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On Political Impotence: How Liberal Democracy Becomes Militant, and Its Demos Becomes Impotent[2]

Abstract

Research into liberal democracy's self-preserving quality is usually confined to the notion 'militant democracy' and focuses mainly on the specific instruments the political system employs to challenge its adversaries and bolster its structure. This paper takes a different approach to understanding liberal democracy's self-preservation. It challenges the boundaries of the dominant concept by exploring consolidative tendencies in a more general and comprehensive fashion, focusing on gradual political – and legal-evolutionary developments that contribute to the solidification of the political system. On that basis, a critical follow-up question is posed: what are the implications of these consolidative endeavours? By highlighting 'political impotence' and its destabilizing effects as one of more socio-political implications, the paper suggests that the self-preserving vigour of liberal democracy might turn out to be counterproductive, and that the crisis which liberal democracy is now experiencing does not occur in spite of but rather because of its self-preserving characteristics.

Keywords: liberal democracy, militant democracy, legal constitutionalism, populism, political impotence

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O niemocy politycznej: jak liberalna demokracja staje się demokracją walczącą i jak jej demos staje się bezsilny

Streszczenie

Analiza samozachowawczej natury demokracji liberalnych ogranicza się zazwyczaj do pojęcia „demokracji walczącej", skupiając się głównie na konkretnych instrumentach, z których ustrój korzysta, by stawić czoła jego przeciwnikom oraz by wzmocnić swoją własną strukturę. Niniejsza praca podchodzi do kwestii samozachowawczości liberalnej demokracji od nieco innej strony. Niejako podważa ona granice koncepcji uznanej za dominującą, analizując zaobserwowane skłonności do konsolidacji w ogólniejszej, szerszej perspektywie, koncentrując się na stopniowej ewolucji polityki i prawa, której to efekty przyczyniają się do umocnienia ustroju politycznego. Analiza ta prowadzi do istotnego pytania: jakie konsekwencje mogą wynikać z konsolidacyjnej praktyki ustrojowej? Podkreślając znaczenie „niemocy politycznej" oraz wynikającej z niej ogólnej destabilizacji w wymiarze społecznym i politycznym, niniejsza praca stawia tezę, że samozachowawczy instynkt demokracji liberalnej może przynieść efekt przeciwny do zamierzonego oraz że do obecnego kryzysu demokracji liberalnej nie doszło pomimo jej samozachowawczej natury, a raczej niejako w następstwie tej natury.

Słowa kluczowe: demokracja liberalna, demokracja walcząca, konstytucjonalizm prawny, populizm, niemoc polityczna

Introduction

Since the fall of communism, the demise of authoritarian regimes and the prolife-ration of liberal democratic 'dreams' and practices in the mid – and late 20th century, liberal democracy has undisputedly become the main protagonist on the global political stage. With nearly one hundred state devotees, it has recently reached its quantitative peak, and for some this is a sufficient reason to argue that the political system is doing well, or even that it has never been as *successful* as it is now. Indeed, if we were to appraise liberal democracy on these quantitative grounds only, the discussion about whether the system is, to put it bluntly, successful or not would end here. However, given the present-day political reality in a wide range of liberal de-mocracies, it is obvious that such a numerical approach is far too one-dimensional.

Presently, both relatively 'young' as well as 'older' or 'established' liberal democ-racies are facing radical yet viable political adversaries. In the European context the often rehearsed and paradigmatic cases are Hungary and Poland, but more broadly and increasingly liberal democracies experience the surge of a 'new' kind of popu-lism on both left and right that aims its arrows at institutions and conventions of the political system itself. Moreover, and as I will argue later, underlying these political manifestations are less visible inner-societal developments and specific psychopo-litical conditions that are detrimental to the stability of liberal democracies. One example of system-corroding societal developments can be found in World Value Survey's research into political trust and support for liberal democracy and its institutions, which empirically evinces a growing 'gap of understanding' and mutual distrust between parties and voters, between representatives and the represented.[3] The credence of liberal democracy, its institutions, and actors is declining palpably. And so too is the legitimacy of the political system at large. The question that follows and lies at the heart of this paper is whether liberal democracy is in crisis and, if so, how come.

To answer that question, this paper focuses on internal and institutional features of liberal democracy itself as potential causes of the current crisis.[4] On the basis of a functionalist and consequentialist approach, the paper advances a rather uncon-

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[3]   http://www.worldvaluessurvey.org/WVSOnline.jsp

[4]   Although external elements such as the refugee – and other sorts of crises play their part, they are not interpreted in this paper as the main *causes* of the current democratic discontent.

ventional line of thought; by focusing on institutional settings of systemic *self-preservation*, the question is raised if and how the self-preserving features of liberal democracy negatively influence and affect the stability of the political system itself. In other words, the paper seeks to find out whether liberal democracy's consolidative efforts evince a counterproductive, self-defeating potential. In order to make a modest yet sound attempt at providing *an* answer (not *the* answer) to the above questions, the paper is structured as follows: central to the first part is to outline the 'elementary logic' of liberal democracy's self-preservation and highlight the main consolidative elements of the political system. The issues covered include the intra-political, the extra-political and the trans-political dimensions of systemic preservation that originate at different stages of liberal democracy's evolution. On the basis of the previous, a tentative reformulation of the now dominant concept of 'militant democracy' is proposed, namely 'militancy *sensu lato*'. In the second part, a brief sketch of the effects of the consolidative logic on the anatomy of the political system will be made by referring to the dynamics of 'verticalisation' and the intensified tension between the ideal and the actual, between 'horizontal' and 'vertical' democracy, and the increasing distance between *demos* and *kratos*. In the third and final part, the paper discusses the implications of the consolidative logic for the political viability of political communities by making an analogy between 'political' and physiological impotence.[5] On that basis, it is suggested that a politically impotent society is psychologically inclined to feel – under certain circumstances – resentment towards the political system itself, which sensitises a 'demos' to support political *anti*-forces. Based on the previous, the papers concludes by implying that liberal democracy might indeed be confronted with self-produced systemic threats; the self-preserving endeavours of liberal democracy that are dominant in both theory and practice could turn out to be counterproductive and undermine the stability of the system at large.

