

**A comparative analysis of 'Defensive
Democracy': a cross-national assessment of
formal-legal defensiveness in 8 advanced
European democracies**

**Submitted by Beimenbetov Serik to the University of Exeter
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ABSTRACT

This dissertation addresses the question how democracies defend themselves from political parties and groups which profess antidemocratic values and use violence as one of the means to achieve their goals. In particular this dissertation analyses the range of formal-legal measures and provisions that democracies have at their disposal to constrain their non-democratic groups and political parties, looking at eight advanced European democracies Austria, Belgium, Denmark, France, Germany, the Netherlands, Sweden, and the United Kingdom. These measures and provisions are identified in constitutional documents, civil law, criminal law, in electoral laws, and other pertinent legal sources passed by the legislature and issued by courts of these countries, pertaining to the regulation of political freedoms, public order, and homeland security. On this basis, the thesis provides an encompassing and systematic assessment of differences and similarities between these democracies and thereby assesses their relative formal-legal democratic defensiveness.

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LIST OF ABBREVIATIONS

AIVD	Algemene Inlichtingen- en Veiligheidsdienst
BfV	Bundesamt für Verfassungsschutz (Federal Agency for the Protection of the Constitution)
BNP	British National Party
BUF	British Union of Fascists
BVerfG	Bundesverfassungsgericht
Cf.	confer (Latin for 'compare')
CPUSA	Communist Party of the United States of America
DCRG	Direction Centrale des Renseignements Généraux
DCT	Direction du la surveillance du territoire
DKP	German Communist Party (Deutsche Kommunistische Partei)
ECHR	European Convention on Human Rights
ETA	Euskadi Ta Askatasuna (Basque Homeland and Freedom)
EU	European Union
FN	National Front (Front Nationale)
FPÖ	Freiheitliche Partei Österreichs
FRG	Federal Republic of Germany
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
INLA	Irish National Liberation Army
IRA	Irish Republican Army
IRSP	Irish Republican Socialist Party
LOPP	Organic Law on Political Parties
MI5	Military Intelligence, Section 5
MP	Member of Parliament
NICRA	Northern Ireland Civil Rights Association

NPD	National Democratic Party of Germany (Nationaldemokratische Partei Deutschlands)
NSDAP	German National Socialist Workers' Party (National-Sozialistische Deutsche Arbeiterpartei)
NUM	National Union of Mineworkers
NRWO	Nationalrats-Wahlordnung,
POA	Public Order Act
PTA	Prevention of Terrorism Act
SRP	Socialist Reich Party (Sozialistische Reichspartei)
UKIP	United Kingdom Independence Party
UM	Union Movement
UMP	Union for Popular Movement
UNO	United Nations Organization
VB	Vlaams Belang (Flemish Affairs)
WWII	World War Two

CHAPTER 1:

INTRODUCTION

1.1 Introducing the problem and the research questions

Throughout history democracies have often been the target for attacks by political parties and groups which profess antidemocratic values and use violence as one of the means to achieve their goals. During the 1930s and 1940s, several democracies in Europe were destroyed at hands of Nazi and fascist political parties and movements. The most prominent example was the breakdown of the democratic Weimar Republic in Germany (1918-1933) which was destroyed shortly after the totalitarian NSDAP party led by Adolf Hitler was elected into the government. Having got the mandate to govern and backing in the parliament, the party quickly started to replace, through a series of legal manoeuvres, the democratic order by a totalitarian regime. After the end of World War II and the restoration of democratic regimes in Western Europe, the threat from non-democratic parties and groups did not dissipate. On the contrary, as documented in multiple studies, almost all democracies in Europe are once again threatened by an increase in electoral support and popularity for various right-wing extremist and populist political parties which under the cover of the rule of law and fundamental freedoms seek to challenge the existing democratic system and undermine the liberty and rights of others (Cf. Betz, 2003: 71ff; Pedahzur & Weinberg, 2001: 52-53; Backes, 2007: 250; Minkenberg, 2009: 13; Jesse, 2004: 8; Smith, 2003: 72; Ignazi, 2003: 138-139). Although these parties are less dangerous as compared with the fascist and Nazi parties of interwar Europe, they still represent a formidable challenge for the stability and safety of democratic systems today. Their principal beliefs include the ethnic and social inequality between people, rejection of political and social pluralism as the fundamental feature of democratic states, and rejection of a multiparty system (Cf. Mudde, 2007: 63ff). Simultaneously, almost all democratic countries are challenged by various radical groups and social-cultural milieus such as neo-Nazi groups, militant groups, racist organisations, and religious fundamentalist groups. Unlike political parties such groups often have no formal organisational structures, small membership base, and

frequently use violence as a means to intimidate national minorities and challenge public authorities (Cf. Griffin, 1999: 32; Virchow, 2004: 59; Minkenberg, 2009: 15).

In light of these alarming occurrences, this study will focus on the question how liberal democracies defend themselves from these often violent non-democratic political parties and organisations. In the following I will refer to such groups as internal enemies of democracy as opposed to external enemies such as in the case of war (Cf. Capoccia, 2001: 2). What constitutes exactly the defence of democracy from its internal enemies is of course not straightforward and scholars have variously addressed this question in the past (Cf. Widfeldt, 2001: 6). For instance, many scholars have paid considerable attention to the range of political strategies developed by mainstream democratic political parties within democratic political institutions. In essence, these strategies aim to marginalize non-democratic parties to minimize their chances of achieving success within parliament (Cf. Widfeldt, 2004; van Spanje J. & van der Brug W., 2007; Downs, 2012). Despite the lack of strong evidence proving whether such party-based strategies are effective in continuously isolating non-democratic parties, the relevant literature has provided many valuable insights into the effectiveness and variable nature of these strategies.

Another significant portion of scholarly works is devoted to the relevance and varieties of strategies developed by civil society and non-governmental organisations in defending democracy from non-democratic forces and tendencies in the society (Cf. Pedahzur, 2002; 2003; 2004; Husbands, 2002). Many scholars consider the civil society a powerful vehicle in fostering trust and intercultural understanding within vulnerable communities. With this related, there is also considerable research analysing the role of education, particularly so of civic and political education in defending democracies (Cf. Kamens, 1988; Putnam, 1994; Galston, 2001). Scholars believe education is an invaluable instrument for democratic governments and political institutions to foster democratic values in the society, particularly amongst young generations and those prone to the influence of extremist ideologies.

The context within which the defence of democracy will be discussed in this study will be exclusively directed towards *the range of formal-legal measures*

and provisions that contemporary democracies have at their disposal to defend the democratic order from its internal enemies. From the late nineteenth century onward and particularly so after the end of World War II, all democratic countries in Europe adopted legal measures intended to defend their democratic institutions from abuse and subversion by non-democratic actors. As some scholars have argued, in this way liberal democracies sought to assure their own stability (Cf. Pedahzur & Weinberg, 2001: 53). The choice of focusing on the formal-legal side of defending democracy can be justified for the reason that unlike party-based and civil society strategies scholars have paid relatively little attention to the range of formal-legal measures that are available in contemporary democracies to counter the threat of non-democratic actors, as well as the distinct forms that such measures can take across democracies (Cf. Capoccia, 2005: 55-56; Issacharoff, 2007: 1415). Additionally, the analysis of formal-legal measures can expand our understanding of how democracies react to these threats, as well as the impact non-democratic actors can have on democratic systems in general (Cf. Widfeldt, 2001: 6).

At present, the literature examining the range of legal mechanisms used in individual countries to defend themselves from their internal enemies is extensive. However, there are still many gaps in the literature that this study will endeavour to close. This study will in particular focus on answering the following three questions:

- 1. What formal-legal instruments are available in democratic states to defend the democratic order from political parties and groups that profess antidemocratic values and use violence as one of the means to achieve their goals?*
- 2. What differences and similarities exist between democracies in the extent to which they have such formal-legal instruments available?*
- 3. What broader features can help us to understand the differences between democracies in democratic defensiveness?*

The first question will focus on the variety of formal-legal measures that contemporary democracies have at their disposal to protect their democratic order from political parties and groups that seek to undermine it from within by

utilising the institutions, privileges and political freedoms granted to them in democratic states. There is an extensive body of literature attempting to investigate the range and varied implementations of such measures across individual countries. In this regard the research on the concept of 'militant democracy' will deserve my particular attention and draw critic later. The 'militant democracy' concept was introduced during the 1930s and 1940s by two German exiled political scientists Karl Loewenstein and Karl Mannheim in reaction to sustained attacks on democratic regimes by various fascist and Nazi parties and movements (Cf. Loewenstein, 1937a; 1937b; 1938a; 1938b; Mannheim, 1945). It was in particular Karl Loewenstein who systematically elaborated the theoretical framework of the concept of 'militant democracy' and classified the typology of anti-extremist legislation related to it (Cf. Loewenstein, 1937b: 644ff; for a short summary Thiel, 2009: 400). These measures ranged from the legal ban of non-democratic parties to special provisions to ensure the loyalty of civil servants to the democratic state and the constitution. Fundamentally, the concept of 'militant democracy' emphasized the need for legal repression of all those who seek to exploit the democratic institutions and political freedoms as a "Trojan horse" to enter the democratic system and destroy it from within (Loewenstein, 1937a: 424). Since the conclusion of World War II, the concept of 'militant democracy' has become the main theoretical and empirical paradigm for scholars to study the range of formal-legal measures in contemporary democracies, as well as to capture the variations between democracies in the militancy of their legal structures (Cf. Klamt, 2007: 134; Bourne, 2011: 2).

While the research on the concept of 'militant democracy' provides many good foundations, this concept is insufficient as a theoretical framework to study the range of formal-legal measures that contemporary democracies use to defend themselves from non-democratic threats as it focuses too narrowly on repressive instruments only. While drawing on recent literature examining the defensive efforts of contemporary democracies against political extremism (Cf. Sajo, 2004; Schellenberg, 2009; Thiel, 2009), it is evident many contemporary democracies use besides repressive legal measures also other subtle or non-repressive instruments to maintain continuity (Cf. Mudde, 2004: 197; Thiel, 2009: 383; Buis, 2009: 77). These instruments are particularly evident within

electoral legislation and party laws. In contrast to the instruments of militant democracy which were introduced solely to protect democratic institutions and political freedoms from abuse and subversion, these instruments were not intended by law-makers and governments as means to defend democracy from its internal enemies as such. Nevertheless, they assist in defending democracies *de facto* by imposing legal barriers that effectively constrain the presence and operation of non-democratic parties and groups in the political arena. Consequently, this study purposefully expands the focus of formal-legal measures and provisions beyond the conventional mechanisms of militant democracy toward those provisions which help defend democracy *de facto* rather than by the intention of law-makers only. In line with this, *formal-legal democratic defensiveness as defined in this study will encompass those mechanisms that constrain directly or indirectly the presence and operation of non-democratic parties and groups in a democracy.*

In light of this, the second question highlights the differences and similarities between democracies in the extent to which they have such formal-legal mechanisms available within their legal arsenals. This question will build the core research question within this study. Despite many efforts in the past to examine the differences between democracies in terms of the defensiveness of their legal structures against political extremism, this question has remained largely understudied in the political science literature particularly so from a comparative perspective (Cf. Capoccia, 2001: 12). Many past efforts, particularly by scholars focusing on variations in militant democracy structures between democracies (Cf. Boventer, 1985; Canu, 1997; van Donselaar, 2004; Klamt, 2007; 2012; Thiel, 2009) were very unsystematic and focused only on a limited range of legal measures and provisions such as in particular the legal ban of political parties. As a consequence, the scholars did not move beyond implicit assumption that “democracies are always *more or less* militant” and lacked a systematic account of such variations in ‘militant democracy’ structures (Cf. Pfersmann, 2004: 53 (*italics in original*)). This study will endeavour to close this gap in the scholarly literature by providing an encompassing and systematic account of variations in formal-legal defensiveness between a range of selected democracies in Europe.

In order to account for differences in democratic defensiveness, this study will develop an analytical framework that will be used to assess systematically the cross-national variations between selected democracies in a broad range of formal-legal measures and provisions that are important legal instruments regularly used to defend democracy. To facilitate a systematic assessment of state variations in democratic defensiveness, this framework will focus exclusively on the *presence* of different formal-legal mechanisms (e.g. party ban), *not the frequency of their usage*. While the former is doubtlessly an important area of study, I believe that before accounting for patterns of usage, we first need to generate systematic insights into the formal-legal means that are available to a democracy. In line with this, the democratic defensiveness is defined in this thesis as *the presence (not the usage) of those mechanisms that constrain the presence and operation of non-democratic parties and groups in a democracy*.

Lastly, the third question sheds light on broader factors that can help us understand the existing differences in democratic defensiveness between democracies. To date, there is little research indicating why democracies are different in terms of their formal-legal responses to their internal enemies (Cf. Downs, 2012: 53). This study will ascertain these determining factors by drawing on 'historical institutionalism' as an approach to the study of politics. Developed in the 1970s, historical institutionalism represents an attempt to illuminate how political struggles are mediated "by the institutional setting in which [they] take place", whereby institutions are conceived either narrowly and include formal organisations or more broadly to include informal rules and procedures "that structure conduct" (Thelen & Steinmo, 1992: 2).

The 'historical institutionalism' provides a convenient lens for understanding the broader factors that drive democratic defensiveness. At its broadest, it can be assumed that a country's democratic defensiveness is driven by a confluence of different historical, political, and systemic factors. Drawing on historical institutionalism, this study will examine two particular factors in their relation to democratic defensiveness, firstly the historical experience of internally triggered or supported breakdown of democratic regime during the 20th century and the importance of the type of democracy, either substantive or procedural. Both perspectives are compelling on theoretical grounds and have been frequently

cited by scholars as alternatives to explain how and why democracies react to their internal enemies (Cf. Fox & Nolte, 1995; Backes, 2006; Downs, 2012: 53; Bleich & Lambert, 2013: 127ff). The historical experience of the breakdown of democratic regime in the past emphasises the nature of a democracy's response to its internal enemies today reflects the way whether a democracy was internally subverted in the past. The second perspective highlights the differences in the type of democratic system between democracies that can be substantive or procedural and how these differences influence democracies' reactions to their internal enemies. The distinction between substantive and procedural democracies is whether governing majorities can amend the constitution in order to alter or eliminate democratic institutions (Cf. Fox & Nolte, 1995: 24).

1.2 Organization of the thesis

To answer these three research questions posited above in a clear and analytical manner, the thesis is organised into 8 chapters which will be introduced here briefly. Within Chapter 2, the origins of the idea and the definition of defensive democracy will be outlined. For the purpose of this study I build on Capoccia's definition of defensive democracy as a foundation for a detailed discussion of the defensive strategies encompassed in the concept (Cf. Capoccia, 2005: 47-48). Drawing on Capoccia these strategies will be broadly grouped into *party-based*, *cultural-societal*, and *formal-legal strategies* and will be followed by an analysis of the literature pertaining to each of them. This discussion will emphasise that among defensive strategies, the formal-legal strategy has remained relatively understudied in the political science, particularly so from a comparative perspective.

Following this, Chapter 3 develops an analytical framework to study formal-legal defensiveness comparatively, discusses the primary sources, country case selection, and the methodology used in the empirical analysis. To facilitate the cross-national comparison of variations between democracies in democratic defensiveness this study will use an organisation-centred perspective on formal-legal measures. This perspective will help to identify the range of protectionist legal measures as they affect non-democratic actors in their presence and operation in democracies, in line with the definition of formal-legal

defensiveness presented earlier. Having identified the range of relevant measures, I will then divide them in three analytical categories depending on the relative severity of constraints they impose on the presence and operation of non-democratic parties and groups. Moving from the most to the least constraining measures, I will distinguish *legal ban*, *freedom constraints*, and *operational constraints*. Chapter 3 will conclude by specifying the empirical scope of this study, which examines formal-legal defensiveness in 8 European democracies: Austria, Belgium, Denmark, France, Germany, the Netherlands, Sweden, and the United Kingdom. The countries have been selected in light of two factors. Firstly, their different historical experiences of an internally triggered or supported breakdown of their democratic regimes in the past and, secondly, their differing constitutional foundations as clearly evident in the distinction between substantial and procedural democracy defined earlier. These two central features, according to the literature, shape the disposition of a democratic regime towards or against formal-legal defensiveness.

The next Chapters 4, 5, and 6 are dedicated to the cross-national analysis of differences between democracies in individual indicators across three categories of formal-legal defensiveness distinguished in Chapter 3 (that is legal ban, freedom constraints, and operational constraints). This analysis will capture the formal-legal defensiveness as in place in 2013. After providing a clear analysis of the differences and similarities between democracies in formal-legal democratic defensiveness, Chapter 7 will turn to the question which factors can further our understanding of the varying patterns of democratic defensiveness among selected democracies. Drawing on historical institutionalism as underlying approach to the study of politics of democratic defensiveness, this chapter will focus on the historical experience of the internally triggered or supported breakdown of a democratic regime in the past, and the type of democratic regime that is substantive or procedural in their relation to democratic defensiveness. While doing so, this chapter will find out that among two factors only the historical experience of the internally triggered or supported breakdown of democratic system in the past is the most significant factor while the type of democracy is less helpful. At the same time, it will also find that while internally triggered or supported democratic breakdown helps to understand some of the cross-national differences better, this perspective

cannot account for all kinds of variations between all democracies covered in this study. In particular, the analysis will find that in Denmark, the United Kingdom, and Sweden deviations exist with respect to historically grounded expectation of democratic defensiveness of these democracies. More specifically, the analysis will find a higher level of democratic defensiveness in the United Kingdom and Sweden than their past experiences (in that case long-term democratic stability and continuity) would let us expect. By contrast, the analysis will find a lower level of democratic defensiveness in Denmark than its historical experience (in that case externally triggered but internally supported democratic breakdown) would suggest.

Based on these findings, Chapter 8 provides a detailed analysis of the evolution of democratic defensiveness from the 1930s to 2013. This analysis is underpinned by the assumption that the formal-legal defensiveness of a democracy as of 2013 (which is the focus of the empirical chapters 4 to 6) can be partially accounted for by focusing on the over-time changes in dispositions toward developing defensive laws. In order to ascertain this assumption, the United Kingdom is selected as a case-study and a detailed analysis of the changes in its dispositions towards developing its defensive laws is recorded over-time. This chapter will particularly focus on four critical junctures in the history of the United Kingdom that could have a lasting effect on the country's formal-legal defensiveness. Firstly, the rise of fascism in the 1930s, secondly the conflict in the Northern Ireland (1968-1998), thirdly the miners' strike (1984-1985), and fourthly the rise of radical Islamism and terrorism since the beginning of the 21st century. The argument presented in this chapter is the UK's historically grounded expectation of low disposition toward democratic defensiveness (given the lack of the experience with the breakdown of democratic regime in the past) was overridden by spikes of political violence in the country's history since 1930s which stimulated the British government to develop a higher level of democratic defensiveness than its long-term democratic continuity as such would suggest.

The study will conclude with a summary and discussion of core findings in the concluding Chapter 9 and on this basis will identify avenues for future research.

CHAPTER 2:

THE CONCEPT OF DEFENSIVE DEMOCRACY: THEORETICAL BACKGROUND AND PRIOR RESEARCH

2.1 Introduction

This chapter will review the literature related to the problem of defending democracy from non-democratic parties and groups. The first section clarifies the definition of 'defensive democracy' and maps the typology of relevant defensive strategies related to it. This section is followed by a detailed description of each defensive strategy besides the formal-legal variety to give a broad understanding of all defensive strategies at a democracy's disposal. The discussion in the chapter will emphasise that among defensive strategies the formal-legal strategies have received little scholarly attention.

2.2 Origins of defensive democracy

Numerous scholars and philosophers have discussed at length how a democracy can best defend itself from political forces who under the protection of democratic principles seek to destroy the democratic order and replace it with an autocratic state (Cf. Pedahzur, 2002: 2). According to Pfersmann, the origins of scholarly deliberation of the issues surrounding a defensive democracy can be traced back to "the very beginnings of the democratic theory itself" (Cf. Pfersmann, 2004: 47). Plato discussed at length the reasons for transitions from one form of government to another and the difficulties of stabilizing governments (Cf. Pfersmann, 2004: 47). Bleicken mentions the ancient democratic city-states in Greece had at their disposal special rules against popular tyranny, sedition and high treason (Cf. Bleicken, 1984: 389). It was finally Aristotle (384BC-322BC) who set the direction for the philosophical deliberation about the idea of defensive democracy for centuries to come (Cf. Backes, 1998: 7). Within his tractate *Politics*, Aristotle advocated for his best state form *Politie* which was the mixture of democratic and oligarchical principles the need for the limitation of an incumbents' term in office and building of *Ostrakismos* or courts in Athens and Argos (Cf. Backes, 1998: 8; also cf. Forsdyke, 2000: 235ff). The later institution implied that undesired individuals were allowed to be expelled from the state for the duration of ten

years. A special attention was given to the “education to the constitution” (Cf. Backes, 1998: 9). In addition, every citizen had the opportunity to submit formal complaints to the people’s council against those who were entitled to make laws. Such complaints could be submitted either against the illegal form of a legal document or against the content of it (Cf. Bleicken, 1984: 390). With regard to the nature of the defensive provisions ancient Athens adopted, Bleicken concludes that “the Athenians in their efforts to protect their legal and political order, developed procedures which were comparable to ours” (Cf. Bleicken, 1984: 386 (own translation)).

After times passed, the academic debate surrounding the problem of defending democracy from its internal enemies was re-invoked by the French revolution in the late 18th century. The French revolution inspired in people the will to get rid of state oppression and command. The revolution gave birth to a new worldview of a liberal state characterized by the guarantee of freedom of an individual from state suppression coupled with the guarantee of freedom of press and freedom of assembly. The birth of the new conception of a liberal state influenced concomitantly the origin of a new liberal notion of state defensiveness which later found its way into the new French constitution of 1791. According to Backes, its basic features can be summarized as based on three main pillars: institutional process, political process, and political culture (Cf. Backes, 1998: 19). More specifically, the defense of the state on the institutional level entailed the need to mix and balance the state powers to ensure they were not again concentrated either in the hands of one person or an oligarchical group. This required for legally binding the executive government by law, constitution, and subjecting it to public control, and building an independent court. A special role in defending the liberal foundations of the revolution was attributed to the role of ‘mass education’ (Cf. Backes, 1998: 15-21). Another important component of the new liberal state conception was the requirement to abolish judicial and police persecution of the people. This requirement was particularly important for the liberal thinkers who developed the new concept in reaction to the severe abuses of human rights by the previous autocratic regimes. Essentially, many of the ideas promoted by liberal thinkers after the revolution were driven by the ideas of the great French philosopher Charles Louis de Montesquieu (1689-1755), who according to Peyre was the “spiritual father of the first two

revolutionary assemblies” (Cf. Peyre, 1949: 77). Within his main work “*L’Esprit des Lois*” published in 1748, in the famous Book XI, Chapter VI, dedicated to the English constitution, Montesquieu discussed at length the virtues of mixing powers and the existence of an independent judicial court in order to avoid abuse of power and dictatorship (Cf. Montesquieu, 2004: 455-457). Later, with the onset of the Napoleonic wars, this idea spread gradually across Europe until similar legislation to prevent power abuse and sedition was found within the constitutions of several German states as early as the 19th century (Cf. Backes, 1998: 22).

Despite its early origin, it was not until the 20th century that the problem of defensive democracy was approached in a more systematic and comprehensive way. The tragic experience involving the collapse of several democracies within interwar Europe at the hands of fascist and Nazi political parties and groups exploiting democratic institutions and freedoms, as well as the rising challenges of new threats emanating from political parties and groups contesting the democratic values after the end of World War II, have forced many scholars around the world to study how democracies can best defend themselves against all those who seek to destroy them from within (Cf. Boverter, 1985: 31ff; Pfersmann, 2004: 47).

During the 1930s and 1940s, the idea originated which was popularized by two German exiled political scientists Karl Loewenstein and Karl Mannheim that democracies must become ‘militant democracy’ if they were to survive the threat of becoming extinct at hands of fascist and Nazi groups and political parties (Cf. Loewenstein, 1937a: 430-431; Mannheim, 1945: 7). It was in particular Karl Loewenstein who defined the concept of ‘militant democracy’ and systematically classified the legal measures associated with it (Cf. Boverter, 1985: 40; Thiel, 2009c: 400). This new doctrine of militant democracy aimed at reinforcing the legislative apparatus of democratic states to facilitate the legal repression of the political and civil rights of internal non-democratic actors “even at the risk and cost of violating fundamental principles” (Loewenstein, 1937a: 432). After the end of World War II, the doctrine of militant democracy remained popular among scholars as a paradigmatic concept in the study of democratic responses to non-democratic enemies (Cf. Klamt, 2007: 134; Bourne, 2011: 3; Capoccia, 2013: 210-211). Pfersmann, for example, defined militant democracy

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 populations” (Pfersmann, 2004: 47).

Besides legal repression through measures of militant democracy, alternative theoretical frameworks have been developed to supplement the knowledge of defensive democracy (Cf. Pedahzur, 2002: 3). For example, a great deal of scholarly research has been dedicated to the institutional strategies developed by mainstream democratic political parties. Unlike legal repression, the ‘party-based’ strategies have a diametrically opposite goal of integrating non-democratic political parties into the political process in the hope that it would abate their antidemocratic stance (Cf. Downs, 2001; 2012; Godmer & Kestel, 2004; van Spanje & van der Brug, 2007; Bale e.a., 2010; van Spanje, 2010; Rummens & Abts, 2010). More recently, additional scholars have presented a new academic debate discussing the relevance of civil society as another important bulwark to counter the challenge of non-democratic actors within the society (Cf. Pedahzur, 2001; 2002; 2003; 2004). Thereby, with the term of civil society scholars refer to various ‘pro-democratic’ non-governmental organizations conducting civil education and trust-building activities within communities (Cf. Pedahzur, 2002: 8; 106ff). Against the background of the ever growing academic discourse about defensive democracy, the comparative work of Giovanni Capoccia deserves particular attention as it offers a more comprehensive and inclusive theory of defensive democracy (Cf. Capoccia, 2001a; 2001b; 2004; 2005). His definition of “defense of democracy” will be used here as the working definition of defensive democracy and the starting point for the below discussion of defensive strategies related to it.

2.3 Distinguishing strategies of defensive democracy

According to Capoccia, defensive democracy can be defined as a concept that “encompasses all activities, be these formal provisions or political strategies, which are explicitly and directly aimed at protecting the democratic system from the threat of its *internal* opponents” (Capoccia, 2001: 2; 2005: 47-48, italics added to original). As argued by Capoccia, this definition excludes reactions against external enemies of democracy such as in the case of war as well as “indirect” actions such as the promotion of economic development or literacy,

and the reactions to non-democratic actors developed by the civil society (Cf. Capoccia, 2005: 48). Drawing on this definition, Capoccia identified four main defensive strategies relevant for defending democracy against non-democratic groups and political parties: “militancy”, “incorporation”, “purge”, and “education” (Cf. Capoccia, 2005: 49). As he noted, each strategy was designed “to stem the development of an existing challenge, to prevent its snowballing – in short, to stop it from taking over the system” (Capoccia, 2005: 48).

The first strategy which Capoccia defined ‘militancy’ encompasses all formal legislation that aims to curb “de juro or de facto” the political and civil rights of non-democratic actors on the grounds of their political ideology or activities that threaten the democratic order (Capoccia, 2005: 49). As detailed by Capoccia, in the realm of militant strategies fall specifically the passing and enactment of anti-extremist legislation, the administrative provisions of the same kind, as well as the “covert political influences of the state administration and the courts” (Capoccia, 2001: 4). Of all the strategies included in his theoretical framework of defensive democracy, Capoccia defined the militancy strategy as the most visible and effective government weapon in the fight against political extremism (Cf. Capoccia, 2005: 56).

Capoccia’s second strategy ‘incorporation’ included those strategies used by established democratic parties to dissipate non-democratic ideologies by accepting into the regime parts of non-democratic establishment by building strategic alliances with them in the parliament, or making policy concessions, or leading negotiations with them (Cf. Capoccia, 2005: 63-64). As argued by Capoccia, the main goal of this strategy is to weaken the extremist camp and in so doing to increase the legitimacy of the democratic regime and the support for it (Capoccia, 2005: 49). Capoccia clearly outlines this strategy is a short-term solution and implemented when the enemy is real and imminent.

The third strategy “purge” is aimed at ensuring the systemic loyalty of civil servants by either passing laws requiring civil servants to show support for the democratic order or aimed at excluding the members of non-democratic parties and groups from duty in civil service (Cf. Capoccia, 2005: 50-51). Capoccia states the main goal of these strategies is to reinforce the integrity of the state institutional and bureaucratic machinery (Cf. Capoccia, 2005: 50).

Lastly, the fourth strategy that Capoccia named 'education' aims to strengthen democratic values and beliefs within society in general, and among parts of the population affected or exposed to extremist influence in particular (Cf. Capoccia, 2005: 53-54).

Drawing on this classification, Capoccia arranged these four 'polar' strategies along two underlying dimensions on the basis of their repressive or inclusive nature, and the short-term or long-term range of their political objective (Cf. Capoccia, 2005: 48-49). Table 1 replicates the model of defensive democracy developed by Capoccia schematically.

Table 1: Giovanni Capoccia's model of 'defensive democracy'

		Time range of the objective	
		Short-term	Long-term
Nature of measures	Repressive	Militancy	Purge (lustration)
	Inclusive	Incorporation	Education

Source: Capoccia, 2005: 49

Within the Capoccia's theoretical framework of defensive democracy I am particularly interested in strategies which he called "militancy" and "purge" strategies. Both strategies fall in the rank of repressive strategies. What is common to the repressive strategies is that they fall in the realm of formal-legal rules in a sense that they are embodied in formal legislation, court rules, or administrative provisions and relate to legal constraints imposed on organizations or individuals that cannot be circumvented (Cf. Pedahzur, 2002: 6-7; Husbands, 2002: 55; Capoccia, 2005: 56). For the purpose of this study I will refer to them under the term of *formal-legal strategies*.

The choice of focusing on formal-legal strategies can be justified for the reason that unlike other defensive strategies in Capoccia's framework ("incorporation" and "education"), the formal-legal strategies have received relatively little attention in scholarly literature, particularly so in a comparative perspective (Cf. Capoccia, 2005: 55-56; Issacharoff, 2007: 1415). Capoccia noted himself that "very little effort has been devoted to the conceptualization and comparative analysis of those strategies that react to immediate threats posed to a democratic system by internal political actors" (Capoccia, 2005: 55-56; similarly Issacharoff, 2007: 1415). In particular, it is still unknown what *formal-legal measures and provisions contemporary democracies have at their disposal to defend themselves against non-democratic groups and political parties that operate within them. As a consequence, cross-national differences and similarities between democracies in the extent to which they have such provisions available remain underexplored. Furthermore, if differences exist between democracies we know little about the factors that assist in expanding our understanding of these cross-national similarities and differences.*

These questions will be answered within the subsequent chapters. Before doing so, the remainder of this chapter discusses the defensive strategies related to the concept of defensive democracy more broadly (i.e. beyond the presence of formal-legal means). While using Capoccia's typology of defensive strategies for the below discussion of each defensive strategy, I will expand this framework to include significant recent literature. For instance, framework strategies Capoccia has titled "incorporation" will be discussed under the broader term of "party-based strategies" as the range of party-based strategies have expanded in recent years to include strategies such as e.g. 'cordon sanitaire' (Cf. Downs, 2012: 30-31). Additionally, framework strategies previously termed "education" in recent literature have been frequently discussed in combination with activities of civil society. Therefore, I will analyze educational and civil society strategies under the term of "cultural-societal strategies". After the discussion of party-based and cultural-societal strategies I will turn to the analysis of formal-legal strategies. Because formal-legal strategies will build my main focus in the next chapters I will discuss them at somewhat greater length. Furthermore, I will do so at the very end as a foundation for the chapters that follow.

2.3.1 Party-based strategies to defend democracy

Party-based strategies have been intensively studied in previous literature. The key feature of party-based strategies is that they are informal in a sense that they are not legally binding for participating parties and short-term in terms of anticipated results (Cf. Capoccia, 2001: 4; Downs, 2012: 30). Drawing on the literature, the variety of party-based strategies can be divided into 'isolation', 'cooptation', and 'collaboration' (Cf. Capoccia, 2005: 63ff; Downs, 2012: 31). The strategy 'isolation' has been extensively studied within party politics literature. As noted by several scholars, the main goal of this strategy consists in the negation and marginalization of non-democratic parties within the electoral or parliamentary arena through avoiding any cooperation with them, denying them media access, or otherwise obstructing them from gaining publicity and popularity in the public (Cf. Downs, 2001; 2012: 82-82; Swyngedouw & Ivaldi, 2001: 2-3; Bale e.a. 2010: 412ff; van Spanje & van der Brug, 2007; van Spanje J. 2010). Typically, this strategy transpires as a result of mainstream democratic parties signing an informal agreement committing to avoiding all contacts with such parties. Often this strategy is called "cordon sanitaire" named after the French term first used by the mainstream political parties in Belgium to describe the efforts of the major five Flemish parties in 1989 to isolate the members of the right-wing extremist *Vlaams Blok* party from any involvement in the political process (Cf. Bleich & Lambert, 2013: 133)¹. Backes and Jesse examined the effects of the cordon sanitaire strategy in Germany where it was frequently applied by mainstream democratic parties against two right-wing extremist parties *The Republikaner* and the *National Democratic Party* (NPD) (Cf. Backes & Jesse, 1989, Vol. II: 254-263). Eatwell also analyzed the cordon sanitaire strategy as it was frequently used by UK's major democratic parties against the *United Kingdom Independence Party* (UKIP) and the *British National Party* (BNP), the two main right-wing extremist parties in the country which are notorious for their anti-immigrant propaganda (Cf. Eatwell, 2010: 218-220). Additionally, Happold examined the effects of cordon sanitaire strategy within the European Union. In 2000, fourteen member-states of the EU decided to withdraw its diplomatic representatives from Austria

¹ The party *Vlaams Blok* led at the time by Karel Dillen was notorious for its anti-Belgian and anti-EU sentiments, anti-racist propaganda, and anti-establishment propaganda (Cf. Ishiyama & Breuning, 1998: 109ff).

as a sign of protest against the election of the right-wing extremist *Freedom Party of Austria* (Freiheitliche Partei Österreichs, FPÖ) into government after the parliamentary elections in October 1999 (Cf. Happold, 2000: 954ff).

The tactic of isolation or “cordon sanitaire” is not always widely adopted. Studies have revealed that some countries with established democratic political parties have instead engaged directly or indirectly with parties whose ideologies are considered outside the mainstream. As such, engagement strategies have a diametrically different goal of forcing parties to give up their opposition to democratic principles and become moderate through driving integration (Cf. Downs, 2001; Bale et. al., 2010: 415). As discussed at length by Downs and other scholars, such engagement could be either in form of building strategic alliances with extremist parties (*collaboration*) or mainstream parties adopting the policy issues which traditionally belonged to non-democratic political parties (*co-optation*) (Cf. Bale et al. 2010; Downs, 2012: 44-45). For example, while cordon sanitaire is consistently applied against non-democratic parties in Germany or the United Kingdom, it is not applied at all or not persistently in Italy, Austria, or the Netherlands. In Italy, for example, the party of *Lega Nord* formed in 1991 and which promoted the idea of separating the northern part of the country from the south was surprisingly treated as a mainstream party by conservative parties. The leader of this party Umberto Bossi was the Minister for Federal Reform within Silvio Berlusconi’s government from 2008 to 2011. In Austria, the *Freedom Party of Austria* had often sided with other mainstream parties in the federal government. For example, from 2001 to 2007 the Freedom Party filled six out of ten ministries including defence and justice (Cf. Pelinka, 2009: 45)². Similarly in the Netherlands, the *Party for Freedom (Partij voor de Vrijheid)* led by Geert Wilders was involved in the efforts of building a coalition with mainstream parties after this party became the third largest after the parliamentary elections of 2010 (Cf. Mock, 2010).

Recent literature has raised the question of why some democracies ostracise their non-democratic counterparts, while other democracies seek to create strategic alliances with them (Cf. van Spanje, 2010; Bleich & Lambert, 2013). Several explanations have been offered to account for such differences

² It can be a coincidence that in this period there were no penal cases brought forward against members of radical right in Austria (Cf. Pelinka, 2009: 45).

between democracies. One explanation used the fundamental reason for a democracy to defend itself as a way of distinguishing these differences. The main argument is democracies must be kept safe from parties with reprehensible ideologies (Cf. van Spanje, 2010: 357). The legal repression, which will be the main focus later, represents then the most extreme option that democratic parties would choose if the tactic of institutional out-casting of non-democratic parties from political process turns out to be ineffective (Cf. Capoccia, 2005: 55-56; Minkenberg, 2006: 26). Another argument presented recently by van Spanje pointed out the importance of the size and the main political agenda of a political party in question as the principal motivational factor for mainstream democratic parties to decide what approach they will choose towards deviant political parties (Cf. van Spanje, 2010: 355). According to van Spanje, if the party's size is insignificant and its ideological position on issues such as immigration is more radical, it is more likely that such party will be ostracized or boycotted by main political parties (Cf. van Spanje, 2010: 362). By contrast, the more powerful a party is and the less reprehensible its ideology, the more likely other parties will collaborate with it (Cf. van Spanje, 2010: 362). As noted by Capoccia and other scholars, conservative parties which Capoccia termed as "border parties" in a sense that their strategic positions are closer to extremist parties, are more likely to forge alliances with the later parties in the attempt to maximize the electoral gain or regain their lost electorate (Cf. Capoccia, 2004: 89; also Godmer & Kestel, 2004: 134; Schain, 2006: 273; Green-Pederson et al., 2010: 421). In particular, with regard to immigration and economic welfare policies, conservative parties are considered much closer or adjacent to non-democratic parties than other democratic parties. Other scholars investigated the role of historical experience with the collapse of democratic systems in the past for determining the factors that contribute to defensive actions brought against non-democratic parties in the future. Art, for example, raised the contrasting experience with the collapse of the democracy in the past in Germany and Austria as building grounds for tolerance by Austria's main political parties towards the Freedom Party of Austria on the one hand, and for outright rejection of any engagement with the far right parties in Germany on the other (Cf. Art, 2006; 2007: 338).

Another important question raised by scholars is whether cooperation with non-democratic actors is more useful in terms of defending democracy than their exclusion from the political process. Generally scholars tend to emphasize that results vary between the political contexts. For example, while in Belgium the practice of maximum exclusion of the Vlaams Blok party from the political process was relatively successful and consistently applied, the same strategy applied against non-democratic parties in the Netherlands and Austria was not successful. According to Art, the exclusion of non-democratic parties from cooperation in whatever form can lead to the de-legitimization of these parties in the eyes of core and potential voters and in the long-term perspective to their internal decay because of problems to recruit new members (Cf. Art, 2007: 335). On the other hand, however, the tactic of exclusion can also result in increased radicalization of an affected party's members. For example, as noted by Art, the strategy of ostracism pursued by mainstream democratic parties in Germany against the NPD has resulted in further radicalization of its party members. Similar observation was made in a larger study conducted by van Spanje and van der Brug (Cf. van Spanje & van der Brug, 2007; also Downs, 2012: 81). Both scholars used the results of the European Election Studies' data from 1989, 1994, 1999 and 2004 to conclude that "the extent to which anti-immigration parties were excluded from "normal politics" turns out to have a strong, positive impact on party radicalisation" (van Spanje & van der Brug, 2007: 1033). Among ostracised political parties examined by these scholars were *Vlaams Belang*, *the National Front* (both in Belgium), *the Republikaner* in Germany, *Centre Democrats* in the Netherlands and the *National Front* in France. The authors made the conclusion that ostracised parties show the tendency to be "frozen" into political extremism. By contrast, the authors found that 'co-optation' was more likely to result in a moderation of non-democratic parties. They made this conclusion through examining the effects of 'co-optation' pursued by mainstream democratic parties toward *Lega Nord* in Italy, the *Freedom Party* in Austria, the *People's Party* in Denmark, and the *Progress Party* in Sweden.

2.3.2 Cultural-societal strategies to defend democracy

Both education and political culture are recognized as important foundations for a stable democracy (Cf. Dewey, 1915 [2004]). It is believed that in a country

with a strong democratic political culture, non-democratic groups should experience less support from citizens and consequently should pose less of a threat to democracies. Many scholars have underlined that all liberal democracies depend on the citizens' acknowledgement. How the citizens perceive the state, its institutions and its political elites is commonly viewed as a crucial factor for sustaining and safeguarding democracy. Almond and Verba referred to such attitudes as the political culture, which is a product of aggregate historical experiences, economic and political structure (Cf. Verba & Almond, 1989: 16). Consequently every nation has its own individual political culture. By the time of the first publication of their study in 1963, the authors attested that only the Anglo-American nations have democratically "fit" political culture which they termed "civic culture". All other nations examined in the study were inferior with less democratically-fit political cultures. The 'worst' among them were the Germans and Italians who a decade after the end of the World War II still employed attitudes and orientations "unfitting" democratic systems. At the same time, Almond and Verba also demonstrated that political culture could be significantly attributed to the level of education in a nation. Their study states the collapse of many democracies in interwar Europe could be powerfully associated with the lack of proper training among citizens in democratic values and principles. This conclusion largely resonates with the observation made earlier by Mannheim, who was one of the proponents of mass education in democratic societies. In his much acclaimed sociological tractate "*Crisis of our times*" he noted with regard to the collapse of first democracies that:

"[a]lthough the causes leading to their collapse were very complex and the defects of the modern economic and political order were primarily to blame, no one can deny that the lack of mental resistance played a very large part of this breakdown. Not only was the educational system in those countries still unfitted for mass education, but the psychological processes at work outside the school were left without any real social control, and so, of necessity, led to chaos and disintegration" (Mannheim, 1945: 73).

The research conducted over the last decades has confirmed the conclusion made in the book of Mannheim. Many scholars support his thesis that the support for democracy and acceptance of democratic principles and values increases with the level of education within the society (Cf. Duch & Gibson, 1992: 252ff; Galston, 2001; Johnson et al., 2005). Similarly, it has been argued the roots of political extremism and the level of popular support for extremist

ideas and movements is manifested significantly more so among social groups which have lower degree of education (Cf. Betz, 1994; Knutsen, 2004: Ch.5).

With regard to education particular role is assigned to political and civic education. It is believed that political education can represent a powerful tool for instilling democratic values into citizens (Cf. Verba & Almond, 1989: 106). The term political education refers to a complex of state supported educational programs conducted and organized mostly at schools and higher education institutions but also in military and civil service with the principal goal of creating democratic awareness among citizens (Cf. Frazer, 2000: 89). Since the end of World War II, the subject of civic education has become a constitutive part of school curriculum in many western democracies although with different timing for its introduction (Cf. Judith et al., 1999; Capoccia, 2005: 53). Germany, for instance, embarked on political education as early as by the mid-1950s. The plan to introduce political education in the classroom built a constitutive part of 'de-Nazification' program which was launched by victorious Allied forces in 1945 (Cf. Capoccia, 2005: 53). After the strategy to purge from office all German officials who were known members or collaborators of the Nazi party proved insufficient and difficult to implement and besides resulted in public outcry, the German government was prompted to refocus its efforts on educational strategies instead to increase awareness within the nation of evils of anti-Semitism, racism, and Nazism (Cf. Weiss, 1994: 909). The plan included changes in grade school and adult education curricula. In addition the government provided special training to teachers and leaders of youth organizations, and relocated funds for publishing brochures and other teaching aides for classroom lessons. Outside the classroom, the government created in the mid-1960s public displays of sites at former concentration camps (Cf. Weiss, 1994: 909). In other countries, political education became a key part of their education curriculum at a relatively later stage. In the United Kingdom, for example, the "citizenship education", the official name of political education in this country, did not become a matter of national policy until 2002. One powerful reason for such a belated start is believed to be the pervasive antipathy among authorities both in politics and education to government interference in education (Cf. Frazer, 2000: 97ff). On the other hand, the decentralized feature of British schools in the last century and the specific attitude toward the idea of

citizenship also made it difficult to promulgate political education much earlier and on a broad scale (Cf. Frazer, 2000: 98; McLaughlin, 2000).

The subjects particularly relevant to raising democratically minded citizens that are not inclined to support non-democratic ideas and thus non-democratic groups vary between nations. As scholars demonstrated, the relevant subjects of political education are very much predicated on the principal goals of political education in each country. In Germany the goal of political education is “constitutional patriotism” and is officially mandated by state authorities. The belief is quite strong among educators in Germany that only through fostering appreciation of democratic order can the state effectively protect itself from the threat of totalitarianism (Cf. Canu, 1996: 105). More specifically, the political education in Germany takes place through critical analysis of the Nazi period (*Geschichtsaufklaerung*) and the time under the Communist rule (East Germany) and the importance of democratic order today. In 2002, a new educational program was launched “Learn and Live Democracy” which ran until 2007. The program was implemented by the federal and state governments to encourage young people to participate actively in civil society by democratising education and school life (Cf. Schellenberg, 2009: 221). In France, since Jules Ferry³ in the Third Republic schools have been developing their pupils in light of “esprit républicain” (Cf. Canu, 1996). In the United Kingdom, the principal goals of political education are social and moral responsibility, community involvement and political literacy (Cf. Frazer, 2000: 89ff).

However, beyond scholarly appraisal of civic education for raising democratically minded citizens, there are many critical opinions also. One critical opinion discusses the importance of a comprehensive educational strategy to fight against radicalism. Acknowledging the growth of right-wing inspired violence and intolerance toward foreign citizens across European cities, Pelinka has argued in support of the introduction of special courses into school curricula that are directed against racism, xenophobia, and anti-Semitism (Cf. Pelinka, 2009: 46). Such courses could assist in destroying the stereotypes of “otherness” that is widely observed among European citizens.

³ According to the entry in the Wikipedia, Jules François Ferry (1832-1893) was the French statesman and republican. He was French prime-minister for two times (1883-1885) and 1880-1881.

Such need for a common educational strategy has been recognized within the European Union. In 1993, the Council of Europe established the *European Commission against Racism and Intolerance* (ECRI), the racism watchdog within the European Union. ECRI consists of independent experts and has recommended to each of its 47 member states to introduce subjects specializing in teaching human rights (Cf. Pelinka, 2009: 53).

Another criticism which has been frequently raised concerns the learning outcomes of educational courses. Even though the outcomes differ from country to country, the general view among scholars is the learning outcomes from educational programs often fall short. A number of empirical studies found that the level of democratic tolerance remained below expectations, particularly so for those who used to be involved in extremist activities and movements. According to Husbands, one common explanation for this negative result is that the targeted groups are “too alienated to be easily retrievable through such means” (Husbands, 2002: 65).

As a solution to this problem, several democracies in Europe have launched special programs for those who were previously affiliated with non-democratic groups. In many Scandinavian countries, for example, the EXIT Program was established for members of extreme right-wing organizations to help these people disengage from their organisations (Cf. Dechese, 2011: 289; general discussion in Dalgaard-Nielsen, 2013: 99-115). Similar exit programs for former members of extreme right-wing organisations have been set up across Germany by both civil society organisations and the government. In 2000, the initiative “EXIT-Deutschland“ was launched with the support of the *Amadeo Foundation* and the *Freudenberg Foundation*, the two largest non-governmental organizations engaged in the area of educating and informing citizens about the risks of intolerance, to support former members of extreme right-wing organisations (Cf. Schellenberg, 2009). A similar program called “*Aussteiger Programm*” (getting-out program) was introduced in 2001 by the government of Gerhard Schröder which sought to provide financial incentives for conducting community service for those who wanted to escape the extreme right-wing milieu (Cf. Husbands, 2002: 65-66).

Furthermore, a growing number of scholars have argued that educational strategies must be complemented and accompanied with social strategies and social control outside schools (Cf. Carothers & Barndt, 1999-2000: 28-29). In line with this argument, a particular role is attributed to the civil society in instilling democratic norms and values within the society. With civil society scholars refer to voluntary organizations engaged in facilitation of educational and intercultural programs among different groups of society, particularly so among those who are endangered or affected by extremist views. The popular argument is civil society organizations make an invaluable contribution to strengthening the democratic foundation within society, promote peaceful coexistence among populations of different national, ethnic or religious backgrounds, foster tolerance and social and religious pluralism, and defend the rights of minorities (Cf. Pedahzur, 2003: 64-65). Pedahzur called such groups as “pro-democratic civil society” (Cf. Pedahzur, 2003: 64).

There are three particular areas where civil society organisations have been particularly successful in assisting state authorities to combat extremist tendencies within the society. Firstly, the area of ‘education for democracy’ which encompasses the promotion and organization of educational programs and initiatives with the goal of instilling democratic values, norms and expectations, such as intercultural tolerance among both youths and adults, has been widely successful. In a number of European democracies, for example, there are numerous non-governmental organizations engaged in campaigns which promote tolerance within their society. In Belgium, the NGO *Hand in Hand* founded in 1992 is the most important civil society organisation in the Flemish part of the country engaging in the organisation of public campaigns in support of cordon sanitaire, and protection of democracy, and equal rights for all citizens in the country (Cf. Swyngedouw, 2009). A similar organization exists in the French speaking part of the country (Walloon) with the *Movement against Racism, Antisemitism, and Xenophobia* (Movement contre le racisme, l’antisémitisme et la xénophobie, MRAX). MRAX monitors racist acts, analyses complaints, observes political parties and the mass media, organizes conferences, debates, meetings and engages in the promotion of campaigns in support of diversity (Cf. Swyngedouw, 2009). In Austria, the *Documentary Center of the Austrian Resistance* (Dokumentationsarchiv des Österreichischen

Widerstandes) (DOEW) founded in 1963 by former members of resistance movements against Nazism, also offers educational programmes about Nazism and its atrocities in the country during the World War II, as well as public exhibitions (Cf. Pelinka, 2009). In France, the non-governmental organization the *Ligue internationale contre le racisme et l'antisémitisme* (LICRA) founded as early as 1926 has branches across many countries in Europe and is well known for offering educational programmes to those worst affected by racist violence and discrimination on the ground of racial, ethnic and religious differences.

The second area where civil society organisations have been particularly successful in defending democracy is in developing initiatives and activities within the community. These efforts include offering aid to the victims of right-wing inspired violence or intimidation, fundraising in favor of social programs against extreme right, and so forth (Cf. Pedahzur, 2003: 67ff). To give an example, the non-governmental organization called *Hope not Hate* in the United Kingdom is known for local campaigning, working within communities endangered by racist violence, empowering communities, but also campaigning against the British National Party in cities and towns known for the support of this party (Cf. Husbands, 2002; Eatwell, 2010).

Finally, the third area of activity where civil society organizations have been successful includes the monitoring and juridical litigation against groups promoting hatred and violence within communities in an effort to stem their growth and popularity. A number of non-governmental organizations, particularly in the USA and increasingly so in Europe also, have been active in this area.

2.3.3 Formal-legal strategies to defend democracy

The final dimension of defensive democracy, which will build the main focus of this study, has been broadly named 'formal-legal strategies'. This dimension includes all strategies in Capoccia's framework of defensive democracy that are embodied in state constitutions and other legal acts and designed to defend a democratic state from its enemies by imposing de facto and de jure constraints on their activities and presence in the political arena (Cf. Capoccia, 2005: 49-50). As stressed by Capoccia and other scholars, among defensive strategies the formal-legal strategy has remained relatively understudied subject in the

political science, particularly so from a comparative perspective (Cf. Capoccia, 2005: 56; Issacharoff, 2007: 1415). In particular, little is known regarding the range of formal-legal measures that are at the disposal of contemporary democracies to protect democratic institutions and freedoms from non-democratic parties and groups and, more importantly, the differences between democracies in terms of their formal-legal democratic defensiveness.

As discussed previously, the concept of militant democracy has been the main theoretical and empirical framework among scholars to conceptualize the range of formal-legal measures that contemporary democracies employ in fight against non-democratic threats as well as to capture the state variations between them in terms of the militancy of their legal structures (Cf. Husbands, 2002: 52; Capoccia, 2005: 56; Minkenberg, 2006: 27; Klamt, 2007: 134; Thiel, 2009c: 398; Bourne, 2011: 2; Capoccia, 2013: 209-210). As mentioned earlier, the concept of militant democracy was introduced by two German scholars Karl Loewenstein and Karl Mannheim during the 1930s and 1940s (Loewenstein, 1937a, 1937b; 1938a, 1938b; Mannheim, 1945). It was in particular Karl Loewenstein⁴ who systematically elaborated the concept of militant democracy and defined the range of legal measures related to it (Cf. Boventer, 1985: 40; Thiel, 2009c: 400). Having himself first-hand experience from the collapse of the Weimar democracy in Germany (Cf. Boventer, 1985: 36ff; Simard, 2012: 169ff.; Loewenberg, 2006: 599ff), Loewenstein criticized the principle of constitutional legality that the Weimar Republic (1918-1933) was founded on. The principle of constitutional legality implied that all political forces, irrespective of their political ideology, had an equal chance to participate in the political process and only voters were to decide through elections which political parties are represented in the government. According to Loewenstein, it was this principle which “opened the way to power for Adolf Hitler” (Cf. Loewenstein, 1937a: 427). The solution advocated by Loewenstein was democracies should become a “militant democracy” if they are to survive the challenge presented by political parties and groups which seek to destroy them from within by utilising democratic

⁴ Karl Loewenstein was a professor of comparative constitutional law at the University of Munich before he fled from Nazis to the United States in 1933 where he became the Professor of Jurisprudence and Political Science at Amherst College (Massachusetts). Between 1946 and 1947 he served for a short time as an advisor to the military administration in the American zone in occupied Germany. See on Loewenstein's personality and his contribution to the development of comparative politics and notably so to the discussion on militant democracy in: Boventer, 1985: 37ff; Simard, 2012: 169ff; Loewenberg, 2006: 599ff.

institutions and political freedoms. To become a militant democracy, democracies had to adopt a legal bulwark in form of special anti-extremist legislation aimed to protect democratic institutions and restrict the political freedoms of non-democratic actors. As emphasized by Loewenstein, “fire is fought with fire” and democracies should not hesitate to restrain the political and civil rights of their enemies “even at the risk and cost of violating fundamental principles” (Loewenstein, 1937a: 432). Besides setting out the theoretical contours of the new concept, Loewenstein’s research has provided exceptional insight through systematically identifying and describing the typology of anti-extremist legislation required to create a sustainable militant democracy. These measures ranged from a legal ban of non-democratic parties to special rules against subversive propaganda (Cf. Loewenstein, 1937b: 644-656; also Loewenstein, 1938a: 596ff; Loewenstein: 1938b; for a brief summary see Thiel, 2009c: 400)⁵.

After the end of the World War II, the concept of militant democracy has become the main theoretical and empirical framework in the study of democratic responses to the problem of political extremism (Cf. Klamt, 2007: 134; Bourne, 2011: 2; Capoccia, 2013: 210ff). While doing so, scholars have mainly focused *on the range of repressive measures* which were outlined by Loewenstein in his typology of anti-extremist legislation. There is a growing body of literature, reviewed below, focusing on the measures and provisions of militant democracy in individual countries thus providing some important insights into variations between contemporary democracies.

There are numerous case-studies addressing the variations between democracies in the enforcement of legal ban of political parties and groups

⁵ This list contained the following fourteen legal measures and provisions: legislation against high treason and other seditious acts; legal ban of subversive movements; legislation against formation of paramilitary organizations and the wearing of uniforms; legislation against formation of private party militias and military bands; legislation against the wearing of weapons; legislation to protect democratic institutions from acts of malignant criticism and “insidious attacks”; legislation against inciting hatred against national minorities; legislation restricting the freedom of assembly; legislation protecting democratic institutions and leading personalities against defamation and libel; legislation against glorification of political crimes; legislation against political activities of members of armed forces and police as well as legislation protecting democratic armed forces against infiltration by subversive propaganda; legislation against political activities of civil servants; legislation on police surveillance of anti-democratic activities and movements; legislation against foreign publications of extremist character and political activities of members of foreign countries which are inimical to democracy (Cf. Loewenstein, 1937b: 644-656; see also Loewenstein, 1938a; 1938b).

which were found unconstitutional or violating the law (Cf. Finn, 2001; Issacharoff, 2007; Rosenblum, 2007; Bale, 2007; Navot, 2008; Niesen, 2012; Gerlach, 2012). According to scholars legal ban represents the most repressive provision of militant democracy (Cf. Loewenstein, 1937b: 645; Capoccia, 2005: 59; 2013: 213; Downs, 2012: 38). Downs noted that a legal ban is a “democracy’s last card” which is used only when all other legal measures are proven futile (Cf. Downs, 2012: 38-39). Typically, the legal decision to ban a party or group is followed by further prohibitions upon the organisation including closure of offices, seizure of assets, demonstrations and meetings in public, and prohibition of any reorganisation in the future (Cf. Bourne, 2012: 4; Bourne & Casal, 2014: 3).

