Speak No Evil, Hear No Evil, Do No Evil

A comparative perspective on the limitations of the right to freedom of expression in Croatia and Sweden

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Abstract

Once again Europe is faced with the challenge to which extent should a democratic state act in a militant manner to combat threats to its democratic future. Croatia and Sweden, both the European Union and Council of Europe member states, are also facing the increased clash between the freedom of expression and the far-right expression that occurs in public debate, therefore, affecting the legislative framework throughout the produced case law. Comparative legal research on the constitutional protection of freedom of expression and related rights in Croatia and Sweden depicts the state of militant democracy in the context of contemporary far-right expression in the national constitutional contexts, as well on the broader scale given their necessity to comply with the international and European legal standards.

Keywords: freedom of expression, far-right, Croatia, Sweden, European Court of Human Rights, constitutional protection, militant democracy

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1. Introduction

1.1. Topic and research problem

In 1976 the European Court of Human Rights (hereafter: ECtHR), in one of the most famous cases regarding freedom of expression, *Handyside v. UK*,[1] ruled that freedom of expression constitutes one of the essential foundations of such a [democratic] society and is one of the basic conditions for its progress and the development of every man.[2] In the same judgment, ECtHR further emphasized that the freedom of expression is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population.[3] Indeed, freedom of expression is considered to be one of the fundamental human rights, the pillar of a contemporary, liberal democratic society. Freedom of expression is multifaceted; it represents much more than a mere legal issue. It is a linguistic, social, cultural, and political issue. As stressed out in *Handyside,* freedom of expression is autonomous – it contributes to the progress and the development of every man, it allows an individual to be an individual. Additionally, the political dimension is of utter importance for the creation, enforcement, and survival of liberal democracy. The political dimension of freedom of expression allows an individual to be Aristotle's true *zoon politikon.* Despite the freedom of expression being the foundation stone of liberal democracy[4], it is not an absolute category. Freedom of expression can be limited and/or restricted on certain occasions. Namely, the European Convention on Human Rights[5] (hereafter: ECHR) stipulates that "the exercise of these freedoms, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of

[1] *Handyside v. UK,* App. No. 5493/72 (ECtHR, 7 December 1976)
[2] *Handyside v. UK*, para 49
[3] Loc. cit.
[4] Loc. cit.
[5] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

information received in confidence, or for maintaining the authority and impartiality of the judiciary."[6] International Covenant on Civil and Political Rights[7] (hereafter: ICCPR) also prescribes that restriction of freedom of expression is possible when provided by law and necessary "for respect of the rights or reputations of others" or "for the protection of national security or of public order or public health or morals".[8] Therefore, it is evident that, according to the tools available in international law, freedom of expression can be limited and restricted when necessary to protect certain values shared by liberal democracies. Moreover, it is important to mention that the rights to freedom of expression, association, and peaceful assembly are often grouped because they are intertwined in a manner that the respect for freedom of expression and freedom of opinion is a fundamental criterion that enables several other freedoms and rights to be enjoyed, such as freedom of association and freedom of assembly.[9]

This study concerns the limitations of the right to freedom of expression in two European Union and Council of Europe member states – Sweden and Croatia, throughout a comparative perspective of their national legislation in the light of their different historical, political, social, and economic backgrounds, yet, bearing in mind the influence of international and European legislation on their national legal systems. The focus of the study is the clash between freedom of expression and the far-right expression and its interpretation in the discourse of (inter)national public law and the concept of militant democracy.

Bearing this in mind, in this chapter, the aims, purposes and research questions, background and previous research, the relevance of the topic to human rights, and delimitations will be outlined. Chapter 2 covers the theoretical framework of this thesis, while chapter 3 serves to explain the methodology of the thesis. Chapter 4 is focused on the analysis and theoretical and practical implications of the research. Chapter 5 brings

[6] ECHR, Article 10, para. 2
[7] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[8] HRC General Comment 34, '*Article 19 – Freedom of Opinion and Expression*' (2011) CCPR/C/GC/34, para. 2
[9] Human rights, democracy and the principles of the rule of law in Swedish foreign policy, Government communication 2016/17:62, (8 December 2016), p. 20

together the dialogue of various scholars in an attempt to invite the reader to engage in further discussion or research. Ultimately, chapter 6 serves to conclude this thesis.

1.2. Aims, Purpose, and Research Question

This thesis aims to examine how far-right expression condoned by both political parties and the non-party actors affects the status of the right to freedom of expression as prescribed by law. Namely, both Sweden and Croatia are facing the rise of far-right rhetoric where the line is often blurred – does the particular expression still, falls under the scope of freedom of expression, or is that thin line, enshrined by the concept of militant democracy, has been crossed? Another aim is to explore how the very different historical development of the right to freedom of expression legislation, as well as the utterly different political and cultural heritage of the two aforementioned countries, affects the exercise of far-right expression. Lastly, this project examines the status of the right to freedom of assembly and association in the context of the far-right that seemingly becomes louder and louder in both Croatian and Swedish, as well as the European public discourse. The corresponding research question for accomplishing these aims is:

> How can the clash between freedom of expression and far-right expression be discursively understood and interpreted in Croatian and Swedish national [legal] contexts?

The purposes of this work are manifold. First, the text is meant to contribute to the body of existing literature on the limitation of the right to freedom of expression through a comparative analysis of seemingly similar legal systems, thus broadening the research field and filling a gap in the literature. Second, this text will add to the field of human rights in terms of highlighting connections between theoretical and practical law, in both national contexts, as well as on international and European levels. Third, this text has the more general purpose of highlighting the issues surrounding legal limitations imposed on the right to freedom of expression in a democratic society. Fourth, this text has the purpose of contributing to the field of human rights in terms of an attempt to understand the stance of the far-right towards the freedom of expression, which at times is lacking in

the human rights field. Lastly, the text ought to raise the responsibility of states in striking a balance between a limited democratic discourse and a less effective democracy.

1.3. Background and previous research

This section overviews the factual background of the situation concerning freedom of expression, association, and assembly in both respective countries. However, it also overviews previous research on the national context concerning freedom of expression, association, and assembly. Therefore, this section serves a dual purpose while it is structured in three subsections. Subsection one deals with the general information on the right to freedom of expression. Since this research is undertaken in a particular national context, i.e., Croatia and Sweden. For that reason, a brief overview of the constitutional protection of freedom of expression in each respective country is necessary, as well as the pithy historical circumscription. Therefore, section two dwells on the contextual background and limitations of the right to freedom of expression in Croatia, while section three explores the right to freedom of expression and its limitations in Sweden. In the end, a brief discussion of gaps in the existing research, as well as placement of the current research in the field is addressed.

Contextual framework: The far-right meets freedom of expression

The destructive force of the far-right was tragically witnessed through the mass devastation brought by the Second World War.[10] In the years after the Second World War, the international community developed tools and established institutions meant to combat the repetition of devastation that occurred during the war. Nevertheless, despite the existing mechanisms, we are, once again, witnessing unprecedented electoral support of the violent far-right entities across Europe.[11]

[10] N. Alkiviadou, *The Far-Right in International and European Law*, New York, Routledge, 2019, p. 1
[11] J. Henley, 'Rise of the far-right: will there be an election bonanza for Europe's populists?', *The Guardian,* 9 April 2022, https://www.theguardian.com/world/2022/apr/09/far-right-europe-rise-elections (accessed: 2 May 2022)

First of all, the clarification of what can be considered a far-right entity is required. Notwithstanding, there is no consensus on the definition of the far-right movement.[12] According to Goodwin, far-right entities reject the principle of human equality, and hence are hostile towards immigrants, minority groups, and rising ethnic and cultural diversity.[13] Alkiviadou builds up on that and states that far-right movements violate human rights and fundamental freedoms, such as non-discrimination, and reject principles such as equality and human dignity.[14] She further elaborates that far-right movements exploit rights and freedoms [i.e., expression, association, and assembly] to pursue and achieve their discriminatory and, at times, violent goals.[15] On the other hand, Rydgren argues that radical right parties and movements share an emphasis on ethnonationalism rooted in myths about the past.[16] Their programs are directed toward strengthening the nation by making it more ethnically homogeneous and—for most radical right-wing parties and movements—by returning to traditional values.[17]

Second of all, it is important to determine the limitations of the right to freedom of expression. To do so, I am going to elaborate on key characteristics of what constitutes hate speech, which will further be addressed as a limitation to the right of the freedom of expression.[18] Similar to when it comes to the far-right definitional framework, there is no consensus on what constitutes hate speech. Delgado and Stefancic consider hate speech to be a conscious and willful public statement intended to denigrate a group of people.[19] Hate speech covers all forms of expression which spread, incite, promote, or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants, and people of immigrant

[12] Alkiviadou, 2019, p. 7
[13] M. Goodwin, *Right Response: Understanding and Countering Populist Extremism in Europe*, The Royal Institute of International Affairs, London, 2011, p. 12
[14] Alkiviadou, p. 8
[15] Ibid., p. 9
[16] J. Rydgren, 'The Radical Right: An Introduction', in J. Rydgren (ed.), *The Oxford Handbook of the Radical Right*, New York, Oxford University Press, 2018, p. 1
[17] Loc. cit.
[18] See heading 1.5: Delimitation
[19] R. Delgado and J. Stefancic, 'Images of the outsider in American law and culture: Can free expression remedy systemic social ills? ', in. R. Delgado (ed.), *Critical race theory: The cutting edge*, Philadelphia, Temple University, 1995, cited in M. A. Paz, J. Montero-Díaz, A. Moreno-Delgado, '*Hate Speech: A Systematized Review,* SAGE open, vol. 10, no. 4, 2020, p. 1

origin.[20] Noticeably, the limitations on the right of freedom of expression are broadly defined. In *Vejdeland and Others v Sweden*, the ECtHR builds upon this (non)definition when stating that it is not necessary for the speech to directly recommend individuals to commit hateful acts,[21] and that speech used in an irresponsible manner may not be worthy of protection.[22] Given those two broad (non)definitions of hate speech, one could side with Kiska who argues that hate speech seems to be whatever people choose it to mean.[23] Accordingly, there are three basic determinants of hate speech. The disputed speech must be a public expression of intolerance, accessible to a wider audience. It has to contain a message that spreads and promotes intolerance or hatred which may lead to violence and discrimination of a person or group based on their ascriptive characteristics.[24] In plain words, the following elements of hate speech can be emphasized. The first element, the content, must be of hateful, offensive, degrading, and dehumanizing character. The second element entails that the hateful, offensive, degrading, and/or dehumanizing message is pointed toward certain groups which can be identified on the grounds of particular common and objective characteristics like race, ethnicity, sex, gender, religion, etc. The third element is the public character of the speech, explained in the previous section. Nevertheless, following the ECHR and ICCPR, freedom of expression can be restricted in limited and exceptional circumstances when complying with the famous three-part test. Namely, the restrictions must be provided by law, in pursuit of a legitimate aim [i.e., respect for the rights of others], and it must be necessary for a democratic society.[25]

Moreover, the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter: ICERD)[26] requires states to condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of

[20] Council of Europe's Committee of Ministers Recommendation 97 (20) on Hate Speech (30 October 1997), p. 106
[21] *Vejdeland and Others v. Sweden*, App. No. 1813/07, (ECtHR, 9 May 2012), para 54
[22] Ibid., para 55
[23] R. Kiska, 'Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence', *Regent University Law Review,* vol. 25, no. 1, 2012, p. 110
[24] I. Hlebec and Đ. Gardašević, 'Pravna analiza govora mržnje', *Pravnik: časopis za pravna i društvena pitanja*, vol. 55, no. 107, 2021, p. 11
[25] ICCPR, Article19, ECHR, Article10, para. 2
[26] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1966, entered into force 4 January 1969), 660 UNTS 195 (ICERD)

persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.[27] ICERD further elaborates that all member states shall declare illegal and prohibit organizations, and also organized and all other propaganda activities which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law.[28]

As illustrated in this section, the point at which the right to freedom of expression ends, and where hate speech (as a form of a limitation of the right to freedom of expression) be is a burning issue, especially in an age of social media, where billions of people have direct and immediate access to share content locally, nationally, and globally.

Contextual framework: Croatia

Croatia is a pretty young democracy. Namely, merely 31 years have passed since the first democratic elections occurred, and the first democratic constitution came into force. After the violent collective reconfiguration of Croatian territorial sovereignty, the time has come to introduce liberal democracy. In this short period Croatia, as a successor of socialist Yugoslavia, had to go through fast-forward process of implementing liberal democratic values. Therefore, freedom of expression, often regarded as the foundation stone of liberal democracy, was first introduced in the Croatian constitution. Today, freedom of expression has been one of the principal guarantees of the modern Croatian constitutional order since the adoption of the Constitution of 1990.[29]

On April 10th, 1941, Slavko Kvaternik proclaimed the Independent State of Croatia[30] (hereafter: NDH)[31] in the following words:

[27] ICERD, Article4
[28] ICERD, Art 4b
[29] Đ. Gardašević, 'Historical Events in Symbols and the Freedom of Expression: The Contemporary Constitutional Debate in Croatia', *Croatian Political Science Review,* vol. 55, no. 4, 2018, p. 147
[30] See: The Independent State of Croatia, Britannica [website] https://www.britannica.com/place/Independent-State-of-Croatia, (accessed 2 May 2022)
[31] Due to a possible misinterpretation of the term the Independent State of Croatia, Croatian abbreviation NDH (Nezavisna Država Hrvatska) will be used.

