

MILITANT DEMOCRACY: AN ALIEN CONCEPT FOR AUSTRALIAN CONSTITUTIONAL LAW?

ABSTRACT

This article presents an overview of the development and growth of the concept of militant democracy in contemporary constitutional theory and practice, and its relevance to Australia. Militant democracy refers to a form of constitutional democracy authorised to protect its continued existence as democracy by pre-emptively restricting the exercise of civil and political freedoms. Initially, militant democracy focused on electoral integrity, adopting measures such as the prohibition of allegedly undemocratic political parties. However, in recent years militant democracy has expanded to include policies aimed at addressing threats such as religious fundamentalism and global terrorism. This article examines the extent to which Australia can be said to be a militant democracy. It investigates how militant democracy is manifesting itself in contemporary Australian democracy by analysing provisions of the *Australian Constitution*, relevant legislation and jurisprudence of the High Court of Australia. The article attempts to reconceptualise certain features of the Australian constitutional system through the lens of the militant democracy concept.

I INTRODUCTION

This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed — Paul Joseph Goebbels¹

Over the past few decades militant democracy has emerged as an important way of understanding constitutional systems around the world. Generally speaking, militant democracy is a form of constitutional democracy authorised to protect its continued existence as a democracy by pre-emptively restricting the exercise of civil and political freedoms. Initially militant democracy focused on

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¹ Joseph Goebbels, quoted in Karl D Bracher, Manfred Funke and Hans-Adolf Jacobsen (eds), *Nationalsozialistische Diktatur, 1933-1945: Eine Bilanz* (Bonn, Bundeszentrale für Politische Bildung, 1983) 16: ‘Das wird immer einer der besten Witze der Demokratie bleiben, dass sie ihren Todfeinden die Mittel selber stellte, durch die sie vernichtet wurde’, quoted in András Sajó, ‘From Militant Democracy to the Preventive State?’ (2006) 27 *Cardozo Law Review* 2255, 2262.

electoral integrity, adopting measures such as the prohibition of allegedly undemocratic political parties. However, in recent years militant democracy has expanded to include policies aimed at addressing, for example, the threats of religious fundamentalism and global terrorism.

The concept of militant democracy provides a different perspective to the liberal view of the state. Under the latter view, democracy is understood as an accommodating political system premised on there being a plurality of ideas and opinions. However, liberalism presents a serious dilemma for democracy: how should it defend itself against non-democratic political collective or individual actors? The concept of militant democracy was introduced to legal scholarship and constitutional practice as an attempt to address this challenge.

Militant democracy is widely used to better understand constitutional systems and evaluate and explore their practical operation, particularly in relation to the actions of the state directed at self-defence from internal threats. It is especially useful where it provides a rationale for constitutional concepts and approaches that might otherwise be considered outside the liberal conception of democracy. An example of this is the most obvious dilemma of any democracy — how to protect democracy from its potential ‘enemies’ and remain true to itself. Despite the importance of the idea of militant democracy and its wide use in constitutional scholarship,² the concept’s application has not been investigated in respect of the *Australian Constitution*. This article fills this gap by explaining and developing the concept, and by determining whether and to what extent it applies to Australian constitutional law.

This article first focuses in Part II on the concept of militant democracy and its growth in contemporary constitutional theory and practice. It argues that all democracies are militant to some extent, but warns that the concept should not be idealised, as its practical application can be problematic. Part III then examines the modern interpretation and application of this concept outside Australia. It will also discuss how the concept of militant democracy is being applied to address the ‘new’ types of threats faced by democracies. This discussion lays the background for Part IV, where the relevance and potential application of militant democracy in the Australian context is explored. This analysis draws upon the text of the *Australian Constitution*, legislation for the proscription of unlawful associations and examples from the constitutional jurisprudence of the High Court of Australia. Part V then concludes that despite the common perception of the *Australian Constitution* as a liberal document, militant democracy does have an important role to play in understanding the *Constitution* and explaining the way it operates.

² See, eg, András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004); Gregory H Fox and Georg Nolte, ‘Intolerant Democracies’ (1995) 36 *Harvard International Law Journal* 1; Patrick Macklem, ‘Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe’ (2012) 19 *Constellations* 575; Samuel Issacharoff, ‘Fragile Democracies’ (2007) 120 *Harvard Law Review* 1405; Paul Harvey, ‘Militant Democracy and the European Convention on Human Rights’ (2004) 29 *European Law Review* 407.

II MILITANT DEMOCRACY: FOUNDATIONS

A Origin and Growth of the Concept

Karl Loewenstein first introduced the term ‘militant democracy’ in the 1930s;³ however, similar ideas were evident in the works of other scholars before and during the same period. For example, Karl Popper in *The Open Society and Its Enemies*⁴ refers to the ‘paradox of tolerance’ and warns that ‘unlimited tolerance must lead to the disappearance of tolerance’.⁵ He argues that tolerance should not be granted ‘to those who are intolerant’⁶ for ‘the right not to tolerate the intolerant’.⁷ In addition he calls for ‘any movement preaching intolerance’ to be placed outside the law.⁸ In other words, democracy can be more aggressive towards those who do not believe in it and its values.⁹ Further, Popper refers to Plato’s criticism of democracy and agrees that democracy should not be only about procedure, but also about substance, meaning there should be fundamental principles and rules which cannot be recalled even by the majority’s decisions. The idea of constitutions containing an unalterable core later became an element of the concept of militant democracy.¹⁰ This idea, however, had been known to constitutional practice since 1884, when the French Constitution established the unalterable character of the provision on the republican form of government. Current constitutions of many countries make explicit reference to the idea of the unalterable character of fundamental provisions.¹¹

The archetypal example of how purely procedural democracy and tolerance towards intolerant political actors can become dangerous is the electoral success of the Nazi Party. Events in the 1930s made many people realise that democracy cannot survive without institutionalised means to protect itself against attacks from its internal enemies. Democracy cannot remain passive and silent about attempts to damage it

³ Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’ (1937) 31 *The American Political Science Review* 417; Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, II’ (1937) 31 *The American Political Science Review* 638.

⁴ Karl Popper, *The Open Society and its Enemies* (Princeton University Press, 1950).

⁵ *Ibid* 546.

⁶ *Ibid*.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ Kent Roach, *9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 56.

¹⁰ For more recent debate on substantive and procedural democracies, see Fox and Nolte, above n 2, 14. Arguments in support of a substantive view of democracy as opposed to the purely procedural view can also be found in early works of Carl Schmitt (for details see Fox and Nolte, above n 2, 18–21).

