MILITANT DEMOCRACIES AND CHILLING EFFECTS: SHOULD THERE BE A CONCERN?

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ABSTRACT

Democracy is seen by international law as the cornerstone of any modern nation. Not only the implementation but future maintenance of this form of government can be equally understood as being of the utmost importance. From this very assumption, doubts regarding the possible mechanisms that may be applied to protect such *status quo* arise. Is it justifiable to hinder rights such as freedom of speech or assembly, rights understood as inherently attached to democracy, as a way to defend it from anti-democratic acts? If yes, is it acceptable for a democracy to bear the constant chilling effect that arises from these forms of democratic protection? Does militancy provoke worrying chilling effects? This article, based on literature review and documentary analysis, aims to explore this defensive behavior of democracy, understood as militant democracies, and the potential side-effect of discouraging citizens' political participation due to the unpredictability of *de facto* situations in which specific expression is undue. The first step offers to examine the theoretical framework of academic study militant democracy. The second step consists of disclosing the chilling effect and its direct influence within democracies. Lastly, a general assessment regarding that militant behavior may be a catalyst for political rights inhibition is discussed. Considering that their actions are analogous to authoritarian governments, the article concludes that militant democracies tend to, theoretically, suppress political participation from citizens allocated at the opposite spectrum of the incumbent power holders. However, reasons for this may not be mostly due to institutional provisions such as law and statutes, but from actual social dynamics and behaviors which, although linked to the law *status quo*, may be secondary a power play.

KEYWORDS: Democracy. Militant democracies. Freedom of speech. Chilling effect. Political participation.

DEMOCRACIAS MILITANTES Y LOS EFECTOS INTIMIDATORIOS: ¿DEBERÍA HABER UNA PREOCUPACIÓN?

RESUMEN

La democracia es vista por el derecho internacional como la piedra angular de cualquier nación moderna. No solo la implementación, sino también el mantenimiento futuro de este tipo de gobierno puede entenderse igualmente como de suma importancia. A partir de esta premisa, surgen dudas sobre los posibles mecanismos que pueden aplicarse para proteger este status quo. ¿Es justificable restringir derechos como la libertad de expresión o de reunión, derechos entendidos como inherentemente ligados a la democracia, como forma de defenderla de actos antidemocráticos?

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Si es así, ¿es aceptable que una democracia soporte el constante efecto intimidatorio que surge de estas formas de protección democrática? ¿Provoca la militancia efectos intimidatorios preocupantes? Este artículo, basado en revisión bibliográfica y análisis documental, tiene como objetivo explorar este comportamiento defensivo de la democracia, comprendido como democracias militantes, y el potencial efecto secundario de desalentar la participación política de los ciudadanos debido a la imprevisibilidad de situaciones reales en las que expresiones específicas se consideran indebidas. En un primer momento se examina el marco teórico del estudio académico sobre democracia militante. En segundo se estudia el efecto intimidatorio y su influencia directa dentro de las democracias. Por último, se discute si el comportamiento militante puede ser un catalizador para la inhibición de los derechos políticos. Considerando que sus acciones son análogas a los gobiernos autoritarios, el artículo concluye que las democracias militantes tienden, teóricamente, a suprimir la participación política de los ciudadanos ubicados en el espectro opuesto a los titulares del poder incumbente. Sin embargo, las razones para esto pueden no deberse principalmente a disposiciones institucionales como leyes y estatutos, sino a dinámicas sociales y comportamentales reales que, aunque están vinculadas al status quo legal, pueden ser secundarias en los juegos de poder.

PALABRAS-CLAVE: *Democracia. Democracias militantes. Libertad de expresión. Efecto intimidatorio. Participación política.*

INTRODUCTION

Democracy is considered by many scholars, politicians, and citizens as the best political regime. An achievement to be celebrated by countries. Even if such can be considered an effective accomplishment, it becomes problematic not to acknowledge the flaws that come along with this form of government. Departing from a very singular and initial point, it can be said that one of democracy's biggest issues is its moral prepotency. Democrats have assumed that such a form of government is not only unpaired but necessarily better and self-sufficient in a way that, whichever may be the issue a democracy has to face, the institutions, the law, the courts, and the constitution have all the necessary tools to handle the distress. This has arguably not been the case a century before, as it still isn't today. Democracy does seem to bear a wider range of issues to deal with since it tends to embrace a greater variety of people as legitimate participants within public discussions and political spheres.

By qualitatively and quantitatively increasing participation a larger spectrum of ideologies, opinions, and preferences tend to be developed within the public sphere and they consequently take part as new variables in the formation of public opinion. However, between this highly heterogeneous mass of political discussion, some ideas appear to be at odds with the very democratic premise that allows them to engage in such discussions. Someone even blatantly state its hostility toward democracy as a whole or, at least, how it is being conducted. What then stems from this scenario is how to deal with these ideas from a theoretical and pragmatic perspective. Should people who present a threat to democracy have the same extension of political rights as those who abide by its rules?

Assuming that democracy stands on rights such as freedom of speech, assembly, and press, it is not far-fetched to say that there is no democracy without the manifestation of ideas. But such ideas are bound to enter into conflict to a greater or lesser extent. Nonetheless, conflict should not be seen as problematic, as long as it stays within an unharmful specter of interplay. However, what happens then when the manifestation of particulars, social groups, and political parties, even under the protection of individual liberties, tend to harm democratic structures? Is

right or left-wing extremist expression allowed to be delivered without any form of institutional obstacles? What are the consequences of allowing such behavior? Can these extremist expressions be possibly hindered under the scope of democratic protection?

Considering the possible answers to this debate, different problems must be faced. The article leans on the hypothesis of the positive answer. By acknowledging the possibility of curbing rights as an alternative for democratic protection, citizens may be pervaded by the so-called "chilling effect". This phenomenon may be broadly defined as the inhibition of the exercise of fundamental rights by their very holders deriving from a sense of fear that their actions are possibly deemed undue or even illegal. Such concern is normally linked to unclear standards of illegality and also potentially *ad hoc* behavior from the political leaders. In this case, is it preferable to leave democracy with minimum protective barriers or to increase them at the cost of an undesired phenomenon such as the chilling effect? Does militant democracy entail a more preoccupying framework with which scholars should pay more attention?

