

Militant Democracy in Austria

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I. Introduction

As liberal democracy seems to be on the retreat across the globe,¹ an old topic of constitutional law has gained new currency. We are talking about *militant democracy* again, the idea that democracy can defend itself against its internal opponents – those who use democratic procedures and liberal individual rights to promote a decidedly antidemocratic, illiberal ideology. My dissertation,² on which this paper is based, examines the concept of militant democracy and its possible use in Austrian constitutional law. The question is the following: Is Austria a militant democracy? Which means to ask: Are there any instruments of democratic self-defence in Austrian law? Traditionally, this question has been answered in the negative. Austrian constitutional scholars have often emphasised that the democracy of the Austrian Federal Constitutional Act (*Bundes-Verfassungsgesetz*, hereinafter *B-VG*)³ is but a formal one, devoid of substantial tenets, and therefore open to its enemies, open to be legally abolished in favour of a dictatorship. They have contrasted Austria’s constitution with the German Basic Law (*Grundgesetz*) and its famous “eternity clause”, stipulating that some contents of the constitution, such as democracy and the rule of law, among others, cannot be abolished via constitutional amendment, rendering these principles, in fact, unalterable. But eternity clauses are only one of the many possible instruments of democratic self-defence. To ban certain anti-constitutional political parties is another famous example of militant democracy in practice. Here the stark contrast between Austria and Germany starts to wane, because Austria, too, knows party bans, quite a few of them indeed, as we will see.⁴ As they are not part of the core constitution, but are laid down in separate constitutional acts, they tend to be overlooked, even more so internationally.

¹ See, e.g., Yasha Mounk, *The People vs. Democracy. Why our Freedom Is in Danger and how to Save It* (Cambridge, MA: Harvard University Press, 2018); Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018); David Runciman, *How Democracy Ends* (London: Profile Books, 2018); Jan Zielonka, *Counter-Revolution. Liberal Europe in Retreat* (Oxford: Oxford University Press, 2018); Edward Luce, *The Retreat of Western Liberalism* (London: Brown, Little, 2017); Timothy Snyder, *On Tyranny. Twenty Lessons from the Twentieth Century* (New York: Tim Duggan Books, 2017).

² Ulrich Wagrandl, *Wehrhafte Demokratie in Österreich* (Dissertation, University of Vienna, 2018; soon to be published with Verlag Österreich).

³ All laws and court decisions quoted are accessible via the Federal Laws Information System, www.ris.bka.gv.at; cases of the European Commission and Court of Human Rights via www.hudoc.echr.coe.int.

⁴ On the quite different approaches to public law in Austria and Germany, see Andras Jakab, ‘Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany’, (2009) 58 *International and Comparative Law Quarterly* 933–955. In general, Austrian public law is characterized by a more formal style of reasoning that puts more emphasis on structure than on principle. This paper oscillates between the two.

This paper therefore seeks to reassess Austria's constitutional order in the light of militant democracy. It will turn out that Austria's democracy is much more militant than previously thought. In order to prove this point, we will proceed as follows: We must first establish the definition of militant democracy (II.) to get a clear picture of what we are looking for. The current scholarly debate on militant democracy shows a certain lack of theoretical reflection, so that some conceptual clarification is necessary. Then, we will have to ask what it is that militant democracy protects. I propose to pinpoint this by using the term "constitutional identity" (III.). After that, we plunge *in medias res* and start with exploring the central feature of Austrian militant democracy, which is the prohibition to abuse one's human rights for antidemocratic or illiberal purposes, as laid down in Article 17 of the European Convention on Human Rights, which forms an integral part of Austria's constitution (IV.). Equipped with this tool, we thereafter look for democracy-promoting and democracy-defending measures in Austrian law, which, when push comes to shove, would need to be justified by Article 17. They are structured by a logic of escalation, beginning with the less invasive instruments. The first of these is what can be called constitutional patriotism: Via education in school, but also through integration classes for migrants, the state promotes liberal democratic values, presumably with the aim to preventively instill democracy in the hearts and minds of its citizens (V.). If that does not suffice and democracy is endangered by political actors, militant democracy escalates and resorts to bans on political parties and political speech (VI.). Here the survey reveals that Austria has much more of these provisions than traditional scholarship would acknowledge, subverting the idea that Austria's democracy is open to all its enemies. The last instrument of militant democracy would be a constitutional eternity clause, legally hindering any constitutional move away from liberal democracy as it is now (VII.). It will be shown that an open constitution without eternity clause does not impede militant democracy, neither conceptually nor practically; but that in any case, Austria has such a clause, contrary to what is commonly assumed. As indicated, liberal democracy in Austria is quite militant, although not in the clear-cut and systematic fashion we are used to from the German Basic Law. In treating these points, the paper hopes to make an interesting contribution to the study of militant democracy, but also to Austrian constitutional law and to constitutional theory.

II. A brief theory of militant democracy

Militant democracy consists in restricting fundamental rights – those rights in particular that could be used to destroy liberal democracy from within. Freedom of speech, of association, and of assembly are vital to the democratic process, as it is only under

the protection of these rights that political goals can be meaningfully pursued. Unfortunately, these rights also lend themselves to anti-democratic and illiberal ends. Militant democracy denotes a form of democracy that is not willing to accept this possibility and that therefore uses preventive and repressive measures against those who attempt to use their rights in such a manner. That is why party bans and speech restrictions are a staple of militant democracy: With these tools, some rights are restricted for some people in order to protect the system of rights as a whole.

The story of militant democracy starts in the inter-war years and its implementation in many post-war constitutions may be seen as a direct result of the “Weimar trauma”. It is best illustrated by a quote from Nazi propagandist-in-chief, Joseph Goebbels:

This will always be one of the best jokes of democracy, that it gave its enemies the instruments with which it was destroyed. The leaders of the NSDAP, as parliamentarians, enjoyed immunity, remunerations, and free tickets. This way they were safe from prosecution, were able to say more than ordinary citizens and above all let the enemy bear the costs of their activities.⁵

This apparent paradox of democracy, that one can use it to destroy it did not go unnoticed by Goebbel’s contemporaries. It was famous German jurist Carl Schmitt who decried the “self-destructive neutrality” of the liberal *Rechtsstaat*, which supposedly is incapable of recognizing its own enemies and acting accordingly.⁶ But also liberal democracy’s adherents did grasp the problem. It was Karl Loewenstein, a public law professor just like Schmitt, but who had to flee the Nazis, who invented the term “militant democracy”. He reasoned much in the same vein as Schmitt when he claimed that pacifist democracy was doomed and needed to become militant, which for him includes the suspension of fundamental rights, emergency rule and even the expatriation of antidemocratic opposition leaders.⁷ Karl Popper, in 1945, influentially coined the *paradox of tolerance* in this respect: That unlimited tolerance leads to its own destruction, and that therefore we have no obligation to tolerate intolerance.⁸

⁵ Joseph Goebbels, *Der Angriff – Aufsätze aus der Kampfzeit* (Munich: Zentralverlag der NSDAP, 1935) p. 61 (my own translation).

⁶ Carl Schmitt, ‘Legalität und Legitimität’ in Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954. Materialien zu einer Verfassungslehre* (Berlin: Duncker und Humblot, 1958) p. 301; translation: *Legality and Legitimacy* (Durham/London: Duke University Press, 2004) pp. 47–58. See also Heiner Bielefeld, ‘Schmitt’s Critique of Liberalism’ in David Dyzenhaus (ed.), *Law as Politics. Carl Schmitt’s Critique of Liberalism* (Durham/London: Duke University Press, 1998) 23–36.

⁷ Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *American Political Science Review* 417–432; Karl Loewenstein, ‘Militant Democracy and Fundamental Rights II’ (1937) 31 *American Political Science Review* 638–658.

⁸ Karl Popper, *The Open Society and its Enemies, Volume I: The Spell of Plato* (London: George Routledge & Sons Ltd, 1945) p. 109, n. 4.

Our definition of militant democracy cannot be as ferocious and unscrupulous as Loewenstein's. But even in mitigating it, we cannot but acknowledge that militant democracy means the politicization of liberal democracy. Politicization in turn means that liberal democracy must become aware of its opponents and must thus become *political*. Militant democracy means to develop a political stance toward those who seek to overthrow liberal democracy, and to stop them while it is still possible. Militant democracy therefore means exclusion: It draws the boundary of the political community by outlawing certain political ideologies which henceforth are no legitimate contribution to the democratic process anymore. It is a limitation of political pluralism for the sake of safeguarding this very pluralism.

The question then arises how to deal with those people who adhere to ideologies inimical to liberal democracy. Since there is no elaborate theory of militant democracy yet, I can only offer some preliminary thoughts and must refer the reader to future research on the subject. Given that neither expatriation, nor banishment, nor disenfranchisement are options for a liberal democracy worthy of that name, what is the relation between supporters of the liberal democratic order and its opponents? Especially since they are and must remain *fellow citizens*? I propose to construe it as a genuinely *political*, not *moral* relation, which treats the opponents of liberal democracy not as *enemies*, with whom there is no political community but only latent civil war,⁹ but as *adversaries*,¹⁰ with whom there is a legitimate political struggle over the just constitution of state and society.

How to conceive of the opponents of liberal democracy not as *moral enemies*, but as *political adversaries*? It begins by acknowledging that liberal democracy, too, though being the form of government and of society we wish to uphold, comes with some losses. Some ideas of what defines a good life cannot be realized in a liberal democracy, and this causes distress for those who happen to cherish such ideas. This is the valuable insight of the philosophy of multiculturalism,¹¹ which we can redeploy for our purposes. As John Rawls, referring to Isaiah Berlin,¹² famously put it:

⁹ Carl Schmitt, *Der Begriff des Politischen* (Hamburg: Hanseatische Verlagsanstalt, 1933) pp. 27, 38; translation: *The Concept of the Political* (Chicago: University of Chicago Press, 1995) p. 26.

