

WHAT CAN CONSTITUTIONAL LAW DO AGAINST THE EROSION OF DEMOCRACY AND THE RULE OF LAW? ON THE INTERCONNECTEDNESS OF THE PROTECTION OF DEMOCRACY AND THE RULE OF LAW

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ABSTRACT

Democracy and the rule of law are slowly deteriorating in several countries around the world, including some member states of the European Union. There are many reasons for this, such as economic changes, new digital communication channels, and geopolitical developments. Furthermore, the manner in which former socialist countries acceded to the European Union turned out to be counterproductive for the state of democracy and the rule of law in these countries. Constitutional law has a number of tools at its disposal for preventing or reversing such tendencies. While constitutional lawyers typically see the rule of law as the guardian of democracy, the rule of law cannot entirely protect democracy in political reality. In fact, it is partly the other way around: democratic rotation guarantees the rule

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of law. Consequently, constitutional courts, concerned politicians, and citizens should concentrate their efforts more strongly on democratic rotation than is currently the case.

KEYWORDS: *Illiberalism, Populism, The Rule of Law Crisis of the European Union, Quantitative Methods in Constitutional Law, Institutionalism, Political Morality, Institutional Alcoholism, Böckenförde Dilemma*

I. EROSION OF DEMOCRACY AND THE RULE OF LAW

In the past few years, democracy and the rule of law have been declining in many countries of the world (Graber et al. 2018), including several member states of the European Union (von Bogdandy and Sonnevend 2015; Brusi 2018; Jakab and Kochenov 2017). The fear that more stable democracies could take such a turn is pervasive in public debate and scholarly discourse (Luce 2017; Gärditz and Steinbeis 2018; Huq and Ginsburg 2018, 78; Levitsky and Ziblatt 2018; Mounk 2018a; Mounk and Foa 2018, 29; Rohac 2018; Sunstein 2018). The latest report from Freedom House states:

In 2018, Freedom in the World recorded the 13th consecutive year of decline in global freedom. The reversal has spanned a variety of countries in every region, from long-standing democracies like the United States to consolidated authoritarian regimes like China and Russia. The overall losses are still shallow compared with the gains of the late 20th century, but the pattern is consistent and ominous. Democracy is in retreat. (Freedom House 2019)

These developments have been referred to as an “illiberal” turn,¹ anti-constitutional populist backsliding (Sadurski 2018), decline of liberal constitutionalism (Skąpska 2018, 130), de-democratization (Bogaards 2018, 1481), rule-of-law backsliding (Pech and Scheppele 2017, 3), decomposition of constitutional norms (Chafetz and Pozen 2018, 1435), erosion of democracy and constitutionalism (Pogany 2013, 352), regression of democracy (Erdmann and Kneuer 2011), democratic decay (Daly 2019), and democratic deconsolidation (Foa and Mounk 2016, 5; Howe 2016). What these narratives have in common is that they describe the deterioration of democracy and the rule of law as a “slow, gradual degradation” (as opposed to the fast, coup-like, authoritarian collapse of the state through a *coup d’état*, the central theme

1. For the origins of the concept, see Zakaria (1997).

of state-of-emergency law).² Examples are numerous: from Hungary and Poland, through Indonesia and Turkey to Nicaragua, Columbia, Brazil, and Ecuador.³

Traditional military coups, however, are becoming increasingly rare (Lühmann and Lindberg 2019). Because of their undemocratic nature, such power grabs are frowned on (and are even carried out in the name of democracy see, e.g., the 2016 failed coup in Turkey). Aspiring dictators do everything they can to avoid them; instead, they opt for a more comfortable solution, dismantling the safeguards of democracy and the rule of law gradually, evoking less resistance (Ginsburg and Huq 2018, 76). Various metaphors describe this process, ranging from the slowly boiled frog, which stays in the water because the temperature increases only very slowly, until it is finally too late to jump out (Sadurski 2018); to the wolf masquerading as sheep, wherein the autocrat poses as a democrat until it is no longer necessary to pretend (Ginsburg and Huq 2018, 77). Or, as Recep Tayyip Erdoğan (mayor of Istanbul at the time) put it: “Democracy is like a tram. You ride it until you arrive at your destination, then you step off” (Varol 2018, 339).

In the present paper, democracy means the concurrent presence of the following qualities of any regime: (1) periodically organized fair and free elections, (2) general and equal suffrage, (3) an actually and legally realistic chance of voting the incumbent government out of office, and (4) voters having a real opportunity and the legal means to inform themselves about the performance of the government. Rule of law here means its formal elements—in particular, predictability, effectiveness, and clarity—as well as substantive elements such as separation of powers and the protection of fundamental rights both in law and in reality. It is evident from the above definitions that the two notions include both factual and legal elements. Of course, this is not the only way to define democracy and the rule of law; however, the purpose of these working definitions is to underpin the arguments elaborated in the next few pages.⁴ A central proposition of this paper is that these notions

2. On the difference between the two types of democratic breakdown see Huq and Ginsburg (2018, 78); Svobik (2015, 715); Balkin (2017, 147). For a more general typology of regime breakdowns see Coppedge (2017) and Djuve et al. (2018).

