MASTER'S THESIS

The self-correcting capacity of representative democracy

A critical review of the relationship between militant democracy and the principles of representative government

Stam, J.

Award date:
2019

Awarding institution:
Leiden University

UNIVERSITEIT LEIDEN

The self-correcting capacity of representative democracy

A critical review of the relationship
between militant democracy and the principles of representative government

Jip Stam

Author
J. (Jip) Stam LL.M. MSc
Department of Jurisprudence
Leiden University
Tel.: +31624197187
Email: j.stam@law.leidenuniv.nl

Contents

Word count: 12.552 (footnotes excluded)

Introduction

Over the past three decades, the concept of 'militant democracy' has recaptured attention within the area of legal philosophy and constitutional theory.[1] In essence, militant democracy addresses what Karl Popper once called the 'paradox of tolerance'. 'If we extend unlimited tolerance even to those who are intolerant', Popper wrote, 'then the tolerant will be destroyed, and tolerance with them'.[2] In the same way, democracy is vulnerable to democratic self-destruction through democratic procedures.[3] In order to address this 'weakness', advocates of militant democracy argue for the implementation of effective countermeasures, such as the ability to ban political parties.[4]

Germany has long remained one of the few democracies that has enshrined such an instrument in its constitution, but this exceptional status might change in the upcoming years. In the Netherlands, for example, the current coalition government has formulated the ambition to create a special legal provision for the prohibition of political parties in order to make democracy 'more defensible against radical anti-democratic forces'.[5] This argument has been repeated in a recently published report of the Advisory Committee on the Parliamentary System (Staatscommissie Parlementair Stelsel). According to this committee, 'existing self-defence measures', such as (proportional) representation and constitutional checks and balances, turn out to be insufficient to safeguard the democratic system against 'political radicalisation' within society. Religious fundamentalism and right- and left wing extremism are indicated as the primary sources of danger.[6] The committee thus underlined the cabinet's wish to implement a special legal provision for the banning of political parties.[7]

Apparently, political parties are considered as potentially dangerous actors to a system that, despite built-in safeguards, is incapable of mitigating this danger. This line thought clearly resembles the tenor of Karl Loewenstein's first description of 'militant democracy' in the 1930s. In response to Germany's transition in to a full-fledged dictatorship, Loewenstein warned that the political party can be used as a 'Trojan horse' with which anti-democratic forces can 'enter the city'.[8] In other words: the freedom of association can be utilized by the enemies of democracy to

[1] Backes 1998; Kirschner 2014; Müller 2012, Tyulkina 2015; 2016; Sajó 2004; Thiel 2009; Capoccia 2013; Rijpkema 2018.
[2] Popper 2002, p. 581-582, footnote 4.
[3] Ibidem; Müller 2012, p. 2.
[4] Capoccia, 2013, p. 213.
[5] See Coalition agreement '*Vertouwen in de toekomst',* 10 October 2017, p. 5.
[6] Staatscommissie Parlementair Stelsel 2018, p. 219.
[7] Ibidem. p. 220-221.
[8] Loewenstein 1937a, p. 424.

realise their anti-democratic objectives. In order to fix this inherent 'weakness', democracies should 'become militant' against those who aim to overthrow it.[9]

Inspired by Loewenstein and other advocates of democratic self-defence, Germany has developed a substantive framework of militant democracy (*Streitbare demokratie)* with a specific normative foundation: the so called 'free democratic basic order'. This concept was later specified by the German Constitutional Court in to eight fundamental principles.[10] If a political party aims to abolish at least one of these principles, it runs the risk of being banned.[11] With this broad legal basis for banning parties, the German model is vulnerable to the criticism that it is too 'substantive' and therefore leaves little room for an open political debate, which is traditionally considered as an essential element of democratic politics.[12] Others fear that it may give rise to the abuse of power or that it is simply irreconcilable with the principle of tolerance.[13]

With these considerations in mind, the Dutch legal scholar Bastiaan Rijpkema has recently proposed an alternative understanding of militant democracy in the book *Militant democracy: The limits of democratic tolerance* (2018). His view is not based on a wide range of 'absolute' or 'superior' democratic values, but on a much more simple idea: 'democracy as self-correction'.[14] Self-correction, Rijpkema argues, is dependent on three constitutional principles: 1) political evaluation, 2) political competition, and 3) freedom of speech. If one or more of these principles is under serious threat, the banning of a political party may be justified.[15] With this narrower basis for limiting the exercise of political rights, Rijpkema's concept of militant democracy seems to be more attractive than its German counterpart.

Still, the essential instrument of Rijpkema's theory, the prohibition of political parties, might just as well run in to an established principle of modern constitutional law: the independence of individual MPs. According to this principle, individual parliamentarians are not bound by mandates or instructions but allowed to act and vote freely in all parliamentary affairs.[16] This could imply that the prohibition of a party has (in principle) no legal effect on the formal

[9] Ibidem. p. 432.
[10] Rijpkema 2018, p. 142.
[11] Michalowski & Woods 1999, p. 21.
[12] Bellekom 1982. See also John Stuart Mill's classical liberal account of 'the liberty of thought and discussion'. Mill 2013, p. 19-55 (chapter II).
[13] Malkopoulou & Norman 2018, p. 447; Kelsen 2006.
[14] Rijpkema 2018, p. 133.
[15] Ibidem, p.153-156.
[16] In the Dutch constitution, the independence of members of the *Staten-Generaal* is guaranteed by article 67 sub 3, which reads: 'The members shall not be bound by a mandate or instructions when casting their votes' (source: www.government.nl). The German constitution protects the independent position of MPs through article 38. Although the United Kingdom has no written constitution, the Representation of the People Act clearly underlines the formal independence of MPs (Krouwel 2004, p.33-34). See also Yardley (1990, p.14-15).

status of MPs, because the constitution considers them to be independent actors. As a result, the so called 'free mandate' of MPs could curtail the desired effect of a party ban.[17]

As Rijpkema realizes the significance of this point, he comes up with the idea that the judiciary should ultimately decide whether the MPs associated to banned parties should give up their seat. In his view, this is a 'tailored' solution to anti-democratic political parties.[18] Nevertheless, by placing the fate of individual parliamentarians in the hands of unelected judges, Rijpkema's strategy might place the courts in an awkward and controversial position.[19] Elzinga therefore infers that it would be more desirable to leave the decision on the 'democratic spirit' of representatives to the electorate rather than the judiciary.[20]

Hence, a clear dilemma remains. On the one hand, it seems reasonable to put the protected independence of MPs aside to achieve the desired effect of a party ban. On the other, constitutional law explicitly protects the independence of MPs, and, as such, seems to stand firmly in the way of this line of reasoning. This highly interesting and yet unexplored puzzle can be summarized in the following question: *How does the logic of a party ban as a crucial instrument of militant democracy (and more specifically: democracy as self-correction) relate to the protected independence of parliamentarians?*

In order to adequately address this question, chapter one will first outline the origins of representative government with a focus on its existing self-protective features. Subsequently, this view will be contrasted with the German legal doctrine of militant democracy. In the second chapter, Rijpkema's alternative notion of 'democracy as self-correction' will be introduced, as well as the tension between the party ban and the constitutionally protected independence of MPs. The third and final chapter will trace back the meaning of the 'free mandate' within the framework of representative democracy, so that it may be possible to produce an answer, or at least a better understanding, of how militant democracy and the principle of the 'free mandate' relate to another.

[17] Elzinga 1982, p.163; Rijpkema 2018, p.164, p. 8; BVerfGE 2.1, consideration No. 332. Rijpkema, B.R. (2015). p.190-191.
[18] Rijpkema 2015, p. 194; 2018, p. 166.
[19] Manin 1997; Heringa et al. 2015, p. 155; Waling 2017.
[20] Elzinga 1982, p. 163.

1. The origins of militant democracy

As briefly mentioned in the introduction, the inherent 'weakness' of democratic constitutions particularly gained scholarly attention among legal philosophers after the transformation of the German Weimar Republic (1919-1933) in to a full-fledged dictatorship.[21] Yet this does not imply that the central 'problem' of militant democracy, the abuse of democratic rights by tyrannical majorities, is a German or historical particularity. Quite the contrary. Long before the development of 'militant democracy' as a legal doctrine, concerns were raised about inherent dangers and weaknesses of a democratic regime. Accordingly, the designers of democratic constitutions have already included a broad range of institutional 'self-defence measures' in the basic legal framework of the state. In this chapter, I will trace back the considerations underlying the adoption of these measures and subsequently compare them to the post-war legal doctrine of militant democracy as it developed in Germany. From this comparison, I aim to deduce that militant democracy embodies a perspective on democratic self-defence that is fundamentally different from the traditional model of representative democracy.

1.1. Representative government and its alleged 'lack of militancy'

In this section, I will introduce the doctrine of (republican) constitutionalism, which may be considered as the precursor of militant democracy theory. The most straightforward way to illustrate this is to ask: *What kind of regime are we are currently employing?* A straightforward answer could be "democracy" or "government by the people". This, however, is not very precise. Although these notions can be associated with the political system of the ancient Greek *polis* (and perhaps present day Switzerland), the modern understanding of democracy that has gradually development since the European Enlightenment is somewhat different.[22] Instead of embodying a direct a form of popular government, based on the immediate expression of the will of the people (or at least its majority), modern democracies typically contain multiple barriers between the populace and the government apparatus.

Representation is the most essential of these barriers. Because of this element, the French political thinker Bernard Manin (1951–) described modern representative democracy as a 'balanced system'; 'a machinery that combines democratic and undemocratic parts'.[23] It is democratic because the appointment of representatives occurs through regular elections in which

[21] Loewenstein 1937a, 1937a, p. 426. For a concise overview of the historical background of militant democracy, see Capoccia 2013 and Müller 2012.
[22] Thomassen 1991, p. 167-168.
[23] Manin 1997, p. 237.

the entire body of citizens participates, but it is undemocratic due to the 'absence of mandates, legally binding pledges, and discretionary recall'.[24] This implies that representatives have, despite the fact that they are directly elected, no binding obligations to their electors.

