

Protecting Australian democracy: From attempting to ban the Communist Party to resisting foreign interference

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Abstract

The article analyses the shift of the limits of democratic tolerance in Australia. In 1950, the Australian Parliament passed an Act under which the activities of the Australian Communist Party were outlawed, and the party had to be dissolved. One year later, the High Court of Australia struck down the Dissolution Act and indicated that the "militant democracy" concept had never been a part of the Commonwealth Constitutional architecture. Thus, the interpretation of the judicial system of Australia went contrary to the findings, for instance, of the German Federal Constitutional Court, which dissolved the Communist Party of Germany in 1956. The latest developments in Oceania, such as a ban on foreign donations and the threat of foreign interference through political parties, require a new examination of the status quo of the limits of democratic tolerance in Australia and whether it has been subject to changes since the establishment of a highly liberal pathway to democratic competition.

Keywords: Australia, Australian Communist Party, democratic tolerance, militant democracy, Oceania, political parties

Introduction

Court decisions related to party banning are becoming increasingly critical. Currently, however, there exist only a handful of studies analysing the phenomenon of party prohibitions in the context of both national and international court decisions.¹ Fernando Casal Bértoa and Angela K. Bourne have summarized the relevant instances of court-mandated party banning,² but their study simply lists the key court decisions and precedents and does not analyse the legal principles applied in each decision. Moreover, all of the cases reviewed by Casal Bértoa and Bourne relate to the banning

¹ Walter F Murphy and Joseph Tanenhaus, *Comparative Constitutional Law* (St. Martin's Press Inc., 1977); Olgun Akbulut, "Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties," *Fordham International Law Journal* 34, no. 1 (January 1, 2011): 46; Alexei Trochev, "Ukraine: Constitutional Court Invalidates Ban on Communist Party," *International Journal of Constitutional Law* 1, no. 3 (July 1, 2003): 534–40; Yurii Barabash and Hryhorii Berchenko, "Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine," *Baltic Journal of European Studies* 9, no. 3 (September 1, 2019): 3–24; Geliijn Molier and Bastiaan Rijpkema, "Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans," *European Constitutional Law Review* 14, no. 2 (June 2018): 394–409; Hans-Martien ten Napel, "The European Court of Human Rights and Political Rights: The Need for More Guidance," *European Constitutional Law Review* 5, no. 3 (October 2009): 464–80.

² Angela K. Bourne and Fernando Casal Bértoa, "Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945-2015)," *European Constitutional Law Review* 13, no. 2 (May 8, 2017): 221–47.

of political parties only in the European region, and they ignore experience stemming from other geographic areas.

The ban on political parties in Australia has been little investigated,³ especially in comparison with other bans that took place in Europe, namely in Spain, the United Kingdom,⁴ Germany,⁵ Belgium,⁶ the Czech Republic⁷ or Turkey.⁸ The aim of this study is to address this knowledge gap by exploring the phenomenon of party banning in Australia and review it in the contemporary context. This study offers a review of prohibition of political parties in Australia with law enforcement practices and explains the limits of democratic tolerance set by Canberra. To wit, this study will consider how existing doctrines interpret the limits of democratic tolerance and argue that existing theoretical frameworks for party banning are inadequate and incomplete when applied to the case of Australia.

Measuring the limits of democratic tolerance in Australia

Can a democratic society accommodate all ideas? If not, what are the limits of democratic tolerance, and how can they be explained? It is these two intersecting questions that we are going to discuss here to help us to understand how Australia manages threats stemming from anti-democratic and anti-constitutional political actors. The question of how the country draws the contours of its orientation towards intolerant parties is then of primary value.

This is because political parties play a crucial role in healthy pluralistic democracies. Political competition between genuine players represented by parties indicates a fair and open electoral process. Fluidity in the governing majority is a proven guarantee against authoritarianism. In open societies, political parties create a link between the people's will and the formation of state policy. Founder of constitutional justice and theories of constitutionalism Hans Kelsen described the role of parties in the following way

Modern democracy virtually rests on political parties, whose importance grows the more the democratic principle is realized in practice. Under such circumstances, (admittedly still weak) attempts to anchor political parties constitutionally and to fashion them legally into what they factually already are – into organs of government – are certainly understandable. This tendency forms merely one part of a process, which has been aptly referred to as the “rationalization of power” and goes hand in hand with the democratization of the modern state.⁹

At the time his work was published, only a few countries had a multiparty system corresponding to the ideas of pluralistic democracy. This, however, did not prevent

³ The following study is one among only few which address the issue of party banning in Australia: Svetlana Tyulkina, *Militant Democracy* (Routledge, 2015).

⁴ Angela K Bourne, *Democratic Dilemmas* (Routledge, 2018).

⁵ Molier and Rijpkema.

⁶ Gur Bligh, “Defending Democracy: A New Understanding of the Party-Banning Phenomenon,” *Vanderbilt Journal of Transnational Law* 46 (2013).

⁷ Miroslav Mareš, “Czech Militant Democracy in Action,” *East European Politics and Societies* 26, no. 1 (February 1, 2012): 33–55.

⁸ Tyulkina.