3. Elkins (2018, 58). Further cases from constitutional history where a dramatic deterioration in the quality of democracy emerged (without foreign occupation) are Argentina in the 1930s, Germany 1933, Austria 1933, Estonia 1933–1934, Latvia 1934, Uruguay 1968–1973, Chile 1973, India 1975, Sri Lanka 1980, Suriname 1980, Fiji 1987 and 2000, Gambia 1994, Ukraine 1999, Russia 2000, Philippines 2004–2005, Macedonia 2010 and 2012, Mexico 2013–2014 (Coppedge 2017, 8; Ginsburg and Huq 2018, 54; Erdmann and Kneuer 2011, 21).

4. On dilemmas about the definition on the rule of law and democracy see Jakab (2016b) and Möller and Skaaning (2011).

are not merely supportive of each other through certain common elements (e.g., the protection of political rights); rather, they are inseparably linked, to the effect that there can be no protection of democracy without the protection of the rule of law (and vice versa). Thus, the effects of the mechanisms to protect democracy and the rule of law are strongly intertwined.⁵

II. WHY DOES EROSION OCCUR? MULTICAUSALITY AND RISK FACTORS

Political science literature refers to several economic, political, and social factors that (may) destabilize a democracy (Hadenius and Teorell 2005, 87; Acemoglu and Robinson 2009; Lust and Waldner 2015, 21). It is harder for poor countries with a low GDP to build a stable democracy (Bernhard et al. 2003, 404). Further risk factors include weak statehood (Slater et al. 2014, 353), being geographically cut off from the West, having a closed economy (Rodrik 2018, 12), and suffering from pervasive corruption (Klug 2018, 295; Knott 2018, 355). However, risks are not limited to economic factors: also likely to be dangerous are political and social factors such as ethnic divides and tensions (Chandra 2005, 253; Fish and Kroenig 2006, 828; Choudhry 2008);⁶ a weak civil society (Bernhard et al. 2015, 4; Cornell et al. 2016); the rejection of rational, secular values and the value of self-fulfillment (Inglehart and Welzel 2010, 551); and Islam as a dominant religion,⁷ as well as radical political preferences of political players (Mainwaring and Pérez-Liñán 2014). By contrast, openness toward civil resistance and peaceful protests (Snyder 2017), in addition to a British (as opposed to French) colonial past,⁸ seems to reinforce the stability of a democracy. A well-functioning democracy—defined by horizontal accountability, effective participation, and effective political competition—gives less incentive for behavior that is detrimental democracy, and consequently makes erosion less likely; therefore erosion is less likely in liberal democracies than in hybrid regimes (Pérez-Liñán and Smith 2018, 72, 83). We are also aware that the

5. On causality between democracy and the rule of law see Rigobon and Rodrik (2005).

6. On the economic motivations behind ethnic/racial divisions see Aly (2005).

7. For an empirical comparative quantitative analysis see Fish (2002, 5): “Muslim societies are not more prone to political violence; nor are they less ‘secular’ than non-Muslim societies; and interpersonal trust is not necessarily lower in Muslim societies. But one factor does help explain the democratic deficit: the subordination of women.” For literature reviews see Elstain (2009, 5) and Hinnebusch (2006, 376).

8. On the positive effects of British colonial past see Poe et al. (1999, 291).

older the democracy,⁹ the smoother the transition (Levitsky and Way 2015, 54) and that the stronger the party system (Bernhard et al. 2015, 4; Cornell et al. 2016, 24), the more likely it is to remain stable in the future. In this respect, the circumstances surrounding the adoption of the states' formal constitutions—in particular, including as many political players as possible in the constitution-making process—are also relevant (Elkins et al. 2009; Widner 2008, 1513).

The past few years have witnessed the deterioration of a number of other risk factors. None of the numerous risk factors is decisive on its own. No single responsible risk factor may be identified; the erosion of democracy and the rule of law is multicausal. The picture is not black and white, for no one factor may be pinpointed as the sole culprit. Consider the factors enumerated in the following paragraphs.

1. Without societies' constant and fervent support for democracy and the rule of law, the stability of liberal democracies cannot be guaranteed. It is clear from a number of surveys that it is exactly this level of support that has dipped in the past decades (Teorell and Hadenius 2006, 95; Foa and Mounk 2016, 5; Howe 2016, 15).¹⁰ Failure is customarily explained with reference to the lack of support for liberal values in societies (e.g., the Weimar Republic), as George Lukács has noted: "A republic without republicans, a democracy without democrats" (Lukács 1955, 61). The reasons for lagging support are diverse:

1.1. Low or negative economic growth, manifest in crises, is known to have an adverse effect (cf. the effects of the Great Depression between 1929 and 1933 in Germany). The 2008 economic crisis did not leave democracies unscathed (Przeworski et al. 1996, 39). Besides the directly destabilizing effect of declining living standards, such crises can undermine trust in the intellectual capabilities of established elites. All this, coupled with news that alternative societies such as China are an economic success, can cast increasing doubt on one's own societal system.

1.2. In recent decades, the value system of elites has removed itself from the value system of the rest of the population. Several social reasons explain this, e.g., globalization of the elite's lifestyle, growing economic inequality, and in many countries the slow waning of the middle class.¹¹ The alienation of values, particularly

9. Sadurski (2018, 63): the younger the regime, the more likely it will suffer from backsliding; in a similar vein concerning democratic traditions see Bugarič (2015, 219) and Avbelj (2017, 35); on the lack of legitimacy and weak institutions in young democracies see Kapstein and Converse (2008, 58).

