

**LLM/MA IN: LLM IN INTERNATIONAL HUMAN RIGHTS LAW**

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**DISSERTATION TITLE**

Militant Democracy: A safeguard for international human rights law against the rise of right-wing populism in Europe and the USA.

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UNIVERSITY OF ESSEX

SCHOOL OF LAW

LLM in International Human Rights Law

2018-2019

Supervisor: Dr Andrew Fagan

DISSERTATION

Militant Democracy: A safeguard for international human rights law against the rise  
of right-wing populism in Europe and the USA

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Registration Number: 1700062  
Number of Words: 19808  
Date Submitted: 20/11/2019

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## INTRODUCTION

The concept of militant democracy has been attracting an increasing measure of attention amongst political and legal scholars due to the rise of populist victories in liberal democracies in recent years. Militant democracy can be defined as the ability of liberal democracies to legally defend themselves against threats to their existence by eliminating anti-democratic individuals and groups from the political arena.<sup>1</sup> The term 'militant democracy' was first coined by German legal scholar Karl Loewenstein in 1937 in response to Hitler's regime and the rise of fascism in Europe.<sup>2</sup> Hitler gained power through democratic means and then subsequently destroyed the liberal principles of the Weimar democracy such as separation of powers and guarantees of fundamental rights. He transformed the Weimar Republic from having the most progressive constitution in Europe into a ruthless dictatorship, responsible for the worst atrocities of recent history.<sup>3</sup>

The collapse of the Weimar democracy represented the ultimate example of how democracy can be destroyed from within by abusing democratic institutions and this example has played a key role in the development of the concept of militant democracy.<sup>4</sup> As Paul Joseph Goebbels, Minister of Propaganda in Nazi Germany, commented "one of the best jokes of democracy [is] that it gave its deadly enemies the means by which it was destroyed".<sup>5</sup> Loewenstein argued that democracies can only overcome the challenges to its existence by expelling its enemies from the political arena and banning anti-democratic parties. He recommended adopting legal instruments to restrict freedom of speech, association and participation when necessary to relinquish the neutrality of democracy.<sup>6</sup> Aspects of Loewenstein's concept of militant democracy have been embedded in several liberal constitutions and have been used to curb activities of fascist, communist, religious fundamentalist, racist and violent political parties since the end of World War II.<sup>7</sup>

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<sup>1</sup> Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (Routledge 2015) p.15

<sup>2</sup> Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 *The American Political Science Review* pp.417-432

<sup>3</sup> Miles Roger Maftean, 'Fighting Fire with Fire: A Normative Exploration of the Militant Democracy Principle' (Central European University, Hungary, 2018) p.13

<sup>4</sup> Tyulkina (2015) *supra* n.1 p.11

<sup>5</sup> Giovanni Capoccia, 'Militant Democracy: The Institutional Bases of Democratic Self-Preservation' (2013) 9 *Annual Review of Law and Social Science* p.208

<sup>6</sup> Bastiaan Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance* (Routledge 2018) p.3

<sup>7</sup> Maftean (2018) *supra* n.3 p.2

One could easily be forgiven for confusing the term 'militant democracy' as an oxymoron and an affront to liberal values. After all, how can liberal democracy - which is an essentially tolerant and accommodating system - become militant by imposing restrictions on democracy? The answer lies within the very nature of democracy. Democracy is an inherently vulnerable and precarious political system. The principles which underpin and characterise democracy might also, through their application, endanger it and bring about its destruction.<sup>8</sup> Throughout history democracy's enemies have recognised that the easiest way to defeat this system is to exploit its openness to a plurality of views and its guarantees on fundamental human rights such as free elections, freedom of speech and freedom of association.<sup>9</sup> The inherent weakness of democracy has occupied thinkers for millennia. Plato's critique of Athenian democracy led him to declare that "the trajectory that begins with the delights of democracy ends with the nightmare of tyranny"<sup>10</sup>. Plato warned of how democracy can empower the masses but, in turn, lead to that power being abused either by the people themselves or by demagogues preying on the anxiety of the masses.<sup>11</sup>

Plato's commentary on how democracies can give way to tyrannies when mob passion overwhelms political wisdom and a populist autocrat seizes the masses, bears remarkable similarities with the traits embodied by right-wing populists in today's world. Indeed, right-wing populism has emerged as the single greatest political threat to liberal democracy and international human rights law (IHRL). The rise of right-wing populism was most clearly evidenced in the tactics used during Trump's presidential election campaign, the manner in which the Leave campaign operated during the UK's 2016 EU referendum and in a series of other right-wing populist political victories in recent years.<sup>12</sup> The modus operandi of right-wing populism is to defeat liberal democracy and undermine human rights through a politics of hate, a promotion of fear and scapegoating.<sup>13</sup> Indeed, as recently as 2018, Hungary's Prime Minister, Viktor Orbán declared: "The era of liberal democracy is over".<sup>14</sup>

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<sup>8</sup> Tyulkina (2015) *supra* n.1 p.206

<sup>9</sup> *Ibid* pp.11-14

<sup>10</sup> *Ibid* p.11

<sup>11</sup> Sean Illing, 'The people's tyrant: What Plato can teach us about Donald Trump' *Vox* (7 November 2016) <https://www.vox.com/policy-and-politics/2016/11/7/13512960/donald-trump-plato-democracy-tyranny-fascism-2016-elections>

<sup>12</sup> Andrew Fagan, 'Constructively Confronting Right-Wing Populism' *University of Essex Human Rights Centre Blog* (2 October 2019) <https://hrcessex.wordpress.com/2019/10/02/constructively-confronting-right-wing-populism/>

<sup>13</sup> William A. Galston, 'The Populist Challenge to Liberal Democracy' (2018) 29 *Journal of Democracy* p.13

<sup>14</sup> Jay Nordlinger, 'The Era of Liberal Democracy Is Over' *The Corner* (13 May 2018) <https://www.nationalreview.com/corner/the-era-of-liberal-democracy-is-over/>

Today, populist governments promote division and openly disregard the fundamental principles of liberal democracy such as equality and non-discrimination by spreading a racist and xenophobic message and alienating minorities and immigrants across Europe and the USA.<sup>15</sup> This trend worries many scholars for awakening the memories of fascism.<sup>16</sup> Furthermore, the weakening state support for liberal values and human right principles has been hampering the facilitating conditions that have long supported the work of IHRL institutions. Populist governments are now increasingly undermining the authority of IHRL institutions and posing a significant threat to the future of international human rights law.<sup>17</sup> The threat to liberal democracy and to international human rights law posed by the rise of right-wing populism cannot be underestimated. Lessons need to be learned from the failures of the past when democracy was unable to protect itself from enemies who sought to destroy democracy by exploiting its tolerant nature and openness to a plurality of views.

This dissertation seeks to examine how militant democracy can function as a safeguard for liberal democracy and international human rights law against the rise of right-wing populism. The study will begin with an analysis of the origins and development of the concept of militant democracy and a consideration of its legal basis. Attention will then turn to the threats posed to liberal democracy and international human rights law by the burgeoning trend of right-wing populism, in particular in Europe and the USA. The study will conclude with a discussion of how the use of militant democracy measures against right-wing populism can be justified under the notion of 'substantive democracy' and international human rights law. It will be argued that although there are challenges to the application of militant democracy measures, the concept can be a potential tool for combating right-wing populism by setting out the constitutional boundaries of democratic tolerance.

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<sup>15</sup> Enzo Traverso, *The New Faces of Fascism: Populism and the Far Right* (Verso 2019) (Kindle edn) ch.1 part 1

<sup>16</sup> *Ibid*

<sup>17</sup> Laurence Helfer, 'Populism and International Human Rights Law Institutions: A Survival Guide' *iCourts Working Paper Series* (No.133, 2018) p.4

## CHAPTER 1

### **Militant Democracy: A Safeguard for Liberal Democracy and Human Rights**

#### **1.1. The origin of the concept of militant democracy**

##### ***1.1.1. The rise of fascism and the collapse of the Weimar Republic***

In order to understand how militant democracy grew into becoming a significant constitutional defence mechanism, it is important to first explore the events of 1920s and 1930s when fascism was on the rise and democracy was under threat in many countries across Europe.<sup>18</sup> The fascist movement first emerged in Italy during World War I in favour of totalitarian one-party state in stark opposition to liberalism and Marxism and quickly grew in popularity. By 1924, the Italian Fascist Party had become established and was able to win parliamentary elections. Just months after coming to power, Mussolini dismissed the Parliament, abandoned democracy and declared himself the dictator of the country.<sup>19</sup> Similarly, Albania (1923), Portugal (1925), Poland (1926-1935), Yugoslavia (1929) and Romania (1938) chose dictatorships over democracy. Europe was losing its confidence in democracy and fascism was quickly spreading across the continent and to the other parts of the world.<sup>20</sup>

The extent of the threat against democracy posed by fascism was, perhaps, most evident in the controversies surrounding the short-lived Weimar democracy. The Weimar Republic was formed with the adoption of the first liberal constitution of the German nation in August 1919 and was considered to be the most progressive democracy in Europe at the time. The constitution was based on the principles of liberal democracy which guaranteed political plurality, separation of powers, the rule of law and the Bill of Rights guaranteed fundamental rights such as free elections, freedom of speech, freedom of association and religion and equality before the law for everyone.<sup>21</sup> However, in little over 13 years, the Weimar Republic had transformed from having the most progressive constitution in Europe into a ruthless dictatorship, responsible for the worst atrocities of its time.<sup>22</sup> The collapse of the Weimar

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<sup>18</sup> Rijpkema (2018) *supra* n.6 p.21

<sup>19</sup> G. Payne Stanley, *A History of Fascism, 1914-1945* (Routledge 2005) p.114

<sup>20</sup> Capoccia (2013) *supra* n.5 p.208

<sup>21</sup> Tyulkina (2015) *supra* n.1 p.11

<sup>22</sup> Maftéan (2018) *supra* n.3 p.13

democracy has become known as the ultimate example of how democracy can be destroyed from within by abusing democratic institutions and this example has played a key role in the development of the concept of militant democracy.<sup>23</sup>

The political system in the Weimar Republic was based on proportional representation and popular sovereignty and it had extensive tolerance towards political pluralism with little concern for political actors whose aims were to turn the system into a totalitarian one-party state. This meant that even anti-democratic parties could participate freely in politics.<sup>24</sup> Indeed, the National Socialist German Workers' Party (the Nazi Party) with a far-right, anti-Semitic and anti-democratic agenda was operating within the system and plotting a national revolution soon after the birth of the Republic.<sup>25</sup> The leader of the party, Adolf Hitler, followed his nationalist and racist agenda with little confrontation until 1923. He attempted to launch a coup d'état in November 1923 but failed owing to a lack of support from commanders. He was found guilty and imprisoned for treason and his party was banned.<sup>26</sup> Out of that failure, Hitler decided to change his tactics; instead of continuing as a violent revolutionary, he chose to play along with the democratic institutions in order to destroy democracy from within. He planned to utilise the constitutional freedoms of speech, association and press to build up a large enough following which would make the revolution possible.<sup>27</sup> Eventually, he was released from prison in 1925 and he managed to convince the authorities to reverse the ban on the Nazi Party.<sup>28</sup>

Although the Party only gained 2.6% of the votes in 1928 parliamentary elections, they slowly increased their popularity amongst the suffering lower middle-class by exploiting the economic crisis and using capitalism and Jews as scapegoats. The party finally managed to attract the largest percentage of the votes in 1932 and Hitler was appointed as the Chancellor in January 1933. Just two months after taking office and following the widespread use of propaganda against the opposition, Hitler convinced the Parliament to pass the Enabling Act which suspended the key principles of the Weimar constitution such as separation of powers and guarantees of rights and freedoms. Hitler had the power to rule by decree and suppressed all political opponents. He finally ended the Weimar democracy and established

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<sup>23</sup> Tyulkina (2015) *supra* n.1 p.11

<sup>24</sup> *Ibid* p.12

<sup>25</sup> Rijpkema (2018) *supra* n.6 p.1

<sup>26</sup> David Jablonsky, *The Nazi Party in Dissolution: Hitler and the Verbotzeit, 1923-1925* (Routledge 1989) p.57

<sup>27</sup> Rijpkema (2018) *supra* n.6 p.1

<sup>28</sup> Adrian Weale, *The SS: A New History* (Little, Brown 2010) pp.26-29

the totalitarian dictatorship for which he had long aspired.<sup>29</sup> Perhaps Joseph Goebbels, the Minister of Propaganda at the time, best summed up how the Nazi Party had exploited democracy for its own agenda: "We enter Parliament in order to supply ourselves, in the arsenal of democracy, with its own weapons. If democracy is so stupid as to give us free tickets and salaries for this work, that is its affair... We do not come as friends, nor even as neutral."<sup>30</sup> It is obvious that the Nazi Party was never on the side of democracy but they successfully acquired power by using democratic means and constitutional freedoms, only to subsequently overthrow democracy and deny the same freedoms to others as soon as they assumed power.