⁹ Hans Kelsen, *The Essence and Value of Democracy*, ed. Nadia Urbinati and Carlo Invernizzi Accetti (Lanham, Md.: Rowman & Littlefield, 2013).

Kelsen from correctly identifying the trend of the status of political parties as the only democratically legitimate representatives that transform state sovereignty into political decisions.¹⁰

Karl Lowenstein, another German philosopher and constitutionalist, defined the weakness of multiparty democracy before its eternal enemies: authoritarians.¹¹ He diagnosed three main factors that threaten democracy. First, democracy is vulnerable because of its internal structure, which is built on compromise. Second, democracy guarantees constitutional freedoms even to its most bitter enemies. Third, democracy allows those parties hostile to democratic standards to subvert the democratic order after gaining power. In view of this, democracy must abandon its neutral attitude towards such anti-democratic parties, it must oppose those parties that threaten its existence; “Democracy must no longer be pacifist; it must become a warrior.”¹²

Almost simultaneously, Dutch constitutionalist George van den Berg gave a lecture on the self-corrective nature of democracy, according to which democracy respects all ideas except the one that democracy has to be abolished. These seminal works were published prior to WWII when democratic regimes had collapsed, not only because of domestic developments but also as a result of foreign interference by totalitarians (as in the occupation of Czechoslovakia in 1938).¹³

Thus, democracy cannot accommodate all political ideas; there are multiple reasons for this. History, for one, presents examples of dictatorships gradually being installed through the means of democratic elections and constitutional procedures. The most well-known example, to which Lowenstein referred, is that of the Weimar Republic and the rise of the Nazi party in Germany in 1933. A much more recent case shows how a vibrant period of experimental pluralism in Russia abruptly ended when no opposition party took a seat in the State Duma after flawed parliamentary elections in 2003. In these cases, the deadliest enemies of democracy – dictators – gained power by the means of a popular vote and within the existing constitutional frameworks, and thus democracy ended.

Lowenstein’s heritage also sheds light on why democratic tolerance has its boundaries. The idea of democracy accepting all political ideas sounds more like a utopian novel than a real-life case. A cohort of recognized scholars has calibrated several conceptual approaches to explain why democracy can be intolerant to certain political views or movements. Understanding the limits of democratic tolerance, its differences and similarities is essential to explaining why certain democracies ban far-right or antidemocratic parties, while others prefer to keep them afloat on the political market.

Several doctrines propose how to classify the models of democratic tolerance and address state practices in a uniform way. Fox and Nolte’s interpretation proffered the classification of democratic (in)tolerance into two large groups: tolerant and militant.¹⁴ Thereafter, these two groups are split into subgroups: (1) tolerant procedural

¹⁰ Ibid.

¹¹ Paul Cliteur and Bastiaan Rijpkema, “The Foundations of Militant Democracy,” in *The State of Exception and Militant Democracy in a Time of Terror*, ed. Afshin Ellian and Geliijn Molier (Dordrecht: Republic of Letters Publishing, 2012).

¹² Ibid, 235.

¹³ Ibid.

¹⁴ Gregory Fox and Georg Nolte, “Intolerant Democracies,” in *Democratic Governance and International Law*, ed. Gregory Fox and Brad Roth (Cambridge: Cambridge University Press, 2000), 406.

democracy; (2) militant procedural democracy; (3) tolerant substantive democracy; and (4) militant substantive democracy.¹⁵

The second approach is suggested by Gur Bligh. He discusses the question of when a party can be proscribed legitimately and what threats the relevant ban should address. In so doing, the author came up with two categories of democratic (in)tolerance. The first is the militant paradigm which, according to the author, is becoming outdated; the second is the legitimacy paradigm, which has been taking on more currency in recent times.¹⁶

Conceptual frameworks for democratic (in)tolerance put forward by Fernando Casal Bértoa and Angela K. Bourne are also worth close consideration. For instance, they revised Fox and Nolte's categorization by laying down their own system of classification of democratic (in)tolerance. Their classification can be summarized as follows

...the typology distinguishes between 'intolerant democracies' or those that actively employ the tool of proscription against extremist parties and 'tolerant democracies' or those that abstain from employing this tool. The second, abstentionist category includes two subcategories: democracies that adopt a permissive stance by choosing not to adopt legal instruments permitting proscription of extremist parties at all; and democracies that remain passive in the face of extremist parties, even though equipped with legal instruments for proscription.¹⁷

There are a number of other authors who have developed original typologies and classifications with the aim of outlining the limits of democratic tolerance, such as Mudde,¹⁸ Brems,¹⁹ Issacharoff²⁰ or Capoccia.²¹ Despite different approaches proposed by the authors there is one common denominator. They all argue that all incidents of party banning and the limitation of political activities can be summarized under the umbrella of the militant democracy concept.

Svetlana Tyulkina argues that "all democracies are militant to some extent and that militant democracy is the major concept to guide states' policies to neutralise various internal threats".²² To add, Angela Bourne and Fernando Casal Bértoa also viewed party banning as evidence of the application of the militant democracy concept.²³ Thus, all classifications rely on the idea of a democracy capable of defending itself and that all democratic states have inherent militancy in their constitutions.

