# Defending Democracy or Subverting Rights? The Role of 'Militant Democracy' in Baltic States Cases before the ECtHR

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**Abstract**

In this paper, I examine the evolving jurisprudence of the European Court of Human Rights (ECtHR) on 'militant democracy,' with a particular focus on recent cases from Latvia and Lithuania. I explore how the Court navigates the tension between protecting democratic order and upholding fundamental rights, particularly in response to contemporary security threats such as hybrid warfare. The study argues that the ECtHR has moved beyond a rigid application of Article 17 of the Convention, instead embracing a more context-sensitive approach rooted in subsidiarity and national constitutional identity. By analysing cases such as *Savickis and Others v Latvia*, *Ždanoka v Latvia* (*No. 2*) and *Kirkorov v Lithuania*, I highlight the Court's evolving stance on external threats manifesting through more individualised analysis of the domestic specificity.

## 1 Introduction

Democracy is inherently fragile. It can serve as a powerful instrument for achieving noble ends and fostering an inclusive society. Yet, it can also be exploited for wrongful purposes. As A. Sajó points out, '[w]ithin the framework of the democratic process, using the mechanisms of democracy (free speech, assembly, elections), a regime may be established that dissolves democracy'.[1]

What if an adversary exploits the mechanisms of democracy for wrongful purposes? Are there legal tools that can both uphold democratic values, including fundamental rights, and safeguard democracy itself? There is no straightforward answer. However, the European Court of Human Rights (the ECtHR or the Court) frequently encounters attempts to invoke human

1 A. Sajó, 'From Militant Democracy to the Preventive State', (2006) 27 *Cardozo Law Review*, p. 2262.

rights enshrined in the Convention as a basis for challenging measures adopted by member states to counter perceived existential threats to their constitutional order. As the supranational human rights framework governing most European states, the Convention for Protection of Human Rights and Freedoms (the Convention) system provides a unique vantage point from which to observe the evolving dynamics of applicants' claims regarding alleged violations of the Convention – claims that governments justify as necessary responses to protect democracy.

The objective of this paper is to examine the ongoing evolution of the Court's case law concerning situations that pose an existential threat to the state. I systematise the Court's approaches to cases that align with the concept of 'militant democracy', with particular emphasis on those involving the Baltic states. In my view, the Lithuanian and Latvian cases exhibit distinctive characteristics that reflect their specific historical and political contexts, thereby necessitating a recalibrated judicial approach to threats against the constitutional order of states.

Although the concept of 'militant democracy' seemed to fade after the end of the Cold War, it has recently re-emerged.[2] The reasons for this resurgence include its potential use to justify restrictions on freedom of religion (primarily in relation to Islam), the rise of populism and the emergence of new forms of authoritarianism – regimes that formally claim to uphold democracy while selectively maintaining certain democratic elements.[3] I argue that the Court's most recent case law represents another step in its ongoing effort to balance the protection of human rights with respect for the constitutional order and sovereignty of states. This statement provides empirical support for the trend already identified by a number of authors, namely, the shift from the traditional paradigm of militant democracy.[4] Some of the cases pending adjudication at the time of this paper's submission continue to place this debate at the core of their subject matter.[5]

2 J.-W. Müller, 'Militant Democracy and Constitutional Identity', in G. Jacobson and M. Schor (eds.), *Comparative Constitutional Theory*, Edward Elgar: Chaltenham/Northamption, 2018, p. 415.

3 Ibid., pp. 415–416.

4 P. de Moree, *Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights*, Intersentia: Cambridge/Antwerp/Portland, 2016, p. 238. P. Harvey, 'Militant Democracy and the European Convention on Human Rights', (2004) 29(3) *European Law Review,* pp. 409–412.

5 See e.g. G. Baranowska, 'What, if any, are the Consequences of the Instrumentalization of Migration for Human Rights Protection under the ECHR? A Look at the Arguments Raised at the ECtHR', *Strasbourg Observers*, 4 March 2025, available at https://strasbourgobservers

Human rights are an inalienable feature of democracy. However, they can also be subject to abuse. The long-term objective of undermining democracy and fundamental rights may, paradoxically, be pursued through actions that formally rely on the functioning of democratic institutions and the fundamental rights enshrined in the Constitution. A. Kirshner has highlighted that the moral costs of militant action and the inherent challenges of protecting democracy remain ambiguous and insufficiently defined. As a result, there is no clear principled framework for determining when defensive measures are justified or how to address the harm they may inflict.[6] This demonstrates the importance of identifying the legal instruments available to both applicants and governments in disputes where the constitutional order is at stake.

This research aims to delineate the conceptual boundaries and meaning of 'militant democracy' within the framework of the ECtHR. To this end, a comprehensive literature review was undertaken, drawing on academic databases to identify scholarly articles, legal analyses and other substantial contributions to the subject. Given that militant democracy is frequently associated with states of emergency, I also examined the protection of human rights in such contexts. This entailed an analysis of legal frameworks, case law and academic discourse concerning the balance between democratic principles and security imperatives. I conducted a distinct doctrinal analysis of the case law of the ECtHR, with a particular focus on the prohibition of the abuse of rights under Article 17 of the Convention. Using the HUDOC database, I identified cases in which the Court has applied Article 17 and explicitly referenced the concepts of 'militant democracy' and 'democracy capable of defending itself'. Furthermore, I examined cases involving the Baltic states that may illustrate circumstances in which external actors seek, albeit indirectly, to influence or destabilise the state.[7]

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.com/2025/03/04/what-if-any-are-the-consequences-of-the-instrumentalization-of-migration-for-human-rights-protection-under-the-echr-a-look-at-the-arguments-raised-at-the-ecthr-g/, last accessed 10.03.2025.

6 A.S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism*, Yale University Press: New Haven/London, 2014.

7 I wish to thank the committed participants in the discussion on 8 April 2025 at Jagiellonian University in Kraków, organised by Dr hab. Wojciech Ciszewski, for their valuable feedback on an earlier draft of this paper. I am also grateful to those attending f the lecture 'Defending Democracy or Restricting Rights? Militant Democracy in the ECtHR', held at Vilnius University on 12 March 2025. Finally, my thanks go to the anonymous reviewer whose detailed and insightful analysis greatly contributed to the improvement of this work.

This research does not address constitutional identity in the context of EU law, as it constitutes a distinct and complex domain requiring a separate analytical approach. Moreover, while engaging with concepts derived from political science, I do not seek to develop a comprehensive argument in that field. My objective is limited to examining recent ECtHR cases against Latvia and Lithuania, specifically in the light of the [alleged] attempt by the Court to align the Convention framework with the existential threats faced by member states.

First, I establish the conceptual foundations of 'militant democracy', including an analysis of the 'scissors effect' between ECHR obligations and national constitutional orders. Second, I examine the evolution of 'militant democracy' in the case law of the ECtHR, focusing on the practical developments in the interpretation of the Convention, including Article 17. This section provides a positive analysis of these interpretative trends. Third, I analyse the Latvian and Lithuanian cases before the ECtHR as a key area for the development of a more nuanced application of 'militant democracy'. In particular, considering the *Savickis and Others v Latvia*[8], *Ždanoka v Latvia No. 2*[9] and *Kirkorov v Lithuania*[10] cases, I argue that the ECtHR's current case law seeks to shift the role of 'militant democracy' away from an overly restrictive interpretation of Article 17 of the Convention towards a more context-sensitive approach. This approach, grounded in the legitimate aims of restrictions, aligns with the principles of subsidiarity and judicial dialogue.