The choice to create this balance had various reasons. In the first place, representation was considered to be indispensable in governing large nation-states. Through elections, the people were are able to influence political decision-making despite the inevitable distance between them and those actually in power.[25] Secondly, representation was conceived as a way to 'refine and enlarge the public views'; to improve political decision-making through deliberation by wise and knowledgeable men consciously thinking about what is in the general interest.[26] In the third place, representation was considered as an effective way to render manipulation and arbitrary use of state power less likely. Because, with the elective method the power over the legislature is effectively dispersed over a considerable number of 'governors' attached to different constituencies, thereby making concentration of power at the centre more difficult.[27]

At first, this might seem a somewhat confusing combination of arguments, as the first two point towards the enhancing operation of representation, whereas the third emphasises its mitigating purpose.[28] Still, this seemingly odd combination of effects forms the very essence of representative democracy; a system in which the people are considered to be the ultimate source of political authority and yet involves a number of institutional safeguards when it comes to the exercise of that authority.[29]

The primary reason why these safeguards are considered necessary has been powerfully expressed by John Stuart Mill in his *Considerations on Representative Government* (1861):

> 'The moment a man, or a class of men, find themselves with power in their hands, the man's individual interest, or the class's separate interest, acquires an entirely new degree of importance in their eyes. […] One of the greatest dangers, therefore, of democracy, as of all forms of government, lies in the sinister interest of the holders of power.'[30]

On the basis of this assumption about human nature, Mill inferred that the constitution of a representative system requires 'efficacious securities' against power abuse.[31]

[24] Manin 1997, p. 237.
[25] Ibidem, p. 9.
[26] Hamilton et al., p. 53 (No. 10).
[27] Ibidem, p. 53-54.
[28] Pettit 1997, p. 173.
[29] Ibidem; Manin 1997, p. 221.
[30] Mill 2015, p. 260.
[31] Ibidem, p. 262.

A similar argument can be found in the writings of James Madison (1751-1836), one of the authors of the *Federalist papers* (1788); a series of essays published to propagate the adoption of the US Constitution. Though a fierce defender of representation, Madison realised that 'in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.'[32] Hence, next to regular elections, which Madison considered to be the primary (external) control on the government, there have to be a number of internal constraints on the exercise of political authority.

According to the *Federalist*, this internal protection is to be achieved primarily by distinguishing a legislative, executive and a judicial authority. With this separation of powers, inspired by Charles de Montesquieu (1689-1755), the concentration of power can be avoided.[33] In addition to this, various constitutional 'checks' have to be put in place. These are to create and maintain a power balance between the three departments.[34] Typical examples thereof are the executive veto, the motion of no-confidence (or: presidential impeachment) and judicial review.[35] Another safeguard proposed by the *Federalist,* is the division of the legislature in two distinct houses, also known as 'bicameralism'.[36] This is necessary, they argued, because the legislature has a 'natural predominance' over the other departments due to its direct link with the people.[37] On the level of the government, this forms the final line of defence against the abusive aspirations of office-bearers.

Yet, despite these constitutional securities, a representative system is still vulnerable to power abuse. After all, on the level of society the 'defect of better motives' may just as well pose a threat to the constitutional order. This is what *Federalist* referred to as the 'the problem of faction'.[38] By 'faction', Madison understood 'a number of citizens […] united and actuated by a common impulse of passion, or of interest, adverse to the rights of other citizens', which, if combined in a majority, could 'sacrifice to its ruling passion or interest both the public good and the rights of other citizens'.[39] In other words: factions can utilize the representative system and abuse it to further their own particular wishes. If their predominance is consistent over a longer period of time, factions could triumph over the separation of powers and checks and balances and modify the constitutional framework without much opposition, enabling them to 'legally do

[32] Hamilton et al., 2008, p. 257 (No. 51)
[33] Montesquieu 1949; See also Diamond 1987, p. 671-672; Hamilton et al., 2008, p. 258 (No. 51).
[34] Heringa et al. 2015, p. 21; Pettit 2010, p. 177-180. See also Hamilton et al., 2008, p.257 (No. 51).
[35] Diamond 1987, p. 671-672; Pettit 2010, p. 177-180. See also Hamilton et al., 2008, p. 258 (No. 51).
[36] Pettit 2010, p. 178-179; 181; Diamond 1987, p. 673.
[37] Hamilton et al., 2008, p. 257 (No. 51).
[38] Ibidem, p. 48-49 (No. 10).
[39] Ibidem. p. 51 (No. 10).

oppressive things'.[40] For this reason, the constitution requires 'auxiliary precautions' against the abuse of power by factional majorities.[41]

This, however, turns out to a very complicated matter, since the republican constitution envisaged by the *Federalist* is committed to the protection of one of the very causes of faction: liberty.[42] 'Liberty is to faction what air is to fire', Madison realised. At the same time, he was convinced that 'it could not be less folly to abolish liberty, which is essential to political life'.[43] At this point, it appears that Madison faced exactly the same issue as Popper: the paradox of tolerance.[44] Yet contrary to Popper, who defended a 'right not to tolerate the intolerant', Madison principally rejected this course of action, arguing that a true republic needs to 'secure the public good and private rights against the danger of […] faction, and at the same time preserve the spirit and the form of popular government.'[45]

This is where the typical argument of the *Federalist papers* comes in to play. Madison expects that both the preservation of liberty and the effective mitigation of factions can be achieved by applying the principle of representation to the extensive territory and large population of a federal (that is: multi-layered) republic:

> 'Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.'[46]

Hence, Madison's solution to the paradox of tolerance is essentially to 'make government more difficult to organize' by integrating the diversity of interest of the nation in to the representative system.[47] This 'republican' line of reasoning, which is all about thwarting those who are in power, can be traced back to the political thought of the northern Italian republics. Long before the creation of modern constitutions, Niccolò Machiavelli (1469-1527) observed that the friction between the governing institutions of the ancient Roman republic (particularly the senate and the tribunes) had a stabilizing effect on society as a whole.[48] From this observation, Machiavelli inferred that freedom is not primarily the consequence of good laws, but more so of the

[40] Diamond 1987, p. 670.
[41] Hamilton et al., p. 257 (No. 10).
[42] Riemer 1954, p. 35.
[43] Hamilton et al., 2008, p. 49 (No. 10).
[44] See the Introduction.
[45] Popper 2002, p. 581 (footnote 4); Hamilton et al., 2008, p. 49 (No. 10).
[46] Ibidem. p. 53-54 (No. 10).
[47] Pettit 2010, p. 173. This republican conception of freedom is thoroughly discussed by Pettit 2010. His focus lies on a conception of freedom as 'non-domination' instead of the negative-positive dichotomy presented by, for example, Berlin 1958. See also Pitkin 1967, p. 195.
[48] Machiavelli 1983, p. 110-111. See also Colish 1971.

dispersion of political authority over multiple countervailing powers; an argument that, as we have seen, clearly resonated in the writings of the advocates of representative (and: federal) government.[49] Their principled choice to rig the constitutional design rather than restrict the exercise of political rights clearly testifies thereof.

However, despite the profound influence of the republican tradition on the constitutional theory of representative democracy (more on this in chapter three), the reliance on institutional contrivances as the primary safeguards against abuse of power rapidly diminished since the second quarter of the twentieth century. Particularly during the 1920s and 1930s, when many European democracies witnessed the rise of authoritarian political movements, the general trust among constitutional theorists in the stabilizing effect of the constitution was seriously affected. The legal transition of the German Weimar Republic in to a full-fledged dictatorship in 1933 seems to have been the tipping point, instigating an intensive scholarly debate about the self-destructive capacity of representative government. From this debate, a more radical appreciation of democratic self-protection emerged: 'militant democracy'.[50]

According to the German legal scholar Karl Loewenstein (1891-1973), who coined this concept in the 1930s, democratic constitutions needed extra protection against power seizures by oppressive majorities. In his view, the downfall of the Weimar Republic and the upswing of fascist and communist movements all across Europe testified of this necessity.[51] Analogous to the reasoning of Popper, Loewenstein argued that the democratic constitution was unable to counter frontal attack on its fundamental principles – not *despite* but *because* of its stubborn reliance on these very principles:

> 'Democracy and democratic tolerance have been used for their own destruction. Under cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion. […] Democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city'.[52]

As Popper, Loewenstein pointed to the paradox that the freedom a representative democracy aims to protect can easily be abused by oppressive movements in society. The 'Trojan horse' is clearly a metaphor for the political party, which functioned as the vehicle through which the

[49] Manin 1997, p. 45, 63; Pettit 2010, p. 20. For an historical overview of the influence of Florentine political thought on modern constitutional thought, see Pocock 1975.
[50] Müller 2012, p. 5; Rijpkema 2018, p. 24.
[51] Loewenstein 1937a; 1937b.
[52] Loewenstein 1937a, p. 423.

Nazis could freely organize themselves, reach out to the masses, and acquire access to the parliamentary system.[53]

Hence, democratic constitutions had to be 'stiffened' and 'hardened' so that they could withstand attempts of anti-democrats to overthrow the democratic system:

> 'Constitutional scruples can no longer restrain from restrictions on democratic fundamentals. […] If democracy believes in its own absolute values, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk of violating fundamental principles.'[54]

As becomes clear from this passage, Loewenstein concluded that the principled choice to rig the constitutional design no longer sufficed to withstand the authoritarian movements of the twentieth century. Due to new developments such as the rapid expansion of the suffrage, the increased power base of political parties, and the rise of mass media, anti-democrats could much more easily get a grip on the political system than in the past.[55] For this reason, there should be no more taboo on the suspension of political rights to the enemies of these rights. Fire should – in Loewenstein's famous words – be 'fought with fire'.[56]

This metaphor clearly reveals the fundamental difference between republican constitutionalism and Loewenstein's concept of militant democracy. After all, 'fighting fire with fire' is exactly what Madison categorically excluded as a proper solution to the problem of faction.[57] This principle difference with constitutionalism will become ever more clear when reviewing the enshrinement of militant democracy in the German Basic Law over the course of the next section.