The case of Australia is unique in showing flaws in such doctrinal positions and simultaneously demonstrates the necessity to elaborate a more tangible classification

¹⁵ Ibid.

¹⁶ Bligh.

¹⁷ Fox and Nolte.

¹⁸ Cas Mudde, "Defending Democracy and the Extreme Right," in *Western Democracies and the New Extreme Right Challenge*, ed. Cas Mudde and Roger Eatwell (Routledge, 2004).

¹⁹ Eva Brems, "Freedom of Political Association and the Question of Party Closures," in *Political Rights under Stress in 21st Century Europe*, ed. Wojcieck Sadurski (Oxford University Press, 2006), 120–95.

²⁰ Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (New York: Cambridge University Press, 2015).

²¹ Giovanni Capoccia, "Defending Democracy: Reactions to Political Extremism in Inter-War Europe," *European Journal of Political Research* 39, no. 4 (June 2001): 431–60.

²² Tyulkina, 2.

²³ Bourne and Casal Bértoa, 221–47.

of democratic orientation towards party bans. This is mainly because Australia has never experienced the concept of a militant democracy and has no preconditions to do so in the future. Next, we provide further explanation.

In the first place, we argue that the question of democratic tolerance is to be measured principally through the judicial and law enforcement domains, which are the principal actors in liquidating democratic players (as political parties) in democratic societies. In the Australian Communist Party case, the High Court of Australia remarkably noted that it is exceptionally up to the judiciary to decide “whether or not the power exercised has been conferred (within the limits as s. 107 of the Constitution)”.²⁴

Second, we offer an original classification of how democracies tolerate or respond to antidemocratic or anti-constitutional actors, taking into account principally the Australian experience. To develop a tangible classification, we suggest that all of these three models that follow lead towards party closure: militant, institutional and liberal (as in the case of Australia we frame it as super liberal).

Under the first, the so-called militant model, political parties can promote any ideas or implement any doctrines except those aimed at dismantling a democratic system. The concept of “militant democracy” or “democracy capable of defending itself”, as defined by the ECtHR is the theoretical backbone of this model.²⁵ According to this approach, democracy tolerates all political ideas except the idea that democracy must perish.

The second, the institutional model, assumes that parties are allowed to pursue any political goals except those aimed at destroying the state, inciting hatred, and grossly infringing on fundamental rights and freedoms. Ukraine, for instance, belongs to the group of countries that have the institutional model.

The third is the liberal model. Under this model, the activities of a party, like any other group, are limited only by the requirements of criminal law. The application of this model always requires the availability of proof, higher standards of compliance with procedural law, a sound base of evidence, and requirements of criminal proceedings. The critical difference between the institutional model and the liberal model is that the former does not require the application of criminal law as a mandatory instrument for banning a party. For instance, Tyulkina has observed that Australia has no record of militant democracy measures, except the failed prohibition of the Communist Party of Australia.²⁶

While for the European continent, two systems of dominant paradigm are evident, i.e., militant²⁷ and institutional,²⁸ countries belonging to the Anglo-Saxon system (including the US, UK, Australia, New Zealand) have the widest limits of democratic tolerance, the system which can be best described as a liberal paradigm.²⁹

The full-scale Russian invasion of Ukraine and Chinese military provocations around Taiwan raised dramatically the challenges for democracies worldwide, especially

²⁴ George Winterton, “The Communist Party Case,” in *Australian Constitutional Landmarks*, ed. H. P. Lee and George Winterton (Cambridge University Press, 2003), 124.

²⁵ *Refah Partisi (The Welfare Party) and Others v. Turkey* (ECtHR 2003).

²⁶ Tyulkina, 70.

²⁷ In Germany, Turkey or the Czech Republic.

²⁸ In Ukraine, Spain, Belgium or the Netherlands.

²⁹ In the United Kingdom, the US, Australia (in transition) or Iceland, Ukraine (between 1991 and 2014).

where the domestic system has been indulging the infiltration of political circles by foreign agents.³⁰ For authoritarian states, it has become a more viable option to bribe politicians than try to confront them in international arena.³¹ Tyrants are willing to erode weak democratic institutions from the inside by showing their inherent vulnerability. The countries which have a liberal orientation towards party banning are becoming the mildest targets to contaminate domestic political competition with foreign influence. The practice shows that these threats can no longer be ignored, even by those states with the most liberal tradition towards party bans and supervision.

Australian officials started to become concerned about the threat stemming from foreign interference on internal policy, and subsequently, in 2019, passed a law to ban foreign donations.³² The adoption of new restrictions took place amidst talks on the necessity of limiting Chinese influence on political decisions. The same concerns were shared by neighbouring New Zealand, which moved to pass the same ban on foreign donations.³³ A step which comes as no surprise for European democracies is deemed as a great shift for the Anglo-Saxon countries where freedom of speech and thought is given supreme value.

Fathoming Australian constitutional tradition and the set of freedoms it enshrines is also a vital task. To compare, an absolute majority of democratic states (almost all in the Council of Europe) have constitutionalized the status of political parties, and accordingly, the grounds for the prohibition of parties are prescribed by constitutional acts, too.