¹⁰ This distinction is borrowed from Chantal Mouffe, *The Democratic Paradox* (London/New York: Verso, 2000) p. 101; Chantal Mouffe, *On the Political* (London/ New York: Routledge, 2005) p. 20.

¹¹ See Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995) 152-172.

¹² Isaiah Berlin, 'The Pursuit of the Ideal' in Isaiah Berlin, *The Crooked Timber of Humanity. Chapters in the History of Ideas*, 4th edn., edited by Henry Hardy (Princeton, NJ/Oxford: Princeton University Press, 2013) 1-20, p. 14.

No society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular, and we may regret some of the inevitable effects of our culture and social structure. (...). But if a comprehensive conception of the good is unable to endure in a society securing the familiar equal basic liberties and mutual toleration, there is no way to preserve it consistent with democratic values.¹³

Rawls mostly has in mind some very traditional societies in America, such as the Amish. Within multiculturalism, debates range from the compulsory usage of French in Québec to Sharia courts in Western countries. What counts is the basic fact that liberal democracy excludes some ways of life, which either must try to accommodate themselves, or request accommodation from liberal democracy, or – and this is where militant democracy comes in – must abandon the existing order to fully flourish. These thoughts help us to see that those who oppose liberal democracy frequently do so because of sincere and deeply felt convictions which make up their *identity* (if one wants to use that word). That they cannot live according to their convictions is something we can sincerely lament, thereby acknowledging that militant democracy has “moral costs”, as Alexander Kirshner puts it.¹⁴

In the light of these costs, it is not warranted to unpack the cudgel of moral superiority against those who feel that liberal democracy is not for them. The relation towards them must not be a moral one, dealing in good versus evil, enlightenment against obscurantism, rationality against stupidity. Liberal democracy, although becoming militant, should withhold judgment in this respect. That is why it should confine itself to a political conception, shifting the rationale of exclusion from moral wickedness to incompatibility. Some conceptions of the good life are incompatible with liberal democracy, as we have observed, and militant democracy’s judgment should stop right here. This avoids militant democracy becoming a moral crusade and self-appointed defenders of democracy from mounting the high horse. Of course, to put morality aside for a moment must be justified on moral grounds: the respect liberal democracy owes to every human being forces us to face up to the fact that *moral* exclusion from public discourse inevitably looks *political* from the viewpoint of the excluded. Liberal democrats might say: “We exclude you because of your racist views”, but the racist might reply: “You exclude me because I am your *other*”.

In acknowledging this fraught relation, and in avoiding moral condemnation, we treat the opponents of liberal democracy not as enemies, but as adversaries. This makes it

¹³ John Rawls, *Political Liberalism* (New York NY/Chichester: Columbia University Press, 1993) p. 196.

¹⁴ Alexander Kirshner, *A Theory of Militant Democracy. The Ethics of Combatting Political Extremism* (New Haven, CT Yale: University Press, 2014) pp. 135-139.

much easier to recognize them as fellow citizens, which they are, and heavily limits the permissible scope of militant democracy's instruments. As they do not serve to lecture, let alone to humiliate people, but to protect the liberal democratic order from incompatible political ideas, these instruments can never go as far as to disenfranchise a whole class of people. This does not mean abandoning morality altogether. It only serves to confine militant democracy to the realm in which it was meant to operate in the first place, and this is the realm of politics, not morals.

Apart from that, the legitimacy of militant democracy stems from Europe's historical experience with totalitarianism. It can in fact be conceived of as a "rearward barrier"¹⁵ that obstructs any political change back to the system that liberal democracy has successfully replaced, which in practice can manifest itself in the ban of the former ruling party,¹⁶ as is the case in Austria. In addition, we should not forget that liberalism, of which liberal democracy is the offspring, has always been a fighting creed. The great liberal revolutions of 1776, 1789 and 1848 always were equally directed towards something and against something. Liberal democracy in part draws its legitimacy from having overcome certain other conceptions of government, such as absolutism, serfdom, religious intolerance. In this light, it is quite odd to expect that liberal democracy be open to those ideas it has vanquished. Rather, it sounds quite plausible that even in a liberal democracy, some things cannot be part of the democratic process.

III. What militant democracy protects: constitutional identity

Having established the notion of militant democracy as such, we must ask what this militant democracy protects. I propose to identify this object of protection (*Schutzobjekt* in German legalese) with the notion of constitutional identity. As will be shown, this constitutional identity is liberal democracy. Throughout the text, democracy has always been qualified by the addition of the word "liberal". In fact, I posit that militant democracy today only makes sense and only is legitimate if it is a militant *liberal* democracy. Liberal democracy denotes the association of two distinct ideas, popular sovereignty and individual autonomy. The first manifests itself in the democratic procedures, the second in all the safeguards that assure that democracy does not become the "tyranny of the majority".¹⁷ This works by guaranteeing fundamental rights and their effective protection by independent courts. Indeed, the liberal

¹⁵ Ulrich Preuß, *Legalität und Pluralismus. Beiträge zum Verfassungsrecht der Bundesrepublik Deutschland* (Frankfurt am Main: Suhrkamp, 1973) p. 163: 'Rückwärtssperre'.

¹⁶ Peter Niesen, 'Banning the Former Ruling Party' (2013) 19 *Constellations* 540–561.

¹⁷ Alexis de Tocqueville, *Democracy in America*, 3rd American edn., vol. I (New York, NY: George Adlard, 1839) pp. 267–8; Alexander Hamilton or James Madison, *Federalist No. 51*, available at http://avalon.law.yale.edu/18th_century/fed51.asp.

part of liberal democracy seems to be the more endangered nowadays, as the talk of “illiberal democracy” indicates.¹⁸

Constitutional identity is a concept we know from European Union law, where it denotes the core of national constitutions that do not cede to the primacy of Union law.¹⁹ For our purposes, it shall indicate something different, but similar: Constitutional identity is neither a new category of constitutional law, nor a legal stratum elevated even above the constitutions’ “fundamental principles” which could only be amended by referendum pursuant to Article 44 para. 3 B-VG. Rather, its purpose is to illustrate the common denominator of all the provisions that defend liberal democracy. It is a functional approach that tries to determine constitutional identity by looking at what is effectively protected by actual, operative provisions. In order to identify these provisions, we need an idea of what Austria’s constitutional identity could be.

Constitutional identity points at the difficulty of rendering this thought operational. Obviously, it oscillates between the abstract and the concrete on the one hand, and between the principles and their elaboration on the other. I claim that constitutional identity should be defined concretely, but only regarding the fundamentals. That means first: Militant democracy always protects a concrete political community that wants to safeguard their liberal democratic identity.²⁰ It does not protect universal values. This echoes the distinction between a political and a moral conception of militant democracy discussed in the previous section. Second, this liberal democratic identity has to be defined in broad strokes, covering only the basic tenets, without reference to particularities.

To that one might object that, in the interest of certainty, but also to forestall any possible abuse, and with reference to liberal broadmindedness, one should more precisely define constitutional identity in order to have a clear-cut criterion by which to judge. But the more details one adds to constitutional identity, the more elaborate it gets and the more it branches out, the more extensive it becomes. That would lead to the unintended consequence that even a quarrel about minor issues would already

¹⁸ See Fareed Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76/6 *Foreign Affairs* 22-43 and more recently, Renata Uitz, ‘Can You Tell When an Illiberal Democracy is in The Making? An Appeal to Comparative Constitutional Scholarship from Hungary’ (2015) 13 *International Journal of Constitutional Law* 279-300.

¹⁹ See for example Thomas Wischmeyer, ‘Nationale Identität und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven’ (2015) 140 *Archiv des öffentlichen Rechts* 415-460.

²⁰ This does not have to be a national community, though. See Ulrich Wagrandl, ‘Transnational Militant Democracy’ (2018) 7 *Global Constitutionalism* 143-172.

touch constitutional identity. Instead, constitutional identity should serve as an indicator as to when militant democracy should step in. Thus, it is not adequate to define its object of protection in all-too comprehensive terms. It is the last, not the first boundary of the democratic process.

That is why we cannot resort to the Austrian constitution's well-established "fundamental principles" to designate constitutional identity, because these principles are simply too specific. They cover some institutions and ideas that for Austria have historical significance or are otherwise justified by constitutional tradition; such as the principle that no referendum can bypass Parliament.²¹ To alter that principle would itself require a constitutional referendum, but in that case, would Austria have abandoned liberal democracy? Not at all. It is perfectly possible to have a liberal democracy in which referenda sometimes replace parliamentary legislation. This shows that liberal democracy is amenable to many different elaborations. Militant democracy must therefore only deal with the possibility that after a constitutional overhaul, Austria is no liberal democracy anymore. As long as constitutional amendments, even such far-reaching ones as to reintroduce the monarchy, for example, stay within the concept of liberal democracy, getting militant is not warranted.

How to determine constitutional identity, then? What we can deduce from the many provisions protecting democracy is a kind of negative definition. For a start, we can look at what the law does Austria *not* want to be. This way, as will be shown immediately, constitutional identity first is defined by the uncompromising rejection of national socialism. Because a rejection without grounds is void, constitutional identity must also include the reasons for this rejection, and they can only be the values of liberal democracy itself: the equal freedom of all human beings.

When we look at the very beginning of Austria's recent constitutional history, we must not go back to 1920 when the constitution, the B-VG, was first adopted - because it was abolished fourteen years later. It was reintroduced though in 1945, after a series of other legal moves by Austria having regained independence from Nazi Germany. Thus, the "historically first constitution" - the constitution that cannot be traced back to yet another legal act but came into force by revolution²² - is Austria's Declaration of Independence of 27th April 1945. The Declaration vested power in a Provisional Government, which in turn issued transitional legislation and finally reinstated the B-VG, which fully came into force in December 1945. It is this critical

²¹ See the decisions of the Constitutional Court regarding the 'principle of representative democracy': Collection of the Decisions of the Constitutional Court (*VISlg*) no. 13.500 and 16.241.

