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# Constitutional Self-Defense in the 21st Century

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Protecting Liberal  
Democracy and  
the Rule of Law

## Introduction

This policy paper addresses challenges to the liberal constitutional order with the aim to identify possible venues to secure and uphold liberal democracy and liberal constitutionalism. The focus will be on measures that will strengthen the normative force of the liberal constitution. The concept of constitutional self-defense, building on the idea of militant democracy and constitutional patriotism, will be introduced and defined. The main purpose is to identify what constitutional (legal and political) preconditions are needed in order to protect liberal democracy and the rule of law.

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**Anna Jonsson Cornell**

Faculty of Law, Uppsala  
University

**FORES**



# Constitutional Self-Defense in the 21st Century

## Protecting Liberal Democracy and the Rule of Law

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### 1. Introduction

Liberal democracy and constitutionalism go hand in hand. Constitutionalism, as understood and explained by Dieter Grimm<sup>1</sup>, is a system in which political power is bound by a constitution that expresses certain values, including the protection of fundamental human rights and freedoms, separation of powers and independence of the judiciary. In a political system characterised by constitutionalism, public power is exercised on the basis of legality and respect for fundamental rights. And rule of law, in the thick sense of the term as defined by Brian Z. Tamanaha<sup>2</sup>, is a principle respected and upheld by all holders of public power.

In challenging times where disinformation and populism, together with the dismantling of independent judiciaries, erosion of separation of powers, and a weakened human rights protection for vulnerable groups and minorities, are on the rise, the question of whether liberal democratic rule of law states are able to protect themselves and their core values arises. The conundrum of a liberal-democratic rule of law state is the difficulty it has to protect itself without acting in contradiction with its most fundamental principles and rights. “The constitution is not a suicide pact” is a phrase emanating inter alia from the case law of the US Supreme Court<sup>3</sup>, which is frequently used to describe the core of the conundrum.

This policy paper addresses challenges to the liberal constitutional order with the aim to identify possible venues to secure and uphold liberal democracy and liberal constitutionalism. The focus will be on measures that will strengthen the normative force of the liberal constitution. The concept of constitutional self-defense, building on the idea of militant democracy<sup>4</sup> and constitutional patriotism<sup>5</sup>, will be introduced and defined. The main purpose is to identify what constitutional (legal and political) preconditions are needed in order to protect liberal democracy and the rule of law.

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1 Dieter Grimm, *Constitutionalism: Past, Present and Future*, Oxford University Press, 2016.

2 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, 2004.

3 This is not the exact wording of how the idea has been expressed in decisions by the US Supreme Court. See for example *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

4 Karl Loewenstein, “Militant Democracy and Fundamental Rights, I”, *The American Political Science Review*, Vol. 31, No. 3 (Jun., 1937), pp. 417-432, Karl Loewenstein, “Militant Democracy and Fundamental Rights, II”, *The American Political Science Review*, Vol. 31, No. 4 (Aug., 1937), pp. 638-658.

5 For an introduction to and elaboration of the concept see, Jan Werner Müller, *Constitutional Patriotism*, Princeton University Press, 2007.

## 2. Liberal v. illiberal democracy

The starting point for this paper is inherently normative in the sense that it sets off from the notion that liberal democracy is the current political norm in Western democracies, and that this is a system worth preserving. Liberal democracy as a normative idea and political system is being challenged both from within the West, and by states in other parts of the world.<sup>6</sup> State leaders and political party representatives declare that liberal democracy is not the only democratic system, at the same time as they set out to redefine European- and international law.<sup>7</sup> This must be taken seriously both intellectually, legally, and politically. Those who oppose liberal democracy generally have a narrow definition and understanding of democracy which is mainly procedural and with an emphasis on popular sovereignty and the will of the majority. This understanding of democracy does not value qualitative aspects such as individual freedom, separation of powers, and the protection of minorities. In such systems, the will of the majority rules, and there are no or very few and weak, built-in mechanisms to protect democracy as a political system. In addition, rule of law is discarded as a principle and relativised in terms of importance, i.e., put second in relation to the will of the majority as expressed by the party in power.

