

The Theory of Militant Democracy and its Legal History. A Critical Analysis

Syed Raza Shah Gilani¹, Shehla Zahoor²
& Hidayat Ur Rehman³

Abstract

The present study explores the paradoxes of 'militant democracy'. It is a reaction to a constitutional history in particular: the fragility of the Weimar Republic before the war and its destruction by a totalitarian movement. In today's world, this is not a new phenomenon: legal and political history have witnessed many occasions when this concept was adopted to protect the State's existence. As it is an interpretive instrument hence, many states responded with tough new anti-terrorism laws with little regard for the rights and the liberties of the people and justified their actions. Now, this article will try to reveal the damage done by these anti-terrorism laws to Human Rights in general and freedom of expression Article 10 of the European Convention of Human Rights in particular.

Keywords: Militant Democracy, Paradoxes of Tolerance, Extremism, Anti-Terrorism laws.

Introduction

To begin, this article will critically analyze the notion of 'militant democracy'. It will also address the question of how it developed and became incorporated into the legal systems of many constitutions. The legality of militant democracy in democratic societies and international obligations to incorporate it into domestic legal systems will be appraised in the article, and its role in coping with the threat of terrorism will be further analyzed. Moreover, the article also examines the normative approach of militant democracy that underpins the argument that it improves the constitutional framework on the "War on Terror". The importance and protection of Article 10 and Article 10(2) of the European Convention of Human Rights (ECHR), which is a qualified right and safeguards the freedom of expression of an individual, (Müller, Militant democracy. 2012) is

¹Dr. SRS Gilani is an Assistant Professor (Law) at Abdul Wali Khan University Mardan, Pakistan. He is also Assistant Editor of *Journal of Islamic State Practices in International Law*. He can be reached at sgilani@awkum.edu.pk

²Shehla Zahoor is a Lecturer at the Department of Law, Shaheed Benazir Bhutto Women University, Peshawar. She can be reached at shehlazahoor@sbbwu.edu.pk

³Hidayat Ur Rehman is an Assistant Professor at the Department of Law at Abdul Wali Khan University, Mardan, Pakistan. He can be reached at hidayat@awkum.edu.pk

discussed in the framework of ECtHR. The question of how the European Convention on Human Rights (ECHR) has strengthened its policies by adopting the principles of the doctrine of militant democracy is also addressed, and whether 'militant democracy' can be used to effectively tackle the ongoing problem of terrorism. In this light, Article 17, Article 11(2), Article 10, and 10(2) of ECHR are addressed and analyzed. Emphasis will be placed on theoretical debates and the practical application of "anti-terrorism policies from a militant democracy perspective". (Fox 1995) However, on the other hand, militant democracy measures are at variance with civil liberties if not properly defined and applied. What are the threats from militant democracy to the rights of individuals, and if this doctrine is not properly used, how is Article 10 of ECHR threatened? Furthermore, the question on the role of the UN and how it views militant democracy in the age of the War on Terror will be evaluated in this article. Several international treaties have been signed that describe the militant actions that states can use when threatened: they will be duly appraised in this article. The War on Terror spawned a plethora of Anti-Terrorism laws: hence, finally, this article also aims to explore in detail the effect of militant democracy on "the freedom of expression, which is an essential part of democracy, any restrictions on political rights must be necessary for a democratic society". (Almond 2015)

The notion of "militant democracy" argues that a democratic state has the right to take preventative actions against an undemocratic movement (violence). If the state does not itself commit to democratic methods and aims, therefore, courts must strictly implement the norms of human rights, the legality of such actions is doubtful. Despite the historical benefits of militant democracy as a resolution to the transitional dilemma, demographic change and regional changes might well include reassessing the rules of protection of domestic and regional rights. The present acceptance of this strong concept of "legal legitimacy and judiciary" offers potential for the emergence, in place of a more nuanced "balance of values" in which individual rights reach the public, of an alternative to post-war surveillance with extreme militancy and strong "Republicanism." In this vital field of freedom and liberty, this would be required to shape the European consensus. (Beckman 2016)