The events during this period revealed that the traditional understanding of liberal democracy at the time was not capable of eliminating internal enemies as it proved too tolerant towards the notion of political plurality and lacked constitutional defence mechanisms for those who may seek to undermine the system.<sup>31</sup> This tolerant nature proved democracy's own downfall and facilitated anti-democratic individuals and groups to exploit democratic institutions such as free elections, freedom of speech and freedom of association in the pursuit of overthrowing the regime itself. In order to survive, liberal democracy needed to be prepared to overcome these attempts to destroy it from within and put in place self-defensive systems that could be initiated when necessary. In other words, liberal democracy had to be "militant" against those exploiting the rights and freedoms provided by the system. This ideology became known as the concept of 'militant democracy'.<sup>32</sup>

### **1.1.2. Karl Loewenstein: The father of the concept of militant democracy**

The term 'militant democracy' (*wehrhafte demokratie*) was first introduced into constitutional doctrine by the German legal scholar Karl Loewenstein whilst he was studying the challenges that democracies faced with the rise of fascism in 1930s. Loewenstein, himself, was a victim of the fascist movement in Europe. He was made redundant from his position at the University of Munich upon Hitler's rise to power in 1933. He then fled the Nazis and migrated to the USA and continued his work at Yale University.<sup>33</sup>

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<sup>29</sup> Tyulkina (2015) *supra* n.1 p.12

<sup>30</sup> Joseph Goebbels, *Der Angriff. Aufsätze aus der Kampfzeit (Essays from the Time of Struggle)* (Zentralverlag der NSDAP 1935) pp.71-73

<sup>31</sup> Tyulkina (2015) *supra* n.1 p.13

<sup>32</sup> *Ibid* p.13

<sup>33</sup> Rijpkema (2018) *supra* n.6 p.25

In 1937, after studying several democracies in Europe, Loewenstein published his article on militant democracy and fundamental freedoms and called on European democracies to take action to address the weaknesses of democracy and to adopt special legal measures to prevent individuals and groups from exploiting these weaknesses.<sup>34</sup> He criticised the 'outdated' view of liberal democracy at the time which accorded the use of democratic institutions of speech, press, association and parliamentary participation to everyone equally including anti-democrats. He argued that this 'democratic fundamentalism' and 'legalistic blindness' allows democracy's enemies to enter into its heart and prepare its downfall.<sup>35</sup> He claimed that democracies can only overcome these challenges by expelling its enemies from the political arena and banning anti-democratic parties. He recommended adopting legal instruments to restrict freedom of speech, association and participation when necessary to relinquish the neutrality of democracy.<sup>36</sup>

Loewenstein's work on militant democracy was criticised by some scholars for contradicting the inherent character of liberal democracy. French scholar Thierry Maulnier argued that it was not democratic fundamentalism itself that facilitated the rise of fascism. He claimed that the political and economic crisis that was prominent in Europe at the time formed a breeding ground for fascism and led to the failure of democracy.<sup>37</sup> German scholar Karl Mannheim also referred to the economic situation at the time and recommended social change as the answer to the problem. He emphasised the importance of addressing the conditions that turned voters to extremist parties and argued that effective economic planning should be the key component of militant democracy rather than restricting democratic freedoms.<sup>38</sup> Loewenstein, on the other hand, believed that although the economic and political crisis accelerated the rise of fascism, it was the tolerant and accommodating nature of liberal democracy that made it vulnerable to fascism and extremist movements.<sup>39</sup> He argued that fascism was not an ideology but a 'sophisticated technique' which succeeded with its perfect adaptation to democracy and appeal to the psychology of the masses. Fascism was able to exploit the tolerant nature of democracy and utilised emotional manipulation to increase its support base amongst the population.<sup>40</sup> Loewenstein saw

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<sup>34</sup> Loewenstein (1937) *supra* n.2 pp.417-432

<sup>35</sup> *Ibid* p.424

<sup>36</sup> Rijpkema (2018) *supra* n.6 p.3

<sup>37</sup> *Ibid* p.26

<sup>38</sup> Capoccia (2013) *supra* n.5 p.208

<sup>39</sup> Rijpkema (2018) *supra* n.6 p.26

<sup>40</sup> Loewenstein (1937) *supra* n.2 p.423

this 'emotionalism' as the biggest enemy of democracy and argued that it can deter a rational approach to any problem in any democracy and can pose a threat to the rule of law.<sup>41</sup> As a result, democracy had to become militant and 'fight fire with fire' by providing constitutional defence mechanisms.<sup>42</sup>

Loewenstein also acknowledged the paradox surrounding militant democracy owing to its restricting nature on freedom of speech, press, association and parliamentary participation. It was a difficult task for democracy to restrict these freedoms "without destroying the very basis of its existence"; after all, democracy inherently stood for equal enjoyment of these freedoms by everyone. However, Loewenstein believed that this paradox faded when compared to the nature of the threat as there was a war against democracy and special measures were necessary to fight it.<sup>43</sup> This justification did not satisfy all of his critics as the limits of the concept were not adequately defined leaving it open to abuse in the name of democratic self-defence. The question of whether a democracy can legally act in an anti-democratic manner in order to combat threats to its existence still continues to be debated today.<sup>44</sup>

Although, Loewenstein's work fell short on the limits and justification of militant democracy, his contribution has been widely praised for identifying the weaknesses of democracy and encouraging the constitutionalisation of militant democracy principles. Due to his extensive work on the subject, he has become known as the father of militant democracy.<sup>45</sup> Aspects of his concept of militant democracy have now been embedded in many liberal constitutions around the world since the end of World War II following the lessons learnt from the fascist era.<sup>46</sup> The development and the scope of these provisions in comparative constitutional law will be explored further in the next section.

## **1.2. The development of the concept of militant democracy in comparative law**

Unfortunately, Loewenstein's pleas to adopt militant democracy measures in order to stop fascists in Europe did not have any constitutional expression until the end of World War II when fascists had already overtaken several democracies and committed some of the worst crimes in history. Following

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<sup>41</sup> Loewenstein (1937) *supra* n.2 p.423

<sup>42</sup> Capoccia (2013) *supra* n.5 p.208

<sup>43</sup> Rijpkema (2018) *supra* n.6 p.28

<sup>44</sup> *Ibid* pp.29-30

<sup>45</sup> *Ibid* p.30

<sup>46</sup> Maftéan (2018) *supra* n.3 p.23

the lessons learnt from this era, Europe started to pay attention to the constitutionalisation of the concept of militant democracy as a belated response to Loewenstein's calls. Germany was the first country to debate the concept extensively in order to ensure that the events of the Nazi era would never happen again.<sup>47</sup> In light of these concerns, drafters of the post-war German constitution included militant democracy as one of the foundational principles of the German Basic Law in 1949 and gave life to various elements of Loewenstein's concept of militant democracy.<sup>48</sup>

A central element of German militant democracy is outlined under Article 21 of the Basic Law which provides the procedure to ban a political party. The Article states that "parties, that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality"<sup>49</sup>. This provision ensures that freedom granted to political parties will not be used to disrupt or destroy democratic government. Furthermore, Article 79.3 of the Basic Law prohibits alteration of some constitutional provisions, even by unanimity, in order to protect democratic principles which were disregarded during the Nazi era. Another important element of German militant democracy is the prohibition on abuse of rights. Article 18 of the Basic Law provides that "whoever abuses the freedom of expression, in particular the freedom of press, the freedom of teaching, the freedom of assembly, the freedom of association, the privacy of correspondence, posts and telecommunications, the rights of property or the right to asylum in order to combat the free democratic basic order shall forfeit these basic rights". This article further authorises the Federal Constitutional Court to determine the extent of this forfeiture. Moreover, German militant democracy also allows restricting certain rights as provided by Article 19 of the Basic Law as long as the restriction is prescribed by the law and do not affect the essence of the right. Article 33.5 regulates the activities of public servants and gives them a duty of loyalty. Finally, Article 20.4 gives German people the right to resist anyone who seek to destroy the constitutional order.<sup>50</sup>

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<sup>47</sup> Patrick Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination' (2006) 4 *International Journal of Constitutional Law* p.491

<sup>48</sup> Tyulkina (n1) p.43

<sup>49</sup> *Basic Law for the Federal Republic of Germany* (23 May 1949)

<sup>50</sup> *Ibid*

It is clear that many lessons drawn from the Weimar experience were reflected in the Basic Law of 1949. The militant democracy provisions reveal the intentions of lawmakers to ensure that the shortcomings in the Weimar constitution are not repeated again and that democracy is safeguarded against internal threats.<sup>51</sup> These provisions also represent a constitutional expression of Loewenstein's argument that democracy should "fight fire with fire" and prevent its enemies from destroying it from within.<sup>52</sup> Whilst the German Basic Law provided the first elaborate form of militant democracy, a much narrower interpretation of the concept was first present in the Italian constitution of 1947. In contrast to the German constitution, the Italian constitution targets explicitly fascism rather than an abstract enemy and prohibits the reorganisation of the fascist party and authorises restrictions to the political rights of fascists.<sup>53</sup> Although the German constitution does not explicitly refer to fascism or fascist parties, the description of political threat under Art 21 of the Basic Law was clearly drafted due to the concerns about the reorganisation of Nazis at the time.<sup>54</sup> In fact, in 1952, the Federal Constitutional Court of Germany exercised its authority under Article 21 to ban the Socialist Reich Party for having former Nazis in leadership positions and advocating anti-democratic, racist and neo-Nazi propaganda.<sup>55</sup> Hence, it can be argued that the initial concerns during the post-war period were mainly regarding the re-emergence of fascism and militant democracy was used as a preventative technique to stop this scenario.<sup>56</sup>

Shortly after, however, militant democracy became a tool to curb the activities of a new political enemy: communism. During the Cold War, the USA waged a notorious campaign against communism and restricted the rights and activities of communist political parties.<sup>57</sup> Prior to its war on communism, the USA already had restrictions in place on radical speech in order to protect national security with the introduction of the Smith Act in 1940. The Act criminalised any actions advocating the overthrow of the US government. This Act was later used to prosecute several people for advocating fascist and communist ideologies.<sup>58</sup> In the case of *Dennis v. USA*, eleven high ranking members of the Communist

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<sup>51</sup> Tyulkina (2015) *supra* n.1 p.44

<sup>52</sup> Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31 *The American Political Science Review* p.656

<sup>53</sup> Rory O'Connell, 'Militant Democracy and Human Rights Principles' (2009) *Constitutional Law Review* p.3

<sup>54</sup> Tyulkina (2015) *supra* n.1 p.15

<sup>55</sup> Angela Bourne, 'Party bans as an instrument of militant democracy: Under what conditions do democracies ban parties in practice' (ECPR Joint Sessions, 10-14 April 2018) p.5

<sup>56</sup> Tyulkina (2015) *supra* n.1 p.15

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid* p.74

Party who were convicted under the Smith Act questioned the constitutionality of the Act before the US Supreme Court as they argued it restricted their constitutional freedoms. The Court upheld the convictions and ruled that it was constitutional to restrict the freedom of speech guaranteed under the First Amendment of the US Constitution when a speech, publication and assembly poses a vital threat to national security.<sup>59</sup> With this judgment, political right restrictions covered under the concept of militant democracy gained constitutional basis in the USA.<sup>60</sup> Although, the Communist Party in the USA had a minor role in politics, the US government brought about extensive limitations on free speech to prevent the spread of communist ideology which was seen as a threat to the democratic order.<sup>61</sup>

Similarly, in 1956, the Federal Constitutional Court of Germany ruled the Communist Party of Germany unconstitutional after exercising its power under Article 21 of the Basic Law. Several European countries also followed this example and outlawed communist parties.<sup>62</sup> With the collapse of the communist regime on the European continent, post-communist democracies in Central and Eastern Europe followed the German example and included militant democracy provisions in their constitutions. Most of these provisions are in relation to restrictions on political rights and banning of political parties in order to protect the new constitutional order.<sup>63</sup> For instance, Article 13 of the Polish constitution outlaws political parties based on totalitarianism and racial or national hatred, Article 37 of the Ukrainian constitution authorises banning of political parties that pose a threat to independence of the state and Article 11 of the Bulgarian constitution prohibits formation of political parties on the basis of ethnicity.<sup>64</sup>

In addition, militant democracy was used to neutralise religiously affiliated political parties in Turkey in order to protect the constitutional principle of secularism. Similar to the German Constitution, the Constitution of Turkey prohibits alteration of certain constitutional provisions even by unanimity. These provisions are related to the main characteristics of the Turkish Republic which provides, amongst others, that Turkey is a democratic and secular Republic governed by the rule of law.<sup>65</sup> The Constitution emphasises the secular nature of Turkish democracy in order to distance the Republic from the previous

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<sup>59</sup> *Dennis v US*, 341 U.S. 494 (4 June 1951)

<sup>60</sup> Tyulkina (2015) *supra* n.1 p.74

<sup>61</sup> *Ibid* p.74

<sup>62</sup> *Ibid* p.15

<sup>63</sup> *Ibid* p.44

<sup>64</sup> Macklem (2006) *supra* n.47 p.493

<sup>65</sup> Bertil Emrah Oder, 'Roots of Militant Democracy in Turkey: Modernity, Authoritarianism and Europeanization' in Markus Thiel (ed), *The 'Militant Democracy' Principle in Modern Democracies* (Routledge 2016) pp.264-279

rule of the Ottoman Empire as the Empire was ruled by the Islamic religious law.<sup>66</sup> The Constitution further authorises limitations to freedom of speech and opinion in order to protect national security, public order and public safety and the basic characteristics of the Republic.<sup>67</sup> More importantly, the Constitution specifically prohibits the abuse of freedom of religion by emphasising that “No one shall be allowed to exploit or abuse religion, religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political and legal order of the state on religious tenets”.<sup>68</sup> The specific provision on abuse of freedom of religion was drafted in order to stop social or political groups which may try to exploit religious sentiments amongst people as some groups in society were not happy with the secular nature of the Republic and desired the return of the Islamic rule of the Ottoman Empire.<sup>69</sup>

Indeed, the short history of the Turkish Republic has seen many attempts by political parties to utilise religious propaganda and appeal to the ambitions of certain sections of society to bring back religious rule.<sup>70</sup> The Constitutional Court of Turkey dissolved several political parties for having an Islamic agenda and threatening the principle of secularism. The most high-profile case was the decision of the Constitutional Court to ban Refah Partisi in January 1998 as the Court found that the party aimed to introduce Islamic law and promote the concept of jihad (a holy war to ensure the complete domination of Islam in society) in Turkey.<sup>71</sup> This decision was later supported by the ECtHR in the case of *Refah Partisi v. Turkey*.<sup>72</sup> The decision of ECtHR to rule that the party was a threat to democracy and its dissolution was lawful presented a significant moment in the development of the concept of militant democracy as it gave the concept a legal basis on an international level.<sup>73</sup> The role of the ECtHR in the justification of militant democracy will be discussed further in Chapter 3.