¹¹ The most well-known example of this is the ‘eternity clause’ provision from the *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 79(3): ‘Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.’

from within by organisations and individuals abusing the privileges, rights and opportunities granted to them by the regime. In other words, liberal constitutions should not function as suicide pacts, and must be prepared to take self-defensive actions when needed.¹² These ideas and visions of democracy received wide support in the aftermath of the Second World War and the collapse of communism in Europe.¹³

There is no universal definition of militant democracy. It is defined by Otto Pfersmann as ‘a political and legal structure aimed at preserving democracy against those who want to overturn it from within or those who openly want to destroy it from outside by utilizing democratic institutions as well as support within the population’.¹⁴ Other authors refer to militant democracy as ‘a form of constitutional democracy authorized to protect civil and political freedoms by preemptively restricting their exercise’ in order to guard ‘the democratic character of a constitutional order’.¹⁵ Gregory H Fox and Georg Nolte narrow militant democracy to a set of measures to prevent the change of a state’s own democratic character by the election of anti-democratic parties.¹⁶ Samuel Issacharoff characterises militant democracy as the ‘mobilization of democratic institutions to resist capture by antidemocratic forces. The aim is to resist having the institutions of democracy harnessed to what may be termed “illiberal democracy.”’¹⁷ Paul Harvey refers to militant democracy as a system ‘capable of defending the constitution against anti-democratic actors who use the democratic process in order to subvert it.’¹⁸

As we can observe, while there are various definitions of militant democracy, authors mostly refer to the same qualities that the term ‘militant’ adds to democracy. First, militant democracy is about pre-emption, which means that states are not expected to wait until those who aim to destroy or overturn the system have real opportunity to do so; secondly, such pre-emptive measures are aimed against a specific ‘enemy’: individuals or groups of individuals aiming to harm the democratic structures of the state; thirdly, such ‘enemies’ aim to harm democratic structures by abusing rights and privileges afforded to them by democracy and an open society. These features are crucial to determine the militancy of a constitutional system. Generally speaking, militant democracy can be defined as the capacity of liberal democracies to defend themselves against challenges to their continued existence as democracies by taking

¹² See, eg, Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

¹³ Many post-communist countries have provisions on the dissolution of political parties. For details see, eg, Jiri Priban and Wojciech Sadurski, ‘The Role of Political Rights in the Democratization of Central and Eastern Europe’ in Wojciech Sadurski (ed), *Political Rights Under Stress in 21st Century Europe* (Oxford University Press, 2006) 196, 225–30.

¹⁴ Otto Pfersmann, ‘Shaping Militant Democracy: Legal Limits to Democratic Stability’, in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 47.

¹⁵ Macklem, above n 2, 1–2.

¹⁶ Fox and Nolte, above n 2, 6.

¹⁷ Issacharoff, above n 2, 1409.

¹⁸ Harvey, above n 2, 408.

preventive actions against those who want to overturn or destroy democracy by abusing democratic institutions and procedures.¹⁹ I will rely on this broad²⁰ definition of militant democracy in this article.

Militant democracies perform the task of protecting democracy against challenges to its continued existence by taking preventive actions against those who want to overturn or destroy democracy by abusing or misusing democratic institutions and procedures such as free elections, freedom of speech and association. Therefore, today ‘militant democracy is most commonly understood as the fight against radical movements, especially political parties, and their activities’.²¹ In that form, it is usually agreed that militant democracy was explicitly constitutionalized for the first time in 1949 in Germany.²² The Basic Law is often described as the ‘counter-constitution to the previous one upon which the Nazi regime had been based.’²³ The German political system was given a new form, which included the mechanism to protect founding principles against potential enemies of the state — militant democracy. Central to Germany’s militant democracy is the so-called ‘eternity clause’²⁴ that proclaims certain constitutional provisions are absolutely immune from being amended or abolished and describes the procedure to ban unconstitutional political parties:

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.²⁵

¹⁹ Stephen Holmes, ‘András Sajó (ed), *Militant Democracy*’ (2006) 4 *International Journal of Constitutional Law* 586, 591.

²⁰ This definition is, however, not as broad as provided in some recent publications on the topic. For example, Walker interprets militant democracy as a state that has a right and a duty to take actions against significant forms of terrorism (like the Irish Republican Army or transnational groups epitomized by Al-Qaeda). In this sense Walker equates notions of ‘militant democracy’ and ‘militant state’. See Clive Walker, ‘Militant Speech About Terrorism in a Smart Militant Democracy’ (2011) 80 *Mississippi Law Journal* 1395, 1396.

²¹ Sajó, ‘From Militant Democracy to the Preventive State?’, above n 1, 2262.

²² For a summary of the German Basic Law provisions on militant democracy see, eg, Pfersmann, above n 14, 49.

²³ Elmar M Hucko, *The Democratic Tradition: Four German Constitutions* (St. Martin’s Press, 1989) 68.

²⁴ Article 79(3) of the Basic Law: ‘Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible’. The provisions mentioned in Article 79(3) refer to the: guarantee of human dignity; concept of democracy; federal state; separation of powers; rule of law; and social state.

²⁵ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 21(2).

While the Basic Law does not ban a particular ideology from German politics and refers only to an abstract enemy, it was obviously adopted with particular groups in mind: the Nazis and Communists. In contrast, the drafters of the Constitution of the Italian Republic did not hesitate to name the enemy and chose to ensure that the previous rulers had no chance of returning to the political mainstream by explicitly prohibiting the reorganisation, in any form, of the dissolved Fascist party.²⁶

Later, the concept of militant democracy was used in democratic countries around the world to curb the activities of communist parties. For example, during the Cold War era the United States federal government launched an extensive campaign against the Communist Party USA. Part of this campaign was the enactment of new legislation which criminalised advocating the overthrow of government.²⁷ In 1950, Australia's federal Parliament enacted the *Communist Party Dissolution Act 1950* (Cth) to declare the party, and other associations likely to be under the influence of communists, illegal and made it an offence to be a member of a banned organisation.²⁸ And in 1956, the Federal Constitutional Court of Germany exercised its power under art 21 of the Basic Law and rendered the judgment which declared the Communist Party of Germany unconstitutional.²⁹

²⁶ *La Costituzione della Repubblica Italiana* [Constitution of the Italian Republic] adopted on 22 December 1947, came into force on 1 January 1948. Article XII of the Transitory and Final Provisions reads as follows:

It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party. Notwithstanding Article 48, the law has established, for not more than five years from the implementation of the Constitution, temporary limitations to the right to vote and eligibility for the leaders responsible for the Fascist regime.

²⁷ The *Alien Registration Act* 18 USC § 2385 (1940) known as the *Smith Act* provided in §§ 2–3 as follows:

Sec. 2.

(a) it shall be unlawful for any person —

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government;

...

Sec.3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of ... this title.

The Act is best known for its application against political figures as in the case of *Dennis v United States*, 341 US 494 (1951).

²⁸ *Communist Party Dissolution Act 1950* (Cth).

²⁹ Bundesverfassungsgericht [German Constitutional Court], *Communist Party Case* (1956), 5 BVerfGE 8. For details see Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd revised and expanded ed, 1997) 222.