## 2 The Conceptual Foundations of 'Militant Democracy'

### 2.1 *The Theory Is Political, and the Practice Is Legal*

By focusing on 'militant democracy' in the legal system, I find myself wading into deep waters that do little to enhance clarity. The topic permeates political and legal sciences, appears in practical political discourse, is referenced in real-world applications, and spans various fields of law. While this may align with the ever-present call for 'interdisciplinarity', the complexity of the subject does not necessarily contribute to greater clarity. But let us try anyway.

The idea of 'militant democracy' is related to the legal and political framework designed to safeguard 'democracy against those who want to overturn it from within or those who openly want to destroy it from outside by utilizing

8 ECtHR, *Savickis and Others v Latvia,* no 49270/11 [GC], 09.06.2022.

9 ECtHR, *Ždanoka v Latvia* (*No. 2*), no 42221/18, 25.07.2024.

10 ECtHR, *Kirkorov v Lithuania,* no 12174/22, 19.03.2024.

democratic institutions as well as support within the population'.[11] This understanding of 'militant democracy' aligns with M. Steuer's argument that its rationale is rooted in the assumption that unrestricted freedoms within a democracy may enable actors seeking to dismantle it to gain traction and ultimately succeed.

M. Steuer indicates that 'the rationale for militant democracy stems from the assumption that if unbounded liberty is permitted in democracies, those actors striving to overthrow it and introduce some form of authoritarianism will be more likely to succeed'.[12] Even if most citizens do not support the ideas promoted by anti-democratic actors, their trust in democracy may still be weakened in the process.[13] Therefore, 'militant democracy is a rational response to prevent (negative) emotional reactions leading to the downfall of the regime'.[14]

The conceptual foundations of 'militant democracy' were set by K. Loewenstein in his famous two articles on 'Militant Democracy and Fundamental Rights'.[15] K. Loewenstein, who coined the term, explained that fascism took advantage of democracy's vulnerabilities to seize power, ultimately intending to dismantle the system from the inside.[16] By referring to the failure of the Weimar Republic to sustain its democracy and liberties against the Nazis, he argued for the need for democracies to fight the threat using the methods the threat used:

> More and more, it has been realized that a political technique can be defeated only on its own plane and by its own devices, that mere acquiescence and optimistic belief in the ultimate victory of the spirit over force only encourages fascism without stabilizing democracy.[17]

C. Schmitt may also be considered one of the theorists associated with the concept of 'militant democracy', although he did not use the term explicitly.

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11 S. Pfersmann quoted in J.-A. Santos, 'Constitutionalism, Resistance and Militant Democracy', (2015) 28 *Ratio Juris*, p. 395.

12 M. Steuer, 'Militant Democracy', in S. N. Romaniuk and P. N. Marton (eds.), *The Palgrave Encyclopedia of Global Security Studies*, Palgrave: Cham, 2023, p. 955.

13 Ibid.

14 Ibid., p. 956.

15 K. Loewenstein, 'Militant Democracy and Fundamental Rights I', (1937) 31(3) *The American Political Science Review*, pp. 417–432; K. Loewenstein, 'Militant Democracy and Fundamental Rights II', (1937) 31(4) *The American Political Science Review*, pp. 638–658.

16 K. Loewenstein, 'Militant Democracy and Fundamental Rights I', *supra* note 15, p. 424.

17 Ibid., p. 430.

He emphasised that a constitution has validity because it originates from a constitution-making authority and is founded on the will of that power. He stressed that the political existence of the state served as the foundation for unity and order.[18] His approach to constitutional order suggests that democratic freedoms may be restricted – contrary to standard constitutional principles – if such measures are deemed necessary to safeguard the 'political core' of the constitution itself.[19]

The difficulty of defining this 'political core' and the extent to which the measures may still be valid within the constitutional order are among the major concerns discussed by scholars. The 'systematic unity'[20] of the constitution makes the constitutional identity a key for understanding how a society member belongs to the people governed by the constitution. C. Schmitt's suggestion that the political nature of this belonging complicates the implementation of liberal democracy that is purely normative. The idea of substantive democracy (advocated by C. Schmitt, among others) is in a direct clash with the ideas of modern multicultural societies.[21]

This tension between democratic principles and the necessity of restricting certain freedoms to protect the constitutional order raises the question how far a democratic state may go in countering its challengers. A democratic state may counter its challengers through various measures that appear antidemocratic, ranging from restricting access to political office to engaging in covert actions.[22] While the term 'militant democracy' may not always be explicitly invoked, similar outcomes can be achieved through other legal and political mechanisms. In *Herri Batasuna and Batasuna v Spain,*[23] the ECtHR ruled that the Spanish Supreme Court's decision to ban the party – later upheld by the Spanish Constitutional Court – fell within the narrow margin of appreciation afforded to states and could reasonably be considered to meet 'an imperative social need'.[24]

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18 C. Schmitt, *Constitutional Theory*, Duke University Press: Durham/London, 2008, pp. 64–65.

19 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', (2017) 65 *Political Studies*, p. 186.

20 C. Schmitt, *Constitutional Theory*, *supra* note 18, p. 65.

21 See R. O'Connell, 'Theories of Democracy', in R. O'Connell (ed.), *Law, Democracy and the European Court of Human Rights*, Cambridge University Press: Cambridge/New York, 2020.

22 A.S. Kirshner (2014), *A Theory of Militant Democracy*, *supra* note 6.

23 *ECtHR, Herri Batasuna and Batasuna v Spain,* nos 25803/04 and 25817/04, 30.06.2009.

24 J.-A. Santos, 'Constitutionalism, Resistance and Militant Democracy', *supra* note 11, p. 401.

Rights that may be restricted under the framework of 'militant democracy' include freedom of speech, the exercise of religion (in certain cases), freedom of association, freedom of assembly, and, in some instances, surveillance and detention without judicial oversight.[25] However, the framework of 'militant democracy' also poses a threat to a democratic order, which is an interesting paradox itself – by grounding the need to interfere with certain democratic features of a state the authorities impose restrictions on democratic order if we assume the morally neutral meaning of liberal democracy.

Although the concept of 'militant democracy' originates in political science, the issues it addresses – particularly the abuse of legal mechanisms to undermine democracy – are deeply intertwined with concrete legal challenges. These challenges primarily arise in the domains of international and constitutional law, particularly from the perspective of human (fundamental) rights.

Consider one of the early cases before the European Commission of Human Rights (EComHR), *German Communist Party and Others v Germany*.[26] The German Federal Constitutional Court dissolved and banned the Communist Party. The EComHR declared the party's application inadmissible, citing Article 17 of the Convention and reasoning that the party's objective – the establishment of a dictatorship of the proletariat – was incompatible with the values enshrined in the Convention. While the broader implications of the case may appear political – given that the party sought to dismantle the existing constitutional framework – the legal dimension is equally significant. The party's dissolution was carried out under a constitutional provision, and its challenge before the EComHR was framed through specific Convention rights.

