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Party Bans under the European Convention of Human Rights

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Julia Schreiber

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Table of Contents

List of Abbreviations	III
Introduction	1
1. Militant Democracy.....	5
1.1 The Origins of the Theoretical Concept of Militant Democracy	5
1.2 Defining Militant Democracy: Core Elements and Scope	7
1.3 Militant Democracy in International Human Rights Law: The ECHR Perspective	9
1.4 New Challenges: Populism and the Evolution of Militant Democracy	11
2. Measures of Militant Democracy	13
2.1 Angela Bourne’s Typology	13
2.2 Party Bans under the ECHR.....	15
2.3 Cordon Sanitaire: Theory, Historical Origins and Typology.....	22
3. Brandmauer vs. Party Ban: Proportionality & Effectiveness under the ECHR.....	27
3.1 Nature of the German Cordon Sanitaire: Brandmauer	28
3.2 Preliminary Remarks Regarding the Brandmauer and the ECHR: A Doctrinal Analysis of Non-Interference	33
3.3 Proportionality of the Brandmauer under the ECHR Framework.....	41
3.4 Conclusion: Factual Effectiveness of the Brandmauer	55
4. Normative Appraisal: Suitability and Critique of the Cordon Sanitaire.....	56
4.1 Framing the Dilemma.....	56
4.2 Cordon Sanitaire: Main Critiques and Risks	57
4.3 Are the Cordon Sanitaire and Party Bans Sequential or Complementary?	61
4.4 Conclusion: Sequential in Fact but Normatively Distinct.....	63
Conclusion.....	64
Bibliography	IV
References	X
Abstract.....	XIII
Abstrakt.....	XIV

List of Abbreviations

AfD	Alternative for Germany <i>(Alternative für Deutschland)</i>
AKP	Justice and Development Party Turkey
BfV	Federal Office for Protection of the Constitution <i>(Bundesamt für Verfassungsschutz Deutschland)</i>
BVerfG	Federal Constitutional Court Germany <i>(Bundesverfassungsgericht Deutschland)</i>
CDU/CSU	Christian Democratic Union Germany <i>(Christlich Demokratische Union Deutschlands)</i>
CoE	Council of Europe
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
FDGO	Free Democratic Order <i>(Freie Demokratische Grundordnung)</i>
FDP	Free Democrats Germany <i>(Freie Demokratische Partei Deutschlands)</i>
GO-BT	Rules of Procedure of the German Parliament <i>(Geschäftsordnung des Deutschen Bundestages)</i>
IoPPs	Initiatives Opposing Populist Parties (A. Bourne)
NPD	National Democratic Party Germany <i>(Nationaldemokratische Partei Deutschlands)</i>
SPD	Social Democrats Germany <i>(Sozialdemokratische Partei Deutschlands)</i>
VB	Vlaams Belang
Venice Commission	European Commission for Democracy Through Law
Venice Convention	Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures

Introduction

Democracies inherently face a paradox: how can they uphold fundamental values such as pluralism, tolerance, and freedom, while at the same time defending themselves against actors who seek to dismantle these very principles from within?

This democratic dilemma has long been recognized in constitutional theory but has acquired a new urgency. Across Europe, populist and radical right political parties have advanced not by openly dismantling democratic institutions through coups or revolution, but by engaging in electoral politics while promoting illiberal policies and eroding democratic culture from within.

In Germany, the rise of the *Alternative für Deutschland* (Alternative for Germany – AfD) has put the concept of *wehrhafte Demokratie* (militant democracy) to a modern stress test. Founded in 2013 as a Eurosceptic platform, the AfD significantly radicalized in recent years, leading the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz* – BfV) to classify parts of the party, and in 2025, allegedly, the party as a whole, as a “proven right-wing extremist” organization.¹ The AfD’s electoral success, as the largest opposition force in the 21st legislative period of the German *Bundestag*, has stirred up a renewed public debate about the limits of democratic tolerance.

Where many strategic responses have emerged to safeguard democracy against abstract threats, this thesis, for better comparability under the legal framework of the European Convention on Human Rights (ECHR), will focus on two of them. The first being a formal approach, grounded in constitutional law and recognized within the jurisprudence of the European Court of Human Rights (ECtHR), namely party banning procedures, and secondly, an informal approach, whereby mainstream parties politically isolate a perceived threat to democracy via a so-called Cordon Sanitaire, by jointly refusing any form of cooperation – in Germany known as the *Brandmauer* (firewall).

¹ ‘Verfassungsschutz stuft AfD als gesichert rechtsextremistisch ein’ (*Beck Aktuell*, 2 May 2025) <<https://rsw.beck.de/aktuell/daily/meldung/detail/verfassungsschutz-gutachten-afd-gesichert-rechtsextremistisch>> accessed 21 July 2025; ‘Medien veröffentlichen Verfassungsschutz-Gutachten zur AfD’ *tagesschau.de* (14 May 2025) <<https://www.tagesschau.de/inland/afd-medien-publizieren-verfassungsschutz-gutachten-100.html>> accessed 21 July 2025.

Moving beyond Germany's borders and into the global media arena, the debate over democratic self-defense has become increasingly entangled with competing global narratives about legitimacy and political pluralism. In early 2025, U.S. Vice President J.D. Vance delivered a notable address at the Munich Security Conference. In a striking intervention into the domestic politics of a key democratic ally, Vance urged European leaders to end the isolation of far-right parties, arguing, essentially, that there was “*no room for firewalls.*”² While he did not specifically mention the AfD, his remarks were recognized as a direct critique of the “*longstanding agreement by mainstream German politicians to freeze out the group.*”³ This intervention, combined with a meeting with AfD leader Alice Weidel, emphasized how traditional European democratic norms concerning political exclusion are now being challenged by a redefinition of the transatlantic relationship. It illustrates a direct and powerful clash between the principles of militant democracy and a global anti-establishment discourse that frames such measures as inherently anti-democratic.⁴

While the political discourse in Germany is deeply divided, the legal terrain is equally contested. Party bans constitute the most drastic formal restriction on political parties that the German Basic Law (*Grundgesetz* – GG) permits and are subject to stringent substantive and procedural preconditions. Historically, party banning procedures have been implemented sparingly and have rarely been found justified under the ECHR framework. Conversely, the *Brandmauer* lacks direct legal enforceability and is maintained through voluntary, inter-party consensus. This distinction makes it a particularly challenging object to be assessed legally under the ECHR.

A distinctive contribution of this thesis lies in placing such an informal political strategy under the analytical scope of the ECHR. Traditionally, legal scholarship on militant democracy focused rather on ‘hard’ tools such as constitutional clauses, surveillance powers, or banning procedures. By contrast, this thesis evaluates the *Brandmauer* as a political strategy whose proportionality value might critically influence the necessity and legitimacy of invoking more severe measures. Its performance in this role may affect where the ECtHR considers the necessity threshold for banning a political party to have been reached.

² Jim Tankersley, Steven Erlanger and David E. Sanger, Reporting from Munich, ‘Vance Tells Europeans to Stop Shunning Parties Deemed Extreme’ *The New York Times* (14 February 2025) <<https://www.nytimes.com/2025/02/14/world/europe/vance-europe-immigration-ukraine.html>> accessed 26 May 2025.

³ *ibid.*

⁴ *ibid.*

Against this backdrop, this thesis seeks to answer several central questions: First, under what conditions are restrictions on political parties, namely party bans, justified under the ECHR framework? Building on this legal foundation, the analysis will then compare informal political isolation strategies, the Cordon Sanitaire, to party bans in terms of their legitimacy, proportionality, and effectiveness. A core inquiry will be whether the Cordon Sanitaire can be considered a less restrictive measure within the ECHR's proportionality test. Ultimately, this thesis aims to define the normative relationship between these two instruments.

These questions address the fundamental nature of contemporary democratic resilience, aiming to find an answer as to whether informal practices of political ostracism (Cordon Sanitaire) can safeguard democracy without compromising its pluralistic character, and at what point such strategies should give way to the most severe instruments of militant democracy.

The methodology employed in this thesis begins with a doctrinal approach to outline the concept of militant democracy in chapter 1 and concludes with the analysis of both measures under the ECHR legal framework concerning party bans and political science perspectives on the abstract Cordon Sanitaires and party bans in chapter 2. Following this doctrinal groundwork, this thesis employs a comparative methodology to analyze the *Brandmauer* and party bans side-by-side. This involves evaluating each measure against consistent criteria to determine its effectiveness in achieving legitimate aims under the ECHR proportionality test. Finally, a normative evaluation is undertaken to critically appraise the role of political isolation strategies as a measure of militant democracy and explore whether their relationship with party bans may be described as sequential or complementary.

To thoroughly examine these issues, this thesis will proceed through a structured analysis. Chapter 1 will establish the essential theoretical groundwork of militant democracy, outlining its origins, core elements, and scope. Following this, chapter 2 will present two distinct tools of militant democracy, party bans and the cordon sanitaire, within a scholarly typology and under the ECHR legal framework. Chapter 3 will then transition to a practical and comparative assessment of both measures, providing an empirical foundation of the effectiveness and thus proportionality of the *Brandmauer* against formal party bans. Finally, chapter 4 will assess the broader democratic costs and benefits of political ostracism, interrogating whether the *Brandmauer* is a sequential precursor to party bans or a distinct instrument while weighing its implications for democratic pluralism.

In sum, this thesis aims to bridge the gap between legal and political practice, offering a rigorous framework for how democratic societies can remain both resilient and true to their fundamental values when facing extreme political polarization.

1. Militant Democracy

First, it is important to establish the essential theoretical groundwork for understanding how democracies attempt to defend themselves against internal threats. To this end, the origins and the evolution of the concept of militant democracy will be outlined.

In the following, its core elements and scope will be defined, including different types of actors and the spectrum of measures it may employ. Subsequently, the relevance of militant democracy in the international human rights context will be assessed within legal frameworks, specifically under the ECHR. In the final step, this chapter will focus on new challenges for militant democracy.

1.1 The Origins of the Theoretical Concept of Militant Democracy

1.1.1 The Democratic Dilemma & Weimar Context

At its core, militant democracy aims to resolve the paradox of how to guarantee fundamental democratic values, especially the plurality of opinions, while defending itself against actors that seek to dismantle it from within.

This dilemma became a core issue for democratic theory during the interwar period, culminating in the downfall of the Weimar Republic.⁵ Karl Löwenstein, a German legal scholar and political scientist, first theorized this idea within this historical context, warning that liberal democracies were vulnerable to internal threats by actors seeking to abolish them using democratic means.⁶ Analyzing the downfall of the Weimar Republic, Löwenstein argues that “(…), *democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city.*”⁷

His perspective stood in contrast to other prominent legal philosophies of the time, such as that of Hans Kelsen, an Austrian jurist, legal and political philosopher. In his work, Kelsen contended that a democracy that tries to defend itself against the will of the majority would cease to be a democracy⁸. From his positivistic perspective, Kelsen emphasized the importance of procedural integrity and the inherent tolerance of democracy.⁹ He furthermore cautioned against the potential of an overly substantive defense to become arbitrary or authoritarian.¹⁰

⁵ Gregory Fox and Georg Nolte, ‘Intolerant Democracies’ (1995) 36 Law Faculty Research Publications 1, 14.

⁶ Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’ (1937) 31 American Political Science Review 417, 426.

⁷ *ibid.*

⁸ Hans Kelsen, ‘Verteidigung der Demokratie’, *Abhandlungen zur Demokratietheorie* (Mohr Siebeck GmbH & Co KG 2025) 237.

⁹ Wolfgang Merkel, ‘Die Fallstricke der wehrhaften Demokratie’ [2024] Verfassungsblog 2–3 <<https://verfassungsblog.de/die-fallstricke-der-wehrhaften-demokratie/>> accessed 30 June 2025.

¹⁰ *ibid.*

Löwenstein, conversely, asserted that democracies must defend themselves against such actors who use inherent democratic procedures and freedoms to subvert democratic values, and thus prioritized substantive values of democracy such as human dignity, pluralism, and freedom over rigid procedural safeguards.¹¹ This fundamental contention accentuates the central paradox of militant democracy:

*To preserve their very existence, democracies seem to inevitably have to restrict certain freedoms and, therefore, are subject to the risk of appearing prima facie undemocratic.*¹²

1.1.2 Löwenstein's Militant Democracy: Definition and Proposed Measures

By identifying fascism as a political technique to gain and hold power rather than an ideology, Löwenstein paved the way for a more analytical understanding of such movements.¹³ To safeguard democracy, Löwenstein argued that: *"Constitutional scruples can no longer refrain from restrictions on democratic fundamentals, for the sake of ultimately preserving these very fundamentals."*¹⁴ Thus, democracy would have to fight 'fire with fire' and become militant.¹⁵

At its core, Löwenstein suggested a form of constitutional militancy with strong parliamentary control by a few elites, who are loyal to liberal core values such as human dignity and freedom, reflecting a degree of distrust in unchecked popular will in times of crisis.¹⁶ As a possible solution, he furthermore suggested implementing legislation to defend democracy, in particular the banning of anti-democratic groups¹⁷, limiting the misuse of parliamentary rights such as immunity¹⁸, controlling hate speech and misinformation, and ensuring the loyalty of public officials.¹⁹

1.1.3 Germany as a Prototype

Germany's *Wehrhafte Demokratie* (militant/ defensive democracy) enshrined a free democratic basic order (*freie demokratische Grundordnung* - FDGO), which entails certain rights that are protected by Art. 79 (3) GG – the so-called *Ewigkeitsgarantie* (eternity clause).

¹¹ Loewenstein (n 6) 432.

¹² Merkel (n 9) 2–3.

¹³ Loewenstein (n 6) 422–423.

¹⁴ *ibid* 432.

¹⁵ *ibid* 423, 638.

¹⁶ Mariano Croce, 'Democracy: Constrained or Militant? Carl Schmitt and Karl Loewenstein on What It Means to Defend the Constitution' (2025) 35 *Intellectual History Review* 247, 247.

¹⁷ Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31 *American Political Science Review* 638, 645–646.

¹⁸ *ibid* 650.

¹⁹ *ibid* 651.

Additionally, the GG established the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) as its guardian, inter alia, equipped with the power to ban unconstitutional political parties. Germany is therefore recognized as a prototype for an institutionalized substantive militant democracy. State actors as well as citizens are equipped with tools to actively defend themselves from anti-democratic exploitation. Political parties, as an example, make use of these tools by isolating other political parties, which they agree are not acting on the grounds of the constitution.

In sum, the concept of militant democracy emerged as a response to the structural vulnerabilities of democratic systems during the interwar period, and particularly in the collapse of the Weimar Republic. While this concept is rooted in this special historical context, the core issue between procedural tolerance and substantive self-preservation is timeless in its relevance and finds recognition in contemporary understandings of new paths to safeguard democracy.²⁰

1.2 Defining Militant Democracy: Core Elements and Scope

A militant democracy can be characterized as a “(...) *democratic system that has adopted and applies pre-emptive, prima facie undemocratic legal instruments to defend itself against the risk of being overthrown by anti-democratic actors that make use of political rights and democratic procedures with the aim of abolishing it.*”²¹

Elaborating on Löwenstein’s finding regarding the nature of democracy, it may be recognized that democracy as such is not merely a set of institutional procedures for choosing leaders and making decisions based on majority rules (procedural democracy), but rather a substantive order with citizens enjoying core rights and liberties, creating the foundation for the legitimacy of militant democracy.²² Therefore, tolerating the intolerant would be inappropriate given the threat to core values such as human dignity, the rule of law, and the separation of powers.

While the concept of militant democracy originated in response to fascism, contemporary scholars have expanded Löwenstein’s theory to be applicable in a broader context. András Sajó argues that fascism is just one example within the broader category of the

²⁰ See Angela Bourne, ‘Party Bans and Populism in Europe’ [2024] Verfassungsblog <<https://verfassungsblog.de/party-bans-and-populism-in-europe/>> accessed 17 September 2025.

²¹ Paulien De Morree, *Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (1st edn, Intersentia 2016) 148; Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (Routledge 2016) 15 <<https://www.routledge.com/Militant-Democracy-Undemocratic-Political-Parties-and-Beyond/Tyulkina/p/book/9781138281592>> accessed 10 July 2025.

²² Angela Bourne, ‘Mapping Initiatives Opposing Populist Parties in Europe’ in Angela Bourne, *Responding to Populist Parties in Europe* (1st edn, Oxford University Press/Oxford 2023) 45.

political movements of so-called “Emotional Politics” such as Populism, Nationalism, or religious movements, that exploit democratic rights to subvert democracy.²³ He thus identified the concept of militant democracy as not just a single measure, but as a set of interrelated legal and political tools that serve to defend the democratic order.²⁴ Sajó concludes that the concept of militant democracy is not to be limited to a fascist context but rather to be recognized as a defensive framework applicable to a wider range of emotionally charged political movements threatening democratic values and stability.²⁵

As shown above, the theoretical concept of militant democracy is applicable in a wide context of defending democracy against anti-democratic actors and may be understood as a set of legal and political tools designed to defend the democratic order. As Michael Minkenberg put it, to prevent its destruction, a militant democracy assembles “*an elaborate repertoire of instruments*” to protect itself from exploitation.²⁶

Typically, these measures or tools are legally authorized for exceptional use, pre-emptive, and appear *prima facie* undemocratic, as they interfere and restrict political rights of so-called ‘democratic enemies’ by limiting, for example, free political competition.²⁷ In general, militant democracy therefore subjects political parties to an ‘exceptional treatment’ in comparison to ‘normal politics’.²⁸ The spectrum of measures includes ‘formal’ legal tools such as constitutional provisions protecting a ‘democratic core’, party bans, rights limitations, and surveillance, as well as ‘informal’ political and administrative tools, such as the concept of Cordon Sanitaire, a strategy of political exclusion.²⁹

Taken together, the core elements and scope of militant democracy cannot be understood as a singular, stringent, and defined legal doctrine or instrument, but rather represent a flexible, versatile, and evolving framework. Some aspects might be relatively undisputed, such as the pre-emptive character of militant democracy, while other aspects, such as the contemporary, broad application of militant democracy out of its historical focus on fascism, are highly criticized for overreaching and concept-stretching.³⁰ Nevertheless, this wide application of the

²³ *ibid*; Tyulkina (n 21) 15–17.

²⁴ András Sajó, ‘Militant Democracy and Emotional Politics’ (2012) 19 *Constellations* 562, 563–566.