Despite many specificities in how each domestic jurisdiction regulates the status of political parties, there is one feature common to the majority of democratic constitutions: the prohibition of a party is the exclusive power of the judicial authorities.

Thus, democratic tolerance or intolerance is concentrated in the hands of the judiciary and law enforcement agencies which bring the cases to the court. This is why court practice in cases on banning political parties can illustrate how militant democracy is. In Germany, two parties were prohibited because their activities *inter alia* went contrary to the principles of the free democratic basic order.³⁴ Spanish judiciary mandated the dissolution of Basque parties because of their connection to the terrorist

³⁰ For instance, see Tatiana Tkachenko and Martin Laine, "How a Russian Influence Group Infiltrated Cypriot Party Politics," OCCRP, 2023, <https://www.occrp.org/en/investigations/how-a-russian-influence-group-infiltrated-cypriot-party-politics>.

³¹ Julian Lewis, "Intelligence and Security Committee of Parliament Extreme Right-Wing Terrorism," 2022, https://isc.independent.gov.uk/wp-content/uploads/2022/07/E02710035-HCP-Extreme-Right-Wing-Terrorism_Accessible.pdf.

³² Alex Hawke, "Australian Democracy Strengthened as Foreign Donations Banned," Minister Hawke's office, 2019, <https://www.smos.gov.au/media-release/2019/01/14/australian-democracy-strengthened-foreign-donations-banned>.

³³ Hon Andrew Little, "Government to Ban Foreign Donations," the Beehive, 2019, <https://www.beehive.govt.nz/release/government-ban-foreign-donations>.

³⁴ Judgment of October 23, 1952 – 1 BvB 1/51 (Federal Constitutional Court 1952); Judgment of August 17, 1956 – 1 BvB 2/51 (Federal Constitutional Court 1956).

acts.³⁵ Finally, Ukrainian courts dissolved more than twenty parties affiliated with Russia.³⁶

Notably, the Australian Constitution is among only a few which does not have direct provisions on freedom of association or political parties. The High Court of Australia interpreted that the restrictions which can concern the limits of democratic tolerance in the light of the right to freedom of communication on political matter as:³⁷

... the law effectively burdens the freedom of political communication in its terms, operation or effect (first limb); and the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government (second limb).³⁸

Tyulkina added that the Australian Constitution has been silent about individual rights and freedoms. In that way Australian Constitutional premises are of a completely different legal nature to the European. There are also no remedies for the protection of infringed rights which the Constitution explicitly provides.³⁹ What the Australian Constitution does is that it protects the freedom of political communication as it concerns legislative power rather than individual rights.⁴⁰

To understand how liberal orientation towards party bans evolved in Australia, one has to scrutinize it from a historical perspective (section 3); after doing so, we discuss how in recent years, the public and law enforcement discourse became more and more resilient towards foreign interference on domestic policy (section 4). Finally, we make concluding remarks (section 5) whether these developments make the Australian system militant or institutional instead of liberal.

Failed attempt to ban communists: paving the way to a super-liberal orientation towards the limits of democratic tolerance

In 1948, during a public debate in the city of Brisbane, the leader of the Communist Party of Australia declared that in the event of a war between “Russia” and the West, his party “will fight on the side of Soviet Russia.”⁴¹ This statement served as the main evidence, according to which the leader of the Communist Party Australia was convicted of “uttering words expressive of seditious intention.”⁴² In 1949, the High Court of Australia (Australia's highest judicial institution) upheld the decisions of the lower courts.⁴³ The decision of the High Court was based on the following: (1) the statement of the leader of the Communist Party demonstrated a real intention to

³⁵ Judgment of March 27, 2003 (HB and successors ban), STS 2133/2003 (Supreme Court of Spain 2003); Judgment of September 22, 2008 (Eusko Abertzale Ekintza – Acción Nacionalista Vasca ban), STS 4581/2008 (Supreme Court of Spain 2008).

³⁶ Iryna Fedoriv, “Pro-Russian Parties Went Down: What Kremlin Projects Has the Court Banned?,” *Pravda*, 2023, <https://www.pravda.com.ua/articles/2022/06/30/7355630/>.

³⁷ The Australian Constitution.

³⁸ *Lange v Australian Broadcasting Corporation* (“Political Free Speech case”) (High Court of Australia 1997).

³⁹ Tyulkina, 158.

⁴⁰ *Unions NSW v New South Wales* (High Court of Australia 2013).

⁴¹ Murphy and Tanenhaus, 627.

⁴² *Ibid.*

⁴³ *Burns v. Ransley* (High Court of Australia 1949).

undermine the authority of the Sovereign and the government;⁴⁴ (2) despite the hypothetical nature of the statement, it had signs of disloyalty, enmity and hostility;⁴⁵ (3) the statement could be characterized as incitement to sedition, which in turn is a crime; (4) taking into account the previous considerations, the party leader's statement goes beyond what can be interpreted as criticism made by the political opposition.⁴⁶

One of the electoral promises given by the incoming ruling coalition, the Liberal/Country Party, was to declare the Communist Party unlawful and dissolved. In 1949, the Liberal/Country Party won the elections and started realising its political program.⁴⁷ In 1950, the Australian Parliament passed the Australian Communist Party Dissolution Act.⁴⁸ The Act had an extensive preamble condemning the activities of the Communist Party of Australia as undermining the foundations of the state, both in terms of program objectives and in practice. The act declared the party to be an illegal organization that was subject to dissolution, its property was subject to confiscation, and the activities of organizations associated with the Communist Party were prohibited.⁴⁹ Immediately after its adoption, the constitutionality of the Act was challenged in the High Court of Australia.