Liberalism, both as a normative concept and a model for organising the state, takes its starting point in individual freedom. A liberal democracy is a political system which is defined by liberal principles, such as freedoms of association, expression, and assembly, and which has a constitutional system set up to secure the core values of a liberal democratic state, including separation of powers and an independent judiciary. Rule of law and the protection of minorities are necessary for a liberal democracy. As argued by Takis S. Pappas “Given the interdependency of such conditions, the polity ceases to qualify as a liberal democracy even if only one of them is violated.”<sup>8</sup>

Illiberal democracy and illiberal constitutionalism, although contested concepts<sup>9</sup>, are useful for understanding a situation in which the constitution as a normative document still exists, together with an electoral democracy, at the same time as

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6 Takis S. Pappas, *Populism and Liberal Democracy: A Comparative and Theoretical Analysis*, Oxford University Press, 2019, p 7. Pappas makes an interesting distinction between declarative (based on the stated political and intellectual preferences of an individual or a state) and evaluative (based on studies and analysis) normativity.

7 Already in 2006 Russian politicians and thinkers introduced the concept sovereign democracy in order to create acceptance and legitimacy for an alternative to liberal democracy, with the goal to underline that national identity, culture and history need to be taken into account when a state designs its constitutional, political, and legal framework. This also set the pathway towards political domination by one political party, United Russia. On the same theme, and in preparation for the elections to European Parliament in 2018 Victor Orban stated that “Christian democracy is not liberal...It is illiberal, if you like.” Quoted in Reuters, <https://www.reuters.com/article/us-hungary-orban-idUSKBN1K10BK>, last accessed on Nov. 2, 2021. Taken together this illustrates a trend towards a parliament dominated by one party, and re-nationalisation of constitutional law, which in itself is a counter reaction to the Europeanisation of constitutional law that followed after the dissolution of the Soviet Union.

8 Pappas 2019, p. 2.

9 As explained in Drinóczi, T. & Bień-Kacała, A, “Illiberal Constitutionalism: The Case of Hungary and Poland”, *German Law Journal* 20, 2019, pp. 1140–1166.

the political process and the outcome thereof are clearly illiberal. Pappas raises an important point in this context, namely that should the democratic ethos in an illiberal democracy be done away with, the next step is authoritarianism. His main point is that an illiberal democracy should be seen as a balancing act between liberal democracy and authoritarianism, and if it is possible to counter its illiberal dispositions, a liberal democratic order can be reinstated.<sup>10</sup> But how can this be achieved, what preconditions are necessary to turn the development around? In this context, the main questions, theoretically and from a policy point of view, are how do liberal democracies turn into illiberal democracies? What processes are at play and what is required to reverse such a transition once it is evident?<sup>11</sup>

Drinóczi and Bień-Kacata<sup>12</sup>, understand illiberal constitutionalism as a status quo in states that already experienced liberal democracy and constitutionalism, and who is backsliding into illiberal democracy and illiberal constitutionalism. The transformation process is, according to them, supported by a misconception of political constitutionalism and overemphasis on national identity. "Illiberal constitutionalism is not the opposite of liberal constitutionalism, but instead a state in which the political power relativizes the rule of law, democracy, and human rights in politically sensitive cases; constitutionalizes populist nationalism; and takes advantage of identity politics, new patrimonialism, clientelism, and state-controlled corruption."<sup>13</sup>

The authors compare the development in the beginning of the 21st Century in Poland and Hungary and reaches an important conclusion: transformation into illiberal democracy and illiberal constitutionalism in Hungary was formal in the sense that it took place within the constitution, while the transformation in Poland was made by informal tools which violated, abused, and de-legitimised the 1997 constitution. Research applying process-tracing methods shows how both states applied a strategy that involved taking control of the constitutional courts, which was done by court packing, changing the appointment process of constitutional court judges (Hungary) or their decision-making process (Poland), and thereafter the reforming of the judicial system and rules regarding the prosecutor general.<sup>14</sup> As a result, these constitutional courts can now be considered as servants of the illiberal regime. The latest decision by the Polish Constitutional Tribunal on the status of the EU Charter on Fundamental rights in the Polish legal system is a testament to this.<sup>15</sup> Courts in general, and constitutional courts in particular, can act as key players in the tipping game between a return to liberal democracy and liberal constitutionalism, on the one hand, or moving forward towards

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10 Pappas 2019, p. 3-4.

11 It should be noted that this paper does not deal with transitions in non-democratic and authoritarian states such as Russia and China, which have not in modern times been defined as democracies.

12 Drinóczi, T. & Bień-Kacata, A 2019, p. 1141.

13 Ibid

14 Ibid p. 1145.

15 [Trybunal.gov.pl](https://trybunal.gov.pl), accessed on October 11, 2021. The Polish decision follows a pattern, developed by inter alia the Russian Constitutional Court, of declaring the national constitution to be of the highest legal status in the national legal order, to the detriment of international and European Law (in the case of Russia ECHR and in the case of Poland, EU-law). This trend, and strategy, of what I call re-nationalisation of constitutional law is likely to increase.

authoritarianism, on the other.<sup>16</sup> In cases like Poland and Hungary, constitutional courts are controlled by the illiberal regime, which means that the tipping game is more likely to play out in ordinary courts.