### 2.2 *Between National and International*

The concept of 'militant democracy' is complex, as its rationale is rooted in domestic legal orders (the constitutional framework of a state) while its effects extend into the realm of international law. This dual nature creates tensions between national sovereignty and international legal obligations.

At the core of the hierarchy between militant democracy and human rights lies a fundamental question: the primacy of international law versus constitutional law.[27] The principles of militant democracy are anchored in national

25 A. Sajó 'From Militant Democracy to the Preventive State', *supra* note 1, pp. 2274–2275.

26 EComHR, *German Communist Party* (KPD) *v Germany*, no 250/57, 20.07.1957.

27 This does not negate the tension within the constitutional framework itself. Many cases on the international level are grounded on the adjudication of the same issues at the national level (as part of the requirement to exhaust all domestic measures before applying to international tribunals). However, for the purposes of this paper, I underline

legal orders, often in direct contrast with potential conflicts arising from international obligations.

For instance, when addressing conflicts between United Nations (UN) Security Council measures and internationally protected human rights, the issue is framed as a question of hierarchy between two normative sources operating at the same level – both derived from international law within the context of collective security.[28] However, the situation is different in the context of 'militant democracy'. Here, the conflict arises between international law and the highest domestic legal norms, such as constitutional provisions. The resolution of this conflict often depends on the legal perspective of the respondent, with different fields of law offering distinct approaches to reconciling these tensions.

'Militant democracy' seeks to safeguard the democratic order of a sovereign state, which can be seen as a prerequisite for the effective implementation of human rights standards. State sovereignty, grounded in the principle of non-interference in domestic affairs, remains the Westphalian foundation of the post-war international order – an order in which nation-states coexist as equals under a collective pact of negative liberty.[29]

However, while a sovereign state may reasonably argue that preserving its democratic order justifies certain constitutional limitations, the situation becomes far more complex when such prioritisation conflicts with the state's human rights obligations. These obligations, rooted in the principle of *pacta sunt servanda*, require states to uphold their international commitments to human rights, creating a legal and normative tension between democratic self-preservation and adherence to binding international norms.

Article 1 of the Convention establishes the general obligation of member states to secure the rights and freedoms enshrined therein. However, states do not relinquish their sovereignty entirely. Rather, they seek to balance their international obligations with the sensitive demands of their own constitutional frameworks. It is within this delicate interplay between international commitments and domestic constitutional priorities that the concept of 'mili-

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the tension of national vs international (supranational) while applying the 'militant democracy' concept.

28 See A. Tzanakopoulos, 'Collective Security and Human Rights', in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford University Press: Oxford, 2012, p. 44.

29 M. Goodale, 'Human Rights beyond the Double Bind of Sovereignty', in B. Fassbender and K. Traisbach (eds.), *The Limits of Human Rights*, Oxford University Press: Oxford, 2020, p. 81.

tant democracy' emerges, highlighting the tensions between safeguarding democratic order and adhering to supranational human rights obligations.

This tension between international obligations and domestic constitutional priorities is further complicated by the relationship between state sovereignty and popular sovereignty, particularly in the context of defining and enforcing human rights. State sovereignty, often perceived as an obstacle to the realisation of universal human rights, is deeply intertwined with popular sovereignty. It is national citizens who determine the content, scope and applicability of human rights law that constrains the democratic state.[30] As a result, tensions arise between the rights owed to citizens and those owed to non-citizens, leading to the politicisation of human rights law.[31] However, as C. Calhoun argues, nationalism has also been – and continues to be – an often-overlooked source of solidarity. Through its commitment to public institutions and civic values, nationalism can serve as one of the foundational conditions for democracy itself.[32]

The conflict between constitutional orders and international human rights obligations contributes to the fragmentation of international human rights law, as the specific constitutional contexts of individual states may be placed at risk in various ways. As K. Nash has noted:

> in fact, it can be argued that international law will never become a predictable, routinely applied set of coherent and consistent rules precisely because, in the absence of global consensus on fundamental norms, and without a final authoritative law-maker and enforcer at the global scale, states remain the most important actors in making and institutionalising international human rights law.[33]

The ECtHR is no exception. While the Court seeks to develop a coherent and universal approach to conflicts between constitutional orders and human rights obligations – particularly in cases concerning 'militant democracy' – its case law remains highly context-specific.

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30 K. Nash, 'Human Rights, Global Justice, and the Limits of Law', in B. Fassbender and K. Traisbach (eds.), *The Limits of Human Rights*, *supra* note 29, p. 75.

31 Ibid., p. 76.

32 Ibid. Also C. Calhoun, *Nations Matter: Culture, History, and the Cosmopolitan Dream*, Routledge: London/New York, 2007, p. 17.

33 K. Nash, 'Human Rights, Global Justice, and the Limits of Law', *supra* note 31, p. 71. Also see S.D. Krasner, 'The Whole in a Hole', (2004) 25(4) *Michigan Journal of International Law*, pp. 1076–1078.

The scholarship on 'militant democracy' highlights specific conceptual challenges in the development of this doctrine. I have identified three major dilemmas that, in my view, also reflect the evolution of the Court's case law. Accordingly, I examine these dilemmas briefly to establish a foundation for the subsequent discussion of the Court's jurisprudence.

### 2.3 *Protecting Democratic Order or Destroying It?*

The potential abuse of legal mechanisms designed to address threats to democracy has been a concern since the initial discussions of this concept. J.-W. Müller cautions against the use of constitutional identity as a justification for restricting human rights, noting that 'constitutional identity can become a sword (wielded against minorities) or a shield against criticism of authoritarian populist projects'.[34] He further warns that 'the focus on historical particularity and identity can also justify restrictions in areas of public and even private life that have nothing directly to do with party politics and the survival of democracy'.[35]

This concern raises a fundamental question about the very nature of militant democracy: whether the measures taken to protect democracy ultimately risk eroding its core principles, as M. Steuer critically asks, '[w]ill democracies employing such measures remain democratic, or will they basically adopt some of the techniques democracy's opponents long for?'[36] M. Steuer illustrates this dynamic through the political situation in Slovakia. A Slovak MP from an extreme right political party, when prosecuted for extremist speech with the potential to incite hatred and violence, claimed that the trial was politically motivated, designed to exclude him from parliament, and indicated that Slovakia is a police state. In this way, the implementation of militant democratic measures becomes not only a legal challenge but also a battle of competing narratives. Crucially, the outcome of the legal process does not necessarily determine the success or failure of the broader political discourse surrounding it.[37] This underlines the complex interplay between law and political rhetoric in shaping perceptions of democracy and its legitimacy.