The division employed within this research, based on literature review and documentary analysis, can be seen in three different steps. The first consists of disclosing the academic study of militant democracies with an emphasis on theory. Secondly, the concept of chilling effect and its influences within the exercises of political rights, more specifically, regarding freedom of speech. Third and last, a theoretical exercise aiming to relate the adoption of militant behavior and the intensification of the chilling effect is undertaken. The article concludes that militant democracies tend to, theoretically, suppress political participation from citizens allocated at the opposite spectrum of the incumbent power holders. However, reasons for this may not be mostly due to institutional provisions such as law and statutes, but from actual social dynamics and behaviors which, although linked to the law *status quo*, may be secondary a power play.

1. MILITANT DEMOCRACY: A DEFENSIVE STANCE

The academic study of militant democracies has been developed among the studies of Political Science and Constitutional scholars for less than one hundred years. The work responsible for coining the term of this literature is Militant Democracies and Fundamental Rights I, wrote by Karl Loewenstein (1937). In the first half of the 1900s the author recognized that when democracy faces, mostly but not only, political mobilization that threatens its existence, it is expected for its pillars to be left aside to articulate proper defensive mechanisms aiming for its maintenance. Proper response, in such cases, is expected from the legislative through preventive legislation. By the executive pushing back the threat by a decree. Finally, the judiciary may rule under constitutional guarantees. However these measures tend to result in the abridgment of rights, thus giving rise to the so-called democratic dilemma: should democracy be defended through a rights-curbing approach?

By presenting his statement about the necessity of preserving democracy, Loewenstein had a very clear purpose of confronting fascism and its preoccupying spread within fragile governments. His worries were grounded on the Republic of Weimar episode and its demise. This case is of particular importance not only because the events that took place in Weimar had global implications, but because it is quite representative of the issue being discussed here. All the proceedings regarding Hitler's rise to the Chancellor's chair were, technically, allowed within the constitutional framework of the republic. A far-right politician who aimed

to eradicate left-wing opposition within the state was permitted to do so because it did not break any democratic rules. Such an outcome had political grounds since it constituted a pragmatic move to enable the existing parliamentary deadlock. However, he did also lean on a high tolerance behavior of democrats that did permit such maneuver to be undertaken. The Rule of Law indeed prevailed during the rise of the National Socialist German Workers Party (Nazi Party), and even though democrats did have issues with the potential of the ideology that was being taken at the highest State position, to interfere within the trajectory in non-legal ways was a rough alternative that would put into question the entitlement of democracy.

At the same time, just watching as a democracy shifts to an authoritarian government does not appear to be compatible with the democratic theory by which every person must be conceived as a participant and potential influencer of public opinion. The very first question that can be asked is simple, however, considerably intricate: is there something that can be done to prevent this political rearrangement from happening? In other words , theoretically and pragmatically, is there a conflict in intervening within a democratically attained result if this outcome tends to eradicate the conditions that enabled this very decision to be made?

To answer these questions, efforts aimed to understand the role of democratic institutions before self-announced and unannounced threats started to take place. The initial premise consists of understanding the legitimacy of democracy defending itself. Standing on the importance of democracy as the most suitable political system, its defense should be only a natural step toward its maintenance. But to permit the intervention from State institutions within the public opinion formation sphere is itself a movement that goes in contrasting ways with the liberal democracy model which is considered to be the axiom of international standards (Ikenberry, 1999). A considerable obstacle is then positioned before the academic study of militant democracies but there are some paths that permit the aforementioned direct intervention in the political sphere without being directly confronting liberal democracy premisses (Kurki, 2010; Posner, 2017).

A first step in understanding which alternatives may be utilized to defend democracy begins with elucidating the path to be taken and permit further discussion about its repercussions. Based on Loewenstein's assessment, different measures could be taken to prevent fascist leaders from obtaining any possible legal power that would allow them to subvert democracy: (a) enable concentrated power for the executive; (b) utilize power grounded on the premise of emergency; and (c) curb freedoms through *ad hoc* legislation that would permit rights such as freedom of speech to be hindered for specific cases and people (Capoccia, 2013). More specifically, both (a) and (b) can be sorted together since a blatant unbalance within the system of checks and balances arises if disproportionate power is left to the head of the executive without considering particular circumstances that a state of emergency may be responsible for offering (Reinolds, 2017). Thus, it is possible to understand Lowenstein's defensive stance as being two-front: legal and political. Legal because it stems from the utilization of law, whether *ad hoc* or not, to hinder preemptively or *ex post facto* perilous movements against democracy. Politically because, although law itself is already essentially political, judicialization of rights restriction tends to be considerable and it is not uncommon for these legal discussion to reach Constitutional Courts, which are political organs.

However, Loewenstein's assessment does not enter into details about the specificities that such defense tools must observe and neither their more specific ends. Sure, the greater scope is

democratic defense, but what institutions, what ideas, and what groups of people must be aimed by these measures is left pretty much unassessed by the author. Considering militant democracy approach being a newborn, the dearth of pragmatical approaches is compreheensible. Nevertheless, some authors try to offer a more detailed analysis of this subject. Capoccia (2005), for example, delineates four different approaches of democratic defense based on short and long-term reactions along with repressive or accommodative behavior to be better able to assess interwar European State performance regarding the protection of their democratic governments.