²² For this concept, see Hans Kelsen, *Reine Rechtslehre*, 2nd edn. (Vienna: Franz Deuticke, 1960) p. 303.

phase that we must look at to ascertain the constitutional rejection of national socialism.

Austria's very first constitutional steps are defined by their uncompromising resolve to liquidate all remnants of national socialism in Austria, especially in Austrian law. Thus, a separate declaration by the Provisional Government states in rather martial tones:

But those who, out of contempt for democracy and democratic freedoms, have established and maintained a regime of violence, of police spies, of persecution and oppression over our people; who have plunged the country in this monstrous war and have exposed it to devastation, and want to continue this exposure, shall not expect lenience. They shall be punished according to the same exceptional laws that they have forced upon others and that they now shall deem good for themselves.²³

Accordingly, subsequent legislation purges Austrian law of all provisions “that contradict the principles of a real democracy” or “contain typical ideas of national socialism”.²⁴ The provisional constitution contains the command to “interpret all provisions according to the principles of a democratic republic”.²⁵ The complete rejection of national socialism is made especially clear in one piece of legislation that continues to be relevant, applicable and readily applied to this day, and which forms the central provision of militant democracy in Austria: The so-called Prohibition Act (*Verbotsgesetz*). This act dissolves the NSDAP and its subsidiaries, makes national socialist association, propaganda and speech a severely punishable crime and contains a general clause stating that “it is prohibited for everybody (*jedermann*) to in any way (*irgendwie*) support the NSDAP or to pursue its goals.”²⁶ The Constitutional Court has given this provision a state-centred turn to the effect that it is now a constitutional principle that no legal act may seem as if supporting national socialism. That means that any form of legal recognition of national socialist activities, for example if a group of Nazis wants to register an association, is void *ex lege*. The agency involved with such a request simply has to reject it. In the Constitutional Court's words: “The uncompromising rejection of national socialism is a fundamental characteristic of the

²³ Government Declaration (*Regierungserklärung*), State Law Gazette no. 3/1945 (my own translation).

²⁴ Sec. 1 Legal Transition Act (*Rechts-Überleitungsgesetz*), State Law Gazette no. 6/1945 (my own translation).

²⁵ Article 1 para. 2 of the Provisional Constitution (*Vorläufige Verfassung*), State Law Gazette no. 5/1945 (my own translation).

²⁶ Sec. 3 Prohibition Act (*Verbotsgesetz*), State Law Gazette no. 13/1945 as amended by Federal Law Gazette no. 148/1992 (my own translation).

republic. Every state action without exception has to respect that prohibition. No agency may act in a way that would imply that the State supported national socialism”.²⁷

As indicated, the rejection of national socialism must be underpinned by certain values that justify this rejection. For our purposes, these values can be only those of liberal democracy itself, most basically the equal freedom of all human beings. Austria’s constitutional identity therefore must rest on both these elements: the rejection of national socialism plus liberal democracy.

There can be no reasonable doubt that Austria is in fact a liberal democracy. That the word “democracy” is always used without the addition of “liberal” is no evidence to the contrary, but rather a sign that liberalism and democracy have become so inseparable in our thinking, that we often say “democracy” when we mean fundamental rights, the separation of powers, the rule of law, and so on, which actually are “liberal” principles.²⁸ It is the historically unique conjunction of the two – popular sovereignty and individual autonomy – that defines liberal democracy. Austria too may be considered as such. Liberalism came first, mainly with the constitutionalist reforms of 1867, introducing fundamental rights, an independent judiciary, and other elements of the Rule of Law. Austria’s “Bill of Rights” actually dates back to this time: The Basic Law on the General Rights of the Citizens (*Staatsgrundgesetz über die Allgemeinen Rechte der Staatsbürger*) remains in force unto this day.²⁹ The democratic part of liberal democracy arguably came later, as universal suffrage (without qualifications of property or gender) was only introduced in 1918. Those two elements, liberalism and democracy, are interrelated. It is commonplace, but true nonetheless, that a democracy, that is collective self-government, only works if there are robust protections of free speech, association and assembly, as only those rights guarantee the political pluralism without which there is no democracy. Conversely, democratic self-government enables us to experience human rights as autonomously given, and not as timeless truths that are forced upon us – this is Habermas’ famous *co-originality* of democracy and human rights thesis.³⁰ Their *co-dependency* is reflected in the

²⁷ Collection of the Decisions of the Constitutional Court (*VSIG*) no. 10.705 (my own translation).

²⁸ See Fareed Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad*, 2nd edn. (New York, NY: W.W. Norton, 2007) p. 20.

²⁹ Imperial Law Gazette no. 142/1867, as amended by Federal Law Gazette no. 684/1988.

³⁰ Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp, 1992) p. 153.

preamble to the European Convention on Human Rights, which reads: “those fundamental freedoms which are the foundation of justice and peace in the world [...] are best maintained [...] by an effective political democracy”.

IV. The prohibition of fundamental rights abuse

It is time to turn to the heart of the matter and start with militant democracy’s instrument of choice: The prohibition to abuse one’s fundamental rights for purposes they were not intended to. This flows from Article 17 of the European Convention on Human Rights of 1950 (hereinafter: the Convention) which enjoys the rank of constitutional law in Austria and is directly applicable there as an additional Bill of Rights that complements the first one, from 1867. It is therefore not only a tool of European, but also of Austrian militant democracy. Article 17 reads:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The so-called abuse clause tackles a paradox in liberal democracy and resolves it in a certain way. As indicated before, liberal democracy might suffer from being open to its enemies, and human rights in fact lend themselves to all kinds of purposes, those as well that are incompatible with liberal democracy. Freedom of speech technically allows one to argue against free speech, the freedom of association technically covers the founding of parties which object to multiparty democracy. Fundamental rights may this way be turned against themselves. The Convention, drawing on Europe’s experience in totalitarianism, is not willing to accept this paradox any longer. That is the rationale of Article 17: it removes fundamental rights protection for every activity that is directed against the idea of fundamental rights, which also means in our context, as explained above, liberal democracy as such.

As the doctrine and case law of fundamental rights abuse are far from consistent, it is proposed here to elucidate that paradoxical concept by using the idea of *performative self-contradiction*, as we know it from speech act theory.³¹ Performative self-contradictions occur when an utterance undercuts or compromises the very preconditions

³¹ See John L. Austin, *How to Do Things With Words*, 2nd edn. (Cambridge, MA: Harvard University Press, 1975) 48–51; Daniel Vanderveken, ‘Illocutionary Logic and Self-Defeating Speech Acts’, in John Searle, Ferenc Kiefer and Manfred Bierwisch (eds.), *Speech Act Theory and Pragmatics* (Dordrecht/Boston, MA/London: D. Reidel Publishing, 1980) 247–272; Martin Jay, ‘The Debate over Performative Contradiction: Habermas vs. the Post-Structuralists’, in Axel Honneth, Thomas McCarthy, Claus Offe and Albrecht Wellmer (eds.), *Zwischenbetrachtungen im Prozeß der Aufklärung: Jürgen Habermas zum 60. Geburtstag* (Frankfurt am Main: Suhrkamp, 1989) 171–189;

on which it rests, and therefore destroys its meaning. When someone says: I claim that I do not exist, the very act of uttering it proves the claim wrong, as to exist is the precondition for uttering sentences. I now propose to borrow this concept for our purposes. It is a rather rough transplant, and I cannot claim sufficient expertise to see whether linguistics would agree with me. But the idea of performative self-contradiction serves as a helpful tool, as an illustrative image that elucidates an otherwise mysterious phenomenon. It seems that we can reconstruct the instances of fundamental rights abuse as performative self-contradictions. When someone invokes the right to free speech in order to give a talk against the very idea of free speech, have they not undercut the very foundation of their action? The contradictoriness captured by the concept of performative self-contradiction looks like the inconsistency people move themselves into when they claim the protection of liberal democracy in order to do away with it. I therefore think we can use the idea of performative self-contradiction as a lens through which to screen the case law that has been associated with Article 17.

Before turning to case law, however, it is necessary to further inquire into what the abuse clause actually does. Does it remove some conduct from the very scope of a right, or is it only an additional limitation that justifies state interference? And does it cover every right of the convention? The text of Article 17, which clearly is a rule of interpretation, indicates that Article 17 restricts the scope of a right and thus removes protection for abusive behaviour from the outset, therefore is no further limitation clause. This result has met fierce rejection from some scholars,³² but it is the only possible reading of Article 17. Fears that this invites arbitrary overreach and massively weakens human rights protection can be countered. First, the idea of performative self-contradiction offers a clear-cut tool to assess if certain conduct looks abusive under Article 17. Second, we must ask ourselves if the abuse clause really covers every right of the Convention. Fortunately, that is not so. The provision speaks of “activities” that are “aimed at” the destruction of fundamental rights. Thus, we have two elements that human rights abuse must show to count as such: There must be factual activities, and they must have an aim, a purpose. Considering the host of human rights in the Convention, we see that most of them do not lend themselves to activities, let

Matthias Kettner, ‘Ansatz zu einer Taxonomie performativer Selbstwidersprüche’, in Andreas Dorschel, Matthias Kettner, Wolfgang Kuhlmann and Marcel Niquet (eds.), *Transzendentalpragmatik. Ein Symposium für Karl-Otto Apel* (Frankfurt am Main: Suhrkamp, 1993) 187–237; Petra Hedberg, ‘What are Performative Self-Contradictions?’, (2005) 6 *Sats – Nordic Journal of Philosophy* 66–91.