The elementary logic of preservation

Prior to commencing the substantive part of the analysis, I think it is useful to outline two more general (and – for some – self-evident) observations that lay out the foundation for this paper. First, as a colleague of mine has aptly pointed out, every system

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[5] I have chosen to focus in this paper merely on the implication of 'political impotence', and to investigate how the tension between 'ideal' and 'actuality' operates and comes to its breaking point. In other writing, I focus on different implications of self-preservation, e.g. 'civic militancy', U. Eijkelenberg, *Black-Belt Constitutionalism: Considering "Street-Fighting" as a Constitutional Essential*, "Int'l J. Const. L. Blog" Oct. 20, 2018.

of political power is structured towards its self-preservation.[6] Although liberal democracy is often seen as an anomaly on that list – mainly because of its lack of 'force', its open and inclusive character, and the seemingly extensive reach of the people's self-ruling capacity – it is certainly no exception to the rule. A second point that needs to be stressed is that the preservation of a political system involves the maintenance of the ideology underlying that system. Different ideologies require different political settings to be effective. Communism, for example, resorts to a form of authoritarian rule that creates an amalgamation between the state, the party, its leader and (in more fascist terms, an exclusive reading of) the people. Liberalism, on the other hand, is an ideology based on the notion of freedom as non-interference and individual liberties, as well as tolerance and pluralism, and is closely linked to a democratic ideal of political ordering.

What follows from these two general observations is, first, that a political system is instrumental to the dominant ideology and its maintenance. This is to mean that the political system ought to provide both maximization and preservation of the ideology it embodies, and secure the position and interests of hegemonic forces accordingly.[7] And, second, in the case of liberal democracy, this balance is delicate; there seems to be a contradiction, or at least a mismatch, between the fluidity and variability inherent in democracy on the one hand, and the strive for stabilization and consolidation on the other. Despite this tension, this paper aims to provide an initial attempt at laying bare some general self-preserving mechanisms of liberal democracy, and, by interpreting historical and political evolutionary facts, to underline the *elementary logic* of liberal democracy's self-preservation.

The consolidative logic

When establishing a consolidative logic, it is necessary to investigate first how the political system is gradually shaped and second how this shaping functions in the consolidation of the system, the dominant ideology, and the hegemonic interests. In the case of liberal democracy I suggest that there are three decisive structural developments that constitute an intensified solidification of the political system. The first is connected with the moment of liberal democracy's emergence in modernity and the integration of electoral representation in the post-revolution era of democratization. The second can be attributed to the more recent, post-war constitution-

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6   I am particularly indebted to Matija Lujić for the many fruitful discussions on this topic.

7   For a critical analysis of the relation between liberal democracy and the preservation of hegemonic interests, see e.g. Ran Hirschl's 'hegemonic preservation'-thesis. In: R. Hirschl, *Towards Juristocracy: The origins and consequences of New Constitutionalism*, Harvard 2007, p. 11.

alisation of rights and the displacement of political decision-making power from representative institutions to judiciaries. The third concerns the process of de-nationalization of structural norms and principles. These developments reveal a similar consolidative logic, which is that liberal democracy's self-preservation entails a gradual yet increasing limitation of popular power. Or to phrase it in a more formulaic manner: *democratic limitation equals systemic preservation*. Central to the subsequent three paragraphs is to explicate how this logic is materialised: how the political system is shaped by those in power (§1.2., 1.3. and 1.4.), and how this shape contributes to consolidation of the status quo by means of limiting popular influence (§1.2.1 and 1.3.1.). Following that, I will offer a brief and tentative proposition for reconsidering the existing conceptualization of democratic militancy (§1.5.).

Shaping the political system: Post-revolution electoral representation

The first critical formative development instructive for the purposes of this paper pertains to the moment of liberal democracy's emergence in modernity, the rise of the nation state, and the reforming elite's implementation of electoral representation as the primary democratic selection mechanism. Although some notable authors of those days, e.g. Montesquieu and Rousseau, argued that a proper system for selecting governors was one involving a combination between 'lot' and election – lot representing the *democratic* component, election the *aristocratic* – only the latter selection mechanism has survived until modern day.[8] Montesquieu, for example, talks about the nature of different selection mechanisms: 'the suffrage by lot is natural to democracy; as that by choice is to aristocracy'.[9] The emphasis on the division between lot and election is important: the democratic component (lot) is based on the Aristotelian ideal of democracy as the equal *chance* to govern and to be governed;[10] the aristocratic element (elections) consists in selecting the most suitable candidates, the '*best*', or '*aristoi*'. Accordingly, the interaction between lot and election guarantees equality in political chances (democracy) as well as the quality or competence of experts (aristocracy).[11] In that sense, prior to the emergence of modern liberal democracies, electoral practices were depicted as aristocratic selection mechanisms because they innately distinguished between candidates on the basis of their specific qualities. This is to say that by means of electoral selection, political societies

8   R.G. Mulgan, *Lot as a Democratic Device of Selection*, "The Review of Politics" 1984, 46(4), pp. 539–540.

9   C. De Montesquieu, *The Spirit of Laws*, Kitchener, Ont. 2001, p. 28.

10   http://plato.stanford.edu/entries/aristotle-politics/

11   D. van Reybrouck, *Tegen Verkiezingen*, Amsterdam–Antwerpen 2015, p. 85.

create *differentiation*; rulers are qualitatively distinguished from the ruled.[12] Although the interaction between both the democratic and the aristocratic component could be beneficial for political societies,[13] electoral practices have been implemented without a democratic counterpart. In the post-revolution emergence of liberal democracy, therefore, a *first* and crucial limitation to democracy is established, which has consciously yet discretely tempered the democratic virtue of political equality.[14]

After the revolutions in France and the United States of America, where modern liberal democracy originated, the reconfiguring elites promoted a limited inter- pretation of democratic governance. In the construction of the new political system, electoral representation was not just the paramount but the only mechanism of selection available. After this, the tacit or explicit avoidance of equality-based demo- cracy became a common standard.[15] The aim of implementing electoral practices was, as Aristotle and Montesquieu maintained, to prevent incompetence and get to power (in the more direct words of John Adams) 'the propertied, the talented, the wise and the virtuous'. [16] Accordingly, during the post-revolution emergence of liberal democracies, a democratic system based on equality in self-rule has hardly been part of the reform agenda.[17] Moreover, over the centuries of democratic advan- cement that followed, electoral practices have remained the primary – if not the only – mechanism of political selection. Although the last few decades provided for universal suffrage and a decline of wealth-based aristocratic political prevalence – at least at the main stage of the political arena – both the rationale behind electoral politics (not everybody is suitable for representation) as well as its inherent function (creating favourable conditions for the 'best' to come to power) are still seen today. Nowadays, electoral practices still empower 'aristoi', the 'best', favouring the well- -educated top-layer of society. Present-day liberal democracies are therefore labelled as 'diploma democracies',[18] in which a merits-based differentiation between rulers and the ruled is prolonged. The prevalence of merits and expertise in political arenas and representative bodies evinces that electoral representation is indeed

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12   Ibidem, p. 84.