It is vital to understand the logic behind strategies employed to turn liberal democracies into illiberal democracies. It could be argued that states that apply such strategies still have a pragmatic and probably instrumentalist view of the constitution as a normative document and on the role played by the judiciary and constitutional courts as both legal and political actors. This is certainly the case concerning the initial phase of Hungary's transformation into an illiberal democracy which took place within the boundaries of the constitution.<sup>17</sup> The Polish case is slightly different in that some of the reforms violated the Polish constitution, which also made it easier for the EU to push along with more force. The question that lingers is then if (and if yes, how) it is possible to tip the balancing act in favor of liberal democracy and liberal constitutionalism with the help of domestic courts (general courts, not constitutional courts if they have been politicised), domestic political opposition, and external actors that still can exert leverage on the illiberal regime? The answer to this question is crucial for defining steps towards constitutional self-defense.

### **3. Why and how is the idea of liberal democracy and liberal constitutionalism challenged?**

Clearly, there are several causes and explanations to the current challenge of the idea of liberal democracy and liberal constitutionalism, including the anti-globalisation movement, nationalism, corruption, migration crisis, and terrorism. These are all causes or plausible explanations that carry different magnitude in terms of how and why they contribute to the challenge of liberal democracy and liberal constitutionalism. There is not enough space to discuss the political processes and actual events that lay behind this development here.

There is however one overriding change in society that poses a major challenge to liberal democracy and liberal constitutionalism; the increasing polarisation between different groups in society and the inability of political leaders to mitigate between these groups together with the willingness, amongst politicians and other power brokers, to exploit and fortify polarisation for individual gains. How polarised groups are composed will be determined by the questions at hand; the most frequent currently being ethnicity, religion, social-economic status, rural v urban population, and migration.

A public debate and public space dominated by polarisation creates a sense of insecurity. Insecurity is a strong, and for many, real sensation. This also means that politicians have a strong incitement to address the sense of insecurity, and when doing so politicians frequently apply a rhetoric based on emotions, combined with a sense of belonging, hence risking to fortify group identities, the sense of insecurity, and thereby processes of polarisation. This phenomenon is

<sup>16</sup> On this point see, Ginsburg, T. & Moustafa, T., *Rule by law: the politics of courts in authoritarian regimes*, Cambridge University Press, 2008.

<sup>17</sup> Drinóczi, T. & Bień-Kacała, A, 2019, pp. 1140–1166.

sometimes described as populism.

In 2017, populism was announced by the Cambridge Dictionary word of the year.<sup>18</sup> Still, there is no theory analysing and describing what we mean by populism. Pappas views populism as an opposition to political liberalism. His research shows that a system guided by populism, and which is also balancing between liberalism and autocracy, is inherently vulnerable and hence more prone to transition towards authoritarianism than a return to liberalism.<sup>19</sup> Pappas reaches the conclusion that several “cases of populist ascent to office have either coincided with, or been preceded by, either the absence of an established party system or the precipitous decline - and often collapse - of previous party systems.”<sup>20</sup> He adds that a crisis in the representative system has in some cases been orchestrated by political leaders in young and what Pappas describes as “poorly institutionalized liberal democratic policies”.<sup>21</sup> In Hungary, a strategy resting on polarisation and a domination of the center liberal arena allowed for Victor Orbán to create a de facto two-party system that would further strengthen Fidesz’s position as the dominant power. The modus operandi of populist parties that have come to power via elections have, according to Pappas, followed a blueprint consisting of four major parts:

- a. colonising the state with loyalists;
- b. reinforcing the party and state leader’s executive capacity;
- c. assaulting liberal democratic institutions, and;
- d. utilising various forms of state patronage to the benefit of their supporters.<sup>22</sup>

If we were to try to capture the core and substance of the current illiberal trend, especially in Europe, but also in the US and Russia, it could be illustrated by the following strategies and actions:

- rhetoric and actions that relativise the rule of law and protection of fundamental rights and freedoms, especially for already vulnerable and marginalised groups of society;
- an emphasis on, and potentially abuse and manipulation of, popular sovereignty and the will of the people<sup>23</sup>;
- the interest of the nation and its national (and constitutional) identity and security, i.e., identity politics with a nationalistic agenda, is put forward as arguments supporting illiberal actions and decisions;
- political decisions resting on emotional arguments rather than on scientifically proven and evidence-based conclusions.

