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**The proscription of parties and the problem with ‘militant
democracy’**

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Abstract

In 2003, Spain banned the political party *Herri Batasuna* and its successors *Euskal Herriarrok* and *Batasuna* for integration in the Basque separatist terrorist group *Euskadi Ta Askatasuna*. Since then, eleven other parties or electoral groupings deemed successors to the illegal parties have also been banned. The party bans in Spain highlight weaknesses in leading theoretical accounts of proscription and democratic responses to extremism, weaknesses that are symptomatic of broader problems with the paradigmatic concept of ‘militant democracy’. More specifically, closer examination of the Spanish case illustrates an error of classification in Fox and Nolte’s (2000) distinction between ‘tolerant’ and ‘intolerant’ democracies, but also suggests a strategy for responding to a more fundamental problem of internal inconsistency in their model.

I Introduction: The Problem with Militant Democracy

‘Militant democracy’ is a paradigmatic concept in the study of democratic responses to political extremism. Its origins are usually traced to Karl Loewenstein’s appeal for robust responses to the rise of fascism in 1930s Europe.¹ Loewenstein thought ‘fundamentalist’ commitments to democratic principles could be ‘suicidal’ because ‘under cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally’.² Only timely implementation of anti-fascist legislation – including bans on party paramilitary organisations and political uniforms, prosecution of incitement to violence or hatred and the proscription of subversive movements or parties- could provide democracies with effective defence against such techniques.³ In the post-war period, justifications and techniques of militant democracy have become widely used, with Germany the best known example of a so-called militant democracy.⁴ The German Basic Law explicitly bans parties that

¹ K. Loewenstein, ‘Militant Democracy and Fundamental Rights I,’ (1995) 31 *The American Political Science Review* 417.

² *Ibid*, 423-4.

³ *Ibid*, 429

⁴ G. Brunner, ‘The Treatment of Anti-constitutional Parties in Eastern Europe’, in

seek to damage or destroy the ‘free democratic basic order’ and Federal Constitutional Court rulings have clarified that political parties must positively adhere to democratic values.⁵ Subsequently, the European Court of Human Rights developed a robust doctrine of militant democracy.⁶

One widely recognised problem with militant democracy is that it requires difficult choices about whether or not to ‘tolerate the intolerant’.⁷ On the one hand, militant democracy is a response to what Popper called the ‘paradox of tolerance’, whereby ‘unlimited tolerance must lead to the disappearance of tolerance’.⁸ On the other, an overzealous application of the instruments of militant democracy, which potentially affect a wide range of political and civil rights, may diminish the quality of democracy in practice. In this article, however, I focus on a different problem with militant democracy: its limited utility as a concept for conceptualising variation in democratic responses to extremism.

In recent years, many scholars have criticised the concept of ‘militant democracy’ for being too vague, too imprecise or too narrowly focused on legal instruments.⁹ Some have preferred to reconceptualise democratic militancy as a matter of degree – a democracy may therefore be either *more* or *less* militant.¹⁰ Others have sought to develop more elaborate or comprehensive classificatory schemes and replace the rubric of militant democracy with a new vocabulary of ‘defending’¹¹ or ‘intolerant’¹²

F. Feldbrugge and W. Simons (eds), *Human Rights in Russia and Eastern Europe* (Kluwer, 2000) at 15; G. Fox and G. Nolte, ‘Intolerant Democracies’, in G. Fox and B Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000) at 389; M. Thiel *The Militant Democracy Principle in Modern Democracies* (Ashgate, 2009).

⁵ O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961).

⁶ P. Harvey, ‘Militant Democracy and the European Convention on Human Rights’ (2004), 29 *European Law Review* 407; P. Macklem, *Guarding the Perimeter: militant democracy and Religious Freedom in Europe* (2010) Available at SSRN: <http://ssrn.com/abstract=1660649>.

⁷ J. Rawls, *A Theory of Justice* (Oxford University Press, 1971), 216-221.

⁸ K. Popper, *The Open Society and its Enemies* (Routledge, 1966) at 265.

⁹ C. Mudde ‘Defending democracy and the extreme right,’ in R. Eatwell and C. Mudde (eds.) *Western Democracies and the Extreme Right Challenge* (Routledge, 2004) at 197; A. Pedahzur, ‘The defending democracy and the extreme right: A Comparative Analysis’, in R. Eatwell and C. Mudde (eds.), *Western Democracies and the New Extreme Right Challenge* (Routledge: London, 2004) at 109-10; Thiel *op cit.* n. 4 *supra* at 384.

¹⁰ O. Pfersmann, ‘Shaping militant democracy: Legal Limits to Democratic Stability’, in A. Sajó (ed), *Militant Democracy* (Eleven International Publishing, 2004), 53.

¹¹ Pedahzur *op cit.* n. 9 *supra*; Giovanni Capoccia, ‘Repression, Incorporation, Lustration, Education: How Democracies React To Their Enemies: Towards a Theoretical Framework for Comparative

democracies. For those that continue to use the terminology of militant democracy, its meaning has tended to expand from a narrow focus on fascist and communist parties using democratic entitlements to gain control of the state,¹³ into shorthand for a much wider range of measures employed against all kinds of extremist threats.¹⁴

While this body of work provides many useful insights, the ‘reworked’ concept of militant democracy is problematic. In essence, it has become the victim of ‘concept stretching’.¹⁵ Indeed, some argue that there is no discernable alternative to militant democracy because ‘it is barely conceivable that a country does not have (or never has) taken legally defensive measures to fight... against political extremists or terrorist threats’.¹⁶ In other words, if all democracies are in some sense militant democracies, we cannot be certain what a non-militant democracy is. And yet understanding variation in state responses to extremism provides valuable insights into how democratic states might juggle competing commitments to tolerate reasonable political dissent, while guaranteeing their physical security and providing suitable conditions for all citizens’ enjoyment of liberties.

In this article, I review two widely-known classificatory schemes which try to overcome this problem of definitional vagueness, namely Ami Pedazhur’s (2004) conceptualisation of ‘defending democracies’ and Fox and Nolte’s (2000) typology of ‘tolerant’ and ‘intolerant democracies’. I do so in order to identify more robust ways of conceptualising variation in democratic responses to extremism and more specifically, proscription of extremist political parties. Particular attention to the problem of party bans is apposite given that proscription is widely recognised as a particularly grave measure –the prestigious European Commission for Democracy

Analysis of Defence of Democracy”, Paper presented to ECPR Joint Sessions of Workshop, Grenoble, 6-11, April 2001.

¹² Fox and Nolte *op cit* n. 4 *supra*.

¹³ eg, Loewenstein *op cit* n. 1 *supra*; D. Kommers, *Judicial Politics in West Germany* (Sage, 1976) at 238.

¹⁴ eg. A. Sajó (ed.), *Militant Democracy* (Eleven International Publishing, 2004); Thiel *op cit* n. 4 *supra*; Macklem *op cit* n. 6 *supra*.

¹⁵ G. Sartori, ‘Concept Misformation in Comparative Politics’ (1970), 64 *The American Political Science Review* 1033.