"Croatian people! God´s providence and the will of our allies, as well as the centuries-long painful struggle of the Croatian people, and the great sacrifice of our supreme leader […], including the Ustasha movement in the country and abroad – they determined that today, the day before the Resurrection of the Son of God, our Independent State of Croatia will resurrect as well! God and the Croats! For homeland ready!"[32]

For the past couple of decades, every time on that notorious April 10th, more than just a few Croatian citizens gather and celebrate the birth of the NDH[33] – the state that was a Third Reich´s satellite state. According to Ramet, the NDH regime was the most brutal and most sanguinary satellite regime in the Axis sphere of influence during the Second World War.[34] Regardless, on April 10th every year, one can face hundreds of men wearing black and marching through major Croatian cities. One can hear the leader shouting: "*For home*", while the crowd will chant in reply: "*Ready!*". Even though the aforementioned salute was estimated inconsistent with the Croatian constitution in the several Constitutional Court judgments[35], the participants are still in a legal loophole of the right of freedom of expression, due to the incoherent case-law produced by county, district, supreme and constitutional court.

Furthermore, the legacy of the NDH is not limited solely to Croatian territory due to the political circumstances that surround the rise and fall of the satellite state.[36] For the past 30 years, Croatian neo-Nazi and pro-Ustashe[37] groups march through the streets of the small Austrian town of Bleiburg, to commemorate the killings of fascists and pro-Nazi fighters in May 1945. The official commemoration of the victims of Bleiburg began in 1995, while Franjo Tuđman[38] served as president. Recently, commemorative events became nothing more than political events, and the focus shifted from the actual victims

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[32] D. Krajcar, 'Slavko Kvaternik proglasio Nezavisnu Državu Hrvatsku – 1941, *Povijest.hr*, 10 April 2021, https://povijest.hr/nadanasnjidan/slavko-kvaternik-proglasio-nezavisnu-drzavu-hrvatsku-1941 (accessed 19 April 2022)

[33] A. Franić, 'Je li Split odlučio bez pardona slaviti 10. travnja?', *Slobodna Dalmacija,* 10 April 2021, https://slobodnadalmacija.hr/split/je-li-split-odlucio-bez-pardona-slaviti-10-travnja-skejo-za-dom-spremni-je-sveti-hrvatski-poklic-crveni-fasisti-to-nece-promijeniti-1090257 (accessed 19 April 2022)

[34] S. Ramet, 'The NDH – An Introduction", in S. Ramet (ed.), *In Independent State of Croatia 1941 – 1945*, Routledge, New York, 2007, p. 401

[35] See e.g.: U-III/5226/2013 [18 October 2016], or U-III/1296/2016 [25 May 2016]

[36] See: N. Bartulin, 'The Racial Idea in the Independent State of Croatia: Origins and Theory', *Central and Eastern Europe regional perspectives in global context*, Brill, vol. 4, 2014

[37] See: Ustaša, Britannica [website], https://www.britannica.com/topic/Ustasa (accessed: 2 May 2022)

[38] Franjo Tuđman was a Croatian politician and historian. Following the country's independence from Yugoslavia, he became the first Croatian president and served as such until his death in 1999. Today, some perceive Tuđman as a villain, some as a patriot.

of the Bleiburg massacre to voicing Ustashe greetings and symbols. For that reason, in 2019 the Austrian government, with the help of the Austrian church, decided to ban the mass in Bleiburg since the event was being used purely for nationalistic purposes. According to Pavlakovic, the blurring of the past and the present is an integral part of the Bleiburg commemorations; not only do the participants dress in Ustasha uniforms, display Ustasha insignia and iconography, and sell paraphernalia associated with the NDH and its leaders but there is an active discourse about the Croatian War of Independence accompanied by images of heroes (as well as individuals guilty of war crimes) from the conflict in the 1990s.[39] As Pavlakovic emphasized, the past and present are blurred for the participants of the Bleiburg commemoration, as well as the salute "*For homeland ready!*".

Moreover, displayed far-right behavior does not stop merely on Bleiburg commemoration or similar events of political relevance. "*For homeland ready!*" greeting infiltrated every pore of contemporary Croatian society. Marko Perkovic Thompson, a Croatian singer famous for his nationalist songs regarding the Homeland War, initiates every concert with the aforementioned greeting. Football supporters' groups are often voicing it during the Croatian representation matches. Even football players do not hesitate to use it.[40] In the end, the "*For homeland ready!*" greeting, still falls under the scope of freedom of expression, regardless of being inconsistent with the constitutional order of the Republic of Croatia.

Kulenovic and Blanusa surveyed a national representative sample regarding Croatian citizens' attitudes toward banning hate speech, and the use of political symbols connected to totalitarian regimes.[41] They asked the participants if several discriminatory activities and the use of symbols of fascist and communist regimes should be legally sanctioned. The results demonstrated that around 80% of citizens would like to ban direct hate speech that expresses violence and discrimination against certain groups and the use of Nazi

[39] V. Pavlakovic, 'Defying the Defeated: Commemorating Bleiburg since 1990, L'Europe en Formation, no. 357, 2010/3, https://www.cairn.info/revue-l-europe-en-formation-2010-3-page-125.htm (accessed: 21 April 2022)

[40] F. Bieber, 'Ready for Homeland? Šimunić and a bit of normal fascism', *Balkan Insight,* 21 November 2013, https://balkaninsight.com/2013/11/21/ready-for-the-homeland-Šimunić-and-a-bit-of-normal-fascism/, (accessed: 2 May 2022)

[41] E. Kulenovic and N. Blanusa, 'Hate Speech, Contentious Symbols and Politics of Memory: Survey Research on Croatian Citizens' Attitudes', *Croatian Political Science Review,* vol. 55, no. 4, 2018, p. 176

symbols.[42] On the other hand, only 61% of citizens would like communist symbols to be legally sanctioned.[43] Nevertheless, when it comes to the "*For Homeland Ready!*" only 45.1% of the citizens would ban it even though it represents both the use of symbolic hate speech and the promotion of a genocidal regime and policy.[44] Kulenovic and Blanusa state that the possible reasons for this discrepancy could be explained by the fact that the call and insignia "For Homeland Ready!" were used during the Homeland War. Therefore, Croatian citizens ascribe the more positive value to the struggle for national independence and support for war veterans while ignoring the negative aspects of the greeting. That aligns with Pavlakovic's idea of blurred past and present and that "*For Homeland Ready!*" needs to be interpreted solely in the context of 1991, not in the context of 1941.

As per legal context, freedom of expression is guaranteed by the Croatian constitution.[45] Accordingly, all persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, color, gender, language, religion, political and other opinions, national or social origin, property, birth, education, social or other status.[46] Notwithstanding, the constitution stipulates that freedoms and rights may only be restricted by law to protect the freedoms and rights of others, legal order, and public morals and health, as well as that any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case[47]. The constitution also prescribes a direct limitation on the right to freedom of expression when emphasizing that any call for or incitement to war or use of violence, to national, racial, or religious hatred, or any form of intolerance shall be prohibited or punishable by law.[48]

Furthermore, everyone is guaranteed the right to public assembly and peaceful protest[49], as well as the right to freedom of association for the protection of common interests or the promotion of social, economic, political, national, cultural, and other convictions and

[42] Ibid., p. 179
[43] Loc. cit.
[44] Ibid., p. 183
[45] Ustav Republike Hrvatske, NN 56/90, 135/97, 113/00, 28/01, 76/10, 5/14, Article 38 (Ustav)
[46] Ibid., Article 14
[47] Ibid., Article 16
[48] Ibid., Article 39
[49] Ustav, Article 42

aims.[50] Similarly to the freedom of expression, freedom of assembly and association can be restricted by the prohibition of any violent threat to the democratic constitutional order and the independence, unity, and territorial integrity of the Republic of Croatia.[51]

Contextual framework: Sweden

Last year Sweden celebrated 100 years of universal *suffrage*, and 100 years of democracy. Moreover, *de facto* Sweden is a parliamentary monarchy since 1917, and *de iure* since 1975.[52] Worldwide, Sweden is known as a progressive and multicultural liberal democracy with a long history of protecting the freedom of expression.[53] Namely, in 1776, Sweden enacted the very first Freedom of the Press Act[54] – the first systematic legal instrument anywhere intended to protect freedom of expression and information.[55] Due to the period when the Freedom of Press Act appeared in the Swedish constitutional system, its scope was the protection of the printed media. For that reason, in 1991, the Fundamental Law on Freedom of Expression was enacted,[56] and is intended to widen the scope of the Freedom of the Press Act to television, radio, Internet, etc.[57]

However, on April 16th, 2022, Rasmus Paludan, a Danish-Swedish politician, lawyer, and activist, wrote on his Facebook page: "The demonstration for *Stram Kurs Sverige*[58] has been moved to […] right by Öresundsbron. Time to burn a lot of the Quran.[59] We´ll probably bring pork blood too, to pour it over […]".[60] This Facebook post received 346

[50] Ibid., Article 43
[51] Loc. cit.
[52] J. Lindvall et al. 'Sweden's Parliamentary Democracy at 100', *Parliamentary Affairs*, vol, 73, no. 3, 2020, p. 488
[53] See: T. Bull, 'Freedom of Expression in Sweden: The Rule of Formalism', in Kierluf, A., Rønning, H. (eds.), *Freedom of Speech Abridged? Cultural, Legal and Philosophical Challenges*, Gothenburg, University of Gothenburg, 2009
[54] Tryckfrihetsförordning (1949:105)
[55] Bull, 2009, p. 82
[56] Yttrandefrihetsgrundlagen (1991:1469)
[57] See heading 3.3.: Functional Method
[58] More on *Stram kurs Sverige* on: J. Linder, and J. Balcer Bednarska, 'Detta vet vi om Stram kurs', *SVT Nyheter,* 20 April 2022, https://www.svt.se/nyheter/inrikes/detta-vet-vi-om-stram-kurs (accessed 2 May 2022)
[59] See heading 1.5.: Delimitation
[60] R. Paludan, 'Demonstrationen for Stram kurs Sverige…', Facebook, 16 April 2022, https://www.facebook.com/photo/?fbid=10159151322813423&set=a.236588408422, (accessed April 19 2022)

likes, 78 super likes, 22 laughing emojis, 114 rage emojis, and six supportive comments, such as *Go Rasmus!* and *Long live Denmark!* It is unknown if any negative comments were deleted from the post.

Paludan exercised his freedom of expression, which soon became much more than mere words on Facebook, or a righteous assembly that serves as *Stram Kurs Sverige´s* political campaign in the light of the upcoming parliamentary elections.[61] Namely, on April 15th violent riots, occurred in two Swedish cities. Several police officers and civilians were injured, in the violent outburst of the counter-protest participants.[62] Reacting to the occurred violence, which has served as a reaction to Paludan´s freedom of expression exercise, Swedish Prime Minister Magdalena Andersson said:" In Sweden, people are allowed to express their opinions, whether they are in good or bad taste, that is part of our democracy. No matter what you think, you must never resort to violence. We will never accept it".[63] In that sense, Andersson´s intention was not to protect Paludan or his proteges, but the freedom of expression. Ultimately, she emphasized: "This is exactly the kind of violent reaction he [Rasmus Paludan] wants to see. The very purpose is to invite people against each other".[64]

More assemblies were announced in other cities, but *Stram Kurs* decided to relocate them to Denmark, since "the Swedish Police can´t protect Paludan as well as Danish Police can"[65] and in Paludan´s own words: "if I was seriously injured or killed due to the inadequacy of the police authority, that would be very sad for Swedes, Danes, and other northerners".[66] While writing this text, Paludan is exercising his freedom of expression

[61] Kingdom of Sweden, Election Guide: Democracy Assistance & Election News [website] https://www.electionguide.org/elections/id/3813/, (accessed 2 May 2022)
[62] 'Police injured at anti-far right protest at Örebro in central Sweden', *Euronews*, 16 April 2022, https://www.euronews.com/2022/04/16/police-injured-at-anti-far-right-protest-at-orebro-in-central-sweden (accessed 19 April 2022)
[63] TT., 'Magdalena Andersson fördömer uppploppen', *Aftonbladet*, 15 April 2022, https://www.aftonbladet.se/nyheter/a/Or9l83/magdalena-andersson-fordomer-uppploppen (accessed 19 April 2022)
[64] Ibid.
[65] Stram Kurs Sverige, 'Varför får Paludan inte längre ägna sig åt koranbränning i Danmark?', Facebook, 19 April 2022, https://www.facebook.com/photo?fbid=118015847523753&set=pcb.118015930857078 (accessed April 19 2022)
[66] R. Paludan, 'Jag bestämde mig för ställa…', Facebook, 17 April 2022, https://www.facebook.com/photo/?fbid=10159152905673423&set=a.236588408422 (accessed 19 April 2022)

by burning Quran at Sneservej 3a, near the Copenhagen Airport, approximately 55 kilometers from where I am seated.[67]

Nevertheless, this is not the first time that the exercise of freedom of expression from the extreme-right party, as well as non-party actors, posed a threat to Swedish democracy.[68] For example, the *Nordic Resistance Movement* (hereafter: NRM)[69] applied for permission to march in central Gothenburg on September 30th, 2017, on the same day as the Jewish Holiday of Yom Kippur.[70] By Swedish law, to get permission for a public gathering, a formal application must be submitted to the Swedish police.[71] The police concluded that the *NRM* met all the requirements for a public gathering, and permission was granted. Consequently, a heated debate began in the editorial pages of Sweden´s leading newspapers.[72] Several journalists accused the police of not doing their job and of jeopardizing democracy in Swedish society, by allowing the *NRM* to march in the very center of Gothenburg on the exact day of Yom Kippur. The police, on the other hand, defended their decision, claiming that they were defending democracy by allowing the exercise of freedom of expression, freedom of association, and freedom of assembly.[73] The police handling in this particular case received severe criticism. In that regard, Jonsson stated the following on the importance of the assembly´s location: "When the

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[67] Stram Kurs Sverige, 'Varför får Paludan inte längre ägna sig åt koranbränning i Danmark?', Facebook, 19 April 2022, https://www.facebook.com/photo?fbid=118015847523753&set=pcb.118015930857078 (accessed April 19 2022)

[68] According to Askanius, Sweden, as a symbol or "pinnacle of progressive smugness" and political correctness in Europe, has in recent years been positioned in international extreme right circles as the frontier of the battle lines in the alleged imminent race war for a "white Europe". Furthermore, according to Teitelbaum and Lundström, Sweden has historically long been an epicenter for white supremacist activism and "intellectualism", fueled by a once world-leading white-power music industry in the 1990s. (See: T. Askanius, 'I just want to be the friendly face of national socialism: The turn to civility in the cultural expression of neo-Nazism in Sweden', *Nordicom Review, 42 (S1),* p. 19, and C. Lundström and B. R. Teitelbaum, 'Nordic Whiteness', *Scandinavian Studies*, vol. 89, no. 2, University of Illinois, p. 154)

[69] According to Askanius, NRM might be the most vocal and visible extremist group in Sweden (and in the rest of the Nordic countries) today, it must be understood as part of a much larger and ideologically motley landscape of actors and networks currently making up what we might call the extreme-right movement. (Askanius, 2021, p. 18)

[70] At the time being, the Gothenburg Book Fair was in doubt should the books related to the far-right ideology be exhibited.