1.2. Germany: The constitutionalisation of militant democracy

After 1945, Loewenstein's argument for militant democracy became highly influential among German constitutionalist and legal philosophers. After witnessing the horrors of the Second World War, many agreed that the country's constitutional order had to be fortified in order to prevent another democratic disaster in the future.[58] Arnold Brecht concisely summarized this line of thought as follows: 'It would be advisable for the new German constitution (and for any other democratic constitution to be enacted in the future) to contain certain sacrosanct principles and

[53] Ibidem, p. 424, 426.
[54] Loewenstein 1937a, p. 432.
[55] Ibidem, p. 423-424.
[56] Ibidem, p. 432, Loewenstein 1937b, p. 647, 656.
[57] See again Hamtilon et al., p. 49 (No.10).
[58] Müller 2012, p. 209.

standards that could not be abolished or suspended by emergency decrees or by any parliamentary or plebiscitarian majorities.'[59] Inspired by this line of thought, the designers of the new *Grundgesetz* (Basic Law) decided to entrench the democratic and federal structure of the state and create a legal framework of militant democracy.[60]

The central point of reference of this framework is the so called 'free democratic basic order'. If a political party openly proposes to damage or overthrow this order, the Constitutional Court can be requested to review whether such a party is 'unconstitutional'.[61] If that is indeed the case, the Court has the exclusive competence to ban the party that is under review. This competence is included in article 21 sub II of the Basic Law:

> 'Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.' (Basic Law, Art. 21(2))

It should be noted that the Court cannot initiate a party ban fully on its own. Requests to ban a party should be filed by either the Bundestag (Federal House of Representatives), the Bundesrat (Federal Council) or the Bundesregierung (Federal Government) – all political institutions.

Since 1949 two political parties have been banned on the basis of Article 21(2). In the first case, which reached the Court in 1952, it had to decide whether the Socialistische Reichspartei Deutschland (SRP) posed a threat to the 'free democratic basic order'. Before coming to its verdict, the Court made a 'basic decision' in favour of a 'substantive' (as opposed to formal) understanding of democracy based on a fixed set of constitutional values that make up the 'free democratic basic order'. This resulted in list of eight principles: respect for human rights; popular sovereignty; separation of powers; accountability of government; legality of the administration; independence of the judiciary; the multiparty principle, and the right to opposition. The SRP met at least seven of these criteria, and thus its prohibition was justified.[62] In the second ruling, which took place in 1956 against the Kommunistische Partei Deutschland (KPD), the Court added to its jurisprudence that a party can also be banned solely on the basis of its programmatic objectives, thereby significantly enlarging the scope of its authority.[63]

[59] Brecht 1945, p. 138.
[60] Schwartzberg 2007, p. 175; Klamt 2004.
[61] Michalowski & Woods 1999, p. 19-20.
[62] BVerfGE 2.1 (1952), consideration No. 38.
[63] BVerGE 5, 85 (1956). p. 141

Of course these verdicts should be placed in historical perspective. During the 1950s, the horrors of Nazi-Germany were still fresh in the nation's memory, and therefore it is not surprising that the Constitutional Court used its leverage to expel extreme movements even though their oppressive potential was marginal.[64] Over the last six decades, this historical context gradually became less relevant, and under the influence of the case law of the European Court of Human Rights (ECHR), the German Constitutional Court had to nuance the two earlier decisions. In 2017 the Court decided in a high-profile case against the Nationaldemokratische Partei Deutschlands (NPD) that although this party was clearly opposed to the 'free democratic basis order', a ban on the NPD was unnecessary because it did not have the real potential of damaging it.[65] Accordingly, the Court partially came back to its earlier decisions.

All the same, the entrenchment of militant democracy in the German Basic Law remains to be fairly unique from a comparative perspective.[66] Particularly the interplay between the 'free democratic basic order' as an inviolable part of the constitution and the related competence of the Constitutional Court to prohibit political parties is a rare phenomenon in the democratic world. Even the highly influential US Supreme Court, which is known for its profound influence on political issues, cannot equal the strong grip on the exercise of political rights of its German sister.[67]

Quite the contrary. The First Amendment of the US Constitution only allows for limitations on the freedom of speech and the freedom of association when a 'clear and present danger of direct harm' is established.[68] Hence, one could argue, with Teitel, that the American constitutional tradition and the legal doctrine of militant democracy as it developed in the German (and in the broader European context) constitute two divergent models of constitutional oversight. The former exemplifies the 'liberal' (or: republican) model, which is *passive* and *formal*, while the latter counts as 'militant', and is *active* and *substantive*.[69]

Despite the conceptual clarity of this distinction, a too sharp dichotomy can also be misleading. Although constitutionalism is 'formal' in the sense that it merely includes structural and procedural safeguards, and 'passive' in the sense that it is extremely reserved and tolerant towards political parties, it certainly contains some degree of militancy. As we have learned in the previous section, the designers of modern constitutions were well aware of the potential dangers involved in representative government, which led them to rig constitutions in such a way that it

[64] Bourne 2018, p. 24-29.
[65] BVerGE 2 (2017, BvB, 1.13
[66] Capoccia 2010, p. 212-213.
[67] Ibidem. p. 210.
[68] Issacharoff 2007, p. 1415-1416
[69] Teitel 2008, p. 70

would mitigate the potential power of oppressive factions. Hence, it seems fair to conclude that republican constitutionalism is also 'militant' but merely in a passive way, whereas the German Basic Law is militant in a more 'aggressive' fashion. In between, a range of 'varieties' or 'degrees' of militancy could be possible, as Müller and Pfersmann have contended.[70] A democracy could, for example, make use of militant democracy measures such as a party ban but refrain from entrenching a wide range of 'inviolable values' in its constitution. If such a nuanced model of militant democracy could strike a balance between the idleness of (republican) constitutionalism and the highly restricting German model, it would certainly be worth considering. Therefore, the next chapter will explore such an alternative conception.

[70] Müller 2012, p. 536-537; Pfersmann 2004, p. 50.

2. Democracy as self-correction: A good alternative?

As became clear from the previous chapter, the German doctrine of militant democracy makes a principled choice for a 'substantive' conception of democracy as opposed to a 'formal' or 'procedural' conception. As such, it moved away from the classical doctrine of republican constitutionalism, which is strongly committed to the (equal) enjoyment of political rights. For this reason, it seemed fair to conclude that constitutionalism provides a 'liberal' answer to democratic self-destruction, while the German method reverts to an 'illiberal' solution. In this chapter, I will present an alternative notion of militant democracy, known as 'democracy as self-correction'. This perspective, which has recently been advocated by Bastiaan Rijpkema, may be considered as a middle way between republican constitutionalism and the German doctrine of militant democracy. As it stays relatively close to the formal and value-neutral fabric of the former, this approach provides a more justifiable basis for militant democracy measures than the German model. Nevertheless, as will become clear in the second part of this chapter, Rijpkema's perspective is equally vulnerable to the collision between the party ban and the formal independence of parliamentarians.

2.1. A 'general theory' of militant democracy

In his book *Militant democracy: The limits of Democratic Tolerance* (2018), Rijpkema compares different legal and philosophical perspectives on militant democracy and aims to distil from these a 'comprehensive' and 'coherent' theory.[71] Throughout his analysis, Rijpkema focusses on the justification of democratic self-defence, which has in his view been neglected in most other studies on the subject.[72] Although many scholars have argued for a variety of militant democracy strategies ever since Loewenstein coined the idea in 1937, none of them has succeeded in providing a generally applicable and theoretically sound solution to self-destruction.[73] Rijpkema's aim is to fill this gap.

His effort is inspired by his compatriot George van den Bergh (1890-1966), a renowned professor in constitutional law at the University of Amsterdam and a member of the *Tweede Kamer* (Lower House) during the interbellum. In his inaugural lecture in 1936, Van den Bergh took up a highly typical issue in Dutch politics at the time: what to do with anti-democratic political movements such as the NSB (National Socialist Movement)?[74] In formulating his answer, Van

[71] Rijpkema 2018, p.5.
[72] Ibidem. This is also argued by Müller 2012, p. 2.
[73] Müller 2013, p. 2-3
[74] Van den Bergh 1936

den Bergh agreed with his contemporary Loewenstein that a too strong emphasis on procedural aspects of democracy is problematic because it paves the way for anti-democrats to hijack the parliamentary system.[75] For this reason, Van den Bergh reluctantly supported militant democracy measures such as the prohibition of anti-democratic political parties.[76]

Yet, despite his agreement with Loewenstein on the necessity of such measures, Van den Bergh presented a fundamentally different justification for it. Instead of appealing to certain norms and values as the 'inviolable' or 'absolute' foundation of democracy, he qualified the essence of democracy as a mechanism of 'self-correction'. Unlike all other political systems, democracy provides the unique opportunity to revoke past decisions and to 'learn' from its 'mistakes' over time.[77] A democracy thus creates and maintains the opportunity to come back to choices made in the past, repair the 'damage' caused by these choices and consciously adopt alternatives. The resourceful argument of Van den Bergh was that the self-correction capacity of democracy applies to every decision but one, namely the decision to abolish democracy itself. Because, by abolishing the essential democratic rights, a temporary majority takes away the opportunity for all future majorities to revoke this particular decision.[78]

With this insight, Van den Bergh shifted the attention from *taking* decisions to the act of *revoking* them. As a result, he steered away from the formalistic focus on simple majority rule and added a new criterion to it. We may call this the 'principle of revocability'. At the core of this principle lies the operation of democracy as a learning process; a view that closely resembles Popper's analogy between democracy and the scientific method of 'piecemeal engineering':

> 'The piecemeal method permits repeated experiments and continuous adjustments. In fact, it leads the happy situation where politicians begin to look out for their own mistakes instead of trying to explain them away and to prove that they have always been right. This – and not the Utopian planning or historical prophecy – would mean the introduction of scientific method into politics, since the whole secret of scientific method is a readiness to learn from mistakes.'[79]

Democratic government is thus unique in that it puts the 'governors' under the constant critical scrutiny by the 'governed'. This not only makes politicians critical of each other, but also of themselves, as their re-election depends on the public assessment of their performance. And even

[75] Van den Bergh 1936, p. 8.
[76] Ibidem, p. 6-7, 23-24.
[77] Ibidem, p. 9.
[78] Ibidem.
[79] Popper 2013, p. 153.

if politicians persist in making grave mistakes, the public ultimately has the capability to send them away and consciously choose alternatives.[80]

According to Rijpkema, Van den Bergh's perspective on democracy can form the basis for a general justification of militant democracy.[81] Yet, in order to serve this purpose, the principle of revocability requires further specification. Therefore, Rijpkema comes up with three constitutional principles that he considers to be essential for the proper functioning of self-correction. The first of these is the *principle of political evaluation*.[82] Starting off from the conviction that representative democracy implies that the people are able to review the performance and trustworthiness of representatives, there has to be a constitutional provision that guarantees regular elections and the equal right of (active) suffrage. This is, in Rijpkema's words, the 'hard guarantee' of self-correction politicians cannot escape from.[83]

But in order to serve its evaluating purpose, a democracy should be accompanied by two other principles. First, the *principle of political competition,* which implies that the democratic arena should be open to more than one political viewpoint. This principle translates into the right of all citizens to organize themselves (freedom of association) and to run for public office (passive suffrage).[84] This, however, is only possible in the context of a free exchange of ideas in a public debate. Accordingly, evaluation and competition will have to be reinforced by *the freedom of expression*.[85]

Together, the three principles form the backbone of democracy's self-correction capacity. If only one of these principles is about to be damaged or abolished, the ability of a democratic polity to reverse its own decisions is in jeopardy, and thus, taking pre-emptive legal measures such as banning political parties is justified.[86]

In Rijpkema's view, this approach to militant democracy has much 'better credentials' than its substantial counterparts.[87] Three considerations stand at the core of this contention. Firstly, democracy as self-correction is more open-ended and tolerant, as it is not based on a broad framework of values. Substantive conceptions of democracy, on the other hand, obscure the inherent openness of democracy because of their appeal to a number of unchangeable or

[80] Magee 1974, p. 78.
[81] Rijpkema 2018, p. 139.
[82] Ibidem, p. 140-141.
[83] Ibidem, p.141.
[84] Ibidem, p. 146.
[85] Ibidem, p. 154.
[86] Ibidem.
[87] Ibidem, p. 139.

even 'sacrosanct' principles.[88] The eternity clause in the German Basic Law is a typical example thereof.