According to the author, a long run strategy of democratic defense would be the "Purge". This alternative consist of eliminating the presence of extremist ideologies inside the governmental institutions by passing specific legislation aiming to reaffirm peoples' loyalty to the government. One of the most acknowledged examples of the "Purge" is the *Berufsverbot* ("labor proibition"), an official measure by which all public employees in West Germany should prove their loyalty not only to the State itself, but mostly to the liberal-democratic order. Considering that this measure requests a institutional path to be enacted, Capoccia understands it as better fitting in the a "long run" perspective. On the other hand, a shor term strategy would be the "Incorporation" by which the democratic incubents partialy incorporate the extremist party, group, and individuals. This strategy aims to diminish the extremist force by engaging in direct conversation, negotiation and even concessions that, in the short run, help to ease inflammatory discourses and ideas deemed harmful to democracy. An attempt in implementing the "Incorporation" strategy may be seen in Czechoslovakia. The Czech State had, for a period of time, considerable more threaths to factor in from the Communists than Fascists. However, when this scenario changed by the mid-late 1930s the Communist parties, still posing as a political problem, were to join other left wing parties to fight the opposing right-wing party. The desidered collaboration was not all effective, but the idea behind it was the incorporation.

Even though the alternatives are displayed and recognized as possible instruments for preserving democracy, it won't be possible to assess them here in-depth or even thoroughly for each one of them bears peculiarities. However, what they have in common is the fact that they appear to stand on considerable uncertainty regarding factual premises and high political bets. Sure, enabling the President or the Prime Minister to hold "unlimited power" to back away from potential democratic threats may be teleologically understandable from a militant scope, but there is no actual guarantee that this behavior won't be repeated in rather unalike controversial situations that may vary from when it was firstly utilized. Thus, even though mechanisms that at their very root may lack legal confirmation are utilized to maintain the democratic *status quo* and positive results are achieved, it isn't a safe affirmative to say that history would simply repeat itself.

Belgium may be a fair example of that. From 1936 to 1939 the country faced severe democratic instability which, although the potential harm stored was higher than the actual damage caused, demonstrates how a series of factors apparently disconnected along with a party dynamic aimed at defending institutional integrity may be a very reasonable alternative to be adopted in times of turmoil. The extreme right-wing party, the Rexists, feasting on regular anti-system claims such as governmental corruption, collusion among political and economic groups, and public power inefficiency, tackled Belgian politics until already settled internal disputes within the country would reach the turning point of demanding a severe change of political alignment in the government. Accordingly, had it not been for borderline parties, direct executive activity, and *ad hoc* illegal

measures, perhaps the Rex Party would have obtained its desired place in politics (Capoccia, 2005).

The Belgian Catholic Party, considered at the time a borderline party, played a major role in avoiding the rise of the Rexists. Being one of the three biggest parties in Belgian Politics it also played the role of being an umbrella party, thus, it fostered a great variety of ideologies. The elected President, Hubert Pierot, although not alone, was responsible for assisting the internal reform of the party to better enable its functioning without permitting the party to abandon its former coalition with the Socialists and Liberals to form a new coalition with the Rex Party. Arguably, had that political affiliation been done, the outcome of avoiding the maturation of the extreme right-wing party could have been changed.

This assessment also needs to pay greater attention to the utilization of illegal measures to curb the Rex Party movement. The Belgian government advanced the 1936 election, which was expected to take place in October, to May 24th to destabilize the organizational movement from the Rexist. Degrelle, the leader of the party, was denied access to State Radio, a right granted to all political parties. Illegal mandates were issued against several party members and even home searches were undertaken. Apart of the anticipation of the elections, which had legal grounds and was accompanied by the Parliament regarding its legality, the remaining measures were often groundless and lacked any legal provisions. It is complex to say how important relying on these illegal alternatives influenced the outcome of the Belgian scenario, but they do appear to play a considerable role at least regarding the organization of the party.

Although all these facts are deeply troublesome, for the scope of this analysis the issue in which more emphasis will be applied is the *ad hoc* approach. The claim of engaging in democratic defense whilst incurring *ad hoc* behavior, be it by the legislative, the executive, or the judiciary, is quite complex. The measures themselves, even considering the theory from Loewenstein, do not need to be necessarily legal. Therefore, to enable *ad hoc* defensive measures to be undertaken is, to a certain extent, to permit a considerable range of issues to be solved considering the obtention of the desired results. If the elected ways to defend democracy end up being undemocratic, this does not mean that more would be lost if an authoritarian government substituted a democratic one. However, the measures for this maintenance are rather uncertain as the situations in which they are used are also of considerable imprecision.

These blurred scenarios along with the unclear extension of the application of the aforementioned possible instruments for democratic defense are some of the aspects that render drawbacks to militant democracy theory (Macklem, 2006). In fact, by standing on general premises, stricter application parameters do not appear within this theory. Militant democracy, thus, does not have a one-case-fits-all parameter and countries and regional systems have to develop their way of being militant. Each democracy may adopt better suitable alternatives for its problems which does indicate fluidity to its application, despite such inconsistency may draw backfire concerns (Müller, 2012).

It is not entirely clear whether some of the normally applied alternatives for democratic protection are effective. Party bans may be the most tangible example. The Batasuna party, from the Basque country, was prohibited from participating in the election for being connected with the ETA organization (Euskadi Ta Askatasuna/Basque Homeland and Freedom). The party was outlawed once in 2003 when it was entirely forbidden to participate in the elections that year. In 2007 the party was only partially allowed to run for the election, that is, it was banned in half of the

municipalities in the country. In 2011 the party had no bans to bear in the electoral run, however, since it had been virtually removed from the political frame for a considerable period the party's popularity and relevance as a political contender dropped remarkably. Nevertheless, other forms of political repression may backfire. Within repressive contexts, indiscriminate State violence, even when backed with legal provisions, tends to result in a loss of support from the electorate (Arenas, 2021)

Thus, how, when, and why the selected measures are applied also gives rise to open-ended debates. The German constitution in 1949 adopted a straightforward militancy. It states that the principles of its Constitution, such as the rejection of totalitarianism and democratic relativism, are not modifiable along with the undisputed liberal democratic order (Klamt, 2007). Such provisions find reasoning within the events of the Second World War and the aforementioned Weimar case. However, other countries across the world may find such provisions exaggerated (Heinze, 2009). India bans any political discourse made by parties or party members that stands on race, religion, caste, or any appeal to religious symbols since the country recognizes that it stands in a highly fractured society, where religion and its religious premises cannot be a factor of influence for political decisions (Issacharoff, 2015). May a specific party stand on specific minority exclusion as one of its policies, and democracy itself will, most likely, be undermined. Israel, similarly, bans political parties that reject democracy and the Jewish aspects of its State (Issacharoff, 2015). These examples demonstrate that particular elements that have been considered sensitive to a country's history tend to be fostered by militant conduct.