### 2.4 *What Are We Actually Safeguarding?*

Another conceptual issue within the legal framework for defending democratic order concerns the point of reference. Are we safeguarding democracy

34 J.-W. Müller, 'Militant Democracy and Constitutional Identity', *supra* note 2, pp. 434–435.
35 Ibid., p. 425.
36 M. Steuer, 'Militant Democracy', *supra* note 12, p. 955.
37 Ibid.

as a universally recognised principle, or are we preventing threats to a specific constitutional order shaped by a state's unique constitutional identity? Referring to C. Schmitt's notion of the 'political core' of the constitution,[38] this perspective prevails. The response to this question leads to fundamentally different legal and theoretical outcomes, shaping further discussions on the subject. In my view, prioritising a specific constitutional order – one that reflects a state's constitutional tradition and identity – is a more viable approach, as it allows for a context-sensitive analysis of the challenges individual states face.

The theoretical notion that certain provisions constitute the 'political core' of a constitution conforming to the foundation of the constitutional framework – presents a challenge in determining which provisions qualify as such. In this regard, unless a constitutional system explicitly identifies these 'political core' provisions, it is difficult to assert that any particular provision requires a higher level of protection. The concept of constitutional identity may be regarded as the 'political core' of a constitution.

Constitutional identity has the potential to undermine the essence of certain human rights. For instance, in a highly homogenous society, constitutional identity may be invoked to legitimise measures that are oppressive towards minorities. This can lead to conflicts with the state's human rights obligations at the international level. As S. Levinson emphasises, there will always be a degree of alienation experienced by some members of minority groups in relation to the dominant culture, highlighting the inherent tensions between national identity and the protection of universal human rights.[39]

Besides, the belief in a political community's self-definition and the values it upholds is essential. Without this foundation, anti-democratic actors may successfully promote their narrative, framing democrats as 'hypocritical' and undermining the legitimacy of their core principles.[40] We may witness a trend that an increasing number of people perceive their nation-state, rather than international institutions, as the sole dependable 'area of freedom, security,

38 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', *supra* note 19, p. 186.

39 See S. Levinson, discussing Y. Tamir's approach towards Israeli Arabs and Palestinians in S. Levinson, 'The Continuing Spectre of Popular Sovereignty and National Self-Determination in an Age of Political Uncertainty', in M. A. Graber, S. Levinson and M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford University Press: New York, 2018, p. 662.

40 M. Steuer, 'Militant Democracy', *supra* note 12, p. 958.

and justice' that must be protected from foreign or international interference.[41]

The question of what is being safeguarded is closely tied to the question of who constitutes the self-determining authority and the 'sovereign'. According to S. Levinson, Wilsonian self-determination implies a people united by shared characteristics, suggesting a more homogenous society.[42] Fundamentally, the concept of a democracy capable of defending itself serves as a legal mechanism to preserve at least some degree of self-determination within the constraints of Convention obligations. This raises the question of whether the national constitutional order genuinely reflects the views and will of the constituency.

### 2.5 *How to Define 'Enemy'?*

The two-dimensional relationship inherent in militant democracy – the sovereign versus the enemy – raises significant challenges in defining the characteristics of 'the enemy'. This issue lies at the heart of the fundamental tensions between militant democracy and human rights. The distinction between 'friend' and 'enemy' reminds us, yet again, of the fundamental (although very disputed) works of C. Schmitt. *The Concept of the Political*[43] is the most prominent work, where he develops the idea of antagonism between social organisations unified under specific sets of values and defending them.

The original concept of 'militant democracy' emerged in specific historical contexts as a preventive mechanism against radical political movements that threatened the constitutional order, as seen in the Weimar Republic. This rationale is reflected in the case law of the ECtHR, particularly in cases concerning Germany. For instance, in *Voigt v Germany,*[44] the Grand Chamber ruled that Germany had violated Articles 10 and 11 of the Convention in a case involving the dismissal of a teacher from civil service due to her political activities on behalf of the German Communist Party. Although this was the violation judgment, the Court ruled that the aim of the interference at issue was legitimate:

41 B. Fassbender, 'The State's Unabandoned Claim to Be the Centre of the Legal Universe', (2018) 16(4) *International Journal of Constitutional Law*, p. 1214.

42 S. Levinson, 'The Continuing Spectre', *supra* note 39, p. 655.

43 C. Schmitt, *The Concept of the Political. Expanded Edition*, The University of Chicago Press: Chicago/London, 2007.

44 ECtHR, *Voigt v Germany,* no 17851/91 [GC], 26.09.1995.

> In this case the obligation imposed on German civil servants to bear witness to and actively uphold at all times the free democratic constitutional system within the meaning of the Basic Law (see paragraphs 26–28 above) is founded on the notion that the civil service is the guarantor of the Constitution and democracy. This notion has a special importance in Germany because of that country's experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of nazism, led to its constitution being based on the principle of a 'democracy capable of defending itself' (wehrhafte Demokratie). Against this background the Court cannot but conclude that the applicant's dismissal pursued a legitimate aim within the meaning of paragraph 2 of Article 10 (art. 10–2).[45]

In the German tradition of addressing political extremism through 'militant democracy', the concept was later adopted by Turkey, as exemplified in *Refah Partisi* (*the Welfare Party*) *and Others v Turkey*, concerning Article 11 (freedom of association). In this case, the Grand Chamber ruled that the dissolution of the political party by the Turkish Constitutional Court did not violate the Convention. The Turkish government explicitly invoked the doctrine of 'militant democracy' to justify its actions.[46]

Just as it seemed that the end of the Cold War had eliminated the concept from legal and political practice, it re-emerged in two ways: as a framework to support the transition of newly established democracies and as a framework for combating religious fundamentalism. This shift is also reflected in the Court's case law, particularly in cases concerning the prohibition of religious clothing.

The transition of newly established democracies was viewed by the Court as a possibility of temporary restriction in the context of the political sensitivity of the state.[47] For example, in *Rekvényi v Hungary,*[48] the ECtHR examined a constitutional amendment adopted by Hungary in 1993, which prohibited members of the armed forces, police and security services from participating in political activities. The applicant, a police officer, claimed that this restriction infringed his rights to freedom of expression (Article 10 of the Conven-

45 Ibid., para. 51.

46 ECtHR, *Refah Partisi* (*the Welfare Party*) *and Others v Turkey,* nos. 41340/98, 41342/98, 41343/98 and 41344/98 [GC], 13.02.2003, para. 62.

47 P. de Moree 'Militant Democracy in the Context of the ECHR', *supra* note 4, p. 233.

48 ECtHR, *Rekvényi v Hungary*, no 25390/94 [GC], 20.05.1999.

tion) and freedom of association (Article 11). The Hungarian government argued that the limitations were necessary to protect democratic order. The Court acknowledged the government's position and, taking into account Hungary's historical context, concluded that such restrictions could be justified in a democratic society. As a result, it held that there was no violation of Article 10 or 11.

