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**MILITANT DEMOCRACY AND POPULISM:**

**A RESPONSE TO TOM GINSBURG AND AZIZ HUQ**

This short essay has the following aims: first, it is written to honor professor Josip Kregar, who was a democracy promoter all his life, either within the former Yugoslavia, or today’s Croatia, which was a rather challenging task he never gave up; second, to respond to Tom Ginsburg and Aziz Huq, who in their recently published book How to Save a Constitutional Democracy, labeled militant democracy a dangerous and inadequate tool for confronting the present phenomena of democratic backsliding. In this essay, I will first argue that the authors’ skepticism towards militant democracy springs from a wrong association of militant democracy with other concepts that also do not treat individual liberty as an absolute value and, then, sketch an argument why militant democracy could help confront democratic backsliding.

*Key words: militant democracy, populism, democratic backsliding, militant constitutionalism, extremism*

**1. INTRODUCTION**

Both militant democracy and populism are controversial concepts. The first because it is not neutral to all voices in the political game, does not support free expression and participation for all, and consequently, it does not accommodate all citizens’ voices in representative institutions.[[2]](#footnote-2) The second, because questions like what is populism, whether populism actually exists, and how to respond to populist politics still beg for ‘true answers’.[[3]](#footnote-3)

Nonetheless, although controversial and hardly new phenomena, in recent times, militant democracy and populism have been given certain conceptual and normative assumptions which denote their current definitions. Thus, there is a consensus that militant democracy, or sometimes called defensive or fitting democracy, refers “to the idea of a democratic regime which is willing to adopt pre-emptive, *prima facie* illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying democratic regimes.”[[4]](#footnote-4) The idea of militant democracy emerges in the fight against radical movements and their activities: related to this model, extremists are perceived as threat to democracy and therefore should be excluded from political arena.[[5]](#footnote-5)

Defining populism, however, turns out to be more problematic, mainly because different versions of democracy and populism are used as a starting point.[[6]](#footnote-6) Isaiah Berlin’s view that the concept of populism suffers from the Cinderella complex – “there is a shoe but not a foot,”[[7]](#footnote-7) and Tibor Várady’s warning that it is still debatable whether the present notion of populism reflects a clear content that could serve as a basic assumption in seeking remedy, confirm that definitional issues have yet to be resolved.[[8]](#footnote-8) Yet, it is probably fair to say that Cass Mudde’s minimum definition of populism is in line with a growing consensus within the scholarship. According to Mudde, populism is “a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the volonté générale (general will) of the people.”[[9]](#footnote-9) Speaking directly in the name of the ‘pure’ people, populists have been persistently eroding what Rosalyn Dixon and David Landau call “substantive ‘minimum core’ of democracy”: commitments to free and fair elections, the separation of powers, fundamental rights and governmental accountability.[[10]](#footnote-10) Consequently, populists, like extremists, are depicted as a threat to democracy.

Now, ever since early twenty-first century when populism re-emerged and managed to reduce democracy to the plebiscite elections in a growing number of states, much ink has been spilled on possible strategies which could save democracy from dying. Among numerous studies tackling this issue, a prominent place, for a number of reasons, occupies Tom Ginsburg’s and Aziz Huq’s book *How to Save a Constitutional Democracy*.[[11]](#footnote-11) The authors understand democratic erosion as the decay of several basic grounds on which democracy is founded – competitive elections, freedom of expression, associational rights, and the rule of law.[[12]](#footnote-12) They identify five mechanisms through which democratic erosion occurs: formal constitutional amendment, systematic dismantling of interbranch checks, the elimination of political competition, centralization and politicization of the executive power, and weakening of the public sphere.[[13]](#footnote-13) Their focus, then, shifts to various protective measures that could potentially stop the erosion,[[14]](#footnote-14) including the concept of militant democracy, which they flatly eliminate from the constitutional toolkit for democracy protection. Ginsburg and Huq find militant democracy not only an inadequate tool to tackle a polarized political environment as “it raises the stakes of majority control, when in fact, the opposite is needed,”[[15]](#footnote-15) but also “a very risky strategy for associational rights that are at democracy’s core.”[[16]](#footnote-16)

In particular, Ginsburg and Huq argue that militant democracy is designed to fight with internal enemies of democracy. As such, it is an inadequate tool to tackle, for example, democratic backsliding in Poland and Hungary or to address the situation in Trump’s US, as the populist parties’ strategies to erode democracy are much broader in scope than Nazi’s strategies used to capture and abolish democracy.[[17]](#footnote-17) However, inadequacy is not their main worry. They are more concerned with the contra-productive effect the militant democracy might have as it may be used against anyone perceived as “alien and therefore unworthy of inclusion in the body politics.”[[18]](#footnote-18) In their view, this is particularly dangerous in cases related to the limitation of the associational rights of minorities, especially European Muslims, although they admit that the original justifications of militant democracy (Loewenstein’s) “are not present in respect to the targeted groups.”[[19]](#footnote-19) To justify their claim, Ginsburg and Huq turn to a position of Muslims in today’s Europe, although they correctly note that European Muslims have no chance to seize the political power to overturn democracy.[[20]](#footnote-20)