13   Ibidem, p. 75.

14   C.L. Eisgruber, *Constitutional Self-government*, Harvard 2001, p. 51.

15   D. Van Reybrouck, op. cit., p. 80.

16   "The first necessary step, then, is to depute power from the many to a few of the most wise and good.", John Adams, *Thoughts on Government*, 1776.

17   B. Manin, *The Principles of Representative Government*, Cambridge 1997, p. 94.

18   M. Bovens, A. Wille, *Diploma democracy: On the tensions between meritocracy and democracy*, Verkenning for the NWO programme Contested Democracies, Utrecht–Leiden, April 2009.

essentially aristocratic; it distributes political power not equally to all, but rather creates favourable conditions to empower the 'happy few'.

The consolidative logic: the intra-political dimension

In the above, we have paid attention to the shaping of the political system and taken note of how democracy – and the ideal of equality in self-rule – is limited through the implementation of electoral practices. How then does this limitation function as one of the main elements of systemic preservation? It is suggested that the consolidative logic (democratic limitation equals systemic preservation) can be observed on two distinct levels. The first involves a concrete and the second a more abstract reasoning.

On the concrete level it is possible to say that a political system that distributes political power within state governance to 'aristoi', the 'best', structurally empowers those to whom the social make-up has been most beneficial. In such a case, a form of a mutual dependence between system and actors is produced; systemic change becomes contingent on those political actors who – on account of their privileged position and increasingly their status as 'career politicians'[19] – are most dependent on and interested in the preservation of the existing political design, thus becoming its most *probable* proponents. In other words, structural and systemic change depends precisely on those who have the least incentive to change. On the contrary, subjects not belonging to the 'aristoi', those who are the most likely advocates of reforms, are structurally hindered from obtaining positions of genuine political power.[20] By creating a relation of mutual dependence between a political system and its actors, systemic preservation becomes ingrained in the very structure of democracy itself. What is created is here referred to as the *intra-political* dimension of systemic consolidation.

A second way in which electoral practices have contributed to the consolidation of the political system involves a more abstract consideration. With the introduction of electoral practices as the primary selection mechanism, the struggle for political freedom and democratic participation has been *translated* and reduced to a struggle for suffrage.[21] Hence, it has produced a discursive conversion that has made 'voting'

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[19]   "There are two ways of making politics one's vocation: Either one lives 'for' politics or one lives 'off' politics." – Max Weber, in: H.H. Gerth, C. Wright Mills, *From Max Weber: Essays in Sociology*, Routledge 2009, p. 84.

[20]   M. Bovens, A. Wille, op. cit., pp. 8–9, 67.

[21]   M. Foucault, *The Archaeology of Knowledge & the Discourse on Language*, New York 1972.

synonymous with democracy.[22] When the struggle for political freedom was re-
duced to the struggle to vote, the ideal of political freedom became limited to the
boundaries of the system itself. This is to say that by reducing political freedom to
the act of voting, the ideal of political freedom became encapsulated in and confined
to a political system that structurally imposes differentiation. Hence, paradoxically,
the struggle for freedom has come to advance the acceptance and maintenance of
a system that offers and promotes limited freedom. As Hannah Arendt described
in her notes on the American Revolution, "the Revolution, while it had given freedom
to the people, had failed to provide a space where this freedom could be exercised.
Only the representatives of the people, not the people themselves, had an opportu-
nity to engage in those activities of 'expressing, discussing, and deciding' which in
a positive sense are the activities of freedom."[23]

In line with Hanna Arendt's observations, the previous indicates – first – how the
implementation and dominance of electoral practices has shaped liberal democracy,
and – second – how the differentiation inherent to electoral representation functions
as a limitation of democracy and popular political power, and constitutes the pri-
mary intra-political dimension of liberal democracy's consolidative logic, which
operates both on a concrete and an abstract level. In the following paragraph, the
focus will be on the second dimension of the consolidative logic that can be attri-
buted to the more recent post-war rights progression and the displacement of po-
litical decision-making power from representative institutions to judiciaries. Here,
again, a two-step approach is adopted: the first section addresses how the political
system is shaped, and the second provides an analysis of how that shaping relates
to the consolidative logic; that is, how this shaping imposes limitations on democratic
power and thereby contributes to the preservation of the political system and the
dominant ideology.

Shaping the political system:
the Post-War Constitutionalisation of Rights

The failure of Weimar and the 1930s' surge of autocratic forces in democratic Europe,
followed by a later phase of a post-authoritarian diffusion of democratic ideals and
practices into 'fragile' political soil, have contributed to and legitimised what can
be viewed as the most radical transformation in liberal democracy's anatomy since
its post-revolution emergence. Weimar as well as the precarious position of many

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22   W. Schinkel, *De Nieuwe Democratie: Naar Andere Vormen van Politiek*, Amsterdam–Antwerpen 2012,
     p. 21.

23   H. Arendt, *On Revolution*, Penguin Books 1990, p. 235.

other democracies in the 1930s had proven the vulnerability of the democratic order vis-à-vis its adversaries, and, combined with the subsequent proliferation of democracy towards post-authoritarian, heterogeneous or multi-ethnical political societies, a (in the words of Roberto Unger) 'discomfort with democracy' grew stronger amongst political elites.[24] Although the rapid proliferation of liberal democracy and the establishment of universal suffrage might question this discomfort (both being important aspects of the democratizing waves that took shape in recent decades[25]), the post war advancement of the liberal democratic project has engendered a radical and fundamental transformation that reflects and institutionalises this discomfort. It encompasses a rigorous alteration in the balance between democracy and constitution, and politics and law.

In relation to this transformation, two interlinked paradigms seem to be of particular importance. Both have become dominant in the post-war period, and both capture and produce a transformation characterised by a reassessment of the balance between politics and law. The first is *militant democracy*, the second is *new constitutionalism*. Militant democracy originated as a direct and explicit response to democracy's fragility and its inability to temper the political endeavours of its adversaries. It implies the means through which democracy can protect itself against its own decay.[26] The concept is usually employed – as was the case when Karl Loewenstein coined it[27] – when democracy faces direct and immediate antidemocratic challenge intrinsic to the system, violent or non-violent,[28] requiring legal counter-measures to prevent democracy's demise. In general, these legal measures entail limitations of political expression or organization, or – in their most radical form – a complete exclusion of political movements by means of party prohibitions. In militant democracies, law and legal actors are employed to 'fortify

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24   R.M. Unger, *What Should Legal Analysis Become?*, Brooklyn, NY 1969, p. 72.