²⁵ *ibid*.

²⁶ *ibid*.

²⁷ De Morree (n 21) 148.

²⁸ Bourne, ‘From Militant Democracy to Normal Politics?’ 496; Bourne, ‘Mapping Initiatives Opposing Populist Parties in Europe’ (n 18) 49. Angela Bourne, ‘From Militant Democracy to Normal Politics? How European Democracies Respond to Populist Parties’ (2022) 18 *European Constitutional Law Review* 488, 496; Bourne, ‘Mapping Initiatives Opposing Populist Parties in Europe’ (n 22) 49.10/1/2025 10:58:00 AM

²⁹ Bourne, ‘From Militant Democracy to Normal Politics?’ (n 28) 497.

³⁰ Angela Bourne, ‘The Proscription of Parties and the Problem of “Miltant Democracy”’ (2012) 7 *Journal of Comparative Law* 196, 196–197.

concept allows for assessing both legal and political responses to anti-democratic threats under the pretext of democratic self-defense and their limits.

1.3 Militant Democracy in International Human Rights Law: The ECHR Perspective

The ECHR was established by the Council of Europe (CoE) in the historical context of the post-war period and aims to protect fundamental rights and freedoms. While the concept of militant democracy is primarily rooted in national constitutional law, its underlying theory, principles, and limitations are highly relevant within the framework of International Human Rights Law in general. Even though the explicit term ‘militant democracy’ is not used by the European Commission of Human Rights (the Commission) or the ECtHR, the underlying ‘doctrine’ of democracies having to protect themselves is nevertheless consistently recognized by the ECtHR.

1.3.1 Foundational Commitment to Democracy and the Evolution of Militant Interpretation in the ECtHR’s Jurisprudence

The ECHR framework reflects the national dilemma of balancing the protection of individual rights with the necessity of democratic self-preservation on an international level. As the Convention was drafted in the historical context of widespread human rights violations by totalitarian regimes during the Second World War, its original purpose was to ensure that member states of the CoE adhere to democracy.³¹

Looking into the Preamble to the Convention, it stipulates that the fundamental rights mentioned in it are best protected “*by an effective political democracy*”.³² This foundational commitment ensures that member states are actively allowed to protect their democracy against anti-democratic actions.³³ Thus, it is crucial to mention that the Convention’s militancy is interpreted in a way that reflects changing threats as well as evolves in the face of maturing democracies.³⁴ While initially the Court saw the necessity to defend democracy from totalitarian threats³⁵, specifically Nazism and early Communism, and accepted restrictions of individual rights more widely, over time, it became more critical in regard to broad restrictions

³¹ De Morree (n 21) 225–227; *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights: 9789024722303 - AbeBooks*, vol 2 (Springer 1985)

<<https://www.abebbooks.com/9789024722303/Collected-Edition-Travaux-Preparatoires-European-9024722306/plp>> accessed 10 July 2025; ‘Militant-Democracy-in-the-Context-of-the-Echr.Pdf’.

³² European Convention on Human Rights 1953 5.

³³ De Morree (n 21) 226.

³⁴ *ibid* 238–239.

³⁵ *ibid* 228; Susan Marks, ‘The European Convention on Human Rights and Its “Democratic Society”’ (1996) 66 *British Yearbook of International Law* 209, 211.

imposed on communism in Western Europe.³⁶ In the realm of transitional justice and democratization in Central and Eastern Europe after the Cold War, the Court assessed that restrictions might be necessary in transitioning phases, but demanded the measures to be justified and limited to a certain period only³⁷, while at the same time still presenting an open stance to restrictions imposed against fascist ideologies and Holocaust denial³⁸. More recently, in the case *Refah Partisi v Turkey*³⁹, which will be assessed in detail in section 2.2, the ECtHR adopted a new approach by protecting “*pluralism, tolerance and broadmindedness*” as being part of democracy itself, in the wake of theocratic regimes gaining power.⁴⁰

1.3.2 Key Militant Measures under the ECHR: Proportionality Test and Margin of Appreciation

To guarantee stability and to protect the functioning of democratic institutions, the Commission as well as the Court have recognized that individuals or groups may have their rights restricted to some extent.⁴¹ Thus, the doctrine of ‘democratic self-defense’ is considered a legitimate ground for restricting the fundamental rights of anti-democratic actors. The Court already assessed measures of democratic self-defense such as the dissolution and banning of political parties, barring individuals adhering to certain ideologies from public office or public sector positions, restrictions on political speech and racist speech, the prohibition of certain symbols, and the prosecution of Nazi activities.⁴²

It is to be emphasized that the Convention itself recognizes the inherent tension between the protection of human rights and the defense of democracy.⁴³ Nevertheless, the long-term survival of democracy might have a higher rank compared to the restriction on individual or group rights.⁴⁴ At the same time, the Convention warns against excessive measures of militant democracy, therefore demanding that the member states show restraint in the interference with

³⁶ De Morree (n 21) 231; *Vogt v Germany* [1995] ECtHR [GC] 58012/10 [43].

³⁷ De Morree (n 21) 233; Paul Harvey, ‘Militant Democracy and the European Convention on Human Rights – European Sources Online’ (2004) 29 Sweet & Maxwell 407, 415.

³⁸ De Morree (n 21) 236.

³⁹ *Refah Partisi (The Welfare Party) and Others v Turkey* [2001] ECtHR [GC] 41340/98, 41342/98, 41343/98 and 41344/98.

⁴⁰ De Morree (n 21) 239; Marks (n 35) 232.

⁴¹ De Morree (n 21) 227; European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights, ‘GUIDELINES ON POLITICAL PARTY REGULATION’ (2020) CDL-AD(2020)032 [81,108].

⁴² Regarding Party Banning see: *Refah Partisi (The Welfare Party) and Others v Turkey* [2001] ECtHR [GC] 41340/98, 41342/98, 41343/98 and 41344/98; Barring to Public Office: *Zdanoka v Latvia* [2004] ECtHR 58278/00; Restriction of Political Speech: *Feret c Belgique* [2009] ECtHR 15615/07; Prohibition of Symbols: *Vajnai and Others v Hungary* [2019] ECtHR 36358/14, 66792/14, 66798/14, 66889/14, 72826/14, 4240/15; Prosecution of Nazi Activities: *Kühnen v the Federal Republic of Germany (dec)* [1988] EComHR 41424/98.

⁴³ Harvey (n 37) 410–411; De Morree (n 21) 241.

⁴⁴ Fox and Nolte (n 5) 2, 38.

fundamental rights, asking the state to show a “*clearly established need*” for the measure taken.⁴⁵ The Court furthermore cautions that not every movement supporting changes in the legal and constitutional order is incompatible with democracy as such.⁴⁶ When member states define the boundaries of militant democracy measures in general, the Court grants a generous margin of appreciation to the states, recognizing that these specificities need to reflect the individual constitutional order of a state.⁴⁷ Finally, it is to be determined by the Court if a certain measure employed by a member state was used legitimately, paying close attention to the risk of illiberal democracies concealing their authoritarian goals as measures of democratic self-defense.⁴⁸

Concluding, through its jurisprudence, the ECtHR developed a wider understanding of the applicability of measures of militant democracy while still demanding strict necessity, proportionality, and respect for pluralistic opinions and political discourse. This normative tension will be utilized as a point of reference in assessing and comparing informal measures such as ‘Cordon Sanitaire’ with the most restrictive formal measure of militant democracy, party dissolution, and banning.

1.4 New Challenges: Populism and the Evolution of Militant Democracy

Across Europe, populist parties have gained influence not by seeking the formal abolition of democratic structures, but by undermining the liberal democratic order from within. These parties often exploit democratic mechanisms, disguising their exclusionary, illiberal, or anti-pluralist agendas by calling upon the sovereign people to stand up against the (unresponsive) elite.⁴⁹ Although this shift complicates the applicability of traditional militant democracy tools, as was assessed beforehand, the idea of democratic self-defense remains, but might require conceptual adaptation.

Circling back to the description of Germany as the prototype for an institutionalized militant democracy, it was assumed that Germany’s militant democracy could prevent right-wing populist parties from entering the political landscape.⁵⁰ Germany was therefore seen as an “*exceptional case in continental Europe*.”⁵¹

⁴⁵ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [48-52].

⁴⁶ *ibid* [115].

⁴⁷ De Morree (n 21) 244; *Paksas v Lithuania* [2011] ECtHR [GC] 34932/04 [12].

⁴⁸ De Morree (n 21) 244.

⁴⁹ Angela Bourne and Bastiaan Rijpkema, ‘Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges’ (2022) 18 *European Constitutional Law Review* 375, 378.

⁵⁰ Bénédicte Laumond, ‘Increasing Toleration for the Intolerant? “Adapted Militancy” and German Responses to Alternative Für Deutschland’ (2023) 21 *Comparative European Politics* 761, 762.

⁵¹ *ibid*.

At the latest, after the right-wing populist party AfD entered the German Parliament in 2017, a party that in principle claims to accept the rules of liberal democracy, adapted responses of militant democracy became urgent.

As modern anti-democratic actors target constitutional courts, civil society, as well as the media, rather than openly advocating regime change, Laumond stipulates that using classical legal tools such as party bans or criminal sanctions to counter modern anti-democratic actors, which present themselves as mere democratic reformers, is characterized by many systemic thresholds.⁵²

Given this context, Laumond's answer to challenges imposed on militant democracy by populism is her concept of 'adapted militancy'.⁵³ Rather than relying on formal, legal mechanisms to defend democracy, this adapted militancy allows a more flexible, preventive, and proportionate response, such as political and social exclusion strategies.⁵⁴ Though uncoded and informal, tools such as the political practice of mainstream parties agreeing to exclude a populist party from coalition building, public office, or parliamentary cooperation (Cordon Sanitaire) may act as functional substitutes for this new challenge, without triggering the legal and political risks associated with party bans.⁵⁵

In conclusion, while initially formulated in response to fascist movements, the underlying logic of the concept of militant democracy applies to a wider spectrum of actors and threats. Responding to the rise of illiberal populism, it has expanded beyond formal, legal instruments to contain informal political strategies such as ostracism or exclusion.

⁵² *ibid.*

⁵³ Laumond (n 50).

⁵⁴ *ibid* 762.

⁵⁵ *ibid* 762–765.

2. Measures of Militant Democracy

Having established the theoretical foundations of militant democracy in chapter 1, this chapter now turns to assess its practical implementation through specific measures designed to counter threats to democratic integrity. The evolving challenges posed by populist parties, which often undermine democratic institutions subtly, rather than through open opposition, necessitate adaptive and novel responses of democratic self-defense. Consequently, states and political actors have deployed a wide range of defensive strategies aimed at safeguarding democracy.

To systematically analyze these diverse responses, this chapter draws on Angela Bourne's typology of Initiatives Opposing Populist Parties (IoPPs).⁵⁶ This framework provides a crucial analytical lens for understanding various forms of democratic self-defense, particularly in the context of contemporary threats. At first, Bourne's framework for mapping IoPPs will be introduced (Section 2.1), with a particular focus on two categories of intolerant engagement, thereby building the analytical basis for assessing these measures under the ECHR legal framework.

Following this conceptual introduction, two types of measures will be assessed in detail: Party bans as a formal, rights-restrictive tool used by public authorities (Section 2.2), and the Cordon Sanitaire as a form of political ostracism, primarily employed by mainstream parties (Section 2.3). This detailed examination of party bans will serve as a critical benchmark for the subsequent assessment of the Cordon Sanitaire under the ECHR framework in chapter 3.

2.1 Angela Bourne's Typology⁵⁷

Bourne's typology systematically classifies the variety of possible responses democratic actors employ in the face of the rise of populism, providing a theoretical foundation for practical democratic defense. Her typology is grounded on two dimensions that distinguish the variety of measures: first, the type of initiator employing the measure, and second, the mode of engagement adopted by the actor.⁵⁸ Bourne categorizes the first dimension into three types of actors: (1) State authority, (2) Political Party, (3) Civil Society. The second dimension distinguishes between (1) intolerant or (2) tolerant modes of engagement (see Figure 1).⁵⁹

⁵⁶ Bourne, 'Mapping Initiatives Opposing Populist Parties in Europe' (n 22).

⁵⁷ *ibid.*

⁵⁸ *ibid* 46.

⁵⁹ *ibid.*

IoPPs Initiator				
Mode of Engagement	Public Authorities		Political Parties	Civil Society
	Intolerant	<u>Rights-Restrictions</u>	<u>Ostracism</u>	Coercive Confrontation
	Tolerant	Ordinary legal controls and pedagogy	Forbearance	Adversarialism

Figure 1, Source Bourne⁶⁰

Bourne describes such ‘tolerant’ responses as treating populist parties like any other political actor, applying standard norms and rules, while at the same time aiming to oppose their political influence through public persuasion, protest, and policy co-option.⁶¹

Conversely, ‘intolerant’ responses are characterized by a criterion of exceptional treatment, involving the suspension of ordinary rules and the denial of specific rights, privileges, or recognition.⁶²

While numerous typologies of militant democracy exist,⁶³ Bourne’s concept is highly relevant due to its adaptation to the contemporary challenges populist parties pose to democracy. Most other frameworks concentrate predominantly on legal restrictions, essentially

⁶⁰ *ibid* 47.

⁶¹ *ibid* 50.10/1/2025 10:58:00 AM

⁶² *ibid* 49–50.

⁶³ For different typologies see, e.g.: Giovanni Capoccia, ‘Defending Democracy: Reactions to Political Extremism in Inter-War Europe’ (2001) 39 *European Journal of Political Research* 431; Gregory Fox and Georg Nolte, ‘Intolerant Democracies’ (1995) 36 *Law Faculty Research Publications*; Stefan Rummens and Koen Abts, ‘Defending Democracy: The Concentric Containment of Political Extremism - Stefan Rummens, Koen Abts, 2010’ (2010) 58 *Sage Journals*; Ludvig Norman and Anthoula Malkopoulou, ‘Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives’ (2018) 66 *Sage Journals* 442; Bonnie M Meguid, ‘Competition Between Unequals: The Role of Mainstream Party Strategy in Niche Party Success’ (2005) 99 *American Political Science Review* 347; Daniele Albertazzi and Davide Vampa (eds), *Populism and New Patterns of Political Competition in Western Europe* (Routledge 2021).

failing to capture the full spectrum of measures employed in practice and often assuming the existence of a “ (...) *readily identifiable threat to democracy*.”⁶⁴ Bourne, as well as Laumond⁶⁵, emphasize the new challenges populist parties pose for democracy.⁶⁶ Without openly rejecting democratic institutions, traditional measures of militant democracy, such as party bans, are often difficult to implement and to justify.⁶⁷ By incorporating a broader range of actors, especially beyond state authority and by recognizing the wide variety of IoPPs, Bourne aims to offer a more contemporary typology. Significantly, Laumond’s concept of adapted militancy draws on Bourne’s typology, further underscoring its utility.⁶⁸ In the following analysis, this thesis will focus on two specific categories established within Bourne’s typology: (1) Rights Restrictions by Public Authorities, and (2) Ostracism by Political Parties, to allow to further assess if such political isolation strategies, compared to party bans, can be seen as proportionate and legitimate under the ECHR framework.

(1) Rights Restrictions by Public Authorities

Typically based on the traditional concept of militant democracy, these intolerant strategies employed by state actors include ‘hard’ measures, such as party bans and dissolutions, as well as ‘soft’ measures such as denial of public funding and surveillance.⁶⁹

(2) Ostracism by Political Parties

Intolerant responses from political parties are categorized under the broader term of ‘ostracism’. Bourne identifies different types of ostracism: (a) governmental ostracism (refusal to form coalitions), (b) parliamentary ostracism (denial of certain parliamentary positions), and lastly (c) public ostracism (avoidance of joint debates).⁷⁰

2.2 Party Bans under the ECHR

Building on the spectrum of militant democratic measures identified in section 2.1, this section will assess the banning and dissolution of political parties as a formal legal measure of rights restriction under the ECHR. Due to its intense interference with political pluralism, the

⁶⁴ Bourne, ‘Mapping Initiatives Opposing Populist Parties in Europe’ (n 22) 44–46.

⁶⁵ Laumond (n 50).

⁶⁶ Bourne, ‘Mapping Initiatives Opposing Populist Parties in Europe’ (n 22) 44.

⁶⁷ *ibid* 46.

⁶⁸ Laumond (n 50) 764.

⁶⁹ Bourne, ‘Mapping Initiatives Opposing Populist Parties in Europe’ (n 22) 53–55.

⁷⁰ *ibid* 55–56.

dissolution and/ or banning of a political party represents the most severe and intrusive form of democratic self-preservation, consequently deemed a ‘last resort’.⁷¹

While measures of militant democracy in general enjoy a wide margin of appreciation from the ECtHR⁷², the extremely rights-restricting nature of party bans means the Court grants only a narrow margin of appreciation to member states in such cases.⁷³ This rigorous scrutiny is underscored by the ECtHR’s jurisprudence, which determines whether such state actions meet the Convention’s requirements for justified restrictions under Art. 10 (2) and 11 (2) ECHR.

The ECtHR’s jurisprudence is notably complemented by the Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures, which were adopted in 1999 by the European Commission for Democracy through Law, also known as the Venice Commission. The Venice Commission is an advisory body of the CoE, constituted of experts of constitutional law from its member states. It has established authority on issues regarding constitutional and human rights standards, although its resolutions are not binding.

Nevertheless, the Commission’s Guidelines became an influential point of reference for the ECtHR in establishing criteria for assessing the proportionality of party banning procedures. As the Venice Commission confirms, “(...) *any limitation on the formation or regulation of the activities of political parties must be proportionate in nature. For instance, dissolution shall only be applied as an instrument of last resort, when the legitimate aim cannot be reached using less restrictive means of regulation. It is the most severe sanction available and should be considered proportionate only when imposed in extreme cases of the most grave violations*”.⁷⁴

The Commission has developed key principles guiding national decision-making on party bans, underlining the requirements for the measure to be based on clear and foreseeable domestic law and to strictly meet the criteria of democratic necessity and proportionality.⁷⁵

In the following, this section will outline the legal framework used by the ECtHR to assess under which circumstances party bans may be a justified restriction of Convention rights, illustrating the inherent tension between pluralism and democratic self-preservation. Supported by crucial jurisprudence, this section will serve as a benchmark for assessing the proportionality and legality of informal exclusion mechanisms, such as the Cordon Sanitaire, in chapter 3, under the ECHR legal framework.