Despite admitting that the basic assumption for the implementation of militant democracy measures is not fulfilled in this case (to activate militant democracy, the enemy of democracy should aim at seizing the political power to destroy democracy), they nonetheless continue to build the case against militant democracy on this example, arguing that its methods are used to discriminate Muslims in Europe. On this point, they offer two concrete examples. The first is the prohibition of Muslim womentowear head coverings at specific workplaces, upheld in European Human Rights Law which, at the same time, tolerates the choice to display Christian symbols in the classrooms.[[21]](#footnote-21) The second is the extensive use of antiterrorist measures in France during the state of emergency declared after terrorist attacks in Paris, with a high impact on “the closure or close surveillance of many mosques and Islamic association.”[[22]](#footnote-22)

Finally, Ginsburg and Huq question the effectiveness of the hate speech prohibition as, they claim, the bans did not stop far right parties from acquiring public support in many European countries.[[23]](#footnote-23) To support their stance, the authors offered several examples testifying that in hate speech cases it was either hard to draw the line between permissible and impermissible speech or policing hate speech was based on the shaky grounds (*e.g.* the charge against Bob Dylan for comparing Serb attitudes towards Croats with Jewish attitudes toward Nazis). [[24]](#footnote-24)

Subsequently, in the blog devoted to democratic erosion and militant democracy, Ginsburg and Huq have fortified their view that constitutionally designed militant democracy cannot save democracy. On the contrary, “militant democracy may preserved the ballot but reinforce the illiberal strands for policy making,” they claim.[[25]](#footnote-25)

I find Ginsburg and Huq to be on the wrong track. To put my views into perspective, I should first explain how militant democracy differs from other phenomena that it is often associated with, particularly with a “counter-terror state”, the emergency powers and “identitarian democracy.”

**2.** **WHAT MILITANT DEMOCRACY IS AND IS NOT**

* 1. **What does Militant Democracy Stand For?**

Ginsburg and Huq are right when they claim that militant democracy deals with internal threats aimed to destroy it with the constitutionally instituted legal measures. As Otto Pfersmann notes, the difficulty of stabilizing governments was first thoroughly discussed by Plato in *The Republic*,[[26]](#footnote-26) but the problem came into focus with the rise of fascism in the XX century Europe. It was the German émigré scholar Karl Loewenstein who used the term “militant democracy” (Streitbare Demokratie) to argue that some democratic regimes in post-World War I Europe, including the Weimer Republic, either lacked or failed to use legal defensive measures against fascist emotional techniques of exploiting democratic instrumentalities for their own destruction. [[27]](#footnote-27)Loewenstein showed that it was “the exaggerated formalism of the rule of law which under the enchantment of formal equality does not see fit to exclude from the game parties that deny the very existence of its rules.”[[28]](#footnote-28) To ensure democracy’s survival, Loewenstein suggested that democracy had to restrain its suicidal nature and rise to militancy. The constitutional democracies, he argued, should have developed anti-extremist legislation that would prohibit anti-democratic parties and limit other civil liberties from which the fascists benefited, including the freedom of speech, freedom of assembly, and the freedom of association.[[29]](#footnote-29)

Starting from the 1948 German Basic Law, Loewenstein’s idea that democracy cannot survive without self-protected measures has been constitutionally entrenched in many jurisdictions, particularly in Europe. Constitutional militancy includes, for example, restricting free speech, outlawing hate speech, banning political parties and associations, and disqualifying parties from electoral lists.[[30]](#footnote-30) Thus, notwithstanding different protective techniques that lead to varieties of militancy, contemporary democracies are by default legally structured as more or less militant democracies.[[31]](#footnote-31)

In contemporary Europe, militant democracy is internationally promoted by the European Court of Human Rights (the ECtHR), whose jurisprudence serves as a principle guide on permissible legal obstacles to democracy endangering actions.[[32]](#footnote-32) Moreover, theEU democracy, despite all its deficiencies, is also antagonistic to its enemies. For the first time, the transnational militant democracy protective mechanism was included on the EU level in the Amsterdam Treaty, adopted in 1999, and then amended in 2001 with the adoption of the Treaty of Nice. The amendments were inspired by the sanctions imposed on Austria in 2000 due to the formation of the collation government that included the far-right Haider's Freedom Party, associated to the National Socialist past.[[33]](#footnote-33) Transnational militant democracy mechanism as a response to democratic backsliding in the Member States was for the first time activated in 2017 against Poland, and soon after, against Hungary in 2018. Both proceedings are still pending.

