democratic norms.

Militant Democracy

"Until very recently, democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the

[1] Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, 'The Coming Demise of Liberal Constitutionalism?' (2018) 85(2) The University of Chicago Law Review 239, 239 <https://www.jstor.org/stable/pdf/26455907.pdf> accessed 12 March 2024.

city. To fascism in the guise of a legally recognized political party were accorded all the opportunities of democratic institutions".[2]

The theory of militant democracy represents a paradox in liberal democratic theory. The Böckenförde Dilemma articulates this fundamental tension within liberal democratic states and explains this paradox as:

"The liberal secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it has undertaken for freedom's sake. As a liberal state it can endure only if the freedom it bestows on its citizens takes some regulation from the interior, both from the moral substance of the individuals and a certain homogeneity of society at large. On the other hand, it cannot by itself procure these interior forces of regulation, that is not with its own means such as legal compulsion and authoritative decree. Doing so, it would surrender its liberal character and fall back, in a secular manner, into the claim of totality it once led the way out of, back then in the confessional civil wars".[3]

This idea aligns closely with Karl Popper's theory of the "paradox of tolerance," which asserts that unlimited tolerance can lead to the disappearance of tolerance altogether. Popper argued that if a society is tolerant without limit, its ability to be tolerant is eventually seized or destroyed by the intolerant. Therefore, in order to maintain a tolerant society, the state must be intolerant towards intolerance. This principle justifies certain restrictive measures against groups and ideologies that seek to destroy or undermine democratic values and institutions. Popper's stance supports the notion that democracies must sometimes take illiberal actions, such as banning extremist parties or restricting speech that incites violence, to preserve the very fabric of liberal democracy.

[2] Karl Loewenstein, 'Militant Democracy and Fundamental Rights 1' (1937) 31 The American Political Science Review 417, 424 <https://www.jstor.org/stable/pdf/1948164.pdf> accessed 12 March 2024.
[3] Ernst Wolfgang Böckenförde and J.A Underwood, *State, society and liberty: studies in political theory and constitutional law* (Berg, 1991) 45.

The Böckenförde Dilemma complements Popper's theory by highlighting the intrinsic challenge that liberal democracies face in maintaining their foundational values without undermining their liberal character. Ernst-Wolfgang Böckenförde argued that a democratic state relies on preconditions of social cohesion and shared values that it cannot guarantee through legal compulsion alone. This creates a tension where the state must balance the need for self-preservation with its commitment to liberal principles. Militant democracy, through the lens of the Böckenförde Dilemma, embodies this tension by implementing protective measures that may seem illiberal but are deemed necessary to prevent the rise of anti-democratic forces. Together, Popper's theory and the Böckenförde Dilemma underscore the complex interplay between tolerance and intolerance, and the lengths to which a democracy must go to defend itself while striving to uphold its core liberal values. This interplay is crucial in understanding the operationalization of eternity clauses where the legal frameworks are designed to protect democratic integrity against internal subversion.

Hence, militant democracy embodies the tension between safeguarding democratic pluralist principles and preserving the stability of the democratic system against internal threats. An often-quoted infamous statement falsely attributed to Goebbels derisively s summarizes this paradox as “This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed”.[4]

The concept of militant democracy emerged in Europe in the aftermath of World War II, particularly in Germany, as a response to the recent traumas in their modern history with how liberal democratic norms were instrumentalized by the autocrats to clear the way for their fascist agenda. The main argument of this concept stems from the trauma of experiencing a parchment plan of liberal democracy’s inability to contain fascism in the 1930s. In his work that coined

[4] Gregory H. Fox and Georg Nolte, ‘Intolerant Democracies’ (1995) 36(1) Harvard International Law Journal 1 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hilj36&id=7&men_tab=srchresults > accessed 15 March 2024.

the term first throughout the rise of the Nazi regime in the Weimar Republic, Loewenstein focused on the self-destructive potential of liberal constitutionalism and warned against the "legalized opportunism" in dictatorships which authoritarian leaders substitute for the rule of law.[5] Seventy-two years later, Thiel approached the issue from a security perspective from a 'democratic self-defense' point of view and stated that "freedom and security cannot be as mere antipodes" as the freedoms people have relied on the endurance of the democratic system is based on the rule of law.[6] Protection of rights and freedoms are only effectively possible in a democratic system under independent institutions. Therefore, the militant stance is not merely about restricting rights but about safeguarding the very framework within which rights and freedoms can be genuinely protected.

Recognizing the inherent vulnerabilities within democratic systems, these theorists argue for a proactive and defensive stance that goes beyond mere procedural adherence to democratic norms. The emphasis is on ensuring that democratic institutions do not become the very tools through which authoritarian regimes can rise to power. By addressing the weaknesses exposed during the rise of fascism, militant democracy seeks to fortify democratic resilience through legal and institutional safeguards. This approach underscores the delicate balance between maintaining democratic freedoms and implementing necessary restrictions to prevent their exploitation by anti-democratic forces.

Seeing fascism as a political technique to gain and hold onto power "for the sake of power alone" rather than a shared spirit or an ideology itself, Loewenstein argues that democracies should be able to defend themselves against such tactics. Underlining that "this technique could be victorious only under the extraordinary conditions offered by democratic institutions", mainly being the democratic tolerance of pluralism, Loewenstein argues "if democracy is

[5] Loewenstein (n 2), 418.
[6] Markus Thiel, *The 'Militant Democracy' Principle in Modern Democracies* (Routledge 2009).

convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant".[7]

This means that militant democracy rests on the belief that democracy should be defended actively, even if it requires temporary measures that restrict certain democratic freedoms. The idea rests on the two-fold role of democratic institutions: safeguarding rights and freedoms while also ensuring the public good. In this sense, the aim is to prevent misuse of rights and freedoms ensured for all as a Trojan horse to erode democracy. In an inherently defensive manner, militant democracy recognizes that democratic freedoms and institutions can be exploited by anti-democratic actors to undermine democracy itself. Proponents argue that allowing extremist groups or individuals to exploit democratic freedoms to undermine democracy itself is self-defeating, or to put more dramatically, democratic suicide. In their analysis, Fox and Nolte state that "long-term survival of democratic institutions outweighs short-term deprivation of political rights to anti-democratic actors".[8]

Following the end of the Cold War, discussions on militant democracy waned, but recent years have witnessed a resurgence of interest in the concept. With the rise of 21st century "stealth authoritarianism", ways of combatting non-violent autocratic movements became a highly discussed topic around the world.[9] The new popular discourse in academia depicting the procedurally legal means to undermine liberal democratic principles as something special to the third wave of autocratization misses the very beginning of militant democracy discussions in Europe, especially Germany. Therein, the concept of "legal revolution", in today's words similar to the likes of 'abusive constitutionalism', 'autocratic legalism' or 'stealth

[7] Loewenstein (n 2), 422-423.
[8] Fox and Nolte (n 4), 2.
[9] Ozan O. Varol, 'Stealth Authoritarianism' (2015) 100(4) Iowa Law Review 1673 <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/ILR-100-4-Varol.pdf> accessed 17 March 2024.

authoritarianism', was used for instances where via means in line with legal positivism, a radical change to alter the constitution's core identity had been pushed forward.[10]

As explained above, the specter of the Weimar Republic's collapse and the failures of inter-war democracies influenced the adoption of militant models by several European democracies in the latter half of the twentieth century. So, to prevent history from repeating itself, militant democracy does not necessarily wait for its adversaries to secure electoral majorities; instead, it proactively interferes against rights such as free speech and association to combat threats to the democratic order effectively. Accordingly, either the people or the state "need not stand idly by while others destroy the basis for their existence".[11]

Central to militant democracy has been the practice of banning political parties, although now seen as controversial, especially by the European Court of Human Rights. However, militant democracy encompasses a multifaceted array of tools and strategies aimed at defending democratic systems from internal and external threats. Beyond party bans, it involves electoral regulations, eternity clauses, prohibitions on extremist symbols and speech, a robust judiciary, civic education, security measures, legislation against extremist organizations, and media regulation. These measures collectively work to ensure the resilience and integrity of democratic institutions and values.

Militant Democracy and Unamendability as a Tool

"When invoking the special status of the content of a constitutional norm, we usually have in mind that it expresses uniquely important values espoused by the state, requiring stronger

[10] See: Heinrich Triepel, 'Die nationale Revolution und die deutsche Verfassung' Deutsche Allgemeine Zeitung (2 April 1933); Karl Dietrich Bracher, 'The Technique of the Nationalist Seizure of Power' in Theodor Eschenburg and others (eds) *The Path to Dictatorship, 1918- 1933; Ten Essays* (Anchor Books 1966) 115.
[11] Alexander S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press 2014) 3.

preventive or pre-emptive protection, since the lack of such protection would entail the risk of violating or at least undermining the constitutional identity of that state".[12]

While constitutions are drafted by lawyers, behind them there are always politicians and forces of the society.[13] From a Hobbesian point of view, whoever has the power to rule has the ability to change the main document of the state, the constitution. However, the reality is that the constitution is unique because its creator, the constituent power, effectively vanishes after establishing the constitution. As the constituent power is the primary legislator to establish the main foundation of the state in question, the power to amend the constitution (constituted power), being the delegated power it is, is limited by this founding moment unless a new entity is being created.[14]

As Klein and Sajó argue, "the constitution is an instrument designed to solve the pre-commitment problem" and organize the structure of power, with an understanding of limited power.[15] So, the ambition of the founders, as expressed in this foundational document being the constitution, is to ensure the continuation of a specific vision of social order. The constitution then strives to perpetuate not only this vision but also the fundamental values underlying itself, particularly those concerning the principles of government and the essence of the nation. Accordingly, how they do so is the current question this thesis is concerned with. To make this vision come to life requires substantial and procedural limitations to the politics of the time, and in some perspectives ties the hands of the incumbent governments to make their own vision for the state in question to life. Such limitations include limiting the power of the constituted power with the vision of the constituting power, coming in the form of unamendability.

[12] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) 21.
[13] Andrew Arato, 'Forms of Constitution Making and Theories of Democracy' (2013) 17 Cardozo Law Review 191 <10.1590/S0102-64451997000300002> accessed 17 March 2024.
[14] Emmanuel Joseph Sieyés, *What Is the Third Estate?* (1789).
[15] Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 12.

This does not mean that the constitutional law within a polity should freeze in time and stay unresponsive to the public. So, the dilemma the amendment power embodies requires balancing of the need of institutional flexibility for durability within any polity with the underlying the aim to protect the specific content of the constitution that is given an implied or direct hierarchical status. Modern constitutions are generally understood to assign equal legal value to all constitutional norms. However, there is also acknowledgment of the potential for a hierarchy among these norms. Some norms, considered essential to the functioning of the state's governance system, are recognized as constitutional principles. These principles act as the guiding framework for interpreting and applying other norms in the constitution, often relegating the latter to a supportive or secondary role.

To protect the constitution's continuity, it must remain open to future changes, while functioning as an executor and trustee of a will. So, the amendment power, distinct from the constituent power, operates within the constitution's framework and its limits "reflects the understanding of popular sovereignty", and limits to the will of the majority, which usually showcase what is feared for the future of the polity in question.[16]

In Preuss's words, the nexus between the constituent power, the constituted power and unamendability can be explained as:

"The integrity of the constitution is the reality of the constituent power. The constitution is an institutionalized reminder of the retroactively constructed 'fact' that, at the beginning of the constitution, there was a collective will of the people to live in a polity. The fact is a myth, and a necessary one. This myth feeds the legitimacy of the constitution, and the vitality of the constitution feeds the belief in this constitutional narrative.

[16] Ibid, 438.

...On this understanding, an "eternity clause" in a constitution is an attempt to keep this narrative alive without undermining the capacity of each generation to adapt the constitution to new needs and challenges". [17]

Albert and Oder classify unamendability along substantive and procedural dimensions with eight subcategories.[18] In general, unamendability aims to make the amendment process more rigorous, thereby protecting the constitution from frequent and potentially destabilizing changes . Some constitutions prohibit changes to fundamental principles, like democracy or the rule of law, but do so in general terms. For instance, a court may invalidate an amendment that it believes undermines these essential principles, relying on its interpretation of what the constitution requires for that ideal. This judicial interpretation can be subjective and contentious, as it involves making judgments about the substance of amendments based on the vague prohibitions in the constitutional text. Some constitutions do not include any substantive limitations on amendment, but their constitutional courts, interpret the constitution in a way to limit the amendment power, India's "basic structure doctrine" being the prime example.[19] However, in those instances, as Albert et al. argue, "the lack of textually codified limitations on the amendment power denies the basic structure doctrine the full force it might otherwise enjoy—and it invites the claim that the court is overstepping the explicit boundaries set by the constitution about how the court should exercise its powers".[20] Following Sieyes once again, a democratic explanation, or legitimization, can rest on the idea that representatives can only make changes that align with the constitution's structure and spirit. Any fundamental change

[17] Ulrich K. Preuss, 'The Implications of 'Eternity Clauses': The German Experience' (2011) 44 Israel Law Review 429, 444-445 < https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6A3BAC8CBE9CF24480D964190E9EA9C8/S0021223700018124a.pdf/div-class-title-the-implications-of-eternity-clauses-the-german-experience-div.pdf> accessed 21 March 2024.

[18] Richard Albert and Bertil Emrah Oder, *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018).

[19] *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) 4 SCC 225.

[20] Richard Albert, *Constitutional Amendments: Making Breaking, and Changing Constitutions* (Oxford University Press 2019) 646.

must be approved by the people themselves. This principle means that the legislature, executive, and judiciary—all considered "constituted powers"—are bound by the constitution created by the people's "constituent power." Therefore, following this logic, a court may invalidate amendments that it deems incompatible with the essential principles established by the people to preserve the integrity of the constitution.