[71] Ordningslagen (1993:1617)

[72] G. Gelotte, 'Ingen lag ger nazisterna rätt till Götaplatsen', *Göteborgs Posten*, 15 August 2017, https://www.gp.se/kultur/kultur/ingen-lag-ger-nazisterna-rätt-till-götaplatsen-1.4532270 (accessed 19 April 2022)
A. Verständing, and S. Stutzyinski, 'Håll nazisterna borta vår synagoga', *Göteborgs Posten*, 11 September 2017, https://www.gp.se/debatt/håll-nazisterna-borta-från-vår-synagoga-1.4621539 (accessed 19 April 2022)

[73] C. Mattsson, 'Lost in translation – A case study of a public debate on freedom of expression and a neo-Nazi rally', *Social Identities,* vol. 26, no. 1, 2019, p. 94

Nazis applied to have a demonstration [in Lund] it was granted. However, the site designated was an abandoned football pitch on the outskirts of town. There the Nazis could not do any harm, and, to my knowledge, they got bored. Peace was restored".[74] Hence, Jonsson proposed an alternative on how to protect democracy from freedom of expression while still allowing its exercise.

As per the Swedish legal context, the Swedish Constitution consists of four constitutional documents, three of which concern freedom of expression.

According to the Fundamental Law on Freedom of Expression, everyone is guaranteed the right to publicly express their thoughts, opinions, and sentiments, and in general to communicate information on any subject whatsoever on sound radio, television, and certain similar transmissions, through public playback of material from a database, and in films, video or sound recordings, or other technical recordings.[75] Equally, the Freedom of the Press Act prescribes the right for everyone to publish written matter, without prior hindrance by a public authority or other public body.[76] Besides the two aforementioned constitutional documents, the Instrument of the Government guarantees freedom of expression, or better to be said, freedom to communicate information and express thoughts, opinions, and sentiments, whether orally, pictorially, or in writing, or in any other way.[77] Freedom to organize or attend meetings for information or the expression of opinion or any other similar purpose, freedom to organize or take part in demonstrations in public space, and freedom to associate with others for public and private purposes is also prescribed.[78]

However, previously enumerated freedoms might be restricted by law. The restrictions can only be imposed to satisfy purposes acceptable in a democratic society, and they need to be necessary and proportionate.[79] Further on, the Instrument of the Government

[74] S. Jonsson, 'Polisens flathet ger nazisterna grönt ljus', *Dagens Nyheter*, 19 September 2017, https://www.dn.se/kultur-noje/professor-stefan-jonsson-polisens-flathet-ger-nazisterna-gront-ljus/ (accessed 19 April 2022)
[75] Yttrandefrihetsgrundlagen, Ch. 1, Article 1
[76] Tryckhetsförordningen, Ch. 1, Article 1
[77] Regeringsformen, Ch. 2, Article 1, para 1
[78] Ibid., para 3, 4, 5
[79] Ibid., Article 21

enumerates conditions under which the restriction of freedom of expression can be imposed.[80]

1.4. Relevance to Human Rights

The issue of the right of freedom of expression and its limitations has been repeatedly raised in legal scholarship and the human rights community. Freedom of expression is increasingly disputed about the far-right expressions which, according to some authors, tend to normalize the neo-Nazi discourse, by re-branding their rhetoric into the fresh-faced propaganda packaged and presented in the form of the light-hearted entertainment, humor, and satire.[81] Populist, nationalist and reactionary movements are gaining influence by challenging democracy based on the rule of law, free media, as well as on human rights and freedoms.[82] The comparison of Sweden and Croatia was chosen because nowadays both jurisdictions appear, just like the other European Union member states and other liberal democracies, to deal with similar problems such as limitations of freedom of expression in the context of multiculturalism and severe historical revisionism, whereas the legal and political culture in those two countries. Apart from that, constitutional law on hate speech has been researched extensively, both in Sweden and Croatia as well as on an international and European level. Nevertheless, the extensive analysis of the Swedish system regarding hate speech is rare, if not nonexistent, in Croatian literature, and *vice versa.*

The three primary themes of the research reviewed herein, the contextual framework of the far-right and its complex relationship with the freedom of expression in the international and European legal context, and the national, cultural, and sociopolitical contexts of both Croatia and Sweden, are all relevant to the present study. However, from a human rights perspective, none of the aforementioned texts reviewed the problematized legal framework surrounding freedom of expression in contrast with the far-right

[80] Regeringsformen, Ch. 2, Article 23
[81] See Askanius, T., 'On Frogs, Monkeys, and Execution Memes: Exploring the Humor-Hate Nexus at the Intersection of Neo-Nazi and Alt-Right Movements in Sweden', *Television and New Media*, vol. 22, no. 2, 2021, p. 148
[82] Defending free speech: measures to protect journalists, elected representatives, and artists from exposure to threats and hatred, Government Offices of Sweden, Ministry of Culture p. 7

expression. The legal framework was not a relevant factor in the studies conducted in the field of social psychology or anthropology and *vice versa*. The vast majority of the reviewed studies used either ethnography, interviews, a mix of the two, either legal interpretation or a comparative legal perspective.

Therefore, the present study places itself in a new area of research on this topic because, firstly, it approaches the topic of the relationship between the right to freedom of expression and the far-right expression from a human rights perspective. Secondly, it discusses human rights in terms of what happens when the exercise of one freedom infringes another person's freedom from a legal and human rights standpoint. Thirdly, it analyzes two very different national legal, cultural, and political, contexts which serve to paint a broad picture of the state of democracy in the context of the right to freedom of expression in Europe today. Methodologically, this study is conducted in the field of legal research, but the human rights perspective voices over throughout the tradition of the discursive analysis of how [the abuse] of the right to freedom of expression might be manifested within society´s discursive practices.

1.5. Delimitation

This thesis has a necessarily limited scope and thus does not tackle several issues which are important to the broader problem of the right to freedom of expression, assembly, and association, and their manifestation.

Firstly, this thesis is without the scope to discuss in detail the wholesome legislative framework surrounding the limitations of the right to freedom of expression, assembly, and association. Similarly, the focus is mainly on the constitutional framework of both respective countries. Additionally, due to the significant impact that European and international legislation on the positive and negative obligations of both respective states concerning the aforementioned freedoms, a certain comparison will be drawn on that level.

Secondly, this research will mostly focus on the right to freedom of expression, while the right to freedom of assembly and association will be addressed discursively while being perceived as an extension of the right to freedom of expression.

Thirdly, blasphemy will be addressed merely as a manifestation of freedom of opinion in a broader sense concerning the Swedish constitution, and as freedom of expression concerning the Croatian constitution.

Ultimately, far-right expression is often regarded as hate speech in public discourse. This thesis deals with the limitations of the right of freedom of expression, and the term hate speech will be used interchangeably with the latter syntagm.

2. Theory

In the following section, Loewenstein's viewpoint on militant democracy will be explained, as it is taken as a starting theoretical perspective for this thesis. Loewenstein´s perspective is highly applicable to this thesis since it directly addresses the problems surrounding limitations on the right to freedom of expression. Subsequent sections will discuss the theoretical and practical implications of the concept of militant democracy, as well as the legality of constitutional democracy to act in an anti-democratic manner to combat threats to its existence, through a thorough discussion of Loewenstein and his contemporaries. The practical implications of militant democracy, on the other hand, will be addressed on a theoretical level through the praxis of ECtHR, which supervises domestic compliance of both respective countries with ECHR. These implications of the concept of military democracy aid in the examination of the state of the right to freedom of expression in Croatian and Swedish legal contexts. Lastly, the concept of militant democracy will be utilized in a manner to provide an answer to the research question and explain the legislative attempts to combat hate speech in both respective countries.

2.1. The Foundations of Militant Democracy

Militant democracy can be defined as a form of constitutional democracy authorized to protect civil and political freedoms by preemptively restricting their exercise.[83]

The roots of the concept of military democracy can be traced back to the German émigré scholar Karl Loewenstein.[84] Loewenstein left for the U.S. when he realized that, in the new political climate that resulted from Nazi ascendancy to power in 1933, his Jewish ancestry and liberal mindset would not – to say at least – be in his favor.[85]

In his two essays on militant democracy, Loewenstein wrote: “If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it,

[83] P. Macklem, ‘Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe’, *Constellations*, vol. 19, no. 4, 2013, p. 575

[84] P. Cliteur, and B. Rijpkema, ‘The Foundations of Militant Democracy’, in Ellian, A., Molier, G. (eds.), *The State of Exception and Militant Democracy in a Time of Terror*, Leiden, Leiden University, p. 228

[85] Loc. cit.

even at the risk and cost of violating fundamental principles".[86] Accordingly, to resist the autocratic threat, democracy needs to become militant, and the pacifist perception of democracy needs to be abolished. In his own words, democracy needs to abandon its passive, apathetic attitude and has to undertake action against parties that threaten its survival. Democracy should no longer be pacifist; it should become militant.[87]

Loewenstein indirectly addresses the vulnerability of democracy in three folded ways. Firstly, democracy is vulnerable because, structurally, it is governed by compromise. Secondly, constitutional freedoms such as freedom of expression (manifested in the ability to freely disseminate propaganda), and freedom of assembly and association (manifested in freedom to organize and demonstrate to fulfill the anti-democratic goals) are granted to the opponents. Finally, democracy allows organized parties to access the elections, and ultimately – win.

Given the period when Loewenstein was writing, the first essay is focused on the deep circumscription of fascism as a universal political technique that threatens the democratic order. In the second essay, Loewenstein is illustrating some versions of the concept that developed in various European states immediately before the Second World War. He provides a summary of anti-fascist legislation according to which many democracies have resorted to statutory precautions and legislative defense.[88]

Ultimately, he concludes that European democracy has overstepped democratic fundamentalism and risen to militancy, fire is being fought with fire.[89]

However, he circumscribed militant democracy only on a theoretical level, without further engagement in the practical implications of the "fortified soft spots"[9091] of democracy.

Concurrently, George van der Bergh, a Dutch national constitutionalist and Loewenstein's contemporary, was developing his very own concept of military

[86] K. Loewenstein, 'Militant Democracy and Fundamental Rights, I', *The American Political Science Review,* vol. 31, no. 3, 1937, p. 432
[87] Loewenstein, 1937, p. 755–784
[88] K. Loewenstein, 'Militant Democracy and Fundamental Rights, II', *The American Political Science Review,* vol. 31, no. 4, p. 644
[89] Loewenstein, 1937, p. 656
[90] Loewenstein considered fundamental rights, such as free speech, assembly, and press to be the "soft spots" of democracy.
[91] Loc. cit.

democracy unfamiliar with Loewenstein's idea. Unlike Loewenstein, van der Bergh engages in a discussion of actually forbidding political parties and devotes attention to the legal justification of the concept of militant democracy.

In essence, the core idea that both Lowenstein and van der Bergh presented is that democracies can and should protect themselves from the ideas and movements that are deeply undemocratic and whose goal is to use freedoms provided by democracies to destroy democracy itself.[92]

2.2. The Democratic Dilemma

In 1928, Joseph Goebbels stated: "We enter the Reichstag to arm ourselves with democracy´s weapons. If democracy is foolish enough to give us free railway passes and salaries, that is the problem. It does not concern us".[93] What Goebbels blatantly indicated was that democracy, as a concept, allows democracy to undermine itself, or as Loewenstein emphasized – 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.[94]

A couple of decades later, Karl Popper reframed Plato's "paradox of democracy": the possibility that a majority may decide that a tyrant should rule[95] with the "paradox of tolerance" and warned that unlimited tolerance must lead to the disappearance of tolerance,[96] and emphasized that one should be intolerant against the intolerance when the intolerant denounces all argument.[97] Popper's statement serves as an extension of the concept of militant democracy, coined by Loewenstein, according to whom the success of fascism is based exactly on its perfect adaptation to democracy.[98] Additionally, Loewenstein stressed that under the cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally.[99]

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[92] Kulenović, Blanuša, 2018, p. 184
[93] Cliteur, Rijpkema, 2012, p. 256
[94] Loewenstein, 1937, p. 424
[95] K. Popper, *The Open Society and its Enemies*, New York, Routledge, 2015, p. 602
[96] Popper, 2015, p. 546
[97] Popper, 2015, p. 602
[98] Loewenstein, 1937, p. 423
[99] Loc. cit.

On the other hand, Schmitt provided more solid juridical grounds for the "state of exception"[100] which represents a loophole for democracy that tends to undermine itself. The state of exception comes to force when a sovereign action becomes a way for sovereigns to use the constitution and legal ways to do, basically, whatever. Moreover, Schmitt differentiated constitutional core and constitutional law and on that basis created his version of militant democracy where emergency powers, in the state of exception, may be called upon to justify a restriction of democratic freedoms in violation of ordinary constitutional law, as long as the political core of the constitution itself is defended.[101] Given his infamous decision to join the Nazi Party, Schmitt seems to be an unlikely exponent of the concept of militant democracy, but the relevance of his "state of exception" theorization in the light of the concept of militant democracy cannot be disregarded.