25   S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman, OK 1993.

26   P. Cliteur, B. Rijpkema, *The Foundations of Militant Democracy*, [in:] A. Ellian, G. Molier (eds.), *The State of Exception and Militant Democracy in a Time of Terror*, Dordrecht 2012, p. 228.

27   K. Loewenstein, *Militant democracy and fundamental rights I*, "The American Political Science Review" 1937, 31(3).

28   In 1937, Professor George van den Bergh (University of Amsterdam) first divided parties clearly in two categories as either violent or non-violent. The latter consists of antidemocratic political movements who attempt to obtain political power via legal means. He delineated that the difficulty of curtailing antidemocratic sentiments concerned not so much violent parties (those can be challenged on the basis of criminal law) as those parties who acted lawfully, that is, those which stayed within the legal framework of political contestation. See: U. Eijkelenberg, *Van Gerechtvaardigde Angst naar Morele Paniek: De Ontwikkeling van de Nederlandse Weerbare Democratie en haar Uiterste Verzetsmiddel; het Partijverbod*, "Staatsrechtkring" 2016, 7, pp. 9–13.

the soft spots of democracy'.[29] Consequently, democratic politics becomes subordinated to the rational and expertise-based judgements of responsible elites, or – as Karl Loewenstein himself labelled them – 'political aristocrats', who Loewenstein considered indispensable to liberal democracy and its survival.[30] As such, the rationality of law and legal actors can intervene in the emotionalism of which democratic politics is accused in order to protect it from internal breakdown.[31]

In a similar yet more rigorous fashion, a second paradigm being part of the same transformation, new or liberal constitutionalism, entails the advancement of juridification and judicialisation of politics through 'constitutionalisation of rights'. In post-war democratic developments, the procedural conception of democracy – like the idea of sovereignty of parliament[32] – is dismissed as a feasible option and what is promoted instead is a substantive, value-based concept; liberal democracy implies a fundamental appreciation and protection of basic values, or rights, to be enshrined and entrenched in the constitution and to be secured by courts. This promotion of rights within political and primarily legal/constitutional thought produces, again, a transition in the balance between democracy and constitutions, and politics and law. The introduction of bills of rights as an integrated part of constitutions induced the transfer of constitutions from the political to the legal realm; it established a foundational framework of higher law that requires active judicial review in order to protect individual rights against the will (tyranny) of the majority. Or, as Ronald Dworkin argues, democracy must protect itself against the tyranny of majority rule through constitutionalisation and judicial review.[33] Moreover, as a consequence of the distrust-infused or simply fragile political environment in many states in the post-war era, the balance between 'legal constitution' and 'democracy' is tilted and increasingly set to favour the former. In that sense, with the post-war dominance of liberal, legal constitutionalism, a fundamental structural transition is materialised: constitutions, rather than being understood as political documents open to political-democratic contestation and alteration, are interpreted as part of the legal realm, positioned as superior law to be overviewed and protected by specialised judicial bodies against legislative change. New constitutionalism,

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29   P. Cliteur, B. Rijpkema, op.cit., p. 239.

30   "Perhaps the time has come when it is no longer wise to close one's eyes to the fact that liberal democracy, suitable, in the last analysis, only for the political aristocrats among the nations, is beginning to lose the day to the awakened masses." [in:] K. Loewenstein, *Militant democracy and fundamental rights II*, "The American Political Science Review" 1937, 31(4), p. 657.

31   A. Sajó, *Militant Democracy and Emotional Politics*, "Constellations" 2012, 19(4), pp. 562–574.

32   A. Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, "West European Politics" 2011, 25(1), p. 78.

33   R. Dworkin, *A Bill of Rights for Britain*, London 1990.

therefore, fosters supremacy of law over politics and constitutions over democracy. In doing so, increasingly and expansively, a process of depoliticisation unfolds: democratic vigour is limited to the judicially protected yet expansive boundaries of legal constitutions. As new constitutionalism has become the cornerstone of modern liberal democracies, and militant democracy is advanced as a key paradigm in preventing internal democratic disintegration, post-war liberal democracies manifest a fundamental transition in which law and legal actors supersede, trump, and thereby limit the extent and intensity of political-democratic endeavours.

The consolidative logic: the extra-political dimension

The above description of the fundamental post-war transition reveals how this second, extra-political dimension operates as part of the overall consolidative logic. Some authors claim, in line with Unger's discomfort-thesis, that the institutionalization of universal suffrage and the broadened spectrum of interests in political arenas have contributed to the development and dominance of new constitutionalism because the intra-political consolidative dimension has been weakened;[34] the transfer of political power from representative to judicial bodies has succeeded the expansion of interests in legislative bodies; the *expansion* of democracy is followed by a *limitation* on democracy.

Whatever the reasons for these structural conversions, be it the establishment of universal suffrage, the fear and distrust in democratic governance due to the atrocities that occurred after the fall of democracies in the 1930s, or the fragility of new democracies[35], it is clear that liberal democracy has made a consolidative move. By legally regulating and moderating democracy's political realm, and by promoting legal constitutionalism through rights, the post-war conception of liberal democracy embodies a substantial solidification; it fosters the gradual and on-going transition from democracy's unpredictability and fluidity to law's predictability and solidity. The upset balance between constitutions and democracy, and the positioning of legal actors at the apex of the political structure, has produced rigid boundaries that solidify and stabilise liberal democracy's foundational framework. With the creation of a rigid, depoliticised basic structure, which is subject to change primarily through the interpretative actions of judges – again, a group belonging to the

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[34]   See: R. Hirschl, op. cit., and M. Mandel, *A Brief History of the New Constitutionalism, or "How We Changed Everything so That Everything Would Remain the Same"*, "Israel Law Review" 1998, 32(2), pp. 250–300.

[35]   S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, Cambridge 2015.

'aristoi' of society – an extrinsic, superior, and overviewing dimension of system preservation is added to the intra-political dimension of the consolidative logic. In other words, what we encounter here is the *extra-political* dimension of systemic preservation.