The clearest form of unamendability comes in formal unamendability, the limitation and entrenchment being explicitly mentioned in the constitution. Formal substantive unamendability, or eternity clauses, involves explicit constitutional provisions that are immune to amendments. Informal substantive unamendability arises from judicial interpretations that implicitly protect certain constitutional principles from amendments, as mentioned above. A famous quote by Marbury summarizes the implicit limits to amendment power as “the power to amend the constitution was not intended to include the power to destroy it”.[21] In that sense, unamendability serves as a safeguard for the core values and identity of the constitution, ensuring that certain essential aspects remain intact regardless of future political changes.

These classifications illustrate the complex ways in which constitutions can entrench certain principles or processes, ensuring their protection against legislative efforts. By embedding these unamendable provisions, constitutions can effectively shield key aspects of the state's constitutional identity from transient political influences for stability and continuity over time. Eternity clauses enshrine constitutional principles of paramount importance to the state's governance, ensuring that these principles serve as the interpretative lens for all other norms. It is widely acknowledged that a hierarchical structure among these norms exists, with some principles holding greater weight than others. These foundational principles hold a superior status, with subsidiary norms effectively supporting and aligning with them. As a result, the

[21] William L. Marbury, ‘The Limitations upon the Amending Power’ (1919) 33 Harvard Law Review 223, 223 < https://archive.org/metadata/jstor-1327162> accessed 22 March 2024.

core values protected by eternity clauses remain inviolable, guiding the interpretation and application of the constitution as a whole.[22]

As Preuss discusses the legal and philosophical foundations of eternity clauses, he argues that these clauses are rooted in the notion of constitutional identity, encompassing core values and principles defining the character of the state.[23] This constitutional identity is meant to be preserved against majoritarian impulses, ensuring the continuity of fundamental democratic principles and human rights. Suteu explores the multifaceted nature of constitutional identity vis-à-vis eternity clauses by highlighting its legal and sociological dimensions. Referencing scholars like Rosenfeld and Jacobsohn, who emphasize that constitutional identity involves a dynamic, Suteu underlines the dialogical process reflecting both historical commitments and evolving societal values. This identity is seen as both expressive and functional, serving to outline the core values of a constitution and establish a hierarchy within constitutional norms[24]. The Venice Commission identifies key unmodifiable principles frequently safeguarded by eternity clauses, including sovereignty, democracy, the republican form of government, federalism, and fundamental rights.[25] These exemplary clauses are rooted in the concept of militant democracy, with a goal of protecting democratic structures from internal threats. Reassuring this link between constitutional limits and historical experiences, Roznai highlights the increasing popularity of eternity clauses after WWII, mainly as a reaction to the rise of fascism in the previous decades, and states that "just as having a constitution became a universal

[22] See András Sajó, 'Militant Democracy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018).
[23] Preuss (n 17).
[24] Suteu (n 12).
[25] 'Conference of European Constitutional Courts - XVIIth Congress' (Council of Europe Venice Commission 2017). <https://www.venice.coe.int/WebForms/events/?id=2077> accessed 25 March 2024.

trend after the American and French revolutions- a symbol of modernism- so in the aftermath of the WWII, including an unamendable provision became the symbol of modernism".[26]

Eternity clauses are one of the legal mechanisms used within militant democracies to safeguard fundamental democratic principles against internal subversion. These clauses are entrenched in constitutions and declare certain principles, or characteristics of state, as unamendable, ensuring that they remain inviolable regardless of changes in political power or public opinion. Acting on the possibility of the change of public opinion or power, pre-emption is arguably crucial, as authoritarian measures, once established, can be challenging to dismantle and tend to develop a "creeping normality".[27]

By entrenching core liberal values, eternity clauses act as a legal bulwark against attempts to erode the democratic framework from within. Suteu explains the nexus between unamendability, precommitment theories, and militant democracy as revolving around the protection of democratic principles from potential erosion or subversion.[28] Precommitment theories suggest that constitutions function as instruments for future-proofing democracy by limiting the ability of current and future majorities to make changes that could undermine the democratic order. This concept is premised on the idea that democratic societies must "tie their own hands" to prevent impulsive decisions that could jeopardize long-term stability so that democratic constitutions do not become "suicide pacts".[29] Suteu explains this view towards politics and society as: "The literature on constitutions as instruments of precommitment puts forth a very specific view of the aims and mechanisms of constitutionalism. It sees the people

[26] Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migrations and Success of a Constitutional Idea' (2013) 61(3) The American Journal of Constitutional Law 657, 667 <https://ssrn.com/abstract=2297734 > accessed 24 May 2024.
[27] Zachary Elkins, Militant democracy and the pre-emptive constitution: from party bans to hardened term limits' (2022) 29(1) Democratization 174 <https://doi.org/10.1080/13510347.2021.1988929> accessed 27 March 2024.
[28] Suteu (n 12).
[29] Ibid, 19.

as unpredictable and to be distrusted, threatening insofar as they might show a 'weakness of the will' that will result in their downfall."[30]

Meant to be effective in safeguarding core democratic values against majoritarian excesses, these unamendable constitutional provisions protect fundamental principles such as human dignity, basic human rights, and the democratic order, ensuring they remain inviolable regardless of shifting political majorities. Habermas highlights that eternity clauses act as a counter-majoritarian mechanism preventing authoritarian.[31] They create a stable framework for rational discourse, essential for the functioning of a healthy democracy, and protect against populist threats. While they introduce some rigidity into the constitutional framework, this protective approach can be seen to be justified to maintain the normative foundations of constitutional democracy.

Role of the Judiciary

This counter-majoritarian focus also has a central role in the global expansion of judicial power, in which the annulment of constitutional amendments or other legislation finds its place within the boundaries of eternity clauses. The role of the judiciary in reviewing laws passed by the Parliament acting is a heavily discussed topic. The judiciary's review of the constitutionality of a new norm can be either *a priori*, or *a posteriori,* leading to different levels of questioning of legitimacy in the face of separation of powers. While some scholars believe that courts should be able to invalidate amendments even when such a power is not explicitly given in a constitution[32], others argue this is against separation of powers and is undemocratic in its

[30] Ibid, 18.
[31] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1998).
[32] Richard Albert, 'Nonconstitutional Amendments' (2015) 22(1) Canadian Journal of Law and Jurisprudence 5 <https://doi.org/10.1017/S0841820900004550> accessed 27 April 2024.

essence.[33] A constitutional court, functioning within the judicial framework and adhering to the constraints typical of collegial judicial bodies, sets itself apart from conventional political institutions. Unlike these political bodies relying on public votes and the building of political majorities, a constitutional court bases its decisions on rational deliberation and persuasive legal reasoning. The seriousness and transparency of its consensus-driven deliberations not only legitimize its counter-majoritarian role but also should enhance public acceptance of its decisions.[34]

Critical Reflections

The concept of militant democracy, influenced by Carl Schmitt's theories, reveals a tension between liberal democratic ideals and authoritarian measures meant to protect them. Schmitt's idea that a sovereign can suspend constitutional law to safeguard the political core critiques militant democracy.[35] The idea of preemptive protection introduces a fundamental element of discretionary power within a democracy, allowing for arbitrary decisions about what constitutes a threat. Accetti and Zuckerman build on this, arguing that militant democracies inherit this discretionary power, leading to a structural relationship characterized by domination.[36] They contend that even if militant measures are rarely applied, their constitutionalization establishes a state of domination because the potential for interference by the sovereign's arbitrary will is enough to undermine core democratic principles. Raising concerns about legitimacy, Accetti and Zuckerman point out that these practices, who shall aim for the protection of democracy,

[33] John R. Vile, 'Limitations on the Constitutional Amending Process' (1985) Constitutional Commentary 496 <https://scholarship.law.umn.edu/concomm/496> accessed 11 February 2024.
[34] Silvia von Steinsdorff and others, *The Constitutional Court in Turkey – Between Legal and Political Reasoning* (Baden-Baden; Nomos 2022).
[35] Carl Schmitt, *Constitutional Theory* (Duke University Press 2008).
[36] Carlo Invernizzi Accetti and Ian Zuckerman, 'What's Wrong with Militant Democracy?' (2017) 65(1) Political Studies 182 <https://doi.org/10.1177/0032321715614849> accessed 29 March 2024.

not only challenge the procedural legitimacy of democracy but also create a form of constitutional elitism that is deeply at odds with democratic inclusivity and flexibility.[37]

Accordingly, Müller addresses how militant democracy's measures might undermine popular self-government by concentrating power in elites' hands, thus questioning the people's capacity to govern themselves.[38] Focusing on country studies, Pech explores the rule of law in the EU, noting that militant democracy principles can clash with foundational legal principles, potentially undermining the rule of law itself.[39] Similarly, Rak and Bäcker analyze neo-militant democracies in post-communist EU states, illustrating how restrictive measures can lead to democratic backsliding.[40] Tomini and Wagemann highlight that measures taken under the umbrella of principle of militant democracy can accelerate democratic regression if not balanced with other principles.[41] As mentioned above, the Böckenförde Dilemma works as both a 'for' and 'against' argument for militant democracy and highlights that a democratic state cannot preserve itself by undemocratic means without losing legitimacy. Instead, democracy relies on the self-corrective capabilities of its institutions and the trust of its citizens, rather than preemptive suppression of dissent or threats to democracy.[42]

The rigidity introduced by unamendable clauses in constitutions intended to safeguard democratic values further complicates this picture. While such clauses aim to protect against democratic backsliding, they also risk stifling legitimate democratic evolution and adaptation. Critics, in general, argue these clauses can prevent necessary reforms, hindering the democratic

[37] Ibid.
[38] Jan-Werner Müller, 'Militant democracy and constitutional identity' in Jacobsohn and others (eds) *Comparative Constitutional Theory* (Edward Elgar Publishing 2018).
[39] Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6(3) European Constitutional Law Review 359 <https://doi.org/10.1017/S1574019610300034> accessed 2 April 2024.
[40] Joanna Rak and Roman Bäcker, *Neo-militant Democracies in Post-communist Member States of the European Union* (Routledge 2022).
[41] Luca Tomini and Claudius Wagemann, 'Varieties of contemporary democratic breakdown and regression: A comparative analysis' (2017) 57(3) European Journal of Political Research 687 <https://doi.org/10.1111/1475-6765.12244> accessed 17 April 2024.
[42] Böckenförde and Underwood (n 3).

process by locking in outdated norms. Eternity clauses, while aiming to prevent abuses, paradoxically embody a distrust in democratic processes themselves, potentially leading to authoritarianism. [43] Preuss also points out that eternity clauses can inhibit adaptability, leading to rigidity that stifles democratic renewal.[44] Albert and Oder explore the concept of unamendability within constitutional democracies, highlighting how these provisions can also inhibit necessary constitutional reforms, thus creating a democratic deficit.[45] In a similar manner, Roznai's extensive work on unconstitutional constitutional amendments delves into the theoretical and practical challenges of unamendability. Although in general arguing for substantive limitations on amending powers, Roznai argues that unamendable clauses can lead to a form of constitutional stasis, where necessary reforms are impeded by rigid constitutional protections. This can result in a democratic deficit, as the inability to adapt the constitution to contemporary needs undermines the principle of popular sovereignty.[46]

Moreover, the enforcement of eternity clauses often depends on judicial interpretation. Courts, particularly constitutional courts, play a crucial role in determining the scope and application of these clauses. As discussed by many scholars, this can lead to debates over judicial activism and the appropriate limits of judicial power.[47]

Looking at the relationship between militant democracy and constitutional identity, Müller points out that while historical differences result in contextualized operationalization of militant democracy, “the ultimate measure”, being the party bans were relatively shared.[48] However, he also states that things have changed and in militant democracy discussions, constitutional identity plays a different role these days. Analyzing the role of religious bans, populism, and

[43] Suteu (n 12).
[44] Preuss (n 17).
[45] Albert and Oder (n 18).
[46] Roznai (n 26).
[47] Habermas (n 31).
[48] Jan-Werner Müller, ‘Militant democracy and constitutional identity’ in Jacobsohn and others (eds) *Comparative Constitutional Theory* (Edward Elgar Publishing 2018).

supranational protection of democracy against “illiberal democracies”, he underlines that “militant democracy in the name of constitutional identity should not be a matter of reifying national identities and reinforcing the power of majorities”.[49]

To Suteu, the inherent link between unamendability and liberal constitutionalism is at best questionable as despite their protective intent of certain principles, eternity clauses can lead to significant challenges. Suteu notes that these provisions can obscure rather than clarify constitutional identity, often being used to support exclusionary values, or resist necessary constitutional evolution.[50] She highlights that the rigid nature of unamendable clauses can inhibit democratic adaptability, potentially fostering autocratic tendencies under the guise of protecting core values. This critique aligns with concerns raised by other scholars about the balance between safeguarding essential principles and allowing constitutional flexibility. Using case studies such as Germany and Hungary, Suteu contrasts these two examples to illustrate how eternity clauses can be employed both to uphold liberal democratic values and to enforce exclusionary or autocratic projects. She argues that the judicialization of constitutional identity through these clauses often leads to contentious interpretations and potential abuses, highlighting the complex interplay between constitutional law and identity politics by stating that "Judicial interpretation of eternity clauses often becomes a battleground for competing visions of constitutional identity, with significant implications for democratic governance".[51] In more specific words linking this problem with other methods of militant democracy, Müller explains this battle, or the whole process of “fighting fire with fire” as “Put simply, under militant democracy, we used to ban fascist parties; now we prohibit pieces of cloth that hide

[49] Ibid, 434.
[50] Marbury (n 21).
[51] Ibid, 102.

women's faces. Particular constitutional or even just national identities have been invoked to justify such novel uses—or, in the eyes of critics: abuses—of militant democracy".[52]

[52] Müller (n 48).

