

Defending Democracy in the Light of Growing Radicalization: Tensions within Germany's Militant Democracy

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Abstract: Germany has experienced repeated waves of far-right radicalization and violence since Reunification in 1990. This article discusses the German approach against this threat to democracy, an approach seeking to pre-emptively limit the constitutionally guaranteed freedoms of radical groups before they can attack the country's political institutions. This particular approach builds on the idea of "militant democracy", shaping Germany's response to radicalization following the country's lessons from the national-socialist power takeover. This article also points to the legal tension between "militant democracy", its aim of guaranteeing the basic democratic order by preventing and prosecuting extremism by criminal law, and the fundamental rights laid down in the Constitution, such as freedom of speech and freedom of assembly.

Keywords: democracy, militant democracy, (de-)radicalization, far-right extremism

2039

1. Introduction

December 2022 saw German authorities launch a nationwide razzia targeting a far-right plot for a violent takeover of political power in Germany. 3000 police agents descended on 150 locations throughout the country¹ (in 11 out of 16 states). They charged 51 people and arrested 25 members of Patriotic Union, a network connected to the *Reichsbürger*, a far-right milieu largely specific for Germany (with a certain similarity to the US Freemen on the Land). The *Reichsbürger*, or Citizens of the Empire, are a loose milieu of around 20,000 individuals believing in the conspiracy theory that the German Federal Republic does not exist as there was never a peace treaty ending World War II and confirming the existence of the new republic. Reich citizens claim the national-socialist state still exists and regard it as Germany's only legitimate state power (seeing the German Federal Republic as a hoax or a private company). Following the razzia,

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¹ Süddeutsche Zeitung, *Razzien in rechter Szene. 19 mutmaßliche Reichsbürger bereits in Untersuchungshaft*, 2021, Available at: www.sueddeutsche.de/politik/reichsbuerger-razzia-festnahmen-verhaftungen-1.5710821

same as in other cases of dealing with *Reich* citizens, the German media and public mainly focused on detailing the network's bizarre ideas and extravagant members. Attention went to a noble prince and a judge, the latter affiliated with the far-right Alternative for Germany (*AfD*) party, and to the large amounts of cash and guns stashed in the locations. Hotly debated were the network's links to the police and the army, as four of the 25 arrested members were former police and army officers that had served in special forces units.

The preventive action against the *Reichsbürger*, based on the suspicion that individuals are members or supporters of a terrorist organization (§§ 129, 129a *StGB*), exemplifies the German approach to combating radicalization, which we discuss in this article, focusing on the legal framework underpinning Germany's approach. We ask how this approach has emerged and endured and what it achieved. We also ask about its limitations and the criticisms it has faced.

Addressing these questions, we outline Germany's legal and political approach to (de)radicalization considering its specific historical context. To make sense of the German preventive path to radicalization and de-radicalization, we refer to the concept of "militant democracy"². The concept captures those legal measures exercised by democratic states that restrict internal enemies' political rights to protect liberal democracy³. In other words, militant democracy is understood as the democratic states' fight against radical movements, and especially against radical parties and their activities⁴.

² A.K. Bourne, *Militant Democracy and the Banning of Political Parties in Democratic States: Why Some Do and Why Some Don't*, in A. Ellian, B. Rijpkema, (Eds) *Militant Democracy – Political Science, Law and Philosophy. Philosophy and Politics – Critical Explorations*, vol 7, 2018. A.K. Bourne, B. Rijpkema, *Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges in European Constitutional Law Review*, 18(3), 2022, pp. 375-384. F. Brandmann, *Radical-right Parties in Militant Democracies: How the Alternative for Germany's Strategic Frontstage Moderation Undermines Militant Measures in European Constitutional Law Review*, 18(3), 2022, pp. 412-439. A. Ellian, B. Rijpkema (Eds), *Militant Democracy – Political Science, Law and Philosophy. Philosophy and Politics – Critical Explorations*, Springer International Publishing, vol 7, 2018. G. Molier, B. Rijpkema, *Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans: Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II*, in *European Constitutional Law Review*, 14(2), 2018, pp. 394-409. A. Malkopoulou, A.S. Kirshner (Eds), *Militant Democracy and Its Critics: Populism, Parties, Extremism*. Edinburgh: Edinburgh University Press, 2019. J. Müller, *Militant Democracy*, in M. Rosenfeld, A. Sajo (Eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012. J. Müller, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, in *Annual Review of Political Science*, 19(1), 2016, pp. 249-265. D. Oberndörfer, *Germany's 'Militant Democracy': An Attempt to Fight Incitement Against Democracy and Freedom of Speech Through Constitutional Provisions: History and Overall Record*, in D. Kretzmer, F. Kershman Hazan (Eds), *Freedom of Speech and Incitement against Democracy*, The Hague: Kluwer Law International, 2001. A., Sajo, *From Militant Democracy to the Preventive State*, in *Const. L. Rev.* 1:63, 2009.

³ Bourne, Rijpkema, *Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges*.

⁴ Sajo, *From Militant Democracy to the Preventive State*.

The concept was originally coined by Karl Loewenstein in his work on “anti-fascist legislation” in interwar Europe⁵. He interpreted the collapse of European democracies in the 1920s and 1930s as the result of a process in which “democracy and democratic tolerance have been used for their own destruction.” According to Loewenstein, fascists had used democratic institutions such as freedom of speech, press, assembly, and parliamentary participation “to systematically discredit the democratic order and render it useless by paralyzing its functions”⁶. He argues that democracies must proactively defend themselves against internal fascist threats through anti-fascist legislation, “even at the risk and cost of violating fundamental principles”⁷. During the Cold War, the idea that democratic states must use freedom-restricting means to protect themselves against anti-democratic forces took on new meaning concerning Soviet communism and neo-fascist movements, legitimizing party bans, among other things⁸. More recently, the idea of militant democracy has gained renewed importance within European democracies following 9/11 and Islamic extremism, which according to Sajó has led to the emergence of a “preventive state”⁹. In Germany, the idea of militant democracy has emerged in response to the national-socialist power takeover and Germany’s subsequent Cold War division. Believing that the Weimar Republic’s liberalism allowed national socialists to seize power, post-war legislators developed a preventive state protection concept, intervening to protect democracy from external extremist enemies before crimes materialize.