Not all answers for understanding the militant framework may lie in history, but it does shed some light on the subject. Legal-political historical events faced by countries or groups of countries have some important participation within the theory of militant democracy, since they may indicate what has constituted an enemy within a particular history (mostly extremist ideologies or groups within the political spectrum) and they also show reasons for defending itself, even though within a narrower point of view. Such premises indicate that historical events that have affected geographical or politically linked countries may produce similar effects on militant behavior shared by the aforementioned agents. Minimum and maximum thresholds of militancy could be alike, just as what constitutes a legitimate threat, and what enables the application of defensive mechanisms in situations in which democracy is not at threat.

History also provides considerable aid in different ways. Militant behavior has been mostly associated with an institutional responsibility, thus, leaving little to no participation for citizens. Although seemingly contradictory there are historical reasons for that. Militancy also accounts for populism, which is the mobilization of the electoral masses under general claims of state corruption and lack of representativity (Laclau, 2005; Eatwell, 2017) as a democratic pathology or even a symptom of unconsolidated democracies. The key point to enable populist leaders to act is the utilization of the electorate, therefore, to insert the population within the equation of democratic defense may result in the empowerment of those responsible for the problem in the first place. More contradictory is that not including the citizens as defenders of democracy may reinforce populism (Stahl; Popp-Madsen, 2022; Abts; Rummens, 2010; Accetti; Zuckerman, 2016).

Leaving much of the pressing affairs to be resolved by the State enhances the experience gained from constantly engaging in events that may trigger militancy by the government on a diminished scale. A ground judge deciding simple cases about the trespassing of political rights is accumulated until certain patterns can be recognized. This cluster of information, thoughts,

and even legal decisions (considering the example given) bears no reason for being strictly limited to such a smaller sphere of action. When the heads of the State, the Parliament, or even Constitutional Courts are provoked to deliver decisions on the subject of democratic defense, some of these decisions may turn into actual governmental policies.

This is the case regarding the First Amendment Doctrine in the United States, for example. The issue with freedom of speech is hardly completely understood without making considerable reference to the First Amendment Doctrine and the very process in which it has been molded. From Schenck vs. United States (United States, 1918) and The New York Times Co. vs. Sullivan (United States, 1964), cases responsible for understanding the issues with unlimited protection to speech, to United States vs. Eichman (United States, 1990) in which discussions about content-based restrictions posed great legal issues, time and experience in dealing with such cases enabled jurisprudence to be formed and, perhaps retrospectively, enabled several theories of freedom of speech to take form through the reasoning of several magistrates. Time and, we may say, History, are responsible for formulating this workable framework, and theories within the most varied assessed subjects end up becoming intertwined.

Therefore, the Militant Democracy theory has several variables to consider. The next section chooses one of the many entangled literatures to better theorize whether militancy could be responsible for causing considerable effects on it: freedom of speech and the chilling effect. The latter is understood as the unintended suppression of permissible behavior due to the unclarity of what is impermissible. This may be due to several factors. Both the existence of unclear legislation, unclear judicial parameters of decision, or even the lack of any institutional provision discussing dimmed subjects. The existing connection between militant democracies and the chilling effect lies in the fact that, according to what has been presented, the defense of democracy may ordinarily trace unsafe paths since *ad hoc* measures happen to be rather frequent. If there exists imprecision about what may be a threat to democracy then it may also be expected for people to refrain from engaging in important public and civic democratic activities. This one explanation stems mainly from a law-framed theory, however, as it will also be presented, a great deal of social sciences fosters important debates and empirical indications about how these two literatures relate even further.

2. CHILLING EFFECT: THEORY AND FREEDOM OF SPEECH ISSUES

Militant Democracy literature departs from the proposal of directly curbing rights, more specifically, political rights, when they are deemed to have been misused. This possibility is based on the premise that rights enjoyment have limitations. The statement, thus, bears the inevitable question: where is the threshold that indicates such limits to be put at? This question is a central issue in chilling effect theory for some reasons: if the bar is set too low, then the abuse of political rights is expected to be of considerable reach and this would turn out the bar to be incapable of rendering the desired results initially fixed. On the other hand, by setting the bar too high many abusive behaviors regarding rights enjoyment end up being legally fostered, leaving only extremist conduct open to scrutiny.

Therefore, there are important consequences in delimiting what is permissible and what is not in a militant democratic regime. Virtually, every conduct which has some kind of legal regulation is possibly fated to suffer limitations. However, even for scope-narrowing reasons, a greater emphasis is given to freedom of speech. Not only has the chilling effect concept derived

from legal theory about this right, but the ongoing literature has also been built on top of many premises in which freedom of speech was seen as a pivotal aspect to be considered: It enables the self-realization of the individual; maintains the market place of ideas; and permits democratic participation (Delgado, 1982; Carbonell, 2014). Apart from this specificity, a general discussion on how to work with the "bar fixing" issue does prove to be helpful.

The borderline in which rights operate indicates that there exists an area in which an individual is undertaking the protected activity and, from a determined point on, it starts incurring in unprotected action. From a rather simple assessment of the statement, it is possible to draw some conclusions. First, there exists a threshold in which permissible activity becomes impermissible. Second, not all hindrances regarding rights are understood as undue, since, if barriers are built on the side of impermissible activity, they are most likely seen as necessary or simply a consequence of the prior judgment of allocating the respective behavior within the "unprotected side". Third, hindrances, generally speaking, are not to fall upon the content allocated within the "protected side".

The issue about the chilling effect is mostly allocated in the third and last statement. The problem is not whether the restriction exists or not, but whether it meets the objectives it originally proposed to attain without causing more harm than it should. The literature and theory about the chilling effect puts this logic as a "spillover" issue (Stone, 2008; Kendrick, 2013). Mostly near where the threshold is set, there are conducts and also expressions that fluctuate between permissible and impermissible territory on account of place, time, and channel chosen by the speaker.