³² See for example Hannes Cannie and Dirk Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Convention of Human Rights: An Added Value for Democracy and Human Rights Protection?’ (2011) 29 *Netherlands Quarterly of Human Rights* 54–83, pp. 69–70; Paolo Lobba, ‘Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime’, (2015) 26 *European Journal of International Law* 237–253, p. 239.

alone purposeful activities. The right to life, for example, covers one's unharmed existence, but not specific conduct amounting to activities in the sense of Article 17. Likewise, the right to a fair trial does not protect any specific behaviour on the part of the individual but contains positive obligations of the state. These rights equally cannot be exercised purposefully: One simply cannot exercise one's right to life in order to pursue a goal, because this right is exercised simply by being. Likewise, one cannot be free from slavery, or from torture, with the purpose to do something. One simply lives freely and without disturbance. That means that these rights are not open to abuse and therefore cannot be revoked via Article 17. The only rights that lend themselves to abuse are those that cover purposeful activity. These are quite few, albeit those that are vital for democracy: The freedom of religion, of expression, of association and of assembly as well as the right to educate one's child. These rights are capable of being abused and therefore fall under Article 17. Every other right is not and can never be curtailed by the abuse clause.

Let us now apply these thoughts to actual cases. One can roughly divide the case law on Article 17 into two categories: First there is *political* human rights abuse, marked by underlying ideologies that simply are incompatible with liberal democracy. They are what Article 17 was intended for, and so we have communists, national socialists and radical Islamists, all trying to claim human rights protection for their political activity, when in fact their desired model of state and society does not contain any. The second category can be called *exclusionary* human rights abuse. It covers cases where the protagonists did not seek to change society altogether, but to deny some of their fellow human beings the human rights protection that is due to them. These cases deal primarily with hate speech and Holocaust denial.

The most instructive case on political human rights abuse is one in which the court did not apply Article 17. But as we will see, the Court's findings are in perfect harmony with the idea of it, and in a subsequent case, the same findings have finally been made under the right header.³³ Of course, this is about the (in)famous *Refah Partisi* case. The Refah Partisi, or Welfare Party, was an Islamist political party in Turkey which was banned and dissolved by the Constitutional Court. The party advocated, among other things, the introduction of Sharia Law, which would have resulted in a systematic discrimination of women and non-Muslims in private and public life. The Court's Grand Chamber found clear words for these designs:

Sharia is incompatible with the fundamental values of democracy, as set forth in the Convention. [...] Principles such as pluralism in the political sphere or

³³ ECtHR, *Kasymakhunov and Saybatalov v Russia*, App. No. 26261/05 and 26377/06, 14 March 2013, at §§ 102-114.

the constant evolution of public freedoms have no place in it. [...] It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.³⁴

While this looks like a description of a performative self-contradiction ("it is difficult...while at the same time"), what follows now is the corresponding prohibition of such contradictions:

a political party whose leaders incite to violence or put forward a policy which fails to respect democracy, or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy, cannot lay claim to the Convention's protections against penalties imposed on those grounds.³⁵

Refah moved itself into a performative self-contradiction: It clearly campaigned for a move away from liberal democracy, while at the same time it wanted to enjoy the fundamental rights protection such a liberal democracy offers; a protection that Refah would have done away with, had it gained power. The right in question was freedom of association as enshrined in Article 11 of the Convention, which is an abusable right, as it covers purposeful activities. Therefore, the Court should have applied Article 17, even more so because it would not have made a difference: The Court all the same rejected Refah's application on the grounds that the Turkish state's interference with its right to association was justified.

Refah is an example of the political variety of human rights abuse; hate speech is an example of its exclusionary form. As mentioned, the conduct grouped in this category does not aim to replace liberal democracy altogether, but to exclude some people of human rights protection, in the case of hate speech, frequently by advocating their removal from the country. Almost invariably, this is motivated by the assumption of a fundamental *inequality* of human beings, and as such not less directed against liberal democracy. In one of the first cases concerning hate speech, *Glimmerveen and Hagenbeek*, the applicants argued for the deportation of all non-white persons from the Netherlands.³⁶ The European Commission on Human Rights (the Court's precursor) noted that such statements were removed from the scope of free speech by Article

³⁴ ECtHR (Grand Chamber), *Refah Partisi and others v Turkey*, App. No. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, at § 50.

³⁵ ECtHR (Grand Chamber), *Refah Partisi*, at § 98.

³⁶ EComHR, *Glimmerveen and Hagenbeek v The Netherlands*, App. No. 8348/78 and 8406/78, 11 October 1979.

17. Not only because the Netherlands would, in the course of implementing this proposal, violate many human rights, such as the prohibition of collective expulsion, but probably also the prohibition of inhuman treatment, the right to private and family life, and so on. Also because, as the Commission emphasized, a society based on racial segregation is incompatible with the Convention. In many subsequent judgments, the Court confirmed this very strict approach to hate speech,³⁷ even if it claims to be religiously motivated.³⁸

Article 17 thus has a wide range of possible applications.³⁹ They share a common denominator: their incompatibility with liberal democracy. Human rights must not be used to subvert the idea of human rights from within. With this in mind, we can now turn to the more concrete realisations of militant democracy in Austrian law, which, as explained, would have to be justified on the basis of Article 17 if the need arises.

V. Constitutional patriotism

One rather less invasive instrument to preventively defend democracy that could turn out to be the most effective one is civic education. In fact, I propose to conceive of civic education as the first level of militant democracy, in the sense that it is a purely preventive effort of the state to instil liberal democratic values in its citizens, in order that more aggressive instruments of militant democracy, such as party bans, are hopefully never needed. For our purpose, the notion of constitutional patriotism shall serve as a tool to single out those measures and instruments in Austrian law that are designed to promote the values of liberal democracy. It will turn out that more often

³⁷ ECtHR, *Norwood v United Kingdom*, App. No. 21131/03, 16 November 2004; (Grand Chamber), *Jersild v Denmark*, App. No. 15890/89, 23 September 1994; *Pavel Ivanov v Russia*, App. No. 35222/04, 20 February 2007 at § 1; *Molnar v Romania*, App. No. 16637/06, 23 October 2012, at §§ 8, 23.

³⁸ Most recently in ECtHR, *Fouad Belkacem v Belgium*, App. No. 34367/14, 27 June 2017 at §§ 33–37; *M'Bala M'Bala v France*, App. No. 25239/13, 20 October 2015, at §§ 39–42; *Hizb ut-Tahrir and others v Germany*, App. No. 31098/08, 12 June 2012, at §§ 73, 78.

³⁹ Its application to Holocaust denial could not be treated here, but see the leading case ECtHR, *Garaudy v France*, App. No. 65831/01, 24 June 2003 and the myriad of other judgments in this respect: EComHR, *T v Belgium*, App. No. 9777/82, 14 July 1983; *Lowes v UK*, App. No. 13214/87, 9 December 1988; *F.P. v Germany*, App. No. 19459/92, 29 March 1993; *Walendy v Germany*, App. No. 21128/92, 11 January 1995; *Ochensberger v Austria*, App. No. 21318/93, 2 September 1994; *Nationaldemokratische Partei Deutschlands v Germany*, App. No. 25992/94, 29 November 1995; *Rebhandl v Austria*, App. No. 24398/94, 16 January 1996; *Remer v Germany*, App. No. 25096/94, 6 September 1995; *Honsik v Austria*, App. No. 25062/94, 18 October 1995; *D.I. v Germany*, App. No. 26551/95, 26 June 1996; *Marais v France*, App. No. 31159/96, 26 June 1996; ECtHR, *Schimaneck v Austria*, App. No. 32307/96, 1 February 2000; EComHR, *Hennicke v Germany*, App. No. 34889/97, 21 May 1997; ECtHR, *Nachtmann v Austria*, App. No. 36773/97, 9 September 1998; *Witzsch v Germany*, App. No. 41448/98, 20 April 1999; *Witzsch v Germany*, App. No. 7485/03, 13 December 2005.

than not, these measures seem to cling to a rather universalist notion of liberal democracy and are not occupied with spreading typically Austrian national values, whatever they may be.

Constitutional patriotism is the notion that as a modern, pluralistic society that contains a great variety of cultures, religions, ethnicities, and ways of life, *belonging to the state* should not be founded upon one of these particular identities, but has to be based on an overarching political culture that allows each and everyone to identify with this community. This political culture manifests itself in the liberal and democratic principles of the constitution, which deserve allegiance because they enable a peaceful living together that gives everyone the opportunity to pursue their preferred way of life.⁴⁰ Having identified Austria's constitutional identity with liberal democracy, it makes sense to look for measures of constitutional patriotism in Austrian law. As it turns out, there are three: Civic education in schools, integration classes for migrants, and, generally underrated, political aesthetics such as monuments, rituals, public holidays, official commemorations, and so on. Their common denominator is that they indicate which values the state wishes to promote, and which it discourages. This has recently been described as the state's "expressive capacity" which it uses for "democratic persuasion".⁴¹ The constitutional lawyer's task will be to investigate whether these measures are actually compatible with liberal democracy, or whether they amount to indoctrination.

Civic education in schools is mandated by Article 14 para. 5a of the Constitution, which conveniently also includes a list of those values the state wishes to be promoted in this context. The rather verbose provision reads as follows. Note that almost everything in it complies with a universal notion of liberal democracy, and that nearly

⁴⁰ See, most instructively, Jan-Werner Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007); Jan-Werner Müller, 'Is Europe Converging on Constitutional Patriotism (And If So: Is It Justified?)', (2007) 10 *Critical Review of International Social and Political Philosophy* 377-387; Jan-Werner Müller, 'A General Theory of Constitutional Patriotism', (2008) 6 *International Journal of Constitutional Law* 72-95; *Habermas*, 'Faktizität und Geltung' 659; Cecile Laborde, 'From Constitutional to Civic Patriotism', (2002) 32 *British Journal of Political Science* 591-612; Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State', in Amy Gutmann (ed.), *Multiculturalism. Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) 107-148, p. 134; Melissa Hayward, 'Democracy's Identity Problem: Is „Constitutional Patriotism“ the Answer?' (2007) 14 *Constellations* 182-196; Ciaran Cronin, 'Democracy and Collective Identity: In Defense of Constitutional Patriotism', (2003) 11 *European Journal of Philosophy* 1-28; Anna Stilz, *Liberal Loyalty. Freedom, Obligation and the State* (Princeton, NJ: Princeton University Press, 2009) 154-165.

