

SPECIAL ISSUE EDITORIAL: CONSTITUTIONAL DECLINE, CONSTITUTIONAL DESIGN, AND LAWYERLY HUBRIS

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In recent years we have witnessed a gradual decline of democracy and the rule of law in a number of democracies in a number of countries all around the world. In our call for contributions to this issue, we named this phenomenon “constitutional decline” (on the terminological plethora see Section I in Jakab in this volume, with further references). In place of constitutional democracy an increasing number of countries are seeing a turn toward autocracy. Concerning these trends, the newest report of the V-Dem Institute has established, among other things, the following:

- Autocratization—the decline of democratic traits—is accelerating in the world. For the first time since 2001, autocracies are in the majority; these comprise ninety-two countries, home to 54 percent of the global population. Almost 35 percent of the world’s population—2.6 billion people—live in autocratizing nations.
- The European Union has its first nondemocracy as a member: Hungary is now classed as an electoral authoritarian regime.
- Major G20 nations and all regions of the world are part of the “third wave of autocratization.” Autocratization is affecting Brazil, India, the United States of America, and Turkey, which are major economies with sizable populations, exercising substantial global military, economic, and political influence. Latin America is back to a level last recorded in the early 1990s, while Eastern Europe

Constitutional Studies, Volume 6

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and Central Asia are at post-Soviet Union lows. India is on the verge of losing its status as a democracy as a result of the severely shrinking space for the media, civil society, and the opposition under Prime Minister Narendra Modi's government (V-Dem 2020, 6).

The main novelty lies in the slow, step-by-step nature of the process of constitutional decline, which may make it difficult to identify and less likely to arouse concern in a timely fashion. Autocratization frequently proceeds in a combination of minor steps taken by elected officials, starting with changes within the executive branch (Freeman) and extending to other branches. These steps, taken together, may then result in a serious deterioration. This can happen through formal amendments to laws and constitutions, but more frequently autocratization occurs through changes in what is sometimes called the “small ‘c’ constitution,” ranging from statutory enactments to the abandonment of norms and even simply to changed daily behavior of officials (which can be illegal or, conversely, in some cases even entirely legal). Traditionally, liberal democracies have feared sudden and openly violent breakdowns in the form of a military coup d'état or an abused state of emergency. These are, however, not the main dangers nowadays—for even if the currently ongoing COVID-19 pandemic might give rise to states of emergency in some countries, the crisis only accelerates an existing pattern of decay along already existing vulnerabilities (Lührmann and Rooney 2020). The nature and the causes of the decline cannot be explained by the pandemic state of emergency even where it is becoming a contributing factor. It is merely a symptom and an opportunity for autocrats to further entrench their powers.

In this special issue, we analyze the question of what legal rules or institutions can do against constitutional decline. As an overarching term, we suggest “constitutional design,” which includes rules not only in constitutional rank but also below that, in ordinary statutes or even in decrees or in case law. As it turns out, most of the studies in this volume conclude that legal rules on their own of whatever form or rank are unable either to cause or to stop constitutional decline. The triggers of the decline lie chiefly outside of the legal system, in social, economic, political, and communication technology factors. As a result, the authors conclude, the circumstances in which a constitution operates have more to do with the possibility of decline than its design; good constitutional design can fail in unfortunate circumstances, and bad constitutional design can survive in fortunate circumstances. Liberal democracy in Poland has been in decline *not* because of faults in the constitutional system but because of the “human factor” (Sadurski); the 1982 Chinese constitution failed *not* because of its design problems but because of the political environment (Zhai); and the current French liberal democratic constitutional

regime survives *despite* its obvious flaws with the help of the Republican spirit, which flaws are apparent especially when we compare it to the much more sophisticated German constitutional system (Grote). Constitutional rules are important, though, because *in combination with certain social and political forces* they can effectively protect democracy and the rule of law (in general, see Jakab; specifically concerning judicial independence, see Kosař and Šipulová). Viewing constitutions or courts as the main guardians of democratic processes is a lawyerly hubris, committed so often by constitutional lawyers who are overestimating their own role and possibilities. A “Democracy without Democrats” (Huq and Ginsburg) or a liberal democratic regime without “Democracy-Defending Citizens” (Daly) is doomed to fail.

These studies carry sobering lessons. If there is one thing we can certainly learn from the currently ongoing third wave of autocratization, it is that doctrinal sophistication in constitutional law not only cannot prevent constitutional decline, it can be counterproductive if it results in a decontextualization of constitutional law from its political and social environment. In cases where constitutional law is slowly losing its normativity, it may even become ridiculous and, to some degree, dishonest. Writing even a critical case note on a judgment of a captured and subservient constitutional court is a futile and meaningless exercise. Doctrinal analysis can even legitimize the theater of legalism by taking seriously words that are not worth taking seriously. Judicial decisions of captured courts and doctrinal writings of pro-autocracy academics in these countries can be viewed as merely performative acts (as opposed to reasons), and while they can be analyzed as empirical material for studying the phenomenon of decline, they are unsuitable for use in doctrinal, systematic-conceptual legal work. Both judicial case law and doctrinal scholarship feed on coherence, but autocratic constitutional regimes are by their very nature ad hoc and arbitrary.

Therefore, the third wave of autocratization does not simply deliver a new set of questions for constitutional lawyers; it also motivates us to rethink the methods of constitutional scholarship. Purely doctrinal analyses are likely to become less attractive—in certain countries perhaps much less attractive—than before. And analyses combining legal-doctrinal and political science methods, like the ones in the present volume, are likely to gain further popularity in the future.

April 26, 2020, Vienna and Wisconsin

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Lührmann, Anna, and Bryan Rooney. 2020. “Autocratization by Decree: States of Emergency and Democratic Decline.” V-Dem Institute Working Paper 2020/85.

V-Dem Institute. 2020. *Autocratization Surges, Resistance Grows*. Democracy Report 2020. Gothenburg, Sweden: Varieties of Democracy Institute.