The Historical Background of Militant Democracy and its Underpinnings

The notion of Militant democracy means is that the democracies must take actions against individuals. Individuals or political groups under specific situations that threaten to weaken or utterly destroy democracy, but who do not engage in fierce or other illegal activities. The phrase relates in the German post-war constitution to the concept of some rights as being possible to derogate from the

democratic order or as being forfeited. This approach has been confirmed throughout the Cold War by calling on the Parties that try to undermine or destroy the free, democratic basic order because of their aims. Article 21(2) of the Basic Law limits constitutional protection. (Gerald 2017) In German Law the Court has affirmed a statute that allows the Communist Party to dissolve, as the interpreter of this Article:

...the Basic Law is the deliberate endeavor to synthesize the concept of tolerance for political views and certain intrinsic principles of the democratic system...the Basic Law has established in this respect a 'militant democracy'. (Wagrandl, Transnational militant democracy. Global Constitutionalism 2018)

The concept of defending democracy against its enemies is as old as the beginning of the notion of democracy. In *The Republic*, Plato discusses in detail the reasons for transitioning from one government to another when difficulties exist related to government stability. We have an example of this in ancient Greece; the Athenians allegedly denied civil and political rights to offenders from previous regimes: i.e. during the transition period between 411 and 403 BC. Montesquieu, in a later period, also wrote about the issues of stabilizing the moderate. However, the concept of militant response only took shape after the First World War. (Eijkelenberg 2019)

In 1930, German Scholar Karl Loewenstein used the term 'militant democracy' in two papers, which he presented and published in the US in 1939. Both papers addressed the issue of fascist Nazi movements in Europe. Loewenstein migrated to the US in 1933 as a result of the Nazi army's attack on the European mainland; his first paper dealt with the mechanism of tyranny which had dangerously begun to spread in many European states. Loewenstein's second paper supplied an analysis of different anti-fascist methods and techniques practiced in various parts of the European continent. (Loewenstein 1937) Loewenstein emphasized the need for militant democracy to stand up against and crush rebellious activities, and to protect the core of democracy. Many political and legal researchers have written and argued on the importance of Loewenstein's influential concept. In "Militant Democracy and Fundamental Rights", Loewenstein critically analyzed the causes and reasons for the downfall of the Weimar Republic, which was tantamount to the destruction of democracy. He

criticized the one-party rule and referred to it as a political strategy to obtain power. He revealed the secret behind the victory of the fascist movement when he stated that the mechanism of democracy is the Trojan horse by which the enemy enters the city. Essentially, democracy failed because there were no provisions in the constitution to stop the subversive movements of the Nazis. This deficiency was used as a tool to conquer major sections of Europe. (Loewenstein 1937) Loewenstein also said that the reason for accessing national and communal representative bodies was facilitated by that gravest mistake of the democratic ideology, proportional representation.

According to Loewenstein, democratic fundamentalism and legalism led to a situation that legally tied the democracies. The emergence of anti-parliamentary and anti-democratic parties was therefore possible. He reads his declaration:

In the absence of democracy, it needs to combat a tactic on the level of democracy that only serves the aim of power. Democracy needs to be an activist. (Loewenstein 1937)

Moreover, on “democratic fundamentalism” and “legalistic blindness”, Loewenstein argued:

This may lead to democracies being obligated to enable anti-parliamentary and anti-democratic parties to grow and emerge, as long as they nominally comply with the norms of legality and the free movement of public opinion. To convert democracy into a militant state is the only cure for this sad scenario. (Loewenstein 1937)

By militant democracy, Loewenstein’s objective is to suggest that democratic fundamentalism may undermine democracy. He highlights the need to incorporate different measures, from the criminal prohibition in shaping paramilitary groups to banning subversive movements and enforcing limits on the right to speak freely. In this way, the democracy can eliminate radicals who oppose its rules. Ultimately, democracy must be redefined with this purpose in mind if its values are to be achieved. (Maddox 2019)

Loewenstein demonstrated in his work that militant democracy and fundamental rights can be compatible. Further, his two papers comprehensively

explain the “legislative control of Political Extremism in European Democracy”, and he believed that the liberal majority rule system would progressively give way to a more disciplined and authoritative democratic system. Customary law, which traditionally advocated tolerance towards extremism, has now largely been rejected, and the principle that the democracy has to fight back when faced with its enemy is now more acceptable. (Rezmer-Plotka 2020)

The Notion of “Lawful Militancy Response” and “Paradoxes of Tolerance” in the framework to irradiate the Criminal activities.