⁴¹ Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton, NJ: Princeton University Press, 2012) pp. 29, 42.

nothing in it makes reference to the Austrian nation, the text thus being open to a constitutional-patriotic reading:

Democracy, humanity, solidarity, peace and justice as well as openness and tolerance towards people are the elementary values of the school, based on which it secures for the whole population, independent from origin, social situation and financial background a maximum level of education, permanently safeguarding and developing optimal quality. In a partnership-like cooperation between pupils, parents and teachers, children and young people are to be allowed the optimal intellectual, mental and physical development to let them become healthy, self-confident, happy, performance-oriented, dutiful, talented and creative humans capable to take over responsibility for themselves, their fellow human beings, the environment and following generations, oriented in social, religious, and moral values. Young people shall in accordance with their development and educational course be led to independent judgement and social understanding, be open to political, religious and ideological thinking of others and become capable of participating in the cultural and economic life of Austria, Europe and the world and of participating in the common tasks of mankind, in love for freedom and peace.⁴²

While the provision is in most parts aspirational, and does not lend itself to direct application, its general idea, the promotion of liberal democratic values, is taken up by implementing legislation and schools in Austria indeed teach liberal democracy. The question then arises if this is compatible with the parents' right to educate their child according to their own convictions, as laid down in Article 2 of the First Additional Protocol to the Convention, and furthermore, if this respects the child's freedom of belief, as found in Article 9 of the Convention (belief being the secular counterpart to religion, in German: *Weltanschauung*). One may find it hard to see the problem – is civic education not a generally praised and recommended remedy for the current crisis of democracy? As follows from the political conception of militant democracy laid out above, we must bear in mind that liberal democracy is but one ideology among many, and that, as the debate around multiculturalism shows, some people do not want their child to be exposed to what they consider a godforsaken, decadent, and individualistic aberration. Those people might then feel that their children are being indoctrinated; indoctrination though is forbidden by the right to education and the freedom of belief. Liberal democracy, if it does not want to become illiberal in the course of promoting itself, must take this concern seriously.

Concerning the parent's right to educate their child according to their own convictions, Strasbourg jurisprudence often emphasizes the prohibition of indoctrination,

⁴² Article 14 para. 5a B-VG, Federal Law Gazette no. 1/1920 as amended by Federal Law Gazette I no. 22/2018 (my own translation).

but rarely finds any,⁴³ except when compulsory religious classes are at stake, where the Convention requires an opt-out possibility for non-believers.⁴⁴ The right to educate one's child in any case does not include those ideologies which would fall under Article 17. The court explained that

Having regard to the Convention as a whole, including Article 17, the expression "philosophical convictions" in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a "democratic society" and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education.⁴⁵

This statement is instructive, but not sufficient for our inquiry, because one may object to civic education classes on other grounds than on ideologies incompatible with the convention. It is therefore worthwhile to elucidate further the concept of indoctrination. It cannot simply mean a state-led inculcation of values. Otherwise, any form of education could be challenged under the Convention, because no education is neutral. Indoctrination must therefore be understood in a narrower sense. Considering that it is the parent's right to educate their child, and not the child's freedom of belief that is at stake, indoctrination must be directed against the parent's function as educators. It is therefore not content-specific but defined by such acts that would effectively thwart or counteract the parents' education, so that their child is no longer open to their efforts (less than children and teenagers usually are). This approach requires intentionality (with regard to "correcting" parental education) on the part of the state. It is therefore no indoctrination if schoolchildren, being confronted with other opinions than their parents', autonomously choose to reject their parents' ideas. As long as liberal democracy is taught with enough room to discuss and to dissent, it is no indoctrination that the state takes its own side in schools and promotes its own values. This finding also holds true for the child's own right to freedom of belief. Even when the beliefs at issue do not fall under Article 17, schoolchildren cannot challenge their being educated in the principles of liberal democracy. As the Convention requires education to be tolerant, pluralistic and open-minded, one might even say that only an education in liberal democracy conforms to these principles.

⁴³ The leading cases being ECtHR, *Kjeldsen, Busk Madsen and Pedersen v Denmark*, App. Nos. 5095/71, 5920/71 and 5926/72, 7 December 1976; ECtHR *Belgian Language Case*, App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968.

⁴⁴ EGMR *Folgero v Norway*, App. No. 15472/02, 29 June 2007; although one cannot opt out from having to see a crucifix in school; see ECtHR (Grand Chamber) *Lautsi and others v Italy*, App. No. 30814/06, 18 March 2011.

⁴⁵ ECtHR *Campbell and Cosans v United Kingdom*, App. No. 7511/76 and 7743/76, 25 February 1982, at § 36.

The second tool of constitutional patriotism is the civic integration of migrants, on the one hand by civic integration classes, on the other by requiring a citizenship oath upon naturalisation:

I vow to be a loyal citizen of the Republic of Austria, to faithfully obey her laws and to refrain from everything that could be detrimental to the interests and reputation of the Republic and commit myself to the fundamental values of a European democratic state and its society.⁴⁶

Again, it is striking that where one would expect epic declarations of national pride, there is nothing but constitutional patriotism, that means, no particular Austrian identity, but common European values. Again, we must ask ourselves if the liberal democratic state has a right to expect such declarations of allegiance. Is liberal democracy not defined by the separation of morality and legality, so that it does not matter why someone obeys the laws, as long as she does it? Why would the state now require allegiance, which means nothing else but inner acceptance, that is a moral motive of obedience? This conundrum has famously been expressed by the so-called Böckenförde dictum:

The liberal, secular state lives by prerequisites which it cannot guarantee itself. This is the great endeavour it has undertaken for the sake of liberty. As a liberal state it can only endure if the freedom it bestows on its citizens takes some regulation from the interior, both from a 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 coercion and authoritative command. In doing so, it would surrender its liberal character and fall back, in a secular manner, into the claim of totality of which it led out of, in the confessional civil wars.⁴⁷

If we take that seriously, then citizenship oaths are doomed, especially if they are thought of as an instrument of militant democracy. Because either the oath really seeks to alter one's inner conscience and disposition towards the state – then the oath is blatantly illiberal. Or, the oath is conceived of as a simple formality that one must recite and never think about ever after – then the oath does not perform what it was intended for and could be abolished without loss.⁴⁸ Taken seriously, the oath would seem to infringe upon the freedom of conscience of Article 9 of the Convention, as

⁴⁶ Sec. 21 Citizenship Act (*Staatsbürgerschaftsgesetz*), Federal Law Gazette no. 311/1985 as amended by Federal Law Gazette I no. 56/2018 (my own translation).

⁴⁷ Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht* (Frankfurt am Main: Suhrkamp, 1976) p. 60 (my own translation).

⁴⁸ See also Liav Orgad, Liberalism, Allegiance, and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy, (2014) 17 *Canadian Journal of Law & Jurisprudence* 99-126.

it requires one to transform legal obligations towards the state into moral ones. As to the content of this oath, the values of liberal democracy, we encounter the same problem as with civic education: What about the freedom of belief, where belief means non-religious convictions, of which liberal democracy is only one? The Convention knows a *negative religious liberty* that protects one from being coerced into religious activities: It is “a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”⁴⁹ It seems that we can expand this thought into a *negative freedom of belief* that would protect one from having to profess political values.

The only way to rescue citizenship oaths is to grasp their instrumental, symbolic value. Taken seriously, they are illiberal, not taken seriously, they are useless. A synthesis of these opposing conceptions could lie in acknowledging their importance as a political symbol that serves to promote unity and cohesion (in constitutional-patriotic terms, of course). In order not to become illiberal, participants and oath-takers should develop a somewhat ironical, distanced attitude towards it: one that recognizes the instrumental value of such rituals while not forgetting that in a liberal democracy, the oath cannot be taken as seriously as it seems. The oath must become a spectacle.

VI. Party and propaganda bans

When the measures of constitutional patriotism do not suffice, when the state fails in fostering allegiance to liberal democracy, and antidemocratic or illiberal political actors have stepped onto the stage, militant democracy escalates to its second level. This level is defined by a severe restriction of political pluralism, consisting in the ban and dissolution of political parties and the prohibition of certain kinds of political speech. These instruments constitute the core of traditional militant democracy. As explained above, Article 17 of the Convention covers and allows such moves, but it does not mandate them. More than any other part of militant democracy, party and propaganda bans are a question of political prudence. To use them often is not a good sign. Austria has many more of such instruments than has been acknowledged so far. Taken together, they prove quite clearly that militant democracy exists in Austria.

The law of party and propaganda bans in Austria follows no clear-cut pattern but is a rather haphazard assemblage of provisions. This is because other than the German Basic Law, which was designed after World War II with militant democracy in mind, the Austrian Constitution originally did not know this category. Thus, the task was

⁴⁹ ECtHR *Kokkinakis v Greece*, App. No. 14307/88, 25 May 1993, at § 31.

first and foremost to identify and to collect all the provisions fitting under this header and to systematically present them for the first time.