As the concept rejuvenated and tickled academic imagination at the verge of the 20th century, Agamben revisited both Schmitt and Loewenstein, in a more philosophical than legal fashion, when he stated that it is as if juridical order contained an essential fracture between the position of the norm and its application, which, in extreme circumstances can create a zone in which application is suspended, but the law remains in force.[102] In essence, Agamben agrees with Schmitt and adds that this is a sovereign ban whereby the law suspends itself so that it can change and be adaptive to things that happen. Notwithstanding, Schmitt thinks the link between democracy and sovereignty in a form of a state of exception, is something desirable, while Agamben disagrees, but they both agree that this is how sovereign power in every legal system works.

Finally, it is important to emphasize Kelsen´s contribution to this democratic dilemma – when democracy attempts to safeguard itself from anti-democratic entities, it is no longer a democracy.[103] In the Kelsian sense, militant democracy itself is anti-democratic, and should not be enacted throughout the nation-state constitutions.

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[100] Additionally, in *Political Theology* Schmitt wrote that all law is situational law and that a regular situation must be created, and sovereign is he who definitely decides if this situation is actually effective. (C. Schmitt, *Political Theology: four chapters on the concept of sovereignty*, Chicago and London, Chicago University Press, 2005, p. 18)

[101] See C. Schmitt, *Legality and Legitimacy,* Duke University Press, 2004.

[102] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford, Stanford University Press, 1998, p. 31

[103] Cliteur, Rijpkema, 2012, p. 41

2.3. Moral Anxiety and Democratic Suicide

Human rights, individual freedoms, and liberties today are under enormous pressure since Europe is experiencing the rebirth of another set of legal and political debates about the nature of its democratic commitments.[104]

Introduced to combat extremist political agendas that threaten peace, security, and democratic order, the traditional manifestations of militant democracy[105] typically interfere with the exercise of individual human rights, such as freedom of expression, opinion, religion, and association, in the name of democratic self-preservation.[106]

In the aftermath of the Second World War, most of the European states accepted certain anti-democratic measures to counterattack the extremist movements that might try to enter democracy in the same fashion as national socialism or fascism did. The states are faced with the overwhelming moral anxiety due to increased electoral support of the far-right parties, or constant, and often subliminal media presence of "normalized" neo-Nazism by the far-right actors. Therefore, moral anxiety is widely experienced in the contemporary democratic [constitutional and judicial] systems due to the moral dilemma, or better said, a conflict that arises from the clash of militant and pacifist democracy.

The framing of moral anxiety aligns with Cliteur and Rijpkema's claim that the most common analogy to think about these matters [distinction between pacifist and militant democracy] seems to be ´suicide' as a decision of a human individual.[107] At first the said analogy might seem a bit far-fetched, but abolishing democracy, indeed, is a decision by a majority overriding the interests of a minority.[108] That arrays with Schmittean perception of the state of exception, the society is once again looking for the sovereign, the one with the ability to seek the change and decide on it. Pursuant to Schmitt, Cliteur, and Rijpkema's question should some of the constitutional clauses, representing a foundation of democracy, be completely unassailable.[109]

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[104] P. Macklem, 'Militant democracy, legal pluralism, and the paradox of self-determination', *Int'l J Con Law,* vol. 4, no. 3, 2006, p. 489

[105] For instance: hate speech legislation, the banning of political parties, restrictions on mass demonstrations, and the criminalization of certain political organizations.

[106] Macklem, 2006, p. 489

[107] Cliteur, Rijpkema, 2012, p. 257

[108] Ibid., p. 258

[109] Loc. cit.

Notwithstanding, Loewenstein claimed that democracy, as a pattern of political organization, is doomed, as royal absolutism was once doomed when liberal democracy conquered the globe.[110] Nevertheless, he foresaw the murder of pacifist democracy, while he did not take into consideration the suicidal tendency of militant democracy as perceived by Kelsen.

Finally, according to Macklem, one might seek and find an answer to the constitutional limits of militant democracy in international human rights law,[111] but without understanding the concept and its inception, as well as its consequences, the task seems incomprehensible due to the theoretical demands inclined and implemented in, seemingly, legally blind legal international, European, and national systems.

2.4. Militant Democracy in ECtHR Praxis

To apply the theoretical aspect of the concept of militant democracy in the present democracies, I will resort to the praxis of the ECtHR. The reasons why I utilize the ECtHR case law are two folded. As previously noted, ECtHR serves to supervise the domestic compliance of member states to the ECHR. Apart from that, ECtHR (in)directly quotes Loewenstein in the judgments regarding the violation of the right to freedom of expression, association, and assembly.[112] Additionally, Article 17 of the ECHR which concerns the prohibition of abuse of rights of the ECHR is grounded within the concept of military democracy.

In the case *Garaudy v. France*,[113] the applicant was found guilty of disputing the existence of the Holocaust in his book. The ECtHR stated that "the negation or revision of historical facts of this type calls into question the values which underlie the fight against racism and anti-Semitism and are likely to seriously disturb public order" and that "such acts are incompatible with democracy and human rights because they infringe the rights of

[110] Loewenstein, 1937, p. 422
[111] Macklem, 2006, p. 494
[112] The (in)direct citations of Loewenstein's concept of militant democracy are present in many early judgments on the violation of Article 10, for example in the pilot judgment *Handyside v. UK,* and *Sunday Times v. UK.*
[113] *Garaudy v. France*, App. No. 65831/01, (ECtHR 16 December 1998)

others".[114] Therefore, the application was found inadmissible since Garaudy could not rely on the provisions of Article 10 of the ECHR when considering the aforementioned Article 17 which was, according to ECHR drafters, understood as a bulwark against a democracy´s capacity to surrender to fascist rule.[115]
Based on the *Garaudy* case it is certain that historical revisionism is one of these ideas that can be perceived as "deeply undemocratic" when it comes to the exercise of freedom of expression, and that the concept of militant democracy *needs* to be employed to protect democracy itself.

Nevertheless, in the case *Vajnai v. Hungary,* ECtHR ruled that Vajnai, the Vice-President of the Workers´ Party who was a speaker at a lawful demonstration in central Budapest wore a five-pointed red star – both a communist symbol and the symbol of the international workers´ movement. Consequently, Vajnai was convicted of the offense of wearing a totalitarian symbol. ECtHR noted that the disclosed evidence did not demonstrate an actual or even remote danger of disorder triggered by the public display of the red star in Hungary.[116] The ECtHR had a similar line of reasoning when adjudicating the case *Jersild v. Denmark*. The applicant was a journalist who made a documentary containing extracts from interviews with the "Greenjackets", who made abusive and derogatory remarks about immigrants and other ethnic groups in Denmark. The applicant was convicted of aiding and abetting in the dissemination of racist remarks. The ECtHR concluded that the documentary as a whole did not aim to propagate racist views and ideas but to inform the public about a social issue.[117]

When it comes to freedom of association, which often refers to the movement that could be "deeply undemocratic" the ECtHR acknowledged the legitimacy of the concept of "democracy capable of defending itself"[118] and went a step further in the *Refah Partisi and Others v. Turkey*[119] where the following was emphasized in a manner that "the state

[114] *Garaudy v. France*, para 4
[115] Macklem, 2013, p. 580
[116] *Vajnai v. Hungary,* App. No. 33629/06, (ECtHR 8 July 2020)
[117] *Jersild v. Denmark,* App. No. 15890/89, (ECtHR 23 September 1994)
[118] *Vogt v. Germany*, App. No. 17851/91, (ECtHR 2 September 1996), para 51, para 59
[119] The *Refah Partisi* is just one of the judgments whereas the ECtHR took a similar stance in the very early years of ECHR, the European Commission upheld West Germany's ban on the German Communist Party,

cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standard of the Convention and democracy".[120]

Nevertheless, there are several quite the opposite ECtHR rulings, which indicate case law incoherency as well as the lack of legal standards and definitions when it comes to the right to freedom of assembly and association. For example, in *Socialist Party and Others v. Turkey*, the ECtHR stated that it is the essence of democracy to allow diverse political programs to be proposed and debated, even those that call into question the way the State is currently organized, provided that they do not harm democracy itself.[121]

Bearing that in mind, the often disputable Article 17 of the ECtHR, which aligns with the concept of military democracy, suggests that a state might be entitled to act in a militant manner, toward associations or organizations that aim to destroy the rights and freedoms enshrined in the convention, but it fails to stipulate any criteria for determining whether an organization or association fits this description.[122]

2.5. Militant Democracy: Then and Now

As much criticism has Loewenstein's concept of militant democracy received throughout the years, the influence on modern democracies is indisputable.

As previously mentioned, Loewenstein circumscribed how constitutional order in the 1930s was altered to combat anti-democratic mechanisms that were slowly entering the pores of (un)stable democracy of that time.[123]

Concurrently, George van der Bergh, started the implementation of the concept of militant democracy in the Dutch constitution, while his practical developments of the concept started to be recognized, if not on the international level, at least in European.

Once again, we are faced with shifts in national constitutions, to protect democracy from that same-old "Trojan horse" that comes in form of exercise of extreme freedom of expression, association, and assembly.

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thereby extending the reach of Article 17 to permit a member state to enact militant measures to preclude democracy's capacity to surrender to communist rule. (Macklem, 2013, p. 581)

[120] *Refah Partisi and Others v. Turkey,* App. No. 41340/98, 41342/98, 41343/98 et al., (ECtHR 13 February 2003), para 102

[121] *Socialist Party and Others v. Turkey*, App. No. 20/1997, 804/1007 (ECtHR 25 May 1998), para 51

[122] Macklem, 2006, p. 495

[123] See heading 2.1: The Foundations of Militant Democracy

In his analysis of the contemporary forms of militant democracy, Macklem analyzes several European Union member states' constitutions to demonstrate how the latter helped the rejuvenation of militant democracy, as a response to the "destabilizing potential of new forms of terrorism and religious fundamentalism".[124] Additionally, he emphasized that militant democracy is a fundamental challenge to traditional conceptions of constitutional democracy at the very moment when Europe itself appears to be evolving in its constitutional order.[125]

[124] Macklem, 2013, p. 580
[125] Loc. cit.

3. Methodology

This thesis methodology is based on comparative legal analysis. The following discussion will explicate the use and implications of comparative legal analysis, and describe the research design and methodological challenges while providing the details on the exact methods and materials used.

3.1. Comparative Methodology of Legal Research

Comparison is a logical and inductive method of reasoning that enables objective identification of merits and demerits of any norm, practice, system, procedure, or institution as compared to that or others.[126] On that notion, comparative legal research seeks to recognize, understand, and interpret common or dissimilar properties of each respective legal system. Comparative legal research aims to contextualize various legal problems that are conceptually the same in whichever legal system they arise. Today, it is still more or less focused on comparing national legal systems, even if Europeanization processes [or the globalization processes on a broader scale] are challenging national legal systems. Needless to say, the interdisciplinary study adds to the work and the efficacy of the comparative legal analysis since socio-legal and economic dimensions of legal regimes provide rich input, and the understanding of the law in that light makes comparative legal research more meaningful.[127] As Legrand emphasized, what is anthropology if not the study of foreign cultures? And, what do comparative legal studies address if not the study of foreign legal cultures?[128]

Therefore, the comparative methodology of legal research aids in the comprehension of different legal systems, that are hardly separable in today´s globalized world, especially if the legal *corpus* of the European Union, or Council of Europe, is being explored, yet need to be understood as independent legal systems of respective nation-states.

[126] P. Ishwara Bhat, 'Comparative Method of Legal Research: Nature, Process, and Potentiality', *Journal of the Indian Law Institute,* vol. 57, no. 2, 2015, p. 147
[127] Ibid., p. 151
[128] G. Samuels, *An Introduction to Comparative Law, Theory and Method*, Portland, Hart Publishing, 2014, p. 22

3.2. On Constitutionalism in Comparative Legal Research

Constitutional rights are the protections and liberties guaranteed to the people by the constitution of each respective nation-state. It is widely recognized that all constitutional rights are rights, but not all rights are constitutional rights.[129] According to Alexy, three concepts determine the *differentia specifica* of constitutional rights – formal, procedural, and substantial concept.[130]

Firstly, a formal concept of constitutional rights is employed if fundamental rights are defined as rights contained in a constitution, or as rights endowed by the constitution with special protection, for example, a constitutional complaint brought before the constitutional court.[131] In plain words, constitution rights are rights written in the constitution or the rights that are enforced throughout the constitutional complaint mechanism.

Secondly, the procedural concept of constitutional rights holds that constitutional rights are so important that the decision to protect them cannot be left to simple parliamentary majorities.[132] Candidly, the procedural concept of constitutional rights represents a distrust in the democratic process, since constitutional rights are so rigidly protected from the procedural aspect.

Ultimately, a substantial concept entails further elaboration on the significance of human rights for constitutional rights. Alexy states that human rights are at the core of the substantial concept of constitutional rights.[133] Further on, constitutional rights are rights that have been recorded in the constitution to transform human rights into positive law – the intention, in other words, of positivizing human rights.[134] Even though Alexy´s definition of human rights as moral, universal, fundamental, and abstract rights that take priority over all other norms,[135] is overly simplified, yet without further elaboration on

[129] R. Alexy, 'Rights and Liberties as Concepts' in M. Rosenfeld, and A. Sajó (*eds.), The Oxford Handbook of Comparative Constitutional Law,* Oxford University Press, Oxford, 2012, p. 5
[130] Loc. cit.
[131] Loc. cit.
[132] Loc. cit.
[133] Loc. cit.
[134] Loc. cit.
[135] Loc. cit.

the definition of what human rights truly are,[136] the constitutions of all Council of Europe member states contain a title or chapter on fundamental rights and freedoms. The constitutional renewal took place immediately after the war in European liberal democracies, and after 1989 in the countries of Central and Eastern Europe.
The catalog of fundamental rights and freedoms embedded in the national constitutions was fairly influenced by the post-war human rights conventions, as well as the ECHR. The said depends on the relationship between international and domestic law, i.e., monism and dualism, on the incorporation of human rights treaties in the national legal order, on their rank in the hierarchy of norms, and the judicial review of conventionality and constitutionality.[137]

Bearing the substantial concept of constitutional rights in mind, human rights – as fundamental rights and freedoms – are the center of comparative constitutional legal research. The interdisciplinarity of human rights is entrenched when exploring various legal systems while seeking the just, or the good principle that arises from the constitution.