It was expected that the fall of communism would decrease the use of militant democracy measures, given so many were introduced to guard against the ‘threat’ of communism.³⁰ However, due to local political and social situations, many of the young European democracies that emerged after the fall of communism included militant democracy provisions in their constitutions. It was hoped that this would help protect fragile democratic regimes from the possibility of being harmed by previous rulers.³¹ In general, these measures imposed restrictions on political parties in the form of a priori prohibition of parties’ adherence to certain ideologies, or a requirement that party programs and activities be compatible with major democratic principles.³²

The most recent trend in the debate surrounding militant democracy emerged after the 11 September 2001 terrorist attacks. Many western democracies regarded themselves as the targets of an undeclared war by Islamic extremists on Western liberal democratic values.³³ The ‘9/11’ attacks and the anti-terrorism policies and legislation that followed brought issues of militant democracy back to the forefront of constitutional and political discourse. Interest was also heightened by an increased awareness of the novel threats posed by religious fundamentalism. The possibility was raised that militant democracy could potentially be used in a much wider sense to protect democracy not only from undemocratic political parties but as well from newly emerging types of threats.

B Militant Democracy: Challenges and Concerns

There are many questions, concerns and challenges about the concept that remain unresolved, despite the substantial constitutional practice in support of it. It is important to be aware of these problems, as militant democracy has the potential to become dangerous, especially in unstable or transitional democratic regimes.

First, militant democracy is, in an important respect, self-contradictory, as it limits rights and liberties in order to secure and protect their existence.³⁴ This is why the idea has been vehemently criticised.³⁵ It is questionable whether democracy can behave in

³⁰ Shlomo Avineri, ‘Introduction’ in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 1, 2.

³¹ For a brief overview of militant democracy provisions in Central and Eastern Europe states see András Sajó, ‘Militant Democracy and Transition towards Democracy’ in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 209, 218–19 and Priban and Sadurski, above n 13.

³² A detailed account of limitations on speech and political parties from militant democracy perspectives can be found in Priban and Sadurski, above n 13, 196–238.

³³ Avineri, above n 30, 2.

³⁴ See, eg, Loewenstein, above n 3, 431; Pfersmann, above n 14, 52; Sajó, ‘Militant Democracy and Transition towards Democracy’, above n 31, 211; Fox and Nolte, above n 2, 6.

³⁵ Markus Thiel, ‘Comparative Aspects’ in Markus Thiel (ed), *The ‘Militant Democracy’ Principle in Modern Democracies* (Ashgate Publishing Company, 2009) 379, 417.

a militant way and remain true to itself.³⁶ This critique might be outweighed by the argument that democracy cannot afford to remain inactive when its basic structures are being attacked and its very existence is under threat. In other words, democracy is inherently self-contradictory if it allows this course of action by its enemies and continues to allow their enjoyment of all democratic privileges despite their abusive exercise of such privileges. This is why it is important that legal systems balance militant democracy measures by ensuring the strong protection of rights.

Secondly, in practice, militant democracy can be difficult to apply effectively, even where such measures seem to be justified. For example, there is a justified fear that political groups with aggressive tendencies will become even more violent and disobedient if their associational rights are suppressed. The experience of Germany, where repressive measures were widely used against the extreme right groups in the 1990s, demonstrates that such approach did not halt the rise of violence, but resulted in increased mobilisation of targeted groups and hardening an ideology.³⁷

Thirdly, it is hard to define the right moment to invoke the concept of militant democracy. It is often difficult to draw a clear line between acceptable critiques of a democratic regime and a direct or indirect attack on the foundations of that regime. That is, how can we define the point at which democracy is endangered, and, more importantly, who should make such a decision? The latter question is particularly challenging as militant democracy measures bear a risk of being misused for political purposes. That is why there is the strongly held opinion that the judiciary, at least in European jurisdictions, must carefully scrutinise the arguments of the government advanced in favour of such measures, and take into account local conditions and the degree of the threat. Judicial controls can play an important role in preventing the political misuse of militant democracy measures and preserving legal guarantees of fundamental rights where such rights may be curtailed for the sake of protecting democracy.

Some commentators argue it is quite unlikely that a political ideology such as communism or fascism will realistically have the opportunity to attack and destroy democracy.³⁸ Combined with the fact that the concept of militant democracy gives rise to some serious concerns outlined above, it can be argued that democratic

³⁶ This, for example, was a serious concern in the recent NDP party dissolution case. For details see Thilo Rensmann, 'Procedural Fairness in a Militant Democracy: the "Uprising of the Decent" Fails Before the Federal Constitutional Court' (2003) 4 *German Law Journal* 1117 <https://www.germanlawjournal.com/pdfs/Vol04No11/PDF_Vol_04_No_11_1117-1136_Public_Rensmann.pdf> (available online).

³⁷ See, eg, Michael Minkenberg, 'Repression and Reaction: Militant Democracy and the Radical Right in Germany and France' (2006) (40) *Patterns of Prejudice* 25, 43–4.

³⁸ Miguel Revenga Sanchez, 'The Move Towards (and the Struggle For) Militant Democracy in Spain' (Paper presented at the European Consortium on Political Research Conference, 18–21 September 2003) <<http://www.essex.ac.uk/ecpr/events/generalconference/marburg/papers/10/7/Sanchez.pdf>>.

states should no longer be encouraged to militarise their constitutional systems. Indeed, the idea that ‘democracy should refrain from providing legal regulations and measures of a “militant” provenance and (mainly or solely) rely on self-regulative powers of the electoral and political processes’³⁹ is plausible. However, this is not always realistic, especially in the case of young and transitional democracies.⁴⁰ In recent decades, democracy has been widely accepted as the preferred system of government; however, it is not yet completely secured from ideological and physical attacks from both internal and external enemies. Therefore, despite challenges and concerns liberal democracies may face when applying militant democracy measures, militant democracy may be employed to the extent ‘of excluding conceptually and institutionally the abuse of opportunities for restricting rights’.⁴¹

III MILITANT DEMOCRACY IN PRACTICE: POLITICAL PARTIES AND BEYOND

Militant democracy in its contemporary form was first constitutionally manifested in Germany in 1949, and included two central elements: the prohibition of unconstitutional political parties; and the unalterable character of some constitutional provisions. Further, democracies with national constitutions that do not contain explicit provisions on banning dangerous political parties are characterised as ‘passive’ or ‘tolerant’ (as opposed to ‘active’ and ‘intolerant’).⁴² Democracies with constitutions that are open to amendments and can be revised or even abolished by the majority rule, are described as ‘procedural’ (as opposed to ‘substantive’).⁴³ Since 1949, the ‘militancy’ of particular constitutional systems has been measured against these explicit parameters. However, this approach seems too narrow to accommodate the variety of ways constitutional democracies may adhere to the notion of militant democracy and it is important to look beyond these indicators to determine if a democracy is militant.

Generally speaking, the constitutional practices of democratic states reveal that constitutions of democratic nations around the world commonly contain provisions reflecting the concept of militant democracy. And even where there is no explicit reference to the militant character of a state, this may be implied from the text of its

³⁹ Thiel, above n 35, 417.