⁷¹ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [52].

⁷² De Morree (n 21) 244; *Paksas v. Lithuania* (n 47) [12].

⁷³ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [110]; *Refah Partisi (the Welfare Party) and Others v Turkey* [2003] ECtHR [GC] 60936/12 [100].

⁷⁴ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [52].

⁷⁵ *ibid* [106-120].

2.2.1 Refah Partisi (The Welfare Party) and Others v. Turkey (2003)

This judgment of the Grand Chamber of the ECtHR from 2003 may be described as the landmark case on the compatibility of party bans with the ECHR. *Refah Partisi*, a major political force with an Islamist orientation, was dissolved by the Turkish Constitutional Court on the grounds of aiming to introduce a legal order based on Sharia law and advocating for a system operating with undemocratic methods, namely the use of force to achieve political goals. The Grand Chamber reviewed the actions of Turkey under a possible violation of Article 11 ECHR, the freedom of association of the political party *Refah Partisi*, finding no violation of such. The Grand Chamber stipulated that the party's political program, as well as its conduct, revealed aims that were not compatible with the fundamental principles of democracy. This landmark decision will act as a point of reference for assessing the legal framework of party banning and dissolution under the ECHR, while other crucial jurisprudence will be used as far as necessary.

2.2.2 Applicability of Convention Rights and Article 17 ECHR

Before determining if a possible interference was justified, the Court examines if the rights the applicant invoked are generally applicable, and if there indeed was an interference in the individual case.

Political parties, as defined by the Venice Commission as “*free associations of individuals, one of the aims of which is to express the political will of the people by seeking to participate in and influence the governing of the public life of a country, inter alia, through the presentation of candidates in elections*”⁷⁶, enjoy strong protection under Article 10 and Article 11 ECHR.⁷⁷ Article 11 ECHR protects individuals who form or join political parties, as well as the parties themselves as political entities. Article 10 ECHR safeguards their right to express opinions, especially on matters of public interest. Essentially, even controversial or offensive views lie within the material scope of Article 10 ECHR.⁷⁸ The ECtHR has repeatedly found that Article 11 ECHR is to be interpreted in the light of Article 10 ECHR, essentially stating that: “*The protection of opinions and the freedom to express them is one of the objectives of the*

⁷⁶ Office for Democratic Institutions and Human Rights, Europarat, and Organisation für Sicherheit und Zusammenarbeit in Europa (eds), *Guidelines on Political Party Regulation: Adopted by the Venice Commission at Its 84th Plenary Session, Venice, 15 - 16 October 2010* (OSCE/ODIHR 2011) [9].

⁷⁷ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [43-45].

⁷⁸ *United Communist Party of Turkey and Others v Turkey* [1998] ECtHR [GC] 58128/00 [43]; *Freedom and Democracy Party (özdep) v Turkey* [1999] ECtHR [GC] 61878/00, 63477/00, 63480/00, 63647/00, 64986/01, 64996/01, 65478/01, 65507/01, 65906/01, 67913/01, 68449/01, 69076/01, 69491/01, 70741/01, 71176/01, 71428/01, 71570/01, 72656/01, 73653/01, 74961/01, 75126/01, 682/02 [57].; *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [47]; *Vona v Hungary* [2013] ECtHR 35943/10 [57].

*freedom of assembly and association as enshrined in Article 11 ECHR. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.”*⁷⁹

The ECtHR has affirmed that political parties are a form of association “*essential to the proper functioning of democracy*”⁸⁰ and emphasized the importance of pluralism⁸¹, concluding that democracy must allow advocacy for legal and constitutional change if the aim is compatible with fundamental principles of democracy, and is pursued by peaceful and democratic means.⁸² Nevertheless, where there is evidence of incitement to violence or an intent to undermine democracy as such, the ECtHR recognizes that member states may have to restrict political parties under strict conditions.⁸³

Before assessing whether any interference with Article 10 and 11 ECHR is justified, the Court may first consider Article 17 ECHR, which entails that the Convention: “*shall not 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 rights and freedoms set forth*”, in it.⁸⁴ “*The general purpose of Article 17 is (...) to prevent totalitarian or extremist groups from exploiting in their own interest the principles enunciated by the Convention.*”⁸⁵ Thus, Article 17 ECHR enshrines a form of militant democracy⁸⁶ at the international level, which denies protecting anti-democratic actors seeking to undermine the values of the Convention. This so-called ‘abuse clause’ is closely modelled on Article 30 of the Universal Declaration of Human Rights⁸⁷, therefore, reflecting the historical post-war context, aiming to prevent the destruction of any rights and freedoms from within. Although the Commission applied Article 17 ECHR directly to declare applications inadmissible, most notably in the case *German Communist Party v. Germany*⁸⁸, the ECtHR has never upheld a party ban solely on the direct application of Article 17 ECHR, but rather draws on it as a tool of interpretation when assessing whether an

⁷⁹ *Yazar and Others v Turkey* [2002] ECtHR 48614/12, 52151/12, 52958/12, 53248/12, 54272/12, 54277/12, 54928/12, 54932/12, 55319/12, 56037/12, 59898/12, 60416/12, 60419/12, 60863/12, 60868/12, 62958/12, 74770/12 [46].

⁸⁰ *United Communist Party of Turkey and Others v. Turkey* (n 78) [43].

⁸¹ *ibid.*

⁸² *Yazar and Others v. Turkey* (n 79) [49]; *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [98].

⁸³ *Zdanoka v Latvia* [2004] ECtHR 58278/00 [99-100].

⁸⁴ European Convention on Human Rights Art. 17 (1).

⁸⁵ ‘ECtHR Guide on Article 17 ECHR’ 17 <<https://ks.echr.coe.int/web/echr-ks/article-17>> accessed 16 July 2025; *Ayoub and Others v France* [2020] ECtHR 77400/14, 34532/15, 34550/15 [92]; *Paksas v. Lithuania* (n 47) [87]; *W.p and Others v Poland (dec)* [2004] ECtHR 66711/13, 66717/13, 66863/13.

⁸⁶ ‘ECtHR Guide on Article 17 ECHR’ (n 85) [6]; *Vogt v. Germany* (n 36) [51,59]; *Zdanoka v. Latvia* (n 42) [100]; *Perinçek v Switzerland* [2015] ECtHR [GC] 27510/08 [242]; *Ayoub and Others v. France* (n 85) [138]; De Morree (n 21) 88.

⁸⁷ De Morree (n 21) 71; ‘ECtHR Guide on Article 17 ECHR’ (n 85) [2].

⁸⁸ *German Communist Party and Others v Germany (dec)* [1957] EComHR 250/57.

interference with the freedom of association or expression was indeed ‘necessary in a democratic society’.⁸⁹ In sum, Article 17 ECHR is a critical interpretive and normative tool that equips the ECtHR with the means to assess whether political parties operate within the spirit of democratic pluralism or seek to destroy it.

2.2.3 Justification of the Restriction

In determining whether the dissolution of a political party constitutes a justified interference with Article 10 or Article 11 ECHR, the Court follows a structured, three-step proportionality test, embedded in Article 10 (2) and 11 (2) ECHR.⁹⁰

Article 11 Freedom of assembly and association

(1) (...)

(2) “No restriction shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police, or of the administration of the State.

In the landmark case *Refah Partisi*, the Court examined the legality, legitimacy, and necessity of the interference with the political parties’ freedom of association.

First, the Court examines whether the interference is “*prescribed by law*”. This condition requires not only that the interference has a legal basis in domestic law, but that it is accessible, foreseeable, and formulated with sufficient precision to avoid arbitrary application. If domestic law “*affords(s) a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention*”, it meets this requirement.⁹¹ In the case of *Refah Partisi*, the dissolution of the political party was based on specific provisions of the Turkish Constitution and general legislation regulating political parties, which the Court found to meet this threshold.

⁸⁹ De Morree (n 21) 85; Sébastien van Drooghenbroeck, ‘L’Article 17 de La Convention Européenne Des Droits de l’Homme Est-Il Indispensable?’ (2001) 12 Revue trimestrielle des droits de l’homme 541, 551.

⁹⁰ In most cases, the ECtHR assesses the banning and dissolution of political parties under Article 11 ECHR, while it is to be assessed in the light of the importance of the freedom of expression (Article 10 ECHR).

⁹¹ *Maestri v Italy* [2004] ECtHR [GC] 29443/20 [30]; *N.f v Italy* [2001] ECtHR 37119/97 [26,29; ‘ECtHR Guide on Article 11 ECHR’ [149].

Second, the interference must pursue at least one of the legitimate aims as set out in Article 11 (2) ECHR. This enumeration of legitimate aims is strictly exhaustive and “*must be narrowly interpreted*”.⁹² In *Refah Partisi*, the Turkish government argued that the party's program would pose a threat to national security and the democratic order, and that the dissolution was aimed at extinguishing this threat.⁹³ The Court held this aim to be legitimate and saw this requirement satisfied.

Third, the interference must be “*necessary in a democratic society*”. This requirement demands the State to demonstrate and justify (1) a pressing social need for them to act, with relevant and sufficient reasons, and that (2) the interference is proportionate to the legitimate aim pursued.⁹⁴

(1) To assess if there is such ‘pressing social need’ concerning the dissolution of a political party, the Court, inter alia in the case *Refah Partisi*, looked into (a) “*whether there was plausible evidence that the risk to democracy was sufficiently imminent*”, (b) “*whether the leader’s acts and speeches taken into consideration in the case under review were imputable to the political party concerned*”, and (c) whether this conduct “*formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a democratic society.*”⁹⁵

(2) Regarding the assessment of proportionality of the taken measure, in our case the banning or dissolution of a political party, to the pursued legitimate aim, States have “*a heightened duty to provide reasons to justify such measure*”, since if such measure is not grounded on “*acceptable and convincing reasons*”, it is “*liable to have a chilling effect on the applicants association and its individual members (...).*”⁹⁶

To meet the requirement of proportionality, state authorities must show: “*that there are no other means of achieving the same aims that would interfere less seriously with the right to freedom of association.*”⁹⁷ Such drastic measures as the dissolution or banning of a political

⁹² ‘ECtHR Guide on Article 11 ECHR’ (n 91) [159].

⁹³ *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [65, 78-85].

⁹⁴ ‘ECtHR Guide on Article 11 ECHR’ (n 91) [160].

⁹⁵ *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [104].

⁹⁶ *Adana Tayad c Turquie* [2020] ECtHR 59835/10 [35-36].

⁹⁷ *ibid* [36].

party “*may be taken only in the most serious cases*”, such being endangering fundamental democratic principles or political pluralism.⁹⁸

Nevertheless, as established by the Court, a political party promoting legal and or constitutional change is not to be seen as conflicting with fundamental democratic principles, if “*firstly, the means used to that end [are] legal and democratic; secondly, the change proposed (...) itself [is] compatible with fundamental democratic principles.*”⁹⁹ To assess these requirements, the Court not only tends to the political party's program, but also compares the actions of individual members of the party.¹⁰⁰ As the Constitutional Court of Turkey dissolved *Refah Partisi* with the reasoning that it would be a “*centre of activities against the principle of secularism*”, the Court found no violation of Article 11 ECHR.¹⁰¹ On the grounds of acts and speeches of members as well as leaders of the political party, the Court assessed that it aimed at “*setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah had not excluded recourse to force to implement its policy.*”¹⁰²

Conversely, in cases in which there was not sufficient evidence of undemocratic intentions of a political party being dissolved, the Court found violations of Article 11 ECHR.¹⁰³ In summary, the Court's assessment of party bans under Article 11 ECHR involves weighing the importance of pluralism and freedom of association against the state's obligation to defend the democratic order. As with *Refah Partisi*, the Court illustrated and confirmed that the protection of democratic institutions can, in exceptional circumstances, justify severe measures such as party bans and dissolution.

⁹⁸ *Herri Batasuna and Batasuna v Spain* [2009] ECtHR 25803/04, 25817/04 [78]; *Parti Pour Une Société Démocratique (dtp) Et Autres c Turquie* [2016] ECtHR 3840/10, 3870/10, 3878/10, 15616/10, 21919/10, 37272/10, 39118/10 [101].

⁹⁹ *Yazar and Others v. Turkey* (n 79) [49]; ‘ECtHR Guide on Article 11 ECHR’ (n 91) [181].

¹⁰⁰ *Herri Batasuna and Batasuna v Spain* [2009] ECtHR 25803/04, 25817/04 [80].

¹⁰¹ *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [23].

¹⁰² *ibid*; ‘ECtHR Guide on Article 11 ECHR’ (n 91) [184].

¹⁰³ ECtHR found a violation of Article 11 ECHR, e.g. in these cases: *Socialist Party and Others v Turkey* [1998] ECtHR [GC] 58172/14; *United Communist Party of Turkey and Others v. Turkey* (n 78); *Yazar and Others v. Turkey* (n 79); *Partidul Comunistilor (nepeceristi) and Ungureanu v Romania [extracts]* [2005] ECtHR 68175/13, 61298/14, 57708/15; *Freedom and Democracy Party (özdep) v. Turkey* (n 78); *Parti Pour Une Société Démocratique (dtp) Et Autres c. Turquie* (n 98); *HADEP and Demir v Turkey* [2010] ECtHR [GC] 28003/03.

2.3 Cordon Sanitaire: Theory, Historical Origins and Typology

The Cordon Sanitaire has emerged as a contemporary strategy within the broader repertoire of militant democracy. As the radical right and other parties contest the boundaries of democratic legitimacy, understanding the conceptual grounding, historical evolution, and typology of the Cordon Sanitaire is essential for any analysis of contemporary democratic self-defense.

This chapter defines and situates the Cordon Sanitaire in the spectrum of militant democracy, demonstrates a necessary typology, and contextualizes it as a political response to the emergence of the rise of populism. As Downs contends, “(…), *the choice [of political parties] to pursue a strategy of quarantine or coordinated isolation of a pariah party appears at least initially to satisfy the requirements of democratic due diligence. In opting to cordon off one or more parties deemed to be unacceptable participants in the democratic system, those keeping their distance can present clean hands to internal constituents and to external audiences. Strategies of ostracism and demonization enable claims by the political establishment of ‘Doing the right thing’. While meeting the standard of being politically correct and adhering to the advice of most anti-racism and anti-extremism groups, there is, however, an open empirical question of whether doing the right thing is actually effective, or if it more often yields unintended and undesired consequences.*”¹⁰⁴

2.3.1 Defining the Cordon Sanitaire: Abstract and Comparative Perspectives

The strategy commonly known as the Cordon Sanitaire, though also described as ‘political quarantine,’ or as a ‘systematic refusal to cooperate,’ is a prominent but contentious form of political isolation directed against so-called pariah or extremist parties.¹⁰⁵

As Downs describes the notion of ‘political quarantine’ is central, with “*the construction of a Cordon Sanitaire*” typically referring to “*the imposition of a political quarantine against a pariah party*”¹⁰⁶, with ‘pariah’ specifically indicating a party seen as a threat to democratic norms or to the established parties’ electoral success.¹⁰⁷ The scholarly literature offers various formulations for what this entails. It is a form of political quarantine, aiming to isolate the ‘pariah’ party (outcast, despised, and avoided by the majority) and depriving it of parliamentary power, coalition potential, or policy influence, even if this party attracts significant electoral

¹⁰⁴ William Downs, *Political Extremism in Democracies* (Palgrave Macmillan US 2012) 84.

¹⁰⁵ *ibid*; Joost Van Spanje and Wouter Van der Brug, ‘Being Intolerant of the Intolerant. The Exclusion of Western European Anti-Immigration Parties and Its Consequences for Party Choice’ (2009) 44 *Acta Politica* 353, 355.

¹⁰⁶ Downs (n 104) 82.

¹⁰⁷ William M Downs, ‘Pariahs in Their Midst: Belgian and Norwegian Parties React to Extremist Threats’ (2001) 24 *West European Politics* 23 [27].

support.¹⁰⁸ Van Donselaar emphasizes the ethical and procedural ambiguity, calling it a “stubborn, morally charged issue which lend itself to both divergent and arbitrary approaches.”¹⁰⁹ Van Spanje and van der Brug provide a more operational definition, stating that the Cordon Sanitaire is a “party’s systematic refusal to politically cooperate with a particular other party at a specific level and at a particular point in time.”¹¹⁰

In political science, the term ‘Cordon Sanitaire’ refers to the systematic refusal of mainstream political parties to cooperate or form alliances with a party deemed extremist or incompatible with liberal-democratic values, most often by withholding coalition opportunities and excluding it from power.¹¹¹ This refusal can be codified, as Downs notes, “either formally or informally during campaigns, with mainstream parties rejecting overtures to form electoral cartels or to otherwise cooperate in the construction of party lists.”¹¹²

The mechanism of the Cordon Sanitaire is based on political commitment rather than legal obligations. It operates by political parties publicly announcing their unwillingness to cooperate, by informal conventions and inter-party agreements rather than through binding constitutional rules. Crucially, while traditional instruments, such as party bans, are institutionally grounded and legally formalized, the Cordon Sanitaire is a primarily political concept, relying on voluntary, collectively upheld exclusion rather than state coercion.

The Cordon Sanitaire, as a policy, “can either be a formal or a tacit agreement,” and when formalized may take the shape of “adherence to a set of rules – a regime of sorts – designed to ensure the fidelity of all participating parties to a clean hands strategy.”¹¹³ Importantly, ostracism in this sense has also been captured by Bourne as synonymous with the Cordon Sanitaire: “Ostracism is often referred to as a policy of ‘Cordon Sanitaire’, which, as Downs points out, invokes the idea of preventing “contamination from some perceived menace or danger” by “keeping the threat at some safe, sanitary distance.”¹¹⁴

Given the metaphorical origins of the concept as a ‘sanitary cordon’ in public health, it points out its core logic: preventing the perceived contagion of extremism by depriving it of political contact.¹¹⁵

¹⁰⁸ Downs (n 104) 14,82.

¹⁰⁹ Jaap Van Donselaar, ‘Patterns of Response to the Extreme Right in Western Europe’ in Peter H Merkl and Leonard Weinberg, *Right-wing extremism in the twenty-first century* (Frank Caas) 285.

¹¹⁰ Van Spanje and Van der Brug (n 105) 355.

¹¹¹ Downs (n 107) 27.

¹¹² Downs (n 104) 36.

¹¹³ *ibid* 83.