Now, because it allows excluding some citizens and their voices from political life, *i.e.*, it diverges from a fundamental premise of liberal democracy under which all citizens and all voices should be accorded free expression and participation, militant democracy has been subjected to various critics from the moment of its conceptualization.[[34]](#footnote-34) Loewenstein himself was aware of the democratic dilemma or so-called ‘paradox’ of democracy: “Democracy stands for fundamental rights, for the fair play of all opinions, for free speech, assembly, press. How could it address itself to curtailing these without destroying the very basis of its existence and justification?”[[35]](#footnote-35) Loewenstein’s approach to democracy was sharply criticized by his contemporary rival Hans Kelsen who defended pluralism embedded in the idea of democracy on procedural grounds, arguing that all political positions should be given equal rights of expression and participation.[[36]](#footnote-36) The fundamental question of how to synchronize autonomy, laying in the heart of political rights and freedoms, and measures aimed at restricting that autonomy, without turning the very democracy against itself, has been the preoccupation of modern scholars as well, whose debate is driven by contemporary challenges to constitutional democracies, different from those in Loewenstein’s time.

Considering the issue of whether it is possible or not to pacify the inherent arbitrariness of militant democracy and prevent democracies from turning abusive in the long run, however essential, is not a subject of this discussion. Instead, I turn now to dispute Ginsburg’s and Huq’s views related to populism and militant democracy. I will start with the conceptual issues because the authors’ suspicion towards militant democracy derives from its association with specific concepts that do not treat liberty as an absolute value in a similar way as militant democracy, or from the wrong transfer of its logic in the religious liberty field.

* 1. **Militant Democracy Does Not Stand for a ‘Counter-Terror State.’**

One line of arguments used by Ginsburg and Huq to show why militant democracy cannot hedge against the risk of democratic erosion is its alleged problematic association with the state’s responses to terrorism. To explain the use of militant democracy’s methods against Muslim minority in Europe, they merged not only militant democracy and the state responses to terrorism, but militant democracy and emergency powers, as well: “Antiterrorism measures, in particular France’s extensive use of emergency powers after a series of attacks in Paris, have led to the closure or close surveillance of many mosques and Islamic associations.”[[37]](#footnote-37) Once the distinct models were merged, this inevitably led to the conclusion that constitutionally designed militant democracy can be counterproductive as “it is amenable to use against not only those who present an actual threat, but also those who are perceived as alien and therefore unworthy of inclusion in the body politic.”[[38]](#footnote-38)

Ginsburg and Huq are not the first ones who have connected militant democracy with the state’s responses to terrorism. Some anti-terrorist laws adopted after the 9/11 attacks on the US soil have been explained with the reference to militant democracy.[[39]](#footnote-39) Clive Walker, for example, evaluated then-valid UK anti-terrorism laws arguing that “The anti-terrorism legislation reflects long-standing notions of militant democracy in which a state based on legitimate foundations should be ready and willing to confront opponents who abuse its tolerance.”[[40]](#footnote-40) True is, that what he was advocating for was “smart militant democracy,” militant towards organized forms of terrorism, but “smart” and responsive to fundamental democratic values, including individual rights, in order to avoid dehumanization and delegitimization of the state actions.

While in many respects terrorism, either international or domestic, represents a significant threat to democracy, state responses to terrorism, however militant and suppressive towards fundamental rights, should not be equated with the militant democracy. In other words, although in both cases it looks like ‘fire is fought with fire’ (Loewenstein), fires are not the same, either offensive or defensive. The fact that militant democracy and the state anti-terrorist measures do not treat liberty as an absolute value does not prove that we deal with the same or similar phenomenon. True is, the principal dilemma of whether democracy can fight anti-democratic movements, far-right political parties, and terrorist organizations within the rule of law, can blur the difference. But then again, there are many differences.

Recall again what militant democracy is about. In Stephen Holmes’ views, militant democracy “refers to the capacity of modern constitutional democracies to defend themselves against domestic political challenges to their continued existence.”[[41]](#footnote-41) Holmes’ definition implies that: (a) militant democracy addresses democratic self-defense in cases when attacks on democracy are of political rather than violent nature prohibited under criminal law and; (b) that militant democracy deals with domestic and not international challenges to constitutional democratic orders.

As I have already emphasized, defending democratic measures of a militant nature imply restricting free speech, outlawing hate speech, banning political parties and associations, disqualifying parties from electoral lists, securing irreversibility of constitutional order, and even civil resistance to defend free democratic order. Terrorism, on the other hand, represents an act of violence, incriminated as domestic terrorism, international terrorism, and terrorism as a war crime.[[42]](#footnote-42) Being a crime imputing individual criminal responsibility, the state responses are covered in criminal and administrative law and include deprivation of liberty, surveillance, extradition, denial of some due process rights, restrictions on freedom of movement, etc. Even if some measures coincide, like the free speech or religious rights restrictions, this is insufficient to assert or draw an analogy between militant democracy and criminal prosecution, as the militant democracy, by default does not cover illegal acts under criminal law (hate speech being a prominent exception).[[43]](#footnote-43) Terrorism might or might not be politically motivated, which is irrelevant for its criminal persecution, while essential for militant democracy to be activated is the political aspiration to destroy democracy. Furthermore, subjects exposed to (violent) emotionalism differ, as well as the purposes of the threats. International terrorism might be instituted against the civilian population, government, or an international organization, not solely against “free democratic order.”[[44]](#footnote-44) Recall here that the purpose of acts amounting to international terrorism is to intimidate a population or to compel a government or an international organization to a specific behavior utilizing violent actions (e.g., murder, kidnapping, hostage-taking, extortion, bombing, torture, etc.), and not to destroy democracy by exploiting democratic instrumentalities. Moreover, international terrorism is identified as “a threat to international peace and security”[[45]](#footnote-45) and not as a threat to the continued existence of constitutional democracy, which requires the activation of militant democracy.