The adoption of the Act took place in a challenging environment in the international arena between the Communist and anti-Communist blocks. The intensification of the Cold War, the revolution in China and the subsequent creation of the People's Republic of China, the beginning of the war in Korea, the Communist revolution in Czechoslovakia, prohibition of the Communist Party in the West Germany, organization of workers' strikes in Australia, which led to economic hardships,⁵⁰ were among many other reasons to introduce blocking legislation against communists in Australia. Thus, the main justification for the bill was the necessity to resist "communist infiltration of democratic societies."⁵¹

In 1951, the High Court of Australia recognized this act as unconstitutional in its entirety.⁵² The case of the dissolution of the Communist Party of Australia had several unique features. Dissolution of associations (including political parties) was a matter for the individual states, so one of the key issues before the court was whether Parliament had the power to dissolve a political party.⁵³

Justice Fullagar concluded that the same dissolution act can be passed by "the Parliament of the United Kingdom or of any of the Australian States. It is only because

⁴⁴ Ibid., 627-628. Quote from the decision of the High Court of Australia: "a statement shows a present intention to excite disaffection against the Sovereign and the Government".

⁴⁵ Ibid. Quote from the decision of the High Court of Australia: "Disaffection when used in relation to a Sovereign or a Government means not merely the absence of affection and regard, but disloyalty, enmity and hostility".

⁴⁶ Murphy and Tanenhaus, 627-630.

⁴⁷ "Election Speeches Robert Menzies, 1949 Museum of Australian Democracy at Old Parliament House," electionspeeches.moadoph.gov.au, 1949, electionspeeches.moadoph.gov.au.
<https://electionspeeches.moadoph.gov.au/speeches/1949-robert-menzies>.

⁴⁸ "Communist Party Dissolution Act," Pub. L. No. 16 (1950).

⁴⁹ Quote from the Act on the dissolution of the Communist Party: "The Australian Communist Party is declared to be an communist unlawful association and is, by force of this Act, dissolved...".

⁵⁰ "The Communist Party Dissolution Act 1950," *Australian Prime Ministers Centre* (blog), 1950, <http://static.moadoph.gov.au/ophgovau/media/images/apmc/docs/82-Communist-Party-ban.pdf>.

⁵¹ George Williams, "The Communist Party Dissolution Bill and Its Aftermath | Australian Society for the Study of Labour History," labourhistorycanberra.org, 2010, <https://labourhistorycanberra.org/2015/05/the-communist-party-dissolution-bill-and-its-aftermath/>.

⁵² *Australian Communist Party v Commonwealth* ("Communist Party case") (High Court of Australia 1951), <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1951/5.html>.

⁵³ Ibid.

the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior authority...”⁵⁴ The remarkable point was that the Court had not reviewed the activities of the party in question as such, while legal assessment was largely focused around the powers of the federal government.⁵⁵

To add, such a right would be also confirmed if there was an obvious threat (state of war or emergency). Under the circumstances of the specific case, the court did not find sufficient grounds for recognizing the dissolution of the party as a legitimate and proportionate measure, particularly given the absence of direct threats to the country.⁵⁶ Following the annulment of the Act, the Australian government tried to impose a ban via the referenda on the level of states. Yet, those attempts failed (Referenda in Australia require a majority in a majority of States to pass (Section 128 of the Commonwealth Constitution)).⁵⁷

We also did not find any reference to a militant democracy in the dissenting opinion of Justice Latham CJ. He upheld his view on the constitutionality of the Act relying on the defence powers of the government. Subsequently, according to him, the Court has no power to conclude who are enemies and reassess policy questions such as war and peace.⁵⁸

George Winterton characterised the above decision of the High Court of Australia as “the most important” for the interests of the rule of law and the protection of civil liberties in Australia.⁵⁹ Such assessment can hardly be altered. Apart from its legal legacy, the decision stipulated ultra-liberal limits of democratic tolerance with regard to the activities of undemocratic actors.

Therefore, the concept of militant democracy in its pan-European sense was not reflected in the Australian case, since the ban on the Communist party of Australia was subsequently abolished.⁶⁰ Tyulkina admitted that the Australian Constitution lacks militant provisions, however, the government tried to rely on this concept once defending the validity of the Act at the court.⁶¹

The rise of militant measures to protect democracy from foreign interference

In recent years Australia’s super liberal stance towards party bans and supervision of their activities have been subject to changes and significant reconsideration. The growth of Chinese influence over the region forced Australian politicians to seek ways of limiting interference in their domestic policy. Australian officials started to express numerous warnings about the rise of the attempts carried out by authoritarian

⁵⁴ Ibid.

⁵⁵ Tyulkina, 72.