The most characteristic feature of Austrian militant democracy is that party bans cannot be issued by a court but are purely legislative. This way, the legislature assumes, figuratively, the role of a court in this respect, as it is the only forum where party bans can be discussed. But what is more, party bans need to be enacted by a piece of *constitutional* legislation. Only a two thirds majority can therefore ban a political party. This follows from Austria's very liberal law on political parties, which contains only minimum requirements. For example, the party must have a members' assembly. It is not required, however, that this assembly have any powers. To found a party, all that is needed is a registration with the Ministry of the Interior, which is not even empowered to review or to reject those registrations. Section 1 para. 3 of the law governing political parties, the Party Act, itself a provision of constitutional rank, contains the following clause:

The founding of political parties is free [of restrictions], insofar nothing to the contrary is provided by federal constitutional law. Their activities must not be the object of restrictions by special provisions [of ordinary legislation].⁵⁰

That means that the activity of parties can only be restricted via constitutional legislation, which in turn makes the constitutional legislator the court of first and final instance on the question of which parties to ban. It is true that the wording of this provision does not point right at this conclusion. But it has been drafted regarding some party bans already in place, dating, as will surprise no one, from the aftermath of national socialism.

The Prohibition Act, or *Verbotsgesetz*, that has been mentioned in section III., is such a piece of constitutional legislation. It contains two party bans. One is individual: Section 1 bans and dissolves the NSDAP. The other is general and perpetual: Section 3 prohibits any national socialist activity, which the Constitutional Court construed as invalidating any legal act that would amount to recognizing national socialism. This is effectively a continuing party ban for any nazi group. But what happens now if a nazi group files a registration with the Ministry of the Interior, wanting to be recognized as a political party? As explained, their application cannot be rejected. The Constitutional Court's solution was ingenuous.⁵¹ In giving Section 3 of the Prohibition Act the said effect, nullifying every legal act with national socialist content, the nazi group's

⁵⁰ Party Act (*Parteiengesetz*), Federal Law Gazette I no. 56/2012 as amended by Federal Law Gazette I no. 25/2018 (my own translation and additions).

⁵¹ VfSlg 10.705, as cited above.

application turns out to be void. The Ministry does not have to reject it, because it was never validly filed. Legally, national socialist acts are void and therefore legally do not exist. This solution pertains to every act with national socialist content, such as contracts, the registration of associations, applications to hold a public assembly, applications to use public space for campaigning, and, most importantly, applications to stand for elections. By virtue of Section 3 Prohibition Act, the electoral commissions have to reject any candidacy with national socialist background. These single acts of rejection can be challenged in court, and that is why the Constitutional Court after all gets a say in the matter. But in general, it is not for the Court to decide which party to ban. That is up to the legislature. The Court only has to ensure that the statute banning a party is applied correctly. A legislative party ban of this sort might also be called “ideology ban”, as the law does not target specified, individual parties, but all groupings that show the traits of national socialism.

Another rather overlooked treasure trove for party bans is Article 9 of the Austrian State Treaty of 1955. It first provides for the prohibition of national socialism, an obligation carried out by the *Verbotsgesetz*. But it has a second paragraph that is of relevance here. Again, it is a provision of constitutional rank⁵² and therefore a permissible restriction on the activities of political parties pursuant to Section 1 para. 3 of the Party Act.

Austria undertakes to dissolve all Fascist-type organizations existing on its territory, political, military and paramilitary, and likewise any other organizations carrying on activities hostile to any United Nation or which intend to deprive the people of their democratic rights.⁵³

This clause interestingly also appears in the Paris Peace Treaties of 1947 with Romania, Bulgaria, Hungary, and Finland.⁵⁴ There seem to be three different party bans: first, fascist-type organisations; second, organizations that are hostile to a member state of the United Nations; and third, most importantly, antidemocratic organisations. As there are special provisions for national socialism in para. 1 of Article 9, the fascism of para. 2 must mean something else. Taking into account the historical background of 1955, the term fascism therefore probably designates its emanations other than national socialism, meaning Italian fascism first and foremost. Hostility towards

⁵² According to Article II no. 4, Federal Law Gazette no. 59/1964.

⁵³ Austrian State Treaty (*Staatsvertrag von Wien*), Federal Law Gazette no. 152/1955 (authentic English version).

⁵⁴ Compare the texts at the Australasian Legal Information Institute, <http://www.austlii.edu.au/au/other/dfat/treaties/1948/2.html>.

a member of the United Nations would probably encompass any kind of war propaganda, and could nowadays be put to use against groups that call for the violent annihilation of Israel (being one of the few examples of ongoing, large-scale calls to hostilities).⁵⁵ The prohibition of those organisations which want to deprive the population of their democratic rights – antidemocratic organisations – works as a catch-all clause that targets any group whose political ideology does not conform to democracy. But which are the democratic rights in question? It helps to read the clause together with Article 8 of the State Treaty, which is entitled “Democratic Institutions” and provides for regular and secret elections as well as the equal accessibility of public office, which surely are “democratic rights”. The question is if the standard, liberal human rights also fall under this category. The respective Article of the State Treaty, Article 6, does not have constitutional rank. It can therefore not be part of the reasoning, as parties can only be restricted by constitutional provisions. A party directed against the idea of human rights could therefore not be prohibited by Article 9 para 2, but a party objecting to universal suffrage, be it on aristocratic (property requirements), islamist (no female suffrage) or anarchist (antiparliamentarian) terms, could.

In the defence of democracy, the state does not only ban parties, however. An equally powerful instrument is the prohibition of certain kind of political speech, of political propaganda. Again, the measures of this kind are primarily directed against national socialism. Section 3d of the Prohibition Act contains severe penalties (imprisonment from five up to twenty years!) for those who incite to national socialist acts or glorify national socialism in public or via the media. Section 3h also prohibits to deny, ridicule, or justify the Holocaust (imprisonment from one up to twenty years!). But there are two less severe provisions which aim at keeping national socialist propaganda at bay. One is the Emblem Act, prohibiting the use of national socialist insignia in public, and threatening a fine of 4000 Euros.⁵⁶ The other is a provision hidden in the Introductory Act to the Administrative Procedures Acts, fining those who spread national socialist ideas “in the sense of the Prohibition Act” with 2180 Euros.⁵⁷ These

⁵⁵ This is an interesting parallel to the German Basic Law, which in Article 9 para. 2 provides for the dissolution of associations that are directed against the idea of peace and mutual understanding in the world. Accordingly, an association calling for *Jihad* against Israel was banned, which was confirmed by the European Court of Human Rights; see ECtHR, *Hizb ut-Tahrir and others v Germany*, App. No. 31098/08, 12 June 2012. A similar ban on organizations in Austria, as provided by Article 9 para. 2 of the State Treaty, would therefore not meet objections in Strasbourg.

⁵⁶ Emblem Act (*Abzeichengesetz*), Federal Law Gazette no. 84/1960, as amended by Federal Law Gazette I no. 113/2012.

⁵⁷ Article III para. 1 no. 4 Introductory Act to the Administrative Procedures Acts (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*), Federal Law Gazette no. I 87/2008 as amended by Federal Law Gazette I no. 57/2018.

laws serve to get a hold on minor offenders who do not deserve the severity of the Prohibition Act.

These bans on political propaganda have recently got new siblings. In analogy to the Emblem Act, symbols of the so-called Islamic State and Al Qaida have been prohibited by the Symbols Act of 2014.⁵⁸ An amendment to the ban on hate speech now forbids to spread, with the intention to endorse or to justify, ideas or theories that support, encourage or incite to hatred or to violence against one of the groups that are protected by hate speech legislation, such groups that are defined by religion, or colour of skin, nationality, ethnicity, or – for our political approach most significant – by their belief (*Weltanschauung*).⁵⁹ As some political ideologies are defined by or at least contain the hatred against other groups, especially other political groups (Antifa against fascists, communists against the bourgeoisie), this provision could turn out to be too sweeping.

Party and propaganda bans have until now not been at the centre of scholarly attention in Austria. This lack of exposure may be the reason why some of these provisions seem too broad, too severe, or too dated. Except for some, they have never had to endure scrutiny. It does not help that most of the legislation in question is part of the constitution. This way, it cannot be measured against constitutional rights, because there can be no unconstitutional constitutional law. What remains then is international oversight. As shown above, Article 17 of the Convention grants considerable leeway in dealing with the opponents of liberal democracy. It does not say, however, that we must fully exhaust it.

VII. A constitutional eternity clause?

We have reached the last step of militant democracy: What if civic education, party bans, and prohibitions on political speech have all failed and the opponents of liberal democracy now have a majority in Parliament? Are they allowed to abolish the very liberal democracy that was their vehicle? To ask this question is to ask whether there is a constitutional eternity clause. Austrian constitutional scholarship has at first

⁵⁸ Symbols Act (*Symbolegesetz*), Federal Law Gazette I no. 103/2014.

⁵⁹ Section 283 para. 4 Penal Code (*Strafgesetzbuch*), Federal Law Gazette no. 60/1974 as amended by Federal Law Gazette I no. 154/2015.

largely ignored it,⁶⁰ than staunchly denied it,⁶¹ and those who dissented⁶² were not believed.⁶³ In this section, I will try to prove the existence of an eternity clause in a way that satisfies the formalist Austrian approach to public law.

Constitutional eternity clauses are not as contradictory as they seem. They simply are an exception to the general rule that constitutions are amendable. An eternity clause removes certain contents from the amendment procedure, resulting in a situation where no organ of the state has the power to change those contents. Eternity clauses therefore are a problem of competencies. It should be borne in mind, though, that eternity clauses cannot stop a revolution. A political movement that has captured the government and that is sure of popular support will do away with the constitution in any case. Eternity clauses therefore rather serve to lift the veil of these pretensions and to call them what they are: unconstitutional. Such clauses prove their value more as political arguments than as effective legal provisions.