18 Pappas 2019, p. 1.

19 Pappas 2019, chapter 5. Drinóczi, T. & Bień-Kacała 2019 make a similar observation when they refer to the misconception and abuse of political constitutionalism and the idea of the sovereignty of the people in for example Hungary and Poland.

20 Pappas 2019, p. 134.

21 Ibid

22 Pappas 2019, p. 210.

23 See Drinóczi, T. & Bień-Kacała, A 2019, p. 1149. Already in 2012 Joakim Nergelius made the point that the new constitution aimed to “enforce and strengthen the powers of the governing party, in a way that will make it more difficult for other political parties or groups to be reckoned with and to really be able to influence society in the future”, Joakim Nergelius, *The Hungarian Constitution of 2012 and its protection of fundamental rights*, EPA 2012:3, Sieps, p. 6.

The connection between constitutional identity (as in constitutionalism) and national identity (as in nationalism), in combination with a process of re-nationalisation of constitutional law that has been going on for quite some time is particularly worrisome. The development in this direction has been propelled forward by the migration crisis in 2015, and the pandemic in 2020 and 2021.

## 4. Rule of Law

In this section we will connect back to the illiberal blue-print that Pappas identified, in order to illustrate how rule of law can be manipulated in the process towards illiberalism. First, on colonizing the state with loyalists, Sajo and Tuivonen illustrate how in Hungary the state-private relation played out within the formal framework of the law. Foes were ousted and loyalists let in to take control of media, private companies and other crucial establishments, all within the legal framework. Hence, rule of law was respected, in the formal sense. They also underline the difficulty in detecting illiberal strategies at an initial phase, *inter alia* because legitimacy is sought in the political rhetoric by referring both to the rule of law and the will of the people.<sup>24</sup> The latter is referred to in attempts to justify a thin understanding of the rule of law (procedural, formal).<sup>25</sup> Second, in states where the ruling majority has sought to consolidate power, it is often done with reference to the constitution and within its framework. Again, a formal and thin idea of the rule of law is employed to create legitimacy for the reinforcement of the executive power.

In sum, a crucial part of the strategy to turn a state into an illiberal democracy is to maintain the façade of a rule of law state, which includes attempts to “bend the judiciary to its will, while wanting to be seen as following the rules.”<sup>26</sup> This is important to the regime because of the strategic importance of international collaboration, international trade and investment, and domestic public opinion. Herein lies the driving force for setting the agenda as regards the narrow and shallow understanding of rule of law. We can clearly see this in the international, regional and national level. States on a path to illiberalism and potentially authoritarianism adhere to a formal and procedural minimalistic rule of law concept for strategic reasons; it benefits those loyal to the current regime, and it allows for a rule of law rhetoric in international cooperation, as well as within the financial sector. A thin rule of law concept, focusing on the principle of legality, also allows for concentration of power with reference to the will of the people and popular sovereignty. The law is considered an expression of the will of the people; hence it must be just. Institutional changes that will lead to increased political control of for example the judiciary, can from a minimalistic procedural point of view be described as in accordance with the formal framework and hence in accordance with the rule of law although the effect of the changes is an

24 Sajo, A. & Tuovinen, J., *The Rule of Law and Legitimacy in Emerging Illiberal Democracies*, 2019, p. 507, [https://www.researchgate.net/publication/338254402\\_The\\_Rule\\_of\\_Law\\_and\\_Legitimacy\\_in\\_Emerging\\_Illiberal\\_Democracies](https://www.researchgate.net/publication/338254402_The_Rule_of_Law_and_Legitimacy_in_Emerging_Illiberal_Democracies)

25 Tamanaha 2004.

26 Sajo, A. & Tuovinen, J., 2019, p. 511.

increased political control.<sup>27</sup> As a result, any strategy to counter illiberalism must take this into account and expose attempts to undermine the thick rule of law.