⁵⁶ Rule of Law Education Centre, “The Communist Party Case: 65 Years on - Rule of Law Institute of Australia,” ed. William Shrubbs, Rule of Law Institute of Australia, March 9, 2016, <https://www.ruleoflaw.org.au/65th-communist-party-case/>.

⁵⁷ Murphy and Tanenhaus, 638.

⁵⁸ Winterton, 128.

⁵⁹ Ibid, 129.

⁶⁰ Helen Irving, “Australia,” in *the “Militant Democracy” Principle in Modern Democracies*, ed. Markus Thiel (Ashgate Publishing Limited, 2009), 15.

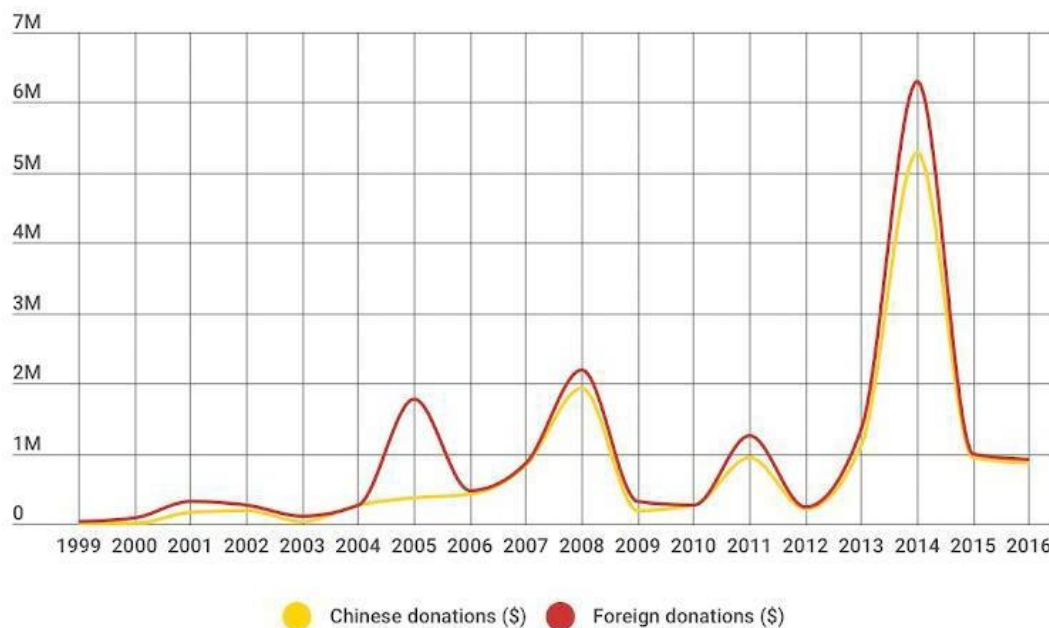
⁶¹ Tyulkina, 70.

countries (such as China, Iran or Russia) in order to influence Australian politics.⁶² Foreign interference on the Australian political market was a disturbing signal for US officials who were shocked by the flow of money pouring into Australian political projects (see figure 1).⁶³

Figure 1: Chinese and foreign donations in Australia

The data shows that the majority of foreign donations between 1999 and 2016 in Australia originated from China.⁶⁴

Chinese and foreign donations



Source: Melbourne Law School Dollars and Democracy Database; and Australian Electoral Commission

The reported leverage of China on Australian domestic affairs has strong economic reasons behind it. For instance, Beijing has been appearing as the biggest trade partner of Canberra.⁶⁵ China is importing “about one-third of everything that Australia sells...”.⁶⁶ This is when Washington stands as the closest defence ally of Canberra. According to observers’ reports, China or companies affiliated with the Chinese government had transferred to key political parties in Australia “more than AU\$5.5 million from 2013 to 2015, making them easily the largest source of foreign-linked donations.”⁶⁷ Another example subject to criticism because of potential undue

⁶² Stephen Dziedzic, “Home Affairs Minister Wants to Name and Shame Foreign Countries Interfering in Australia,” *ABC News*, February 14, 2023, <https://www.abc.net.au/news/2023-02-14/apn-foreign-interference-in-australia/101969988>.

⁶³ Rod McGuirk, “US Voices Concern over Chinese Money in Australian Politics,” *AP News*, September 14, 2016, <https://apnews.com/article/4be63d50a4b44cba80ea3c2c56699668>.

⁶⁴ Luke Henriques Gomes, “Nearly 80 per Cent Foreign Donations Come from China, Data Shows,” *The New Daily*, December 10, 2017, <https://thenewdaily.com.au/news/national/2017/12/10/chinese-donations-australia/>.

⁶⁵ Amy Searight, “Countering China’s Influence Operations: Lessons from Australia,” *www.csis.org* (CSIS, May 8, 2020), <https://www.csis.org/analysis/countering-chinas-influence-operations-lessons-australia>.