10. On how institutions and culture mutually influence each other in general see Alesina and Giuliano (2015, 898).

11. See the 2019 OECD report on this question.

sexual, religious, and national identities (Lasch 1995, 27), has also crippled trust in globalized elites (Norris and Inglehart 2018).¹² More often than not, this has also diminished trust in the “state governed by the rule of law” as a project of the elite, especially when this project seeks to enforce the new value system by legal means. As Rosalind Dixon recently observed, it may well be the case that “global public law” and the “rights revolution” have also contributed to the erosion we are witnessing (Dixon 2018, 1049, 1051, 1057).

1.3. Besides keeping in mind the aforementioned reorientation on issues of identity, note that it is in this decade that the remaining members of the World War generation are departing and the postwar generation is going into retirement. These generations have valued the benefits of liberal democracy. History has taught them to be resilient and given them an intuition for danger.

2. Certain changes within the elites are also of relevance. Given the passing of time since World War II, increasingly elites lack historical perspective; as a result, their “elites’ consensus” is dwindling. What was once our *shared* trauma, whose reoccurrence we all wanted to prevent, no longer pervades our common consciousness. Numerous studies confirm that elites are more ideologically polarized than just thirty or forty years ago, particularly in the United States, though also in other countries (Ginsburg et al. 2018, 245; Haggard and Kaufmann 2012, 495). A symptom of elite polarization in constitutional law is what Mark Tushnet describes as “constitutional hardball,” that is, violating informal rules of political culture without being strictly speaking illegal (Tushnet 2004, 523). The elite’s lack of a minimum degree of consensus makes liberal democracies nonfunctional (Higley and Burton 2016). Where such consensus is lacking, moves against the opposition, erstwhile considered illegitimate and authoritarian, will become acceptable.¹³

3. Paradoxically, EU membership has destabilized democracy in several post-socialist states. This was brought about through various mechanisms.

3.1. It has been suspected for a while now, albeit not without criticism, that an abundance of natural resources, such as oil, and the revenues gained from their sale contribute to the strengthening of autocratic regimes: the *paribus ceteris* low economic performance of the autocracy,¹⁴ it has been claimed, is masked by oil revenues (Dunning 2008; Haber and Menaldo 2011; Ross, 2011, 325). The EU funds apportioned to new EU member states play a similar role.

12. On the conflict between countryside and city population see, e.g., Cramer (2016).

13. See Levitsky and Ziblatt (2018, 21–24) on the denial of the legitimacy of political opponents and on encouraging (or tolerating) violence as symptoms of erosion.

14. The rule of law has a positive effect on economic growth (see Feld and Voigt 2006, 251).

3.2. Lack of foreign pressure to observe democratic and rule-of-law standards can also be dangerous (Lührmann et al. 2017). This was exactly what happened when the new member states joined the European Union, for post-accession conditionality is much weaker than pre-accession conditionality. Once a country has joined the European Union, hardly any means are available to exert pressure and to demand or enforce democratic or rule-of-law standards. The authoritarian traits of a society are like alcoholism: although it is theoretically possible to kick one's addiction alone, normally one needs external help or pressure, given the empirically evident great danger of relapsing (i.e., institutional alcoholism) (Jakab 2019, 203). If EU member states are to accept the equality of all EU states and strive toward eventually eliminating the differences existing between long-standing and new members, it follows that there should be an identical supervisory mechanism for all. As long as the long-standing member states are reluctant to accept this arrangement, there will be no solution for this problem.

3.3. Because it is easy to immigrate to Western Europe (e.g., by accepting an academic position in Austria), citizens believing in Western values and being free to move are leaving their home countries in a proverbial "brain drain," facilitating the dismantling of institutions of the rule of law and democracy.

4. Certain technological and scientific developments also pose challenges for democracies.

4.1. A somewhat counterintuitive but nevertheless convincing narrative is that new technologies for political mobilization (i.e., the development of political marketing) undermine democratic stability. There are social strata in every society that for decades have not been engaged in the democratic political process. Usually, these groups suddenly join the political process when they are angry or incited. Their goal is to wipe out the long-standing establishment (Bermeo 2003). They want to avenge perceived injustice and incompetence. This goal is so prevalent that often such groups do not even act in their own interest, as evidenced by the case of the Brexit referendum. To put it simply, the idea that "the more citizens participate in the democratic process, the better it will be for democratic values" is simply wrong.

4.2. The dominant forms of communication technology and people's reading habits when it comes to the news have always had an influence on polity (Markoff 1996, 46). The printed press contributed to the bourgeois revolutions of the eighteenth and nineteenth century, and there would have been no fascism without the radio. Nowadays it is Facebook, Google, and other free news sites that help shape the political landscape (Hasen 2018; Runciman 2018; Summers 2018).

5. That terrorist attacks are always dangerous is well known: however, this danger includes not only the tragic, direct consequences of the terrorist attack itself

but also its contribution to the demise of the protection of fundamental rights or possibly the suspension of certain democratic mechanisms (Goderis and Versteeg 2009, 131). Terrorist attacks are exploited rhetorically by antidemocratic forces to further their own interests. The terrorist attacks of the past two decades in New York, London, Madrid, and Paris have been detrimental to the quality of democracy in a number of Western states.