¹¹⁴ Downs (n 94) 82; Joost van Spanje and Nan Dirk de Graaf, ‘How Established Parties Reduce Other Parties’ Electoral Support: The Strategy of Parroting the Pariah’ (2018) 41 *West European Politics* 1, 3; Angela Bourne, *Responding to Populist Parties in Europe: The ‘Other People’ vs the ‘Populist People’* (Oxford University Press 2023) 77.

¹¹⁵ Downs (n 104) 81–82.

The main function of this exclusion strategy, as Van Spanje puts it, is “*systematically refusing to cooperate with that party politically.*”¹¹⁶ Akkermann and Rooduijn highlight the effect for radical right parties as follows: “[m]ainstream parties deny them any legitimacy by refusing to acknowledge them as credible and respectable political partners.”¹¹⁷ Ultimately, the Cordon Sanitaire has become a preventive mechanism aimed at “*avoiding the ‘fateful mistake’ [of] willingly handing over the keys of power to an autocrat-in-the-making*”, reflecting lessons learned from the downfall of the Weimar Republic.¹¹⁸

2.3.2 Historical Origins

The historical roots of the Cordon Sanitaire as a political practice can be found in Belgium. In the late 1980s, early 1990s, the political party *Vlaams Blok* (Flemish Block) had rapid electoral success.¹¹⁹ In response, established Flemish parties vowed in a formal agreement not to collaborate with the far-right party at any level of government.¹²⁰ Over the following decades, this Cordon Sanitaire became a central figure of Belgian politics, inspiring other states, such as France, the Netherlands, the Nordic states, and Germany to implement such measures against ‘pariah’ parties, even if mainly in a less codified form. As Downs documents, the Cordon Sanitaire implemented in Belgium quickly diffused across many Western European party systems in response to ‘pariah’ parties.¹²¹ The adoption of the Cordon Sanitaire might reflect the desire of political parties to protect the integrity of democracy, as well as to keep and present ‘clean hands’.¹²²

¹¹⁶ Joost van Spanje and Nan Dirk de Graaf, ‘How Established Parties Reduce Other Parties’ Electoral Support: The Strategy of Parroting the Pariah’ (2018) 41 *West European Politics* 1, 3.

¹¹⁷ Tjitske Akkermann and Matthijs Rooduijn, ‘Pariahs or Partners? Inclusion and Exclusion of Radical Right Parties and the Effects on Their Policy Positions’ (2015) 63 *Sage Journals* 1140, 1140.

¹¹⁸ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Penguin Books 2019) [13].

¹¹⁹ Downs (n 104) 93.

¹²⁰ *ibid.*

¹²¹ *ibid* 105–107.

¹²² *ibid* 84.

2.3.3 Typologies and Variations

The Cordon Sanitaire has been characterized by political scientists in various typologies, distinguishing between several dimensions along which this measure may vary. As previously mentioned, Bourne classifies measures of Cordon Sanitaire as a subtype of intolerant party-initiated responses to populist threats. This thesis, to allow for the following comparison with party bans, will focus on two specific forms of Cordon Sanitaire identified by Bourne (1) governmental ostracism (refusal to form coalitions), and (2) parliamentary ostracism (e.g., denial of certain parliamentary positions).¹²³

Measures of Cordon Sanitaire can be normative and strategic at the same time. Normatively, it acts as a boundary in signaling to voters which actors fall outside of the acceptable democratic spectrum.¹²⁴ On the strategic side, it aims to limit the influence of radical challengers by denying them access to political power and legitimacy.¹²⁵ Such cordons may have a different scope, targeting the formation of government coalitions, prohibiting all parliamentary cooperation, and/or preventing individual members of such a ‘pariah’ party from gaining positions of parliamentary power.¹²⁶

A Cordon Sanitaire may as well differ in its formality. It may be formalized in explicit party resolutions and signed statements, such as in Belgium, or function as a merely unwritten, but widely accepted understanding among mainstream parties. While the Belgian Cordon Sanitaire is commonly viewed as a prototypical and highly implemented type, France’s experience with the Rassemblement National (*former Front National*) led it to choose a more variable, flexible, regionally and temporally adapted application.¹²⁷ This wide range of how a Cordon Sanitaire might be characterized and implemented reflects the differences in political culture, but also the evolving character of populist parties themselves.

2.3.4 Theoretical Function and Rationale in Democratic Systems

The Cordon Sanitaire functions within militant democracy as a non-legal mechanism of democratic self-defense. Its purpose is to deny parties whose ideology or conduct is deemed to be a threat to democracy the legitimacy, institutional leverage, and policy impact that electoral

¹²³ Angela Bourne, *Responding to Populist Parties in Europe: The ‘Other People’ vs the ‘Populist People’* (Oxford University Press 2023) 56.

¹²⁴ Tjitske Akkermann and Matthijs Rooduijn, ‘Pariahs or Partners? Inclusion and Exclusion of Radical Right Parties and the Effects on Their Policy Positions’ (2015) 63 *Sage Journals* 1140, 1144.

¹²⁵ Jørgen Eikvar Axelsen, ‘The Cordon Sanitaire: A Social Norm-Based Model’ (2024) 34 *Journal of Elections, Public Opinion and Parties* 277, 278; William Downs, Carrie Manning and Richard Engstrom, ‘Revisiting the “Moderating Effects of Incumbency”: A Comparative Study of Government Participation and Political Extremism’ (2009) 17 *Journal of Contemporary European Studies* 151.

¹²⁶ Downs (n 104) 82–83.

¹²⁷ *ibid* 108.

winners typically gain. Therefore, the Cordon Sanitaire draws the acceptable boundaries of democratic participation in a way that impacts voters, civil society, as well as external actors. Unlike measures of militant democracy employed by the state itself, the party-driven Cordon Sanitaire draws its legitimacy from political consensus and party behavior and not from constitutional (emergency) clauses.

Concluding, the Cordon Sanitaire remains a subject of debate due to voices deeming it to be anti-pluralist backfiring. And notably, the effectiveness of the Cordon Sanitaire is debated. Some scholars argue that in some instances, such as the Belgian Cordon Sanitaire against the Vlaams Belang (VB), it might have missed its original purpose by fueling public support for the narratives of anti-establishment parties.¹²⁸ These findings bring up the question of whether this tactic of Cordon Sanitaire is effective in defending democracy, and to what extent this political ostracism can be proportionate to potential restrictions of political pluralism. These important questions of the effectiveness and the alignment of the Cordon Sanitaire with the fundamental democratic principle of political pluralism will be discussed and analyzed in the following chapter. By applying the ECHR proportionality test to a specific Cordon Sanitaire (*Brandmauer*) as a less restrictive measure compared to a party ban, these questions of effectivity and proportionality will be directly addressed.

2.3.5. Conclusion

Having established the theoretical framework of the concept of militant democracy within its historical context, as well as through the critical lens of new challenges, and by introducing a typology of measures of militant democracy, focusing on two specific measures which enable a comparative assessment within the scrutiny of the ECHR framework, in the following, this thesis will move from the abstract to the practical application. This second part of the thesis will build directly upon these theoretical distinctions, using them to evaluate the German *Brandmauer* and the legal institution of a party ban as two distinct tools of democratic self-defense. By comparing their effectiveness, legitimacy, and proportionality against the principles of the ECHR, this analysis will provide a nuanced, comparative critique of their respective strengths and weaknesses in safeguarding democracy from within.

¹²⁸ *ibid* 101.

3. Brandmauer vs. Party Ban: Proportionality & Effectiveness under the ECHR

Moving beyond the abstract, this chapter undertakes a critical examination of the German *Brandmauer* as a specific form of the Cordon Sanitaire, through the lens of the ECHR proportionality standards, comparing it directly with formal party banning procedures. The central question guiding this chapter is not whether the *Brandmauer* constitutes a direct violation of Convention rights in an isolated sense, but rather:

If the Brandmauer can be seen as a less restrictive, yet effective response to the threat posed by the German right-wing party Alternative für Deutschland (Alternative for Germany – AfD) within the ECHR framework, compared to the highly restrictive measure of a party ban.

This comparative approach is crucial for understanding the relative utility, practicability, and overall suitability of different militant democratic instruments in safeguarding the constitutional, democratic order of a state. To facilitate a comprehensive analysis of the complex dynamics, section 3.1 will first provide a detailed and empirical foundation of the German *Brandmauer*, characterizing it as a ‘Cordon Sanitaire’, and outlining its historical and institutional evolution, its operational mechanisms, and its scope. Section 3.2 will then assess the proportionality of the *Brandmauer* under the ECHR framework, commencing with preliminary remarks that address the doctrinal tension between informal political strategies and Convention law, and establishing the analytical basis for assessing its proportionality. Section 3.3 will then proceed to evaluate the effectiveness of the *Brandmauer*, drawing on empirical evidence and scholarly assessments regarding its capacity for isolation, deterrence, and influencing political outcomes, while also considering its practical limitations.

This section will proceed with providing a parallel assessment of the effectiveness of party banning procedures under the same established criteria, before actively engaging in a comprehensive comparative synthesis, identifying the key strengths and weaknesses of both the *Brandmauer* and party bans. Finally, section 3.4 will conclude by synthesizing its findings, setting the stage for the broader normative evaluation and critical appraisal of militant democracy instruments in chapter 4.

3.1 Nature of the German Cordon Sanitaire: Brandmauer

As established, the Cordon Sanitaire represents a political party-driven, informal strategy of democratic self-defense. In Germany, this concept has found its manifestation under the label of the *Brandmauer* (Firewall). To show the specific character of the German *Brandmauer*, its historical and institutional evolution will be traced, explaining its mechanics and scope, and discussing its broader significance as a tool of militant democracy. To allow for the subsequent legal assessment under the ECHR framework, this analysis will focus on the most impactful application of the *Brandmauer*, namely the refusal of established/ mainstream political parties to cooperate with the extremist AfD.

3.1.1 Historical and Institutional Revolution

Germany's post-war political system is fundamentally shaped by the concept of militant democracy, a constitutional principle designed to protect the democratic order from internal subversion, drawing lessons from the Weimar Republic's collapse. While this principle is enshrined in formal legal instruments, such as the party ban under Article 21 GG, the rise of the AfD since 2013 has necessitated the development and elaboration of (existing) informal, party-driven defensive mechanisms.

The AfD, initially a Eurosceptic party, became progressively more radicalized, climaxing with the internal verdict of the BfV confirming the AfD to be a proven right-wing extremist political party in May 2025.¹²⁹ Its significant electoral success across federal¹³⁰, state, and local levels has increasingly challenged the traditional assumption that anti-democratic actors would remain marginal.¹³¹

In response, the *Brandmauer* emerged as a normative and rhetorical barrier imposed by the mainstream political parties, such as *Christlich Demokratische Union* (Christian Democratic Union – CDU/CSU), the *Sozialdemokratische Partei Deutschland* (Social Democratic Party – SPD), *Die GRÜNE* (Greens), the *Freie Demokratische Partei* (Free Democrats – FDP), and *Die LINKE* (Left Party).

¹²⁹ Due to a pending legal dispute between the AfD and the BfV, with the AfD challenging the BfV's verdict, the BfV had to agree to a 'stand-still agreement' essentially, prohibiting further communication regarding the AfD being 'proven right wing extremist' 'Verfassungsschutz stuft AfD als gesichert rechtsextremistisch ein' (n 1); 'Medien veröffentlichen Verfassungsschutz-Gutachten zur AfD' (n 1).

¹³⁰ Currently the AfD holds 151 out of 360 seats in the German Parliament, thus building the biggest oppositional party: 'Sitzverteilung des 21. Deutschen Bundestages' (*Deutscher Bundestag*) <<https://www.bundestag.de/sitzverteilung>> accessed 22 July 2025.

¹³¹ Wolfgang Schroeder and Bernhard Weißels, 'Radikalisiert und Etabliert' 5 <https://www.otto-brenner-stiftung.de/fileadmin/user_data/stiftung/02_Wissenschaftsportal/03_Publikationen/AP59_AfD_Schroeder_Weissels.pdf> accessed 8 February 2025.

The term ‘*Brandmauer*’ carries a distinct historical and political weight. Its popularization in German political discourse, particularly concerning the AfD, signifies a deliberate and often rhetorically charged commitment by mainstream parties to establish a barrier against perceived extremist influences. Notably, the term ‘*Brandmauer*’ as used in this political context, predates its current widespread application against the AfD. In 2014, Hans-Olaf Henkel (an Eurosceptic politician), referred to the Maastricht Treaties ‘no bail-out clause’ as the ‘*Brandmauer* of the Euro’, therefore, a financial barrier meant to fiscally separate disciplined countries from indebted Eurozone states.¹³² In the meantime, the term ‘*Brandmauer*’ evolved from an euro-critical context to a central metaphor, symbolizing the resolve of democratic parties to prevent any form of cooperation that could legitimize or empower the far-right, thereby safeguarding the foundational principles of Germany’s militant democracy.¹³³

Initially an informal understanding, it has evolved to acquire some formal features, reflecting a collective commitment by established parties to avoid all cooperation with the AfD. This commitment has been formalized to some extent through explicit party resolutions, such as the *Unvereinbarkeitsbeschluss* (incompatibility resolution) from the currently governing CDU/CSU, adopted at federal and state party conferences in December 2018, and reaffirmed in Spring 2020, to reject cooperation with the AfD.¹³⁴ Similarly, the Federal Executive Board of the FDP¹³⁵ decided in Spring 2020 to reject cooperation with the AfD at all political levels.¹³⁶ Lastly, die LINKE confirmed its rejection to cooperate with the AfD in any form in a resolution in Spring 2024.¹³⁷

Notably, in preparation for the EU parliament election in 2024, all the CDU/CSU, SPD, FDP, die GRÜNE, die LINKE laid down a joint code of conduct, ruling out any form of cooperation with the AfD or other anti-democratic powers specifically.¹³⁸

¹³² Paul Gross, ‘Die Brandmauer Und Die AfD: Die Geschichte Eines Begriffs’ *Frankfurter Allgemeine Zeitung* (14 February 2025) <<https://www.faz.net/aktuell/politik/bundestagswahl/die-brandmauer-und-die-afd-die-geschichte-eines-begriffs-110289837.html>> accessed 21 July 2025.

¹³³ Wolfgang Schroeder, Daniel Ziblatt and Florian Bochert, ‘Hält die Brandmauer? Eine gesamtdeutsche Analyse: Wer unterstützt die AfD in den deutschen Kreistagen (2019-2024)’ Wissenschaftszentrum Berlin für Sozialforschung 4; Gross (n 132).

¹³⁴ ‘Cdu_deutschlands_unsere_haltung_zu_linkspartei_und_afd_0.Pdf’ 2 <https://archiv.cdu.de/system/tdf/media/dokumente/cdu_deutschlands_unsere_haltung_zu_linkspartei_und_afd_0.pdf?file=1> accessed 22 July 2025.

¹³⁵ The FDP is currently not represented in the German Parliament.

¹³⁶ ‘Brandmauer gegen die AfD’ <https://www.fdp.de/search?type=all&search_terms=Brandmauer%20Beschluss&language=de&field_themen=all&field_gremium=all&sort=created_desc&page=1> accessed 22 July 2025.

¹³⁷ ‘Unsere Alternative heißt Solidarität’ <<https://www.die-linke.de/partei/parteidemokratie/parteivorstand/parteivorstand-2022-2024/detail-beschluesse-pv/news/unsere-alternative-heisst-solidaritaet/>> accessed 22 July 2025.

¹³⁸ ‘Parteien einigen sich auf Kodex für faire Wahlkämpfe’ *tagesschau.de* (24 May 2024) <<https://www.tagesschau.de/inland/innenpolitik/wahlkaempfe-verhaltenskodex-100.html>> accessed 22 July 2025.

Despite this perceived strictness of the *Brandmauer*, it has faced challenges, such as a CDU motion passed in the German Parliament with AfD support, exposing its fragility.¹³⁹ These events led to intense public and political debate regarding the precise definition of ‘cooperation’.¹⁴⁰ With the CDU/CSU and the FDP leaning in the direction of policy co-option, and the SPD, Grüne, and die LINKE distinguishing themselves from the AfD regarding their program as well as their party conduct.¹⁴¹

¹³⁹ Schroeder, Ziblatt and Bochert (n 133) 7.

¹⁴⁰ Jens Thureau, ‘Nach Asyl-Abstimmung: Was ist die “Brandmauer”? – DW – 30.01.2025’ [2025] *dw.com* <<https://www.dw.com/de/brandmauer-asyl-abstimmung-bundestag-friedrich-merz-v2/a-71455738>> accessed 22 July 2025.

¹⁴¹ *ibid* 6.

3.1.2 Mechanics and Scope

The *Brandmauer* operates as a multi-layered mechanism of political exclusion, primarily aimed at denying the AfD access to political power and legitimacy. In their empirical study¹⁴² of cooperation of political parties with the AfD between 2019 and 2024, Schroeder and Ziblatt distinguish between two conceptual ‘firewalls’:

- (1) The first *Brandmauer* (Indirect Cooperation) refers to situations where established parties, while not actively seeking cooperation, accept or rely on the AfD votes to pass their motions or legislation. The CDU motion in January 2025, which passed only due to AfD support, is cited as an example of a breach of the first *Brandmauer* at the federal level.¹⁴³
- (2) The second *Brandmauer* (Direct cooperation) entails active support for AfD motions or candidates, or the formation of joint fractions or coalitions with the AfD. This second *Brandmauer* is considered the higher and more robust barrier, which, nonetheless, is easier to breach once the first *Brandmauer* is already torn down.¹⁴⁴

Facilitating the subsequent legal assessment of the *Brandmauer*, the focus will be specifically on the “Second *Brandmauer*” as it directly applies to the refusal of mainstream parties to form governing coalitions with the AfD, constituting the most politically consequential and constitutionally relevant manifestation of the *Brandmauer* in terms of political power, since this refusal of cooperation directly impacts a party’s ability to govern and implement its agenda.

Despite recent challenges and media narratives suggesting the collapse of the *Brandmauer*, empirical studies indicate that at least the second *Brandmauer* (refusal of direct cooperation) has largely held, particularly at the communal level.¹⁴⁵ Thus, it may be argued that the *Brandmauer* carries significant normative and strategic weight within the broader framework of democratic self-defense. Normatively, it acts as a crucial boundary mechanism, signaling to voters, institutions, and the international community that the AfD falls outside of the acceptable democratic spectrum due to its radicalization and perceived anti-democratic tendencies. This finding aligns with the principle that democracies are not obliged to tolerate those who seek to dismantle democratic institutions from within.