⁴⁰ For example, Peter Niesen argues that ‘Civic Society’ should be a new desirable paradigm for party ban. See Peter Niesen, ‘Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties’ (Pt 2) (2002) (3) *German Law Journal* <<http://www.germanlawjournal.com/article.php?id=169>> (available online). See also Günter Frankenberg, ‘The Learning Sovereign’ in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004) 113, 130–32; Thiel, above n 35, 417–21.

⁴¹ Sajó, ‘Militant Democracy and Transition towards Democracy’, above n 31, 211.

⁴² Fox and Nolte, above n 2, 22.

⁴³ *Ibid* 1.

constitutional norms and preambles.⁴⁴ As Otto Pfersmann claims, militant democracy is one of many features of democracy and ‘that democracies are always more or less militant’.⁴⁵ Sajó develops this argument further and contends that the state’s most natural characteristic is self-defence.⁴⁶ Hence, it is arguable that it is possible to find at least some signs of ‘militancy’ in the constitutional framework of nearly all democracies (including Australia) and that the ‘militancy’ of a particular constitutional system need not be determined by its constitution alone.

There are, however, instances where ordinary legislation has introduced militancy to the constitutional system of the state. For example, the Spanish Constitution of 1978⁴⁷ does not give state institutions explicit militant democracy powers; there are no provisions banning political parties and every constitutional provision is open, at least technically, to the procedure of amendment. However, it did not prevent the Law on Political Parties,⁴⁸ enacted in 2002, from introducing a procedure to outlaw political parties. It does not follow that militant democracy in Spain is not constitutionally authorised. Where laws represent a continuation of constitutional principles and are compatible with them (as was the case in Spain, where the Law on Political Parties only detailed further constitutional provision on the freedom of political parties) such legislative acts can be considered as a part of the constitutional system. Therefore, it is important to look within the constitutional system in order to see if it has features of a militant democracy state.

As discussed above, militant democracy is traditionally understood as a tool to fight abuses of the electoral process and to suppress the activities of political organisations, mainly political parties. But constitutional law is generally able to accommodate new realities of social and political life via constitutional amendments or judicial interpretation of constitutional provisions. Every generation has its own disease,⁴⁹ and, some time ago, the idea of unlimited democratic tolerance was abandoned in order to rid democratic ‘societies of unjust and oppressive forms of political rule’⁵⁰ such as fascist and communist parties. It seems only reasonable to equip modern democracies to do the same against its modern enemies. Loewenstein’s statement that ‘[f]ire is fought with fire’⁵¹ is still relevant and its interpretation should not be limited to only outlawing political parties or political parties with communist and fascist agendas.

⁴⁴ For example, art 89 of *La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] explicitly provides that the republican form of government shall not be subject to amendment.

⁴⁵ Pfersmann, above n 14, 53 (emphasis altered).

⁴⁶ Sajó, ‘Militant Democracy and Transition towards Democracy’, above n 31, 213.

⁴⁷ *La Constitución Española de 1978* [Spanish Constitution of 1978].

⁴⁸ *Ley Orgánica 6/2002, de 27 de junio, Partidos Políticos* [Law on Political Parties] (Spain) 27 June 2002.

⁴⁹ Thiel, above n 35, 379.

⁵⁰ Ibid 382, quoting Claus Offe, ‘Democracy and Trust’ (2000) 47(96) *Theoria: A Journal of Social and Political Theory* 1, 3.

⁵¹ Loewenstein, above n 3, 656.

Today, militant democracy exists and is indeed a way of understanding certain laws, including those which affect areas well beyond the traditional interpretation of militant democracy, such as threats posed by global terrorism and religious fundamentalism.⁵² Legal and political science scholars have started to debate a number of issues, such as: whether Islam is compatible with democracy;⁵³ how the principle of secularism, cherished in many modern democracies, should be interpreted in the current reality;⁵⁴ and how to fight terrorist groups that threaten to destroy or damage democracies and their citizens' usual way of life.⁵⁵ These scholarly debates reflect the reality and challenges democracies currently face. The constitutional practice of the last decade demonstrates that there are legitimate grounds to claim that the application of militant democracy is being extended beyond the prohibition of political parties.

An example of this is how militant democracy measures are being applied to address one of the more recent challenges to democracy, namely, fundamentalist and coercive religious movements.⁵⁶ Furthermore, militant democracy can be helpful in explaining why religious and ethnic groups are excluded from the political process in some democracies and why certain constitutional principles are being protected from any religious intrusion (as is happening to the principle of secularism in Turkey). Further, the jurisprudence of the European Court of Human Rights provides ample evidence that there are cases involving freedom of religion or political parties with religious agendas that could be better rationalised and understood through the prism of militant democracy.⁵⁷ For example, the Court referred to the need to protect and preserve democracy to justify the limits on manifesting religious beliefs through wearing particular types of clothes associated with Islam;⁵⁸ therefore, the Court's case law demonstrates that the rationale of militant democracy is used to address threats (alleged or real) coming from fundamentalist religious groups.

⁵² For example, András Sajó claims that protection of secularism is intimately interrelated with militant democracy. See Sajó, 'Militant Democracy and Transition towards Democracy', above n 31, 210.

⁵³ Asef Bayat, *Islam and Democracy: What is the Real Question?* (Amsterdam University Press, 2007) 8.

⁵⁴ See, eg, Macklem, above n 2; Peter G Danchin, 'Islam in the Secular *Nomos* of the European Court of Human Right' (2011) 32 *Michigan Journal of International Law* 663.

⁵⁵ See, eg, Suzie Navot, 'Fighting Terrorism in the Political Arena: The Banning of Political Parties' (2008) 14 *Party Politics* 745; Leslie Turano, 'Spain: Banning Political Parties as a Response to Basque Terrorism' (2003) 1 *International Journal of Constitutional Law* 730.

⁵⁶ See Danchin, above n 54; Macklem, above n 2; Michael D Goldhaber, *A People's History of The European Court of Human Rights* (Rutgers University Press, 2007) 88.

⁵⁷ See, eg, *Kalifatstaat v Germany* [2006] (European Court of Human Rights, Application No 13828/04, 11 December 2006); *Refah Partisi (Welfare Party) v Turkey* [2003] I Eur Court HR 209 (French); 267 (English); *ahin v Turkey* [2005] XI Eur Court HR 115 (French); 173 (English); *Dogru v France* [2008] (European Court of Human Rights, Chamber, Application No 27058/05, 4 December 2008). See also Renáta Uitz, *Freedom of Religion in European Constitutional and International Case-Law* (Council of Europe Publishing, 2007) 177.

⁵⁸ Uitz, above n 57, 177.