The historical perspective offers yet another difference. Militant democracy was developed to fight against internal secular totalitarian movements, and therefore a strategy to justify ‘war against terrorism’ targeting religious fundamentalist movements under the concept of militant democracy was wrong. Even if in the meantime the circumstances have changed, at the time when the ‘war on terrorism’ was at its peak, hardly any political wing or association of Al-Qaida or another fundamental religious movement were active in the US or other targeted countries to the extent that they could be labeled an internal enemy for the militant democracy purposes.[[46]](#footnote-46)

Now, it may be claimed that domestic terrorism is more worrying for a continued existence of democratic order, than international terrorism, especially if linked with a political party which defends or excuses terrorist strategy. To defend democracy, a state may resort to the most comprehensive and effective measure and prohibit the subversive party. But then again, the prohibition by default springs from constitutional law, not from criminal law, although for the prohibition some indication of criminal activity may be requested. A good illustration is the prohibition of Batusana party in Spain, which advocated the independence of the Basque Country and had alleged connections with the ETA terrorist group.[[47]](#footnote-47)

At the time of the Batusana controversy (the beginning of the 2000s), it seemed that the Spanish Constitution allowed restrictions on associational rights only if the association either favored criminal goals or used illegal means: “Associations which pursue ends or use means classified as criminal offenses are illegal.”[[48]](#footnote-48) At the same time, Article 6 of the Constitution placed the political parties in the heart of pluralism, declaring that “their creation and the exercise of their activities are free in so far as they respect the Constitution and the law”, and required their internal structure to be democratic.[[49]](#footnote-49) The dispute over the issue of whether Article 6 allowed additional limitations on political parties to be imposed, other than restrictions based on criminal law, arose in 2002 with the adoption of the statute concerning political parties. Article 9 (2) of the statute envisaged the possibility of outlawing a political party on militant democracy grounds:

[…] a political party shall be outlawed when its activity violates the democratic principles, in particular, when through its activity it seeks to deteriorate or destroy the system of liberties, or make impossible the democratic system, or eliminate it[…][[50]](#footnote-50)

Eventually, it was established that the political party may be prohibited on militant democracy grounds encapsulated in Article 9(2), even when it was not possible to outlaw it on the grounds of the criminal law.[[51]](#footnote-51) It turned out that despite the established links between Batusana and ETA, evidences were not strong enough to satisfy stringent criminal law standards for declaring Batusana a criminal association, its members criminally liable, and to outlaw it on the basis of the Criminal Code.[[52]](#footnote-52) However, the prohibition of Batusana eventually did happen on the grounds of ‘constitutional illegality’ introduced by the 2002 statute for activities against constitutional values defined in Article 9 (2).[[53]](#footnote-53)

For the sake of clarity, the above scenario does not target undefined terrorists but the political parties inclining to defend terrorist strategies. Consequently, unlike the counter-terror state, militant democracy does not treat everyone as a potential enemy but only the enemy identifiable under the stringent rules. Even then, militant democracy operates under judicial review requirements, which is often not the case with the counter-terror state.

Suppose that militant democracy differs from the counter-terror state, as I have described. Is Ginsburg’s and Huq’s slippery-slope argument that militant democracy can be counterproductive as “it is amenable to use against not only those who present an actual threat, but also those who are perceived as alien and therefore unworthy of inclusion in the body politic” still valid? The issue requires a broad explanation and brings us back to the inherent arbitrariness of militant democracy, which is not the subject of the present discussion. Here it is sufficient to say that, in my view, the authors’ wedge argument originates in the general skepticism towards militant democracy present in the American scholarly discourse. Later, I will come back to this point.

Finally, militant democracy is not about emergency powers either, despite the militant language and militant reasoning in constitutionally designed models of emergency powers.[[54]](#footnote-54) First and foremost, constitutionally designed militant democracy applies in ‘regular’ time in the society and not in an exceptional time when public safety is seriously threatened. Militant democracy is not the law of the exception to be activated according to special emergency rules - its measures are subject to ‘the ‘ordinary’ legal system that operates under normal circumstances. Emergency powers apply only in cases of urgent threat to ‘the life of the nation’ as underlined in the European Convention For the Protection of Human Rights and Fundamental Freedoms, not only when the constitutional order is in danger for political reasons. To activate emergency measures, a state of emergency should be proclaimed while no such condition exists with regard to the application of the militant democracy measures – to dissolve a party or to prosecute hate speech, no state of emergency is needed.

Second, the nature of the threat requesting the activation of emergency powers is not reduced only to civil war and terrorism whose protagonists may indeed want to destroy the constitutional (liberal) order: the threats range from war, and economic meltdown to natural disasters, as is, for example, the current COVID-19 virus pandemic. In addition, the threats are not only internal but also external. External threats do not satisfy the definition of militant democracy. And, again, even when civil war or terrorism amount to an attempt to destroy the constitutional liberal order, special measures to preserve it may be justified only if the state of emergency is proclaimed.