## 5. Militant democracy and constitutional patriotism – the conceptual foundation of constitutional self-defense

It is important to recognise the limitations and vulnerabilities of the formal aspects of a liberal, democratic, rule-of-law state and the importance of a political and civic culture that understands and protects the value and premises of the formal aspects of a liberal democracy and rule of law. The best safeguard is thus not necessarily the formal aspects of the constitution, but rather what Habermas and others, building on Sternberger's idea, have termed constitutional patriotism.<sup>28</sup>

Sternberger's idea of constitutional patriotism was primarily about protecting the democratic system and its most vital institutions, including the constitution and the rule of law. As highlighted by Müller, Sternberger's understanding of constitutional patriotism is close to Karl Lowenstein's ideas on militant democracy.<sup>29</sup>

The core in Karl Lowenstein's idea on militant democracy is that illiberal political parties can be stopped by legal means. Lowenstein argues that opinions and beliefs cannot and should not be criminalised. Rather, focus should be on criminalising actions and measures that are needed in order to fulfill political strategies, based on fascist ideas and techniques or any other radical and subversive extremism, that aim to gain and consolidate power. Lowenstein underlines that fascism is not primarily a political ideology; it is first and foremost a political strategy and should be fought as such.<sup>30</sup> Populism, with the same argument, is not an ideology, it is primarily a political strategy<sup>31</sup> and hence policies and measures to counter populism should take this into account.

In Europe during the 1930s, several legislative acts were directed at inter alia criminalising the establishment of paramilitary groups, private armies and political uniforms.<sup>32</sup> The main purpose was to maintain peace within (and possibly between) European states, and to secure the unity and integrity of the state.

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27 This refers to inter alia the organization of court administration, the appointment procedure and responsibility of court presidents etc. See *ibid* p. 516-518 for examples.

28 Müller 2007.

29 Constitutional patriotism has been criticised for several reasons elaborated and explained by Jan-Werner Müller in his book *Constitutional Patriotism*. Some critics would argue that the idea of constitutional patriotism is too abstract, that it in any case must rest on a national identity and a proper functioning state, and hence it cannot serve as a strong enough counter idea to liberal nationalism, that it has a top-down perspective and that it is unrealistic in terms of how identities are crafted, and finally that patriotism in itself is a controversial and outdated concept that should be avoided.

30 Karl Lowenstein, "Militant Democracy and Fundamental Rights, I", *The American Political Science Review*, Vol. 31, No. 3 (Jun., 1937), pp. 417-432, p. 431.

31 See Pappas 2019, p. 213.

32 As was the case in for example Finland and Sweden, see Karl Lowenstein, "Militant Democracy and Fundamental Rights, II", *The American Political Science Review*, Vol. 31, No. 4 (Aug., 1937), pp. 638-658, p. 639. It is interesting to note in the beginning of the 1930's neither Germany nor Spain took any strong actions against political uniforms and the formation of private armies. *Ibid* p. 648.

In order to achieve this goal, subversive forces applying fascist techniques<sup>33</sup> were forced into the constitutional legal order by legal measures that criminalised certain behaviour. This, in its turn, resulted in a change of strategy and tactics amongst the fascist political forces. "Within the limits of the possible, it immunized the state against fascist techniques and prepared the country for defense if and when a final clash of doctrines can no longer be avoided."<sup>34</sup> Thus, the first, and necessary steps, towards constitutional self-defense were taken.

"... constitutional patriotism... would allow for an identity that did not rely on an ethnically-centred nationalism."

Both militant democracy and constitutional patriotism are closely related to the period leading up to WWII. In the mid-1980s, Jürgen Habermas popularised the latter term. In his understanding of the concept, constitutional patriotism was the only viable collective identification for West Germans, since it would allow for an identity that did not rely on an ethnically-centred nationalism.<sup>35</sup> Habermas elaborated the concept to also include the social aspects of the state, i.e., those that require a functioning welfare state. By doing so, democracy, as a social system could be

upheld, and a public space for debate secured.<sup>36</sup> A more recent take is provided by Jan Werner Müller who understands constitutional patriotism as "the idea that political attachment ought to center on norms, the values, and more indirectly the liberal procedure of a liberal democratic constitution."<sup>37</sup> Or as a legal scholar would put it; on liberal constitutionalism and the rule of law.

Current threats to liberal democracy differ from the threats posed in the 1930s. In today's Europe, and main parts of the world, it is not open rebellion, subversion, or conspiracy against the state which constitute the main challenges. Moreover, most states have a proper constitutional and criminal legal framework in line with the idea of militant democracy to counter such threats should they arise. The current threat is instead best described as a capture of the liberal democratic rule of law state within the constitutional framework applicable. Hence it is not necessarily only a state capture but rather a constitutional capture, although the two are intrinsically interlinked. In order to protect against constitutional capture something more than militant democracy and constitutional patriotism is required. A proper constitutional self-defense needs to be put in place.