The article is structured as follows. The next part discusses right-wing radicalization since Reunification and its challenge to the German democratic system. Subsequently, part 3 presents the German approach to radicalization, explaining its specific militant democracy character. Part 4 details the difficult balancing act the approach needs to accomplish between fundamental freedoms and the fight against radical political movements. The concluding section discusses the effectiveness of militant democracy and – in light of the balancing act discussed in Part 4 - the main criticism it has faced.

2. Right-Wing Radicalization in Germany Since Reunification

Since the early 1990s, Germany has seen a steep increase in right-wing violence. Attacks and pogroms against migrants and People of Color have resulted in numerous deaths¹⁰. In 1992-1993, according to official statistics, far-right perpetrators committed well over 2,000 acts of violence, including

⁵ K. Loewenstein, *Militant Democracy and Fundamental Rights, I*, in *American Political Science Review*, 31(3), 1937, pp. 417-432.

⁶ *Ibid.*, pp. 423-424.

⁷ *Ibid.*, p. 432.

⁸ Bourne, Rijpkema, *Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges*, p. 376.

⁹ Sajó, *From Militant Democracy to the Preventive State*.

¹⁰ A. Brausam, *Todesopfer rechter Gewalt seit 1990*, 2021. Available at: www.amadeu-antonio-stiftung.de/rassismus/todesopfer-rechter-gewalt/

arson attacks and bombings¹¹. The district of Rostock-Lichtenhagen is telling of the racist riots in the post-reunification period, as in August 1992, it saw neo-Nazis hurling stones and Molotov cocktails at a building with asylum seekers amidst applause from local Germans¹². The later members of the terrorist cell known as the National Socialist Underground (NSU) radicalized in the 1990's climate of violence, murdering ten people and carrying out three bomb attacks and 15 robberies from 1998 to 2011¹³.

The threat of right-wing political violence has again become highly present in Germany since 2015 (at the latest). With an increasing influx of refugees due to the Syrian war and other conflicts in the Middle East and Afghanistan, the far right has succeeded in tapping into latent xenophobic sentiments in the population. It successfully mobilized masses against immigrants, Muslims, and other minorities, creating a climate of aggression and anti-immigrant sentiment. In the context of anti-migration movements, terrorist cells such as the "Freital Group" formed and committed severe attacks on refugees and left-wing politicians. In contrast, other cells such as "Oldschool Society" and "Revolution Chemnitz" were stopped by the police right before they could carry out their murderous plans, ideologically rooted in white supremacy, anti-Muslim racism, anti-Semitism, and misogyny¹⁴. Most recently, in a period of a few months from 2019 to 2020, three right-wing terrorist attacks took place, killing 13 people: the anti-Semitic attack on Yom Kippur in 2019, the murder of politician Walter Lübcke in June 2019, and the racist attack in Hanau in February 2020¹⁵.

In addition to street terror, widespread authoritarian and racist attitudes became mobilized by the far-right AfD, which articulated a radical right-wing counter-program to that of the "established parties". Founded in 2013 as a Eurosceptic party, the AfD has since established itself as the dominant political force of the far right. Since 2017, the AfD is present in the Bundestag – the German Parliament – and all state parliaments but Schleswig-Holstein. Particularly in East Germany, the AfD has achieved major electoral successes in recent years. In the last federal election, its vote share was twice as high as in West Germany. In four of the five East German states, the AfD was the second-strongest party, with figures between 18.6 and 22.7 percent, and in Saxony, it was even the strongest party with 27 percent¹⁶.

More recently, the Covid-19 pandemic has contributed to a dynamic in which segments of the population have become increasingly alienated from the democratic system and eager to join radical movements that openly

¹¹ A. Speit, *Der Terror von rechts – 1991 bis 1996* in A. Roepke, A. Speit (Eds), *Blut und Ehre: Geschichte und Gegenwart rechter Gewalt in Deutschland*. Berlin: Ch. Links Verlag, 2013, p. 109.

¹² *Ibid.*, p. 95.

¹³ M. Quent, *Rassismus, Radikalisierung, Rechtsterrorismus. Wie der NSU entstand und was er über die Gesellschaft verrät*. Weinheim Basel: Beltz Verlag, 2016, p. 9.

¹⁴ R. Philippsberg, *Rechtsterroristische Gruppen in Deutschland nach dem NSU*, in *Zeitschrift für Rechtsextremismusforschung*, 1, 2021, pp. 19-20.

¹⁵ R. Blum, *Rechter Terror in Deutschland*, in O. S. Nobrega, M. Quent, J. Zipf (Eds), *Rassismus. Macht. Vergessen. Von München über den NSU bis Hanau: Symbolische und materielle Kämpfe entlang rechten Terrors*, Bielefeld, Transkript Verlag, 2021, pp. 161-173.

¹⁶ F. Decker, *Wahlergebnisse und Wählerschaft der AfD*, in BpB, 2022. Available at: [Wahlergebnisse und Wählerschaft der AfD | Parteien in Deutschland | bpb.de](https://www.bpb.de/wahl/wahl-2022/wahlergebnisse-und-waehlerschaft-der-afd)

challenge democratic institutions and seek to destabilize and polarize the population. This dynamic became evident when a demonstration against the federal government's pandemic control measures resulted in right-wing extremists and others attempting to storm the Bundestag in August 2020¹⁷.