¹⁶ Thiel *op cit* n. 4 *supra* at 384; see also C. Vidal, ‘Spain’, in M. Thiel (ed), *The ‘militant democracy’ principle in modern democracies* (Ashgate, 2009) at 260.

Through Law, for instance, recommended has be used as a measure of last resort ¹⁷ – and because proscription profoundly affects fundamental liberties of association and expression, political representation and the conduct of democratic competition. A case study of party bans in Spain, which from 2003 proscribed a succession of radical Basque nationalist parties and electoral groupings for integration in the terrorist group *Euskadi Ta Askatasuna* (ETA, Basque Homeland and Freedom), illustrates problems with these approaches in their existing forms, but also provides the substance for an amended framework. I begin with an analysis of Pedazhur, Fox and Nolte’s work.

II Defending, militant and immunized democracies

Pedahzur’s analysis of ‘defending democracies’ identifies two ideal type responses to political extremism.¹⁸ On the one hand, a less-belligerent, ‘immunized’, approach will deal with subversive acts against the government or state in a more comprehensive and liberal manner.¹⁹ It will focus on treating both causes and symptoms of extremism, provide opportunities for civil society initiatives against extremism and will try to inculcate democratic values through programmes of civic education. State responses will be within normal legal and constitutional limits and renounce extensive use of measures like restrictions on freedom of movement or infiltration of extremist groups.

In contrast, a ‘militant’ route focuses on the symptoms of extremism, such as incitement and violence, and employs measures which may undermine democratic standards, such as illegal police monitoring or party bans which circumvent standard legal and judicial processes. Such a response will make frequently use special police and security services and continually expand the legal framework to confront extremists. It will show little interest in treating causes of extremism though

¹⁷ The European Commission for Democracy through Law, also known as the Venice Commission, is the Council of Europe’s advisory body on constitutional matters. *Guidelines on the Proscription and Dissolution of Political Parties and Analogous Measures* drawn up in 1999 by Venice Commission caution that proscription is ‘a particularly far-reaching measure should be used with utmost restraint’ and urges government to consider using ‘less radical measures could prevent the said danger’.

¹⁸ While Pedahzur *op cit* n. 9 *supra* develops this framework primarily with reference to right wing extremists, it can easily be applied to other types of political extremism.

¹⁹ *Ibid*, 115-116.

promoting democratic socialisation through the education system or promote civil society initiatives.

At first glance, it appears logical to assume that states adopting more militant responses are more likely to ban a political party than one adopting an immunized response. However, more detailed case study analysis demonstrates that this is not so: Pedazhur argues that ban proceedings in both Germany and Israel were conducted in accordance with strong commitments to liberal values, and for this reason, were characteristic of an immunized response to extremism.²⁰ In short, Pedazur's conceptualisation of 'defending democracies' does not help conceptualise variation in state practices relating to party bans. Fox and Nolte's typology of 'tolerant' and 'intolerant' democracies does better in this regard.

III Tolerant and Intolerant Democracies

Fox and Nolte develop a two dimensional typology of democratic responses to extremism.²¹ On the one hand, they distinguish between contrasting 'procedural' and 'substantive' conceptions of democracy. On the other, they distinguishes between states which actively (or militantly) employ measures against such actors and those which do not (passive or tolerant), even when their legal system may permit them to do so.

A 'procedural model' draws on Schumpeter's conception of democracy as an institutional arrangement for choosing leaders and determining the political preferences of majorities.²² The views of all citizens are given equal consideration and the primacy of majority rule as a basis for legitimacy limits state authority to select among competing views. An individual's capacity for reason, a continual process of self-examination and knowledge of alternatives strengthen public commitment to democracy, but cannot ensure it will always prevail. Tolerance is a transcendent norm. This 'rough approximation of actual state practice'²³ takes more concrete form

²⁰ *Ibid*, 119-120.

²¹ Fox and Nolte *op cit* n. 4 *supra*.

²² J. Schumpeter, *Capitalism, Socialism and Democracy* (Allen and Unwin, 1947).

²³ Fox and Nolte *op cit* n. 4 *supra* at 406.

in specific constitutional features, including the absence of substantive limits on Acts of Parliament, or the absence of restrictions on the scope of constitutional change.²⁴

In a ‘substantive democracy’, by contrast, democratic procedure is conceived as a means for creating a society where citizens enjoy core rights and liberties. It draws on Mill, Rawls and others in its insistence that rights cannot be used to abolish other rights, and that a democracy need not tolerate the intolerant when its core values are at stake. An unalterable democratic core deserves special protection against possible incursions. The most important characteristic of a substantive democracy’s legal system are specific prohibitions on amendment of core constitutional commitments to democracy (or other core principles such as territorial integrity or secularism).

When combined with the above-mentioned distinctions between active-militant and passive-tolerant state practices, four categories emerge as summarized in Figure 1.

Figure 1: Fox and Notle’s Model of ‘Tolerant’ and ‘Intolerant democracies’

	Procedural democracy	Substantive democracy
Passive-tolerant	Tolerant procedural democracy <i>Britain, Botswana, Japan</i>	Tolerant substantive democracy <i>France, Canada, India</i>
Active-militant	Militant Procedural democracy <i>United States (1940s, 1950s)</i>	Militant substantive democracy <i>Germany, Israel, Costa Rica</i>

A *tolerant procedural* democracy, like Britain, Botswana and Japan, will possess one or more of the following characteristics:²⁵

- No substantive limitations on Acts of Parliament; or
- No restrictions on the scope of constitutional amendments; or
- Most constitutional scholars will consider proscription of parties unconstitutional due, for instance, to the absence of specific constitutional authorization to ban parties and or free association guarantees.

²⁴ Ibid 406-8.

²⁵ Ibid, 406-8.

It will be ‘passive’ or ‘restrained’ in the application of measures against extremist parties.²⁶ A tolerant procedural democracy may not invoke relevant constitutional provisions, or if it does, will employ them against a narrow range of extremists such as those employing violence.

A *militant procedural* democracy enacts ‘qualitatively more restrictive anti-subversion legislation’ than other procedural democracies.²⁷ For instance, the United States - whose constitution does not preclude the possibility of amendments abolishing the republican form of government – adopted legislation in the 1940s and 1950s criminalizing members of groups wanting to overthrow government by force (Smith Act, 1940), requiring registration of parties designated subversive (Internal Security Act, 1950) and denying the Communist Party of the United States of America and its successors all rights and privileges under state and federal law (Communist Control Act, 1954).²⁸

Tolerant substantive democracies possess one or more of the following features:

- specific prohibitions on amending core constitutional commitments to democracy or fundamental constitutional principles (such as territorial integrity or secularism); or ²⁹
- a constitutional duty for political parties to respect the principles of democracy; or ³⁰
- constitutional provisions explicitly permitting restrictions on core rights of association when necessary to protect fundamental democratic principles.³¹

However, a *tolerant substantive* democracy will not invoke existing rules against extremist parties or will, as in the case of France, apply them against small groups on the political fringe rather than against major political parties.³²

A *militant substantive* democracy will apply legal rules permitting proscription of parties more often and justify proscription on a wider range of grounds than other

²⁶ *Ibid*, 407.