A similar line of argument can be traced in the so-called ‘war on terror’. Sajó points out several similarities between political radicalism and terrorism, and therefore argues that militant democracy can be a relevant consideration in explaining and justifying national counterterrorism policies.⁵⁹ Further, the question of whether democracies can ‘fight antidemocratic parties democratically?’ came to be compared with the question, ‘[c]an democracies fight terrorism within the bounds of the rule of law?’⁶⁰ Fundamentalist Islam and global terrorism are not perceived only as threats to the life of citizens, but also to the entire democratic constitutional structures. Given this, the concept of militant democracy may be useful in guiding state policies to neutralise these and other challenges which might arise in the future. While drawing parallels between counterterrorism and militant democracy should be done cautiously, there is at least one feature which closely connects these concepts. If we leave aside the criminal dimension of counterterrorism policies, we can observe that there is a preventive basis to many counterterrorism measures, including but not limited to detention and interrogation by intelligence services, and some serious limitations imposed on the freedoms of speech, association and religion.⁶¹ Moreover, both notions are based on the assumption that democracies are justified in denying rights and freedoms to those who disrespect democracy.

Public international law also facilitates the concept of militant democracy, and the extension of its application beyond banning dangerous political parties. For example, the United Nations Security Council Resolution 1624, adopted on 14 September 2005,⁶² appealed to militant democracy⁶³ by calling all states to adopt measures to prevent and criminalise incitement to commit acts of terrorism.⁶⁴ The then Prime Minister of the United Kingdom, Tony Blair, warned, while advocating for the adoption of this Resolution, that

Terrorism was a movement with an ideology and strategy. This strategy was not just to kill but also to cause chaos and instability, to divide and confuse. Terrorism would not be defeated until the Council’s ... passion for democracy was as great as their [terrorists] passion for tyranny.⁶⁵

⁵⁹ Sajó, ‘From Militant Democracy to the Preventive State?’, above n 1.

⁶⁰ Holmes, above n 19, 589.

⁶¹ In Australia, there is an extensive list of preventive counterterrorism measures such as preparatory offences, the proscription regime, the questioning and detention powers of the Australian Security Intelligence Organisation (‘ASIO’), the control order regime and preventive detention orders. For further details see George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 39 *Melbourne University Law Review* 1136.

⁶² SC Res 1624, UN SCOR, 60th sess, 5261st mtg, UN Doc S/RES/1624 (14 September 2005) (‘*Resolution 1624*’).

⁶³ Roach, above n 9, 56.

⁶⁴ *Resolution 1624*, UN Doc S/RES/1624.

⁶⁵ United Nations Security Council, ‘Security Council Meeting of World Leaders Calls for Legal Prohibition of Terrorist Incitement, Enhanced Steps to Prevent Armed Conflict’ (Press Release, 14 September 2005) <<http://www.un.org/News/Press/docs/2005/sc8496.doc.htm>>, cited in Roach, above n 9, 56.

Resolution 1624 was intended to respond ‘not only to the methods of terrorists but also to “their motivation, their twisted reasoning, wretched excuses for terror ... [and their] poisonous propaganda.”’⁶⁶ Leaving aside the debate as to whether Resolution 1624 was interpreted and implemented appropriately (especially by non-democratic states),⁶⁷ the mere adoption of such an international instrument with an underlying militant democracy justification demonstrates that militant democracy has a place in the counterterrorism debate (to explain and contextualise counterterrorism laws) and is being utilised to protect democratic structures from possible attacks by terrorist groups.

IV AUSTRALIA AS A MILITANT DEMOCRACY

A Militant Democracy and the Australian Constitution

At first glance, the *Australian Constitution* does not contain any of the traditional features of a militant democracy state discussed in Part III, such as procedures to outlaw political parties or unalterable constitutional provisions. It is on this basis that someone might conclude that Australia lacks any elements of constitutional militancy. In this Part I will argue that this impression is not correct and that the concept of militant democracy is a feature Australian constitutional law. In fact, signs of militant democracy may be found in the text of the *Australian Constitution*, legislation and the decisions of the High Court of Australia.

The very first draft of the Commonwealth of Australia Constitution Bill adopted in April 1891 indicates that drafters of the *Constitution* were concerned to draft a constitution capable of maintaining the legal order to be established. Clause 52(6) of the 1891 draft of the *Constitution* granted the Federal Parliament a power to make laws with respect to ‘The Military and Naval Defence of the Commonwealth and the calling out of the Forces with a purpose to execute and *maintain* the laws of the Commonwealth, or of any State or part of the Commonwealth.’⁶⁸ The phrase ‘to execute and maintain the laws’ survived all consequent Convention debates on the draft of the *Constitution* and is present in s 51(vi) of the *Constitution* as enacted. The wording of s 51(vi) was slightly modified during the debates,⁶⁹ but there was never a question of removing the idea that the defence power included maintaining the legal order.

⁶⁶ Roach, above n 9, 55.

⁶⁷ For a detailed account of the implementation of Security Council Resolution 1624 see the Security Council Committee, *Global Survey of the Implementation by Member States of Security Council Resolution 1624 (2005)*, UN Doc S/2012/16 (9 January 2012).

⁶⁸ Commonwealth of Australia Constitution Bill (Draft) 1891 (Imp) (emphasis added).

⁶⁹ See the *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, vii–xxi; the *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897, vii–xix; and the *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, (1)–(18).

Examples of the application of the defence power⁷⁰ demonstrate that in times of war the defence power of the federal legislature ‘may extend into virtually every aspect of Australian life’.⁷¹ In times of peace, the scope of the power is much more limited but it still has the potential to regulate activities only indirectly related to defence.⁷² Thus, the defence power of the federal Parliament was relied upon to ban the Communist Party of Australia in 1950⁷³ and to introduce the mechanism of control orders as part of the anti-terrorism legislative package in 2005.⁷⁴ The defence power invoked in times of peace to protect and maintain the legal order definitely speaks in favour of a militant democracy rationale underlying the doctrine of defence power as enshrined in the text of the *Constitution* and interpreted by the High Court.

Further reference to militant democracy can be found in s 61 of the *Constitution* which deals with the executive power and states that ‘[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.’ Notably, the first two drafts of the Commonwealth of Australia Bill (the 1891 and 1897 versions) did not mention the ‘maintenance’ of the *Constitution* and executive power was limited to its execution only.⁷⁵ However, the 1898 draft of the *Constitution* extends the executive power to both the execution and maintenance and makes it almost identical to the wording of s 51(vi) in relation to the purpose of defence power of the Parliament. Elaboration of the amendments to the text of the respective clause is not reflected in the protocols of the 1898 Australasian Federation Conference debates and most probably the extension of the executive power to maintain the *Constitution* was not contested by the delegates. This task of the executive is in full conformity with the spirit of militant democracy, as is s 51(vi) of the *Constitution* which enables the Parliament to legislate in order to maintain the existing legal order.

⁷⁰ On the scope of defence power see David P Derham, ‘The Defence Power’ in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (Law Book Co, 2nd ed, 1961) 157; Geoffrey Sawer, ‘Defence Power of the Commonwealth in Time of Peace’ [1951–54] 6 *Res Judicatae* 214; Geoffrey Sawer, ‘The Defence Power of the Commonwealth in Time of War’ (1946) 20 *Australian Law Journal* 295.

⁷¹ Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 825.

⁷² *Ibid* 836.