A related downside of the substantive argument mentioned by Rijpkema is that it excludes a specific 'core' of principles from political discussion and could therefore frustrate the democratic process.[89] Although political parties that openly strife for the abolishment of democracy may be objectionable, defusing them with the far-reaching instrument of prohibition is not always strictly necessary.[90] The German ban on the anti-democratic but electorally harmless KPD in 1956 is a good example of such an unnecessary intervention (see section 1.2). Because, by suspending the political rights of such a harmless party, the 'clash of opinions' necessary for making a conscious and well-informed democratic choice is unnecessarily forestalled. Moreover, banning parties could have negative side effect that their activities go underground, which renders it less easy for state authorities to assess potential threats.[91] Democracy as self-correction is indeed less prone to this problem, as its basis for banning political parties is significantly narrower.[92] Only when the revocability of decisions is in jeopardy, the state may suspend the exercise of political rights.[93]

This brings us to Rijpkema's third objection to substantive theories, which is that a broad basis for party bans increases the risk of abuse by those entrusted with applying it.[94] Although the judiciary branch is supposed to be impartial and neutral, judges generally enjoy a significant amount of interpretive leeway. Particularly when confronted with open and general norms, such as 'human dignity' or 'free democratic basis order', judges may be inclined to use this freedom to sneak their political aspirations in to their decisions. It goes without saying that this is particularly risky and problematic with regards to the banning of associations, as this instrument indeed resembles, as Bourne strikingly noted, 'the hallmarks of authoritarianism'.[95] The legal criteria for the suspension of civil rights, Rijpkema concludes, should therefore be as simple and narrow as possible.[96] Contrary to substantive theories, 'democracy as self-correction' provides such a

[88] See again Brecht 1945, p. 138.
[89] Rijpkema 2018, p. 41, 139.
[90] Ibidem, p. 139, See also Michalowski & Woods, p. 23.
[91] Michalowski & Woods 1999, p. 23. See also Bale 2007.
[92] Rijpkema 2018, p. 139, 143.
[93] Ibidem. p. 140.
[94] Ibidem, p. 139.
[95] Bourne 2018, p. 24. See also Schwarztzberg 2009, p. 190. Schwartzberg noted that the entrenchment of 'inviolable' principles in the German Basic Law has vested an 'institutionally unchecked authority' in the Federal Constitutional Court to make legal changes though interpretation. See also Van Schie 2018.
[96] Rijpkema 2018, p. 139

narrow basis, because it merely requires the protection of the revocability principle. As such, it retards judges from entering 'political territory'.[97]

On the basis of the above considerations, Rijpkema comes to the conclusion that democracy as self-correction provides a much stronger theoretical justification for militant democracy than substantive arguments. That seems to be the case indeed. Rijpkema's theoretical framework requires no (entrenchment of) additional constitutional provisions, as all three principles of self-correction of democracy are already present in the basic structure of representative democracy. As such, it is relatively simple and formal, which is beneficial to the openness and tolerance necessary in a democratic society. In addition, the three principles of self-correction are also more easy to apply by judges and are therefore less prone to the danger of abuse. Consequently, it seems fair conclude 'democracy as self-correction' offers a plausible middle way between the perhaps overly tolerant and passive posture of constitutionalism on the one hand, and the extremely conditional and strict militancy of the German model on the other.

2.2. Party bans and individual parliamentarians

As follows from the previous section, 'democracy as self-correction' offers a more attractive theoretical basis for militant democracy than substantive theories. As a result, a party ban will probably be more legitimate if it would be taken on the basis of Rijpkema's theoretical framework. Nevertheless, if we shift our attention to the application of a party ban itself, it appears that his theory is confronted with a serious challenge. Because, if a banned political party has already gained seats in parliament, the incumbent MPs of that party still enjoy special constitutional protection and may thus hold on to their parliamentary seat.[98] As this could seriously curtail the desired effect of a party ban, the issue requires further attention.

A clear illustration of this issue can be found in the jurisprudence of the German Constitutional Court. As soon as 1952, when the Court had first established that a party was unconstitutional, it also had to decide on the fate of its incumbent MPs in two regional parliaments.[99] This resulted in a complex dilemma. On the one hand, the Court was bound by article 38(1), stating that the members of the Bundestag 'shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience'.[100] On the other hand, article 21(1) prescribed that 'political parties shall participate in the formation of the political will of the people'. The Court realised that these provisions were 'theoretically hard to

[97] Ibidem, p. 155.
[98] Elzinga 1982, p. 53-69, 163; Heringa et al., 2015, p. 154-158
[99] BVerfGE 2.1, p. 2.
[100] Although this case was about MPs in regional parliaments, article 38 was applicable to it.

unite' because of the clear tension between the norm that MPs represent 'the whole people' and, at the same time, are expected to act as 'exponents' of a concrete party organisation'.[101] In order to neutralize the 'irreconcilability' between these two norms, the Court argued that it had to establish which principle should in any case prevail.[102]

In coming to its decision, two considerations were essential. Firstly, the Court reasoned that the tension between article 21(1) and article 38(1) 'naturally loses its theoretical pungency' because the constitutional designers of the Basic Law had not fully anticipated the fundamental conflict between the two provisions.[103] In this regard, the Court found it of particular importance that article 38(1) was merely included out of convention because it is part of the 'established ideological body of liberal democracy', while article 21(1) – which includes the basis for a party ban – was deliberately added to the Basic Law in order to incorporate the legal doctrine militant democracy.[104] This brought the Court to its second consideration, namely that the intended effect of a party ban cannot reasonably be produced if the MPs of banned parties can still 'represent' and 'validate' their ideas in parliament. Hence, it followed 'compellingly' that article 38(1) had to lose its force.[105]

In multiple respects, this is a highly confusing line of reasoning. In the first place, the mere fact that article 21 was deliberately included and article 38 out of convention, does not necessarily say anything about their relative importance. The same goes for the fact that the conflict between these provisions was unforeseen. At most, these considerations reveal the clear lack of foresight among the framers of the Basic Law. Moreover, aside from mentioning that article 38 is part of the 'established ideological body of liberal democracy', the Court provides no further explanation about its historical and theoretical background. Hence, it leaves the meaning and political relevance of this principle obscure. Though the Court does mention the importance of the 'free mandate' in cases of party secession or a switch from one party to another, it elaborates no further on this point. All we learned from the Court's decision is thus that the free mandate has to be put aside for the sake of an effectiveness of the party ban.

Compare this to the legal framework of the Netherlands: a country that did not enshrine the legal doctrine of militant democracy in its constitution.[106] Similar to the German Basic Law, the Dutch constitution holds that members of parliament 'shall not be bound by a mandate or instructions when casting their votes' (article 67.3), and that they 'shall represent the

[101] BVerfGE 2.1, p. 25, consideration No. 330.
[102] BVerfGE 2. 1 no. 330.
[103] BVerfGE 2. 1 no. 330. My translation of: 'Der Gegensatz verliert freilich an theoretischer Schärfe […]'
[104] Ibidem. My translation of: '[…] gesicherten ideologischen Bestand des Verfassungsrechts der liberalen Demokratie'.
[105] BVerfGE, 2.1, No. 332.
[106] Elzinga 1982, p. 141. Since the publication of Elzinga's dissertation, this remained unchanged.

entire people of the Netherlands' (article 50). Yet, when it comes to the role and status of political parties, the constitution is completely silent.[107] Accordingly, Dutch law considers political parties as 'freely formed and freely operating social organisations' to which only the rules of private law apply.[108] This, in turn, implies that the prohibition of a political party occurs on the basis of the Civil Code, and, accordingly, that a party ban has no (public law) consequences.[109] Hence, the independence of Dutch MPs ultimately prevails over their connection to a party organisation.[110]

When comparing the two cases, it follows that the Dutch constitution is immune to the contradiction faced by the German Constitutional Court. The primary reason for this is that Dutch constitution contains no special provisions defining the role and status of political parties. As such, it sketches a wholly different picture of political representation than German Law does. Instead of portraying MPs as 'exponents' of a party organisation, Dutch law considers them as independent actors, making them immune to the legal effects of a party ban.

According to Elzinga, this is desirable, because the assessment of MPs, including their 'democratic spirit', should ultimately be up to the people.[111] Rijpkema, who also discusses this issue in his book, seems to disagree with this conclusion. In his view, the Dutch system has a 'serious weakness', rendering it unfit to function as a proper framework of militant democracy:

> 'Antidemocrats maintain their platform under this [Dutch] model, whereas a party ban aims to prevent this scenario. The fact that it only affects a few individuals does not necessarily matter. Even individuals can generate a good deal of attention with the assistance of parliamentary instruments. […] Underestimating the impact of antidemocratic MPs keeping their seats fails to appreciate that parliament is not just 'a forum for the recording of preferences', but can also be a platform for the 'mobilization of political power.'[112]

From this passage, it seems to follow that Rijpkema concurs with the German Constitutional Court in the SRP case, holding that a party ban can only be effective when the formal independence of MPs is put aside.