Chapter One: Germany

History of Militant Democracy: The Memories of Weimar

For German constitutional law after the creation of the Basic Law in 1949, the principle of militant democracy is a fundamental element. Haunted by the memories of the Nazi regime, the new German legal system focused on the Weimar Republic's failure to protect its democratic credentials from destruction. Via virtues of tolerance and pluralism, in Loewenstein's words, democracy "sharpened the dagger by which it was stabbed in the back".[53]

So, in post-war Germany, the very problem of constitutional defense against fascist threats came to the fore as early as only a couple of years after the end of the WWII.[54] As a way of protecting the state, or even the people, from themselves, Hermann Jahrreiss characterizes the main function of militant democracy as an interim agreement until the awareness of democracy becomes resilient, in a way showing an optimistic stance unlike the critics of militant democracy.[55] This leading role ascribed on the principle of militant democracy later crystalized as the German Federal Constitutional Court ("the FCC") in its *KPD* decision, and explained the necessary nature of its paradoxicality as "Article 21 Section 2 of the Basic Law… does not conflict with a fundamental principle of the constitution; it is an expression of the conscious constitutional political will to solve a broader problem of the free democratic form of state, a reflection of the experiences of the constitutional legislator, who thought he could not realize the principle of neutrality of the state towards political parties

[53] Karl Loewenstein, 'Autocracy versus Democracy in Contemporary Europe' (1935) 29(4) American Political Science Review 571, 580 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/amepscir31&id=578&men_tab=srchresults> accessed 27 May 2024.
[54] Markus Thiel, *The 'Militant Democracy' Principle in Modern Democracies* (Routledge 2009).
[55] Hermann Jahrreiss, Demokratie. Selbstbewusstsein – Selbstgefährdung – Selbstschutz. (1950*) Festschrift für Richard Thoma*, Tübingen, S. 71–90.

in a pure form in a specific historical situation, a confession to a 'militant democracy'. This decision is binding the Federal Constitutional Court".[56] Later, in another judgment, the Court clarified its position by stating that "A community based on the principle of militant democracy cannot tolerate if its free order is challenged".[57]

As Thiel argues, the German court has "adjudicated an autonomous legal character to this principle, using it as a criterion for the interpretation of constitutional and sub-constitutional norms, the appreciation of conflicting constitutional values, and the justification of curtailments of fundamental rights The Court, on the one hand, deduced the existence of this principle from a look at the numerous manifestations of the constitution, and, on the other hand, declared it as an overarching constitutional idea that influences the norms of constitutional law.[58] After 1990, the Court has become less active in "militant" (*streitbare*) or "fortified" (*wehrhafte*) democracy matters due to the historical developments that dramatically reduced the likelihood of death of democracy. However, party closure cases still stayed relevant. The operationalization of militant democracy coming in the form of party closures in Germany is mainly linked to how constitutional rights and freedoms are understood within the context of the Basic Law. To put it simply, liberty is not unlimited, and cannot be misused.

The Basic Law embodies the idea that fundamental rights rationally have limits. In the beginning of the text of the constitution, Article 2 Paragraph 1 of the Basic Law titled "Personal Freedoms" puts forwards this approach as "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." Article 2, despite being interpreted

[56] *KPD* Federal Republic of Germany Federal Constitutional Court 1 BVerfGE, 85, 139.
[57] *Dienstpflichtverweigerung* Federal Republic of Germany Federal Constitutional Court 1 BVerfGE 28, 243.

[58] Thiel (n 54), 113-114.

often as an umbrella norm for liberties, establishes a balance between individual freedoms and the protection of the constitutional order, showing that when in need, militant democracy limits rights to prevent the so-called misusage of rights by the enemies of democracy. So, right to free development of personality being limited in the sense of Article 2 implies that the exercise of personal freedoms should not endanger the democratic framework of the state, indicating a balance between safeguarding individual rights and ensuring that these rights are not exploited to subvert democracy.[59] In a way, the German understanding of what a constitutional democracy is a communitarian point of view towards constitutional rights and freedoms. As Kommers puts it, "As seen through the eyes of the FCC, the political system is composed not of autonomous voters but of active informed citizens involved in public affairs, striving for the creation of a socially cohesive and politically integrated 'free democratic basic order'."[60]

The Free Democratic Basic Order at Stake

So, within Germany, what is being protected by the principle of militant democracy is the 'free democratic basic order'.[61] Throughout the rest of the Basic Law's text, the concept of "free democratic basic order" is repeated in Articles 10(2), 11(2), 18, 21, 87a and 91.

The general constitutional norms regarding the protective or guarding understanding can be seen as follows:

Article 17a [Restriction of basic rights in specific instances]

[59] Susanne Baer, 'Violence: Dilemma on Democracy and Law', in David Kretzmer and Francine Kershman Hazan (eds) *Freedom of Speech and Incitement Against Democracy* (Kluwer Law International 2000).
[60] Donald P. Kommers, 'The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany' (1980) 53(2) Southern California Law Review 657, 678 <file:///C:/Users/35386/Downloads/53SCalLRev65780.pdf> accessed 29 April.
[61] *Southwest State Case* Federal Republic of Germany Federal Constitutional Court 1 BVerfGE 14 (1951).

…

(2) Laws regarding defence, including protection of the civilian population, may provide for restriction of the basic rights of freedom of movement (Article 11) and inviolability of the home (Article 13).

Article 18 [Forfeiture of basic rights]

Whoever abuses the freedom of…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."

While the Constitution allows limitation and forfeiture as mentioned in Article 18, the essential nature of the limitation being an exception in good faith in support of the free democratic basic order was guaranteed under Article 19 paragraph 2 which states that "In no case may the essence of a basic right be affected." Considering the specific competence, it was given by the last sentence of Article 18, The FCC, in its first party closure case against the Socialist Reich Party (*Sozialistische Reichspartei* – SRP) defined the "free democratic basic order" as:

"An order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: Respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; popular sovereignty; separation of powers; responsibility of government;

lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties"[62]

So, according to the interpretation of the FCC, the state not only has the right but also the duty to protect itself by suppressing activities that are unconstitutional. The same understanding was solidified the next year as the FCC invalidated a constitutional amendment.[63] While the state is under the duty to protect the free democratic basic order, Article 20/4 of the Constitution gives the right to resistance (not the duty, only the right) as it states that "All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available."

The special competence of the FCC is not only found in the Basic Law, but also in the Law on the Federal Constitutional Court. In accordance with all the legislation, for an action to be declared a misuse of a right, the FCC's declaration is constitutive, and for such a declaration, "an active and aggressive *modus operandi*" in fighting the free democratic basic order is necessary.[64] However, such an intervention had not happened in Germany, and motions to the FCC by the competent bodies have been extremely rare.

Most discussed legal measure within the militant democracy toolbox in Germany is Article 21 of the Basic Law, which regulates the formation and prohibition of political parties. The article stipulates that political parties in Germany play a crucial role in forming the political will of the people and can be freely established, provided their internal organization adheres to democratic principles and they publicly account for their assets and funding sources. Parties that seek to undermine or abolish the free democratic basic order or endanger the existence of the Federal

[62] Kommers (n 60), 680.
See also: *Party Ban I* Judgment of Oct. 23, 1952, [1952] Federal Constitutional Court (First Senate), 2 BVerfGE 1,12-13).
[63] Judgment of Dec. 18, 1953 [1953], Federal Constitutional Court (First Senate), 3 BVerfGE 225 (W. Ger.).
[64] Thiel N (54), 136.

Republic of Germany are deemed unconstitutional. Such parties are excluded from state financing, and any favorable fiscal treatment for them ceases. The FCC is responsible for ruling on the unconstitutionality of these parties and their exclusion from state financing, with further details regulated by federal laws.

Aimed at protecting the constitutional order from extremist threats, party closures and bans are a significant tool for Germany's militant democracy framework. As can be understood from the article above, once again, the FCC plays a central role in this process. The FCC is entrusted with the authority to declare such parties unconstitutional and, consequently, to ban them. Since parties as political associations hold a special importance as being an essential element of the democratic process, declaring a party unconstitutional is now considered an *ultima ratio* interference. The FCC has only banned two political parties which are linked to either neo-Nazism or communism, the main threats perceived deadly for the German democracy. Thiel explains the role of this constitutional shield as "this article expresses the conviction of the drafters of the Basic Law, based on their historical experience that the state could no longer afford to maintain an attitude of neutrality toward political parties".[65] If not a political party, the organizations not fulfilling the party criteria can still be banned under Article 9 prescribing freedom of association and its limits. Still, all this does not come much of a preemptive attack as "…the free democratic state does not proceed against hostile parties by itself, but acts in defense, repelling attacks against its fundamental order".[66]

For the first time in 1952, the SRP a neo-Nazi party, was banned for its anti-democratic ideology and activities as well as organization that mirrored the *Nationalsozialistische Deutsche Arbeitpartei* (NSDAP). The FCC ruled that the SRP's goals were fundamentally incompatible with the democratic principles of the Basic Law, leading to its prohibition. While the first party

[65] Thiel (n 54), 121.
[66] *KPD* N (n 56).

ban of FCC was widely accepted as 'natural', the second ban on *Kommunistische Partei Deutschlands* (KPD) in 1956, based on its alignment with Soviet communism, was more controversial, causing discussions on its legal necessity and political effectiveness. However, despite the debate about its constitutional validity and implications for democratic governance the support among the public yet again shows the contemporariness of militant democracy as the support among the public was reflective of the collective anxiety about the potential for a communist takeover during the Cold War.

The FCC's approach to party bans has evolved over time, reflecting a balance between militant democracy and judicial restraint. This is evident in the cases involving the *Nationaldemokratische Partei Deutschlands* (NPD). The first motion to the FCC to ban the NPD in 2003 failed due to procedural issues, mainly related to the government's many informants within the party compromising the integrity of the case. The FCC dismissed the case without examining the substantive grounds, emphasizing the need for stringent procedural adherence in such significant decisions. In 2017, the FCC again addressed the possibility of banning the NPD. While acknowledging the party's anti-democratic aims, the Court ruled the NPD didn't have the potential to achieve its goals due to lack of significant political influence.[67] Putting an emphasis on the *ultima ratio* nature of a prohibition under Article 21(2), the Court characterized party bans as "the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against an organised enemy".[68] This decision highlighted the FCC's new nuanced approach in line with the ECtHR standards, balancing the protection of democratic order with the principles of proportionality and political reality. Emphasizing the examination of proportionality in party bans, the newly introduced criterion of 'potentiality' raises the

[67] *Party Ban I* (n 62).
[68] Ibid, 2 BvB 1/13.

threshold for intervention, requiring proof that the party poses a substantial threat to the democratic order.[69]

Accordingly, the FCC's role in banning political parties underscores its function as a guardian of the democratic order and exemplifies a robust approach to militant democracy. By exercising its authority to ban parties, the Court protects the constitutional framework from extremist threats while ensuring that such measures are taken judiciously and in accordance with strict legal standards. In 2024, after the government and both the Bundestag and the Bundesrat took Die Heimat, previously known as NPD, to the court again, the FCC ruled that the party will be excluded from state financing for six years in accordance with Article 21(3) of the Basic Law since it 'continues to disregard the free democratic basic order and, according to its goals and the behavior of its members and supporters, is aimed at its elimination'.[70] This shift shows that the lesser form of interference, being exclusion from state funding, has come to the fore as a new form of balanced militancy signaling the undemocratic nature of the entity in question. Such a balance ensures that the fight against extremism does not compromise the very democratic values it seeks to defend.

The Eternity Clause and its Interpretation

While the concept of formal unamendability in some forms have some antecedents in even the ancient times in Europe, general entrenchment clauses originated during the American Revolution in 1776-1777. Later, the idea migrated to Europe and mainly became widespread in

[69] Uwe Backes, 'Banning political parties in a democratic constitutional state: the second NPD ban proceedings in a comparative perspective' (2019) 53(2) Patterns of Prejudice 136 <https://doi.org/10.1080/0031322X.2019.1572275> accessed 14 June 2024.

[70] 'Germany's top court rules far-right party's ideology makes it ineligible for funding' *euronews* (23 January 2024) < https://www.euronews.com/2024/01/23/germanys-top-court-rules-far-right-partys-ideology-makes-it-ineligible-for-funding> accessed 12 May 2024.

the post-World War II era following the rise of fascism across the continent.[71] Despite originating from a jurisdiction on the other side of the World, the concept of eternity clauses nowadays is usually linked to Germany's Basic Law. The concept of the eternity clause within the Basic Law was born from the devastating experiences of the Weimar Republic's collapse and the subsequent rise of the Nazi regime. The framers of the Basic Law sought to establish robust safeguards to prevent any future erosion of democratic principles.

The Weimar Constitution's amendment process, which treated constitutional amendments as equivalent to ordinary legislation, played a significant role in its vulnerability to subversion. The Nazi regime exploited these weaknesses, facilitating its rise to power. In response, the Basic Law's eternity clause was designed to ensure that certain fundamental aspects of the constitution could not be altered, thereby preventing similar democratic breakdowns. Preuss emphasizes that the eternity clause serves to preserve the constitutional identity of Germany, ensuring that amendments cannot undermine the foundational elements of the state.[72] This principle is underscored by the doctrine of *nulla potestas extra constitutionem*, reinforcing the idea that all political power is derived from and limited by the constitution, and that no entity, including the amendment power, can overstep these boundaries. Practically, this means that unless the Basic Law is replaced with an entirely new legal document prepared by the constituting power, the eternity clause shall remain intact no matter the will of the constituted power.