⁷³ For example, the Preamble of the *Communist Party Dissolution Act 1950* (Cth) explicitly refers to the powers of the ‘Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States.’

⁷⁴ Both legislative measures are discussed further below. See below Parts IV(B)–(C).

⁷⁵ Commonwealth of Australia Constitution (Draft) Bill 1891 (Imp) and Commonwealth of Australia Constitution (Draft) Bill 1897 (Imp).

B *Militant Democracy and Federal Legislation*

The argument that the concept of militant democracy is relevant to Australia is further bolstered by reference to federal legislation, most notably as a mechanism for the proscription of unlawful associations.⁷⁶ In 1916, the Commonwealth Parliament passed the *Unlawful Associations Act 1916* (Cth) which was introduced as an act of the nation's self-defence against the Industrial Workers of the World organisation.⁷⁷ Later, pt IIA of the *Crimes Act 1926* (Cth) replicated the proscription mechanism to a large extent, and its provisions were aimed at defeating 'the nefarious designs of the extremists in our midst.'⁷⁸ While no organisation has ever been declared unlawful under this legislation, it is hard to contest that Australian democracy was concerned with the problem of self-defence and its continued existence as a democracy from the very early years of the Commonwealth. Australia's apparent willingness to employ proscription as a mechanism to fight dangerous and subversive political movements was common to other states at that time. The fact that proscription mechanisms were aimed at fighting subversive groups and individuals located within Australia confirms that, in the first half of the 20th century, Australia was far from unique.

Another example of militant democracy in the constitutional history of Australia is the attempt to ban the Communist Party of Australia in 1950.⁷⁹ The declaration by the Commonwealth Parliament that the Communist Party was an unlawful association is a typical militant democracy measure. The Communist Party had existed since the 1920s, but it had never been close to overcoming the popular support for the Labor Party.⁸⁰ The federal Government had advocated banning the Party earlier and as a result it was banned temporarily from 1940 until 1942 within the framework of wartime regulations. However, after the Soviet Union joined the war, the Party was allowed to resume its activities and gained some support amongst Australians. In the early 1940s, a wave of industrial strikes affected Australia and the Communist Party was accused of controlling

⁷⁶ For a detailed account see Andrew Lynch, Nicola McGarrity and George Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament' (2009) 13 *Legal History* 25 and Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscriptions of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1.

⁷⁷ Lynch, McGarrity and Williams, 'Lessons from the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament', above n 76, 29.

⁷⁸ Ibid 30–1, citing Nathan Hancock, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Parliamentary Library, Parliament of Australia, 2001–2002), quoting Prime Minister Stanley Bruce, 'Policy Speech' (Speech delivered at Dandenong, Victoria, 5 October 1925).

⁷⁹ For a detailed analysis of the Australian response to communism see, eg, Frank Cain and Frank Farrell, 'Menzies' War on the Communist Party, 1949–1951' in Ann Curthoys and John Merritt (eds), *Australia's First Cold War, 1945–1953* (George Allen & Unwin, 1984) vol 1, 109; Roger Douglas, 'Cold War Justice? Judicial Responses to Communists and Communism, 1945–1955' (2007) 29 *Sydney Law Review* 43.

⁸⁰ For a more detailed account see David Dyzenhaus, 'Constituting the Legislature' in David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) ch 2, 72–86.

these strikes and trying to destabilise the country. The 1949 elections brought the Coalition of the Liberal Party and the Country Party to power, and it did not take long for the Coalition to implement its electoral promise to ban the Australian Communist Party.⁸¹ The new Prime Minister, Robert Menzies, ensured the passage by the Parliament of the *Communist Party Dissolution Act 1950* (Cth), which came into operation on 20 October 1950. The enactment of this statute and its execution were presented to the public as the fulfilment of the constitutional responsibilities of the legislative and executive branches of government to defend the existing form of government.⁸²

The Act also provided for the Governor-General to declare other organisations associated with the Communist Party to be unlawful. The consequence of such a declaration was that these organisations were dissolved, membership became a criminal offence and the property belonging to the organisations was forfeited to the Commonwealth. Individuals could also be declared to be communists and, as a result, they were banned from employment in the Commonwealth public service. The preamble to the Act stated:

the Australian Communist Party ... engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party ... would be able to seize power ...⁸³

... the Australian Communist Party also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government of Australia ...⁸⁴

The ban imposed on the Communist Party was promoted as being ‘necessary, for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth’.⁸⁵ The execution and *maintenance* of the Constitution mentioned in the Preamble as one of the aims of this legislation refers to the very essence of executive power stipulated in s 61 of the *Constitution*. As was discussed above, ss 51(vi) and 61 of the *Constitution* are militant democracy measures aimed at protecting Australia’s continued existence as democracy. And the fact the government used the maintenance of the *Constitution* and of the laws of the Commonwealth to justify the ban of the Communist Party is a clear indication that militant democracy is present not only in Australia’s *Constitution* but also in the legislative practice of the Commonwealth Parliament.

On the same day that the *Communist Party Dissolution Act 1950* (Cth) was enacted, the Australian Communist Party, ten unions and some union officials challenged the constitutional validity of the statute. The High Court held that the Act was

⁸¹ Ibid 73.

⁸² Blackshield and Williams, above n 71, 844.

⁸³ *Communist Party Dissolution Act 1950* (Cth) Preamble para 4.

⁸⁴ Ibid para 5.

⁸⁵ Ibid para 9.

unconstitutional.⁸⁶ However, the legislation was not held unconstitutional because it banned a political party per se or because of its underlying militant democracy purpose. Rather, the Court held that the federal Parliament had exceeded its legislative powers by enacting the law.⁸⁷

C Militant Democracy in the Case Law of the High Court of Australia

In addition to the text of the *Australian Constitution* and Commonwealth legislation, militant democracy is also evident in the decisions of the High Court, most significantly in regard to the defence power. In the aftermath of 9/11 and the London and Bali bombings, the federal Parliament referred multiple times to the defence power to enact anti-terrorism legislation. One such instance was the enactment of div 104 of the Commonwealth *Criminal Code*⁸⁸ which introduced the mechanism of control orders.⁸⁹ This particular legislative measure was later challenged in the High Court in the case of *Thomas v Mowbray*,⁹⁰ in which the scope of the defence power became one of the central questions to be decided. The High Court's interpretation of the scope of the defence power is used here to illustrate how militant democracy can be inferred from this important judicial ruling and to explain its significance to the claim that Australia is indeed a militant democracy.

Shortly after 9/11, Australia began developing a comprehensive and complex counterterrorism regime. It was not hard to observe the similarity between the moral panic surrounding the fear of communism in 1950s and that surrounding the threat of terrorism.⁹¹ For example, more than 50 years ago communists were labeled 'the most unscrupulous opponents of religion, of civilised government, of law and order, of

⁸⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*').