Third, militant democracy measures are by default subject to judicial review, while it is not always the case with the emergency powers. Consider the French model applicable to Ginsburg’s and Huq’s example. Although the French President should consult the Constitutional Council regarding the measures, there are no enforceable checks on the President’s authority to declare the state of emergency and the measures employed to respond to it.[[55]](#footnote-55)

It is a totally different issue of whether emergency powers can help preventing democratic erosion. In addressing this issue, the authors are not definitely skeptical about the capacity of the good constitutional emergency powers model to serve the purpose, [[56]](#footnote-56) but this issue is beyond the scope of this chapter.

I turn now to show why Ginsburg’s and Huq’s thesis should not be extended to anti-veil cases.

* 1. **Militant Democracy is not Identitarian Democracy**

Ginsburg and Huq are right – the European Human Rights Law treats the choice to wear Muslim garb as a threat to the democratic order. At a closer analysis, under the European Human Rights Law, the Muslim women wearing full-face veils or *jijabs* have been considered enemies of democracy, no matter how irrational this may be. But this is wrong. It is fully possible not only to defend the Muslim women’ right to wear the Islamic veil under the European Human Rights Law but also to oppose mutations of militant democracy in freedom of religion cases. This is not the place for a full discussion of the first claim, but it is for the second.

It all began when the ECtHR in the *Leila Sahin* case upheld the prohibition on wearing the Islamic headscarf in institutions of higher education in Turkey.[[57]](#footnote-57) The Court considered the prohibition to be a preventive measure “necessary in a democratic society” and compatible with the principle of secularism shaped in the Turkish Constitution in militant democracy terms: “In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practice that religion or on those who belong to another religion may be justified under Article 9 § 2 of the Convention.”[[58]](#footnote-58) In several subsequent cases, the Court continued to support the idea that wearing the veil was incompatible with democratic society. For example, the Court held that in a democratic society it was justified to criminalize the Muslim women wearing the full-face veils since they jeopardized the rights and freedoms of others and the concept of ‘living together’ that are at democracy core.[[59]](#footnote-59)

Unfortunately, the Court of Justice of the European Union (the CJEU) joined the ECtHR in conceptualizing the Islamic veil jurisprudence on the identitarian democracy grounds and under the notion of neutrality.[[60]](#footnote-60) The CJEU upheld the France’s and Belgium’s private companies’ dress policies which banned the employees to wear a headscarf. Without considering an employee’s right to manifest her religion, the CJEU declared that the provision aiming to neutralize the religious belief could be justified if it was designed to achieve corporate neutrality, and if the means of achieving that aim were appropriate and necessary.[[61]](#footnote-61)

 Now, a big loser in the European Islamic veil jurisprudence is democracy itself. Both European courts, aggressively (the ECtHR) or passively (the CJEU) have reinterpreted the freedom of religion rights, to borrow from Susanna Mancini and Michel Rosenfeld “in ways that disadvantage or exclude the rights asserted by Muslims.”[[62]](#footnote-62) But should this be assigned to the correct enforcement of militant democracy principles? I think it should not.

The concept of militant democracy supports the idea of suppressing those who want to destroy democracy from within, by using constitutionally enriched democratic values. The claim that a Muslim woman, by choosing to wear Muslim garb, wants to destroy democracy cannot be justified on militant democracy grounds without distortion of the very idea of militant democracy, as Patrick Macklem has effectively claimed.[[63]](#footnote-63)

First, militant democracy does not reflect the idea of identitarian democracy neither in its historical nor in contemporary form. The idea of defending democracy is a project of a liberal democracy and not of Schmitt’s decisionism. Although militant democracy is paradoxical concept in several aspects, one thing is sure: the very idea of militant democracy was born from the need to protect minorities and not to exclude them from the society. At the time when Lowenstein conceptualized militant democracy, Schmitt had already argued that political communities were based on the friend-enemy polarity.[[64]](#footnote-64) While Schmitt worshiped the homogeneity and labeled enemy anyone who did not belong to the majority forming homogeneity, for Loewenstein enemy was anybody who wanted to destroy democracy and pluralism accommodated in the democratic order. Neither today militant democracy adopts ethnically driven plebiscitarian methods. Rawls, for example, argues that “[…] just citizens should strive to preserve the constitution with all its equal liberties as long as liberty itself in their own freedom is not in danger”; otherwise, “they can properly force the intolerant to respect the liberty of others[…]”[[65]](#footnote-65)

Second, there is no inherent anomaly in the concept of militant democracy that requests the boundaries to be set between majorities in today’s Europe and ‘the Muslim enemy.’ As Mancini reminds, one of the paradoxes of militant democracy is that restrictions to political pluralism is needed in order to preserve the very pluralism.[[66]](#footnote-66) Pluralism lies in the heart of democracy. Even the ECtHR itself repeatedly said that “there can be no democracy without pluralism”.[[67]](#footnote-67) According to the Court, pluralism is “built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious belief, artistic, literary and socio-economic ideas and concepts”.[[68]](#footnote-68)