Post-national developments and trans-political solidification

This progression in the field of rights and the extra-political dimension of preservation are, however, fostered and furthered by a process of 'de-nationalization' and the emergence of a global political and legal system. Much of the previous, therefore, deserves further qualification and is best understood in light of the increasing complexity of a rapidly changing world in which the nation state is no longer at the centre; a world in which claims to authority transcend states and multiple jurisdictions overlap and merge. In light of the thesis advanced in this paper, two developments are specifically influential. The first is the post-war genesis of international law that is driven by a human rights discourse; the second pertains to the European context specifically and involves the accession and integration of nation states into a supranational order. In relation to the former, the emergence of a post--national order and an international law driven by the promotion of international human rights norms, it is particularly noteworthy how norms provided for at the international level determine the substance of domestic constitutions and laws. Much of these developments are grounded in the global intensification of judicial authority and the emergence of constitutional courts, which convert trans-normativity to the internal core of the domestic political and legal structure.

Emanating from the memory of human rights abuses,[36] the emergence of an international human rights discourse has contributed to the rise and the growing authority of both international and domestic courts. Through human rights norms, judicial authority has expanded in the form of international courts, which stimulate an increasing judicial prominence in national societies. In the wake of human rights advancement, national courts have gained authority for presenting an effective mechanism of translation between international norms and national societies.[37] Courts, increasingly gaining constitutional legitimacy, have come to act as interpreters in the interaction between different normative systems, subsequently incorporating an extensive and expansive amount of normative authority themselves.

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[36]   D. Levy, N. Sznaider, *Sovereignty Transformed: A Sociology of Human Rights*, "The British Journal of Sociology" 2006, 57(4), pp. 657–676.

[37]   C. Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure*, Cambridge 2016, p. 92.

Within national societies specialised courts are institutionally provided with the instruments to unify distinct normative systems. The fact that national courts have obtained a capacity to perform judicial review of legislation attributes to their higher-tier importance, and creates a situation in which such courts acquire a dual normative capacity: on the one hand, they are able to influence ordinary legislation in relation to either constitutional or international norms, and on the other, courts are enabled to shape or even create national constitutional norms in their relation to the international order. In other words, the increased prominence of international law has triggered a vast transfer of power both between the nation-transcending order and the national level, and within nation states from legislatures to courts.[38] In the national context, courts are empowered to shape laws, be it constitutional or ordinary, incrementally expanding their authority beyond the mere translation of human rights norms.[39] Moreover, since structural and binding norms and decisions emanate from a nation-transcending sphere, descending from top to bottom – that is, from the international order to the national context – a universal or general image of legal and political ordering is transmitted to national societies, where constitutions are shaped according to those standards. The subsequent empowerment of national courts combined with a judicialisation of political decision-making has become an effective mechanism for preserving the metanorms and structural guidelines that have increasingly informed a broad range of liberal democracies. The trans-normativity of international institutions and their domestic standing and integration is, in other words, a key stimulator for creating uniformity, consistency and stability amongst and within liberal democracies. Here, we encounter a third dimension of systemic preservation, namely the *trans-political* dimension.

Focusing more on the European context, but closely linked to what has been covered earlier, we can see an accelerated and intensified expression of such dynamics in the accession and integration of nation states into the European Union. In this process, 'inter' is replaced by 'supra' structuring, where domestic power and sovereignty are partially transferred to a superseding entity that relies less on the consent-format that has served as the basis for the inter-state structure. Given that accession to this supra-entity requires a specific institutional composition and that compliance is mandatory and digression sanctioned, the materialization of a systemic blueprint becomes apparent. Here too courts function as intermediary institutions, applying and implementing supranorms in the domestic sphere. In the wake of the ongoing nationalisation of international norms, the supranational project

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38   Ibidem, pp. 88–90.

39   A. Stone Sweet, *Constitutionalism, Rights and Judicial Power*, "Yale Law School: Faculty Scholarship Series" 2008, 77, p. 238.

of the European Union has generated a regional acceleration and intensification of these dynamics. Here, it becomes even more visible how a general standard of political and legal ordering is implemented and solidified in diverse national societies – with little or no democratic authorization.

These two developments show, in short, how liberal democracies are consolidated through a trans-political dimension. Norms and courts transcending national societies and national political communities altogether, have acquired extensive and expansive authority and increase their jurisdiction in relation to domestic politics and laws. Related to their distinct normative authority, these institutions have a less explicit yet gradually increasing influence on the composition of foundational legal/political structures. Constitutional norms are defined and shaped by a transcending order, either in their origination, or gradually through inter-judicial communication.[40] Thus a specific standard, or blueprint, for political and legal organisation on the national level is created, effectively stabilised and consolidated by placing its normative foundational structure beyond the realm of domestic political contestation.

Preservation conceptualised: Militancy sensu lato

In the previous paragraphs an attempt has been made to outline how three different dimensions operate as part of a single consolidative logic, how this has evolved over time, and, subsequently, how these dimensions induce an increasing transfer of power away from domestic political-democratic institutions in order to advance systemic consolidation. On the basis of this outline of systemic self-preservation, or 'militancy', a tentative conceptual suggestion is made here. If we follow the above ideas about liberal democracy's consolidative logic, it becomes clear that the now-dominant concept concerning the protection and preservation of liberal democracy, 'militant democracy', is either flawed or falls short in its conceptual reach. Therefore, an initial and tentative suggestion to revise the concept is made here, so that it fits this reality and includes the abovementioned consolidative dimensions. What is suggested here is not a complete abandonment but rather a reinterpretation of the dominant but limited concept of militant democracy.

What the above has shown is that liberal democracy is 'militant', i.e. self-preserving in a much *broader* fashion than the original concept implies. Hence the proposition of an extended and inclusive reading of militancy – *sensu lato* – that captures the intra-, extra-, and trans-political dimensions described in the previous paragraphs. The concept covered, *militancy sensu lato,* diverges from the original in two ways,

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40   C. Thornhill, op. cit., p. 90.

involving *aim* and *function*. First, in contrast to what the original term 'militant democracy' seems to indicate, 'militancy' aims not merely to protect democracy, but rather involves the preservation of the liberal, ideological foundations informing the political system. Hence, in the formulation of the novel concept, the somewhat misleading attachment 'democracy' is removed.[41] Secondly, related to the concept's functioning, the above has shown that this militancy operates not only through legal means (§ 1.3.) but is also integrated as part of the political structure (§ 1.2.) and exceeds the national domain (§ 1.4.). In other words, if we were to use 'militancy' as a concept related to the preservation of a political system, it should at least provide an answer to the questions of 'what is protected' (aim), and 'how is it protected' (function). In this, the former pertains to the foundational ideological structure of liberal democracy, and the latter applies to the limitation of democratic power. With this in mind, I propose the more inclusive concept, militancy *sensu lato*, which can be understood to include the institutional features of liberal democracy that function as limitation on popular power and thereby see to protect, preserve, and perpetuate the status quo – that is, the political system , its distribution of power and its ideological foundation.