Furthermore, 9/11 terrorist attacks in the USA in 2001 saw the emergence of a new trend in the militant democracy debate. With anti-terrorism policies and legislation that followed after these terror attacks,

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<sup>66</sup> Tyulkina (2015) *supra* n.1 p.170

<sup>67</sup> Oder (2016) *supra* n.65 p.284

<sup>68</sup> *Ibid* p.288

<sup>69</sup> Tyulkina (2015) *supra* n.1 p.170

<sup>70</sup> *Ibid* p.173-177

<sup>71</sup> *Ibid* p.174

<sup>72</sup> *Refah Partisi and Others v. Turkey* [GC] App no. 41340/98 (ECHR, 13 February 2003)

<sup>73</sup> Kathleen Cavanagh and Edel Hughes, 'Rethinking What is Necessary in a Democratic Society: Militant Democracy and the Turkish State' (2016) 38 *Human Rights Quarterly* p.628

the scope of militant democracy went further from only applying to political parties. The concept has grown to be seen as a tool to protect democracy from other emerging threats such as religious fundamentalists and terrorists in addition to undemocratic political parties.<sup>74</sup> The USA and several other European countries introduced anti-terrorism policies and legislation in order to curb the activities of religious fundamentalists and terrorist groups that pose a threat to democracy. These policies and legislation authorised limitations on rights to freedom of speech, association and religion with the justification that these rights can be denied to those who abuse constitutional freedoms to destroy democratic order.<sup>75</sup> For instance, the UK Parliament passed a series of Terrorism Acts between 2000 and 2015 and adopted the Counter-Extremism Strategy in October 2015 to counter all sorts of extremism. The Country proscribed Islamist Al-Muhajiroun network in 2005, the Shariah Project in 2014 and the far-right, neo-Nazi organisation National Action in 2016 under these anti-terrorism legislations.<sup>76</sup> However, the lack of concrete international concept for terrorism meant that these measures were open to interpretation and states have been criticised for misusing them and violating fundamental human rights.<sup>77</sup>

Most states now have militant democracy provisions in place with the justification of protecting democracy and human rights against political violence, hate speech, far-right and racist movements and terrorism.<sup>78</sup> These measures vary from state to state but mostly include banning of political parties, criminalising political organisations, hate speech legislations, anti-terrorism legislations and restrictions on certain human rights such as freedom of opinion and expression, freedom of thought, conscience and religion, freedom of association, freedom of assembly and the right to vote and take part in the government.<sup>79</sup> Some States have explicit references to party bans and right limitations in their constitutions as mentioned earlier. Other constitutions are not so obvious in this regard, but the militant nature of democracy can be inferred from Court judgments and judges' interpretations of constitutional freedoms as it was seen in the case of *Dennis v. USA*.<sup>80</sup> In the UK, there is not a doctrine of militant

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<sup>74</sup> Tyulkina (2015) *supra* n.1 p.16

<sup>75</sup> *Ibid* pp.45-46

<sup>76</sup> Afshin Ellian and Bastiaan Rijpkema (eds), *Militant Democracy: Political Science, Law and Philosophy* (Springer 2018) p.69

<sup>77</sup> Commissioner for Human Rights, 'Misuse of anti-terror legislation threatens freedom of expression' *Council of Europe Portal* (04 December 2018) <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>

<sup>78</sup> Macklem (2006) *supra* n.47 p.488

<sup>79</sup> *Ibid* p.488

<sup>80</sup> Tyulkina (2015) *supra* n.1 p.41

democracy, partly because the country lacks a written constitution. However, militant democracy measures were used by UK governments in the form of specific laws passed by the Parliament.<sup>81</sup> For instance, the UK government banned Sinn Fein, an Irish nationalist political party, in 1956 and Irish Republican Clubs in 1967 for supporting the terrorist group IRA and threatening the preservation of peace and order.<sup>82</sup> Both Sinn Fein and Republican Clubs were legalised again in 1970s in the pursuit of resolving the conflict between Ireland and Northern Ireland.<sup>83</sup>

Today, Western states are becoming increasingly reluctant to ban political parties in stark contrast to the immediate post-war period. Contemporary party bans are mostly directed against violent forms of political extremism and non-violent forms of right-wing extremism continues to operate in many countries.<sup>84</sup> In 2010, the right-wing extremist Workers' Party (DS) in Czech Republic was banned by the Country's Supreme Court for organising hatred riots and violent attacks on Czech minorities by its neo-Nazi paramilitary units. However, after its dissolution, the party was reorganised under the name of Workers' Party of Social Justice without the violent elements and continues to operate today with the same neo-Nazi political agenda.<sup>85</sup> There are similar political parties mobilising support in all parts of Europe. The Austrian Freedom Party, for instance, was originally founded by a former Nazi officer Anton Reinthaller in 1956. The party changed its strategy to right-wing populism following Jörg Haider's leadership in 1986.<sup>86</sup> Similarly, Sweden Democrats has its roots in fascism. The party's first chairman Anders Klarström was an active neo-Nazi and members often wore Nazi uniforms to party meetings. Only in the 1990s, Sweden Democrats officially distanced themselves from their Nazi past.<sup>87</sup> National Front in France also emerged from French Fascism. The party's founder Jean-Marie Le Pen was convicted of hate speech several times for denying the Holocaust, sympathising with French Nazi leader Phillippe Pétain and spreading Islamophobia.<sup>88</sup> He was expelled from the Party in 2015 as his daughter

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<sup>81</sup> Richard Mullender, 'United Kingdom' in Markus Thiel, *The Militant Democracy Principle in Modern Democracies* (Routledge 2009) p.46

<sup>82</sup> Bourne (2018) *supra* n.55 p.5

<sup>83</sup> *Ibid*

<sup>84</sup> Ellian and Rijpkema (2018) *supra* n.76 p.69

<sup>85</sup> *Ibid* p.69

<sup>86</sup> Winston Nagan and Samantha Manausa, 'The Rise of Rightwing Populism in Europe and the United States' (2018) 6 *International Journal of Social Science Studies* p.51

<sup>87</sup> Jake Wallis Simons, 'EU elections 2014: I can hear the boots of the 1930s marching through Europe' *The Telegraph* (14 May 2014) <https://www.telegraph.co.uk/news/worldnews/europe/eu/10823028/EU-elections-2014-I-can-hear-the-boots-of-the-1930s-marching-through-Europe.html>

<sup>88</sup> Angelique Chrisafis, 'Jean-Marie Le Pen fined again for dismissing Holocaust as detail' *The Guardian* (6 April 2016) <https://www.theguardian.com/world/2016/apr/06/jean-marie-le-pen-fined-again-dismissing-holocaust-detail>

Marine Le Pen has been trying to distance the Party from its anti-Semitic past. Marine Le Pen continues her nationalist and anti-immigration propaganda with a softer tone than her father in order to appeal to people.<sup>89</sup>

In 2017, the Federal Constitutional Court of Germany ruled against banning the neo-Nazi National Democratic Party (NDP) even though it found evidence that the Party was racist, anti-Semitic, Islamophobic and xenophobic. The Court also accepted that the Party sought to replace parliamentary democracy with a Nazi-style authoritarian system, but justified its decision by arguing that the NDP did not pose a strong enough threat to liberal democratic order.<sup>90</sup> However, the lessons learnt from the Nazi regime must not be forgotten. Hitler first started as a violent revolutionary but changed his tactics after being imprisoned for treason. Out of that failure, he decided to play along with the democratic institutions in order to destroy democracy from within. He planned to utilise the constitutional freedoms of speech, association and the press to build up a large enough following which would make the revolution possible.<sup>91</sup> The Nazi Party of Germany only had about 2.6% of the voters' support in their first election in 1928 and no-one would have predicted the extent of the power they were going to acquire in the future<sup>92</sup>. Hence, the same risk today exists for all extremist or populist parties who do not yet have large enough support to change political system. Even though fascism was dismantled and fell out of fashion and the number of democracies has more than doubled since the end of World War II, the threat for democracy and human rights still lives on.<sup>93</sup> The developments since the end of World War II reveal that the enemies of democracy have been coming to the forefront in different forms throughout history which affected the development of the concept of militant democracy. Today, the threat once again comes in a different form, in the shape of populists and spreads a nationalist and racist agenda around the world.<sup>94</sup> The challenge of this generation is to extend the concept of militant democracy to populist parties in order to overcome the threats populism poses to the basic principles of democracy and fundamental rights.

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<sup>89</sup> Traverso (2019) *supra* n.15 ch.1 part 1 (Kindle edn)

<sup>90</sup> Bourne (2018) *supra* n.55 p.1

<sup>91</sup> Rijpkema (2018) *supra* n.6 p.1

<sup>92</sup> Tyulkina (2015) *supra* n.1 p.12

<sup>93</sup> *Ibid* p.11

<sup>94</sup> *Ibid* p.45

## CHAPTER 2

### **Populism: A New Threat for Democracy and Human Rights**

#### **2.1. What is populism?**

The biggest threat challenging today's democracies is, perhaps, a new phenomenon called 'populism'.<sup>95</sup> At first glance, populism does not appear to reject any principles of democracy. Populists often use democratic language, insist on elections and referenda and rely on the support of the popular vote. However, in order to gain that support and power, they argue that today's political system – the 'establishment' - is corrupt or elitist and the ordinary people - 'the real people' - are forgotten. They promise to take down the 'establishment' and make democracy work better for 'the real people'.<sup>96</sup> Populism does not seem to favour any particular political ideas. Both right wing politicians such as Donald Trump and Marine Le Pen and left wing politicians such as Bernie Sanders and Alexis Tsipras are often considered populists.<sup>97</sup> As a result, there is not one single agreed definition or a clear criteria for populism.<sup>98</sup> However, there is one aspect that unites all populist leaders around the world: they all employ an 'anti-establishment' narrative and thrive on the support of a frustrated, disenfranchised population. Thus, populism is commonly associated with 'anti-establishment' sentiments.<sup>99</sup>

German scholar Jan-Werner Müller argues that populism is actually a form of identity politics.<sup>100</sup> Although politics always include identity in one form or another, populism focuses more on the conflict between identities and facilitates a division in society.<sup>101</sup> It does this by creating three core concepts: 'the people', 'the elite' and 'the general will'.<sup>102</sup> Populists imply that they alone speak on behalf of the real people. By real people they mean one homogeneous authentic group of people who are native or from a certain socioeconomic status who share similar values.<sup>103</sup> They claim that this group of people are betrayed and forgotten by the political elite and their interests are not taken into account by the

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<sup>95</sup> Michael Cox, 'The rise of populism and the crisis of globalisation: Brexit, Trump and beyond' (2017) 28 *Irish Studies in International Affairs* p.9

<sup>96</sup> Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press 2016) p.1

<sup>97</sup> Müller (2016) *supra* n.96 p.1

<sup>98</sup> *Ibid* p.7

<sup>99</sup> Cox (2017) *supra* n.95 p.13

<sup>100</sup> Müller (2016) *supra* n.96 p.3

<sup>101</sup> *Ibid* p.4

<sup>102</sup> Cas Mudde and Cristóbal Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) p.9

<sup>103</sup> Mudde and Kaltwasser (2017) *supra* n.102 pp.9-11

establishment. Any politician, scholar, economist, journalist or artist opposing to this claim are considered elitist and the enemies of the people.<sup>104</sup> Populists argue that the political elite is incapable of serving the general will of the people. They assume that they know this general will and promise to fight for real people's interests against the corrupt establishment.<sup>105</sup>

There is a certain consensus amongst scholars that populism is actually a political strategy rather than an ideology. Venezuelan scholar Moises Naim certainly thinks so as he argues that populism is a sophisticated technique that is used by some politicians in order to appeal to a frustrated population in order to gain influence and power.<sup>106</sup> Australian scholar Benjamin Moffitt also shares this view and claims that populists do not care much about the message itself but focus more on the way the message is delivered.<sup>107</sup> They are known for their dramatic performance and spectacle in order to convince people that they alone represent ordinary people and all opponents are elitists and 'enemies of the people'.<sup>108</sup> These arguments are startlingly similar to Loewenstein's analysis of fascism in which he claimed that fascism is not an ideology but a clever strategy which works well by utilising emotional manipulation and exploiting the tolerant nature of democracy.<sup>109</sup>

Hungarian legal scholar and former European Court of Human Rights (ECHR) judge András Sajó refers to this technique used by both fascists and populists as 'emotionalism'. In his view, emotionalism can be characterised by the politics of emotional manipulation which thrives on exploiting people's emotions in order to change the course of the rational democratic decision-making process.<sup>110</sup> Populists try to mobilise support by raising concerns that are not generally addressed by the political elite. These concerns tend to be related to sensitive issues such as national sentiments, economy, class division, religion and immigration.<sup>111</sup> Left-wing populists tend to rely on economic inequalities and the division between different classes within society. Right-wing populists, on the other hand, exploit national sentiments amongst people and seek division between natives and foreigners.<sup>112</sup> Both left-wing and

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<sup>104</sup> Mudde and Kaltwasser (2017) *supra* n.102 pp.11-16

<sup>105</sup> *Ibid* pp.16-19

<sup>106</sup> Cox (2017) *supra* n.95 p.13

<sup>107</sup> Nagan and Manausa (2018) *supra* n.86 p.50

<sup>108</sup> Müller (2016) *supra* n.96 p.4

<sup>109</sup> Loewenstein (1937) *supra* n.2 p.423

<sup>110</sup> Rijpkema (2018) *supra* n.6 p.27

<sup>111</sup> Erik Jones, 'The Rise of Populism and the Fall of Europe' (2017) 37 *SAIS Review of International Affairs* p.50

<sup>112</sup> Roger Eatwell and Matthew Goodwin, *National Populism: The Revolt Against Liberal Democracy* (Kindle edn, Pelican Books 2018)

right-wing populism have been a cause for concern as they have been seen to promote division in society. However, right-wing populism has been a particularly disturbing trend for spreading a nationalist and xenophobic message and normalising racism across Europe and the USA.<sup>113</sup> This trend worries many scholars for posing a threat to democracy and human rights.<sup>114</sup> Hence, the next section will explore this alarming trend further.

## 2.2 The rise of right-wing populism in Europe and the USA

Right-wing populism has been reshaping the political landscape of Western democracies during the last two decades.<sup>115</sup> Voters in Europe and the USA have been turning to populist leaders in growing numbers. Many people express frustration with long standing institutions and feel that they have been alienated by the establishment.<sup>116</sup> IPSOS carried out a survey to study populist and nativist sentiments amongst people across 27 countries in 2019. The survey revealed that 54% of the participants agree that the political system is broken in their respective countries, 66% felt traditional politicians ignore 'ordinary' people and 64% said they want a strong leader to take the country back from the elite.<sup>117</sup> In addition, the survey revealed widespread support for nativist sentiments and national populism as 60% of the participants said that employers should favour natives over immigrants and their nation would be better off without accepting all immigrants.<sup>118</sup>

There are several reasons as to why this phenomenon has been particularly predominant in the West. Eatwell and Goodwin argue that the West has been experiencing four important trends in recent years which have led to a shift towards right-wing populism. They refer to these trends as the 'Four Ds' and identify them as *distrust* of politicians owing to the elitist nature of liberal democracy, *destruction* of national identity caused by immigration and multiculturalism, *deprivation* which has arisen out of growing economic inequalities and the financial crisis, and *de-alignment* from the mainstream parties

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<sup>113</sup> Traverso (2019) *supra* n.15 ch.1 part 1 (Kindle edn)

<sup>114</sup> *Ibid*

<sup>115</sup> Cox (2017) *supra* n.95 p.12

<sup>116</sup> *Ibid*

<sup>117</sup> IPSOS Global Advisor, 'Populist and Nativist Sentiments in 2019: A 27-Country Survey' (IPSOS 2019) p.3

<sup>118</sup> *Ibid*

due to deep dissatisfaction and weakening bonds.<sup>119</sup> Today, increasing numbers of people feel that the past was better than the present and worry about their future due to these factors.<sup>120</sup>

Indeed, British sociologist Tony Giddens argues that globalisation has been changing cities and towns across the world, shaking our way of life and undermining people's settled notion of identity. People have been losing jobs due to cheap imported goods from countries like China or working for less as a result of cheaper labour coming from elsewhere.<sup>121</sup> Rising immigration has been seen as a threat to the existing way of living by some natives. Furthermore, the 2015 refugee influx into Europe has fuelled a fear of immigration further amongst some Western people due to the perception of cultural differences between Christians and Muslims. Furthermore, horrifying incidents of terrorism that have been targeting Western countries since 9/11 created apprehension and fear towards immigrants from majority Muslim countries.<sup>122</sup> In addition, the financial crisis of 2008 and the Great Recession that followed it, have fuelled inequalities and anti-establishment sentiments amongst people.<sup>123</sup>

These developments have been seized upon by populists and used as an opportunity to manipulate people's fear and frustration in order to rise up to power. They blamed the establishment for the current situation, played on the nationalist sentiments of people, conspired against immigrants and promoted an 'us and them' narrative in order to create conflict and gain support.<sup>124</sup> The Brexit result in the UK in 2016 and the election of Donald Trump as the US President in 2017 brought a new sense of urgency to study the rising trend of populism which challenges the established political order in the Western world.<sup>125</sup> The next section will explore populist developments in Europe, the UK and the USA further in order to present the extent of this rising trend.