⁶⁶ *Ibid.*

⁶⁷ “US Ambassador to Australia John Berry ‘Surprised’ by China ‘Undue Influence’ in Australian Politics - CBS News,” *www.cbsnews.com*, September 14, 2016, <https://www.cbsnews.com/news/us-ambassador-australia-john-berry-surprised-china-undue-influence-donations/>.

influence was the establishment of the Australia-China Relations Institute at the University of Sydney.⁶⁸ Industrial espionage also reported on the case of education cooperation between Chinese companies and Australian universities.⁶⁹ The conspiracy includes hidden steps to promote Chinese interests through local grassroots organizations of the Chinese Australian community.⁷⁰

The necessity to strengthen the internal resistance of Australia to external threat became such that it could not be ignored after the findings presented in “the Second interim report on the inquiry into the conduct of the 2016 Federal Election: Foreign donations” prepared by the Joint Standing Committee on Electoral Matters (JSCEM).⁷¹ The Committee stressed that a ban on foreign donations is necessary to maintain public confidence in Australian political institutions.

The JSCEM argued three negative aspects of foreign donations into Australian political circles: sovereignty, compliance, and transparency. First, the Committee noted that only Australians have the right to influence the domestic political process and foreign donations can consequently have an undue impact on the elections and political decisions. Second, in the opinion of the Committee, foreign donations can undermine public confidence. The money flow in electoral campaigns has to be available and disclosed to the public in an effective manner.⁷² Third, non-compliance with electoral funding regulations is complicated to address when the donation is of foreign origin, mainly because Australian law enforcement cannot follow adherence to the rules by foreign entities or persons.⁷³ The JSCEM screened the legislation on banning foreign donations to political parties in line with the Constitutional premises of freedom of political communication and Section 44(i).⁷⁴ Thus, the JSCEM came to the conclusion to recommend “a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties.”⁷⁵

To address these challenges the Prime Minister of Australia launched the campaign to resist foreign influence in 2017. He claimed, “...we will not tolerate foreign influence activities that are in any way covert, coercive or corrupt. That is the line that separates legitimate influence from unacceptable interference.”⁷⁶ He continued appealing to the findings identified by the intelligence service on the harmful impact of foreign

⁶⁸ Ed Kennedy, “Foreign Donations, Local Politics: China’s Australia Influence,” *The Diplomat*, July 19, 2017, <https://thediplomat.com/2017/07/foreign-donations-local-politics-chinas-australia-influence/>.

⁶⁹ Tory Shepherd, “University Students and Staff Face Increasing Threats, Foreign Interference Inquiry Finds,” *the Guardian*, March 25, 2022, <https://www.theguardian.com/australia-news/2022/mar/25/university-students-and-staff-face-increasing-threats-foreign-interference-inquiry-finds>.

⁷⁰ Amy Searight, “Countering China’s Influence Operations: Lessons from Australia,” *www.csis.org* (CSIS, May 8, 2020), <https://www.csis.org/analysis/countering-chinas-influence-operations-lessons-australia>.

⁷¹ “Role of the Committee,” *www.aph.gov.au* (The Joint Standing Committee on Electoral Matters), accessed August 28, 2023, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/Role_of_the_Committee.

⁷² Linda Reynolds, “Foreign Donations,” *Aph.gov.au* (Parliament of Australia, 2016), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2016Election/Report_1/section?id=committees%2Freportjnt%2F024053%2F24460.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ “Speech Introducing the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017,” Malcolm Turnbull, 2017, <https://www.malcolmturnbull.com.au/media/speech-introducing-the-national-security-legislation-amendment-espionage-an>.

interference by the Chinese Communist Party and comparing their role to Russia's malign activities within the political landscape during Brexit or elections in the US.⁷⁷

The efforts of the ruling coalition resulted in the adoption of a new piece of legislation aimed at blocking foreign donations.⁷⁸ The object of the law was to

... secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign persons and entities exerting (or being perceived to exert) undue or improper influence in the outcomes of elections... to achieve this object by restricting the receipt and use of political donations made by foreign persons or entities that do not have a legitimate connection to Australia.⁷⁹

The said regulation by virtue of its provision prohibits any donations from a foreign entity, foreign public enterprise, political body or organization of a foreign country. The rise of militant measures in Australian policy resembles the Ukrainian transformative pattern. Since independence in 1991 Ukraine had opted for a super liberal model for party closures allowing all wings of political players to engage in political debates. Even former communists – the most aggressive enemies of democracy – joined an open political competition. Australia's orientation towards party bans and supervision was much of the same nature. Here we can recall the Ukrainian Constitutional Court in 2001 pronouncing the unconstitutionality of a prohibition of *Kompartii* in 1991⁸⁰ similarly to the ruling of the High Court of Australia in 1951.

Yet, the super liberal model in Ukraine proved its bankruptcy on the verge of Russian aggression in 2014, the subsequent occupation of Crimea and certain regions in Donbas. The model of prohibition of political parties and supervision over their activities shifted because of the exceptional challenges Ukraine has faced. The same conditions, however not as dramatic, are facing Australia. The growing militarism in China, instability in the South China Sea, tensions between the US and China are cumulative factors which trigger the revision of the super liberal orientation towards the limits of democratic tolerance in Australia. This brings us to the important conclusion that the limits of democratic tolerance can be adaptive and change over time.