3.3. Functional Method

The functional method is perhaps the most dominant method of comparative legal analysis in constitutional law, as well as in other fields of law. In comparative legal studies, a functional approach focuses not on rules but on their effects, not on doctrinal structures and arguments, but events, and as a consequence, its objects are often judicial decisions as responses to real-life situations, and legal systems are compared by considering their various judicial responses to similar situations.[138] According to Jackson, the goals of functional comparison may be as normative and universalistically theory-seeking, but the techniques used to focus more on specific functional comparisons and

[136] See G. L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', *Stanford Law Review,* vol. 55, no. 5, 2003; A. Macintyre, *After Virtue*, Bloomsbury, London: New York, 2013
[137] Loc. cit.
[138] Michaels, R., 'The Functional Method of Comparative Law', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law,* 1st edn., Oxford, Oxford University Press, 2006, p. 342

questions of causation, rather than on the moral, principled appeal of comparative approaches.[139]

Jackson further elaborates functional comparisons can be advanced through several techniques, including conceptual functionalism, detailed case studies, and large-N studies.[140] For the purposes of this thesis, I will focus mainly on functional analysis in the context of more detailed case studies, or how a constitutional institution functions in two societies. Firstly, a scholar examines a certain case in the home system and determines how the facts of the case would be decided in the foreign system. Secondly, a scholar needs to examine a similar fact case in a foreign system [reasoning, applicable concepts, procedural issues, etc.]. Thirdly, a scholar needs to focus on the policy implications of a case in a foreign system, and lastly, draw a comparison of the reasoning and policy implication of the case in the foreign system with the reasoning in the home system case.[141] Notwithstanding, it is important to briefly describe conceptual functionalism, or easily put, develop a hypothesis about why and how constitutional institutions or doctrines function as they do. When it comes to conceptual functionalism, a scholar first needs to determine the rule in the home system and subsequently examine its function in the home system. Later on, a scholar will explore how this function is fulfilled in the foreign system, and consequently determine what rule aligns with the home system rule. Ultimately, a scholar will draw a comparative conclusion.[142]

3.4. Methodological Challenges

Van Hoecke stated that researchers get easily lost when embarking on comparative legal research.[143] He also highlighted the main reason being that there is no agreement on the kind of methodology to be followed, nor even on the methodologies that could be followed.[144] Factually, the methodological categories overlap, and single research might

[139] V. Jackson, 'Comparative Constitutional Law' in M. Rosenfeld, and A. Sajó (*eds.), The Oxford Handbook of Comparative Constitutional Law,* Oxford University Press, Oxford, 2012, p. 1
[140] Jackson, 2012, p. 2
[141] Samuels, 2014, p. 75
[142] Ibid., p. 68
[143] M. Van Hoecke, 'Methodology of Comparative Legal Research', *Law and Method,* 2015, (https://doi.org/10.5553/REM/.000010), p. 1
[144] Loc. cit.

include examples of multiple methodologies, which might affect the comparative analysis in its entirety by positive or negative consequences.

Jackson perceives the goals of comparative legal analysis as two folded. Firstly, a scholar wants to achieve a better intellectual understanding of one or more foreign legal systems. For this purpose, the challenges include time, the need to develop expertise, language barriers, and the need to understand the broader context – both legal and social – to develop that expertise.[145] She emphasizes the fact that as hard as it is to achieve bilingualism, achieving bilegalism is even harder.[146] Accordingly, van Hoecke states that in practice when choosing national legal systems to compare with most (individual) researchers will make the choice based on their knowledge of languages, which explains why most comparative research is focusing on comparing countries with the [common law] countries that still use English as their (main) language.[147]

Secondly, a second goal for comparative legal analysis is to enhance one´s capacity for self-reflection on one´s system and to develop a better understanding of it.[148] If self-reflection is not employed, that might bear the risk of subjectivity and partiality of a researcher.

Therefore, methodological challenges are indeed substantial and need to be addressed for a researcher to enter the complex sphere of comparative legal analysis with self-consciousness on them.

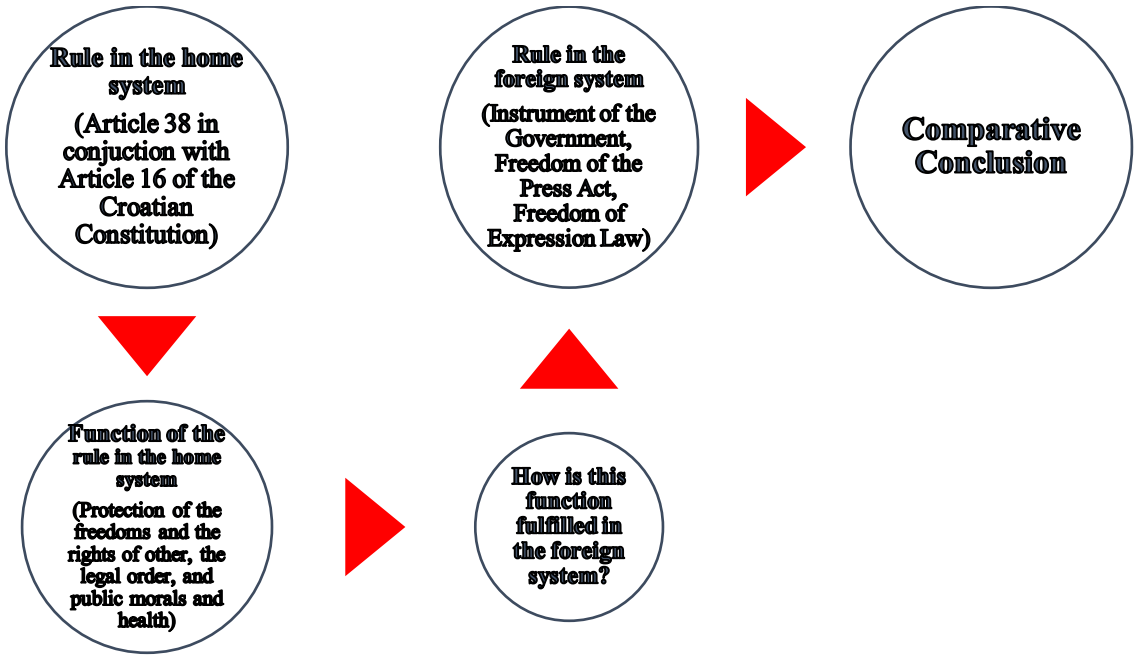
3.5. Research Design

For this thesis, we need information on the legislative frameworks of each respective framework, and the influence of European and international law on them. This research question therefore best fits an explanatory research design that aims to explain things and identify how one or more variables are related to one another. In this particular thesis, the explanatory design will be utilized throughout the three central themes depicted in flow charts.

[145] V. Jackson, 'Methodological Challenges in Comparative Constitutional Law', *Penn State International Law Review,* vol. 28, no. 3, 2010, p. 319
[146] Loc. cit.
[147] Hoecke, 2015, p. 3
[148] Jackson, 2010, p. 320

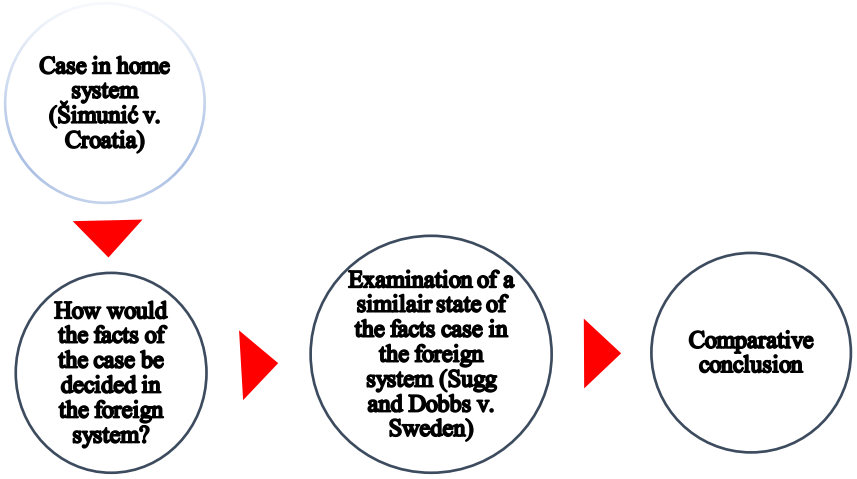
The analysis will be carried out in accordance with the following three flow charts, where each describes one of the aforementioned themes.

FLOW CHART 1



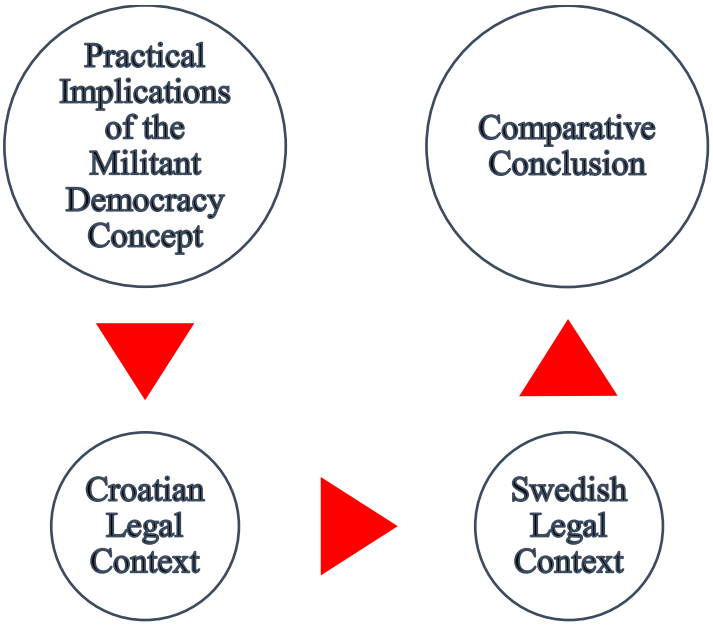
Flow chart 1 concerns the utilization of conceptual functionalism where the relevant provisions are examined.

FLOW CHART 2



Flow chart 2 concerns the utilization of a detailed case study where the two following cases are examined and juxtaposed, *Šimunić v. Croatia*[149], and *Sugg and Dobbs v. Sweden*.[150]

FLOW CHART 3



Flow chart 3 concerns the in-depth analysis of the concept of militant democracy in the conjunction with the relevant Croatian and Swedish national legislation.

[149] *Šimunić v Croatia*, App. No. 20373/17, (ECtHR 9 March 2017)
[150] *Sugg and Dobbs v. Sweden*, App. No. 45934/99, (ECtHR 4 February 1999)

4. Analysis

In this section, I will analyze the selected parts of international, European, and national legislation concerning freedom of expression. I will first orient my analysis to answer my research question concerning discursive understanding and interpretation of the clash between the freedom of expression and far-right expression in the national legal contexts of both Croatia and Sweden. I will do that by going through themes mentioned in research design[151], as well as utilizing a functional method of comparative legal analysis to answer my research question. Thus, my focus will be on constitutional regulation of the limitation of the right to freedom of expression in both respective countries, as well as the resolved constitutional complaints that appeared before both constitutional courts. At last, I will analyze the status of militant democracy based on the previous analysis of the specified international and European legislation, but with an emphasis on the important national legislation.

4.1. Relevant Legislation Concerning Freedom of Expression

The focus of the following section is on relevant international, European, and both Croatian and Swedish national legislation concerning freedom of expression. Accordingly, the section will be structured in three subsections. Firstly, due to the complex relationship between international and European legislation in both respective countries, relevant provisions of both international and European legislation will be addressed and analyzed. Secondly, I will proceed with an in-depth analysis of the Croatian constitutional protection of the right to freedom of expression. Ultimately, the same analysis will be conducted about the Swedish constitutional protection of the aforementioned right.

[151] See heading 3.5.: Research Design

European and International Legislation

As mentioned in the previous research section,[152] and further stressed in the theory[153] and methodology section[154] of this thesis, globalization, and most notably Europeanization of legal practice are of great influence on today´s national constitutional law. Since this thesis is concerning the limitations of freedom of expression in Croatia and Sweden, I will first reiterate the legal context of both countries. Additionally, I will restate the most notable international and European legislation concerning the said, and further explain how the latter was implemented in the constitutional law of both respective states.

First of all, it is important to mention that both Croatia[155] and Sweden[156] are European Union member states. By European Union membership, both states agreed to respect the European Union's *acquis communautaire* and to implement and apply the applicable legislation to their national legislations. Furthermore, both countries are also Council of Europe member states which means that they ratified the ECHR and most of its additional protocols into Croatian[157] and Swedish law[158]. Apart from the European Union and Council of Europe membership status, throughout the years, both the countries have ratified several international conventions in the field of fundamental rights and freedoms, including the ICCPR and ICERD, which I find of particular interest when determining the relationship between the right to freedom of expression and the far-right expression that has been put in question. As far as the two conventions are concerned, both ICCPR and ICERD have been incorporated into Croatian national law[159], but they have not been incorporated into Swedish law, but according to Swedish national laws should be interpreted in conformity with both. Last but not the least, it is important to mention that constitutionally Croatia embraced the monist approach, which blatantly means that the international law automatically takes effect in the domestic law, while Sweden´s position regarding the prevalent approach, even though it could be characterized as dualist which

[152] See heading 1.3.: Background and previous research
[153] See heading 2.5.: Militant Democracy: Then and Now
[154] See heading 3.2.: On Constitutionalism in Comparative Legal Research
[155] Croatia has been a member state of the European Union since 2013.
[156] Sweden has been a member state of the European Union since 1995.
[157] The Croatian law on the ECHR came into force in 2002.
[158] The Swedish law on the ECHR came into force in 1995.
[159] Ustav, Article135

means that the international law must be implemented by domestic law before its given domestic effect.