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<sup>119</sup> Eatwell and Goodwin (2018) *supra* n.112 ch.1 "The Four Ds" (Kindle edn)

<sup>120</sup> *Ibid*

<sup>121</sup> Cox (2017) *supra* n.95 p.14

<sup>122</sup> Jones (2017) *supra* n.111 p.52

<sup>123</sup> Galston (2018) *supra* n.13 p.6

<sup>124</sup> Nagan and Manausa (2018) *supra* n.86 p.51

<sup>125</sup> *Ibid* p.50

### 2.2.1. Europe

A study carried out by the Guardian newspaper in 2018 highlighted that support for populism in Europe has been steadily on the rise and has almost tripled since 1998. The vote share for populists in the national elections amongst 31 European countries was only 7% in 1998 but this has now increased to 25% with almost one in four people supporting a populist party.<sup>126</sup> Europe was confronted with this reality once again during the recent European elections in 2019 as right-wing populists took almost 25% of the seats in the European Parliament.<sup>127</sup> A 2011 Chatham House report considers the burgeoning support for populist parties as “the most striking development in modern European politics.”<sup>128</sup>

Right-wing populism emerged in European politics in the late 1990s in response to European integration and rising immigration.<sup>129</sup> Radical right-wing politicians started this trend by spreading nationalist and anti-immigration propaganda in order to appeal to the hidden ambitions of people and draw in voters. The Syrian refugee crisis in 2015 fuelled anti-immigration sentiments and accelerated the rise of right-wing populism in Europe.<sup>130</sup> By 2018, populists with far-right and xenophobic sentiments had gained enough support to form governments in several countries across Europe including Austria, Switzerland, Belgium, Denmark, Finland, Italy, Poland, Hungary and Slovakia.<sup>131</sup> Hungary and Italy have seen the largest support for right-wing populism. The radical right-wing politician Victor Orbán, who has been the prime minister of Hungary since 2010, repeatedly claimed that Europe is under invasion by migrants and projected himself as the saviour of Christian values against Muslim migration to Hungary.<sup>132</sup> This fear of immigration resonated with many people in rural areas. Over 49% of the voters supported him in the 2018 national elections giving him a sufficient majority to change the constitution.<sup>133</sup> In Italy, the Eurosceptic and anti-establishment Five Star Party and right-wing League have won a combined

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<sup>126</sup> The Guardian, ‘The new populism revealed: One in four Europeans vote populist’ (20 November 2018)

<https://www.theguardian.com/world/ng-interactive/2018/nov/20/revealed-one-in-four-europeans-vote-populist>

<sup>127</sup> Daniel Boffey and Phillip Oltermann, ‘EU elections: voters boost Greens and far right as centre left and right lose out’ *The Guardian* (27 May 2019) <https://www.theguardian.com/politics/2019/may/26/european-elections-centrist-parties-projected-lose-grip-power>

<sup>128</sup> Cox (2017) *supra* n.95 p.10

<sup>129</sup> Mudde and Kaltwasser (2017) *supra* n.102 p.34

<sup>130</sup> Nagan and Manausa (2018) *supra* n.86 p.50

<sup>131</sup> Traverso (2019) *supra* n.15 ch.1 part 1 (Kindle edn)

<sup>132</sup> Shaun Walker, ‘Hungarian leader says Europe is now under invasion by migrants’ *The Guardian* (15 March 2018) <https://www.theguardian.com/world/2018/mar/15/hungarian-leader-says-europe-is-now-under-invasion-by-migrants>

<sup>133</sup> Marc Santora, ‘Hungry election gives Orban big majority, and control of constitution’ *The New York Times* (8 April 2018) <https://www.nytimes.com/2018/04/08/world/europe/hungary-election-viktor-orban.html>

majority of over 50% in the 2018 national elections and together formed the country's first populist government.<sup>134</sup> In Austria, the Freedom Party won over 26% of the vote share in the 2015 national elections with an anti-immigration and anti-Islam platform and became part of the coalition government taking control of six ministerial positions including foreign affairs and defence.<sup>135</sup> Similarly, the Swiss People's Party (SVP) which has been in government since 1999 increased their popularity up to a record 29.5% in the 2015 elections following their promise to reduce the number of immigrants and asylum seekers in Switzerland.<sup>136</sup>

Right-wing populism has been shrinking mainstream parties and changing the political landscape across all parts of Europe.<sup>137</sup> The French populist Marine Le Pen of the National Front has been increasing her support base by campaigning against immigration and globalisation which she holds responsible for endangering French civilisation.<sup>138</sup> She has been receiving enough support to go through to the second round of the presidential elections since 2002 and has been influential in setting the political agenda in France as the leading opposition to Emmanuel Macron.<sup>139</sup> In the Netherlands, Geert Wilders' populist Freedom Party (PVV) has become the second-largest party in the Parliament after the 2017 national elections. Earlier this year, another populist party Forum for Democracy (FvD) won the most votes in the Dutch provincial elections just three years after it was founded.<sup>140</sup> In Germany, the Alternative für Deutschland (AfD), a populist party with far-right and anti-immigration propaganda entered the Parliament for the first time after winning 12.6% of the vote in the 2017 Federal elections.<sup>141</sup>

Even the Scandinavian countries which are often considered as the most progressive in Europe have been experiencing the rise of right-wing populism. In Sweden, the far-right party Sweden Democrats

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<sup>134</sup> BBC News, 'Italy's populist coalition: What you should know' (01 June 2018) <https://www.bbc.co.uk/news/world-europe-44168602>

<sup>135</sup> The Guardian, 'Austrian president approves far-right Freedom party joining coalition government' (16 December 2017) <https://www.theguardian.com/world/2017/dec/16/austrian-president-approves-far-right-freedom-party-role-in-coalition-government>

<sup>136</sup> The Telegraph, 'Anti-immigration party wins Swiss election in slide to the right' (19 October 2015) <https://www.telegraph.co.uk/news/worldnews/europe/switzerland/11939953/Anti-immigration-party-wins-Swiss-election-in-slide-to-the-Right.html>

<sup>137</sup> Jon Henley, 'How populism emerged as an electoral force in Europe' The Guardian (20 November 2018) <https://www.theguardian.com/world/ng-interactive/2018/nov/20/how-populism-emerged-as-electoral-force-in-europe>

<sup>138</sup> Cox (2017) *supra* n.95 p.11

<sup>139</sup> Traverso (2019) *supra* n.15 ch.1 part 2 (Kindle edn)

<sup>140</sup> Eline Schaart, 'Far-right populists score stunning win in Dutch provincial vote' *Politico* (20 March 2019) <https://www.politico.eu/article/mark-rutte-to-lose-senate-majority-after-dutch-local-elections/>

<sup>141</sup> Henley (2018) *supra* n.137

which has a neo-Nazi origin managed to increase their vote share from 0.4% to 17.6% in the last twenty years. Similarly, in Denmark, the far-right Danish People's Party has been gaining support with a campaign to reduce non-Western immigration and prevent the Islamisation of the country. Finally, Norway's Progress Party and Finland's Blue Reform Party both with anti-immigration tendencies have been part of coalition governments for years.<sup>142</sup>

All of these populist parties across Europe are certainly different from one another in many aspects as each country has its own peculiarities. However, they are all united in one aspect: they all exploit national sentiments, stereotype immigrants and refugees and create a division in society in order to take down the mainstream parties and change the traditional politics in a fundamental way. They have successfully achieved this goal in several countries by forming majority governments or forcing mainstream parties to enter into coalitions with them. They now have the power to influence government policies in their countries and challenge European politics in a way that has not been witnessed before.<sup>143</sup>

### **2.2.2. The United Kingdom**

In the UK, right-wing populism reached its peak with the surprising win for the Leave campaign during the 2016 Brexit referendum.<sup>144</sup> Prior to the referendum, there was an overwhelming call from those in power to back the Remain campaign amid warnings Brexit would be a disaster for the country. The Prime Minister David Cameron, his Conservative government and the major opposition parties Labour and Liberal Democrats all backed the motion to remain in the EU. The Treasury issued warnings that leaving the EU would lead to recession, job losses, price hikes, cuts to public services and higher taxes. Financial institutions threatened to move their headquarters elsewhere in Europe in the event of Brexit. British universities claimed that they would lose European researchers and fall down in the world tables as a result of Brexit. The Remain campaign had such an impressive line-up, even the Leave

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<sup>142</sup> Henley (2018) *supra* n.137

<sup>143</sup> Jones (2017) *supra* n.111 p.50

<sup>144</sup> Eamonn Butler, 'Populism in the UK' in Libertarian Club, *Abusing the People: Global Challenges of Authoritarian Populism* (Libek 2018) p.55

campaigners were doubtful about winning against them.<sup>145</sup> However, to everyone's surprise, UK voters defied these warnings and the majority decided to back the Leave campaign.<sup>146</sup>

Boris Johnson, a Conservative MP at the time and UKIP leader Nigel Farage were the two leading campaigners for Brexit. These two politicians deployed a populist strategy in order to manipulate the nationalist sentiments of people. They knew that sovereignty and immigration were high up amongst the issues that mattered to the working class population, so they focused their propaganda on these sensitive issues and exploited the fear and frustration amongst people. They claimed that UK laws were being made by the EU institutions in Brussels and Strasbourg and leaving the EU would mean giving sovereignty back to British people.<sup>147</sup> Furthermore, they projected European migration as a significant burden on the country's economy and the National Health Service (NHS). After the EU opened up immigration from Eastern European countries, the UK has seen a surge of European migrants taking up low skilled jobs in the country. Although, the wealthier population has benefited from cheaper labour, the working class felt threatened by the rising immigration.<sup>148</sup>

In order to fuel this fear of immigration further, Johnson and Farage went as far as spreading false or misleading information. Farage claimed that the UK immigration was at breaking point and produced posters with pictures of North African migrants and Syrian refugees trying to enter into the country. Although the issue was not directly related to EU migration, it was projected as a consequence of EU membership in order to promote anti-European sentiments amongst people.<sup>149</sup> Similarly, Boris Johnson claimed that Turkey was about to join the EU and 76 million people could soon end up in the UK and urged people to vote Leave in order to prevent mass migration from Turkey. This was proven to be a false claim as Turkey has long stalled its negotiations with the EU with no prospect of joining the Union anytime soon due to rising human rights abuses in the country. Nevertheless, Boris Johnson used it as a sales pitch in order to ignite the fear of immigration amongst people.<sup>150</sup> He also falsely claimed that the UK was paying £350m per week to the EU and leaving the EU would mean this money could be

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<sup>145</sup> Butler (2018) *supra* n.144 p.55

<sup>146</sup> *Ibid*

<sup>147</sup> Jones (2017) *supra* n.111 p.52

<sup>148</sup> Butler (2018) *supra* n.144 p.56

<sup>149</sup> Jones (2017) *supra* n.111 p.52

<sup>150</sup> The Independent, 'Brexit lies: the demonstrably false claims of the EU referendum campaign' (17 December 2017) <https://www.independent.co.uk/infact/brexit-second-referendum-false-claims-eu-referendum-campaign-lies-fake-news-a8113381.html>

spent on the struggling NHS, a much beloved institution amongst the British public. This promise appealed to all sections of British society.<sup>151</sup> The fact that some of these claims were misleading or false did not stop people who feel disconnected from the establishment from backing the Leave campaign and in the end, against all odds, this populist strategy worked and the Leave campaign claimed victory.<sup>152</sup>

Furthermore, the appointment of Boris Johnson as the UK Prime Minister in July 2019 following Theresa May's resignation represents another milestone for populism in the UK as it brought right-wing populism into No.10 for the first time.<sup>153</sup> Johnson has been eying up the leadership position in the Conservative Party since he rebelled against the party leader David Cameron during the Brexit referendum campaign. The failure of Theresa May to deliver Brexit and the frustration of the British public with the long Brexit process presented Johnson with the perfect opportunity to take on the job. As soon as he took office, he resorted to a populist strategy which has proved to be working successfully elsewhere in Europe and the USA. He dismissed the pro-European language used by his predecessor and employed a nationalist language instead. He argued that turning back from the Brexit decision would be a betrayal of the people's will and promised to deliver Brexit with no more delays and claimed that he will restore people's trust with the Conservative party.<sup>154</sup>

Although he has only been in office for a relatively short time, Boris Johnson has been the subject of several political controversies and has already been accused of silencing the Parliament and endangering the future of democracy. Johnson reacted to these claims with defiance and bravado and claimed that he is simply trying to deliver the will of British people and accused those who are trying to stop Brexit of being traitors and the real enemies of the people and democracy.<sup>155</sup> The use of such rhetoric is the modus operandi of populists as they tend to claim they alone represent the people and all opponents are enemies of the people.<sup>156</sup> Johnson's populist language is yet to pass an election test;

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<sup>151</sup> The Independent (2017) *supra* n.150

<sup>152</sup> Jones (2017) *supra* n.111 p.52

<sup>153</sup> Richard Carr, 'Boris Johnson: populists now run the show, but what exactly are they offering' *The Conversation* (23 July 2019) <http://theconversation.com/boris-johnson-populists-now-run-the-show-but-what-exactly-are-they-offering-120808>

<sup>154</sup> *Ibid*

<sup>155</sup> Danielle Sheridan and Asa Bennett, 'Boris Johnson hits back at Supreme Court ruling saying people want to frustrate Brexit and stop this country coming out of the EU' *The Telegraph* (24 September 2019) <https://www.telegraph.co.uk/politics/2019/09/24/brexit-latest-news-supreme-court-ruling-boris-johnson-prorogue/>

<sup>156</sup> Müller (2016) *supra* n.96 p.3

however, a recent survey carried out by Prospect magazine revealed that large majority of respondents would support a PM who would put Britain first even if it damages relationships with allies or disadvantages minorities.<sup>157</sup> Putting Britain first seems to be Johnson's strategy for now. The next general election will prove whether this populist strategy will win people over or not but, in the meantime, Johnson has the power to lead the country with a nationalist agenda during the Brexit process.