¹⁴² Schroeder, Ziblatt and Bochert (n 133).

¹⁴³ *ibid* 7.

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid* 23.

While the *Brandmauer* as such includes various forms of ostracism, the deliberate and persistent exclusion from coalitions stands out as the most structurally significant. It affects the AfD's ability to exercise executive power, shape the legislative process, and has a tremendous external impact on how the AfD is publicly perceived. Thus, this refusal to form a coalition plays a crucial role in preserving the institutional boundaries of democratic governance. This practice of excluding the AfD, upheld by the CDU/CSU, SPD, die Grünen, and LINKE, formally or informally, constitutes the key operational mechanism through which the *Brandmauer* is translated from a rhetorical commitment into an effective political practice.

*"The CDU Germany rejects coalitions and similar forms of cooperation with both the Left Party and the AfD."*¹⁴⁶

*"The Left Party reaffirms its stance on dealing with the AfD in parliaments and also calls on the other parties to refrain from cooperation with the AfD. At the federal, state, and local levels, there must be a clear separation from the AfD: no joint motions, no approval of motions, no election of AfD candidates, and no coalitions with the AfD."*¹⁴⁷

Focusing on this dimension of the *Brandmauer* is particularly warranted because it seems to be the most severe form of political exclusion. Unlike more symbolic forms of exclusion, this coalition refusal carries functional and normative weight, acting as a gatekeeping measure, demonstrating a distinction between democratic legitimacy and democratic membership. Therefore, focusing on this specific aspect of the *Brandmauer* warrants a clear illustration of how informal party practices can generate factual consequences for political equality and pluralism, making it a suitable entry point for a legal assessment under the ECHR.

¹⁴⁶ Translated by the author from German: 'Die CDU Deutschlands lehnt Koalitionen und ähnliche Formen der Zusammenarbeit sowohl mit der Linkspartei als auch mit der Alternative für Deutschland ab.' 'Unsere Haltung zu Linkspartei und AfD' <https://archiv.cdu.de/system/tdf/media/dokumente/cdu_deutschlands_unsere_haltung_zu_linkspartei_und_afd_0.pdf?file=1>.

¹⁴⁷ 'Unsere Alternative heißt Solidarität' (n 129). 'Unsere Alternative heißt Solidarität' (n 130). 'Unsere Alternative heißt Solidarität' (n 136). 'Unsere Alternative heißt Solidarität' (n 137).

3.2 Preliminary Remarks Regarding the Brandmauer and the ECHR: A Doctrinal Analysis of Non-Interference

3.2.1 Placing the Brandmauer in the ECHR Discourse

The doctrinal analysis on militant democracy and its instruments originally focuses mostly on hard, legally codified mechanisms such as party bans, which, in the example of Germany, is foreseen in Article 21 GG.

Nevertheless, informal, non-legal, and political strategies have emerged or have been re-classified as means for democratic self-defense, responding to new threats such as the rise of populism. The German *Brandmauer*, as a specific variant of the Cordon Sanitaire, entailing a voluntary, coordinated refusal by mainstream political parties to cooperate with parties designated as extreme or populist, such as the AfD, can be seen as such a responding strategy.

The following section will demonstrate that such political strategies, nevertheless, may play a role in assessing these hard measures of militant democracy, such as party bans, namely by being introduced as a possible less restrictive measure within the ECHR legal framework of the proportionality test.

The legal assessment of the *Brandmauer* within the framework of the ECHR presents a complex and deeply doctrinal question. At its core, the issue is whether a non-legislated political practice, adopted by a collective of parliamentary parties, can be considered a state action or omission that violates the rights of another political party, thereby engaging the responsibility of Germany under the ECHR. The following analysis must proceed by dissecting this central issue into its individual legal questions.

3.2.2 The Brandmauer as a Question of State Action under the ECHR

Does the Brandmauer, as a political strategy of non-cooperation, constitute a state action or an act attributable to the State of Germany, and thus engage with its responsibility under the ECHR?

The ECHR applies to the action or omission of a High Contracting Party, as required by the admissibility criteria of *ratione personae*.¹⁴⁸ Thus, actions of private individuals are not generally subject to the Convention's scrutiny unless they are carried out under the explicit direction or control of the state.¹⁴⁹

The *Brandmauer* is not a piece of legislation, a binding executive order, or a judicial decision. It is a series of voluntary, albeit coordinated, political decisions by individual members of parliament to abstain from forming coalitions with, or voting for candidates from, a particular political party.

While this coordination and organization might lead to the appearance of a state-sanctioned policy, it is fundamentally an unrestricted exercise of the independent mandate (*freies Mandat*) granted to each member of parliament by Article 38 (1) GG. In the context of the ECHR, the Venice Commission has stipulated that: “*the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates must prevail as a cornerstone of the European democratic constitutionalism*”, thus effectively acknowledging the free mandate as a sphere with which the state as such shall not interfere.¹⁵⁰

For example, the decision of the CDU or the SPD to refuse collaboration with the AfD is a political choice made within the sphere of their constitutionally protected right to freedom of expression and association. The Venice Commission's “Guidelines on Political Party Regulation” supports this, emphasizing that the internal organization and activities of political parties, as a “free association of persons”, should not, in principle, be subject to state control.¹⁵¹

¹⁴⁸ *M.a and Others v Lithuania* [2018] ECtHR 59793/17 [70]; Council of Europe, ‘Practical Guide on Admissibility’ [279, 294] <https://www.echr.coe.int/d/admissibility_guide_eng> accessed 23 September 2025.

¹⁴⁹ *United Communist Party of Turkey and Others v. Turkey* (n 78) [25]; See Political Parties as Private Actors European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [20].

¹⁵⁰ Venice Commission and Council of Europe, ‘Report on the Imperative Mandate and Similar Practices Adopted by the Council for Democratic Elections at Its 28th Meeting’ [39] <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)027-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)027-e)> accessed 23 September 2025.

¹⁵¹ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [45].

To classify the *Brandmauer* as a state act would be confusing the sovereign state with the autonomous, pluralistic choices of its elected representatives. Therefore, the *Brandmauer* is not an act that is imputable to the German state, as a legal entity, for which it can be held directly liable.

Nevertheless, the threshold for applicability of the ECHR and, therefore, the general scrutiny of the ECtHR cannot be reduced to entire legal formalism. The ECtHR has, in its jurisprudence, recognized and concerted systematic behavior by private actors may, under specific circumstances, engage the positive obligations of the state to ensure the effective enjoyment of convention rights.¹⁵²

3.2.3 The Doctrine of Positive Obligations and the Duty to Intervene under Articles 10, and 11 in Conjunction with Article 1 ECHR

Given that the political strategy of the Brandmauer is not a state act, does Germany nevertheless have a positive obligation to intervene in this political practice to protect the rights of the AfD under Article 10 and 11 in conjunction with Article 1 ECHR?

The concept of positive obligations, as recognized by the jurisprudence of the ECtHR, stipulates that states must take measures to protect Convention rights from infringement by non-state actors and thus guarantee the effective enjoyment of Convention rights.¹⁵³

This is notably true for political rights, where the state is required to maintain a legal and institutional framework that guarantees effective pluralism and the free functioning of a democratic society, but nonetheless, positive obligations play a minor role when it comes to the ECtHR's scrutiny regarding Article 10 and Article 11 ECHR.¹⁵⁴

Furthermore, even when arguing that a state's positive obligation is to secure an "effective political democracy,"¹⁵⁵ this does not extend to compelling political parties to cooperate against their will. The very essence of a pluralistic democracy is the freedom of association, which includes the freedom to disassociate.¹⁵⁶ Forcing political parties to enter a coalition or to vote for a candidate with whom they fundamentally disagree would not only

¹⁵² *Zhdanov and Others v. Russia* [2019] ECtHR 12200/08, 35949/11, 58282/12; *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [103]; *Zdanoka v. Latvia* (n 42) [162].

¹⁵³ *Airey v. Ireland* [1979] ECtHR 78103/14 [25].

¹⁵⁴ Preamble ECHR

¹⁵⁵ Preamble ECHR

¹⁵⁶ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [142].

undermine the principle of democratic contestation, but it would also represent a violation of their own Convention rights.

The *Brandmauer*, far from undermining democracy, can be framed as a legitimate and non-coercive expression of militant democracy where established parties exercise their democratic freedom to defend a particular vision of the political landscape. The ECtHR, in cases like *Refah Partisi*, has consistently set a high standard for state restrictions on the internal affairs of political parties, acknowledging that a state's role might be to uphold an effective political democracy, but does not entail managing political alliances.¹⁵⁷

In sum, Germany has no positive obligation under the ECHR to intervene with the *Brandmauer*, as such an act would fundamentally violate the principle of free association and democratic pluralism for other political parties.

3.2.4 The Scope of Article 10 and 11 ECHR – Protection for Intra-Parliamentary Rights

Does the Brandmauer, in its practical effects, constitute an interference with the rights of the AfD guaranteed by Article 10 and 11 ECHR? Do Article 10 and Article 11 entail a right of the AfD to achieve a committee chairmanship or the right to be a viable coalition partner?

The ECHR protects fundamental rights to expression and association that are necessary for participation in the political process. However, it does not guarantee a specific political outcome or a particular office or position.

The ability to form a coalition or to secure a specific parliamentary position, such as a committee chairmanship, is a function of political capital and negotiation, not a fundamental human right. Unlike procedural restrictions on legislative amendments found to be a violation in *Karacsony and Others v. Hungary*, the *Brandmauer* does not alter the formal rules of the Bundestag, but rather plays out within the legal boundaries of the ‘*Geschäftsordnung des Bundestages*’ (Rules of Procedure of the German Parliament – GO-BT). The members of parliament belonging to the AfD parliamentary group are not legally or procedurally prevented from bringing in bills, speaking in debates, or voting on legislation.

The AfD and its members retain their constitutionally guaranteed rights to participate in elections, stand for office, participate in parliamentary debates, and their right to access to judicial remedies.

¹⁵⁷ *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [96-99].

Another complicating dimension to these preliminary considerations is the assessment of the state's margin of appreciation. As the ECtHR held, states enjoy a wide margin of appreciation when regulating intra-parliamentary affairs, especially regarding internal procedural rules, such as committee appointments and coalition practices, if the main objective remains the effectiveness of the parliament.¹⁵⁸ The ECtHR has repeatedly emphasized that decisions regarding parliamentary autonomy and parliamentary privilege are governed by domestic law and are only subject to limited scrutiny by the ECtHR.¹⁵⁹

In contrast, the ECtHR applies a much narrower margin of appreciation to measures that fundamentally restrict political pluralism, such as the dissolution or banning of political parties.¹⁶⁰ This raises the question of the general scope of Germany's margin of appreciation under the ECHR regarding the *Brandmauer*.

The *Brandmauer* operates within the area of parliamentary autonomy, governing coalition practices, and committee appointments. The refusal to cooperate with the AfD takes place within this area, legally covered by the GO-BT and procedural norms of the GG, where the actions of members of parliament are an exercise of their political will and not a state act. This is a sharp contrast to the banning of a political party, where the ECtHR's scrutiny is extensive due to the fundamental importance of political parties for democratic pluralism.¹⁶¹

These findings lead to the conclusion that the *Brandmauer*, as a political strategy, in contrast to formal party bans as direct actions of the state, plays out within the area of intra-parliamentary affairs. In terms of a possible interference with Article 10 or Article 11 ECHR, Germany would thus be granted a wide margin of appreciation. In sum, the *Brandmauer*, as a form of intra-parliamentary conduct, falls under Germany's wide margin of appreciation.

Additionally, when assessing if the scope of protection of Article 10 or 11 ECHR is concerned by the *Brandmauer*, it may be argued that the effect it has on the AfD's political outcomes, such as its inability to secure a coalition, does not constitute an interference with the rights protected by the ECHR.

The ECHR does not entail a positive right for political parties to become governing parties, nor does it require other political actors to enter coalitions with another party. The democratic process, by its nature, presupposes the possibility of exclusion and contestation.

¹⁵⁸ *Karácsony and Others v Hungary* [2016] ECtHR [GC] 42461/13, 44357/13 [143].

¹⁵⁹ *ibid* [143-146]; *Kart v Turkey* [2009] ECtHR [GC] 8917/05 [82].

¹⁶⁰ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [110]; *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [100].

¹⁶¹ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights, 'GUIDELINES ON POLITICAL PARTY REGULATION' (2020) CDL-AD(2020)032 [110]; *Refah Partisi (the Welfare Party) and Others v Turkey* [2003] ECtHR [GC] 60936/12 [100].

Pluralism is not to be enforced through legal obligations, but rather enabled through the freedom of a political choice. Consequently, there is no *de jure*, nor a ‘*de facto* ban’ constituted by the *Brandmauer*.

3.2.5 Concluding Synthesis

The legal assessment of the *Brandmauer* under the existing ECHR framework reveals that it does not constitute an interference with the rights of the AfD under the ECHR, hence, there is no need for a justification, and in conclusion, no violation of the ECHR can be found. The analysis has demonstrated that:

- 1) The employed political strategy of the *Brandmauer* is not a state act, nor imputable to the state, and thus does not engage the ECtHR’s scrutiny. It is a voluntary political practice for which the German government cannot be held directly liable.
- 2) Germany has no positive obligation to intervene, as such intervention would violate the rights of the political parties that are freely exercising their right to freedom of expression and association under the ECHR.
- 3) The *Brandmauer* does not fall under the scope of protection of Article 10 or Article 11 ECHR. The rights to freedom of expression and association guarantee participation in the political process, but they do not guarantee a specific political outcome, such as the right to form a coalition or hold a specific political position.

Consequently, the ECtHR’s scrutiny is not triggered, and the AfD’s rights under the ECHR are not concerned.

3.2.6 Why the *Brandmauer* should be assessed as a ‘less restrictive measure’

Notwithstanding that the *Brandmauer* as such is not interfering with, nor violating the rights of the AfD under the ECHR, there are arguments as to why a legal assessment of its proportionality remains necessary and appropriate.

The ECtHR’s focus on the effective enjoyment of Convention rights¹⁶² entails that democracy can be subverted effectively by informal practices as well as by formal laws. When a party with significant electoral support, such as the AfD, is systematically excluded, even in the absence of a formal prohibition, there is a question whether the effect is just as chilling.

When assessing whether drastic measures, such as party bans, are necessary in a democratic society, the ECtHR investigates whether the domestic state sufficiently explored less restrictive means¹⁶³ before enacting the ultima ratio of a party ban. This thesis suggests that (informal) non-cooperation strategies could be such a less restrictive measure that needs to be taken into consideration.

Whenever the ECtHR is called upon to assess a state-imposed restriction on Convention rights, such as the banning of a political party, the Court applies the previously described three-step test: (1) The restriction must be prescribed by law, (2) pursue a legitimate aim, and (3) must be necessary in a democratic society.

By refusing any cooperation with the AfD, the political parties use their democratic discretion to limit political influence. In principle, this is less restrictive than banning, as it leaves all formal rights intact and crucially avoids the stigma, finality, and possible counterproductivity a formal dissolution might entail.

The third step of this test, as the Court reiterated in its judgment *Association Rhino and Others vs. Switzerland*, practically declares that “(...)for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.”¹⁶⁴

If the *Brandmauer* may achieve the legitimate aim of safeguarding national security, public safety, and/or the protection of the rights and freedoms of others,¹⁶⁵ effectively enough

¹⁶² *Artico v Italy* [1980] ECtHR 6694/74 [33].

¹⁶³ European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [113].

¹⁶⁴ *Adana Tayad c. Turquie* (n 96) [36]; *Association Rhino and Others v Switzerland [extracts]* [2011] ECtHR 48848/07 [65]; *Glor v Switzerland* [2009] ECtHR 13444/04 [94].

¹⁶⁵ When dissolving or banning political parties, State’s often refer to (one of) these legitimate aims (exhaustively) listed in Article 11 (2) ECHR.

to meet the ‘pressing social need’ of having to restrict a political party, severe measures like the banning or dissolution of political parties may not be justified as necessary.

Conversely, if the *Brandmauer* proves to be ineffective in attaining its goal, then harsher measures such as party bans may be justified in this regard. The key takeaway is that the effectiveness of the *Brandmauer* may become decisive.

To summarize this point, the proportionality test under the ECHR demands an assessment of whether the *Brandmauer* is sufficient to meet the legitimate aim as effectively as a legal party ban. The ECHR doctrine of necessity and the exploration of less severe means is thus implicated in this comparative assessment, even if the measure under scrutiny is not itself an interference with Convention rights.

3.2.7 Conclusion

In sum, although the *Brandmauer* does not on its face amount to an interference with Convention rights, its legal assessment remains relevant and imperative for several reasons. While the legal assessment of the *Brandmauer* does not focus on its legality under the ECHR per se, it is relevant in determining its proportionality value relative to party bans.

From the perspective of proportionality, the existence of less invasive but effective measures conditions the legitimacy and necessity of resorting to more invasive party bans, both within the national constitutional order and under the ECHR framework. Thus, the legal assessment of the *Brandmauer* provides a criterion to evaluate the entire spectrum of militant democracy. In sum, the following questions are highly relevant:

Are the instruments (party ban and Brandmauer) both necessary and equally effective in achieving the legitimate aim? Do they respect fundamental principles such as political representation and pluralism?

This approach aligns with the dynamic interpretive orientation of the ECtHR by its ‘living instrument’ doctrine¹⁶⁶, stipulating that the Convention is to be interpreted in the light of new challenges while focusing on reaching the effective enjoyment of Convention rights. Accordingly, the proportionality and effectiveness of the *Brandmauer* must be scrutinized, not because it would necessarily display a legal restriction, but because it serves as the crucial alternative whose success or failure determines the legitimacy of measures of militant democracy, such as the party ban.

¹⁶⁶ *Tyrer v the United Kingdom* [1978] ECtHR 5856/72 [31].

3.3 Proportionality of the Brandmauer under the ECHR Framework

Following this empirical grounding of the *Brandmauer* and the necessary preliminary remarks before legally assessing a political strategy, this section focuses on the core assessment of the *Brandmauer*, evaluating its proportionality compared to formal party bans, within the framework of the ECHR.

