

Foreword

András Jakab*

Constitutional Resilience and the Role of Courts

<https://doi.org/10.1515/gj-2025-2001>

Published online December 24, 2025

The present special issue of the *Global Jurist* offers a carefully selected collection of case-studies showing how constitutional courts can react to adverse circumstances. The three editors and the authors, all of them eminent and internationally recognized scholars in the field, are succeeding in explaining the complex nature of the challenge that constitutional courts are facing nowadays. The nuanced picture that they are drawing here is helpful for researchers of erosion phenomena all around the world, both comparative constitutional lawyers and political scientists.

Constitutional resilience is usually defined as the capacity of a constitutional system to withstand attempts aimed at changing or violating its core elements.¹ The expression is used mostly in the context of protecting democracy and the rule of law. Resilience depends on the *interaction* of the constitutional design, including adaptation through constitutional amendment, ordinary legislation and case-law (in the terminology of the present special issue: ‘the institutions’)² and the political-social-cultural context in which a constitution operates (in the terminology of the present special issue: ‘the structure’). Challenges can be sudden external shocks (e.g., *coups*) or, especially in recent decades, slow gradual degradations (often called erosions).

1 Jakab, A, ‘Constitutional Resilience’, in: Rainer Grote, Frauke Lachenmann, Rüdiger Wolfrum (eds.): *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]* (Oxford University Press 2022) <https://oxcon.oupplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e845>; Grabenwarter, C, ‘Constitutional Resilience’ (6 December 2018) *Verfassungsblog*, <https://verfassungsblog.de/constitutional-resilience/>.

2 Skowronek, S, and Orren, K, ‘The Adaptability Paradox: Constitutional Resilience and Principles of Good Government in Twenty-First-Century America’ (2020) 18 *Perspectives on Politics* 354.

***Corresponding author: András Jakab**, European Court of Human Rights, Strasbourg, France; and University of Salzburg, Salzburg, Austria, E-mail: andras.jakab@sbg.ac.at

In general, although constitutional law has an important role to play for its own resilience,³ *on its own*, it is not decisive for the outcome.⁴ Constitutional law is only ever meaningful in combination with certain domestic and international social and political factors.⁵ This can be illustrated by Art. 48 of the Weimar Constitution on the emergency decrees of the Reich's president, which has been widely blamed – and rightly so – for contributing to the erosion of the Weimar Republic. This clause is very similar to the still existing Art. 16 of the 1958 Constitution of France, which, however, has so far not brought about erosion in France. Likewise, the 1853 Constitution of Argentina was an almost verbatim translation of the Constitution of the 1787 US Constitution, without, however, resulting in democracy, but in a presidential dictatorship instead. One can even mention the 1920 Federal Constitutional Law of Austria, which has already failed once, in 1933, and may only be considered a success story since the end of World War II. The 1922 Constitution of the Republic of Latvia has had a history similar to that of Austria, falling prey to erosion in 1934; yet since the end of socialism in 1990 it has proved to be a democratic success story. All these examples can be explained by the fact that constitutional rules operate in context; that is, they work in combination with social and political factors.

Written formal (legal or constitutional) rules can be best understood if they are viewed in interaction with their particular social and political context. This approach is referred to as the institutionalist or neo-institutionalist paradigm.⁶ This paradigm is particularly apt to analyse the erosion of liberal democracy, as a key erosion phenomenon is exactly the demise of the normativity of constitutional law, i.e., the growing gap between the constitutional norms (*Verfassung*) and constitutional

3 Blasi, GJ, and Cingranelli, DL, 'Do Constitutions and Institutions Help Protect Human Rights?' in Cingranelli, DL, (ed.), *Human Rights and Developing Countries* (JAI Press 1996) 223; Davenport, CA, "Constitutional Promises' and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties Are Suppressed' (1996) 58 *Journal of Politics* 627; Cross, FB, 'The Relevance of Law to Human Rights Protection' (1999) 19 *International Review of Law and Economics* 87.

4 Law, DS, and Versteeg, M, 'Sham Constitutions' (2013) 101 *California Law Review* 863; Levitsky, S, and Ziblatt, D, *How Democracies Die* (Crown 2018); Ginsburg, T, and Huq, A, *How to Save a Constitutional Democracy* (University of Chicago Press 2018).

5 Holmes, S, 'Can Foreign Aid Promote the Rule of Law?' (1999) 8 *East European Constitutional Review* 68; Gorges, MJ, 'New Institutional Explanations for Institutional Change: A Note of Caution' (2001) 21 *Politics* 137.