### **2.2.3 The United States of America**

Populism is certainly not just a European phenomenon. In the USA, it has taken centre stage in the shape of Donald Trump and has shaken the US political system to its core.<sup>158</sup> Similar to the Brexit decision in the UK, Trump's presidency was highly unexpected in the USA.<sup>159</sup> Throughout his campaign, Trump was accused of being a racist, sexist and even a fascist.<sup>160</sup> However, he dismissed all of these claims and presented himself as the 'man of the people'. He often played on the contrast between ordinary Americans and the political elite in Washington and promised to 'Make America great again' by taking down the corrupt establishment.<sup>161</sup> He openly used xenophobia and racism as propaganda tools by promising to kick out Muslims and Mexicans in order to appeal to the chauvinism of some of his electorate. He accused globalism of being un-American, the liberal press of spreading fake news and climate change as being a hoax.<sup>162</sup>

Trump's populist language was appealing for the lower middle class Americans for various reasons. Firstly, they were hit the hardest by 2008 economic crisis which worsened social inequalities in the country and left people disillusioned with the political elite.<sup>163</sup> Secondly, the advancement of human rights was projected by some as non-whites, immigrants and women receiving more economic opportunities at the expense of white middle class men.<sup>164</sup> In addition, immigrants were projected as criminals, drug dealers and a threat to the white community by white nationalist leaders which

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<sup>157</sup> Tom Clark, 'Exclusive polling: majority of Britons want an MP who puts Britain first – even if minorities lose out' *Prospect* (8 May 2019) <https://www.prospectmagazine.co.uk/magazine/polling-populist-prime-minister-british-trump-boris-johnson>

<sup>158</sup> Cox (2017) *supra* n.95 p.10

<sup>159</sup> Traverso (2019) *supra* n.15 ch.1 part 4 (Kindle edn)

<sup>160</sup> *Ibid*

<sup>161</sup> *Ibid*

<sup>162</sup> Cox (2017) *supra* n.95 p.10

<sup>163</sup> Traverso (2019) *supra* n.15 ch.1 part 4 (Kindle edn)

<sup>164</sup> Nagan and Manausa (2018) *supra* n.86 p.53

exacerbated anti-immigration sentiments amongst people.<sup>165</sup> Trump manipulated these sentiments with his 'man of the people' attitude and unusual 'politically incorrect' language. His populist strategy claimed victory against all the odds making Trump one of the most powerful men in world politics.<sup>166</sup> Since coming to power, Trump has signed several executive orders in order to fulfil his election promises including building a wall along the Mexico-USA border and blocking immigration from some Muslim-majority countries. These orders have proved to be controversial and divided the nation.<sup>167</sup> However, Trump continues to thrive on conflict and arms himself with xenophobic, divisive and racist language, encouraging polarisation amongst people.<sup>168</sup> Although, there is a widespread outcry against Trump's language and his populist policies, his latest approval ratings stand at 48%, highlighting the possibility of him being re-elected in the 2020 mid-term elections.<sup>169</sup> The result of this election will certainly determine the extent to which populism will continue to exert an influence in the US and world politics.

### **2.3. The populist threat to liberal democracy**

As previously mentioned, populists rely on three core concepts in order to gain power and influence: 'the real people', 'the elite' and 'the general will'.<sup>170</sup> These core concepts all appear to be problematic and challenge the essence of liberal democracy. Liberal democracy requires equality of all citizens, inclusive citizenship, political competition, plurality of ideas, 'separation of powers' and 'checks and balances'.<sup>171</sup> The idea that only one homogenous, authentic group of people represent 'the real people' undermines the intrinsic nature of liberal democracy as it excludes sections of society from being part of 'the real people' simply because of their race, nationality, religion, socio-economic status and political affiliation.<sup>172</sup> This language creates an 'us and them' mentality and encourages polarisation within society. In addition, projecting all political opposition as elitist and enemies of the people disregards the respect for different political ideas required in a democratic society. This language can lead to one party

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<sup>165</sup> Nagan and Manausa (2018) *supra* n.86 p.53

<sup>166</sup> Traverso (2019) *supra* n.15 ch.1 part 4 (Kindle edn)

<sup>167</sup> NBC News, 'Here's the full list of Donald Trump's Executive Orders' (14 February 2017)

<https://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796>

<sup>168</sup> Müller (2016) *supra* n.96 p.4

<sup>169</sup> Henry Olsen, 'Trump's approval ratings are bad news for Democrats' *The Washington Post* (24 September 2019) <https://www.washingtonpost.com/opinions/2019/09/24/trumps-approval-ratings-are-bad-news-democrats/>

<sup>170</sup> Mudde and Kaltwasser (2017) *supra* n.102 p.9

<sup>171</sup> Galston (2018) *supra* n.13 p.9

<sup>172</sup> Müller (2016) *supra* n.96 pp.3-4

rule by demonising and criminalising political opponents.<sup>173</sup> Furthermore, the idea of 'general will' proposes that there is only one absolute will amongst the population. This is another worrying aspect of populism as peoples' views often differ on any given subject.<sup>174</sup> Hence, all three concepts of populism pose a great danger to the very existence of democracy since they encourage anti-pluralism, polarisation and conflict within the population. Democracy has to be open to a plurality of political ideas and a society where everyone can live together as free and equal no matter how diverse they may be.<sup>175</sup>

Although, populists pretend to talk the language of democratic values, once they assume power, they appear to become increasingly authoritarian towards opposition and minorities.<sup>176</sup> Populists claim that liberal values of democracy harm 'the real people' as it forces them to set aside their own interests.<sup>177</sup> Populists try to convince their supporters that opposition groups are working against national interests and, consequently, national security can only be achieved by putting pressure on these groups and even taking away their rights and freedoms.<sup>178</sup> This is sometimes done by introducing state of emergency measures which allow states to derogate from certain human rights obligations. The use of emergency measures is strictly regulated under international human rights law so states must meet certain criteria before they can derogate from their human rights obligations.<sup>179</sup> However, in practice, the depth and scope of emergency measures used by populist governments often appear problematic and unnecessarily lengthy with little regard for fundamental rights such as freedom of movement, privacy, equality and non-discrimination.<sup>180</sup> In addition, populist governments appear to use these measures to silence their opposition rather than overcoming real threats to the life of the nation.<sup>181</sup>

Erdogan's increasingly authoritarian rule in Turkey is a very clear illustration of this threat. Erdogan first came to power in Turkey in 2002 with a reformist and liberal agenda. He introduced several economic and social reforms in the country between 2002 and 2012 which increased his popularity amongst the

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<sup>173</sup> Müller (2016) *supra* n.96 pp.3-4

<sup>174</sup> Mudde and Kaltwasser (2017) *supra* n.102 p.18

<sup>175</sup> Müller (2016) *supra* n.96 pp.3-4

<sup>176</sup> Cox (2017) *supra* n.95 p.12

<sup>177</sup> Galston (2018) *supra* n.13 p.5

<sup>178</sup> Müller (2016) *supra* n.96 pp.2-4

<sup>179</sup> Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2014) pp.583-631

<sup>180</sup> Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* p.4

<sup>181</sup> *Ibid*

Turkish electorate.<sup>182</sup> However, in 2013 a series of protests against Erdogan's environmental policies, led to a change in his language; no longer was it reformist and liberal, it had turned into a nationalist and religious propaganda. Erdogan labelled these protestors as foreign spies and accused them of trying to destabilise the country when, in fact, they were Turkish citizens exercising their democratic right to free expression. He saw these protests as an opportunity to polarise the nation, strengthen his support base amongst conservative and religious voters and silence the opposition. Erdogan's new religious and authoritarian tone saw a surge of critics from liberal and secular sections of Turkish society.<sup>183</sup> However, instead of softening his tone, Erdogan and his ruling Justice and Development Party (AKP) used the coup attempt against the government in July 2016 as a justification to introduce emergency measures in the country and increase pressure on the opposition. These emergency measures soon turned into an opportunity to crackdown on his critics, the judiciary and the press. Critics were accused of plotting to take down the government and were painted as a threat to national security. The state of emergency lasted two years and saw around 2,745 judges and prosecutors being detained, many journalists being arrested and over 150,000 people comprising of academics, teachers, police officers, bureaucrats, doctors and various other civil servants being expelled from their public office without any administrative and judicial investigation and due process of law solely on the basis of allegations that they supported the organisation behind the coup attempt.<sup>184</sup>

More importantly, Erdogan further used his influence to change the government system in the country. He convinced his supporters that the country would be stronger with a presidential system rather than a parliamentary democracy and managed to change the constitution with a referendum in April 2017. The constitutional amendment meant that power would be concentrated in the hands of the President giving him the right to dissolve the Parliament, appoint all members of his cabinet, elect all members of the Board of Judges and Prosecutors and other high state officials without the approval of the Parliament. This constitutional amendment is considered as the end of Turkish democracy by many scholars as it practically abolishes the system of checks and balances and the separation of powers which is necessary in a democratic society.<sup>185</sup>

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<sup>182</sup> Bican Sahin, 'A Liberal Assessment of Turkish Democracy' in Libertarian Club, *Abusing the People: Global Challenges of Authoritarian Populism* (Libek 2018) pp.8-10

<sup>183</sup> *Ibid* pp.10-12

<sup>184</sup> *Ibid* pp.12-13

<sup>185</sup> *Ibid* p.13

This same threat now exists for other democracies who are currently experiencing a rise of populism. Although, populists accept popular sovereignty and the principle of majority, they are sceptical about the limitations liberal democracy imposes on governments because they claim that these limitations prevent the majority from achieving their will. This poses a threat to the guarantees that liberal democracy provides for opposition, minorities and marginal groups in society.<sup>186</sup> Populist leaders are demonising political opposition, normalising hate and promoting division amongst society. The anti-pluralist and divisive language used by populists can have detrimental effects on the gains democracy has made since the end of World War II.<sup>187</sup> As a result, one must be cautious to not to be fooled by the democratic language used by populist leaders and remember the lessons learnt from the fascist era; an era where the same democratic rhetoric was merely a pretence and enabled the downfall of many democracies in Europe.<sup>188</sup>

#### **2.4. The populist threat to international human rights law**

International human rights law was developed in order to impose restrictions on what governments can do following the atrocities witnessed during World War II. Having seen what governments are capable of during the fascist era, states adopted a series of human rights treaties and created international human rights institutions to prevent future abuse.<sup>189</sup> One of the main purposes of these institutions is to hold states accountable for the violations of international human rights obligations when domestic legal mechanisms fail to redress these violations.<sup>190</sup> Getting states to uphold these human rights obligations has always been a struggle since the beginning of the international human rights movement after the end of WWII. However, in the past, most states showed a willingness to respect their human rights obligations even if they disregarded them in practice. Now, there is a new surge amongst populist leaders to openly attack human rights norms and institutions as they clash with their nationalist and xenophobic agenda.<sup>191</sup> As a result, populists try to present international human rights obligations as an

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<sup>186</sup> Galston (2018) *supra* n.13 p.11

<sup>187</sup> Müller (2016) *supra* n.96 pp.3-4

<sup>188</sup> *Ibid* p.6

<sup>189</sup> Kenneth Roth, 'The Dangerous Rise of Populism: Global Attacks on Human Rights Values' *Human Rights Watch* (6 November 2016) <https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism>

<sup>190</sup> Helfer (2018) *supra* n.17 p.4

<sup>191</sup> Alston (2017) *supra* n.180 pp.3-4

obstacle to defending the nation from suspected threats. They portray human rights norms as only protecting terrorists, immigrants and asylum seekers with no regard for the safety and economic welfare of the 'ordinary people'.<sup>192</sup> They suggest if the majority wants to limit the rights of terrorists, immigrants, asylum seekers and minorities; international treaties and institutions should not stand in the way against this general will. Hence, populist governments are now increasingly undermining the authority of IHRL institutions. This trend is deteriorating the facilitating conditions that have long supported the work of IHRL institutions and posing a significant threat to the future of international human rights machinery.<sup>193</sup>

Two factors have particularly facilitated the creation and expansion of IHRL institutions since the end of World War II. Firstly, wealthy and powerful states in Western Europe and North America pushed for codification of human rights norms and the creation of international monitoring bodies. These states have been advocating to make human rights a central pillar of the UN and regional organisations.<sup>194</sup> There was a widespread confidence in international human rights institutions as enough powerful states showed an interest to support this international framework.<sup>195</sup> With the rise of populism, however, some of these states have been turning against these institutions using national security and sovereignty as their justification. Populist governments have been criticising international rulings and openly targeting human rights courts and review bodies. Although IHRL institutions experienced similar attacks in the past, they were pushed back by the US or European governments. The influence of right-wing populism in the USA and Europe is weakening the possibility of this pushback in the future hence leaving IHRL institutions vulnerable.<sup>196</sup> Even more importantly, instead of being the facilitator for the effective work of international organisations, these powerful governments are now turning into a threat themselves. The US, for instance, alarmingly withdrew from the Human Rights Council in 2018 after calling it a "biased and hypocritical body which makes a mockery of human rights".<sup>197</sup> Trump also famously criticised the work of the UN for not always doing what the US wanted and threatened to cut the US funding for the work of the organisation.<sup>198</sup> The US pays around 22% of the UN regular budget and 28% of the budget for peacekeeping operations. The country has also been the biggest voluntary contributor for the work

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<sup>192</sup> Roth (2016) *supra* n.189

<sup>193</sup> Helfer (2018) *supra* n.17 p.4

<sup>194</sup> *Ibid* p.5

<sup>195</sup> Jones (2017) *supra* n.111 p.56

<sup>196</sup> Alston (2017) *supra* n.180 p.3

<sup>197</sup> BBC News, 'US quits biased UN Human Rights Council' (20 June 2018)