Shouting "Fire!" inside a theater was considered to be unprotected speech on account of the possible harm inflicted by it. However, under this logic, the same shout in an open park mostly made out of concrete wouldn't have the same repercussions. On similar strands militaries wearing their uniforms in theatrical productions criticizing the military role in the Vietnam War, although underpinned by a discussion about content-based distinction, does imply that such form of protest would be allowed within the same period, however elsewhere. Lastly, the burning flag issue, by which a direct statement about the dissatisfaction with the government is made, has been thoroughly discussed whether it should or not be abridged considering freedom of speech standards, since the channel by which a message is delivered also constitutes part of the message transmitted. The same dissatisfaction, although debatably far less intense, could be made through official channels of communication such as issuing a complaint in local administrative buildings of a city.

Therefore, there may be an inherent uncertainty in a speech that stays near the threshold settled, for small variations on the circumstances in which an expression is delivered can be responsible for pushing or pulling the speech from the permissible side to the other.

Two more evident alternatives appear to be suitable to mitigate this problem. The first would be the application of the Prior Restraint Doctrine. Instead of having a system with subsequent liability that would permit freedom of speech to be unconstrained by post-scrutiny, the Prior Restraint Doctrine does the opposite: it restricts in advance, thus requiring expression to undergo a previous process of verification which will only then allow the desired message to be delivered (Emerson, 1955). There is a high defiance in the aforementioned approach since it can easily turn into authorized censorship and, from a liberal democracy perspective, it pretty much disables the self-government premise of democracy (Meiklejohn, 1948; Post, 2000).

The second alternative would be to extend the margin of the threshold in favor of speech. Frederick Schauer's theory (1978) on chilling effect, for example, heavily relies on "deterrence" as to what constitutes the main aspect of chilling. Thus, if people are afraid to undertake their normal activities for there is no plain legal foreseeability about what is impermissible, and if the individual happens to fall within the illegal conduct, further consequences, such as a legal process and its costs, prove to be too burdensome when considered in a cost-efficiency equation. In addition, Schauer furthers his theory by laying out the problem of judicial error. An initial misinterpretation of law and legal statutes leads to a legal process based on an individual having incurred in unprotected speech, and if there was a legal misinterpretation then the judge would acknowledge this mistake and decide in favor of the defendant. However, he also states that there is no guarantee that this will be the outcome since judges also incur mistakes. On his account, people are restrained under fear, risk, and uncertainty, thus, causing unintended chilling.

Since there is a tendency to favor the prevalence of freedom of speech over the possibility of unduly restricting speech, Schauer argues that considering the margin of error of the judiciary, there should be an extended protection margin in which it is blatantly acknowledged that legally unprotected speech will possibly be protected. Therefore, considering that some form of damage will be present either in overextending protection or in restrictive protection, the author claims the necessity to apply the "Principle of Comparative Harm". The principle follows from a balance between harms which results in a deliberate adoption of one from the acknowledged harmful choices and works with it aiming to minimize the risks that come along with it.

One of the examples offered by Schauer is in the case of obscenity and pornography. The case is about a handler or retailer of "adult" material that has, without knowing, hardcore pornography material. Considering that the content in discussion is illegal and not protected by any form of freedom of speech principle, those responsible for having such material should be penalized according to the law. However, it would be too burdensome for the owner of such material to evaluate the threshold where the material trespasses legal protection. Thus, if hardcore pornography is found in the possession of a retailer, and the owner does not know about the content, no penalty should be applied.

What underpins the argument is the chilling effect potential of individual self-curbing, the application of the Principle of Comparative Harm, and the intent of the individual. The retailer may refrain from commercializing allowed material for it does not know when such material becomes illegal and, as it was aforementioned, since there exists a tendency to favor freedom of speech, it would be more harmful to potentially hinder the individual from acting within legally protected activity for reasons of mere statutory uncertainty or judicial misinterpretation. A final element that stems from the other two already mentioned is then added to shut the discussion which is generally understood as the intent of the speaker: did the speaker had the intention of trespassing the legal parameters of protected speech? Some reasoning about the speaker's intent may be seen in Brandenburg v. Ohio (United States, 1996). The US Supreme Court primarily held the State cannot forbid expression based on the potential of causing harm. Not only then must the speech be able to produce such material outcomes as the speaker must have had the intention of causing such harm. This precedent enables some complex and even blatantly undesired results that cannot be reached by the two criteria disclosed, which are the cases in which damage is caused, but the speaker is left unpunished for it did not intend to do so. However, this is technically acceptable

from a freedom of speech prevalence approach.

Schauer's perspective on the subject is highly based on freedom of speech accounts and therefore has considerable First Amendment Doctrine's influence. Still, it appears to overly rely on these grounds without engaging with other just as important fields of knowledge responsible for explaining chilling conduct. Not only that, but deterrence is one of the many behaviors that fit within the broader chilling effect doctrine, such as speech shaping (Penney, 2022). Not only refraining from entering into protected speech leads then to a chilling effect issue, but also socially conforming speech is just as potentially harmful against this same right. However, legal theory does not appear to offer considerable insight into this aspect, thus leading scholars to further reach for social science's perspectives.

One author who looks to this greater scope is Jonathon W. Penney (2022). His insight understands the chilling effect not as previously defined, that is, an act of deterrence based on the fear of legal harm and economic factors, but as an act that an individual undertakes to comply with social norms. Social psychology has a standard definition of "social norms" terminology: understood rules for accepted and expected behavior (Miller, 1999). Beyond this definition, there are two categories of social norms. The first is the descriptive norm, understood as what most people would do in a situation. The second is the injunctive norm which refers to what people normally approve or disapprove of in given situations (Cialdini; Trost, 1998). Law does have its role within this theory, but it plays one role along with psychological and social ones. It is not thus considered the main reason why people struggle with freedom of speech issues. Therefore, the main shift relies on observing the social level rather than the individual level (Licht, 2008).