⁸⁷ For broader implications of this case on Australian constitutional law see, eg, Roger Douglas, 'A Smallish Blow for Liberty? The Significance of the *Communist Party Case*' (2001) 27 *Monash University Law Review* 253; George Williams, 'Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*' (1993) 15 *Sydney Law Review* 3; George Williams, 'The Suppression of Communism by Force of Law: Australia in the Early 1950s' (1996) 42 *Australia Law Journal of Politics and History* 220; George Winterton, 'The *Communist Party Case*' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108.

⁸⁸ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

⁸⁹ See, eg, Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (University of New South Wales Press, 2006) 41–58; Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 *Melbourne Law Review* 143; Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; Geoffrey Lindell, 'The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*' (2008) 10(3) *Constitutional Law and Policy Law Review* 1. (2007) 233 CLR 307.

⁹¹ Nicole Rogers and Aidan Ricketts, 'Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy' (2002) 7 *Singapore Journal of Legal Studies* 149, 167.

national security’, and communism was depicted as ‘an alien and destructive pest’.⁹² In March 2002, the then federal Attorney-General, Daryl Williams, declared that ‘terrorism has the potential to destroy lives, devastate communities and threaten the national and global economy’ and described terrorist forces as ‘actively working to undermine democracy and the rights of people throughout the world’.⁹³ In light of these similarities, it was logical to rely on the same constitutional provisions as in the 1950s while trying to protect Australia from a newly emerged threat coming from both foreign and domestic ‘enemies’.

In 2007, the High Court handed down its decision in *Thomas v Mowbray*. Joseph Thomas⁹⁴ was subjected to an interim control order under sub-div B of div 104 of the *Criminal Code*⁹⁵ and he challenged the constitutionality of div 104 of the *Criminal Code* in the High Court.⁹⁶ The majority of the Court (5:2) ruled that sub-div B of div 104 of the *Criminal Code* was valid.⁹⁷ The case for invalidity of div 104 was based on three grounds.⁹⁸ The most relevant issue to this article was *whether the Commonwealth had the legislative power to enact the law which introduced the control order regime?* That is, whether the defence power can be used to address not only external but internal threats.

The Commonwealth legislature lacks a specific power to deal with terrorism, as well as a general power to legislate with respect to criminal law; these matters come within state legislative power.⁹⁹ Prior to *Thomas v Mowbray*, it was also not clear whether anti-terrorism legislation could be enacted under the defence power. It became one of the central questions in *Thomas v Mowbray*. The High Court had to decide whether the control order regime was within the Commonwealth’s defence power under s 51(vi) of the *Constitution*.

⁹² Ibid, quoting G Winterton, ‘The Significance of the *Communist Party Case*’ (1992) 18 *Melbourne University Law Review* 630, 635.

⁹³ Ibid 167–8, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1141–2 (Darryl Williams, Attorney-General).

⁹⁴ For more details on Joseph Thomas’ prosecution see Ben Saul, ‘Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement?’ (2008) 19 *Public Law Review* (2008) 20, 21.

⁹⁵ *Jabbour v Thomas* (2006) 165 A Crim R 32.

⁹⁶ It was a special case an adjunct to proceedings involving the original jurisdiction by the court, but not an appeal (for details see Hector Pintos-Lopez and George Williams, ‘“Enemies Foreign and Domestic”: *Thomas v Mowbray* and the New Scope of the Defence Power’ (2008) 27 *University of Tasmania Law Review* 83, 95).

⁹⁷ For details see Lynch, above n 89, 1189.

⁹⁸ These were: (1) the violation of Chapter III of the *Constitution* in terms of the conferral on a federal court of non-judicial powers to decide on the imposition of the Control Order; (2) federal courts exercise of judicial power while issuing control orders in a manner contrary to Chapter III; and (3) the absence of legislative powers (either expressed or implied) to enact laws establishing Control Order regime. For further details see Lynch, above n 89.

⁹⁹ Lynch, above n 89, 1189.

The Court decided (6:1) that the interim control order mechanism was valid under the defence power (Kirby J dissenting). The High Court interpreted the scope of the defence power under s 51(vi) such that it can be applied beyond the prevention of an external threat, stating that ‘there need not always be an external threat to enliven the [defence] power’.¹⁰⁰ Such an enlarged conception of the defence power was endorsed in the High Court judgment for the first time. After the *Thomas v Mowbray* decision, to legislate under the defence power the federal Parliament does not need to be at war or threatened by another state, and the enemy need not necessarily be a collective or a group. Justice Kirby did not agree with this conclusion and argued that it might lead to an ‘effectively unlimited’ defence power.

Thomas v Mowbray stands as the most important case on the defence power since the *Communist Party Case*.¹⁰¹ The interpretation of the scope of the Commonwealth defence power in *Thomas v Mowbray* is easily reconciled with the concept of militant democracy: it declares that the Commonwealth can legislate under the defence power, even on matters that are unrelated to issues of ‘defence’ in its traditional understanding. It was declared by the Court that the current threat of terrorism is sufficient to broaden and modify the traditional interpretation of the defence power even though Australia was not involved in a ‘war’, in the traditional sense of the word. In other words, the defence power was ‘stretched’ to adjust this constitutional provision to a new reality and thus the concept of ‘defence’ now includes responding to threats falling short of traditional war.

Thomas v Mowbray opened the door for militant democracy to occupy a greater space in Australia’s constitutional law. The defence power was interpreted such that the federal government may take preventive measures to protect Australia’s statehood and body politic not only from external but also from internal enemies. This is exactly what the concept of militant democracy allows liberal democracies to do — to act pre-emptively to suppress attempts to harm the system from within. Interpreting the defence power in a manner compatible with the concept of militant democracy may be justified in light of the nature and extent of the threat of terrorism, which is not always necessarily an external threat.

D *Australia as a Militant Democracy: Implications and Concerns*

The previous three sections examined how militant democracy manifests itself in contemporary Australian democracy by analysing provisions of the Commonwealth *Constitution*, legislation and jurisprudence of the High Court. It was argued that Australia has a long-lasting commitment and ability to defend democracy where it has needed to do so. But in practice, militant democracy is not easily applied and it should not be idealised nor positioned as a universal panacea to all challenges modern democracies face. Militant democracy is an important tool to protect Australia’s

¹⁰⁰ Oscar I Roos, ‘Alarmed, but Not Alert in the “War on Terror”?’ The High Court, *Thomas v Mowbray* and the Defence Power’ (2008) 15 *James Cook University Law Review* 169, 176, quoting *Thomas v Mowbray* (2007) 233 CLR 307, 395 [251] (Kirby J).

¹⁰¹ Roos, above n 100, 169.

statehood and constitutional integrity. It is also a useful concept to explain (and sometimes justify) the actions of government that might be seen as inconsistent with the traditional understanding of how a liberal democracy should function. And while ‘militant’ features of democracy should not attract negative connotations, they must be applied in practice with caution.