<https://www.bbc.co.uk/news/44537372>

<sup>198</sup> Alston (2017) *supra* n.180 p.3

of the UN Office of the High Commissioner for Human Rights (OHCHR). Blocking this financial support would have detrimental effects on the work that the organisation carries out for the promotion and protection of human rights worldwide.<sup>199</sup> The US also plays a significant role in funding the Inter-American Commission on Human Rights. The Commission has already been going through financial difficulties as they announced they may need to cut 40% of their staff in 2016. This outcome was avoided at the last-minute owing to extra funding. However, the withdrawal of US funding in the future could prepare the end of the Inter-American Commission on Human Rights and leaving human rights protection in the region at risk.<sup>200</sup>

Similarly, European unity has been under attack by nationalist and anti-European populist leaders as they argue that the European Union (EU) undermines the sovereignty of domestic institutions.<sup>201</sup> Populist challengers have been trying to work their way into the European Parliament and aggravate Europe's democratic dysfunction in order to promote anti-European sentiments amongst people. Europe's inability to stop the migration flow from the Middle East and Sub-Saharan Africa and the economic inequalities within the Eurozone further fuelled nationalist sentiments and antipathy towards European ideology.<sup>202</sup> These failures facilitated populist efforts to mobilise support against the ideals and values that have long united European nations.<sup>203</sup> In 2017, the UK became the first country to trigger the process to withdraw from the Union which raised concerns that other countries might follow suit.<sup>204</sup> Furthermore, populists from Austria, Belgium, France, Germany, Italy, the Netherlands and Poland have started a broad alliance under the name of 'Europe of Nations and Freedom' in order to promote nationalism on regional level.<sup>205</sup> This trend highlights the risk of the return of a form of the 19<sup>th</sup> century nationalism which ultimately led to war and violence in Europe.<sup>206</sup>

In addition, support for the Council of Europe (CoE) and its judicial body, the European Court of Human Rights (ECtHR) has been weakening amongst its members. Some states including Russia and Turkey

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<sup>199</sup> Alston (2017) *supra* n.180 p.3

<sup>200</sup> *Ibid* p.8

<sup>201</sup> Jones (2017) *supra* n.111 p.54

<sup>202</sup> *Ibid* pp.54-56

<sup>203</sup> Eatwell and Goodwin (2018) *supra* n.112 ch.1 part 1 (Kindle edn)

<sup>204</sup> The Week, 'What might trigger the collapse of the EU?' (14 February 2019) <https://www.theweek.co.uk/99579/what-might-trigger-the-collapse-of-the-eu>

<sup>205</sup> Eatwell and Goodwin (2018) *supra* n.112 ch.1 (Kindle edn)

<sup>206</sup> Nagan and Manausa (2018) *supra* n.86 p.53

are already unresponsive to the judgments of the ECtHR.<sup>207</sup> Many other states have been critical of the Court's judgments for overturning the decisions of domestic courts and undermining state sovereignty. This led to the adoption of the Brighton Declaration in May 2012 to give European governments greater control and to remind ECtHR judges of their subsidiary role in the protection of human rights.<sup>208</sup> In the UK, the feud between the British government and the ECtHR in the case of *Othman (Abu Qatada) v. UK* intensified the antipathy towards international human rights treaties and institutions. In this case, the decision of the UK domestic courts to deport radical Islamic cleric Abu Qatada back to Jordan was overturned by the ECtHR as it would violate Article 6 of the ECHR due to the risk of him being put on trial with the use of evidence obtained by torture by Jordanian prosecutors.<sup>209</sup> The UK Home Secretary at that time, Theresa May, criticised the Court and branded this judgment as "crazy interpretation of human rights law".<sup>210</sup> This decision also angered sections of British society. Populists exploited these sentiments and a growing number of people started considering human rights as protecting terrorists and damaging the government's efforts to defend the nation.<sup>211</sup> A YouGov survey carried out in July 2014 revealed that 41% of the respondents would support the UK's withdrawal from the ECHR and the Council of Europe.<sup>212</sup> The risk of withdrawal from the ECHR exists for all members of the Council of Europe who are experiencing the rise of national populism and poses a challenge to the future of the ECtHR.

These parallel developments in the US and Europe pose a significant challenge for IHRL institutions as neither Europe nor the US would be able to cover for each other's absence against attempts by populists to undermine the authority of international organisations.<sup>213</sup> International human rights law already suffers from lacking effective enforcement mechanisms. The unwillingness of powerful European states and the USA to encourage other states to behave responsibly or in line with international human rights obligations would further damage the effectiveness of these enforcement mechanisms and lead states to depart from the established understanding of human rights norms by diluting their integrity and

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<sup>207</sup> Alston (2017) *supra* n.180 p.8

<sup>208</sup> House of Commons Research Briefing (SN/IA/7053), 'Protocol No. 15 to the European Convention on Human Rights: subsidiarity and the margin of appreciation' (4 December 2014) p.3

<sup>209</sup> *Othman (Abu Qatada) v. the United Kingdom* App no 8139/09 (ECHR, 17 January 2012)

<sup>210</sup> Alan Travis, 'Theresa May criticizes human rights convention after Abu Qatada affair' *The Guardian* (8 July 2013) <https://www.theguardian.com/world/2013/jul/08/theresa-may-human-rights-abu-qatada>

<sup>211</sup> Roth (2016) *supra* n.189

<sup>212</sup> William Jordan, 'Scepticism about human rights as well as the ECHR' *YouGov* (20 July 2014) <https://yougov.co.uk/topics/politics/articles-reports/2014/07/20/scepticism-about-human-rights-well-echr>

<sup>213</sup> Jones (2017) *supra* n.111 p.56

interpretation.<sup>214</sup> There is also a risk that under this current trend, populists may make their way into the heart of these organisations and change their structures and priorities. The OHCHR and the Human Rights Council can be vulnerable to this threat in the future. China and Russia have already expressed their desire to introduce major reforms to the Human Rights Council. If the rising number of populist governments side with Russia and China in the future, they can change the structure of these organisations and turn this threat into a reality.<sup>215</sup>

A second facilitating factor for the advancement of human rights movement was the spirit of brotherhood and the climate of respect for human rights amongst people after the end of World War II. Today, however, there is an increasing antipathy towards human rights institutions and treaties amongst certain sections of Western society.<sup>216</sup> This is partly because mainstream human rights advocacy has been prioritising civil and political rights, particularly the rights of marginalised and oppressed individuals and minorities. As a result, human rights advocacy often makes headlines with its work on immigrants, minorities and sometimes terrorists. Economic, social and cultural rights, on the other hand, are addressed in a tokenistic manner and the issue of economic and social inequalities are often neglected. The majority in society are affected by these economic and social inequalities and so the lack of advocacy in this regard makes some people feel that they have no stake in the human rights framework.<sup>217</sup> Populists use this as an opportunity to present human rights as only protecting minorities, immigrants and terrorists in opposition to the majority and, therefore, portray human rights as running contrary to national interests. Populists use national security as a justification for breaking the rules of international human rights law in order to ensure the continued support of the majority.<sup>218</sup> Startlingly, an IPSOS survey in 2019 revealed that an increasing number of people now actually say they would back a leader who breaks the rules if it is in the best interest of the country.<sup>219</sup>

Hence, populists now openly express their desire to push back against key pillars of international human rights law in order to protect so-called 'national interests'.<sup>220</sup> Trump's election campaign, for instance,

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<sup>214</sup> Jones (2017) *supra* n.111 p.56

<sup>215</sup> Alston (2017) *supra* n.180 p.7

<sup>216</sup> *Ibid* p.3

<sup>217</sup> *Ibid* pp.3-4

<sup>218</sup> Helfer (2018) *supra* n.17 p.8

<sup>219</sup> IPSOS Global Advisor (2019) *supra* n.117 p.14

<sup>220</sup> Alston (2017) *supra* n.180 p.3

reproduced various aspects of fascist anti-Semitism. Jews were the particular enemy of fascism. Whilst Trump's strategy could not be accused of anti-Semitism, his rhetoric was directed against blacks, Latinos, Muslims and other non-white immigrants as he portrayed them as enemies of American values.<sup>221</sup> He continued to use the language of hate during his presidency and disregarded basic human rights principles of dignity and equality. He attacked marginalised groups in society and threatened women's reproductive rights and the rights of LGBT people.<sup>222</sup> He stereotyped immigrants, demonised asylum seekers, vilified an American judge for having Mexican ancestry and told US congresswomen to go back to the country they came from allowing his supporters to chant "send her back".<sup>223</sup> Trump comes from a business background. He was not a neo-Nazi activist, he did not even take part in politics until 2015. He appealed to the psychology of the masses through his celebrity persona and his 'man of the people' attitude. However, his ability to manipulate the national sentiments of people and exploit their emotions in order to gain power pose the same threat that overturned the democracies in Europe during the fascist era.<sup>224</sup>

Using language to scapegoat immigrants, minorities and marginalised groups is not unique to Trump. Many European populists exploited the fear of immigration by claiming that Europe and its Christian values were under attack by Muslims and promised to stop the perceived Islamisation of the Continent.<sup>225</sup> Hungary's Prime Minister Victor Orbán closed his country's borders to Muslim refugees, the Dutch and French governments supported restrictions on the face veil for Muslim women and the Danish populists proposed a ban on the Muslim Holy Book, the Qur'an.<sup>226</sup> Furthermore, Nigel Farage criticised race discrimination law in the UK for preventing employers from prioritising British people over immigrants and promised to axe much of the legislation as part of his political strategy.<sup>227</sup> This trend normalises racism, xenophobia and Islamophobia within society as the language used by political leaders has the power to influence the thoughts and behaviour of individuals.<sup>228</sup>

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<sup>221</sup> Traverso (2019) *supra* n.15 ch.1 part 4 (Kindle edn)

<sup>222</sup> Roth (2016) *supra* n.189

<sup>223</sup> *Ibid*

<sup>224</sup> Traverso (2019) *supra* n.15 ch.1 part 4 (Kindle edn)

<sup>225</sup> Eatwell and Goodwin (2018) *supra* n.112 ch.1 (Kindle edn)

<sup>226</sup> Roth (2016) *supra* n.189

<sup>227</sup> BBC News, 'Nigel Farage would axe much of race discrimination law' (12 March 2015)

<https://www.bbc.co.uk/news/uk-31846453>

<sup>228</sup> Nagan and Manausa (2018) *supra* n.86 p.56

In fact, racism, xenophobia and Islamophobia have been on the rise in recent years in Europe and the USA owing to the rising trend of intolerant language used by populist politicians. In addition to supporting populists in elections, there are now increasing numbers of people who think it is acceptable to stereotype and attack foreigners and minorities.<sup>229</sup> A recent survey conducted by the Guardian newspaper revealed that people with racist sentiments are now feeling increasingly emboldened to abuse or discriminate against people from ethnic minorities in the UK. 76% of the people from ethnic minorities who took part in the survey said that they have been abused by a stranger because of their ethnic identity.<sup>230</sup> In addition, the 2018 crime figures from the Home Office revealed that racially motivated hate crimes in England and Wales almost doubled since 2015.<sup>231</sup> The trend is very similar on the other side of the Atlantic. A survey conducted by Southern Poverty Law Centre in 2019 showed that the number of active hate groups in the US has hit 20 years high with almost 25% increase in the last four years alone.<sup>232</sup>

The nationalist and xenophobic agenda promoted by populist leaders is an extremely worrying trend for disregarding the basic principles of human dignity upon which the United Nations (UN) and human rights movement were founded. Equality and non-discrimination are fundamental components of international human rights law and essential for the exercise and enjoyment of all other rights. Article 1 of the Universal Declaration of Human Rights (UDHR) provides that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Similarly, Art 1.3 of the UN Charter sets out “promoting respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion” as one of the purposes of the UN. Furthermore, Art 2.1 of the International Covenant on Civil and Political Rights (ICCPR), Art 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Art 14 of the European Convention on Human Rights (ECHR) and Art 1.1 of the American Convention on Human Rights (ACHR) all prohibit discrimination on protected grounds such as race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other

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<sup>229</sup> Nagan and Manaua (2018) *supra* n.86 p.53

<sup>230</sup> Robert Booth, ‘Racism rising since Brexit vote, nationwide study reveals’ *The Guardian* (20 May 2019) <https://www.theguardian.com/world/2019/may/20/racism-on-the-rise-since-brexit-vote-nationwide-study-reveals>

<sup>231</sup> *Ibid*

<sup>232</sup> Chris Woodyard, ‘Hate group count hits 20-year high amid rise in white supremacy, report says’ *USA Today* (20 February 2019) <https://eu.usatoday.com/story/news/nation/2019/02/20/hate-groups-white-power-supremacists-southern-poverty-law-center/2918416002/>

status. Race discrimination is also considered as a peremptory norm of customary international law following the judgments of International Court of Justice (ICJ) in the *AO Namibia*<sup>233</sup> and *Barcelona Traction*<sup>234</sup> cases. As a result, states are expected to adhere to the prohibition on race discrimination regardless of whether they are a party to international and regional human rights instruments or not.

Nonetheless, populist governments manipulate the language of democracy and justify their disregard for the basic principles of international human rights law on the grounds that they are serving the 'general will of the majority' and protecting national security. They argue that they are democratically elected, and this gives them a mandate to deliver the will of the majority.<sup>235</sup> Regardless of their poor human rights record, the nationalist and populist governments appear to attract increasing support in Europe and the USA. As a result, the growth of IHRL norms and institutions has been slowing down or in some instances even moving backwards. The inability of the UN Human Rights Council to appoint a special rapporteur on LGBT rights, the funding threats, the defiance of states against regional human rights courts rulings, the Brighton Declaration and the withdrawal of the USA from the Human Rights Council are some of the signs of weakening IHRL institutions.<sup>236</sup> When viewed collectively, all of these developments reveal the vulnerability of international human rights treaties and institutions against the rise of populism. The extent of the populist threat is not yet fully known, and it is not obvious how bleak the future of human rights may be but regardless, this threat should not be underestimated. The international community must work together in order to find ways to safeguard international human rights institutions against populist threat before it is too late to act.