The religious fundamentals trend may be witnessed in the Grand Chamber case of *S.A.S. v France,*[49] where the Court found no violation of the Convention concerning France's ban on wearing religious face coverings in public. The Court broadened the scope of the interference ground, shifting from the traditional justification of 'the protection of the rights and freedoms of others' to a more expansive concept encompassing the requirement that all individuals within a jurisdiction demonstrate 'respect for the minimum requirements of life in society' – or, as the government framed it, the principle of 'living together'.[50]

The Court noted that 'individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.' As a result, the Court accepted that 'the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier'.[51]

*S.A.S. v France* highlights a paradoxical situation in which the applicant is not, in themselves, a threat to the state, yet the characteristics of their conduct are perceived as posing a challenge to fundamental aspects of the constitutional order. Moreover, the contemporary debate has become even more complex. First, new methods of challenging the national order have emerged, particularly through the use of social media and other soft tools. While such mechanisms have been employed by non-democratic regimes to consolidate power, they are also increasingly used to exploit vulnerabilities within democratic systems, further complicating the balance between safeguarding democracy and upholding fundamental rights.

*Invernizzi* and *Zuckerman* express concern that the determination of who qualifies as an enemy of democracy inevitably touches upon the very bound-

49 ECtHR, *S.A.S. v France*, no 43835/11, 01.07.2014.

50 C. Gearty, 'Reason, Faith, and Feelings', in B. Fassbender and K. Traisbach (eds.), *The Limits of Human Rights*, *supra* note 29, pp. 115–116.

51 ECtHR, *S.A.S., supra* note 49, para. 122.

aries of the political entity itself and, as such, cannot be fully governed by any pre-existing democratic norm.[52] They ask: what is the 'principled, non-arbitrary way of distinguishing between what can and cannot be tolerated within a democratic framework?'[53]

In this regard, the focus of the response should not be solely on the structural deficiencies of 'militant democracy' but also on its practical application. In my view, the Court seeks to individualise the grounds for restricting 'the enemy' by carefully calibrating the limitations imposed on individual freedoms, thereby avoiding the excessive abstraction that could otherwise result from an overly rigid application of 'militant democracy'.

The need for a more individualised approach has become even more apparent in recent years. The rapid emergence of new forms of interaction, particularly in the online environment, has introduced unprecedented challenges to democratic governance.[54] In general, restrictions on social media can extend to traditional media, and in cases of democratic backsliding, this may result in effective government control over the media landscape. Such developments can significantly narrow public debate and suppress legitimate criticism of government decisions.[55] A. Sajó emphasises that democracies are particularly vulnerable to emotionally manipulative politics and challenges that exploit constitutional mechanisms to undermine democratic principles.[56]

However, the major challenge has become the increasingly complex notion of 'the enemy', which has shifted from an internal threat to an external one. The distinctiveness of this external 'enemy' – one that operates within the internal legal framework – has led to the development of the term 'post-militant democracy'.[57] I delineate the evolution of threats to democracy since the Second World War until today in Table 1 below.

52 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', *supra* note 19, p. 184.

53 Ibid., p. 185.

54 M. Steuer 'Militant Democracy', *supra* note 12, p. 956.

55 Ibid., p. 957.

56 A. Sajó, 'From Militant Democracy to the Preventive State', *supra* note 1, p. 2263.

57 See J. Rak, 'Conceptualizing the Theoretical Category of Neo-Militant Democracy: The Case of Hungary', 49(2) *Polish Political Science Yearbook*. For the sake of simplicity, however, I continue to use 'militant democracy' in this paper.

TABLE 1 Evolution of 'militant democracy' contexts since the end of the Second World War

| The type of the threat for democracy | Example |
|---|---|
| Radical political movements that aim to destroy the democratic regime by using democratic means (internal threat) | German Communist party trying to get into power and dissolve the constitutional framework |
| Radical religious movements that use democratic means to fight against individuals of other views (internal threat) | Islam radicals acting against non-believers |
| External agents, states act against the state by using proxies (external threat) | Russia acting against European states, exploiting individuals who serve the purpose of destabilising the state |

## 3 'Militant Democracy' under the Convention and the Recent Case Law of the ECtHR

Let us now turn to the Convention. Here, I aim to illustrate the ongoing development of the Court's case law, highlighting general trends as well as the challenges they present. The Convention appears to reflect the evolution of 'militant democracy', with the Court striving to respond to existential threats as they arise. First, I outline the general mechanism established by the drafters of the Convention, which formally empowers the Court to address threats to democratic order. I then examine the specific context of the Latvian and Lithuanian cases, arguing that the changing nature of these 'threats' has compelled the Court to adopt a more context-specific application of the Convention, moving away from previously established formulas where necessary.

### 3.1 *Abuse of Application: The Formal Way to Deal with Existential Threats to Member States*

The Convention system incorporates mechanisms that enable states and the Court to prevent the potential abuse of complaints brought under the Convention. Two formal approaches are designed to address such claims. The first

is Article 17, and the second is Article 35.[58] The latter, Article 35, is procedural in nature and does not directly apply to situations that might be classified under the concept of 'militant democracy'. Article 17, however, presents a different and more substantive dimension to this issue.

Article 17 prescribes that:

> [n]othing in [the] 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.

Article 17 is derived from Article 30 of the Universal Declaration of Human Rights (UDHR). In one of its early rulings, *German Communist Party* (*KPD*) *v Germany*, the EComHR emphasised that the purpose of Article 17 is to safeguard the rights enshrined in the Convention by ensuring the uninterrupted functioning of democratic institutions.[59] Article 17 was incorporated into the Convention to prevent individuals or groups from invoking the rights it guarantees as a means to justify actions that seek to undermine those very rights.[60]

The greatest challenge with Article 17 is that it is narrowly construed. The Court has acknowledged this limitation in numerous cases, emphasising that Article 17 applies only in exceptional circumstances and in the most extreme cases.[61] Moreover, the threshold for its applicability remains particularly high.[62] Article 17 should be invoked only when it is immediately evident that the applicant has sought to rely on the Convention to justify activities or actions that are fundamentally at odds with its values and are intended to undermine the rights and freedoms it enshrines.[63]

The Court has developed a Convention-linked concept that allows for greater flexibility in the application of Article 17 – namely, the notion of a 'democracy capable of defending itself'. In numerous cases, the Court has emphasised the close connection between Article 17 and this principle,

58 Article 35 of the Convention: … 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application ….

59 ECtHR, *German Communist Party* (*KPD*) *v Germany*, no 250/57, 20.07.1957.

60 ECtHR, *Perinçek v Switzerland*, no 27510/08 [GC], 15.10.2015, para. 113.

61 ECtHR, *Paksas v Lithuania*, no 34932/04 [GC], 06.01.2011, para. 87.

62 ECtHR, *Lilliendahl v Iceland*, no 29297/18, 12.05.2020, para. 26.

63 ECtHR, *Perinçek v Switzerland*, no 27510/08 [GC], 15.10.2015, paras. 114–115.

highlighting its role in safeguarding democratic institutions from those who seek to undermine them.[64] The early case law of the Court is directly linked to the traditional concept of 'militant democracy' as the tool to fight anti-democratic ideologies.[65]

Moreover, the Court has acknowledged that Article 17 implicitly informs its assessment of potential threats to member states, even in cases where Article 17 is not directly applicable. However, the Court's implicit reliance on Article 17 introduces an additional layer of uncertainty, raising concerns about the consistency and predictability of its approach. This marks the emergence of a new phase of 'militant democracy' within the Convention framework – one in which the tools of 'militant democracy' are increasingly framed within the standard proportionality tests applied to specific Convention Articles.