Among individual countries, there are numerous studies dedicated to Germany where in the past two political parties were banned: the *Socialist Reich Party* (Sozialistische Reichspartei, SRP) in 1952 on the ground of party’s close association with the NSDAP party of Adolf Hitler, and the *German Communist Party* (Deutsche Kommunistische Partei, DKP) in 1956 on the suspicion of the party’s close links with the Soviet Communist Party (Cf. Franz, 1982: 59-62; Backes & Jesse, 1989, Vol. 2: 282, 287; Wise, 1998: 302-303; Jesse, 2001). The ban of these two parties became the subject of many scholarly debates, particularly so among German scholars. The focus of these debates was mainly the question whether the legal ban was an appropriate legal measure in a democracy to deal with its enemies. Thereby, while the ban of the SRP caused fewer objections among scholars, it was in particular the decision to ban the DKP that caused many discussions. Most scholars doubted the usefulness of the legal ban against the DKP which was in fact a small and electorally insignificant political party (Cf. Backes & Jesse, 1998: Volume 3: 287-288). The recent attempt to ban the right-wing extremist *National Democratic Party of Germany* (Nationaldemokratische Partei Deutschlands, NPD), which failed on procedural grounds in 2003⁶, has led to another resurgence of scholarly interest

⁶ According to Minkenberg, the government’s documentation of the NPD’s unconstitutional nature relied partially on data that was gathered by informants who worked secretly for the Federal Agency for the Protection of the Constitution (Bundesamt für Verfassungsschutz) which is the government agency set up in 1951 to monitor non-democratic groups and political parties in the country. Because the agency refused to disclose the identity of its informants the court could not decide whether the gathered information about anti-constitutional character of the

in the use of party ban legislation in and outside Germany (Jesse, 2001; Minkenberg, 2006; Bale, 2007).

Another significant portion of studies is dedicated to the question whether legal ban is an effective tool to deal with democracy's enemies. After analysing various party bans in Germany and France, Minkenberg, for example, concluded the bans "have not resulted in a lasting debilitation of organizations across the radical-right spectrum. Instead, it provokes various organizational efforts and new strategies in order to prevent or avoid a ban, or to survive it" (Minkenberg, 2006: 41). Furthermore, Bale stated in his insightful analysis of party bans in Turkey, Belgium, and Spain that arguments of the futility of party bans are not "borne out in reality" (Cf. Bale, 2007: 143). According to Bale, "firstly, bans saw no accentuation of threat apparently posed to secular liberal democracy by the parties affected, whether it be religious, violent or racist. Secondly, those parties did not simply carry on as before. Thirdly, bans did not seem to undermine positive democratic development and achievements that took place prior to them coming into force" (Bale, 2007: 155).

Recently, further studies have attempted to produce a comparison of party ban legislation across different countries (Franz, 1982; Gordon, 1986-1987). Gordon, for example, compared the party bans of the United States during the McCarthy era⁷ when it was first introduced through the *Communist Control Act* of 1954, with party bans in Germany. He found that the party ban rule in the US was rather narrow in its scope because it only targeted the Communist Party (CPUSA) while in Germany the phrasing of the party ban legislation was far more comprehensive giving the democratic government power to target all political parties irrespective of their political orientation or behavior provided they were declared unconstitutional by the Federal Constitutional Court under Article 21(2) of the Basic Law (Cf. Gordon, 1986-1987: 377ff; also Franz, 1982: 67-68; Kremnitzer, 2004: 161ff; Michael & Minkenberg, 2007; Navot, 2008: 754ff).

party was based on genuine party decisions or were supplied by the secret services in an attempt to facilitate the ban (Cf. Minkenberg, 2006: 25).

⁷ The term of "McCarthy era" or for short "McCarthyism" refers to Joseph Raymond McCarthy who was the Republican Senator in the US Congress. His name is often associated with hundreds of unfounded accusations of many US citizens of being the members and spying on behalf of the Communist Party (Cf. Gibson, 2008: 96).

Besides Germany and the United States, party bans within Spain have also been extensively studied. In this country more than dozen political parties have been banned since 2003 when the Spanish government adopted the new *Organic Law on Political Parties* (LOPP) which allows the Supreme Court to ban those political parties which are engaged in or support terrorism (Cf. Sawyer, 2002-2003: 1543ff; Turano, 2003: 733; Comella, 2004; Tardi, 2004: 97; Cram, 2008; Bourne, 2010: 3-5; Bourne, 2011: 16-17; Bourne, 2012: 3-4). Additionally, Brems reconstructed the decision of the Ghent court in Belgium in 2004 to ban the *Vlaams Blok* party (Flemish bloc) for its persistent violation of the anti-racist law (Brems, 2006; also Erk, 2005). Because *Vlaams Blok* party proceeded to reincarnate itself within three months to become the *Vlaams Belang* (Flemish Affairs) party, positing itself as more moderate party, although widely believed to have the same political and ideological stance, Erk critically denounced this legislation as ineffective (Cf. Erk, 2005: 497-498). Other high-profile cases of party bans include studies surrounding Israel (Navot, 2008), Turkey (Macklem, 2006; 2010), and new democracies in Eastern Europe (Brunner, 2002; Niesen, 2002; 2010; Sajó, 2004; Bourne, 2012; Niesen, 2012). Several academic contributions also analysed party bans implemented outside Europe in Rwanda, Iraq, or South African Republic (Basedau et.al., 2007; Kemmerzell, 2010; Niesen, 2012).

Given the number of party bans across democracies, numerous recent studies have attempted to create typologies of legal bans. Rosenblum, for example, identified four different grounds for the enactment of party bans common in democratic states: the association with violence, the incitement of hate, the existential threat to the state's national identity, and support by a foreign power (Cf. Rosenblum, 2007: 43-71). Navot observed a number of democracies have widened their legal grounds for enactment of a party ban to include the support of terrorism (Cf. Navot, 2008: 748; 754-756). In his turn, Issacharof argued that these parties are mostly insurrectional, separatist, or antidemocratic majoritarian parties which are frequently banned in democracies (Cf. Issacharoff, 2007: 1430-1431). Fennema noted in his analysis of anti-racist legislation, several democracies in Europe have shifted their legal motives for banning political parties. During the immediate post-war era, political parties

were predominantly banned on the ground of their affiliation with fascist or Nazi parties, whereas today political parties are more frequently banned on the grounds of racial discrimination (Cf. Fennema, 2000: 127; also Bleich, 2011: Ch.5). On the other hand, Sajó noted, post-communist and transition states are more likely to have party ban legislation than established democracies (Cf. Sajó, 2004: 213ff; also Bourne, 2012: 5ff; Niesen, 2012: 553ff). As noted by Bourne, “new democracies face particular problems which make the option of proscribing a political party more compelling” (Bourne, 2012: 6).

While variations in legal bans have been extensively studied, the variations between democracies in the enforcement of other mechanisms of militant democracy have remained relatively underinvestigated. In 1972 the German government adopted the ‘radicals’ decree’ (“Radikalenerlass”) which sought to improve regulations governing the political loyalty of civil servants as well as to keep members of non-democratic parties and groups out of duty in civil service. This event spurred the interest of many scholars in this provision (Cf. Capoccia, 2013: 212). However, the bulk of such studies were single–case studies while there are only a few comparative works. Most of the single case-studies are dedicated to Germany where the measure originated first (Cf. Brinkman, 1983; Monson, 1984: 301-324; Kvistad, 1988: 95-125). According to Brinkmann, the duty of civil servants in Germany to demonstrate political loyalty to the state and constitution has existed at least since the end of the eighteenth century and was always regarded as a “traditional and binding principle of the professional civil service” in Germany (Cf. Brinkmann, 1983: 587; also Rudolf, 2003: 212ff). In his turn Rudolf argued that in Germany’s past, the duty of civil servants to abide by their state and the constitution was always diminished in its value by the fact that such duty was bound to the personal duty of civil servants to support either the monarch during the time of monarchy or the Führer during the Third Reich (Cf. Rudolf, 2003: 213ff). Rudolf states a genuine duty to demonstrate strong loyalty to the democratic constitution and its principles was first introduced in Germany during the Weimar Republic in 1922 (Cf. Rudolf, 2003: 214; cf. also Leggewie & Meier, 1995: 182ff). The new law demanded its civil servants to stand up for “the republican state form and leave all activities which do not conform with the status of a civil servant” (Cit. in Rudolf, 2003: 214). However, Rudolf asserted that the loyalty of civil servants in the Weimar Republic was

“not active” in a sense that the civil servants were not obligated to stand up for the state form and its constitution “all the time”, including outside the office (Cf. Rudolf, 2003: 214).

A number of scholars have analysed the efficacy of the legislation. Monson, for example, argued that the ‘radicals decree’ was less effective because it was bias towards members of the Communist Party as opposed to the members of the right-wing extremist parties (Cf. Monson, 1984: 305). In addition to single-case studies there are a few comparative studies analysing the differences in the regulation of civil service across democracies. An earlier study edited by Böckenförde et al. described the legal basis of employment in civil service across several countries including the former Soviet Union and Yugoslavia (Böckenförde et al., 1981). He discovered that among countries, Germany was an isolated case in terms of strictness of its regulation toward employment of non-democratic actors in civil service (Cf. Böckenförde e.a., 1981: 49). By contrast, the laws of other countries, in particular in the United Kingdom, France, and Italy were “less open and less conspicuous” (Cf. Böckenförde e.a., 1981: 38; similarly Brinkmann, 1983: 587). A recent study edited by Neuhold provides an up-to-date account of the delicate balance between civil service and politics (Neuhold et al., 2013). However, this study does not approach the problem from the point of view of defending democracy from political extremists in civil service. Lastly, the monograph of Art analysed a broader range of factors that affect the internal cohesion of right-wing extremist parties in democracies. Among them he also identified the legislation in keeping extremist out of civil service duty and argued within several case-studies that expelling members of non-democratic organisations from civil service can effectively dampen the chances of non-democratic parties to effectively recruit new members as the public will be aware of the professional and social risks in joining such parties (Cf. Art, 2011: Ch.3).

A number of studies have also analysed state variations in the regulation of anti-racist legislation (Bird, 2000; Rosenfeld, 2002-2003; Bleich, 2011; Bleich & Lambert, 2013). Most countries in Europe adopted such legislation during the 1960s and 1970s following the adoption of the *United Nations International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD) in

1965 (Cf. Fennema, 2000: 129; Skenderovich, 2010: 43; Bleich, 2011: 19ff; Bleich & Lambert, 2013: 138-139). Further studies have discovered that in the United States anti-discrimination propaganda is given wide constitutional protection while in other Western democracies it is largely prohibited and subjected to criminal sanctions (Cf. Appleman, 1995-1996: 425ff; Rosenfeld, 2002-2003: 1529ff; Bleich, 2011: Ch.5; Michael & Minkenberg, 2011: 1110). The substantial differences between democracies in Europe and the USA is typically attributed to different experiences with the continuity of political freedoms, as the United States has been successfully steady whilst Western Europe democracies suffered a violent disruption of these freedoms and the upsurge of hatred toward minorities during the 1930 and 1940s (Cf. Bird, 2000: 403ff; Oberndörfer, 2000: 237-246; Michael & Minkenberg, 2007: 1120; Backes, 2006: 279ff). Bleich, for example, stated “[i]n the United States it is legal to have racist opinions; it is legal to say racist things; and it is legal to be motivated by racist opinions when acting to burn a cross or form a racist organization when those actions are seen to be intimately related to expressing an opinion” (Bleich, 2011: 110).

In addition to numerous case-studies analysing variations across individual provisions of militant democracy, there is a number of descriptive case-studies examining the broader spectrum of militant democracy measures in individual countries (Backes & Jesse, 1989; Leggewie & Meier, 1995; Thiel, 2003; Jesse, 2008b). However, the bulk of such case-studies are dedicated to Germany while the majority of other countries have remained relatively neglected. Typically, Germany is considered the “prototype of militant democracy” (Cf. Boverter, 1985: 80). As noted by many scholars, the drafters of the post-war German democratic state were explicit in their wish to implement the militant democracy doctrine in the state’s new constitutional framework. Much of the legal legislation originally mentioned by Loewenstein, such as the legal ban of political parties (article 21(2)), or the legal ban of violent groups (Article 9(2)), or the forfeiture of democratic rights if they are used to undermine or destroy the ‘free basic democratic order’ (Article 18), have found a prominent place within the German post-war constitution, the Basic Law (Grundgesetz). The current German state is officially termed “streitbare” or “wehrhafte Demokratie” (literally translated as “fortified democracy”) which is the equivalent of “militant

democracy”⁸ in German (Cf. Jesse, 2008b: 318; Schellenberg, 2009: 194; Thiel, 2009: 117ff; Müller, 2012: 1260).

While Germany’s model of militant democracy has been extensively analysed within militant democracy literature, the repertoire of militant democracy of other European democracies has found relatively little scholarly attention. According to Capoccia, one reason for such neglect is the concept of militant democracy is relatively foreign for many other countries outside Germany (Cf. Capoccia, 2013: 210). For instance, in France there is still no equivalent word for the term of “militant democracy” (Cf. Buis, 2009: 76)⁹. In the United States the term of “militant democracy” was absent from constitutional discourse for the most period of time before the collapse of the Soviet Union (Cf. Tushnet, 2009: 357). In the United Kingdom, only few lawyers were acquainted with the term of “militant democracy” in the past (Cf. Mullender, 2009: 311). It is only recently, most likely triggered by the rise of new challenges since the beginning of the new millennium (Cf. Capoccia, 2013: 210), that scholars started paying more attention to the legal arsenals used in other democracies against non-democratic parties and groups. From earlier works, the study of Boventer was the first attempt to compare the repertoire of militant democracy structures in the United States and France with the arsenal of legal mechanisms in Germany (Boventer, 1985: Ch. 3, 4, and 5). Another notable study by Canu focused on the differences and similarities of legal mechanisms of militant democracy in France and Germany (Canu, 1997: Ch. 2). While Boventer analysed tools of militant democracy in state constitutions, Canu provided an encompassing analysis of legal mechanisms preserved in both state constitutions and penal codes of the two countries. Widfeldt, analysed the range of legal mechanisms used in Sweden to support their fight against far right parties and groups (Widfeldt, 2001; 2004). He described the approach of Swedish authorities toward right-wing extremist parties and groups as a ‘diversified approach’: while state authorities were relatively lenient toward right-wing extremist parties such

⁸ The expression of “wehrhafte Demokratie” or “streitbare Demokratie” was first used by the Federal Constitutional Court of Germany in its ruling banning the Socialist Reich Party (Sozialistische Reichspartei, SRP) in 1952. The word derives from the German translation of militant democracy used in the work of Karl Mannheim ‘Diagnosis of Our Time’ (Cf. Mannheim, 1945: 7).

⁹ Buis, for example, noted that the French adjective “militante” refers to the basis of the structure of political parties. Thus, the term “démocratie militante” would mean a democracy ruled by activists. See: Buis, 2009: 76.

as the New Democracy, they resorted more frequently to repressive measures when acting against the neo-Nazi groups and movements (Cf. Widfeldt, 2004: 155ff). Furthermore, the monograph of Pedahzur provided an excellent analysis of the broad range of defensive measures and strategies employed in Israel to counter the Jewish right-wing extremism (Pedahzur, 2002). The edited study of Dumont et al. in French language reconstructed the full range of militant democracy measures and provisions that Belgium employed against, as they called them, “les groupements liberticides” (‘freedom-abusing/threatening groups’) (Dumont et al., 2000). As noted by Velaers and other authors, in Belgium the relevance of militant democracy mechanisms has become particularly acute with the resurgence of extreme right-wing parties in the Dutch-speaking part of the country after the end of World War II (Cf. Velaers, 2000: 319; Gérard, 2000: 85). In addition, the edited book of Thiel has provided an encompassing analysis of militant democracy measures and institutions in sixteen countries (Thiel, 2009a). Thiel used the German model of militant democracy to address the question “whether Germany is an ‘isolated case’ or if other democracies could be qualified as militant as well” (Thiel, 2009a: 3). He concluded the countries studied within his book demonstrate a wide diversity of arrangements “regarding the problem of democratic self-defense” (Thiel, 2009c: 382). Finally, the most recent book of Klamt in German language examined differences in militant democracy structures between twenty-seven EU member-states plus Turkey (Klamt, 2012).

Despite the fact that the research on militant democracy has expanded to include multiple countries, this previous research must be criticised in several respects. First, the vast research on militant democracy must be criticized for having a limited focus of legal measures and provisions that are relevant for defending a democracy. As the preceding analysis made clear, scholars of militant democracy have tended to focus on repressive legal instruments only, such as the legal ban of political parties. Although these studies build a good foundation, it should be noted that contemporary democracies use many other non-repressive measures to counter the threat of non-democratic parties and groups within their political systems besides the repressive measures extensively discussed. Several scholars have raised this criticism (Cf. Mudde, 2004: 197; Buis, 2009: 77; Thiel, 2009: 383). Mudde, for example, stressed that

“there are many ‘anti-extremist’ measures that are more subtle, although nonetheless effective” (Mudde, 2004: 197). Buis also stated in her analysis of the range of defensive provisions used in France against democracy’s enemies “that list (the list of legal measures compiled by Karl Loewenstein, S.B.) is a useful tool to circumscribe possible measures but insufficient to investigate the actual French way of coping with dangers. The banning of uniforms or a training of a political police were possibly effective in the interwar Europe but seem to be outdated or unsuitable in the context of the Fifth Republic” (Buis, 2009: 77). Thiel also emphasized that the list of repressive measures in Loewenstein’s typology of anti-extremist legislation “naturally is dated and roots in a historical situation completely different from the present” (Thiel, 2009: 401).

Simultaneously, scholars stressed the importance of other legal tools for defending democracy which were originally not mentioned in Loewenstein’s typology of anti-extremist legislation. Kremnitzer, for example, in his account of militant democracy provisions in Israel pointed out the importance of the rule on base of which political parties which negate the state of Israel, incite racism, or otherwise engage in illegal activities can be denied a formal registration for elections. According to Kremnitzer, the legal basis for this provision is supplied in Article 5 of the Israeli Party Law from 1992 (Cf. Kremnitzer, 2004: 166; also Pedahzur, 2002: 58). On base of this legislation, the Socialist List was excluded from running in parliamentary elections in 1965. The rule is still applied against parties built by Arab communities exploiting in turn their sense of frustration with the Israeli state and its democracy (Cf. Kremnitzer, 2004: 166). As noted by Kremnitzer, this legislation builds an important barrier protecting the Israeli democracy from hostile parties and movements (Cf. Kremnitzer, 2004: 160). Additionally, Brunner also reported the presence of a similar legislation within a number of post-communist democracies in Eastern and Central Europe where Communist Parties are formally denied the right to register for running in parliamentary elections (Cf. Brunner, 2002: 22-25). Bourne also noted that in Spain political parties may be suspended from running in elections if they violate the requirement “to respect the Constitution and the law” and are not “democratic in their internal structure and functioning”. On base of this provision, a political party may be suspended from participating in elections for 3 years before a permanent ban is ruled against it (Cf. Bourne, 2011: 12-13;

see also Tardi, 2004: 98-99). The regulation in Canada introduced in 1993 is of a different nature, demanding political parties to field at least 50 candidates within each of its 295 constituencies in order to be registered for elections (Cf. Tardi, 2004: 96). This legislation was originally introduced to prevent the Communist Party from entering the election race, and was recently considered controversial among political parties in Canada leading to its abolishment in 2004 by the Supreme Court as it contradicted the Canadian Charter of Rights and Freedoms. Now only one candidate is required for parties to field within each constituency in order to be eligible for election. Finally, van Donselaar and Wagenaar specified that the state authorities in the Netherlands use other legal remedies besides legal instruments of militant democracy, such as those enshrined in the Elections Act (Cf. van Donselaar & Wagenaar, 2009: 391). The relevant legislation includes the formal requirement for political parties to file a certain amount of signatures in support of their nominees. The authors stated that this provision plays an important role in preventing non-democratic parties in successfully placing their candidates during elections and thus helps defend democracy indirectly (Cf. van Donselaar & Wagenaar, 2009: 396). As argued by scholars, “[f]or many decades, it has been difficult for radical right-wing parties to collect these signatures because, in doing so, supporters come out publicly as party adherents” (van Donselaar & Wagenaar, 2009: 396).

In addition, the previous research on militant democracy must be criticised for failing to provide an encompassing and systematic assessment of differences and similarities between democracies in terms of formal-legal defensiveness. Indeed, despite many scholarly efforts to study variations between democracies in terms of ‘militancy’ of their legal structures (see e.g. works of Boventer, 1985; Klamt, 2007; 2012; Jesse, 2008a; Thiel, 2009) scholars have not moved beyond implicit assumption that democracies are “always *more or less* militant” (Pfersmann, 2004: 53) italics in original)) without providing a more systematic account of such variations. Therefore, we still know little about variations between democracies in terms of the defensiveness of their legal structures whilst taking stock of a broader range of legal measures and provisions which are relevant for defending democracy. In part this omission has occurred due to the absence of an analytical framework that could be used to assess systematically the differences and similarities between democracies and the

defensiveness of their legal structures. This shall be illustrated below using two well-known analytical frameworks used by scholars to analyse state variations between democracies in the militancy of their legal structures in the past.

The first such framework is the 'lineal model' proposed by Pfersmann (Cf. Pfersmann, 2004: 53ff). Using Loewenstein's original concept of militant democracy, Pfersmann placed "open democracy" as an "ideal type" at the one end of the scale. The open democracy was defined by him as "a legal system in which the addressees participate in the production of the general norms by majoritarian decisions, directly or through the election of representatives in charge of enacting such general rule" (Cf. Pfersmann, 2004: 53). Well aware that this kind of democracy was "legally contingent on the democratic stances of the majority" and thus risked being easily abolished if a majority was not willing to maintain it, Pfersmann added that all democracies have at their disposal "normative legal obstacles to abolishing democratic government" (Cf. Pfersmann, 2004: 55). Thereby, he distinguished between "direct" obstacles, those "that prohibit actions against democracy under the threat of sanctions as well as those that impose obligations to identify anti-democratic action in a preventive way or to promote pro-democratic beliefs and attitudes", and "indirect or higher-order obstacles", those that prevent a modification of democratic rule in order to abolish the democratic state (Cf. Pfersmann, 2004: 56). Thus defined, he concluded all democracies are more or less militant "according to the *intensity* of the first- and higher-order obstacles" (Pfersmann, 2004: 56 (italics added)). Overall, Pfersmann's classification framework allows readers to comprehend the militancy of democratic states in terms of gradation from high to low intensity (Cf. Thiel, 2009: 396). However, the disadvantage of Pfersmann's classification framework is it does not provide a clear criterion to distinguish between direct and indirect obstacles. Therefore, his model is difficult to operationalize for conducting a systematic assessment of cross-national variations in formal-legal defensiveness between democracies (Cf. Thiel, 2009: 398).

An alternative classification framework was introduced by Jesse (Cf. Jesse, 2008a). Using the German model of militant democracy, Jesse proposed three general categories to test militancy of a democracy: the normative orientation of political system ("Wertgebundenheit"), the will to protect the superior norms

("Abwehrbereitschaft"), and the degree of anticipation of measures of protection ("Vorverlagerung") (Cf. Jesse, 2008a: 342-343; translation of categories taken from Buis, 2009: 77). On base of the first two criteria (that is, the normative orientation toward superior norms in the constitution and the will to protect them) that he defined as the key categories, Jesse developed four main variants to assess a country's degree of democratic defensiveness ("Demokratieschutz"). The first variant describes a democracy with a strong disposition toward both the normative orientation and the will to protect resulting in the most defensive democracy possible. As noted by Jesse, Germany belongs to this type of democracy (Cf. Jesse, 2008a: 354). The second variant is a democracy with a strong disposition toward normative orientation but no will to protect superior norms. According to Jesse, the examples for this type of defensive democracy include Spain, Portugal, and Greece (Cf. Jesse, 2008a: 347). The third variant is a democracy with no disposition toward normative orientation but with a strong will to protect superior norms. The examples for this type of a defensive democracy can include most democracies in Eastern and Central Europe. Lastly, the fourth variant is a democracy which has neither normative orientation nor the will to protect superior norms, resulting in the least defensive democracy possible (Cf. Jesse, 2008a: 343). Among democracies in Europe, Jesse ascribed the United Kingdom and Nordic democracies in Scandinavia to this type of a defensive democracy. Overall, Jesse's model is more useful as it provides a framework better suited for conducting a wider comparison (Cf. Buis, 2009: 77). However, the disadvantage of Jesse's classification framework is similar to that of Pfersmann's framework as it is difficult to operationalize. For example, the model of Jesse does not take in account that even if democracies do not acknowledge normative orientation in their constitution, this should not automatically imply they are less defensive against their enemies, notably so if they have party banning legislation.

2.4 Conclusion

Liberal democracies know a wide range of defensive strategies to protect themselves from non-democratic groups and political parties that threaten them from within. This chapter has introduced the concept of defensive democracy and discussed the relevant literature related to the broader spectrum of defensive strategies comprised within this concept, broadly circumscribed as

party-based, cultural-societal and formal-legal strategies. The critical discussion of these three strategies has revealed some important conclusions relevant to the further development of this thesis. First, among defensive strategies the formal-legal strategies represent the most effective in defending democratic institutions and values against non-democratic threats. However, despite their importance the problem of defending democracies using legal measures has remained relatively understudied within the political science. As previously argued, while there is significant knowledge surrounding party-based and cultural-societal strategies available, there is scarce evidence verifying the range and the distinct forms of those formal-legal measures and provisions that contemporary democracies have at their disposal to counter the threat of non-democratic groups and political parties.

This chapter has emphasized the concept of militant democracy, which has been the main paradigmatic concept in the study of democratic responses to democracy's enemies, is no longer sufficient as a theoretical and empirical framework to study both the range of legal mechanisms contemporary democracies employ against non-democratic parties and groups and is ineffective in capturing the variations between them in terms of formal-legal democratic defensiveness. First, it was argued the concept of militant democracy focuses too narrowly on repressive legal instruments only, while contemporary democracies use many other, non-repressive instruments also. Thus, in order to generate a plausible assessment of state variations in formal-legal democratic defensiveness, a broader focus must be adopted by looking beyond the conventional arsenal of measures of militant democracy. Second, it was argued comparative scholars studying the differences between democracies in the militancy of their legal structures have failed to provide an encompassing and systematic assessment of variations between democracies in terms of the formal-legal democratic defensiveness. This issue has partially arisen because scholars relied on analytical frameworks which were not suited to developing a systematic assessment of state variations in formal-legal defensiveness. This chapter illustrated this issue using two well known analytical frameworks developed by Pfersmann and Jesse. Although these previous analytical frameworks provide good foundations, they suffer weaknesses as they do not provide clear-cut criteria to systematically define

which democracy is more or less defensive. I believe these are the questions where the previous research on militant democracy can be fruitfully expanded. Considering these gaps in the literature, the remainder of this dissertation will endeavor to provide an encompassing and systematic assessment of state variations in terms of the degree of formal-legal democratic defensiveness. As the first step, the next chapter turns to the task of developing an analytical framework that will be used for a cross-national assessment of differences and similarities in formal-legal democratic defensiveness between a range of European democracies.

CHAPTER 3:

TOWARD SYSTEMATIC ASSESSMENT OF VARIATIONS BETWEEN DEMOCRACIES IN FORMAL-LEGAL DEMOCRATIC DEFENSIVENESS: DEVELOPING AN ANALYTICAL FRAMEWORK

3.1 Introduction

The main goal of this dissertation is to provide a systematic assessment of differences and similarities in formal-legal democratic defensiveness between eight European democracies. The previous chapter discussing the literature surrounding formal-legal strategies has made clear that prior research into militant democracy has failed to provide an encompassing and systematic assessment of state variations in democratic responses to non-democratic parties and groups (Cf. Pfersmann, 2004: 53). The purpose of this chapter is to provide an analytical framework to assist in identifying and mapping the differences between democracies in formal-legal democratic defensiveness which is defined as *the presence (not the usage) of those mechanisms that constrain the presence and operation of non-democratic parties and groups in a democracy*. This chapter is organised as follows. The first section will outline which formal-legal measures will be included or excluded from the comparative assessment. Using the organisation-centred perspective on formal-legal measures as a starting point, I will expand the focus of formal-legal measures beyond the conventional measures of militant democracy countering so the criticism often expressed toward the concept of militant democracy that it is focused too narrowly on the repressive instruments while unduly overlooking the non-repressive mechanisms democracies adopt to defend themselves from non-democratic parties and groups. On this basis, the second section will develop an analytical framework that would enable me to comparatively assess the differences in formal-legal defensiveness between the democracies selected, while focusing on a broader spectrum of formal-legal measures. Using the organisation-centred perspective on formal-legal measures as an underlying approach I will *divide the broad spectrum of formal-legal measures and provisions into three analytical categories depending on the severity of constraints they impose on the presence and operation of non-democratic*

parties and groups in a democracy: legal bans, freedom constraints and operational constraints. The remainder of this chapter will introduce the methodology underpinning the empirical analysis to follow in subsequent chapters, discusses the selection of country-case studies and primary and secondary sources used to measure variations. The chapter will conclude with a first overview of variations in formal-legal defensiveness between eight democracies covered in this study.

3.2 Defining and broadening the scope of formal-legal measures

Before I move on to present my analytical framework to study formal-legal democratic defensiveness, it is necessary to firstly address the question what formal-legal measures shall be included or excluded from my comparative analysis. As discussed within the previous chapter, the concept of militant democracy was the former main theoretical framework used to determine the range of defensive rules and provisions employed by democracies to counter their internal threats whereby researchers focused on the key propositions of anti-extremist legislation, which was systematically elaborated by Karl Loewenstein during the 1930s (see for details the previous chapter) (Cf. Capoccia, 2005: 56; Klamt, 2007: 135; Bourne, 2011: 2). While the typology of anti-extremist legislation of Loewenstein is useful as it proposes a comprehensive list of legislative measures and provisions against non-democratic parties and groups, it was noted that Loewenstein's typology of anti-extremist legislation has been criticised by several scholars for being insufficient as a theoretical framework to analyse the broader spectrum of formal-legal measures that are available in contemporary democracies to counter their internal enemies (Cf. Capoccia, 2005: 62; Thiel, 2009: 400; Buis, 2009: 77). As mentioned earlier, one frequent point of criticism was that *defending democracy is not confined to repressive legal instruments of militant democracy only and can also include many other, more subtle or non-repressive instruments as well* (Cf. Pedahzur, 2004: 109; Mudde, 2004: 197; Thiel, 2009: 387; van Donselaar & Wagenaar, 2009: 391; Rummens & Abts, 2010: 651ff).

In line with this critic it is important that we first define the categories of formal-legal measures that will be included in the comparative analysis of differences

in formal-legal defensiveness between the selected democracies. To facilitate the selection of relevant formal-legal measures this chapter will use the *organisation-centred perspective* on formal-legal measures, which is derived from previous research focusing on the cross-national differences in the legal regulation of voluntary organisations such as non-governmental organisations, interest groups, non-profit organisations, and other civil society organisations (Cf. van Biezen, 2012; Bloodgood et al., 2013; Bolleyer et al., 2013: 243ff; Bolleyer & Skirmuntt, 2014). The organisation-centred perspective starts out from the proposition to look at legal regulations from the perspective of the constraining effect they impose on the presence and operation of voluntary organisations within democracies (Cf. Bolleyer & Skirmuntt, 2014: 6). For instance, Bolleyer and Skirmuntt used this approach to establish variations between 18 advanced democracies to ascertain if they have enabling or constraining regulatory frameworks toward three types of voluntary organisations such as political parties, non-profit organisations, and public-benefit organisations (e.g. charities) (Cf. Bolleyer & Skirmuntt, 2014).

The principal advantage of using the organisation-centred perspective on formal-legal measures is that it permits to look at formal-legal measures which are applicable for defending democracy not primarily from the point of view whether they belong to militant democracy's arsenal or not, but from the perspective of the constraining effect they impose on the presence and operation of non-democratic parties and groups within a democratic system. In other words, a formal-legal measure is defensive if it formally constraints the presence and operation of non-democratic groups and political parties in a democracy. Thus, using the organisation-centred perspective the focus of formal-legal measures as applicable for constraining the non-democratic parties and groups in their presence and operation in a democratic system would include not only militant democracy mechanisms which were *intended* by law-makers to defend democratic institutions and freedoms from non-democratic threats but also those which were not intended to be defensive but help defend democracies *de facto* by putting operational constraints on non-democratic parties and groups¹⁰. In line with this, *formal-legal democratic defensiveness is*

¹⁰ To give an example, looking from the organisation-centred perspective the electoral threshold is defensive because it constraints the presence of non-democratic parties by making it difficult for them to obtain a representation in the parliament. While doing so the electoral threshold,

defined within this thesis as a concept that encompasses not only those legal mechanisms of militant democracy that interfere directly with political rights and freedoms of non-democratic parties and groups but also those legal measures that help defend democracy de facto by constraining the presence and operation of non-democratic groups and political parties in a democracy. In the following I will refer to the range of such relevant instruments as de facto constraints.

What formal-legal measures and provisions can be defined as relevant de facto constraints? While we are already familiar with the range of militant democracy measures and provisions, in what follows I introduce and systematically describe the range of relevant de facto constraints that will be included in my analytical framework. Drawing on a careful examination of literature focusing on legal barriers in electoral systems (Jackman & Volpert, 1996; Adeb, 2004: Ch. 4; Norris, 2005: 83ff; Carter, 2002: 127-137; 2005: 147-197; Arzheimer & Carter, 2006) the range of relevant de facto constraints can be identified in the electoral laws and party finance laws of democratic countries. Electoral laws refer broadly to a set of laws that govern political parties and elections in democratic states (Cf. Mozaffar & Schedler, 2002: 7; Janda, 2005: 4; Karvonen, 2007: 438). Party finance laws refer to statutory laws governing the funding of political parties (Cf. Janda, 2005: 5; van Biezen, 2012: 194). Drawing on previous literature, the following legal measures and provisions have been identified as relevant de facto constraints: *the special rules for ballot access (such as collecting voter signatures and paying electoral deposit), the electoral threshold, and special rules governing the access of non-democratic parties to direct state funding* (Cf. Fisichella, 1984: 183ff; Adeb, 2004; 90-91; Norris, 2005: 83; Carter, 2005: 148ff; van Donselaar & Wagenaar, 2009: 391; Swyngedouw, 2009: 71). Before discussing each mechanism in greater detail, it is important to stress that most of these legal rules were introduced for other purposes than defending democracy and were not intended as defensive by law-makers and governments. For instance, the electoral threshold was originally introduced to prevent party system fragmentation and government instability (Cf. Boix, 1999: 614; Carter, 2002: 131-132). Similarly, the ballot

particularly if it is high, helps defend democracy de facto. For more discussion of electoral threshold and how it helps defend democracy de facto see Section 3.2.2.

access rules were introduced to bring more order to the electoral market (Cf. Norris, 2005: 83). However, in reality and this is what some scholars have pointed out in their analyses, these mechanisms represent important indirect constraints on the presence and operation of non-democratic parties in a democratic system by making it impossible or more problematic for such parties to enter political institutions or making them the access to the financial resources more problematic or contingent on specific requirements such as showing commitment to democratic principles. While doing so, and so is my argument here, these measures help defend democracy *de facto*.

Drawing on these insights, the following sections will now give greater detail of the range of selected *de facto* constraints. These sections will elaborate on the question how these measures, even though not necessarily introduced with the purpose of fighting or weakening non-democratic groups or parties, *de facto constrain their presence and operation* in a democracy, in line with my conceptualization of formal-legal democratic defensiveness presented earlier.

3.2.1 Rules on the ballot access as *de facto* constraint against non-democratic parties

The recent literature on electoral systems and how they shape the competition of political parties in democracies has revealed the formal rules regulating the nomination and registration of candidacies of political parties for parliamentary elections can represent formidable barriers for non-democratic parties to successfully place their candidates on ballot lists thus constraining their presence and operation on the political arena (Cf. Norris, 2005: 87; Carter, 2005: 163ff). Two types of ballot access requirements tend to be particularly common in contemporary democracies: the payment of an official deposit prior to election, and the collection of a certain number of valid signatures per candidate or party list (Cf. Massicotte et. al., 2004: 61-64; Abedi, 2004: 92ff; Norris, 2005: 89; Carter, 2005: 163; Downs, 2012: 34-35). Table 2 reflects the extent to which the eight European democracies studied in this thesis use these two types of ballot access requirements discussed.

Table 2: Ballot access requirements in selected democracies in Europe

Country	Collection of signatures	Payment of deposit
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Austria	Yes	No
Belgium	Yes	No
Denmark	Yes	No
France	No	No
Germany	Yes	No
Netherlands	Yes	Yes
Sweden	No	No
United Kingdom	Yes	Yes

Source: Information of the ballot access requirements was compiled using the data from the website of the Inter-Parliamentary Union (IPU) PARLINE database on national parliaments at: <http://www.ipu.org/parline/parlinesearch.asp> (accessed 02.11.2013).

According to table 2 the majority of democracies studied in this thesis compel their political parties to either file a certain number of signatures in support of their nominees or to pay a monetary deposit in order to appear on the ballot list. France and Sweden are the only democracies that do not adopt either ballot access requirement. As detailed in greater detail later, the remaining democracies differ in terms of the amount of deposit political parties are required to pay or the amount of signatures they are required to collect before they appear on the ballot (Cf. Norris, 2005: 89-90). Whatever the differences between democracies in the use of these two requirements, it was frequently argued by scholars that both the requirement to collect signatures or to pay monetary deposit can represent formidable challenges for many non-democratic political parties to cope with (Cf. Carter, 2005: 163; Norris, 2005: 83; van Donselaar & Wagenaar, 2009: 396). Each requirement can convert a non-democratic party's participation in an electoral race into a very costly endeavour (Cf. Carter, 2005: 167; Norris, 2005: 89). The principal reason for this is the fact that most non-democratic political parties tend to have a relatively small membership base, implying they have less financial resources, and are usually less popular among voters as compared with established democratic political parties (Cf. Betz, 1994; Carter, 2005: 167; Ignazi, 2006). Therefore, it should be particularly difficult for them to cope with such requirements. For example, collecting signatures is often a costly process and higher signature requirements imply that larger funds are required to collect them (Cf. Stratmann, 2005: 62; Carter, 2005: 167; Bischoff, 2006: 68). Focusing on right-wing extremist parties, Carter argued ballot access rules are very important in that

they either encourage or discourage such political parties to present their candidates in all districts. While doing so, the ballot access rules can significantly impact on the overall right-wing extremist party vote (Cf. Carter, 2005: 163).

Besides limited resources, another barrier for non-democratic parties appears as voters are often hesitant to put their signatures in support of a political party which is known for its malignant ideology or violent actions. Often, in order to submit their lists with signatures political parties are required to enclose the personal information about their signatories such as the full address, voter registration number, social security number, and workplace to verify the signatures are real. These formalities often scare potential voters away. For example, van Donselaar and Wagenaar stated with regard to the Netherlands' current requirement for political parties to submit at least 30 signatures in each of its 19 constituencies that "[f]or many decades, it has been difficult for radical right-wing parties to collect these signatures because, in doing so, supporters come out publicly as party adherents" (van Donselaar & Wagenaar, 2009: 396; see also Bernard & Kaufmann, 2013). Similar arguments have been presented with regard to the requirement for political parties to pay a monetary deposit. As noted by scholars, the need to pay a deposit can make it difficult for non-democratic parties to participate in the election and thus helps reduce the presence of unwanted candidates in the electoral race (Cf. Stratmann, 2005: 63).

To summarise, ballot access rules represent important indirect constraints on the presence and operation of non-democratic parties within a democracy by making their access to the political institutions more costly and demanding. While doing so they help defend democracies de facto.

3.2.2 The role of electoral threshold in constraining non-democratic parties

In addition to special ballot access rules, a significant number of scholars have discussed electoral threshold as another important de facto constraint on non-democratic political parties, since high thresholds prevent the latter from entering parliament. The term of *electoral* or *legal threshold* refers to the minimum percentage of votes that a party or a group participating in an election

needs to obtain in order to secure a seat in the legislature (Cf. Carter, 2005: 148; Norris: 2005: 119). This constraint has been clearly used since the conclusion of World War II, at first as a strategic weapon in the hands of ruling parties to maintain and maximize their representation in the parliament, while recently becoming a broader strategy for mainstream political parties either to hinder non-democratic political parties from entering the political system or otherwise to isolate them from the political process (Cf. Boix, 1999: 614ff). The legal thresholds of the eight democracies studied within this thesis are detailed within Table 3 below.

Table 3: Formal electoral threshold at national level in eight European democracies

Country	Legal threshold
Austria	4%
Belgium	5%
Denmark	2%
France	12.5%
Germany	5%
Netherlands	0.67%
Sweden	4%
United Kingdom	No legal threshold

Source: Information on electoral threshold was obtained from the website of the Inter-Parliamentary Union PARLINE database on national parliaments at: <http://www.ipu.org/parline/parlinesearch.asp> (accessed 02.11.2013).

Table 3 reveals the eight democracies studied within this thesis are diverse in the minimum number of national votes required for their political parties to obtain a seat in parliament. The United Kingdom and the Netherlands are the only democracies where a seat can be won with less than 1% of the national vote. The remaining countries have a minimum threshold, which tends to impose higher barriers such as in France, Belgium and Germany (Cf. Downs, 2012: 38).

As noted by several scholars, high electoral thresholds can effectively dampen the chances of non-democratic political parties to enter parliament (Cf. Boix, 1999: 614; Carter, 2005: 132; Carter & Arzheimer, 2006; Downs, 2012: 34; Jackman & Volpert, 1996: 515; Norris, 2005: 121-122). Van der Brug et al.

stated the main reason for this is non-democratic parties usually have low “electoral potential” in a sense that they are less popular amongst the electorate (Cf. van der Brug e.a., 2005: 546). Jackman and Volpert found that “increasing electoral thresholds dampen support for the extreme right as the number of parliamentary parties expands” (Jackman & Volpert, 1996: 501). This resonates with Norris’ findings that “the existence of high legal vote thresholds (...) exerts an important mechanical brake on the radical right share of seats” (Norris, 2005: 255). Similarly, Downs argued “[s]etting minimum requirements on electoral support is one means of controlling access to parliamentary representation, and it can serve as a significant barrier to entry by pariah parties” (Downs, 2012: 34).

It is particularly important to ascertain the high and low dimensions of an electoral threshold to support the subsequent analysis. Several scholars have come to share an observation after studying the electoral fortunes of non-democratic parties and groups in different countries, that a threshold of 3 per cent represents a “threshold of relevance” whereby a party passing it breaks through from a “fringe” to a “relevant” party (Cf. Norris, 2005: 53; also Ellinas, 2007: 365). Drawing on this observation, it can be stated a threshold above 3 per cent is ‘high’ while an electoral threshold below 3 per cent is ‘low’. Using the dimension 3 per cent as a boundary between a high and low threshold also corresponds with the recommendation of the Council of Europe to use 3 per cent as a threshold for parliamentary elections¹¹.

In conclusion, if an electoral threshold is higher than 3 per cent, it represents a significant de facto constraint for non-democratic parties and groups to participate in parliamentary elections, as access to political institutions, given their low electoral potential as defined above, will be difficult if not impossible.

¹¹ See Paragraph 58 of the resolution which reads “In well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections. It should thus be possible to express a maximum number of opinions. Excluding numerous groups of people from the right to be represented is detrimental to a democratic system. In well-established democracies, a balance has to be found between fair representation of views in the community and effectiveness in parliament and government”. See the full text of the Resolution of the Council of Europe, 1547 (2007), available at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/ERES1547.htm> (accessed 07.11.2013)

3.2.3 The role of rules constraining the access of non-democratic parties to direct state funding

The third important de facto constraint is a special provision in law that gives state authorities the right to deny or suspend non-democratic political parties from access to *direct state funding* (Cf. Swyngedouw, 2009: 71-72; van Donselaar & Wagenaar, 2009: 395). Direct state funding refers to state cash grants given to either all political parties, or depending on the results of previous elections, or the number of candidates participating in an election (Cf. Casas-Zamora, 2005: 28; Carter, 2005: 176; Nassmacher, 2007: 122). There is another source of state funding called *indirect state funding*, referring to in-kind subventions such as access to state-owned broadcasters, public buildings or publicly printed material (Cf. Casas-Zamora, 2005: 28; Carter, 2005: 176). However, this form of state funding is less important for political parties as compared with direct state funding which often represents the primary source of income for political parties (Cf. Piccio, 2014: 224). Therefore this section will focus on the restrictions to direct state funding for non-democratic parties. Following the recent study by van Biezen (Cf. van Biezen, 2008: 316), all eight democracies analysed within this thesis provide direct state funding to their political parties. However, not all of them have legal provisions that constrain the non-democratic parties in their access to direct state funding.

There are several studies suggesting the importance of direct state funding for political parties. Generally, it is widely believed that direct state funding plays an important role as a principal source for political parties to develop their organisational strength (Cf. Katz & Mair, 1995: 6; van Biezen, 2004: 702; Carter, 2005: 176ff; van Biezen & Kopecky, 2007: 238ff; van Biezen, 2008: 345-346). Carter stated the direct state funding “enable(s) parties to field more candidates, buy more advertising space in the press or more time on television, print more campaign literature and, generally, reach a greater number of voters” (Carter, 2005: 176). Particularly over the last few decades, political parties in Europe have become even more dependent on the direct state funding. As it was noted by van Biezen and other scholars, in contemporary democracies political parties struggle with declines in their membership base and as a consequence suffer decreasing revenues due to less membership fee receivable and private contributions, which has increased the importance of

direct state funding as an alternative income source (Cf. van Biezen, 2004: 702; van Biezen, 2008: 347; Piccio, 2014: 224).

Typically the eligibility of receiving state funding is based on the number of votes a party is able to attract or sometimes the number of seats it is able to attain in parliament. In some democracies, non-democratic political parties cannot access direct state funding at all or their state funding can be withdrawn after being received, due to carrying out activities directed against the democratic state or violating democratic norms (Cf. van Donselaar & Wagenaar, 2009: 395). For example, Swyngedouw in his analysis of strategies used in Belgium against right-wing extremism stated that the law on financing political parties passed by the Belgian parliament in 1989 and amended in 1999 has been “highly relevant in containing the extreme-right political parties and groups” in the country (Swyngedouw, 2009: 71). In 2004, when the state court in Belgium ruled that the far-right political party Vlaams Blok violated the anti-racism law, the party automatically lost its entitlement to receive state funding which in effect caused the shutdown of this party (Cf. Erk, 2005: 494; Brems, 2006: 705ff). Similar observations regarding the importance of laws regulating the state party funding have been made in the Netherlands (Cf. van Donselaar & Wagenaar, 2009: 395).

To summarise, the right to withdraw direct state funding from political parties in case if they are found to violate democratic norms represents another important de facto constraint on the presence and operation of non-democratic parties in a democracy.

3.3 Developing the analytical framework: distinguishing three types of legal mechanisms

Thus far, the previous sections have demonstrated that the defence of democracy is not confined to the designated measures of militant democracy, but also expands to include non-militant democracy tools such as electoral threshold or special ballot access rules which assist in defending democracies de facto. This section will now address the question how can we meaningfully compare and classify different types of defensive democracies? A look at previous research studying variations between democracies in terms of militancy of their legal structures can be of little help. As argued earlier, the

previous research has failed to provide clear criteria to assess systematically the variations in the formal-legal democratic defensiveness between democracies.

Consequently, I suggest here an alternative approach. Before going into details, it is important to stress the legal measures which have been deemed important constraints on the presence and operation of non-democratic parties and groups are different in terms of their *severity*. For example, legal bans are more severe than state surveillance. While a legal ban completely dissolves a political party or group as an organisation, state surveillance does not destroy them altogether but only undermines their organisational capacity to be active. Similarly, the requirement to pay a monetary deposit is different in terms of the constraining effect it imposes on non-democratic parties as compared with a legal provision that denies members of a non-democratic party the right to organise a public demonstration. While the former measure constrains non-democratic parties indirectly through increasing the threshold for them to enter the parliament, the latter rule interferes directly with their right to the freedom of association (Cf. Preuss, 2012: 952). The list of such differences can go on. Importantly, it should be acknowledged that legal measures and provisions are not similar in terms of the severity of constraints they impose on the presence and operation of non-democratic parties and groups within a democracy. Such considerable differences between individual defensive measures can have important consequences for an assessment of formal-legal democratic defensiveness. We cannot, for example, consider democracies equally defensive if one has no regulation for party ban but the other does. In essence, this implies that we need to specify the boundaries between different formal-legal measures and provisions that are relevant for constraining the non-democratic parties and groups.

While building on these insights, I will use again an organisation-centred perspective on the formal-legal measures as a starting point for constructing the analytical framework. The principal advantage of using this perspective is it allows to divide the entire range of formal-legal measures into three analytical categories *depending on the severity of constraints they impose on the presence and operation of non-democratic parties and groups in a democracy*.

Moving from the most constraining to the least constraining category, these categories are as follows:

1. *Legal ban*
2. *Freedom constraints*
3. *Operational constraints*

The principal advantage of this categorisation is it allows to capture qualitative differences in the degree of democratic defensiveness between democracies more accurately. In essence, the relative formal-legal defensiveness of a democracy can be captured in a decreasing order from 1 to 3. That means that a country which allows banning political parties and groups (1) is more defensive than a country that only employs operational constraints (3). Table 4 describes the three analytical categories of democratic defensiveness with their corresponding individual legal measures in detail.

Table 4: Three analytical categories of formal-legal democratic defensiveness

Category	Types of legal constraints	Goal
1. Legal ban	<ol style="list-style-type: none"> 1. Legal ban of political parties 2. Legal ban of groups 	To permanently dissolve a non-democratic party or a group as formal or informal organisation.
2. Freedom constraints	<ol style="list-style-type: none"> 1. Constraints on public demonstrations 2. Constraints on the freedom of assembly 3. Constraints on the formation of military organizations (party militia, militant groups, etc.) 4. Constraints on the wearing of arms 5. Constraints on the wearing of uniforms 6. Constraints on hate propaganda 7. Constraints on anti-Holocaust propaganda 8. Constraints on propaganda degrading or delegitimizing democratic authorities 9. Constraints on propaganda delegitimizing democratic institutions 	To limit the chances of non-democratic actors to threaten the democratic order through unlawful actions or antidemocratic propaganda.

3. Operational constraints	<ol style="list-style-type: none"> 1. Constraints of state surveillance 2. Constraints on the employment in civil service 3. Constraints on the ballot access 4. Constraints of electoral threshold 5. Constraints on access to direct state funding for non-democratic political parties 	To put indirect constraints on the presence and operation of non-democratic parties and groups.
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Source: Legal constraints have been compiled using Loewenstein, 1937: 644ff; Capoccia, 2005: 58; Carter, 2005: 163ff; Norris, 2005: 87ff.

As Table 4 portrays, the framework includes a broad range of formal-legal measures representing the legal constraints upon the presence and operation of non-democratic parties and groups in a democracy. More specifically, the framework includes the majority of legal measures that were originally included in the concept of militant democracy¹². Therefore, the original typology of anti-extremist legislation of Loewenstein was used as a guide to select the individual categories of legal constraints (Cf. Loewenstein, 1937b: 644ff). Besides the instruments of militant democracy, this framework also includes legal rules and provisions used to constrain the presence and operation of non-democratic parties and groups *de facto*. In what follows I specify each defensive category in turn.

The first category *legal ban* represents the most constraining dimension including the two most punishing provisions democracies employ to constrain the presence and operation of non-democratic parties and groups: legal ban of non-democratic parties and legal ban of non-democratic groups (Cf. Capoccia, 2005: 59; Downs, 2012: 38). In the context of this study, a legal ban is defined

¹² Note that I do not consider emergency legislation. Typically, the enactment of emergency law leads to the delegation of extraordinary powers to the head of state or head of government to deal with an emergency and is often accompanied by a temporary suspension of individual liberties (Cf. Ferejohn & Pasquino, 2004: 216-217; Capoccia, 2005: 57; Tushnet, 2007: 275; Dyzenhaus, 2012: 448ff). However, following Canu and other scholars, the emergency law has no relevance today for defending democracies (Cf. Canu, 1997: 116; Ferejohn & Pasquino, 2004: 216-217). For example, as noted by Ferejohn and Pasquino, the emergency powers were rarely used in contemporary democracies. Only France has used emergency rule in the recent past (1961), which was due to the Algerian crisis (Cf. Buis, 2009: 93). Other democracies preferred to deal with common emergency situations including terrorism by ordinary legislation rather than by special emergency rules (Cf. Ferejohn & Pasquino, 2004: 216-217; also Tyulkina, 2011: 77). In addition, as argued by Capoccia, virtually all states have emergency rule in one form or another and thus focusing on it might not prove very useful analytically (Cf. Capoccia, 2001: 16).

as the right of state authorities *to dissolve a party or group permanently as a formal or informal organisation*. Typically, the decision to dissolve a party or group is followed by further prohibitions upon their organisational life such as carrying out demonstrations, wearing uniforms and other insignia in public, seizure of assets, criminalisation of leadership, and closure of offices, all of which implies their freedom of association is severely constrained (Cf. Capoccia, 2005: 57; Issacharoff, 2007: 1429; Downs, 2012: 38; Bourne, 2012: 4; Bourne & Casal, 2014: 3). Thus defined the focus excludes other forms of legal bans such as *non-registration* and *rights denial* as these are weaker forms of exclusions of non-democratic parties and groups from the political process because they work towards undermining rather than the elimination of a non-democratic organisation and thus do not qualify as legal ban as per the definition described (Cf. Bourne, 2012: 4; Bourne & Casal, 2014: 3). *Non-registration*, for example, involves only the denial of a new party's right to formally acquire legal recognition as a political party, acquire associated privileges such as direct state funding, or participate in elections. Even if an organisation was formally denied a registration as a political party, it can remain active as a non-registered association and thus continue to enjoy the freedom of association granted within a democratic state¹³. Similarly, *rights denial* involves only the withdrawal of rights and privileges, such as the right to stand in elections, which can be a temporary provision, while a party or group might not be formally dissolved (Cf. Bourne, 2012: 4; Bourne & Casal, 2014: 3).

The second category *freedom constraints* is visibly larger and comprises of formal-legal measures that place direct constraints upon the political rights and freedoms of non-democratic parties and groups. When comparing to the legal ban category, it is evident this category is less severe in terms of the constraints imposed upon the presence and operation of non-democratic actors. As detailed within Table 4, this category comprises 9 legal constraints. They have been compiled using the original typology of anti-extremist legislation by Loewenstein. These measures can be divided into two groups dependent upon

¹³ In addition, as noted by Brunner, most European democracies, with the exception of Spain and Portugal, do not impose special restrictions upon the right to register a political party (Cf. Brunner, 2002: 22).

whether they constrain freedom of assembly and association (constraints from 1 to 4)¹⁴ or freedom of expression (constraints from 5 to 9)¹⁵.

More specifically, the first provision constraining the freedom of assembly and association includes legislation used to constrain the rights of non-democratic party and group members to organise public demonstrations. This legislation targets the operations of non-democratic parties and groups directly, as it undermines their organisational capacity to organise demonstrations in public and use them as a platform to demonstrate their internal strength, to intimidate the public, and to create the sense of solidarity within the group (Cf. Eatwell, 2010: 224-225; Pedahzur, 2003: 66-67).

The second direct constraint to the freedom of assembly represents the provision that imposes legal constraints on the rights of non-democratic actors to gather together in public places such as, for example, parks, squares, pubs, or libraries (Cf. Taeusch, 1952: 35; Emerson, 1964: 1; Preuss, 2012: 952ff). Non-democratic parties and groups use such organised events to voice their antidemocratic claims to the wider public, to recruit new members, and to create networks. Therefore, by constraining this right, the state directly undermines their operation.

The third constraint prohibits the formation of military organisations such as paramilitary groups, private armies, or militia. This legislation interferes directly with the right of non-democratic actors to form associations. A paramilitary organisation has a similar organisational structure to the professional military but is not part of the state's formal armed forces.

The final provision constraining the freedom of assembly and association is legislation that prohibits the wearing of arms during public demonstrations and assemblies. By constraining this privilege, the state undermines the capacity of

¹⁴ Freedom of assembly and association can be defined as the freedom to organize and attend meetings for the purposes of information or the expression of opinion or for any other similar purpose (Cf. Preuss, 2012: 952-959; Taeusch, 1952: 33).