3. The German Legal Framework against “Extremism” in Historical Context

The historical development of today's law on “politically-motivated crime” (*politisch motivierte Kriminalität*) begins after Germany's defeat in World War II when the Allies replaced several laws deemed national-socialist¹⁸. As a result of the criminal law reform in 1951, provisions of protecting the state from extremism appeared in the German Criminal Code¹⁹: 1) communication offenses (e.g. incitement to hatred, §130 *StGB*; insult, §185 *StGB*; threatening to commit a felony, §241 *StGB*), 2) violent offenses (e.g. murder under specific aggravating circumstances, § 211; causing bodily harm, § 223; criminal damage, §303), 3) organizational offenses (e.g. violation of ban on forming an organization, §85 *StGB*; dissemination of propaganda material of unconstitutional organizations, §86a *StGB*; forming criminal organizations, §129 *StGB*)²⁰. The law reform introduced the new offense of “endangering the democratic state” (§ 86 – 90a, *Staatsgefährdung*) in addition to the offenses of “high treason” (§ 81 – 83, *Hochverrat*) and “treason against the state” (§ 94 – 100a, *Landesverrat*).

The state punishes as “endangering” not only concrete acts, but even the simple “intention to abolish individual constitutional principles”²¹. Aligning with the historical-political narrative that an overly “tolerant” Weimar Republic facilitated national socialism²², German authorities interpret the criminal element of state endangerment even more preventively (i.e., already at the level of intentions) than those of treason and treason against the state. The aim is to facilitate early intervention before an attempted overthrow.

On this legal basis, authorities banned in 1952 the far-right Socialist Reich Party, an openly neo-Nazi party, and in 1956 the Communist Party of Germany, considering “purely tactical” the latter's commitment to the liberal democratic basic order, *fdGO*²³. Thus, the Federal Republic of Germany's new political criminal law was directed against an imminent

¹⁷ R. Lüdecke, *Zwei Jahre nach dem Sturm auf den Reichstag: Demokratiefeinde setzen Hasskampagnen mit der Energiekrise nahtlos fort*, in Antonio Amadeu Stiftung, 2022. Available at: [Zwei Jahre nach dem Sturm auf den Reichstag: Demokratiefeinde setzen Hasskampagnen mit der Energiekrise nahtlos fort - Amadeu Antonio Stiftung \(amadeu-antonio-stiftung.de\)](https://www.amadeu-antonio-stiftung.de)

¹⁸ H. H. Kalinowsky, *Politische Justiz gegen rechts im vereinten Deutschland in Kampfplatz Justiz*, Herbolzheim: Centaurus Verlag & Media, 1993, pp. 531-540.

¹⁹ H.H. Kalinowsky, *Antisemitismus und Strafrecht*, 2015, p. 101. Available at: library.fes.de/fulltext/asfo/01023006.htm

²⁰ *Ibid.*, p.100.

²¹ M. Fuhrmann, S. Schulz, *Strammstehen vor der Demokratie. Extremismuskonzept und Staatsschutz in der Bundesrepublik*, Stuttgart: Schmetterling Verlag, 2021, p. 47.

²² *Ibid.*

²³ *Ibid.*, pp. 50-51.

right-wing extremist danger and against communist activists, which fits the political context of the German division and the Cold War²⁴.

In the mid-1970s, West-German authorities drafted the first anti-terrorism law, following the rise of the left-wing terrorist RAF²⁵, defining terrorism and related offenses in the Criminal Code. As a rule, terrorist crimes relate to forming terrorist organizations (§ 129a, 129b *StGB*). Serious, politically-motivated violent offenses (§ 129a of the Criminal Code) are also considered terrorism. Furthermore, Sections 89a, 89b, 89c and 91 of the Criminal Code are assigned to terrorism. The central norm of the criminal law on terrorism, § 129a *StGB*, was also designed to be preventive²⁶. Anyone who established, joined, or supported an association involved in serious crimes (in particular murder, manslaughter, extortionate kidnapping, hostage-taking, and certain homicidal offenses) could henceforth expect a prison sentence of six months to five years irrespective of committing or attempting a crime²⁷. The preventive nature of criminal liability has been even further extended recently.

Regarding right-wing extremism, Reunification brought new impulses for developing criminal law to prevent it. In particular, the massive rise in right-wing extremist violence at the beginning of the 1990s presented a new challenge for the reunified German state. In 1994, the Parliament responded with a comprehensive redesign of Section 130, on “inciting masses”, which brought legal changes in the area of so-called “communication offenses”²⁸. For instance, the introduction of Section 130 (3) made the denial, downplaying, and approval of the national-socialist genocide punishable²⁹. Among other things, the decision of the Federal Constitutional Court on the “Auschwitz Lie” (Holocaust Denial, *BVerfGE* 90, 241) was ground-breaking in this context. This decision sets boundaries to the scope of freedom of expression when referring to Nazis annihilating the Jewish population and other minorities and social groups, which right-wing extremists, including revisionist historians, deny, notwithstanding indisputable evidence³⁰. The decision determined that criminal punishment for Holocaust denial is a legitimate restriction on freedom of speech, i.e., because Holocaust denial violates the personal rights of Holocaust victims³¹.

Responding to international jihadist threats, 2009 introduced section

²⁴ *Ibid.*, pp. 50ff.

²⁵ Kalinowsky, *Politische Justiz gegen rechts im vereinten Deutschland in Kampfplatz Justiz*, pp. 208ff.