The literature that switches the scope from individual to group considerations then engages in explaining, through empirical analysis, that people are motivated to rely on norms to frame their relations with other individuals, but these norms are not the ones that can be found on official bureau websites. The norms that underpin interpersonal behavior with considerably more intensity are social norms that are frequently built under customs. One of the most prominent and famous studies about how these social norms overweight the institutional provisions posed by the State was developed by Robert C. Ellickson (1991). Ellickson went through the foundational pillars that regulate Shasta County neighbor ranchers' interplay in their daily lives, mostly assessing what sort of rules, if any, were responsible for regulating such relations. Trespass laws, for example, played no role at any level and disputes were settled through local norms established by the ranchers themselves after communal and neighbor behavior (Penney, 2022).

If anything can be drawn from these observations is that there are relevant factors that derive from social relations and, more specifically, social norms that are just as relevant as law to explain the chilling effect. Perhaps of even greater importance are the major factors associated with self-inflicted harms stemming from the transgression of social norms. There is a moral issue in respecting or disrespecting social norms that some scholars attribute to the "watching eye" effect, which is the awareness of surveillance even when there are no mechanisms to do so (Keller & Pfattheiche, 2015). This supposed supervision would be responsible for chilling people from fully expressing themselves or, more commonly, engaging in socially conformed speech. On this account, people are prone to change their behavior because of awareness of being observed, identified as the "Hawthorne effect" (Adair, 1984). On this logic, speech that is deemed to be better accepted by the social fabric tends to experience greater freedom to an extent where there

may not even be counter-ideologies to discuss, also known as the "Spiral of Silence" (Neumann-Noelle; Petersen, 2004).

The previous information does not imply the irrelevance of legal constrictions contributing to the chilling effect, but that it is necessary to apprehend a greater width of elements that imbue the fear, risk, and even uncertainty posed by Frederick Schauer. It seems to be the case to provide an intertwined assessment, which the following and final part of this work proposes to do. It will draw on much of what has been already discussed about Militant Democracies and the chilling effect and if there should be greater preoccupations about the chilling of freedom of speech in democratic societies that adopt militant behavior. Militant Democracy literature draws heavily on legal approaches to curb the misuse of political rights, hence on a possible justification that there would be considerable intensification of chilling. However, as it has been discussed, the manifestations and behavior of individuals also considerably rely on social norms. The next pages aim to elocute the relation existing between the aforementioned aspects.

3. DOES MILITANCY INTENSIFY THE CHILLING EFFECT?

Militancy straightforwardly claims that curbing political rights is an alternative to protect democracy and, although the issues that come along with this decision are acknowledged, it is preferable to take risks in favor of saving democracy (Fox; Nolte, 1995). One of the known problems the literature understands to be considerable is to enable the chilling effect in areas where, technically, most would assume there shouldn't be. One of them is the regulation of political discourse. To settle restrictions within public discourse offers a great deal of resistance since this involves a complex field of human rights not to say that state measures against freedom of speech can result in censorship. What follows as a seeming consequence is that outlawed expression inevitably causes a chilling effect. But is that true? More than that, is that necessarily a bad thing?

A general assumption that comes along with the argument is that when someone is incurring an illegal activity a penalty is expected. Regarding the chilling effect, this penalty can come from the law or from the uneasiness of disrespecting social norms and rendering a moral penalty. The legal consequences for illegal behavior are available for everyone who wishes to consult it. However, it does not mean that the individual would do that. Militant Democracy, when linked to the legal justification of the chilling effect, assumes that people are well aware of the penalties and, to a certain extent, they consider them to be incompatible with the uncertainty that stems from the legal provision that outlaws expression. This is when the chilling effect is enabled.

However, it poses a great deal of debate whether people are aware of the specific penalties they might bear. Maybe the justification for why people refrain from saying everything they wish lies elsewhere. It could be possible to find better grounds in penalty justification by paying closer attention to the relevance of social norms and how they can be considered as important as legal statutes to condition behavior. Punishment is arguably more simply justified since it is found in a moral violation. Thus, even though penalties are not implemented they create a personal sentiment by which people feel displeased when violating social norms and which, arguably, every single person has to a lesser or greater extent (Garland, 2001). Still, objective assessments of these conduct prove to be a fair challenge.

There is no simple way to answer the question: from where does chilling come from? A considerable complication is because there is no easy way to measure people being "chilled" from

expressing themselves. The issue posited is that there is an attempt at gauging the absence of something inherently abstract. For instance, by assuming that a considerable amount of chilling effect relates to judicial activity, it is implied that a court undertakes a cost-efficiency evaluation when dealing with freedom of speech issues and this deems that their decision offers a better relation between under-protected and overprotected expression (Kendrick, 2013). Nevertheless, there is no easy way to say that courts are doing good work or missing the point.

An empirical approach that may have some indication, but requires a substantial change of scope from private to public discourse, is found in the study undertaken by Suneal Bedi (2021). The author tries to measure how peoples' expression changes according to increasing degrees of institutional limitations regarding words and level of aggression. The study demonstrates that even though the speaker delivers the same message, as the degree of censorship increases, expression becomes less intense. Interestingly, the author's work may show that the chilling effect may assist in decreasing heated expression, which would be most welcomed in democracies. However, the problem in this study rests in its scenarios of application. Bedi asked the participants to write negative reviews about a restaurant with three increasing degrees of censorship. The author acknowledges that his findings may not be applied in the public sphere. And this is the key issue here.

Measuring the chilling effect within the private sphere may be complicated enough, but within the public sphere, while considering democracy maintenance or enhancement in the equation, it does not appear to be something as feasible as Bedi made it look. However, a thin piece of information may be used: people did obey orientations regarding what they were permitted to write and what they weren't. This is a complicated aspect, however. The interviewees did obey the rules set, but the situation of the study itself bears the question of whether had these people not been asked to participate and accept to undertake the study the results would be the same. That is, had the rules been set and they had to obey them without any prior consultation, nothing would technically guarantee that the outcome would have been the one documented. In addition, each participants would earn $2 (two dollars) for their honest participation, what also raises the question of whether this "reward" also influenced the study. But it may be said, however carefully, that there is an aspect underlining rules-abiding behavior as something positively evaluated. It is morally well seen to obey the existing rules and when these very rules provide considerable safety to individuals this behavior tends to be maintained.