But it turned out that the guardian void its vision. The ECtHR’s Islamic veil jurisprudence fits well with its position that Islam is incompatible with democracy. In its highly criticized *Refah* decision, the Court upheld the decision of Turkish Constitutional Court to ban the Refah Party (forming then-ruling coalition) on the grounds that its advocacy for a plurality of legal regimes in Turkish society that would include one based on Sharia, stood contrary to the fundamental principles of democracy.[[69]](#footnote-69) The Court’s approach is problematic for many reasons. For example, one can easily find anti-democratic policies embodied in other religions, but the Court has not considered that. Thus, the Court neither considers mandatory disposal of the Christian symbols as a threat to democracy,[[70]](#footnote-70) nor it has been ready to problematize a state’s policy concerning the beginning and the end of life, adopted in some Member States under a strong influence of the Catholic religion.[[71]](#footnote-71) If one adds to this the fact that many European parties originated from affiliation to Christian religion without this being questioned by the Court, it is hard to resist the conclusion that the Court’s vision of “democratic society” is hardly compatible with society which does not origin from “Christian principles and values”.[[72]](#footnote-72) In sum, the boundaries between majorities in today’s Europe and ‘the Muslim enemy’ are judicial (and legislative) constructions that appeared recently, together with globalization and migration waves; they are not inherent in the concept of militant democracy.

Third, in Sajó’s view militant democracy is constitutional risk aversion.[[73]](#footnote-73) If this is so, to what extent, if any at all, a Muslim woman wearing Muslim garb is a risk to democracy that requests militant reaction, *i.e.* restriction of the right to manifest her religion? Going back to *Leila Sahin* case, the warning of dissenting judge that “not all women who wear the headscarf are fundamentalists”,[[74]](#footnote-74) indicates that generally no apparent link between the women wearing the Muslim garb and anti-democratic agenda, necessary to build a militant democracy case, exists. Moreover, a number of women wearing a full-face veils in public spaces in Europe does not expose well-organized and massive anti-democratic force: Mancini’s analysis displays that, at one point, measures criminalizing such apparel targeted aground 200 women in Belgium, less than 2000 women in France, around 160 in Austria and 300 in the Netherlands.[[75]](#footnote-75) Finally, if, as Mancini suggests, one takes into account Edward Said’s claim that the Orient was one of the key blocs in building the European identity,[[76]](#footnote-76) the absurdity of subjecting the Muslim women wearing the veils to ‘permissible’ limitations of religious liberty becomes obvious.

However, this is not to deny that the European courts, although erroneously, have transplanted militant democracy logic in the religious freedom domain, moving European democracy closer to Schmitt’s vision of the constitutional state. Nevertheless, this is not for the first time in history that the courts supported exclusionary politics. The experience learned from the US Supreme Court Korematsu decision in which the Court upheld a race-specific statute disadvantaging the US citizens of Japanese origin due to military necessity during the Second World War should serve as a clear warning.[[77]](#footnote-77) Long after, in 1984, the Congress had enacted legislation acknowledging ‘the fundamental injustice’ towards Japanese minority, while the very Supreme Court only in 2018 admitted that the decision was wrong: “The dissenter’s reference to Korematsu, however, affords this Court the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.”[[78]](#footnote-78) By the same token, the ECtHR’s and CJEU’s Islamic veil-jurisprudence that facially discriminate against Muslim women is inherently suspect under a liberal constitutional design.

In sum, as militant democracy does not equal the present phenomenon of identitarian democracy, the judicial construction of the Muslim women being a threat to democracy should be challenged and not used as a claim against militant democracy.

1. **CAN MILITANT DEMOCRACY CONFRONT POPULISM?**

So far, I have focused on the conceptual issues – what is and what is not militant democracy as a first step in testing Ginsburg’s and Huq’s thesis that militant democracy cannot help democracy in the process of slowly dying. Assuming that my differentiation between militant democracy, anti-terrorism law and its mutations in the religious liberty field is acceptable, the issue which still begs the answer is can militant democracy make democratic backsliding less likely? Or, it may turn that Ginsburg’s and Huq’s disqualification of militant democracy from the preventive constitutional toolkits may be right, but for different reasons?

One should keep in mind that Ginsburg and Huq have been investigating how constitutional design might prevent democratic erosion. For that purpose, they have recommended several techniques to a hypothetical designer of a new constitution. The elimination of militant democracy from the preventive constitutional toolkits should not surprise, as militant democracy is mostly absent from the constitutional discourse in the USA. Several reasons explain this fact. First, the concept is usually associated with the restrictions of the freedom of speech, the idea highly disqualified under the First Amendment clause.[[79]](#footnote-79) Second, a (wrong) tendency in the American discourse to identify defense mechanisms with criminal prosecution makes militant democracy undesirable constitutional democracy defending technique.[[80]](#footnote-80) Third, Samuel Issacharoff identifies the specificity of the American presidential system that rather limits the possibility for extremists to disrupt governance, as yet another reason for the redundancy of militant democracy in the US. “There are many reasons to be wary of presidentialism, but it does serve as a buffer to the threat posed by marginal parties’ ability to insinuate themselves into parliament and disrupt governance from within,” Issacharoff claims.[[81]](#footnote-81)

Now, if one rejects the idea that all contemporary democracies should switch to the presidential system to preserve democracy from extremism as trivial and accept that, for historical reasons and terrible experience with Nazi politics in Europe, the European democracies should keep their militancy constitutionally entrenched, is militant democracy also helpful in confronting populism?