²⁶ P. Frank, S. Freuding, *Prävention durch Strafrecht*, in B. S. Brahim, U. Kemmesies (Eds), *Handbuch Extremismusprävention. Gesamtgesellschaftlich. Phänomenübergreifend*, 2020. Available at:

www.bka.de/SharedDocs/Downloads/DE/Publikationen/Publikationsreihen/PolizeiUndForschung/1_54_HandbuchExtremismuspraevention.html

²⁷ *Ibid.*, p. 682.

²⁸ S. Seehafer, *Strafrechtliche Reaktionen auf rechtsextremistisch/fremdenfeindlich motivierte Gewalttaten*. Berlin: Humboldt-Universität zu Berlin, Juristische Fakultät, 2003, p. 33. Available at: edoc.hu-berlin.de/handle/18452/15509

²⁹ *Ibid.*

³⁰ J. Bröhmer, C. Hill, M. Spitzkatz, *60 Years German Basic Law: The German Constitution and its Court. Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights*, in *The Malaysian Current Law Journal Sdn Bhd*, 2012, p. 365.

³¹ *Ibid.*

89a in the Prosecution Act for Preparing Serious State-Endangering Violent Offences (*Gesetz zur Verfolgung der Vorbereitung schwerer staatsgefährdender Gewalttaten*), significantly expanding criminal liability for terrorism to include preparatory acts³². Underpinning these amendments was the assumption that laws criminalizing the establishment of a terrorist organization could not effectively counter international terrorism threats, increasingly carried out by radicalized individuals. Section 89b of the German Criminal Code (*StGB*) turns even contact to a terrorist organization into a punishable offense. Additionally, Section 91 of the *StGB* criminalizes the online dissemination of instructions for explosive devices, intended to commit acts of violence endangering the state. In 2015, the anti-terrorism legislation changed again, responding to the increasing numbers of people traveling as ‘foreign fighters’ to the Middle East to participate in armed conflicts or visit terrorist training camps. Ever since, terrorist offenses even include the unsuccessful attempt to leave Germany for another state to join acts of state-threatening violence or to train in manufacturing or handling firearms, explosives or similar dangerous devices.

Following three right-wing terrorist attacks in Germany in 2019 and 2020, a new law to combat right-wing extremism and hate crime came into force in April 2021³³. The aim of the new law is, among other things, to facilitate the harsher and more effective prosecution of online hate crimes. One of the key points of the new law is the expansion of Section 241 of the German Criminal Code, which previously only made the threat of a crime – usually the threat of murder – punishable. Now, threats to commit acts against sexual self-determination, physical integrity, personal freedom or property of significant value are also punishable by up to one year in prison. If the act is committed publicly on the internet or by other means, the penalty is up to two years imprisonment. The range of punishment for threatening to commit a crime has also been raised to up to two years imprisonment if not committed publicly. Publicly threatening an offense may lead to up to three years imprisonment. This applies, for example, to threats of murder and rape on the internet. Insults (§ 185 *StGB*) are also punished more severely, as anyone who publicly insults people online is punishable with up to two years imprisonment instead of up to one. In addition, rewarding or approving online threats of yet uncommitted serious crimes (§ 140 *StGB*) is also punishable to counter the attempted creation of a fear climate.

Other changes establish the obligation of social networks to report posts containing hate speech to the Federal Criminal Police Office (BKA). Social networks must delete punishable postings after February 2022 and report them to the BKA along with the user’s IP address and port number. However, the reporting obligation does not cover insults, defamation, and slander, as it is difficult to distinguish them from statements protected by the right to freedom of expression. Finally, June 2021 saw the adoption of law 19/28678 and 19/31115 that, among other things, criminalizes the

³² Frank, Freuding, *Prävention durch Strafrecht*, p. 683.

³³ BMJV, *Gesetzespaket gegen Hass und Hetze tritt am 3. April 2021 in Kraft*, 2021. Available at: www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2021/0401_Hasskriminalitaet.html

dissemination of right-wing “enemy lists” (together with the new Section 126a of the German Criminal Code, *StGB*).

In summary, German legislation on extremism and terrorism has developed closely following historical experience³⁴. The criminal law approach to extremist parties was, until the 1960s, partly anti-Nazi and partly anti-communist, following ideological Cold War confrontations. The implementation of the Terrorism Act came following the left-wing terrorism of the RAF (*Rote Armee Faktion* – Red Army Faction). It developed further in the 2000s due to the international jihadist threat. Hate speech legislation, on the other hand, developed after the right-wing extremist violence wave of the 1990s. The most recent far-reaching change in the law directly responded to the increased right-wing extremist threat since 2015 and the three murderous acts of terrorism in 2019 and 2020. The common feature of the recent legal changes regarding extremism and terrorism is the preventive nature that facilitates prosecuting crimes before being committed.

4. The Principle of Militant Democracy in the German Approach to Combating Radicalization

For a better understanding of the German legal approach to radicalization, which presents itself as a fight against “extremism,” it makes sense to interpret it as a specific realization of the militant democracy idea. The German notion of militant democracy - *wehrhafte* or *streitbare Demokratie* - is an umbrella term for the constitutional mechanisms protecting the most important values guaranteed in Article 79, Paragraph 3 of the Basic Law against the threat posed by enemies of democracy³⁵. Such mechanisms include the legal possibility to ban associations and parties or even the deprivation of fundamental rights, such as the right of assembly, in the case

³⁴ E. Bleich, *The freedom to be racist?: How the United States and Europe struggle to preserve freedom and combat racism*, Oxford: Oxford University Press, 2011.

A. Pedahzur, *Struggling with the challenges of right-wing extremism and terrorism within democratic boundaries: a comparative analysis*, in *Studies in conflict and terrorism*, 24(5), 2001, pp. 339-359.

G. Flümman, *Streitbare Demokratie in Deutschland und den Vereinigten Staaten: der staatliche Umgang mit nichtgewalttätigem politischem Extremismus im Vergleich*, Berlin: Springer-Verlag, 2014.