6 Offe, C, 'Designing Institutions in East European Transitions' in Goodin, E, (ed.), *The Theory of Institutional Design* (CUP 1996) 199; Elster, J, Offe, C, and Preuss, UK, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (CUP 1998); Lowndes, V, and Roberts, M, *Why Institutions Matter: The New Institutionalism in Political Science* (Palgrave Macmillan 2013); Adams, M, Meuwese, A, and Ballin, EH, (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2017).

reality (*Verfassungswirklichkeit*). This growing gap is difficult to analyse with the help of traditional doctrinal (black letter) scholarship. Most of the contemporary erosion tends to happen in the *de facto* behaviour and in the narrative; changes in formal legal rules (or via constitutional amendments) are usually just the tip of the iceberg, facilitating informal deteriorations or institutional capture.⁷

To be sure, having an organizationally and financially independent judicial system (ordinary courts and constitutional courts) with ample competencies is helpful for constitutional resilience.⁸ But the actual effectiveness of the rules regarding judicial independence is actually more dependent on public support,⁹ effective competition between political parties, and political fragmentation¹⁰ than on the precise formulation of these rules.¹¹ A number of empirical in-depth studies conducted in Argentina, Japan, Mexico, and Korea substantiate this correlation in respect of judicial independence.¹² We have always viewed courts as guardians of democracy, but we should be more aware of the reverse causality: democratic rotation is very effective in guaranteeing the *de facto* independence of courts.

7 Jakab, A, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary' (2020) 68 *American Journal of Comparative Law* 760.

8 LaPorta, R, et al., 'Judicial Checks and Balances' (2004) 112 *Journal of Political Economy* 445; Gibler, DM, and Randazzo, KA, 'Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding' (2011) 55 *American Political Science Review* 696; Issacharoff, S, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (CUP 2015); Staton, JK, et al., 'Can Courts Be Bulwarks of Democracy?' (2018) *V-Dem Institute Working Paper* 2018/71.

9 Staton, JK, 'Judicial Policy Implementation in Mexico City and Mérida' (2004) 37 *Comparative Politics* 41.

10 Magalhães, PC, 'The Politics of Judicial Reform in Eastern Europe' (1999) 32 *Comparative Politics* 43; Finkel, JS, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (University of Notre Dame Press 2008) 3; Smulovitz, C, 'Law and Courts' Impact on Development and Democratization' in Cane, P, and Kritzer, M, (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 729, at 738; Smith, BC, *Judges and Democratization* (Create Space Independent Publishing Platform 2017) at 5, 91–95.

11 Pritchard, K, 'Comparative Human Rights: An Integrative Explanation' (1986) 13 *Politikon, South African Journal of Political Studies* 24; Gibler, DM, and Randazzo, KA, 'Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding' (2011) 55 *American Political Science Review* 696; Melton, J, and Ginsburg, T, 'Does De Jure Judicial Independence Really Matter?' (2014) 2 *Journal of Law and Courts* 187.

12 Ramseyer, JM, 'The Puzzling (In)Dependence of Courts: A Comparative Approach' (1994) 23 *Journal of Legal Studies* 721; Domingo, P, 'Judicial Independence: The Politics of the Supreme Court in Mexico' (2000) 32 *Journal of Latin American Studies* 705; Ginsburg, T, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003); Chavez, R, and Chavez, B, *The Rule of Law in Nascent Democracies* (Stanford University Press 2004); Ríos-Figueroa, J, 'Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002' (2007) 49 *Latin American Politics and Society* 31.

Courts *by themselves* are unable to protect democracy, but they may be helpful in preventing erosion in combination with social and political factors. Ultimately, what every political community needs is a democratic, rule of law-oriented political *culture* (a democratic, rule-of-law-oriented political culture means the internalized support for key elements of democracy and the rule of law, which is more than just lip-service support for these noble words).¹³ Liberal democracy needs to be defended in the political process, both by the average citizen and the political elite.¹⁴

¹³ Jakab, A., 'Cultural Enabling Factors of the Erosion of Liberal Democracy – and What Follows from Them for the Restoration Process' (24 October 2024). *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* No. 2024/27, 4–7 <https://ssrn.com/abstract=5021057>.

¹⁴ Ginsburg, T, and Huq, A, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 4: 'the only way to defend liberal democracy is to fight in elections against those who seek to erode it'.