33 The fascist techniques pointed out by Loewenstein included, besides inter alia rebellions, violence, threats and violent provocations "[...] the more subtle weapons of vilifying, defaming, slandering, and last but not least, ridiculing, the democratic state itself, its political institutions and leading personalities." Ibid p. 652.

34 Ibid p. 644.

35 Müller 2007, p. 22.

36 Ibid p. 24.

37 Ibid

## 6. What is constitutional self-defense and how can it be achieved?

*"The most perfectly drafted and devised statutes are not worth the paper on which they are written unless supported by indomitable will to survive."<sup>38</sup>*

Constitutional self-defense refers to a legal and political situation in which the constitution is considered a legally binding document by society as a whole. Its values are entrenched in society, its words and spirit respected by politicians, civil servants, judges, business, civil society and the population. The constitution has built in mechanisms that would prevent it from being captured by illiberal and authoritarian forces. Society in general, including civil society and the public, would protest forcefully against any attempt to sideline or amend the constitution in any way that would damage its normative force.

At the beginning of the 21st Century, it has become clear that illiberal democracies need and treasure the legitimacy that comes with adhering, at least nominally, to the constitution. Major political changes are seldom forced through in direct violation with the black letter of the constitution. Strategies are more sophisticated and directed at changing the substantial meaning and content of concepts such as democracy, rule of law, constitutional identity, and national security. Such strategies could be described as "concept kidnapping" that aims to empty said concepts of their liberal values and content. This is crucial for understanding the need for, and purpose of, a liberal constitutional self-defense.

Traditionally the organisational and institutional aspects of the state are laid down in a constitution or ruled by constitutional conventions (traditions). Constitutions thus provide the formal setting of the political, legal and social playing field. We have seen how states like Poland and Hungary by either constitutional or unconstitutional amendments have changed the constitution and the normative foundations of the state. EU law is one important factor that these states do not control, that they are bound by, and hence must consider. This is of course also why Hungary and Poland are prepared to take the fight with the EU concerning issues such as rule of law and independence of the judiciary. It is aggravating to see, with the benefit of hindsight, how Poland and Hungary were able to change their constitutional orders without any serious repercussions from the EU. In parallel with changes to the national constitutional order, politicians have applied a rhetoric referring to EU constitutional law concepts such as national security and constitutional identity as support for the re-nationalisation of constitutional law. This is a political strategy aiming to weaken the position of EU law in national legal orders while at the same time undermining EU's competence claims, and in the long run, its legitimacy. It has been argued that the EU failed to see the development in Hungary and Poland as systematic challenges to the rule of law and liberal democracy and that this could explain the initial EU position.<sup>39</sup>

<sup>38</sup> Karl Loewenstein, "Militant Democracy and Fundamental Rights, II", *The American Political Science Review*, Vol. 31, No. 4 (Aug., 1937), pp. 638-658, p. 657.

<sup>39</sup> "Here a combination of a general attitude of deference by international bodies, an emphasis on the procedural aspects of democracy, ill-defined or under theorized concepts such as the constitutional

Taken together this poses substantial challenges for the EU moving ahead. If constitutional capture is a strategy by populist regimes, the EU need to develop strategies and adopt measures that could counter such a strategy.

“... there is no evidence suggesting that illiberal democracies... would be more efficient in guaranteeing the security of the state or its population.”

A common trait between subversive strategies as described by Loewenstein and strategies applied by populists in the 21st Century is emotional politics. Responsible leadership in general, and political leadership in particular, requires a knowledge and an evidence-based approach. Liberal democracies are not by definition incapable of handling severe societal crises and difficult balancing acts between different legitimate interests. And there is no evidence suggesting that illiberal democracies, or authoritarian states, would be more efficient in guaranteeing the security of the state or its

population. It is, of course, legitimate to address the population’s concerns, and values might clash and hence need to be balanced against each other. Measures taken should however rest on scientific foundations, tested models, and an evidence-based approach, together with an openly accounted for balancing of different values and interests. By doing so, legislatures and policy makers will avoid the temptation to fall back on quick fixes with high potential impact on the part of the electorate that one tries to appeal to. Such an approach will also save courts from having to take the political blame for taking difficult decisions.

It is important to recognise that populism, as the foundation of illiberal democracy, is not a political ideology. It cannot be. It is a political strategy, which rests on polarisation as a tool, and a situation in which polarisation is constructed in order to gain and maintain power.<sup>40</sup> In this context, it is important to recognise that consensual and moderate political solutions are looked down upon by the populist political leaders for instrumentalist and strategic reasons, and by its followers, whom consider necessary traits and compromises for moderate and consensually oriented political system as signs of weakness. Hence, the issue of political leadership cannot be underestimated in the process of designing strategies and policies that will counter a development towards illiberal democracy and illiberal constitutionalism.