A popular but misguided (partial) narrative for the dismantling of democracy and the rule of law is the increasing political role of national (Mounk 2018b, 98) or supranational (Mair 2013) bureaucratic-technocratic decision-makers. This misguided explanation asserts that the possibility for making rational decisions is so limited that voters turn to irrational and populist options out of rage or because rational choice would yield disadvantageous results. A new generation of politicians actually do scapegoat experts (e.g., economists and lawyers). However, the problem is not that political choices are unavailable. Instead, the range of choices is different, though no more limited than before; but that certain choices are no longer available for economic or legal reasons cannot explain the reorientation of the political discourse. These views garnered support not because of real shifts in power but because of a change in political perception. The latter, in turn, is the product of the reasons outlined earlier (Huq and Ginsburg 2019).

III. HOW TO BRING ABOUT EROSION? A HANDBOOK FOR DICTATORS

Those hollowing out democracy with the tools of erosion are very much democratically elected politicians. In some cases, the steps taken are manifested in the amendment of legal norms; in other cases, the change is reflected in the *de facto* behavior of officials and/or the political rhetoric. These (almost) completely lawful (Sonnevend et al. 2015, 33; Scheppele 2018a, 545) changes are generally disguised as technocratic reforms,¹⁵ making it difficult for onlookers to recognize what is actually happening (Varol 2015, 1673). Taken together, however, and in light of the given social and political context, these steps are extremely detrimental to democracy and the rule of law.¹⁶ Usually, the following steps are taken (Ginsburg and Huq 2018, 72–73, 104, 116):¹⁷

15. On “ambiguity and plausible deniability” see Frantz and Kendall-Taylor (2017, 62).

16. On the “fallacy of decomposition” see Tushnet (2015, 409ff.); in a similar vein, on the interaction effect of different measures see Scheppele (2013, 559).

17. For similar, but more humorous descriptions of these steps see Bueno de Mesquita and Smith 2011; de Guillaume 2003; Wood and DeLuca 2012.

1. Normally, the first step will be to employ populist rhetoric against institutions of rule of law and long-standing elites, to make this rhetoric the new normal. Based on Jan-Werner Müller's definition, populism rests on two principles: moralized anti-pluralism (i.e., it is only the populist who represent the real people and the true nation) and a noninstitutionalized will of the people (i.e., only the populist knows the will of the people or the nation, even if not having expressed so in any formal way) (Müller 2016). Populists purport to speak for the people, or the nation. Only they are capable of undoing the Gordian knot; in this way, they legitimize the breach of established written and unwritten political standards. Hence, when politicians in power resort to anti-rule-of-law rhetoric (seemingly pro-democratic, but only in a populist sense), it should be considered a warning signal, even in consolidated democracies.

2. Constitutional lawyers' blind spot is the centralization and politicization of the executive. These two are achieved by subordinating the ministerial bureaucracy to ministerial offices; by employing individuals in high executive positions without protection from dismissal; and by abolishing the independence of—among other bodies—statistical offices, competition authorities, media supervision authorities, election committees, and national banks. There are usually no constitutional guarantees for securing the autonomy and preventing the fragmentation of the different executive bodies. What's more, constitutional lawyers do not consider this to be a separation-of-powers issue. One reason for this blind spot is that it does not fit into the classical Montesquieuian trichotomy, but another problem is that the independence of such bodies is mostly enshrined only in ordinary statutes. This is wrong. The civil service is usually conservative, working incrementally and cautiously, providing neutral information and following regulated, predetermined work-processes—features authoritarian politicians are inclined to dismantle (Ginsburg and Huq 2018, 104). The role executive branch bureaucrats have in safeguarding democracy and the rule of law is largely underestimated by constitutional lawyers.

3. A central chapter of the authoritarian politician's playbook is the elimination of judicial review. Austria would be the historical example par excellence. The Austrian Constitutional Court was depoliticized or "un-politicized" in 1929 (in the framework of which Hans Kelsen was dismissed from the Court). In actual fact, this process meant the exact opposite, namely, the politicization of the Constitutional Court (Merkl 1929, 293, 297). The new staff of the Austrian Constitutional Court no longer stood in the government's way. Shortly thereafter, the Austrian Constitutional Court suffered the finishing stroke: it was dissolved in 1933. In 2015, one of the first moves of the new Law and Justice (PiS) government in Poland was to pack the Polish Constitutional Court with loyal justices. The reorganization of Russian

constitutional jurisdiction between 1993 and 1995 or the Hungarian constitutional jurisdiction between 2010 and 2012 was carried out in the same vein.¹⁸

4. The intentional and conscious erosion of the public sphere—which “is a fragile ecosystem,” in the words of Tom Ginsburg and Aziz Huq (2018, 113)—as an epistemic and discursive basis for democracy is another instrument in the successful dictator’s toolbox. This is implemented through the transformation of state media into a propaganda machinery and partly through the restructuring of the commercial media landscape. The latter is achieved not only by administrative means but also through corrupt processes whereby stooges or friendly oligarchs buy into commercial media.

5. Constitution-making processes (e.g., Hungary in 2010–2011, Venezuela in 1999 and 2017) can serve various purposes. Such processes are always a PR show, the symbol of a new start, the end of the old “corrupt” and “elitist” period. At the same time, they are a great opportunity to codify authoritarian centralization attempts at the highest level of the law (Landau 2018, 521). Meanwhile, a new constitution also allows for dismissing leading officials of independent institutions under a legitimate guise. This is how the constitution-making process and the constitution itself are turned into instruments of everyday party politics (Sonnevend et al. 2015, 33).