Loewenstein’s influence can be found in the works of his contemporaries, and Karl Popper is a prominent name among them. In his book, *The Open Society and its Enemies*, Popper explained the concept of tolerant and intolerant societies towards enemies. He wrote this book in 1938 when he received news of the interruption of Australia. Hence, a major part of the book was written in wartime. It was eventually published in two volumes; the first was entitled *The Spell of Plato* and the second was *The High Tide of Prophecy*. (B. Rijpkema 2012)

In his work, Popper illustrated how civilization is still in a process of transition from the tribal or “closed” society to a more open and accepting society. A consequence of this transition is the rise of different movements. As a result, civilization regresses to tribalism and the concept of an open society diminishes. Additionally, Popper described dictatorship and the implications of the perpetual battle against it. He also scrutinized the rational methods of science and the problems they pose to an open society. Popper condemned social concepts that are responsible for widespread bigotry, which is opposed to the prospects of democratic change (within these philosophies, historicism is deemed the most significant).

Significantly, Karl Popper critically analyzed the doctrine of militant democracy. Under the umbrella of *The Principle of Leadership*, Popper provided a detailed discussion on the Paradoxes of Tolerance and the Paradoxes of Democracy. Popper asked, “Does the deficit in freedom not make mankind so eager to have a tyranny?” And this is dubbed the “paradox of freedom,” which Plato also affirmed. (B. Rijpkema 2012) Popper’s research on tolerance’s paradoxes shows Loewenstein’s assertion that ‘infinite tolerance must lead to the destruction of tolerance.’ Popper argued that the tolerance of ‘those that are intolerant, or the tolerant would be destroyed and tolerant to them’ should not be extended. He claimed that the right to not tolerate this intolerant and that any movement which preaches intolerance puts itself outside the law and induces intolerance. He further argued that provocation to intolerance should be treated as a criminal act and must be criminalized in a similar way to incitement to murder, or kidnapping.

Fundamentally, Popper's work promotes and explores the theory of militant democracy; he analyses why and how majority rule and unlimited tolerance are not intrinsic to any democratic society. Rather, he explains and endorses the right of society – in the name of tolerance and self-preservation – to intervene and to stop intolerant actions.(Rak 2021)

The legitimization of the notion of militant democracy stems from arguments regarding how much tolerance can be shown towards political players, including their voters and associates. Popper justified the intolerant action of society towards intolerant political players. As previously mentioned, he was a great supporter of the principle that “unlimited tolerance must lead to the disappearance of tolerance”. Taking Popper's work into account, John Rawls believed that it was a principle that reflected justice and equity. Rawls asserted that intolerant behavior is only acceptable in situations involving “some considerable risks to our legitimate interests”. (B. & Rijkema 2018) For Rawls, any threat towards the nation should be managed by the power of democratic institutions. He believed this would help to control fanatics and curb their intolerant behavior. However, this theory may in reality be very difficult to apply in an unstable society, where there are internal political struggles. However, based on Rawls' theory, Andras Sajó stated that the most important feature of the state is self-defense and militant democracy may be warranted on a comparable footing. (A. Sajó 2004)

A silent approach ought not to be accepted in the face of efforts to harm or abuse privileges, rights, and opportunities that have been formally agreed upon by a democratic regime. The success of the Nazi regime in assuming control of many states in the 1930s caused majority rule government followers to understand that a popularity-based state cannot be maintained without standardized measures to secure itself from the assaults of potential foes. Unfortunately, it required the loss of many lives to acknowledge and realize this. This research will show how there is much to be learned from Loewenstein's theories. They continue to contribute to contemporary society in significant ways; as he explained, to neglect the experience of democracies deceased would be tantamount to surrender for democracies living.(A. Sajó 2005)

Conceptual Approach of “Militant Democracy”