Nevertheless, when reading Rijpkema's book more carefully, it becomes highly uncertain whether he agrees with the German Court or not. Indeed, he mentions that the formal

[107] Rijpkema 2018, 164; Elzinga 1982, p. 23, 47.
[108] Elzinga, p. 165.
[109] Elzinga 1882, p. 23. For an overview of the legal instruments at the disposal of the Dutch Prosecution Office to request for a party ban, see Molier 2018.
[110] The only exceptions to this rule are certain criminal convictions. For a brief overview, see Elzinga 1982, p. 119.
[111] Elzinga 1982, p. 163.
[112] Rijpkema 2018, p. 164.

independence of MPs is a constitutional 'fiction', wrongfully suggesting that MPs acquire their parliamentary seat on their own. In reality, Rijpkema notes, political parties decide on the recruitment of candidates and the composition of election lists, thereby having a much stronger influence on the appointment of MPs than the constitution suggests.[113] Yet, at the same time, Rijpkema mentions that the free mandate 'places a check on overly strict parliamentary party discipline and overall party power'.[114] In this regard, he notes:

> 'A link between membership of parliament and membership of a party, however limited, would, on the whole, erode the free mandate, tying MPs more closely to parties. The question is whether such watering down of the free mandate, and strengthening the position of political parties, is the way to go. […] At least in the Netherlands, the first cracks in the independent position of parliamentarians are already beginning to show'.[115]

After reading this passage, it becomes clear that Rijpkema not only rejects the complete unconditionally embodied by the Dutch constitution, but does not favour the German practice either.

Alternatively, he proposes a third solution, based on the jurisprudence of the Turkish Constitutional Court.[116] This Court has the ability to select which individual representatives are allowed to stay in parliament and which are not, depending on their democratic spirit. In this way, the independence of MPs will only have to be violated when the judge considers it to be strictly necessary.[117] Such a 'context-sensitive' approach would be 'better' than the Dutch and German models, Rijpkema concludes in the original version of his book.[118]

But is this, then, a convincing way to solve the issue? At first, it seems plausible to choose the Turkish method, as it aims to strike a balance between the protection of the free mandate and the intended effect of a party ban. Yet, on further consideration, it appears that this method merely shifts the issue from the level of the party to that of the judge. In other words: Instead of making the fate of individual MPs dependent on the constitutionality of their party (as in Germany), the Turkish model places it directly in the hands of judges, asking them to violate the 'free mandate' directly.

---

[113] Ibidem, p. 164.
[114] Rijpkema 2018, p. 165.
[115] Ibidem. p. 165.
[116] Rijpkema 2015, p. 194-195.
[117] Ibidem, p. 194.
[118] Ibidem, p. 194-195. Remarkably, this conclusion is not drawn in the English translation. Although Rijpkema mentions the advantages of the Turkish approach, he leaves it undecided which perspective (the German, Dutch or Turkish) is superior.

In the context of Rijpkema's own vigilance when it comes to the trustworthiness of judges, this seems to be a highly risky way to go. But even if we assume that the courts are fully reliable, their position may still become highly controversial when they are forced to mingle with the representational integrity of parliamentarians. Moreover, Rijpkema's note on the tension between the disciplining effects of parties on individual parliamentarians raises the question why a party ban is necessary in the first place. Could it be that the internal coherence that parties commonly try to achieve is not itself a part of the problem the party ban is supposed to solve?

Although Rijpkema's analysis provides no definite answer to these questions, his equivocal analysis sheds an interesting light on the role of political parties in modern representative democracies. In fact, his attempt to neutralize the issue revealed that a proper theory of militant democracy should not merely be concerned with anti-democratic parties, but also, or perhaps primarily, with the actual politicians that represent, propagate and enact their respective ideas. Hence, Rijpkema's struggle with the issue highlights that we need a more thorough understanding of the constitutional relationship between political parties and individual parliamentarians before giving a verdict on his theory. Otherwise, the 'irreconcilability' of the party ban and the 'free mandate' may just become the Achilles heel of 'democracy as self-correction'.

3. Militant democracy and its politicians

The previous chapter introduced Rijpkema's alternative perspective on militant democracy, 'democracy as self-correction', which has significant theoretical advantages compared to substantive theories. Nevertheless, when it comes to the implementation of the party ban, Rijpkema's theory just as well runs in to the constitutionally protected independence of MPs; an established principle of liberal democracy. In this chapter, I will first aim to clarify why the independent position of parliamentarians causes so much confusion in the face of militant democracy theory. To fulfil that task, we need a more thorough understanding of what this principle means in the historical and philosophical context of representative government. Subsequently, the meaning of the 'free mandate' will have to placed in the perspective of contemporary party politics, so that it will be possible to formulate an answer to the central question of this thesis.

3.1. The emergence of elective representation

In both Rijpkema's analysis and the jurisprudence of the German Constitutional Court, the exact meaning of the independent position of MPs in a well-functioning representative democracy was left unclear. Although both Rijpkema and the Court found that the 'free mandate' is a relevant principle in the constitutional law of representative democracy, neither specified these contentions. Therefore, we should first explore the historical circumstances and philosophical ideas that shaped the prevailing notion of representation that underpins the independent position of MPs. In other words: Where does the prevailing notion of elective representation come from?

To a considerable extent, the concept "representation" was inherited from medieval politics. In the Middle Ages, long before modern constitutions were created, representation had been a widely established practice in most parts of Europe.[119] However, the medieval mode of representing was different in a number of ways, particularly when it comes to the discretion of individual delegates. This had everything to do with the fact that medieval assemblies were not yet national parliaments but feudal councils in which local vassals offered advice to their overlords.[120] An important aspect of these councils was the use of so-called 'imperative mandates'. About these mandates, Lord noted the following:

> 'A deputy, being considered as an ambassador or procurator more than as a national councillor, usually received from his constituents more or less detailed instructions, which often limited and

[119] Lord 1930, p. 125
[120] Lovik & Zwalve 2014, p. 103

> hampered him in the extreme. If the matters to come up in parliament were known in advance, he might have the line that he was to follow absolutely prescribed: if not, he might be ordered to agree to nothing without consulting his constituents […].'[121]

Until the 15th century, this complicated system of delegation did not raise any deep conflicts between overlords and assemblies.[122]

This gradually changed over the course of the 15th and 16th centuries, when the scope of government gradually began to expand due to population growth, expanding commerce, and improved means of communication. As a result, disagreements arose about the division of power between kings and estates.[123] The Dutch revolt against Philip II of Spain, which debouched in to the Declaration of Secession (1581), is a typical example of such a conflict.[124] Finally, the Peace of Westphalia (1648) made an end to the most power conflicts due to the recognition of the sovereign equality of states. This marked a tipping point in the political history of Europe, announcing the replacement of gigantic multi-layered empires, based on personal feudal rights and multiple jurisdictions by centralised states with a single jurisdiction.[125]

As a logical consequence, the influence of parliaments increased significantly. Due to the centralisation of power, parliamentarians started to feel a stronger urge to place a check those entrusted with the execution of laws and treaties.[126] The well-known phrase "no taxation without representation", taken from the American Revolution (1775-1783), clearly testifies of this desire. This call for due representation was theoretically underpinned by the liberal notion of the 'social contract', taken from John Locke (1632-1704). In the *Second Treastise of Government* (1689), Locke wrote: 'Men Being, as has been said, by Nature, all free, equal and independent, no one may be taken from this Estate and subjected to the Political Power of another but by his own consent'.[127] With this criterion for political legitimation, Locke connected the idea of popular sovereignty with the practice of elective representation.[128]

Absolute sovereignty of the king thus evolved in to the absolute sovereignty of the people. And soon after the democratic revolutions of the late 18th and early 19th centuries, parliaments started to become the central political stages of national decision-making. A crucial element of these national parliaments was that individual members were no longer regarded as

[121] Lord 1930, p. 138.
[122] Ibidem.
[123] Kossmann 2000, p. 134.
[124] Waling & Huijsen 2014, p. 14.
[125] Lesaffer, 1997, p. 72; Baudet 2012, p. 27.
[126] Ibidem. p. 180; Manin 1997, p. 88-91.
[127] Locke 2015, p. 330.
[128] Manin 1997, 84-86.

deputies of localities or special interests, but representatives of the entire nation.[129] Accordingly, the use of imperative mandates had definitely lost its significance. The French revolutionary Abbé Sieyes was one of the first to emphasise this point in 1789:

> 'The deputies are present in the National Assembly, not to announce the already established wish of their constituents, but to deliberate and to vote freely according to their actual opinion, when that has been illuminated by the lights that the assembly provides for each'.[130]

3.2. The mandate-independence controversy

Despite the clear triumph of representation as an expression of popular sovereignty, not all champions of the liberal revolutions agreed that this would be proper way of legitimising the exercise of power. Jean-Jacques Rousseau (1712-1778), for example, argued that the sovereignty of the people is inalienable, and that representation is thus nothing but tyranny. In the *Social Contract* (1762), Rousseau noted:

> 'The deputies of the people […] are and cannot be its representatives: they are merely its stewards, and can carry through no definite acts. Every law the people has not ratified in person is null and void – is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the elections of members of parliament.'[131]

According to this line of thought, representation is unfit to serve as a legitimate expression of popular rule, because it implies the impossible: willing for others.[132] Later, Rousseau conceded that representation might be necessary for practical reasons, but only on the condition that the electors can impose their will on the representatives through binding instructions. For if representatives would be given a free mandate, they cannot truly represent the 'general will' of the people.[133]

Rousseau's argument reveals that the triumph of the 'modern' over the 'medieval' understanding of representation was not uncontested. At the root of this quarrel lies a fundamental and ongoing disagreement about what "representation" means. Hanna Pitkin (1931–) refers to this disagreement as the 'mandate-independence controversy'.[134] On one the side of the argument, there are those who believe that a representative should act as a delegate or agent, instructed by his constituents on the basis of a precisely defined mandate. He is sent to pursue

[129] Loewenstein 1922, p. 192-193.
[130] Rials 1983, p. 3.
[131] Rousseau 1997, p. 114.
[132] Pitkin 1967, p. 207.
[133] Rousseau 1986 [1772], p. 193-194.
[134] Pitkin 1967, p. 144-167.

the will of his constituents and not his own.[135] On the other side, there are those who defend the exact opposite position, conceiving the representative not as an agent but as a trustee, whose job is not to pursue a particular will, but the general interest of the whole nation. Instead of acting on the precise instructions of his constituents, the representative should exchange arguments and deliberate with others before consciously making a decision.[136]

Perhaps the most classical defence of this position came from the Irish political thinker Edmund Burke (1729-1797). In his famous *Speech to the electors of Bristol* (1780), he argued:

> 'Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation with one interest, that of the whole; where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.'[137]