²⁷ *Ibid*, 409.

²⁸ *Ibid*.

²⁹ *Ibid*, 417.

³⁰ *Ibid*, 412

³¹ *Ibid*, 413.

³² *Ibid*, 412.

substantive democracies. In the 1950s, for instance, West Germany proscribed the Socialist Reich Party and the Communist Party of Germany for wanting to overthrow the ‘free democratic basic order’ despite the absence of concrete undertakings to that end or evidence of actual or imminent danger to the democratic system.³³

One problem with Fox and Nolte’s typology is generates inconsistent expectations about outcomes. While the very definition of a procedural democracy – characterized by a commitment to ‘open debate and electoral competition among all ideological factions’³⁴ - generates the expectation that procedural democracies are less likely to ban political parties, an orientation of active-militancy acknowledges the empirical reality that procedural democracies do in fact ban parties. This problem is particularly apparent in Fox and Nolte’s category of *militant procedural* democracy (Figure 1).

Another problem is what Sartori calls mislabelling.³⁵ Fox and Nolte’s use of the term ‘tolerant’ as a synonym for a passive orientation to proscription is not consistent with common sense or philosophical notions of tolerance, especially when ‘tolerance’ is attributed to a country like France which ‘frequently’ banned small groups and parties.³⁶ By most definitions, tolerance involves ‘putting up with what you oppose’ when another person’s life choices or actions may shock, enrage, frighten or disgust us.³⁷

Furthermore, Vidal argues that conceptions of procedural and substantive democracy underestimate the extent to which all democracies must guarantee certain procedures (eg. elections and majority decisions) and commit to core values (eg. freedom, justice, equality) to qualify as a democratic.³⁸ While this is undoubtedly the case, it does not rule out the utility of relating these theoretical concepts to empirically observable variation in legal-constitutional responses to the problem of extremism. Thiel accepts the utility of distinctions between procedural and substantive democracy, but challenges the validity of distinctions between tolerant-inactive and militant-active responses, arguing that all democracy employ measures of some kind against political

³³ *Ibid*, 416

³⁴ Fox and Nolte *op cit* n. 4 *supra* at 389. Thiel *op cit* n. 4 *supra* at 389 makes a similar point.

³⁵ Giovanni Sartori, ‘Comparing and Miscomparing’, (1991) 3 *Journal of Theoretical Politics* 247.

³⁶ *Ibid*, 412.

³⁷ Catriona McKinnon, *Toleration* (Routledge, 2006) at 4.

³⁸ Vidal *op cit* n. 16 *supra* at 245.

extremists.³⁹ This point has already been addressed in this article's introduction: If militancy is defined widely to include all measures employed against extremists, be it limits on public service appointments, public dress codes, rules against incitement or counterterrorism policy, then this point is reasonable. It is less so if the distinction is used to gauge the much simpler matter of whether or not a democracy bans a political party. The proscription of political parties may be defined as the dissolution and complete exclusion of a political party from elections, government office and the public sphere; denial of formal registration as a political party; or withdrawing a party's fundamental political rights and privileges without total exclusion from the public sphere.

One final critique identifies discrepancies in the classification of particular countries into different categories.⁴⁰ Spain is one such instance of misclassification.⁴¹ On closer inspection, it becomes clear that since the proscription of radical Basque nationalist parties in 2003, Spain is an instance of Fox and Nolte's problematic *militant procedural* category. Consequently, a more detailed discussion of the Spanish case is likely to provide valuable insights on the nature of problems with Fox and Nolte's model and how they might be resolved.

IV Basque terrorism and the ban on *Batasuna et al.*

Euskadi Ta Askatasuna (ETA, Basque Homeland and Freedom) was founded in 1959 during – and as a response to the repression of – the dictatorship of General Francisco Franco. It was formed by a small group of Basque youths dissatisfied with the civil war generation of Basque nationalists and the dominant *Partido Nacionalista Vasco* (Basque Nationalist Party, PNV). The group sought to establish an independent socialist state, encompassing Basque provinces in Spain and France, in order to protect and promote Basque culture and language.⁴² Following Franco's death in 1975 and the subsequent transition to democracy, the largest faction in ETA – *ETA militar* – still considered the Basque Country an occupied territory of Spain and France and

³⁹ Thiel *op cit* n.4 *supra* at 389.

⁴⁰ *Ibid*, 288-305

⁴¹ Vidal *op cit* n. 16 *supra*.

⁴² G. Jáuregui, 'ETA: Orígenes y evolución ideológica y política', in A. Elorza, J. M. Garmendia, G. Jáuregui, F. Domínguez (eds), *La Historia de ETA* (Temas de Hoy, 2002); D. Muro 'Nationalism and nostalgia: the case of radical Basque nationalism', (2005) 11 *Nations and Nationalism* 571.

considered armed struggle necessary for national liberation. ETA rejected Spain's 1978 democratic constitution, which did not recognise a right to Basque self-determination. The 1979 Basque Autonomy Statute devolving powers to new Basque institutions was seen as an obstacle to the achievement of independence. In contrast, democratisation and autonomy lure the faction known as ETA *político militar* from violence.

During an intense period of political agitation and repression in the Basque Country, ETA mounted a massive campaign of terror against the reform process.⁴³ In the transition years 1978-9 ETA assassinated 142 people, and in 1980, ETA was responsible for 92 deaths. Since the first confirmed ETA killing in 1968, ETA has been responsible for the deaths of 829 people, while injuring, kidnapping and extorting thousands of others. ETA declared ceasefires of varying duration on ten occasions between 1981 and 2010 which mostly coincided with efforts to initiate or conduct negotiations with the central government. None of these have yet produced an agreement whereby ETA has agreed to permanently abandon violence.

In 1975, key organizations of the radical Basque nationalist left formed *Koordinadora Abertzale Sozialista* (KAS, Patriotic Socialist Coordinator).⁴⁴ Alongside ETA itself, KAS members included what was initially the main political party *Herriko Alderdi Sozialista Iraultzailea* (HASI), the trade union, *Langile Abertzaleen Batzordeak* (LAB), the youth organization *Jarraia*, and the prisoners' lobby *Gestoras Pro Amnistía*. KAS was to direct activities of participating groups, *Herri Batasuna* (HB), and the whole social tapestry of associations supporting ETA, known as the *Euskal Herri Askapenerako Mugimendua* (Basque National Liberation Movement, EHAM) or more generally, the *izquierda abertzale* (radical nationalist left).⁴⁵

HB was formed in 1978, by a coalition of radical Basque nationalist parties, including HASI. *Euskal Herritarrok* (EH) emerged in 1998 as an electoral coalition, dominated by HB. It was refounded as *Batasuna* in 2001. When permitted to contest elections,

⁴³ F. Domínguez, 'El Enfrentamiento de ETA con la Democracia', in A. Elorza (ed), *La Historia de ETA* (Temas de Hoy, 2006), 273-372.