6. Attacks against nongovernmental organizations (NGOs) are obvious moves: these organizations are depicted as agents of international globalized conspiracies and, where necessary, are condemned in show trials. Of course, the necessary laws must be adapted to render their persecution more effective.

7. A central theme, albeit one introduced only in the final phase of consolidating the autocratic regime, is of course the elimination or suppression of effective political competition. This can be achieved through *gerrymandering* (i.e., in a majority voting system, restructuring electoral constituencies based on detailed statistical data) or by excluding or prosecuting the opposition. A recent example is Indonesia, where a number of opposition politicians have been persecuted by the authorities since 2017 in the name of the fight against political Islamism (Satrio 2019). Besides administrative tools, corruption can also come in handy: for example, certain opposition politicians or even entire opposition parties can be paid to keep the opposition divided or to legitimize certain unpopular government measures (March 2009). As a consequence, all hope for a change of government diminishes, which in turn undermines rule-of-law guarantees in practice. I will come back to this in Section VII.

18. For a wider picture in this context see, e.g., Bugarič and Ginsburg (2016, 69).

8. Finally, as a cherry on top, academic freedom and the autonomy of universities and research institutes would be restricted by any reasonable dictator. Facts and scientific findings, in particular in the social sciences, can be uncomfortable for those in power. Restrictions can take the form of funding shortages and smear campaigns against social scientists, but also administrative measures. Vivid examples are evident in Russia and Hungary: research institutes of the Russian Academy of Sciences were nationalized in 2013; in Hungary, the Central European University was forced to relocate to Vienna its main activity, the awarding of US diplomas, owing to a 2017 amendment to the Act on Higher Education. Also in Hungary and following the Russian example, the independence of the Academy of Sciences was severely curbed in 2018 (Hennings et al. 2018).

IV. WHAT CAN CONSTITUTIONAL LAW DO ABOUT THIS? METHODOLOGICAL CONSIDERATIONS

The question is, Can constitutional law prevent the processes of erosion described in the preceding section, and if so, how? First, however, the term “constitutional law” must be clarified: it comprises not only the constitution in a formal sense but also all sub-constitutional rules relevant for political processes.¹⁹ These include ordinary laws on elections, the independence of law enforcement authorities and individual prosecutors, rules governing ownership structures in media companies, appointment procedures for judges at ordinary courts and constitutional courts, rules on the promotion of judges and prosecutors, procedural rules on the ban against political parties and substantive rules governing their internal structure, campaign finance laws, and laws on media freedom. Also included are slander laws applicable to journalists and politicians, rules against hate speech, laws on referenda and surveillance, norms governing freedom of assembly and association, rules on the dismissal of civil servants, secrecy requirements regarding official documents, and more. These may be laid down in simple statutes and other general norms (decrees) or gleaned from case-law.

In general, although constitutional law has an important role to play in the fight against erosion (Blasi and Cingranelli 1996, 223; Davenport 1996, 627; Cross 1999, 87; Keith et al. 2009, 644), *on its own*, it is not decisive for the outcome of the process (Keith 2002a, 111; Keith 2002b; Keith 2011; Law and Versteeg 2013, 863; Ginsburg and Huq 2016). Constitutional law is only ever meaningful in

19. Together all these norms are often referred to as a “constitution in a material sense”; see, e.g., Jakab (2016b, 143) with further references. This should be differentiated from the *de facto* constitutional practice of officials, often referred to as “small-c constitutions” (see Law 2010, 376).

combination with certain social and political factors.²⁰ This can be illustrated by Article 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.²¹ This clause is very similar to the still existing Article 16 of the 1958 French Constitution, which, however, has so far not brought about erosion in France (Jakab 2006, 453). Likewise, the Argentine Constitution of 1853 is an almost verbatim translation of the US Constitution, without, however, resulting in democracy, but in a presidential dictatorship instead. One can even mention the Federal Constitution Law of Austria, which has already failed once, in 1933 (Adamovich 2015, 126), and may only be considered a success story since the end of World War II. The Latvian Constitution 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 (Galligan and Versteeg 2013).

This is why it is so important to consider constitutional norms in their particular social and political context. Only in this way can we understand how constitutional norms interact in their function of supporting democracy and the rule of law. This is referred to as the institutionalist or neo-institutionalist paradigm (Offe 1996, 199; Elster et al. 1998; Lowndes and Roberts 2013; Adams et al. 2017). According to this approach, we must accept that the study of legal rules yields only partial insight into the rule of law and democracy. In particular, in case of erosion the main problem is exactly the demise of the normativity of constitutional law, that is, the growing chasm between the constitution and constitutional reality. Amendments to formal legal acts have little to say about what and how things will change. If we do not want to remain blind to erosion, besides considering the formal rules, we must also examine the *de facto* conduct of both officials and citizens, and the narrative accompanying it (the latter includes the social mentality or the political rhetoric regarding constitutional institutions).²² Fine-tuned constitutional law doctrine is always capable of identifying a *de facto* breach of the general requirements of the rule of law and democracy by the addressees of constitutional rules.

20. National and international (see Holmes 1999, 68; Gorges 2001, 137).

21. In general on the erosion during Weimar see Revermann (1959); Linz and Stepan (1978); Gusy (1997); Berchtold (1998); Capoccia (2005); Lehnert (2016, 103). Regarding rehabilitation of the Weimar Constitution, Lammert (2015, VIII) says, [I]t was better than the circumstances at the time, yet not good enough for the circumstances that it was supposed to regulate.”