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<sup>233</sup> *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ (21 June 1971)

<sup>234</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase*, ICJ (5 February 1970)

<sup>235</sup> Helfer (2018) *supra* n.17 p.8

<sup>236</sup> *Ibid* p.6

## CHAPTER 3

### **Confronting Right-Wing Populism with Militant Democracy Measures**

#### **3.1. Justifying the application of militant democracy measures to right-wing populism**

##### **3.1.1. Justification under the notion of 'substantive democracy'**

Right-wing extremism has been one of the main targets of militant democracy and has been a key factor in the development of the concept since the end of World War II. Although the concept has been widely used against traditional neo-Nazi parties, its application to the recent phenomenon of right-wing populism has been limited.<sup>237</sup> This is partly because contemporary militant democracy measures appear to be directed against violent forms of right-wing extremism.<sup>238</sup> Populists do not openly use violence, nor do they form paramilitary units to fight off the establishment. However, populist governments promote division and hatred and disregard the fundamental principles of liberal democracy such as equality and non-discrimination by spreading a racist and xenophobic message and alienating minorities and immigrants across Europe and the USA.<sup>239</sup> This trend worries many scholars for awakening the memories of fascism.<sup>240</sup> Populists reject such association and distance themselves from fascism.<sup>241</sup> However, Italian historian Enzo Traverso argues that fascism no longer presents itself in the form of totalitarian dictators such as Hitler or Mussolini. It has transformed into a new form, where the language of democratic values and people power play a significant role in order to gain influence.<sup>242</sup> Populists do not march in the streets with troops behind them, instead they promise to give the power back to people and make democracy's ideals work better for ordinary people.<sup>243</sup> Nonetheless, the techniques they are using in order to mobilise support present alarming similarities to fascism. Fascists relied on nationalism and emotional manipulation in order to gain power.<sup>244</sup> The same strategy is now being deployed by populists. The success of the populist movements in Europe and the USA has been

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<sup>237</sup> Ellian and Rijpkema (2018) *supra* n.76 p.74

<sup>238</sup> *Ibid* p.69

<sup>239</sup> Traverso (2019) *supra* n.15 ch.1 part 1 (Kindle edn)

<sup>240</sup> *Ibid*

<sup>241</sup> *Ibid*

<sup>242</sup> *Ibid*

<sup>243</sup> *Ibid* ch.1 part 4

<sup>244</sup> Tyulkina (2015) *supra* n.1 p.28

built on the exploitation of national sentiments amongst people.<sup>245</sup> Hence, it is crucial that the scope of militant democracy is extended to right-wing populism in order to ensure that democracy and human rights are protected.

Using militant democracy measures against non-violent forms of extremism has been criticised by supporters of 'procedural democracy'. Dutch constitutional scholar Theo Bellekom supports the notion of procedural democracy and uses the metaphor of the 'marketplace of ideas'. In his view, democracy is a free market where all ideas compete against each other and whichever idea prevails in the competition, should be respected.<sup>246</sup> Similarly, Austrian legal scholar Hans Kelsen argues that in democracies, rather than viewpoint, the votes should matter. If democracy tries to resist the will of the majority, it will cease to be a democracy.<sup>247</sup> Hence, supporters of procedural democracy do not favour constitutional defence of democracy as defending democracy should be a political will.<sup>248</sup> However, this argument is dismissed by the supporters of the notion of 'substantive democracy'. These scholars claim that democracy is more than just a procedure of vote counting.<sup>249</sup> Plato claimed that democracy is not only about procedure, but also about substance which means that some fundamental principles and rules can not be changed even by a majority decision.<sup>250</sup> Similarly, Dutch legal scholar George van den Bergh argues that the essence of democracy lies with the fundamental values of freedom, equality and the rule of law rather than the majority principle. Therefore, these principles must be respected by everyone.<sup>251</sup> As there is no liberal utopia, there is always a risk that the essence of democracy can be undermined by anti-democrats who could exploit democratic procedures. Once they hold the power, anti-democrats can deny basic guarantees of democracy to opposition and minorities.<sup>252</sup> American legal scholar Stephen Holmes argues that democracy has two options when faced with anti-democrats: repression or concession. Concession will legitimise anti-democratic motives and prepare the downfall of democracy. Repression, on the other hand, when used effectively and by lawful means will underline what is politically acceptable and determine the constitutional boundaries of tolerance.<sup>253</sup> In light of this

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<sup>245</sup> Nagan and Manausa (2018) *supra* n.86 p.50

<sup>246</sup> Rijpkema (2018) *supra* n.6 p.104

<sup>247</sup> *Ibid* p.103

<sup>248</sup> *Ibid* p.104

<sup>249</sup> *Ibid* p.105

<sup>250</sup> Tyulkina (2015) *supra* n.1 p.14

<sup>251</sup> Rijpkema (2018) *supra* n.6 p.105

<sup>252</sup> *Ibid* p.104

<sup>253</sup> *Ibid* pp.100-101

argument, using militant democracy measures against right-wing populism can be justified as a legitimate defence against the anti-democratic motives of populists.

### **3.1.2. Justification under international human rights law**

Militant democracy measures interfere with the exercise of various human rights principles which are guaranteed under international human rights treaties. These include freedom of opinion and expression, freedom of thought, conscience and religion, freedom of association, the right to assembly and the right to vote and take part in the government. However, the concept of militant democracy does not contravene international human rights law. Instead, international human rights instruments support 'substantive democracy' and militant democracy measures by authorising limitations to certain freedoms and prohibiting abuse of rights.<sup>254</sup> The concerns and lessons learnt from the fascist era led drafters of international human rights treaties to include these measures in order to ensure that the rights guaranteed under these instruments are not exploited to destroy fundamental rights and democratic order.<sup>255</sup> For instance, Article 29.2 of the UDHR gives way to right limitations by providing that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for rights and freedoms of others and of the meeting the just requirements of morality, public order and the general welfare in a democratic society". In addition, the ICCPR authorises restrictions to freedom of thought, conscience and religion (Art 18), freedom of opinion and expression (Art 19), the right of peaceful assembly (Art 21), the right to freedom of association (Art 22) as long as the restrictions are "prescribed by law" and "necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others".<sup>256</sup>

Furthermore, international human rights law also prohibits abuse of rights and advocacy of national, racial and religious hatred. Article 30 of the UDHR provides that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at destruction of any of the rights and freedoms set forth herein". The same provision is

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<sup>254</sup> Tyulkina (2015) *supra* n.1 p.52

<sup>255</sup> Rory O'Connell, 'Militant Democracy and Human Rights Principles' (2009) *Constitutional Law Review* p.3

<sup>256</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966)

also repeated under Article 5.1 of the ICCPR. Human Rights Committee referred to this Article when it held that the reorganisation of fascist party was not protected under the ICCPR in the case of *M.A v. Italy*.<sup>257</sup> In addition, Article 20.2 of the ICCPR states that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Similarly, Article 4 of the Convention on the Elimination of all Form of Racial Discrimination (CERD) permits declaring an organisation illegal if it promotes racial discrimination and prohibits public authorities or public institutions to incite racial discrimination.<sup>258</sup> This provision can be extended to political parties that are promoting a racist political agenda which can justify their dissolution.<sup>259</sup> Although international human rights norms have various historical and geopolitical roots, right restrictions and abuse clauses can be included under the concept of militant democracy. Hence, all of the provisions identified above can be interpreted as the justification of militant democracy under international human rights law.<sup>260</sup>

Militant democracy measures also have legal basis on a regional level. Although, the term ‘militant democracy’ is not officially used by regional institutions, the measures that come under the concept have been supported by regional organisations in the Americas and Europe.<sup>261</sup> The American Convention on Human Rights (ACHR) permits restrictions to freedom of conscience and religion (Art 12), freedom of thought and expression (Art 13), the right to assembly (Art 15) and freedom of association (Art 16) providing that the restrictions are provided by law and necessary in a democratic society. Furthermore, Article 32 of the ACHR provides that “everyone has responsibilities to his family, his community, and mankind” and “the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society”.<sup>262</sup> The Inter-American Commission on Human Rights addressed the issue of “representative democracy and political rights” in its yearbook of 1990 and held that governments are required to “guarantee the organisation of all political parties, unless they are constituted to violate human rights”.<sup>263</sup> With this statement, the Commission basically excluded political parties that aim to destruct human rights from

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<sup>257</sup> Human Rights Committee (10 April 1984) Communication no. 117/1981 para. 13.3

<sup>258</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (3 September 1981)

<sup>259</sup> Tyulkina (2015) *supra* n.1 p.54

<sup>260</sup> Ellian and Rijpkema (2018) *supra* n.76 p.65

<sup>261</sup> *Ibid* p.66

<sup>262</sup> Organization of American States, *American Convention on Human Rights* (22 November 1969)

<sup>263</sup> Ellian and Rijpkema (2018) *supra* n.76 p.83

the Convention's protection. In addition, the Charter of the Organization of American States (OAS) and the Inter-American Democratic Charter both provide the notion of 'undemocratic change of government' which combats the abuse of democratic institutions in order to change the government system to autocracy in Americas. This notion is narrower than the concept of militant democracy as it only targets attempts to change the system by undemocratic means. However, it still contributes to the overall aim of protecting democracy.<sup>264</sup>

In Europe, both the EU and CoE have measures in place in order to maintain respect for democracy and human rights. Both the EU and the CoE include respect for democracy and the rule of law as their membership requirement. Article 2 of the Treaty on the European Union provides that "the Union is founded on the on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".<sup>265</sup> If a Member State breaches this provision, they can be subject to sanctions which may result in the suspension of their memberships rights. Similarly, Article 3 of the Statute of the Council of Europe states that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms..." and Article 8 of the Statute provides that the Committee of Ministers may decide that a member state ceases to be a member of the Council if it violates Article 3.<sup>266</sup> This language can be interpreted as both the EU and the CoE indirectly holding member states responsible for providing defensive legal mechanisms in order to maintain democratic order.<sup>267</sup>

Furthermore, Article 52 of the Charter of Fundamental Rights of the EU permits restrictions to certain rights as long as the restriction is provided by law and the essence of the right is respected. Article 54 of the Charter prohibits abusing rights to prevent destruction of any of the rights and freedoms recognised in the Charter. The EU also provides measures against racism and xenophobia with the adoption the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law in 2008. The Preamble of the Framework Decision

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<sup>264</sup> Ellian and Rijpkema (2018) *supra* n.76 p.92

<sup>265</sup> European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* (13 December 2007) 2007/C 306/01

<sup>266</sup> Council of Europe, *Statute of the Council of Europe* (5 May 1949)

<sup>267</sup> Tyulkina (2015) *supra* n.1 p.54

reiterates that “racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the EU is founded and which are common to the Member States” and Article 1 of the document requires all Member States to take measures to punish publicly inciting violence or hatred on the basis of race, colour, religion, descent or national or ethnic origin.<sup>268</sup>

The ECHR also permits limitations to the right to respect for private and family life (Art 8), the freedom of thought, conscience and religion (Art 9), freedom of expression (Art 10) and freedom of assembly and association (Art 11) proving that they are prescribed by law and necessary in a democratic society. Each article provides specific grounds for limitations to each right which include, amongst others, national security, public safety, the protection of public order, health and morals or the protection of the rights and freedoms of others.<sup>269</sup> In addition, the abuse clause is also included under the ECHR. Article 17 of the ECHR provides that “Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein”. The Court highlighted the importance of this Article for the protection of democracy in the case of *Kasymakhunov and Saybatalov v. Russia*. In its judgment, the Court held that “there is a very clear link between the Convention and democracy and no one may be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society”.<sup>270</sup>

In its earlier judgments, the Court mostly used this abuse clause in order to justify the measures that come under the concept of militant democracy.<sup>271</sup> The first party dissolution case the Court handled was *the Communist Party of Germany v. the Federal Republic of Germany* in 1957. In this case, the European Commission on Human Rights examined the lawfulness of the decision of the Federal Constitutional Court of Germany to ban Communist Party of Germany (KPD). The Commission referred to Article 17 of the ECHR and upheld the decision of the Federal Constitutional Court on the basis that Communist Party advocated a regime “incompatible with the Convention, inasmuch as it includes the

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<sup>268</sup> European Union, *Council Framework Decision 2008/913/JHA* (28 November 2008)

<sup>269</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, CETS 5 (2 November 1950)

<sup>270</sup> *Kasymakhunov and Saybatalov v. Russia* App no. 26261/05 and 26377/06 (ECHR, 14 June 2013) para.104

<sup>271</sup> Tyulkina (2015) *supra* n.1 p.189

destruction of many of the rights or freedoms enshrined therein”.<sup>272</sup> Similarly, in the case of *Glimmerveen and Hagenbeek v. the Netherlands*, the Commission referred to Article 17 of the Convention as a justification to restrict the rights of those whose activities aimed at destruction of the rights and freedoms set forth in the Convention. In this case, the president and the vice-president of the Netherlands’ Volks Unie party claimed that their right to take part in elections were violated as their party was banned and the candidate list was declared invalid by the Dutch authorities. However, the Commission held that the applicants could not claim that their right to take part in elections were violated as they intended to use this right for a purpose deemed unacceptable under Article 17 of the Convention.<sup>273</sup>

The case of *Refah Partisi and Others v. Turkey* was the first case where the Court supported restricting freedom of association by banning political parties and it strengthened the international legality of militant democracy measures.<sup>274</sup> In this case, the Court held that political parties are a form of association and they are essential for effective functioning of democracy, hence their dissolution would interfere with Article 11 of the Convention and this interference can only be permitted if there are “convincing and compelling reasons”.<sup>275</sup> The Court underlined that “a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds”.<sup>276</sup> Thus, the Court decided that Turkey did not violate the freedom of association by banning Refah Partisi (the Welfare Party) as the Party promoted the concept of jihad and aimed to replace the existing secular order with Islamic law (sharia). The Court argued that Turkey was authorised to act in a militant manner in order to stop the threat that Refah Partisi and its religious agenda posed to democracy and the constitutional principle of secularism. Furthermore, the Court held that Islamic law “clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State

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<sup>272</sup> *Communist Party of Germany v. the Federal Republic of Germany* App No. 250/57 (ECommHR, 20 July 1957)

<sup>273</sup> *Glimmerveen and Hagenbeek v. the Netherlands* App no. 8348/78 and 8406/78 (ECHR, 11 October 1979)

<sup>274</sup> Tyulkina (2015) *supra* n.1 p.190

<sup>275</sup> *Refah Partisi and Others v. Turkey* (2003) *supra* n.72 para.46

<sup>276</sup> *Ibid* para.98

party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlines the whole of the Convention.”<sup>277</sup> Hence, the Court found no violation of Article 11 as the restrictions to freedom of association was necessary in a democratic society in this case.<sup>278</sup>

All of the international human rights provisions and the Court judgments identified above emphasise the importance of democratic order as they only permit restrictions to rights if it is “necessary in a democratic society”. This language indicates that international human rights law favours ‘substantive democracy’ and states owe it to the international community to maintain democratic government and they shall be able to restrict certain rights in the pursuit of this goal.<sup>279</sup> When viewed collectively, these provision and judgments indicate that militant democracy measures have now acquired a legal basis at the international level.<sup>280</sup> As a result, the measures provided under international human rights law can also be applicable to activities of right-wing populists if their conduct can be interpreted as a threat to democratic order.