The issue of militant democracy is profoundly timely and important in the contemporary world. Many books and articles have been written on its significance, jurisdiction, and application. Modern legal scholar Macklem has defined democracy as authorized in pre-empting their practice to safeguard the democratic character of constitutional order, to preserve civil and political

liberties. (Macklem 2006) Given the Macklem conception of militant democracy, the legal philosophers have recently been given greater attention to the concept of restricting some democratic liberties to safeguard democratic regimes from being subverted by legal methods. Furthermore, given the ECtHR's statement of 'The permissible boundaries of militant democracy, the legitimacy of legal pluralism may therefore be understood. The ruling of the Court, however, also gives an overview. It provided another reason why the Turkish prohibition did not violate the convention's freedom of association provision, notably that Refah promoted Islamic jihad and the use of violence to achieve their goals.

I believe that, as Muller noted, this judgment offers us a set of baseline criteria that clarify the validity of militant democracy, addressing the permissible limitations of legal diversity. (Müller, Protecting popular self-government from the people? New normative perspectives on militant democracy. 2016) The right of a State to act militantly against groups and individuals engaged in violent behavior to promote or implement their beliefs or exercising civil and political liberty in a manner that poses an imminent danger to the ability to guarantee civil and political freedom of others' in a constitutional democracy. Similar to his ideas Gregory Like his beliefs, Gregory H. Fox and Georg Nolte greatly emphasized militant democracy; by electing anti-democratic political parties they described it as a series of actions aimed at preventing the transformation of the democratic character of a state. (Fox 1995) Legal scholar Samuel Issac Harf developed the concept of militant democracy as the movement of democratic institutions against anti-democratic capture. (Isaac 2002) The major goal is to stop forces fanatically engaged in democracy or what may be referred to as "liberal democracy. Paul Harvey is comparing militant democracy to a system that 'suffers the constitution against anti-democratic protagonists using the democratic process to undermine it. To oppose the acts of those who want to destroy it using the many possibilities, Revenga Sánchez stated. He explained. In all, militant democracy is said to be a very efficient way of safeguarding the constitutional security of society. (Gerald 2017)

Elevating the Macklem concept of Militant democracy I further argue that this doctrine is a preventive tool designed to be used before a disaster occurs. (Sajó, 2005) It cannot protect society against violent riots that have already started, natural disasters, or even paramilitary forces. Principally, it helps to protect and secure constitutional comfort. It encourages political participation, but has a threshold and sets certain limits. It protects society from possible harms and abuses which can issue from a political course. Whilst individuals can equally engage in making choices – either social or political – in constructing their forms of social life, these are to be made within the parameters defined by the

constitution itself. Any action perpetrated by an individual or a group which denies the rights of others in the society will be repudiated.

Militant Democracy: A Normative Approach to Strengthen the Constitutional Framework and help to reduce the crime.

Having gained an understanding of the notion of militant democracy, this article suggests that there are substantial reasons to apply it to the state at risk of the threat of terrorism, as there exist no definitive solutions or mechanisms to counter this crime. In assessing whether militant democracy is appropriate in dealing with terrorist activities, a critical analysis of anti-terrorism policies is required. Terrorism uses many horrific ways of killing and creating chaos; therefore, it cannot be defeated by ordinary means. A prominent feature of militant democracy is its preventive mechanisms, which can help to rectify existing legal errors and loopholes. Taking preventive measures can be the best solution to avoid incidents such as the 9/11 attack. Terrorists live in society and are difficult to be identified. The battle against terrorism has captured the imagination of almost all the states of the world. (Gilani 2021) It is a permanent threat that the traditional democratic structure is ill-equipped to handle. States can be allowed to depart from the traditional way, and this departure may be driven by militant democracy logic. What this entails is adopting deterrent measures and procedures to identify the enemies of society. It signifies the exit from normal constitutionalism, which is acknowledged by governments and is incorporated by the constitutional laws in line with certain conditions of implementation overseen by the judiciary. (Almond 2015)

It is worth mentioning here that militant democracy and anti-terrorism policies share some common features and together they can be a significant tool to counter the terrorism threat. Deterrence is the primary and common characteristic in both systems. Ordinary laws and national policies can do little in the war on terror since they can only be applied after an incident has happened and lives have been lost. However, a militant democracy regime can stop the incident from occurring by preventing any political party or movement from abusing laws under the cover of rights and fundamental freedoms. Militant democracy authorizes states to act to avoid incidents of terrorism. Now, in this scenario, it is essential to analyze the role of the international institution, namely the UNO, and its policy to counter the crime of terrorism after 9/11.