⁴⁴ F. Llera, 'Ejército Secreto y movimiento social', (1992) 78 *Revista de Estudios Políticos*, 161-193; J. M. Mata, *El nacionalismo vasco radical* (Universidad del País Vasco, 1993), 95-131.

⁴⁵ Domínguez *op cit* n. 43 *supra* at 274; Llera *op cit* n. 44 *supra*, 183-6.

HB and its various successors obtained ample representation in Basque political institutions. In Basque parliament elections, for instance, the party won an average of 15.47 per cent of the vote and between seven and 14 seats. When it took part in Spanish general elections (between 1979 and 1996), HB won an average of 203,315 votes and three seats, with its best performance in 1986 when it won 231,722 votes and five parliamentary seats.

The decision to ban *Batasuna* after twenty years of direct participation in electoral processes was a high profile and polemical decision in Spain. It coincided with deepening political polarization in Basque politics. In an effort to ‘socialise the pain’ of nationalist struggle, create social tensions and force Basque citizens to openly take sides, ETA and its supporters unleashed a wave of violence on the streets of the Basque Country and widened the targets of terrorist attacks beyond police and security service personnel to journalists, civil servants, judges, academics and politicians from the main political parties.⁴⁶ The brutal kidnapping and assassination of Popular Party councilor Miguel Ángel Blanco mobilized millions of citizens in the Basque Country and beyond against ETA, bolstered a Basque peace movement and prompted closer cooperation between mainstream parties on security policy.⁴⁷ With the support of opposition Socialists, the Popular Party government of José María Aznar took a tougher line on ETA and its supporters, matched by a judicial campaign, spearheaded by Judge Baltazar Garzón of the *Audiencia Nacional*, to criminalise and dismantle ETA’s support networks. A short-lived Basque ‘nationalist front’, involving both radicals and moderates and formalised in the 1998 Lizarra Pact, produced a temporary ETA ceasefire but deepened tensions with the so-called ‘constitutionalists’, who sought to maintaining the constitutional status quo against the Basque nationalists’ independence agenda.

Article 6 of the 1978 Spanish Constitution defines political parties as ‘the expression of political pluralism’, responsible for ‘the formation and expression of the will of the people’ and ‘an essential instrument for political participation’. The Constitution does not explicitly permit proscription of parties. However, article 6 requires that, while parties can be freely created, parties must ‘respect the Constitution and the law’ and

⁴⁶ D. Muro, *Ethnicity and Violence* (Routledge, 2008), 155-7.

⁴⁷ *Ibid*, 165-167.

must be ‘democratic in their internal structure and functioning’. Furthermore, as a specific form of association, political parties are subject to constitutional provisions in article 22.⁴⁸ This article explicitly prohibits secret and paramilitary associations and declares that ‘associations which pursue ends or use means classified as crimes are illegal’. Illicit associations are defined in the Spanish Penal Code as groups involved in organized crime; armed, violent or terrorist groups; and those inciting hatred or violence against others.⁴⁹

Law 54/1978, the first law on political parties in democratic Spain, permitted proscription of parties proven to be ‘illicit associations’ or which were not democratic in their internal structure and functioning.⁵⁰ This law was replaced in June 2002 by the new Organic Law on Political Parties (LOPP) which added an additional justification for proscription; namely, conduct threatening to undermine the liberal democratic system. More specifically, this last justification for proscription, permitted the courts to dissolve parties that ‘violate democratic principles in a repeated and grave form, or aim to undermine or destroy the regime of liberties, or injure or eliminate the democratic system’ (article 9.2) Conduct deemed to violate democratic principles were listed as (LOPP article 9.2 a-c):

- promoting, justifying or excusing of attacks on people’s life or integrity, or exclusion or persecution of people because of their ideology, religion or beliefs, nationality, race, sex or sexual orientation
- Encouraging, promoting or legitimizing violence as a means to achieve political goals, or to destroying conditions necessary for democracy, pluralism and political liberties
- Complementing or supporting politically, the activities of terrorist organizations which aim to subvert the constitutional order, gravely alter public peace, create a climate of fear, or enhance the effects of fear and intimidation generated by terrorist violence

⁴⁸ R. Blanco Valdés, *Los Partidos Políticos* (Tecnos, 1990), 159.

⁴⁹ *Código Penal*, 12^a edición 2008, Editorial COLEX, Madrid, 1238.

⁵⁰ J. A Montilla, ‘Algunos Cambios en la concepción de los partidos. Comentario a la STC 48/2003, Sobre La Ley Orgánica 6/2002, de Partidos Políticos’, (2003-4) 12-13 *Teoría y Realidad Constitucional*, 563.

Political parties must apply to the Interior Ministry for inscription in a register of political parties to obtain relevant legal entitlements. A special chamber of the Supreme Court rules on bans for nondemocratic internal functioning and threatening democratic and liberal values. The Supreme Court is responsible for preventing formation of new parties, or the use of existing ones, which continue the activities of a banned party (LOPP article 12.3). Succession is determined by similarities in structure, organization and functioning with a banned party, as well as the presence of similar people who direct, represent or administer the party and financial and material resources employed. Evidence that a party also supports violence or terrorism is crucial for determining succession.

In the 1980s, the government unsuccessfully sought to deny registration to HB because its party statutes did not require party members to be Spanish nationals or expressly state the party's 'respect' for the constitution.⁵¹ The Supreme Court overturned the decision, arguing, among other things, that parties were not required to explicitly declare respect for the constitution. Soon afterwards, the Supreme Court rejected the government's request to declare HB an illicit association because HB's documentation for registration did not show any signs of criminality.⁵² HB was formally registered as a political party in 1986.

In March 2003, in the first application of the LOPP, the Supreme Court declared HB, EH and *Batasuna* illegal.⁵³ The suit was initiated by the Attorney General and Public Prosecutor, on the initiative of an overwhelming majority of deputies in the Spanish parliament's lower house. The Supreme Court accepted the government's evidence establishing the subordination of HB, EH and *Batasuna* to the strategy and mandates of a terrorist group, ETA.⁵⁴ Evidence of links with ETA included the presence of a significant number of people with terrorist convictions in positions of responsibility in the party, its parliamentary groups and electoral lists.

⁵¹ M. Esparza, *La Ilegalización de Batasuna* (Aranzadi, 2004) at 145.

⁵² *Ibid*, 144-145.

⁵³ Sentence of the Supreme Court, STS de 27 de marzo de 2003.

⁵⁴ E. Virgala, 'La STS de 27 de marzo de 2003 de ilegalización de Batasuna: el Estado de Derecho Penetra en Euskadi', (2003-4) 12-13 *Teoría y Realidad Constitucional* at 614.