Earlier in this chapter, I have suggested that populists, like extremists, are depicted as a threat to democracy. However, it has already been noted that these threats are of a different sort. Populists rule in people's name, and therefore, unlike extremists, they do not want to destroy democracy but to reduce it to electoral democracy as they maintain power through regular elections. Consequently, it seems that the militant democracy paradigm makes little sense in confronting populists’ attacks on democracy, as Weiler claims, democratic backsliding 'is often done in the name of democracy and popular will.'[[82]](#footnote-82) Put differently, populists are not enemies of democracy in the same sense as extremists because majoritarianism they rely on, in principle, does not reject democracy. In the end, as Müller argues, militant democracy response to populist rulers can harm democracy rather than defend it because it may amount to revenge.[[83]](#footnote-83) Thus, on the one hand, populists exclude all those who do not belong to 'true people' in their version of ‘the people’, while on the other, militant democracy response to such differentiation is also of an exclusionary nature.[[84]](#footnote-84) In view of these considerations, it seems likely that militant democracy can be a wrong tool to confront democratic backsliding.

However, as democracy should not be reduced to the majority rule, Cass Sunstein reminds us that constitutionalism is the preventive mechanism to protect democratic processes against their own excesses or misjudgments: “if a political majority restricts dissenters, or disenfranchises people, it is behaving inconsistently with democracy, and a constitution that forbids those actions is justified on democracy grounds.”[[85]](#footnote-85) Therefore, some authors have suggested that constitutionalism should be upgraded to a militant mode as a response to the populist erosion of democracy.[[86]](#footnote-86) ‘Militant constitutionalism’ symbolizes robust constitutional self-defense, an improved version of preventive measures already embodied in the constitutions. According to Sajó, upgrading constitutionalism to a militant form should embrace entrenchment clauses crucial for preserving liberal democracy, proportional electoral system, safeguards against direct democracy, strict criteria to ensure judicial independence, safeguards against corruption in public administration and against abuse of emergency powers, to name some of them.[[87]](#footnote-87)

But this does not mean that militant democracy, which differs from militant constitutionalism, is a redundant concept in confronting populism. First, populism feeds extremism, so classic militant democracy measures, like restrictions of associational rights to exclude additional anti-democratic actors from the political arena either before populists come to power or once they assume it, could help democratic self-defense. A good example is the ban and dissolution of the Hungarian Guard Association and Hungarian Guard Movement established by the Association, whose activities targeted Roma population. The ban was imposed by the Hungarian national courts, right at the time when populists were to assume power in Hungary.[[88]](#footnote-88) Soon after, it was upheld by the ECtHR. In considering the ban, the ECtHR emphasized that the activities of the Hungarian Guard Association can be regarded as implementing a policy of racial segregation and can be seen as constituting the first steps in the realization of a certain vision of “law and order” which is racist in essence.[[89]](#footnote-89) Had the authorities omitted to impose the ban, “the general public might have perceived this as legitimization by the State of this menace, concluded the Court.”[[90]](#footnote-90) In other words, “this would have enabled the Association, benefiting from the prerogatives of a legally registered entity, to continue to support the Movement, and the State would thereby have indirectly facilitated the orchestration of its campaign of rallies.”[[91]](#footnote-91) Accordingly, militant democracy prevents tacit (not to mention open) collaboration between populist rulers and extremists and helps exclude anti-democratic actors from the political arena in circumstances where democracy is already partly destroyed.

Second, transnational militant democracy may prove successful in saving national democracies from the populists’ grip. As ruling populists in Hungary and Poland managed to dismantle constitutional self-defense mechanisms, the European Union had intervened, and as mentioned earlier, it activated a transnational militant democracy mechanism to sanction Poland in 2017 and Hungary in 2018. The proceedings under Article 7 TEU are still pending and could end up in the suspension of the rights deriving from the application of the Treaties to Hungary and Poland, including their voting rights in the Council and the rights derived from secondary EU law. But equally important is the CJEU’s militant stance against Poland in court-packing cases - it indicates how judicial avenues may also help prevent the Member States from reducing democracy only to the election of leaders.[[92]](#footnote-92)

Finally, carefully selected, what Muller calls ‘individual militant democracy’ measures, including a partial and provisional restriction of electoral rights, some forms of impeachment, or individual resistance to democratic backsliding on the ground of the right to resistance, could also help in saving democracy from dying.[[93]](#footnote-93) I am not saying that this is not a risky course for the very democracy, but how risky and whether the risk could be controlled is already a subject for a different discussion.