¹⁵ The Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) defines the freedom of expression as the right which includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice" (UN General Assembly Resolution, 1966). In common law countries the later freedom is often referred to as the freedom of speech while in civil law countries the freedom is termed as freedom of expression (Cf. Barendt, 2012: 893).

non-democratic parties and groups to militarise their ranks and in doing so, ensures the state monopoly of power (Cf. Loewenstein, 1937b; Capoccia, 2005: 60).

The remaining legal constraints within this category interfere directly with the freedom of expression for non-democratic actors. The individual measures include, on the one hand, legal rules that prohibit members of non-democratic parties and groups the wearing of uniforms and other insignia. As Loewenstein stated, often such outer insignia serve as a tool for non-democratic actors to foster a common identity or to intimidate the general public (Cf. Loewenstein, 1937b: 648-649). Although these rules target explicitly the individual members of non-democratic parties and groups, the latter are directly affected in their operation as their capacity to radiate the political affiliation of their members to wider public is undermined, making it thus difficult for them to maintain inner solidarity within the group (Cf. Loewenstein, 1937b: 649).

The next constraint to the freedom of expression is legislation prohibiting verbal expressions or written materials inciting hatred and discrimination toward groups of people on the grounds of their racial, ethnic, or cultural differences. Within contemporary democracies, such laws are typically referred to as anti-discrimination or anti-racist laws (Cf. Hare, 1997: 417; Bleich, 2011: 18; Herz & Molnar, 2012: 5). Although these laws do not explicitly target non-democratic parties or groups, they can directly affect their membership base if, for example, one or several of their members are imprisoned or fined for violating anti-discrimination laws.

Another constraint to the freedom of expression includes legislation that undermines the ability of members of non-democratic parties and groups to delegitimise democratic institutions or democratic authorities. It is well-known that some European interwar democracies allowed fascist parties to ascend to power by allowing the spread of distrust through doubting the legitimacy of democratic institutions, eventually escalating into a landslide support for such political parties, particularly so among disenchanting groups in the society (Cf. Loewenstein, 1937: 650-651). Within contemporary democracies, the instances of antidemocratic propaganda are less conspicuous or often rely on a minimal support within their societies. Despite this, quite often this propaganda is used,

notably so during elections, as a tool to gain further popularity, particularly amongst those disenchanted with their democracy or angry at the lack of economic performance by the current government (Cf. Capoccia, 2005: 59).

The final constraint to the freedom of expression within this category is legislation which imposes legal restrictions on the dissemination of speech and writings which deny, ridicule, or otherwise diminish the crimes committed during World War II against the Jewish population. Within contemporary democracies, such legislation is usually referred to as 'Holocaust denial' law (Cf. Markovits & Hayden, 1980: 54; Kahn, 2004: 4). As the result of the enormous suffering inflicted upon the Jews during World War II, many European democracies have enacted such laws prohibiting anti-Holocaust propaganda although, as we will see later, not every country in Europe has done so.

The third category groups together *operational constraints*. In comparison with the first two categories, this category is the least severe in its implications upon the operation of non-democratic actors. Among individual rules this category includes, for example, special rules for state surveillance of non-democratic parties and groups. State surveillance includes gathering information on activities and members of non-democratic political parties and groups, by special government agencies or specially trained police forces (Cf. More, 1984; Preuss, 2012: 964). Often the practice involves infiltration of suspect parties and groups by undercover agents (Cf. Marx & Fijnaut, 1995: 3). Although state surveillance belongs to the classic canon of militant democracy, this constraint undermines the presence and operation of non-democratic parties and groups rather indirectly. According to Art, when a party or a group is put under state surveillance, it can effectively deter or discourage people from joining such organisations due to the fear that such actions could result in problems in one's professional life (Cf. Art, 2007: 102-103).

The second operational constraint includes special rules that formally deny a member of a non-democratic party or a group the right to work in civil or public service. As argued by scholars, the existence of this restriction represents a powerful indirect constraint upon the presence of non-democratic parties and groups within a democratic state. Refusing members of a non-democratic organisation an entry in civil service or requiring the members of civil service to

disclose their political affiliation renders an intense pressure on non-democratic actors, making all efforts to increase the membership base or enticing their members to remain active voice within their organisation extremely difficult. Therefore this measure contributes indirectly to the drain of antidemocratic parties and groups within a democracy (Cf. Brinkmann, 1983: 588; Corby, 1986: 171; Kvistad, 1988; Rudolf, 2003; Art, 2011: 192; Preuss, 2012: 964). As a result, non-democratic parties or groups forcefully lose their members considerably limiting so their chances to field enough candidates during elections, to reach wider groups of voters within their society, and to organise public events. (Cf. Art, 2011: 192; Preuss, 2012: 964).

Apart from state surveillance and constitutional restrictions to the right to work in civil service, this category also includes all de facto constraints detailed earlier within this chapter. As discussed, such de facto constraints include special rules on ballot access (requirements for signature collection and payment of a monetary deposit), the electoral threshold, and special rules for the withdrawal of direct state funding from parties that threaten the democratic constitutional order. These de facto constraints belong to this category because they are the least severe in terms of constraints they impose on the presence and operation of non-democratic parties.

3.4 Methodology: Coding procedure to assess variations in formal-legal democratic defensiveness

After the three dimensions of democratic defensiveness and the respective formal-legal constraints have been broadly introduced, this section will address the underlying coding procedure that will be used to assess variations in formal-legal democratic defensiveness between eight democracies.

In order to facilitate a cross-national assessment of the state variations in formal-legal democratic defensiveness, *I will exclusively assess the presence or absence of specified legal mechanisms*. Therefore I will not assess *whether and how democracies use these mechanisms in practice*. As previously argued, while focusing on the usage of legal mechanisms may represent an important methodological approach to assess how defensive a democracy is compared to another, it is important first to generate systematic insights into the differences and similarities between democracies in the availability of such tools before

accounting for patterns of their usage. By focusing on the availability of legal tools, this study will bridge a significant gap that currently exists in defensive democracy literature, as no other study has analysed this extensive array of defensive tools as this study will. The presence or absence of specified measures will be identified based on an in-depth analysis of primary legislation as specified further below in this chapter and, where necessary, complemented by secondary literature. In order to capture the differences, for each category dummy variables of 1 and 0 will be used to identify the presence or confirm the absence of a specific legal constraint. To put simply, where a specific legal constraint is present, the country is coded 1; alternatively, where the legal constraint is absent, the country is coded 0. The relative formal-legal defensiveness of a democracy will then be calculated by adding up the total scores for each category. On this basis, an index will be constructed for each category capturing the defensiveness of a country ranging from 0 to 1 expressed as a percentage. On this basis, the democracies will be ranked depending on the standardized score they achieve for each category, dividing them up into three groups respectively of *low defensiveness* (scores 0-0.3), *medium defensiveness* (0.4-0.6) and *high defensiveness* (0.7-1). For instance, if Germany receives an index of 1 for the first category of legal ban (that is having both a regulation for party and group ban) while Belgium receives 0.5, since it has only group ban within this category, Germany's level of relative democratic defensiveness in this category will be defined as 'high defensiveness' while Belgium's level of defensiveness will be defined as 'medium defensiveness'. This procedure will be applied to assess state variations within the remaining two categories also. The following section will discuss the specification of indicators used for each category.

3.5 Operationalization of variables

To facilitate the assessment of variations between democracies across all three categories, the individual constraints will be operationalised as described below in turn.

1. Legal ban

Legal bans that are applied to non-democratic parties and groups will be measured through the following two indicators:

(1) legal ban of political parties

(2) legal ban of groups

Party bans and group bans will be assessed separately as the majority of democracies have distinct laws for party bans and group bans (Cf. Thiel, 2009: 403). Therefore, when focusing on the first indicator of party ban, I will look whether the law explicitly refers to political parties as targets. Alternatively, where the focus is on the second indicator of group ban, I will look whether the law refers to groups (militant groups, paramilitary groups, terrorist groups, private militia) as targeted actors. It should be noted that there are democracies where a political party can be considered as a form of association and therefore be banned on the basis of laws prohibiting associations. This is however very unusual and does not happen frequently. In addition, distinguishing if a political party can be banned on the basis of association law or not, would require another measurement and is beyond the scope of this analysis.

Freedom constraints

The political freedoms constraints applied to non-democratic parties and groups will be described through the following nine indicators:

(1) Constraints on public demonstrations

In assessing the state variations in this constraint, I am particularly interested whether democracies have such legal provisions which require non-democratic parties and groups to formally request permission to organise a demonstration and whether such permission can be denied. Consequently, democracies where this permission is required and thus can be denied will be coded 1, while democracies where no permission is required will be coded 0. The typical grounds for preventive bans can include considerations of public order and safety, vicinity to public buildings, or negative experiences in the past (Cf. Canu, 1995: 121).

(2) Constraints on the freedom of assembly

My aim in assessing the state variations in this constraint is to assess whether a state can disband or prohibit unlawful assembly or not. Consequently, if a state has the right to disband or prohibit unlawful assemblies they will be coded 1, whereas states which have no such right will be coded 0. An unlawful assembly is a gathering organised by members of a party or a group prohibited by executive authorities or the legal court or one which is likely to breach the public order (Cf. Canu, 1995: 121).

(3) Constraints on the formation of military organisations

In assessing the variations in this constraint I am interested whether a state has special regulations in law giving it the right to prohibit the formation of military organisations such as militant groups, para-military organisations, terrorist groups, violent groups, and private militia. Consequently, states which have such law will be coded 1, while states without such rule will be coded 0.

(4) Constraints on the wearing of arms

In looking for variations in this constraint I am interested whether a democracy has special provisions in law to prohibit the wearing of arms and weapons during demonstrations and in assemblies. Consequently, where a state has such provisions available within its law it will be coded 1, while a state which has no such legal provisions available will be coded 0.

(5) Constraints on the wearing of uniforms

In assessing the state variations in this constraint, the focus is the presence or absence of legal rules that prohibit the wearing of uniforms and other insignia of prohibited or unlawful political parties and organisations, such as Adolf Hitler' NSDAP party. Democracies with such rules will be coded 1, while democracies without such rules will be coded 0.

(6) Constraints on hate propaganda

My goal in assessing the state variations in this constraint is to assess the differences between democracies in the availability of legal measures and provisions that prohibit the distribution of materials either in speech or writing inciting discrimination against other groups of people on the ground of their

racial, ethnic, religious, or cultural differences. Consequently, where a state possesses such regulations they will be coded 1, while a state devoid of such rules will be coded 0.

(7) Constraints on anti-Holocaust propaganda

The target set for this constraint is to look for the presence or absence of legal measures prohibiting the distribution of propaganda material which refutes, minimizes, or otherwise trivializes the Holocaust of Jewish people during World War II. Consequently, a state which has such measures available will be coded 1, while a state without such provisions will be coded 0.

(8) Constraints on propaganda degrading or delegitimizing democratic authorities

In assessing the variations in this constraint I will be looking for differences between democracies in the presence or absence of legal rules prohibiting the dissemination through speech or publication of propaganda material seeking to delegitimize or otherwise express contempt of democratic authorities. A state which has such rules available will be coded 1, while a state without such rules will be coded 0.

(9) Constraints on propaganda delegitimizing democratic institutions

The goal in assessing the state variations in this indicator is to look for the availability of such provisions in law which prohibit the distribution of propaganda materials aimed at delegitimizing the democratic form of the government, democratic institutions, or state insignia in the eyes of general public. Following the coding procedure, democracies which have such provisions available will be coded 1, while democracies without such provisions will be coded 0.

2. Operational constraints

The *operational constraints* applied to non-democratic political parties and groups will be measured through the following five indicators:

(1) State surveillance

In assessing the variations in this constraint across eight democracies, this study will focus on the availability of such provisions in law which authorize the state to conduct surveillance and gathering intelligence about the activities of non-democratic political parties and groups by special forces in police or other relevant state bodies set up for this purpose. As noted by Preuss, “the undercover observation and infiltration of a political party through state agents is a serious mode of state interference which requires not only a distinct authorization by law but, in addition, a special justification which meets the standards of the principle of proportionality” (Preuss, 2012: 964). Consequently, states where such law exists will be coded 1 while states which do not authorize state surveillance will be coded 0.

(2) Constraints on the employment in civil service

In assessing the state variations in this constraint this study will focus on the presence or absence of specific law on base of which members of non-democratic parties and groups can be denied or suspended from civil service. Such conditions can include a membership in a party or group which are considered harmful to the stability of democratic state, or a breach of loyalty to the state and its constitution. Consequently, democracies where such law is present will be coded 1, while democracies without such law will be coded 0.

(3) Constraints on ballot access

As previously argued, barriers to participate in elections can be erected through different legal means. The literature on electoral systems points to signature requirements and deposit payments as alternative means to prevent groups from participating in elections. To distinguish in form of a simple clear-cut proxy, I will distinguish systems that do not resort to such two mechanisms constraining ballot access from those that do. Thus, countries will be coded 0 if they do not require signatures or deposit payments, while countries that do require these mechanisms will be coded 1.

(4) Electoral threshold

As emphasised earlier, another means to protect a democracy from its non-democratic parties is the electoral threshold. Following the suggestion made

earlier by some scholars to take 3 per cent as a boundary between high and low threshold (Cf. Norris, 2005: 53; also Ellinas, 2007: 365), I consider democracies with an electoral threshold above 3 per cent as more defensive (thus coded 1) than democracies with an electoral threshold below 3 per cent or no electoral threshold at all (thus coded 0).

(5) Constraints on access to direct state funding for non-democratic political parties

Finally, the focus in assessing the state variations in this constraint is to identify the presence or absence of rules that allow state authorities to deny or withdraw direct state funding from non-democratic political parties, if they violate the law or threaten the democratic order. As with the other variables, democracies with the presence of such rules will be coded 1, while democracies without such rules will be coded 0.

3.5 Sources

The study is based on a document analysis method as an approach to start with. Bowen defined a document analysis as “a systematic procedure for reviewing or evaluating documents – both printed and electronic (computer-based and Internet-transmitted) material” (Bowen, 2009: 27). The main rationale for adopting this approach is that formal-legal strategies, which are the main focus of this study, are based on legal documents such as state constitutions, penal and civil codes, electoral codes, party laws, and other pertinent laws passed by the legislation and issued by courts (Cf. Capoccia, 2005: 48-49)¹⁶.

The relevant laws were examined as of the end of 2013 either in their original form or in form of an official English translation that could be retrieved or accessed from official government websites. For Germany, the original source of information was the following website www.dejure.org, which contains all legislation in Germany sorted according to the area of legislation. Another helpful source was the website run by the Federal Ministry of Justice in cooperation with Juris GmbH (www.juris.de) which provides online access to most relevant legislation. The original source of information surrounding Swedish law was found using the Swedish government website which provides

¹⁶ For the overview of legal sources used see Appendix.

access to non-official translation of most Swedish statutes ordered in areas of legislation (<http://www.government.se/>). The relevant source of information used to find relevant legislation in Denmark was the Danish government website (<https://www.retsinformation.dk/>). In the United Kingdom, the recently created database managed by The National Archives on behalf of the government publishes online all legislation in the United Kingdom since 1991 (www.legislation.gov.uk). For Belgium, the original source of information used was the access portal of *Moniteur Belge* which gives access to Belgian law online (www.ejustice.just.fgov.be/doc/rech_f.htm). Another helpful source of information was *World Law Guide* website which contained legislation information for many of the eight countries covered in this study (<http://www.lexadin.nl/wlg/>). Additionally, the online legislation service run by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE) (<http://legislationline.org/>) was particularly useful. According to the information on the website, the “Legislationline.org provides direct access to international norms and standards relating to specific human dimension issues as well as to domestic legislation and other documents of relevance to these issues. These data and other information available from the site are intended for lawmakers across the OSCE region”. However, the website’s usefulness was limited as it mostly only contains the extracts from relevant legal documents.

I could consult German, French and English primary sources in their original and coded all legal texts in these three languages respectively without relying on translations. The Swedish legislation was mostly available online in the English language. The legislation from Denmark and Netherlands were mostly available in their original language which has presented some difficulties during the coding of legal sources from these two countries. Where there was no English translation of original legal documents in Denmark and the Netherlands available, I relied on Google Translate (www.google.com) to code the respective legislation.

The data used for my empirical analysis came primarily from the following sources. Firstly, the state constitutions of countries included in my study were extensively consulted. All current state constitutions have been sourced from

the Internet from websites of national governments or parliaments. For each country I used English translations of state constitutions accessible on the relevant government websites. The multi-volume compendium by Blaustein and Gisbert *Constitutions of the Countries of the World* provides a comprehensive English translation of constitutions of some European countries (Cf. Blaustein & Franz, 1971). The state constitutions were primarily consulted as they represent an important source of the legal foundation of political organisations and contain rules that give powerful clues regarding the relationship between state and political parties, and how the latter should behave in order to comply with democratic fundamentals of a state in question (Cf. van Biezen, 2012: 190). Additionally some constitutions contain explicit rules outlining the conditions required to allow a state to restrict freedoms, as, for example, in Germany which contains many provisions relevant for defending democracy within its state constitution, the Basic Law.

A lot of information used to analyse state regulation of non-democratic political parties and groups has been sourced from the penal codes of selected countries. Penal codes contain important information regarding the range of repressive measures that democracies employ to combat extremism and violence. Canu, for example, defined the penal code “as the oldest mechanism of protecting the state against extremists” (Canu, 1997: 116). Penal codes were mostly sourced from the internet (see the Appendix for details). For earlier versions of penal codes, the *American Series of Foreign Penal Codes* was consulted as a source for accurate English translations for penal codes of some European countries (Cf. Mueller, 1960; Rayar & Wadsworth, 1997; West & Shuman, 1966). However, this source contains older versions of penal codes and therefore must be used with caution. In some countries it was necessary to consult civil codes, specifically the Netherlands where many rules pertaining to the formal regulation of political parties and other associations are contained within its civil code. In case with the Netherlands, a recently published official translation of its civil code was particularly useful (see Warendorf et al., 2009).

Another original source of information pertaining to lawful restrictions upon political parties, were the electoral codes and party laws of respective countries. In this respect, the richest source of information used was the online service created and led by the research group at the University of Leiden (The

Netherlands) led by Professor Ingrid van Biezen on *The Constitutional Regulation of Political Parties in Post-War Europe and Re-Conceptualizing Party Democracy* (<http://www.partylaw.leidenuniv.nl/>). According to its homepage, their online portal contains a searchable database on the party laws in post-war European democracies.

Finally, secondary literature was extensively used, mostly to draw on individual case-studies on militant democracy, as well as the recent literature on countering extremism within a democracy (e.g. Boverter, 1985; Canu, 1997; Schellenberg, 2009; Thiel, 2003, 2009). The legal periodicals such as *Hasting Constitutional Law Quarterly* and *Hein Online Collection of Law Periodicals* have also been very useful sources of secondary literature. In some cases, such as in the United Kingdom, it was also necessary to consult court rulings and case law.

3.6 Basic rationale of the country selection

In an effort to capture the state variations in democratic defensiveness along the variables described above, 8 advanced European democracies have been selected for comparative analysis: Austria, Belgium, Denmark, France, Germany, Netherlands, Sweden, and the United Kingdom. The focus on advanced democracies only was first driven by the need to assure basic comparability since I need to be able to assume that in these democracies the rule of law is well established and the implementation of formal-legal measures can be taken as a given (implying their practical relevance for non-democratic political actors they target), an assumption that is more difficult to maintain when studying relatively young democracies. Additionally, the selection of these particular countries was also driven by their variation in two particular factors, which are considered crucial for democratic defensiveness in the literature. The first factor is the varied historical experiences of an internally triggered or supported breakdown of democratic regime in the past. The eight democracies selected for this study represent different constellations regarding experiences of an internally triggered or supported breakdown of their democratic system in the past. Germany, for example, represents a case-study where democratic regime was subverted internally by non-democratic forces nourished within the society. By contrast, Austria, France and Denmark, represent case-studies

where the breakdown of democratic regime was triggered externally but with support of internal non-democratic forces. On the other hand, Belgium and the Netherlands represent case-studies where the breakdown of their democratic regime was also triggered externally but, in contrast to the previous group of countries, without active support of internal non-democratic forces. Finally, Sweden and the United Kingdom represent case-studies which have no experience in suffering a democratic breakdown.

The second factor of variation is determinant upon the type of democracy that can be either substantive or procedural. As detailed later, the key difference between these two forms of democracy lies in the possibility for governing majorities to amend the core democratic principles within the constitution in order to abolish or destroy democracy (Cf. Fox & Nolte, 1995: 14ff). The selected democracies vary greatly across these two types of democracy. Germany and France, for example, are substantive democracies while other remaining democracies represent procedural democracies. These two broad factors will be theorized and examined in detail and linked to patterns of defensiveness in Chapter 7 after I have described patterns of defensiveness along the described dimensions in Chapters 4, 5 and 6.

3.7 A first overview of formal-legal defensiveness within eight European democracies

Based on the variables and coding methodology described previously, this section will present a first overview of the differences and similarities between the eight democracies selected across the three categories of formal-legal democratic defensiveness. Table 5 maps out the eight democracies along the variables within each defensive category respectively. Since each category includes constraints of varying strictness regarding their implications for the presence and operation of non-democratic parties and groups, the countries will be assessed across each category *separately*.

Table 5: A systematic mapping of differences in formal-legal defensiveness between 8 European democracies

Indicator / Country	DE	AT	FR	BE	NL	DK	SE	UK
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Legal ban	1. Legal ban of political parties	1	1	1	0	0	0	0	0
	2. Legal ban of groups	1	1	1	1	1	1	1	1
	Standardized score:	1	1	1	0.5	0.5	0.5	0.5	0.5
Freedom constraints	1. Constraints on public demonstrations	1	1	1	1	1	0	1	1
	2. Constraints on the freedom of assembly	1	1	1	1	1	0	1	1
	3. Constraints on the formation of military organizations	1	1	1	1	1	1	1	1
	4. Constraints on the wearing of arms	1	1	1	1	1	1	0	1
	5. Constraints on the wearing of uniforms	1	1	1	1	1	0	0	1
	6. Constraints on hate propaganda	1	1	1	1	1	1	1	1
	7. Constraints on anti-Holocaust propaganda	1	1	1	1	0	0	0	0
	8. Constraints on propaganda against democratic incumbents	1	1	1	1	0	1	0	0
	9. Constraints on propaganda against democratic institutions	1	1	0	0	0	0	0	0
	Standardized score:	1	1	0.8	0.8	0.6	0.4	0.4	0.6
Operational constraints	1. State surveillance	1	1	1	1	1	1	1	1
	2. Constraints on employment in civil service	1	1	0	0	1	1	0	1
	3. Constraints on ballot access	1	1	0	1	1	1	1	1
	4. High electoral threshold	1	1	1	1	0	0	1	0
	5. Constraints on access to direct state funding for non-democratic political parties	1	0	0	1	1	0	0	0
	Standardized score:	1	0.8	0.4	0.8	0.8	0.6	0.6	0.6

Note: 1 = legal mechanism is present; 0 = legal mechanism is absent. The standardized score reported for each category expresses, in percentages, the relative proportion of the available provisions to the total number of regulations in the category as a whole. Legend: AT-Austria, BE-Belgium, DE-Germany, DK-Denmark, FR-France, NL-Netherlands, SE-Sweden, UK-United Kingdom

Table 5 reflects the defensive frameworks adopted by democracies are fairly diverse, with all democracies being defensive to a certain degree with no country falling in the 'low defensiveness' range (that is falling in the range from 0.3-0), which underlines the general tendency among democracies studied to

adopt fairly constraining legal frameworks against non-democratic actors. Since the three categories contain constraints of varying strictness, it is problematic to draw conclusions about the degree of their democratic defensiveness from simply adding up all three standardized scores in each category to have one country score (i.e. given that the legal ban is more severe than the operational constraints it would be problematic to weigh up scores in both dimensions as equally severe). On the other hand, Table 5 reveals significant differences between the eight democracies in terms of their disposition towards certain categories making it difficult to assess their relative defensiveness straightforwardly unless a more detailed account of the state variations across each category was provided separately. As Table 5 suggests, there are only a few cases where a democracy developed the tendency to have the same level of formal-legal defensiveness across each category. For example, Germany and Austria tend to range as high defensive (that is having a standardized score ranging between 1-0.7) across all three categories which indicates these two democracies are more defensive than the other countries covered in my study. Alternatively, democracies such as Denmark, Sweden, and the United Kingdom tend to range as medium defensive across all three categories (that is having a standardized score ranging between 0.6-0.4). However, Belgium, France, and Netherlands range higher in one dimension and lower in another which makes it difficult to assess straightforwardly their relative defensiveness. For instance, France tends to range high defensive in the first two categories but ranges medium defensive within the third category, operational constraints. Belgium also ranges medium defensive in the first category, legal ban, but high defensive within the remaining two categories, freedom constraints and operational constraints. Finally, the Netherlands tends to range medium defensive in the first two categories, legal ban and freedom constraints, but has high defensiveness regarding operational constraints.

To sum up, this first overview of the relative differences in democratic defensiveness across the democracies analysed indicates that a more detailed analysis of variations in each individual category is required before a more plausible reconstruction of their relative differences in the degree of formal-legal democratic defensiveness can be offered. This analysis will be done throughout chapters 4, 5 and 6, each looking at one of the three categories in turn. While

doing so, these chapters will also provide a more detailed account of the defensive legislation within each democracy.

3.8 Conclusion

The main purpose of this chapter was to present an analytical framework that can be used to map and systematically identify the differences in formal-legal defensiveness of democratic countries included in this study. This chapter started out from a critic of the concept of militant democracy for being insufficient as a theoretical framework to cover the range of defensive measures contemporary democracies have at their disposal to counter the threat of non-democratic parties and groups. On this basis, I used the organisation-centered perspective on formal-legal measures to expand the range of formal-legal measures as applicable for constraining the presence and operation of non-democratic parties and groups beyond the conventional measures of militant democracy toward those mechanisms which assist in defending democracy de facto. The range of such de facto constraint has been identified within electoral laws and party finance laws. On this basis, I presented in the next step an analytical framework to assess the differences between democracies in formal-legal defensiveness. Drawing on the organization-centered perspective toward legal measures, I divided the entire range of formal-legal measures into three analytical categories depending on the severity of the constraints they impose on the presence and operation of non-democratic parties and groups in a democracy. After discussing the key constraints within each category, specifying the sources used to form the analysis and providing the rationale behind the country selection, I was able to then analyse the eight European democracies within the context of the analytical framework presented, and highlight the existing cross-national variations in democratic defensiveness. The subsequent chapters 4, 5 and 6 will discuss each category separately in greater detail, beginning with the first category, legal ban, and followed by the second and third categories, freedom constraints and operational constraints, respectively. Once this detailed discussion is provided, it will then be possible to return to a more detailed comparative analysis of differences and draw further significant conclusions.

CHAPTER 4:

SYSTEMATIC ASSESSMENT OF VARIATIONS BETWEEN DEMOCRACIES IN THE PRESENCE OF LEGAL PARTY AND GROUP BANS

4.1 Introduction

The previous chapter has made clear that democracies vary in terms of dispositions they have toward individual categories. This chapter will expand the first category of legal ban to ascertain the state variations within this category. As previously stated, this category is the most severe within my analytical framework. In order to assess the state variations in party and group bans, I focused on the presence or absence of the right to dissolve political parties and/or groups respectively. Table 6 maps the eight democracies systematically across these two types of constraints. As specified earlier, the standardised score reported for each category expresses, in percentages, the relative proportion of the available provisions to the total number of regulations in the category as a whole.

Table 6: Systematic assessment of variations in the dimension of legal ban

Country / Indicator	Legal ban of non-democratic political parties	Legal ban of non-democratic groups	Standardised score	Level of defensiveness in this dimension
Austria	1	1	1	High defensiveness
France	1	1	1	High defensiveness
Germany	1	1	1	High defensiveness
Belgium	0	1	0.5	Medium defensiveness
Denmark	0	1	0.5	Medium defensiveness
Netherlands	0	1	0.5	Medium defensiveness
Sweden	0	1	0.5	Medium defensiveness
United Kingdom	0	1	0.5	Medium defensiveness

Note: 1 = legal mechanism is present; 0 = legal mechanism is absent. Grey shading is added to indicate democracies in high defensiveness category.

Table 6 reflects that countries range between high defensiveness and medium defensiveness, while there is no democracy falling in the low defensiveness range within this category which underscores the relative importance of the legal ban mechanism among the eight democracies studied. Democracies such as Austria, France, and Germany build the first group of countries having high defensiveness within this category with a score of 1. In comparison with the

remaining democracies, these three countries have specific legal provisions for both party and group bans. Meanwhile, Belgium, Denmark, Netherlands, Sweden, and the United Kingdom fall in the group of countries with medium defensiveness within this category. In comparison with the first group of countries, these democracies have no right to ban political parties but have special rules for banning groups. The following section will describe these differing levels of defensiveness in greater detail with particular focus on the legal situation within each democracy.

4.2 Democracies with *high defensiveness* in the category of legal ban

According to the table, Austria, France, and Germany fall in the range of democracies with high defensiveness within this category, having specific legal provisions for party and group bans in their legal arsenals. In the following sections I analyze the legal situation in these countries.

4.2.1 Legal ban in Austria

The first country in this group is Austria. There are at least three laws that qualify this country for a high defensiveness within this category. The most important law is the *Verbotsgesetz 1947* (Prohibition Act) that was enacted few weeks after the declaration of state independence on 27th April 1945¹⁷. According to Article 1 of this law, all political parties and organisations resembling the National Socialist party or its militant subdivisions and affiliated groups are prohibited¹⁸. The creation of parties in the spirit of National-Socialism is strictly forbidden. These criminal offenses are set out within Articles 3 to 3i and fall within the expressive jurisdiction of the court. According to Article 3a, the establishment or active support of a National Socialist organisation is subject to an imprisonment up to 20 years. Thereby the law applies indiscriminately against all parties and groups that function in the spirit and are guided by ideas of National Socialism (Cf. Auprich, 2009: 47).

¹⁷ Verbotsgesetz 1947 Stf: Stgbl. Nr. 13/1945, available at: http://www.ris.bka.gv.at/Geltende_Fassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000207 (accessed 03.04.2013)

¹⁸ Article 1 of the law reads that “the NSDAP, its militant groups (Wehrverbände) (SS, SA, NSKK, NSFK), its subdivisions and affiliated groups as well as all National Socialist organisations and formations (Einrichtungen) on the whole are dissolved; the new formation of these groups is forbidden” (own translation).

Another relevant provision is stipulated within the *State Treaty* adopted on May 15, 1955 proclaiming the formation of a sovereign Austrian state¹⁹. Article 9 Paragraph 1 to 3 of this treaty documents that all organisations including political parties and groups which engage in activities that contravene the principles of the United Nations Organisation or try to strip people of their democratic rights must be dissolved²⁰.

The third law is the *Law on Associations* (Vereinsgesetz, VerG) enacted in 2002 which stipulates in Article 29 Paragraph 1 that any association can be prohibited if it violates the penal code, its own statute, or does not conform to the terms of its legal status²¹. Besides these provisions, Article 246 of the *Penal Code* stipulates that building of an organisation is prohibited whose goals violate the provisions of the Penal Code, or which aim to destroy the independence, state form, and the constitutional order of Austria²².

4.2.2 Legal ban in France

France's repertoire of legal provisions relating to legal ban also qualifies it for a high defensiveness within this category. Similar to Austria, the law in France contains several rules that can be used for banning non-democratic groups and political parties. The conditions for a legal ban of political parties are set forth in the constitutional charter although the constitutional text does not explicitly refer

¹⁹ Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich, Bundesgesetzblatt für die Republik Österreich, Vienna: 30. Juli 1955, available at: <http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR30002357> (03.04.2013)

²⁰ The original text reads "alle Organisationen faschistischen Charakters aufzulösen, die auf seinem Gebiete bestehen, und zwar sowohl *politische, militärische* und *paramilitärische*, als auch alle anderen Organisationen, welche eine irgendeiner der Vereinten Nationen feindliche Tätigkeit entfalten oder welche die Bevölkerung ihrer demokratischen Rechte zu berauben bestrebt sind" (cursive is mine, S.B.).

²¹ Law on Associations (Vereinsgesetz, VerG), Article 29 Paragraph 1 reads "(1) Jeder Verein kann unbeschadet des Falls nach Art. 2 Abs. 3 bei Vorliegen der Voraussetzungen des Art. 11 Abs. 2 der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten, BGBl. Nr. 210/1958, mit Bescheid aufgelöst werden, wenn er gegen Strafgesetze verstößt, seinen statutenmäßigen Wirkungskreis überschreitet oder überhaupt den Bedingungen seines rechtlichen Bestands nicht mehr entspricht". The *Bundesgesetz über Vereine* (Vereinsgesetz, VerG) is available at: <https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20001917/VerG%2c%20Fassung%20vom%2019.02.2014.pdf> (accessed 05.04.2013)

²² Penal Code (Strafgesetzbuch), available at: [http://www.jusline.at/Strafgesetzbuch_\(StGB\).html](http://www.jusline.at/Strafgesetzbuch_(StGB).html) Paragraph 1 of the article reads "Wer eine Verbindung gründet, deren wenn auch nicht ausschließlicher Zweck es ist, auf gesetzwidrige Weise die Unabhängigkeit, die in der Verfassung festgelegte Staatsform oder eine verfassungsmäßige Einrichtung der Republik Österreich oder eines ihrer Bundesländer zu erschüttern, ist mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu bestrafen". (accessed 07.04.2013)

to the procedure for banning such parties (Cf. Finn, 2001: 57; Buis, 2009: 88-89). Article 4 of the French Constitution commits political parties and political groups (“les partis et groupements politiques”) to a requirement to respect democracy and territorial integrity²³. According to this provision the state is empowered to ban any political party or group which does not abide by these principles (Cf. Fox & Nolte, 1995: 27; Minkenberg, 2006: 39).

Other provisions stipulating conditions on the basis of which political parties or groups can be banned can be found within the statutory law. For example, the *Law on Associations* adopted in 1901, besides setting out the legal conception of what is an association, stipulates the conditions that can lead to a formal dissolution of political parties and groups (Cf. Buis, 2009: 89)²⁴. According to Article 3, any association including political parties “which intends to infringe on the republican form of the government is null and void”²⁵.

Finally, as a result of a grown threat from paramilitary groups before World War II, the French government adopted in 1936 the *Law on Combatant and Paramilitary Groups* that targeted specifically military and paramilitary organisations in the country (“les groupes de combat et milices privées”)²⁶. According to Boventer, the law was enacted because of the inability of the previous Law on Associations of 1901 to effectively suppress the various fascist and Nazi groups in the country. The key weakness of the previous legislation was that it targeted only officially registered associations and did not apply to informal political groups (Cf. Boventer, 1985: 164). The law of 1936 is still in force and remains the main juridical instrument to control radical groups in the country (Cf. Boventer, 1985: 155; Buis, 2009: 90). According to this law, a group

²³ Constitution de la République Française du 4 Octobre 1958, available at: <http://www.assemblee-nationale.fr/connaissance/constitution.asp>. Article 4 reads « Les partis et groupements politiques concourent à l’expression du suffrage. Ils se forment et exercent leur activité librement. Ils doivent respecter les principes de la souveraineté nationale et de la démocratie ». (accessed 14.03.2013)

²⁴ Loi du 1er juillet 1901 relative au contrat d’association, version consolidée au 6 mai 2009, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069570&dateTexte=20090506>. Article 1 defined an association as “An association is an agreement by which two or more people are sharing, permanently, their knowledge or activity for a purpose other than sharing profits. It is governed as to its validity by general principles of law applicable to contracts and obligations” (own translation). (accessed 10.03.2013)

²⁵ Article 3 reads “[t]oute associations fondée sur une cause ou en vue d’un objet illicite, contraire aux lois, aux bonnes moeurs, ou qui aurait pour but de porter atteinte à l’intégrité du territoire nationale et à la forme républicaine du gouvernement est nulle et de nul effet”.

²⁶ Loi du 10 janvier 1936 sur les groupes de combat et milices privées, available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=3CFAD2B681F1BDB366E7E67A1539770A.tpdjo12v_1?cidTexte=JORFTEXT000000325214&dateTexte (accessed 10.03.2013)

is banned by a presidential decree taken by the Council of Ministers after hearing a report from the Minister of the Interior (Cf. Camus, 2009: 148). More specifically, according to Article 1(1-7) the President of the Republic is empowered to dissolve any group which provokes armed demonstrations, is of a paramilitary nature, or aims at dismemberment of the territorial state, or aims at forceful overthrow of the republican form of the government, or incites to racial hatred and discrimination of other groups, or supports acts of terrorism, or collaborates with an enemy (Cf. Mathieu, 1999; Camus, 2009: 148)²⁷. In addition, Articles 431-15 and 431-17 of the *Penal Code* contain special provisions against combattant groups, that is “any group of persons holding or having access to weapons”²⁸. Such groups can be banned by a court decision.

4.2.2 Legal ban in Germany

Germany’s arsenal of legal provisions also qualifies this democracy for a high defensiveness within this category. Germany has several legal provisions that can be used to ban non-democratic political parties and groups. The key provision is contained within the Basic Law (Grundgesetz), the state constitution of Germany. According to Article 21 Paragraph 2, political parties that “by reason of their aims or the behavior 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”²⁹. According to this article the court can ban any political party if it violates the ‘free democratic basic order’ or engages in activities directed against the sovereignty and integrity of the German state. The fundamental characteristics of the free democratic basic order have been defined in the judgment of the Federal Constitutional Court leading to the ban of the Reich Socialist Party (Sozialistische Reichspartei) in 1952 as encompassing “[a]t the very least, respect for the rights of man as set forth in the Basic Law, above all respect for

²⁷ Until 1995, on the basis of the law 69 groups were banned. Among them were, for example, Ordre Nouveau in 1973, the Fédération d’Action Nationale et Européenne (FANE) in 1980 and again in 1985 and 1987. More recently, the law was used to ban the Unité Radicale (2002), Elsass Korps (2005), Tribu Ka (2006), and Jeunesse Kémi Séba (2009). Sanchez mentions that under the law of 1936, 80 organizations were outlawed between 1936 and 2003 (Cf. Canu, 1997: 148-151; Fennema, 2000: 128; Sanchez, 2003: 5; Bleich & Lambert, 2014: 131).

²⁸ Article 431-15 and Article 431-17 of the French Penal Code, available at: www.legifrance.gouv.fr/content/download/1957/13715/.../Code_33.pdf (accessed 16.03.2013)

²⁹ Basic Law for the Federal Republic of Germany, available at: http://www.gesetze-im-internet.de/englisch_gg/ (accessed 02.02.2013)

the rights of one individual to life and free development, the sovereignty of the people, separation of powers, the accountability of the government, administration according to law, the independency of the judiciary, the multiparty principle, with equal opportunity for all political parties, including the right to constitutionally acceptable development, and opposition” (quoted in Franz, 1982: 57)³⁰. An important characteristic of the legal ban in Germany is that the Federal Constitutional Court can outlaw a political party even if there is no likelihood that this party would ever realize its unconstitutional aims in future (Cf. Niesen, 2005: 169).

Additionally, the *Law on Political Parties* adopted on July 24, 1967 sets out the rules for the enforcement of a formal decision by the Federal Constitutional Court that a political party is unconstitutional³¹. According to Articles 32-33, pursuant to the order of the Federal Constitutional Court the formation of substitute organisations is prohibited. Furthermore, according to Articles 84 to 86a of the *German Criminal Code* (Deutsches Strafgesetzbuch, StGB)³² the maintenance and continuation of a political party which has been declared unconstitutional is subject to an imprisonment up to five years or a fine. The usage of symbols and the dissemination of any propaganda material of a banned party is punished by three years of imprisonment or a fine.

The procedures pertaining to cases for a legal ban of political parties are prescribed in the *Federal Constitutional Court Act* (Bundesverfassungsgerichtsgezet, BVerfGG)³³. According to Article 43 of this Act, the Federal Constitutional Court may launch a legal procedure for a legal ban of a political party only after the Bundestag (lower house of the German parliament), the Bundesrat (upper house of the German parliament), the federal government, or the land government in case if the organisation of a party affected was confined to the territory of one single land has made an application to that effect. If the the Federal Constitutional Court found that a party is

³⁰ The decision of the German Federal Constitutional Court banning the SRP (BVerfG, 23.10.1952, 1BvB1/51) is available at: <http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=23.10.1952&Aktenzeichen=1%20BvB%201/51> (accessed 18.02.2013)

³¹ Part VII, Articles 32-33 of the Law on Political Parties, available at: http://www.bundeswahlleiter.de/en/parteien/downloads/parteiengesetz_engl.pdf (accessed 16.02.2013)

³² German Criminal Code, available at: http://www.gesetze-im-internet.de/englisch_stgb/ (accessed 18.02.2013)

³³ Bundesverfassungsgerichtsgesetz (BVerfGG) (Federal Constitutional Court Act), available at: <http://www.gesetze-im-internet.de/bundesrecht/bverfgg/gesamt.pdf> (accessed 15.02.2013)

unconstitutional ('verfassungswidrig'), such decision entails automatically the withdrawal of party assets and the prohibition of building of subsequent organisations ('Ersatzorganisationen').

Besides rules for banning political parties, Germany has also several provisions that can be used to ban non-democratic groups. Such provisions can be found within the Basic Law and the special *Law on Associations* (Vereinsgesetz, VerG), adopted in 1964 and amended in 2007 (Cf. Gerlach, 2012: 98)³⁴. These two documents contain a similar provision which stipulates that "[a]ssociations whose aims or activities contravene the criminal laws or that are directed against the constitutional order or the concept of international understanding, shall be prohibited"³⁵. Another provision was adopted after the terrorist attacks against the United States of America on September 11, 2001. Following this event the German government adopted the new *Law on Combatting the International Terrorism* (Terrorismusbekämpfungsgesetz) in 2002³⁶ which sought to amend the Law on Associations by adding in Paragraph 14 religious and international organisations to the list of prohibited organisations in Germany, if they were concerned in acts related to terrorism or acts linked to efforts of violent subversion of constitutional order (Part IV, Article 14) (Cf. Katzenstein, 2003: 749).

Unlike the legal ban of political parties where the Federal Constitutional Court is granted the exclusive jurisdiction to decide, the hurdle for banning a non-democratic group is set lower. According to Article 3 Paragraph 2 of the law the right to ban a non-democratic group is assigned to the executive, that is either so to the state inner ministers if the activities of an organisation were confined to a particular state (Länder) and to the federal inner minister if the activities of a group affected were confined to the whole state territory (Cf. Thiel, 2009: 122)³⁷.

³⁴ Gesetz zur Regelung des öffentlichen Vereinsrechts, VerG (Law on regulation of the right of public associations), available at: <http://www.gesetze-im-internet.de/bundesrecht/vereinsg/gesamt.pdf> (accessed 05.02.2013)

³⁵ See Article 9 Paragraph 2 of the Basic Law. Also see Part II, Article 3 Paragraph 1 of the Law on Associations (Vereinsgesetz, VerG) (accessed 08.02.2013)

³⁶ Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz), 9 January 2002, Bundesgesetzblatt, Vol. 2002, Part I, Nr. 3, pp.361-395, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Gesetzestexte/Terrorismusbekaempfungsgesetz_pdf.pdf?__blob=publicationFile (accessed 15.02.2013)

³⁷ Part II, Article 3 Paragraph 2 of the Law on Associations (accessed 17.02.2013)

Like in case with political parties, several provisions within the Penal Code prescribe various penalties for an attempt to continue an association which was declared unconstitutional. According to Article 85 of the Penal Code, the maintenance and continuation of an association that was found unconstitutional is punished by five years of imprisonment or a fine. Using symbols and dissemination of propaganda material of unconstitutional association is liable to an imprisonment up to three years or a fine.

4.3 Democracies with *medium defensiveness* in the category of legal ban

According to Table 5, five democracies have a medium defensiveness within the category of legal ban. These democracies include Belgium, Denmark, Netherlands, Sweden, and the United Kingdom. In contrast to democracies with a high defensiveness, these countries have no special provisions for banning political parties, but have specific provisions that can be used to ban non-democratic groups. The following sections analyse the legal situation within these five countries in turn.

4.3.1 Legal ban in the Netherlands

There is no law in the Netherlands that would empower the state to ban political parties (Cf. van Donselaar & Wagenaar, 2009: 393). The existing provisions relating to a legal ban do not speak specifically to political parties as targets. However, the Dutch law has several provisions that can be used to ban non-democratic groups. Firstly, the Dutch *Civil Code*³⁸ stipulates in Article 2:20 that “a legal person the activities of which are contrary to the public order” can be prohibited and dissolved by a District Court upon the request of the Public Prosecution Service³⁹. According to Paragraph 2, the district court may grant a legal person “for a specific period of time the opportunity to adjust its purpose

³⁸ Civil Code of the Netherlands, available at: <http://www.dutchcivillaw.com/civilcodebook022.htm> (accessed 20.04.2013). The official English translation of the Dutch Civil Code can be found in Thomas et al., 2009.

³⁹ Book 2, Title 2 reads “1. Where the activities of a legal person are contrary to public order, the District Court shall prohibit and dissolve that legal person upon the request of the Public Prosecution Service. 2. Where the purpose (objective) of a legal person, as defined in its articles of incorporation, is contrary to public order, the District Court shall dissolve that legal person upon the request of the Public Prosecution Service. Before the dissolution, the District Court may grant the legal person for a specific period of time the opportunity to adjust its purpose (objective) in such a way that it no longer is contrary to public order”.

(objective) in such a way that it no longer is contrary to public order". However, this rule does not apply to organisations pursuing or engaged in terrorism⁴⁰.

The second provision empowering the state to ban groups can be found in the law introduced in 1944 called the '*Resolution concerning the Dissolution of Treasonable Organisations*' (Besluit ontbinding landverraderlijke organisaties) (Cf. Bleich & Lambert, 2013: 134). According to Bleich and Lambert, this law was adopted with the goal to set off the process of 'de-nazification' in the country by banning those organisations which collaborated with the Nazis during World War II. According to Article 1 Paragraph 1 of this law, the National Socialist Movement of the Netherlands and other Nazi and fascist organisations which were included in the list annexed to the document were subject to a formal dissolution. In total, forty-one organisations were defined as 'treasonable organisations' and banned in the aftermath of the passage of this law (Cf. Bleich & Lambert, 2013: 134). According to Article 2, the Minister of Justice is authorized to add any other organisation to the list of proscribed groups if she is found to act in the spirit of proscribed organisations⁴¹.

⁴⁰ Paragraph 3 states that all kinds of organizations listed in Article 2(3) of the Regulation of the EU Council 2580/2001 of the European Council of 27 December 2001 (OJEC L 344), in Annex I of Regulation (EC) No 881/2002 of the European Council of 27 May 2002 (OJEC L 139), or that is mentioned and marked with a star in the Annex to the Common Position No. 2001/931 of the European Council of 27 December 2001 (OJEC L 344) are "prohibited by law and not authorized to perform juridical acts". The EU Council Regulation 2580/2001 from 27 December 2001 was issued in efforts to combine counter-terrorism measures across the EU. Article 2(3) recommends that following organizations are banned: " (i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism; (ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism; (iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or (iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii)". See the Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, (OJEC L 344), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF> (accessed 20.05. 2013)

⁴¹ The copy of the resolutions and the names of organizations banned on basis of this rule can be found on the website supported by the Dutch Ministry of Interior at: http://wetten.overheid.nl/BWBR0002010/geldigheidsdatum_20-01-2014 (accessed 22.05.2013). So far, the law affected 41 pro-fascist and Nazi organizations. Such organizations included e.g. Weather division, Germanic SS of the Netherlands, National Youth Storm, National Socialist Women's Organizations, National Socialist Officers Corps, National Socialist Student Union, National Socialist Front Right, Medical Front, Dentists Front, Pharmacists Front, Veterinarians Front, Economic Front, Front for Easy and Crafts, Carriers Front, Educators National Socialist Guild, Technically Guild, etc.

4.3.2. Legal ban in Belgium

Belgium has also a medium defensiveness within the first category of legal ban. The state authorities in Belgium have no clear right to ban political parties (Cf. Swyngedouw, 2009: 71). In 1944, when the option for banning two pro-fascist parties Rexist Party of Belgium and the Flemish National Union (Vlaamsch Nationaal Verbond, VNV) was first discussed in the Council of Ministers, this solution was straightforwardly abandoned as the opinion dominated within the Cabinet, as expressed by the then Belgian Prime-Minister Marie-Eugène Hubert Pierlot, that “a dissolution would not reach its goal; these parties will reform, in fact, under other names” (Cf. Nandrin, 2000: 48 (own translation)).

Some scholars view the lack of a party ban law in Belgium as an indispensable part of the Belgian attitude to the place and role of political parties within a democratic system. Nandrin described its main features as follows: “[t]he devil is surrounded, encircled, dismissed; ostracized but never eliminated. Belgian democracy would be measured at this price” (Nandrin, 2000: 50 (own translation)).

However, there are several provisions within the Belgian law that give the state the right to ban groups if they are found to incite violence and try to substitute army or police. Firstly, the *Law on Private Militia* (Loi interdisant les milices privées) adopted on July 29, 1934 authorizes the state to ban paramilitary groups⁴². At the time of its introduction, the law was enacted with the goal to counter the militarization of political parties. In its original form the law was targeted specifically against paramilitary groups of the main radical right-wing political parties in Belgium before World War II (Cf. Swyngedouw, 2009: 71). According to Article 1 of this law, any private military group and any organisation of private individuals built with the goal to use violence, trying to substitute the army or police, or otherwise interfering with their activities is prohibited and must be dissolved (own translation)⁴³. During the 1930s, the law

⁴² Loi interdisant les milices privées, 29 Juillet 1934. Coordination officieuse en langue allemande, in: Belgisch Staatsblad, 30.05.2012, Ed. 3, Moniteur Belge, 30995, available at: [http://www.ejustice.just.fgov.be/cgi_loi/arch_a1.pl?=&sql=\(text+contains+\(\)\)&rech=1&language=fr&tri=dd+AS+RANK&numero=1&table_name=loi&F=&cn=1934072930&caller=archive&fromtab=loi&la=F&ver_arch=005](http://www.ejustice.just.fgov.be/cgi_loi/arch_a1.pl?=&sql=(text+contains+())&rech=1&language=fr&tri=dd+AS+RANK&numero=1&table_name=loi&F=&cn=1934072930&caller=archive&fromtab=loi&la=F&ver_arch=005) (accessed 03.05.2013)

⁴³ Article 1 of the law reads “Jede Privatmiliz und jede andere Organisation von Privatpersonen, deren Zweck es ist, Gewalt anzuwenden, die Armee oder die Polizei zu ersetzen, sich in ihr Handeln einzumischen oder an ihre Stelle zu treten, ist verboten“.

was applied in more than 50 instances of unlawful formation of private militant groups (Cf. Nandrin, 2000: 44). Today the law exists in its original version to fight against violent and combatant groups. According to Article 2, the building of such groups is subject to an imprisonment from one month to one year or a fine from 26 to 300,- Euro.

Another provision which allows the state to ban non-democratic groups can be found within the Belgian anti-racist legislation. The *Law prohibiting certain acts inspired by racism or xenophobia* (Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie) adopted in 1981 and sometimes called the ‘Moureaux law’ after the name of its initiator, the Justice Minister of Belgium Phillip Moureaux, allows to ban groups “that clearly and repeatedly practice or advocate discrimination or segregation” (Cf. Fennema, 2000: 128; Brems, 2006: 703; Bleich & Lambert, 2013: 133)⁴⁴. According to Article 22 of this law, a membership in a group advocating racial discrimination is punished by an imprisonment from one month to one year.

4.3.3 Legal ban in the United Kingdom

The next democracy with a medium defensiveness within the first category of legal ban includes the United Kingdom. Similar to democracies analysed previously, there is no special legislation in the UK for banning political parties (Cf. van Donselaar, 2003: 270; Mullender, 2009: 329). Despite this the state has a series of statutory laws that can be used to ban non-democratic groups. Firstly, the *Public Order Act* adopted by the British government in 1936 in response to the grown threat from the presence and activities of quasi-military fascist groups in the country during the 1930s contains specific provisions for banning paramilitary groups (Cf. Davis, 2000: 55)⁴⁵. According to Section 2(1), any group or association of people “organized or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown” or “organized and trained or organized and equipped either for the purpose of enabling them to be employed for the use or

⁴⁴ Title IV, Articles 21 to 23 of the *Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie*, available at: <http://legislationline.org/topics/country/41/topic/84> (accessed 10.06.2013)

⁴⁵ Public Order Act 1936, available at: <http://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/6/contents> (accessed 10.06.2013)

display of physical force in promoting *any* political object” shall be prohibited (italics added, S.B). In this case, according to Section 2(2), the consent of Attorney-General is needed to start the prosecution process before the High Court. After the end of World War II, the Public Order Act of 1936 remained the key legal instrument in the hands of the British government to enforce a proscription of several neo-Nazi groups such as the *Spearhead* or *Free Wales Army* (Cf. Davis, 2000: 55; van Donselaar, 2003: 268).

Other relevant provisions in the UK for banning non-democratic groups can be found within its counter-terrorism legislation. In particular, the conflict in Northern Ireland (1968-1998), commonly referred to as the years of Troubles⁴⁶, prompted the British government to enact a series of laws which introduced a new legal framework that can be used to ban non-democratic groups. The first such law was the *Prevention of Terrorism Act* (PTA) adopted in 1974. This law gave the Secretary of State additional powers to ban any organisation which “appears to [Secretary of State] to be concerned in, or in promoting or encouraging, terrorism occurring in the United Kingdom and connected with the affairs of Northern Ireland” (Prevention of Terrorism Act 1989, Section 1(2))⁴⁷ (Cf. Walker, 1992: 33-39; Davis, 2000: 55-56; Mullender, 2009: 316-317). The PTA was amended several times (1984, 1989, and 2000). The last PTA adopted by the British government in 2000 has consolidated all former counter-terrorism legislation in one single act⁴⁸. Under the new PTA 2000, proscription is no longer applied separately to Northern Ireland or Great Britain as it was previously but applies throughout the whole of the UK (Cf. Legrand & Jarvis, 2014: 4). According to Part II Section 3(5) of the Act, the Secretary of State is empowered to ban any group which commits or participates in acts of terrorism,

⁴⁶ The conflict in and around the territorial situation of the Northern Ireland in the UK and which is commonly referred to as ‘The Troubles’ began with a civil rights march in Londonderry on 5 October 1968 and was only concluded three decades later with the Good Friday Agreement on 10 April 1998. The violent conflict took lives of 3600 people (Cf. Finn, 1991: 47ff). See for details Chapter 7.

⁴⁷ Prevention of Terrorism (Temporary Provisions) Act 1989, Chapter 4, available at: <http://www.legislation.gov.uk/ukpga/1989/4/contents> Section 1(2) reads “Any organization for the time being specified in Schedule 1 to this Act is a proscribed organization for the purposes of this Act; and any organisation which passes under a name mentioned in that Schedule shall be treated as proscribed, whatever relationship (if any) it has to any other organization of the same name. (3) The Secretary of State may by order add to Schedule 1 to this Act any organisation that appears to him to be concerned in terrorism occurring in the United Kingdom and connected with Northern Irish affairs, or in promoting or encouraging it”. (accessed 14.06.2013)

⁴⁸ Terrorism Act 2000, Chapter 11, available at: <http://www.legislation.gov.uk/ukpga/2000/11/contents> (accessed 17.06.2013)

prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in an act of terrorism. Moreover, the terrorist bombing of the London underground transportation system on July 7, 2005 prompted the British government to further expand its counter-terrorism legislation. The new Terrorism Act of 2006 empowers the state to dissolve any organisation which glorifies terrorism (Part II, Section 21)⁴⁹.

The last document that can be used by the British government to ban non-democratic groups is the *Northern Ireland (Emergency Provisions) Act of 1991* (EPA). The act permits the state to proscribe any organisation which appears “to be concerned in terrorism or in promoting or encouraging it”⁵⁰. Under this law a number of radical organisations, particularly so those which were connected with the conflict in Northern Ireland, were already prohibited⁵¹.

4.3.4 Legal ban in Denmark

Denmark’s arsenal of legal tools also qualifies for a medium defensiveness within the first category of legal ban. Similar to other democracies within this group, the Danish state has no specific law for banning political parties but has a special provision for banning non-democratic groups. According to Article 78 Paragraph 2 of the Danish *Constitutional Act*, “associations employing violence, or aiming at the attainment of their object by violence, by instigation to violence, or by similar punishable influence on persons holding other views, shall be dissolved by court judgement”⁵² (Cf. Schubert, 2011: 65; Klamt, 2012: 60-61).