Vertical democracy

In the previous part of the paper, the focus has been on the shaping of liberal democracy and on explaining how this shaping amounts to three distinct yet interlinked dimensions of a single consolidative logic. In this part, a more concrete sketch is provided of how these developments have influenced and altered the anatomy of the political system. What is brought to light here is the process of 'verticalisation'. This process entails that the dimensions of the consolidative logic have created subsequent strata of political hierarchy that have resulted in the erection of a vertical political structure. To provide a clear picture of this transition, a distinction is drawn between 'horizontal' (or 'ideal') democracy and 'vertical' (or 'real') democracy. In line with Roberto Unger's observation that 'the deepest root of all historical change is manifest or latent conflict between the view of the ideal and the experience of actuality',[42] the part hereafter will describe when and how the conflict between ideal and actuality comes to life.

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41   One other option here is not just to remove 'democracy' but to replace it with 'liberalism'.

42   R.M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, New York 1979, p. 153.

Horizontal (Ideal)

In the search for an ideal type of democracy, the most appropriate way is to focus on democracy's etymology. Democracy can be defined as a political system that ensures that the 'people', or '*demos*', are given a considerable amount of 'power', or '*kratos*', over the laws that govern and shape their lives.[43] '*Demos kratos*', or democracy, thus refers to a political system of *self-government*. In this system of self-government, each 'self' is required to be equally empowered to 'rule'; that is, equally enabled to control the rules that shape and influence their life. Equality of political power is, therefore, a fundamental component inherent in the ideal itself. Ideal democracy implies that citizens of a polity enjoy political equality in their ability to rule; they ought to be in control of the rules and structures – even, or in particular, the foundational structures – that shape and determine their life.[44] In such an egalitarian ideal, political power is distributed from one subject to the other and vice versa, resulting in a *horizontal* political model

Figure 1. Horizontal democracy (ideal)
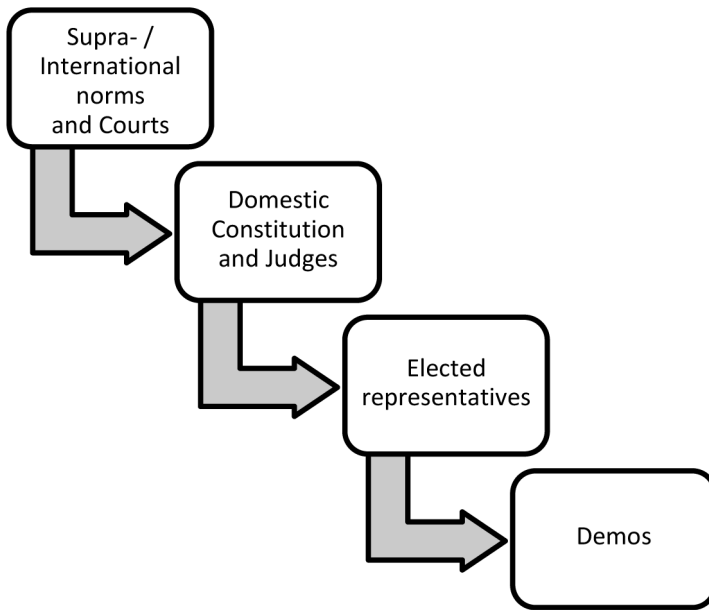

Source: own work.

Vertical (Real)

Compared to this ideal type of democracy, the anatomy of liberal democracy is radically different. One of the main characteristics of liberal democracy's evolution is the process of 'verticalisation'. In the liberal conception of democracy, an increasingly vertical political model emerges. The three dimensions of the consolidative logic have contributed to the vertical establishment of the political framework, with each dimension introducing a subsequent stratum of political hierarchy. First, the post-revolution adoption of electoral mechanisms institutionalises differentiation between rulers and the ruled, introducing the first stratum of political hierarchy. Second, with the constitutionalisation of rights, an unprecedented transfer of

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43   P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, Cambridge 2012, p. 4.

44   D. Held, *Models of Democracy*, Redwood City, CA 2006 (3rd Edition), p. 27.

power from representative institutions to judiciaries has emerged.[45] Courts are granted extensive and ever-broadening (final) decision-making power over fundamental issues of political communities: whereas political power was first in the hands of representatives, now courts are authorised to review and restrain democratic institutions. As political decisions are displaced from legislatures to politically unaccountable courts, the political power of citizens to influence or shape the rules and structures governing their lives is further reduced.[46] The manifestation of courts as final political decision-makers in the national context thus forms a subsequent stratum in the structure of political hierarchy. Finally, and in relation to the domestic transfer of political power, the increasing competence of inter- trans- or supranational norms and decisions engender a further repositioning of political power beyond the nation state. This nation-transcending political and legal reality represents the third and paramount level in the scheme of political hierarchy.

Figure 2. Vertical Democracy (real)

Source: own work.

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[45]   R. Hirschl, *The Political Origins of the New Constitutionalism*, "Indiana Journal of Global Legal Studies" 2004, 11(1), p. 71.

[46]   R. Dworkin, *Political Judges and The Rule of Law*, [in:] idem, *A Matter of Principle*, Harvard 1985, p. 27.

Accordingly, political decision-making power is increasingly distributed and institutionalised in a descending order, enlarging the distance between structural norms and the national *demos*, i.e. the body of citizens collectively[47]. Norms and decisions transcending a nation state are positioned at the apex of political order, informing national constitutions and (politically empowered) constitutional courts domestically. These constitutions and courts, in turn, demarcate the political boundaries of elected representatives. Finally, at the bottom of the structure, resides a *demos*, with the political power to perform a cyclical *ex post* review of a limited group of qualified representatives. Sketching this anatomical composition sees to capture the tension between 'ideal' and 'actuality': whereas horizontal or ideal democracy can be defined as equal distribution of political power for citizens to control the rules and structures under which they live, vertical democracy can be defined as a political system of self-government that distributes political power vertically over several strata in a descending line, in which each above stratum controls and confines the sphere of political influence and decision-making of lower strata. As such, by means of the consolidative logic, an imposing political structure is erected, in which the distance between '*demos*' and '*kratos*' increases, and in whose shadow the democratic ideal of self-government gradually withers.