Institutional safeguards to protect liberal democracy is only one of several necessary components. Constitutional design, constitutional culture, and level of the entrenchment of the constitution in society and politics are important factors

identity and the rule of law have resulted in a system where questions about constitutional backsliding have been effectively side-stepped, or perhaps more accurately, ignored. Even where these issues arise and are dealt with on point, problems about the proper level of intervention remain.” Sajo, A. & Tuovinen, J., 2019, p. 526.

40 Pappas 2019, p. 213. Compare with Karl Loewenstein’s argument how constitutional government was replaced by emotional government in Europe during the mid-20th Century and how this led to authoritarianism, and that fascism is not an ideology, but a political technique. “This technique could be victorious only under the extraordinary conditions offered by democratic institutions. Its success is based on its perfect adjustment to democracy.” Loewenstein 1937, part I, p. 423

that need to be taken into account when defining a policy on constitutional self-defence.

## 7. Constitutional design as a safeguard against or enabler of illiberal democracy and illiberal constitutionalism?

The main focus in this part of the paper is on constitutional design matters that could help prevent constitutional capture by an illiberal regime.<sup>41</sup> At least three themes are of overriding importance. First, the wording of the constitution. Constitutions which are general and vague leave a large room for maneuver for both politicians and courts. When it comes to aspects that are vital for the democratic and rule of law system the wording of the constitution should therefore be detailed and specific. This is especially the case concerning the model of separation of powers, independence of the judiciary, and fundamental rights and freedoms (especially civil and political rights). Second, in order to prevent abuse of political constitutionalism with reference to the will of the people, a constitution should have clear rules on how to amend it and with a high threshold. Changes to the constitution should require among, other things, a qualified majority and procedure that allows for multiple stakeholders to be part of the process. This is especially important in relation to the part of the constitution that regulates the foundations of the state, separation of powers, independence of the judiciary, and fundamental rights and freedoms.<sup>42</sup> The main purpose would be to make it difficult for a dominating party to change the constitution in order to consolidate its power. Third, independence of the judiciary should be regulated, in detail, in the constitution. In detail this means that the foundation of the judicial system, including the number of judges in the highest courts and their retirement age, together with the nomination process, should be regulated in the constitution. In addition, judicial review, especially constitutional review, should be regulated in the constitution. This is especially important taking into consideration the role that courts play in securing the normative force of the constitution, as well as deciding its content through constitutional interpretation.

The importance of courts, and constitutional courts in particular, to uphold the preconditions for liberal democracy and the rule of law, which is in itself necessary to achieve liberal democracy and liberal constitutionalism, can hardly be underestimated. In post-war Germany the question “Who guards democracy?”

41 The doctrine on constitutional design is vast and several important comparative studies have contributed with empirical facts improving our understanding of the role of constitutional design. See for example, Ginsburg, T., *Comparative Constitutional Design*, Cambridge University Press, 2012, Lutz, D-S., *Principles of Constitutional Design*, Cambridge University Press, 2006, Albert, R., *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, Oxford University Press, 2019. In addition, the Venice Commission of the Council of Europe has adopted a substantial number of opinions and studies on matters of constitutional design of importance for protecting democracy and rule of law.

42 Several techniques that would allow for multiple stake-holders to take part exist. It could for example involve the requirement that amendments be voted on two times, with a general election preceding the second decision on the amendment (as in Finland and Sweden), the formation of a separate constitutional assembly which for example drafts the amendments etc.

was to be answered with the constitutional court. This is also evident in the case of both Hungary and Poland, where the constitutional courts played a crucial role in the transition to liberal democracy during the 1990s. These courts have been described as activist courts, an activism which was, at least in Hungary's case, partly required due to vaguely formulated constitutions.<sup>43</sup> There is an important lesson to be drawn from this concerning constitutional design; vaguely defined constitutions create a larger space of manoeuvre for courts and constitutional interpretation, which in turn makes courts particularly vulnerable to political pressure and criticism. The same argument could be put forward concerning budgetary issues, or other questions which are essential political. Can this be solved by constitutional design? Yes, would be the answer provided by legal doctrine. Another important lesson, is the weakness that comes with a system that rely only on constitutional courts for constitutional review. It has been relatively easy for politicians in Hungary and Poland to take control over constitutional courts and hence the normative content of the constitution.<sup>44</sup> But would it be equally easy to take control over the whole judiciary? A tentative answer to this question is no.<sup>45</sup> This speaks in favor of decentralised constitutional review, like the Swedish and US system of constitutional review. Finally, clear and precise laws will better shelter courts from claims of judicial activism and attempts to delegitimise them.