In Burke's view, a good representative should give 'great weight' to the wishes, 'high respect' to the opinions and 'unremitted attention' to the business of his constituents, but he should not sacrifice his 'mature judgement' and 'enlightened conscience' to their commands. Otherwise, 'determination precedes the discussion', leading to the awkward situation where 'those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments'.[138] Burke attributed to the representative what Gerhard Leibholz illustratively called 'die Qualität eines Herrn' (the quality of a master).[139] He believed that the intellectual qualities and moral superiority of the representative enable him to establish, after rational deliberation with other representatives, what is in the general interest of the nation and act on it. To be able to do this, the representative must not be bound imperative mandates or instructions from his constituents.[140]

To a considerable degree, Burke's view resembles that of Madison. In the *Federalist papers,* Madison also applauded the 'aristocratic effect' of elections, arguing that representation can:

> '[…] refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial

[135] Pitkin 1967, p. 146
[136] Ibidem, p. 147.
[137] Burke 1777, p. 353-354
[138] Ibidem.
[139] Leibholz 1958, p. 81-82.
[140] Pitkin 1967, p. 188-189.

considerations. […] The public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves'.[141]

From this passage, it follows that Madison also attributed wisdom and moral superiority ('love of justice') to the representatives of the people; characteristics that enable them to further the 'public good' and 'true interest' of the nation. Yet, contrary to Burke, Madison did not have a blind trust in elites. Although he sincerely hoped that elections will only produce 'enlightened statesmen', Madison expected that they 'will not always be at the helm'.[142]

After all, due to their dependence on the people for their election, representatives may be inclined to focus on the immediate, pluralistic and shifting interests of their constituents.[143] If these interests are salient and widespread enough, Madison anticipated that 'men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first, obtain the suffrages, and then betray the interests of the people'.[144] In this way, rival factions (as explained in section 1.1.) can make their entry into parliament, with ambitious representatives as the main instigators of their mutual animosity.[145] So, whereas Burke expected that representatives would primarily be concerned with furthering the general interest of the nation, Madison feared that the personal ambition of representatives would minimize the aristocratic effect of elections.

Because of this difference with Burke, one could be inclined to conclude that Madison did not see any value in an independent position of MPs after all. When considering his primary solution to the problem of faction (enhancing the 'multiplicity of interest' through the extension of the sphere of government), it seems that Pitkin is right when she notes that Madison's theory of representation is all about creating stable government through stalemate between various rival parties. From this observation, one could also infer that Madison *de facto* accepted the use of imperative mandates and instructions. This is indeed what Pitkin seems to suggest when she writes: 'Only if each representative pursues the factious interests of his constituency can the various interests in the nation balance each other off in the government.'[146]

Although this mechanism is indeed relevant to Madison, there is more to say to it. As we have established in the first chapter, creating stability is not the ultimate the end of republican government, but merely the precondition of another, yet more important value: freedom – or

[141] Hamilton et al., 2008, p. 53 (No. 10).
[142] Ibidem, p. 51 (No. 10).
[143] Pitkin 1967, p. 193.
[144] Hamilton et al., 2008, p. 53 (No. 10).
[145] Ibidem, p. 50 (No. 10).
[146] Pitkin 1967, p. 196.

more precisely: freedom as non-domination.[147] Traditionally, republicans thought the best way to achieve this is by creating multiple countervailing powers that balance each other off. The resourceful addition of modern republicans is that delegation of government makes it possible to extend the sphere of government, and, by doing so, increase the security against domination by oppressive majorities. In this way, the scheme of representation, sustained by the independent position of MPs, brings about a dispersion of (legislative) power over the extended territory of the state, which, as a result, effectively forestalls the successful formation of majority factions at the centre.[148]

Moreover, the emphasis of republicans on the securities provided by the *forms* of government should not obscure the ultimate *source* of its authority: the people. Though representation implies that the people are factually excluded from the exercise of power, they are still the fountain of political power and therefore exclusively entitled to designate the persons exercising it. Hence, the hierarchy of power ends with the people, not with the rulers.[149] This is fully in line with the wider conviction of the *Federalist* that 'the people commonly *intend* the public good', even though they can err and place their faith in the wrong leaders.[150] If the people were only given 'the time and opportunity for more cool and sedate reflection', Hamilton noted, they would ultimately condemn the detrimental and divisive measures that were once taken on their behalf.[151] So, if we read *the Federalist* more carefully, it turns out that the delaying and stalemating effect of representation is not only beneficial to the protection of freedom, but also to the ability of the people to reconsider democratically made choices.

Conceived in this way, the prevailing republican interpretation of representative government resembles Rijpkema's idea of 'democracy as self-correction'. Hence, it is in the context of the self-corrective capacity of the people that the independence of parliamentarians is to be understood. Not as an obstacle, protecting the elites from critical scrutiny, but instead as a buffer or 'safety valve' against the divisive and perhaps violent effects of faction and partisanship.[152] The constitutional protection of the 'free mandate' is thus not a barrier against democracy but instead a crucial reminder of the fundamental democratic relationship between the people and all members of parliament. With this insight in mind, it becomes clear why the seemingly odd combination of direct elections and the absence of imperative mandates is not

[147] Pettit 2010, p. 28.
[148] Hamilton et al., 2008, p. 52-53, p. 258.
[149] Pocock 1975, p. 518-519
[150] Hamilton et al., 2008, p. 350 (No. 71)
[151] Ibidem
[152] For an example, see Waling 2017, p. 195.

contradictory, as Rousseau contended, but paradoxical. Thus, the significance of evaluation by the people, and hence, of self-correction, finds its expression in the 'free mandate'.

3.3 Self-correction and political parties

Now that the meaning of the independent position of parliamentarians within the theoretical framework of representative democracy has been clarified, it is time to return to the main issue: the relationship between individual parliamentarians and political parties in the face of militant democracy. As we have established in the previous section, the 'free mandate' is crucial in protecting the democratic relationship between the people and their representatives, in particular from the potentially dangerous effects of partisanship. At the same time, it became clear that partisanship is an almost unavoidable consequence of democratic politics. If we translate these observations to Rijpkema's idea of self-correction, the following question emerges: Can the ability of the people to self-correct through elective representation be upheld while recognising the unavoidable presence of partisanship in the representative system? This question twofold. First, it asks us to reformulate the idea of 'self-correction through elective representation', and second, it requires an assessment of the extent to which political parties may get involved in that self-correction.

As we have established in section 2.1, democracy as self-correction is all about the revocability of political decisions, that is: the ability of the people (or at least its majority) to reconsider the laws and policies implemented by majorities in the past. Rijpkema's resourceful argument is that revocability is dependent on three constitutional principles: 1) political evaluation, 2) political competition, and 3) the freedom of speech. Political evaluation is the most fundamental of these principles, because elections are, as Rijpkema rightly noted, the 'hard guarantee' of self-correction; 'the ultimate sanction' with which voters can bring about a 'change of the people in charge'.[153] Hence, the desired effect of elections is that it enables the electorate to remove politicians they disapprove and replace them with alternatives of their choosing.[154]

Meanwhile, it is clear that political parties have a significant influence on this selection mechanism. As already mentioned in section 2.2, parties often dominate the recruitment of candidates and the composition of election lists, thereby significantly narrowing down the choices available to the voters.[155] One could argue that this is acceptable as long as a large majority of citizens at least identifies with party organisations. In that case, party structures could function as suitable 'vehicles' of political representation. For a long time, parties have fulfilled this criterion.

[153] Rijpkema 2018, p. 141.
[154] See again Magee 1974, p. 78.
[155] Elzinga 1982, p. 94; Manin 1997, p. 194-195.

Since their emergence in the second half of the 19th and throughout most of the 20th century, party organisations enjoyed mass engagement and support from civil society. As a result, they were able to mobilise and integrate the masses, and effectively represent their interests in political institutions. Therefore, party organisations were widely considered as the legitimate performers of the procedural functions of democracy, that is: candidate selection and appointment of public offices.[156]

This, however, has radically changed over the past fifty years. Due to profound societal changes such as reduced internal class solidarity, secularisation and individualisation, the homogenous and relatively fixed electoral constituencies (or 'pillars') that once sustained the representative functions of parties have gradually evaporated.[157] This resulted in increased volatile voting behaviour, reduced identification with political parties, and, most important, a significant decline in party membership.[158] Consequently, the representative integrity of parties has almost completely diminished.

Nevertheless, the procedural functions of democracy are still firmly in the parties' hands. Peter Mair, writer of the book *Ruling the void: The hollowing out of Western democracy* (2013), noted:

> 'The representative functions of parties are wasting away or being at least absorbed by other agencies, whereas their procedural functions have been maintained and sometimes even become more relevant […] Parties have reduced their presence in the wider society and become part of the state. They have become agencies that govern – in the widest sense of the word – rather than represent.'[159]

One of the key functions parties still perform, Mair concluded, is 'political patronage': the allocation of public offices such as parliamentary seats and ministerial posts. In fact, this function is even more relevant now than during the heyday of party democracy.[160]

The decline of party democracy thus led to the awkward situation where political parties have almost complete control over the appointment of legislative and executive officials, but have lost their primary source of legitimacy: the people. Of course, parties still compete in fair and regular elections, enabling voters to influence their relative strength, but this cannot obscure that evaluation of politicians is *de facto* precluded from popular influence.[161] To illustrate this, consider the example of the Netherlands. About 2,5 per cent of Dutch voters is associated with a

[156] Manin 1997, p. 194; Mair 2013, p. 92-95.
[157] Mair 2013, p. 90-98.
[158] Drummond, 2006; Dalton & Wattenberg, 2000; Dalton, 2004; Van Biezen et al., 2009
[159] Mair 1997, p. 96-97.
[160] Ibidem. p. 95; Van der Meer 2017, p. 58-60. See also Krouwel 1999, p. 210-215.
[161] Elzinga 1982, p. 95.

party. Of this group, about 10 per cent can be indicated as "active member", which means that they participate in relevant decision-making procedures. So, of the 12,5 million eligible voters in the Netherlands only about 31.000 (0,25 per cent) have a real say in the evaluation of government officials.[162] The result is that Dutch parties have a monopoly on political evaluation.[163]