I have already briefly discussed *S.A.S. v France* as an example of the evolving concept of 'militant democracy' and the incorporation of democratic order into the application of individual Convention Articles. This is achieved through the restrictive clauses within specific Articles, which permit interference when activities are deemed contrary to public order or the interests of others. In *S.A.S. v France*, the underlying principle defended was the distinct French concept of 'living together'.

### 3.2 *ECtHR Dealing with the Constant Battle against the Crouching Past and Present Threats*

The Court's recent case law has developed even further, with the Latvian and Lithuanian cases playing a particularly significant role. In this regard, I will examine three recent cases that, in my view, have made a substantial contribution to the development of a more context-specific legal framework within the Court's jurisprudence. Before I do so, however, a brief overview of the context of the Baltic states is necessary to understand better some of the key emphases in the Court's reasoning.

Baltic States were attributed to the USSR's sphere of interest under the secret additional protocol to the Molotov-Ribbentrop Pact on 23 August 1939.[66] The occupation, which lasted for 50 years, had far-reaching consequences in Latvian society which continue to influence democracy even now. A significant part of society is still open to totalitarian ideas and has a positive

64 ECtHR, *Voigt v Germany*, no 17851/91 [GC], 26.09.1995, paras. 51 and 59; ECtHR, *Ždanoka v Latvia*, no 58278/00 [GC], 16.03.2006, para. 100.

65 P. de Moree, 'Militant Democracy in the Context of the ECHR', *supra* note 4, p. 228.

66 See *Vasiliauskas v Lithuania*, no 35343/05 [GC], 25.10.2015.

assessment of the period of occupation by the USSR.[67] Currently, Russia continues the USSR doctrine on spheres of influence that targets some of the Council of Europe member states, including the Baltics, Georgia, Armenia, Moldova and Ukraine.

The persistent pressure from Russia provides a basis for considering the use of non-conventional warfare, which has been intensively deployed against the Baltic States. One of the key concepts in this context is hybrid warfare. While the term remains contested, an increasing number of experts recognise its relevance.[68] Basically, it is related to the concept of the fourth-generation war, which incorporates the manipulation of mass media, execution of acts of terrorism, absence of a clear hierarchy and structure of the enemy, employment of military, economic, financial, energy-related and social pressure measures, use of asymmetric tactics, and the implementation of combined and coordinated, overt and covert military, para-military and civilian measures.[69]

In this context, it is crucial to interpret the Court's case law as an effort to provide the necessary protection for a state's constitutional order when faced with pressure from non-conventional means employed by an external adversary. The ECtHR cases *Ždanoka v Latvia* (*No. 2*) and *Kirkorov v Lithuania* directly address the Court's context-specific recognition of national authorities' capacity to respond to existential threats. While *Savickis and Others v Latvia* does not directly concern an existential threat to the state, it nonetheless establishes a conceptual framework for the further incorporation of vital state interests in addressing such threats.

### 3.3 *External Interests Fuel Internal Threats:* Ždanoka *and* Kirkorov *Cases*

The premise of *Ždanoka v Latvia No. 2* is directly related to the Grand Chamber *Ždanoka v Latvia*[70] judgment. Ms Ždanoka had been an active member of the Communist Party of Latvia since 1971. On 21 August 1991 Latvia recovered its independence and outlawed the Communist Party. Based on the national regulation Ms Ždanoka was not allowed to stand in parliamentary elections in 1998 and 2002. Therefore, she invoked the alleged violation of the right to stand for elections. The Grand Chamber of the ECtHR in the first *Ždanoka v*

67 The Latvian Constitutional Court accurately summarised the context of the Baltic States. See ECtHR, *Ždanoka v Latvia* (*No. 2*), no 42221/18, 25.07.2024, para 16.

68 E. Bajarūnas and V Keršanskas, 'Hybrid Threats: Analysis of Content, Challenges Posed and Measures to Overcome', 16 *Lithuanian Annual Strategic Review*, pp. 124–125.

69 Ibid., pp. 125–126.

70 *Ždanoka v Latvia*, no 58278/00 [GC], 16.03.2006.

*Latvia* case held that in 2006 that restriction was neither arbitrary nor disproportionate, finding no violation of the Convention.

However, the difficulties for Ms Ždanoka continued after the Grand Chamber judgment and led to the second case before the ECtHR. In 2017 she sought a review of the compatibility of section 5(6) of the Parliamentary Elections Act with the Constitution. The Constitutional Court found the provision constitutional, underlining that the aim of the relevant provision was to protect the democratic state order, national security and the territorial unity of Latvia. The Constitutional Court narrowed the permitted reasons to restrict participation in the election to (i) having endangered Latvian independence and the principles of a democratic state governed by the rule of law and (ii) continuing to endanger Latvian independence and the principles of a democratic state governed by the rule of law at the time of application. In 2018 the Central Electoral Commission adopted a decision to strike the applicant's name out of the list of candidates of her political party participating in the parliamentary elections.

After exhaustion of domestic remedies Ms Ždanoka again applied to the ECtHR. In its second judgment the Court heavily relied on the Constitutional Court judgment that grounded the restriction. In its 2018 decision the Constitutional Court underlined the importance of considering the status of an individual subject to the restriction, namely, whether the person was still a threat to Latvian democracy. The ECtHR's emphasis on the threat on democracy is part of the development of its case law of 'democracy capable of defending itself' notion.[71] The ECtHR's approach is shaped in the context of weakened European stability and includes cases that similarly address restrictions on fundamental rights based on potential internal threats based on external interests. Although Ms Ždanoka applied to the ECtHR before Russia's aggression against Ukraine in 2022 the Court's explicit reference to developments occurring after the restriction of the applicant's rights illustrates how willing the Court is to incorporate a contextual background into its deliberations on individual cases. The Court indicated that it 'cannot ignore the fact that on 24 February 2022 Russia launched a military invasion of Ukraine, following which, as a result of a procedure initiated under Article 8 of the Statute of the Council of Europe, the Russian Federation ceased to be a member State as from 16 March 2022'.[72] This aspect is particularly significant in the light of

71 See M. Melnika and J. Senders, 'Self-Protecting Democracy and Electoral Rights', *VerfBlog*, available at https://verfassungsblog.de/self-protecting-democracy-and-electoral-rights/, last accessed 07.03.2025.

72 ECtHR, *Ždanoka v Latvia* (*No. 2*), no 42221/18, 25.07.2024, para. 55.

Russia's ongoing use of hybrid warfare – a form of non-conventional conflict marked by a blend of military, economic, informational and covert operations, which has been systematically directed against the Baltic States.

The decision in *Kirkorov v Lithuania* is significant due to its reference to Article 10 of the Convention (freedom of expression), in which the applicant alleged censorship.

The premise of the case is as follows. The applicant, a well-known singer and music producer from Russia, was denied entry to Lithuania on the ground that he posed a threat to national security. What is particularly relevant in this context is that he was not considered a direct threat himself but was instead viewed as a vehicle for advancing Russian propaganda in former Soviet states. His frequent performances in Crimea were interpreted as an endorsement of the Russian state's policy of aggression.