The eternity clause, being paragraph three of Article 79 titled 'Amendment of the Basic Law' stipulates that "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible". In Thiel's words, "this article is regarded as a coming

[71] Michael Hein, 'Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism' (2019) 21 European Journal of Law Reform 226 <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ejlr21&id=231&men_tab=srchresults> accessed 19 June 2024.
[72] Preuss (n 17).

to terms with the past".[73] Keeping in mind the legal takeover that led to the Enabling Act in 1933, the eternity clause in the Basic Law aims to prevent such a legal revolution and protect democratic credentials.[74]

Other than the constitutional amendments affecting the federal structure and organization, Article 79(3) prohibits amendments on Article 1 which guarantees the inviolability of human dignity and fundamental rights, establishing these as the highest values that the state must protect.

Article 1 of the Basic Law reads:

"(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law"

Article 20 outlines the principles as:

"(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

[73] Thiel (n 54), 127.
[74] Martin Klamt, 'Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions' in Fred Bruinsma and David Nelken (eds) *Exploration in Legal Cultures* (Recht der Werjekijkheid 2007).

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available."

By making these provisions unamendable, the clause ensures that the foundational elements of Germany's constitutional identity and democratic governance remain intact. Or, from another point of view, "the regulations and provisions mentioned in Article 79(3) of the Basic Law seem to be exempt from any access by the (constitutional) legislator; they have been granted a constitutional right of continuance".[75] However fortified these articles might seem, it is necessary to point out that the FCC interprets this limitation restrictively. According to the Court, while Article 79(3) forbids amendments that would eliminate or fundamentally alter the protected principles, amendments that modify but do not undermine these principles can be permissible. This means that certain adjustments or updates to the constitution are allowed as long as they do not compromise the essence of the principles protected by the eternity clause.[76]

Showing practical judicial restraint, however involved the FCC can be in most legal questions in Germany, it has never struck down a constitutional amendment despite declaring itself competent to do so. The FCC's landmark decision in 1951 established the precedent for reviewing the constitutionality of constitutional amendments as the Basic Law stays silent on the issue. The Court emphasized that the Basic Law has an "inner unity," and any amendment must be consistent with the overarching principles of the constitution, being often referred to as the German equivalent of the U.S. Supreme Court's *Marbury v. Madison*.[77] In another decision in 1953, the Court reasserted the existence of the concept of unconstitutional

[75] Thiel (n 54), 128.
[7676] *Mephisto* Federal Republic of Germany Federal Constitutional Court 1 BVerfGE 30, 173.
[77] Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 2012).

constitutional amendment within the Basic Law and highlighted the higher status of the principles protected under the eternity clause.[78] In subsequent cases, such as the *Klass Case*, the FCC upheld the idea that constitutional amendments cannot violate the essential democratic principles protected by the eternity clause.[79] The FCC ruled that as long as parliamentary oversight was maintained on the infringement of privacy rights for national security, the amendment did not violate the Basic Law's core principles.

In *Land Reform I* case following reunification, the Court reviewed amendments stating expropriations under occupation law or based on sovereign acts by occupying powers could not be reversed. The FCC ruled that these provisions did not violate the eternity clauses, as they did not affect the fundamental principles protected by Article 79(3). In this follow-up case, the FCC upheld its previous decision, reaffirming that the challenged provisions did not infringe on the principles of equality or other protected values under the Basic Law. The Court reiterated that property rights, insofar as they are covered by Article 79(3), were not compromised by the amendments, showing the matters of priority within the understanding of the Court.

Assessing the Maastricht Treaty process, the court ruled that the treaty was constitutional but set strict limits on the transfer of sovereign powers.[80] It asserted that the German state must retain its identity as a constitutional democracy, and any transfer of power to European institutions must not undermine this principle. In its judgment on the Lisbon Treaty, while the FCC did not strike down the Lisbon Treaty itself, it set stringent conditions for its compatibility with the constitution.[81] The court ruled that certain provisions of the treaty were only constitutional if interpreted in a way that ensured the German parliament retained sufficient authority, emphasizing that the principles of democracy, rule of law, and federalism must remain

[78] BVerGE 225 (1953).
[79] *Klass Case* Federal Republic of Germany Federal Constitutional Court 30 BVerfGE 1, 1970.
[80] *Maastricht Treaty Case* Federal Constitutional Court, BVerfGE 89, 155.
[81] *Lisbon Treaty Case* Federal Constitutional Court BVerfGE 123, 267.

intact and that any further transfer of powers to the EU would require a new constitutional amendment approved by the German people. Accordingly, the Lisbon Treaty and Maastricht Treaty cases illustrate the court's role in ensuring that Germany's participation in international and supranational organizations does not compromise its constitutional identity. The European Arrest Warrant case demonstrates the Court's commitment to ensuring that all legal procedures, especially those involving international cooperation, meet the stringent standards of judicial protection and fair trial mandated by the Basic Law.

The Non-Negotiable: Human Dignity

Human dignity under Article 1, which shall not be forfeited under any circumstances, is part of the two-sided relationship between democracy and militant democracy as it imposes substantive restrictions on what can the democratic state do to protect itself from its enemies, being the people holding right to human dignity. As an "unbreakable limitation" to forfeiture or any kind of interference to rights, human dignity makes sure that nobody is deprived of their rights for an unlimited amount of time, or in another arbitrary manner, no matter the underlying reason.[82] When it comes to certain principles like human dignity that have found their place as widely accepted, the eternity clause goes beyond legalistic discussions or actions, and may structure the state apparatus directly or indirectly by determining who does or does not have access to a public position. Thiel tells us the story of a German law professor, Horst Dreier, whose nomination to a seat in the FCC bench was withdrawn due to his critical writings on the absolute ban on torture, in which he argues for an exceptional possibility of 'rescue torture' as a last resort when the authorities face a risk of mass murder.[83] His story tells the very untouchability of human dignity, and how the black letter of law functions when it is embedded in the core

[82] Klamt (n 74).
[83] Thiel (n 54).

beliefs of a society. As can be seen from the case law of the FCC, the principle of human dignity is paramount and non-negotiable. Cases like the *Aviation Security Act*[84] and *Life Imprisonment*[85] highlight that the FCC consistently prioritizes human dignity, even in the face of urgent security matters.

[84] *Aviation Security Act Case* Federal Constitutional Court BVerfGE 115, 118.
[85] *Life Imprisonment Case* Federal Constitutional Court], BVerfGE 45, 187.

Chapter Two: France

"A people is always free to change its laws, even the best of them; for if it chooses to do itself harm, who has the right to stop it?" (Rousseau, 1762)

The Legacy of the Revolution

In her chapter on history of militant democracy in France, Buis starts by putting forward that "the presence of enemies of democracy has been a permanent, or at least recurrent, concern in the political history of France" as ever since the French Revolution in 1789, the country has had an "extremely unstable constitutional history" with many political crises (2009, p.75). France's history with militant democracy is deeply intertwined with its revolutionary past and the subsequent political upheavals. Within its sui generis constitutional experience, the country has faced threats coming from various fronts such as royalists, Bonapartists, anarchists, communists, nationalists, separatists…

The French Revolution marks the beginning of France's journey towards militant democracy. The Revolution was driven by Enlightenment ideals of liberty, equality, and fraternity, but it also involved significant violence and repression to achieve these goals. Alexis de Tocqueville describes the revolution as a profound upheaval that sought not only to dismantle the old regime but also to establish a new order based on democratic ideals.[86] For this end, the extreme measures used throughout the Reign of Terror to eliminate perceived enemies of the revolution highlighted the tension between democratic ideals and militant enforcement. Schama provides a vivid account of this period, highlighting how the revolutionary government justified extreme measures as necessary to safeguard the republic.[87] The use of militant tactics during the Reign

[86] Alexis de Tocqueville, *The old regime and the French Revolution* (Garden City 1955).
[87] Simon Schama, *Citizens: A Chronicle of the French Revolution* (Random House 1989).

of Terror set a precedent for the future defense of democratic principles in France, where the survival of the state sometimes necessitated suspension of certain liberties. However, the idea of militant democracy as a concept was still against the core of the Revolution, and the Declaration of the Rights of Man of 1789 within the "French understanding of liberty", which is heavily individualistic.[88] Still, what holds as a legitimate ground for limitation is Article 5 of the Declaration which ensures the enjoyment of rights by all within a system based on collective will, which this paper will delve deeper into below.

Militant Democracy in France

Unlike Germany, the militancy of democracy as a form of inner self-defense with a paradoxical twist was neither explicitly mentioned nor conceptualized in France until 1937 when Charles Eisenmann gave a speech in 1937 and stated that "It is indeed legitimate that the legislation of democratic states defends itself against anti-democratic parties, against parties which would establish their dictatorial regime if they came to power. Democracy cannot recognize the right of dictatorship without denying itself and even being inconsistent".[89]

The lack of theorization, however, can be substantiated by a comparative approach, which one should take with a pint of salt as the main sources on militant democracy tend to be formulated with the German experiences of the 20th century in mind. So, Buis argues for a broader approach to be able to catch the French experience and uses Loewenstein's point of view where every single effort of a democracy to protect or rescue itself shall be taken into account and states that this wider perspective "should allow us to consider the evolution of the French

[88] Gregor Paul Boventer, *Grenzen politischer Freiheit im demokratischen Staat. Das Konzept der streitbaren Demokraties in einem internationalen Vergleich* (Duncker and Humblot 1984).
[89] Cliare-Lise Buis, 'France' in Markus Thiel (ed.) *The Militant Democracy Principle in Modern Democracies* (Ashgate 2009), 76.

attitude to new dangers, such as Islamic terrorism" while keeping the governments' short and medium-term strategies in mind. [90]

The late 18th century experiences in France firstly introduced an insider-outsider duality to protect the democratic ambitions but fell short of encompassing the complexity of the problem.[91] Being aware of the opposition to the democratic goals of the Revolution, militant instruments to protect the ambitions of the Revolution were introduced. This defense strategy against the 'enemies of the Revolution" included both radical forms like robbing the status of the citizen, and more classical instruments such as surveillance, criminal sanctions, and the notion of safety of the state.[92] One of the actors seen as such was the clergy, or the Catholic Church in general, as holding substantial land and wealth, the Church had significant political influence and was seen as an ally of the monarchy.

On the other hand, the popular French legal discourse on sovereignty and legitimacy of law was not compatible with the idea of militant democracy. Rousseau, in his seminal work, envisioned a society where the general will, reflecting the collective interest of the people as a 'body', is sovereign and guides the governance of the state. In this ideal, individuals willingly submit to the collective decision-making process, ensuring freedom through participation and equality.[93] Condorcet, an Enlightenment philosopher, shared the same view as Rousseau in the superiority of the collective will of the people, and argued that no constituting power has the right to force its ideals to the upcoming generations.[94] This philosophy found its way into the 1958 Constitution as the last paragraph of Article 2 states that "the principle of the Republic shall be:

[90] Buis (n 89), 77.
[91] Jean-Clément Martin, 'La Revolution française: aa généalogie de l'ennemi' (2002) 5 Raisons Politiques <10.3917/rai.005.0069 > accessed 15 April 2024.
[92] Alain Noyer, *La súreté de l'etat: 1789-1959* (LGDJ 1966).
[93] Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Cambridge University Press, 1997).
[94] Jean-Antoine Nicolas de Caritat Concorcet*, Idees sur le despotisme, à l'usage de ceux qui prononcent ce mot sans l'entendre* (Firmin Didot Frères 1847).

government of the people, by the people and for the people".[95] Militant democracy, however, imposes restrictions and pre-emptive measures that can suppress dissent and minority opinions, undermining the very essence of the general will. While "a militant democracy anticipates the ambition of a dangerous minority or overcomes the ruthlessness of the majority", Rousseau's vision relies on trust and mutual respect among citizens, where the legitimacy of the state arises from the authentic expression of the people's collective, and somewhat direct, will.[96] By contrast, militant democracy's coercive tactics can erode this trust, creating a disconnect between the state and its citizens, ultimately contradicting Rousseau's foundational principles of freedom, equality, and collective sovereignty.

Based on the history of legal thought in France, Buis explains how some enduring principles, such as "superiority of the law and the role of the assembly, as the representative institution of the nation, in which sovereignty resides"[97] and how "the role of the law, as a central but possibly changeable norm, has been qualified as 'légicentrisme' and interpreted as the reason why the principle of a control of constitutionality was long unthinkable in the French political culture".[98] So, while the French Revolution planted some seeds of democracy and its protection, the political and philosophical principles around it made it less likely to become militant within its common meaning. Within this historical context, Buis argues that the constitutional instability that characterizes the post-revolution era can be interpreted as an either direct or indirect result of the lack of establishment of militant democratic principles, institutions, and mechanisms in France.[99] What also contributed is the judiciary's relatively weak position. Seeing the judiciary as an extension of the monarchy and the ancién regime, the revolutionaries sought to ensure that no single branch of government could dominate the others, leading to a political culture

[95] Article 2, French Constitution of 4 October 1958.
[96] Buis (n 89), 78.
[97] Ibid, 80.
[98] Ibid.
[99] Ibid.

that emphasizes a strong executive and legislative branch while maintaining a more restrained judiciary. This balance of power is enshrined in the French Constitution and reflects a deep-seated wariness of returning to a system where an unelected body, perceived as elitist, could wield significant influence over the democratic process.