We must first tackle a theoretical issue. Is militant democracy altogether conceivable under a constitution *without* an eternity clause? If the traditional view is true and the

⁶⁰ See Hans Kelsen, Georg Froehlich and Adolf Merkl, *Die Bundesverfassung vom 1. Oktober 1920* (Vienna: Franz Deuticke, 1922) p. 121; see also the reference to Article 73 para. 3 of the German Basic Law in Ludwig Adamovich and Hans Spanner, *Handbuch des österreichischen Verfassungsrechts*, 5th edition (Vienna: Springer, 1969) p. 103 n. 1; the mere allusion in Robert Walter, *Bundesverfassungsrecht* (Vienna: Manz, 1972) p. 106 n. 10.

⁶¹ Heinz Mayer, Gabriele Kucsko-Stadlmayer and Karl Stöger, *Grundriss des Bundesverfassungsrechts*, 11th edn., (Vienna: Manz, 2015) at no. 146; Ludwig Adamovich, Bernd-Christian Funk, Gerhart Holzinger and Stefan Frank, *Österreichisches Staatsrecht*, 2nd edn., vol. I (Vienna: Springer, 2011) at no. 10.003; Walter Berka, *Verfassungsrecht*, 6th edn. (Vienna: Verlag Österreich, 2016) at no. 118; Heinz-Peter Rill and Heinz Schäffer, 'Article 1 B-VG', in Benjamin Kneih and Georg Liebhaber (eds.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Vienna: Verlag Österreich, 2001) at nos. 22, 34; Markus Vasek, *Unabänderliches Verfassungsrecht und Revisionsschranken in der österreichischen Bundesverfassung: Dargestellt am demokratischen, republikanischen und bundesstaatlichen Prinzip* (Vienna: Verlag Österreich, 2012) pp.78, 94; Heinz Mayer, 'Gibt es unabänderliches Verfassungsrecht?' In Metin Akyürek (ed.) *Staat und Recht in europäischer Perspektive: Festschrift Heinz Schäffer* (Vienna: Manz, 2006) 474-484; Clemens Jabloner, 'Verfassungsrechtliche Grundordnung und historisch erste Verfassung', in Thomas Olechowski and Klaus Zeleny (eds.), *Clemens Jabloner: Methodenreinheit und Erkenntnisvielfalt. Aufsätze zur Rechtstheorie, Rechtsdogmatik und Rechtsgeschichte* (Vienna: Manz, 2013) 129-150.

⁶² Peter Pernthaler and Fried Esterbauer, 'Die Entstehung des österreichischen Bundesstaates als geschichtlicher Vorgang und staatsrechtliches Problem', (1973) *Montfort* 128-156; Peter Pernthaler, *Der Verfassungskern: Gesamtänderung und Durchbrechung der Verfassung im Lichte der Theorie, Rechtsprechung und europäischen Verfassungskultur* (Vienna: Manz, 1998) pp.78-82; Siegbert Morscher, 'Über unabänderliches Verfassungsrecht' in Karl Weber (ed.), *Vom Verfassungsstaat am Scheideweg: Festschrift für Peter Pernthaler* (Vienna: Springer, 2005) 239-254; Peter Oberndorfer, 'Article 1 B-VG' in Karl Korinek and Michael Holoubek, *Österreichisches Bundesverfassungsrecht: Kommentar* (Vienna: Springer, 1999) at no. 10; Andreas Janko, *Gesamtänderung der Bundesverfassung* (Vienna: Verlag Österreich, 2004) pp. 153 et seq.

⁶³ See note 61.

Austrian Constitution is alterable in every way, would that mean the end for the instruments of militant democracy we expounded so far? Indeed, it seems highly problematic to forbid quite a few political parties and ideologies while at the same time maintaining that the Constitution is, theoretically, open to their proposals. If the Constitution is open to any kind of political ambition, must not the proponents of these have unhindered access to constitutional revision? If the Constitution allows for the reintroduction of national socialism (by abolishing the Prohibition Act), why put those who want that in jail? Again, the inevitable Carl Schmitt acts as chief prosecutor. Decrying the neutral conception of the liberal *Rechtsstaat*, and the “formalistic” view of constitutional alterability, he writes:

If this is the prevailing [...] opinion, then there are no anticonstitutional goals. Even the most revolutionary, subversive, inimical [...] goal is permitted and must not be robbed of the possibility to legally acquire power. Every restriction or hindrance of this chance would be unconstitutional.⁶⁴

That means that if the Constitution provides for the possibility of amendments, the state is not allowed to block the way. It has to grant every political party the same chance to legally come to power and to legally alter or abolish the constitution.

To prefer the existing form of government, or the respective ruling parties, be it via subsidiaries, [...] by discriminating when using public broadcasters, official journals, when exercising film censorship, [...] prohibitions to publicly assemble for extreme parties, the distinction between legal and revolutionary parties according to their program, all of these are [...] crass and provocative breaches of the constitution.⁶⁵

But is Carl Schmitt right with this indictment? He might actually have made a mistake in carrying the “formality” and “neutrality” he criticizes in the Weimar constitution not far enough. Schmitt obviously seems to think that a formal and neutral constitutional revision clause that is open for every political program contains something like a positive obligation of the state to ensure equal entry. In other words: A revision clause that does not declare some contents eternal, but that leaves everything to the political struggle, confers a right upon the political actors to have a chance to use it. But understood this way, the revision clause would not be neutral and formalistic at all. In fact, it would have quite a material content, namely the principle of equal opportunity for political parties. If we take neutrality and formality seriously, as Schmitt

⁶⁴ Schmitt, ‘Legalität’, p. 302 (my own translation).

⁶⁵ Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: Mohr Siebeck, 1931) p. 113 (my own translation).

did not, then we cannot deduce from it any principle whatsoever. A neutral and formal revision clause does not contain any obligation or right. It is just a vehicle for constitutional transformation. It does not tell us who gets to use this vehicle. Therefore, measures of militant democracy are not incompatible with a neutral and formal conception of constitutional alterability, simply, because the Constitution, or its revision clause, is mute on the subject.

In any case, it is now time to ask again: Does the Austrian Constitution know an eternity clause, preferably one that protects liberal democracy? The answer is yes, but it is an eternity clause of a hitherto unknown kind. It is path dependent, therefore relative, and negative in scope. We must come back to Section 3 of the Prohibition Act, which, as explained, prohibits and nullifies every legal act with national socialist content. I now claim that this provision is self-reflexive. It also prevents its own abolition, when such an abolition would be motivated by national socialist ideology.

Imagine that national socialists have legally obtained a two thirds majority in parliament and now strive to abolish the Prohibition Act so that they can finally tear off their masks. As they are national socialists, and probably aim at transforming Austria into a national socialist state, the motivation behind abolishing the Prohibition Act is also a national socialist one. This is precisely the behaviour proscribed by the Prohibition Act. It therefore nullifies every legal move the national socialists would have to take in Parliament to get their legislation through. One must bear in mind that the Prohibition Act covers every legal act, which is much more than just laws. Introducing a bill and voting in Parliament are such legal acts as well, just as signing off and promulgating legislation. All of that would be void if carried out with national socialist intention. But what if the national socialists abolish the Prohibition Act retroactively, so that it legally never covered their acts? Then its nullifying force would disappear, would it not, because it legally never existed? Now we are in the depths of legal theory. There is a convincing claim that a law must always conform to the conditions valid at the time of its creation. A constitutional law that was not created in the prescribed manner cannot heal itself of that flaw by just retroactively changing the conditions. What counts is what happens in real-time. Imagine a constitutional law that falls short of the required two thirds majority. Would it be valid if this very law retroactively reduced the quorum so as to pass? That would be preposterous. Because it did not meet the quorum, it never became a constitutional law in the first place. It thus never had the power to change the constitution. The situation is the same with the Prohibition Act. It is a general precondition of every legal act that they are not national socialist. A law that does not meet this condition is void, thus does not have the force of law, and thus cannot change the law, not even retroactively.

This admittedly complex deduction⁶⁶ effectively leads to a relative and negative eternity clause. It is relative, or path dependent, because it insulates the Prohibition Act only from abolition for national socialist reasons. The Prohibition Act can be abolished on all sorts of other grounds. If a whim of liberal broadmindedness befell the legislature and it abolished the Prohibition Act because it appears to contradict freedom of speech, that would be no national socialist motive and therefore perfectly valid. Thus, the eternity is only relative, relative to certain grounds. It is also a negative eternity, as indicated, because it only tells us what not to do. It does not protect certain material values of the constitution. It only obstructs the way to constitutional change for certain people, national socialists.

VIII. Conclusion and outlook

This survey over the instruments of democratic self-defence allows for the conclusion that Austria is indeed a militant democracy. It preventively spreads the idea of liberal democracy. It bans certain parties and certain political propaganda. And it even has a kind of constitutional eternity clause. Democracy in Austria is not as neutral, open and tolerant as the scholarly discourse has commonly assumed. It is not neutral, but partial as the liberal democratic state takes its own side. It is not open, but rather closed, as some political ambitions are radically excluded from the democratic process. It is not tolerant, but intolerant of its opponents, as they see their liberal democratic rights severely curtailed when they try to use them against the very order that guarantees these rights.

The defence of liberal democracy is an ongoing task. The concept of militant democracy, being born out of the trauma of Weimar Germany, and targeting clear-cut parties and ideologies, may not always be suited to tackle current threats to our liberal and democratic constitutional identity. Indeed, the populist surge the Western world is witnessing today cannot really be stopped by party bans. As dangerous as these developments are, the right instruments to counter them have yet to be found. But militant democracy at least reassures us that liberal democracy is worth defending and that it need not remain passive in the face of its opponents. This study thus has shown what instruments we already have at our disposal and laid the groundwork for further reflection. The puzzling relation (or absence of it) between the supporters of liberal democracy and its opponents lies at the heart of the problem. As it somewhat mirrors the socio-economic divide between urban and rural areas, between people with and without university education, between cosmopolitans and patriots, between believers and the religiously indifferent, between people with promising jobs and

⁶⁶ (Evidence that this paper belongs to Austrian public law with its penchant for structural reasoning.)

those threatened by automation, to keep our political community liberal and democratic is a task for all of us, and will be an enterprise for years to come.