In its party ban jurisprudence, the ECtHR dedicates substantial attention to determining the existence and imminence of an actual threat to democracy¹⁶⁷. In the German system, determining whether a political party constitutes a threat to the FDGO is a multi-level process. The BfV is responsible for the administrative assessment and the public classification of parties as ‘suspected’ or ‘confirmed’ extremist threats, based on intelligence and constitutional law criteria.¹⁶⁸ However, only the BVerfG holds the legal authority to formally determine that a political party is unconstitutional within the meaning of Article 21 (2) of the GG and to order its dissolution. For this verdict, the BVerfG requires evidence that the party’s aim and conduct endanger the FDGO, and that it has the concrete ‘*Potenzialität*’ (potential) to realize such a threat.¹⁶⁹

Within this section, the German context is used, not to substantiate or contest the existence of a threat, but to allow for an evaluative framework for the *Brandmauer* as an informal strategy. The normative and doctrinal analysis within this thesis is to be considered as intentionally detached from diagnosing the potential threat imposed by the AfD, and instead aims to clarify under what general circumstances, and with what conditions, informal exclusionary strategies like the *Brandmauer* can be effective within a democratic order.

This section will proceed as follows: Section 3.3.1 will evaluate the effectiveness of the *Brandmauer*, drawing on empirical evidence and scholarly assessments. Subsequently, section 3.3.2 will provide a parallel assessment of the effectiveness of party banning procedures. Finally, section 3.3.3 will offer a comprehensive comparative synthesis, employing a matrix to identify the key strengths and weaknesses of both measures and to assess their respective suitability to defend democratic values.

¹⁶⁷ *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73).

¹⁶⁸ See Art. 73 Nr. 100 GG, § 3 BVerfSchG.

¹⁶⁹ Schroeder, Ziblatt and Bochert (n 133) 7.

3.3.1 Effectiveness of the Brandmauer

While the ECtHR does not prescribe a rigid list of criteria to measure the effectiveness of measures of militant democracy, its case law, notably *Refah Partisi v. Turkey*, emphasizes that restrictions on political actors must pursue a legitimate aim and be necessary in a democratic society, which necessarily includes demonstrating their suitability and relevance to that pursued aim. At the same time, comparative political scholars, such as Angela Bourne, have offered structured criteria for evaluating the effectiveness of tools of democratic self-defense such as ostracism.¹⁷⁰

To provide a robust basis for the subsequent comparative analysis, the *Brandmauer* will be assessed against four key dimensions of effectivity, partly inspired by Angela Bourne's effectivity criteria and chosen to reflect the ECtHR's emphasis on proportionality in its party ban jurisprudence, particularly regarding the exploration of less invasive, yet effective, alternative measures in its judgements *Adana Tayad v. Turkey* and *Association Rhino and Others v. Switzerland* as well as stipulated by the Venice Commission.¹⁷¹

The following criteria will be applied:

- (1) The Prevention of Access to Governing Power**
- (2) The Normative Signaling of Democratic Boundaries and Deterrence of Anti-Democratic Behavior**
- (3) The Practical Implementation and Resilience Over Time**
- (4) The Ability to Minimize Harm and to Balance Proportionality**

By systematically analyzing the *Brandmauer* against these criteria, this section aims to provide a comprehensive empirical and legal basis for its role as a tool of militant democracy, setting the stage for a direct comparison with the effectiveness of party-banning procedures.

¹⁷⁰ Bourne, 'Manipulation of Voter and Party Choice' (n 118).

¹⁷¹ *Adana Tayad c. Turquie* (n 96) [36]; *Association Rhino and Others v. Switzerland [extracts]* (n 164) [65]; European Commission for Democracy Through Law and OSCE Office for Democratic Institutions and Human Rights (n 41) [52].

(1) The Prevention of Access to Governing Power

This criterion examines the capacity of the *Brandmauer* to effectively block the excluded party from influencing government by denying it access to positions of power, such as ministry posts, coalition participation, or parliamentary leadership.

The ECtHR, notably in *Refah Partisi*, has underscored that democracies may justifiably restrict parties when their potential access to government power poses a concrete threat to the democratic order.¹⁷² Thus, for the *Brandmauer* to be considered effective under this criterion, it must ensure that anti-democratic agendas cannot be implemented through formal executive influence, aligning with scholarly arguments that a main goal of such measures is to “*reduce the ability of populist parties to realize illiberal and anti-democratic policies.*”¹⁷³

Schroeder, Ziblatt, and Bochert’s analysis of over 11,000 local council meetings between 2019 and 2024 demonstrates that in approximately 81% of cases at the County level, no cooperation¹⁷⁴ with the AfD took place.¹⁷⁵ In this period between 2019 and 2024, the AfD’s electoral success¹⁷⁶ and its radicalization increased, but it is to be recognized that direct integration in executive and powerful committee roles was systematically avoided by established parties.¹⁷⁷ In instances where the *Brandmauer* failed on the federal level, namely isolated cases of ‘shared votes’ or instances of joint fractions, remained the exception.¹⁷⁸

On the federal level, prominent examples of how the *Brandmauer* was upheld are, namely, the prevention of AfD politicians from gaining positions of parliamentary power, such as the denial of the position as head of the budget committee and as Vice-President of the German Parliament.

On the 30th of January 2025, an AfD candidate nominated by the AfD for the position of Vice-President of the parliament was rejected due to not obtaining the required majority in parliament.¹⁷⁹ Following this, on Mai 21st 2025, the refusal to cooperate with the AfD led to a situation, in which despite it being parliamentary tradition that the largest opposition party can propose a candidate as head of committee for the budget committee, mainstream parties achieved to prevent AfD politicians from obtaining such key-parliamentary positions by mere

¹⁷² *Zdanoka v. Latvia* (n 42); *Refah Partisi (the Welfare Party) and Others v. Turkey* (n 73) [98-107].

¹⁷³ Bourne, ‘Manipulation of Voter and Party Choice’ (n 118) [69].

¹⁷⁴ *As defined by Schroeder, Ziblatt and Bochert*: Schroeder, Ziblatt and Bochert (n 133).

¹⁷⁵ *ibid* 24.

¹⁷⁶ *ibid* 3–4.

¹⁷⁷ See ‘Kein Vorschlagsrecht für Ausschussvorsitz und Stellvertreter’ (*Deutscher Bundestag*, 2 June 2025) <<https://www.bundestag.de/presse/hib/kurzmeldungen-1083764>> accessed 22 July 2025.

¹⁷⁸ See ‘German Parliament Passes Immigration Resolution Backed by the Far Right’ *Le Monde* (29 January 2025) <https://www.lemonde.fr/en/immigration/article/2025/01/29/german-parliament-passes-immigration-law-backed-by-the-far-right_6737567_144.html> accessed 26 May 2025; Schroeder, Ziblatt and Bochert (n 133) 7.

¹⁷⁹ See ‘Keine Mehrheit für AfD-Politiker Dietz als Bundestagsvizepräsident’ (*Deutscher Bundestag*) <<https://www.bundestag.de/dokumente/textarchiv/2025/kw05-de-wahlen-1042018>> accessed 29 July 2025.

voting strategy, while acting clearly within the legal framework of the GO-BT.¹⁸⁰ The candidate to obtain the position of head of committee proposed by the AfD failed to obtain the necessary majority to be elected.¹⁸¹ In the following proceedings, Lisa Paus, a member of die GRÜNEN, was elected as head of the committee.¹⁸²

In sum, on the federal level, the AfD as such has not gained access to positions of comparable parliamentary power. The *Brandmauer* has thus proven as effective in preventing institutional normalization of the AfD's political positions and their access to power. While its strength varies by region and seems to be more porous in eastern German counties, compared to most European contexts, direct power-sharing with radical right actors is rare.¹⁸³

This demonstrated effectiveness in preventing access to power strongly supports the *Brandmauer*'s potential as a less intrusive, yet functionally robust, measure of democratic defense, pursuing legitimate aims prescribed under Article 11 (2) ECHR.

(2) The Normative Signaling of Democratic Boundaries and Deterrence of Anti-Democratic Behavior

This criterion assesses whether the *Brandmauer* functions as an explicit and widely recognized political norm that demarcates anti-democratic behavior, thereby deterring such conduct.

Beyond direct exclusion, the *Brandmauer* serves a visible normative function. It signals to political actors, and to the voters, where the boundaries of acceptable democratic participation lie, aiming to deter anti-democratic or illiberal conduct by stigmatizing cooperation with a party perceived as extremist.¹⁸⁴

The study of the WZB¹⁸⁵ shows that this signaling effect has shaped both party strategy and public debate. Major parties repeatedly reaffirmed their self-binding pledges against cooperation through party congress resolutions and public statements¹⁸⁶, especially following media-effective breaches of the *Brandmauer*, such as the election of Kemmerich in Thuringia in 2020, or the CDU's joint voting in January 2025.¹⁸⁷ Whenever the *Brandmauer* was breached,

¹⁸⁰ See Volker Müller, 'Auslegung zum Vorschlags-recht für Ausschussvor-sitzende und...' (*Deutscher Bundestag*) <<https://www.bundestag.de/dokumente/textarchiv/2025/kw23-de-auslegung-go-1083672>> accessed 22 July 2025.

¹⁸¹ See 'Deutscher Bundestag - Der Haushaltsausschuss hat sich konstituiert' (*Deutscher Bundestag*) <<https://www.bundestag.de/dokumente/textarchiv/2025/kw21-pa-haushalt-konstituierung-1064094>> accessed 17 July 2025.

¹⁸² See *ibid.*

¹⁸³ Schroeder, Ziblatt and Bochert (n 133) 13–14.

¹⁸⁴ In the context of Anti-Immigration Parties see Van Spanje and Van der Brug (n 105) 375.

¹⁸⁵ Wissenschaftszentrum Berlin für Sozialforschung.

¹⁸⁶ See Section 3.1.

¹⁸⁷ See 'Demos gegen Rechtsruck - "Wir sind die Brandmauer"' *tagesschau.de* (25 January 2025) <<https://www.tagesschau.de/inland/demos-gegen-rechtsruck-102.html>> accessed 29 July 2025.

mass protests and strong media coverage reinforced its ongoing importance as a democratic line.¹⁸⁸

While debates persist over how to define “cooperation”¹⁸⁹, and local actors occasionally invoke personal conscience to justify exceptions¹⁹⁰, the collective action of established parties communicates both to the AfD and their ranks that anti-democratic rhetoric and strategies will result in isolation, not acceptability. This has likely raised the reputational costs of open cooperation.

Nevertheless, given the electoral success of the AfD, the normative signaling of the *Brandmauer* seems to be unsuccessful in deterring voters. This effect may be seen as consistent with scholarly findings that show that electoral consequences of political isolation strategies are complex and sometimes counterintuitive.¹⁹¹

(3) The Practical Implementation and Resilience Over Time

This criterion evaluates whether the *Brandmauer* is not only conceptually sound but also practically enforceable and sustainable over multiple political cycles without losing its effectiveness.

The resilience of the *Brandmauer* depends on both formal party self-discipline and the political will of politicians at various levels to adhere to its demands. Although nearly every established party has at times publicly pledged to uphold the *Brandmauer*, breaches may occur, for example, out of coalition pragmatics and thematic overlap on less controversial topics.¹⁹²

Notably, there has been no clear trend towards the ‘erosion’ of the *Brandmauer*.¹⁹³ As Schroeder, Ziblatt, and Bochert stipulate, most of the counties showed no record of cooperation over five years, and only 19 % of AfD motions at the local level received any support from established political parties.¹⁹⁴

Despite the *Brandmauer* not being uniformly implemented and sometimes breached, it shows some degree of durability, taking into consideration the strength and electoral success the AfD gained, especially on the local level. Nevertheless, this persistent electoral success poses a long-term challenge to the *Brandmauer*, essentially limiting its practical options of

¹⁸⁸ See *ibid.*

¹⁸⁹ Schroeder, Ziblatt and Bochert (n 133) 7.

¹⁹⁰ ‘Kretschmer: „Im Grundgesetz Stehen Keine Brandmauern“ | FAZ’ *Frankfurter Allgemeine Zeitung* (22 May 2024) <<https://www.faz.net/aktuell/politik/inland/kretschmer-im-grundgesetz-stehen-keine-brandmauern-19736536.html>> accessed 29 July 2025; Schroeder, Ziblatt and Bochert (n 133) 7.

¹⁹¹ Van Spanje and Van der Brug (n 105) 375–377.

¹⁹² Schroeder, Ziblatt and Bochert (n 133).

¹⁹³ *ibid* 24.

¹⁹⁴ *ibid* 22.

blocking the AfD from gaining governmental influence as well as questioning the legitimacy of the *Brandmauer*.

The challenge to its long-term effectiveness may be less of a formal erosion but rather a gradual normalization through repeated small exceptions.¹⁹⁵ However, the evidence still supports the interpretation of the *Brandmauer* as practically enforceable and institutionally strong, within its limits.

(4) The Ability to Minimize Harm and Balance Proportionality

This last criterion assesses whether the *Brandmauer* avoids “*perverse effects*”, as Bourne calls them.¹⁹⁶ Such effects entail inadvertently increasing the support for the targeted party, improving its resources, or heightening its radicalization.¹⁹⁷ While the exclusion imposed on the AfD by the *Brandmauer* factually has not stopped the AfD’s electoral success, this finding cannot causally lead to the conclusion that the *Brandmauer* alone was a deciding factor for this increase.

In most instances, the cooperation of political mainstream parties remains the exception, but no political party has yet managed to systematically abandon the AfD either. While the *Brandmauer* can be seen as effective in politically isolating the AfD and preventing it from accessing significant governmental power, there is a specific caveat to its effectiveness that must be acknowledged. As described previously, the *Brandmauer* is not able to deter voters from choosing the AfD. With a growing proportion of voters, the political isolation imposed by the *Brandmauer* could become unsustainable and democratically difficult to maintain.

Importantly, scholarly and media debate regarding the side effects of the *Brandmauer* is persistent. Some voices warn that sustained exclusion might lead to reinforcing “*victimhood*” narratives and thus pose a risk to democratic standards.¹⁹⁸

Conversely, one compelling element of the *Brandmauer* lies in its ability to balance competing interests and in adhering to the principle of proportionality. Unlike formal party bans, the *Brandmauer* operates as a political, not as a legal, tool of democratic self-defense. It may effectively minimize the danger of the AfD gaining certain executive or legislative power without infringing upon the party’s fundamental rights as a political party of the opposition.

As stipulated in section 3.2.2, members of the parliamentary group of the AfD are not legally disenfranchised. They maintain their right to speak on the floor, participate in debates,

¹⁹⁵ Schroeder, Ziblatt and Bochet (n 133).Schroeder, Ziblatt and Bochet (n 133).

¹⁹⁶ Bourne, ‘Manipulation of Voter and Party Choice’ (n 118) 69.

¹⁹⁷ *ibid.*

¹⁹⁸ Downs (n 104).

and may introduce bills. Thus, the *Brandmauer* retains a delicate balance in protecting the democratic system from perceived internal threats while simultaneously respecting the AfD's democratic mandate as protected under the GG and the ECHR. In sum, the *Brandmauer* thus offers a minimally invasive tool of militant democracy by introducing a flexible and proportionate response.

Synthesis

Evaluated against these four criteria, the *Brandmauer* may factually fulfil its mandate as a less restrictive, proportionate strategy in Germany's militant democracy system. It has limited the AfD's access to real governing power, offers a powerful and normative signal regarding democratic boundaries, shows practical enforceability and resilience over time, and it appears, as of now, to avoid the most pronounced risk of backfire and disproportional harm. From an ECHR perspective, the *Brandmauer* demonstrates effectiveness across these criteria, and thus may be considered as a less restrictive means within the proportionality test for party bans. Nevertheless, its effectiveness is not absolute and depends fundamentally on ongoing political commitment, strategic adaptation to changing social realities, and the balancing of the democratic costs of exclusion.

3.3.2 Effectiveness of Party Bans

Party bans are the most far-reaching legal tool of militant democracy, aiming to protect the constitutional order by formally excluding parties that pose an existential threat to democracy. However, practical experiences with attempted bans, notably the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands* – NPD, later ‘Die Heimat’) in Germany and the Welfare Party (later Justice and Development Party – AKP) in Turkey, emphasize the efforts as well as the limits of this instrument.

Due to the given circumstances that no party-banning procedure against the AfD was initiated, this assessment of the effectiveness of party bans as a formal tool of militant democracy focuses on an abstract understanding and current arguments for and against the effectiveness of party bans when opposing the rise of populism as a threat to democracy.

To allow for a robust comparison of the effectiveness of both measures, the same four criteria introduced in section 3.3.1 to measure the effectiveness of the *Brandmauer* will be reused for the assessment of party bans.

(1) The Prevention of Access to Governing Power

The primary goal of party bans is recognized as the removal of a party’s access to public office, elections, and overall institutional power. Thus, a successful party ban should create a legal barrier for the participation of the banned party in democratic institutions.¹⁹⁹ As the experience with the party ban procedure of the NPD in Germany and against the AKP in Turkey shows, this aim is not always realized in practice.

The NPD, despite being recognized as anti-constitutional, was not banned by the BVerfG due to insufficient ‘*Potenzialität*’ (potentiality), meaning that it did not pose an actual and present threat to the state order.²⁰⁰

In Turkey, the Constitutional Court came close to banning the AKP in 2008, but since the necessary supermajority was not reached, the banning procedure failed, with the AKP remaining legitimate to govern.²⁰¹ Moreover, prior ‘successful’ bans against Islamist parties in Turkey, namely the Welfare and Virtue Parties, resulted in the reconstitution under new names, with their supporters often gaining access to parliament or ministerial positions through the influence of the successor parties.²⁰²

¹⁹⁹ Hendrik Cremer, ‘Warum die AfD verboten werden könnte’ (Deutsches Institut für Menschenrechte) 61–64.

²⁰⁰ *NPD II* [2017] Bundesverfassungsgericht BvB 1/13 [1009].

²⁰¹ Andrew O’Donohue and Cem Tecimer, ‘Why Party Bans Often Don’t Work’ [2024] Verfassungsblog 1–2 <<https://verfassungsblog.de/why-party-bans-often-dont-work/>> accessed 24 May 2025.

²⁰² *ibid* 4.

This experience highlights one fundamental flaw in the effectiveness of formal party bans. Party bans as such target the legal shell of a political movement, often nurturing the emergence of more resilient, less transparent, and maybe even more radicalized successors.²⁰³ Thus, formal bans can be criticized for seldom eliminating the political base or the possible access to power in a sustainable way.