The changes aimed at curbing the space for foreign influence in Australian politics can be a signal of transformation of the Australian liberal paradigm towards party bans and supervision. While there are constitutional obstacles in its way the Australian government is persistent in its policy to reduce impact from abroad on national politics. The important part of this discussion is whether the Australia pathway is militant as in Germany, or institutional as in the Ukrainian case. As seen from the key official statements, the main reason behind new norms is concern around sovereignty. While Ukraine bans Russian-affiliated parties it also puts the national interests and security in the first line of arguments to support the limitations of freedom of association. So, the idea of protecting national interests in Australia is linked to the institutional paradigm.

⁷⁷ *Ibid.*

⁷⁸ "Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill" (2017).

⁷⁹ *Ibid.*

⁸⁰ Decision № 20-rp/2001 (Constitutional Court of Ukraine 2001).

Concluding remarks

Australia has a long tradition of democratic governance and open competition, even between the most belligerent enemies of democracy such as communists. Until recently, the Australian political market has been open to all political movements and contestants, even for those affiliated with authoritarian governments.

The latest developments in Australia show a growing concern over the super liberal model of party closures and supervision. Tyulkina noticed that the failure of prohibition of Australian communists was a sign of the rule of law commitments and in the outcomes the revitalized communists had not been able to overthrow the constitutional democratic order by installing a dictatorship of the proletariat.⁸¹ There is an open question how successful Chinese communists can be in achieving their conspiracy aims compared to soviet communists.

The transition from a liberal to an institutional model is pending, although problems still remain. The former Prime Minister of Australia, Malcolm Turnbull, admitted that acts against foreign interference were primarily targeted to reduce Chinese influence in Australia; nonetheless the chosen legislative approach failed.⁸² Such conclusions become apparent if we consider the statistics of criminal proceedings under the legislative corpus designed to fight foreign interference. To date, only two persons have been criminally charged under the Espionage and Foreign Interference Bill in effect as of 2018.⁸³

The Foreign Influence Transparency Scheme was designed to counter foreign interference and provide the public with transparent information about the activities Australian public officials undertook on behalf of a foreign principal.⁸⁴ This is a little ironic since this scheme has targeted its founder, former Prime Minister of Australia. He was included in that register after participating as a speaker during public events in Taiwan and South Korea.⁸⁵

Thus, many questions are raised in terms of the adequacy of that regulation and its mechanisms. Certain practitioners argue that legal frameworks should target primarily influence which arises from authoritarian states alone.⁸⁶ Other commentators even express disappointment about the outcomes of the application of the given scheme.⁸⁷ Some observers noted that the legal provisions to ban foreign donations were insufficient and ineffective. For instance, there is a loophole because foreigners still

⁸¹ Tyulkina, 74.

⁸² Kirsty Needham, "Australia's Foreign Interference Laws Designed for China - Former PM Turnbull," *Reuters*, February 21, 2023, sec. Asia Pacific, <https://www.reuters.com/world/asia-pacific/australias-foreign-interference-laws-designed-china-former-pm-turnbull-2023-02-21/>.

⁸³ "Australian Man Charged with Foreign Interference," Australian Federal Police, April 14, 2023, <https://www.afp.gov.au/news-media/media-releases/australian-man-charged-foreign-interference>.

⁸⁴ "Foreign Influence Transparency Scheme -Factsheet 1 -Fast Facts Foreign Influence Transparency Scheme Factsheet 1 What Is the Foreign Influence Transparency Scheme?" (Australian Government, 2019), <https://www.ag.gov.au/sites/default/files/2020-03/fast-facts.pdf>.

⁸⁵ Daniel Hurst and Caitlin Cassidy, "China Is Carrying out 'Blatant' Influence Operations in Australia, Malcolm Turnbull Says," *The Guardian*, February 21, 2023, sec. Australia news, <https://www.theguardian.com/australia-news/2023/feb/21/china-is-carrying-out-blatant-influence-operations-in-australia-malcolm-turnbull-says>.

⁸⁶ Matthew Doran, "Foreign Influence Regime under the Parliamentary Microscope, with Calls for Shakeup," *ABC News*, February 20, 2023, <https://www.abc.net.au/news/2023-02-20/foreign-influence-regime-under-the-parliamentary-microscope/102001306>.

⁸⁷ *Ibid.*

have the possibility to make official contributions through a company incorporated in Australia.⁸⁸

Despite the growing concerns as to efficacy of the regulation, Australian officials declare the further strengthening of the legal instruments to minimize the foreign footprint in domestic policy-making. In 2023, the Minister for Home Affairs of Australia pointed out that the threat posed by authoritarian governments has become more alarming than ever before and so particular steps are to be taken to overcome these risks.⁸⁹ There are strong signs that the transition from liberal model towards party bans and supervision to the institutional paradigm will happen sooner or later.

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⁸⁸ Annika Dean, “The Flaws in the Government’s Foreign Donations Bill,” The University of Sydney, 2018, <https://www.sydney.edu.au/news-opinion/news/2018/03/02/the-flaws-in-the-governments-foreign-donations-bill.html>.

⁸⁹ Stephen Dziedzic, “Home Affairs Minister Wants to Name and Shame Foreign Countries Interfering in Australia,” *ABC News*, February 14, 2023, <https://www.abc.net.au/news/2023-02-14/apn-foreign-interference-in-australia/101969988>.

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