In terms of the possibility to retract from a populist illiberal state of things, two aspects are of considerable importance. First, when the constitution or other fundamental laws are amended there is an obvious risk of the illiberal elements of the political system being cemented. This, again, speaks in favor of a high threshold for amendments to the constitution and potentially also cardinal laws. Secondly, a system of patronage creates strong incentives, economic to their nature, for current power holders to ensure that they remain in power. Once such a situation is established, the cost of returning to liberalism might be too high (both on an individual and collective level). It is not uncommon that the packing of the state administration and courts with loyal civil servants and judges takes place before institutional changes, including changes to the constitution. Lessons to be drawn from this are several. One important lesson, which connects to the resilience of the liberal rule of law state, is closely connected to the culture, ethics and code of conduct of civil servants. The importance of the integrity and professionalism of civil servants is hard to underestimate, especially concerning judges (on all levels).<sup>46</sup> Another point that should be made here is the number of political appointees in governmental departments and administrative agencies. A lower number of political appointees is likely to create resilience in the state apparatus and make packing of it with those loyal more difficult.

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43 Drinóczi, T. & Bień-Kacała, A 2019, p. 1145

44 Not only by court packing but also by changing the court administrative structures, appointment processes regarding court presidents, and restricting access to the constitutional court by removing *actio popularis* (Hungary). Sajo, A. & Tuovinen, J., 2019, p. 518.

45 It would for sure take longer time to achieve cultural and organizational changes.

46 See for example Hans-Petter Graver, Jussens Helter, Universitetsforlaget, 2020.

## 8. Policy Recommendations

How do we stop liberal democracies from turning into illiberal democracies, and in a worst-case scenario into authoritarian states? Focus should be on the techniques used by illiberal regimes. Populism is mainly a political strategy and should be countered as such. Responsible political leadership that refrains from emotional politics and opportunistic rhetoric is required and should be supported. Clear and precise legislative acts, based on evidence and research, is more likely to protect courts from claims of unmotivated activism. Legislatures need to stay clear off symbolic laws with low chances of solving problems or changing behaviour. The EU must be aware of the misconception, ideological indoctrination, and abuse of political constitutionalism and popular sovereignty in member states. Constitutional design matters. The threshold for amending a constitution needs to be high, stretched in time and designed so as to allow a broad range of actors to take part and a public debate to take place. Constitutional protection of the independence of the judiciary should be elaborated and specific. A system with constitutional review being centralised to constitutional courts is vulnerable to political manipulation and control. Constitutional review should therefore be decentralised in order to involve ordinary courts on all levels, and potentially also administrative agencies. The resilience that a viable constitutional self-defense requires must be built bottom-up. This requires a legislative framework and a culture which fosters integrity and professionalism on behalf of all civil servants, on all levels. Finally, if we accept the idea that illiberal democracy and illiberal constitutionalism is a tipping game between liberal democracy and authoritarianism any counter measure requires a thorough understanding of the political and constitutional context in which the balancing act takes place. If a patronage system has been created the cost for rolling back to liberal democracy and rule of law is higher. It will not suffice to consider changes within a narrow rule of law paradigm. The systemic importance must be recognized and addressed at an earlier stage than what has been the case thus far within the EU. The difficulty lies however in the gliding scale between liberal and illiberal democracy and the fact that changes in the illiberal direction can be formally correct. The system set up to defend liberal democracy within the EU, based on mutual trust, respect, and national constitutional traditions, is not adapted to this fact, a point first raised by Sajo and Tuovinen.<sup>47</sup> The piecemeal approach adopted thus far by the EU needs to be re-evaluated.

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<sup>47</sup> Sajo, A. & Tuovinen, J., 2019, p. 527.

## Author bio

**Anna Jonsson Cornell** is Professor in Comparative Constitutional Law at the Faculty of Law at Uppsala University. She currently serves as Vice Dean of the same faculty and Secretary General of the International Association of Constitutional Law. She has recently published on constitutional responses to the Covid-19 pandemic, and she is co-authoring a book on rule of law as a political and legal concept.

## Editor bio

**Tove Hovemyr** is Domestic Policy Expert at Fores and holds a Master of Laws (LL.M.) from Uppsala University. She has formerly been a political staff member of Sweden's previous Minister of Integration Erik Ullenhag.

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