

Militant Democracy: Lowenstein Revisited

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Abstract

The emerging right to democracy (e.g. Franck, T) within international law favors a liberal, democratic packaging. Yet as Abedolkarim Sourash argues, there has been a conflation of liberalism and democracy, which must be decoupled. It is from this point of departure that this paper will examine the international legality of militant democracy and interrogate when and how a constitutional democracy can legally act in an anti-democratic manner to combat threats to its democratic existence. Militant democracy was a term introduced in 1937 by Karl Lowenstein. It refers to a form of constitutional democracy authorized to protect civil and political freedom by pre-emptively restricting its exercise. Lowenstein's writings, at the time, were concerned with the limitations of democratic institutions in containing fascism. Militant democracies stand in contrast with the principles of legal pluralism, but the extent to which international law authorizes transformative political agendas that seek to implement forms of religious, cultural, or national autonomy is unclear.

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I. Introduction

Let me first begin by providing a bit of a backdrop to this paper. One of my more recent research projects entailed examining the question of Violence and the Liberal state. In this project, I wanted to tackle two primary objectives. First, I wanted to revisit the notion of what comprises the liberal state and measure this against the armed conflict paradigm. Second, it was my intent to operationalize Agambon's polemic in his work, *States of Exception* by looking at specific case examples. What continued to surface during the course of the research was the concept of militant democracy; the idea that you can use anti democratic measures in order to preserve or transit democracy. Both the concept and the various debates that flow from it I find very interesting but, at the same time, incredibly flawed.

The legal lacunae of both of these 'political' developments create a space for abuse. State powers that engage with the concept of militant democracy argue the rather paradoxical position of defending democracy by sidelining civil and political rights. Equally, pluralist models create space for religious, cultural and national communities who endeavour to create autonomous legal regimes, which often limit or restrict the rights of minorities and others. At the intersection of both militant democracy and legal pluralism is the principle of self-determination. The tension that exists between protecting the human rights regime through the undermining of the same is highlighted both in case study (the Occupied Territories and Algeria for example) and case law (specifically, the European Court of Human Rights decision in *Refah v. Turkey*, in which the Court upheld the banning of a political party that advocated a form of legal pluralism which would introduce elements of Islamic law in Turkey).

The purpose of this examination will be two fold. First, to examine the debates which engulf the concept of democracy and to interrogate the argument Sourash and others have proffered to critically evaluate the underpinnings of the emerging right of democracy. Second, to look at the question of military democracy vs. legal pluralism. References will be made to case studies (Occupied Territories and Algeria) as well as to the illiberal secular trends in Europe which serve as the backdrop for the *Refah Partisi (Welfare Party) and Others v Turkey* case.

In order to explore this further, I have set up a longer term project with several goals in mind. Firstly, to critically evaluate the efficacy of the preventative mechanisms which accompany the militant democracy discourse [e.g. hate speech legislation; public and political participation; linguistic and educational rights provisions]; second, to revisit the inclusion-moderation/exclusion-

radicalization thesis by measuring the effect these mechanisms have on minority communities focusing on selected case studies [and let me break here and note that whilst it may be impossible to measure the ‘success’ of State security provisions, my argument is that it is possible to measure their impact on targeted communities and to the extent to which this promotes inclusion or exclusion from the state]. To this end, I have identified two case studies, with the possibility of a third should time allow. Case Study 1 will examine the impact of Prevention of Terrorism (PTA) legislation on the Muslim community in the UK, specifically looking at the question of exclusion-inclusion and the moderation-extremism. Study 2 will engage with the Prevention of Terrorism Act and its effect on Muslims in Gujarat, India. We propose Northern Ireland as a 3rd possible case study. Here the focus would be on the experience of the Nationalist community in NI under both the EPA/PTA; and finally, to generate a model that will provide ‘legal legs’ to the concept of legal pluralism. Now this is the much larger project. For today, I have a far more modest agenda and that is simply to revisit the concepts of military democracy and legal pluralism which lays the groundwork for the project that will follow.

The emerging ‘right’ to democracy (e.g. Franck, T) within international law favours a liberal, democratic packaging. Yet as Abedolkarim Sourash argues, there has been a conflation of liberalism and democracy, which must be decoupled. It is from this point of departure that this paper will examine the international legality of militant democracy and interrogate when and how a constitutional democracy can legally act in an antidemocratic manner to combat threats to its democratic existence.

Militant democracy was a term introduced in 1937 by Karl Lowenstein. It refers to a form of constitutional democracy authorized to protect civil and political freedom by pre-emptively restricting its exercise. The nature, scope and supervision of that restriction remain unclear. While Lowenstein’s writings must be understood within a historical context; he was concerned with the limitations of democratic institutions in containing fascism, in the post 9-11 landscape, the concept itself has been rejuvenated. The theoretical underpinnings of militant democracy clash with emerging principles of legal pluralism (which frame the minority rights discourse), but the extent to which international law authorizes transformative political agendas that seek to implement forms of religious, cultural or national autonomy is equally unclear.