The second main thrust of the government's and Public Prosecutor's case was to establish that, since entry into force of the LOPP, *Batasuna* continued to act as a political complement to ETA and thereby violated article 9.2.c of the LOPP prohibiting support for the activity of terrorist organisations, charges which *Batasuna* also denied.⁵⁵ The Supreme Court accepted evidence that *Batasuna* or its leading members had undertaken acts: explicitly or tacitly supporting, excusing or minimising the significance of terrorist actions; of provocation and confrontation to neutralise and isolate those opposing terrorism; using terrorist symbols; collaborating with organisations linked to terrorism; promoting or participating in acts of homage to terrorists.

Since proscription of *Batasuna* in 2003, ETA and its political wing developed a complex strategy to return to electoral politics under a different guise. As Table 1 below indicates, since the proscription of HB, EH and *Batasuna* in 2003: two parties have been denied registration (*Abertzale Sozialisten Batasuna* and *Sortu*); two parties have been declared illegal and dissolved (*Eusko Abertzale Ekintza (EAE)* and *Euskal Herrialdeetako Alderdi Komunista (EHAK)*); and two parties have had their party lists disqualified for particular elections (*EAE* and *Askatasuna*).⁵⁶ Around five hundred lists of candidates presented by electoral groupings⁵⁷ have been disqualified for local, provincial, autonomous community and European Parliament elections (including *Autodeterminaziorako Bilgunea*, *Herritarren Zerrenda*, *Aukera Guztiak*, *Abertzale Sozialistak*, *Demokrazia Hiru Milioi*).⁵⁸ The Supreme Court, and later the Constitutional Court, endorsed most suits calling for the dissolution of parties or disqualification of party or electoral grouping lists, with the notable exception of *Iniziatiba Internazionalista* and *Bildu*.

Table 1: The Proscription of Political Parties in Spain

⁵⁵ *Ibid.*

⁵⁶ A. J. Pérez and X. Ferreiro, 'La ilegalización de D3M y Askatasuna: Problemas Jurídicos-Procesales', (2009) 4 *El Cronista del Estado Social y Democrático de Derecho* 68; J. Tajadura y E. Virgala, 'España', in J. Corcuera, J. Tajadura and E. Virgala (eds), *La Ilegalización de Partidos Políticos en las Democracias Occidentales* (Dykinson, 2008), 17-111.

⁵⁷ An electoral group is a collection of individuals which associate temporarily with the aim of presenting candidates in a specific electoral constituency in a single electoral contest.

⁵⁸ M. Iglesias, *La ilegalización de partidos políticos en el ordenamiento jurídico español* (Comares, 2008); M. Pérez-Moneo, 'Aukera Guztiak y la sucesión de Batasuna: un nuevo episodio en la ilegalización de partidos', (2005) 74 *Revista Española de Derecho Constitucional* 395.

Party	Year of ban	Type of ban procedure	Grounds for ban
<i>Herri Batasuna</i>	1984	Non-registration (overruled)	Formal defects
<i>Herri Batasuna</i>	1986	Non-registration (overruled)	Illicit association
<i>Herri Batasuna, Euskal Herritarrok Batasuna</i>	2003	Parties declared illegal and dissolved.	Complement to and support for a terrorist organisation.
<i>Autodeterminaziorako Bilgunea and others</i>	2003	Disqualification of electoral grouping lists (local elections)	<i>Batasuna</i> successor
<i>Herritarren Zerenda</i>	2004	Disqualification of electoral grouping list (European parliament)	<i>Batasuna</i> successor
<i>Aukera Guztiak</i>	2005	Disqualification of electoral grouping lists (autonomous community elections)	<i>Batasuna</i> successor
<i>Abertzale Sozialisten Batasuna</i>	2007	Party denied registration	<i>Batasuna</i> successor
<i>Eusko Abertzale Ekintza</i>	2007	Disqualification of party lists (local elections)	<i>Batasuna</i> successor
<i>Abertzale Sozialistak</i>	2007	Disqualification of electoral grouping lists (local elections)	<i>Batasuna</i> successor
<i>Eusko Abertzale Ekintza</i>	2008	Party declared illegal and dissolved	<i>Batasuna</i> successor
<i>Euskal Herrialdeetako Alderdi Komunista</i>	2008	Party declared illegal and dissolved	<i>Batasuna</i> successor
<i>Askatasuna</i>	2009	Disqualification of party lists (Autonomous Community elections)	<i>Batasuna</i> successor
<i>Demokrazia Hiru Milioi</i>	2009	Disqualification of electoral grouping lists (Successor to banned party)	<i>Batasuna</i> successor
<i>Iniziatiba Internazionalista - Herrien Elkartasuna</i>	2009	Disqualification of electoral coalition lists (European Parliament) (overruled by Constitutional Court)	<i>Batasuna</i> successor

<i>Sortu</i>	2011	Non-registration (municipal and provincial elections)	<i>Batasuna</i> successor
<i>Bildu</i>	2011	Disqualification of electoral coalition lists (municipal and provincial elections) (overruled by Constitutional Court)	<i>Batasuna</i> successor

V Is Spain a ‘militant substantive’ democracy?

Fox and Nolte don’t discuss the Spanish legal system in any detail, but suggest that Spain ought to be considered a *militant substantive* democracy because its constitution contains ‘clauses prohibiting the reestablishment of the Fascist party’.⁵⁹ However, a closer examination of the Spanish case shows that Fox and Nolte’s judgement was too hasty.⁶⁰ When Fox and Nolte published their article in 2000, no political parties had yet been banned in Spain (see Table 1). If militancy is defined as active implementation, then by this criteria Spain does not meet it. Parties were only banned after enactment of the LOPP in 2002 and proscription of HB, EH and *Batasuna* in 2003.

More importantly, the literal text of article 6 of the Spanish constitution is not widely regarded by Spanish legal scholars as justification for characterising Spain as a substantive democracy. Indeed, the majority of Spanish legal scholars characterize the Spanish constitutional order as an ‘open’ or ‘procedural’ democracy. Four arguments articulated by Jiménez Campo and de Otto Pardo have been particularly influential in establishing this position.⁶¹ Firstly, during parliamentary debates on the draft 1978 Spanish constitution deputies explicitly rejected establishing a ‘substantive model’ of democracy along the lines of the German Basic Law. More importantly, the constitution contains no express provisions authorizing measures against

⁵⁹ Fox and Nolte *op cit* n. 4 *supra*, 418-9.

⁶⁰ Vidal draws the same conclusion, *op cit* n. 16 *supra*.