This monopoly is reinforced by the logic of coalition government, which requires from elected representatives that they act in concert. This phenomenon particularly arises in parliamentary and proportional systems, where cabinet members are selected among the members of parliament (i.e. the leaders of coalition parties), which, in turn, renders their success dependent on the degree of unity and coherence among the coalition parties in parliament.[164] In order to secure this unity, individual parliamentarians of coalition parties have to be disciplined by the party leadership.[165] A very effective way to achieve this is to offer incumbent MPs, in exchange for their loyalty, a high position on the party list for the upcoming election.[166] In this way, the party leadership can filter out dissidents and pressurise incumbent MPs to vote in accordance with its wishes. From the high numbers of party unity in established European democracies, it appears that this tactic is highly successful.[167]

An important consequence of party discipline is, according to Manin, that 'the freedom of judgement of the representative no longer exists', and that the discretion of those who govern shifts towards the parliamentary party and the party leadership.[168] More significant, however, is the blurring separation of powers and due checks and balances between parliament and the government.[169] This image strikingly resembles Leibholz's description of the *Parteienstaat* (party state), in which political parties effectively control the executive department through the domination of the legislature, making them 'die eigentlichen Herren der Gesetzgebung' (the true masters of legislation).[170]

If we place this image in the context of Rijpkema's notion of self-correction, two observations can be made. First, the current functioning of political parties curtails proper self-

[162] Van der Meer 2017, p. 53. This calculation is based on the 1 January 2019 count of party membership by the Documentatiecentrum Politieke Partijen. See: https://dnpprepo.ub.rug.nl/11137/1/lt_per01012018.pdf. Although preference voting can in theory be used to change a party's list order, it is often very difficult to accomplish this due to high electoral thresholds. Hence, potential candidates have a much better chance of electoral success by convincing a party's selection committee to grant them a high position on the list. See Andeweg 2005.
[163] Hazan & Voerman 2006, p. 155.
[164] Kolltveit 2014, p. 270.
[165] Lucardie et al. 2007, p. 147; Manin 1997, p. 211-213; Giannetti et al., 2009, p. 3; Elzinga 1982, 102
[166] Secker 2000, p. 300; Louwerse & Van Vonno 2012; Elzinga 1982, p. 102
[167] Lucardie et al. 2007, p. 146-148; Waling 2017, p. 12; Andeweg & Thomassen 2011
[168] Manin 1997, p. 214.
[169] Koole 2018.
[170] Leibholz 1958, p. 95-97.

correction by the people, because the influence of parties on the evaluation of representatives and other public offices is not accessible to the vast majority of the electorate. Second, parties utilize their dominant influence on candidate selection to discipline incumbent MPs, with the ultimate aim of strengthening their overall political power. In other words, the monopoly of parties on political evaluation, and thus the preclusion of evaluation to the people, is reinforced and maintained by a systematic disregard of the constitutionally protected independence of MPs. Democratic self-correction is thus under serious pressure from political parties, even though they are not threatening to overthrow the constitutional itself.

Ironically, this is probably why advocates of militant democracy are reverting to the instrument of the party ban. After all, it turns out that political parties are indeed very powerful actors that can easily pose a threat to the stability of the democratic system. Yet, what the proponents of militant democracy have failed to see is that the threat posed by political parties is not rooted in the weakness of the constitutional design of representative government, but rather in the ability of party organisations to ignore and bypass its primary protective mechanism: the 'free mandate'. This loophole, in turn, is made possible by the monopoly of party elites on the selection of candidates which is granted to them by the prevailing electoral system. The proportional system used in the Netherlands is a striking example in this regard. Hence, it logically follows that the solution to the problem of militant democracy is not the prohibition of political parties, but rather to render this solution needless by taking away their monopoly on political evaluation.

Perhaps this is what Karl Loewenstein tried to make clear when he mentioned that the obtainment of political power by anti-democrats 'is facilitated by the gravest mistake of the democratic ideology, proportional representation'.[171] If that is indeed the case, it is highly confusing that Loewenstein did not propose to reinforce the independence of MPs through modifications of the electoral system. The same holds for Rijpkema. Although he signalled that the 'free mandate' is under pressure from political parties, and that 'at least in the Netherlands, the first cracks in the independent position of parliamentarians are already beginning to show', he did not draw any useful conclusions from this fact.[172] Strangely enough, Rijpkema simply assumed that political parties would adhere to all 'external democratic rules', including the 'free mandate'.[173] It now turns out that these contradictory statements reveal a serious shortcoming in Rijpkema's argument for banning political parties. Because in reality, the independence of MPs is

[171] Loewenstein 1937a, p. 424.
[172] Rijpkema 2018, p. 165.
[173] Ibidem, p. 171.

not respected but grossly violated, and that is causing not just 'cracks' but a serious dent in democracy's self-correcting capacity.

In order to restore this capacity, the dependence of representatives on the people has to be restored by returning to them the crucial instrument of political evaluation. For too long, political parties have held on to their monopoly on this instrument, while the societal circumstances have made their political platforms largely unnecessary. Party elites should acknowledge this fact and no longer pretend to function as the legitimate 'mediators' between the people and the state. Representatives, in turn, need to break away from the disciplining wrecks of party democracy, so that they can redirect their attention to the general welfare of society. Essentially, this implies a shift from party democracy back to the republican (or: classical-liberal) ideal of representation, based on personal trust in the representative rather than segmental or partisan loyalties.[174] Combined with the restored ability of the people to directly evaluate their representatives, such a shift can repair both the broken relationship between political institutions and the citizenry and, at the same time, make our democracies more defensive against those who aim to overthrow it by means of partisanship. To all these ends, the principle of the 'free mandate' is indispensable.

[174] Manin 1997, p. 219-221.

Conclusion

Perhaps it is not that surprising that the idea of militant democracy is, after many years of absence, back on the minds of political scientists, constitutional theorists, and legal philosophers.[175] Not only because there are indeed a number of unprecedented threats to democratic society, such as religious fundamentalism and left- and right-wing political extremism, but more so because the vehicle through which political power is generally exercised; the political party, can still be utilised as a 'Trojan horse' with which the enemies of democracy enter the city. In fact, there are clear indications that such a hostile takeover by anti-democratic forces is now much more easy to achieve than ever before. This conclusion is the the result of our inquiry in to the relationship between the main instrument of militant democracy theory, the party ban, and one of the cornerstones of modern representative government: the independent position of MPs.

We started this inquiry with an exploration of the existing self-defence mechanisms of representative government. It turned out that the designers of the first modern constitutions were well-aware that a popular form of government requires, in the words of James Madison, 'auxiliary precautions' against abuse of political power. Particularly the formation of so called 'factions' (or: parties) were considered as a threat to the rights of minorities. Because, if a faction could achieve a parliamentary majority through the representative system, it could easily sacrifice the rights of other citizens to its own desires and interests. The aim of constitutional designers, particularly those associated with the republican tradition, was therefore to avoid this from happening without having to infringe political liberties.

In the twentieth century, particularly with the rise of mass party politics, this line of thinking was exposed to the criticism that it was overly tolerant and idle in the face of well-organised anti-democratic political parties. Karl Loewenstein, who was one of the first scholars to stress this point, argued that democratic constitutions therefore had to 'become militant', even at the expense of the equal enjoyment of political rights. Loewenstein's line of thinking was incorporated in the post-war German constitution, with the ability to ban allegedly dangerous political parties as its most essential instrument; a tactic that turned out to be diametrically opposed to the solution offered by republican constitutionalism.

In chapter two, we have seen how Bastiaan Rijpkema did a resourceful attempt to mitigate this authoritarian turn of militant democracy theory by proposing an alternative justification for intervening in democratic politics. On the basis of his conception of democracy as 'self-correction', there is no need for an appeal to a broad framework of fundamental, absolute

[175] The recently published book 'Militant Democracy: Political Science, Law and Philosophy' (2018) is a clear illustration of the simultaneous attention from these three areas.

and multi-interpretable values (as in the German tradition), but only to three already existing cornerstones of representative democracy: political evaluation, political competition and the freedom of speech. On the basis of these relatively formal and value-neutral principles, Rijpkema has surely improved the theoretical justification and applicability of militant democracy theory.

Nevertheless, the instrument on which his theory ultimately depends; the ability to van political parties, ran in – just as the German doctrine – to the so called 'free mandate'; an established constitutional principle that creates a formal distinction between individual parliamentarians and party organisations. As it turned out that Rijpkema was not able provide a satisfactory solution to the clear opposition between this principle and the desired effect of a party ban, further research into this theoretical puzzle was necessary.

Chapter three therefore explored what the independent position of parliamentarians means within the framework of representative government. This led to the important insight that the absence of imperative mandates or instructions is crucial in producing both the dispersion of power-effect argued by republican constitutionalists *and* the ability of the people to evaluate and correct the performance of elected representatives. So, without a considerable degree of discretion for individual MPs, a representative democracy cannot properly protect itself and, at the same time, remain responsive to the people.

However, as political parties currently enjoy a dominant influence, if not a full monopoly, on the selection of candidates for political offices in many democratic systems, they are able to effectively discipline the behaviour of the MPs associated to them. At the same time, it turns out that party organisations no longer enjoy support and engagement from the citizenry, which implies that proper political evaluation is practically impossible for the majority of voters. As a result, party elites are capable to centralise political power through their decisive impact on the appointment and behaviour of representatives.

The ironic conclusion is, thus, that the necessity of a party ban is not rooted in the 'weakness' of the constitutional design of representative government, but rather in the ability of political parties to dominate its schemes of evaluation. A critical review of current political practice, through the lens of Rijpkema's conception of self-correction, has thus led us to the insight that the self-protective capacity of representative government is not helped by banning parties, but by simply reaffirming two of its well-established principles. Firstly, the ability of the people to self-correct by directly appointing their own representatives, and second, by adopting an electoral system that fosters this purpose and enhances the independent position of MPs. If

both of these criteria are fulfilled, the potential threat of highly centralised party organisations – or in Federalist language: factions – is likely to be far less imminent.

This, of course, does not necessarily imply that political parties are obsolete. Party organisations could still fulfil representational functions, such as mobilisation and integration, and facilitate the selection of election candidates. The central point, however, is that the influence of parties on the functioning of democracy should be balanced with the influence of individual MPs. In this regard, the proposal of the Dutch Advisory Committee on the Parliamentary System to increase the effect of casting a (local) preference vote is a small step in the right direction.[176] Further research should be directed at the effects of such electoral reforms, so that the self-protective mechanisms of representative democracy cannot only be sustained by theory but also by political practice.

[176] Staatscommissie Parlementair Stelsel 2018, p. 120-121.

Bibliography

B. Anderson. *Imagined Communities. Reflections on the Origin and Spread of Nationalism,* Revised Edition, New York: Verso 1936.