Militant democracy has only limited legitimacy and not every action taken by governments can be morally justified merely by the rationale behind such measures — the protection of democratic structures. Militant democracy measures are only acceptable if there are strong procedural and institutional guarantees to ensure that limitations on individual rights and freedoms are not misused in the name of protecting democratic structures. The negative impact of various national security measures on individuals (including militant democracy measures) might be quite severe. Thus, it is generally agreed that constitutional and legislative norms on human rights have a potential to carry sufficient power to counteract the negative impact of national security policies on individual rights¹⁰² that ‘should be protected as a central and constant feature of the modern democratic state.’¹⁰³ In Australia, however, the protection of human rights is not institutionalised,¹⁰⁴ as in other western democracies, and there is no federal bill of rights.¹⁰⁵ Therefore the Australian constitutional framework is missing some important safeguards from militant democracy which can be found in other jurisdictions.

To date, Australia does not have a bill of rights, and so lacks protection for some of the most fundamental freedoms, such as the freedom from torture or a general freedom of speech. The Australian human rights framework is patchy and incomplete but nevertheless there are some express rights in the *Constitution* and some implied rights as determined by the High Court. The *Constitution* contains few express individual rights. Eight constitutional provisions refer to ‘rights’ but only three have been interpreted as protecting an individual right.¹⁰⁶ There is no mention in the *Constitution* of the concept that all persons (or citizens) benefit from a specified

¹⁰² See Keith D Ewing and Joo-Cheong Tham, ‘The Continuing Futility of the *Human Rights Act*’ [2008] *Public Law* 668; Walker, above n 89, 143; and Aileen Kavanagh, ‘Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape’ (2011) 9 *International Journal of Constitutional Law* 172.

¹⁰³ Fiona De Londras and Fegral F Davis, ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms’ (2010) 30 *Oxford Journal of Legal Studies* 19, 45.

¹⁰⁴ See, eg, Nicola McGarrity and George Williams, ‘Counter-Terrorism Laws in a Nation without a Bill of Rights: The Australian Experience’ (2010) 2 *City University of Hong Kong Law Review* 45 and Williams, ‘A Decade of Australian Anti-Terror Laws’, above n 61.

¹⁰⁵ This, however, should not be interpreted in a way that democracies with a constitutional or statutory bill of rights do not have any issues protecting their statehood.

¹⁰⁶ George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013), 111–2. Provisions of the *Constitution* that can be conceptualised as capable of protecting rights are ss 41, 44, 51(xxxi), 74, 78, 84, 100, 117.

list of fundamental rights and freedoms.¹⁰⁷ The Australian approach is unusual. The inclusion of individual rights is considered a norm in most other liberal democracies, including most common law jurisdictions.

Furthermore, unlike many constitutions in the world, the *Australian Constitution* does not offer a range of remedies where constitutional rights are infringed or violated. There is no mechanism which would enable an individual to apply to the court or any other instance to obtain an appropriate and just remedy.¹⁰⁸ In the case of constitutional powers being exceeded, a plaintiff will be left with a declaration to that effect, but no further action will be taken or granted unless a common law cause of action is raised.¹⁰⁹ In the absence of any sort of bill of rights, the only check on the abrogation of human rights in Australia, including in the name of national security, 'derives from political debate and goodwill of political leaders'¹¹⁰ and the recently introduced mechanism of parliamentary scrutiny under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).¹¹¹ This, however, can hardly be considered acceptable or sufficient as it offers very little control over the legitimacy of restrictive counterterrorism measures.

Unsurprisingly, the High Court of Australia in deciding *Thomas v Mowbray* did not find an opportunity within the Australian constitutional framework to reflect on how to minimise the effect on individual rights and liberties when the Parliament legislates with respect to the defence power. That is why the extension of the constitutional defence power to protect Australia's statehood from internal enemies appears to be somewhat problematic and worrying. Having no constitutional bill of rights and no possibility to seek any remedy other than a declaration of constitutional invalidity of an Act, measures enacted in times of peace under the defence power must be applied with great caution.

¹⁰⁷ Williams and Hume, above n 106, 113.

¹⁰⁸ Such remedies are available, for example, under the *Canadian Charter of Rights and Freedoms: Canada Act 1982* (UK) c 11, sch B pt I; *Human Rights Act 1998* (UK) c 42; *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 8 s 38; *New Zealand Bill of Rights Act 1990* (NZ).

¹⁰⁹ Williams and Hume, above n 106, 156.

¹¹⁰ McGarrity and Williams, 'Counter-Terrorism Laws in a Nation without a Bill of Rights', above n 104, 66.

¹¹¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Act established a Parliamentary Joint Committee on Human Rights to perform the functions prescribed by s 7:

- (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

V CONCLUSION

The text of the *Australian Constitution* might not seem to have an explicit militant character but one should not rush to conclude that militant democracy has no place in Australian constitutional law. Militant democracy is more familiar to Australia than it might appear. Australia's constitutional framework is quite unique as compared to other contemporary democracies,¹¹² but there are definitely some features of militant democracy similar to those of most other democracies. The text of the *Constitution*, the history of the proscription of unlawful associations and the attempt to dissolve the Australian Communist Party in 1950 are indicative of Australia's long-lasting commitment and ability to defend democracy where it has needed to do so. It has been demonstrated throughout this article that Australia's constitutional framework allows the Commonwealth Parliament to legislate to protect internal democratic structures. And the High Court decision in *Thomas v Mowbray* supports the claim that militant democracy is present in Australian law and politics.

Treating Australia as having features of a militant democracy has two important implications. On the one hand, it is a useful concept to re-evaluate some government policies (for example, national security measures enacted as part of the anti-terrorism package) which have recently been labelled as being inconsistent with the liberal approach to how a state should run and operate. On the other hand, it is another reminder that Australia is missing a very important check on the abrogation of human rights — a constitutional or legislative bill of rights. It is important that militant democracy is balanced by strong procedural guarantees of individual rights and freedoms. On a larger scale, an institutionalised bill of rights would be an effective tool to counteract the excessive use of state powers in all areas of public life.

Having features of militant democracy in Australia may be easily justified, but it can be dangerous to have them without the checks and balances that are required for the legitimate practical application of militant democracy measures. Militant democracy can be justified only as long as it is 'capable of excluding conceptually and institutionally the abuse [or misuse] of opportunities for restricting rights'.¹¹³ This is where Commonwealth legislation, as an extension of Australian constitutional values, and High Court jurisprudence that determines the validity of such legislation, require changes in order for Australia's national security policy to fully comply with valid militant democracy practices. This process could, however, take some time in Australia as a federal bill of rights is still quite a distant reality.

Australia can be said to be a militant democracy. But in light of the constitutional, legislative and judicial experience of dealing with the protection of Australia's statehood, and given the absence of a bill of rights, it is useful to keep in mind the following passage from the landmark *Communist Party Case* by Dixon J. It stands as

¹¹² For example, it has a very strict separation of powers and no bill of rights.

¹¹³ Sajó, 'Militant Democracy and Transition towards Democracy', above n 31, 211.

a reminder about the limits on excessive activism in protecting democracy from its potential internal enemies:

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.¹¹⁴

¹¹⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187–8 (Dixon J).