⁶¹ J. Jiménez, “La Intervención Estatal del Pluralismo”, (1981) 1 *Revista Española de Derecho Constitucional* 161 and I. de Otto, *Defensa de la Constitución y Partidos Políticos* (Centro de Estudios Constitucionales, 1985).

unconstitutional parties. Thirdly, according to the Constitution's article 168, the Constitution itself is open to 'total' revision. It would not, therefore, be logical to prohibit efforts to attain what the constitution ultimately permits, so that parties wanting to change the constitution, including those who wanted to destroy its liberal democratic character, could indeed desire and articulate this preference without violating the constitution. Finally, imposition of limits on political parties would undermine constitutional commitments to equality (article 14), especially among citizens who chose to participate in politics through parties and those who did not. Measures imposing limits on parties – and not imposing parallel limits on public powers – would also contravene article 9.1 requirements for equal subjection to the Constitution and the Law. This ideological liberty, however, did not mean parties were free to act as they choose. Early Constitutional Court rulings established that political parties must pursue their objectives through means permitted by the constitution.⁶²

Parliamentary approval of the LOPP reopened debate on this question. One issue was whether the Constitution permitted proscription of political parties for activities other than those spelt out in the penal code (article 22.X) or a party's undemocratic internal structure and functioning (article 6). Pérez Royo, for instance, argued that these were the only grounds for banning a party and that proscription of parties for conduct threatening to undermine the liberal democratic system, spelt out in article 9.2 of the LOPP (see above), had no constitutional basis.⁶³ In contrast, Blanco Valdés considered the LOPP to be in accordance with earlier jurisprudence of the Constitutional Court permitting dissolution of parties for such activities and the accepted and unchallenged provisions of the previous Law 54/1978 permitting dissolution of parties for activities contrary to democratic principles.⁶⁴ Nor did he think that it contradicted the logical intuition that democratic activity was by its nature activity 'respectful' of the constitution and the law and thus constituted an appropriate application of the Spanish Constitution's article 6.⁶⁵

⁶² de Otto *op cit* n. 61 *supra* at 45.

⁶³ J. Pérez Rojo, 'El Derecho de Batasuna a no condenar', *El País*, 20 August 2002, 9-10.

⁶⁴ R. Blanco Valdés, 'La nueva ley de partidos y la defensa del Estado' in L. López and E. Espín (eds), *La Defensa del Estado* (Tirant lo blanch, 2004)

⁶⁵ *Ibid*, 54.

Forced to address the question in 2003, the Constitutional Court confirmed the view that the Spanish legal order was an open or procedural order and that the LOPP did not transform it into a substantive one. One of the principal justifications for this view – which was based on the distinction between the prohibition of anti-democratic (or anti-system) *ideologies* and anti-democratic (or anti-system) *behaviour* – is of particular interest because, as I argue in the next section, it helps address fundamental problems in Fox and Nolte’s model. The Constitutional Court argued that Spain was not a substantive democracy because only ‘conducts’ were contemplated as grounds for proscription, not a party’s ultimate objectives.⁶⁶ In so doing, the Constitutional Court endorsed the position of legislators written into the Preamble of the LOPP that ‘any project or objective is compatible with the Constitution, so long as it is not defended by an activity which violates democratic principles or fundamental rights of citizens’.

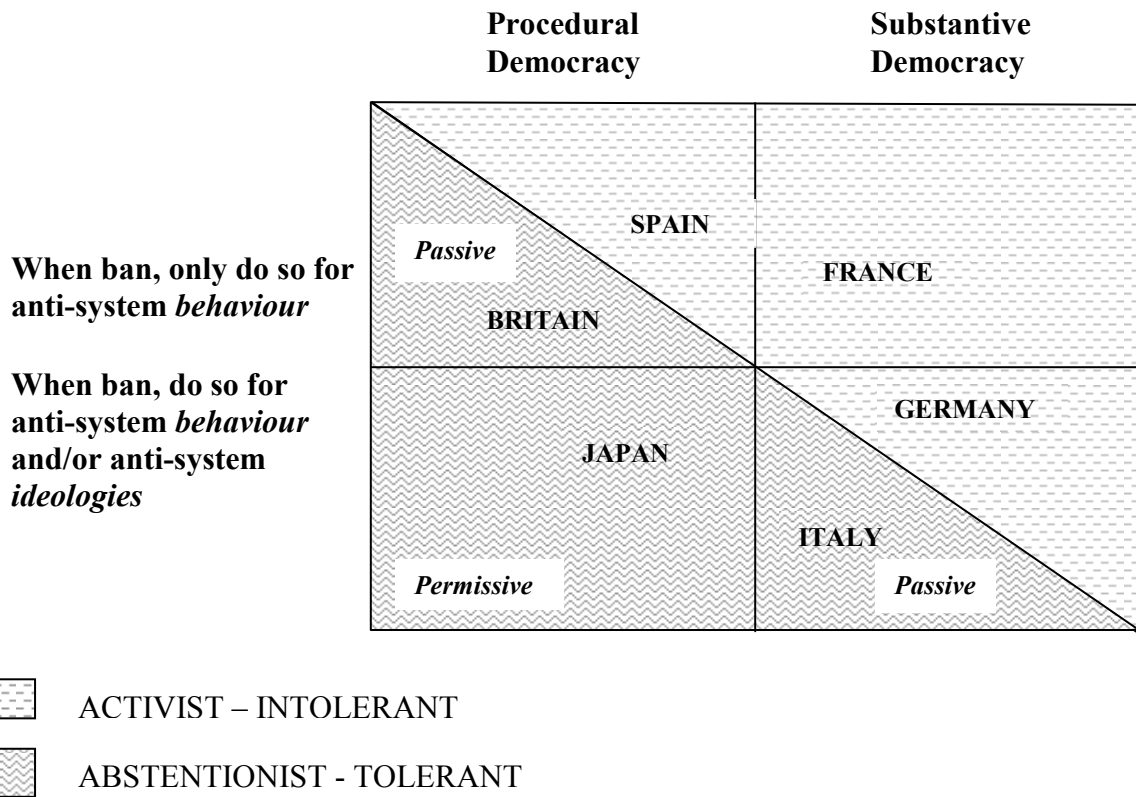
In sum, Spain ought to be regarded as a *tolerant procedural* democracy up to 2003 and as a *militant procedural* democracy since then – not as Fox and Nolte argue a *militant substantive* democracy. However, as I spelt out above, the problem with Fox and Nolte’s model are greater than the misclassification of countries into categories. In what follows, I rework Fox and Nolte’s model by adding an additional dimension to their typology in order to develop more plausible classification of approaches to the proscription of political parties.

VI Classifying party bans: A new typology

My typology presents a three dimensional classification of democratic states’ responses to extremist political parties and more specifically, state practices regarding the proscription of political parties. Figure 2 summarises the model.

⁶⁶ Sentence of the Spanish Constitutional Court 48/2003 of 12 March

Figure 2: Tolerant and Intolerant Democracies: A New Typology



A *Procedural and substantive democracies*

The model retains the categories ‘procedural democracy’ and ‘substantive democracy’ which, following Fox and Nolte, represent both conceptions of democracy that have concrete form in distinctive legal-constitutional arrangements (see table 2). These are mutually exclusive categorisations – a democracy is either a procedural or a substantive democracy, not a mixture of the two - and as such should be conceived as a dichotomous variable.