R.B. Andeweg. 'The sanctity of proportionality', in *The politics of electoral systems.* Oxford: OxfordUniversity Press 2005.

R.B. Andeweg & J.J.A. Thomassen, 'Pathways to party unity: Sanctions, Loyalty, Homogenity, and Division of Labour the Dutch parliament', Party Politics 17(5) 2011, p. 655-672.

U. Backes. *Schutz des Staates. Von der Autokratie zur streitbaren Democratie.* Wiesbaden: Springer 1998.

T. Bale. 'Are bans on political parties bound to turn out badly? A comparative investigation of three "intolerant" democracies: Turkey, Spain and Belgium'. *Comparative European Politics* 5(41), p. 141-157.

T.H.P. Baudet, 'The significance of borders: Why Representative Government and the Rule of Law require nation states' (dissertation). Leiden 2012.

Th. L. Bellekom, 'Partijverboden', p. 113-116, in: A.W. Heringa, R.E. de Winter & W.J. Witteveen, *Staatkundig Jaarboek* 1982,1982, Leiden 1982.

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.R. Rijpkema (ed.), *Militant Democracy: Political Science, Law and Philosophy*, Cham: Springer 2018.

A. Brecht, *Federalism and Regionalism in Germany: The Division of Prussia.* New York: Oxford University Press, 1945.

E. Burke, The political tracts and speeches of Edmund Burke, Esq. Member of Parliament for the city of Bristol, Dublin: Whitestone 1777.

G. Capoccia. 'Militant democracy: The institutional Bases of Democratic Self-preservation', *Annual Review of Law and Social Science (9),* p. 207-226.

M.L. Colish, 'The Idea of Liberty in Machiavelli', *Journal of the History of Ideas* 32, 1971, p. 323-350.

R.J. Dalton & M.P. Wattenberg. *Parties without Partisans: Political Change in Advanced Industrial Democracies.* Oxford: Oxford University Press, 2000.

R.J. Dalton. *Democratic Challenges, Democratic Choices: The erosion of Political Support in Advanced Industrial Democracies.* Oxford: Oxford University Press, 2004.

M. Diamond, 'The Federalist', p. 659-686, in: L. Strauss & J. Cropsey, *History of Political Philosophy*, Chicago: Chicago University Press 1987.

A.J. Drummond. 'Electoral volatility and party decline in Western democracies: 1970-1995'. *Political Studies*, 54(3) 2006, p. 628-647.

D.J. Elzinga. *De politieke partij en het constitutionele recht*, Nijmegen: Ars Aequi 1982.

A. Hamilton, J. Madison and J. Jay, *The Federalist papers*. Oxford: Oxford University Press 2008.

A.W. Heringa et al., *Staatsrecht* (Twaalfde druk). Deventer: Wolter Kluwer 2015.

R.Y. Hazan & G. Voerman, 'Electoral Systems and Candidate Selection', *Acta Politica 41*(2) 2006, p. 146-152

H. Kelsen. *Verteidigung der Democratie: Abhandlungen zur Democratietheorie,* Tübingen: Mohr-Siebech 2006.

A. Kirschner. A Theory of Militant Democracy: The Ethics of Combating Extremism. New Haven: Yale University Press 2014.

K. Kolltveit. 'Concentration of power in cabinets: Exploring the importance of the party political context'. *Acta Politica 49,* 2014, p. 266-285.

R.A. Koole, 'Gouvernementalisering. De veranderende verhouding tussen regering en parlement in Nederland' in: *Tijdschrift voor Constitutioneel recht,* October 2018, p. 317-341.

A. Krouwel, 'The catch-all party in Western Europe 1945-1990: a study of arrested development', Amsterdam (PhD dissertation), 1999.

E.H. Kossmann, *Political Thought in the Dutch Republic. Three Studies*, Amsterdam: KNAW 2000.

K. Loewenstein. *Volk und Parliament: Nach der Staatstheorie der Französischen Nationalsammlung von 1789*. München: Drei Masken Verlag, 1922.

K. Loewenstein. 'Militant democracy and fundamental rights I', *The American Political Science Review*. 31(3), 1937 [1937a], p. 417-432.

K. Loewenstein. 'Militant democracy and fundamental rights II', *The American Political Science Review*. 31(3), 1937 [1937b], p. 638-658.

T. Louwerse & C.M.C. Van Vonno, 'Candidate Selection, Parliamentary Activity and Party Orientation' Politicologenetmaal of the Nederlandse Kring voor de Wetenschap der Politiek (NKWP), 31 May – 1 June, Amsterdam, The Netherlands.

H.A. Lokin,& W.J. Zwalve, *Hoofdstukken uit de Europese codificatiegeschiedenis* (Vierde, herziene druk. ed.). Den Haag: Boom Juridische uitgevers 2014.

C. Lefort, *Wat is politiek?,* Amsterdam: Boom 2016.

R. Lesaffer, 'The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', *Grotiana 18*, 1997, p. 71-96.

G. Leibholz, *Strukturprobleme der Democratie*. Karlsruhe: Verlag C.F. Müller. 1974.

R.H. Lord, 'The Parliaments of the Middle Ages and the Early Modern Period', The Catholic Historical Review 16(2) 1930, p. 125-144.

J. Locke, *Second Treatise of Government*, Cambridge: Cambridge University Press 1988.

P. Lucardie, A. Marchand & G. Voerman, 'Frictie in de fractie', in W. Woude & G. Voerman (eds.), *Representatie, Fractiediscipline en Financiering: Drie Onderzoeken Rondom het Advies over een Nieuw Kiesstelsel*, 2006, p. 58-168.

N. Machiavelli, *The Discourses,* London: Penguin Books 1983.

B. Magee, *Popper*, London: Woburn Press 1974.

B. Manin, *The principles of representative government*. Cambridge: Cambridge University Press 1997.

P. Mair, *Ruling the void: The hollowing out of Western democracy*, London: Verso 2013.

A. Malkopoulou & L. Norman, 'Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives', *Political Studies*, *66*(2), 2018, p. 442–458.

S. Michalowski & L. Woods, German Constitutional Law: The Protection of Civil Liberties, Ashgate: Dartmouth, 1999

J.S. Mill, *On Liberty, Utilitarianism and Other Essays*, Oxford: Oxford University Press 2015.

C. de Montesquieu, *The spirit of the laws,* New York: Hafner Press 1949.

G. Molier, 'Justsifying Militant Democracy: Philosophical and Legal Reflections on Dutch Militant Democracy', in A. Ellian & B.R. Rijpkema (ed.), *Militant Democracy: Political Science, Law and Philosophy,* Cham: Springer 2018.

J.-W. Müller. "Militant Democracy', in *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press 2012.

P. Pettit*, Republicanism: A theory of freedom and Government.* Oxford: Oxford University Press 2010.

O. Pfersmann, 'Shaping Militant Democracy: Legal Limits to Democratic Stability', p. 47-68, in A. Sajó (ed.), *Militant Democracy*, Utrecht: Eleven Publishing 2004.

H. Pitkin. The Concept of Representation. Berkeley and Los Angeles: University of California Press. 1967.

J.G.A. Pocock, *The Machiavallian Moment: Florentine Political Thought and the Atlantic Repiblican Tradition.* Princeton: Princeton University Press 1975.

K. Popper, *The Open Society and its Enemies*, London: Routledge. 2002.

S. Rials. *Textes politiques français,* Paris: Presses Universitaires de France 1983.

B.R. Rijpkema, *Weerbare democratie. De grenzen van democratische tolerantie*. Amsterdam: Nieuw Amsterdam. 2015

B.R. Rijpkema, *Militant democracy. The limits of democratic tolerance,* London: Routledge. 2018.

N. Riemer, 'James Madison's Theory of the Self-destructive Features of Republican Government', *Ethics* 65(1) 1954, p. 34-43.

J.J. Rousseau, *The Social Contract and other later political writings.* Cambridge: Cambridge University Press 1985.

J.J. Rousseau, *Considerations sur le Gouvernmenant de Pologne* [1772], in J.-J. Rousseau, Oevres Complètes, Vol. III. Paris: Gallimard. 1964

A. Sajó, *Militant democracy.* Utrecht: Eleven International. 2004.

M. Schwartzberg, *Democracy and legal change*, Cambridge: Cambridge University Press 2007.

P. van Schie, *Democratie moet leven.* In: A. Ellian, G. Molier & B.R. Rijpkema, *De strijd om de democratie: Essays over democratische zelfverdediging*, Amsterdam: Boom, 2018.

I. Secker, 'Representatives of the Dutch People: The Smooth Transformation of the Parliamentary Elite in a Consociational Democracy 1948-1998', p. 270-309, in H. Best & M. Cotta (eds.), *Parliamentary Representatives in Europe 1849-2000. Legislative Recruitment and Careers in Eleven European Countries,* 2000.

Staatscommissie Parlementair Stelsel. *Lage drempels, hoge dijken: Democratie en rechtsstaat in balans.* Amsterdam: Boom 2018.

R. Teitel, 'Militating Democracy: Comparative Constitutional Perspectives', *Michigan Journal of International Law 29*(1) 2007, p. 49-70.

S. Tyulkina, *Militant democracy: Undemocratic Political Parties and Beyond*, London: Routlegde 2015.

J.J.A. Thomassen (ed.), *Hedendaagse democratie*, Alphen a/d Rijn: Samson H.D. Tjeenk Willink, 1991.

M. Thiel, *The 'Militant democracy' Principle in Modern Democracies,* London: Routledge 2009.

G. Van den Bergh, *De democratische staat en de democratische partijen* (oratie Amsterdam UvA), Amsterdam: De Arbeiderspers 1936

T. Van der Meer, *Niet de kiezer is gek,* Houten: Spectrum 2017.

I. Van Biezen, P. Mair & T. Poguntke, Going, oging, … gone? The decline of party membership in contemporary Europe'. *European Journal of Political Research* 51(1), 2009, p. 24-56

G.H. Waling, (2017), *Zetelroof. Fractiediscipline en afsplitsing in de Tweede Kamer 1917-2017,* Nijmegen: Van Tilt.

G.H. Waling & Coos Huijsen (ed.), De geboortepapieren van Nederland. De Unie van Utrecht, de Apologie van Willem van Oranje en het Plakkaat van Verlating in hedendaags Nederlands, Amsterdam: Elsevier Boeken 2014.

D. Yardley, *Introduction to British constitutional law* (7th ed.), London: Butterworths 1990.