22. For such an analysis see, e.g., Jakab (2018).

However, the question regarding the gravity of such breaches cannot be captured with the standard tools of legal doctrine. To fully grasp the picture, one must refer to the various democracy²³ and rule-of-law indices, among them the Bertelsmann Transformation Index, the World Justice Project Rule of Law Index, the Political Rights and the Civil Liberties indices of Freedom in the World, and the Worldwide Governance Indicators of the World Bank;²⁴ other relevant datasets are recorded in the Cingranelli-Richards Human Rights Dataset and the Political Constraint Index. Historical analyses may be based on Polity IV (for the period following 1800), V-Dem (following 1900), and the Historical V-Dem, which has a limited set of indicators for the period starting with 1789 (see Knutsen et al. 2018). For the purposes of time-historical analyses, the above-mentioned and various related quantitative measures are available.

Although one can plausibly argue that erosion itself strongly affects constitutional law and that therefore such effects are not unidirectional, in this study I am primarily concerned with the effects of constitutional law on erosion.²⁵ Notwithstanding the fact that some constitutional rules may reinforce their own effects (Chilton and Versteeg 2015, 575), constitutions cannot enforce themselves on their own.

These preliminary methodological issues lie at the heart of the identity of constitutional law scholarship as a whole. Were we to accept that in the end, no constitutional rule can effectively counter erosion, the relevance of constitutional law (i.e., what it is capable of achieving and what it is not) would have to be completely reevaluated.

Constitutional law is partly a symptom of the political culture. One could, somewhat pessimistically, paraphrase Böckenförde's well-known dictum that a written constitution thrives (at least in the *short run*) "on conditions that it cannot guarantee itself" (Böckenförde 1976, 60). At the same time, constitutional law is the guideline for political life and, to put it optimistically, it can, if well designed, transform the political culture in the *long run* (Acemoglu and Robinson 2012). In this optimistic vein, I next introduce the tips and tricks that can strengthen the resilience of liberal democracy in such unfavorable times as these.

23. On the Polity IV database see Munck and Verkuilen (2002); on the different V-Dem indices see Coppedge et al. (2017); on the Democracy Barometer see Bühlmann et al. (2012).

24. On the different rule of law indices see Jakab and Lőrincz (2017).

25. On the opposite question, i.e., what constitutional solutions are chosen authoritarian regimes, see Ginsburg and Simpser (2014). Some of the features are symptoms of social and political vulnerabilities (e.g., strongly nationalistic preambles) and not the causes of erosion. The explanatory force of constitutional design is stronger in democracies than in hybrid regimes and autocracies, as the political processes in democracies are more strongly guided by law, see Smulovitz (2010, 737).

V. TIPS AND TRICKS: STRENGTHENING THE IMMUNE SYSTEM AT THE TIME OF A PANDEMIC

In the following, I identify some constitutional solutions that are resistant to erosion. These solutions are important for designing new constitutions or amending existing ones, as well as for evaluating constitutional rules (e.g. by the Venice Commission), but they are of relevance also for constitutional court and supreme court judges when they are interpreting their own constitutions. These aspects may influence the policy pursued by international organizations (e.g., the United Nations and the European Union), NGOs, and foreign ministries when making aid conditional on democracy-building measures, and even when defining the criteria for the prospective EU-membership of Balkan states, for example, to prevent erosion similar to what has taken place in Poland since 2015 and in Hungary since 2010. These causal effects may be direct (Cooter 2000); or they may be indirect, when constitutional rules evoke a certain economic response, which in turn promotes or prevents erosion (Persson and Tabellini 2003; Rigobon and Rodrik 2005; Koob et al. 2017). Such rules are at the very least capable of potentially delaying the inevitable (Ginsburg et al. 2018); this in itself is of great value, however, in combination with certain social and political factors such rules can even amount to a strong and effective long-term protection against erosion.²⁶

1. The archetype of the democratically elected politician who then erodes democracy and the rule of law is the president of the republic who becomes a dictator. To prevent this, the obvious solution seems to be to limit the terms of office (e.g., to single reelection), or to avoid the presidential system of government altogether (e.g., by opting for a parliamentary system). Although limiting the term of office can be very useful, there are a number of examples (e.g., Sri Lanka in 2010, Bolivia in 2014) where this safeguard is inoperable—and it is so exactly in those states where it is most needed. More often than not, such rules are changed by the incumbent president or rendered useless through various techniques (e.g., postponing a change in term limits to an increasingly later point in time, usually invoking administrative problems).²⁷ Nevertheless, even if such rules are incapable of halting the process on their own, they are definitely not harmful and may even constitute an obstacle to erosion, at the very least making it visible, shedding light on what is actually going on (Ginsburg et al. 2010). The most efficient guarantors of such rules are not the courts, but rather movements with strong support within the population (Versteeg et al. 2020).

26. The idea is one century old (see Jellinek 1914, 788 [Chapter 22: “The Guarantees of Public Law”]).

27. The last method is called in French *glissement*, see Gathii (2018, 321).

Yet to disqualify the presidential form of government as a dangerous system would be overhasty. It is itself often just a symptom of a political situation in which society yearns for strong leadership, which can in turn can lead to erosion. As such, no causality between a given form of government and erosion can be identified; instead, we can observe only a correlation between the two (Maeda 2010).