The Court declared the application inadmissible. However, given the nature of the case, it chose to issue a fully reasoned decision, including an analysis of the proportionality of Lithuania's interference in the applicants' rights guaranteed by Article 10 of the Convention.

The decision also highlights policies considered by the Court in its admissibility assessment. While analysing whether the interference was 'necessary in a democratic society', the Court upheld the ban on the applicant's entry into Lithuania, finding it justified on the ground that his presence constituted a threat to national security and public order. This conclusion was based on the applicant's role as a tool of the Russian Federation's 'soft power'.[73] The Court also emphasised that national courts and the Lithuanian Parliament (*Seimas*) as well as the European Parliament had recognised the need to counter Russian disinformation and propaganda warfare. It ultimately determined that the domestic courts had sufficiently balanced national security and public order interests against the applicant's actions, declaring the application inadmissible as manifestly ill-founded.

### 3.4 *Protection of Constitutional Identity: The Legitimate Aim to Interfere with the Convention Rights*

The third crucial case I wish to highlight is the Grand Chamber judgment in *Savickis and Others v Latvia*. This case concerns applicants who were denied having their periods of employment accrued in other former USSR states being counted towards the calculation of their social benefits. The applicants argued that they were treated differently due to their status as 'permanent resident

73 ECtHR, *Kirkorov v Lithuania,* no 12174/22, 19.03.2024, para. 59.

non-citizens' in contrast to Latvian citizens. The distinction between 'permanent resident non-citizens' and Latvian citizens has been the subject of numerous cases before the ECtHR, reflecting ongoing legal and human rights debates surrounding the rights and status of this group.

In the *Andrejeva v Latvia*[74] case the Court found a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention, considering that the national authorities' refusal to take into account the years of the applicants' employment 'outside Latvia' had been based exclusively on the consideration that she had not had Latvian citizenship. In contrast to *Andrejeva*, the national courts in the *Savickis and Others* circumstances indicated the absence of legal ties between them and Latvia.[75] The difference between the factual circumstances of the *Andrejeva* and *Savickis and Others* cases was acknowledged by the Court in the *Savickis and Others v Latvia* judgment.

The most conceptually significant conclusion was reached in the discussion of whether the interference was legitimate. Here, the Court recognised that the alleged difference in treatment was justified by the legitimate aims of protecting Latvia's constitutional identity, which is grounded in the doctrine of state continuity, as well as its economic system. The Court emphasised the importance of the specific historical context, particularly the decades of unlawful occupation and annexation, as well as the complex policy choices faced by Latvia following the restoration of its independence:

> More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In this specific historical context, such an aim, as pursued by the Latvian legislature when establishing the system of retirement pensions, was consistent with the efforts to rebuild the nation's life following the restoration of independence, and the Court accepts this aim as legitimate.[76]

*Savickis and Others*, along with *Kirkorov* and *Ždanoka* (*No. 2*), appears to mark another step in the Court's evolving doctrine on a democracy capable of defending itself. The Court's approach has been shaped by the broader context

74 ECtHR, *Andrejeva v Latvia,* no 55707/00 [GC], 18.02.2009.

75 See the excerpt from the Latvian Constitutional Court ruling of 17 February 2011, ECtHR, *Savickis and Others v Latvia,* no 49270/11 [GC], 09.06.2022, para. 51.

76 Ibid., para. 198.

TABLE 2 The Court's response to the evolution of 'militant democracy' contexts[a]

| The type of the threat to democracy | The Court's toolkit |
|---|---|
| Radical political movements that aim to destroy the democratic regime by using democratic means (internal threat) | Article 17 applicable |
| Radical religious movements that use democratic means to fight against individuals of other views (internal threat) | Article 17 could be applicable in some cases, individual analysis and the proportionality test |
| External agents, states act against the state by using proxies (external threat) | Individual analysis and the proportionality test – the threat is external, the applicant is a threat indirectly |

a The explanation of the Court's toolkit is simplified and does not include instances when the applicant's behaviour is excluded from the scope of application of the relevant right or the Court refers to Article 17 implicitly.

of weakened European stability, emphasising an individualised assessment of situations involving external threats.

In the light of ongoing challenges, I include the table that reflects the Court's potential legal framework for dealing with different settings of threats to democracy, based on Table 2 (above).

However, the Court's case law in developing these constitutional self-defence doctrines rests on uncertainty.as it risks compromising the universality of human rights. Several key aspects of this shift in the Court's jurisprudence should be considered in the broader context of its commitment to upholding subsidiarity and reinforcing the role of national authorities as the primary interpreters and implementers of the Convention, particularly in context-dependent cases.

## 4 The Context-Specific Court's Approach

First, the Court's case law recognises the challenges faced by the constitutional order of member states when the threat comes from an external adversary that operates indirectly, using individuals who may not themselves pose a

direct danger. However, it is important to recognise that the unique challenges posed by 'internal threats driven by external pressures' complicate the individualised application of human rights safeguards to individuals who are deemed a threat solely due to the broader context. Addressing this issue effectively requires an explicit focus on external threats while encouraging individuals to distance themselves from activities that could be exploited by external actors.

This issue gains particular relevance in the context of Russia's ongoing hybrid warfare against European states, especially its neighbouring countries, which Russia may regard as falling within its sphere of influence. The need for the Court to adopt a more nuanced and responsive approach to national security concerns in the context of hybrid threats became even more apparent following Russia's full-scale invasion of Ukraine in 2022. On 16 March 2022, the Committee of Ministers adopted a resolution declaring that the Russian Federation would cease to be a member of the Council of Europe, thus ending 26 years of membership. Prior to this decision, the Council of Europe retained at least a theoretical capacity to influence Russia's position on certain political matters. However, this avenue of engagement was effectively shut down following Russia's expulsion.

The shift in the Court's case law reflects this approach by emphasising the constitutional framework as it has been substantially developed through national constitutional court jurisprudence. In response to criticism regarding the absence of a non-arbitrary assessment, the Court increasingly refers to national constitutional case law to justify its reasoning.

The clearest example of this is the recognition of constitutional identity as a legitimate aim. While *Savickis and Others v Latvia* is not itself a militant democracy case, its use of constitutional identity as a legitimate aim exemplifies the Court's attempt to establish a framework that: (i) allows democracy to safeguard its core values (a concept applicable to militant democracy); (ii) upholds the principle of subsidiarity; and (iii) ensures an individualised assessment of circumstances under the necessity of restriction test. In this way, the 'enemy' is no longer merely an individual or group challenging majority political views but rather one that, in C. Schmitt's terms, seeks to undermine the very core of democratic values.