Providing a controversial militant aspect of the French political system, scholars often discuss the relationship between state sovereignty and the principle of laïcité (secularism) in France, highlighting how the state's authority intersects with religious matters.[100] The Revolution was marked by a strong anti-clerical sentiment driven by Enlightenment ideals that emphasized reason, individual rights, and the separation of church and state. In that sense, revolutionary leaders saw the Catholic Church as and a barrier to progress and equality. So, Declaration of the Rights of Man and of the Citizen proclaimed freedom of religion and the principle of equality before the law, undermining the privileged position of the Catholic Church. Throughout the 19th century, there were ongoing struggles between the state and the Catholic Church, with various regimes either supporting or opposing Church influence. Long after the Revolution, the 1905 Law on the Separation of the Churches and the State formalized laïcité, ensuring the state's neutrality in religious matters and pushing the religion into the private sphere. In the Fifth Republic, the principle found its way to Article 1 of the Constitution, which reads: "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs".[101]

The state's commitment to their particular form of secularism enshrined in Article 1 has often led to legislative measures and judicial rulings that strictly regulate religious expressions in public spaces, most notably in public schools where the display of religious symbols is

[100] Murat Akan, *The Politics of Secularism: Religion, Diversity, and Institutional Change in France and Turkey* (Columbia University Press 2017).
[101] Article 1, French Constitution of 4 October 1958.

prohibited under laws such as the 2004 ban on conspicuous religious symbols and the 2010 ban on full-face veils. Judicial protection of secularism in France involves the Constitutional Council and other courts upholding these secular principles against challenges, ensuring that legislative measures comply with the constitutional mandate of secularism while balancing fundamental rights and freedoms.

The Eternity Clause and Its Interpretation

Following the fall of Napoleon, the notion of protecting essential constitutional principles gained traction as France transitioned through various political regimes. The volatile nature of French politics in the 19th century, marked by frequent changes in government as France experienced several shifts in governance, including the restoration of the monarchy, the Second Republic (1848-1852), the Second Empire (1852-1870), and the establishment of the Third Republic (1870-1940), which collectively highlighted the need for immutable principles for stability as each regime change brought with it varying degrees of constitutional modifications, reflecting the nation's struggle to establish a stable democratic framework. While some explicit steps towards limiting amendment power was adopted by the Republican majority back in 1884, the Third Republic lacked a significant legal outcome for altering the republican form of state, and thus failed in preventing revolutionary change.[102] Sowerwine notes that these frequent changes underscored the need for a more resilient constitutional structure to safeguard the republic.[103] The 1946 and 1958 Constitutions of the Fourth and Fifth Republics, respectively, aimed to bring a form of legal stability and introduced the idea of entrenching certain democratic principles to prevent their alteration by transient political forces. The

[102] Buis (n 89).
[103] Charles Sowerwine, *France since 1870: Culture, Politics, and Society* (Red Globe Press 2018).

introduction of the Fifth Republic in 1958 marked a turning point in French constitutional history. Drafted under the guidance of Charles de Gaulle, the 1958 Constitution aimed to provide a more stable and resilient governance framework. One of the critical innovations of this constitution was the inclusion of an eternity clause.

The current French Constitution of 1958 contains two main limitations to the amending power of the constituted power under Article 89, and one additional temporary limitation under Article 7 in case there is a vacancy in the office of the presidency. While Article 89 Paragraph 4 limits the amendment power "where the integrity of national territory is placed in jeopardy",[104] Paragraph 5 puts forward the eternity clause as "The republican form of government shall not be the object of any amendment"[105] and crystallizes the republican form of governments for the Fifth Republic after a history of constitutional instability. Looked within the militant democracy context, Buis explains the importance of this clause as "the stabilization of democracy was de facto, in French historical experience, parallel to the stabilization of the republican regime" (2009, p.84). The philosophical underpinnings of the eternity clause are deeply entwined with the revolutionary ideals of the late 18th century. The Enlightenment provided a crucial philosophical backdrop for the French Revolution and the subsequent development of constitutional thought. Philosophers such as Montesquieu, Rousseau, and Voltaire influenced the revolutionary leaders with their ideas on the nature of government and the rights of individuals. So, the French Revolution was not merely a political upheaval but a profound rethinking of societal values and governance. The revolutionaries aimed to establish a society founded on the principles of liberty, equality, and fraternity—values that were meant to be timeless and unassailable (Tocqueville, 1955).

[104] Article 89, para. 4, French Constitution of 4 October 1958.
[105] Ibid, para. 5.

Trying to place Article 89/5 within a hierarchical framework, Buis discusses three main positions on the status of this eternity clause: The first one, which is seen as marginal, puts the republican form of government as a supra-constitutional norm relying on Article 89/5 and focused on the decision of the Constitutional Council of 16 July 1971 on principle of liberty being against arbitrariness of the law, argues that a hierarchy of norms exists and takes Declaration of Human Rights as an overarching source (Rials, 1984).[106] Buis argues that this understanding is rests firstly on Kelsen's hierarchy of norms, and secondly the German Basic Law holding certain human rights principles as superior.[107] According to Boventer, the republican form of government within the meaning of the eternity clause includes the content of Article 1 to 4 as well, mainly indivisibility and laicity.[108] The normativity this point of view presupposes to be enshrined under the eternity clause is perhaps the interpretation most in line with a theoretically militant reading of the constitution.

The second position categorically rejects the theory of supra-constitutionality as "according to the French positivist tradition, supra-constitutionality would refer to norms that are situated outside the constitutional text; that is to say: not positive and therefore not litigable".[109] Buis quotes Lavroff's summarization of this conception as "it does not seem to us that there would be rules of supra-constitutional value, except if we want to refer, for philosophical reasons, to rules of natural law whose content is variable and whose existence is disputable".[110]

But then, without rejecting the possibility entirely, how substantive can we interpret the limitation to amendment power in Article 89/5 to be? Going back to Sieyes, and then Rousseau, one can argue the constituting power does bind the constituted power, and Rousseau's social contract idea underpins the notion that the fundamental principles enshrined in the constitution

[106] Stéphane Rials, 'Supra-constitutionnalitè et systématicité du droit ' (1986) Archives de philosophie du droit.
[107] Buis (n 89).
[108] Boventer (n 88).
[109] Buis (n 89), 82.
[110] Dimitri Georges Lavroff, *Le droit constitutionnel de la Vème Republique* (Dalloz 1997),128.

represent the general will and should therefore be protected against any form of alteration that might subvert the collective interests of the people. On the other hand, the same legal writings can be interpreted as only limiting the amendment power procedurally, which is the majority opinion among French scholars shared by the Constitutional Council (as discussed below), to both respect the constituting power and the omnipotent collective will of the people in a 'hands-not-that-tied' way. So, the dominant position, being the third side, remains suspicious towards the substantive limits to the amending power, but instead, argues that Article 89/5 rather "indicates the superiority of the constitution in the hierarchy of norms" and amendments are therefore mainly procedurally limited.[111] Coming back to Sieyes once again, some scholars question this understanding and point out that it also allows for legal revolutions by stripping the Constitutional Council of a potential role as a "guardian of the constitution" while the concept of constituent power, within this interpretation, is leveled with the constituted power.[112] According to this point of view, the Council should check on the constitutionality of amendments both with regard to its procedure and content unless the amendment passes via a referendum as the eternity clause, being the will of the constituent power, binds the constituted power, not the people, who are the sovereign.

However, the Constitutional Council seems to agree with the procedural limitation interpretation which stems from the Council being developed as "an offshoot of the judicial review of administrative action" as when it comes to judicial review, "France illustrates the popular sovereigntist resistance to the doctrine of unconstitutional amendment" despite having an eternity clause and being the birthplace of the theory of constituent power.[113] In a decision dating back to 1962, the Constitutional Council explicitly acknowledged that the reviewing power of the court are limited by the exhaustive list provided in the Constitution of 1958.

[111] Buis (n 89), 83.
[112] Carl Schmitt, *Constitutional Theory* (Duncker and Humblot 1928).
[113] Albert (n 32), 661.

The French Constitution does not give any power of judicial review over constitutional amendments, but the Council can check the procedure of the referendum within its powers under Article 60.[114] Under Article 61, the Council is given the competence to check the constitutionality of ordinary legislation a priori, and in Article 61 paragraph 1, the Council can perform concrete judicial review as the article reads: "If during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'état or by the Cour de Cassation to the Constitutional Council, within a determined period".[115]

Going back to the question of unconstitutional constitutional amendments, in 1962, President Charles de Gaulle argued that the French president should be elected by direct popular vote rather than by an Electoral College, necessitating a constitutional amendment. Unable to secure parliamentary support, de Gaulle used Article 11, which allows the President to submit bills on the organization of public authorities to a referendum. This move was deemed unconstitutional by many and became a heavily controversial action. Despite all opposition, de Gaulle proceeded, and the referendum passed with nearly two-thirds approval. The Senate President challenged the amendment's constitutionality, but the Constitutional Council ruled that it had no authority to review a referendum-approved bill. The Council's decision established that constitutional amendments adopted via referendum are not subject to judicial review. This precedent suggested that referendums have a higher authority than ordinary legislative activities, and future amendments via referendum would similarly be beyond judicial scrutiny, though the Council left open the question of amendments passed by Parliament without a referendum, it rejected the delegation theory and acknowledged its powers as being exhaustive.

[114] Article 60, French Constitution of 4 October 1958.
[115] Ibid, Article 61.

While analyzing the case law, it is also necessary to mention that constitutional amendments in France are relatively complicated, so when reading on how the Council accepted the outcome of the referendum as "the direct expression of national sovereignty", the complexity of the procedure in general, and the very inclusion of a popular vote, helps to contextualize this stance towards democratic credentials and the ability of the system to balance itself based on the general will. In a 1992 decision regarding the Maastricht Treaty, facing a question on the Treaty's conformity with the Constitution, mainly being concerned with Article 3, which vests national sovereignty in the people. The Council indicated that constituent authority is sovereign and constrained only by unamendable rules, both substantive and temporal. Although the Council's main focus was on the authority of constitution-making, it also hinted that specific restrictions on amending the constitution are enforceable. [116]

In 2003, the Court gave a clearer answer when sixty senators challenged an amendment on the Constitutional Law on Decentralized Organization of the Republic. In their application, the senators invoked the eternity clause, enshrining the formal unamendability of the republican form of government and argued that decentralization of local government violated the unitary character of the state protected by Article 1 of the Constitution. In doing so, they argued that the limitation under Article 89/5 does not only protect the form of government superficially, meaning that the unamendability is not simply a ban on turning back to monarchy, and that the eternity clause essentially protects the fundamental characteristics of the French Republic as well.[117] Citing its own case law from 1962, the Council held that it had no jurisdiction to hear the case as the Constitution did not confer upon the power on it to do so, this time crystallizing the exhaustive character of its reviewing powers, and at the same time equating the constituent power to the constituted power by seeing both as expressions of popular sovereignty. So, while

[116] Albert (n 26).
[117] Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Hart Publishing 2011).

France has an eternity clause, via the Constitutional Council's self-restraining judicial interpretation, it has made it judicially unenforceable.

All of these does not mean that the French judiciary has no role in protection of the very core of the Constitution. Baranger states that "while the Conseil constitutionnel has refused to review constitutional amendments, this has been done in a way that comes very close to the language used by those courts that state that such amendments are justiciable", so, accordingly "far from adhering to a mere policy of neutrality and self-restraint, the Conseil constitutionnel speaks a 'language of eternity' with a rich substantive content", a language that suggests a deep engagement with the constitutional principles.[118] Underlining De Gaulle's influence in the first years of the Fifth Republic on the "newborn institution", especially as regards the 1962 decision, he argues De Gaulle "molded the Constitution according to his own idea of constitutional power. Maybe 'idea' is too abstract a word: the Constitution was molded around de Gaulle's very person. How could a newcomer like the Conseil constitutionnel not be immensely deferent in such a context?." [119]

Furthermore, what should be kept in mind is that before 2008, meaning before Article 61-1, the Constitutional Council was only able to exercise constitutional preview. Before that, additionally, the Council could review ordinary acts of parliament, as discussed above, and the compatibility of treaties with the Constitution before ratification under Article 54 upon referral to advise on whether the Constitution must be amended for ratification. Accordingly, this set a particular form of limitation to its constitutional review duties and shaped the understanding of judicial power vis-à-vis legislative power. Although the Council makes it clear that it does not review constitutional amendments, the language of eternity as mentioned by Baranger can be

[118] Denis Baranger, 'The language of eternity. Constitutional review of the amending power in France (or the absence thereof)' (2017) 5 <Mutation ou crépuscule des libertes publiques? https://juspoliticum.com/article/Le-langage-de-l-eternite-Le-Conseil-constitutionnel-et-l-absence-de-controle-des-amendements-a-la-constitution-318.html> accessed 23 March 2024.
[119] Ibid, 394.

seen in the 1992 decision as the Council states that "Subject to the provisions governing the periods in which the Constitution cannot be revised (Articles 7 and 16 and the fourth paragraph of Article 89) and to compliance with the fifth paragraph of Article 89 ("The republican form of government shall not be the object of an amendment"), the constituent authority is sovereign; it has the power to repeal, amend or amplify constitutional provisions in such manner as it sees fit; there is accordingly no objection to insertion in the Constitution of new provisions which derogate from a constitutional rule or principle; the derogation may be express or implied" (…). In time, the French constitutional law has become "a cobweb of contradictions" as while the Constitution explicitly limits amendment power, the Council applies a form of self-restraint with a touch of respect for the integrity of the Constitution while on the other hand complicating factors (such as EU law, international law, and political as well as economic factors) have infiltrated into the legal system. [120]

To better understand this very specific system, Baudouin explains the specific approach of the French starting from the Third Republic as a "republican dynamic" in which both the monarchist and the proletarian opposition is supposed to get integrated for the republic to endure via persuasion and assimilation instead of fighting. [121] This is an original, and definitely optimistic, approach to protecting democracy rather than declaring enemies to it and defending it via a strong judiciary that is willing to explicitly enforce eternity clauses, which may cause discussions on the separation of powers. Establishing a different discourse for Article 1 of the Constitution, the French approach to militant secularism reflects a commitment to maintaining a clear separation between religion and state to protect democratic values and ensure public order. Despite the conception that laïcité aims to ensure state neutrality and freedom of religion, the state actively regulates certain religious practices to maintain public order and social

[120] Ibid, 428.
[121] Jean Baudouin, 'Dynamique démocraticque et intégration républicaine' in Marc Sadoun (ed.) *La Democratie en Franc vol.1* (Gallimard 2000).

cohesion, and to ensure that other constitutional principles are protected. As a militant form of secularism, laïcité embodies a confrontational and assertive approach to ensuring the separation of religion from the state and public affairs. As discussed above, this principle is deeply rooted in French history, particularly the periods following the Revolution of 1789 and the establishment of the Third Republic, where the state sought to diminish the influence of the Catholic Church and other religious institutions. However, its implementation, particularly concerning Islam, has raised significant concerns about discrimination and the balancing of secularism with religious freedoms.[122] The evolution of laïcité from a tool against Catholic dominance to a principle applied to a multicultural society illustrates the complexities and controversies inherent in enforcing secularism in modern France, and showcases the dilemma discussed in the previous chapters in militant democracies.