⁴⁹ Terrorism Act 2006, Chapter 11, available at: http://www.legislation.gov.uk/ukpga/2006/11/pdfs/ukpga_20060011_en.pdf (accessed 19.06.2013)

⁵⁰ Article 28 Paragraph 3, Northern Ireland (Emergency Provisions) Act 1991, Chapter 24, available at: <http://www.legislation.gov.uk/ukpga/1991/24/contents>. The article reads “(3) The Secretary of State may by order add to Schedule 2 to this Act any organisation that appears to him to be concerned in terrorism or in promoting or encouraging it”.

⁵¹ Article 28 Paragraph 7 lists several organisations such as *Red Hand Commando*, *Ulster Freedom Fighters* (both banned 1973), *Ulster Volunteer Force* (banned 1975), *Irish National Liberation Army* (banned 1979), and *Irish People’s Liberation Organization* (1990). (accessed 17.06.2013)

⁵² The Constitutional Act of Denmark of June 5, 1953, available at: http://www.thedanishparliament.dk/democracy/the_constitutional_act_of_denmark.aspx (accessed 24.06.2013)

4.3.5 Legal ban in Sweden

The last democracy within the group of democracies with a medium defensiveness includes Sweden. Similar to democracies analysed previously, the Swedish law does not give the state authorities a clear right to ban political parties, but authorises them to ban non-democratic groups (Cf. Widfeld, 2004: 163; Björk, 2005: 317; Löow, 2009: 450; Klamt, 2012: 68). Although Article 21 of the Constitution⁵³ (The Instrument of Government) states “no limitation [to the freedom of association, S.B.] may be imposed solely on grounds of a political, religious, cultural or other such opinion”, this right is restricted to military or paramilitary groups. Following Article 24 of the Constitution, “Freedom of association may be limited only in respect of organisations whose activities are of a military or quasi-military nature, or constitute persecution of a population group on grounds of ethnic origin, colour, or other such conditions”. According to Löow, the scope of a legal ban outlined within this article refers to any group including racist groups, subversive and paramilitary groups (Cf. Löow, 2009: 450).

4.4 Evaluation of findings

This chapter has provided a systematic assessment of the variations between the eight democracies studied in the presence or absence of the right to ban non-democratic political parties and/or groups. As specified earlier, this category is the most severe among the three categories analysed in terms of a constraining effect on the presence and operation of non-democratic parties and groups. Two distinct groups have been identified with Austria, Germany, and France falling in the range of democracies with a high defensiveness with legal mechanisms for banning both parties and groups, while Belgium, Denmark, the Netherlands, Sweden, and the United Kingdom having a medium defensiveness with legal mechanisms against non-democratic groups only. Therefore, there is no democracy having a low defensiveness regarding legal bans which underlines the significance of this legal mechanism in the fight against the non-democratic parties and groups within the democracies studied.

⁵³ The constitution of Sweden consists of four fundamental laws: the Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression. The Constitution of Sweden is available in English at: <http://www.riksdagen.se/en/Documents-and-laws/Laws/The-Constitution/> (accessed 20.06.2013)

The clustering of countries observed within this category was found to be similar to earlier studies, which focused on the cross-national variations in legal ban regulations among the democracies studied. For instance, Germany has a reputation of actively using legal bans by its government as a means against its non-democratic parties and groups (Cf. Franz, 1982: 52ff; Backes, 2006: 275; Michael & Minkenberg, 2007). On the other hand, the evidence also echoes previous studies which focused on the enforcement of legal ban measure in France (Cf. Canu, 1997: 108; Backes, 2006: 275; Camus, 2009: 148). However, scholars have stressed that unlike Germany, the legal bans used within France are less severe as they can only be enforced against those conducting violent actions, while in Germany legal ban can be used against groups and parties if they engage in both violent actions and promote non-democratic ideas (Cf. Backes, 2006: 277; Minkenberg, 2007: 36-37). This distinction in severity of legislation was also apparent in earlier studies focusing on the use of legal bans within Austria (Cf. Boventer, 1985: 189ff; Auprich, 2009; Pelinka, 2009: 39ff). Additionally, the United Kingdom is known within earlier literature for its lack of legal party ban mechanisms but regularly uses its legal group ban provisions against groups engaged in violence and terrorism (Cf. Klamt, 2007: 136; Mullender, 2009: 325; Eatwell, 2010: 213ff). Similarly, the evidence is in line with a portrayal of the use of a legal ban in Belgium (Cf. Swyngedouw, 2009:71; Nandrin, 2000: 42-44). Swyngedouw, for example, stated “there is no legal ban on extremist parties, whether from the right or from the left. A law prohibiting private militia, however, has existed since 1934” (Cf. Swyngedouw, 2009: 71; also Nandrin, 2000: 42-44; Erk, 2005; Brems, 2006). The findings regarding Sweden are also consistent with earlier studies, as Lööv stated “There is no party prohibition in Sweden, but there is a law against organizing paramilitary organisations. If convicted, the organisations can be banned” (Lööv, 2009: 450; also cf. Widfeldt, 2004: 163-164). Therefore, the earlier literature surrounding these democracies supports the findings of the empirical analysis conducted.

However, the findings of this empirical analysis regarding Denmark did not support earlier literature, but instead expanded out understanding of the availability of legal bans within this country. Typically, Denmark had a reputation within earlier literature for its lack of legal ban mechanisms. Meret, for example,

stated “in contrast to other European countries, Denmark has no constitutional prohibition against the formation of political parties and movements having contentious ideology and program” (Meret, 2009: 99). The results from this empirical analysis reveal a different perspective as Denmark assigns the legal ban mechanism a constitutional rank, similar to Germany, allowing its Constitutional Court to ban groups who use violence to achieve their goals or who instigate violence under Article 78 Paragraph 4 of the Danish Constitution.

The next chapter will conduct a systematic assessment of the variations across individual constraints within the freedom constraints category. It will be particularly interesting to ascertain whether the patterns of defensiveness we observed in the legal ban category are enhanced or becoming more complex when analysing these two categories simultaneously.

CHAPTER 5:

SYSTEMATIC ASSESSMENT OF VARIATIONS BETWEEN DEMOCRACIES IN THE PRESENCE OF FREEDOM CONSTRAINTS

5.1 Introduction

While the previous chapter described the variations between the eight democracies in the presence or absence of the right to ban non-democratic parties and groups, this chapter will analyse the cross-national differences between them within the second category of freedom constraints. As detailed in Chapter 3.3, this category contains 9 legal constraints which variously limit the non-democratic actors in their exercise of freedom of assembly and association (constraints 1-4) and freedom of expression (constraints 5-9). Table 7 systematically maps the eight democracies across these constraints following the methodology discussed earlier (for details see Chapter 3.4).

Table 7: Mapping democracies across freedom constraints

Country / Indicators	DE	AT	FR	BE	UK	NL	DK	SE
1. Constraints on public demonstrations	1	1	1	1	1	1	0	1
2. Constraints on the freedom of assembly	1	1	1	1	1	1	0	1
3. Constraints on building militant organisations	1	1	1	1	1	1	1	1
4. Constraints on the wearing of arms	1	1	1	1	1	1	1	0
5. Constraints on the wearing of uniforms	1	1	1	1	1	1	0	0
6. Constraints on hate propaganda	1	1	1	1	1	1	1	1
7. Constraints on anti-Holocaust propaganda	1	1	1	1	0	0	0	0
8. Constraints on propaganda against democratic incumbents	1	1	1	1	0	0	1	0
9. Constraints on propaganda against democratic	1	1	0	0	0	0	0	0

institutions								
Standardized score:	1	1	0.8	0.8	0.6	0.6	0.4	0.4
Level of defensiveness in freedom constraints	High defensiveness				Medium defensiveness			

Note: 1 = legal mechanism is present; 0 = legal mechanism is absent; Note: the countries are ordered according to the standardized score they achieved across individual indicators. Grey shading indicates high defensiveness category. Legend: AT-Austria; BE-Belgium; DE-Germany; DK-Denmark; FR-France; NL-Netherlands; SE-Sweden; UK-United Kingdom.

Table 7 indicates that the eight democracies studied have either high defensiveness or medium defensiveness within this category, while there is no democracy falling in the low defensiveness range. More specifically, Germany, Austria, France, and Belgium fall in the range of democracies with a *high defensiveness* having a strong presence of all or the majority of freedom constraints within their legal arsenals available, as depicted in Table 7. The remaining democracies the United Kingdom, the Netherlands, Denmark, and Sweden have a medium defensiveness within this category, as their legal arsenals contain fewer legal constraints on political rights and freedoms of non-democratic actors. As evident from the table, these democracies tend to have more constraints upon the freedom of assembly and association than constraints upon the freedom of expression. The subsequent discussion will describe each country by category while focusing on the specific set of legislative measures in place.

5.2 Democracies with *high defensiveness* within the freedom constraints category

Germany, Austria, France and Belgium have strong presence of all or the majority of the freedom constraints within their legal arsenals and therefore are more defensive than the remaining democracies within this category. The following sections discuss the specific regulations in place within each of the four countries starting with two more restrictive cases (Germany and Austria) followed by the (relatively speaking) less restrictive ones (France and Belgium).

5.2.1 Freedom constraints in Germany

The law in Germany has all relevant provisions to constrain the political freedoms of its non-democratic actors. With regard to the constraints upon the

freedom of assembly and the right to demonstrations Germany has several laws that can be used to constrain these freedoms. According to Article 18 of the Basic Law, the state can forfeit its non-democratic actors of a range of political freedoms, including the freedom of assembly and association and freedom of expression if they are used to “combat the free democratic basic order”⁵⁴. According to Article 36 of the *Federal Constitutional Court Act*, in this case the federal government, the state governments, and the Bundestag (lower house of the parliament) can file a request with the Federal Constitutional Court to forfeit these freedoms⁵⁵. The Federal Constitutional Court has a sole responsibility to declare the right of forfeiture and to define the extent of it⁵⁶. Furthermore, Article 8(2) of the Basic Law also stipulates that the right to organise an outdoor demonstration can be restricted.

Several provisions constraining the freedom of assembly and the right to demonstrations can also be found within the statutory law. Article 1(2) of the *Law on Associations and Processions* (Versammlungsgesetz, VersG) states whoever was forfeited of his political freedoms according to Article 18 of the Basic Law, or if a political party or a group have been declared unconstitutional by the Federal Constitutional Court according to Article 21(2) and 9(2) of the Basic Law, they have no right to organise demonstrations and meetings in public places⁵⁷. Additionally, according to Part III Article 14 of this law, open-air

⁵⁴ Basic Law for the Federal Republic of Germany, Article 18 reads “Whoever abuses *the freedom of expression*, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), *the freedom of assembly* (Article 8), *the freedom of association* (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights”. (cursive added S.B.)

⁵⁵ Article 36 of the Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BverfGG), available at: <http://www.gesetze-im-internet.de/bundesrecht/bverfgg/gesamt.pdf> (accessed 20.02.2013)

⁵⁶ However, the article has not been used yet in the past. One example when the government requested to enforce this provision was the case of Gerhard Frey, who was the chairman of the right-wing extremist party Deutsche Volksunion (German People’s Union). The Constitutional Court has finally stopped the process as it found that the grade of danger to the public presented by this party was insufficient (Cf. Thiel, 2003: 141; Backes, 2006: 278).

⁵⁷ Article 1(2) of the law reads “(1) Jedermann hat das Recht, öffentliche Versammlungen und Aufzüge zu veranstalten und an solchen Veranstaltungen teilzunehmen. (2) Dieses Recht hat nicht: wer das Grundrecht der Versammlungsfreiheit gemäß Artikel 18 des Grundgesetzes verwirkt hat, 2. wer mit der Durchführung oder Teilnahme an einer solchen Veranstaltung die Ziele einer nach Artikel 21 Abs. 2 des Grundgesetzes durch das Bundesverfassungsgericht für verfassungswidrig erklärten Partei oder Teil- oder Ersatzorganisation einer Partei fördern will, 3. eine Partei, die nach Artikel 21 Abs. 2 des Grundgesetzes durch das Bundesverfassungsgericht für verfassungswidrig erklärt worden ist, oder 4. eine Vereinigung, die nach Artikel 9 Abs. 2 des Grundgesetzes verboten ist“. The full text of the Gesetz über Versammlungen und Aufzüge

demonstrations require prior permission of state authorities and following the regulation stipulated within Article 15 can be banned if such gatherings take place in proximate vicinity of Jewish graves and memorials, or if the police believe that there is a serious threat to the public order and security. In general, outdoor demonstrations organised by non-democratic parties and groups can be prohibited on the level of police and ordinary courts (Cf. Minkenberg, 2006: 39). According to van Donselaar and other scholars, in Germany the formal bans of marches of non-democratic groups and political parties have become “the rule rather than exception” (Cf. van Donselaar, 2009: 394; also Minkenberg, 2006: 39).

Moreover, several German states have specific rules that can be used to prevent non-democratic actors to rent indoor facilities for their meetings. Typically, in Germany the indoor meetings are regulated on the level of state and municipal authorities. For example, one regulation in the state of Mecklenburg stipulates that state authorities are allowed to deny extremist groups to hire rooms for public meetings if there is a suspicion that rooms will be used for extremist activities⁵⁸.

As regards the next constraint upon the right to wear arms during public demonstration, this privilege is strictly prohibited according to Articles 113 (2.1) and 125a of the German Criminal Code. The act of wearing of arms during

(VersG) (Law on assemblies and processions) is available at: <http://legislationline.org/topics/country/28/topic/15> (accessed 10.02.2013)

⁵⁸ The document which is an administrative ruling is called „Merkblatt ‘Vermietung von öffentlichen Einrichtungen an rechts- oder linksextremistische Gruppen‘ (letting public premises to right-wing and left-wing extreme groups)“. The document can be viewed at: http://www.thuringen.de/imperia/md/content/tmwta/wirtschaft/wirtschaftsverwaltung/2006_06_19_merkblatt_extremismusbekaempfungfeinrichtungen.pdf (accessed 20.02.2013). Similar provisions exist in other German states also. For example, see a similar provision in the state of Mecklenburg-Vorpommern available at: http://www.regierung-mv.de/cms2/Regierungsportal_prod/Regierungsportal/downloads/IM/ImmobilienrunderlassMinister.pdf. Furthermore, the Business Act (Gewerbeordnung), in §35 prohibits commercial and industrial buildings such as pubs be used by extremists. It is enough to launch a case if the director of the pub lets such meetings happen in his building („§ 35 Gewerbeuntersagung wegen Unzuverlässigkeit“). For example, see the ruling of the Administration Court in Weimar which prohibited the use of a public premise to a right-wing extremist group. The ruling from 25.07.2006 (8 E 850/06) can be viewed at: <http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VG%20Weimar&Datum=25.07.2006&Aktenzeichen=8%20E%20850/06> (Cf. Richwin, 2012: 12-15). (both accessed 16.02.2013)

demonstration is classified as an aggravated crime of rioting and is punished with a maximum of 10 years of imprisonment⁵⁹.

Moving to the next constraint, several articles within the Law on Assemblies and Processions prohibit the wearing of uniforms during public demonstrations and in open-air gatherings⁶⁰.

As regards the next constraint prohibiting the building of militant organisations, this right is prohibited according to Article 9(2) of the Basic Law which stipulates that “Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited”⁶¹. Furthermore, several provisions within the Criminal Code also prohibit the building of militant and other radical groups. According to Section 127 of the Criminal Code, the building of armed groups is prohibited. Additionally, Section 129 of the Code prohibits any other illegal organisation aiming at committing offences⁶². Such crimes are punished by a maximum of five years of imprisonment.

Besides having robust legislation for constraining the right of assembly and association, Germany has at its disposal also several laws that can be used to constrain the freedom of expression of non-democratic actors. The relevant regulations are contained within the Criminal Code. Articles 130 and 131 of the Code prohibit speeches inciting hatred against people on the base of their cultural and religious descent (“Volksverhetzung”). This provision was introduced in 1960, in reaction to a wave of synagogue and cemetery desecrations across several places in Germany (Cf. Bleich, 2011: 20). The full formulation forbids inciting hatred, calling for violence or arbitrary measures, or assaulting human dignity by insulting, maliciously maligning, or defaming segments of the population in a manner that is capable of disturbing the public

⁵⁹ German Criminal Code (Strafgesetzbuch, StGB), available at: http://www.gesetze-im-internet.de/englisch_stgb/ (accessed 13.02.2013)

⁶⁰ Article 3(1) reads “It is forbidden to wear in public or in a meeting uniforms and similar garments as an expression of common political beliefs”.

⁶¹ Basic Law for the Federal Republic of Germany, Article 9(2).

⁶² Article 127 of the Penal Code reads “Whosoever unlawfully forms or commands a group in possession of weapons or other dangerous instruments or joins such a group, provides it with weapons or money or otherwise supports it, shall be liable to imprisonment not exceeding two years or a fine”. Article 129 reads “Whosoever forms an organization the aims or activities of which are directed at the commission of offences or whosoever participates in such an organization as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment not exceeding five years or a fine”.

peace. In the beginning of the 1970s, Article 130 was expanded to forbid the publication of any materials inciting against racial and religious groups⁶³.

Moving to the next constraint forbidding anti-Holocaust propaganda, the relevant provision was introduced in the Criminal Code in 1994. According to Article 130 Paragraph 3, “Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine”⁶⁴.

Several articles within the Criminal Code aim to protect the democratic institutions and its incumbents against anti-democratic and malicious propaganda. Article 86 of the Criminal Code prohibits the dissemination of propaganda material of organisations which were declared unconstitutional by the Federal Constitutional Court⁶⁵. The public display of symbols of prohibited parties and organisations is forbidden according to Article 86a of the Criminal Code (Cf. Stegbauer, 2007: 2007, 174)⁶⁶. Article 90(a) forbids the desecration of the state flag and a defamatory propaganda against the German state⁶⁷.

⁶³ Specifically, Article 130 prohibits writings that incite hatred, violence, or arbitrary measures, or which assault the human dignity of others by insulting, maliciously maligning, or defaming “segments of the population or a national, racial or religious group, or one characterized by its folk customs”.

⁶⁴ Criminal Code, Article 130(3).

⁶⁵ Section 86 is entitled ‘Dissemination of propaganda material of unconstitutional organisations’ and reads “(1) Whosoever within Germany disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination within Germany or abroad, propaganda material 1. of a political party which has been declared unconstitutional by the Federal Constitutional Court or a political party or organisation which has been held by final decision to be a surrogate organization of such a party; 2. of an organization which has been banned by final decision because it is directed against the constitutional order or against the idea of the comity of nations or which has been held by final decision to be a surrogate organisation of such a banned organization; 3. of a government, organization or institution outside the Federal Republic of Germany active in pursuing the objectives of one of the parties or organizations indicated in Nos 1 and 2 above; or 4. propaganda materials the contents of which are intended to further the aims of a former National Socialist organisation, shall be liable to imprisonment not exceeding three years or a fine”.

⁶⁶ Article 86a reads “(1) Whosoever 1. domestically distributes or publicly uses, in a meeting or in written materials (section 11(3)) disseminated by him, symbols of one of the parties or organisations indicated in section 86(1) Nos 1, 2 and 4; or 2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use in Germany or abroad in a manner indicated in No 1, shall be liable to imprisonment not exceeding three years or a fine. (2) Symbols within the meaning of subsection (1) above shall be in particular flags, insignia, uniforms and their parts, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in the 1st sentence shall be equivalent to them”.

⁶⁷ Article 90a (1-3) of the Criminal Code reads “(1) Whosoever publicly, in a meeting or through the dissemination of written materials (section 11(3)) 1. insults or maliciously expresses contempt of the Federal Republic of Germany or one of its states or its constitutional order; or 2.

Specifically, the law forbids speeches and written material that insult or maliciously express contempt against the Federal Republic of Germany, any of its states, or against its democratic constitutional order. Furthermore, Article 90(b) of the Code punishes defamatory speech directed against the constitutional organs of the German state or propagating against its constitutional principles⁶⁸. Lastly, the defamation of the state president is prohibited according to Paragraph 90 of the Code.

5.2.2 Freedom constraints in Austria

Austria's arsenal of freedom constraints also qualifies this democracy for a high defensiveness within this category. As regards the constraints upon the freedom of assembly and association, Austria has several provisions within the *Law on Assemblies* (*Versammlungsgesetz*, *VersG*), introduced in 1953, that constrain this freedom⁶⁹. According to Article 2 of this law, any meeting is subject to a prior notification with responsible state authorities and can be banned if they believe that such an assembly can represent a threat to the public order or violate the law⁷⁰. Furthermore, according to Article 11, any gathering of people has to appoint a responsible to observe the order and that no unlawful expressions are used during the meeting. Moreover, state

insults the colors, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its states shall be liable to imprisonment not exceeding three years or a fine. (2) Whosoever removes, destroys, damages, renders unusable or defaces, or otherwise insults by mischief a publicly displayed flag of the Federal Republic of Germany or one of its states or a national emblem installed by a public authority of the Federal Republic of Germany or one of its states shall incur the same liability. The attempt shall be punishable. (3) The penalty shall be imprisonment not exceeding five years or a fine if the offender by the act intentionally supports efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles”.

⁶⁸ Article 90b of the Criminal Code reads “Anti-constitutional defamation of constitutional organs (1) Whosoever publicly, in a meeting or through the dissemination of written materials (section 11(3)) defames a constitutional organ, the government or the constitutional court of the Federation or of a state or one of their members in this capacity in a manner detrimental to the respect for the state and thereby intentionally supports efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles, shall be liable to imprisonment from three months to five years.

⁶⁹ *Versammlungsgesetz* 1953 (Law on Assemblies), available at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000249&ShowPrintPreview=True> (in German) (accessed 12.04.2013)

⁷⁰ Article 6 states that “Meetings whose purpose runs counter to the criminal law or the holding of which represents a threat to the public safety and public welfare shall be banned by the authorities”. Articles 13 and 14 add that “(1) If a meeting is held in contravention of the provisions of this, it shall be banned by the authorities (Articles 16 and 17) or be solved. (2) Similarly, an assembly must be dissolved - even if it is held legally – if it occurs that during such meeting illegal actions take place or when the meeting assumes public order threatening character”. The arrangements of Articles 13 and 14 shall also apply to public marches and demonstrations“ (own translation).

authorities have the right to send one or more representatives to be present and observe the meeting, and in case if the authorities apprehend that such congregations contradict the law or likely to stir a breach of the public order they are authorized to dissolve it (Articles 12 and 13)⁷¹.

Concerning the next constraint restricting the right to wear arms during public demonstration, this freedom is prohibited according to Article 9a of the Law on Assemblies also. The relevant provision states „At meetings mentioned in Section 2 it is prohibited to participate while carrying weapons. Likewise it is prohibited to anyone to carry items that can be appropriate and be used to exert violence against other people or damage property” (own translation)⁷².

Moving to the next constraint, it is prohibited to wear uniforms and any other symbols associated with National-Socialism according to the *Law on Badges* (Abzeichengesetz) introduced in 1960⁷³. According to Article 1(1) of this law, „Badges, uniforms or parts of uniforms of a prohibited organisation in Austria must not be worn or put on display, shown or distributed to the public. Emblems, symbols and labels are also be regarded as badges”. According to Article 3 of this law, whoever violates its provisions is punishable with imprisonment of one month and a fine of 4.000 Euro.

Moving to the constraint upon the building of militant organisations, according to Article 246 of the Penal Code the formation of organisations hostile to the state (‘staatsfeindliche Verbindungen’) is prohibited. This includes all organisations aiming to destroy the democratic form of government⁷⁴.

⁷¹ For example, in 2006 the right to the freedom to demonstrate was denied to a group led by the “Documentation Centre of the Welser Defence” (Dokumentationszentrum des Welser Widerstandes). The demonstration was planned to demonstrate under the slogan “Multikulti beenden. Für unser Heimatland!” (End to the multi-culti. For our homeland). The Federal Constitutional Court declared in 2006 that it was not unlawful to ban the demonstration on the basis of Article 6 of the Law on Assemblies. The copy of the jurisdiction (B1954/06-7) can be viewed at: <http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VfGH%20%D6sterreich&Datum=16.03.2007&Aktenzeichen=B%201954/06> (accessed 17.04.2013)

⁷² Law on Assemblies, Article 9a.

⁷³ Bundesgesetz vom 5. April 1960, mit dem bestimmte Abzeichen verboten werden (Abzeichengesetz 1960). StF: BGBl. Nr. 84/1960, available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005262>

⁷⁴ Article 246 of the Penal Code titled ‘Staatsfeindliche Verbindungen’ (state hostile organizations) states “Whoever establishes an organisation whose if not exclusive purpose is to undermine the independence, or in the State Constitution defined state constitutional order or any government institution of the Republic of Austria and one of its provinces shall be punished with imprisonment from six months to five years” (own translation).

Austria is in a similar position to that of Germany as far as the constraints on the freedom of expression are concerned. The main provisions are stipulated within its Penal Code. According to Article 302 of the Code, the state authorities have the right to punish discriminatory speech against national minorities. The article states "Whoever requests, prompts, or attempts to induce others to commit hostilities against the various nationalities (ethnic groups), religious groups or other organisations, specific classes or segments of the civil society or against authorized corporations or in general requests, prompts or attempts to induce the inhabitants of the state to hostile partisanship among themselves, commits a gross misdemeanour insofar as the act does not constitute a more severely punishable deed"⁷⁵. Furthermore, several articles within the Penal Code (Article 283 (incitement to discrimination; 'Volksverhetzung'), Article 302, and Article 321 (genocide; 'Völkermord')) provide legal tools that can be used to forbid racist propaganda and actions directed against individuals or groups of other ethnic, racial, or cultural backgrounds⁷⁶.

Moving to the next constraint upon the distribution of anti-democratic propaganda in public, Austria has specific provisions within its Penal Code that can be used to punish the distribution of malicious propaganda and contempt for constitutional organs and democratic authorities⁷⁷. Similarly, there are several provisions within the Penal Code to protect the state form and state symbols against disgraceful propaganda⁷⁸. According to Article 248 of the

⁷⁵ Penal Code, Article 302.

⁷⁶ Article 283(1) reads „Whoever publicly, in a manner that is likely to endanger the public order, or who incites to violence against a church or religious community or another groups of people on the ground of race, color, language, religion or belief, nationality, or national or ethnic origin, gender, disability, age or sexual orientation is punished with imprisonment up to two to years”. Article 321(1) reads „Whoever has the intention to kill or inflict serious damage to a group of people in whole or in part because of their membership in a specific church or religious community, or because of their membership in another race, or tribe, or a specific social group (Article 84 Paragraph 1) or causes them harm that are likely to cause the death of all the members or part of the group, or imposes measures aimed to prevent births within the group, or children of the group by force or threat of violence shall be punished with imprisonment for life“ (own translation).

⁷⁷ Article 116 of the Penal Code entitled ‚Public insults of a constitutional organ, or of armed forces, or of an official body‘ gives the right to punish „Acts which are defined according to Article 111 as defamation (üble Nachrede, S.B.) or which are defined according to Article 115 as libel (Beleidigung, S.B.) are also punishable, if they are directed against National Council (Nationalrat), or the Bundesrat, the Federal Assembly (Bundesversammlung) or a Landtag, or the Armed forces, or against an official body (Behörde) and committed in public.

⁷⁸ Article 248 of the Penal Act reads „(1) Whoever insults or belittles in a hateful way the Republic of Austria and one of its provinces is to be punished with imprisonment up to one year. (2) Whoever insults, belittles or otherwise expresses himself in a hateful way about the flag of the Republic of Austria or one of its provinces shown at a publicly accessible event, or an

Code, such acts are punished either with an imprisonment up to six months or a fine.

Lastly, Austria prohibits any speech and propaganda material denying Holocaust. The relevant provision was introduced by the *Prohibition Law* (Verbotsgesetz) in 1992 (Cf. Fennema, 2000: 137). According to Paragraph 3(h) of this law whoever, publicly through speech or writing, denies the crimes against humanity committed by National-Socialism during World War II is punished with an imprisonment from 1 year up to 20 years (Cf. Bailer, 2011: 43)⁷⁹. Over the past decades, this law was frequently used to punish the members of the right-wing extremist Freedom Party of Austria for denying the Holocaust (Cf. Pelinka, 2009: 45).

5.2.3 Freedom constraints in France

France's legal arsenal of constraints upon political freedoms of non-democratic actors also qualifies this democracy for a high defensiveness within the second category. However, France has no legislation that can be used to protect its democratic institutions against anti-democratic propaganda, which makes it (relatively) less defensive than the countries already discussed.

Regarding the range of constraints on the freedom of assembly and association, France's regulations are very robust. According to Article 431-3 of the French Penal Code all assemblies require a prior permission of the French authorities, and any unlawful assembly can be banned if the state authorities believe that it can represent a serious threat to the breach of a public order⁸⁰. A

authority emblem, or the national anthem is punished with imprisonment up to six months or a fine up to 360 daily rates" (own translation).

⁷⁹ Article 3h of the Prohibition Law (Verbotsgesetz) reads "Nach §3g wird auch bestraft (...) wer in einem Druckwerk, im Rundfunk oder in einem anderen Medium oder wer sonst öffentlich auf eine Weise, daß es vielen Menschen zugänglich wird, den nationalsozialistischen Völkermord oder andere nationalsozialistische Verbrechen gegen die Menschlichkeit leugnet, gröblich verharmlost, gutheißt oder zu rechtfertigen sucht".

⁸⁰ Article 431-3 of the French Penal Code stipulates that any unlawful assembly that is one that is likely to violate the public order can be disbanded. The article reads "An unlawful assembly is any gathering of persons on the public highway or in any place open to the public where it is liable to breach the public peace. An unlawful assembly may be dispersed by the forces of public order (...) by the prefect, the sub-prefect, the mayor or one of his deputies, any judicial police officer in charge of public safety, or any other judicial police officer, bearing the insignia of their office". The official English translation of the French Penal Code is available at:

www.legifrance.gouv.fr/content/download/1957/13715/.../Code_33.pdf (accessed 12.03.2013). Further provisions in the Penal Code prohibit the organization of unlawful assembly (Article 430-6). Article 431-9 states that "„[t]he following offences are punished by six months' imprisonment

participation in an assembly that was previously prohibited is punished by a fine of 15.000 Euro (Article 431-4). Numerous provisions within the Penal Code prohibit the organisation and participation in an unlawful demonstration, that is one which was previously prohibited or which was not lawfully notified⁸¹. A participation in an unlawful assembly whilst carrying a weapon is punished by three years of imprisonment and a fine of 45.000 Euro (Article 431-5). In the past, several members of non-democratic groups were punished on base of this provision (Cf. Canu, 1997: 122).

Furthermore, the law prohibits the wearing of uniforms and symbols of prohibited and unlawful organisations, particularly those using the symbols of National-Socialism. Article *R645-1* of the Penal Code states “Whoever wears or exhibits a uniform, insignia or emblem reminiscent of the uniforms, insignia or emblems that are worn or displayed either by members of a criminal organisation declared under Article 9 of the Charter of the International Military Tribunal annexed to the London Agreement from August 8, 1945, or by a person convicted by a French or international court of a crime or crimes against humanity under Articles 211-1 to 212-3 mentioned by law No. 64-1326 of 26 December 1964 is punished by a fine for offenses of the fifth class” (Cf. Errera, 1991: 15)⁸².

Regarding the next constraint prohibiting the formation of militant organisations, Articles 412-3 and 412-4 of the Penal Code stipulate that the building of “insurrectional movements” which aim to usurp the lawful authority is strictly

and a fine of €7,500: 1° the organization of a demonstration on the public highway without filing a prior notice pursuant to the conditions laid down by law; 2° the organization of a demonstration on the public highway which has been prohibited pursuant to the conditions laid down by the law; 3° drawing up an inaccurate or incomplete notice liable to mislead about the objective or conditions of the proposed demonstration”. Article 431-3 authorizes the relevant authorities “to disperse any unlawful assembly”.

⁸¹ See Articles 431-9 to 431-12 of the Penal Code. For example, Article 431-9 states that “The following offences are punished by six months' imprisonment and a fine of €7,500: 1° the organisation of a demonstration on the public highway without filing a prior notice pursuant to the conditions laid down by law; 2° the organisation of a demonstration on the public highway which has been prohibited pursuant to the conditions laid down by the law; 3° drawing up an inaccurate or incomplete notice liable to mislead about the objective or conditions of the proposed demonstration”.

⁸² Article *R645-1* of the Penal Code, available at: <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006419560&cidTexte=LEGITEXT000006070719> (in French) (accessed 19.03.2013).

forbidden⁸³. Furthermore, according to Section IV Articles 431-13 to 431-17, a participation, maintenance and re-establishment of a combatant group is punished by three years of imprisonment and a fine of 45.000 Euro⁸⁴.

France has the majority of provisions that can be used to constrain the freedom of expression of non-democratic actors although its arsenal is less expansive compared with democracies analysed previously. Notably so, France has numerous laws that prohibit verbal or print propaganda inciting racial discrimination, hatred and violence. According to Bird, the anti-racist legislation in France is among the strictest and most vigorously enforced of any other country in Europe (Cf. Bird, 2000: 400). The first anti-racist law was introduced in 1881 and was enshrined within the freedom of press act which forbade verbal or print expressions insulting and defaming other people on the ground of their racial or ethnic origin⁸⁵. During the post-war period, two new laws were introduced to combat racist propaganda, the *Pleven Law* and the *Gayssot Law*, both named after the names of their drafters René Pleven and Jean-Claude Gayssot⁸⁶.

The anti-racism 'Pleven' law was ratified in 1971 and implemented in July 1972 (Cf. Fennema, 2000: 127)⁸⁷. Similar to Germany, the adoption of this law was elicited by a resurgence of racial violence across the country. One of the drafters of this law, the Minister of Justice Jean Foyer (1962-1967), stated to justify the introduction of this law, "it is nevertheless true that racist inspired acts are particularly odious and that it may therefore be useful to foresee a specific punishment against them" (quoted in Bleich, 2011: 21). The new law contained extensive provisions against racist speech. According to the new law, it became

⁸³ According to Article 412-3 an "insurrectional movement" is a movement which "consists of any collective violence liable to endanger the institutions of the Republic or violate the integrity of the national territory".

⁸⁴ According to Article 431-13 of the Penal Code, a combatant group is "any group of persons holding or having access to weapons, which has an organised hierarchy and is liable to breach of the public peace".

⁸⁵ Loi du 29 juillet 1881 sur la liberté de la presse (Law on the freedom of the press), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080312> (in French) (accessed 22.03.2013)

⁸⁶ According to entries in Wikipedia, René Pleven (1901-1993) was the French Justice Minister during 1969-1973. Jean-Claude Gayssot was a member of the French Parliament (1986-1997) for the Communist party. From 1997 to 2002 he was the French Transport Minister under the government of Lionel Jospin.

⁸⁷ Law of Pleven Loi n° 72-546 du 1 juillet 1972 relative à la lutte contre le racisme, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000864827> (accessed 23.03.2013)

illegal to incite racial hatred or to use language that was racially defamatory, contemptuous, or offensive (Cf. Bird, 2000: 399).

The *Gayssot law*, passed by the parliament on July 13, 1990, was introduced to further strengthen the existing anti-racism legislation in France. Article 1 of this law declared “[a]ny discrimination based on membership or non-membership of an ethnic group, nation, race or religion is prohibited”⁸⁸.

Another law to prohibit racist propaganda is the *Toubon Law*⁸⁹, introduced in September 1996 and named after Jacques Toubon, the Minister of Culture at that time. The law was introduced to regulate the use of the French language in public, academia, telecommunication, and business. According to Fennema, this law became “the culmination point of anti-racist legislation in France” (Cf. Fennema, 2000: 129). One of the key functions of this law was to outlaw any message against any person or group purported to insult their dignity, honour or consideration for the reason of origin, ethnicity or nationality (Cf. Fennema, 2000: 129). The law foresees heavy fines and imprisonment.

The most recent law, the *Lellouche Law*, named after the parliamentary deputy Pierre Lellouche and enacted in 2003, is broader in focus as it forbids also crimes motivated by racism⁹⁰. Lastly, Article *R624-3* of the Penal Code stipulates that defamation of any person on the ground of ethnic, national, racial, or religious difference is punishable⁹¹.

Moving to the constraint on anti-Holocaust propaganda, the relevant law was introduced during the 1990s within the press law of 1881. According to Article *24bis* of this law, it is forbidden to contest the existence of crimes against

⁸⁸ Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000532990> (in French). (accessed 23.03.2013)

⁸⁹ The full text of the Toubon Law can be viewed at the website of *La Délégation Générale à la Langue Française* at: <http://www.dglf.culture.gouv.fr/droit/loi-gb.htm> (accessed 26.03.2013)

⁹⁰ Loi n° 2003-88 du 3 février 2003 visant à aggraver les peines punissant les infractions à caractère raciste, antisémite ou xénophobe (1) (Lellouche law), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000781920&dateTexte=&categorieLien=id> (accessed 30.03.2013)

⁹¹ Article *R624-3* of the Penal Code stipulates that “La diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l'amende prévue pour les contraventions de la 4e classe”.

humanity committed by the Nazis during World War II, including revisionist speeches (Cf. Troper, 1999: 1239)⁹².

As previously mentioned, France does not have a law protecting its democratic institutions against antidemocratic propaganda. The existing provision within the Penal Code is limited to the protection of the official symbolic of the state, such as the national anthem or tricolor from insulting in public (Article 433-5-1)⁹³.

However, there is a provision in law that aims to protect the democratic incumbents from contempt⁹⁴. According to Article 433-5 of the Penal Code, the contempt is defined as “words, gestures or threats, written documents or pictures of any type not released to the public, or the sending of any article addressed to a person discharging a public service mission, acting in the discharge or on the occasion of his office, and liable to undermine his dignity or the respect owed to the office that he holds”. According to this article, the contempt against public authorities is punished by a six months of an imprisonment or a fine of 7.500 Euro.

5.2.4 Freedom constraints in Belgium

The last democracy within the group of democracies with a high defensiveness in freedom constraints category includes Belgium. Belgium’s arsenal of legal constraints is similar to that of France analysed previously. Like France, Belgium

⁹² Article 24bis reads «Seront punis des peines prévues par le sixième alinéa de l'article 24 ceux qui auront contesté, par un des moyens énoncés à l'article 23, l'existence d'un ou plusieurs crimes contre l'humanité tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale».

⁹³ “The act of publicly insulting the national anthem or tricolour flag at a demonstration organised or regulated by the public authorities is punished by a fine of €7,500. Where it is committed as a group action, the insult is punished by six months' imprisonment and a fine of €7,500”.

⁹⁴ Article 433-5 stipulates that “Contempt is punished by a fine of €7,500. It consists of words, gestures or threats, written documents or pictures of any type not released to the public, or the sending of any article addressed to a person discharging a public service mission, acting in the discharge or on the occasion of his office, and liable to undermine his dignity or the respect owed to the office that he holds. When it is addressed to a person holding public authority, contempt is punished by six months' imprisonment and a fine of €7,500. When it is addressed to a person discharging a public service mission and the offence is committed inside a school or an educational establishment, or in the surroundings of such an establishment at a time when the pupils are arriving or leaving the premises, contempt is punished by six months' imprisonment and by a fine for €7,500. When committed during a meeting, contempt under the first paragraph is punished by six months' imprisonment and a fine of €7,500, and the contempt set out in the second paragraph is punished by one year's imprisonment and a fine of €15,000”.

has no legislation to protect its democratic institutions from malicious propaganda.

Starting with the constraints upon the freedom of assembly and association, according to the *Law on Public Safety and Convenience of Passage* all public meetings and processions in France are subject to a prior permission of the public authorities⁹⁵. Thereby, according to the *Law on Private Militia* adopted as early as in 1934⁹⁶, the public marches of groups which have the appearance of military troops or which threaten the public order are strictly forbidden⁹⁷. According to the of the *Law on Working of Police Forces* ('Loi sur la fonction de police') adopted in 1992, the police forces are charged to disperse the gatherings of groups as specified within the *Law on Private Militia*⁹⁸.

The wearing of uniforms of militant and paramilitary organisations as well as the appearance in the public with offensive weapons are subject to either an imprisonment from eight days to six months or a fine from 26 to 200 Euro according to Article 2bis⁹⁹. The building of militant or para-military organisations

⁹⁵ Article 31 of the law states that "Tout rassemblement, manifestation ou cortège, de quelque nature que ce soit, sur l'espace public ou dans les galeries et passages établis sur assiette privée, accessibles au public, est subordonné à l'autorisation du bourgmestre". Loi de la sécurité publique et de la commodité du passage (Law on Public Safety and Convenience of Passage), available at: <http://www.legislationline.org/topics/country/41/topic/15> (in French) (accessed 23.04.2013)

⁹⁶ Loi interdisant les milices privées, 29 Juillet 1934. Coordination officieuse en langue allemande, Belgisch Staatsblad, 30.05.2012, Ed. 3, Moniteur Belge, 30995 (available at: [http://www.ejustice.just.fgov.be/cgi_loi/arch_al.pl?=&sql=\(text+contains+\(""\)\)&rech=1&language=fr&tri=dd+AS+RANK&numero=1&table_name=loi&F=&cn=1934072930&caller=archive&fromtab=loi&la=F&ver_arch=005](http://www.ejustice.just.fgov.be/cgi_loi/arch_al.pl?=&sql=(text+contains+()) (in German) (accessed 23.04.2013). According to Nandrin, the adoption of the law was a response to increased upsurge of militant and para-military organizations across the country in the 1930s (Cf. Nandrin, 2000: 42).

⁹⁷ Article 1(1) of the law reads that "das Auftreten in der Öffentlichkeit von Privatpersonen in Gruppen, die entweder durch die Übungen, die sie machen, oder durch die Uniform beziehungsweise Ausrüstungsteile, die sie tragen, wie militärische Truppen aussehen" are prohibited.

⁹⁸ Chapter IV, Article 22 of the law reads "Les services de police sont chargés de disperser les attroupements qui s'accompagnent de crimes et de délits contre les personnes et les biens ou d'infractions à la loi du 29 juillet 1934 interdisant les milices privées". See the full text of Loi sur la fonction de police, 1992 (Law about the Working of Police Forces), available at: <http://www.legislationline.org/topics/country/41/topic/15> (available in French, German, and English) (accessed 12.03.2013).

⁹⁹ Article 2 of the Law on Private Militia states "Die Uniformen und Abzeichen der Milizen oder Organisationen oder derer, die in der Öffentlichkeit auftreten, sowie die Waffen, das Material und alle Gegenstände, die ihnen dienen oder dazu bestimmt sind, ihnen zu dienen, werden beschlagnahmt. Das Gericht ordnet die Einziehung der im vorliegenden Artikel erwähnten Gegenstände an, selbst wenn sie dem Verurteilten nicht gehören". Article 2bis adds that „Wer bei oder anlässlich einer Kundgebung oder bei oder anlässlich einer Versammlung im Besitz eines Gegenstands entdeckt wird, der eine Gefahr für die öffentliche Sicherheit darstellt, wird mit einer Gefängnisstrafe von acht Tagen bis zu sechs Monaten und mit einer Geldbuße von sechsundzwanzig bis zu zweihundert [EUR] oder mit nur einer dieser Strafen bestraft“.

is also prohibited. Article 1 of the Law on Private Militia states clearly “[a]ny private militia and any other organisation of individuals whose purpose is to use force in order to replace the army or the police or in order to interfere in their actions or to take their place, is prohibited” (own translation).

Belgium has the majority of legal measures to constrain the freedom of expression. The hate and racist propaganda is prohibited according to the *Moureaux Law* which was adopted in 1981 and named after the Minister of Justice Philippe Moureaux. Similar to other European countries, this law was adopted to implement the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Cf. Fennema, 2000: 137). The law was tightened in 1993 and 1994 respectively. According to Part III Article 12 of this law, “[i]n matters within the scope of this Act, any form of discrimination is prohibited. For the purposes of this title, discrimination means: direct discrimination; indirect discrimination; instruction to discriminate; harassment” (own translation)¹⁰⁰. This law also punishes a membership or support of groups and organisations which propagate or engage in discrimination and segregation (Cf. Fennema, 2000: 128; Bleich & Lambert, 2013: 133). In the past, this law was applied several times, although, as Fennema noted, the enforcement of the anti-discrimination legislation in Belgium was not as severe as it was in Germany or France (Cf. Fennema, 2000: 129).

Similar to France discussed previously, Belgium has no provisions in its law to protect the state and its democratic institutions against a malicious anti-democratic propaganda¹⁰¹. However, there are several provisions within the Belgian Penal Code¹⁰² which aim to protect the democratic authorities from defamation and libel. According to Article 275 of the Penal Code, any outrageous act, be it through a speech or behaviour, directed against democratic incumbents is punished with an imprisonment from fifteen days to

¹⁰⁰ Loi tendant à réprimer certains actes inspirés par le racisme ou la xénophobie (Law aiming at punishing certain acts inspired by racism and xenophobia), 30 July 1981, available at: <http://legislationline.org/topics/country/41/topic/84> (in French) (accessed 23.03.2013)

¹⁰¹ Nandrin mentioned that during World War I, a Royal Decree was passed on 11th October 1916 which aimed to protect the democratic government from a malicious anti-democratic propaganda spread by Communists, Trostkists, and Nazi movements across the country. However, this law was in force only for the time of war and repudiated after the end of WWI (Cf. Nandrin, 2000: 45).

¹⁰² Code Pénale, 8 June 1867, available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1867060801 (in French) (accessed 29.03.2013)

six months and a fine from 50 to 300 Euro¹⁰³. Furthermore, according to Articles 445 and 446 the spreading of defamatory news (“une dénonciation calomnieuse”) against state incumbents is forbidden¹⁰⁴.

Similar to other democracies with a high defensiveness, Belgium has a specific legislation which punishes any propaganda materials that negate or ridicule the Holocaust against Jewish people during World War II, as well as other crimes against humanity. The majority of these provisions are outlined within the Penal Code¹⁰⁵. Additionally, the state has adopted a special *Holocaust Denial Law* on March 23, 1995, further extended in 1999. According to Article 1 of this law, “Whoever (...) denies, grossly minimises, attempts to justify, or approves the genocide committed by the German National Socialist regime during World War II, shall be punished by an imprisonment from eight days to one year and a fine from twenty six francs to five thousand francs”¹⁰⁶.

5.3 Democracies with *medium defensiveness* within the freedom constraints category

Unlike Germany, Austria, France and Belgium, the remaining four democracies the United Kingdom, the Netherlands, Denmark, and Sweden fall in the range of

¹⁰³ “Sera puni d'un emprisonnement de quinze jours à six mois et d'une amende de cinquante à trois cents [euros], celui qui aura outragé par faits, paroles, gestes ou menaces, un membre des Chambres législatives dans l'exercice ou à l'occasion de l'exercice de son mandat, un Ministre, un membre de la Cour constitutionnelle ou un magistrat de l'ordre administratif ou un membre de l'ordre judiciaire ou un officier de la force publique en service actif, dans l'exercice ou à l'occasion de l'exercice de leurs fonctions”

¹⁰⁴ Article 447 of the Penal Code states “Le prévenu d'un délit de calomnie pour imputations dirigées, à raison des faits relatifs à leurs fonctions, soit contre les dépositaires ou agents de l'autorité ou contre toute personne ayant un caractère public, soit contre tout corps constitué, sera admis à faire, par toutes les voies ordinaires, la preuve des faits imputés, sauf la preuve contraire par les mêmes voies. S'il s'agit d'un fait qui rentre dans la vie privée, l'auteur de l'imputation ne pourra faire valoir, pour sa défense, aucune autre preuve que celle qui résulte d'un jugement ou de tout autre acte authentique. Si le fait imputé est l'objet d'une poursuite répressive ou d'une dénonciation sur laquelle il n'a pas été statué, l'action en calomnie sera suspendue jusqu'au jugement définitif, ou jusqu'à la décision définitive de l'autorité compétente. (Dans le cas où l'action publique ou l'action disciplinaire relative au fait imputé est éteinte, le dossier concernant cette action est joint au dossier de l'action en calomnie et l'action en calomnie est reprise. Dans le cas d'une décision de classement sans suite ou de non-lieu quant à l'action relative au fait imputé, l'action en calomnie est reprise, sans préjudice d'une suspension de cette action si l'enquête relative au fait imputé connaît de nouveaux développements judiciaires”.

¹⁰⁵ See in particular Articles 136bis, 136ter, 136quater, 136sexies and 136septies within the Penal Code.

¹⁰⁶ Loi tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste allemand pendant la seconde guerre mondiale, 23 March 1995, available at: http://www.ejustice.just.fgov.be/cgi/loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1995032331 (accessed 30.03.2013)

democracies with a medium defensiveness within this category. Compared to the four highly defensive countries, the legal arsenals in these democracies cover fewer of regulations based on which political freedoms could be constrained. The subsequent sections will analyse the legal situation within these countries in greater detail.

5.3.1 Freedom constraints in the United Kingdom

The UK's arsenal of legal constraints entitles this democracy for a medium defensiveness within the freedom constraints category. Regarding the constraints on the freedom of assembly and association, the UK has several provisions within its law that can be used to constrain these freedoms. The key legislation is the *Public Order Act of 1936* (afterwards POA 1936), which was already analysed within the previous chapter focusing on the legal bans. As stated previously, this law was introduced in reaction to the grown activities of various non-democratic groups in the United Kingdom during the 1930s. The act provides the government with several provisions to control the assemblies and public processions of the non-democratic groups in the country (Cf. Ewing & Gearty, 1990: 86). According to Section 3 Paragraph 1 and 2 of this act, all public demonstrations and meetings are subject to a prior notification of the police authorities. After the receipt of such notification, the senior police officer has the right to either impose conditions concerning the route or the places where the demonstration or meeting take place, or prohibit them at all, if the police officer apprehends that such event might "occasion serious public disorder". According to Ewing and Gearty, this provision was extensively used during the government of Margaret Thatcher (1979 - 1990) to ban anti-government marches organised by miners' trade unions during 1984 - 1985 (Cf. Ewing & Gearty, 1990: 86, 113).

Furthermore, Section 2(3) of the POA 1936 gives the police authorities the right to search in and even disband the properties and premises where the non-democratic groups gather¹⁰⁷. A similar provision is contained within *the Equality Act 2010*¹⁰⁸. According to Article 57(4) of this Act, a minister can „restrict the

¹⁰⁷ Public Order Act, 1936 (1 Edw. 8 & 1 Geo. 6. Ch.6), available at: <http://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/6/contents> (accessed 02.06.2013)

¹⁰⁸ Equality Act 2010, available at: http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf (accessed 05.06.2013)

provision of goods, facilities or services in the course of activities carried on in the performance of his functions in connection with or in respect of an organization to which this section relates". This article refers primarily to religious and belief organisations.

Additionally, Section 1 of the POA 1936 prohibits the wearing of uniforms "in any public place or at any public meeting" that could signify a person's association with any political organisation or with a promotion of any political goal¹⁰⁹. During the 1930s, this provision was used against the British Nazi groups to prohibit their members to wear the black shirts. More recently this provision was used against the party *Sinn Fein* to prohibit its members to wear the Basque berets (Cf. Eatwell, 2010: 214). Furthermore, according to Section 4(1) of the POA 1936 the wearing of arms during meetings and public demonstrations is forbidden¹¹⁰. Section 2 forbids the building of paramilitary organisations.

Another key legislation used frequently by the British government to constrain its non-democratic groups in the exercise of the freedom of assembly and association is the *Public Order Act of 1986* (afterwards POA 1986)¹¹¹. According to some scholars, the POA 1986 has significantly expanded "the extensive list of police public order powers" (Ewing & Gearty, 1990: 117-118). In essence, the Act extended the preventive powers of the police to impose a total ban on meetings and demonstrations if a concern arises for a "serious public disorder"¹¹². According to Section 11(1) of the Act, all proposals to hold a public demonstration or a meeting should be submitted to the police for its approval at least six days before the planned event and can be rejected if "the chief officer

¹⁰⁹ Public Order Act 1936, Section 1.

¹¹⁰ Section 4(1) reads "Any person who, while present at any public meeting or on the occasion of any public procession, has with him any offensive weapon, otherwise than in pursuance of lawful authority, shall be guilty of an offence".

¹¹¹ Public Order Act 1986 (Chapter 64), available at: <http://www.legislation.gov.uk/ukpga/1986/64> (of particular relevance to the freedom of assembly are sections 11, 12, 13, 14, 14A, 14B, 14C, 15 and 16 of the Act) (accessed 04.06.2013).

¹¹² Section 13, for example, says that "If at any time the chief officer of police reasonably believes that, because of particular circumstances existing in any public district or part of a district, the powers under section 12 will not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder, he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned". The article 13 of the POA 1986 was often used in the past to prohibit marches of the far right group English Defence League.

of police reasonably believes” that such demonstration may cause a public disorder.

Besides the POA 1936 and POA 1986, another key legislation to control the freedom of assembly and association is the *Serious Organized Crime and Police Act of 2005*. This act has given the police additional powers to disband meetings and demonstrations taking place within the vicinity of the British parliament under Section 132 to 135¹¹³. Anyone seeking an authorization from the police to organize a demonstration in a designated area must give a written notice to the Commissioner of Police of the Metropolis not less than 6 days before the day on which the demonstration is to start (Section 133).

Unlike democracies with a high defensiveness within the freedom constraints category, the United Kingdom has fewer provisions for constraining the freedom of expression. For example, the UK has no provisions to protect its democratic institutions and authorities from subversive propaganda and libel. Although the UK’s defamation law includes several acts¹¹⁴, the existing law does not explicitly punish verbal or written expressions used to delegitimize its democratic institutions or incumbents. Furthermore, in comparison with democracies within the first group, the UK does not have a law prohibiting an anti-Holocaust propaganda. According to the current law, the denial of Holocaust is not a crime in the UK.

However, the UK has several laws that can be used to punish a dissemination of propaganda materials inciting hatred and discrimination against other groups of people on the ground of their ethnic, religious, or cultural origin. According to Bleich, the UK has “the most highly developed antidiscrimination institutions in Europe” (Bleich, 2011: 121). According to Part III Section 18(1) of the POA 1986, “any person who uses threatening, abusive, or insulting words or

¹¹³ Section 132 to 135 of the Serious Organized Crime and Police Act of 2005, Chapter 15, available at: http://www.legislation.gov.uk/ukpga/2005/15/pdfs/ukpga_20050015_en.pdf According to the Section 132 the parliament falls in so called “designated area”. (accessed 12.07.2013)

¹¹⁴ The defamation law in the UK is regulated by several parliamentary acts. The first act was adopted in 1952 and can be viewed at: http://www.legislation.gov.uk/ukpga/1952/66/pdfs/ukpga_19520066_en.pdf. This act was amended in 1996 to expand the definition of ‘malicious falsehood’ used within the previous law. The Defamation Act of 1996 is available at: <http://www.legislation.gov.uk/ukpga/1996/31/introduction>. In 2013, the government adopted another Defamation Act, primarily with the goal to set forth the definition of a ‘serious harm’ used within the previous defamation law. This act can be viewed at: <http://services.parliament.uk/bills/2012-13/defamation.html>. (accessed 18.07.2013)

behaviour, or displays any written material which is threatening, abusive, or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby”¹¹⁵. Section 21 of the Act adds whoever distributes, shows, or plays any visual images or sounds which are threatening, abusive or insulting is also guilty of an offence. Furthermore, Section 22 prohibits broadcasting of programs in cable program service with abusive and insulting content. According to Section 23, it is an offence to possess “racially inflammatory material”.

Another key legislation used to constrain the non-democratic actors in using racial discrimination and violence is the *Race Relations Act* which was adopted in 1965 in reaction to grown instances of racial violence in the country (Cf. Mullender, 2009: 331; Bleich, 2011: 120-121). This act was amended several times. In 1968, Sections 3 and 5 were added to prohibit discrimination in the employment and housing¹¹⁶. In 1976, the Act was amended again, mainly to emulate the much harder anti-racism legislation of the United States (Cf. Bleich, 2011: 121). The Race Relations Act of 1976 prohibits any form of racial discrimination based on color, race, nationality, or ethnic origin, and provides a more effective mechanism for its enforcement (Cf. Bleich, 2011: 121)¹¹⁷. More recently, the government adopted the new *Racial and Religious Hatred Act 2006* which made it an offence to use words or behavior or display of a written material with an intention to stir up racial hatred or if in the circumstances racial hatred is likely to be stirred up¹¹⁸.