2. The regulation of in-party democracy or the financing of political parties was also mentioned as means to forego the strengthening of antidemocratic political formations (Choudhry 2018, 54; Scheppele 2018b, 495). However, regulation can also easily be abused by autocratic incumbents to the detriment of opposition parties (Ginsburg and Huq 2018). Rules adopted for the purposes of “militant democracy,” which restrict certain political freedoms of antidemocratic actors, are also risky (Sajó 2004; Thiel 2009; Kirshner 2014; Müller 2012). Opposition parties can suddenly be labelled as anti-democratic and consequently excluded from the political competition (e.g. Indonesia 2017).²⁸

3. International and supranational legal requirements regarding the rule of law and democracy (e.g. a procedure in the meaning of Article 7 TEU) have a limited effect in preventing erosion (Hafner-Burton and Tsutsui 2007, 407; Hathaway 2002, 1935; Müller 2015, 141; Jakab 2016a, 187; Sadurski 2017, 417; Bozóki and Hegedűs 2018, 1173; Wagrandl 2018, 143).²⁹ A *mix* of political action (this component, namely, the political will in the EU was lacking in respect of Hungary and Poland for the beginning of the erosion), certain domestic political and social circumstances, and legal instruments on both domestic and supranational/federal level seem to be effective ways to counter authoritarian tendencies at the local level (Gibson 2012; Jenne and Mudde 2012, 147; Carp 2014, 1; Blauberger and Kelemen 2017, 321; Sedelmeier 2017, 337).

4. Federal statehood also seems to operate as a guarantee against autocratic tendencies (Ginsburg et al. 2018, 239, 249). It is instructive to consider the differences between the constitutional history of India (with good democratic credentials) and Pakistan (with a cycle of dictatorships and democracies), since the two countries shared the same starting position at the time of their separation, 1947, from both a legal and a sociopolitical perspective. Originally, both countries introduced a similar parliamentary system (inspired by their shared British colonial

28. On the danger of abusing such measures see Accetti and Zuckermann (2017, 182).

29. For more optimistic views see Pevehouse (2002, 611), Simmons (2009), and Levitz and Pop-Eleches (2010, 457).

heritage); however, their respective constitutional laws differ on certain points, the development of Indian federal statehood being a decisive factor.³⁰

5. Cumbersome or multilayered special constitutional rules (eternity clauses) may provide a partial shield against autocratic moves to amend the constitution (Landau 2013, 189; Albert 2016, 143; Roznai 2017).

6. It is widely recognized that proportional representation systems (in contrast with majority voting systems) are better suited to prevent authoritarian tendencies (Reynolds 2010; Halmai 2017, 215; Sadurski, 2018, 8).

In a proportional representation system, relative majorities (i.e., those without an absolute majority) cannot govern on their own; at the same time, they bolster the culture of compromise, a phenomenon diametrically opposed to authoritarian political culture. The potentially positive effects of obligatory voting (introduced to prevent sudden surges of new electoral groups) and preferential voting (to combat extremists) are also known (Dixon and Gauja 2018). To reverse polarization, a number of different voting techniques have been suggested, such as negative votes and plural votes.³¹ Ensuring, encouraging, and facilitating the suffrage of citizens who have moved abroad can strengthen constitutionalist arguments in the political discourse, especially if a large number of citizens have moved to and therefore get socialized in countries where democracy and the rule of law are highly regarded in the political culture.

7. Having an organizationally and financially independent judicial system (ordinary courts and constitutional courts) with ample competencies is key (LaPorta et al. 2004, 445; Gibler and Randazzo 2011, 696; Issacharoff 2015; Staton et al. 2018). Notwithstanding the criticism voiced by some (Epstein et al. 2001, 117; Chilton and Versteeg 2015, 575; Daly 2017),³² this continues to hold true. According to Paul Blokker (2013), one factor in the erosion of Slovak democracy immediately after the dissolution of the Czechoslovak Republic (1993–1998) was the different rules governing judicial appointment (which were better designed in the Czech

30. On the differences concerning presidential law-making, constitutional amendment rules (eternity clauses), role of the military and the role of religion see Choudhry et al. (2016); Khan (2009); Aziz (2018). Some of these diverging rules were introduced later on (either by amendment or by judicial case-law), and it is not entirely clear how far they were a consequence rather than a cause of different democratic and rule of law performances.

31. In an easily comprehensible form, see www.d21.mc/en/, or in a more academic style with detail, see Cahan and Slinko (2018) and Gregor (2013).

32. Some even argue that strong constitutional/supreme courts even have an adverse effect on the stabilization of democracy, as this lowers the feeling of responsibility of the electorate and the politicians (see Blokker 2013; Harvey 2013; Gardbaum 2015, 285). This latter causal effect (adverse effect on democracy) could not, however, yet be proven empirically, as opposed to the positive effect which is empirically tested.

Republic than in Slovakia, although the two countries shared a similar starting point).³³ The effectiveness of rules regarding judicial independence is more dependent on public support (Staton 2004, 41), effective competition between political parties, and political fragmentation (Magalhães 1999, 43; Finkel 2008, 3; Smulovitz 2010, 729, 738; Smith 2017, 5, 91–95) than on the precise formulation of these rules (Pritchard 1986, 24; Gibler and Randazzo, 2011, 696; Melton and Ginsburg 2014, 187). A number of empirical in-depth studies conducted in Argentina, Japan, Mexico, and Korea substantiate this correlation in respect of judicial independence (Ramseyer 1994, 721; Domingo 2000, 705; Ginsburg 2003; Chavez and Chavez 2004; Ríos-Figueroa 2007, 31).