The role of the judiciary in France in the context of militant secularism and the protection of laïcité is a complex and nuanced one, deeply intertwined with other constitutional principles and the republican form of government protected under the eternity clause. Troper explains this relationship, again linking the Revolution to the current views on amending powers as "the Constitution must remain supreme relative to international law and to statutes, but without contradicting the idea formulated in the Declaration of the Rights of Man, that the law, meaning acts of parliament, is the expression of the will of the sovereign. The principle of laïcité played a major role in this delicate construction".[123] Although the Constitutional Council has traditionally refrained from reviewing constitutional amendments directly, it has engaged in ensuring that laws and policies adhere to fundamental constitutional principles. In its decisions on the ban of religious symbols and the ban on face-covering veils, the Council and the Conseil

[122] Murat Akan, 'Comparative or Multiple Secularisms? Evidence From a Comparison of France and Turkey' (2023) 37 (2) Boğaziçi Journal of Social, Economic and Administrative Studies <https://doi.org/10.21773/boun.37.2.1 > accessed 24 April 2024.
[123] Michel Troper, 'Sovereignity and Laïcitè', in Susanna Mancini, Michel Rosenfield (eds.) *Constitutional Secularism in an Age of Religious Vival* (Oxford University Press, 2014), 156.

d'État often emphasize the general will and safety and that the constituent power, while sovereign, must respect the foundational principles enshrined in the Constitution, including laïcité. [124] Grounded in the constitutional framework explained in this chapter, the courts seek to ensure that the secular nature of the Republic remains inviolable, balancing individual freedoms with collective secular values. This judicial oversight not only preserves the constitutional mandate of secularism but also adapts to evolving societal contexts which create new perspectives on what is at stake for the French democracy, reinforcing the enduring principles of the French Republic.

And now, if one focuses on Article 89/5 in a narrow way, the republican form of government is not a principle that is seen to be at risk in any way for French democracy. While the left is seen to be more assimilated or integrated, the rise of the right-wing such as the Front Nationale (or the National Rally) that has been linked to certain anti-pluralistic ideologies in the last couple of years, albeit being comparatively moderated to its previous years, might make scholars question their assumption that this optimistic model measured to expectations. Recent developments in France and the public's discontent with conventional political parties have enhanced support for the National Rally, highlighting its increasing influence and potential effect on future elections. Further on the pluralism front, contemporary France faces challenges in balancing laïcité with religious freedoms, particularly concerning its growing Muslim population. Debates over the role of religion in public life have intensified, with critics arguing that militant laïcité disproportionately targets Muslim communities. The 2021 Law Reinforcing the Respect of the Principles of the Republic reinforcing laïcité has furthered these tensions, aiming to curb what the government views as radicalism and separatism, but facing criticism for potentially marginalizing religious minorities.

[124] Ibid.

However, considering the narrow and limited interpretation discussed above, accepting the requirements of a parliamentary democracy may qualify as democratic enough if one follows the traditional non-militant operationalization of eternity clauses in France. However, regarding the future for pluralism, one thing that's certain is, unlike Buis's expectations, assimilation of anti-democratic actors does not seem to be the first step towards their "extinction." [125]

[125] Buis (n 89) 89.

Chapter Three: Turkey

Contextualization of militant democracy rests on the anxiousness of a new regime vis-à-vis a painful past and a feared future. Tracing back to the founding moment of the Turkish republic in 1920s, it is possible to see how militant democracy, before being named as such, has been the main idea behind the protection of the new values and identity of the Republic. The establishment of the secularist modern republic was a transformative period in Turkish history, marked by significant influence of intellectual and political movements during the Ottoman times. The foundations of modern Turkey are deeply rooted in the 19th and early 20th-century efforts to reform and modernize the Ottoman Empire, particularly through the activities of the Young Turks and other reformist groups. Thus, its essential to understand the key developments and influences leading to the creation of the secular Republic of Turkey to understand why and how the eternity clause in Turkey emphasizes the role of constitutionalism, nationalism, and the leadership of Mustafa Kemal Atatürk.

Tanzimat Reforms (1839-1876)

The Ottoman Empire's constitutional movements in the late 19th century were driven by the decline of the traditional *millet* system, Western influences, and an internal enlightenment period. These top-down reforms aimed to modernize and centralize the empire to ensure its survival. The Tanzimat era, initiated by Sultan Mahmud II, introduced significant administrative, legal, and educational changes, promoting civil liberties and legal equality.

In 1876, Sultan Abdülhamit II introduced the first Ottoman Constitution, marking the beginning of constitutional governance, though it was short-lived. Opposition groups like the Young Turks, inspired by European political movements, sought to restore constitutional governance

and modernity. The Young Turk Revolution of 1908 reinstated the 1876 Constitution and reintroduced parliamentary governance, but later shifted towards Turkish nationalism, leading to significant atrocities. Post-World War I, the Turkish National Movement, led by Atatürk, emerged, uniting resistance groups and leading the Independence War. The abolition of the Sultanate in 1922 and the declaration of the Republic of Turkey in 1923 marked a decisive shift from Ottoman rule to a secular nation-state while radical reforms focused on secularizing and modernizing Turkey, setting the foundation for its future constitutional principles.

Kemalist Reforms

Atatürk's vision for Turkey was rooted in the principles of secularism, nationalism, and modernization. His reforms, collectively known as Kemalist reforms, sought to transform Turkish society rapidly. Key reforms included abolition of the Caliphate in 1924, introduction of a new constitution, and secularization of the legal and educational systems. Atatürk aimed to reduce the influence of Islam in public life, replacing religious institutions with secular ones.

However, the political struggle against the top-down reforms following the War of Independence was inevitable. The Ottoman Empire was an officially Muslim state where Islam significantly influenced politics, laws required approval from religious authorities to pass, and the Sultan served as the Caliph. Transitioning to a secular state was thus fraught with challenges due to the deep-rooted importance of religion. The conservative circles opposed to these reforms mainly because they thought the new government was burning down all bridges between state and Islam. Opposition extended beyond secular reforms, certain groups even branded Atatürk as a public enemy. The Menemen incident, for example, involved dervishes attempting to reinstate Sharia law and the Caliphate. Such events pushed the government towards increasingly authoritarian measures with the idea of homogeneity being the obvious solution. After the rise and fall of fascism in Europe, the nationalism within Turkish constitutionalism became a controversial subject because of its negative connotations, however,

it was kept intact with the memories before Lausanne in mind, and was argued to be a "positive, proportional, and peaceful nationalism", not a racist ideology.[126] Still, the reforms sought to create a unified national identity, often at the expense of ethnic and religious minorities.[127] Non-Turkish and non-Muslim communities faced significant challenges as the new republic promoted a homogenized Turkish identity. While Islam's formal role in governance was minimized, it remained a significant cultural force, creating a complex relationship between secularism and religion in Turkey.

Militant Democracy in Turkey

The transition from a multi-ethnic, multi-religious empire to a secular nation-state involved significant political, social, and cultural changes, many of which continue to influence Turkish society today. The legacy of these predecessors is evident in the ongoing tension between secularism and religion, nationalism and diversity, characterizing contemporary Turkey.

As Oder puts it, "studying militant roots of democracy in Turkey inevitably covers almost all ingredients of Turkish Constitutional Law-which means a journey through the constitutional patchwork of the republican era".[128] The operationalization of militant democracy in Turkey is "the product of a trilogy: Modernity, Authoritarianism and Europeanization. " [129] Compared to Germany, the crystallization of militant democracy happened earlier in Turkey. After the founding of the republic, militant democracy became a substantial element in both state-building and policymaking through legislation on both constitutional and sub-constitutional levels throughout the reforms that took place starting from 1920s. Key elements of militant

[126] Bertil Emrah Oder, 'Turkey' in Markus Thiel (ed.) *The Militant Democracy Principle in Modern Democracies* (Ashgate 2009), 274.
[127] Soner Cagaptay, *Islam, Secularism and Nationalism in Modern Turkey Who is a Turk?* (Routledge 2006).
[128] Oder (n 126), 263.
[129] Ibid, 264.

democracy in Turkey include constitutional provisions allowing for the banning of political parties deemed to be anti-democratic or supportive of violence, and legal frameworks enabling the government to take swift action against threats to national security. The Turkish state has historically used these measures to suppress movements with supposedly extremist ideologies, particularly those advocating for separatism or Islamist agendas, and to support a certain way of national unity. Trying to break away from the Ottoman past in its first few decades, the new republic saw political Islam, often being expressed as the public visibility of Islam, as the main threat towards the newly founded democracy.

In the Turkish context, the principle of militant democracy has been implemented on different legal levels, both constitutional and sub-constitutional, and state actions to counter perceived threats to democracy, such as Islamist and Kurdish parties. Oder characterizes this defensive network as a 'militant substantive democracy', where an 'unalterable core' of the constitution aims to protect the democratic regime from its internal opponents". [130] Following the eternity clause, Article 5 of the 1982 Constitution puts the duty to safeguard many of the constitutional principles provided within the text of the Constitution on the State. However, unlike its interpretation of Article 2, the Court has interpreted this article in 1990s as emphasizing the need to maximize the individual self-development instead of defending the state. [131]

Eternity Clauses Throughout Time

Turkey's journey with eternity clauses started simplistically with Article 102/4 of its first Constitution of 1924 by stating that "The amendment or modification of the first article of this law, which states that the State is a Republic, cannot be proposed under any circumstances".[132]

[130] Ibid.
[131] See E.1990/15, K.1991/5, K.t. 28 February 1991, AYMKD 27, 171-172.
[132] Article 102, Turkish Constitution of 1924.

After the first military coup d'état in Turkey in 1960, the principle of the immutability of the republican form of government in the 1924 Constitution found its place in the new constitution. Article 9 of the 1961 Constitution enshrined the republican form of government as "The provision of the Constitution establishing the form of the state as a republic shall not be amended, nor shall any motion therefore be made".[133] With this constitution, the discussions on what exactly is included in this unamendability rule started as Article 9 did not explicitly call out which articles the entrenchment was covering. Article 1 titled "the Form of the State" enshrined the republican form of government as it read "the Turkish state is a Republic".[134]

What has been discussed is whether the following Article 2 titled "Characteristics of the Republic"[135] would be under the same level of protection. Article 2 of the 1961 Constitution stated that "the Turkish Republic is a nationalistic, democratic, secular and social state governed by the rule of law, based on human rights and fundamental tenets set forth in the preamble".[136] If the protection of the state's form includes its characteristics, then this unamendability extends to the "fundamental tenets" in the preamble. These include sovereignty, national and territorial unity, democracy, human rights, rule of law, and commitment to Atatürk's reforms and principles, aiming to create a legal framework supporting these ideals. The main idea, according to the preamble, was to create a legal framework to support the social framework enforcing these ideals.

As regards protection of these, before the 1971 amendment, the 1961 Turkish Constitution had no specific provision for reviewing the constitutionality of amendments. Until then, the Turkish Constitutional Court asserted its authority to review these amendments and evaluated their form and substance, and included the liberal constitutional principles laid out in the 1961 Constitution

[133] Ibid, Art. 9.
[134] Ibid, Article 1.
[135] Ibid, Article 2.
[136] Ibid, Article 3.

as being unalterable for the endurance of the republican regime, despite not being explicitly protected.[137][138]The amendment to Article 147 of the 1961 Turkish Constitution clarified that the Turkish Constitutional Court could review only the procedural regularity of constitutional amendments, not their substance. After that, the Court, in an activist manner, basing their arguments on the form, not the substance, held certain principles as "an integral part of the republican form of state (Article 1) which, pursuant to Article 9 of the 1961 Constitution, cannot be amended" and that the principle of irrevocability is a broader procedural component acting as a check on the parliament which can be reviewed.[139]

The 1982 Constitution

Compared to the 1961 Constitution, the 1982 Constitution following the military coup tells a different story on the balance between protectionism and liberalism. While the 1961 Constitution, following the 1960 military coup, was created to establish a more democratic order following the authoritarian practices of the previous decade and establish a robust system of checks and balances to prevent returning to one party rule, the 1982 Constitution following the 1980 military coup was influenced by the turbulent political climate of the 1970s marked by violent clashes between leftist and rightist groups. The military sought to stabilize the country by implementing stricter controls over political life, and the 1982 Constitution introduced more stringent measures to safeguard the state against perceived threats. The Constitution's militant framework starts with the "constitutional boundaries for ideological pluralism" set forth in the preamble "through both juridical and meta-juridical references" including "respect and absolute loyalty to the letter and spirit of the constitution that is in

[137] E. 1970/1, K.1970/31, K.t. 16 June 1970, AYMKD 8, 323.
[138] See E. 1970/1, K.1970/31, K.t. 16 June 1970, AYMKD 8, 323
[139] Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Bursa Ekin Press 2008), 43.

accordance with 'ideas, beliefs, and resolutions' within the preamble. [140]The meaning of these references become clearer with the presupposition of constitutionality of the modernization laws following the establishment of the new republic under Article 174 of the Constitution which provides "presupposed constitutionality" of eight laws adopted between 1924 and 1934, a part of Kemalist revolution discussed above.