Conversely, from the perspective of effectiveness, the limits of formal party bans might seem frustrating or insufficient. Still, from the standpoint of political pluralism, formal party bans are already interfering with the political rights of the targeted party to the greatest extent possible, while simultaneously respecting and protecting the effective enjoyment of the rights enshrined in the ECHR.

(2) The Normative Signaling of Democratic Boundaries and Deterrence of Anti-Democratic Behavior

Party bans are intended to send a clear signal that democracy will defend itself against threats against its core principles. Initiating party ban procedures against the NPD and the AKP initially substantiated legal and social boundaries, thus allegedly had a deterring effect.²⁰⁴ Nonetheless, both cases illustrate that attempted, as well as successfully implemented, bans can backfire.

In Turkey, the AKP used the attempted ban as evidence for their narrative of ‘victimhood’. They portrayed the secular judiciary as undemocratic and thus mobilized support for anti-pluralist reforms.²⁰⁵ In Germany, attempts to ban the NPD did strengthen public debate on democratic limits, but its failure, nevertheless, was perceived as frustrating by civil society.²⁰⁶

This demonstrates that the intended normative signal is not to be seen as ‘mixed’ but rather as holding the potential for the banned party to be actively “*perverted*”, as Bourne would say,²⁰⁷ by using it to undermine the very purpose of militant democracy: creating some legitimacy for anti-system narratives.²⁰⁸ Therefore, the normative signaling of party bans seems to potentially backfire, at least to some degree, by reinforcing the very anti-establishment narratives they aimed to delegitimize.

²⁰³ *ibid.*

²⁰⁴ Uwe Volkmann, ‘Einerseits und Andererseits’ [2024] Verfassungsblog 6–7 <<https://verfassungsblog.de/einerseits-und-andererseits/>> accessed 24 May 2025.

²⁰⁵ O’Donohue and Tecimer (n 201) 2.

²⁰⁶ See Ben Knight, ‘Court rules against NPD ban’ *dw.com* (17 January 2017) <<https://www.dw.com/en/germanys-constitutional-court-rules-against-banning-far-right-npd-party/a-37155332>> accessed 1 August 2025.

²⁰⁷ Bourne, ‘Manipulation of Voter and Party Choice’ (n 118) 69.

²⁰⁸ Volkmann (n 204) 3.

(3) The Practical Implementation and Resilience Over Time

For a party ban to be considered effective under this criterion, it must be enforceable, clear in its scope, and resistant to circumvention over time. The lengthy and strict standards regarding the evidence, in Germany, especially the criterion of ‘potentiality’, create a high threshold for enacting a ban.²⁰⁹ This results in party bans being an inherently slow and reactive instrument, languishing behind the fast-paced evolution of political threats.

In the Turkish context, both procedural missteps (insufficient evidence, ill-timed prosecution) and political realities (electoral legitimacy of targeted parties) have repeatedly undermined prosecutorial efforts for dissolution.²¹⁰ And even when bans have been imposed, such as on Turkey’s Welfare or Virtue Party, successor organizations quickly emerge.²¹¹

Furthermore, as Volkmann stipulates, the practical implementation of a party ban extends far beyond the final judgment of the court.²¹² A successful ban is not a singular, decisive event but the starting point for a complex, potentially straining series of subsequent measures, such as the removal of party members from official positions, if necessary, by forceful actions.²¹³

In short, party bans are more resilient and comprehensive when combined with broader sustainable reforms and targeted enforcement measures. In sum, the necessary procedural safeguards for banning political parties may act as a *de facto* barrier to their effective use, especially when facing new challenges as described in section 1.4.

(4) The Ability to Minimize Harm and Balancing Proportionality

Because party bans deprive voters from choosing a political party to represent them and thus restrict political pluralism, their proportionality must be scrutinized, especially given their potential to produce unintended consequences.

Legal scholars and rights institutions caution that bans can reinforce the banned party’s martyr narrative, deepen societal polarization, and drive radical segments of a political movement further underground.²¹⁴ As Cremer emphasizes, bans “*are not a panacea*”, they cannot eliminate the social conditions or attitudes they aim to combat, and furthermore may spark radicalization or loss of trust in democratic structures.²¹⁵

²⁰⁹ *NPD II* (n 200) [1009].

²¹⁰ O’Donohue and Tecimer (n 201) 2–3.

²¹¹ *ibid* 4.

²¹² Volkmann (n 204) 6.

²¹³ *ibid*.

²¹⁴ *ibid* 3.

²¹⁵ Cremer (n 199) 61–62.

In the case of the AKP in Turkey, the failed ban was used by the party to justify restrictive reforms and consolidate executive power, arguably accelerating democratic erosion.²¹⁶ In both Germany and Turkey, experience shows that less-restrictive, targeted measures (financial sanctions, exclusion from public funds, or political cordons) may in some circumstances act as a more proportionate tool, as evidenced by the judgement of the BVerfG to exclude the NPD (*Die Heimat*) from state party funding for six years, thereby removing a key source of its operational funding without resorting to a party ban. ²¹⁷

Conclusion

Party bans are the most restrictive available legal method for excluding a political party from power and influence in the institutional realm of democracy. Yet, as cases such as the attempted banning of the NPD in Germany and the AKP in Turkey demonstrate, bans are difficult to enact, often circumvented, and may produce unforeseen, sometimes counterproductive effects, such as strengthening the resilience of illiberal actors and victim-narratives, which may lead to further dividing society.

While bans are more effective than informal strategies at blocking a specific party's immediate institutional influence, their broader effectiveness and legitimacy as a tool of last resort must be used with caution, always seeking to employ less intrusive alternatives first.

²¹⁶ O'Donohue and Tecimer (n 201) 2.

²¹⁷ *ibid* 4–6; 'Pressemitteilung: Die Partei Die Heimat (vormals NPD) ist für die Dauer von sechs Jahren von der staatlichen Parteienfinanzierung ausgeschlossen' (*Bundesverfassungsgericht.de*) <<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2024/bvg24-009.html>> accessed 1 August 2025. 'Pressemitteilung: Die Partei Die Heimat (vormals NPD) ist für die Dauer von sechs Jahren von der staatlichen Parteienfinanzierung ausgeschlossen'.

3.3.3 Comparative Synthesis

Building on the preceding empirical and doctrinal analysis of each instrument, this section turns to a direct comparison of the *Brandmauer* and party-banning procedures concerning their effectiveness.

Drawing from the established four criteria in section 3.3.1, this comparative assessment evaluates how each measure serves the legitimate aim of national security, public safety, and the protection of the rights and freedoms of others as recognized within the ECHR's proportionality framework under Article 11 (2) ECHR, particularly in the light of the investigation of "less restrictive means".

By systematically considering the core strengths and weaknesses of both measures, the following analysis filters the central findings of the prior sections 3.3.1 and 3.3.2 to clarify where each tool excels, where it falls out, and what this implies for the effectiveness of democratic protection under the Convention.

(1) Strengths and Weaknesses of the *Brandmauer*

While a primary strength, the *Brandmauer*'s ability to effectively prevent extremist parties like the AfD from accessing governmental power, particularly through institutional roles such as committee leadership or coalition participation, nevertheless remains dependent on sustained political will.

The *Brandmauer* serves as a clear normative signal, reinforcing political and societal boundaries and deterring collaboration with anti-democratic forces by raising reputational and practical costs. The informal yet coordinated ostracism imposed by the *Brandmauer* is enabling political actors to respond adaptively to emerging threats, though this flexibility inherently lacks the legal certainty and the finality of formal measures.

Turning to the *Brandmauer*'s weaknesses, its main vulnerability arises from its dependence on political will and collective discipline, which, from an ECHR perspective, raises concerns about the foreseeability and the lack of a clear legal basis for its implementation, despite its 'not-yet' rights restricting, informal nature.

Regional inconsistencies and occasional breaches reveal potential difficulties in its application, enabling gradual normalization of AfD, thus possibly eroding its normative clarity and making its long-term effectiveness uncertain. Starting with the ambiguities in politically defining what "cooperation" as such entails, combined with coalition tactics, risks weakening its deterrent power.

As an informal mechanism, it cannot systematically address the social, economic, and ideological drivers of extremism and is thus limited in its effectiveness in fully meeting the ‘pressing social need’ to counter fundamental threats to democracy, potentially requiring additional, more formal measures.

(2) Strengths and Weaknesses of Party Bans

The strongest theoretical advantage of party bans is their legal definitiveness. By formally prohibiting the existence of a party, bans try to block its participation in elections, coalition government, and official offices. Yet, as prior sections have demonstrated, this legal finality often is difficult to accomplish in practice.

These rights restrictions include an authoritative rejection of organizations that threaten the constitutional order and public safety, though the effectiveness of this normative signal is undermined by possible backlash effects. Existing rigorous judicial oversight, including a very detailed review of evidence and procedural safeguards, underpins the legitimacy of this measure by ensuring a high threshold for the ECtHR criteria of the restriction being necessary in a democratic society. Nevertheless, it makes the process exceptionally complicated, essentially, often hindering bans from being enacted at all. But where applied effectively, bans provide a critical tool for defending democracy and safeguarding the rights and freedoms of others.

Conversely, party banning procedures have structural weaknesses regarding their effectiveness. Despite their formal strength, they face substantial practical and normative limitations. They are difficult to implement, as demonstrated by repeated failed attempts against extremist parties. Even when bans have been declared, affected parties often reconstitute under new names, thus circumventing the ban’s intended purpose.

Comparative Matrix

Effectivity Criteria	Brandmauer	Party Ban
Prevention of Access to Governing Power	Strength	
	Blocking institutional access	Legitimate legal exclusion from any position associated with the rights of political parties
	Weakness	
	Blocking depends on political consensus	May be circumvented by rebranding/renaming of the banned party
	Possible threats to democracy maintain the position as a legitimate political party	
Normative Signaling of Democratic	Strength	
	Strong societal and political signal of who is subjectively perceived as democratic and who is not	Strong verdict on legitimacy of the banned political party
	Weakness	
	May not be perceived as a united signal	High risk of promoting victim narratives
Practical Implementation/ Resilience Over Time	Strength	
	Flexible	When implemented, extremely resilient
	Functions immediately, since it's sustained by political norms	
	Weakness	
	Vulnerability to erosion, dilution and exceptions	Procedurally extremely complex
		High burden of proof
		Not easily adaptable to 'new' threats to democracy
Minimizing Harm/ Balancing Proportionality	Strength	
	No interference with political rights/preserving pluralism	
	Weakness	
	-	Challenges pluralism Potential for societal divisions

3.4 Conclusion: Factual Effectiveness of the *Brandmauer*

The adaptiveness, and thus proportional effectiveness, is the greatest strength of the *Brandmauer*. From the ECHR perspective, this positions the *Brandmauer* as a possible less restrictive measure that, despite its informality, effectively serves the legitimate aim of democratic self-defense while minimizing direct interferences with Convention rights.

Its principal weakness lies in its inherent dependency on political commitment, making its long-term reliability fragile. As an informal practice, breaches and ambiguity in its implementation threaten its durability, while it cannot fully counteract the underlying causes of extremism. The biggest strength of party bans in terms of effectiveness is the unequivocal exclusion they enforce, decisively protecting the constitutional order and the rights and freedoms of others in the face of serious threats, backed by judicial scrutiny and procedural safeguards, which lends them high legal legitimacy.

Conversely, its most significant weakness is the implementation difficulty, which, if the implementation should fail, brings unintended consequences, including the establishment of victim narratives, societal polarization, and the resilience of extremist structures beyond party bans. As the ECtHR has explicitly held in its jurisprudence, party bans should remain as an absolute last resort, applicable when lesser means are demonstrably insufficient to reach the legitimate aim.

Given this, the *Brandmauer* appears effective, thus possibly proportionate and sustainable under the ECtHR's necessity standard. Its relative effectiveness compared to the procedural and political difficulties party bans face suggests that while fulfilling similar protective aims, it comes at a significantly lower legal and normative cost. However, this presumption holds only if the *Brandmauer* is consistently applied, publicly justified, and embedded within a broader democratic culture that resists authoritarianism not only through exclusion, but also through engagement and reform.

In sum, the proportionality logic of the ECHR demands that states pursue the least intrusive means necessary to protect democracy. When informal political strategies like the *Brandmauer* are deemed sufficient in holding threats to democracy at bay, formal bans might be disproportionate. Conversely, if such measures collapse or fail to prevent such threats, harsher tools may regain legitimacy. Thus, the effectiveness of the *Brandmauer* is not only a political fact but a legal benchmark that may influence the threshold for invoking the most severe instruments of militant democracy. After this factual assessment, the following chapter will normatively assess which role such political isolation strategies may play concerning the proportionality of party bans.

4. Normative Appraisal: Suitability and Critique of the Cordon Sanitaire

As established in the preceding chapters, militant democracy is a necessity, underscored by historical experience as well as recognized in the ECtHR's jurisprudence. As the comparative analysis of the effectiveness of two measures of militant democracy in chapter 3 has demonstrated, the Cordon Sanitaire may be utilized as a suitable alternative to the formal party ban. However, to achieve a well-rounded analysis of the Cordon Sanitaire as a measure of militant democracy, the implications it imposes regarding the democratic dilemma must be normatively assessed by drawing on scholarly criticism.

Thus, this chapter will start with reintroducing the democratic dilemma in section 4.1, normatively narrowing it down to its concrete persistence concerning the Cordon Sanitaire. Section 4.2 will identify relevant criticism of this political strategy by drawing on experience from the European practice, and weighing the costs and benefits of the implementation of the Cordon Sanitaire. Following this, section 4.3 will conclude this isolated assessment of criticism, before section 4.4 will assess the normative relation between the Cordon Sanitaire and the party ban, enabling a concluding holistic appraisal of the Cordon Sanitaire as a measure of militant democracy.

4.1 Framing the Dilemma

As this chapter aims to transition to a rigorous normative evaluation of the Cordon Sanitaire, it is necessary to consider a more comprehensive perspective, thus, to move beyond the Cordon Sanitaires' comparative utility as a possible alternative to a formal party ban, under the ECHR proportionality test, in its concrete form as the German *Brandmauer*. By transitioning to critically assessing the Cordon Sanitaire as an abstract measure, drawing on criticism originating in multiple forms in the European context, this chapter aims to demonstrate the challenges this measure of militant democracy imposes for fundamental democratic principles. As a measure of militant democracy, the Cordon Sanitaire faces the democratic dilemma posed by extremist parties:

Should democracies accommodate anti-democratic political parties to uphold the principle of pluralism, or should they defend themselves by exclusion and isolation?

As argued in chapter 3, the Cordon Sanitaire serves the legitimate aim to essentially safeguard democracy, but nevertheless, it comes with the real cost of potentially eroding inclusion, provoking polarization in society, and undermining public trust in democratic institutions. Hence, any assessment of the Cordon Sanitaire must weigh these costs, acknowledging that the path chosen reflects not only empirical calculations and political strategy, but rather normative judgements about what democracy requires and tolerates.

4.2 Cordon Sanitaire: Main Critiques and Risks

4.2.1 Democratic Legitimacy and Risks to Pluralism

The Cordon Sanitaire faces significant criticism regarding its potential to undermine fundamental principles of democratic legitimacy and pluralism. Starting with the primary concern of Detterbeck, which reflects the key dilemma of the Cordon Sanitaire, that it “*poses a fundamental problem (...) because it denies voters the possibility of choosing a real political alternative and gives ammunition to the rhetoric of neo-populist parties on the political right.*”²¹⁸ Thus, Downs claims, the efforts of mainstream parties to “*demonize, ostracize, and legally penalize*” a party can “*fuel and sustain political support*” for it, as evidenced by the Belgian case of the VB, which sustained public support from the Cordon Sanitaire it faced.²¹⁹

While the Cordon Sanitaire does not restrict the rights of voters or parties, it may amount to a mild disenfranchisement, with voters supporting ostracized parties possibly feeling excluded from meaningful political participation.

Conversely, one should not turn a blind eye to this criticism, hoping it will simply disappear. Rather than ignoring the inherent dilemma that such a Cordon Sanitaire is not only ostracizing a political party but the entire electorate of this party as well, public debate must explain why it is that this specific political party is ostracized.

This paradox, that by seeking to preserve democracy, the Cordon Sanitaire might jeopardize its inclusive, pluralistic nature, needs to be addressed. Ultimately, it is a choice of each elected member of parliament how to react when confronted with members of parliament whom they perceive as a threat to democracy.

Naturally, the decision to ostracize such a threat to democracy comes with a normative cost of marginalizing part of the electorate, raising questions of democratic fairness and inclusivity, which, one could argue, can be seen as an accepted democratic cost. Nevertheless,

²¹⁸ Klaus Detterbeck, ‘Cartel Parties in Western Europe?’ (2005) 11 Party Politics 173, 102.

²¹⁹ Downs (n 104) 102.

even a political decision that does not violate any rights of the ostracized political party has to remain proportionate to avoid fueling narratives of democratic hypocrisy.

4.2.2 The Ambiguity of Normative Boundaries

One central challenge the Cordon Sanitaire faces lies in the lack of clear and consistent criteria for its application. Unlike formal bans, the Cordon Sanitaire has no explicit procedural safeguards or abstract review mechanisms but is rather governed by the broader legal framework of parliamentary processes.

While democratic self-preservation may justify militant actions to defend fundamental democratic principles, without normative boundaries, the line between legitimate and illegitimate actions may become blurry.

Essentially, the lack of codified thresholds can fuel narratives that claim this practice of isolating a political party is arbitrary or political opportunistic. Nonetheless, the rights of members of parliaments and political parties are, in general, protected by a state's constitution as well as by procedural rules, alleged violations of these rights are therefore under the scrutiny of domestic courts.

4.2.3 The Risk of Unintended Consequences: The Martyr Effect

Beyond these legitimacy dilemmas, another concern arises from the potentially counterproductive outcomes of exclusion. As Downs stipulates, so-called 'quarantine efforts' might "*often yield unintended and undesired circumstances*".²²⁰ Political parties facing a Cordon Sanitaire might aim to frame this political strategy and use it as a "*martyr's mantra*", which, according to Downs, goes like this: "*It is hypocrisy (...) to deny power to democratically elected parties in the name of democracy.*"²²¹ By blaming the political establishment as "*detached from the real concerns of everyday people*" and as only being interested in preserving their position and, thus, political power, this narrative supports societal polarization.²²²

²²⁰ *ibid* 21.