International Perspective of Militant Democracy concerning United Nations (UN)

Are states justified in acting in militant and repressive ways to combat threats to their democratic future? Article VII of the UN Charter is very important in this regard and its significance increased after the 9/11 attacks on the USA. Article VII relates to international peace and the security of nations. The UN Security Council has acted as an executive and instructed states to make a list of terrorists and to comply with asset freezes and travel bans. At the same time, the Security Council has also acted as a legislator and imposed permanent and general obligations, most notably of Resolution 1373, Resolution 1373 (2001) concerning terrorism and its financing; the resolution encouraged all member nations to ensure that terrorism and its financing is a serious crime. The resolution also imposed permanent and general obligations on all the states to take adequate measures to remove weaknesses in their domestic legislation to avoid incidents and to act on resolution 1540, "which prevents terrorists from gaining access to weapons of mass destruction". Furthermore, it advised nations to make the security of their people a top priority. This call was for all states; however, the intensity of the reactions to the call varied and related to each state's involvement in this problem differently. Security Council Resolution "1267 (UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267)", failed to prevent the 9/11 terrorist attack. After this incident and the promulgation of resolution 1373, almost all the nations of the world responded in a manner that reflected their particular histories and legal, political, and social cultures. Many countries responded with tough new anti-terrorism laws with little regard for the rights and the liberties of the people. In this scenario, many countries with poor human rights records have justified their actions. (A. Sajó 2004)

The United Kingdom also did not show any hesitation in taking the security measures reducing the protection given to Human Rights. The UK derogated from the "Europe Convention of Human Rights" to justify their act of indeterminate detention based on secret evidence of a non-national suspected of involvement in terrorism, who could not be deported because of the apprehension that he might be tortured. Canada used immigration law as counter-terrorism law to impose indefinite detention based on secret evidence. The USA has also opted for dramatic measures to stop this kind of attack in the future. The Patriot Act of 2001 was the major legislation for the USA to justify its actions against terrorism.

International Perspectives of Anti-Terrorism Laws

Sajó has taken into consideration the notion of militant democracy measures, stating that this notion does not contradict the principles of international

human rights law. The respect of democratic norms is enshrined in the heart of international law, Sajó says. State parties are responsible to further develop and protect these principles by enacting preventive measures. Markus Thiel, a German lawyer, opposed the judgment in the Refah Partisi Case. He argued that the judge failed to recognize the fundamental right of the people to freedom of expression. The European Court of Human Rights has recognized the notion of a defensive democracy. The EU has the power to make member states bound to provide legal mechanisms to assist in the survival of democracy. (Fox 1995) If these principles are breached, member states can be suspended and stripped of certain rights. The European Court of Human Rights argued that the state may have a duty to ban certain political parties. Hence, one can conclude that the state may have a duty to ban certain political parties. While it is expedient for the member states to adopt the militant democracy measures, it is evident that acceptance of this principle may help the state to save the society from internal and external aggressions.

Conclusion

The analysis of the historical background, features, concept, and paradoxes of militant democracy in this article has helped to advance the main argument of this article which is that the doctrine of militant democracy is integral to the security of the democratic society; however, it is challenging as well. This article argued that the doctrine of militant democracy, which legitimizes Anti-Terrorism Laws, is not always compatible with the freedom of expression. The article argued that there is no alternative system in place that can save the core of the constitution at the time of an emergency and a democratic society should not tolerate intolerant people. International law, arduously formulated over centuries, is the common backbone of an international directive founded on justice and tranquillity: a situation in which terrorism has no dwelling. Hence, the archetypal movement inferred by the “war on terrorism” strives to implement and exercise strong actions against the terrorist foe. This article also argued that militant democracy is an interpretive instrument, and is not yet defined in any precedent. Although “militant democracy” has historical merits as a solution to the transition problem, demographic change, and regional evolution may likely require a reassessment of existing principles of rights protection, both on a domestic constitutional basis and a regional level. As examined in the article, national crime, and prevention policy may not always be effective in the war on terrorism. It has no preventive mechanisms, for it is a policy that only acts after an incident has occurred. With Article 10 of the European Convention on Human Rights, this chapter suggested that freedom of expression is the most venerable one among all human rights. The judiciary, as the curator of the constitution and the custodian of