On Political impotence

Based on the previous two parts, it is suggested that liberal democracy's consolidative logic entails a limitation on democratic power and consists of an intra-, extra-, and trans-political dimensions, which have step by step altered the anatomy of the political system by increasing the distance between *kratos* and *demos* in a vertical direction towards self-introduced strata of political hierarchy. Accordingly, when political power is increasingly distanced from a people, it progressively and effectively becomes *disempowered*. In this final part, the paper turns to a critical follow-up question, asking whether the consolidative logic of liberal democracy is effective or counterproductive. Or, to put it differently, what are the *implications* of previous developments? In this part, therefore, the effectiveness of liberal democracy's consolidative logic is subject to analysis, and the implications of democratic verticality and the consequential disempowerment of a *demos* are explored accordingly.

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47   C.W. Blackwell, *Athenian Democracy: a brief overview*, [in:] A. Mahoney, R. Scaife (eds.), *Dēmos: Classical Athenian Democracy*, Part of: *The Stoa: a consortium for electronic publication in the humanities* (*Center for Hellenic Studies On-line Discussion Series*, [www.stoa.org]), edition of February 28, 2003.

In examining one of more potential implications of disempowerment,[48] I will employ an analogy between 'impotence' as a physiological condition and 'political impotence'. It is suggested that a *demos* in a liberal consolidative and vertical democracy suffers from 'political impotence', and that a politically impotent demos is psychologically inclined to feel – under certain circumstances – resentment towards the political system itself, which sensitises a *demos* to support political *anti*-forces. It is here where the latent conflict between the view of the ideal and the experience of the actuality becomes evident.

Impotence

In order to plausibly counter potential criticism for being merely provocative, it seems necessary to explain why 'impotence' is conceptually preferred to 'power-lessness' to indicate the problem at hand. Hence, I proceed to outline three reasons why the analogy with impotence is adequate and useful to understand the implications of liberal democracy's self-preservation. The analogy encompasses three distinct levels: definition, causes, and symptoms.

First, on the definitional level, the ailment itself, 'impotence', adequately conceptualises the political condition of citizens in liberal democracies. Impotence in physiological terms is defined as the inability to perform sexually. In political terms, impotence refers to the inability to perform politically. Applied in democratic societies, political impotence implies *the inability to effectively influence and partake in formulating the structures and rules under which one lives.* As we have seen in previous parts, the consolidative logic described in part one, and the consequential erection of a vertical democratic reality outlined in part two, produce a political system in which the democratic power of citizens is increasingly curtailed. It is the structural decoupling and the increasing distance between *demos* and *kratos* that produces a tension between the ideal and the actuality. In this actuality, political activity is reduced to the act of cyclical ex-post electoral review of a narrow selection of representatives who are confined to operating within the boundaries of a foundational framework that is placed beyond the realm of political contestation. Whereas democracy implies activity in the making, and thus a mastering of the rules structuring a polity, liberal democracy fosters passiveness and subjugation to rules made and protected by superiors and predecessors. To use Roberto Unger's words, in

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[48]   In this work, I have chosen to focus merely on the implication of 'political impotence' and on questioning how the tension between 'ideal' and 'actuality' operates and comes to its breaking point. In other works, I focus on other implications, e.g. 'civic militancy'. See: U. Eijkelenberg, *Black-Belt Constitutionalism: Considering "Street-Fighting" as a Constitutional Essential*, "Int'l J. Const. L. Blog", Oct. 20, 2018.

liberal democracies, citizens are "incapable of mastering and changing the inherited and established structures of society";[49] meaning that citizens are politically impotent; they are increasingly disabled to effectively influence and partake in formulating the structures and rules under which they live.

Secondly, in addition to capturing the condition in a definitional sense, there is a correlation between both types of impotence in terms of causes. There are generally two main causes of impotence: the first lies within the body itself, meaning an intrinsic, structural impediment of a vigorous, well-functioning (democratic) body. The second cause concerns the administration of external supplements (e.g. medication) that produce or exacerbate the condition. Translated into the political realm, these two causes resonate with the intra- and extra-political dimension of the consolidative logic. Electoral selection, through its inherent differentiation, creates a primary, intrinsic impediment for citizen's engagement, whilst the post-war administration of court-centred and legalistic supplements, introduced to strengthen and preserve liberal democracy, exacerbate the condition. Liberal democracy, therefore, suffers from both the intrinsic and the extrinsic cause of impotence.

Whilst the analogy is useful to understand both the political condition and its causes, it has not yet provided any insight into how this relates to the success or deficiency of the consolidative logic. In order to get there, the focus will be placed on symptoms, and here, the analogy becomes particularly useful in a third way: it directs us toward two psychological conditions common to impotence: *apathy* and *frustration*. In order to grasp these symptoms, the occurrence of each psychological condition is explored in its political context. These psycho-political conditions are *a)* triggered by different circumstances, *b)* related to the will to perform, and *c)* have different political implications.

Apathy and Frustration

Apathy: *the lack of interest, enthusiasm or concern*.[50]

The first psycho-political condition, apathy, occurs in specific circumstances for it requires (*a*) the relative tranquillity in the intra- or extra-political environment and an absence of external stimuli that cause arousal and trigger the desire to perform. In a system in which democratic activity is slowed down, representation is a game

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[49]   R.M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy*, Brooklyn, NY 2001, pp. xxiv–xxix.

[50]   *Oxford Dictionary*: *Apathy.*

of few rather than all, and political endeavours are increasingly limited by depoliticised metanorms and judicial interventions, political activity and participation become dispensable. The rigid, vertical, and limitation-induced structure of liberal democracy, combined with the relative tranquillity in the intra- or extra-political environment, reduce the incentives to perform politically. Hence, the relative tranquillity in the intra- or extra-political environment fosters (*b*) passiveness amongst political subjects. This passiveness is expressed (*c*) in an indifference towards and abstention or withdrawal *from* politics. Such withdrawal is visible, for example, in the decrease of voting numbers and a decline of political party membership.[51]

> **Frustration**: *The feeling of being upset or annoyed as a result of being unable to change or achieve something.*