The legal lacunae around these two ‘political’ developments create a space for abuse. State powers engaging with militant democracy argue, paradoxically,

that democracy may be defended by sidelining civil and political rights in certain situations. Equally, pluralist models while creating space for religious, cultural and national communities often advocate the creation of autonomous legal regimes that restrict the rights of others. The tension that exists between these emerging rights-based concepts are highlighted both in case study (the Occupied Territories and Algeria for example) and case law (specifically, the European Court of Human Rights decision in *Refah v. Turkey*, which I will return to later in the paper).

Now what I would like to do here is to examine each concept and the accompanying debates separately and then see where they have merged by focusing on a particular case, that of the *Refah Partisi* Party in Turkey. I hope by doing so, it will be clearer as to why I am endeavoring to examine the two emerging principles, which are both political and legal, in the context of this research project.

II. Military Democracy

Two contrasting arguments emerge from the debates on militant democracy. First, that militant State action is necessitated as international law is not a 'suicide pact' for States. The argument follows that pre-emptive State actions in restricting the possibilities of political groups using the democratic system to gain election, only to undermine it when in power, are essential. This constitutional expression of military democracy has been adopted by many liberal and illiberal States and embraces anti-democratic methods for, ostensibly, democratic purposes. The negation of the 2006 elections which brought Hamas to power in the Occupied Territories gaining 76 of the 132 seats in the PA and the exclusion of the Islamic Salvation Front (FIS) from political life in Algeria in 1992 after they were on the path to defeat the then ruling FLN in the December 1991 elections and the various undertakings by the Turkish government to excise Islamic groups from the public political sphere are just a few cases which spring to mind here.

By contrast a second argument suggests that, far from excising out-groups from the public sphere, States should seek to include them. This approach suggests that banning political parties that challenges a State's legitimacy is unlikely to undermine or disband it, but rather to force it underground, radicalise its agenda further and perhaps lead it to adopt violence in order to seize power. Including immoderate groups within a political process could lead to a process of moderation through the necessities and responsibilities of governance. This could be a [positive] transformative process, moving a group

away from its militant tendencies. This argument has been posited in relation to the inclusion of Sinn Fein in NI political processes.

The current 'war on terrorism' discourse has provided ample, relatively uncritical narrative to support the first argument. In framing preventative measures to identify and deter potential terrorists, governments believe they have addressed a pressing need in society for security. The arguments which accompany this discourse are many and dominate the current war on terror narrative (of which we are all so familiar now) so I won't spend a great deal of time expanding on these here.

More interesting, at least for my research purposes, is the idea that inclusion can lead to moderation and exclusion, radicalization, proffered by the second argument, which has been raised both case specifically, when reviewing minority rights literature, (which suggests that exclusion fosters a feeling of disenfranchisement among minorities which, with certain dynamics in place, can enact power shifts) and within the transitology¹ and other political science literatures (especially literature which looks at the question of Islamic party participation). In much of this literature there is an implied casual relationship between inclusion and moderation. The most common formulation of this argument is that institutions shape political behavior by creating constraints and opportunities, which in turn structure the choices available to political actors. Following from this then, even limited political liberalization, such as the legalization of political parties or the holding of elections, should shape the practices of those who choose to participate. Conversely, it would follow that the banning of political parties would have an inverse affect, and indeed some of the literature that proffers this hypothesis conflates inclusion and exclusion; that is, inclusion leads to moderation *and* less radicalization and case specifically focus on groups that have been (through negation of elections or banning of political parties) excluded from political space. As case examples, writers often engage with the exclusion of Palestinians from socio-economic and political authority (coupled with the flagrant mismanagement and corruption of Fatah) which has been argued to underpin the support of Hamas. In India, the targeting of the Muslim population in states such as Gujarat and Orissa and the rise of Hindu nationalism (flamed by the rhetoric of Bharatiya Janata Party (BJP) has, concomitantly, seen a rise in the use of political violence by minority groups. Thus extremists previously shunned within the

1. See: Rustow 1970; O'Donnell and Schmitter 1986.

community, are gaining a platform from where powerful sentiments of religion, ethnicity and nationalism are roused to impact security at the local, national and international levels.

Now I won't try to go further as there is a vast amount of work which flows from this hypothesis ranging from Huntington (which looks at the participation-moderation trade off), rational choice theorists¹, and from scholars who concentrate on political parties² and social movements³ What is interesting to note however and relevant to our discussion today is that more structured evaluations of the inclusion-moderation argument (by Schwedler, Clarke, Hajjar and others) suggest that inclusion may not turn radicals into moderates but rather deny radicals the support base that provides political advantage. Research that has been conducted on political parties in the Middle East also suggests that whilst inclusion may not lead political leaders or elites to change their views what we may simply see are shifts which, as Schwedler has argued "elevate the position of certain actors at the expense of others".