²²¹ *ibid* 109.

²²² *ibid*.

4.2.4 The “Cartel” Critique and Instrumentalization by Mainstream Parties

Another aspect of the criticism the Cordon Sanitaire faces is its potential to be exploited as an instrument of political self-preservation by established parties. Drawing on the ‘cartel party system’ established by Katz and Mair, which, as Downs describes it, is “*characterized by a pattern of interparty collusion designed to reduce risk*”²²³, such as political parties working together, essentially acting as ‘state agents’, and utilizing the state’s resources to ensure their preservation in the political landscape.²²⁴

As Blyth and Katz argue, by cartelizing “*the market for votes through the ‘fixing’ of the policies they produce*”, political parties aim to preserve a specific status quo, in which they currently hold positions of power.²²⁵ Just as cartels limit market competition to stabilize profits, political parties would form exclusionary pacts to reduce electoral competition.²²⁶

While acknowledging the inherent nature of political power dynamics, the Cordon Sanitaire warrants significant criticism for its capacity to foster such a cartel party system, for its potential to hinder political innovation, and to undermine the responsiveness to the interests of voters who are not aligned with the dominant political or social groups being represented by the mainstream political parties. Consequently, it risks marginalizing alternative perspectives and creating a political environment where established political parties lack accountability, thereby challenging democratic legitimacy.

²²³ *ibid* 97.

²²⁴ Richard S Katz and Peter Mair, ‘Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party’ (1995) 1 *Party Politics* 5, 5.

²²⁵ Mark Blyth and Richard Katz, ‘From Catch-All Politics to Cartelisation: The Political Economy of the Cartel Party’ (2005) 28 *West European Politics - WEST EUR POLIT* 33, 38–39; Downs (n 104) 95.

²²⁶ Detterbeck (n 218) 102.

4.2.5 Conclusion

In summary, the discussed critiques regarding the Cordon Sanitaire reveal that, despite its comparative advantages over a party ban, it does not come without risks to democratic principles themselves. Its lack of clear, codified rules exposes it to accusations of arbitrariness and political opportunism, thus creating a situation that is vulnerable to being exploited by the ostracized parties and reframed into a ‘martyr’s mantra’, as Downs puts it.²²⁷ This could lead to undermined legitimacy and a lack of public trust in democratic institutions.

Furthermore, the political strategy of the Cordon Sanitaire is rightfully criticized for its potential to create a party cartel system, thus hindering political innovation and marginalizing a significant portion of the electorate, in favor of maintaining established political power dynamics.²²⁸

Given these normative and practical dilemmas, the Cordon Sanitaire cannot remain unquestioned as the ultimate solution in defending fundamental democratic principles. To summarize, yes, the Cordon Sanitaire might be a possible, less restrictive measure under the proportionality test as required by Article 11 (2) ECHR, but it nevertheless challenges democratic principles.

To assess how the Cordon Sanitaire is to be normatively seen in the light of the ECHR requires a discussion on how it relates to party bans. The following section will thus explore whether these two instruments, the Cordon Sanitaire and the party ban, are truly mutually exclusive alternatives, or if they exist in a more complex, potentially sequential relationship.

²²⁷ Downs (n 104) 82.

²²⁸ Katz and Mair (n 224) 5.

4.3 Are the Cordon Sanitaire and Party Bans Sequential or Complementary?

The relationship between the Cordon Sanitaire and formal party bans poses a complex question that plays within the general dilemma of how democracies may defend themselves:

Are these measures complementary tools that can be deployed sequentially, one preceding the other, or are they mutually exclusive, with the Cordon Sanitaire actively replacing formal party bans?

Addressing this question is critical from a normative standpoint to clarify how democratic systems ought to employ these measures of militant democracy, without compromising fundamental democratic principles. This section aims to explore these dimensions, arguing that while the measures operate in a factual sequence, they are normatively distinct and should be treated as such. Nevertheless, concluding that the Cordon Sanitaire should not be treated as replacing party bans as such, and should not raise the threshold of when they are sought as a legitimate tool of democratic self-defense.

4.3.1 Brief Description of the Measures

As elaborated in chapter 2, the Cordon Sanitaire is sustained by mainstream political parties collectively refusing cooperation with certain anti-democratic actors, effectively excluding them from political power and influence. This informal and strategic ostracism stands in contrast to party bans, which are a formal, legal prohibition that aims to prevent extremist parties from participating in democratic processes and is based on judicial findings of a threat to the constitutional order. To reiterate the findings from preceding chapters, this distinction between a political strategy and a legal measure remains foundational for understanding how they interplay.

4.3.2 Sequential Dynamics

The analysis of the Cordon Sanitaire, as obtained by Downs, suggests a sequential relationship between the Cordon Sanitaire and party bans, meaning that the Cordon Sanitaire may act as a first line of defense by politically excluding extremist parties and hindering their access to political key positions.²²⁹ Additionally, in practice, party bans tend to remain a last resort, as reflected by the fundamental principles of the ECHR, when political isolation strategies prove insufficient in safeguarding democracy. Thus, the Cordon Sanitaire and party bans can be

²²⁹ See Section 2.3.

described as factually being employed sequentially, as an escalation of different levels of democratic self-defense.

Nevertheless, the Cordon Sanitaire has the potential to diminish the perceived immediacy of a ‘pressing social need’ or ‘imminent threat’ as demanded by the proportionality test of the ECtHR for restricting political rights under Article 11 (2) ECHR, for example, by the banning or dissolution of a political party.

In essence, if a Cordon Sanitaire is perceived as effective in defending democracy, a legal assessment, if imposing a party ban is deemed necessary, may find that it would be disproportionate. Thus, by minimizing the factual political influence of extremist parties, the Cordon Sanitaire could lead to delaying or even preempting a need for the more severe legal measure of party banning, while the magnitude and long-term entrenchment in society are not reliably reduced.

4.3.3 Normative Reflection: Militant Democracy and Democratic Representation

From a normative perspective, the relationship between these two measures is more complex and thus deserves a critical assessment. Measures such as the Cordon Sanitaire evolved within the doctrine of militant democracy in the mid-20th century as a response to existential threats to democracy, such as fascism, and more recently adapted to new challenges such as political radicalization and populism. While the doctrine of militant democracy acknowledges that rights restrictions for the cause of safeguarding democracy are sometimes necessary, it also demands rigorous safeguarding against overreach.

While the Cordon Sanitaire factually may be effective and proportionate, thus a possible ‘less restrictive measure’ to party bans, it remains an unreliable, political strategy, dependent on many individual political actors to uphold this ostracism.

While, of course, any member of parliament normatively has the responsibility to protect democracy, respectively, the constitution of their respective state, this responsibility should not amount to a situation where political parties are essentially acting as state agents in substituting for the lack of formal protection of democracy employed by the actual state institutions.

Reiterating the points made within section 3.2, the states’ positive obligations to ensure the effective enjoyment of the freedoms and rights enshrined in the ECHR are binding for the state parties to the Convention but cannot and should not impose any formal obligation on political parties to act accordingly.

The democratic principle, as especially recognized in Germany under the term ‘*Freies Mandat*’ (Free Mandate), that every member of parliament has the freedom to make decisions

guided solely by their conscience, thus independent of party dictates or external pressure, must remain unchallenged. This parliamentary autonomy, as recognized by the ECtHR to some degree by granting a wide margin of appreciation in these matters, is vital for democratic values.

The Cordon Sanitaire, while a highly valuable tool, remains a political and not a legal tool. It inherently involves collective framing of certain parties, thus introducing risks of delegitimizing opposition voices within a political party as unacceptable and potentially undermining parliamentary autonomy, when tried to be institutionalized. To aim for formalizing such a political strategy would, in my opinion, undermine pluralism and lead to the nationalization of political actors, who ought to act as representatives of the people rather than governmental institutions.

In sum, while the Cordon Sanitaire factually is an effective tool to reduce observable threats to democracy, it remains a strategic political calculation rather than a normative or legally justifiable tool to avoid party bans where they would be warranted. When a Cordon Sanitaire is used to argue against employing a party ban, one falsely assumes that democratic threats can be neutralized by informal isolation alone.

4.4 Conclusion: Sequential in Fact but Normatively Distinct

In summary, the Cordon Sanitaire and party bans are factually sequential measures, with the former preceding and potentially delaying the latter. Nevertheless, they are normatively distinct, with the Cordon Sanitaire as a political exclusion strategy and party bans remaining a robust legal instrument.

From my point of view, the democratic order ought to maintain this clear distinction. While political exclusion is an important resilience mechanism, it is not attributable to the state's inherent obligation to protect democracy. It cannot replace legal and constitutional safeguards necessary to counteract existential threats. Furthermore, the inviolability of representatives' free mandate must be preserved to uphold democratic legitimacy.

To conclude, this thesis stipulates that the normative assessment of party bans must remain separate from the implications of political tactics, thus preserving the integrity of democratic self-defense and ensuring that legal measures retain their critical role in protecting constitutional democracy.

Conclusion

This thesis has demonstrated that while democracies face an inherent paradox in balancing pluralism with self-defense against internal threats, the German *Brandmauer* offers a valuable, less restrictive, yet effective tool for safeguarding democratic principles when compared to formal party bans under the ECHR.

The main findings of this thesis are that the *Brandmauer*, as an informal political strategy, can effectively serve the legitimate aim of democratic self-defense by minimizing direct interferences with the Convention rights, provided it is consistently applied and publicly justified, and is thereby factually influencing the threshold for more severe measures like party bans.

At the outset of this research, the analysis began by establishing the foundational concept of militant democracy, highlighting its evolution from responding to totalitarian threats to addressing contemporary challenges posed by populist parties that undermine democratic institutions from within. It was imperative to understand that the ECHR framework foresees the necessity for states to defend democracy as such, but at the same time demands strict necessity and proportionality, especially when fundamental rights, such as the freedom of association, are restricted.²³⁰ This doctrinal tension forms the context against which different measures of democratic self-defense must be evaluated.

The comparative analysis revealed that the *Brandmauer*, as Germany's specific Cordon Sanitaire, has largely succeeded in its primary objective, this being preventing extremist parties like the AfD from accessing significant governing power and normalizing their anti-democratic positions. Empirical evidence shows that mainstream parties have largely upheld a joint refusal to cooperate, thus effectively blocking institutional access for the AfD at both federal and local levels. This informal and flexible approach serves as a strong normative signal, intensifying democratic boundaries without directly interfering with the targeted party's formal rights or its ability to participate in elections.

²³⁰Concurring opinion of Judge Jambrek *Lehideux and Isorni v France* [1998] ECtHR [GC] 24662/94 [2-3]; *Klass and Others v Germany* [1978] ECtHR 38581/16, 41914/16, 57510/16, 62644/16, 7190/17, 10973/17, 12530/17, 19411/17, 22087/17, 28475/17, 78165/17 [49]; *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* [2001] ECtHR 59689/16 [97]; De Morree (n 21) 223–224.

Conversely, while formal party bans offer a complete legal exclusion, their practical implementation is difficult, often slow, procedurally complex, and, just like political isolation strategies, dependent on the required political will for domestically initiating such a procedure. Furthermore, bans carry a significant risk of unintended consequences, such as fueling victim narratives for the banned party and potential polarization of society.

The normative appraisal underscored that while the *Brandmauer* tends to be better at avoiding these severe legal and societal costs, its effectiveness relies entirely on sustained political consensus and the collective will of mainstream parties, making it inherently vulnerable to erosion and dilution over time.

Additionally, regarding the relationship of the Cordon Sanitaire and party bans, this thesis argues them to be factually sequential but normatively entirely distinct, with the Cordon Sanitaire remaining a mere political strategy, not to be utilized, described, or treated as a state measure against threats to democracy.

Nonetheless, the analysis contributes theoretically by demonstrating how an informal political strategy, the Cordon Sanitaire, can function as a less restrictive tool within the ECHR's proportionality test, while stipulating that it normatively should not. This expands the traditional legal scholarship on militant democracy, which, in contrast to the political scholarship, often focuses solely on formal legal tools like party bans, by recognizing the functional equivalence and legal relevance of political self-defense mechanisms that operate outside direct state action. Thus, this thesis offers a nuanced understanding of the most intrusive measure.

In practical terms, this research suggests that for mainstream political parties, maintaining a consistent and publicly justified *Brandmauer* is a vital first line of defense. By effectively minimizing the factual political influence of extremist parties, such strategies can delay or even preempt the perceived "pressing social need" for more severe legal interventions.

For the ECtHR and national constitutional courts, the findings imply that the demonstrated effectiveness of informal measures like the *Brandmauer* factually influences the assessment of the necessity and proportionality of party bans, potentially raising the threshold for their legitimate application. Nonetheless, this thesis normatively argues that such considerations should be cautious of the distinction between legal and political strategies.

However, this research is not without its limitations. The primary focus on the German *Brandmauer* and its assessment under the ECHR framework meant that a detailed comparative analysis with other European contexts, or a deeper dive into the specific socio-economic and ideological drivers of extremism, fell outside of its scope. While the *Brandmauer*'s effectiveness in limiting political influence was assessed, the broader impact of sustained political exclusion on voter behavior or the long-term effects on democratic pluralism could not be covered comprehensively. However, these limitations pave the way for promising approaches for future research. For instance, future research could explore the precise impact of functioning Cordon Sanitaires on the likelihood of states implementing formal party bans. Investigating strategies for public education and engagement that can counteract the “martyr effect” often exploited by ostracized parties would also be valuable. Additionally, setting out on the path to a philosophical perspective, the importance of civil disobedience in safeguarding democracy could provide a more holistic perspective on democratic resilience.

Therefore, while the *Brandmauer* proves to be a powerful tool of political ostracism, its effectiveness should not weaken a state's resolve. A militant democracy requires the courage to implement a formal ban when the necessity threshold is definitively met.

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Abstract

How can democracies preserve pluralism while defending themselves against actors who seek to dismantle it from within? This dilemma has become relevant in Germany with the rise of the Alternative for Germany (AfD), which reignited debates about militant democracy and the use of political isolation strategies such as the Brandmauer (firewall). While most legal research on militant democracy focuses on formal state measures like party bans, it often pays less attention to informal strategies of political ostracism, the Cordon Sanitaire. Addressing this gap, this thesis examines whether the Brandmauer can function as a “less restrictive measure” under the proportionality test of the European Court of Human Rights (ECtHR).

Using doctrinal analysis of the ECtHR’s jurisprudence, combined with comparative and normative evaluation, the thesis assesses the effectiveness and suitability of both party bans and the Brandmauer. From an empirical perspective, the Brandmauer has so far prevented extremist political parties from gaining executive power and reduced their institutional legitimacy, all while avoiding some of the backlash and the procedural hurdles associated with formal party bans. Nevertheless, unlike formal party bans, its durability depends on mere political consensus, and it risks reinforcing polarization through exclusion.

This thesis argues that the Brandmauer and party bans are both tools of militant democracy, which are sequential in practice but normatively distinct in law. While the existence of a Cordon Sanitaire must be considered in assessing whether a party ban is proportionate, it cannot discharge the state’s duty to use formal legal instruments when democratic boundaries are breached. By integrating informal political strategies into a legal framework, this thesis advances the study of militant democracy and clarifies the conditions under which democracies may legitimately balance pluralism with self-preservation.

Abstrakt

Pluralität zu gewährleisten und gleichzeitig interne Bedrohungen durch extremistische und populistische Akteure abzuwehren, ist eine der wohl drängendsten Herausforderungen für heutige Demokratien. Dieses Dilemma führt in Deutschland, vor allem durch den Aufstieg der Alternative für Deutschland (AfD), zu hitzigen Debatten über das Konzept der wehrhaften Demokratie als solches und vor allem über den Einsatz politischer Isolationsstrategien, wie der sogenannten Brandmauer. Während sich die meisten juristischen Untersuchungen des Konzeptes der wehrhaften Demokratie auf formelle staatliche Maßnahmen wie Parteienverbote konzentrieren, wird informellen Strategien politischer Ausgrenzung, dem Cordon Sanitaire, oft wenig Aufmerksamkeit geschenkt. Diese Ausarbeitung schließt diese Lücke, indem sie die Brandmauer, als spezielle Ausformung des Cordon Sanitaire, als potenziell milderes Mittel im Vergleich zu einem formellen Parteienverbot im Sinne der Verhältnismäßigkeitsprüfung des Europäischen Menschenrechtsgerichtshofs (EGMR) in Erwägung zieht.

Anhand einer dogmatischen Analyse der Rechtsprechung des EGMR in Verbindung mit einer vergleichenden und normativen Einschätzung beurteilt diese Ausarbeitung die Wirksamkeit und Eignung eines formellen Parteienverbots im direkten Vergleich zur Brandmauer. Aus empirischer Sicht verhindert die Brandmauer erfolgreich, dass extremistische politische Parteien die Regierungsgewalt erlangen, und schwächt somit ihre institutionelle Legitimität. Gleichzeitig vermag die Brandmauer einige ungewollte Nebeneffekte und prozessuale Hürden, welche mit einem formellen Parteienverbot typischerweise einhergehen, zu vermeiden. Im Gegensatz zu formellen Parteienverboten ist das Bestehen und die Wirksamkeit der Brandmauer jedoch grundlegend vom politischen Konsens abhängig und birgt somit die Gefahr, eine gesellschaftliche Polarisierung und Spaltung zu verstärken.

Die vorliegende Arbeit argumentiert, dass die Brandmauer und Parteienverbote unterschiedliche Instrumente der wehrhaften Demokratie sind, die in der Praxis aufeinander folgen, aber rechtlich und normativ unterschiedlich sind. Die Existenz eines effektiven Cordon Sanitaire's zur Eindämmung einer Gefahr für die Demokratie muss als solche zwar bei der Beurteilung der Verhältnismäßigkeit eines Parteienverbots berücksichtigt werden, dieser Umstand entbindet den jeweiligen Staat jedoch nicht von seiner in der Europäischen Menschenrechtskonvention (EMRK) niedergeschriebenen Pflicht die Demokratie als solche zu schützen. Die Einbeziehung informeller politischer Strategien in eine rechtliche Prüfung ergänzt die vorhandene juristische Forschung des Konzepts wehrhafter Demokratie und erläutert potenzielle Bedingungen unter denen Demokratien der inhärenten Spannung zwischen Pluralismus und Selbsterhaltung gerecht werden können.