Via 1995 and 2001 amendments, the Preamble, being a reference norm in constitutional review for interpretation, became less militant as certain references such as 'sacred Turkish state' and the 'legitimate' role of the military body in constitutional affairs were removed while paragraph five of the preamble, which read "no protection shall be afforded to thoughts and opinions contrary to Turkish national interests; the principle of existence of Turkey as an indivisible entity with its state and territory; Turkish historical and moral values; and the nationalism and principles, reforms and modernism of Atatürk" was amended to exclude 'thoughts and opinions' from the restriction by changing that part to 'activities' in line with Article 17 of the European Convention of Human Rights. [141] While political principles such as "peace at home, peace in the world" remain non-controversial, certain values, which Oder characterizes as "purely ideological references that reproduce the Turkish-Islamic genre of national conservative thought" represent the authoritarian or non-liberal approach the 1982 Constitution is often criticized for, which paradoxically rests on and contradicts the Kemalist modernization at the same time .[142] Shortly after the 1982 Constitution was enacted, the TCC vigorously upheld the ideological boundaries of its preamble. The Court treated the preamble as an *absolute imperative*, prioritizing national interests determined by the militarist drafters of the constitution above all else within the constitutional framework. It declared the principles in the

[140] Oder (n 126), 264.
[141] Ibid.
[142] Odor (n 126), 266. See also Bülent Tanör, *Iki Anayasa* (Beta 1986); Taha Parla, *Türkiye' nin Siyasal Rejimi: 1980-1989* (Iletisim 1993); Ergun Özbudun, *Türk Anayasa Hukuku* (Yetkin 2002).

preamble, including Atatürk's principles and reforms, irrevocable and prohibited any political party programs from contradicting these values. This interpretation strengthened the legal basis for dissolving the anti-laic Huzur Party, highlighting the presence of an official ideology within the 1982 Constitution that heavily limited political plurality and consolidated the "exclusive political game".[143]

The ideas in the preamble are made concrete in the first articles of the 1982 Constitution, which are protected by Article 4 being the eternity clause. Article 4 titled "Irrevocable Provisions" states that "The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed".[144] The main idea behind this new eternity clause originating from the 1961 Constitution was interpreted by the TCC in 1975 as a legal device to protect the pluralistic democratic order against parliamentary majorities that might initiate *unwanted* amendments. [145] The republican form of government is interpreted in two ways: the first assumption is that it protects national sovereignty in broadly, and the second being based on the official proclaiming of the republic back in 1923 arguing that it simply formalizes the form of government and prescribes a president for the new republic instead of the Ottoman sultan.[146] Looking at the TCC jurisprudence, especially starting from 1970s, it can be seen that the republican form of government was interpreted in relation to "Turkish modernism based on a secular state". [147] What the 1982 Constitution did was to enshrine these principles clearly with the eternity clause referencing Article 2, which reads "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based

[143] Ibid, 267.
[144] Article 4, Turkish Constitution of 1982.
[145] Taha Parla, *Türkiye'de Anayasalar - Tarih, Ideoloji, Rejim 1921-2016* (Metis Yayinlari) See also E. 1973/19, K. 1975/87, K.t. 15 April 1975, AYMKD 13, 428.
[146] Bülent Tanör, *Osmanli-Türk Anayasal Gelismeleri (*YKY 1996).
[147] Oder (n 126), 269.

on the fundamental tenets set forth in the preamble".[148] These principles are further protected by various statutes, such as the Turkish Criminal Code, the Turkish Civil Code, and Law on the Radio and Television Broadcasting, the Law on Political Parties, and regulate the sociopolitical stage in a detailed manner.

Specifically, the Turkish experience of militant secularism and the operationalization of eternity clauses illustrates a unique blend of state intervention and control over religion which "aims at establishing a state mandated society and enhancing sociocultural as well as ideological homogeneity". [149] Turkey's approach to secularism involves the state administration of religious affairs, particularly through state-salaried imams and compulsory Sunni Islam courses in public schools. These measures were implemented to mobilize and control religion, using it as a tool for national solidarity and countering leftist movements, rather than purely to promote secularism. The 1982 Constitution's eternity clauses are critical in understanding Turkey's approach to militant democracy and *laiklik*. Articles 2 and 4 explicitly declare the secular nature of the state as immutable, underscoring the intention to protect this principle from any ideological shift, whether through democratic processes or external pressures. This constitutional rigidity reflects the country's enduring commitment to *laiklik* as a foundational element of its national identity while on the other hand the approach to integrating religion into state affairs aligns with Gökalp's vision of using cultural elements, including religion, to strengthen national identity and solidarity. [150] Gökalp's ideas of Turkism, emphasizing national unity and cultural cohesion, played a significant role in shaping the policies embedded in the 1982 Constitution, reflecting a synthesis of secular governance, and controlled religious influence. The 1980 military coup marked a significant shift where the military regime further

[148] Article 2, Turkish Constitution of 1982.
[149] Oder (n 126), 267.
[150] Parla (n 145).

institutionalized religion within the state apparatus, using it to counter leftist ideologies and promote a certain Turkish identity.

In the first headscarf decision (*Headscarf I*) the Court, following a modernist approach, declared the law allowing headscarves in universities void and reinforced its interpretation of the constitution in harmony based on all principles shaping it in line with the paradigm of the previous constitution, including the secular state being "the essence of Turkish revolution and the republic".[151] This time, however, the 1982 Constitution shifted the understanding of the republican form of government being democratic in its substance based on Article 2 rather than one, showing a stricter interpretation of Article 1 in line with the amendments in 1970s limiting the Court's judicial activism as the Court, as explained above, denied interpreting the republican form of government *stricto sensu*.

Where the 'Wall of Separation' Stands

The protection of the secular state by the TCC can be summed up in four pillars as explained by Oder: "First, religion shall not be decisive and effective in state affairs. Second, religion is under protection of a constitutional guarantee, while the private and spiritual sphere of the right to religion is secured on the ground of non-discrimination. Third, in cases where religious activities are beyond the private and spiritual sphere of the individual and they affect the social sphere, the state may impose restrictions with the aim of protecting public order, public security, and the public interest. It may also prohibit the abuse and exploitation of religion. Fourth, as protector of public order and rights, the state has authority to control religious rights and freedoms".[152] Adding to this constitutional community approach against political Islam and

[151] Oder (n 126), 269.
[152] Ibid.

Kurdish separatism, the constitution also enshrines unitary state (and nation), official language, the capital being Ankara and sovereignty symbols such as the flag being irrevocable under Article 3, which was further elaborated in articles on prohibited languages and ordinary legislation. This summary shows the often-criticized restrictive approach of the 1982 Constitution vis-à-vis rights and freedoms, which is humorously put amongst lawyers as 'the restriction being the norm, and the freedom being the exception' within the wording of Article 13 on restriction of fundamental rights and freedoms that puts the principles mentioned in the Constitution as a baseline for general restriction.[153] Supporting headscarf bans, the Court has interpreted these limitations as not being "in conflict with the letter and spirit of the constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality" as regards Article 13, Article 14, and Article 24 Paragraph 5, which acts as a specific abuse clause limiting mainly manifestation of freedom of religion and conscience, with reference to modernization reforms protected under Article 174. In Headscarf II,[154] the TCC, strengthening its militant position on secularism, ruled on the constitutionality of the ban in higher education by means of interpretation of Headscarf I, despite the non-existence of another law in force as required by Article 13.

What is interesting about the enshrined 'secular republic' following the 2001 amendments (including Article 13) in Turkish constitutionalism is that it become as both a ground for restriction under Article 2, and a limitation for restriction under Article 13 to balance its militant characteristics which are supported by Article 5 and Article 14 (prohibiting misuse of rights). Despite these changes, the militant secularism trickled down to administrative courts when it came to ban on religious symbols, mainly being the headscarf in public spaces. Another act of balancing can be seen in Article 15 on suspension of rights in state of emergencies which limits

[153] Article 13, Turkish Constitution of 1982.
[154] See E.1990/36, K. 1991/8, K.t. 9 April 1991, AYMKD 27/1

suspension or derogation from rights and protects specific rights (the so-called 'core rights') under Article 15 Paragraph 2, although the emergency provisions are controversially declared immune from judicial review by the TCC.[155]

Another aspect of militant protection of the principles protected by the eternity clause is as regards constitutional deprivation of political parties from state funding, or as can be seen often in Turkish history, dissolution of them under Article 68 of the Constitution. What the Court tries to find out is that whether the party under review has become "a center for such unconstitutional conducts."[156] However, this has mainly caused the rise of 'back-up parties' in Turkey, for example, following the closure of Refah Party, Erdoğan, a former member, established the AKP in 2001, re-positioning as a more moderate Islamist alternative. [157]

In line with the democratization efforts in 2000s, the 2001 amendments clarified these conducts and limited judicial interpretation of the Court of the standards of the threat the party is presupposed to put on the democratic nature of the republic in which the Court focuses on the aim of the organization, after which it mainly ruled for dissolution.[158] The Party closure cases also show the militant stance of the Turkish state towards Kurdish separatism, political Islam, and leftist ideologies. Although sine 2008 amendments the Court protects freedom of expression when it comes to political parties unless they "directly establish a clear and present threat to democratic life", determining the survival path of the AKP under Erdoğan. [159]

The 2000s highlight the complex interplay between militant secularism and the AKP's rise, reflecting broader tensions in Turkish political life. Ever since, the AKP has been a feared, and in some circles 'belittled', political party representing the allegedly biggest sin in modern

[155] See E. 1990/25, k. 1991/1, K.t. 10 January 1991, AYMKD 27/1, 92-102.
[156] Yusuf Sevki Hakyemez, *Militan demokrasi anlayışı ve 1982 Anayasası* (Seçkin 2000), 243.
[157] Ali Carkoglu, 'Turkey's November 2002 Elections: A New Beginning? ' (2002) 6 (4) Middle East Review of International Affairs <https://ciaotest.cc.columbia.edu/olj/meria/caa02_01.pdf > accessed 25 March 2024.
[158] See Refah Partisi, E.1997/1, K.1998/1, K.t. 16 January 1998, AYMKD 34/2 and Fazilet Partisi, E.1992/2, K.2001/2, K.t. 22 June 2001, AYMKD 37/2.
[159] Oder (n 126), 306. See also HAK-PAR, E.2002/1, K.2008/1, 29 January 2008, RG Sy. 26923, 1 July 2008.

Turkish politics: Political Islam. In June 2008, the Turkish Constitutional Court invalidated constitutional amendments related to equality and the right to education. These amendments aimed to lift the headscarf ban in universities without explicitly mentioning it.[160] In its ruling, the Court declared the amendments unconstitutional as they violated the constitutional mandate for a secular state under Article 2 despite being limited by procedural review.[161] Strengthening the link between secularism and militant democracy in Turkey, the events in 2007-2008 that snowballed into one of the most remembered constitutional crises of Turkish political history show how the fear of a reverse revolution via "a hidden Islamic agenda" (by supporting liberalization of headscarf and freedom of expression in religious matters) was not accepted by the Court as being grounds for dissolution of AKP,[162] but rather deprivation of state aid in line with ECtHR standards despite the fact that the process included involvement by the military in which their *e-muhtıra* [163]categorized Islamist political actors as "enemies of the Republic of Turkey" and stated that they would carry out their legal duties to "protect the unchangeable characteristics of the Republic of Turkey" whenever necessary.

Today, while the party bans keep on acting as the Damocles' sword upon Kurdish parties, it is not necessarily so for organizations with an Islamist agenda. The militancy of the Turkish state mainly focused on the principles of unitary state and secular state, however, with the rise of AKP, the secular state discussions have evolved in a way to discuss the active involvement of Directorate of Religious Affairs in public life and other spheres of constitutional politics. [164]

[160] Yaniv Roznai, and Serkan Yolcu, 'An Unconstitutional Constitutional Amendment — The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10 (1) International Journal of Constitutional Law <10.1093/icon/mos007> accessed 24 April 2024. See also Turkish Constitutional Court decision, June 5, 2008, E. 2008/16; K. 2008/116.
[161] Turkish Constitutional Court, Decision June 5, 2008, E. 2008/16; K. 2008/116, Resmi Gazete [Official Gazette], October 22, 2008, No. 27032, pp. 109–152 ("Headscarf Decision of 2008").
[162] Turkish Constitutional Court, Decision 30.7.2008, K. 2008/1.
[163] BBC, 'EU warns Turkish army over vote' (BBC, 28 April 2007).
< http://news.bbc.co.uk/2/hi/europe/6602661.stm > accessed 28 April 2024.
[164] Başak Çalı, Esra Demir-Gürsel, 'Continuity and change in human rights appropriation: The case of Turkey' (2023) 21 (1) International Journal of Constitutional Law, <https://doi.org/10.1093/icon/moad024> accessed 28 April 2024.