5.3.2 Freedom constraints in the Netherlands

The Netherlands belongs also in the ‘medium defensiveness range within the freedom constraints category. The Dutch legal arsenal with regard to the constraints upon the freedom of assembly and association is relatively wide ranging and similar to those found in the UK. Looking at the first constraint, public demonstrations and meetings are subject to a prior notification under

¹¹⁵ Public Order Act 1986, Part III, Section 18(2)

¹¹⁶ Race Relations Act 1968, Chapter 71, available at: <http://www.legislation.gov.uk/ukpga/1968/71/enacted> (accessed 15.07.2013)

¹¹⁷ Race Relations Act 1976, Chapter 74, available at: <http://www.legislation.gov.uk/ukpga/1976/74> (accessed 15.07.2013)

¹¹⁸ Racial and Religious Hatred Act 2006, Chapter 1, available at: <http://www.legislation.gov.uk/ukpga/2006/1/contents> (accessed 17.07.2013)

Section 2 of the Public Assemblies Act which was adopted in 1988 and amended in 1994¹¹⁹. According to Section 5 of this Act, after a formal notification was submitted, the municipal authorities can deny their permission if they have a concern that such event can lead to a public order risk or endanger the public health, or if they deem it necessary in the interest of traffic¹²⁰. According to van Donselaar, since the end of the 1970s “virtually any attempt by the extreme right to call a demonstration has been regarded as an unacceptable public order risk” (van Donselaar, 2003: 267).

Moving to the next constraint, a building of militant and paramilitary organisations is punished by two important provisions within the Dutch Penal Code¹²¹. According to Article 140 Paragraph 1 and 2, a membership in such organisations is considered a criminal offense and is punished by an imprisonment up to six years¹²². Likewise, if someone participates in an organisation which was banned by a final court decision or by law is punished by an imprisonment for up to one year or a fine¹²³. A formation or participation in an organisation whose goal is to commit terrorist offenses is considered a crime of a greater offense. According to Article 140a of the Penal Code, such act is punished with an imprisonment up to fifteen years or a heavy fine¹²⁴.

¹¹⁹ Public Assemblies Act, Act of 20 April 1988, Bulletin of Acts and Decrees 157 containing provisions concerning the exercise of the right to profess a religion or belief and of the right of assembly and demonstration, as last amended by Act of Parliament of 22 June 1994, Bulletin of Acts and Decrees 573 (entered in force 27-04-1988), available at: <http://legislationline.org/documents/action/popup/id/4703> (accessed 12.05.2013)

¹²⁰ Section 5 of the Act reads “The power to restrict the right (...) of assembly and demonstration (...) may be exercised only to protect health, in the interest of traffic and to combat or prevent disorder”. (accessed 10.05.2013)

¹²¹ Dutch Penal Code in Dutch language is available at: http://wetten.overheid.nl/BWBR0001854/geldigheidsdatum_22-08-2014 (accessed 21.05.2013). Excerpts in English can be viewed at: <http://www.legislationline.org/documents/id/4693>

¹²² “(1). Participation in an organisation whose purpose is to commit crimes, shall be punished with imprisonment not exceeding six years or a fine of the fifth category”

¹²³ Article 140(2) of the Penal Code reads “Participation in the continuation of the activities of an organisation that has been banned by final court decision or by law is prohibited or for which an irrevocable declaration referred to in Article 122, first paragraph, of Book 10 Civil Code was issued, punished with imprisonment not exceeding one year or a fine of the third category”.

¹²⁴ Article 140a reads “1. Participation in an organisation whose object is to commit terrorist offenses, shall be punished with imprisonment not exceeding fifteen years or a fine of the fifth category. 2. Founders, leaders or directors are liable to life imprisonment or a term of imprisonment not exceeding thirty years or a fine of the fifth category”.

As far as the wearing of uniforms is concerned, it is prohibited on the basis of Article 435a of the Penal Code¹²⁵. This provision was introduced within the Penal Code during the 1930s. After the end of World War II, this provision was maintained and according to van Donselaar and Wagenaar was frequently used to put members of radical groups under arrest due to their outer appearance (Cf. van Donselaar & Wagenaar, 2009: 392). Additionally, the *Arms and Ammunition Act* adopted in 1997¹²⁶ prohibits the carrying of a firearm in a plain view in any public place.

The Netherlands has several laws to constrain the freedom of expression of its non-democratic actors. Several articles within the Dutch Criminal Code prohibit any form of discrimination on the basis of race, ethnicity, or culture. The legal basis is provided through Article 137 of the Penal Code. According to Article 137c, it is prohibited to use a discriminatory defamation. The use of discrimination is punished by an imprisonment up to one year or a fine. Whoever makes it a habit or repeats it occasionally is liable to an imprisonment for a term up to two years. Furthermore, according to Article 137d whoever uses hate propaganda is punished with an imprisonment up to one year. Likewise, if someone repeats such delicts or makes it to a habit, is liable to an imprisonment for up to two years. A publication of printed materials containing any discriminatory remarks or displays of discriminatory character is forbidden according to Article 137e. From 1992 on, this provision also applies to sending of discriminatory publications (Cf. van Donselaar & Wagenaar, 2009: 391). Furthermore, according to Article 137g, anyone who is in his official capacity, profession or business, intentionally discriminates against other people on the ground of their race is liable to an imprisonment of not more than 6 months or a fine. A defamation used against public authorities is also covered by several regulations within the Criminal Code¹²⁷. However, as previously

¹²⁵ “Whoever wears and carries in public garments or visible signs signifying a particular political objective, is liable to a term of detention of not more than twelve days or a fine of the second category”.

¹²⁶ Arms and Ammunition Act 1997, available at: http://wetten.overheid.nl/BWBR0008804/geldigheidsdatum_06-05-2014 (accessed 16.05.2013). Article 27 of the act states that “it is prohibited to carry weapons of categories II, III and IV”. These categories include firearms, bladed weapons, and any other weapons.

¹²⁷ Articles 111-113 of the Dutch Penal Code to protect the royal dignity (“Intentional defamation of the King is punishable by a term of imprisonment of not more than five years or a fine of the fifth category”). Article 267 punishes defamation of public authorities, a public body or a public institution. The article reads “The punishments prescribed in the preceding articles of this title

mentioned, there are no legal rules within the Dutch law protecting its democratic institutions from a delegitimising or disgraceful propaganda. Similar to the UK, the Netherlands has also no rules forbidding an anti-Holocaust propaganda.

5.3.3 Freedom constraints in Denmark

Denmark also falls within the range of democracies with a medium defensiveness, although it has fewer constraints than the UK and the Netherlands discussed previously. Regarding the constraints upon the freedom of assembly and association, Denmark has no specific provisions available within its law that can be used to disband or prohibit the meetings and demonstrations organised by its non-democratic parties or groups. In general, the Danish law is relatively lenient toward the need of suppressing the freedom of assembly. Unlike democracies analysed previously, the right to organize an assembly or to run a demonstration is not subject to a prior permission by municipal or police authorities¹²⁸. Similarly, the Danish law has no provision to prohibit the wearing of uniforms and any other symbols of prohibited or outlawed organisations. However, the wearing of arms is prohibited at any time during a public demonstration and meeting. The building of paramilitary and violent organisations is prohibited according to Article 78(2) of the Danish Constitution¹²⁹. Any participation within an organisation which was dissolved through a court judgment is punished with an imprisonment up to two years, according to Article 132 of the Danish Penal Code¹³⁰.

may be increased by one third, where the defamation is made with regard to: (1) the public authorities, a public body or a public institution; (2) a public servant during or in connection with the lawful execution of his duties; (3) the head or a member of the government of a friendly nation.”

¹²⁸ Article 79 of the Danish Constitution states that “citizens shall, without previous permission, be at liberty to assemble unarmed”.

¹²⁹ “Associations employing violence, or aiming at the attainment of their object by violence, by instigation to violence, or by similar punishable influence on persons holding other views, shall be dissolved by court judgment”. In addition, Article 114f of the Danish Penal Code punishes any person who participates or provides financial support and any other support to any corps, group or association, which intends, by use of force, to exert influence on public affairs or give rise to disturbances of the public order.

¹³⁰ Criminal Code of Denmark is available at: www.legislationonline.org/documents/action/popup/id/17600 (in Danish) (accessed 28.05.2013). Article 132 of the Penal Code states that “a person who participates in the continuation of an association's business after it was provisionally banned by the government or dissolved by judgment shall be punished by fine or imprisonment up to 2 years”.

As for other constraints, the Danish law has several provisions that can be used to punish verbal expressions harming other people on the ground of their racial, ethnic, and cultural background. According to the *Act of Equal Treatment* which was adopted to implement the European Council Directive from June 29, 2000 calling for equal treatment between people irrespective of their racial or ethnic origin, no person in Denmark “may subject another person to direct or indirect discrimination on grounds of the latter’s or a third party’s racial or ethnic origin” (Part 1, Article 3(1))¹³¹. Furthermore, Paragraph 266b of the Danish Penal Code punishes serious discriminatory or racist statements made at a public meeting with an imprisonment up to 2 years or a fine (Cf. Meret, 2009: 99)¹³². Furthermore, according to Articles 139 and 140 of the Penal Code speeches insulting or ridiculing any religious community, or religious doctrines or worship are punished with an imprisonment of 4 months or a fine (Cf. Meret, 2009: 100)¹³³.

Similar to the United Kingdom and the Netherlands analysed previously, Denmark has no provisions to protect its democratic institutions from non-democratic propaganda. However, it has special measures to protect the personal honour of its democratic incumbents. According to Article 267 of the Criminal Code, the dissemination of false information and libel disparaging leading democratic authorities is punished with an imprisonment of 4 months¹³⁴. Furthermore, according to Article 115 this punishment can double if the libel was directed against the royal family or the regent. Lastly, according to Article

¹³¹ Act on Ethnic Equal Treatment, available at: <http://www.lexadin.nl/wlg/legis/nofr/eur/lxweden.htm> (accessed 16.05.2013)

¹³² “Any person who publicly or with the intention of dissemination to a wide circle of people makes a statement or imparts other information threatening, insulting or degrading a group of persons on account of their race, color, national or ethnic origin, belief or sexual orientation, shall be liable to a fine, simple detention or imprisonment for a term not exceeding two years”. Part two added in 1995 added “It aggravates the sentence if this has a character of propaganda”. The paragraph can be applied toward print material if the latter contains antiracist information”.

¹³³ The provision was however never used. In 1938, the High Court of Eastern Denmark (Ostre Landsret) convicted a number of Danish Nazis for blasphemy under section 140 of the Danish Criminal Code for having, among other things, distributed media that falsely stated that the Talmud permitted Jewish men to force non-Jewish girls to engage in sexual intercourse. According to Lagoutte, this was the first and the last time when these articles were handed down to convict non-democratic groups (Cf. Lagoutte, 2008: 379-380).

¹³⁴ Danish Criminal Code, Article 267 reads “A person who violates another’s honor by insulting words or actions or by making or spreading allegations of a relationship that is likely to reduce the victim of fellow esteem, punishable by fine or imprisonment for up to 4 months”. Article 121 adds that “any person who with scorn, abuse or other abusive aim assaults any of the persons mentioned in Article 119 in the discharge of his service or duty or in respect of the same shall be punished by a fine or imprisonment up to 6 months” (transl. by Google translator)

121 of the Penal Code anyone who assaults a public authority “with scorn, contempt, or other abusive expression” is punished with an imprisonment of 6 months. Similar to the United Kingdom and the Netherlands, a denial of Holocaust against Jewish people during World War II is not punishable in Denmark (Cf. Bilefsky, 2007).

5.3.4 Freedom constraints in Sweden

The last democracy with a medium defensiveness within this category includes Sweden. With regard to the constraints upon the freedom of assembly and association Sweden has several provisions to constrain its non-democratic actors in the use of this freedom. According to Chapter 2, Section 22-24 of the Public Order Act of 1994, anyone who organises a demonstration or meeting must notify the police beforehand and a permit is required¹³⁵. Section 4 states “public meetings and public events may not, without permission be organized in public places”. Upon the receipt of a notification, the police may impose conditions such as concerning the timing and/or the place necessary to ensure the security and maintain the public order. Anyone who organises a demonstration must ensure that public order is maintained according to Chapter 2, Section 16 of the Act. Furthermore, the police are given wide powers to cancel or disperse a demonstration under Chapter 2, Section 23 of the Act, if serious disorder arises or in connection with a meeting¹³⁶. Serious disorder during a demonstration or meeting refers to an atmosphere that is riotous, causing considerable danger to those present, or a serious disruption to the traffic. Article 24 of the Swedish Constitution states the “[f]reedom of assembly and freedom to demonstrate may be limited in the interests of preserving public

¹³⁵ Chapter 2, Section 22-24 of the Public Order Act states that “a public assembly may be dispersed if a serious disturbance of public order occurs at the place of assembly, or, as a direct consequence of the assembly, in its immediate vicinity, or if it entails a serious risk to those present, or serious disruption to traffic”, and “a public event may be dispersed if it involves something that is forbidden by law or if it results in disorder, danger to those present or serious disruption to traffic. A public event, as well as a public assembly for the presentation of artistic work, may be dispersed”. Public Order Act (1993: 1617), available at: <http://legislationline.org/documents/action/popup/id/7308> (accessed 16.06.2013)

¹³⁶ Chapter 2, Section 22-24 of the Public Order Act states that “3. a public assembly may be dispersed if a serious disturbance of public order occurs at the place of assembly, or, as a direct consequence of the assembly, in its immediate vicinity, or if it entails a serious risk to those present, or serious disruption to traffic, and 4. a public event may be dispersed if it involves something that is forbidden by law or if it results in disorder, danger to those present or serious disruption to traffic. A public event, as well as a public assembly for the presentation of artistic work, may be dispersed”.

order and public safety at a meeting or demonstration, or with regard to the circulation of traffic. These freedoms may otherwise be limited only with regard to the security of the Realm”¹³⁷. Furthermore, the Penal Code foresees penalties for the organisers and participants of such events in case if a riot outbreaks or disobedience to public authority occurs under Chapter 16, Section 1-3 and 9¹³⁸. Additionally, the building of paramilitary organisations is prohibited according to Chapter 18, Sections 4 and 5 of the Penal Code¹³⁹. The building of such organisations is punished with an imprisonment for a maximum of two years or a fine.

Sweden imposes fewer constraints on the freedom of expression. For example, Sweden has no provisions to prohibit the wearing of military uniforms and other visible signs of prohibited organisations, although such law was adopted as early as in 1933 and amended in 1947 to include clothes and symbols. However, this law was repealed in 2002, as it conflicted with the protection of the freedom of expression guaranteed within the constitution (Cf. Widfeld, 2004: 163).

Furthermore, Sweden has no legislation that would protect its democratic institutions and the form of the government against antidemocratic propaganda. The provision enshrined within Chapter 16 Section 7 of the Penal Code which punished the speeches insulting the Swedish flag, was repealed in 1970 (Cf. Brush, 1968: 80). Similarly, there is no legislation that could be used to protect the democratic authorities from defamation and libel¹⁴⁰. The current provisions within the Penal Code refer only to spreading of a socially harmful rumour (‘false alarm’) (Chapter 16 Section 15). Section 6 within Chapter 17 of the Penal Code on base of which spreading false rumours calumniating public authority

¹³⁷ The full text of the Swedish Constitution is available at: <http://www.government.se/sb/d/2707/a/15187> (accessed 18.06.2013)

¹³⁸ The Penal Code, Chapter 16, Section 1 - 3, and 9, available at: <http://www.government.se/sb/d/3926/a/27777> (accessed 10.06.2013)

¹³⁹ Chapter 17, Section 4 and 5 of the Penal Code, available at: <http://www.government.se/sb/d/3926/a/27777> (accessed 18.06.2013). Section 4 reads “A person who founds or participates in an association which must be considered to constitute or, in view of its character and the purpose for which it has been organized, is easily capable of developing into, an instrument of force such as a military troop or a police force, and which does not with due authority reinforce the national defence or the police, or who on behalf of such association deals in arms, ammunition or other like equipment, makes available a building or land for its activity or supports it with money or in other ways, shall be sentenced for unlawful military activity to a fine or imprisonment for at most two years”.

¹⁴⁰ The relevant section in the Penal Code dealing with defamation (Chapter 5) is only 2 pages long.

was repealed in 1976. Moreover, there is no law in Sweden that would prohibit the anti-Holocaust propaganda.

However, Sweden has special provisions to outlaw speeches inciting a discrimination and hatred against people of other ethnic or cultural backgrounds. The major incentive to adopt such provision was the upsurge of racist violence in the country during 1980s and 1990s (Cf. Björge, 1993: 31; Löw, 1993: 62ff). According to the estimation of the European Monitoring Centre on Racism and Xenophobia (EUMC) Sweden had the second highest level of racist and right violence within the EU after Germany (Cf. Widfeld, 2004: 162). As result of increased racist violence, the antidiscrimination legislation which existed in the country since 1948 was amended several times, in 1970, 1982 and 1988 (Cf. Widfeld, 2004: 163). At present, the main provisions against verbal expressions inciting racism and discrimination are supplied within Chapter 16 Section 8 of the Penal Code, which prohibits the incitement to hate on the basis of colour of skin, religion and sexual orientation, as well as ridicule and contempt¹⁴¹. In addition to insulting speech, Chapter 5 Section 5 of the Penal Code punishes “insulting behaviour towards a person with allusion to his or her race, colour, national or ethnic origin or religious belief” (Cf. Bull, 2012: 85). Furthermore, the *Discrimination Act of 2008* prohibits any form of discrimination defined in Section 4 of this Act as a direct discrimination, indirect discrimination, harassment, sexual discrimination, and instructions to discriminate in employment, education, military and civil service¹⁴². Moreover, Chapter 5 Paragraph 1 of the Criminal Code prohibits a defamation of other national groups. The incitement to seditious acts, defamation and discrimination of certain population groups on base of their racial, ethnic or cultural origin can also be punished under the Swedish *Freedom of the Press Act* of 1949. Chapter 7 Article 4 specifies that print materials promoting or inciting high treason, sedition, war, defamation and contemptuous agitation against a

¹⁴¹ The chapter reads “A person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin or religious belief shall, be sentenced for agitation against a national or ethnic group to imprisonment for at most two years or, if the crime is petty, to a fine”.

¹⁴² Discrimination Act (SFS 2008:567), available at: <http://www.government.se/sb/d/3926/a/118187> (accessed 06.06.2013)

population group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation are punishable under criminal law¹⁴³.

5.4 Evaluation of findings

This chapter has provided a systematic assessment of the variations in legal constraints to the freedom of assembly and association and freedom of expression available in the eight democracies studied. As it was stressed earlier, this category is less severe as compared with the first category of legal ban. The following Table 8 presents an overview of the configurations found among these democracies when analysing the first two categories of legal ban and freedom constraints simultaneously followed by a descriptive analysis of the results found.

Table 8: Overview of configurations among democracies across the categories of legal ban and freedom constraints

Freedom constraints	1-0.7 High defensiveness	0.6-0.4 Medium defensiveness	0.3-0 Low defensiveness
Legal ban			
1-0.7 High defensiveness	Germany Austria France		
0.6-0.4 Medium defensiveness	Belgium	United Kingdom Netherlands Denmark Sweden	
0.3-0 Low defensiveness			

When these two categories are analysed simultaneously, it is clear the majority of democracies captured in this study (7 out of 8) exhibit the same pattern of defensiveness across the two categories: grouping either within the high defensiveness (Germany, Austria, and France) or medium defensiveness (UK, Netherlands, Denmark, and Sweden) groups. Additionally, once again no

¹⁴³ “With due regard to the purpose of freedom of the press for all under Chapter 1, the following acts shall be deemed to be offences against the freedom of the press if committed by means of printed matter and if they are punishable under law (...) agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, colour, national or ethnic origin, religious faith or sexual orientation”. The Freedom of the Press Act, available at: <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Freedom-of-the-Press-Act/>(accessed 08.06.2013).

democracies fell into the low defensiveness group, which provides further support towards the argument expressed earlier that the eight democracies studied tend to have fairly constraining legal frameworks against non-democratic parties and groups (for details see Chapter 4.4). These similarities in country constellation between the two categories suggests there is a certain *trade-off pattern* whereby democracies which have both party and group bans as two distinct legal mechanisms also have the most constraining legal frameworks including strong freedom-constraints. Also, the democracies which adopt only group bans tend to have less constraining legal frameworks with fewer restrictions upon political freedoms.

That said, however, Belgium exhibits a differing defensiveness pattern across the two categories. As shown in Table 8, Belgium combines a medium defensiveness within the legal ban category with a high defensiveness within the freedom constraints category, which makes it more similar to the group of democracies with a high defensiveness (Germany, Austria and France). This difference in defensiveness across the two categories is quite possibly due to the fact (see for details Chapter 4.3.2) that the Belgian state has a special attitude towards the place and role of political parties within the democratic political system, which ultimately found its expression in the decision of the Belgian government not to adopt legal party ban mechanism against its non-democratic opponents (Cf. Nandrin, 2000: 50).

The following chapter will ascertain whether the patterns of formal-legal defensiveness observed across legal ban and freedom constraints categories are enhanced when the category of operational constraints is considered or whether the latter introduces additional complexity.

CHAPTER 6:

SYSTEMATIC ASSESSMENT OF VARIATIONS BETWEEN DEMOCRACIES IN THE PRESENCE OF OPERATIONAL CONSTRAINTS

6.1 Introduction

This chapter will analyse the cross-national variations between the eight democracies studied within the last category capturing the operational constraints. As specified earlier, this category combines measures and provisions that are the least severe in terms of constraints they impose on the presence and operation of non-democratic parties and groups. The category includes the following five constraints: state surveillance, constraints on the employment in civil service, electoral threshold, constraints on ballot access, and constraints on access to direct state funding for non-democratic parties. As specified earlier, the first two constraints belong to the classic repertoire of militant democracy, although unlike other measures of militant democracy, they affect the presence and operation of non-democratic parties and groups rather indirectly. The remaining constraints have been derived from the electoral and party finance laws. As argued earlier, these measures were not intended by governments as tools to defend democracy from non-democratic parties and groups. This notwithstanding, they help defend democracy de facto by turning the access of non-democratic parties and groups to democratic institutions more difficult and their ability to access the state financial resources more demanding.

This chapter will present a systematic assessment of the differences and similarities in the operational constraints between the eight democracies studied. I will conclude with a review and discussion of all empirical results presented in the last three chapters to arrive to a better understanding of the key profiles of democratic defensiveness across the countries studied.

6.2 Systematic assessment of variations across operational constraints

The following Table 9 offers a systematic mapping of variations between the eight democracies across the operational constraints.

Table 9: Mapping of democracies across operational constraints

Indicator/ country	DE	NL	AT	BE	UK	SE	DK	FR
1. Constraints through state surveillance	1	1	1	1	1	1	1	1
2. Constraints on employment in civil service	1	1	1	0	1	0	0	0
3. Constraints on ballot access	1	1	1	1	1	1	1	0
4. High electoral threshold	1	0	1	1	0	1	0	1
5. Constraints on access to direct state funding for non-democratic parties	1	1	0	1	0	0	0	0
Standardized score:	1	0.8	0.8	0.8	0.6	0.6	0.4	0.4
Level of defensiveness:	High defensiveness				Medium defensiveness			

Note: 1 = legal mechanism is present; 0 = legal mechanism is absent. The countries are ordered according to the standardized score they achieved across individual indicators. Grey shading is added to indicate democracies in high defensiveness category. Legend: AT-Austria; BE-Belgium; DE-Germany; DK-Denmark; FR-France; NL-Netherlands; SE-Sweden; UK-United Kingdom. Source: Information about electoral threshold was compiled using data from the Inter-Parliamentary Union website at: <http://www.ipu.org/parline-e/mod-electoral.asp> (accessed 20.08.2013).

Table 9 reflects that Germany, the Netherlands, Austria, and Belgium fall in the range of democracies with a high defensiveness in this category having all or the majority of operational constraints within their legal arsenals. The remaining four democracies the United Kingdom, Sweden, Denmark, and France build the second group with a medium defensiveness in this category having fewer operational constraints at their disposal. There are no democracies falling in the low defensiveness range which underscores the importance of formal-legal mechanisms of democratic defensiveness as already revealed in earlier chapters. The following sections discuss each group of countries in turn starting first with the democracies with a high defensiveness in operational constraints.

6.2.1 Democracies with *high defensiveness* in operational constraints

Germany, the Netherlands, Austria and Belgium have a high defensiveness within this category. As in the earlier chapters, I will start with an analysis of the most defensive country in this group, Germany, and move to the less defensive ones.

6.2.1.1 Operational constraints in Germany

Germany is the only democracy among democracies covered in this study which has all operational constraints within its legal arsenal. As far as the state surveillance is concerned, the evolution of state bodies dedicated to the surveillance of the state internal enemies can be traced back to the time after the end of World War II. The emergence of the *Federal Agency for the Protection of the Constitution* (Bundesamt fuer Verfassungsschutz, BfV), which is the main federal state body tasked with the surveillance and gathering data about potentially dangerous groups and political parties, was predicated on the necessity to prevent the Communist Party from undermining the new German state (Cf. Schmalenbach, 2009: 421). The agency was set up in 1951 and has since that time acquired a reputation of being a “guardian of democracy” in Germany. Furthermore, the agency has also acquired a role model for other countries in setting up similar agencies for the surveillance of potentially dangerous parties and groups (see Austria later) (Cf. More, 1994: 285; Canu, 1997: 180). The legal grounds for the functioning of the BfV are laid down within the *Federal Law for the Protection of the Constitution* (Bundesverfassungsschutzgesetz, BVerfSchG)¹⁴⁴. According to this law, the BfV is authorised to conduct a monitoring and gathering of information about political groups and actors who can represent a potential danger to the survival of the state and its democratic constitutional order. According to Article 3(1) of this law, the main goal of the new body is to combat those efforts “which are directed against the free democratic basic order, the existence and security of the Federation or one

¹⁴⁴ Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz (Bundesverfassungsschutzgesetz-BVerfSchG (Law concerning the Cooperation between the Federation and the Länder in relation to the protection of the constitution and about the Federal Agency for the Constitutional Protection), available at: <http://www.gesetze-im-internet.de/bverfschg/BJNR029700990.html> (accessed 06.03.2013)

of its states, or which aim to unlawfully interfere with the execution of the public office by members of the constitutional organs of the Federation or the Länder” (own translation)¹⁴⁵. Regarding the methods that the BfV is allowed to use, Article 8 stipulates the BfV is authorised to employ “methods, objects and instruments as well as undercover agents, observations, audio and video recordings” necessary to retrieve the information about individuals or groups aiming to subvert the democratic order. In its operation, the BfV is directly accountable to the Ministry of the Interior and works closely with similar agencies for the protection of the constitution created within each of the sixteen states (Länder) of the Federal Republic of Germany (Cf. More, 1994: 285). According to Article 2 Paragraph 2, all German Länder are obligated to set up similar state bodies responsible for the protection of the constitution. Thereby, each *Landesamt für Verfassungsschutz* (state agency for the protection of the constitution) has its own statute stipulating its powers for gathering information and intelligence (Cf. More, 1994: 286). The scope of their activities is confined to the territorial borders of respective states, whereas the Federal Agency for Constitutional Protection is authorised to gather information all over the country (Cf. Schmalenbach, 2003: 422). Following the amendment in 1990, a new Paragraph 3 was added to Article 4 which stipulates the collection and evaluation of information about groups suspected by the state can only start after the federal and state agencies have “concrete, factual grounds” for a suspicion that activities of these groups are directed against the free basic democratic order (“Voraussetzung für die Sammlung und Auswertung von Informationen im Sinne des § 3 Abs. 1 ist das Vorliegen tatsächlicher Anhaltspunkte”) (Cf. More, 1994: 285). Since the start of the international campaign against international terrorism after the terrorist attacks on the United States in September 2001, the functions of the BfV have been considerably expanded. The adoption of the *Law on Combatting Terrorism* (Terrorismusbekämpfungsgesetz) in 2002 has increased the functional responsibilities of the BfV (Cf. Schmalenbach, 2003: 423)¹⁴⁶. According to the new Paragraph 4 in Article 3, the agency has now the power to collect and evaluate any information

¹⁴⁵ BVerfSchG, Article 3(1).

¹⁴⁶ Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz), 9 January 2002, Bundesgesetzblatt, Vol. 2002, Part I, Nr. 3, pp.361-395, available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Gesetzestexte/Terrorismusbekaempfungsgesetz_pdf.pdf?__blob=publicationFile (accessed 16.03.2013)

which is directed “against the idea of international understanding” and “peaceful coexistence of nations” (Cf. Schmallenbach, 2003: 423).

Moving to the second constraint which assesses the presence of legal constraints upon the employment in civil service of members of non-democratic parties and groups, Germany has such regulation available within both the Basic Law and statutory law. According to Article 33 Paragraph 4 of the Basic Law, “the exercise of sovereign authority on a regular basis shall (...) be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law” (Cf. Rudolf, 2003: 210, 217). Furthermore, according to Article 7 Paragraph 2 of the *Federal Law on Civil Servants* (Bundesbeamtengesetz, BBG), adopted in 2009, only those are eligible for the work in civil service, “who provide the guarantee at any time to stand up for the free democratic basic order”¹⁴⁷. A similar provision is contained within the *Law on the Status of Civil Servants in the Länder* (Beamtenstatusgesetz, BeamtStG), which regulates the status and function of civil servants on the level of German states¹⁴⁸. According to Rudolf, in Germany the duty of a civil servant to support the free democratic basic order starts from the time of his entry in the civil service and terminates with his resignation. Those civil servants who receive pensions are obligated to keep this duty even after their retirement (Cf. Rudolf, 2003: 210-211). Another important law is the ‘radicals decree’ (‘Extremistenbeschluss’), which was adopted in 1972¹⁴⁹. This rule was introduced primarily to prevent the members of the former Nazi party to take an employment in the civil service. Although this clause was criticised by many and even abandoned in the majority of German states¹⁵⁰, it is still in force in some states, for example, the state of Bavaria (Cf. Rudolf, 2003: 221).

¹⁴⁷ Article 7(2) of the Bundesbeamtengesetz (BBG) (Federal law on civil servants), available at: http://www.gesetze-im-internet.de/bundesrecht/bbg_2009/gesamt.pdf (accessed 06.03.2013). The relevant provision reads “Only those can be appointed in the civil service, who (...) provide the guarantee at any time to stand up for the free democratic basic order within the meaning of the Basic Law“ (own translation).

¹⁴⁸ Article 7(2) of the Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz, BeamtStG), available at: <http://www.gesetze-im-internet.de/bundesrecht/beamstg/gesamt.pdf> (accessed 16.03.2013)

¹⁴⁹ The copy of the Extremistenbeschluss (Radicals decree), BVerfGE 39, 334, can be viewed at: http://www.servat.unibe.ch/dfr/bv_039334.html (accessed 26.03.2013)

¹⁵⁰ The clause was objected not only because of the carelessness with which it was conducted, but also because of its ineffectiveness (Cf. Backes & Jesse, 1989: 292-293; Monson, 1984).

Moving to the constraints on the ballot access, Germany requires all political parties to collect signatures before they appear on the ballot. According to Article 20 Paragraph 2 of the German *Law on Elections* (Wahlgesetz, BWahlG), political parties must submit at least 200 signatures of eligible voters ('Unterstützungsunterschriften') in every of its 299 constituencies for direct mandates. Only those political parties are exempt from this requirement which have at least 5 representatives sitting already in the Bundestag or in one of its sixteen state parliaments (Landtag)¹⁵¹. This amount of signatures is the second highest among the eight countries studied after Denmark (analysed later). During the last federal elections to the Bundestag in 2013, many small parties including non-democratic parties, such as *the Republikaner* and the *Bürgerbewegung pro Deutschland*, faced many difficulties to gather the required amount of signatures among the electorate in support of their parties (Cf. Dammann, 2013; Bernard & Kaufmann, 2013). As a result, these parties could not place their candidates in the selected constituencies. The German system does not require a deposit.

Germany falls in the group of countries with a high threshold for parliamentary entry - using 3 per cent of the national vote as the boundary between high and low thresholds (see for details Chapter 3.4). According to the current provision within the *Federal Elections Act* (Bundeswahlgesetz, BWahlG)¹⁵², all political parties must obtain at least 5 per cent of the national vote in order to get a seat in the parliament. This threshold is applied for both the federal elections to the national parliament, the Bundestag, and the state elections in the state parliaments (Cf. Norris, 2005: 53). In the past, such high threshold has already prevented many small parties, including the non-democratic parties, such as the National Democratic Party of Germany (Nationaldemokratische Partei Deutschlands, NPD), from entering the federal and state regional

¹⁵¹ Article 20 Paragraph 2 of the Federal Law on Elections (Bundeswahlgesetz, BWahlG), available at: <http://www.gesetze-im-internet.de/bwahlg/> (accessed 16.03.2013). For electoral lists the law requires for 2000 signatures. That is in case if a party wants to place its candidates in every single constituency that makes that it has to collect in total 59.800 of valid signatures (calculated on the basis of 299 constituencies × 200 signatures of eligible voters in every constituency).

¹⁵² Bundeswahlgesetz (BwahlG) (Federal Law on Elections), available at: <http://www.gesetze-im-internet.de/bwahlg/> (accessed 16.03.2013). Paragraph 6 states that "During distribution of seats among the regional lists only those political parties are considered which have received at least 5 percent of the valid second votes in the electoral district or won a seat in at least three constituencies (my own translation).

parliaments¹⁵³. Typically, if political parties fail to pass the threshold, they lose automatically the entitlement for a direct state funding, which as said earlier builds an important source of income for contemporary political parties.

Moving to the final constraint, Germany has several rules on base of which a non-democratic party can be withdrawn from the access to the direct state funding. According to Article 18 Paragraph 7 of the German *Party Law*, political parties lose automatically the right to receive the direct state funding if they have been declared unconstitutional and banned by the Federal Constitutional Court¹⁵⁴. According to this Article there is a link between the ability to receive the direct state funding and the democratic character of a political party. Furthermore, according to Article 18 Paragraph 2 of the Federal Elections Act, if any political organisation decides to participate in the parliamentary elections and become eligible for the direct state funding, they must be recognized beforehand as political parties by the Bundeswahlleiter (federal chief election commissioner). Thereby, the party law specifies in detail which requirements political organisations have to meet in order to be recognized as political parties. According to Article 6 Paragraph 2 of the Party Law, political parties must submit their party statutes to the election authorities for their review. If it turns out during the review that the statute of a political party contains any goals that go contrary to the constitutional principles, such organisations cannot be recognised as political parties (Cf. Saalfeld, 2000: 90).

6.2.1.2 Operational constraints in the Netherlands

The Netherlands's arsenal of operational constraints also qualifies for a high defensiveness within this category. With regard to the first constraint of state surveillance, the country has been continuously conducting a surveillance of its non-democratic parties and groups. The AIVD (*Algemene Inlichtingen- en*

¹⁵³ For example, during the last elections in the German Bundestag 2013 all four right-wing extremist parties (National Democratic Party (NPD), The Right Party (Die Rechte), For Germany (pro Deutschland), and the Republican Party (Die Republikaner) participating in the elections achieved only 1.8% together (NPD: 1.3%, Die Rechte: 0.1%, pro Deutschland: 0.2%, Republikaner: 0.2). For the results of the parliamentary elections in 2013 see: <http://www.wahlrecht.de/news/2013/bundestagswahl-2013.html> (accessed 06.08.2013). However, the NPD party could pass the threshold of 5% during the last parliamentary elections in the state of Mecklenburg-Vorpommern where the party achieved 6% in 2011.

¹⁵⁴ Article 18 Paragraph 7 of the Party Law which reads “[i]f a party is dissolved or banned, it shall lose its eligibility for support under the state partial funding program from the date of its dissolution”.

Veiligheidsdienst), established after the end of World War II, is the key security and intelligence service within the country (Cf. van Donselaar & Wagenaar, 2009: 399). The AIVD's statutory responsibilities are outlined within the *Intelligence and Security Services Act*, adopted on 7 February 2002. According to Chapter 3, Article 13, Paragraph 1a of this act, the main duties of the AIVD include to "process personal data relating to persons who give cause to serious suspicion for being a danger to the democratic legal system, or to the security or other vital interests of the state" (Cf. CODEXTER, 2008: 4; van Donselaar & Wagenaar, 2009: 399)¹⁵⁵. According to van Donselaar and Wagenaar, this also involves the surveillance of political parties which have been defined as dangerous to the constitutional order of the state (Cf. van Donselaar & Wagenaar, 2009: 399). At the local level, the service has several branch offices which are integrated within the police force. Initially, there were more than 100 local intelligence services (*Plaatselijke Inlichtingendiensten*) and 20 district intelligence services (*Districtsinlichtingen-diensten*). In 1993, all these services were converted into 25 regional intelligence services (*Regionale Inlichtingendiensten*) (Cf. van Donselaar & Wagenaar, 2009: 399). Since 1993, the AIVD has published the annual reports summing up the development of non-democratic threats in the country. Typically, the AIVD processes this information and shares it with the appropriate partners, enabling them to take the necessary measures. Similar to Germany, the AIVD members do not have the law enforcement authority and cannot investigate criminal offences.

Moving to the next constraint which assesses the presence of legal constraints upon the employment in civil service, the Dutch law contains a provision on base of which the members of non-democratic parties or groups can be suspended from their duty in civil service. The first rule was introduced in the Dutch law as early as in 1934. This law permitted "the exclusion from representation in political bodies (national, provincial, and communal) of adherents of subversive parties who advocate alteration of the existing form of government by unlawful means" (Cf. Loewenstein, 1937b: 650)¹⁵⁶. However, at

¹⁵⁵ Chapter 3 Article 13 Paragraph 1a of the Intelligence and Security Services Act of 7 February 2002 (Wiv 2002), available at: http://www.st-ab.nl/wetten/0662_Wet_op_de_inlichtingen- en veiligheidsdiensten_2002.htm (in Dutch) (accessed 16.05.2013).

¹⁵⁶ Loewenstein mentions the Ordinance from April 5, 1934. The earlier law of 12 December 1929 laying down rules concerning the legal status of Dutch civil servants makes no explicit reference to such possibility. See Law of December 12, 1929, containing regulations governing

present the key provision regulating the employment of the members of non-democratic parties or groups is stipulated within the Dutch Penal Code. According to Article 28 (1-5) of the code, the state has the right to exclude the members of non-democratic parties or groups from an employment in the army and holding “certain professions”, particularly so if that person has been convicted of racial discrimination¹⁵⁷. According to van Donselaar and Wagenaar, the law refers specifically to articles 137c, 137d, 137f, and 137g of the Penal Code which prohibit racial discrimination (Cf. van Donselaar & Wagenaar, 2009: 396).

Moving to the constraints upon the ballot access, the Dutch law requires all political parties which participate in parliamentary elections to submit both signatures and deposit in support of their nominees. According to Section H4 Para 1 of the *Dutch Elections Act*, “[i]n the case of an election to the House of Representatives or to a provincial or municipal council with at least 39 seats to be filled, the minimum number of declarations of support shall be 30; in the case of an election to a municipal council with fewer than 39 but more than 19 seats to be filled, the minimum number of declarations of support shall be 20, and in the case of an election to a municipal council with fewer than 19 seats to be filled the minimum number of declarations of support to be submitted shall be 10”.¹⁵⁸ Although the number of signatures that political parties in the Netherlands are required to collect in support of their nominees is relatively low¹⁵⁹ in comparison with many other democracies where signatures are required, it has presented a formidable barrier for many non-democratic parties in the past. For example, the right-wing extremist party *Conservatieven.nl* was only able to participate in a few numbers of districts because of the problems faced by this party in collecting the enough number of signatures (Cf. van

the legal status of civil servants, available at: http://wetten.overheid.nl/BWBR0001947/geldigheidsdatum_24-02-2014#TitelIV (in Dutch) (accessed 18.05.2013)

¹⁵⁷ Article 28, Paragraph 5 of The Dutch Penal Code reads “The rights (...) may be dismissed by a court judgment 1. to occupy certain posts; 2. to serve in armed forces; 3. to elect members of general representative bodies and to be elected as a member of these bodies; 4. to be elected as a legal counsel or administrator; or 5. to exercise certain professions” (translated by Google translator). The Dutch Penal Code is available at: <http://www.lexadin.nl/wlg/legis/nofr/eur/lxwened.htm> (in Dutch). (accessed 19.05.2013)

¹⁵⁸ Act of 28 September 1989 containing new provisions governing the franchise and elections (Elections Act), available at: <http://www.government.nl/files/documents-and-publications/leaflets/2010/06/25/elections-act/pdf-voor-engelse-site-elections-act-2010.pdf> (accessed 20.05.2013)

¹⁵⁹ If calculated across all of its 19 electoral districts political parties in the Netherlands have to submit the total of 570 signatures which is comparatively low as compared with many other democracies such as for example Germany (Cf. Bischoff, 2006: 70).

Donselaar & Wagenaar, 2009: 396). According to van Donselaar and Wagenaar, there were many other political parties which were discouraged to participate in the elections because of this formal requirement. In addition to the signature requirement, the Dutch law also requires its political parties to pay a monetary deposit in order to stand for election. According to Section H12 of the Dutch *Elections Act*, at present the amount of a deposit for an individual constituency is set at 11.250 Euro¹⁶⁰. Thereby, the party can claim its deposit back only if it has achieved at least 75 per cent of votes of the electoral quota (or 0.5 per cent of the national vote) (Cf. Adebi, 2004: 94-95)¹⁶¹.

In contrast to its strict regulation of ballot access, the Netherlands' current electoral threshold is comparatively low. Along with the United Kingdom, the Netherlands has the lowest threshold among the eight democracies covered in this study (Cf. Downs, 2012: 34). According to Chapter U Article 2 of the *Elections Act*, the seats in the Dutch parliament are distributed on the basis of an effective threshold 100% divided by the total number of seats (that is 150). That sets the current threshold used in the Netherlands at 0.67 per cent¹⁶². That makes the Dutch threshold below 3 per cent which has been defined as the boundary between the high and low threshold for this constraint.

Regarding the final constraint, the Netherlands has special legislation at its disposal to control the access of non-democratic parties to the direct state funding. As a result of an increased criticism during the 1990s, that many non-democratic parties received hefty subsidies and used this money for broadening their antidemocratic activities within the country, the Dutch parliament has introduced a rule within the *Political Subsidies Act*¹⁶³ permitting to withdraw

¹⁶⁰ Section H12 of the Elections Act, available at: <http://www.government.nl/files/documents-and-publications/leaflets/2010/06/25/elections-act/pdf-voor-engelse-site-elections-act-2010.pdf> (accessed 16.05.2013)

¹⁶¹ According to Section P5 of the Elections Act (Act of 28 September 1989 containing new provisions governing the franchise and elections) the electoral quota is equivalent to the sum of the total votes cast for all the lists divided by the number of seats to be allocated. "The quotient thus obtained shall be known as the electoral quota".

¹⁶² Chapter U, Article 2 Section U3, U7 of the Dutch Elections Act. Section U 3 reads "For each province the central electoral committee shall multiply the number of votes cast for each candidate and the total vote cast for the lists by the vote value for that province. In order to determine the result of the election, the products thus obtained shall serve as the numbers of votes cast for each candidate or the total votes cast for the lists".

¹⁶³ The Subsidies Act for Political Parties (as valid on July 22, 2011), available at: http://www.stab.nl/wetten/0813_Wet_subsidiering_politieke_partijen.htm. English translation is available at: www.partylaw.leidenuniv.nl (both accessed 02.04.2013).

those political parties which violate the principles of the Dutch antiracist legislation from receiving the direct state funding (Cf. van Donselaar & Wagenaar, 2009: 395). The current provision within Section 5, Article 16 states “[i]n case that one political party on the grounds of articles 137c, d, e, f, of g, or article 429quater of the Penal Code, is sentenced to an unconditional fine, the claim for subsidies expires legally during a period that starts on the day on which the sentence has become irrevocable”. Articles 137 (c-g) and 429quater of the Dutch Penal Code refer specifically to the acts of inciting a racial discrimination.

6.2.1.3 Operational constraints in Austria

Austria’s range of operational constraints also qualifies for a high defensiveness within this category, although like the Netherlands it also has fewer operational constraints at its disposal than Germany. Regarding the first constraint, Austria actively uses the state surveillance of its non-democratic parties and groups. Following the example of Germany, Austria founded the *Federal Agency for Constitutional Protection and Combatting Terrorism* (Bundesamt für Verfassungsschutz und Terrorismusbekämpfung, BVT) in 2002, which is the key state body responsible for conducting state surveillance of internal and external non-democratic threats to the country. The BVT is directly responsible to the Ministry of Inner Affairs and is incorporated within it as a separate department. The functional responsibilities of the BVT are split between the Bundesamt (federal agency) and 9 Landesämter für Verfassungsschutz (state agency for the protection of the constitution, LV), created within each Austrian state. As outlined within Articles 20 to 27a of the *Bundesgesetz über die Organisation der Sicherheitsverwaltung und die Ausübung der Sicherheitspolizei* (Sicherheitspolizeigesetz, SpG) (Federal Law about the organisation of the security administration and the exercise of the security service)¹⁶⁴, the BVT has the goal to protect the democratic constitutional order. This includes combatting extremist and terrorist threats, espionage,

regulating the amount of subsidies granted to political parties in the Netherlands is Article 6 Paragraph 1 and 2.

¹⁶⁴ Bundesgesetz über die Organisation der Sicherheitsverwaltung und die Ausübung der Sicherheitspolizei (Sicherheitspolizeigesetz - SPG) StF: BGBl. Nr. 566/1991 (NR: GP XVIII RV 148 AB 240 S. 41. BR: 4119 AB 4122 S. 545.), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005792> (accessed 16.09.2013)

international arms trade, trade with nuclear weapons, and organised crimes. Furthermore, the BVG has the duty to publish annual reports with a detailed analysis of the main threats to the state and its democratic institutions (Cf. Verfassungsschutzbericht, 2013). In doing so the BVG raises the awareness about groups that threaten the Austrian democracy and exposes them to a general contempt.

Moving to the next constraint, Austria has strict rules for the employment in the civil service of the former members of the NSDAP party and any other national-socialist organisations. The former members of the NSDAP party have no chance of employment in the civil service¹⁶⁵. The legal basis is provided by the *Law on the National-Socialists*, adopted in 1947 and amended in 1957. According to Part II Paragraph I (1-5) of this law, all former members of the NSDAP party are forbidden to take any posts in the civil service. Additionally, all employers with the links to the national-socialist organisations must be suspended from their duty¹⁶⁶. Only “lesser offenders” (‘minderbelastete Personen’), that is those who were not actively engaged in the National-Socialist party or have no links with national-socialist organisations, could be accepted “only at the request and only by special examination of their political behaviour prior to 27 April 1945” in the civil service (Part II Paragraph I (1)).

With regard to the next constraint on the ballot access, Austria requires its political parties to submit signatures in support of their party nominees. According to the Austrian *Electoral Act* (Nationalrats-Wahlordnung, NRW), introduced in 1992, political parties are required to provide at least 2600 signatures in support of their party nominees¹⁶⁷. According to some experts,

¹⁶⁵ However, when the ‘extremism clause’ was introduced in Germany the Austrian Federal Chancellor Bruno Kreisky (1970-1983) was quoted saying that the issue of a similar rule in Austria is “out of discussion” and that the solution of such problem can only be solved politically but not administratively (Cf. Schäffer & Stadler, 1981: 444).

¹⁶⁶ Bundesverfassungsgesetz vom 6. Februar 1947 über die Behandlung der Nationalsozialisten (Nationalsozialistengesetz), available at: <http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000215/Nationalsozialistengesetz%2c%20Fassung%20vom%2019.02.2014.pdf> (accessed 10.04.2013)

¹⁶⁷ See Article 42 Paragraph 2 of NRW which states „The party nomination list must have been signed by at least three members of the National Council or of those registered in the electoral register on the record date in the provincial constituency and entitled to vote (§ 21 para. 1). In particular, the nominees must be supported in the country constituencies Burgenland and Vorarlberg by 100 voters each; in the country's electoral districts of Carinthia, Salzburg and Tyrol by 200 voters each; in the country's constituencies upper Austria and Styria by 400 voters each; and in provincial constituencies Lower Austria and Vienna by 500 voters

many small parties in Austria, including the non-democratic parties such as the *Communist Party of Austria* had many difficulties during the last parliamentary elections in 2013 to find enough number of supporters and criticised the rule for its exclusionist nature (Cf. Fellner, 2013). That said, Austria does not require its political parties to file a monetary deposit in order to stand for elections. However, parties have to pay a fee in the amount of 435 Euro (called “Druckkostenbeitrag”) for printing ballots, which is not refundable¹⁶⁸.

Moving on the next constraint, Austria has a high threshold that political parties have to pass to obtain a seat in the parliament (Nationalrat). As stipulated within Article 100 Paragraph 1 of the Austrian *Electoral Act* (Nationalrats-Wahlordnung, NRWO), only those political parties can take part in the allocation of mandates which received at least 4 per cent of the valid votes cast, while political parties which obtained less than 4 per cent of the votes cannot be involved in the allocation of mandates¹⁶⁹.

Regarding the next constraint assessing the availability of legal restrictions to receiving the direct state funding for the non-democratic political parties, there are no rules in Austria that would allow the state to withdraw its non-democratic parties from the access to the direct state funding, even if these parties violate the democratic principles. According to Section II Paragraph 2(1) of the *Federal Act on the Functions, Financing and Election Campaigning of Political Parties* (PartG), all political parties which are represented in the National Council have unrestricted access to the direct state funding, “for the purposes of public relations activities”.

each” (own translation). Austria has 11 multi-member constituencies broken down in 43 regional constituencies.

¹⁶⁸ See Article 43 Paragraph 4 which states that „The campaigning political parties have to contribute for the cost of preparing the official ballot in regional constituencies in the amount of 435 Euros to the federal government. The contribution is to submit in bar simultaneously with the submission of the nomination list (Paragraph 1) to the State Election Commission. If the contribution is not paid, the submission of a list is considered as not valid” (own translation).

¹⁶⁹ „Article 100 Paragraph 1 reads “In the second round (that is during the allocation of mandates, S.B.) only those political parties take part which scored at least 4% of the valid votes cast”. Article 107(2) adds “Parties which have received no mandate in a regional constituency and have obtained less than 4% of the valid votes cannot participate in the allocation of mandates” (own translation).

6.2.1.4 Operational constraints in Belgium

Lastly, the range of operational constraints of Belgium places this country also firmly within the group of democracies with a high defensiveness. As far as the state surveillance is concerned, it has always been one of the key strategies used by the Belgian authorities against political extremism. (Cf. Keunings, 1989: 59-60; van Oustrive & Cappelle, 1995: 141). Similar to other democracies in Western Europe, the evolution of the Belgian surveillance system was very much predicated on the efforts of the Belgian state to counter the pro-Communist tendencies in the country after the end of World War II (Cf. van Oustrive, 2003: 39-40). The current Belgian State Security Service, known in Dutch as *Veiligheid van de Staat* and in French as *Sûreté de l'État*, is the key intelligence and security body in Belgium (Cf. van Oustrive, 2003: 32; Matthijs, 2008: 552)¹⁷⁰. It is a civilian agency put under the authority of the Ministry of Justice. Its main tasks, as laid down in Article 7 of the *Organic Law on Intelligence and Security Services* (Loi organique des services de renseignement et de sécurité), adopted on 30 November 1998, include the collection and analysis of information related to all activities threatening the internal and external security of the state, the continued existence of its democratic and constitutional order, the performance of democratic institutions, and the public security¹⁷¹.

Moving to the next constraint assessing the presence of formal restrictions for the employment in the civil service, Belgium has no special law that would allow it to ban the members of non-democratic groups or political parties from the duty in civil service, although in the past its government tried to introduce such law several times (Cf. Nandrin, 2000: 46). For example, on 2nd October 1937 a

¹⁷⁰ See the website of the institution at: http://justice.belgium.be/fr/service_public_federal_justice/organisation/services_et_commissions_independants/surete_de_lEtat/ (accessed 16.04.2013)

¹⁷¹ Article 7(1) reads «La Sûreté de l'Etat a pour mission: de rechercher, d'analyser et de traiter le renseignement relatif à toute activité qui menace ou pourrait menacer la sûreté intérieure de l'Etat et la pérennité de l'ordre démocratique et constitutionnel, la sûreté extérieure de l'Etat et les relations internationales, le potentiel scientifique ou économique défini par le Comité ministériel, ou tout autre intérêt fondamental du pays défini par le Roi sur proposition du Comité ministériel». The full text of the Loi organique des services de renseignement et de sécurité (Organic law concerning the intelligence and security services) is available at: [http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?=&sql=\(text+contains+\(""\)\)&rech=1&language=fr&tri=dd+AS+RANK&numero=1&table_name=loi&F=&cn=1998113032&caller=image_a1&fromtab=loi&la=F&pdf_page=1&pdf_file=http://www.ejustice.just.fgov.be/mopdf/1998/12/18_2.pdf](http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?=&sql=(text+contains+() (accessed 23.05.2014)

Royal Decree was adopted which prohibited the state servants to engage in any activities which contradicted the state constitution or the laws under Article 9 of this act (“Ils [les agents de l'état] ne peuvent se livrer à aucune activité qui serait en opposition avec la Constitution et les lois du peuple belge”)¹⁷². This rule was adopted mainly against the members of the Belgian Communist Party (Kommunistische Partij van België / Parti Communiste de Belgique) to prevent them to enter the civil service. However, this law was suspended on 16th October 1944 due to the positive role that the Communists played within the Resistance Movement during the World War II (Cf. Nandrin, 2000: 46-47). After the end of World War II, the circumstances of the Cold War moved the Communists again in the camp of the state enemies. Therefore, on 13th September 1950, the Council of Ministers took a decision to reanimate the Royal Decree from 2nd October 1937 once again (Cf. Nandrin, 2000: 46-47). This provision remained in force until 4th August 2004 when the government decided to suspend it once again¹⁷³. Today rather informal admission rules are applied within the Belgian civil service (Cf. Suetens et. al, 1981: 50; also Klamt, 2012: 50). According to the new rules, the public sector employees can join any political party inasmuch as this does not conflict with an effective operation of the state.

With regard to the constraints on the ballot access, Belgium requires its political parties to collect signatures in order to place their candidates for the elections in the national parliament (Chamber of Representatives). According to Article 116 §1er of the *Electoral Code* political parties must submit their candidates' lists to the main constituency office. Thereby, political parties must endorse their candidatures' lists with the support signatures ranging from 200 to 500 voters depending on the size of a constituency¹⁷⁴. Alternatively, candidates' lists must

¹⁷² Arrête Royal du 2 octobre 1937 portant le statut des agents de l'état, available at: http://www.fedweb.belgium.be/fr/reglementation/19371002_ar_statut.jsp#.VJMZUPNtLcs (accessed 20.04.2014)

¹⁷³ Arrêté royal du 4 aout 2004 relatif à la carrière du niveau A des agents de l'Etat, available at: http://www.ejustice.just.fgov.be/doc/rech_f.htm (accessed 20.05.2014)

¹⁷⁴ Belgian Election Code 2007, available at: <http://aceproject.org/ero-en/regions/europe/BE/belgium-election-code-2007/view> (accessed 12.04.2014). Article 116 §1er reads “Pour l'élection de la Chambre des Représentants, la présentation doit être signée soit par cinq cents électeurs au moins lorsqu'au dernier recensement, la population de la circonscription électorale est supérieure à un million d'habitants, par quatre cents électeurs au moins lorsque ladite population est comprise entre 500.000 et un million d'habitants et par deux cents électeurs au moins dans les autres cas, soit par trois membres sortants au moins”.

obtain the support of three retiring members of the parliament ('membres sortants'). There is no requirement for a deposit payment.

Moving to the next constraint, Belgium's current threshold for obtaining a seat in the parliament is higher than 3%, thus qualifying it for a high defensiveness within this constraint. According to Article 165bis of the *Electoral Code* only those political parties can obtain a seat in both the Chamber of Representatives and Senate which have received at least 5 per cent of votes cast within each constituency (currently 11 multi-member constituencies)¹⁷⁵. This high threshold was introduced in 2003 as a result of an electoral reform and had the goal to prevent a further fragmentation of the political party system (Cf. Hooghe & Deschouwer, 2011: 637-638). Following the example of Germany, it was hoped that through this new threshold many small political parties, including the non-democratic ones, would face more difficulties to contest a seat during the elections, thus leaving the mainstream political parties to form the government. (Cf. Hooghe & Deschouwer, 2011: 638).