Table 2: Procedural versus Substantive Democracies

Procedural	Substantive
No substantive limits on Acts of Parliament; or	Specific constitutional prohibitions on amendment of core constitutional commitments to democracy or other fundamental features of constitutional order; or
No restrictions on the scope of constitutional amendment; or	Constitutional duty for political parties to respect the principles of democracy; or
Most constitutional scholars will consider proscription of parties unconstitutional	Constitutional provisions explicitly permitting restrictions on core rights of association when necessary to protect fundamental democratic principles or other core features of the constitutional order

B *‘Anti-system ideology’ and ‘anti-system behaviour’ bans*

The model introduces a new variable which distinguishes between states that may ban a) parties *only* for anti-democratic or anti-system *behaviour* and b) those which may also, or only, ban parties for holding anti-democratic or anti-system *ideologies*. The principal advantage of this addition is that it provides a more nuanced understanding of the conditions under which a procedural democracy, such as Spain, can ban a political party and yet continue to claim that all political programmes, even anti-democratic ones, ought be aired in the course of democratic competition.

Admittedly, the line between what constitutes anti-system ideology and anti-system behaviour may sometimes be rather fuzzy. Symbolic action may deliver clear ideological messages: Public displays of a national flag or use of a banned minority

languages may communicate commitments to self-determination. Attending the funeral, visiting the grave, or displaying an image of a prominent political figure may communicate support for particular political projects. So might refusal to publically condemn acts of political violence or participation in a public commemorative ‘minute of silence’. Nevertheless, it is not unusual for scholars to contrast legislative measures employed against extremist parties according to those that address:

the ‘*Sein* or ‘being’ of a party of group – the ideological character of the party...– and its *Handeln* or ‘acting’ – which mainly regards unconventional, illegal or violent nature of political behaviour and strategies.⁶⁷

Mudde has distinguished an ‘American’ from a ‘German’ model of responses to extremism using similar criteria.⁶⁸ The American model permits ‘all ideas’ in the democratic “marketplace of ideas” whether they are democratic or not’, but does not accept all actions, especially those of violent groups. In contrast the ‘German model’ severely punishes anti-democratic actions *and* ideas opposed to the fundamental principles of the free democratic order. Similarly, Issacharof contrasts action-oriented proscription by states, like Spain, which ‘prohibit parties that are deemed to be fronts for terrorist or paramilitary groups’ with that employed by ‘states that forbid the formation of parties hostile to democracy, as Germany has done in banning any successors... to the Nazi or Communist parties’; and states that ‘impose content restrictions on the views that parties may hold, as with the requirement in Turkey of fidelity to the principles of secular democracy as a condition of eligibility for elected office’ or Israel which, ‘through its Basic Law, excludes from the electoral arena any party that rejects the democratic and Jewish character of the state, as well as any party whose platform is deemed an incitement to racism’.⁶⁹

Despite its fuzzy borders, this variable is also conceived as a dichotomous variable. Some democracies will ban parties exclusively on the grounds of anti-system activities, while others will permit proscription of parties both for holding anti-system ideologies and conducting anti-system behaviour or only their anti-system ideologies. And finally, it is important to be aware that this distinction entails a caveat, ‘when they do ban parties’, democracies will do so for either anti-system behaviour etc....

⁶⁷ Capoccia *op cit* n. 11 *supra* at 13.

⁶⁸ Mudde *op cit* n. 9 *supra* at 196.

⁶⁹ S. Issacharof, ‘Fragile Democracies’, (2007) 120 *Harvard Law Review* 1409.

This caveat helps retain the integrity of a model which explicitly accounts for the fact that either procedural or substantive democracies may choose *not* to ban political parties.

C *'Active', 'passive' and 'permissive' orientations to proscription*

Cross-cutting the vertical and horizontal axis is a third variable which retains Fox and Nolte's distinction between states which actively employ available legal rules to ban extremist political parties on the one hand, and those which have no such rules or have them but do not implement them in practice. In Figure 2, this variable is indicated by contrasting background patterns. However, my model does away with Fox and Nolte's confusing associations between inaction and tolerance, on the one hand, and action and militancy, on the other, by relabeling categories. Thus, my model distinguishes between democracies that *actively* employ the tool of proscription against extremist parties and those that that *abstain* from employing this tool. The second, *abstentionist* category includes two subcategories: democracies that adopt a *permissive* stance by choosing not to adopt or use measures permitting proscription of extremist parties at all; and democracies that remain *passive* in the face of extremist parties, even though equipped with legal instruments for proscription. The inclusion of these two subcategories acknowledges the qualitative difference which enactment of anti-extremist legislation provides; or as Capoccia puts it 'the mere existence of legislation may very well act as a deterrent to extremist actors, thereby restricting the range of strategies available to them for political proselytism'.⁷⁰

This new model has several advantages. It permits elaboration of a more meaningful conception of what constitutes a broadly 'tolerant', and a broadly 'intolerant' response on the matter of banning extremist parties. Thus, a 'tolerant democracy' includes states taking an *abstentionist* stance, including either *passive* or *permissive* orientations, while an 'intolerant democracy' is one taking an *activist* stance by actually banning parties either for anti-democratic actions or ideas. This reformulation does away with the jarring associations integral to Fox and Nolte's categories of 'militant procedural' and 'tolerant substantive' democracy.

⁷⁰ Capoccia *op cit* n. 11 *supra* at 20.

A second advantage of this model is that it permits a more plausible classification of state practices and legal regimes regarding the proscription of political parties. Like Pedahzur's and Fox and Nolte's models, this one also permits both cross-cultural synchronic comparisons and diachronic comparisons within individual states over time. This cannot be the place for detailed elaboration, but it is possible to plot the positions of Spain and a number of other prominent cases in Figure 2 to illustrate the plausibility of the model. Spain can be classified as an activist procedural democracy that bans political parties for anti-system behaviour. Prior to the proscription of HB, EH and *Batasuna* in 2003, Spain could be classed as a passive procedural democracy equipped to ban parties for anti-system behaviour, given that provisions of an earlier Law on Political Parties (Law 54/1978) and the Penal Code permitting proscription of parties were unused.

Germany can be considered a fairly unambiguous case of a substantive democracy, which has actively employed the instruments of militant democracy against political parties for anti-system behaviour and/or ideas.⁷¹ This was clearly the case in the 1950s when it banned the Socialist Reich Party and the Communist Party of Germany in accordance with Basic Law article 21.2 provisions permitting proscription of parties undermining the 'free democratic basic order'. It could also be argued that more recent attempts to invoke this provision against the National Democratic Party of Germany justify this classification for the present. The case ultimately failed on procedural grounds rather than because the government and parliament were unwilling to invoke available legal instruments to ban an extremist political party.⁷²

France may be reclassified as a substantive democracy which actively, if not always consistently, employs instruments for banning political parties for anti-system behaviour.⁷³ Article 89.5 of the 1958 French Constitution establishes what some have

⁷¹ Fox and Nolte *op cit* n. 4 *supra* at 415-417; Thiel *op cit* n. 4 *supra* at 394.

⁷² Thiel *op cit* n. 4 *supra* at 112. During the case, it emerged that a large percentage of the National Democratic Party (NPD's) inner circle were in fact undercover agents or informants for the German security services and that the agents had influenced party activities. However, when the Constitutional Court called for names of agents and the security services refused to do so, the case against the was closed (Thiel *op cit* n. 4 *supra* at 122).