This shift represents a blend of continuity and change, maintaining the national security emphasis while redefining the secular basis to a more religiously aligned approach.

Under the rule of AKP, spring of 2010 brought discussions in between branches of government- mainly the judiciary and the executive with the proposed amendments that would link the judiciary to the executive. Since 2010s, "constitutional amendments through referenda have become examples of the enhanced partisanship and elite conflict in Turkey", another legal explosion of "the long-running kulturkampf between the secularists and the Islamic revivalists".[165] What has been discussed lately have been the 2017 amendments, some scholars arguing it is against the republican form of state, some scholars arguing that it is not within the powers of the constituted power to bring about such substantial changes to the system.[166]

[165] Ersin Kalaycıoğlu, 'Political culture' in Metin Heper, and Sabri Sayari (eds.) *The Routledge Handbook of Modern Turkey* (Routledge, 2012).
[166] Maria Haimerl, 'The Turkish Constitutional Court under the Amended Turkish Constitution' (*VerfBlog*, 27 Janunary 2017) <https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended-turkish-constitution/> accessed 28 April 2024.

Conclusion

In a somewhat unrelated post, Pál Sonnevend depicts development of legal doctrines as "the achievement of brilliant minds who intend to leave a mark on the world with certain values and objectives in mind".[167] Looking at how it all functions, the law serves as a medium that stabilizes societal expectations and coordinates actions, while also embedding the norms and values derived from public discourse. In that sense, Roznai asserts that the unamendable provisions serve as the connections linking the past, present, and future of the country, encapsulating the "genetic code of the constitution" and thus building a new form of identity.[168]

Germany exemplifies the notion that eternity clauses indicate the constitution is more than a changeable set of rules; it is a document founded on enduring principles that command extensive and profound respect. In the context of operationalizing eternity clauses within militant democracies, the concept of human dignity, which Kant emphasized as the intrinsic worth of each individual, forms the ethical bedrock for the German constitution as in the first article of the Basic Law, reflecting the imperative that individuals must be treated as ends in themselves, not merely as means to an end. The FCC frequently invokes this principle in its jurisprudence, ensuring that all laws and state actions respect and protect individual dignity. This commitment is further entrenched by the eternity clause in Article 79/3, which prohibits amendments that would undermine core constitutional principles, including human dignity.

Judgments like *Elfes* and *Lüth* are often cited to show the activeness of the Federal Constitutional Court in the German constitutional system to protect its system of values with human dignity on top, while the party closure cases exemplify the militancy of the system vis-

[167] Pál Sonnevend, 'How Not to Become Hegemonial (*Verfassungsblog,* 13 October 2020) <https://verfassungsblog.de/how-not-to-become-hegemonial/ > accessed 23 June 2024.
[168] Yaniv Roznai, 'Unamendability and the Genetic Code of the Constitution' (2015) 27 NYU School of Law, Public Law & Legal Theory Research Paper Series 775.

à-vis certain ideologies. The overarching theme, although moderated, has been the tendency to view right-wing extremism as a national security threat that must be addressed through judicial intervention. On the other hand, as discussed above, the FCC's enforcement of eternity clauses through landmark decisions reflects a commitment to protecting fundamental values from political erosion while showing judicial restraint in practice, but still reminding its power to interfere. While this proactive judicial stance raises questions about the balance between judicial power and democratic legitimacy, it remains a cornerstone of Germany's constitutional framework. That way, Germany ensures that its legal framework remains steadfast in protecting the fundamental rights and dignity of individuals, thereby fortifying the democratic order against internal and external threats. A relevant discussion on how militant the Basic Law's framework shall be remains on the already softened party bans, as the rising far-right party Alternative for Germany (AfD) is seen by some as "too dangerous to be allowed to continue in German politics".[169]

For France, if one focuses on Article 89/5 in a narrow way, the republican form of government is not a principle that is seen to be at risk in any way for French democracy. While the left is seen to be more assimilated or integrated, the rise of the right-wing such as the Front Nationale (or the National Rally) that has been linked to certain anti-pluralistic ideologies in the last couple of years, albeit being comparatively moderated to its previous years, might make scholars question their assumption that this optimistic model measured to expectations. Recent developments in France and the public's discontent with conventional political parties have enhanced support for the National Rally, highlighting its increasing influence and potential effect on future elections. Further on the pluralism front, contemporary France faces challenges in balancing *laïcité* with religious freedoms, particularly concerning its growing Muslim

[169] 'Concentration camp museum director joins campaign to ban Germany's AfD' *Euronews* (18 June 2024) < https://www.euronews.com/my-europe/2024/06/18/concentration-camp-museum-director-joins-campaign-to-ban-germanys-afd> accessed 24 June 2024nai

population. Debates over the role of religion in public life have intensified, with critics arguing that militant *laïcité* disproportionately targets Muslim communities. The 2021 Law Reinforcing the Respect of the Principles of the Republic reinforcing *laïcité* has furthered these tensions, aiming to curb what the government views as radicalism and separatism, but facing criticism for potentially marginalizing religious minorities. However, considering the narrow and limited interpretation discussed above, accepting the requirements of a parliamentary democracy may qualify as democratic enough if one follows the traditional non-militant operationalization of eternity clauses in France. However, regarding the future for pluralism, one thing that's certain is, unlike Buis's expectations, assimilation of anti-democratic actors does not seem to be the first step towards their "extinction". [170]

The comparative analysis of secularism in France and Turkey reveals a shared political field despite their different majority religions. Both countries have navigated the relationship between state and religion through significant institutional changes aimed at maintaining secularism, often employing principles of militant democracy to protect their secular frameworks. In France, *laïcité* was formalized during the French Revolution and later solidified by the 1905 Law on the Separation of Churches and State, emphasizing state neutrality and the exclusion of religious instruction from public education. This approach included measures such as banning religious symbols in public schools to preserve secularism. Turkey, under Atatürk, instituted *laiklik* by abolishing the caliphate, creating the Directorate of Religious Affairs, and secularizing education, utilizing militant democracy tactics to curb the influence of religion in politics and public life up until the 2000s. Contemporary debates in both countries reflect ongoing tensions: France's ban on visible religious symbols and Turkey's increasing state involvement in religious affairs under the AKP, this time in the different direction. Despite these divergent paths, both nations demonstrate the importance of contextualizing secularism as a

[170] Buis (n 89), 187.

constitutional principle within local political, social, and cultural dynamics, challenging broad typologies and underscoring the need for a nuanced understanding of secularism's evolution across different contexts.

From a political point of view on the Turkish experience, militant democracy in Turkey has significantly exacerbated polarization across the country.[171] Initially framed as a center-periphery issue, the situation has evolved into a more complex dynamic involving religious identity. The 1982 Constitution introduced a unique interpretation of the Turkish-Islamic synthesis, characterized by heavy-handed suppression and intense top-down identity-building efforts, which are generally ineffective, and which were recently proven to be reversed under a different government. Scholars like Varol as well as Esen and Gümüşçü argue that the third wave autocrats like Erdoğan are characterized by stealth tactics which instrumentalize law to consolidate the one-man rule.[172]But other than the Islamist leaning tendencies, the AKP government, which is seen as the anti-thesis of the Kemalist CHP governments, primarily followed the same routes to entrench their rule, but went with a slightly different approach where they were able to rest their decisions on the will of the people against the old elite, a different form of polarization. Now, who is excluded from the national rights and freedoms discourse no longer include Sunni Muslims, but other sects, not even just other religious minorities, remain under pressure. Scholars now discuss whether this all links to a new identity-building project, where now the publicly-open-conservative-Sunni Muslims have replaced the secular-but-privately-Sunni Muslims as the exemplars of the ambition. As explained above, history shows us that constitutional principles and fundamental rights in Turkey have been interpreted through lenses prioritizing national security and secularism, which shows the

[171] Murat Somer, 'Turkey: The Slippery Slope from Reformist to Revolutionary Polarization and Democratic Breakdown' (2019) 681 The ANNALS of the American Academy of Political and Social Science 42 accessed 20 June 2024.
[172] Ozan Varol, 'Stealth Authoritarianism' (2014) 100 Iowa Law Review 1673; Berk Esen and Sebnem Gümüşçü, 'Rising competitive authoritarianism in Turkey' 37 (2016) Third World Quarterly 1581 accessed 20 June 2024.

underlying tendency for an authoritarian interpretation of fundamental rights throughout the existence of the Republic.

Summarizing the case law, what can be seen is that Germany performs substantive and procedural review while Turkey has occasionally done the same, despite being explicitly limited to procedural review by the text of the constitution by including substantive criteria within its procedural review. There are also textual differences between two countries as any change affecting the constitutional principles laid out in articles protected by the eternity clause is legally void in Germany while Turkey simply counts the principles as being unamendable themselves. While including a constitutional principle, the republican form of government, as an unamendable character of state, the *Conseil constitutionelle* refrained from any kind of substantive review and stuck to purely procedural review. When it comes to unconstitutional constitutional amendments, courts need clear guidance on the scope of their review powers to maintain a balance between upholding constitutional integrity and respecting democratic processes. This is exactly what the TCC got in between various controversial reforms and bans, not just on constitutional amendments but also on restriction of fundamental rights in protection of principles laid out in the preamble and the irrevocable articles. However, unlike the German Federal Constitution Court and the French *Conseil constitutionelle*, with the declining influence of the Turkish Constitutional Court[173], one cannot predict how the judicial interpretation on constitutional review will evolve in the upcoming years.

So, what can be understood from the experience of militant Turkish, and the not-so-militant French, operationalization of eternity clauses is that unamendability is a tricky game to play. While all three countries have listed certain characteristics as irrevocable, they all have different

[173] Bertil Emrah Oder, 'The Resistance-Deference Paradox' (*Verfassungsblog,* 28 September 2022) <https://verfassungsblog.de/the-resistance-deference-paradox/> accessed 17 June 2024; 'Turkish court refuses to release jailed MP despite top court ruling' (Reuters, 27 December 2023) <https://www.reuters.com/world/middle-east/turkish-court-refuses-release-jailed-mp-despite-top-court-ruling-2023-12-27/> accessed 20 June 2024.

histories of applying similar characteristics in various ways, which tend to fall in line with the politics of the period. As the main theme behind the concept of precommitment, Loewenstein, with militant democracy, aimed to prevent emotional government by fascists, which he saw as opposite of constitutional government. In protecting this sentiment, I agree with Suteu that "Certain types of eternity clauses are more amenable to militant democracy justifications than others, such as provisions that declare unamendable democracy, the multiparty system, or the rule of law". [174] Eternity clauses play a crucial role in defining the constitutional identity of a state, and their militant enforcement by courts significantly influences the political landscape. What is perhaps necessary is instead of curbing political participation of undesirable political actors in a militant way, focusing more on the pluralistic aspects of society to prevent backlash and protect the legitimacy of courts and keep legal certainty intact. In his paper on the third wave, Jakab makes this seem even too obvious as to how "alienation of values (in particular sexual, religious and national identities)" can destroy the trust of the public towards state elites and institutions [175].

The principles enshrined under eternity clauses fall perfectly in line with the analogy of "the blind men's elephant", both domestically, and certainly internationally. Societies tend to have cleavages which create different ideologies, different sensitivities, and certainly different points of view on how a functioning democracy should be. Based on the empirical findings discussed above, rather than seeing the other side as 'enemies of democracy', a balancing operationalization of eternity clauses can create a less polarized society, and a better functioning democracy without relying too much on militant democracy tools. The context behind militant democracy, and thus eternity clauses as one of its tools, shows that what is feared, no matter the

[174] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press, 2021)
[175] Andras Jakab, 'What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law' (2019) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-15, 5 accessed 20 May 2024.

worldview, is going back to repression, and 'repression' has various meanings for different sections of any non-homogenized nation, which tend to be the reality in the diverse world we live in. However, this does not mean that the author completely disregards the utility of the principle of militant democracy, what I argue is, instead, a softer and pluralistic application of the tools in hand, which is beyond comprehension of this thesis. The legitimacy and authority of constitutional courts hinge on maintaining this balance. Overzealous judicial intervention risks being perceived as undemocratic, while inadequate oversight can enable harmful amendments to go unchallenged.

Furthermore, the rising popularity of the doctrine of unconstitutional constitutional amendment shouldn't be seen as universally suitable for all constitutional states. While it might align with specific constitutional traditions and be integrated into their judicial practices, this decision rests with each state and its domestic actors, based on their own governance norms. Constitutional politics must be tailored to the unique social and political contexts of each polity. While due to some historical experiences giving such a vast power to judiciary can be unacceptable for the people, for another polity, "what first seems to be an undemocratic arrogation of power by courts is instead a justifiable judicial intervention to protect the terms of the original bargain approved by the people" [176]

Therefore, normative side of constitutional law can be, at its best, comparative, and definitely not universal. As we see how different actors within different jurisdictions interpret what some scholars assume to be "universal" principles behind democracy, or to be more specific liberal democracy, it becomes clear that history and context matters more than the black letter of law. So, constitutional actors must consider their jurisdiction's specific historical, political, and

[176] Richard Albert and Malkhaz Nakashidze and Tarık Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70 Hastings L.J. 639, 641 accessed 22 June 2024.

social contexts when deciding whether to adopt or reject substantive limitations to amendment power.

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