8. Instead of focusing on a single type of independent institution, such as courts, according to the recently published research findings of Ginsburg and Huq, we should look at the *interaction* between the different independent institutions. The democracy-safeguarding effects of individual independent institutions not only add up but are much rather *multiplied* through interactions with other institutions. Accordingly, without barring additional methods described in this section, the best form of protection is most probably to establish and uphold a *network* of independent institutions that mutually control and protect each other, such as central statistical offices, organizationally independent public broadcasting companies financed through direct taxation, audit offices, election committees, antitrust authorities, anti-corruption agencies, ombudspersons, and committees of civil servants (Ginsburg and Huq 2018, 194–96). This follows from the multicausality of crisis phenomena explained in Section II, which cannot be tackled with a single method. Paradoxically, we expect institutions with no democratic legitimacy—but, one hopes, dedicated to democracy—to force democratically elected but potentially not democratically minded politicians to adhere to democratic principles. The reason for this is the disempowerment of the opposition in the democratic process, which follows from the logic of democratic rotation: independent institutions can act more effectively as a better counterbalance than the opposition parties (Huq and Ginsburg 2019). Nevertheless, independent institutions are no panacea; I will return to this issue at the end of this paper.

VI. ADVICE FOR CONSTITUTIONAL COURTS

Important questions arising in the context of the erosion of democracy are how constitutional courts react to such phenomena and how they can mitigate these

33. On the differences see, e.g., Kosar (2016, 158).

risk factors. As a first step, to answer this question one must accept the above-mentioned institutionalist paradigm; that is, when interpreting rules, *de facto* conduct and narrative must also be considered. We expect constitutional courts not only to do legal doctrine but also to show *judicial statesmanship*. Constitutional courts are to some degree always making political decisions. Should they fail to recognize this, they will also fail to tackle the challenge of erosion.

A general activist approach seems inadvisable. Too much constitutionalization is both dangerous and counterproductive (Wiederin 2019, 72).³⁴ When judicial decisions are rendered on the *main ideological controversies* between the different political constituencies, there is a considerable risk that such decisions can contribute to mobilizing support against the rule of law. A well-known example is the 2015 decision of the Constitutional Court of Bosnia and Herzegovina repealing the rules on Serbian national holidays (Dixon 2018, 1057, with further references). This decision was applauded by the legal-professional audience. At the same time, it generated grave distrust toward the Constitutional Court in particular and the Western model of the rule of law in general. In such cases, one would advise constitutional courts to exercise some *judicial self-restraint*. To maintain the rule of law and democratic status quo, constitutional courts may find making a decision in such cases unavoidable; however, it is advisable to refrain from engaging in activist interpretations.

By contrast, constitutional courts should demonstrate activism when protecting democratic and rule-of-law mechanisms (as defined at the end of Section I of this paper), and in light of these, including in particular the separation of powers, inner fragmentation of the executive, the protection of relevant fundamental rights, and the fight against corruption.³⁵

VII. DEMOCRACY AND THE RULE OF LAW: MUTUAL CONDITIONALITY

The relationship between democracy and the rule of law is like a (good) marriage: Although some structural conflicts exist, one cannot really manage without the

34. Wiederin's remark is in reference to the 1929 decision of the Austrian Constitutional Court to allow Catholics to remarry ("Dispensehe"), even though Austrian marriage laws referred to confessional rules at the time, and the Catholic Church did not allow second marriages (an ideologically and politically highly sensitive issue, moreover doctrinally simply mistaken).

35. This advice applies only to courts that have not yet been captured by authoritarian regimes. A dialogue with such courts is useless, as it only boosts their legitimacy without actually having any influence on the activities.

other.³⁶ As a pair, they flourish; and if they fail, they do so together. Potential examples to show the opposite, where the rule of law operates without democracy (e.g. Singapore), are unconvincing: If you take a closer look, you realize that their system fails to meet our substantive rule-of-law standards.

Commonly known for some time is that the rule of law and especially certain political fundamental rights are preconditions for a democratic process.³⁷ However, in light of the foregoing points, one should not forget another, at times neglected causality: namely, that the rule of law is itself a product of democratic rotation; for if governing parties have no fear of being outvoted and finding themselves in opposition, they will inevitably be less and less inclined to respect the separation of powers, particularly judicial independence, and fundamental rights (Ginsburg and Huq 2018, 14).

Hence, the rule of law *by itself* is unable to protect democracy, but well-designed constitutional provisions 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 morality³⁸—one to be defended in the political process,³⁹ and one that is on the side of both the population and the politicians (and where this is missing, effective external pressure will be necessary).

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36. The present paper is dedicated to my wife.

37. For a classic account see Ely (1980).

38. A democratic, rule-of-law-oriented political morality means the internalized support for democracy and the rule of law (concepts defined at the end of Section I of the present paper).

39. According to Ginsburg and Huq (2018, 4), “[T]he only way to defend liberal democracy is to fight in elections against those who seek to erode it.” Similarly, Di Fabio (2018, 7) asserts, “And even the smartest Constitution is unable to protect from the failure, from the self-destruction of democracy.”

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