### **3.2. Challenges to the application of militant democracy measures**

Many scholars now agree that the rise of right-wing populism poses a threat to democracy and human rights and this legitimises the application of national and international militant democracy provisions to populist extremists.<sup>281</sup> However, in practice, applying militant democracy measures to populist parties proves challenging. There are several reasons for this. Firstly, there is not one coherent theory of militant democracy and no clear criteria for the scope of its application.<sup>282</sup> Although, national and international human rights instruments give legal basis to militant democracy measures, they provide less guidance on what would constitute a threat to democracy. The meaning and scope of these provisions require judicial interpretation.<sup>283</sup> Skilled populist politicians can navigate their way around

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<sup>277</sup> *Refah Partisi and Others v. Turkey* (2003) *supra* n.72 para.123

<sup>278</sup> *Ibid* para.135

<sup>279</sup> Tyulkina (2015) *supra* n.1 p.52

<sup>280</sup> *Ibid* p.97

<sup>281</sup> Benjamin Biard, ‘Do measures of militant democracy contribute to reduce the policy influence of radical right populist parties?’ *ECPR Joint Sessions* (10-14 April 2018, Cyprus) p.1

<sup>282</sup> Rijpkema (2018) *supra* n.6 p.92

<sup>283</sup> Macklem (2006) *supra* n.47 p.494

these provisions and avoid prosecution by hiding behind the protection of freedom of speech.<sup>284</sup> These politicians often argue that “they are saying out loud what people are quietly thinking” as it was once claimed by the National Front leader Marine Le Pen.<sup>285</sup> This claim can make it harder for national courts to prove the anti-democratic motives of these politicians even though they subtly undermine the values of liberal democracy by attacking opposition, minorities and immigrants.<sup>286</sup> On the other hand, the vagueness of what constitutes a threat to democracy also leaves the concept open to abuse by states in the name of democratic self-preservation. This could make the concept counterproductive and lead to violation of fundamental human rights principles.<sup>287</sup>

Svetlana Tyulkina who studied the legal theory of militant democracy supports leaving the meaning and scope of militant democracy open to judicial interpretation. She argues that constructing a concrete definition of militant democracy would actually limit the effectiveness of the concept.<sup>288</sup> This is because each country has its own peculiarities and threats to democracy evolve continuously. Tyulkina argues that states should be able to provide various justifications and reasons for introducing militant democracy measures, however these measures should be subject to caveats and reservations and their application should be justified with ‘convincing and compelling’ reasons under the supervision of IHRL institutions.<sup>289</sup> She recommends a reliable and independent judicial review process as the answer to effective and cautious interpretation of the concept.<sup>290</sup> The ECtHR also emphasises the importance of providing ‘convincing and compelling’ reasons in party ban cases. The Court found several European states guilty of violating freedom of association for not satisfying the Court to hold that dissolved parties posed a threat to democracy.<sup>291</sup> These judgments have the potential to deter states from abusing militant democracy measures and can be helpful in establishing a more coherent theory of the concept of militant democracy.

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<sup>284</sup> Tom Ginsburg and Aziz Huq, ‘Democratic Erosion and Militant Democracy’ *Blog of the International Journal of Constitutional Law* (18 October 2018) <http://www.iconnectblog.com/2018/10/democratic-erosion-and-militant-democracy/>

<sup>285</sup> Rijpkema (2018) *supra* n.6 p.92

<sup>286</sup> Ginsburg and Huq (2018) *supra* n.284

<sup>287</sup> Rijpkema (2018) *supra* n.6 p.92

<sup>288</sup> Tyulkina (2015) *supra* n.1 p.35

<sup>289</sup> *Ibid* pp.206-208

<sup>290</sup> *Ibid* p.212

<sup>291</sup> See ECtHR Judgments in *Partidul Comunistilor and Ungureanu v. Romania* (App no.46626/99); *OZDEP v. Turkey* (App no.23885/94); *TBKP v. Turkey* (App no.133/1996/752/951); *Republican Party of Russia v. Russia* (App no.12976/07); *Socialist Party and Others v. Turkey* (App no.21237/93); *Linkov v. the Czech Republic* (App no.10504/03); *DTP and Others v. Turkey* (App no.3840/10); *Yazar and Others v. Turkey* (App no.22723/93)

Tyulkina also suggests that the application of militant democracy should be extended to the technique of emotional manipulation. In her view, emotional manipulation can be attributed to all threats to democracy; be it fascists, religious fundamentalists or terrorists.<sup>292</sup> This technique is used to exploit people's emotions in order to change the course of rational democratic decision-making process and can be fatal for democracy.<sup>293</sup> This technique is now being used by populists in order to mobilise support by exploiting the national sentiments of people. Addressing the economic and social conditions that leave voters vulnerable to emotional manipulation can be helpful in preventing any further rise of right-wing populism.<sup>294</sup> However, as Lowenstein argued, if democracy remains too tolerant, anti-democrats can always find reasons for emotional manipulation for political gains, be it economic inequalities, religion, immigration, class difference or terrorism.<sup>295</sup> Therefore, having legal defence mechanisms in place and ensuring effective, independent and timely judicial intervention would be the best way forward in order to underline what is politically acceptable, determine the constitutional boundaries of tolerance and protect the future of democracy and human rights.<sup>296</sup> Hence, both national and international law should be clearer on their stance on emotional manipulation and set boundaries to subvert such activities.<sup>297</sup>

Another obstacle in the way of confronting right-wing populism with militant democracy measures is the problem of identifying the right moment for judicial intervention. If the intervention is too early, it can be portrayed as being a political, disproportionate and undemocratic decision. If the intervention is too late and the party has gained in popularity, on the other hand, the effectiveness of militant democracy measures would be severely hampered.<sup>298</sup> A coherent militant democracy should address the issue of timing. Democratic responsibility calls for finding the right balance between moderate and cautious use of militant democracy measures and ensuring that the future of democracy is not undermined.<sup>299</sup> In 2009, the ECtHR shed some light on the issue of timing in the case of *Herri Batasuna and Batasuna v. Spain*. The case concerned the decision of Spain's Supreme Court to ban political parties Herri

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<sup>292</sup> Tyulkina (2015) *supra* n.1 p.217

<sup>293</sup> Rijpkema (2018) *supra* n.6 p.27

<sup>294</sup> Capoccia (2013) *supra* n.5 p.208

<sup>295</sup> Rijpkema (2018) *supra* n.6 p.26

<sup>296</sup> *Ibid* pp.100-101

<sup>297</sup> *Ibid* p.90

<sup>298</sup> *Ibid* p.109

<sup>299</sup> *Ibid* p.112

Batasuna and Batasuna for supporting terrorist organisation ETA. In its judgment, the ECtHR firstly reiterated the importance of pluralism and freedom of expression in democracy.<sup>300</sup> However, the Court ruled that if a political party promotes a change in the law or the legal and constitutional structures of the State which is incompatible with fundamental democratic principles, restrictions to freedom of expression and association can be justified.<sup>301</sup> The Court argued that States “cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy...The Court accepts that where the presence of such a danger has been established by national courts, after detailed scrutiny subjected to rigorous European supervision, a State may reasonably forestall execution of such a policy which is incompatible with the Convention’s provisions that might prejudice civil peace and the country’s democratic regime.”<sup>302</sup> The Court ruled that the actions of these parties indicated ‘explicit support’ for violence and terror which goes against ‘organised existence of a democratic state’. Hence, the Court found no violation of Article 10 and 11 of the Convention and upheld Spain’s decision to ban these parties.<sup>303</sup> Although, the ECtHR has provided some guidance on this issue, identifying the right time for intervention remains a difficult task for the national courts as the decision will almost always be considered a political one.<sup>304</sup>

Interpreting what constitutes a threat to democracy and identifying the right moment for judicial intervention appear to be the two major challenges to the application of militant democracy measures. Ultimately, states have the main responsibility to overcome these challenges and confront right-wing populism and maintain democratic order within their borders. However, international law can also provide an extra layer of protection by establishing a more coherent theory of militant democracy and holding states responsible to implement effective militant democracy measures and have independent judicial review processes in place at a domestic level.<sup>305</sup> International organisations can establish common standards for militant democracy measures in order to maintain respect for democracy and human rights, but also to prevent the misuse of the concept of militant democracy. The ECtHR already provides some guidance on the application of militant democracy measures. It affords states with limited

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<sup>300</sup> *Herri Batasuna and Batasuna v. Spain* App no. 25803/04 and 25817/04 (ECHR, 06 November 2009) para.76

<sup>301</sup> *Ibid* para.79

<sup>302</sup> *Ibid* para.81

<sup>303</sup> *Ibid*

<sup>304</sup> Rijkema (2018) *supra* n.6 p.112

<sup>305</sup> Ellian and Rijkema (2018) *supra* n.76 pp.79-94

'margin of appreciation' in determining what constitutes a threat to democracy and identifying the right moment for intervention. However, this interpretation goes hand in hand with the supervision of the ECtHR to ensure that right restrictions and party bans are justified with 'convincing and compelling' reasons.<sup>306</sup> Furthermore, the Venice Commission of the Council of Europe adopted *Guidelines on prohibition and dissolution of political parties* in January 2000 to establish common principles on party bans amongst member states.<sup>307</sup> States can benefit from having further guidance from regional and international organisations on how to confront right-wing populism and subvert the technique of emotional manipulation.

Today, protecting liberal values of democracy and fundamental human rights has become one of the main characteristics of international law. IHRL has developed as a whole new branch of international law and has been promoting respect for human rights and democracy around the world.<sup>308</sup> As a result, confronting right-wing populism is no longer only a matter for individual states, but is also a concern at an international level. The rise of right-wing populism around the world weakens the support for IHRL institutions and threatens their future. This is because, states are the main actors in the creation and development of international law. If increasing number of states end up with populist governments, the priorities of international law could change as well, resulting in weakening international support for democracy and human rights.<sup>309</sup> Confronting right-wing populism would ensure that states refrain from undermining IHRL institutions and instead co-operate with them in the promotion of liberal values and fundamental human rights. As a result, international law would also benefit from holding states responsible for having effective militant democracy measures in place.<sup>310</sup>

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<sup>306</sup> Ellian and Rijkema (2018) *supra* n.76 p.84

<sup>307</sup> Venice Commission, *Guidelines on prohibition and dissolution of political parties and analogues measures* (10 January 2000) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e)

<sup>308</sup> Ellian and Rijkema (2018) *supra* n.76 p.80

<sup>309</sup> Helfer (2018) *supra* n.17 p.4

<sup>310</sup> Tyulkina (2015) *supra* n.1 p.52

## CONCLUSION

The concept of militant democracy could be seen as somewhat paradoxical insofar as it uses the restriction of democratic freedoms and human rights of those who are opposed to those very freedoms and rights. Indeed, the concept reflects the views put forward by Karl Popper that for a liberal democracy to function well and promote human rights it must “claim, in the name of tolerance, the right not to tolerate the intolerant”.<sup>311</sup> In today’s fractious, divided world the concept of militant democracy is more important than ever as it provides a safeguard for the future of democracy and human rights against potential threats. This paper has demonstrated that right-wing populism has emerged as the single greatest threat to liberal democracy and human rights in the last two decades. Although, right-wing populists pretend to be on the side of democracy by defending popular sovereignty and the principle of majority, they are sceptical about the limitations that liberal democracy imposes on governments because they claim that these limitations prevent the majority from achieving their will.<sup>312</sup> This paper has shown that support for right-wing populism has been steadily on the rise in Europe and the USA as populists continue to exploit national sentiments amongst people with the politics of emotional manipulation. This trend reached new heights with Trump’s presidency in the USA and the victory for the Brexit campaign in the UK and this has brought a new sense of urgency for exploring ways to confront the rise of right-wing populism. Populists are now openly attacking liberal values and undermining human rights through the politics of hate, a promotion of division, fear and scapegoating. This trend worries many scholars for threatening the future of liberal democracy and, in turn, the future of international human rights law given that respect for liberal values has long facilitated the work of IHRL institutions.<sup>313</sup>

This paper proposes the use of militant democracy measures as a potential tool for confronting right-wing populism, hence protecting the future of international human rights law. It has been demonstrated that applying militant democracy measures to right-wing populism can be justified under the notion of ‘substantive democracy’ and international human rights law. However, the lack of a coherent legal theory on the concept of militant democracy makes determining what constitutes a threat to democracy

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<sup>311</sup> Karl Popper, *The Open Society and Its Enemies* (Princeton University Press 1950) p.546

<sup>312</sup> Galston (2018) *supra* n.13 p.11

<sup>313</sup> Alston (2017) *supra* n.180 p.1

and identifying the right moment for judicial interpretation a challenging task and leaves the concept open to abuse.<sup>314</sup> Despite these shortcomings, the lack of realistic alternatives and the significance of the values at stake makes militant democracy an important tool as it can highlight the constitutional boundaries of democratic tolerance and act as a deterrent for the enemies of democracy and human rights.

In order to address the shortcomings of militant democracy, this paper proposes that militant democracy measures should be subject to caveats and reservations and their application should be justified with 'convincing and compelling' reasons under the supervision of IHRL institutions. International law can provide an extra layer of security by establishing common standards for militant democracy measures in order to promote respect for democracy and human rights, but also to prevent the misuse of the concept of militant democracy.<sup>315</sup> Democratic responsibility calls for finding the right balance between moderate and cautious use of militant democracy measures and ensuring that the future of democracy and human rights is not undermined. This paper also recommends that the application of militant democracy measures should be extended to the politics of emotional manipulation as this technique is being used by populists and other extremists to gain popularity by exploiting people's fear and altering the course of rational decision-making process. Confronting right-wing populism would ensure that states refrain from undermining IHRL institutions and instead co-operate with them in the promotion of liberal values and fundamental human rights. Therefore, states owe it to the international community to ensure that democracy and human rights are safeguarded for future generations. One must be cautious to not to be fooled by the democratic language used by populist leaders and recall the lessons learnt from the fascist era; an era where the same democratic rhetoric prepared the downfall of many democracies in Europe. The threat comes once again from within the democratic world and this time it must not be underestimated.

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<sup>314</sup> Tyulkina (2015) *supra* n.1 p.211

<sup>315</sup> Ellian and Rijpkema (2018) *supra* n.76 pp.79-94

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