B. Laumond, *Policy responses to the radical right in France and Germany: Public actors, policy frames, and decision-making*, London: Routledge, 2020.

P. Wagner, *Rezension zu: Flümman, Gereon: Streitbare Demokratie in Deutschland und den Vereinigten Staaten. Der staatliche Umgang mit nichtgewalttätigem politischem Extremismus im Vergleich*, Wiesbaden, 2015. ISBN 978-3-658-08313-7/F. Virchow, G. Botsch, C. Kopke (Hrsg.), *Verbote extrem rechter Parteien und Organisationen. Staatliche Verbotspolitik in der Bundesrepublik Deutschland zwischen „wehrhafter Demokratie“ und symbolischer Politik 1951–2012*, Heidelberg, 2015. ISBN 978-3-658001216, in *H-Soz-Kult*, 11.03.2016, Available at: www.hsozkult.de/publicationreview/id/reb-22570

³⁵ H. Papier, W. Durner, *Streitbare Demokratie*, in *Archiv des öffentlichen Rechts*, 128(3), 2003, pp. 348.

of their abuse for extremist purposes³⁶. Reflecting critically the historical experience of national socialism, it emerged in the West German state and spread widely in the 50s, 60s and 70s³⁷. It builds on the historical-political narrative that the Weimar Republic facilitated the Nazi power grab through its liberalism and lacking commitment to values, a narrative that forms the central justification for establishing a militant democracy in post-war Germany³⁸. In addition, the Cold War and West Germany's anti-communist efforts created a historical context that justified banning associations and depriving individuals of basic political rights to prevent extremism and protect democracy³⁹.

The constitutional basis of militant democracy is rooted in the value-based nature of German Basic Law, the *Grundgesetz*. The so-called “eternity clause”, Art. 79 (3), of the Basic Law prevents democracy from turning into dictatorship through seemingly legal means by declaring inadmissible any amendment affecting the principles of Article 1 GG or the constitutional principles laid out in Art. 20⁴⁰. The latter principles include the protection of federalism, the rule of law and separation of powers, and the social welfare state⁴¹. The intention to create a militant democracy is evident in legal instruments banning “extremist” associations and parties (Art. 9 GG; Art. 21 (2) GG) or depriving individuals of their fundamental rights (Art. 18 (2) GG) if considered a threat to democracy⁴².

Protecting democracy through state action against “extremism” is nevertheless limited by the civil rights enshrined in Articles 1 to 19 of the Constitution. Particularly relevant in this context is Art. 5 GG, freedom of expression, arts and science, which grants the right to express and disseminate opinions in speech, writing and pictures, to unhindered information from generally accessible sources, and to freedom of reporting through broadcasts and film. Art. 5 GG prohibits any censorship. However, the second paragraph of the article limits these rights by stating that expressions of opinion must take place within the framework of general laws and must not violate the right to personal honor or the protection of children. In the context of preventing extremism, this article is in a tense relationship with preventing anti-constitutional mobilization, as explained in more detail below.

Another particularly relevant Article for the state's handling of radicalization is Art. 8 GG, on freedom of assembly, which guarantees all

³⁶ Fuhrmann, Schulz, *Strammstehen vor der Demokratie. Extremismuskonzept und Staatsschutz in der Bundesrepublik*, p. 8.

³⁷ Papier, Durner, *Streitbare Demokratie*, p. 341.

³⁸ Fuhrmann, Schulz, *Strammstehen vor der Demokratie. Extremismuskonzept und Staatsschutz in der Bundesrepublik*, p. 21.

³⁹ Fuhrmann, Schulz, *Strammstehen vor der Demokratie. Extremismuskonzept und Staatsschutz in der Bundesrepublik*.

Kalinowsky, *Politische Justiz gegen rechts im vereinten Deutschland in Kampfplatz Justiz*.

H. Janssen, M. Schubert, *Staatssicherheit. Bielefeld: AJZ-Verlag*, 1990.

⁴⁰ Flümman, *Streitbare Demokratie in Deutschland und den Vereinigten Staaten: der staatliche Umgang mit nichtgewalttätigem politischem Extremismus im Vergleich*, p. 147.

⁴¹ D.P. Kommers, *The Basic Law: A Fifty Year Assessment*, in 53 *S.M.U.L. Rev.*, 477, 2000, p. 479. Available at: [The Basic Law: A Fifty Year Assessment \(nd.edu\)](#)

⁴² Fuhrmann, Schulz, *Strammstehen vor der Demokratie. Extremismuskonzept und Staatsschutz in der Bundesrepublik*, p. 8.

citizens the right to assemble peacefully and unarmed without prior notification or permission. However, laws may restrict the right to assemble in the open air. In addition, Art. 9 GG guarantees the right to form associations but prohibits organizations whose aims or activities contravene criminal laws or attack the constitutional order. This balancing of interests between basic political rights and extremism prevention constitutes a core dispute in the German legal system for dealing with right-wing extremist parties.

In addition, Art. 10 and 13 GG establish fundamental rights constraining state actions against radicalized extremists. Art. 10 GG safeguards the privacy of correspondence and telecommunications and allows restrictions to it only via a legal ruling or for protecting the free democratic order. Art. 13 GG guarantees home inviolability, which means that searches may be authorized only by a judge and must happen in a prescribed form. In addition, Art. 13 GG makes subject to a court order the acoustical surveillance of homes to avert urgent public safety threats. Regarding jihadist threats, Art. 16 GG guarantees that no German may be deprived of citizenship and that no German citizen may be extradited to a foreign country. Finally, Art. 18 GG formulates the possibility of revoking fundamental rights if there is a threat to the democratic order. Accordingly, it denies the free expression of opinion, freedom of teaching, the secrecy of correspondence, property and asylum rights to people abusing these rights to fight against the free democratic basic order.