Here comes the logic that substantiates the previous understanding. When Alexander Meiklejohn (1948) posits the intrinsic relation between freedom of speech and self-government, the main argument on why democracy is preferable to other forms of government, he claims the importance of society's freedom to be attached not to the absence of control, but on the presence of self-control. By postulating the importance of the "self" in controlling activities undertaken by the government, what underlines his argument is that people who have participated in the democratic process were conscious and allowed such restrictions. If the law that contains these restrictions has derived directly from the power-holders, then there is a conspicuous defiance of the will of the people when such law is not adhered to. The Rule of Law is the conclusion of this insight. The argument is essentially legal, but social science's explanation would say that the Rule of Law is the system in which social norms have been allocated at the utmost level of compliance. Possible restrictions destined to preserve democracy would prove to be following this logic if elaborated by the citizens.

In the same strand, the chilling effect would still be directly connected to the many fields of knowledge responsible for its explanation. If law is a social norm at the highest possible level of compliance, then the social explanation of moral penalties is not substituted by the existence of statutory penalties. They do coexist. Not only that, but people find acceptable physical penalties because moral grief may not be responsible for the full disapproval of the transgression of society's moral code, although the physical penalty, as already mentioned, may not be the utmost reason why people avoid incurring in illegal conducts or even refraining from behavior which may be occasionally understood as such. An example demonstrates how law can be understood as a social norm. In a public campaign people driving their cars may be pulled over by police officers for not wearing the seatbelt. The slogan of the campaign was "Buckle up! It's the law.". According to Licht (2008), and based on true propaganda that did contain the mentioned slogan, by saying "it's the law", public authorities assumed to inform the driver that driving unseatbelted goes against a social norm of respecting the law. Consequently, this would be enough to imbue a different correctional behavior by the citizen.

One may say the example is highly detached from intense political disputes over democracy and freedom of speech issues. They may be correct. But if the logic of respecting the Rule of Law is worth something, perhaps paying attention to smaller events, serves as a tendency sample. Then, the question returns: Does militancy intensify the chilling effect? A direct and simple assessment of the issue posited may lead to a more self-evident, but initially misleading answer which is yes, it does. If there are legal statutes outlawing expression, then it is more than assumed that dimmed spots of expression near the legal threshold occasionally fall within what is considered to be illegal conduct. This possibility curbs potential intentions of expression which may be important to public debate and, therefore, democracy. However, several other factors are left unassessed, mainly, those related to why people obey the law in the first place.

As it was seen, there are reasons to understand social aspects as being of great importance to offer a proper answer. People have a high appraisal of how they are perceived, something that is not necessarily related to law compliance. As it was possible to see in Rancher's case, social norms play a fundamental role in conditioning behavior and the less the influence from governmental action upon a group of people is perceived, the greater the role played by these social norms endogenously elaborated. When discussing militant democracies, it is necessary to assume that there is substantial governmental participation in the political debate, thus implying that at some point social norms may conflict with legal norms.

If these social norms take the form of a Bill and go through the entire process until they become a legal norm, then there is an overlapping of elements in a single command. It is complex to assess, from this point on, whether people respect the law for one reason or another. However, it is also possible to acknowledge that different groups, which live by different social norms, have agreed on a specific conduct to be of common interest for everyone to abide by. This process considerably deals with majoritarian premises: not everyone agrees with every aspect of the norm, but a formal threshold has been surpassed, which enabled a decision to be made. Sometimes, even core elements tend to be debatable among political actors and this disagreement proves to be a respectable obstacle to democratic promotion and its relation with the chilling effect.

Democracy suffers from conceptual imprecision. Several works spend utmost efforts not only to discuss this aspect that revolves around this term but also to present possible definitional

paths suitable to researchers with different objectives (Alvarez et al., 1996; Collier; Mahon, 1993; Collier; Levitsky, 1997; Kurki, 2010; Sartori, 1970). The problem of definition is perceived to be contrasting among different groups and this issue spills on governmental policy discussions which inevitably claim for a formal conclusion. Freedom of speech standards support these statements. Perhaps one of the very few agreements about democracy's goal is regarding the participation of citizens who speak and listen to others' ideas aiming to form a public opinion. This dynamic is fostered by people's right to freedom of speech.

However, freedom of speech also suffers both from misconception and conceptual imprecision. There is little to no reconciliation on the extent of this right besides the core element of enabling people to participate in the democratic process. When there are hindrances in this process, correctional intervention is deemed a fair alternative. Hate speech is an example. This form of expression is used by people who attack historically oppressed groups under the claim that this behavior is fostered by their right to freedom of speech. The repeating of this conduct, theoretically, could be responsible for influencing how the targeted groups are perceived and possibly diminish their actual capacity to influence public opinion formation (Post, 1991). If this is true, then it is possible to say that: people do have variations on what is the actual extent of freedom of speech, and that this scenario would permit State intervention to reestablish the *status quo* of the democratic process. The question that remains unanswered is where is it possible to draw a line that separates what can be said from that which cannot, or should not be said? Hate speech might be at an extreme pole of impermissible speech and prove to be a less difficult issue to deal with, but to answer the previous question along less extreme scenarios is more complicated. More than that, the answer invariably bumps into definitional issues of freedom of speech and democracy.

Consent is then the abstraction that links the main argument that has been developed. A substantial agreement in politics tends to be an exception. Seldom a reality. Social groups are in a constant state where their social norms are possibly unmatched by a majority consent. Sure, when the groups do not interact among themselves and cluster into a greater group, there is considerable less importance whether their social norms match the legal norms. Their moral and comunal conducts are the only norms resposible for conditioning their behavior. But when these smaller groups conflate to an extent where they become part of a society, a clash of conflicting behaviors is likelly to materialize.