Second of all, as previously mentioned, ICCPR, ICERD, and ECHR determine the limitations of the right to freedom of expression, in one form or another. For example, Article 19, paragraph 2 of the ICCPR states that everyone shall have the right to freedom of expression, and that right shall include the freedom to seek, receive, and impart information and ideas of all kinds, regardless of the frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice.[160] Yet, in paragraph 3 ICCPR prescribes certain restrictions on the right to freedom of expression, in cases provided by law and if necessary for the respect of the rights and reputations of others, or the protection of national security or public order or public health or morals.[161]

On the other hand, ECHR phrases it similarly by stipulating that everyone has the right to freedom of expression and that this right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[162] ECHR provision continues as follows – this article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.[163] Yet again, in paragraph 2 of the same article, ECHR prescribes limitation to the right to freedom of expression and circumscribes certain occasions when freedom of expression is subdued to limitations.[164] In the context of ECHR, it is also important to reiterate the importance of Article 17 which stipulates the prohibition of rights[165], that is of great importance in the ECtHR case law regarding freedom of expression.

As visible, the text of the provisions is more or less the same, even though ECHR pays more attention to the necessity in a democratic society through a more thorough enumeration of occasions when the limitations on freedom of expression might be imposed.

A bit different provision can be found in the ICERD. Namely, in Article 4, ICERD condemns all propaganda and *all organizations*[166] which are based on ideas or theories of

[160] ICCPR, Article 19, para 2
[161] ICCPR, Article 19, para 2
[162] ECHR, Article 10, para 1
[163] Loc. cit.
[164] ECHR, Article 10, para 2
[165] ECHR, Article 17
[166] Emphasis added.

superiority of one race or groups of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.[167] Namely, the purpose of ICERD differs from the purpose of the ICCPR, and ECHR, and therefore, the positive obligation of member states is phrased differently. Apart from that, ICERD mentions the possibility of the limitation of the work of certain organizations, which leads to the broader understanding of the right to freedom of assembly and association, which are often considered as the right to freedom of expression's long arm, in the context of comprehension of the limitations of the said freedom.

Ultimately, due to the similarities, and importance of a broader understanding of the right to freedom of expression for this thesis – the relevant legislation on the right to freedom of assembly and association will be shortly restated. As mentioned before, Article 4b of the ICERD, on the other hand, further elaborates that all member states shall declare illegal and prohibit organizations, also organized all other propaganda activities which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law.[168] Article 21 and 22 of the ICCPR guarantee the right to freedom of assembly[169] and association,[170] but it also prescribes the same conditions for limitation of those freedoms[171] as imposed for the right to freedom of expression.

On the other hand, ECHR again provides a broader scope of limitations to the right to freedom of assembly and association grounded in Article 11, in the same sense that limitations are prescribed for freedom of expression.[172]

Constitutional protection in Croatia

Just like in the case of most other constitutional rights and freedoms, possible limitations to fundamental freedoms are subject to general criteria formulated in Article 16 of chapter

[167] ICERD, Article 4
[168] ICERD, Article 4b
[169] ICCPR, Article 21
[170] ICCPR, Article 22
[171] ICCPR, Article 21, Article 22, para 2
[172] ECHR, Article 11

two on the basic provisions of the constitution.[173] Namely, the said stipulates that freedoms and rights may only be restricted by law to protect the freedoms and rights of others, the legal order, and public morals and health.[174] Further on, any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in any individual case.[175]

Furthermore, Article 17 stipulates that individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the State, or in the event of a natural disaster.[176] Yet, the same article enumerates freedoms upon which even in cases of clear and present danger to the existence of the state restrictions cannot be imposed. Quite interestingly, even though freedom of expression and thought are prescribed by the same paragraph of the same article, only freedom of thought is enumerated as one of these freedoms that might not be restricted.[177] All other constitutional rights except the enumerated absolute ones, are relative [including the right to freedom of expression] and, therefore, subject to possible limitations solely by Article 16.

Nevertheless, freedom of expression, prescribed under the chapter three of the constitution that concerns the protection of human rights and fundamental freedoms, is even more strictly limited by Article 39 which stipulates that any call for or incitement to war or use of violence, to national, racial, or religious hatred, or any form of intolerance shall be prohibited, and punishable by law.[178]

Freedom of expression is guaranteed by Article 38 of the Croatian constitution.[179] The same article emphasizes that freedom of expression shall particularly encompass freedom of the press and other media, freedom of speech and public opinion, and free establishment of all institutions of public communication.[180]

[173] Gardašević, 2018, p. 148
[174] Ustav, Article 16
[175] Loc. cit.
[176] Ustav, Article17
[177] Loc. cit.
[178] Ustav, Article 39
[179] Ustav, Article 38
[180] Loc. cit.

When it comes to freedom of assembly and peaceful protest that falls under the scope of the same constitutional chapter, the right is guaranteed by Article 42,[181] while freedom of association is guaranteed for the protection of common interests or the promotion of social, economic, political, national, cultural, and other convections and aims, by the law, by Article 43.[182] While there is no prescribed restriction with regards to the right to assembly and peaceful protest, the right to freedom of association is restricted by the prohibition of any violent threat to the democratic constitutional order and independence, unity and territorial integrity.[183]

Bearing this in mind, it is important to mention that the Croatian constitution, under chapter two which concerns basic provisions, stipulates the unrestricted right to establish political parties.[184]

Notwithstanding, the same article also stipulates that political parties which, in their platforms or by violent action, intend to undermine the free democratic order or threaten the existence of the state shall be deemed unconstitutional, whereas the Constitutional Court is responsible for making that decision.[185]

As one may conclude, the phrasing of the Croatian constitution is following the aforementioned international and European legislation. That arises from Article 134 which stipulates that international treaties which have been concluded and ratified by the Constitution, that have been published, and that have entered into force shall be a component of the domestic legal order of the State, and shall have primacy over domestic law,[186] which ultimately circumscribes the monist stance of the Croatian constitution.

Constitutional protection in Sweden

As mentioned before, Sweden has no less than four documents with constitutional status, out of which three are of relevance when examining freedom of expression. Due to the

[181] Ustav, Article 42
[182] Ustav, Article 43
[183] Loc. cit.
[184] Ustav, Article 6
[185] Loc. cit.
[186] Ustav, Article 134

particularities of this thesis, the focus will be on the relevant provisions of each document, with the emphasis on the Instrument of the Government.

Firstly, the Instrument of Government contains a more general provision for freedom of expression, than the other two relevant constitutional documents. Namely, chapter two on fundamental rights and freedoms underlines freedom of expression, assembly, demonstration, and association under Article 1, which guarantees all the following rights and freedoms in relations with the public institutions.[187]
Secondly, Article 20, paragraph 1, prescribes the conditions for restricting previously mentioned rights and freedoms, which are grouped within this article.[188] Those rights and freedoms can be restricted by law only to the extent provided for in Articles 21 to 24.[189] Accordingly, Article 21 emphasizes that the restrictions must be necessary for a democratic society and proportionate to the purposes for which it is imposed.[190] Nevertheless, it is stressed that the right to restrict rights and freedoms cannot be extended so far that it represents a threat to the free shaping of opinion as one of the foundations of democracy.[191] Moreover, Article 23 enumerates specific situations when freedom of expression might be restricted, including national security, public order and safety, etc.[192] Article 24 enumerates specific situations when freedom to demonstrate, freedom of assembly and association can be restricted. The paragraph on freedom of association is of particular interest since it may be restricted only in respect of organizations whose activities are of military or quasi-military nature or constitute persecution of a population group on the grounds of ethnic origin, color, or other such conditions.[193]
Thirdly, the Instrument of Government´s relevance lays also in prescribing compliance with the European Union and ECHR law. Namely, Article 10 prescribes that Sweden is a member of the European Union, but also participates in international cooperation within

[187] Regeringsformen, Ch. 2, Article 1, para 1, para 3, para 4, para 5
[188] Regeringsformen, Ch. 2, Article 20, para 1
[189] For this thesis, greater attention will be given to articles 21, 23, and 24. Article 22 will be disregarded due to its procedural nature. Furthermore, due to the page limitation, Article 25 which deals with special restrictions for foreign nationals within the country regarding freedom of expression, information, assembly, association, worship, and freedom to demonstrate, will not be analyzed due to lack of relevance for the particular topic, but it is something worth mentioning.
[190] Regeringsformen, Ch. 2, Article 21
[191] Loc. cit.
[192] Regeringsformen, Ch. 2, Article 23
[193] Regeringsformen, Ch. 2, Article 24

the framework of the UN and Council of Europe.[194] Additionally, Article 19 prescribes that no act of law or other provision may be adopted which contravenes Sweden´s undertakings under the ECHR.[195]
Ultimately, the whole Chapter 10 is devoted to international relations[196] and it circumscribes in-depth terms and conditions under which international legislation is adopted in the domestic legislation while bearing in mind the dualist stance of the states´ constitution.

On the other hand, the Freedom of the Press Act and the Fundamental Law on the Freedom of Expression contain a comprehensive regulation of freedom of expression when certain technologies are used as a method of disseminating an expression.[197] Those documents cover a large area of possible expressive conduct, but also prescribe certain limitations. Namely, chapter 7 of the Freedom of the Press Act is dedicated to the offenses against the freedom of the press, the freedom to communicate information, and the freedom to procure information. The same chapter is translated into chapter 5 of the Freedom of Expression Law due to their closeness. Acts deemed as offenses against freedom of the press are enumerated, but for this thesis, one needs to be emphasized. Article 6 prescribes that agitation against a population group, whereby a person threatens or expresses contempt for a population group or other such group with allusion to race, color, national or ethnic origin, religious faith, sexual orientation, or transgender identity or expression shall be deemed an offense against the freedom of the press.[198] Another *differentia specifica* is recognized between those two documents and the previously elaborated Instrument of the Government. Both of the documents contain provisions on the hierarchy of responsibility[199] and liability for the disseminated matter.[200]

As one may conclude, the phrasing of the Swedish constitution also aligns with the international and European legislation. Freedom of expression and the akin rights and

[194] Regeringsformen, Ch. 1, Article 10
[195] Regeringsformen, Ch. 2, Article 19
[196] Regeringsformen, Ch. 10
[197] Bull, 2009, p. 80
[198] Tryckhetsförordningen, Ch. 7, Article 6
[199] See Bull, 2009, p. 83 - 87
[200] Tryckhetsförordningen, Ch. 8; Yttrandefrihetsgrundlagen, Ch. 4

freedoms are thoroughly protected under the Swedish constitution, which arises from the historical background of Sweden. Nevertheless, as it will be demonstrated that does not mean that Swedish constitutional protection, no matter how strong it is, might be flawless.

4.2. Functional Method Applied

In the following section, I will further elaborate on the utilized functional method that aims to provide an answer to the posed research question. Firstly, conceptual functionalism will be addressed through the examination of Article 38 concerning freedom of expression in conjunction with article 16 which prescribes its limitations, in the light of the Croatian constitution. As mentioned in the research design, I will then proceed to a comparative analysis of Croatian and Swedish legislation concerning the constitutional protection of freedom of expression.
Secondly, I will elaborate on the case study of the two ECtHR cases in light of the national legal contexts and ECtHR praxis.

Croatia v. Sweden

As previously mentioned, freedom of thought and expression is guaranteed by Article 38 of the Croatian constitution. Following the stated, freedom of expression entails both freedom of the press and other media, as well as freedom of speech and public opinion. Freedom of expression is limited also by the Article 16 of the constitution. Two functions of the rule need to be examined while following the reasoning of the first flow chart mentioned in the research design.
Firstly, the function of Article 38 is to ensure that freedom of expression is guaranteed and enabled to the people.
Secondly, the function of Article 16 is to protect the freedoms and the rights of others, the legal order, and public morals and health.[201] Further on, any limitation to freedom of expression must be proportionate to the need in each case.
Ultimately, given the fact that freedom of expression [unlike freedom of thought, even though the same article prescribes two freedoms] is a relative right, it can be limited

[201] Ustav, Article 16.

during a state of war of any clear and present danger to the independence and unity of the state, or in the event of any natural disaster.[202]

The aforementioned function of Article 16 is fulfilled similarly in Instrument of the Government, Freedom of the Press Act, and the Freedom of Expression Law.
Firstly, in the Instrument of the Government, the function of protecting the freedoms and rights of others, the legal order, and public morals and health is fulfilled similarly since freedom of expression might be limited with regards to the national security, the national supply of goods, public order and public safety, the good repute of the individual, the sanctity of private life, and the prevention and prosecution of crime.[203] Further on, freedom of expression is protected by Article 1, p. 1, under the paragraph on freedom of opinion, guaranteed as fundamental rights and freedoms. According to the Instrument of the Government, freedom of expression entails the freedom to communicate information and express thoughts, opinions, and sentiments [orally, pictorially, or in any other way][204], while a thorough description can be found in the section on conditions for restricting rights and freedoms. Apart from that, fulfilling the function of protecting the rights and freedoms of others and public order and safety, also needs to be necessary in a democratic society, and proportionate to the legitimate aim.[205]
Secondly, the function is additionally fulfilled by the provisions of the Freedom of the Press Act and the Freedom of Expression Law that applies concerning the freedom of the press and the corresponding freedom of expression on sound radio, television, and certain similar transmissions, as well as in films, video, sound, or other technical recordings.[206] Ultimately, the Freedom of the Press Act dedicates the whole of the Chapter to the offenses against the freedom of expression, the freedom to communicate information, and the freedom to procure information.