Authorities created the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, BfV) to assess together with the State Offices (*Landesämter für Verfassungsschutz*, LfV) at the regional level whether the actions of individuals or associations are illegitimate and anti-constitutional. The BfV is an executive agency of the Federal Ministry of the Interior. The authorities collect intelligence, among other things, by observing groups suspected of being hostile to the Constitution⁴³. Information collected then goes to political authorities, other state agencies, and the public for implementing the knowledge politically and administratively and for taking the necessary measures to avert danger in time⁴⁴. Each state authority acts autonomously and is free of BfV instructions. Responsibilities and cooperation between the individual authorities are governed by the Act Regulating the Cooperation between the Federation and the Federal States in Matters Relating to the Protection of the Constitution and on the Federal Office for the Protection of the Constitution (*Bundesverfassungsschutzgesetz*, BVerfSchG).

The division of tasks between federal and state authorities for the Constitution's protection is as follows. The state authorities are responsible for collecting and evaluating information on extremist endeavors and security-threatening or intelligence activities within their respective state. The Federal Office collects and evaluates additional information on efforts

⁴³ W. Schiffauer, *Sicherheitswissen und Deradikalisierung*, in D. Molthagen, (ed) *Handlungsempfehlungen zur Auseinandersetzung mit islamistischem Extremismus und Islamfeindlichkeit Arbeitsergebnisse eines Expertengremiums der Friedrich-Ebert-Stiftung*, Berlin: Forum Berlin, 2015.

⁴⁴ *Ibid.*

and activities that are of national significance. In addition, the Federal Office for the Protection of the Constitution coordinates the state authorities in performing their tasks.

The Office for the Protection of the Constitution observes groups proven dangerous and potentially dangerous. In other words, it also observes groups and practices that are still legal. According to the official reading, the Office for the Protection of the Constitution is considered an “early warning system for democracy”⁴⁵. However, this self-image is highly controversial, especially considering its failure to prevent the NSU’s murders, which went undetected for years, bypassing the surveillance efforts of intelligence services⁴⁶.

Fighting against politically motivated crime is primarily the task of the Police State Protection (ST) division of the Federal Criminal Police Office (BKA). The agency derives its mandate from the Act on the Federal Police (*Bundeskriminalamtgesetz*) and is responsible for compiling nationwide situation reports on politically motivated crime. For this purpose, it uses findings from investigative proceedings of the federal and state police forces and evaluation results of national and international partner authorities.

According to the Code of Criminal Procedure, the police, and not the military (*Bundeswehr*), is also responsible for countering terrorist threats. The Bundeswehr can support the police under certain circumstances on an occasional basis. The military can be deployed per Emergency Laws to protect civilian objects and combat organized and militarily armed insurgents (§ 87a (4) *GG*). The Bundeswehr can also act in case terrorists hijack a commercial aircraft as per the Aviation Security Act.

In addition, the Public Prosecutor General at the Federal Court of Justice (GBA) plays a significant role in prosecuting terrorism. Its jurisdiction, governed by the Courts Constitution Act (*Gerichtsverfassungsgesetz*), includes prosecution for protecting the state and prosecutorial duties in appeal proceedings. The GBA represents the federal government at the Federal Court of Justice. This is an exception to the provisions of the Basic Law (Art. 95, 5), which actually assigns prosecution to the federal states.

In summary, militant democracy has shaped the constitutional approach to radicalization in Germany to this day. It forms the basis for criminalizing political action as “extremist” reflecting alleged undemocratic intentions, even before criminal acts occur. At the same time, the fundamental rights enshrined in the Constitution set strict limits on state action to protect democracy. This creates permanent tension between protecting democracy via extremism prevention and guaranteeing fundamental rights. The tension cannot disperse, nor can a permanent balance between the two poles emerge. Rather, the tension must be understood as an outcome of democratic negotiations in which the respective existing political power relations prevail.

⁴⁵ BfV, *Verfassung schützen*, 2021. Available at: www.verfassungsschutz.de/DE/verfassungsschutz/auftrag/verfassung-schuetzen/verfassung-schuetzen_artikel.html

⁴⁶ Fuhrmann, Schulz, *Strammstehen vor der Demokratie. Extremismuskonzept und Staatsschutz in der Bundesrepublik*.

5 The Balancing of Fundamental Freedoms with the Fight against Extremism

The prevention of extremism and the prosecution of extremist activities under criminal law have constantly been in tension with the fundamental rights of the Constitution. The following section will outline, with the help of a few examples, the balancing issues involved in countering and preventing extremism in Germany. The fundamental tension lies between the fundamental rights in the Constitution, such as freedom of speech and freedom of assembly, on the one hand, and, on the other, protecting the basic democratic order, human dignity, and dignity-based personal rights.

Prosecution of hate speech

A controversial issue is balancing freedom of speech and the criminal prosecution of hate speech. In this context, criminal sanctions for expressing extremist political views are in tension with Art. 5 of the Basic Law, which grants freedom of speech⁴⁷. In other words, the question arises of whether expressions of opinion are punishable if they violate the constitutionally guaranteed personal right to dignity. In this regard, the Federal Constitutional Court sees particularly little room for restrictions on opinion in political speech or debates on issues of public interest⁴⁸.

The Federal Constitutional Court has developed the constitutional standards for balancing freedom of speech and personal rights in the case of insults in decades of case law⁴⁹. In a press release of June 2020, it classified the constitutional standards with reference to four parallel chamber decisions as follows (*BVerfG*, 2020). It has been made clear that its case law emphasizes the central importance of freedom of expression but simultaneously considers its limits regarding personality protection⁵⁰. Thus, for criminal insults, freedom of speech mostly requires a thorough investigation of individual cases⁵¹.