This theoretical scenario is in fact the idea that underpins democracy. Groups of people that are in a constant conflicting dimension is not only the rule in democratic governments, it is also a necessary condition (Mouffe, 2005). There is an inherent antagonism in democracy because, if there wasn't any, there would be no reason for the creation of several set of rules about how to make a decision. However, these rules also indicate that complete agreement is unlikely. Thefore, there must be consent regarding the process that enabled the materialization of the decision, which doesn't mean material agreement. People are not expected to agree with the content of a decision, but to consent that their understandings about a subject do not necessarily match majoritarian preferences.

For these reasons the political agreements are mostly formal, meaning that the content of these agreements is assumedly in accordance with the involved parties when in fact, it is not. Chilling issues are then bound to happen as something inherent to democratic dynamics. The change of the parties in power through elections, for instance, blatantly allows the content of the

formal agreements to be changed, mostly through interpretation of already existing provisions. What once was extremism may not be tomorrow. Democratic militancy does not work as a catalyst, it simply puts the latent problems of interpretation, definition and disagreement in evidence. By directly dealing with abstract concepts, issues of substantial fluidity prove to be tough enough to even separate entire countries. Militancy, however, is not responsible for it.

The overturn of Roe v. Wade (United States, 1973) might be a fair example of that. By tackling from several fronts, but most prominently a right to privacy of women and their freedom to terminate a pregnancy without governmental restrictions, the 1973 Supreme Court's decision upheld one of the two sides in what can be pointed out as being a fair moral debate. To permit the abortion, even though the decision coming from the highest Court in the country, does not imply the acceptability of abortion by the "defeated" side. In fact, the termination of the discussion by the Supreme Court may have been responsible, some years later, for fueling the creation of norms challenging the decision. The Mississippi's Gestational Age Act of 2019, for instance, directly objects the ruling of Wade under the claim that the decision was fragile and controversial, thus, a weak *stare decisis*. Accompaning this logic and added to a substantial change in the Supreme Court's seats, the overturn was possible.

Although there was a substantial turn regarding the content of a remarkably important decision that influenced public politics in the country, this fact should not come as a surprise. The social norms that negatively evaluate the abortion were left mostly untouched since the overturn happened from a top-bottom perspective, thus, it was not the people who decided to place a consented social norm at the legal level of compliance, and this is one of the main points. People did not manifest their consent because there wasn't one. Social groups that despised abortion won't change their creeds base on judical dicisions.

What seems to support then that militancy does not intensify the chilling effect is based on the premisse that the present rules of the democratic game are responsible for doing that alone. Basing the functioning of entire countries on the observance of procedural standards is arguably fair from a less complex point-of-view since it tends to be better considering objective assessments of citizen participation and legitimacy of decisions. However, when a substantial assessment is required, the system colapses for it has not been architected for this end. Chilling is, from what may at first seem contradictory, propeled by the procedural assessment of democracy since people think, speak, and talk about subjects that are not plainly objective.

It seems that Schauer had this in mind when he posited the necessity of stretching the protection of speech even acknowledging the undue protection of some expressions. His assessment is procedural, but attempts to reconcile with the content of the speech. Adding his accounts with Penney's, an inevitable more complex web of factor is posited, but fairly more explicative of the chilling effect phenomenon along with the democratic frame.

Militancy, since is posits a considerable more subtantial assessment of peoples' expressions, may be responsible for the decrease of the chilling effect. It is important to recal the chilling effect as some form of non-intented supression or alteration of the speech to be legally and socially conformed. In a sense, a procedural approach tends to face the issue of identifying if a speech is permited or not from a rather accute perspective that assumes several factors as important to be assessed before deeming speech undue. This was the case in the already mentioned scenario of shuting "Fire!" inside a theater or leafleting against the war in front of military barracks. These

evaluations are highly specific regarding what they propose to analyze, but do not offer just as specific insights about the same content of the speech when the "where", "when" and "how" variables change.

A thorough substantial assessment of the content of the speech, on the other hand, may offer clear standards of what content is permissible or not. Legally speaking, if this is done, Schauer's pure legal theory may be left aside. From a social normative perspective, this may assist in better consent from the many social groups responsible for composing a democracy since that which differentiates a group's social norm can be effectivelly discussed about. A clear issue is the possibility of enabling some content to be excluded from public discourse. However, exclusively in terms of chilling effect, framing the content to be talked about potentialy decreases fear and uncertainty as well as frames the content of what the social norms find to be reasonable to discuss.

CONCLUSION

Militant democracy theory attempts to be an alternative to democratic neutral protection. Democratic governments can be said to be overwhelmed by "enemies", which are those that either claim to be democracy-favorable or plainly state their differences with this form of government. Although freedom of speech should be fostered, some of these people or groups of people may be considered real threats to the maintenance of democracy if they manage to reach any political relevance inside the Congress, the parliament, executive chairs, and Constitutional Courts. To avoid more perilous scenarios the alternative of curbing rights proves to be a way out, despite its inherent problems already discussed.

Additionally, the grounds on which these rights are suppressed, considering how unclear they might be, both in material and formal terms, appear to be theoretically aligned with the chilling effect literature. Thus, people modify their expressions or even avoid pronouncing them at all due to fear of incurring non-conformity patterns established either legally or socially. This behavior then has sprayed roots, which results in a rather complex assessment of how much each part contributes to the chilling effect. Departing from the idea that law compliance is a custom seems a fair initial step to explain the interplay between law and morals as to why people obey the legal statutes and consequently why the chilling effect is inherent to the frame in which democracy is normally allocated. Thus, democratic militancy is not responsible for the intensification of the chilling effect, however, its premises posit definitional issues in the spotlight.

Nevertheless, a more specific study with a greater empirical approach appears to be a pressing affair since much of what has been disclosed here was carved out from material experiences from countries, but no direct and in-depth assessment has been made to an extent in which the theory displayed may be effectively confirmed. The next step may consist of establishing a methodology to entitle a democratic government as militant, identifying States that went through democratic instability that enabled this militancy, finding a way to overcome or not the situation, and if or how freedom of speech was one of the political rights which the government decided to curb through indirect ways. Some groundwork is still to be done.

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