human rights, has to shoulder two major issues: threats to the state's security and the rights of the individual. A balance between the two has to be made by the judiciary in this specific scenario. Hence, the judiciary, through the system of judicial review, has to check the balance between the state's actions and the rights damaged. Essentially, it must assess whether the purpose of the restrictions on human rights is equal to the threshold of harm and whether the objective has been obtained by the restriction.

The article finally concluded that there exist some reservations in the interpretation of militant democracy and the way it is applied by some states. It is observed that this doctrine has been misused by states with poor human rights records. This can also be attributed to international institutions failing to delineate the parameters of militant democracy, leaving states at liberty to interpret this principle according to their constitutions. Arguably, these actions have dragged humanity into the draconian era once again and further leave qualified rights at risk of abuse from the state.

Bibliography

- Abresch, W. n.d. "A human rights law of internal armed conflict: the European Court of Human Rights." Abresch, W. (2005). A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya. *European Journal of International Law* 142-149.
- Almond, G. A. 2015. "The civic culture: Political attitudes and democracy in five nations." Princeton university press 132-147.
- Beckman, J. 2016. "Comparative legal approaches to homeland security and anti-terrorism." Routledge. 98-112.
- Eijkelenberg, U. 2019. "On Political Impotence: How Liberal Democracy Becomes Militant, and Its Demos Becomes Impotent." *Krytyka Prawa* 13-27.
- Fox, G. H., & Nolte, G. 1995. "Intolerant democracies." *Harv. Int'l. LJ* 36-49.
- Gerald, C. M. 2017. "Negative and positive freedom. In Power, Authority, Justice, and Rights." Routledge. 107-128.
- Gilani, S. R. S. 2021. "The Conceptual Analysis of the Doctrine of Proportionality and, its Role in Democratic Constitutionalism; A Case Study of UK." *sjesr*, 4(1) 204-210.
- Isaac. 2002. "How the civil rights movement revitalized labor militancy." *American Sociological Review* 722-746.
- Loewenstein, K. 1937. "Militant democracy and fundamental rights." *American Political Science Review*, 31(3) 417-432.

- Macklem, P. 2006. "Militant democracy, legal pluralism, and the paradox of self-determination." *International Journal of Constitutional Law*, 4(3) 488-516.
- Maddox, G. 2019. "Karl Loewenstein, Max Lerner, and militant democracy: an appeal to 'strong democracy'." *Australian Journal of Political Science*, 54(4), 490-504.
- Müller, J. W. 2012. "Militant democracy." *The Oxford handbook of comparative constitutional law* 1119-1127.
- Müller, J. W. 2016. "Protecting popular self-government from the people? New normative perspectives on militant democracy." *Annual Review of Political Science* 249-265.
- Rak, J. 2021. "Establishing relationships between the state and (un) civil society within the framework of neo-militant democracy." *oxford* 123-137.
- Rezmer-Plotka, K. 2020. "The Effects of Crises in the European Union as a Manifestation of the Militant Democracy Rule Implementation." *Przegląd Prawa Konstytucyjnego* 615-621.
- Rijkema, B. 2012. "Popper's paradox of democracy." *Think*, 11(32) 93-96.
- Rijkema, B., & Asbury. 2018. "Militant democracy: The limits of democratic tolerance." *Routledge*. 215-228.
- Sajó, A. 2004. "Militant democracy." *eleven international Publishing*. 87-92.
- Sajó, A. 2005. "From militant democracy to the preventive state." *Cardozo L. Rev.* 2255 -2269.
- Wagrandl, U. 2018. "Transnational militant democracy. Global Constitutionalism." *Heinonline* 143-172.
- Wagrandl, U. n.d. "Wagrandl, U. (2018). Transnational militant democracy. Global Constitutionalism."