As demonstrated, both provisions concerning the guarantee and the limitations on the freedom of expression comply with the international and European legal standards.

[202] Loc. cit.
[203] Regeringsformen, Ch. 2, Article 23
[204] Regeringsformen, Ch. 2, Article 23
[205] Regeringsformen, Ch. 2, Article 21
[206] Regeringsformen, Ch. 2, Article 1

Firstly, both provisions concerning the guarantee of freedom of expression have similar wording, even though Article 38 of the Croatian constitution mentions freedom of expression in the combination with the freedom of thought, therefore combining the absolute and relative rights in one single provision, while the Swedish constitution is using freedom of opinion as an umbrella term for freedom of expression that then entails freedom of thought as its possible manifestation.

Secondly, due to its more explicit provisions regarding the limitations of freedom of expression whose purpose is to protect public order and safety, health, and morals, the Swedish constitution seemingly provides stronger possibilities of the freedom of expression limitations. By the mere fact that freedom of expression is protected and, more importantly, regulated by no less than three out of four constitutional documents, the Swedish constitution becomes a playground for understanding the scope of limitations of freedom of expression.

Ultimately, the rules in both systems are similar, as well as their functions. Nevertheless, the possibility of imposing certain limitations on the particular freedom seems more prominent under the Swedish constitution.

Šimunić meets Sugg and Dobbs

The year was 1998 when Sugg and Dobbs were found guilty before the Swedish courts when they lodged an application before the ECtHR. In 1998 Sugg and Dobbs were shouting '*Sieg Hei*l', while Šimunić shouted '*For Homeland Ready!*' in 2013. All three applicants publicly expressed intolerance in a manner that was accessible to a wider audience, and their reiterating speech contained a message that promoted intolerance and discrimination towards a certain group. Hence, they fulfilled vaguely defined elements that define hate speech, and therefore, require the application of the provisions that serve to limit freedom of expression.[207]

On the one hand, Josip Šimunić was a Croatian national football representation member that was found guilty before the Zagreb Minor Offences Court of "addressing messages to spectators [of a football match], the content of which incited hatred on the basis of race, nationality, and faith" at a match played between the Croatian and Icelandic national

[207] See heading 1.3.: Background and previous research

football teams.[208] The relevant part of the first instance judgment reads: after the official end of a football match, the accused took the microphone, walked onto the middle of the pitch, and turned towards the spectators, addressing them by shouting "*For home*" even though he should have been aware […] what reaction that would have with the spectators, who, at his shouting replied "*Ready!*" Therefore, all the circumstances of the event […] show that accused directed messages toward the spectators at a sports competition the content which incited hatred on the basis of racial, national, regional, or religious identity because the cry "*For home*" with the reply "*Ready!*" was used as the official greeting of the totalitarian regime of the NDH, and as such is rooted as a symbol or racist ideology, contempt towards other people on the basis of their religion and ethnic origin, and the trivialization of victims of [crime against] humanity.[209]

The first instance judgment was upheld by the High Minor Offences Court and subsequently, his fine was increased. Notwithstanding, the Šimunić lodged a constitutional complaint and alleged that his rights under several articles, including Article 16,[210] of the Constitution were violated. As regards the applicant´s right to freedom of expression, the Constitutional Court, relying on the principles established in the Court´s case-law concluded as follows: the Constitutional Court finds that the applicant´s punishment […] is based on law, […] that interference has a legitimate aim.[211] The legitimate aim of punishing behaviors expressing or inciting hatred on the basis of racial or other identities at sports competitions is the protection of the dignity of others, but also the basic values of a democratic society.[212] […] Given all the circumstances of the event, it cannot be seen aa s disproportionate interference with his [right to] freedom [of expression].[213]

Following the Constitutional Court´s judgment, Šimunić complained to the ECtHR, in the light of Article 10 of the ECHR,[214] that the national court had violated his right to freedom of expression.[215] In its judgment on admissibility, the ECtHR stated that the

[208] *Šimunić v. Croatia*, App. No. 20373/17, (ECtHR 9 March 2017), para 3
[209] Loc. cit.
[210] Due to their procedural nature, Articles 14, 29, 1, 4, 38, 1, 2 of the Croatian Constitution will be disregarded in the light of the ECtHR.
[211] *Šimunić v. Croatia,* para 7
[212] Loc. cit.
[213] Loc. cit.
[214] Due to the procedural nature of Article 6 of the ECHR, the ECtHR reasoning in that part will be disregarded.
[215] *Šimunić v. Croatia,* para 35

ECtHR consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual´s self-fulfillment.[216] Nevertheless, the ECtHR emphasized that it is important to refer to Article 17 of the ECHR in this particular case since the said article, has the purpose, in so far as it refers to groups or to individuals, to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention[217], and continues that speech that is incompatible with the values proclaimed by ECHR is not protected by Article 10 by virtue of Article 17 of the Convention.[218]

ECtHR upheld the judgment while emphasizing that the national courts, including the Constitutional Court, carefully analyzed all aspects of the case and holds that the said expression, irrespective of its original Croatian literary and poetic meaning, had been used also as an official greeting of the Ustashe movement and totalitarian regime of NDH.[219] Moreover, the ECtHR attached particular importance to the context, namely, that the applicant chanted a phrase used as a greeting by a totalitarian regime at a football match in front of a large audience to which the audience replied and that he did so four times.[220] Additionally, the ECtHR emphasized that Šimunić, being a famous football player and a role model for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators´ behavior, and should have obtained from such conduct.[221] Accordingly, the complaint was found manifestly ill-founded and was rejected from further proceedings before the ECtHR, which means that Šimunić, ultimately, did not accomplish to be tried before the ECtHR.

Given the circumstances of the particular case, Šimunić´s judgment would look more or less the same if tried before the Swedish Constitutional Court. Namely, Article 23 of the Instrument of the Government would be employed, which means that Šimunić´s freedom of expression would be limited in order to protect public order and public safety. Moreover, due to the more detailed enumeration of conditions when can the freedom of expression be limited, Šimunić´s freedom of expression would also be limited on the basis

[216] Ibid., 36
[217] Ibid., p. 37
[218] Ibid., p. 38
[219] Ibid., p. 44
[220] Ibid., p. 45
[221] Loc. cit.

of the prosecution of crime. Apart from that, the Croatian Constitutional Court has applied the tripartite test, whereas Šimunić failed due to the fact the offense was prescribed by law, it was deemed to be necessary in a democratic society, served to pursue a legitimate aim, and was proportionate to the nature of the need for such limitation. Since Article 21 prescribes the necessity of tripartite test fulfillment as well, there is no doubt that Šimunić´s case would be adjudicated in the same manner.

On the other hand, in *Sugg and Dobbs v. Sweden*, the applicants were U.S. nationals that attended a public rock concert in Sweden. The first applicant, Sugg, was a singer of an American rock group that performed at the concert, and the second applicant, Dobbs, was a member of the audience.[222] The concert was stopped within two hours, and most of the participants were arrested, among whom were also the two applicants. The reason for the arrests was that the participants had been doing […] "Hitler salutes" with their arms and had been shouting the *´Sieg heil´*.[223] Sugg and Dobbs were found guilty of agitation against a national or ethnic group by the District Court and sentenced to one-month imprisonment.[224] They appealed, but their challenge was rejected by the Court of Appeal which upheld the District Court´s judgment. The appellate court had regard to the *travaux préparatoires* to that provision and a judgment by the Supreme Court[225] concerning the use of Nazi symbols and concluded that the "Hitler salute" and the words "Sieg heil" were clear manifestations of Nazism and racist ideology and expressed contempt for other persons on account of their race or color.[226]

Sugg and Dobbs complained to the ECtHR under Article 7 of the ECHR that they were convicted of a crime that has not been clearly described by law. Further on, they argued that they couldn't know the wording of the relevant provision […] and that they have been in Sweden only 12 hours since they were arrested, and they were not familiar with the values of Swedish society.[227] When deliberating, the ECtHR noted that the measure complained was "prescribed by law" since the case law was published and accessible in a sufficient manner to enable the participants to regulate their conduct.[228] Apart from that,

[222] *Sugg and Dobbs v. Sweden*, App. No. 45934/99, (ECtHR 4 February 1999), para A
[223] Loc. cit.
[224] Loc. cit.
[225] Nytt juridiskt arkiv (NJA 1996, p. 577)
[226] Loc. cit.
[227] *Sugg and Dobbs v. Sweden*, para 1
[228] Loc. cit.

the fact that Sugg and Dobbs were in Sweden for only 12 hours when they were arrested cannot constitute an excuse for not complying with Swedish law.[229] Finally, the ECtHR concluded that the application is manifestly ill-founded within the meaning of the ECHR and deemed the application inadmissible.[230]

As demonstrated by the facts of the cases, Šimunić, Sugg, and Dobbs were convicted under similar circumstances in two different countries, at different periods, under different legislation. Sugg and Dobbs submitted an application in 1998, while the Šimunić case occurred almost twenty years later. The Sugg and Dobbs judgment was even mentioned in the Croatian Constitutional Court judgment when stated that the same view has been expressed in the aforementioned judgment which, *inter alia*, stated that the ban of racist speech is of fundamental importance in a democratic society.[231] All three of them were acting in an anti-democratic manner according to the reasoning of minor courts, constitutional courts, and the ECtHR when voicing Nazi salutes, and receiving support from the audience. All three fail the tripartite test regardless of their appeals – they should have been aware that abstaining from invoking totalitarian regime salutes is prescribed by law, and they should have been aware that by positive national, international, and European legislation, the sanction imposed will be deemed as necessary in a democratic society, and proportionate to the pursued legitimate aim. However, it is important to mention that Sugg and Dobbs were not claiming that their right to freedom of expression was violated, even though the case today serves as one of the landmark cases regarding the freedom of expression in the context of Article 10 [in conjunction with Article 17] of the ECHR. Given the strong limitations imposed to freedom of expression by the national legislation, Sugg and Dobbs played the safe card when claiming merely a violation of Article 7.

Notwithstanding, it is understandable that regardless of the monist or dualist approach of each respective country´s constitutional protection and imposed limitations on freedom of expression, ECHR is equally represented in both cases that appeared in front of the national courts. Notably, all three have consequently lodged an application that was found manifestly ill-founded, and therefore, inadmissible before the ECtHR, which speaks on

[229] Loc. cit.
[230] *Sugg and Dobbs v. Sweden*, para 2
[231] *Šimunić v. Croatia*, para 3

the constitutional conditionalism of the Council of Europe and the European Union membership status.

4.3. In Defense of Democracy

When political theorists discuss threats to democracy, they tend to focus merely on the legislation. Namely, based on the mere definition of militant democracy as a form of constitutional democracy that is authorized to protect civil and political freedoms by preemptively restricting their exercise,[232] it is understandable that the legislators lean towards legislative tools and methods that allow them to combat the anti-democratic threat.

Nevertheless, how does one recognize the rising anti-democratic threat? Militant democracy *per se* was a term coined with the purpose to combat National Socialism and fascism, so resorting to militant democracy does not seem uncommon when Western liberal democracies [as well as the countries under their influence] are faced with the imminent threat of the far-right once more. In the following section, I aim to analyze the influence of the concept of militant democracy on the clash between freedom of expression and far-right expression in the national legal context of Croatia and Sweden through the employment of conceptual functionalism and a case study of the two respective countries.

On Preventive Constitutional Intervention

As demonstrated before, the constitutional protection of freedom of expression, as one of the foundations of a democratic society, is emphasized and highlighted in both the Croatian and Swedish constitutions. Nevertheless, in the following section, I will pinpoint the relevance of the constitutionalism of both states in the context of the concept of military democracy through the analysis of relevant legislation that was elaborated in the previous section.

[232] See heading 2.1.: The Foundations of Militant Democracy

Firstly, the concept of militant democracy concerning freedom of expression is palpable in Article 10, para 2 of the ECHR.[233] Namely, the exercise of freedom of expression can be limited on certain occasions that are enumerated in the said provision. The said limitations are vaguely defined, so their application consequently ends in the production of sometimes incoherent case law. On the one hand, the ECtHR agrees, as demonstrated in *Garaudy v. France*[234] and *Perincek v. Switzerland*,[235] that holocaust denial is, almost unanimously, recognized as a manifestation of an anti-democratic will that needs to be suppressed for the protection of democracy itself. On the other hand, there is a series of case-law that seem to diminish the exercise of freedom of expression that could potentially be harmful, as has been demonstrated, for instance, by *Vajnai v. Hungary*.[236] The potential reason why the justification of some totalitarian regimes[237] is justified in the light of the ECHR lies in the fact that the ECHR is a product of a post-Second World War society that was deeply wounded by fascism and National Socialism.

Secondly, as Macklem stated, Article 17, which represents the core of militant democracy[238] as coined by Loewenstein, was understood as a bulwark against democracy´s capacity to surrender the fascist rule.[239] Article 17 is often invoked when applicants complain regarding the violation of Article 10, but due to its wording which insinuates the prohibition of abuse of the ECHR, makes applications inadmissible due to the possibility of destruction of rights and freedoms provided by the ECHR.[240] Hence, the two analyzed cases concerning far-right expression in a manner of reiterating ´Sieg Heil´ or ´For Homeland Ready!´ were found inadmissible as manifestly ill-founded based on Article 17.