A constitutional consideration concerns, for example, whether an insult involves sufficient defamatory tone to allow prosecution under criminal law. This depends in particular on whether and to what extent the statement affects fundamental rights of respect to which all people are equally entitled or whether it rather diminishes the social reputation of the individual concerned⁵². A further consideration concerns the weighting of freedom of opinion, which is rated all the higher, the more the statement aims to contribute to the formation of public opinion, and all the lower, the more it is merely an emotionalizing spread of sentiments against individual

⁴⁷ Flümman, *Streitbare Demokratie in Deutschland und den Vereinigten Staaten. Der staatliche Umgang mit nichtgewalttätigem politischem Extremismus im Vergleich*, p. 282.

⁴⁸ M. Hong, *Meinungsfreiheit und ihre Grenzen*, 2020a. Available at:

www.bpb.de/apuz/306444/meinungsfreiheit-und-ihre-grenzen

⁴⁹ N. Markard, E. Bredler, *Jeder schweigt für sich allein*, in *Verfassungsblog: On Matters Constitutional*, 2021 Available at: verfassungsblog.de/alleine-schweigen/

⁵⁰ M. Hong, *Apropos Künast-Fall: Das BVerfG bekräftigt seine Rechtsprechung zur Meinungsfreiheit – aber auch zum Schutz vor Beleidigungen im Netz*, *VerfBlog*, 2020/6/20, 2020b. Available at: verfassungsblog.de/apropos-kuenast-fall/

⁵¹ *Ibid.*

⁵² *Ibid.*

persons⁵³.

Freedom of speech is also constrained when it is assessed as “incitement of the masses”⁵⁴. This concerns such statements that are directed against (definable) parts of the population and incite hatred against them, call for violent or arbitrary measures against them or attack their human dignity (§130 (2) *StGB*). In addition, hate speech is punishable if making death threats and terror attack threats (§ 126 *StGB*) or supports such threats (§ 140 *StGB*)⁵⁵.

Ban of a political party

Parties are an essential component of a democratic constitutional state. Banning a political party seriously interferes with the democratic process of political opinion-forming and with the pluralist character of political development⁵⁶. Therefore, parties enjoy special protection compared to other associations with a political orientation⁵⁷. Consequently, it is not sufficient to identify an anti-constitutional stance to ban a party. The condition for a party ban is that the party in question actively seeks to eliminate the free democratic basic order, which must be proven in Court⁵⁸. Accordingly, Germany has not banned a political party for 60 years⁵⁹.

Attempts to ban the National Democratic Party of Germany (NPD), an openly neo-Nazi party, failed in 2017 precisely for this reason. After authorities discovered the right-wing terrorist cell NSU, which included many NPD members, the upper house of the German Parliament (the Bundesrat) decided almost unanimously in December 2012 to initiate a new party banning procedure after the first one had failed in 2003 for formal reasons. In this new trial, it was possible to prove the anti-democratic nature of the party as well as its positive references to national socialism. However, the German Federal Constitutional Court (BVerfG) also ruled that the NPD did not have the potential to enforce its anti-democratic goals at the time⁶⁰. The Court argued that it is unproven that the NPD pursues its anti-constitutional intentions violently⁶¹. Furthermore, there was insufficient evidence to accuse the NPD of purposefully creating an atmosphere of fear that noticeably hinders the freedom of political will formation⁶². In other words, the Court held that the NPD was too insignificant to constitute a

⁵³ *Ibid.*

⁵⁴ Hong, *Meinungsfreiheit und ihre Grenzen*.

⁵⁵ *Ibid.*

⁵⁶ Flümman, *Streitbare Demokratie in Deutschland und den Vereinigten Staaten. Der staatliche Umgang mit nichtgewalttätigem politischem Extremismus im Vergleich*, p.160.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Dlf, *NPD-Verbot gescheitert*, 2017. Available at: www.deutschlandfunk.de/bundesverfassungsgericht-mpd-verbot-gescheitert.2852.de.html?dram:article_id=376567

⁶⁰ BVerfG, *Kein Verbot der NPD wegen fehlender Anhaltspunkte für eine erfolgreiche Durchsetzung ihrer verfassungsfeindlichen Ziele. Pressemitteilung Nr. 4/2017 vom 17. Januar 2017*, 2017. Available at: www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2017/bvg17-004.html

⁶¹ *Ibid.*

⁶² *Ibid.*

serious threat to German democracy and therefore is not unconstitutional⁶³. This is evidenced by the party's weak parliamentary representation, declining membership (less than 6,000 members), and low mobilization capacity⁶⁴. For the reasons above, the party ban as a preventive measure of constitutional protection was deemed unnecessary⁶⁵. Instead of a ban, authorities can use existing criminal law to suppress threats and the NPD's build-up of violent potential⁶⁶.

The BVerfG's judgment shows a shift away from the prior presumptive approach to a potentiality approach, incorporating a "risk calculation" test⁶⁷. This means that a party ban needs convincing arguments to prove the party could achieve its anti-democratic goals. It thus tightened the requirements for a party ban⁶⁸. The decision appears to align with the case law of the European Court of Human Rights that has used a "risk to democracy" rationale in their prior decisions. However, compared to the ECHR's standard, the potentiality test provides a lower threshold⁶⁹. The judgement means that the party does not have to pose a concrete, imminent threat to democracy to be banned but only has to be able to achieve its anti-constitutional goals⁷⁰.

Overall, the ruling shows that, in today's situation, the party ban is no longer an effective weapon of the state in the fight against right-wing extremist parties⁷¹. Instead, the case led to a constitutional amendment that offered militant democracy in Germany a new instrument, namely the ending of state funding of anticonstitutional political parties⁷². However, this amendment to the Basic Law has not yet been implemented⁷³.