With regard to the next operational constraint, Belgium has a special provision within its *Party Finance Law*, adopted in December 1998, which gives the state the right to withdraw the direct state funding for a minimum of three months and a maximum of one year from those political parties which regularly break the European Convention on Human Rights (ECHR), adopted by the European Council on November 4, 1950 (Cf. Swyngedouw, 2009: 71-72)¹⁷⁶. This provision was adopted mainly against the Vlaams Blok party (Flemish Blok) which was known for frequently breaking the Belgian anti-racist legislation. According to Articles 15bis and 15ter of the Party Finance Law, the direct state funding is given to all political parties on the condition that they observe the rights and

¹⁷⁵ The full text of the Electoral Code can be viewed at: http://www.verkiezingen.fgov.be/fileadmin/user_upload/Elections/communales2012/fr/20120822-news/code-electoral-kieswetboek-20120901.pdf Article 165bis of the Code reads "1. pour l'élection de la Chambre des représentants, les listes qui ont obtenu au moins 5 % du total général des votes valablement exprimés dans la circonscription électorale ; 2. pour l'élection du Sénat, les listes qui ont obtenu au moins 5 % du total général des votes valablement exprimés en faveur des listes présentées pour le collège électoral français ou le collège électoral néerlandais, selon le cas".(accessed 15.04.2014)

¹⁷⁶ In general, all political parties in Belgium are entitled to the direct state funding if they are represented in either of the two representative bodies the Chamber of Representatives and the Senate by a directly elected member of parliament. See Chapter III, Article 15 of the Belgium Party Finance Law which reads "The Chamber of representatives and of the Senate, each on their own behalf, shall grant, for each represented political party (within one of the) Assemblies by at least one member of Parliament directly elected". Belgian Party Finance Law of 4th July 1989, available at: www.partylaw.leidenuniv.nl (accessed 22.05.2014)

freedoms guaranteed under the ECHR¹⁷⁷. In order to launch a formal procedure of a withdrawal of the direct state funding from a political party, five members of a parliamentary commission on party financing have to submit their formal complaint to the Council of State about a political party breaching the ECHR (Cf. Swyngedouw, 2009: 72). The Council of State decides then the case. In 2000, this provision was invoked by two anti-racist groups to file an indirect attack on the Vlaams Blok party. On April 21, 2004 the Ghent Court of Appeal declared illegal the financial support granted to this party by three key organisations which were providing financial support to this political party for training of leadership and media relations, on the ground that the party was a racist organisation (Cf. Erk, 2005; Brems, 2006; Bleich & Lambert, 2013: 133). Having lost the source of income, the Vlaams Blok dissolved itself subsequently.

6.2.2 Democracies with *medium defensiveness* within the operational constraints category

The United Kingdom, Sweden, Denmark, and France fall in the group of democracies with a medium defensiveness, when their range of operational constraints is considered. In what follows, the legal situation within each of these countries is analysed in greater detail, moving from higher to lower scores.

6.2.2.1 Operational constraints in the United Kingdom

The United Kingdom's scope of operational constraints places this democracy firmly within the range of medium defensiveness. As far as the first constraint of

¹⁷⁷ Chapter III, Articles 15bis reads "In order to benefit from the subsidy specified at article 15, each party shall, (...), include in its statutes or program a provision according to which it commits to observe the political action it intends to conduct and make its different components and elected representatives observe at least the rights and freedoms guaranteed under the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 as approved by the law of May 13, 1955 and amended by additional protocols in force in Belgium". The next article 15ter §1 adds that "§ 1. When a political party, by its own act or by the act of its components, lists, candidates or elected representatives, proves itself, in a clear manner and based upon several corresponding signs, hostile towards the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 as approved by the law of May 13, 1955 and amended by additional protocols in force in Belgium, the subsidy, that, according to the provisions set forth in this chapter, is granted to the institution specified at article 22 shall be, if (the general assembly within the administrative division) of the State Council decides thereupon, cut off within fifteen days by the Commission of control up to the amount decided by the State Council".

state surveillance is considered, the United Kingdom has by far the most comprehensive legal basis related to the regulation of the security services, as compared with other democracies covered in this study. The key legal document is the *Security Service Act 1989* which was adopted to put the work of the UK's main security intelligence agencies, the MI5 (Military Intelligence, Section 5), MI6 (Military Intelligence, Section 6), and the GCHQ (Government Communications Headquarters), on a statutory ground (Cf. Gill, 2003: 270; Eatwell, 2010: 216)¹⁷⁸. According to Section 1 Paragraph 2 of this act, “[t]he function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means”¹⁷⁹. Other key legal documents include the *Intelligence Services Act 1994* and *Security Service Act 1996*. Both acts were adopted to add “the prevention or detection of serious crime” to the functional duties of security services in the country (Cf. Gill, 2003: 277)¹⁸⁰. Furthermore, the terrorist attacks on the United States on 11th September 2001 and the series of terrorist attacks on the London transportation system on 7th July 2005 have prompted the British government to increase the powers of its security services. According to Moran and Phythian, the security services were seen as the key to combating the new terrorism threat in the country (Cf. Moran & Phythian, 2008: 2; also Klausen, 2009: 412). The *Anti-Terrorism, Crime and Security Act* adopted in 2001 has among other things empowered the security agencies to gather intelligence about groups involved in the illicit production and trade with weapons of mass destruction under Sections 43 to 57 of this Act¹⁸¹. The *Prevention of Terrorism Act 2005*, adopted after the terrorist attacks in London on 7th July 2005, gave the security services additional powers for enhanced surveillance of groups and individuals who were put under the so called ‘control

¹⁷⁸ From these three security agencies the MI5 is responsible for gathering intelligence about domestic threats while the other two MI6 and the GCHQ are responsible for gathering foreign secret intelligence in the interest of national security (Cf. Gill, 2003: 267; CODEXTER, 2007: 8).

¹⁷⁹ Section 1 Paragraph 2, *Security Service Act 1989*, Chapter 5, available at: <http://www.legislation.gov.uk/ukpga/1989/5/contents> (accessed 24.12.2013)

¹⁸⁰ Section 1 Paragraph 2, *Intelligence Services Act 1994*, Chapter 13, available at: <http://www.legislation.gov.uk/ukpga/1994/13/contents> and Section 1(4) of the *Security Service Act 1996*, Chapter 35, available at: http://www.legislation.gov.uk/ukpga/1996/35/pdfs/ukpga_19960035_en.pdf (both accessed 12.11.2013)

¹⁸¹ See the full text of the *Anti-Terrorism, Crime and Security Act 2001*, Chapter 24, available at: <http://www.legislation.gov.uk/ukpga/2001/24/contents> (accessed 12.11.2013)

orders' by the Home Secretary according to Section 1 of the Act (Cf. Moran, 2008: 20). The imposition of a control order entailed further obligations for individuals or groups affected for purposes connected with protecting members of the public from a risk of terrorism. Finally, under the government strategy called CONTEST (an abbreviation for 'the counter-terrorism strategy'), adopted by the Home Office in 2006, the security services were given additional powers for the surveillance of Muslim organisations and communities operating in the country (Cf. Walker, 2008: 54; Gregory, 2010: 85ff; Spalek & Lambert, 2010: 103). The CONTEST strategy consisted of four interrelated strategies PREVENT, PURSUE, PROTECT, and PREPARE, always written in capital letters, and has further increased the powers of the police and state bodies for tackling domestic terrorism and radicalization among Muslim communities, of which the state surveillance was considered as "vital to defeating terrorism" (Cf. Home Office, 2006: 43; Walker, 2008: 54).

Moving to the next constraint, the UK has specific provisions that can be used to expel the members of non-democratic parties or groups from the duty in civil service. Thereby, unlike highly defensive democracies Germany, Austria or the Netherlands, the relevant provisions are found not in the constitution or statutory law, but in the case-law (Cf. Umbach & Harlow, 1981: 226; Woodhouse, 2013: 82). The *Constitutional Reform and Governance Act 2010* which is the main legislation for regulating the civil service in the UK does not refer to the political affiliation of a candidate as a ground for his or her rejection to enter or a dismissal from the duty in the civil service¹⁸². According to Section 10(2) of this Act, "a person's selection must be on merit on the basis of fair and open competition". Similarly, the *Employment Equality Act 2010* which is the main law regulating the discrimination in the workplace on the base of disability, gender, race, religion or belief, and sexual orientation does not also refer to the membership in a hostile party or an organisation as a ground for a dismissal from a job, meaning that such membership cannot be practically tuned against a particular person (Cf. Husbands, 2009: 272)¹⁸³ However, there is a significant body of case-law which provides an evidence that some employers in the UK

¹⁸² Constitutional Reform and Governance Act 2010, Chapter 25, available at: http://www.legislation.gov.uk/ukpga/2010/25/pdfs/ukpga_20100025_en.pdf (accessed 12.06. 2013)

¹⁸³ Equality Act 2010, available at: http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf (accessed 12.07. 2013)

can dismiss their employees if they are affiliated with the right-wing extremist British National Party (BNP). According to Husbands, the courts in the UK consider the membership in the BNP as a “reasonable ground for a dismissal” (Cf. Husbands, 2009: 273).

For example, in a famous *Baggs v. Fudge* case¹⁸⁴ where a person applying for a job of a practice manager in a small medical practice was suspended from the job interview because of his active membership in the right-wing extremist British National Party (BNP), the court has decided that the membership in the BNP was not a religion or belief, what the dismissed person has claimed before the court, but a membership in a “peculiar political party” which “restricts its membership on ethnic grounds” (Cf. *Baggs v. Fudge*, 2005: 2). Thus, his claim before the court tribunal that he was treated in violation of the Employment Equality Act 2003¹⁸⁵ was finally dismissed by the court. According to the court’s judgement the membership in the BNP “was sufficient for the claim to fail” (Cf. *Baggs v. Fudge*, 2005: 3).

The next evidence provides the case of *Redfearn v. Serco Ltd* in which an employee Arthur Redfearn was refused an employment in a transport firm as a driver because of his election as a local councilor for the British National Party (BNP) in West Yorkshire¹⁸⁶. The company justified its decision for the reason that most of its customers were of Asian origin and that the membership of a colleague in the BNP can threaten the safety and welfare of its customers (Cf. Husbands, 2009: 272).

Other cases includes the Association of Chief Constables and Police Officers which in 2004 issued a ban on the membership in the BNP party because it held that such membership would be in conflict with the duty of the police forces to promote racial equality. A similar regulation was enforced on the UK’s teachers in 2009 by the Department for Children, Schools and Families formally banning them from joining the BNP party (Cf. Eatwell, 2010: 214).

¹⁸⁴ The transcript of the full text of the case *Baggs v. Fudge* (1400114/05 (ET)) can be viewed at the website of the employment tribunal at: <http://uk.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247478068637&ssbinary=true> (accessed 24.10.2013)

¹⁸⁵ The Employment Equality (Religion or Belief) Act 2003 was finally revoked while some of its provisions were included in the Equality Act 2010. See Schedule 27, Part II of the Equality Act 2010. (accessed 20.10.2013)

¹⁸⁶ The transcript of the case *Redfearn v. Serco Ltd* (A2/2005/1845) can be viewed at: <http://www.bailii.org/ew/cases/EWCA/Civ/2006/659.html> (accessed 25.12.2013)

Moving to the constraints on the ballot access, the British law requires its political parties to pay a monetary deposit to nominate their candidates for elections. Currently the amount of the deposit is 500 British pounds which is only returned if a party has obtained at least 5 percent of the valid votes cast within a single constituency. While political parties pay a deposit, there is no formal requirement to file signatures for nomination. According to Part II Section 22 of the *Political Parties, Referendums and Elections Act 2000* (which replaced the Registration of Political Parties Act 1998) only those candidates who stand in elections as independents must collect signatures of at least ten voters within their respective constituencies (currently the UK has 650 single-member constituencies)¹⁸⁷.

As regards the next constraint, there is no formal threshold in the UK that political parties have to pass in order to gain a seat in the parliament (Cf. Downs, 2012: 34-35). According to the UK's current electoral system, what is important for winning a seat in the parliament is not a total proportion of votes that a political party has gained but the amount of the concentrated support it obtained within a constituency. This is why it is possible for any political party, including a non-democratic one, to win a seat in the parliament with less than 1 per cent of votes, provided these votes are concentrated within a particular constituency (Cf. Downs, 2012: 34)¹⁸⁸.

With regard to the next constraint assessing the presence of formal restrictions for the access to the direct state funding for non-democratic parties, the UK does not have such constraint. The direct state funding for political parties is provided in the UK since 2000 in form of Policy Development Grants (PDG). The legal basis is stipulated within the Political Parties, Referendums and Elections Act 2000 (Part I Article 12(b))¹⁸⁹. As it stands, the rules for receiving such grants are not strict, as all political parties are only required to have at

¹⁸⁷ Political Parties, Referendums and Elections Act, 2000, available at: <http://www.legislation.gov.uk/ukpga/2000/41/contents> (accessed 24.10.2013).

¹⁸⁸ This is why during the General Elections in 2010 the *Green Party* won 1 seat in the parliament with only 285,616 (or 1%) votes while the United Kingdom Independence Party (UKIP) won no seat even though it received in total 919,546 votes (or 3.1%). Unlike the Green party, the votes of the UKIP party were not concentrated within a constituency, while the Green party received a concentrated support in the constituency Brighton Pavilion (8.4% of votes) (Cf. Mitchell, 2010: 157-185).

¹⁸⁹ Part I Article 12(a) (1) of the Political Parties, Referendums and Elections Act 2000 defines the Development Policy Grant as "a grant to a represented registered party to assist the party with the development of policies for inclusion in any manifesto".

least two members represented in the House of Commons in order to be eligible to receiving them.

6.2.2.2 Operational constraints in Sweden

Sweden's repertoire of operational constraints puts it also firmly in the group of countries with a medium defensiveness. As regards the first constraint assessing the presence of the state surveillance, Sweden is the only democracy which does not have a separate civilian security agency in charge of conducting a surveillance of non-democratic threats inside the country. Internal security remains a matter of the Security Police (commonly referred to as Säpo) which has the power to conduct surveillance and intelligence about groups and political parties that threaten the state and its democratic constitutional order (Cf. Cameron & Töllborg, 2003: 182)¹⁹⁰. In this the Security Police is different from the ordinary police and has a greater degree of autonomy from it albeit both are formally under the control of the National Police Board (NPB) (Cf. Cameron & Töllborg, 2003: 175). The main purpose of the Security Police as laid down within Section 1 of the *Police Act* (1984: 387) consists in "its efforts to support justice and maintain public safety"¹⁹¹. As stipulated further within Section 7 of this Act, this includes the prevention and discovery of crimes against national security. According to Cameron and Töllborg, one of the most important instruments in the work of the Security Police is their security intelligence files. The purpose of these files is to identify the members of political groups and parties who might pose a potential threat to the internal and external security of the state, or who seek to subvert the state's democratic order (Cf. Cameron & Töllborg, 2003: 184; also Töllborg, 1995: 252ff). As discussed at length by Cameron and Töllborg, in this task the Security Police follows the instructions issued by the government concerning as which groups and political parties should be put in the security intelligence files. Typically, the criteria for the inclusion in the security files include "conviction from a crime of violence connected to political activity, or bearing of weapons during a demonstration", as well as "building or participating in secret cells in the work

¹⁹⁰ Another security body called military intelligence agency, *Informationsbyrån*, IB, is in charge of military intelligence work abroad and does not deal with internal security (Cf. Cameron & Töllborg, 2003: 175).

¹⁹¹ The *Police Act* (1984: 387) (with commentary), available at: www.legislationonline.org (accessed 14.09.2013)

place, taking part in a political (re)education course and (...) ‘having, or having had, a leading position in the party’ (Cf. Cameron & Töllborg, 2003: 185). Often the information about the filed person is forwarded to his or her employer and according to Cameron and Töllborg “the release of information from the Security Police files almost always led to a negative result for the filed person” (Cameron & Töllborg, 2003: 186).

Moving to the next constraint, there is no legislation in Sweden empowering the state authorities to dismiss their civil servants because of their political affiliation. In Sweden the appointment of civil servants is generally regulated by the *Public Employment Act* which sets out the rules concerning the employment of civil servants in the Riksdag (Swedish Parliament), the Government, the municipal bodies, as well as the county councils and municipal associations¹⁹². According to Section 4 of this Act, the employers shall pay attention only to objective factors such as service merits and competence when making appointments: “Competence shall be a primary consideration, unless there are special reasons for doing otherwise”. There are no provisions within this act forbidding the civil servants a membership in any political organisation, even if they are considered a threat to the state. Section 7 of the Act states rather generally “An employee may not have any employment or any assignment or exercise any activities that may adversely affect confidence in his or any other employee’s impartiality in the work or that may harm the reputation of the authority”.

Moving to the constraints on the ballot access, Sweden requires its political parties to submit signatures in support of their candidates for the election. According to Chapter 2 Section 3 of the *Elections Act*, all new political parties which are not represented in the Swedish parliament Riksdag have to submit 1500 signatures in support of their nominees¹⁹³. There is no requirement to file a deposit in support of the party nominees.

With regard to the next constraint assessing the strictness of the electoral threshold, according to Chapter 14 Section 5 of the Elections Act the current

¹⁹² Public Employment Act (1994: 260), available at: <http://www.government.se/sb/d/6278/a/72001> (accessed 20.10.2013)

¹⁹³ Chapter 2 Section 3 of the Elections Act (2005:837), available at: <http://www.government.se/sb/d/6822/a/64445> (accessed 20.10.2013)

electoral threshold in Sweden is 4 percent. Therefore Sweden falls in the group of countries with a high threshold. This high threshold is applied in the elections in the national parliament *Rigsdag*, in the elections in 20 county councils (*landsting*) and 290 municipal assemblies (*kommunfullmäktige*), as well as in the elections in the European parliament.

Moving to the final constraint assessing the presence of legal restrictions for receiving the direct state funding for non-democratic parties, Sweden does not have any legislation prohibiting its political parties the access to the state subsidies on the ground of their antidemocratic ideology or activities. According to the current provisions within the *Act on State Financial Support to Political Parties*, the direct state funding is given to all political parties, provided they received at least one seat in the parliament or more than 2.5 per cent of the votes nationwide in either of the last two elections (Section 2 and 3)¹⁹⁴.

6.2.2.3 Operational constraints in Denmark

The arsenal of operational constraints in Denmark is lower than in the United Kingdom and Sweden but still qualifies for a medium defensiveness within this category. Looking at the first constraint of the state surveillance, Denmark has a special law that gives the state the power to surveille its non-democratic parties and groups. The Danish Security and Intelligence Service, for short DSIS (*Politiets Efterretningstjeneste* (PET)), is the key state body authorised to conduct the surveillance of non-democratic actors who are active in the country. This institution was created on 1st January 1951 and is put under the authority of the Ministry of Justice¹⁹⁵. The statutory provisions for the PET are laid down within the *Security and Intelligence Service Act*, adopted on 24th January 1952 and amended in 2013. According to Article 1st of this Act, the Security and Intelligence Service has the task “to prevent, investigate and combat crimes against the independence and security, and crimes against the Constitution and the supreme authorities; and to prevent, detect and prevent other serious crimes that threaten the national or international social order”. Furthermore, Chapter 7 Paragraph 11 adds the PET’s activities can extend to “processing of

¹⁹⁴ The Act on State financial support to political parties (1972:625), available at: <http://www.government.se/sb/d/6822/a/107860> (accessed 20.10.2013)

¹⁹⁵ See the website of the organization at: <https://www.pet.dk/English.aspx> (accessed 10.01.2014)

information about political associations and organisations to include information about who represents management”¹⁹⁶. During the time of Cold War, the PET was actively conducting the surveillance of the Danish Communist Party and other left-wing organisations (such as the Danish Communist Youth organisation) (Cf. Mariager, 2013: 60-75). Since the end of the Cold War the PET has refocused its activities on the right-wing extremist and terrorist groups (Cf. CODEXTER, 2012: 3).

Moving to the next constraint assessing the presence of legal restrictions for the employment in civil service for the members of non-democratic parties and groups, the Danish law does not have such provision. According to the Danish *Civil Servants Act* of 2004, the civil servants are only required to “scrupulously adhere to the rules applicable to his position, and both inside and outside the service prove worthy of the esteem and confidence required by the position” (Chapter 3, Article 10)¹⁹⁷. According to Hansen, a candidate’s political affiliations are not considered during the employment (Chapter 2, Article 5) (Cf. Hansen, 2013: 10-11). However, the constitution of Denmark states those officials appointed by the King are obliged to make a “solemn declaration of loyalty to the Constitutional Act”¹⁹⁸.

With regard to the constraints on the ballot access for the non-democratic parties and groups, Denmark requires its political parties to collect signatures in support of their party nominees. According to Article 12 of the *Parliamentary Election Act* (PEA)¹⁹⁹, adopted in 1987 and amended in 2002, all political parties registered with the Minister for Social Welfare have to enclose with their application the declarations signed by voters whose number must correspond to 1/175 of all valid votes cast during the last general election. Given that during the last parliamentary elections in 2011 the total of 3.588.919 voters cast their votes, the number of signatures required from political parties at present

¹⁹⁶ The Danish Security and Intelligence Service Act (Lov om Politiets Efterretningstjeneste), available at: <https://www.retsinformation.dk/forms/r0710.aspx?id=152182> (accessed 06.01.2014)

¹⁹⁷ The Civil Servants Act, Consolidation Act No. 488 of 06/05/2010 (Bekendtgørelse af lov om tjenestemænd (Tjenestemandsløven), available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=130606&exp=1> (in Danish) (accessed 14.01.2014)

¹⁹⁸ See Article 27(1) of the Constitutional Act of Denmark of June 5, 1953, available at: http://www.thedanishparliament.dk/democracy/the_constitutional_act_of_denmark.as

¹⁹⁹ Parliamentary Election Act of Denmark, available at: http://www.thedanishparliament.dk/Democracy/~/_/media/Pdf_materiale/Pdf_publicationer/English/valgloven_eng_web_samlet%20pdf.ashx (accessed 10.01.2014)

amounts to 20508 signatures²⁰⁰. This amount of signatures is the highest among the eight democracies studied. According to Article 11 Paragraph 1 and 2 of the PEA, only those political parties are exempt from this requirement which are already represented within the Danish parliament (Folketing). Independent candidates must be recommended by at least 150 and at most 200 voters of the nomination district as supporters (Part 6, Article 32(1)). There is no formal requirement to pay a monetary deposit at nomination.

Moving to the next constraint assessing the strictness of the electoral threshold, according to Articles 75 to 77 of the *Parliamentary Election Act*, the current electoral threshold in Denmark is only 2 per cent²⁰¹. Therefore Denmark falls in the group of democracies with a low threshold.

Regarding the last constraint assessing the presence of legal restrictions to receiving the direct state funding for non-democratic political parties, the Danish law has no such provision within its law. According to Article 2 Paragraph 1 of the *Grants to Political Parties (Consolidation) Act No. 1291 of 8 December 2006*, all political parties which participated in the most recently held general election are entitled to receiving a financial grant to cover their costs for political work²⁰².

6.2.2.4 Operational constraints in France

France's repertoire of operational constraints is also lower than in the United Kingdom and Sweden but still qualifies for a medium defensiveness within this category. With regard to the first constraint looking for the presence of the state surveillance, France has this legal constraint available within its defensive arsenal. The *Direction centrale du renseignement intérieur* (DCRI) is the France's key surveillance and intelligence body responsible for collecting

²⁰⁰ In the general election in September 2011, the total of 3588919 voters cast their votes. Divided by 175, it makes approximately 20508 signatures that would be required for a registration of a new party for the next parliamentary elections (retrieved from http://en.wikipedia.org/wiki/Folketing#Latest_election_results).

²⁰¹ According to Articles 75, 76 and 77 of the Parliamentary Election Act, the seats in the parliament are allocated only to political parties which have obtained either at least one constituency seat, or obtained in two of the three regions at least a number of votes equivalent to the average number of valid votes per constituency seat in the region, or which obtained at least two per cent of the valid votes cast in all Denmark.

²⁰² Grants to Political Parties (Consolidation) Act No. 1291 of 8 December 2006, available at: <http://www.partylaw.leidenuniv.nl/party-law> (accessed 24.09.2013)

relevant information about its internal and external enemies (Cf. Brodeur & Dupeyron, 2013: 14-15). The DCRI was built in 2008 after a mergence of the two separate former intelligence agencies “Direction du la surveillance du territoire” (DCT) and “Direction Centrale des Renseignements Généraux” (DCRG) (Cf. Monjardet & Lévy, 1995: 29ff; Canu, 1997: 171ff; Brodeur & Dupeyron, 2013: 14-15). The DCRI operates under the authority of the Ministère de l’Intérieur (Interior Minister). The legal basis for its work is provided by the special Decree issued on 27 June 2008²⁰³. According to Article 1 of this decree the key role of the DCRI consists in fighting all activities aimed at the destruction of the territorial integrity of the state and threatening its fundamental national interests (“pour lutter, sur le territoire de la République, contre toutes les activités susceptibles de constituer une atteinte aux intérêts fondamentaux de la nation”).

Moving to the next constraint assessing the availability of legal restrictions for the employment in the civil service, France does not have any legislation that could be used to prevent the members of non-democratic parties or groups to work in the civil service (Cf. Waline, 1958: 6-7; Canu, 1997: 160; Camus, 2009: 151-152; Buis, 2009: 94-95). Today the civil service in France is regulated by the *Law on the public service* (‘fonction publique de l’Etat’)²⁰⁴. This law does not mention that civil servants are obliged to support the democratic constitutional order, or must be restricted in their political membership. According to Article 19 of this law, candidates are hired primarily on the basis of their educational and professional records (‘certains diplômes ou de l’accomplissement de certaines études’)²⁰⁵. According to Canu, in France „the membership in an enemy political party should not be taken as a reason for a rejection of a candidate“ (Canu, 1997: 246; also cf. Camus, 2009: 151-152).

²⁰³ Décret n° 2008-609 du 27 juin 2008 relatif aux missions et à l'organisation de la direction centrale du renseignement intérieur, NOR: IOCX0811987D, available at: http://www.legifrance.gouv.fr/affichTexte.do?sessionId=CF89DC7C86982C2DC05AF4478A5056C5.tpdjo01v_2?cidTexte=JORFTEXT000019078545&dateTexte=&oldAction=rechJO (accessed 10.10.2013)

²⁰⁴ Loi n° 84-16 du 11 janvier 1984 portant dispositions statutaires relatives à la fonction publique de l'Etat, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000501099> (accessed 12.10.2013)

²⁰⁵ Article 19 reads « Des concours ouverts aux candidats justifiant de certains diplômes ou de l'accomplissement de certaines études. Lorsqu'une condition de diplôme est requise, les candidats disposant d'une expérience professionnelle conduisant à une qualification équivalente à celle sanctionnée par le diplôme requis peuvent, lorsque la nature des fonctions le justifie, être admis à se présenter à ces concours. Un décret en Conseil d'Etat précise la durée de l'expérience professionnelle prise en compte en fonction de la nature et du niveau des diplômes requis ».

With regard to the legal constraints on the ballot access, France has no requirements which political parties need to fulfil before they appear on the ballot (Cf. Ehin et al., 2013: 22). Following the rules stipulated within Chapter V Article L157 of the *Electoral Code*, adopted in 1964 and last amended in March 2012, all candidates have only to submit to the Interior Ministry (préfecture) a declaration of the candidate's registration in the voter list of any constituency and a proof that a financial representative was designated²⁰⁶. No signatures or deposit are required to enclose with the declaration.

Although France does not impose any constraints on the ballot access, it has the highest electoral threshold among the democracies studied (Cf. Downs, 2012: 34). According to Article 24 of the Constitution of 1958 and Part II, Chapter I, Article L.O. 119 of the Electoral Code the members of the National Assembly are elected according to a two-round majority system²⁰⁷. According to this electoral system a candidate is elected in the first round if he or she obtains an absolute majority of the total votes cast. If they do not obtain the absolute majority of votes, they must obtain at least 12.5% of the total number of registered voters in order to be eligible for the second round (Cf. Downs, 2012: 34). According to Fisichella and others, this electoral system was particularly problematic for non-democratic parties such as the National Front (Front Nationale, FN) to pass into the second round (Cf. Fisichella, 1984: 182ff; Downs, 2012: 134).

Moving to the last constraint, France does not impose any legal constraints on receiving the direct state funding for the non-democratic parties. The direct state funding for political parties was introduced in 1988, when the new *Law on Party Finance*²⁰⁸ was adopted by the French parliament (Cf. Pujas & Rhodes, 1999:

²⁰⁶ Chapter V Article L.157 of the French Code Electoral (Version en vigueur pour l'élection présidentielle et pour les élections législatives de 2012), available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/dossiers_thematiques/presidentielle_2012/code_electoral_2012.pdf (accessed 15.10.2013). The article reads " Les déclarations de candidatures doivent être déposées, en double exemplaire, à la préfecture au plus tard à 18 heures le quatrième vendredi précédant le jour du scrutin. La déclaration de candidature est remise personnellement par le candidat ou son suppléant. Un reçu provisoire de déclaration est donné au déposant".

²⁰⁷ Article 24 of the Constitution de la République Française du 4 Octobre 1958, available at: <http://www.assemblee-nationale.fr/connaissance/constitution.asp>

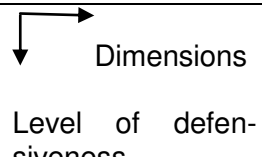
²⁰⁸ Law no. 88-227, of March 11, 1988 on financial transparency in political life, (copyrighted translation) available at: <http://www.partylaw.leidenuniv.nl/party-law> (accessed 12.10.2013). Before 1988 the conditions related to funding to political parties were governed by the 1901 law on associations ('Loi du 1er juillet 1901 relative au contrat d'association'). For example, Article 6

52)²⁰⁹. According to Article 9 of this law the direct state funding is provided to all political parties irrespective of their political ideology, provided their candidates have obtained at least 1 percent of the votes cast in at least fifty constituencies. The distribution is performed proportionately to the number of votes obtained during the first round of elections.

6.3 Summary of findings and conclusion: patterns of formal-legal democratic defensiveness

The preceding three chapters have provided a systematic and comprehensive examination of the cross-national variations across the three categories of democratic defensiveness between the eight democracies focusing on the presence or absence of legal constraints. This section will discuss the evidence of cross-national variations between democracies while considering the three categories simultaneously. As it was argued earlier, it was important to assess the cross-national variations between the eight democracies within each category separately since each category includes constraints of differing severity, which made it difficult to assess the degree of democratic defensiveness by simply adding up the standardised scores for each category to have one country score (see Chapter 3.7 for details). After the differences across individual constraints within each category have been systematically examined, it is now possible to evaluate the overall *patterns of formal-legal democratic defensiveness* between the democracies studied. Table 10 provides an overview of the key country configurations found across the three categories, which will be followed by a descriptive analysis of each configuration.

Table 10: Country configurations of democratic defensiveness across three categories

 <p>Dimensions</p> <p>Level of defensiveness</p>	<p>Legal ban A</p>	<p>Freedom constraints B</p>	<p>Operational constraints C</p>
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of the 1901 law prohibited the acceptance of donations for political parties (Cf. Pujas & Rhodes, 1999: 53).

²⁰⁹ Before 1988 all political parties in France except probably the Communist Party which could raise its funds from membership fees, were funded mostly by donations and gifts from individuals as well as from legal and neutral entities such as endowments (Cf. Pujas & Rhodes, 1999: 53).

High defensiveness (1-0.7)	Germany Austria	Germany Austria	Germany Austria
	France	France	
		Belgium	Belgium
Medium defensiveness (0.6-0.4)			Netherlands
	Belgium		France
	Netherlands	Netherlands	
	UK Sweden Denmark	UK Sweden Denmark	UK Sweden Denmark
Low defensiveness (0.3-0)			

Note: Shading added to indicate patterns of defensiveness. The countries in bold fall in the same group of defensiveness across all three categories.

Table 10 reflects the democracies are characterised by either high or medium defensiveness while there is no democracy within the low defensiveness group, supporting the previous observation that the eight democracies included in this study tend to adopt fairly constraining legal frameworks against internal non-democratic enemies. Furthermore, a majority of democracies (5 out of 8) cluster around the same groups of high or medium defensiveness when considering the three categories simultaneously, also supporting the previous argument that there is a certain trade-off pattern between the three categories. Specifically, the first group of democracies with *high defensiveness* across all three categories includes Germany and Austria which implies these two democracies are the most defensive among all eight democracies studied. In comparison with other democracies, they have both legal measures for banning non-democratic parties and groups, all legal measures for constraining political freedoms, and all or the majority of legal measures for imposing operational constraints. The second group includes the United Kingdom, Denmark, and Sweden which have *medium defensiveness* across the three categories. In comparison with the highly defensive Germany and Austria, these democracies have no legal mechanisms for party bans but do have legal mechanisms for

group bans, they have fewer measures for constraining political freedoms, and have also fewer operational constraints.

However, France, Belgium and the Netherlands do not fit within these two key patterns of defensiveness, as they clearly reveal differing preferences across the three categories. Specifically, these democracies tend to range highly defensive in one category while medium defensive in another. France, for instance, combines high defensiveness in legal bans and freedom constraints, while it has medium defensiveness upon operational constraints. However, given the first two categories capture the most severe constraints as compared with operational constraints, it can be argued France is similar to Germany and Austria in terms of its formal-legal defensiveness and can be considered highly defensive. Ascertaining Belgium’s degree of defensiveness is less straightforward. Belgium combines medium defensiveness in legal bans with high defensiveness in freedom constraints and operational constraints. However, since Belgium ranges highly defensive within freedom constraints and operational constraints categories, it can be argued Belgium is similar to France in terms of its democratic defensiveness and can also be considered highly defensive. By contrast, the Netherlands combines medium defensiveness in legal bans and freedom constraints with high defensiveness in operational constraints, and is therefore similar to the UK, Sweden and Denmark in terms of its democratic defensiveness and can be considered as medium defensive. Table 11 summarizes these overall profiles of formal-legal democratic defensiveness as discussed.

Table 11: Overall profiles of formal-legal democratic defensiveness among 8 European democracies

Democracies	Overall profiles of democratic defensiveness
Germany Austria France Belgium	<i>High defensive:</i> High defensiveness across all or the majority of categories
Netherlands UK Denmark Sweden	<i>Medium defensive:</i> Medium defensiveness across all or the majority of categories

Note: Grey shading added to differentiate high and medium defensive democracies.

As shown in Table 11, the two overall profiles of formal-legal democratic defensiveness can be identified among the democracies studied. Germany, Austria, France, and Belgium all form the first profile of *high defensive democracies*, as they combine high defensiveness across all or the majority of defensive categories. Specifically, these democracies have all or the majority of measures for party or group bans, for constraining political freedoms, and for applying operational constraints. The remaining democracies including the Netherlands, UK, Denmark, and Sweden form the next profile of *medium defensive democracies* as they combine medium defensiveness across all or the majority of categories. In comparison with high defensive democracies, these democracies have legal mechanisms to administer group bans only, use the majority of provisions for constraining freedom of assembly and association but fewer measures for constraining the freedom of expression, and have the majority of measures for imposing operational constraints.

These empirical findings of the existing variations in democratic defensiveness between the eight democracies are similar to the earlier analyses of defensive practices in Europe. For instance, the finding that Germany is a highly defensive democracy correlates strongly with previous studies. Van Donselaar, for example, stated, “Germany’s legal armoury against internal threats is among the heaviest in Europe” (Cf. van Donselaar, 2003: 276; also cf. Backes, 2006: 280-281; Klamt, 2012: 167ff; Bleich & Lambert, 2013: 136). As stated earlier, Germany is commonly viewed as a “quintessential example of militant democracy” (Cf. Minkenberg, 2006: 26).

Similarly, the finding of France’s degree of democratic defensiveness is also clearly evident within previous literature, as France was commonly portrayed by scholars as highly defensive and similar to Germany (Cf. Boventer, 1987: Chapter 4; Fox & Nolte, 1995: 27ff; Canu, 1997: Chapter 2; Backes, 2006). Although the militant democracy concept was largely unknown by the founding fathers of the Fifth French Republic on the model it evolved in Germany, the modern democracy in France is typically described “not only as a liberal regime in the sense that it protects the individuals against the state, but also as a system where the Republic is protected against potential dangers” (Buis, 2009: 88).

Also similar to earlier studies, the assessment of the UK's level of democratic defensiveness resonates with the portrayal of its defensiveness within literature (Cf. Mullender, 2009: 311ff; Husbands, 2009: 265ff; Klamt, 2012: 105-108). Following Klamt's assessment, the UK has "comparatively strong defensiveness" (Cf. Klamt, 2012: 108). According to Mullender, despite lacking the doctrine of militant democracy as it exists in Germany, the UK has developed "the piecemeal approach toward defence of constitutional fundamentals", as the country's democratic defensiveness has evolved in response to the new challenges (Cf. Mullender, 2009: 313; 349).

However, these empirical findings shed new light on the level of democratic defensiveness of several democracies in this study. For example, Austria was considered by some scholars as an example of "a neutral democracy" whereby lacking militancy against its non-democratic forces (Cf. Auprich, 2009: 54-55). The findings in this study rather point in a different direction. In reflecting upon the arsenal of legal constraints across the three categories, Austria has without doubt a quite comprehensive arsenal of constraints similar to those found in Germany.

Similarly, the findings contradict the general perception of Belgium's state of democratic defensiveness also. According to van Donselaar, "Belgium's system of latent instruments of repression is relatively weak, as is its application of that system" (van Donselaar, 2003: 276). Comparing Belgium with Germany, France, United Kingdom, and the Netherlands, he concluded that "Belgium's democracy is (...) the most vulnerable of the five" (van Donselaar, 2003: 276; also cf. Klamt, 2012: 47ff). This depiction of the country's defensiveness must be corrected. As the findings have demonstrated, Belgium has a relatively comprehensive arsenal of legal mechanisms for constraining non-democratic parties and groups and therefore should be characterised as a highly defensive democracy.

Additionally, the Scandinavian countries Denmark and Sweden were commonly portrayed as low defensive (Cf. Jesse, 2008a: 340; Meret, 2009; Löow, 2009). For example, Kirchheimer indicated Sweden has a long tradition of tolerance which made it unnecessary for them to adopt strict laws (cited in Capoccia, 2013: 217). Klamt ranked these two countries as "democracies with low or

moderate defensiveness” (Cf. Klamt, 2012: 62, 70). However, the empirical analysis reveals by contrast that both countries have medium defensiveness across all three categories.

Furthermore, scholars tended to overestimate the state of democratic defensiveness of the Netherlands. Bleich and Lambert, for example, placed the country next to Germany of ‘highly repressive democracies’ in their ranking of ten democracies on a scale of repression against racist associations (Cf. Bleich & Lambert, 2013: 134-135). This classification is not in line with the findings of this analysis, revealing a different degree of democratic defensiveness for this country.

The key reason for these differences in the assessment of states’ degree of democratic defensiveness has arisen due to scholars focusing previously either on a limited range of legal measures, most prominently so the legal ban of political parties, or focusing on the frequency of usage of legal measures rather than their actual presence to account for different patterns of formal-legal defensiveness. While doing so scholars either overrated or underestimated a state’s degree of defensiveness (see for such approach e.g. Fox & Nolte, 1995; van Donselaar, 2003; Bleich & Lambert, 2013). For example, in his analysis of militant democracy in Austria, Auprich pointed out that Austria has never used Article 1 of the Prohibition Act of 1947 except for the banning of the NSDAP following the end of World War II. Based on this he argued “Article 1 of the Prohibition Act did not constitute a shift to a militant democracy” (Auprich, 2009: 47).

To summarise, the presentation of the overall profiles of democratic defensiveness has demonstrated the fruitfulness of constructing an encompassing assessment of variations by analysing the variations across each category separately and, secondly, by focusing on a broader spectrum of formal-legal measures dividing them into three categories according to their constraining severity upon non-democratic parties and groups. Through this approach, this analysis has offered a more plausible reconstruction of the formal-legal democratic defensiveness within the democracies studied, as compared with many unconnected case-studies previously. Building on this overview, the subsequent chapter will turn to the question which basic factors

identified within the literature are relevant to varying patterns of defensiveness to help us understand the cross-national differences revealed by this analysis.

CHAPTER 7:

FACTORS SHAPING FORMAL-LEGAL DEMOCRATIC DEFENSIVENESS: THEORETICAL PERSPECTIVES

7.1 Introduction

After previous chapters have provided a systematic overview of the differences and similarities in formal-legal defensiveness between eight democracies, this chapter will address the question what broader factors can help us understand the cross-national variations in democratic defensiveness. To provide an understanding of all factors driving democratic defensiveness is not a simple task, therefore this chapter will not attempt to develop a theoretical framework providing an exhaustive answer to the question why democracies react “in the ways they do and with what consequences” (Downs, 2012: 53). Instead, this chapter will endeavour to contribute to the debate discussing the key factors determining democratic defensiveness by examining some of the central claims made in the literature in light of the empirical evidence presented in preceding chapters.

This chapter will draw on historical institutionalism to account for the broader factors driving democratic defensiveness. Historical institutionalism is an approach to the study of politics which emphasizes that political and societal evolution is mediated in decisive ways by the institutional setting in which it takes place (Cf. Hall & Taylor, 1996: 937). Thereby historical institutionalists use a definition of institutions which refers to both organisational characteristics of the state and the rules and norms that guide the relationship between the actors (Cf. Ikenberry, 1994: 7). Thus defined, relevant institutions can vary widely in their scope and character. On the one hand, institutions can be conceived narrowly and include specific configurations of political system such as the electoral system, structure of party system, or the relations between various branches of the government. On the other hand, institutions can be conceived more broadly and include cultural, political and social norms and orientations (Cf. Thelen & Steinmo, 1992: 7; Ikenberry, 1994: 12-13; Hall & Taylor, 1996: 938). Although the definition of what constitutes an institution is still a matter of some controversy in the literature (Cf. Steinmo & Thelen, 1992: 2), what is

common to all historical institutionalists is the key assumption that these institutional settings provide a context which shapes and constrains the goals and capacities of groups and individuals who operate within them (Cf. Thelen & Steinmo, 1992: 9; Ikenberry, 1994: 7). An important characteristic of historical institutionalism is that it places an exclusive value on historical development to explain how political and societal institutions evolved. According to this view, contextual features of a state are path dependent in a sense that they represent “the outcome of a confluence of historical forces that shape and reshape the state’s organizational structure” (Ikenberry, 1994: 7).

Historical institutionalism provides a convenient lens to understand what broader factors could be in place to explain why democracies are different in terms of democratic defensiveness. Drawing on historical institutionalism as an approach one can reason that a country’s democratic defensiveness is not developed in a vacuum, but is decisively influenced by a confluence of various historical, political and systemic factors which are unique in each country (Cf. Downs, 2012: 53). Just which factors could be decisive variables driving state variations in democratic defensiveness has remained a matter of some controversy within preceding literature (Cf. Downs, 2012: Ch.3, Bleich & Lambert, 2013: 136ff). For example, there is broad literature which suggests that understanding state variations in responses to non-democratic parties requires attention to the territorial construction of a state (federal or unitary), the design of the electoral system (majoritarian or proportional), and the spikes of political violence (Cf. Downs, 2012: 61ff; Bleich & Lambert, 2013: 139-140; Capoccia, 2013: 220). However, most scholars consider the historical context the most important factor driving democratic defensiveness. According to Downs the historical context provides “an environment that defines and constrains strategic imperatives and alternatives for democratic actors” (Downs 2012: 54). Even when the events are distant in the past and “seemingly forgotten”, they leave traces which can significantly shape the democratic reactions against their enemies (Downs, 2012: 55). Similarly, Bleich and Lambert stated the history of non-democratic regime is “the most significant factor that predisposes a country to increased levels of repression against racist associations” (Bleich & Lambert, 2013: 123).

This chapter will ascertain these determining factors by theorizing and examining two particular factors in their relation to democratic defensiveness: firstly, the type of democracy, either substantive or procedural, and, secondly, the historical experience of internally triggered or supported breakdown of democratic regime during the 20th century. Both perspectives are compelling on theoretical grounds and have been frequently cited by scholars as alternatives to explain how and why democracies react to their internal threats (Cf. Fox & Nolte, 1995: 14; Backes, 2006: 279-280; Klamt, 2007: 135; Downs, 2012: 50; Bleich & Lambert, 2013: 127ff). Downs, for example, stated “how actors in contemporary political systems respond to illiberal but institutionalized parties speaks to a country’s democratic self-understanding and historical memory” (Downs, 2012: 59). Thereby the goal of this analysis is not to ascertain the causal relationship between these two factors in their relation to democratic defensiveness. Given that the literature does not explain which of these two factors accounts for more democratic defensiveness, this analysis will only attempt to contrast and examine them separately in light of the cross-national evidence that was presented in previous chapters. That also means that I do not use deliberately the comparative qualitative analysis (QCA) as a research strategy here. Although QCA is a compelling approach for studying comparative politics²¹⁰, it is an inappropriate research strategy in the context of this study. Unlike QCA which seeks configurations of causal factors to explain how they lead to a certain political and societal outcome (Cf. Rihous, 2006: 682), this chapter will examine the role of historical experience of an internally triggered or supported breakdown of a democratic system in the past and the division into the two types of democracies *separately*, and not as *configurations*, and will not

²¹⁰ Central to QCA is the use of set-theory and Boolean logic to analyze combinations of causal conditions associated with an outcome of interest. To conduct such analysis a researcher needs first to identify the outcome in which he is interested (for example, in my case state variations in democratic defensiveness), and the conditions which could potentially cause that outcome. In the next step the researcher assesses the presence or absence of these conditions in each of the cases in the analysis. Thereby, the goal is to identify what combinations of factors have occurred, which of these have produced the outcome in which he is interested and which have not produced that outcome. The researcher then uses Boolean logic to identify necessary and sufficient conditions which produce the outcome of interest. The researcher takes this result and attempts to interpret what it means by going back to the cases and relating the outcome to the actual circumstances seen in the cases. Charles Ragin who developed QCA in the 1970s described this back-and-forth process a “dialogue between theory and evidence” (Cf. Rihous, 2006: 681-682; Arvind & Stirton, 2010: 5-6).

ascertain whether some factors might only have an effect on defensiveness in combination with other factors.

The subsequent analysis will reveal that among two factors only the historical experience with the internally triggered or supported breakdown of democratic regime is more helpful to explain the existing cross-national differences in the level of democratic defensiveness between the eight democracies studied while the type of democratic government is less useful. At the same time, it will be found out that the historical perspective is not sufficient to account for all types of variations. In particular, contradictions exist in case of Denmark, Sweden and the United Kingdom. In case of Denmark it will be found that this democracy has lower defensiveness than its historical experience (in that case externally triggered but internally supported breakdown of democracy) might suggest. By contrast, in case of Sweden and the UK it will be found that these democracies have medium defensiveness while their historical experiences (in that case continuity of democratic system) should have invited lower defensiveness. Having reached this conclusion, it will be argued in the end that in order to arrive at a fuller picture attention is needed to the overtime changes in defensive legislation. This conclusion will form the basis of the analysis in the subsequent final chapter of one of the cases that is more defensive than its historical experience would suggest.

7.2 Theorizing the influence of the type of democratic government on shaping the formal-legal democratic defensiveness

There are a number of studies which support the causal connection between how democracies respond to non-democratic political parties and groups and their type of democratic government (Cf. Fox & Nolte, 1995: 14; Klamt, 2007: 135; Downs, 2012: 59). Two main conceptions of liberal democratic governments were posited here at the center of scholarly discussion, *substantive* and *procedural democracies*. According to Fox and Nolte and other proponents of this perspective, it is believed that these two types of democracies have differing rationales and perspectives for developing democratic defensiveness as a means to defend their democratic order from its enemies (Cf. Fox & Nolte, 1995: 14; also Thiel, 2009: 387; Bourne, 2011: 9).

What are procedural and substantive democracies and how these two models of democratic governments influence democratic states' reactions and the formal-legal mechanisms they adopt to combat the challenge of antidemocratic forces within their democratic system? In what follows I introduce the two types of democratic government, followed by an analysis of if and how they affect democratic defensiveness.

The main line of distinction between the two forms of democratic government lies in the possibility for governing majorities in the parliament to amend the core democratic principles in the constitution, such as democratic institutions and basic political rights and freedoms (Cf. Fox & Nolte, 1995: 24). Following the classification developed by Fox and Nolte in their seminal study of 'intolerant democracies', procedural democracy is a form of a democracy which provides at least basic procedures and institutions to make decisions and realize opinions (Cf. Fox & Nolte, 1995: 14). Within their definition of procedural democracy, both authors draw on the classic definition of a democracy by Peter Schumpeter as an "institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will" (cited in Fox & Nolte, 1995: 14). In line with this definition, both authors argued in procedural democracies all political opinions are given "equal moral worth" (Cf. Fox & Nolte, 1995: 15). This refers also to political parties, as all political parties, irrespective of their political stance, shall be given an equal opportunity to compete freely in the electoral arena and consequently only the voter can decide which political forces they want to see represented in the government (Cf. Thiel, 2009: 385). As Fox and Nolte stated, even "[t]he enemies of democracy will be among the likely participants" (Fox & Nolte, 1995: 15). Thus, tolerance builds the "fundamental organizing principle of government" in procedural democracies (Cf. Fox & Nolte, 1995; 17). Concerning this fundamental feature of procedural democracies, Wise stated "[a] procedural democracy thus exists only so long as there is a political will to be democratic" (Wise, 1998: 305; also Fox & Nolte, 1997: 16). To give a historical parallel for a procedural democracy, the Weimar Republic is frequently cited by scholars as an example of a procedural democracy. The first democratic republic in Germany (1918-1933) was based on the principle of

popular sovereignty, allowing every basic principle within the state constitution of the Weimar Republic including the constitutional form of the government be subjected to change at any time by law-makers (Cf. Wise, 1998: 305; Backes, 1998: 31). Furthermore, all political forces, including the Nazi parties and movements, were free to compete with other political parties in the political arena provided they followed the democratic rules (Cf. Backes, 1998: 30-31). The breakdown of the Weimar Republic in 1932-1933 orchestrated by the Nazis is an indication of how vulnerable procedural democracies are when faced with parties and groups that seek to destroy them once elected into government (Cf. Backes, 1998: 31).

By contrast, substantive democracy is a form of democracy where democratic procedure is not an end in itself, but a means to create “a society in which citizens enjoy certain essential rights, primary among them the right to vote for their leaders” (Fox & Nolte, 1995: 16). To define substantive democracy, Fox and Nolte draw on the definitions of democracy developed by John Rawls and Carl Schmitt (Cf. Fox & Nolte, 1995: 17-20), declaring that a substantive democracy is based on the principle that democratic institutions and freedoms should not be used to allow some individuals or collective forces to subvert the same democratic institutions and basic freedoms (Cf. Fox & Nolte, 1995: 17). Consequently, unlike procedural democracies, tolerance does not constitute “the transcendent norm of a democratic society” in substantive democracies (Cf. Fox & Nolte, 1995: 17). Drawing on Schmitt’s conception of a democracy as a set of democratic values and principles that cannot be changed or amended at any times by a governing majority, Fox and Nolte add the most important characteristic of substantive democracies is the core democratic values and principles enshrined in the constitution cannot be altered or amended “even if the formal procedures for the constitutional amendment have been followed” (Fox & Nolte, 1995: 19; also see Bourne, 2011: 7).

Against the background of these definitions of substantive and procedural democracies, how the two forms of democratic government can expand our understanding of the existing variations in democratic defensiveness between democracies? It should be noted scholars have acknowledged the utility of relating these two theoretical concepts of democratic governments to the empirically observable variations between democracies in legal responses to

the problem of political extremism (Cf. Thiel, 2009: 389; Bourne, 2011: 9). Fox and Nolte themselves applied this classification to evaluate the differences in terms of 'tolerance' and 'militancy' towards non-democratic actors between ten established democracies in Europe and elsewhere (for the critic of the approach see Thiel, 2009: 385-395; Bourne, 2011: 6-10). Given that tolerance towards the presence and participation of non-democratic actors on the political scene constitutes one of the main distinction lines between substantive and procedural democracies, the distinction between the two raises the expectation that substantive democracies are more inclined to respond aggressively to their non-democratic actors than procedural ones (Cf. Thiel, 2009: 395; Bourne, 2011: 9; Downs, 2012: 59). Downs, for example, argued that "[f]or the proceduralist, to do anything else – even in the name of defending the liberal order – is to abdicate democracy without warrant" (Downs, 2012: 59). In the same vein, Thiel stated because procedural democracies are not reliant on specific substantial values written within their constitutions, they are not likely to provide defensive mechanisms "to protect these principles and values from attacks or the intention to change them" (Cf. Thiel, 2009: 387). In line with these arguments, it can be thus expected that procedural democracies would generally have a weak disposition toward formal-legal democratic defensiveness. By contrast, substantive democracies are expected to have a strong disposition towards democratic defensiveness. As tolerance does not constitute the transcendent norm in substantive democracies, it can be expected that they would not unreservedly tolerate those political actors which seek to destroy them from within in one form or another (Cf. Wise, 1998: 305; Thiel, 2009: 387). The idea that democratic order must be preserved at any costs will force democratic governments to be more vigilant in the face of potential dangers and force them to respond more aggressively to parties and groups which seek to harm or abolish it (Cf. Downs, 2012: 58). As stated by Wise, "a substantive democracy is the militant democracy" (Cf. Wise, 1998: 305).

It is important to note that not all democracies that suffered a traumatic experience of the defeat of their democratic regimes in the past – the case which is discussed further below – develop a substantive view of democracy in the future as some scholars have postulated (i.e. the two factors discussed in this chapter as possibly favourable factors for developing democratic

defensiveness are not necessarily related) (Cf. Downs, 2012: 58-59). Among fourteen substantive democracies that Sánchez counted within the forty-seven member-states of the European Council, only Germany, France and Italy experienced the breakdown of their democratic regimes before World War II (Cf. Sanchez, 2003: 5)²¹¹. Alternatively, it can be argued not all democracies defeated by non-democratic forces in the past have embraced the substantive view of democracy upon the reconstruction of their democracy. The Netherlands and Belgium, for example, knowingly experienced their democratic institutions suspended during World War II due to military occupation by Nazi Germany. In spite of this traumatic experience, these democracies have developed an expressly procedural view of democracy after the end of World War II. I will return to this point later when exploring the different forms of the breakdown of democratic regimes and how such events shaped the country's defensiveness against non-democratic actors.

Against the background of the preceding discussion of the distinction between substantive and procedural democracies and how these two forms of democracy are expected to influence the democratic defensiveness, the next Table 12 places the democracies studied according to the criterion of substantive and procedural democracy. Following Fox and Nolte, as the main line of distinction between substantive and procedural democracies, the table was constructed by using the possibility "whether the national constitution can be amended to alter or eliminate democratic institutions" (Fox & Nolte, 1995: 24). The last column summarises the theoretically expected level of democratic defensiveness as discussed above.

Table 12: Theoretically expected level of democratic defensiveness of substantive and procedural democracies

Type of democratic government	Democracies	Theoretical expectation of democratic defensiveness
Substantive democracies	Germany France	→ are expected to have a strong disposition toward democratic defensiveness
Procedural democracies	Austria Belgium	→ are expected to have a weak disposition toward democratic

²¹¹ According to Sanchez these democracies include Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, France, Germany, Greece, Italy, Moldova, Norway, Portugal, Romania, Turkey, and Ukraine (Cf. Sanchez, 2003: 5).

	Denmark Netherlands Sweden United Kingdom	defensiveness
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Table 12 reflects among the eight democracies studied within this thesis, only Germany and France can be considered substantive democracies. As mentioned earlier, following the end of World War II, these two democracies have developed an expressly substantive view of democracy, clearly reflected within several articles of their state constitutions (Cf. Fox & Nolte, 1995: 32; Wise, 1998: 306-307). In Germany, the substantive view is stipulated expressly in Article 79 Section 3 of the Basic Law which is otherwise called the “eternity clause” (“Ewigkeitsklausel”) (Cf. Thiel, 2009: 127). This article stipulates that “[a]mendments 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”²¹². Additionally, Article 18 of the Basic Law stipulates that basic democratic freedoms guaranteed by several articles of the constitution, such as freedom of expression (Article 5), freedom of assembly (Article 8), freedom of association (Article 9), and freedom of movement (Article 11) among others can be forfeited by Federal Constitutional Court if they are used to combat, undermine or abolish “the free basic democratic order” (Cf. Wise, 1998: 307).

Similarly, France is a clear example of a substantive democracy. According to Article 89 of the French Constitution of 1958, no amendments could be made to change the state territory and the republican form of government (Cf. Fox & Nolte, 1995: 27; Buis, 2009: 81)²¹³. This substantive provision was introduced in response to the attempt of the Marshal Pétain to amend the constitution on 10th of July 1940 shortly after the state territory was occupied by Nazi Germany (Cf. Canu, 1997: 113). Another substantive feature is enshrined in Article 4 of the

²¹² See Basic Law for the Federal Republic of Germany, available at: [http://www.gesetze-im-internet.de/ englisch_gg/](http://www.gesetze-im-internet.de/englisch_gg/) (accessed 10.03.2014). Note that Article 1 of the Basic Law emphasizes the legally binding force of the fundamental freedoms guaranteed in the constitution while Article 20 declares Germany as a democratic and social federal state.