Thirdly, the militant character of democracy can be foreseen in the provisions concerning freedom of association, and assembly about the parties, organizations, or entities associated with the far right. Particularly, the last judgment *Refah Partisi v. Turkey*[241] shed a light on the determinacy of the ECHR to defend itself from the anti-democratic

[233] See heading 4.1.: Relevant Legislation Concerning Freedom of Expression
[234] See heading 2.4. Militant Democracy in ECtHR Praxis
[235] See heading 2.4. Militant Democracy in ECtHR Praxis
[236] See heading 2.4. Militant Democracy in ECtHR Praxis
[237] See heading 1.3.: Background and previous research
[238] See heading 2.1.: The Foundations of Militant Democracy
[239] See heading 2.2.: The Democratic Dilemma
[240] See heading 4.1.: Relevant Legislation Concerning Freedom of Expression
[241] See heading 2.4. Militant Democracy in ECtHR Praxis

entities. Nevertheless, even in the case of assembly or association, in the light of the ECHR, one can argue that the case law is incoherent based on the historical understanding and perception of a certain totalitarian regime.[242]

Ultimately, as demonstrated before, ECHR is implemented in the constitutions of both respective states, and due to its importance in protecting fundamental rights and freedoms, has a direct effect regardless of the monist/dualist approach that each member state has embraced.

Bearing that in mind, the specific provisions of the national constitutions need to be taken into consideration.

Firstly, both constitutions similarly guarantee freedom of expression while emphasizing its importance in a democratic society. Yet, both constitutions also provide a solid ground to limit the freedom of expression when necessary to conquer the anti-democratic enemy that arises in a form of a fascist or a National socialist threat of far-right expression. This is evident when one takes a look at the provisions of the national constitutions that prescribe those limitations. The wording of the provisions is consistent with the ECHR provision when enumerating various reasons that could serve as a justification for when and why freedom of expression should be limited. For instance, Article 17 of the Croatian constitution prescribes the state of exception in a classical Schmittean sense since emergency powers in the state of exception might be called upon to justify a restriction of democratic freedoms in violation of ordinary constitutional law.[243] Even though this particular article does not entail freedom of expression since, in a legal sense, it is not an absolute category,[244] it demonstrates the extent and importance of the various interpretations of militant democracy, and directly relates to the Article 16 of the Constitution whereas freedom of expression might be limited if certain [enumerated] conditions are fulfilled.[245] On the other hand, Swedish constitutional protection of freedom of expression is, in a sense, stronger. The Freedom of the Press Act and the Fundamental Law on Freedom of Expression provide stronger protection for freedom of expression which is less limiting when it comes to various media that can disseminate

[242] See heading 2.4. Militant Democracy in ECtHR Praxis
[243] See heading 2.2.: The Democratic Dilemma
[244] See heading 1.1.: Topic and Research Problem
[245] See heading 4.1.: Relevant Legislation Concerning Freedom of Expression

information to a wider audience. Nevertheless, the Instrument of Government serves as a perfect example of how the freedom of expression of an individual can be limited more easily. Namely, Articles 20 – 24 of the Instrument of the Government[246] prescribe the conditions under which these freedoms can be limited, and they are synonymous with the reasoning provided by the ECHR.

Secondly, the two presented cases demonstrate how imposed limitations affected, first, the judgments before the national courts, and, second, the previously established inadmissibility before the ECtHR. Namely, the reasoning of the national judgments follows Popper´s line of argumentation that intolerance needs to be utilized once the intolerant denounces all arguments.[247] Additionally, the presented cases serve to understand the national case law that has been created by the case law provided by the ECtHR.

Ultimately, as priorly illustrated, freedom of assembly and association are as well protected by the national constitutions as fundamental rights and freedoms even though the monist, i.e., the dualist approach of each respective country conditions the level of restriction. Therefore, the concept of militant democracy is visible in each aspect of constitutionalism regarding the sections on fundamental rights and freedoms which aligns with the idea of moral anxiety that entered every pore of society when European states constitutionally started to accept certain anti-democratic measures in order to counter back the extremist movements.[248]

The Limits of Militant Democracy

One of the most obvious forms of the limitations of freedom of expression is hate speech. In the following section, I ought to explain how the concept of militant democracy comes to expression when addressing the limitations of freedom of expression in the context of the vaguely defined legal term of hate speech.

[246] See heading 4.1.: Relevant Legislation Concerning Freedom of Expression
[247] Popper, 2015, p. 145
[248] Macklem, 2006, p. 489

Firstly, the function of militant democracy is to preserve democracy from destroying itself by fortifying its soft spots.[249] One of the soft spots identified by Loewenstein is freedom of expression, which can serve as a means to destroy democracy by an anti-democratic entity. Therefore, limitations must be imposed to safeguard the democracy as we know it. As previously mentioned, hate speech covers all forms of expression which spread, incite, promote, or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination, and hostility against minorities and people of immigrant origin.[250] On that grounds, hate speech must be limited in the sense of fortifying the soft spots of democracy.

Secondly, regardless of the vague (non)definitions of hate speech, there are key elements that need to be fulfilled for speech to be qualified as hate speech, instead of falling under the scope of the right to freedom of expression. The two presented cases fulfill the priorly analyzed characteristics in the following sense:

1. The disputed speech was a public expression accessible to a wider audience. Sugg was a band member that voiced a salute related to National Socialism at a concert, where Dobbs was part of the audience. Dobbs was a concert attendee that voluntarily replied and chanted in choir with Sugg. Nevertheless, Sugg was not addressing only Dobbs when saluting, he was addressing the whole audience.

   Šimunić, on the other hand, was a famous football player who also voiced a totalitarian regime salute [also related to National Socialism] to a great number of national team representation match attendees.
2. The disputed speech by all the three applicants contained a message that spreads and promotes intolerance or hatred [that might lead to violence]. Namely, all three applicants used the totalitarian regime salutes with the understanding that the aforementioned are associated with intolerance, historical revisionism, and genocide denial.
3. The disputed speech served to promote intolerance, hatred, and discrimination of a group, in both cases, of genocide victims, genocide survivors, and others

[249] See heading 2.1.: The Foundations of Militant Democracy
[250] See heading 1.3.: Background and previous research

involved in the atrocities committed by the totalitarian National socialist regime of the Third Reich and NDH.

On that grounds, since the disputed speech would represent a violation of positive international, European, and national legislation, it had to be subjected to the limitations of freedom of expression. Interestingly enough, neither Sugg and Dobbs nor Šimunić were convicted for a hate speech, even though they do fulfill constituent elements of the legal term. Yet, the limitation of their speech unhindered the real potential of militant democracy – the limitation of freedom of expression at the earliest warning sign of a fascist or National Socialist ideology.

Secondly, militant democracy was imagined as a tool to combat fascism and National Socialism. As the two presented cases demonstrate, the militant character of democracy is utilized in most cases regarding the far-right expression. The far-right expression is presented as a direct threat to a democratic society, due to the very nature of the concept of militant democracy.[251] Nevertheless, the concept of militant democracy as implemented in the national constitutions remains ideologically neutral. Namely, the provisions regarding the limitations of freedom of expression does not identify far-right as a threat to the democratic society, but merely enumerates the situations when freedom of expression can be limited, regardless of whom the violator is, or whose rights are violated, or freedoms infringed.

Ultimately, even though the characteristics of militant democracy are omnipresent in international, European, and national legislation, it seems like they are mostly concerned by the manifestations of fascism and National Socialism, that, in a sense, seems to threaten Europe once again. Nevertheless, the force of militant democracy to combat any form of political extremism is still up for a discussion.

[251] See heading 4.3: In Defense of Democracy

5. Discussion

As demonstrated in the previous section, many prominent scholars engaged in the research surrounding the clash between far-right expression and freedom of expression. The contemporary comprehension of the concept of militant democracy made scholars tried to understand the impact of the legislation on the freedom of expression, "the foundation stone of democracy".[252] In the following section, I will use their voices to broaden the Croatian and Swedish practices regarding the freedom of expression and the far-right expression that has been considered its greatest threat.

On that notion, revisiting the foundations of militant democracy is of utter importance. Namely, Loewenstein wrote that democracy must live up to the demands of the hour, even at the cost of violating its fundamental principles.[253] Living up to the demands of the hour is, therefore, the key when determining how can democracies protect themselves, which questions and ideas are perceived as deeply undemocratic, and which particular movements have a goal to destroy the democracy as we know it.

First of all, contemporary democracies tend to protect themselves by developing a constitutional framework that allows the application of exceptions on the guaranteed right or freedom. According to Loewenstein´s concept, democracies might be able to protect themselves by prohibiting/delegalizing illegal organizations that promote or incite violence, as well as any speech that falls out of the scope of the constitutionally guaranteed freedom of expression. As presented, both Croatian and Swedish constitutions developed tools and mechanisms to limit the freedom of expression, association, and assembly, to safeguard democracy.[254] Yet, in the Kelsian sense,[255] how democratic is it to limit freedoms that are considered to be its foundation stones, or in the Schmittean sense,[256] how does that affect a state´s sovereignty and constitutional power and order, which directly affects the discursive analysis of the clash between the freedom of expression, and the far-right expression.

[252] *Handyside v. UK,* para 49
[253] Loewenstein, 1937, p. 432
[254] See heading 4.3.: In Defense of Democracy
[255] See heading 2.2.: The Democratic Dilemma
[256] See heading 2.2.: The Democratic Dilemma

Second of all, the ideas and movements that can be perceived as "deeply" undemocratic in contemporary society are depicted vividly in the Šimunić and Sugg and Dobbs case. The three applicants spoke in a manner that does not adhere to the values of Croatian and Swedish liberal democracies. Nevertheless, regardless of those two judgments, the recent NDH case in Croatia and Paludan case in Sweden demonstrates that there is a long way that society needs to cross to combat potentially harmful far-right expression. Further on, the incoherent case law demonstrates the lack of legal standards and definitions when it comes to expression, association, and assembly. Since the essence of democracy is to allow the unobstructed exercise of these freedoms, the limitations become blurred. According to Kulenovic and Blanusa, the same problem appears when considering different totalitarian regimes.[257] Namely, "deeply" undemocratic is usually associated with fascism, as perceived by the concept of militant democracy, while other totalitarian regimes such as communism, are less infringed by the imposed limitations on freedom of expression, as demonstrated by the Croatian, Swedish, and ECtHR case law. Furthermore, as Kulenovic, Blanusa and Pavlakovic emphasize per the Croatian national context, the line between far-right expression in the context of the "For Homeland Ready!" greeting is often blurred by the interrelation of 1941/1991 which serves as an explanation for the incoherency of the Croatian domestic case law. On the other hand, Askanius and Mattsson exemplify the re-branding of national socialism in Sweden,[258] when pointing out that their rhetoric has changed in a manner that they cannot be tried before the courts due to the mild, non-threatening tone.

Finally, as the *NRM* is regarded as a threat within the Swedish society today, as well as *Stram Kurs Sverige*, while Croatia is facing the increase of ustashe supporters and the far-right parties whose ideology is grounded on national socialist ideology. Given Loewenstein´s concept of the increased electoral support given to the far-right parties within the European Union, democracy is vulnerable because of the granted constitutional freedoms that allow to access the elections and possibly win. It remains to be seen how, following Macklem's reasoning, the traditional manifestations of militant democracy such as freedom of expression, association, and assembly, in both respective countries, will deal with the democratic self-preservation in case the "re-branded" far-right

[257] Kulenovic and Blanusa, 2018.
[258] Askanius, 2021; Mattsson, 2019

expression reaches its peak point at the upcoming elections, which would potentially affect the constitutional order in accordance with the Schmittean perception of sovereignty.

6. Conclusion

On the basis of this study, it could be said that the clash between freedom of expression and the far-right expression could be discursively understood and interpreted in the Croatian and Swedish [legal] context as prone to the foundations of the Loewenstein´s concept of militant democracy based on the following remarks of the flat-out theoretical and practical analysis of militant democracy.

First of all, both Croatia and Sweden are in a hindered state of militant democracy. Due to the membership in the European Union and the Council of Europe, their national legislation complies with the international and European standards that align with the foundations of the concept of militant democracy, which is apparent in two ways throughout the analysis. First, the wording and the function of the constitutional provisions in both states follow Loewenstein's and van der Bergh's reasoning of the democratic self-preservation through the insurance that freedom of expression, association, and assembly [regardless of their relevancy for the survival of democracy in the Kelsian sense] is considered to be their nature of relative rights that can be derogated in the state of imminent necessity. Secondly, the reasoning that comes out from Šimunić, Sugg, and Dobbs demonstrates how freedom of expression is limited in both systems and serves as a fragment of a broader case law image on the national and European levels.
Second of all, the concept of militant democracy was coined at a certain moment in history, and even though its application today is not limited, by heavily influenced by its origins, i.e., combating fascism and national socialism. That is what cannot be concluded from the provisions of the constitutions of both respective countries, but from the case-law, that is produced by national courts, and consequently the ECtHR. Apart from that, the other totalitarian regimes, such as communism, are not regarded as much as a threat in the context of today's extreme speech as demonstrated by the several ECtHR judgments.
Third of all, from a legal standpoint Sweden has stronger protection of freedom of expression due to the long tradition of protecting human rights and fundamental freedoms. Accordingly, the provisions that limit freedom of expression are more limiting, especially when the Freedom of the Press Act and the Fundamental Law on the Freedom

of Expression in conjunction with the Instrument of the Government are taken into consideration. Nevertheless, public debate in Sweden demonstrates severe leaning toward the limitation of the far-right expression in order to protect the right of others, regardless of the strong constitutional protections.

On the other hand, Croatia is still in a fast-forward learning process of the implementation of the European values, so it subsequently embraced the postulates of militant democracy in a more militant manner, with the hope to adapt to the imposed democratic virtues. Therefore, freedom of speech in the context of the far-right has had a far more limiting span in the past couple of years, than in Sweden.

Finally, as portrayed, both respective countries are trying to prevent the state of full militant democracy by enabling public debate where far-right expression is not prohibited or censored, but this militant character occurs before the courts – when the limiting law concerning freedom of expression is applied. Nevertheless, the clash between freedom of expression and far-right expression is omnipresent in the societal structure of both respective countries, and it is evident that compliance with the international legal standards affects the status of freedom of expression. It remains to be seen how public debate will, but also the constitutional protection, regarding the far-right expression be altered after the upcoming elections in both respective countries.

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