⁷³ Fox and Nolte *op cit* n. 4 *supra* at 411-412; Thiel *op cit* n. 4 *supra* at 390; C.L. Buis, 'France', in M. Thiel (ed), *The Militant Democracy Principle in modern democracies* (Ashgate, 2009)

called an ‘eternity clause’ in which ‘the republican form of government shall not be subject to amendment’ and article 4 requires that parties respect the principles of national sovereignty and democracy.⁷⁴ While this has led various scholars to classify France as a substantive democracy,⁷⁵ Buis notes disagreement among French jurists on the constitutional significance of the provisions but increasing support for the view that the Constitution’s article 89.5 at least limits the permissible actions of state organs.⁷⁶ This disagreement suggests further research is needed to confirm classification. Nevertheless, legislation permits dissolution, by the President, of parties that ‘attack the integrity of the territory or republican form of government’.⁷⁷ The use of violence is the main operational criteria for implementation,⁷⁸ which suggests France ought, as a rule, be classified as a democracy that bans parties for anti-system behaviour. However, the fact that some separatist groups have been banned without having executed plans threatening territorial integrity,⁷⁹ suggests France sometimes strays into the category in which democracies also ban parties for anti-system ideologies.

Italy represents a fairly unambiguous example of a passive substantive democracy, which has failed to employ available instruments to ban extremist political parties.⁸⁰ The 1948 Italian Constitution (XII Transitory and Final Provision) forbids re-emergence of the dissolved fascist party and the 1952 Scelba Law provided for the definition and punishment of associations wanting to recreate a fascist party.⁸¹ Nevertheless, the Italian approach to extremism has been to eschew proscription, initially in favour of collusion among mainstream parties to keep extremist parties out of government and later integrating them into government circles.⁸²

The United Kingdom is an example of a procedural democracy which currently adopts a passive orientation to extremist parties. It is procedural because the most

⁷⁴ Buis *op cit* n. 73 *supra* at 81-2, 89.

⁷⁵ Fox and Nolte *op cit* n. 4 *supra* 411-412; Thiel *op cit* n. 4 *supra* at 390.

⁷⁶ Buis *op cit* n. 73 *supra* at 82-84, 89.

⁷⁷ *Ibid*, 89.

⁷⁸ *Ibid*, 90.

⁷⁹ *Ibid*.

⁸⁰ Thiel *op cit* n. 4 *supra* 394.

⁸¹ S. Ceccanti and F. Clementi, ‘Italy’ in M. Thiel (ed), *The Militant Democracy Principle in modern democracies* (Ashgate, 2009) at 212.

⁸² *Ibid*, 210-217.

fundamental constitutional norm of the British constitution is the doctrine of parliamentary sovereignty, which permits the Westminster Parliament to make or unmake any law it chooses, including those which appear to establish constitutional fundamentals.⁸³ The British parliament has enacted laws permitting the dissolution of certain groups, including political parties – such as section 2(I)(b) of the Public Order Act of 1936 or Section 28.2 of the Northern Ireland (Emergency Provisions) Act of 1991.⁸⁴ However, the UK approach has been what Mullender describes as a ‘piecemeal approach’ ‘focusing on the activities of a particular group in a way that speaks concretely to the threats they pose’ and ‘reluctance to justify intervention by reference to grand overarching theory’.⁸⁵ It has thus resisted calls to ban parties of the extreme right, with the notable exception of the wartime dissolution of the British Union of Fascists in May 1940.⁸⁶ Similarly, a ban on *Sinn Fein*, a party openly siding with terrorist group, the Irish Republican Army (IRA), was lifted in 1975 and not reinstated even though IRA attacks continued.⁸⁷

Japan is an example of what I have called a ‘permissive democracy’, a democracy which chooses not to adopt or use measures permitting proscription of extremist parties at all. Various scholars concur in their characterisation of Japan as a ‘procedural democracy’.⁸⁸ The 1946 Japanese constitution is silent on the matter of militant democracy and does not stipulate a forfeiture of rights and freedoms in case of their abuse.⁸⁹ In addition, most constitutional scholars consider the proscription of political parties unconstitutional, due to the absence of specific constitutional provisions permitting restriction and the presence of free speech and association guarantees⁹⁰ and because the constitution prohibits the imposition of an obligation to respect constitutional values on private individuals through legislation.⁹¹ Moreover, as Sakaguchi observes, the only occasions when an ‘enemy of freedom’ was denied

⁸³ R. Mullender, ‘United Kingdom’ in M. Thiel (ed.) *The ‘Militant Democracy’ Principle in Modern Democracies* (Ashgate, 2009) at 312.

⁸⁴ Fox and Nolte *op cit* n.4 *supra* at 407.

⁸⁵ Mullender *op cit* n. 83 *supra* at 311.

⁸⁶ P. Ignazi, *Extreme Right Parties in Western Europe* (Oxford University Press, 2004) at 175.

⁸⁷ C. Knox, ‘Sinn Fein and Local Elections: The Government’s response in Northern Ireland, (1990) 43 *Parliamentary Affairs* 448.

⁸⁸ Fox and Nolte *op cit* n. 4 *supra* at 408-9; Thiel *op cit* n. 4 *supra* at 391; Sojiro Sakaguchi, ‘Japan’ in M. Thiel (ed.) *The Militant Democracy Principle in Modern Democracies* (Ashgate, 2009).

⁸⁹ Sakaguchi *op cit* n. 88 *supra* at 226-7.

⁹⁰ Fox and Nolte *op cit* n. 4 *supra* at 408.

⁹¹ Sakaguchi *op cit* n. 88 *supra* at 227.

‘protection of the constitution’ – or when the rights and privileges of political associations or parties were curtailed’ – was carried out on instruction of occupation forces in the immediate post-war period.⁹²

VII Conclusion

In this article, I have sought to address the weakness of the paradigmatic concept of ‘militant democracy’ for understanding variation in state responses to political extremism and more specifically for the proscription of political parties. I did so by reviewing two of the most developed and widely known accounts of variation in state responses to extremism – developed by Pedhazur and Fox and Nolte. Each approach provided important insights, but failed to identify variables accounting for varying orientations to party bans in democratic states. Careful examination of the circumstances in which Spain banned HB, EH and *Batasuna* - a case which highlighted the fundamental problem of internal consistency in Fox and Nolte’s model - suggested an additional variable which could be added to, and resolve the main problem with, Fox and Nolte’s model. More specifically, the modifications I introduce to that model incorporate the distinction, articulated by the Spanish Constitutional Court and various legal scholars, between a party banned for espousing anti-democratic or anti-system ideas, on the one hand, and a party banned for using undemocratic behaviour (such as violence) to pursue its goals, on the other. The principal advantage of this model is that it permits a more plausible classification of a number of well-known cases of state orientations to proscription and employs the concept of tolerance in a manner consistent with common sense and scholarly conceptions. Further research is needed to determine whether it is applicable to a broader range of cases.

⁹² *Ibid*, 227-232.