²¹³ See the full text of the Constitution de la République Française du 4 Octobre 1958, available at: <http://www.assemblee-nationale.fr/connaissance/constitution.asp> (accessed 10.03.2014). Article 89 reads « Aucune procédure de révision ne peut être engagée ou poursuivie lorsqu’il est porté atteinte à l’intégrité du territoire. La forme républicaine du Gouvernement ne peut faire l’objet d’une révision ».

constitution, stating all political parties must respect the principles of national sovereignty and democracy²¹⁴. According to Fox and Nolte, this principle originated from the concern of General de Gaulle's government due to the threat posed by the French Communist Party after the end of World War II (Cf. Fox & Nolte, 1995: 27; also Backes, 2006: 274).

By contrast, the remaining democracies included in this study can be considered procedural democracies following the definition given above. Unlike substantive democracies, these democracies have no explicit reference to the legally binding force of democratic principles or the fixed character of the democratic form of government in their constitutional documents. In Austria, for instance, the constitution does not contain any rules that would entitle any of the core democratic principles to a special protection from an amendment or alteration (Cf. Auپرich, 2009: 50-51; also Klamt, 2007: 34). According to Article 44 Paragraph 3 of the Austrian Federal Constitutional Act (*Bundes-Verfassungsgesetz*) of 1920, revised in 1929 and reintroduced in 1945, the constitution can be partially or completely revised²¹⁵. For a partial amendment of the constitution or of any of its constitutional laws a mere two-thirds majority in the lower house with at least half the members present is required, while a complete revision of the constitution is possible if a referendum is held (Cf. Maddex, 2008: 34; Auپرich, 2009: 45-46).

Similarly, Belgium foresees no substantial hurdles to changing its constitution in order to eliminate its democratic fundamentals. According to Article 195 of the Belgian constitution from 1831 which was amended significantly over the last decade, the legislature "has the right to declare that" an amendment is necessary. In such case the two houses of the legislature are dissolved automatically and reconvene after new elections. Any revisions agreed to by the newly convened houses of the legislature must then be adopted by at least two-thirds of the total votes cast in each house²¹⁶.

²¹⁴ Article 4 reads in the original "Les partis et groupements politiques concourent à l'expression du suffrage. (...) Ils doivent respecter les principes de la souveraineté nationale et de la démocratie".

²¹⁵ See the full text of the Bundes-Verfassungsgesetz (B-VG) (Federal Constitutional Act) at: https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.html (accessed 18.03.2014).

²¹⁶ The Belgian Constitution, Title VIII, Article 195, available at: <http://www.fed-parl.be>

In Denmark too, the fundamental principles in the constitution may be subjected to a formal change. According to Article 88 of the Danish Constitution, in order to amend the Constitutional Act a formal bill of the parliament is required. Once it is adopted, a new election takes place. If the new parliament passed the bill without change, it must then be approved in a referendum by majority of the persons taking part in the voting or at least by 40 per cent of the electorate. It becomes effective after receiving the royal assent²¹⁷.

In the Netherlands, there are also no substantial hurdles to changing the fundamental principles enshrined in the constitution. According to Article 137 of the Dutch Constitution, if a formal act of parliament is passed stating that an amendment to the constitution in the form proposed is necessary, the constitution can be changed. Such a bill may be divided into two or more bills by the lower house, which is dissolved after the proposed act has been published. After a newly elected lower house has met, both houses then consider the proposed amendment on second reading, and it must be passed by “at least two-thirds of the votes cast.” Article 139 states amendments “passed by the legislature and ratified by the King shall enter into force immediately after they have been published”²¹⁸.

Similarly, Sweden represents an example of procedural democracy as well. Following the provisions in Chapter 8, Article 14 to 16 of the Swedish constitution, any of its fundamental laws as stipulated in the constitution can be amended if the legislature approves the relevant proposal twice in identical form²¹⁹. Similar to the procedural democracies analysed before, a referendum is held if the proposal is declined due to the majority of those taking part in the referendum voted against it.

Finally, in the United Kingdom there is no written constitution along with the bill of rights at all. The system is distinct through the supreme position of its parliament (Cf. Fox & Nolte, 1995: 22; Mullender, 2009: 313). Therefore, any

²¹⁷ Part X, §88 of the Danish Constitution, available at: http://www.thedanishparliament.dk/democracy/the_constitutional_act_of_denmark.as

²¹⁸ Article 139 of The Constitution of the Kingdom of the Netherlands, available at: <http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>

²¹⁹ See Chapter 8, Articles 14 to 16 of the Constitution of Sweden, available at: <http://www.government.se/sb/d/2707/a/15187>.

law, even fundamental law, can be changed through a simple move of the parliament and thus are not bound by any substantive rules.

Following the claim that substantive and procedural democracies have varying rationales for developing democratic defensiveness, it should be expected that Germany and France would both have a strong disposition towards high defensiveness while Austria, Belgium, Denmark, the Netherlands, Sweden, and the United Kingdom would all have a weak disposition towards democratic defensiveness (see Table 12). Before examining this perspective, the next section will question if and how the historical experience of democratic breakdown in the past can expand our understanding of the differences between democracies in the defensiveness of their legal structures today.

7.3 Theorizing the relationship between the historical experience with the breakdown and stability of democratic regime and formal-legal democratic defensiveness

There is a broad literature supporting the causal relationship between the historical experience of a breakdown of democratic regime in the past and country's democratic defensiveness (Cf. Issacharoff, 2007: 1430; Klamt, 2007: 151; Downs, 2012: 55-61; Bleich & Lambert, 2013: 137-138). Downs, for example, stated "a national past blemished by democracy defeated or significantly compromised by extremism may increase incentives to respond aggressively to contemporary threats from pariah parties" (Downs, 2012: 57). Similarly, Bleich and Lambert found that a country's willingness to suppress the political freedoms of non-democratic parties and groups increases with the centrality of the non-democratic regime in its past history. According to the authors, "having a history of non-democratic regime serves as a predisposing factor which significantly increases a state's likelihood of taking repressive measures against racist associations" (Bleich & Lambert, 2013: 138). Backes in his turn argued the reason Germany and France impose stricter constraints upon the political rights and freedoms of their non-democratic parties and groups than the United States is because these democracies had lived through a traumatic experience of a violent subversion of their democratic systems during the 1930s and 1940s, while the United States did not have such

experience at all (Cf. Backes, 2006: 279; also Gordon, 1985-1986: 377ff; Michael & Minkenberg, 2007: 1119).

Although there is a broad literature suggesting a causal relationship between the historical experience of democratic breakdown and democratic defensiveness, there are only a few studies examining how the varied historical experiences of democratic breakdown in the past have influenced the differing constellations towards democratic defensiveness (Cf. Capoccia, 2005: 71ff; Downs, 2012: 57-61). Drawing on this literature, it is possible to classify democracies according to the form of their past democratic breakdown (Cf. Art in Downs, 2012: 59). The main line of distinction is whether the breakdown of democratic regime was triggered internally or externally, and in case if the breakdown of democratic regime was triggered externally, whether it was supported by internal non-democratic forces or not. Each historical constellation has its own rationales for developing democratic defensiveness.

There are four broad possibilities that can be expected from the historical constellation of a breakdown of democratic regime in the past and democratic defensiveness (Cf. Downs, 2012: 57). Countries that experienced the breakdown of their democracy triggered internally, that is by non-democratic forces nourished within their society, it can be anticipated they would have a very strong disposition towards democratic defensiveness. Since such democracies already have a tragic experience when a relative openness of their political system was abused by internal non-democratic forces, their political actors will be extremely concerned about the survival of their democratic institutions and freedoms in the future and make every precaution to surround their political institutions and freedoms with a maximum legal protection to preclude their non-democratic enemies have another chance to undermine their democratic institutions and freedoms (Cf. Backes, 2006: 279ff; Fennema, 2000: 127; Downs, 2012: 57-58; Bleich & Lambert, 2013: 138). As stated by Downs, "the once defeated democracy is today's wary and defensive democracy" (Downs, 2012: 59).

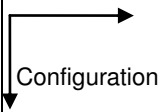
Similarly, a stronger disposition towards democratic defensiveness can also be anticipated from democracies where the breakdown of democratic regime was triggered externally, that is by a foreign non-democratic regime, but with the

active support of non-democratic forces within the society. Since these democracies were already compromised by active collaboration with a foreign non-democratic regime, it can be anticipated that their democratic governments would also be concerned about the presence of non-democratic forces within the political system in the future. Consequently, it can be anticipated that their democratic governments would have more incentives to adopt legal measures constraining the presence and operation of non-democratic forces within their political systems.

By contrast, in democracies where the breakdown of democratic regime was triggered externally but without active support by internal non-democratic forces or where the democratic governments remained stable, these democracies are expected to be more complacent about the presence and participation of non-democratic actors within their democratic political system in the future. As such democracies have little or no experience of non-democratic forces attempting to destroy their democratic regimes and were not compromised by collaborating with a foreign non-democratic regime, it can be anticipated such democracies would face less political and societal pressure to develop a wide-ranging arsenal of defensive measures and provisions to constrain them (Cf. Downs, 2012: 57).

Drawing on these insights, this section will examine the validity of the arguments presented above in light of the cross-national evidence surrounding the variations in democratic defensiveness between the democracies studied. The eight democracies covered in this study provide a solid basis to examine the validity of these arguments, since they all represent different constellations regarding experiences of internally triggered or supported breakdown of their democratic regimes in the past as discussed. Table 13 classifies the main four configurations of historical experiences of the breakdown or stability of democratic regime along with democracies included in each of them.

Table 13: Overview of configurations of experience and nature of democratic breakdown among eight democracies

 Configuration	A Internally triggered suspension of democracy	B Suspension of democracy by foreign non-democratic regime	C Suspension of democracy by foreign non-democratic regime	D No suspension of democracy
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Democracy		with support by non-democratic forces within the government and the society	but without support by non-democratic forces within the government and the society	
Austria		Yes		
Belgium			Yes	
Denmark		Yes		
France		Yes		
Germany	Yes			
Netherlands			Yes	
Sweden				Yes
United Kingdom				Yes
Expected level of democratic defensiveness	→ A and B are expected to invoke strong disposition towards democratic defensiveness		→ C and D are expected to invoke weaker disposition towards democratic defensiveness	

Note: Grey shading in configurations A and B was added to indicate their strong disposition towards democratic defensiveness.

Table 13 reflects overall four configurations can be classified based on the form and nature of the democratic breakdown in the past among democracies covered in this study: internally triggered suspension of democracy (configuration A), suspension of democracy by a foreign non-democratic regime with the active support of internal non-democratic forces (configuration B); suspension of democracy by foreign non-democratic regime without the support of internal non-democratic forces (configuration C), and, finally, no suspension of democracy (configuration D). If the arguments presented above hold, *countries falling in configurations A and B should be much more inclined to invoke stronger disposition towards democratic defensiveness and develop a wide-ranging arsenal of forma-legal mechanisms to defend themselves against internal threats than countries falling in configuration C and D.* More so, as the configurations A and D capture radically different experiences (that is the breakdown of democratic regime by internal forces through utilising institutions and freedoms and the lack of such experience at all) it should be expected that democracies falling in the first configuration are among the most defensive while democracies falling in the last configuration are among the least defensive. Before turning to the examination of each of these perspectives, the next two sections will present the composition of each configuration in turn.

The first configuration A includes Germany as the only democracy among the eight countries studied where the breakdown of democratic regime was triggered internally by non-democratic forces nourished within the society. As documented in many studies, the first democratic Weimar Republic was

formally destroyed between 1930 and 1933, when after a series of unsuccessful minority governments with the German Centre Party ('Deutsche Zentrumspartei') in the lead²²⁰ the Reich President Paul von Hindenburg invited Adolf Hitler to become the next Reich Chancellor of the Weimar Republic (Cf. Broszat, 1987: 93). When in the beginning of March 1933, the last parliamentary elections took place for the Weimar Republic, Adolf Hitler's NSDAP party received 43% of the votes becoming the strongest party in parliament (Reichstag). Having received parliament's full support, Hitler immediately started to expand his power grip. The parliament was dissolved while leaders and members of other political parties within the parliament were physically intimidated or killed. The "Enabling Act" ("Ermächtigungsgesetz") issued on 24th of March 1933 formally symbolised the end of the Weimar democracy (Cf. Broszat, 1987: 105). The new law transferred absolute power to Adolf Hitler allowing him to abridge the democratic constitution and suspend the freedoms formerly guaranteed. All political parties except the NSDAP were prohibited and state censorship was introduced (Cf. Broszat, 1987: 105-106).

The configuration B reflects the experiences of Austria, Denmark, and France. Within these countries the democratic regime was formally defeated as the result of the foreign occupation by Nazi Germany between 1938 and 1940, and the national governments were severely compromised by the active support and collaboration with occupied Nazi Wehrmacht authorities. In Austria, the first democratic republic created in 1918 after the end of World War I was formally suspended in 1938 after its annexation by Nazi Germany with the active support of internal non-democratic forces. Since its founding, as documented at length by Simon, the First Austrian Republic was always burdened by the widespread disloyalty of its population toward the new state and its democratic institutions as well as the strong polarisation of its political forces of which the pro-socialist parties, the clerical conservative parties, and the various German-nationalist parties represented the three powerful competing parties in the country (Cf.

²²⁰ The last three years before the seizure of power by Adolf Hitler ("Machtergreifung") the Reich Chancellors were Hienrich Brüning (March 1930- Mai 1932), Franz von Papen (June 1932-December 1932), and Kurt von Schleicher (December 1932-January 1933). All of them were the members of the Centre Party (Deutsche Zentrumspartei) which represented the interests of the German Catholics. Franz von Papen played an important role during fateful months in the end of 1932 and the beginning of 1933 trying to persuade the ageing Reich President Paul von Hindenburg to offer the office of the Reich Chancellor to Adolf Hitler. For the history of the Weimar Republic before the rise of Adolf Hitler and the process of "Machtergreifung" (seizure of power) after his appointment as Reich Chancellor (Cf. Broszat, 1987: 93).

Simon, 1978: 84ff). The election of the Christian Social Party (Christlich-Soziale Partei) with its leader Engelbert Dolfuss as the new Chancellor into government in 1932 was the first victory for the clerical conservative camp. This government sought to build close relationships with the authoritarian regime of Mussolini in Italy, much to the anger of the German-nationalists led by Austrian NSDAP party which sought the unification with Germany (Cf. Simon, 1978: 91). During the fateful 1933-1934, the political tensions between the three parties increased and resulted in a civil war. In response, the Chancellor Dolfuss banned several opposition parties including Communists, Social-Democrats and National Socialist parties, abolished the democratic constitution of 1920, and dissolved the parliament (Cf. Simon, 1978: 113-114). Effectively an authoritarian one-party state was created with the Christian-Social party in the lead which shortly afterwards renamed itself into Fatherland party (Vaterländische Front), forging an alliance with the pro-Italian fascist Fatherland's Defence party (Heimwehr)²²¹ (Cf. Simon, 1978: 117). After the assassination of Dolfuss in 1934, Kurt Schuschnigg of the conservative party became the next Chancellor. Like his predecessor, he sought to keep Austria under the authoritarian rule. All political forces were suppressed, including those from the German-nationalist camp (Cf. Simon, 1978: 118). During 1938, under the direct pressure of Hitler, Schuschnigg released Austrian Nazis from prison and took several of them in the government. When Schuschnigg attempted to organise a referendum on the state sovereignty, Hitler commanded his troops to invade pre-emptively on March 1938. After this act, Austria formally ceased to exist as an independent state and became a part of Germany (Cf. Simon, 1978: 118).

The fate of the democratic regime in Denmark during the 1930s and 1940s also fits this configuration. The democracy in Denmark formally ceased to exist from April 1940 when Nazi Germany occupied the country within the matter of just two hours. That said, both the Danish government and the king Christian X were allowed to stay in the country fostering an uneasy alliance with the new Nazi Wehrmacht authorities. In response to the mild treatment of the

²²¹ The Heimwehr was composed of diverse social elements from Roman Catholic young farmers to anticlerical German nationalist urban bourgeoisie. Some wished the return of the monarchy, others supported Hitler, many more looked to Mussolini for support (Cf. Simon, 1978: 96).

government and the Danish population by the Nazis²²², the Danish government had actively supported the Nazi authorities until 1943 when it was formally dissolved by the Nazis (Cf. Deák, 2000: 6). For example, the government was actively involved in the recruitment of Danish citizens in the Nordland and Wiking Waffen SS divisions (Cf. Dethlefsen, 1990: 194). In November 1941, the government of Denmark joined the German led Anti-Comintern pact. The economy of Denmark was completely at the service of Nazi Germany, more so than other European countries, even those of the direct German allies during World War II, such as Hungary (Cf. Deák, 2000: 9).

In France, the democratic government was reorganised during May-June 1940 after the Nazi troops invaded. Although Charles de Gaulle formed a government in exile in London, the “legitimate” French government was that of Marshal Philippe Pétain that was built shortly after the German invasion (Cf. Jackson, 2003: Ch.4). After the armistice was signed between the government of Pétain and the new Wehrmacht authorities in June 1940, the French territory was divided into an Occupied Zone in the North and an Unoccupied Zone in the South with the town of Vichy as the capital and the seat of the new government (Cf. Jackson, 2003: 232). On 10th July, the French Parliament voted with an overwhelming majority to grant Marshal Pétain full powers to revise the constitution, who immediately issued a number of constitutional acts giving him absolute power. The parliament was suspended until further notice. The French motto of the Republic “Liberty, Equality, Fraternity” was immediately replaced by a new motto: “Work, Family, Fatherland” marking the complete transformation of the French Third Republic into an authoritarian regime of the Marshal Pétain who collaborated actively with the German Wehrmacht authorities occupying Paris (Cf. Jackson, 2003: 232-233).

The configuration C encompasses the countries that experienced a democratic breakdown triggered by a foreign non-democratic regime but without active support from political forces within their government and society. Among eight countries, this configuration meets the experiences of democratic governments

²²² According to Deák “in occupied Denmark the German army felt so confident of popular and official compliance that within a few weeks of the country’s invasion in April 1940, it reduced the number of occupation forces to half of an infantry division, less than thousand men. This was less than the total number of Danish army and armed police forces in the country, both of which the German occupiers had allowed to continue to function” (Cf. Deák, 2000: 6)

in Belgium and the Netherlands during World War II. Within these two countries, the national governments did not support and collaborate with the occupying Nazi Germany and escaped into exile, thus remaining formally intact and even organised resistance from abroad. In Belgium, after the invasion of the territory by Nazi Germany, the legitimate democratic government led by Hubert Marie-Eugène Pierlot managed to escape to the United Kingdom where she built an exile government in London to lead the resistance within the occupied country. Only the King Leopold III as commander-in-chief of the Belgian armed forces capitulated to the Nazis and remained in the country during the occupation years until its liberation in 1944 by allied troops (Cf. Conway, 2000: 135). Despite the King receiving a genteel imprisonment in the Palace of Laeken outside Brussels and initially seeking to develop some sort of relationship with the German authorities by travelling to Berchtesgaden in November 1940 to meet Hitler, scholars did not consider these attempts a collaboration (Cf. Conway, 2000: 135). Later, while captive by German forces, the King refused to support the German authorities and even became the integrative figure during the resistance for many Belgian people against the Nazi army. Additionally, the Wehrmacht authorities who governed occupied Belgium provided their support to more emphatically collaborationist groups such as the Rexist movement in Francophone Belgium led by Léon Degrelle and the Vlaams Nationaal Verbond (VNV) in the Flemish part of Belgium whose members were quickly promoted by German authorities to prominent positions in the central and local bureaucracy (Cf. Conway, 2000: 135).

Also in the Netherlands, despite the democratic government being formally suspended due to the defeat of the resistance and the occupation of the territory by Nazi army in May 1940, the entire Dutch government including the Queen Wilhelmina managed to escape into exile thus remaining formally intact (Cf. Warmbrunn, 1963: 8). London was proclaimed the seat of the exile government and upon her arrival, the Queen stated she will continue to protect the interests of her country and fight against the enemy. By doing so, the Queen assured the legal existence of the Dutch democratic government and made it possible for the country to continue their war alongside the Allies (Cf. Warmbrunn, 1963: 9). Within the country itself the German Wehrmacht authorities, after a short period of military rule, placed the country under the

authority of a civil German government with the Reichskommissar Dr. Arthur Seyss-Inquart as supreme authority (Cf. Romijn, 2000: 175-176).

Finally, the last configuration D describes countries that did not experience the collapse of their democratic regime, specifically the United Kingdom and Sweden. In both countries the democratic governments remained intact before and during World War II. Within the United Kingdom, the democracy remained intact before and during World War II, although during the 1930s it was severely challenged by the presence of the British Union of Fascists (BUF), the main right-wing extremist party formed in 1932 by Oswald Mosley, through a series of legal acts, including the Public Order Act 1936 allowing the expansion of police force powers. While doing so the government was able to turn the party into a marginal political force (Cf. Mullender, 2009: 325-329; Husbands, 2009: 252-253). During World War II, the British government under the leadership of Winston Churchill (1940-1945) was the leading ally in the fight against Nazi Germany on the European mainland (1944-1945).

Similarly, in Sweden, the democratic government led by the *Socialdemocratic Workers' Party* (Sveriges socialdemokratiska arbetare parti) under the leadership of Per Albin Hansson (1932-1946) was kept intact throughout the war. Their pro-fascist groups within the country, including the proto-type party of Adolf Hitler's NSDAP, Nationalist Socialist Workers' Party (Nationalsocialistiska Arbetarpartiet) led by Sven Olof Lindholm, was a minor force not capable of winning the masses' support and significantly challenging the democratic government. Toward the end of the 1930s, the party moved itself away from the national-socialist ideals of NSDAP and even renamed itself into Swedish Socialist Unity (Svensk Socialistisk Samling) (Cf. Payne, 2001: 305-307). Although during the summer of 1941 shortly after Nazi Germany invaded the Soviet Union, the Swedish government allowed German troops to pass through its territory, a short period commonly referred to as a "mid-summer crisis" (Cf. Scott, 2002: 371), it is not considered a collaboration by scholars²²³. During World War II, despite its neutrality status, Sweden actively assisted other

²²³ On 22nd June 1941, Hitler presented the government in Stockholm with a petition to transport one armored division across Sweden into Finland. After discussions took place between four main political parties in the coalition government, the government including the King Gustav V complied with the German petition and allowed its troops to pass the Swedish territory (Cf. Scott, 2002: 371).

European countries in their war against Nazi Germany and offered its territory as a refuge for many European Jews.

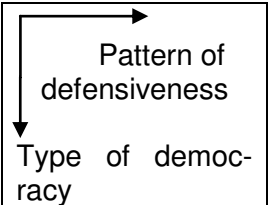
7.4 Comparing theoretical perspectives with the empirical findings

Thus far, this chapter has discussed the role of the democratic government types and the role of historical experience of an internally triggered or supported breakdown of democratic regime during the 1930s and 1940s. I will now examine each theoretical perspective in great detail. To facilitate this, each theoretical perspective will be compared against the levels of democratic defensiveness identified in Chapter 6. The analysis will find out that among two perspectives only the historical experience of an internally triggered or supported breakdown of democratic regime is more helpful to understand the given differences between the eight democracies in the level of their formal-legal democratic defensiveness, while the type of democratic government can only partially account for such variations.

7.4.1 Examining the role of the type of democratic government in shaping the formal-legal democratic defensiveness

According to this theoretical perspective, it is expected that substantive democracies would have a strong disposition towards developing democratic defensiveness while procedural democracies are expected to have a weak disposition towards democratic defensiveness. Table 14 compares the type of democracy with the cross-national evidence of defensiveness to ascertain if the former has an influence upon the latter, a subject of much previous scholarly debate (Cf. Thiel, 2009: 395; Bourne, 2011: 9-10).

Table 14: Examining the relationship between the type of democratic government and the two main profiles of democratic defensiveness

 Pattern of defensiveness Type of democracy	<i>High defensive:</i> High defensiveness across all or the majority of dimensions	<i>Medium defensive:</i> Medium defensiveness across all or the majority of dimensions
Substantive democracy	France Germany	

Procedural democracy	Austria Belgium	Denmark Netherlands UK Sweden
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Note: for the description of the two defensive profiles see Chapter 6.3

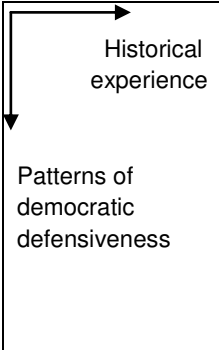
Table 14 reflects the linking of the type of democracy and the cross-national evidence provides no strong support for the claim that the type of democracy has influence on the level of democratic defensiveness. According to the table and the evidence thus far, Germany and France are both substantive democracies and thus are expected to have a strong disposition towards democratic defensiveness, which seems to be true as both countries have highly defensive democracies, therefore meeting this theoretical expectation. However, with the exception of Belgium, Table 14 does not reflect procedural democracies meetings its theoretical expectation. According to the theoretical perspective, procedural democracies are expected to have a weak disposition towards democratic defensiveness. However, according to the cross-national evidence presented, the procedural democracies included in this study do not meet this theoretical expectation, as Denmark, Netherlands, Sweden, and the United Kingdom are procedural democracies by definition but have been found to have medium defensiveness. The most direct contradiction to this perspective bring the cases of Austria and Belgium. These democracies are both procedural democracies and therefore should have a weak disposition towards democratic defensiveness. However, as shown in Table 14, both democracies are highly defensive which is an obvious contradiction to the theoretical expectation.

In conclusion, the type of democracy seems to be less significant in furthering our understanding of the existing differences in democratic defensiveness between the eight democracies studied, as there is no clear connection between the type of democracy and the level of a democracy's democratic defensiveness.

7.4.2 Examining the role of historical experience with the breakdown of democratic regime in shaping formal-legal democratic defensiveness

This section will now analyse the role of historical experience of an internally triggered or supported breakdown of democracy in shaping democratic defensiveness. Table 15 compares configurations representing differing historical experiences (A, B, C, and D) with their corresponding level of democratic defensiveness.

Table 15: The relationship between the historical experience with the breakdown of democracy and the level of democratic defensiveness

 Historical experience Patterns of democratic defensiveness	A Internally triggered suspension of democracy	B Suspension of democracy by foreign non-democratic regime with support by non-democratic forces within the government and the society	C Suspension of democracy by foreign non-democratic regime without active support by non-democratic forces within the government and the society	D No suspension of democracy
<i>High defensive</i> High defensiveness across all or the majority of dimensions	Germany	Austria France	Belgium	
<i>Medium defensive</i> Medium defensiveness across all or the majority of dimensions		Denmark	Netherlands	UK Sweden

Note: A and B are expected to invoke stronger disposition towards democratic defensiveness while democracies in configuration C and D are expected to have weaker disposition towards democratic defensiveness. Cases that do not fall in the theoretically expected categories of defensiveness are highlighted in bold.

Table 15 indicates the linkage of differing historical experiences with cross-national evidence of differences in democratic defensiveness among these eight democracies is more useful in understanding the existing differences in democratic defensiveness. As reflected in Table 15, the democracies where the breakdown of democratic regime was triggered internally (configuration A) or externally with the support of internal non-democratic forces (configuration B) are more defensive than democracies where the democratic breakdown was

triggered externally without the support of internal non-democratic forces (configuration C) or democracies where there was no breakdown at all (configuration D).

That said, however, this comparison is not sufficient in explaining all kinds of variations between democracies studied. For example, Belgium is expected to have a weaker disposition towards democratic defensiveness according to its historical experience and have outcomes similar to the Netherlands. However according to Table 15, Belgium is highly defensive which does not meet the theoretical expectation. This deviation can be explained by the instances of collaboration which took place during the time of occupation between the Nazi Wehrmacht authorities and the local non-democratic groups such as *Rexist* movement and the *Vlaams Nationaal Verbond* (VNV) (for details see the section 7.3). Given that such collaboration took place during World War II between individual internal non-democratic groups and the Wehrmacht authorities, the authorities in Belgium sought to undertake more efforts and adopt a wider range of laws than one would expect from it given its historical experience.

Multiple deviations from our theoretical expectations exist, including Denmark, the United Kingdom and Sweden. In Denmark, according to its historical experience with internally supported breakdown of democratic regime during World War II, it should be similar to Austria and France in terms of democratic defensiveness. However, according to the evidence, Denmark is medium defensive and is similar to the Netherlands, contradicting the theoretical expectation. Additionally, the United Kingdom and Sweden were theoretically expected to have a weaker disposition toward democratic defensiveness because both had their democratic governments remained intact before and during World War II and neither was compromised collaborating with Nazi Germany. However, contrary to these theoretical expectations both countries are medium defensive across all three categories which directly contradicts the theoretical claim and needs further explanation.

To summarise, historical experience of an internally triggered or supported breakdown of democracy in the past is a helpful factor to explain the differences in defensiveness between the democracies studied. That said, however, Denmark, the United Kingdom and Sweden have revealed simply focusing on

historical experience before and during World War II alone is not sufficient to account for all variations in democratic defensiveness between contemporary democracies and must be complemented by a detailed account of the evolution of democratic defensiveness since the end of World War II.

7.5 Conclusion

This chapter has examined various factors that can help us understand the cross-national variations in democratic defensiveness between democracies covered in this study. Drawing on the common argument within historical institutionalist literature that the context matters, this chapter focused on the role of two particular factors in their relation to democratic defensiveness: the division of democracies into two types of substantive and procedural democracies and the historical experience of an internally triggered or supported breakdown of their democratic regime in the past. Several scholars claimed these two factors are very important to ascertain how democracies react to their enemies and which legal instruments they adopt to counter them (Cf. Fox & Nolte, 1995: 14; Klamt, 2007: 135; Downs, 2012: 59). After examining the role of these two factors using cross-national evidence presented in previous chapters, it was found that among these two factors, historical experience was more helpful in understanding a country's disposition towards democratic defensiveness while the type of democracy is less helpful. That said, however, it was also found that while internally triggered or supported democratic breakdown helps us understand some of the cross-national differences better, it cannot account for all kinds of variations between the democracies studied. Specifically, Denmark is medium defensive while the historical experience of this country (in this case subversion of democracy by an external force with support of internal non-democratic forces) should presently result in a higher level of democratic defensiveness. Additionally, the United Kingdom and Sweden also have higher levels of democratic defensiveness than one would expect given their past experiences (in that case long-term democratic stability and continuity). In an effort to explain these deviations from theoretical expectations, the final Chapter 8 will analyse the United Kingdom as a case-study for a detailed analysis of the evolution of democratic defensiveness from the 1930s till 2013. This analysis is underpinned by the

assumption common to the historical institutionalist perspective that formal-legal defensiveness of a democracy as in place in 2013 (which chapters 4-6 focused on) can be partially accounted for by long-term historical dispositions toward developing defensive laws. The chapter will focus on ascertaining the factors that influenced this democracy into developing a higher level of democratic defensiveness than its historical experience would have expected. To do so, Chapter 8 will explore the critical political and historical junctions in the United Kingdom during the 20th century which stimulated the adaptation and development of laws within the three analytical categories of formal-legal defensiveness used in this cross-national analysis.

CHAPTER 8:

CASE-STUDY: WHY UNITED KINGDOM HAS HIGHER DEFENSIVENESS THAN THEORETICALLY EXPECTED?

8.1 Introduction

The previous chapter found that the historical experience of an internally triggered or supported breakdown of a democratic system in the past can help us understand why democracies are different in terms of democratic defensiveness. However, this particular historical experience does not provide us a fully comprehensive understanding as some democracies deviated from the historically grounded expectation of their level of democratic defensiveness. This chapter will provide a detailed analysis of the over-time evolution of the defensive legislation in the United Kingdom and how it was shaped and adopted, specifically discussing why the United Kingdom is more defensive in its formal-legal arsenal than one would expect given the lack of a historical experience with internally triggered or supported breakdown of its democracy in the past, reflecting my broader historical institutionalist perspective. Specifically, this chapter will focus on the main threats to the democratic state and government in Britain during the 20th century and how the government and lawmakers of the United Kingdom responded to these threats in form of what legal measures and provisions. The goal of this analysis is to ascertain if and how these legal responses 'moved' the country along the key indicators of democratic defensiveness across three categories. The analysis is underpinned by the assumption, derived from literature focusing on the politics of policy change, that formal-legal defensiveness of a democracy as in place in 2013 can be partially explained by an analysis of *long-term historical dispositions toward developing defensive laws* (Cf. Finn, 1990: 9; 2000: 55; Bleich, 2011: 42). Thus, while democracies, due to their historical experiences with the breakdown of their democratic regimes during the 1930s and 1940s, might show a stronger disposition towards adopting certain defensive measures as this research has illustrated so far, certain crises within society such as increased spikes of racist violence after the end of the World War II, or grown instances of terrorism in

more recent times, can decisively change the dispositions of democratic states towards democratic defensiveness.

There is broad literature which suggests focusing on the role of objective problem indicators upon policy outcomes can also be a fruitful endeavour to explain why countries differ in their democratic responses to the threat from non-democratic parties and groups inside the political system. Some scholars have reasoned that focusing on historical context only as a predisposing factor can obscure the changes that take place within individual polities *over time* (Cf. Bleich & Lambert, 2013: 144). Often democracies change their original dispositions towards defensive legislation due to certain crises or political upheavals taking place within them in the course of certain time, prompting their governments to adopt new defensive laws in response to them (Cf. Finn, 1991: 55; Bleich & Lambert, 2013: 129, 140). In particular, it is believed that those crises threatening the survival of a democratic state, provide states with the occasion to develop new legislation (Cf. Bleich & Lambert, 2013: 129). For example, Bleich and Lambert, in their analysis of cross-national variations in state responses to racist associations, found that for a fuller explanation of why countries differ in their responses to racist associations, attention is also required to objective events that triggered democratic responses over time (Cf. Bleich & Lambert, 2013: 140-141).

Drawing on these insights it can be argued that in order to develop a casual framework for understanding why the United Kingdom's level of democratic defensiveness deviates from the historically grounded expectation, would require an integration of long-term dispositions and events that shaped its defensive regime over time. Together these factors can provide a probabilistic explanation of why this democracy is more defensive than its historical experience would have suggested. This chapter will provide a more detailed analysis of the over-time evolution of defensive legislation in the United Kingdom. Based on the careful examination of primary legislation and the literature dedicated to the political development of the UK during the 20th century, particularly concentrating on the study of political conflict in the UK's history since 1930s and the timing of laws enacted during this period, this study identified four critical junctures in the UK's 20th century history: *the evolution of*

pro-fascist movements in the 1930s and after the end of World War II, the sectarian conflict in Northern Ireland (1968-1998), the miners' strike (1984-1985), and the resurgence of radical Islamism and international terrorism in the new millennium (Cf. Boyle et al., 1975; Walker, 1992: 31ff; Milne, 2014). Each of these events represented an important and critical juncture in United Kingdom's history since 1930s till present and signifies a time when their democracy was perceived to be in particular jeopardy. The central argument of this chapter is within each event, the scale of political violence arising from the particular conflict spurred the country's willingness to enact fairly restrictive laws with the result that it advanced 'further' along the key indicators of formal-legal democratic defensiveness. For example, during the fascist movements in the 1930s the government responded by enacting fairly constraining public order legislation which advanced the country's level of defensiveness to having key indicators of the legal ban of non-democratic groups and constraints of freedom of assembly and association. During the conflict in Northern Ireland the state was prompted to enact antiterrorism legislation which enforced further the power of proscription of terrorist and other extremist groups (Cf. Finn, 2000: 55). Additionally, the miners' strike prompted the government to change its public order legislation hardening the restrictions of the freedom of assembly and expression. The new threat of radical Islamism forced the government to enact new antiterrorism legislation, upgrading the power of proscription of extremist and terrorist groups and giving the police additional powers for arrest and surveillance of extremist movements. Table 16 schematically maps the advancing of Britain's legal democratic defensiveness between 1930 and 2013.

Table 16: Core legislation in the UK increasing formal-legal defensiveness

Time period	1930s-1960s	1968-1989	1984-1985	Post-9/11, 2001 and post 7/7, 2005
Historical context	British fascism	Conflict in Northern Ireland	Miners' strike	Terrorist attacks
Main legislation enacted	Public Order Act 1936; Racial Act 1965	PTA 1974-1998; Terrorism Act 2000;	Public Order Act 1986	Anti-terrorism legislation
Areas of legal democratic defensiveness enforced	Enforcement of legal ban of paramilitary organisations;	Enforcement of legal ban of terrorist and extremist	Enforcement of stricter constraints on the freedom of	Enforcement of state surveillance of religious

enforcement of legal constraints on the freedom of assembly	groups; enforcement of comprehensive state surveillance	assembly	groups ; religious hatred laws;
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This chapter will firstly separately discuss each historical event introducing the historical context. This discussion shall build the background for the ensuing discussion of the legal framework that evolved in response to the conflict in each case. While this discussion is structured chronologically, it will regularly refer to my analytical framework of democratic defensiveness to make it clear in which time period and which particular event prompted the government to strengthen which particular category of legal constraints.

8.2 British fascism and legal responses to it: advancing defensiveness in legal ban and freedom constraints

The rise of pro-fascist movements during the 1930s was an important critical juncture in the UK's interwar history (Cf. Mullender, 2009: 324-334). Albeit the scale of the fascist threat in the UK was not comparable to its counterparts on the European mainland and the chance for them of taking over the democratic government was very low, it had nevertheless represented an immense challenge for the government to overcome (Cf. Thurlow, 1996: 30-31). In reaction, the British government enforced the fairly constraining Public Order Act 1936 which gave the state the power to ban para-military groups and to enforce a range of rules which in effect could apply constraints upon the public meetings and processions of far right groups in the country. This section firstly focuses briefly on the rise of pro-fascist movements in interwar Britain and will then analyse how the POA 1936 shaped the state's democratic defensiveness.

8.2.1 Far right pro-fascist movements in Britain

The rise of fascism in interwar Britain is often linked with the name of Sir Oswald Mosley (1896-1980). After serving as a member of the British Parliament between 1918 and 1931 and then as a member of the government responsible for the problem of unemployment, Mosley built in 1932 the British Union of Fascists, for short BUF (Cf. Thurlow, 1996: 32; Mullender, 2009: 324-

325; Morgan, 2003: 93). With financial support from Benito Mussolini and the backing of the media baron Lord Rothermere, the movement established itself quickly as the major fascist organisation in Britain (Cf. Morgan, 2003: 93). At the height of its popularity in 1933-1934, the Mosley's movement comprised around 50.000 members (Cf. Morgan, 2003: 96). The movement's main goal enshrined in Mosley's manifesto *Great Britain* was to establish a one-party dictatorship and build a corporate state, as he believed that without a corporate state, the country could quite possibly drift into disaster (Cf. Morgan, 2003: 94-96; Mullender, 2009: 326). Mosley saw the liberal-democratic nature of state as impotent in solving its existing problems as it prevented the leaders from governing in "a suitably decisive fashion" (Cf. Mullender, 2009: 326). Based on this belief, he advocated a totalitarian state as the solution. An important feature of his antidemocratic propaganda was the Anti-Semitism of the kind that was propagated by Nazis in Germany (Cf. Mullender, 2009: 326). Increasingly so since 1934 and 1935, Mosley portrayed Jews as culturally alien and parasitic, a "nation within the nation", feeding off and exploiting their host community (Cf. Morgan, 2003: 97).

Apart from the appalling manifesto, the BUF quickly became the major "law and order" problem for state and local authorities. Through the early 1930s the name of the movement became notorious for major disturbances of the public order in London and other parts of Britain. Throughout the 1930s, Mosley's political rallies in London and elsewhere stirred up anti-Semitic propaganda and caused clashes with anti-fascist groups formed in response to their actions. The apogee of the militancy of Oswald Mosley and his movement emerged in 1936. During that year two large events took place that revealed the real danger of the BUF and of its leadership. On October 4, 1936, Oswald Mosley organised a march of BUF members dressed in black shirts which was the uniform of the movement through the centre of East London where there was a large Jewish community as well as many BUF supporters. The march which was dubbed "Battle of Cable Street" after the street where the march took place ended up in cruel violence with 106 people left injured and 85 people arrested (Cf. Mullender, 2009: 327-328). A week later another "The Mile End Pogrom" took place during which the fascists smashed windows of Jewish shops and houses and assaulting all those who looked Jewish (Cf. Mullender, 2009: 328).

8.2.2 The enactment of the Public Order Act 1936: advancing defensiveness in group ban

Prior to 1936 the police forces were not empowered to take actions against political meetings held in halls unless called by meeting stewards (Cf. Moore, 1990: 66). This is why, as it often happened at political meetings of BUF, the police were standing by lamely while fascist and anti-fascists engaged in acts of blanket violence (Cf. Moore, 1990: 66). Similarly the demonstrations and marches in public places organised by BUF and other extremist movements could freely occur as the police had little power to stop them or ban completely. For example, when Mosley announced its readiness to organise the march through Cable Street, the Home Secretary could not ban it completely because the march was seen as lawful (Cf. Mullender, 2009: 327-328). This problem partly occurred due to the strong commitment of those in charge of public order maintenance to the overarching value of fundamental freedoms (Cf. Poole, 1996: 55). As explained by the Home Office during the discussion in February and March 1934 of the “Bill to Prohibit the Wearing of Uniform” which was proposed to prohibit the BUF wearing the black shirts in public processions, suppressing the BUF would be “contrary to the long established traditions of allowing people in this country to hold and to express what views they like so long as they do not breach the law or incite others to do so” (cited in Moore, 1990: 66). Based on this belief the bill was rejected.

However, with the sheer number of incidents of political violence committed by the BUF, the voices became loud expressing concerns of the adequacy of the current law in dealing with the BUF. The chief of British Security agency MI5, Sir Vernon Kell, warned the senior police and Home Office civil servants they were not treating the BUF with the gravity it warranted and stated “it is impossible to resist the impression that taken as a whole they tend to underestimate the growth and importance of the Movement led by Sir Oswald Mosley” and such situation could lead “to the [fascist] capture of power as a general election, followed by the suppression of all opinion (...) [contrary] to the policy of the Fascist Government” (cited in Moore, 1990: 66). The above named events in October of 1936 thus muted the initial opposition to the launch of a more resolute legal treatment of the BUF and other extremists.

The legal response to the actions and movements of British Union of Fascists was eventually introduced as the Public Order Act 1936 (thereafter POA 1936). According to Moore, the two last events in East London in particular played an important role in helping the government change their doubts surrounding whether the BUF and similar movements must be suppressed or not (Cf. Moore, 1990: 67). The government had commissioned two reports which were drafted by Sir Philip Game in October 1936, who had become one of the central figures in drafting the new legislation during the course of events. In his capacity as the new head of the London Metropolitan Police, Game recommended in his reports to outlaw fascist organisations as he believed that “Private armies even if they start out as small and somewhat farcical organisations, are always apt to induce the other side to arm” (cited in Moore, 1990: 67). Additionally, he advised to forbid the BUF using Anti-Semitic parades, as he believed Anti-Semitism was the most important feature of the BUF and “the only real danger of Fascism”. To counter this menace, he recommended “the only real solution, if a practical method of doing so can be devised, is to suppress the Fascist organisations” (cited in Moore, 1990: 68). As Moore argued, the recommendations given by Sir Philip Game had particularly influenced the government in its decision to act decisively against the BUF. The Cabinet met on 14 October 1936 and acted swiftly upon his recommendations. The bill was passed through the Parliament on 16 November 1936 (Cf. Moore, 1990: 68).

The new legislation meant that Mosley and his followers could no longer engage in profile-raising paramilitary displays. It not only prohibited fascist movements’ unrestrictive use of their freedom of assembly but also severely constrained their freedom of expression (Cf. Mullender, 2009: 329). To summarise its main mechanisms briefly (see Chapter 4.3.3 for more details), this Act introduced the provision which empowered the state to ban “quasi-paramilitary organisations” under Section 2(1). Any person was prohibited under the Act to train and equip an association “for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown” (...) “for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object”²²⁴. Furthermore, the POA 1936 enhanced the state’s powers to prohibit the non-democratic groups

²²⁴ Section 2(1), Public Order Act 1936

the wearing of political uniforms “in any public place or at any public meeting” under Section 1(1).

Apart from banning para-military organisations, the Act introduced three important statutory mechanisms to deal with public demonstrations (Cf. Ewing & Gearty, 1990: 86). Section 3 of the Act allowed the chief officer of police, when a procession was believed to cause serious public disorder, to impose such conditions “as appear to him necessary for the preservation of public order”. If such conditions were insufficient, then the chief officer could apply for a banning order from the Home Secretary in London, or from the local council in any other part of the country, which would ban all or any class of processions in a given area for a duration of three months. According to Ewing and Gearty, the purpose of this imposition of blanket bans was “to prevent the temptation to discriminate against particular marches” (Ewing & Gearty, 1990: 87). Furthermore, Section 5 contained another important statutory mechanism which according to Ewing and Gearty was for decades “one of the central tools in the control of political assembly and public non-conformity” (Ewing & Gearty, 1990: 87). This section prohibited offensive conduct causing the breach of public order, including the use of threatening, abusive and insulting words²²⁵. After its amendment in 1965, this section applied to anyone in public using threatening, insulting words or behaviour or distributed signs or other materials which were threatening, abusive, or insulting. Finally, the third provision within the POA 1936 banned the wearing of uniforms and offensive weapons while at meetings or in public processions. The relevant bid to ban uniforms was ostensibly propelled since 1934 when the Commissioner of the Metropolitan Police in London Lord Trenchard called on the government of Baldwin to forbid the BUF the wearing of blackshirt uniforms (Cf. Mullender, 2009: 329). Thereby, Trenchard took the view that BUF members while wearing their blackshirt uniforms participated in “unauthorized exercises, movements or evolutions” prohibited earlier by Unlawful Drilling Act 1819 (Cf. Mullender, 2009: 329). The new POA took up on Trenchard’s recommendation incorporating the new ruling banning the wearing of prohibited uniforms together with offensive weapons²²⁶.

²²⁵ Section 5, Public Order Act 1936

²²⁶ Section 1 and 4, Public Order Act 1936

8.2.3 The threat of fascism in post-war Britain: advancing defensiveness on banning anti-racist speech

During the post-war period, the scale of fascist groups in the United Kingdom had significantly subsided although they were still present in the country (Cf. Mullender, 2009: 330-331). The rise of anti-immigrant sentiments following the increased immigration of Indian and Asian population groups in the 1940s and 1950s made it possible for Oswald Mosley and similar groups to found a niche in the British politics after the end of World War II (Cf. Mullender, 2009: 331; Husbands, 2009: 252). In 1948 Mosley founded the Union Movement (UM), the purpose of which was to gain support for the idea that Europe should become a nation and to advance an extreme right-wing political agenda (Cf. Mullender, 2009: 331). When the riots erupted between white youths and immigrants in Notting Hill area of London in 1958, Mosley took it as a chance to seek support for the UM. Thereby, he made repeatedly inflammatory statements insulting national minorities such as “Every white man in a job knows that he has got a coloured man at his elbow, ready to take his job at a cheaper rate” (Cited in Mullender, 2009: 331). Although the campaign experienced little public support and the court took actions against the rioters themselves, the state counteractions did not reduce Mosley’s endeavour to campaign against the “coloured invasion” (Cf. Mullender, 2009: 331).

In response to Mosley’s anti-immigrant campaigns, the Labour government of Harold Wilson issued the Race Relations Act in 1965 which was the first legislation in the United Kingdom to address the issue of racial discrimination (Cf. Mullender, 2009: 331; Bleich, 2011: 120-121). The government hoped the introduction of this act would help to counter the spread of anti-immigrant propaganda and integrate the immigrants within the country (Cf. Bleich, 2011: 20). According to Section 6 of the Act, it was illegal to intentionally use threatening, abusive, or insulting language that was likely to stir hatred against national minorities (Cited in Mullender, 2009: 331)²²⁷. The cases related to the prosecution of inflammatory speech can only be raised by the Attorney-General. However, as noted by Bleich, this law was relatively “tepid” because it prohibited racial discrimination only in limited public places and in home sales while containing weak enforcement provisions (Cf. Bleich, 2011: 121). As

²²⁷ Section 6, Race Relations Act 1965

previously detailed in Chapter 5, legislators sought to strengthen this section on several occasions and succeeded. The first amendment occurred in 1968 resulting in an expansion to include discrimination in employment and housing under Sections 3 and 5 of the Act (Cf. Bleich, 2011: 121). During the mid-1970s, the Act was further extended mainly to emulate the much harder race relations legislation of the United States (Cf. Bleich, 2011: 121). The new Race Relations Act of 1976 prohibited more forms of racial discrimination and developed more effective enforcement mechanisms than ever before. More recently, the act was expanded through the Racial and Religious Hatred Act 2006 to cover religion-based hatred. According to the new Act, it is an offence to distribute words or behaviour or display of written material with intent to stir racial hatred or if in the circumstances racial hatred is likely to be stirred (see chapter 5.3.1 for more details).

Overall, the emergence of BUF and rise of incidents of political violence perpetrated by Mosley and his supporters during public marches and demonstrations heightened the willingness of the British government to respond more aggressively to non-democratic groups which was primarily reflected in the enactment of the POA 1936 and the Race Relations Act of 1965. These enacted provisions have significantly changed the defensiveness of the country to encompass the key indicators of legal ban and constraints upon hate propaganda.

8.3 The conflict in Northern Ireland (1968-1998): advancing on key indicators in legal ban dimension

The sectarian conflict in Northern Ireland lasted nearly thirty years from 1968 till 1998 and was the most serious challenge for the stability and integrity of the British state and its authority during the post-war period. This section will focus on the origin of the conflict, the main forces involved and the ensuing legislation enacted by the government to abate it. The efforts of the British government to restore order and peace in the region have spawned a great variety and quantity of laws giving the state authorities comprehensive powers in dealing with terrorist and other extremist groups. This section will particularly focus on the power of the legal ban that was promulgated through new legislation. The first section will describe the political background of the conflict, focusing briefly

on the main features and the main political forces involved. This discussion is followed by a detailed account of the legislation that was enacted in response to the conflict.

8.3.1 Political background of the conflict in Northern Ireland

The conflict in Northern Ireland spans over many centuries since at least the 17th century when the Ulster plantation was forcibly settled (Ulster was the name of the northern part of the island of Ireland) with Scottish colonists in 1607, causing the local Catholics communities to begin incessant uprising that continued over time into the 20th century (Cf. Boyle et al., 1975: 162-178). In 1920, the state of Northern Ireland was formally created with the the Government of Ireland Act partitioning Ireland into Northern and Southern Ireland. The two states represented two distinct legal states each with its own parliament, executive, and judiciary, but both subordinate to the Parliament in Westminster, at least so until 1922 when the Southern Ireland was founded as the Free Irish State (later the Republic of Ireland). Since this time, the conflict has been confined to the northern part of Ireland. The state was ruled from Stormont (the Parliament of Northern Ireland) which was beset by a pro-British Unionist party that was supported by a majority of the Protestant community (Cf. Boyle et al., 1980: 15; Finn, 1991: 51)²²⁸. At the time of the conflict there were around one million Protestants who supported the link with Britain and just over a half a million Roman Catholics who supported the reunification of Ireland (Cf. Boyle et al., 1980: 8). The nationalist Catholic minority generally felt excluded and alienated and their unwillingness to accept the new realities led to the rise of confrontation between the two communities.

The conflict involved several guerrilla and paramilitary groups on both sides of the conflict. For the Catholics, their most formidable power was the Irish Republican Army (IRA). The IRA came from the militant faction within the guerrilla army which fought the British state in the Irish war of independence in 1919 and 1920 (Cf. Boyle et al., 1980: Chapter 3; Finn, 1991: 67). The result of

²²⁸ The Northern Ireland Parliament could legislate on matters concerning the law and order, the police, the courts other than the Supreme Court, the civil and criminal law, local government, health and social services, planning and development, commerce and industrial development and internal trade, agriculture and finance. The Parliament of Westminster retained the right to legislate on matters concerning foreign policy, defense, taxation, external trade, and all matters relating to the Crown (Cf. Finn, 2000: 51).

the war, the partition of Ireland in 1920, ignited the IRA into becoming a force to end the partition and to complete the process of British withdrawal from Ireland (Cf. Boyle et al., 1980: 15). Further escalation of the conflict followed on December 12 1956 when the IRA issued a formal declaration of war against the state of Northern Ireland²²⁹. In the 1960s, the leaders of the Republican movement decided to abandon the strategy of pursuing their goals by military means. Instead they started the general campaign for civil rights and social justice within Northern Ireland. The Northern Ireland Civil Rights Association (NICRA) was created composed of several large national organisations and a series of local groups (Cf. Boyle et al., 1980: 16; Finn, 1991: 56-58)²³⁰. In contrast to IRA, the NICRA campaigned peacefully for political reforms within the province. Among claims they put forward were, for example, the right to participate in the election of central and local government through a scrupulously fair electoral system, the right to pursue legitimate political and social objectives without government interference, the right to share equitably in the allocation of state resources, and the right to freedom from arbitrary arrest and detention (Cf. Finn, 1991: 55-56). Many Protestants believed these claims were targeting their dominant position in the region and responded with hostility which resulted in further escalation of the crisis (Cf. Finn, 2000: 55). Among the Republicans the number of people in support for the repudiation of a political solution and resuming the military campaign in Northern Ireland grew exponentially. When the Irish nationalist party Sinn Féin, the political wing of the official IRA, repudiated this policy at a conference in Dublin in 1970, the militants broke away from the official movement and established a rival 'provisional' movement. Due to this, two wings of the IRA emerged during the conflict: official and provisional. The Provisional IRA had created and sustained its campaign both in Northern Ireland and Britain, with the goal of creating a

²²⁹ The bombing activities of IRA were however not confined to the province of Northern Ireland only but also took place throughout the whole of the United Kingdom's territory. One such case involved the bombing of a pub in Birmingham in 1974 (Cf. Boyle e.a., 1980: 15).

²³⁰ The leaders of the civil rights movement pursued first their goals through peaceful political and legal actions in the hope that their actions would force the governments in Stormont and Westminster to undertake political, economic, and social reforms. When those efforts failed, its more aggressive members began marches and protests. The first such march took place in 1968 and arose from a cause of overt discrimination of members of Catholic community in public housing. The first such march on August 24 in Dungannon, for example, attracted over 2500 participants. The members of protestant community in their turn organized counter-demonstrations which often led to violent clashes and casualties among participants (Cf. Boyle et al. 1980: 15-16).

united Roman Catholic Ireland (Cf. Finn, 1991: 67). The official IRA were Marxists and maintained its separate existence carrying out its own distinct guerrilla campaign, although much less intensely than the Provisionals, while seeking a united workers' republic. In 1972 the official IRA declared a unilateral cease-fire on the grounds that no further political purpose existed to continue the fighting (Cf. Boyle et al., 1980: 16; Finn, 1991: 67). Some members of the official IRA were not satisfied with this notion and left the party to build the radical Irish National Liberation Army (INLA) which was regarded as the military wing of the Irish Republican Socialist Party (IRSP) (Cf. Boyle et al., 1980: 16). These three groups, the Provisionals, the Officials and the IRSP/INLA were often engaged in fighting against each other.

Apart from organisations built by members of the Catholic minority, there were also several paramilitary organisations drawn from members of the Protestant community. Among them the Ulster Voluntary Force (UVF) and Ulster Defence Association (UDA) were the two major organisations more or less openly engaged in paramilitary activities (Cf. Boyle et al., 1980: 19). Both organisations re-emerged or were newly created as underground terrorist groups during the 1960s and early 1970s. As their names implied, both organisations stood to defend the status of Ulster as integral part of the United Kingdom.

Against the background of the conflict in Northern Ireland, the British government was forced to adopt antiterrorism legislation to effectively fight against the growing challenge of Irish terrorism. Clearly everyone in the state had apprehended the conflict as the major threat to the stability of the state and its constitutional order. As one member of the British Parliament described, the conflict in Northern Ireland was "the greatest threat [to the country] since the end of the Second World War" (Cited in Walker, 1992: 31). According to one estimate, around 3600 people died since the conflict began in 1969 until 1998 when the Good Friday agreement was signed ending the conflict (Cf. Summers, 2009). In response to this conflict, the government issued a great variety and quantity of legislation, among them the Prevention of Terrorism (Temporary Provisions) Acts 1989 was the central response of the British government to still the conflict (Cf. Walker, 1992: 31). The next section turns to a more detailed account of the legislative response of the British government.