Bibliography

Ludwig Adamovich and Hans Spanner, *Handbuch des österreichischen Verfassungsrechts*, 5th edition (Vienna: Springer, 1969).

Ludwig Adamovich, Bernd-Christian Funk, Gerhart Holzinger and Stefan Frank, *Österreichisches Staatsrecht*, 2nd edn., vol. I (Vienna: Springer, 2011).

John L. Austin, *How to Do Things With Words*, 2nd edn. (Cambridge, MA: Harvard University Press, 1975).

Walter Berka, *Verfassungsrecht*, 6th edn. (Vienna: Verlag Österreich, 2016).

Isaiah Berlin, 'The Pursuit of the Ideal' in Isaiah Berlin, *The Crooked Timber of Humanity. Chapters in the History of Ideas*, 4th edn., edited by Henry Hardy (Princeton, NJ/Oxford: Princeton University Press, 2013) 1–20.

Heiner Bielefeld, 'Schmitt's Critique of Liberalism' in David Dyzenhaus (ed.), *Law as Politics. Carl Schmitt's Critique of Liberalism* (Durham/London: Duke University Press, 1998) 23–36.

Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht* (Frankfurt am Main: Suhrkamp, 1976).

Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton, NJ: Princeton University Press, 2012).

Hannes Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Convention of Human Rights: An Added Value for Democracy and Human Rights Protection?' (2011) 29 *Netherlands Quarterly of Human Rights* 54–83.

Ciaran Cronin, 'Democracy and Collective Identity: In Defense of Constitutional Patriotism', (2003) 11 *European Journal of Philosophy* 1–28.

Joseph Goebbels, *Der Angriff - Aufsätze aus der Kampfzeit* (Munich: Zentralverlag der NSDAP, 1935).

Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp, 1992).

Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State', in Amy Gutmann (ed.), *Multiculturalism. Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) 107–148.

Alexander Hamilton or James Madison, *Federalist No. 51*, available at http://avalon.law.yale.edu/18th_century/fed51.asp.

Melissa Hayward, 'Democracy's Identity Problem: Is "Constitutional Patriotism" the Answer?' (2007) 14 *Constellations* 182–196.

Petra Hedberg, 'What are Performative Self-Contradictions?', (2005) 6 *Sats - Nordic Journal of Philosophy* 66–91.

Clemens Jabloner, 'Verfassungsrechtliche Grundordnung und historisch erste Verfassung', in Thomas Olechowski and Klaus Zeleny (eds.), *Clemens Jabloner: Methodenreinheit und Erkenntnisvielfalt. Aufsätze zur Rechtstheorie, Rechtsdogmatik und Rechtsgeschichte* (Vienna: Manz, 2013) 129–150.

Andras Jakab, 'Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany', (2009) 58 *International and Comparative Law Quarterly* 933–955.

Andreas Janko, *Gesamtänderung der Bundesverfassung* (Vienna: Verlag Österreich, 2004).

Martin Jay, 'The Debate over Performative Contradiction: Habermas vs. the Post-Structuralists', in Axel Honneth, Thomas McCarthy, Claus Offe and Albrecht Wellmer (eds.), *Zwischenbetrachtungen im Prozeß der Aufklärung: Jürgen Habermas zum 60. Geburtstag* (Frankfurt am Main: Suhrkamp, 1989) 171–189.

Hans Kelsen, Georg Froehlich and Adolf Merkl, *Die Bundesverfassung vom 1. Oktober 1920* (Vienna: Franz Deuticke, 1922).

Hans Kelsen, *Reine Rechtslehre*, 2nd edn. (Vienna: Franz Deuticke, 1960).

Matthias Kettner, 'Ansatz zu einer Taxonomie performativer Selbstwidersprüche', in Andreas Dorschel, Matthias Kettner, Wolfgang Kuhlmann and Marcel Niquet (eds.), *Transzendentalpragmatik. Ein Symposium für Karl-Otto Apel* (Frankfurt am Main: Suhrkamp, 1993) 187–237.

Alexander Kirshner, *A Theory of Militant Democracy. The Ethics of Combatting Political Extremism* (New Haven, CT Yale: University Press, 2014).

Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995).

Cecile Laborde, 'From Constitutional to Civic Patriotism', (2002) 32 *British Journal of Political Science* 591-612.

Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

Paolo Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime', (2015) 26 *European Journal of International Law* 237-253.

Karl Loewenstein, 'Militant Democracy and Fundamental Rights I' (1937) 31 *American Political Science Review* 417-432.

Karl Loewenstein, 'Militant Democracy and Fundamental Rights II' (1937) 31 *American Political Science Review* 638-658.

Edward Luce, *The Retreat of Western Liberalism* (London: Brown, Little, 2017).

Heinz Mayer, 'Gibt es unabänderliches Verfassungsrecht?' In Metin Akyürek (ed.) *Staat und Recht in europäischer Perspektive: Festschrift Heinz Schäffer* (Vienna: Manz, 2006) 474-484.

Heinz Mayer, Gabriele Kucsko-Stadlmayer and Karl Stöger, *Grundriss des Bundesverfassungsrechts*, 11th edn., (Vienna: Manz, 2015).

Siegbert Morscher, 'Über unabänderliches Verfassungsrecht' in Karl Weber (ed.), *Vom Verfassungsstaat am Scheideweg: Festschrift für Peter Pernthaler* (Vienna: Springer, 2005) 239-254.

Chantal Mouffe, *The Democratic Paradox* (London/New York: Verso, 2000).

Chantal Mouffe, *On the Political* (London/ New York: Routledge, 2005).

Yasha Mounk, *The People vs. Democracy. Why our Freedom Is in Danger and how to Save It* (Cambridge, MA: Harvard University Press, 2018).

Jan-Werner Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007).

Jan-Werner Müller, 'Is Europe Converging on Constitutional Patriotism (And If So: Is It Justified?)', (2007) 10 *Critical Review of International Social and Political Philosophy* 377-387.

Jan-Werner Müller, 'A General Theory of Constitutional Patriotism', (2008) 6 *International Journal of Constitutional Law* 72-95.

Peter Niesen, 'Banning the Former Ruling Party' (2013) 19 *Constellations* 540-561.

Peter Oberndorfer, 'Article 1 B-VG' in Karl Korinek and Michael Holoubek, *Österreichisches Bundesverfassungsrecht: Kommentar* (Vienna: Springer, 1999).

Liav Orgad, Liberalism, Allegiance, and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy, (2014) 17 *Canadian Journal of Law & Jurisprudence* 99–126.

Peter Pernthaler and Fried Esterbauer, ‘Die Entstehung des österreichischen Bundesstaates als geschichtlicher Vorgang und staats-theoretisches Problem’, (1973) *Monfort* 128-156.

Peter Pernthaler, *Der Verfassungskern: Gesamtänderung und Durchbrechung der Verfassung im Lichte der Theorie, Rechtsprechung und europäischen Verfassungskultur* (Vienna: Manz, 1998).

Karl Popper, *The Open Society and its Enemies, Volume I: The Spell of Plato* (London: George Routledge & Sons Ltd, 1945).

Ulrich Preuß, *Legalität und Pluralismus. Beiträge zum Verfassungsrecht der Bundesrepublik Deutschland* (Frankfurt am Main: Suhrkamp, 1973).

John Rawls, *Political Liberalism* (New York NY/Chichester: Columbia University Press, 1993).

Heinz-Peter Rill and Heinz Schäffer, ‘Article 1 B-VG’, in Benjamin Kneihls and Georg Lienbacher (eds.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Vienna: Verlag Österreich, 2001).

David Runciman, *How Democracy Ends* (London: Profile Books, 2018).

Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: Mohr Siebeck, 1931).

Carl Schmitt, *Der Begriff des Politischen* (Hamburg: Hanseatische Verlagsanstalt, 1933).

Carl Schmitt, ‘Legalität und Legitimität’ in Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954. Materialien zu einer Verfassungslehre* (Berlin: Duncker und Humblot, 1958).

Timothy Snyder, *On Tyranny. Twenty Lessons from the Twentieth Century* (New York: Tim Duggan Books, 2017).

Anna Stilz, *Liberal Loyalty. Freedom, Obligation and the State* (Princeton, NJ: Princeton University Press, 2009).

Alexis de Tocqueville, *Democracy in America*, 3rd American edn., vol. I (New York, NY: George Adlard, 1839).

Daniel Vanderveken, 'Illocutionary Logic and Self-Defeating Speech Acts', in John Searle, Ferenc Kiefer and Manfred Bierwisch (eds.), *Speech Act Theory and Pragmatics* (Dordrecht/Boston, MA/London: D. Reidel Publishing, 1980) 247-272.

Renata Uitz, 'Can You Tell When an Illiberal Democracy is in The Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 *International Journal of Constitutional Law* 279-300.

Markus Vasek, *Unabänderliches Verfassungsrecht und Revisionschranken in der österreichischen Bundesverfassung: Dargestellt am demokratischen, republikanischen und bundesstaatlichen Prinzip* (Vienna: Verlag Österreich, 2012).

Ulrich Wagrandl, 'Transnational Militant Democracy' (2018) 7 *Global Constitutionalism* 143-172.

Robert Walter, *Bundesverfassungsrecht* (Vienna: Manz, 1972).

Thomas Wischmeyer, 'Nationale Identität und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 *Archiv des öffentlichen Rechts* 415-460.

Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76/6 *Foreign Affairs* 22-43.

Fareed Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad*, 2nd edn. (New York, NY: W.W. Norton, 2007).

Jan Zielonka, *Counter-Revolution. Liberal Europe in Retreat* (Oxford: Oxford University Press, 2018).