Second, the Court seeks to address the challenge of the 'politicisation' of 'the enemy', which risks suppressing human rights without an impartial and objective analysis. Invernizzi and Zuckerman criticise this approach, arguing that subjecting decisions on who should be permitted to participate in the democratic process to a reflexive process of democratic deliberation does not, in itself, provide any assurance that such deliberation will lead to the

exclusion of actors who pose a genuine 'threat' to the stability of the democratic system as a whole.[77] Instead, they argue, this approach merely reproduces the very problem that militant democracy was originally designed to resolve. The core concern of militant democracy was precisely that an anti-democratic majority (or super-majority) could capture the democratic process and exploit it to exclude others arbitrarily from participation.[78]

The Court seeks to address this issue through a procedural approach, allowing the national framework to generate reasoned opinions during the adjudication process.[79] In doing so, it objectifies the political aim of safeguarding the constitutional order, recognising it as a legitimate objective – particularly in *Savickis and Others*. This inclusion has been widely criticised by scholars, primarily due to the vagueness of concepts such as 'constitutional identity' and the risks of abusing them.[80] However, it at least provides the Court with an opportunity to develop and refine these concepts in a manner that aligns them more closely with the principles of the Convention.

Third, the Court emphasises the subsidiary nature of the Convention by emphasising the significance of national constitutional orders and the fragmentation of regional specificity. The *bottom-up* approach, which aligns with the principle of subsidiarity, may explain the ECtHR's increasing reliance on interpretations linked to constitutional identity.[81] This appears even more

77 C. Invernizzi Accetti and I. Zuckerman, 'What's Wrong with Militant Democracy?', *supra* note 19, p. 188.

78 Ibid.

79 The term 'procedural' refers to the 'procedural embedding phase' of the Courts' case law (as indicated by R. Spano: 'the significance of process-based review lies in its shift of the Court's primary methodological focus from its own independent assessment of the "Conventionality" of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded principles and the states' obligations to secure Convention rights to peoples within their jurisdictions' (R. Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law', *Human Rights Law Review*, 18, pp. 480–481)).

80 'The outcome of the constitutional identity trend is messy and incomprehensible: a broad catch-all pretext to suspend a broad spectrum of rights guaranteed by law.' See S. Ganty, D. V Kochenov, and I. Y. Nugraha, 'Constitutional Identity vs. Human Rights: The ECtHR's Bizarre Turn in Three Latvian Cases', *VerfBlog*, 21.12.2023, available at https://verfassungsblog.de/constitutional-identity-vs-human-rights/, DOI: 10.59704/55184a96adabe0b0, last accessed on 09.03.2025.

81 G. Ulfstein, 'The European Court of Human Rights and National Courts: A Constitutional Relationship?', in O. M. Arnardóttir and A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders*, Routledge: London/New York, 2016, p. 57.

justifiable when one considers the diverse challenges faced by the member states of the Convention. The significance of hybrid warfare and the direct threats posed by Russia to its neighbouring states lend greater credibility to the Baltic States' reliance on militant democracy arguments when seeking to justify interferences with Convention rights. The Court's willingness to assess constitutionally grounded justifications aimed at safeguarding democratic order not through a rigid universal standard but via a contextualised, individualised approach suggests that states must articulate more clearly how their constitutional imperatives align with the Convention framework. This also places a greater responsibility on states to develop constitutionally sound and balanced regimes that remain consistent with their obligations under the Convention.

As G. Ulfstein argues, national courts can serve as mediators between national and international legal systems: '[t]his would reflect an application of the principle of subsidiarity adapted to the special constitutional setting represented by the interaction between the ECtHR and national constitutional organs'.[82] In *Savickis and Others*, the Latvian Constitutional Court clearly fulfilled this mediating role.

The present challenges and emerging threats to democracies raise critical questions about whether the Convention can provide an adequate response. In some cases, the absence of a clear response may be problematic not only for states that risk violating the Convention but also for the credibility of the Court and the Convention itself – particularly when states perceive no viable alternative but to act in contravention of Convention obligations.

One such highly complex situation is the phenomenon of 'instrumentalised migration' at the borders of Poland, Lithuania and Latvia.[83] The argument for protecting democracy from external threats by addressing indirect threats – such as individuals being used as instruments – has not yet been developed in the Court's case law.[84] The Court may try balancing the necessity to maintain order with the requirement to remain sensitive to individual needs in instrumentalised migration cases. In any case, applying the Convention in a manner that is both context-sensitive and respectful of individual rights presents a

82 Ibid., p. 58.

83 ECtHR, *C.O.C.G. and Others v Lithuania,* no 17764/22, *R.A. and Others v Poland*, no 42120/21, and *H.M.M. and Others v Latvia*, no 42165/21 cases, still pending at the Court at the time of submission of this paper.

84 V. Milašiūtė, 'Valstybės sienų uždarymas pagal tarptautinę ir Europos Sąjungos teisę žmogaus teisių apsaugos požiūriu', *Vilnius University Open Series*, 2024, available at https://www.zurnalai.vu.lt/open-series/article/view/38062, last accessed on 03.03.2025, p. 260.

significant challenge. Although the Court's attempt to balance both is under critique, there might be no other alternative in emerging substantial threats to the existence of the Convention member states. The Court's evolving approach to balancing state security needs and existential threats within the framework of 'militant democracy' offers a potentially less interventional pathway to safeguarding democracies while simultaneously establishing a case-specific and emergency grounded threshold for human rights protection. In this regard, the capabilities of the Convention member states reasonably to ground arguments for the protection of their constitutional order might be of highest importance – this will determine whether the necessity to interfere in the Convention rights is justified in the eyes of the Strasbourg judges.

## 5 Conclusions

The evolution of the European Court of Human Rights' case law on militant democracy mitigates the growing tension between safeguarding democratic institutions and upholding fundamental rights. As demonstrated by cases such as *Savickis and Others v Latvia*, *Ždanoka v Latvia* (*No. 2*) and *Kirkorov v Lithuania*, the Court is increasingly called upon to balance constitutional identity concerns with its role as the guardian of the Convention. While the recognition of constitutional identity as a legitimate aim signals a shift towards a more context-sensitive approach, it also raises concerns about the potential erosion of universal human rights protection. The Court's reliance on national constitutional reasoning to justify restrictions highlights the increasing fragmentation of human rights law, reinforcing the argument that the principle of subsidiarity plays a crucial role in shaping the Court's jurisprudence.

This shift, however, is not without its risks. The broadening of militant democracy's conceptual framework to include threats arising from external actors operating through domestic legal channels complicates the Court's ability to establish clear and predictable legal standards. While national courts establish the link between domestic and international legal frameworks, their reliance on contested concepts such as constitutional identity introduces the possibility of arbitrary restrictions on fundamental rights.

Moving forward, the Court faces a critical challenge: developing a coherent legal framework that allows democratic states to protect their constitutional order without compromising the universality of human rights. This requires a more refined application of the Convention's proportionality test to ensure that restrictions are both necessary and proportionate to the threats they

seek to address. The Court must remain vigilant against the potential misuse of militant democracy as a political tool to silence dissent or entrench majoritarian dominance. The Court's case law provides national courts – particularly constitutional courts – with a framework for developing well-reasoned arguments that thoroughly examine the protection of the constitutional order in relation to interferences with fundamental rights. As the legal landscape continues to evolve, the Court's ability to balance these competing imperatives will shape the future of militant democracy within the Convention system and, more broadly, define the extent to which European democracies can defend themselves without subverting the very rights they seek to protect.