8.3.2 The legal response to the conflict in Northern Ireland: new framework for legal ban of extremist and terrorist groups

The conflict in Northern Ireland led to a great variety and quantity of laws to give the state sweeping powers in dealing with terrorist and other extremist groups. Among such laws, there were a number of emergency laws such as the Civil Authorities (Special Powers) Act (Northern Ireland) of 1922. This Act was passed by the Parliament of Northern Ireland shortly after its establishment in response to the ensuing conflict caused by the partition of Ireland. Initially enacted for one year, it was re-enacted from year to year until 1933 when it was made permanent. The statute was designed, according to its preamble, “to empower certain authorities of the Government of Northern Ireland to take steps for preserving the peace and maintaining order” (Cited in Finn, 2000: 53). The important matters regulated by the act included demonstrations in public under Section 4 which gave the right to impose blanket bans on public processions such as demonstrations and meetings. Another important Act was the Public Order Act (Northern Ireland) 1951 issued by the Parliament of Northern Ireland. The Act covered meetings and 'non-traditional' parades, although the amendment in 1970 considerably broadened the Act's scope to include paramilitary groups and weaponry.

However, the Prevention of Terrorism (Temporary Provisions) Acts (hereafter referred to as PTA) represented the key response of the British government to quell the resurgence of terrorist threats in Northern Ireland (Cf. Walker, 1992: 31). Despite its name, the Act has long survived the conflict in Northern Ireland that generated it and applies to the whole of the United Kingdom. There are altogether four PTAs since 1974 when the first PTA was passed through the Parliament (Cf. Ewing & Gearty, 1990: 213). The Act emerged as a direct response from the government to IRA's campaign of violence in Britain since early 1972 (Cf. Ewing & Gearty, 1990: 213). The immediate cause for its enactment was the bombing of two pubs in Birmingham in 1974 in which 21 people died and 184 were injured (Cf. Boyle et al., 1980: 15; Ewing & Gearty, 1990: 213-214). As frequently cited by scholars, the Parliament was ravaged by these acts of violence. One member of the Parliament, for example, observed “The House wants blood” (Cited in Walker, 1992: 31). After the bombing, many MPs in the Parliament urged the government to act swiftly and harshly in

response to these acts. The new legislation was to become an instrument by which the most MPs had sought to retaliate on the perpetrators. In urging his fellow members to pass the PTA 1974 Bill, the Lord Hailsham, for example, stated “Apart from [the Bill’s] practical value (...) its moral impact is hardly less important and would, I fear, be considerably blunted if we do not accede to the Government’s request to enable the Bill to receive the Royal Assent so as to place it on the Statute Book tomorrow. (...) I would suggest to pass it without amendment” (Cited in Donohue, 2003: 425). He later added “If one yields to terrorism of this kind other terrorists in Britain will draw the obvious moral that the gun and the bomb pay off because the British did not have the courage to resist them” (Cited in Donohue, 2003: 425). The conception of the Bill was announced on 25th November. The bill was passed in just two days and almost without amendment or dissent (Cf. Walker, 1992: 32). Since its conception, the Act, initially conceived as temporary, underwent a series of amendments and re-enactments (Cf. Walker, 1992: 33-40). The amendment in 1984, for example, added international terrorism as target of the proscription. As justified by one MP at that time, it was vital for Britain to “continue to have on the statute book legislation which will enable a democratic society to respond to the ever-present threat of international terrorism, regardless of the situation in Northern Ireland” (Cited in Donohue, 2003: 428). The following amendment of the PTA 1989 introduced financing terrorism and terrorist groups as an offence and as such prohibited under the Act. The Prevention of Terrorism (Temporary Provisions) Act 1989 represented the latest version of antiterrorism laws adopted since the start of the conflict²³¹. It provided Britain’s state and police forces with a more permanent and comprehensive code containing more safeguards against domestic and international terrorism that the Act defined as “the use of violence for political ends, and (...) for the purpose of putting the public or any section of the public in fear”²³². Although passed specifically for Northern Ireland, the act applies both in Northern Ireland and in Great Britain (Cf. Finn, 1991: 86).

The Prevention of Terrorism Act of 1989 gave the state sweeping powers for dealing with extremist and terrorist groups. As noted by the then Home Secretary Roy Jenkins, the powers granted were “draconian” and

²³¹ See the full text of the Prevention of Terrorism Act, 1989, available at: <http://www.legislation.gov.uk/ukpga/1989/4/contents>

²³² Part III, Section 9(1) of the Prevention of Terrorism Act 1989

“unprecedented in peacetime” but “fully justified to meet the clear and present dangers” (Cited in Walker, 1992: 31). Among such powers, the right to proscribe any organisation concerned in acts of terrorism represented the most significant power within this Act (Cf. Ewing & Gearty, 1990: 215). It should be noted that the Public Order Act 1936 was the main legal source to regulate extremist groups until it was perceived to be inadequate in dealing with the special nature of the conflict in the province (Cf. Ewing & Gearty, 1990: 212). Donohue, for example, stated “[t]he long history of Republicanism and Loyalism and their respective ideologies made it difficult for Westminster to respond to the conflict through ordinary legislation” (Donohue, 2003: 419). On a formal level, Section 2(1) of the POA 1936 empowered the state to ban “quasi-paramilitary organisations” but did not affect the right to proscribe paramilitary groups in Northern Ireland under Section 10(2) (Cf. Walker, 1992: 54-55). Furthermore, while the act made it an offence for any person “who takes part in the control or management of an association” whose members are “organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces” or “for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object”²³³, it did not forbid the mere membership in such organisations (Cf. Walker, 1992: 55).

The PTA 1989 established a new legal framework for banning extremist and terrorist organisations. To summarise it briefly (see chapter 4.3.3 for details), the PTA introduced three groups of crimes of relevance to the general power of proscription (Cf. Ewing & Gearty, 1990: 216ff). First, the act made it a criminal offence if someone “belongs or professes to belong to a proscribed organisation”. It was punished with imprisonment for up to ten years while publicly displaying or inviting support for these organisations was punishable by an imprisonment or a fine, or both. Thereby this power extends to groups related to the conflict in Northern Ireland as well as international terrorist groups. Secondly, the Act made it a crime to arrange, manage, or address any meeting of three or more persons (whether private or public) if it is known that the meeting is to support or to further the activities of proscribed organisations or is to be addressed by someone belonging to proscribed organisations. As

²³³ Section 2(1), Public Order Act of 1936

previously mentioned, the PTA of 1989 added the financing of proscribed organisations (Cf. Ewing & Gearty, 1990: 216)²³⁴. Thirdly, the act made it a criminal offence if anyone wears, carries or displays any item of dress or any article “in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation”. While the POA 1936 mentioned only uniforms “signifying his association with any political organisation or with the promotion of any political object”, the PTA provides for more comprehensive powers as it prohibits not only wearing uniform but also small badges and emblems which cannot be designated as the wearing of a uniform as well as prohibits the carrying of banners of proscribed organisations (Cf. Walker, 1992: 56).

Apart from groups “concerned in, or in promoting or encouraging terrorism”, the Act can also be used to ban any group which subscribes to the use of violence. As noted by Walker, the Act intentionally used a very broad definition of what is an organisation (Cf. Walker, 1992: 47). According to Subsection 6 of the Act, an ‘organisation’ is defined as including “any association or combination of persons” which in effect means that bans are not confined to terrorist associations only (Cited in Walker, 1992: 47; cf. also Finn, 1991: 133). The definition of terrorism given in the Act as “violence for political ends” also implies that the legal ban can apply toward both terrorist and non-terrorist groups. The key criterion remains however the use of violence.

As noted by several scholars, the main purpose of the enforcement of proscription within the PTA was to assure “the public should no longer endure the affront of public demonstrations in support of proscribed organisations” (Cf. Ewing & Gearty, 1990: 216). Finn stated the power of proscription represented a strong effort by the British government “to end or (...) to change the nature of the conflict” (Finn, 1991: 55; also cf. Donohue, 2003: 425-426). The Jellicoe Report issued in 1983 reviewed the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 and made this point even more forcefully. The Report noted that proscription may have some additional practical side-effects, including the prevention of public disorder and the stemming of the flow of funds and support (Cf. Walker, 1992: 56). However, as the report continued, it was more so the presentational value that was placed in it from the outset. Notably

²³⁴ Part III of the Prevention of Terrorism Act 1989

so it was expected that the proscription would generate “public aversion to organisations which use, and espouse, violence as a means to a political end” (Cited in Donohue, 2003: 426). In other words, the knowledge that an organisation was put under the proscription clause would discourage people to join or otherwise support such organisations in the first instance.

To summarise, the conflict in Northern Ireland was another triggering event spurring further the evolution of democratic legal defensiveness in Britain. When faced with the direct threat to its constitutional fundamentals the state enrolled its most constraining mechanism, the legal ban of non-democratic groups as reflected in the enforcement of the Prevention of Terrorism Acts allowing the state to proscribe terrorist and other extremist organisations.

8.4 The Miners’ strike (1984-1985): advancing defensiveness in freedom constraints category

Another ‘triggering’ event forcing the British government to respond in a way that advanced the country along the indicators of democratic defensiveness was the miners’ strike which endured from March 1984 till March 1985 (Cf. Mullender, 2009: 318). The miners’ strike became an important watershed in the post-war history of the state. In its core, the conflict occurred between the most powerful and politicised trade union of miners (National Union of Mineworkers, NUM) and the government of Margaret Thatcher (1979-1990). The decision of the government to close several coal mines across the country led thousands of coal workers to confront the government policies on the streets led by the NUM. The intensity of the ensuing confrontation between miners and the police forces was unprecedented in Britain itself and in the whole of Western Europe (Cf. Ewing & Gearty, 1990: 103). It reached its peak in the summer 1984 during the so called Battle of Orgreave when up to 8.000 riot police forces were mobilised and 39 miners were taken in custody (Cf. Milne, 2014: 22). Due to the conflict’s intensity, the Prime-Minister compared the confrontation with the miners to the war against the Argentine junta over the Falklands islands two years earlier. At a gathering of Conservative MPs in the Parliament she stated “We had to fight an enemy without in the Falklands. We always have to be aware of the enemy within, which is much more difficult to fight and more dangerous to liberty” (Cited in Milne, 2014: 23; cf. also Travis,

2013). As implied by this quotation, the government's key response to the conflict was overwhelmingly repressive. Some commentators described the state response during the miners' strike as a process of "militarisation" (Cf. Ewing & Gearty, 1990: 85; Reiner, 1998: 44). Reiner stated the fundamental essence of this process was the availability and occasional use of riot control hardware and protective uniforms and equipment for the maintenance of the public order (Cf. Reiner, 1998: 44). Additionally, this process concurrently occurred with changes in training, organisation, intelligence, and routines of mobilisation to facilitate rapid deployment of police squads intended to maintain or restore the public order and if necessary with force (Cf. Reiner, 1998: 44). The legal basis for all these changes was supplied by the new Public Order Act of 1986.

8.4.1 The Public Order Act 1986: push for stricter laws for the control of assemblies and demonstrations

To manage the increased accidents of political violence during the miners' strike, the government responded by enforcing the new Public Order Act 1986 (hereafter referred to as POA 1986)²³⁵. According to some commentators, this act was adopted in response and as a direct consequence of the crisis (Cf. Ewing & Gearty, 1990: 113). Before going into details, it is important to reiterate the most important statute in controlling demonstrations before 1986 was the Public Order Act of 1936. As mentioned before, the POA 1936 was adopted by Britain's inter-war government to respond to the increased breaches of public order by many far right groups during the 1930s (see above chapters 5.3.1 and 8.2.2). After World War II and before the new public order act was adopted in 1986, the POA of 1936 remained the main instrument in dealing with public demonstrations. According to Ewing and Gearty, the expansive provisions of the POA 1936 were sufficient to respond effectively to the major threats to the public order in the first decades after the end of World War II. For example, during the first half of the 1980s the authorities used Section 3 of the POA of 1936 to ban many more marches than they had done before. In 1981 alone, there were 42 banning orders and this number in the following years was also

²³⁵ Public Order Act, 1986, available at: <http://legislationline.org/topics/country/53/topic/15>

high: 13, 9, and 11 in 1982, 1983, and 1984 respectively (Cf. Ewing & Gearty, 1990: 113).

However, despite its expansive powers, the miners' strike had revealed the inadequacy of the preceding public order legislation to cope with this immense kind of public disorder which occurred during the miners' strike. According to Ewing and Gearty, the miners' strike had revealed the "malleability and breadth of the law that was available to the authorities" (Ewing & Gearty, 1990: 117; also cf. Smith, 1987: 157). The Home Office itself argued that the existing law was "complex and fragmented" and there were "important points where the law [could] helpfully be extended and clarified" and these related mainly to "improving the opportunities for the police to try to prevent disorder or disruption before it occurs" (Cited in Ewing & Gearty, 1990: 117). As result of such considerations, the new POA 1986 was introduced to further enhance police powers for maintaining the public order (Cf. Ewing & Gearty, 1990: 117)²³⁶. What additional changes have been introduced by the new Public Order Act of 1986?

According to Ewing and Gearty, the Act addresses and expands three areas, including the preventive powers of the police, the public order offences contained in Section 5 of the POA 1936, and includes a provision for the serious public order offences such as riot and unlawful assembly (Cf. Ewing & Gearty, 1990: 118). Firstly, the new POA extended the powers of the police to impose total bans on demonstrations and other public processions in case if "at any time the chief officer of police reasonably believes" that such procession may result in "serious public disorder" (Cf. Ewing & Gearty, 1990: 118)²³⁷. Secondly, the existing public order legislation was modified in three important respects. First, the new act demanded an advance notice of all public processions at least 6 days before they are due to take place (Section 11). If such requirement had existed before only for some territories, this new provision applies now throughout England and Wales (Cf. Ewing & Gearty, 1990: 118). According to

²³⁶ The miners' strike was not the only trigger for the government to revise its existing public order legislation. According to Ewing and Gearty, another public event which concerned the government and immediately had an impact on the consideration for drafting new public order legislation was the campaign rallies for nuclear disarmament (CND) which emerged in the 1980s after the plans were revealed that USA planned to place nuclear missiles on UK's territory (Cf. Ewing & Gearty, 1990: 94).

²³⁷ Part II, Section 13, Public Order Act 1986

Subsection 11(7) “each of the persons organising” a public procession is guilty of an offence if the requirement for advance notice was not satisfied. Secondly, the Act introduced within Section 14 the provision which allowed the police authorities to impose conditions on public assemblies. As previously mentioned, the POA 1936 dealt only with conditions concerning processions and demonstrations. The new act permitted the imposition of such constraining conditions on both demonstrations and meetings (Cf. Ewing & Gearty, 1990: 118). Thereby, the new act has extensively expanded the range of criteria on the basis of which conditions could be imposed on demonstrations and meetings. From now on, they have been extended beyond the apprehension of serious public disorder (Cf. Ewing & Gearty, 1990: 118-119). Under Sections 12 and 14, such criteria included: (a) “serious damage to the property”; (b) “serious disruption to the life of the community”; and (c) “the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do” (Cf. Ewing & Gearty, 1990: 119)²³⁸. If one of these criteria was fulfilled and if it was a demonstration, the senior police officer was authorised to impose such conditions “as appear to him to be necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession”. The officer may prohibit it “from entering any public place specified in the directions” (Cf. Ewing & Gearty, 1990: 119). If it was a meeting, the senior police officer “present at the scene” was authorised to give directions “imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation”²³⁹.

Additionally the Act introduced new provisions concerning the serious public order offences such as riot and unlawful assembly (Cf. Smith, 1987: 158ff; Ewing & Gearty, 1990: 119-120). The previous POA of 1936 foresaw the possibility for a constable to arrest anyone who was found in violation of carrying an offensive weapon at a public procession, or wearing a uniform of a prohibited organisation, or using threatening, abusing or insulting words at any public place or during a public meeting (Section 7(3)). The new act expanded

²³⁸ Section 12(1)(a)(b); 14(1), Public Order Act 1986

²³⁹ Section 14(1), Public Order Act 1986

these powers to arrest anyone without a warrant who organises or participates in an unlawful assembly, as well as anyone who incites someone to organise an unlawful assembly (Section 14(7)). Thereby a mere suspicion from “a constable in uniform” that such meeting is due to take place may suffice for an arrest. Thereby, if someone disobeys the instructions issued under the Act by police may be charged guilty of a criminal offence for which an offender may be either imprisoned “for a term not exceeding 3 months” or fined (Section 14(8, 9, 10)).

To summarise, the miners’ strike was another important and critical juncture in the United Kingdom’s post-war history which considerably spurred Britain’s government to upgrade its public order legislation to expand police powers in substantially constraining the right to demonstrate and the right of assembly, also including rules imposing the outright ban on both demonstrations and meetings, expanded the range of public order offences which included not only those raising the serious public disorder, but also those affecting damage to the property, and intimidation of public, and introduced the novel offence of organising unlawful assemblies.

8.5 Post-9/11 and 7/7: advancing defensiveness in operational constraints

Certainly, another important critical juncture in the post-war history of the United Kingdom was the terrorist attack on the United States on September 11, 2001 (commonly referred to as 9/11) which killed nearly 3000 people (Cf. Moran, 2008: 15). After these attacks, the US government led by George Bush declared a war on international terrorism and proceeded to carry out a military invasion in Afghanistan and Iraq. The United Kingdom stood by the US from the outset with the result that the UK itself became the target of terror following their invasion in Iraq (Cf. Moran, 2008: 16; Phythian, 2008: 45). In November 2003, the British Consulate and the HSBC bank in Istanbul were bombed killing three British citizens among the twenty-eight dead (Cf. Moran, 2008: 16). Subsequently, on 7th of July 2005 (often referred to as 7/7), the bombings in London took place plotted by four British citizens killing 52 and injuring more than 700 people (Cf. Moran, 2008: 16).

Both attacks, in particular the attack in London, put severe political pressure upon the British government to reconsider its policy towards extremists and terrorists (Cf. Moran, 2008: 16; Phythian, 2008: 45). The key response, as Moran and others have asserted, was in the form of new legislation to change the techniques of counter-terrorism (Cf. Moran, 2008: 20; Mullender, 2009: 340). Among powers enhanced through new legislation, was the power of its security and intelligence services to conduct surveillance and gather intelligence about suspect groups and individuals, as police and security services were considered the key to combatting terrorist threats within the country (Cf. Moran, 2008: 21; Foley, 2009: 984; Gregory, 2010: 85). For example, according to Moran and Phythian, “[t]he events of 9/11 were to transform the fortunes of the security and intelligence agencies in the United Kingdom. Having struggled throughout the post-Cold War 1990s to identify a legitimating threat (...), the ‘war on terror’ bestowed on these agencies a centrality that they had never previously enjoyed” (Moran & Phythian, 2008: 2). With regard to the London bombings of 7/7, Klausen asserted similarly the “perception that the terrorism had become “home-grown” provided a powerful motive for changing the way counter-terrorism enforcement was conducted” (Cf. Klausen, 2009: 412). This section will focus on the surveillance powers that were enhanced and increased in the aftermath of the two terrorist plots, with the purpose of ascertaining whether and how the new counter-terrorism policy has changed the powers of security agencies in the United Kingdom and strengthened its operational constraints.

8.5.1 Legal response to terrorism: strengthening operational constraints

As mentioned, one of the United Kingdom’s key responses to 9/11 and 7/7 was increasing the powers of its security agencies in gathering the intelligence and surveillance of suspected and non-democratic groups. Before going into details, it is important to mention, the surveillance of suspected and non-democratic groups by security services was not a new venture for the United Kingdom. According to Gregory, the surveillance of such groups has always been a priority strategy of the British state authorities in their fight against its enemies (Cf. Gregory, 2010: 85). For example, at the end of the 19th century policing was

used to monitor anarchists and Irish republican groups. In 1909, the government set up the security organisation MI5 (Military Intelligence, Section 5), primarily responsible for gathering intelligence surrounding domestic threats to the state's national security. For example, during the 1920s and 1930s the MI5 was actively involved in surveillance of 'bolsheviks', 'communists' and 'fascist' groups, and political parties within the country (Cf. Gregory, 2010: 85; Eatwell, 2010: 216). During the Cold War, MI5 was actively engaged in the surveillance of communists and Irish separatists such as IRA, national terrorist groups, animal-rights organisations, anti-capitalist groups, anarchists groups, and right-wing extremist groups (Cf. Gregory, 2010: 85). For example, as some analysts have argued, the partial success against republican and loyalist paramilitaries during the conflict in Northern Ireland was due to high-level British military intelligence or police informants penetrating these groups and actively helped in the disruption of terrorist activities as well as undermining internal confidence within the paramilitary groups during the 1980s (Cf. Moran, 2008: 21). Other security intelligence agencies in the country include the MI6 (Military Intelligence, Section 6) and GCHQ (Government Communications Headquarters) which are both responsible for gathering intelligence and surveillance of threats coming from abroad (Cf. Gill, 2003: 267).

As previously mentioned within chapter 6, in comparison with the other countries studied, the UK has by far the most comprehensive and elaborated legal basis regulating the activities of its security services. The available legal sources cover a wide range of legal acts. The Security Service Act adopted in 1989 and amended in 1994 and 1996 set out the rules and responsibilities of the domestic security services and put their functions on a statutory footing. Additionally, the Anti-Terrorism, Crime and Security Act 2001 gave security services additional powers for gathering intelligence surrounding activities related to terrorism. Furthermore, the Prevention of Terrorism Act 2005 gave the Home Secretary powers to impose 'control orders' upon suspected extremist and terrorist groups and individuals whether British or foreign. Finally, the Counter-Terrorism Act 2008 gave the Security Service enhanced powers to gather intelligence and share information on suspected groups with other security agencies in the country (Cf. Moran, 2008: 20; Walker, 2008: 58-59; Mullender, 2009: 339-340).

However, as noted by Innes and others, after the bombings of 7/7 there was concern across the police and security sector “whether established methodologies for generating intelligence on possible terrorist organisations, of the type used in Ireland for example, are suitable to deal with the new risks posed by a morphing, fluid, and decentered al-Qaeda” (Innes, 2006: 224; also cf. Klausen, 2009: 405). According to Innes, it was much easier for security services to organise and carry out surveillance and intelligence gathering about groups such as IRA, which were based upon “fairly traditional hierarchical organisational structures”. Consequently, as Innes continued, “if a human intelligence source could penetrate the organisation at a particular level, or an existing member be (sic) persuaded to inform on colleagues, then intelligence on a range of other members and their activities could be collected fairly readily” (Innes, 2006: 232). By contrast to IRA, the social organisation of the Islamic terrorist groups responsible for the London bombings was based “upon largely autonomous, disparate cells and groups that are not connected by any formal command and control structures” (Innes, 2006: 232). Therefore a successful penetration of such groups would not yield considerable intelligence and thus required the police and security services to change their surveillance methods.

These considerations resulted in new surveillance strategy introduced by the Home Office in 2006 called CONTEST, an abbreviation from the term ‘counter-terrorism strategy’ (Cf. Home Office, 2006). CONTEST is not law but rather a government strategy statement surrounding international terrorism. However, since its inception in 2006, this strategy has become an official guide and manual for all institutions involved in the fight against international terrorism. The strategy consist of ‘Four Ps’ which are always capitalized in official documents: PREVENT, PURSUE, PROTECT, and PREPARE (Cf. Home Office, 2006: 9; also cf. Walker, 2008: 54; Klausen, 2009: 406; Spalek & Lambert, 2010: 103). The area of state surveillance and intelligence gathering falls within the PURSUE strategy and is said to be “vital to defeating terrorism” (Cf. Home Office, 2006: 16; Walker, 2008: 54). As set out in the document:

“[a]ll disruption operations depend upon the collection and exploitation of information and intelligence that helps identify terrorist networks, including their membership, intentions, and means of operation. The Security Service (MI5), the Secret Intelligence Service (SIS), and Government Communications Headquarters (GCHQ) – known collectively as the security and intelligence agencies – are therefore critical to the work of PURSUE, as the

work of the police, both special branches and neighbourhood policing alike, for the UK-based terrorist networks” (Home Office, 2006: 16).

Unlike previous surveillance policies, the new strategy was different in several respects. According to Innes, the new policy replaced the traditional intelligence with “community intelligence” (Cf. Innes, 2006: 230). In essence, the new policy paradigm for state surveillance encouraged security agencies to seek greater cooperation and engagement with Muslim communities residing within the country rather than working undercover. Therefore the intelligence was acquired from open sources rather than acquired “from covert human sources and is often provided by ordinary members of the public, rather than those who have some connection to criminal activity” (Innes, 2006: 230). As underlined by many critics and supporters of this new strategy, the incentive was “to facilitate a better understanding of the makeup of different communities – in terms of the social networks to which individuals and groups belong and the intra-community tensions that may exist between them” (Innes, 2006: 230-231). In hindsight, however, it has been acknowledged by several scholars that through the new policy security agencies have acquired additional powers in conducting surveillance of many Muslim organisations resulting in, as Pantazis and Pemberton have argued, “now Muslims have replaced the Irish as the main focus of the government’s security agenda whilst also recognising that some groups have been specifically targeted for state surveillance” (Cf. Pantazis & Pemberton, 2009: 646).

To sum up, the efforts of the British government to counter the threat of radical Islamism and terrorism in the country have spurred their willingness to strengthen their operational constraints. This section has emphasised that one of the benchmarks of such a heightened disposition towards defensiveness was clearly visible in the expansion of their state surveillance laws. The terrorist attacks of 9/11 and particularly 7/7 have forced the government to reconsider how the original surveillance of suspected Muslim groups was conducted within the country. Instead of covert intelligence gathering and infiltration of groups by secret agents, the current trend is to acquire information by stronger engagement with targeted groups.

8.6 Conclusion

This chapter provided a conclusive argument to explain why the United Kingdom has higher defensiveness than theoretically expected, given that the country had no previous experience with the collapse of its democratic institutions. This was carried out by focusing on the historical context in which the defensive legislation was shaped and mobilised within the United Kingdom, particularly the incidents of political conflict throughout its history since the 1930s. Following the perspective proposed by Bleich and others, this chapter emphasised despite the lack of experience with the collapse of democratic institutions in the past and consequently the low disposition towards democratic defensiveness, the United Kingdom has a rich history of political conflicts which ultimately called for state legal intervention aimed at securing the state and its constitutional order (Cf. Mullender, 2009: 349). Each time the state of Britain faced a threat to its democratic order, it responded by crafting and mobilising new laws which gradually moved it towards a higher level of democratic defensiveness. In other words, the low disposition of the UK toward democratic defensiveness, as historical expectations would dictate, was simply ‘overridden’ by governmental efforts to effectively manage their key challenges faced throughout its history.

In reaching this conclusion, we find support for the “piecemeal approach” toward democratic defensiveness that was intimated earlier by Mullender (Cf. Mullender, 2009: 313). According to Mullender, the British state’s approach towards defensiveness was piecemeal in a sense that “the government and associated agencies have sought to gather knowledge of and gain experience concerning the relevant threat before acting intended to counter it” (Mullender, 2009: 349). The examples examined in this chapter include the rise of pro-fascist movements during the 1930s, the sectarian conflict in Northern Ireland, the miners’ strike in the mid-1980s, and the threat of Islamic terrorism and radicalism in the new century. As argued within this chapter, each of these selected events represented a grave challenge to the constitutional order and security of the British state. The discussion made clear whenever Britain’s government and law-makers felt that their constitutional fundamentals were jeopardised, they responded with the enactment of new laws designed to counter that particular threat. In doing so the state of Britain has gradually

advanced across key indicators of democratic defensiveness. In case of fascist movements in the 1930s, the government responded with the enactment of fairly constraining public order legislation which significantly affected the country's 'progress' on the group ban constraint and constraints on the freedom of assembly. As a result of the sectarian conflict in the Northern Ireland, the state responded by enforcing a new superior kind of antiterrorism legislation which propelled the right to ban terrorist and other extremist groups. The miners' strikes elicited the government to respond with new public order legislation including new offences constraining the freedom of assembly and the right of public demonstration. Lastly, this chapter has clearly demonstrated the events perpetrated by Islamic terrorist groups significantly advanced the state's defensiveness within the operational constraints category concerning the state surveillance of suspect Muslim groups.

To conclude, this chapter has positively demonstrated that an encompassing account of the formal-legal defensiveness found today should consider a country's long-term disposition towards and against the use of measures constraining non-democratic actors *in conjunction with* the specific problems it faced over time. The UK could have responded to the crises it experienced with more severe measures than it did. At the same time, to generate a deeper understanding of the adoption of the range of available formal-legal mechanisms that led to medium defensiveness within the categories legal ban, freedom constraints and operational constraints asked for a more in-depth analysis of legislative change. This, in turn, suggests that the cross-national assessment of the degrees of democratic defensiveness in eight European democracies should be the foundation of future work that systematically links cross-national patterns of defensiveness we find today with over-time analysis.

CHAPTER 9:

CONCLUSION

9.1 Introduction

This dissertation has set out to explore how liberal democracies defend themselves against those political parties and groups that seek to undermine or destroy them from within through utilising the institutions and freedoms the democratic state has granted them. Despite previous considerable efforts to study this complex question, there are significant gaps in the literature that need more systematic attention. To reduce these gaps, this study has focused on the formal-legal side of ‘defensive democracy’, a concept which “encompasses all activities, be these formal provisions or political strategies, which are explicitly and directly aimed at protecting the democratic system from the threat of its internal opponents” (Capoccia, 2001: 2; 2005: 47-48). The focus on this particular aspect of defensive democracy was justified for the reason of the relative importance of formal-legal measures in defending democracy from its internal enemies as the most effective defensive strategy and the fact that they have remained relatively understudied within political science literature, particularly so from a comparative perspective. This study has endeavored to find answers to the set of three particular questions: firstly, what formal-legal measures are at the disposal of democratic states to safeguard their democratic institutions and freedoms; secondly, what are the differences and similarities between democracies in terms of the degree of their formal-legal democratic defensiveness; and, thirdly, what broader factors can further our understanding of the existing variations in formal-legal democratic defensiveness between contemporary democracies. This concluding chapter will synthesise the analytical and empirical contribution of this study thus far to answer these three questions and, on that basis, conclude by outlining avenues for further research.

9.1 Summary of the main findings and original contribution

This dissertation has provided an important analytical and empirical contribution to literature through the systematic and encompassing assessment of the cross-

national variations in the degree of formal-legal defensiveness between eight European democracies: Austria, Belgium, Denmark, France, Germany, the Netherlands, Sweden, and the United Kingdom. This was a fruitful endeavour since cross-national analyses of state variations in democratic defensiveness have been rare in the past, while none of them focused on such a broad range of legal measures which are important for defending democracy from its internal threats. This study firstly conducted a critical review of the original concept of militant democracy, which was until recently the main paradigmatic concept for the study of cross-national variations in democratic defensiveness. While this research provided many good foundations, it was argued this concept is insufficient to conceptualise the differences in formal-legal defensiveness between democracies as it does not encompass the broader range of formal-legal measures that contemporary democracies use in their fight against non-democratic parties and groups. It was argued an important limitation of the concept of militant democracy is that it focuses too narrowly on the repressive instruments only, such as legal ban, whereas many contemporary democracies use many non-repressive instruments as well, which although not intended to be defensive, help defend democracies de facto.

Drawing on these drawbacks of the concept of militant democracy, in the next step I sought to define and organise the range of formal-legal measures adopted by the democracies included in this analysis. I did so by taking *the organisation-centred perspective on formal-legal measures*. The principal advantage of using this perspective on formal-legal measures is it allowed me to broaden the focus of relevant formal-legal measures beyond those explicitly repressive measures of militant democracy toward those legal measures and provisions which help defend democracy de facto by constraining the non-democratic parties and groups in their presence and operation in a democratic state. In line with these considerations, formal-legal democratic defensiveness was defined as a concept which encompassed not only explicitly repressive instruments of militant democracy but also those legal measures and provisions that constrain the presence of non-democratic parties and groups de facto. In this thesis the following legal mechanisms were defined as relevant de facto constraints: electoral threshold, ballot access rules (signature collection requirement and/or deposit payment), and the provisions for the withdrawal of

direct state funding from non-democratic parties. These mechanisms help defend democracy from non-democratic parties and groups de facto by making their access to political institutions more costly and their access to direct state funding more demanding.

After defining the range of relevant legal constraints, in the next step I developed an analytical framework to study the cross-national variations in democratic defensiveness between democracies. Using the organisation-centred perspective on formal-legal measures as an underlying approach, the entire range of formal-legal measures as applicable for constraining the non-democratic actors (that is militant democracy provisions and de facto constraints) were divided into three analytical categories, depending on the severity of constraints they impose on the presence and operation of non-democratic parties and groups in a democracy. Moving from the most to the least constraining categories, I distinguished legal ban, freedom constraints, and operational constraints. The principal advantage of this categorisation is it allowed a more plausible reconstruction of cross-national variations in formal-legal democratic defensiveness between the democracies studied. The relative formal-legal defensiveness of a democracy was captured in a decreasing order from the highly constraining category of legal ban to the least constraining category of operational constraints. Additionally, it highlighted the variations across a broader range of formal-legal measures, not just only focusing on legal ban as frequently done in previous literature.

The democratic defensiveness of a democracy was assessed through noting the presence or absence of the specified legal mechanisms, not the frequency of their usage. The advantage of this approach is it allowed the analysis to maintain the consistency in assessing the differences between democracies while using various legal sources from the eight countries. The formal-legal defensiveness of a democracy was captured using an index constructed on the basis of a standardised score from 0 to 1 and divided into three categories of high defensiveness (1-0.7), medium defensiveness (0.6-0.4), and low defensiveness (0.3-0) respectively.

Drawing on the analytical framework and underlying coding methodology, this dissertation provided an empirical analysis of the differences and similarities

between the eight democracies in the degree of their formal-legal defensiveness. The eight countries were selected on the basis of two key predisposing factors for shaping formal-legal defensiveness being the varied historically grown state traditions reflected in the division of democratic states in substantive and procedural democracies and differing historical experiences of democratic instability in the past, as detailed in chapter 7. The key empirical findings are chapter specific and have been summarised within the three empirical chapters (chapters 4, 5, and 6). Overall, the empirical evidence ascertained the eight democracies studied in this analysis correspond to *two prevailing profiles of formal-legal democratic defensiveness*. Germany, Austria, France, and Belgium are *highly defensive democracies* adopting all or the majority of defensive constraints across three defensive categories (that is legal ban, freedom constraints, and operational constraints), while the remaining the Netherlands, Denmark, Sweden, and the United Kingdom are *medium defensive democracies* having fewer defensive constraints at their disposal across three categories. Additionally, it was found there are no democracies characterised by low defensiveness, outlining the general tendency among the democracies studied to adopt fairly constraining legal frameworks against their non-democratic groups and political parties.

On the basis of the existing differences in democratic defensiveness between eight democracies found within the empirical chapters, the penultimate chapter analysed the broader factors to expand our understanding of why democracies are different in terms of democratic defensiveness. Drawing on a historical institutionalism as a theoretical perspective, this study sought to ascertain the validity of two particular factors in their relation to democratic defensiveness: firstly, the type of democracy being substantive or procedural; and, secondly, the varied historical experiences of an internally triggered or supported breakdown of democratic system in the past. Having examined these two factors in detail, it was found that the historical experience of an internally triggered or supported breakdown of democratic system in the past is more useful to explain why democracies are different in terms of democratic defensiveness, while the type of democracy was found to be less useful. At the same time, it was found that the historical experience cannot fully account for all kinds of variations, particularly why the UK, Sweden, and Denmark deviated

from their historically grounded expectation. In order to ascertain why, the last chapter focused on the critical junctions in the UK's history since 1930s that shaped its defensive regime over time. The focus on the events shaping the defensive regime over time in conjunction with the detailed analysis of long-term disposition toward democratic defensiveness was fruitful as it provided a clearer picture of the causal factors driving the UK's democratic defensiveness.

9.2 Theoretical and empirical implications

What are the broader theoretical and empirical implications of this study for our understanding of defensive democracy, particularly the variations between democracies in the degree of formal-legal democratic defensiveness?

The theoretical findings of this study have convincingly demonstrated that the defensiveness of a democracy is not characterised by designated legislation of militant democracy alone, but also encompasses legal mechanisms that assist in defending democracies *de facto* by constraining non-democratic parties and groups in their presence and operation in the political system. This finding has an important implication for future studies of defensive democracy, as it implies militant democracy as a paradigmatic concept to study the range of formal-legal measures and the state variations in their usage has a limited utility as a theoretical and empirical framework in the study of democratic defensiveness and should be revisited (Cf. Bourne, 2011: 3). As previously noted, the concept of militant democracy was introduced during the 1930s and thus, as argued by Thiel and several other scholars, it is naturally outdated and less suitable to circumscribe the broader spectrum of legal mechanisms used by contemporary democracies in their fight against political extremism (Cf. Thiel, 2009: 401; also Buis, 2009: 77; Pedahzur, 2004: 109; Mudde, 2004: 197). With regard to these considerations, the analytical framework developed in this thesis provides a strong starting point in the study of democratic defensiveness.

There is further need to construct a broader comprehensive framework for the study of defensive democracies. This dissertation has demonstrated that all democracies are either high defensive or medium defensive, while none fall in the range of low defensiveness. This finding demonstrates that democratic defensiveness has become a wide-spread phenomenon among contemporary

democracies. Even those democracies which were commonly perceived as less predisposed toward strong defensiveness due to the explicit procedural nature of their democratic systems and a lack of historical experiences with a breakdown of their democratic system in the past, such as Sweden or the United Kingdom in this study, they in fact demonstrate stronger dispositions to democratic defensiveness than anticipated earlier. While this finding confirms the assumption made by scholars earlier, including Sajo's contention that "the state's most natural characteristic is self-defense" or that "democracy is about constitutional risk-aversion" (Sajo, 2004: 213), it also introduces the question what are the broader factors that elicit defensive mechanisms and institutions within contemporary democratic states, despite the procedural nature of most democracies in Europe or the lack of historical legacy of democratic instability in the past. The research in this dissertation suggests that an understanding of the causal mechanisms driving democratic defensiveness would require an integration of democracies' long-term dispositions towards democratic defensiveness and events that shaped their defensive regimes over time. However, further research is required to elaborate further this causal relationship (Cf. Downs, 2012: 56-57).

This brings me to the question why we should care about democratic defensiveness today. The relevance of democratic defensiveness has never been so salient than today. After 70 years since the end of the WWII, many democracies in Europe are confronted by new challenges and threats to their democratic order and values. Almost everywhere in Europe we see once again the rise in popularity of political parties and groups propagating anti-immigrant, EU-sceptic, and other anti-democratic values and ideals. Austria, Denmark, Finland, Greece, Hungary, and the Netherlands, all have non-democratic political parties making various inroads into their parliaments and governments in recent years. Even in long-lived democracies such as the United Kingdom and Sweden we see the rise of populist anti-democratic sentiments gaining popularity among average voters. In face of these alarming occurrences, more and more academic circles are asking if democracies within Europe are experiencing another crisis similar to the crisis 70 years ago when several democracies saw their democratic regime break down under the pressure of Nazi and fascist parties and groups (Cf. Ercan & Gagnon, 2014: 1; Merkel,

2013: 4; Papadopoulos, 2008: 5). Of course, the present growth in support for various political parties with strong anti-democratic values and ideals has been fed by the economic crisis Europe is currently suffering. Mass unemployment and decreasing living standards have created ideal conditions for the rise of such parties. These economic problems seem to be aggravated by increased 'democratic deficit' of democratic institutions in Europe. According to Papadopoulos, the lack of accountability has become one of the most pervasive problems of contemporary democracies (Cf. Magette & Papadopoulos, 2008: 13-16). The root of this problem appears to lie in the relative remoteness of democratic institutions from average citizens, the lack of visibility in political decision-making, the increased role of experts rather than elected representatives, to name just few. This problem is further aggravated by an increased complexity of decision making due to the grown interdependencies between supranational, international, and national institutions in contemporary democracies (Cf. Papadopoulos, 2008: 10ff). In this situation it is consequential that citizens become increasingly alienated from democratic institutions, leading in turn to the rise of anti-democratic sentiments, and finally turning them to various populist and extremist parties and groups which seem to offer simpler solutions. In such situations it is very easy for extremist political parties to advance from the fringe into the mainstream through capitalising on the inability of mainstream parties and democratic institutions to cope with current economic and social problems. As noted by Papadopoulos, "political systems suffering from an atrophy of mechanisms of democratic accountability are more subject to attacks on their legitimacy by anti-establishment political entrepreneurs" (Papadopolous, 2008: 4).

The discussion of the changes in the disposition toward democratic defensiveness over-time has convincingly demonstrated that major crises and political upheavals can powerfully dispose political actors toward developing new laws. Building on this discussion, it can be anticipated that in face of the current crises many European democracies will initiate new laws or reactivate old laws as a precaution to preserve democratic institutions and freedoms from all those who seek to use the current problems to increase their presence in the political system. Thereby it is likely that appeals to the collective memory of the previous struggles with non-democratic actors or the historical experience of a

breakdown of their democratic regime in the past will be used instrumentally to mobilise voters eliciting new laws. In sum, understanding the conditions and the modes by which defensive legislation develops constitutes an important domain for future research.

9.3 Conclusion: avenues for further research

Overall, this study has significantly contributed to reducing the gaps in literature through providing a systematic and comprehensive assessment of state variations in democratic defensiveness. However, as with any study, there are several directions in which this study can be fruitfully expanded by future works. This section will briefly outline some avenues for further research.

Firstly, this dissertation only considered the presence and absence of legal mechanisms. Observing the availability of legal measures was very useful in the context of this study because it ensured that the same categories were applied to very diverse legal texts across eight democracies and in doing so led to a more reliable assessment of cross-national variations in formal-legal democratic defensiveness between them. Future works can build on this and develop further more refined categorisations to assess variations in measures that are present in countries. For example, it may be appropriate to observe not just if there are legal ban laws, but also *on what legal grounds* and *how procedurally* the legal ban is invoked. A detailed account such as this could provide additional *insights into the relative severity of individual legal mechanisms* between democracies and on this basis provide more refined classifications of defensive democracies.

For example, this dissertation has ascertained some democracies have numerous comprehensive grounds for enactment of legal ban while other democracies are less informed. To illustrate this, two highly defensive democracies Austria and France, can be referred to. While they are similar in democratic defensiveness, they are distinctly different due to the number of legal grounds that each requires for the enactment of a party ban. In France the legal grounds are narrowly grounded in the substantive features such as the republican form of the government and state territory thereby without specifying what they mean. By contrast, in Austria the legal grounds are more ‘targeted’

specifying the explicit reasons for its enactment, such as the association with the NSDAP, or violation of the principles of the United Nations Organisation, or the incitement to violence, as well as specifying which political parties are likely to be banned, including those which act in the spirit and form of the NSDAP party. On the basis of these two examples, it would seem the legal ban in Austria is more severe and thus Austria is more defensive than France. There are strong reasons for believing this is the case. The more legal grounds specified within legislation, the easier it is for the government to enact a legal ban, as it will be likely that one of the conditions will be met by a targeted organisation. In addition to legal bans, further research could also consider other legal mechanisms in the framework provided and how easily procedurally they can be enacted, to ascertain further variations in democratic defensiveness.

This notion has already been considered by some scholars, particularly so those dealing with the regulation of legal bans upon political parties (Cf. Rosenblum, 2007; Capoccia, 2007; Issacharoff, 2007; Navot, 2008). Capoccia, for example, when analysing legal bans tried to distinguish between two legal paradigms of legal ban, either 'neutral' or 'targeted' (drawing on Niesen, 2002), stating "the nature of legal paradigm that is used to ban a party matters in explaining variations across different kinds of bans" (Capoccia, 2007: 6). According to Capoccia, the key difference between these two paradigms lies "in how clearly the extremists are defined in the law" (Capoccia, 2007: 3). Drawing on this distinction, he defined the neutral paradigm whereby the legal grounds for enactment of party ban are broadly defined or tied to certain substantive principles in the constitution, such as the form of government or certain democratic values. By contrast, a targeted paradigm exists when the law is more specific listing the types of political parties which can be banned on the basis of certain characteristics defined in law (Cf. Capoccia, 2007: 7). Due to this, he stated party bans are more difficult and costly under neutral paradigm while they are easier to enact under the targeted paradigm (Cf. Capoccia, 2007: 7). This example of Capoccia's work is a good illustration as how my framework can be further refined.

Another fruitful endeavour where future studies can build upon this study is to analyse *whether and how the individual legal mechanisms are used in practice.*

As it was frequently noted in the literature, some democracies despite having clear legal provisions to constrain the activity of non-democratic actors do not use them in practice due to some normative considerations or because of fear that the application of such provision can exacerbate the public peace or lead to the radicalisation of members of an organisation targeted by a legal sanction (Cf. Virchow, 2004; Minkenberg, 2006; Erk, 2005). In Germany, for example, there was fear among some mainstream political parties that the initiated ban against the NPD in 2003 will result in “ghetto-formation” and “hardening of ideology” among members of the party (Cf. Minkenberg, 2006: 40; Schellenberg, 2009: 539). On the other hand, it was noted that Austria has never used the provision in Article 1 of its Prohibition Act of 1947, which allows it to ban political parties. Because of this, some scholars have even suggested that the presence of such law does not represent a shift of Austrian democracy toward militant democracy (Cf. Aufrich, 2009: 45). These two examples can illustrate how different democracies can be in terms of their orientations toward the application of their legal provisions. In light of these considerations, it can be useful to investigate whether and how democracies use individual legal measures. For example, the following questions would be particularly important to address: how frequently democracies use particular mechanisms; what are the particular targets of these mechanisms (that is right-wing extremist or left-wing extremist parties and/or groups); and why democracies often do not use certain legal measures despite having them at their disposal within their legal arsenals.

An important step in this direction was made by Bourne (Cf. Bourne, 2011; 2012; also see Bourne & Casal, 2014). In her study of the legal proscription of political parties, Bourne made a distinction between democracies which ban political parties for anti-system behaviour or anti-system ideology and ideas, and those that ban them only for anti-system behaviour, while on the other hand, also distinguishing between democracies which use legal proscription actively and those which abstain from using legal ban at all or use it rather passively (Cf. Bourne, 2011; Bourne & Casal, 2014). On this basis, she developed a more refined classification of legal ban regimes among democracies in Europe. This example of Bourne’s study can be a good

illustration as how the analytical framework developed in this study can be further elaborated.

The third issue where future research can build upon my research is *to consider other case-studies* covered within my analysis. This study carefully analysed the United Kingdom providing an in-depth analysis of the events that shaped its defensive regime over time complementing so the detailed analysis of the long-term development of its dispositions toward democratic defensiveness. This analysis was useful to learn why the UK has higher defensiveness than theoretically expected. Another interesting case-study to explain a deviation from theoretical expectations would be Denmark. As previously ascertained, Denmark was found to range medium defensive across all three categories while the historical experience of this country (in this case, the experience with an externally triggered but internally supported breakdown of its democratic regime in the past) should have caused a higher level of democratic defensiveness today. Therefore, it is important to understand why Denmark has a lower degree of democratic defensiveness than theoretically expected. Similar to the analysis of the UK, an analysis of the contextual evolution of the defensive laws in Denmark would greatly assist in achieving this. The profile of medium defensiveness as in place today in Denmark can be surprising given the more recent developments in this country, such as the resurgence of right-wing extremism and racist-related violence since the 1970s (Cf. Björger, 1993: 32-34; Rydgren, 2004: 474; Meret, 2009: 82-83). As stated by Rydgren, in the early 1970s Denmark became the “the home of the strongest right-wing populist party on the continent” (Rydgren 2004: 475). The *Progress Party* founded in 1972 and known for its anti-immigration rhetoric, succeeded to make several inroads into the Danish politics causing fear among the political elites and the public. Even when the party withered away during the 1990s, its place was taken by another and more extreme right-wing extremist *Danish People’s Party* built in 1995 and led by Pia Kjaersgaard (Cf. Rydgren 2005: 480). Like its predecessor, this new party is famous for its ethno-pluralist stance, xenophobic nationalism and its anti-political establishment strategy (Cf. Rydgren, 2004: 481). So, why Denmark is medium defensive despite their historical experience of democratic instability in the past and their current contemporary challenges? Further research is needed to ascertain the answer.

Another question that could be explored in future research is whether and how 'spatial-interdependence', that is the degree to which countries are dependent on each other (Cf. Franzese & Hays, 2007: 1), might have spurred the development of democratic defensiveness across countries over time. This perspective could determine how countries emulated defensive strategies after having observed them in other countries. There are studies which have positively demonstrated that sometimes laws adopted in one country against non-democratic groups are emulated by other countries, either due to similar democratic challenges they are facing, or because they are held effective (Cf. Fox & Nolte, 1995: 38). This can be briefly illustrated by recalling the example of the German model of militant democracy which served as a model of defensive democracy to be emulated by Japan, Chile, and many new democracies in Eastern Europe (Cf. Boventer, 1985: 182ff; for democracies in Eastern Europe see Brunner, 2002: 17ff; for Japan see Sakaguchi 2009: 219-220; for Chile see Lizana, 2009: 60). Within this context, it would also be interesting to investigate if and how international norms and institutions influence the adoption and enforcement of defensive laws across democratic countries. To give an example, the International Convention on Elimination of all Forms of Racial Discrimination, ICERD, adopted by the UN in 1965, urged its signatory member-states to adopt stricter regulations against political parties and groups promoting and inciting racial discrimination, including the legal ban of such organisations (see Article 4) (Cf. Fennema, 2000: 128; Bleich & Lambert, 2013: 124). As frequently mentioned within empirical chapters, several countries have followed this recommendation either drafting new laws or enforcing the existing antiracist legislation. However, while this perspective might be an interesting avenue for future research, requiring a longitudinal analysis of the interdependencies between the processes leading to the adoption of defensive mechanisms, Bleich and Lambert have recently found that international treaties and institutions have little significance in terms of increasing disposition among democratic states to adopt stronger defensiveness. In other words, while 'spatial inter-dependence' may be influential in some respect it is not a powerful alternative to the argument developed in this thesis.

Finally, it would also be beneficial if further research could analyse a larger number of democracies. This study investigated only eight countries which

allowed for a more detailed account of the legal situations in each democracy and a better account of the cross-national variations between selected democracies across the range of legal constraints. It also allowed the analysis to single out the 'outliers' among the democracies including Denmark, the UK and Sweden which did not meet their theoretical expectations regarding the historical breakdown of their democracy and then focusing in greater detail on the sources of the unexplained variances by providing an in-depth case study of the UK. Overall, while focusing on a small number of countries was fruitful in the context of this study, a focus on a larger number of democracies would probably give more opportunities for making generalisations. In addition, it could probably allow us to find democracies with low defensiveness. For example, it could be useful to look at democracies outside Europe such as the United States and Australia. Both countries have no historical experiences with the breakdown of their democratic regimes in the past and have been stable throughout. In addition, these two countries were far from the main ideological influences that troubled Europe during the 20th century. Therefore, in line with the historical institutionalist perspective used in this study, it can be anticipated that these two democracies have developed lower levels of democratic defensiveness than their counterparts in Europe. For example, some scholars have observed that in the United States there are no substantial restrictions upon the freedom of association and freedom of expression which are both protected by the First Amendment (Cf. Backes, 2006: 276; Michael & Minkenberg, 2007: 1110). It could be useful to examine this assumption by using the analytical framework developed in this thesis to compare against the full range of legal mechanisms to see if this observation holds.

Ultimately, I hope this research has provided a strong starting point for future possibilities in the study of the formal-legal defensiveness of democratic states. Similarly, it is hoped that this study has made its unique contribution towards the ever-growing discourse of the phenomenon of defensive democracy.

APPENDIX

1. Legal documents and case-laws consulted for each country

Austria

- Bundes-Verfassungsgesetz (B-VG) (Federal Constitutional Law), available at: https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.html
- Bundesgesetz vom 5. April 1960, mit dem bestimmte Abzeichen verboten werden (Abzeichengesetz 1960), available at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005262>
- Vereinsgesetz (VerG) (Law on Associations), available at: [https://www.jusline.at/Vereinsgesetz_\(VerG\).html](https://www.jusline.at/Vereinsgesetz_(VerG).html)
- Versammlungsgesetz 1953 (VersG), StF: [BGBl. Nr. 98/1953](#) (WV) (Law on Assemblies), available at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000249&ShowPrintPreview=True>
- Strafgesetzbuch (Penal Code), available at: [http://www.jusline.at/Strafgesetzbuch\(StGB\).html](http://www.jusline.at/Strafgesetzbuch(StGB).html)
- Bundesabgabenordnung (BAO), available at: [http://www.jusline.at/Bundesabgabenordnung\(BAO\).html](http://www.jusline.at/Bundesabgabenordnung(BAO).html)
- Federal Act on the Financing of Political Parties (Bundesgesetz über die Finanzierung politischer Parteien, PartG), available at: http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=ErV&Dokumentnummer=ERV_1975_404
- Verbotsgesetz 1947 Stf: Stgbl. Nr. 13/1945, available at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000207>
- Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich, Bundesgesetzblatt für die Republik Österreich, Vienna: 30. Juli 1955, available at: <http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR30002357>
- Bundesgesetz vom 27. Juni 1979 über das Dienstrecht der Beamten (Beamten-Dienstrechtsgesetz 1979 - BDG 1979), available at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008470>
- Bundesverfassungsgesetz vom 6. Februar 1947 über die Behandlung der Nationalsozialisten (Nationalsozialistengesetz), available at: <http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10000215/Nationalsozialistengesetz%2c%20Fassung%20vom%2019.02.2014.pdf>

- Bundesgesetz über die Wahl des Nationalrates (Nationalrats-Wahlordnung 1992 - NRW) (Act regulating the elections to the National Council (Parliament), available at: <http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR11001205>
- Bundesgesetz vom 27. Juni 1979 über das Dienstrecht der Beamten (Beamten-Dienstrechtsgesetz 1979 - BDG 1979) (Law on Civil Servants), available at: <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008470>
- Bundesgesetz über die Wahl des Nationalrates 1992 (Nationalrats-Wahlordnung, NRW), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001199>
- Bundesgesetz über die Organisation der Sicherheitsverwaltung und die Ausübung der Sicherheitspolizei (Sicherheitspolizeigesetz - SPG) StF: BGBl. Nr. 566/1991 (NR: GP XVIII RV 148 AB 240 S. 41. BR: 4119 AB 4122 S. 545.), available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005792>

Belgium

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Denmark

- Act on Ethnic Equal Treatment, available at: <http://www.lexadin.nl/wlg/legis/nofr/eur/lxweden.htm>
- Criminal Law of Denmark, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=142912>
- Folketing (Parliamentary) Election Act, Act No. 271 of May 13th 1987, latest amendments added on April 10th 1991, available at: www.legislationonline.org/documents/action/
- Grants to Political Parties (Consolidation) Act No. 1291 of 8 December 2006, available at: <http://www.partylaw.leidenuniv.nl/party-law>
- Danish Security and Intelligence Service Act, available at: <https://www.retsinformation.dk/forms/R0710.aspx?id=152182#Kap7>
- Civil Servants Act, Consolidation Act No. 488 of 06/05/2010 (Bekendtgørelse af lov om tjenestemænd (Tjenestemandsløven), available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=130606&exp=1>

France

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- Loi du 10 janvier 1936 sur les groupes de combat et milices privées, available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=3CFAD2B681F1BDB366E7E67A1539770A.tpdjo12v_1?cidTexte=JORFTEXT000000325214&dateTexte
- R645-1 of the Penal Code is available in French at <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI00006419560&cidTexte=LEGITEXT000006070719>
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- Loi n° 2013-1168 du 18 décembre 2013 relative à la programmation militaire pour les années 2014 à 2019 et portant diverses dispositions concernant la défense et la sécurité nationale (1), available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=2CCB92C547B43741903A00036A25B1E5.tpdjo16v_2?cidTexte=JORFTEXT000028338825&dateTexte=20140412
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Germany

- Abgabenordnung (AO) (The Fiscal Code of Germany), available at: http://www.gesetze-im-internet.de/englisch_ao/index.html#gl_p0008
- Basic Law for the Federal Republic of Germany, available at: http://www.gesetze-im-internet.de/englisch_gg/

- Bundesverfassungsgerichts-Gesetz, BVerfGG (Federal Constitutional Court Act), available at: <http://www.gesetze-im-internet.de/bundesrecht/bverfgg/gesamt.pdf>
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- Gesetz zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz) (Law on regulation of the right of public associations), available at: <http://www.gesetze-im-internet.de/bundesrecht/vereinsg/gesamt.pdf>
- Gewerbeordnung (Business Act) (GewO), available at: <http://www.gesetze-im-internet.de/gewo/>
- Gesetz zur Regelung des Statusrechts der Beamtinnen und Beamten in den Ländern (Beamtenstatusgesetz - BeamStG) (The Law on the status of civil servants in the Länder), available at: <http://www.gesetze-im-internet.de/bundesrecht/beamstg/gesamt.pdf>
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Sweden

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The Netherlands

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United Kingdom

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