However, in times in which the relative tranquillity of the environment is disturbed and a subject is aroused – i.e. (*a*) moments of crises – the will to perform increases. Crises are moments in which political subjects are most eager and willing to perform, and passiveness is substituted with (*b*) activity. This implies that in liberal democracies, crises become the main vehicles of political action and change. Without crisis, there is no change, or, "no trauma, no transition".[52] In a state of impotence, however, the crisis-induced activity is *reactive* in nature: when external stimuli increase the desire to perform, but the ability to do so does not follow suit, the subject becomes confronted with and aware of their impotence. The direct confrontation with and awareness of the impediment provokes resentment vis-à-vis the position of powerlessness.[53] This resentment is in essence a negating force; it is felt and expressed as a 'no' against the outside world; it needs an outside orientation, an external stimulus, to act, and needs the 'other' to determine who the 'I' is. Frustration is visible when *positive* action is transmuted into *negative* reaction. In other words, as the psycho-political condition transitions from apathy to frustration, it transforms from a lack of interest (apathy) to the feeling of being upset as a result of being unable to change or achieve something (frustration). And whereas political impotence initially *suppresses* the positive activity of the subject (apathy), it subsequently emphasises the negative forces of reactivity at moments when performance is most desired (frustration). Consequently, where political impotence initially results in apathy expressed as a withdrawal *from* politics, the crisis-based frustration is conveyed (*c*) by reactivity and a negation *in* politics.

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[51]   D. van Reybrouck, op. cit., pp. 14–16.

[52]   R.M. Unger, *The Self Awakened: Pragmatism Unbound*, Harvard 2007, p. 41.

[53]   F. Nietzsche, *De Genealogie van de Moraal*, Amsterdam 2014 (6th Edition), p. 120.

Table 1. Implications of political impotence

Condition	Apathy	Frustration
Circumstances	Tranquillity	Crisis
Performance	Passive	Reactive
Implication	Withdrawal *from* politics	Negation *in* politics

Source: own work.

New Populism

To return to the introduction of this paper and the crisis of liberal democracy: the 'new populism' currently vibrant and prominent in a multitude of liberal democracies is an evident manifestation of frustration-based political movements. Driven by crises, most populist forces are indeed reactive and characterised by a lack of a positive, self-defining agenda. They are contingent on the existence of an outside entity to enhance their own identity and viability: anti-immigrants, anti-Europe, anti-establishment. It seems to be a mathematical formula: the more explicit the reaction against an outside entity is expressed, the less comprehensive and clear-cut a positive self-defining political agenda can be.[54] As such, populist parties can be seen jumping from crisis to crisis, effortlessly changing their emphasis and identity (be it anti-immigrants, anti-European Union etc.). This type of reactive politics is effective mainly in a context of political frustration. Populism lurks in increasingly impotent political societies; to be politically viable, however, populism depends primarily on external stimuli that arouse and advance the societal self-reflection and awareness that is needed for the impotence-based frustration to manifest itself and to be successfully exploited. In other words, political impotence creates fertile grounds for political frustration to develop and erupt during crises, and to be capitalised on by reactive political forces. From the perspective of liberal democracy, it is worrying that the frustration-induced reactive energies are increasingly often channelled at key institutions of the political system itself. With the arrows of frustration targeted at its central institutions, modern liberal democracies become victims of disruptive challenges that seriously and deeply affect their stability.

Whereas the structural composition of liberal democracy evinces that limitation on democratic power is perceived as a suitable tool for the preservation of the poli-

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[54]   A case to illustrate it is Geert Wilders PVV's party programme of *one* page, dealing entirely with reacting against Islam.

tical system and its ideological foundations, now, however, this consolidative logic seems to have adverse effects. The analogy with impotence helps to understand how and why the shaping of the political system contributes to the frustration palpable in many liberal democracies, how the tension between 'ideal' and 'actuality' comes to erupt, and how its structural composition could be perceived as contributing to rather than preventing the successful rise of anti-systemic, populist political movements. Much like Sheri Berman, who argues that "too often scholars and other observers praise 'order' and 'stability' without recognizing that these are purchased at the price of greater disorder and instability down the road", this paper attempts to be more attentive to the implications of advancing systemic stability at the cost of democracy. Liberal democracy is facing reactive resentment for which it itself is to blame; a tendency, moreover, which due to the built-in consolidative vigour can hardly be reversed. In that sense, liberal democracy produces and is exposed to its own fragility; its self-preserving endeavours inadvertently create a fertile soil for major structural changes that undermine the stability of the system. Or – as I have put it somewhere else – "blinded by the fear of what might happen, liberal democracy has chosen a remedy that creates the conditions in which the dreaded situation is most likely to occur".[55]

Conclusion

This paper addresses the much-debated crisis of liberal democracy. An attempt is made to understand this crisis, its causes, and its implications. In doing so, the focus has been on internal, structural, and institutional features of liberal democracy itself as potential causes of the crisis. Central to the analysis is the idea that the consolidative efforts of liberal democracy embody a disruptive and therefore counterproductive potential. In order to address this issue, the first part of the paper focuses on the core elements of systemic preservation, and by analysing the shaping of the political system and its relation to its self-preservation, a 'consolidative logic' is presented. Central to this has been the outline of three crucial developments that constitute an intra-, extra-, and trans-political dimensions of a single consolidative logic, which institutionalise democratic limitations. On the basis of this logic, a tentative reconceptualization – 'militancy *sensu lato*' – is proposed to capture the multidimensional understanding of systemic preservation as described in this work. The second part of the paper offers a brief sketch of the effects of the consolidative logic on the anatomy of the political system by referring to a process

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55   U. Eijkelenberg, *Black Belt Constitutionalism...*, p. 1.

of 'verticalisation'. Emphasised here is how the multiple dimensions of the consolidative logic have altered the anatomy of liberal democracy and contribute to the tension between 'ideal' and 'actuality' by each creating subsequent strata of political hierarchy. In such vertical democracies, the distance between *demos* and *kratos* increases, and the political vigour of the body of citizens collectively diminishes. The third part, finally, focuses on the implications of the consolidative logic and the verticalisation of political power by making an analogy between political and physiological impotence. A politically impotent society is psychologically inclined to feel, under certain circumstances, resentment towards the political system itself, and sensitises a *demos* to support systemic *anti*-forces. It is suggested, therefore, that the consolidative endeavours of liberal democracy dominant in both theory and practice manifest a counterproductive potential; as the tension between 'ideal' and 'actuality' erupts in erratic moments of awareness, the virulent vigour of frustration comes to deteriorate the social and political stability of the system at large. To conclude this paper I therefore suggest a conversion of the argument; the crisis that liberal democracy is experiencing now does not occur *in spite of* but rather *because of* its consolidative avidity.

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