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Sažetak

Violeta Beširević*[[94]](#footnote-94)\**

**MILITANTNA DEMOKRACIJA I POPULIZAM:**

**ODGOVOR TOMU GINSBURGU I AZIZU HUQU**

*Ovaj kratki esej ima sljedeće ciljeve: prvo, napisan je u čast profesora Josipa Kregara, koji je cijeli život bio promotor demokracije, bilo u bivšoj Jugoslaviji ili današnjoj Hrvatskoj, što je prilično izazovni zadatak od kojega nikada nije odustao; drugo, u ovom ću radu odgovoriti Tomu Ginsburgu i Aziza Huqu, koji su u svojoj nedavno objavljenoj knjizi Kako spasiti ustavnu demokraciju, militantnu demokraciju označili opasnim i neadekvatnim alatom za suprotstavljanje sadašnjome fenomenu demokratskog nazadovanja. Rad ću započeti tvrdnjom da skepticizam autora prema militantnoj demokraciji izvire iz pogrešnog poistovjećivanja militantne demokracije sa drugim konceptima u čijoj je biti također ograničenje individualne slobode, a potom ću skicirati argument zašto bi militantna demokracija mogla pomoći u suprotstavljanju eroziji demokracije.*

Ključne riječi: militantna demokracija, populizam, demokratsko nazadovanje, militantni konstitucionalizam, ekstremizam

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42. For more see, e.g. Cassese, A., *International Criminal Law*, Oxford University Press, Oxford, 2003, pp.120-131; Degan, V.Đ.; Pavišić, B.; Beširević, V., *Međunarodno i transnacionalno krivično pravo*,[International and Translational Criminal Law], Pravni fakultet Univerziteta Union u Beogradu, Službeni Glasnik, Belgrade, 2011,pp.219-228. [↑](#footnote-ref-42)
43. For more see Sajó, A., *From Militant Democracy to the Preventive State?* Cardozo Law Review, vol.27, 2006, pp.2255-294. [↑](#footnote-ref-43)
44. One broadly accepted definition of international terrorism is given in the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in the Resolution 54/109 of 9 December 1999. It offers combination of the wartime and peacetime definition of terrorism: [Terrorism is an] “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” [↑](#footnote-ref-44)
45. See The U.N. Security Council Resolution 1373, adopted on 28 September 2001. [↑](#footnote-ref-45)
46. Beširević, V. (ed.), *op. cit.*(fn.31),p.245. [↑](#footnote-ref-46)
47. For a detailed discussion see Ferreres Comella, V., *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batusan*a, in: Sajó, A. (ed.), *Militant Democracy*, *op. cit.* (fn.1), pp.133-156. [↑](#footnote-ref-47)
48. See Article 22 (2) of the Spanish Constitution. [↑](#footnote-ref-48)
49. Article 6 of the Spanish Constitution reads: “Political parties are the expression of political pluralism; they contribute to the formation and expression of the will of the people and are a fundamental instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and operation must be democratic.” [↑](#footnote-ref-49)
50. Ferreres Comella, op.cit. (fn.46), p. 133. [↑](#footnote-ref-50)
51. *Ibid*., pp.138-141. [↑](#footnote-ref-51)
52. *Ibid*.,p.138. [↑](#footnote-ref-52)
53. *Ibid*.,pp.138-139. [↑](#footnote-ref-53)
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55. See Article 16 of the French Constitution; see also Dyzenhaus, D., *op. cit*. (fn.53), p.445. [↑](#footnote-ref-55)
56. Ginsburg, T.; Huq, A., *op. cit.* (fn.10), pp.57-62. [↑](#footnote-ref-56)
57. *Leyla Şahin v. Turkey*, App. no. 44774/98, Judgment of 10 November 2005. [↑](#footnote-ref-57)
58. *Ibid.*, para.114. [↑](#footnote-ref-58)
59. See. *e.g.*, *Sas v. France*, App. no. 43835/11, Judgment of 1 July 2014, para. 121-122 and *Belcacemi et Oussar v. Belgium*, App. no. 37798/13, Judgment of 11 July 2017, para.61. [↑](#footnote-ref-59)
60. The following two cases confirms this finding: Judgment of the CJEU, Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, ECLI:EU:C:2017:203 and Judgment of the CJEU, Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l’homme (ADDH) v. Micropole SA*, ECLI:EU:C:2017:204 [↑](#footnote-ref-60)
61. See *Achbita v. G4S Secure Solutions NV, op. cit.* (fn.59), para.35 and *Bougnaoui and ADDH v. Micropole SA, op. cit.* (fn.59), para.35. [↑](#footnote-ref-61)
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67. *United Communist Party of Turkey and Others v. Turkey*, App.no.133/1996/752/951, Judgment of 30 January 1998, para.43. [↑](#footnote-ref-67)
68. *Gorzelik and Others v. Poland*, App. no. 44158/98, Judgment of 17 February 2004, para. 92. [↑](#footnote-ref-68)
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70. See *Lautsi and Others v. Italy*, App. no. 30814/06, Judgment of 18 March 2011. [↑](#footnote-ref-70)
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