As militant democracy tends to focus on the nature of the regime and elite level politics (see the language which accompanied the decision in the *Refah vs Turkey* case for example), we often find language which characterizes the actors on a spectrum of moderate to hard-line or radical. Especially when applied to Islamic groups the labeling of moderate is often given to those who seek reform within the system and radicals which seek revolutionary change often through the use of violence. Whilst this type of labeling has disappeared from most scholarly work on democratic transitions, it does still appear in literature that deals with the Middle East and Islamic studies and therefore is worth noting here. Those who are writing on what are typically viewed as anti democratic parties or movements suggest that labeling something moderate or radical (inclusive and therefore democratic biased or exclusive and therefore antidemocratic) might possibly be applied to a particular position but usually fails to apply to whole categories of political actors. The result is that legal Islamist political parties are often lumped together with groups that use violence but do not engage in pluralist practices and with those that use violence in certain circumstances but may also adopt more pluralist practices, (such as Hamas). So as the International Crisis Group has noted, the notion of moderates and radicals usually boils down to "distinguishing between those

1. See: Kalyvas 2000.

2. See: Michels 1962; Keck 1992.

3. See: Lowi 1971; Gamson 1990; Goodwin and Jasper 2003/4.

with whom the Western governments feel they can do business (moderates) and those with whom they cannot or will not".¹

This of course has relevance to the militant democracy argument in two distinct ways. Firstly, it shapes how a particular group is evaluated as moderate or immoderate (anti-democratic) and secondly, how we actually measure the effect that inclusion (or exclusion) may have on a particular group. It may be less in whether we are able to see movement toward 'democratization' on some sort of consistent or predictable path but rather whether we are able to measure whether such inclusion moves a worldview from something that is rigid and limited to more open and indeed tolerant of other perspectives (with the converse effect if excluded). The transitology literature often focuses on placing regimes, particularly when discussing the Middle East in a fixed democratization framework (formal, semi, electoral, façade democracies, etc) rather than focusing on changes that might be occurring in the broader public space. [I should add that critiques on transitology literature are plentiful.² So I think a fundamental step in critiquing these two arguments which are proffered to either support or critique militant democracy is to recalibrate how we evaluate (and label) groups that may be subject to the manifestations of militant democracy. Secondly, in trying to critically engage with the inclusion-moderation hypothesis (which provides an important foil to the militant democracy argument) there are a number of questions that must be raised regarding the process of democratization, the way we engage with Islam and Democracy (in many cases seeing these as fixed and beyond interrogation) and importantly, how exactly we assess the moderating effect on processes of inclusion.

Let me now return to the question of processes of legal pluralism and how this impacts the concept of militant democracy. As Macklem has argued, both adopt a normative commitment to the principle of self-determination, which "explains the ambiguous normative and legal status of both developments, yet it also reveals an intimate relationship between the two, one that provides insight into their normative legality in ways that might be overlooked by viewing each in isolation".³ There is an obvious tension and indeed resistance to this concept (this has been perhaps most evident within Europe which on the one hand proffers and on the other, recoils from pluralism) and mirrors the discomfort raised when we talk about including Islamist groups into political landscapes.

1. See: ICG 2005.

2. See: Adler and Webster 1995; Bunce 1995, 2003; Cammack 1997, Tilly 2001 and Carothers 2002.

3. See: 2006, 488.

And it is here that I want to have a look at a particular decision by the European Court of Human Rights in 2001 in the *Refah Partisi (the Welfare Party) and others v. Turkey* case. I want to turn to this case because I think it illuminates the twin challenges of legal pluralism and militant democracy. The background to the Court's decision in *Refah* is as follows. In 1998, the Turkish Constitutional Court dissolved the *Refah* Party. *Refah* had been in existence for fifteen years. At the time of its dissolution, it had the most seats in the Turkish Parliament, having gained approximately 22 percent of the popular vote, and was part of a national coalition government. The Constitutional Court held that *Refah* was inconsistent with Turkey's constitutional commitment to secularism, which, in Turkish constitutional tradition, calls for a radical separation between church and state. A Chamber of the ECtHR upheld this ban in 2001 and a review by the Grand Chamber in 2003 reaffirmed the ruling stating that "it is not at all improbable that totalitarian movements, organized in the form of democratic parties, might do away with democracy, after prospering under a democratic regime, there being examples of this in modern European history."

When we review both the State's arguments for banning *Refah* and the European Court's judgments which upholds that ban there are two concluding observations I wish to make. First, this case returns us to a narrative often found in the literature on Islam and democracy which finds each, as I have previously noted, fixed and beyond interrogation. The Court in its ruling opined that, "Like the Constitutional Court [of Turkey], the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion (Islam), is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it." Second in assessing the party as immoderate, a very narrow focus was placed on the rhetoric of particular elites within a party rather than paying attention to the internal dynamics of the group. Had they done so, they would have found a wide range of actors, activities, alliance and internal debates. Evaluating this public political space is critical if we are to better engage the inclusion-moderation and exclusion-radicalisation thesis. As one scholar has argued: "the study of Islamist participation in pluralist processes provides a valuable opportunity for unpacking complicated processes of inclusion within even non democratic contexts and assessing their connection to ideological moderation, a process that carries perhaps the highest stakes of all." I think this captures both the challenge and the necessity in looking beyond fixed borders.