The ban of associations based on Article 9 (2) GG is far more

⁶³ Molier, Rijpkema, *Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans: Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II*.

⁶⁴ *Ibid.*

⁶⁵ BpB, *Bundesverfassungsgericht lehnt NPD-Verbot ab*, 2017. Available at: www.bpb.de/politik/hintergrund-aktuell/222103/npd-verbotsverfahren

⁶⁶ *Ibid.*

⁶⁷ Molier, Rijpkema, *Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans: Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II*.

⁶⁸ J. Hogan, *Analyzing The Risk Thresholds For Banning Political Parties After NPD II in German Law Journal* 23.1, 2022, p. 98.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p. 106.

⁷¹ S. Jürgensen, *Der Demokratie zumutbar? Zum NPD-Verbotsurteil des BVerfG*, in *Verfassungsblog: On Matters Constitutional*, 2017. Available at: verfassungsblog.de/der-demokratie-zumutbar-zum-mpd-verbotsurteil-des-bverfg/

⁷² Molier, Rijpkema, *Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans: Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II*, p. 398.

⁷³ F. Jansen, *NPD kassiert weiter Steuergelder: Rechtsextremisten profitieren von jahrelanger Hängepartie*, in *Tagesspiegel*, 2021. Available at: www.tagesspiegel.de/politik/rechtsextremisten-profitieren-von-jahrelanger-haengepartie-5108923.html

important in the state's approach to countering extremism. An association may be banned if its purposes or activities are contrary to criminal law or if directed against the constitutional order or the idea of international understanding (§ 3 (1) Law on Associations). This corresponds to Art. 9 (2) of the Basic Law, which, as an expression of a pluralistic but militant constitutional democracy, limits the freedom of association. Unlike party bans, it is executive orders and not the Federal Constitutional Court that introduce bans on associations. Associations whose activities are limited to one federal state can be banned by the respective state interior minister (§ 3 (2) Law on Associations), while associations present in several federal states can be banned by the federal interior minister⁷⁴.

Ban of religious associations

Reflecting the growing relevance of religion-based extremism in Germany, debates over the limits between religious freedom and counter-extremism prevention have simmered. In Germany, religion-based extremism mainly relates to the Salafi branch of Islam. However, this is itself a highly diverse community and only a small minority of believers legitimizes violence or is willing to use violence⁷⁵. In principle, however, religious beliefs are protected by fundamental rights concerning all religions, even if they are associated with religious ideas of inequality. The scope of protection of religious freedom also includes promoting one's faith and recruiting others away from their faith. Accordingly, "Da'wa" as a form of proselytizing is protected⁷⁶.

Association and criminal law place limits on religious freedom. Religious communities, just like associations, can be banned by the Ministry of the Interior⁷⁷. One example is the Islamic State (IS) ban imposed by the then Interior Minister Thomas de Maizière in 2014. The ban included punishing the public display of IS-symbols such as its flag or sympathy-inducing badges. Furthermore, in connection with Islamist radicalization, membership in a (foreign) terrorist organization is punishable, as is recruiting members into such an organization.

5. Conclusions

There is a permanent legal tension between militant democracy's intention to protect the basic democratic order by preventing and prosecuting extremism, on the one hand, and the fundamental rights enshrined in the Constitution, such as freedom of expression and freedom of assembly, on the other. Beyond these legal tensions, scholars have raised concerns about the effectiveness of militant democracy. The criticism primarily refers to implicitly equating the protection of democracy with

⁷⁴ Flümman, *Streitbare Demokratie in Deutschland und den Vereinigten Staaten. Der staatliche Umgang mit nichtgewalttätigem politischem Extremismus im Vergleich*, p. 216.

⁷⁵ M. Garbert, *Salafismus als politische Herausforderung. In Jahrbuch Extremismus & Demokratie*, Baden Baden: Nomos Verlagsgesellschaft, 2017.

⁷⁶ G. Subai, *Der rechtliche Rahmen für die Präventionspraxis*, 2018. Available at: www.bpb.de/politik/extremismus/radikalisierungspraevention/277540/der-rechtliche-rahmen-fuer-die-praeventionspraxis

⁷⁷ *Ibid.*

protecting the state, building on the assumption that the state cannot act undemocratically and acts as a guarantor of democratic order⁷⁸. However, several empirical cases prove that state representatives can also exhibit far-right extremist tendencies and thus endanger democracy⁷⁹. Another criticism is that such an understanding of protecting democracy would not primarily protect basic democratic rights against state repression but only state institutions from the opposition the state may label extremist⁸⁰. Furthermore, and most problematically, the concept of extremism itself is analytically vague and has a purely negative definition, referring to any acts directed against the liberal democratic basic order (*fdGO*). This brings the danger that extremism prevention leaves out of sight those right-wing groups that refrain from anti-state rhetoric and agitate instead against minorities.

Criticism of the German approach to countering extremism seems entirely justified given the experience with right-wing terrorism in Germany, especially with the NSU terror cell, which was able to commit attacks undetected for over a decade. On the other hand, the example of the early intervention against the *Reichsbürger* mentioned in this article's introduction shows that the preventive means of militant democracy do have an effect, despite the network's connections to the police and the military. Yet the greatest danger to democracy in Germany, from which militant democracy does not protect, is widespread racist sentiment. It adds to a deep mistrust of democratic institutions to facilitate that large popular segments vote for the far-right party *Alternative for Germany (AfD)*. Even though the Federal Office for the Protection of the Constitution observes the AfD, it cannot change the party's electoral success and the associated effects on political discourse.

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⁷⁸ Fuhrmann, Schulz, *Strammstehen vor der Demokratie. Extremismuskonzept und Staatsschutz in der Bundesrepublik*.

⁷⁹ *Ibid.*, p. 118.

⁸⁰ *Ibid.*, p. 118.