



Constitutional resilience as part of the rule of law resilience

Adam Bodnar

Professor of Law at the University of the Social Sciences and Humanities in Warsaw (SWPS)

May 2023

1. Introduction

The RESILIO project identifies constitutional resilience as vital for rule of law resilience. For this purpose, the concept of constitutional resilience depends on constitutional design and constitutionalism.

Firstly, we assume that a robust constitution, laying out the foundations of the political system as well as fundamental rights and civil liberties, is a cornerstone of any rule of law system. Its resilience can be strengthened by entrenchment clauses making it technically difficult to undermine or change constitutional provisions, as well as the performance of checks and balances, which secure the distribution of power. Secondly, we recognize that constitutional resilience also depends on constitutionalism, understood as the respect for the constitution as the fundamental legal order among decisionmakers, members of the judiciary, as well as within society in general.

This snapshot looks at the nexus between a strong constitutional design, internalized constitutionalism, and

the resilience of the rule of law. Theoretical reflections are illustrated with empirical examples, particularly those from Hungary and Poland – the two Member States that have experienced the most acute attacks on their constitutional order and identity over the last decade. These developments are of particular importance as they lie at the core of the rule of law crisis unfolding in the European Union (EU), eroding its legal order.

2. Constitutional design

Within the RESILIO project, constitutional design corresponds to the technical dimension of the constitution as a source of the laws, rules, and principles underlying a society's legal system. In particular, it covers aspects such as constitutional scope, the role of entrenchment clauses, and the performance of checks and balances as a corrective mechanism. We assume that a resilient constitutional design can equip a constitution with robust structures that can prevail over time while being flexible enough to respond to different political dynamics.

2.1 Constitutional scope and entrenchment clauses

The constitutional scope defines the extent to which rights and duties are constitutionally enshrined as well as the constitutionally provided rules for their amendment; i.e., the existence of entrenchment clauses that make certain amendments either more difficult or impossible to pass. It can be operationalized by empirical, observable phenomena and tendencies such as the democratic system enshrined in the constitution, the number and types of rights provided for, and the difficulty of amending it.

The constitution should cover major areas of the operation of the state. It should provide guidance for the resolution of major conflicts that may arise in the state. It should also define and provide for mechanisms of protection of civil and political rights, as well as those social rights that are regarded as the most important ones by a given political community. When certain issues are ill-defined in the constitution, it creates too much space for the legislative and executive power to then fill the vacuum. As a result, the rule of law is put at risk, as arbitrariness may prevail. Moreover, a lack of constitutional regulation of certain issues may empower courts to exercise judicial activism. Judicial activism in itself – if properly used – could be acceptable. However, when abused it can potentially lead to conflicts with other branches of power and reduce the legitimacy of courts. When constitutional principles and rights, as well as the competences of constitutional bodies, are comprehensively provided for in the constitution, then the risk of arbitrary actions is reduced.

When the constitution is difficult to amend, it provides for the stability and predictability of the legal system.¹ It does not mean that constitutions should not be amendable. However, procedures for amending the constitution should be strictly defined. Usually, constitutions establish

high thresholds for their amendment, which as a result, requires political compromise and reflection.

In Poland, the constitution, which was adopted by the National Assembly on 2 April, 1997, has been changed only twice. Each time, these constitutional changes were well thought through and served legitimate interests. However, the Polish example shows that sometimes there is no need to change the constitution in order to achieve a political effect. After 2015, the ruling Law and Justice party secured control over the country's Constitutional Court.² Using its parliamentary majority in both chambers of parliament and thanks to a loyal Polish president, several changes in the operation of the state institutions were achieved. The ruling party used different methods (sometimes contrary to the constitution) to achieve its political goal of an illiberal democracy. In effect, constitutional change has been achieved by changing the nature of how different constitutional bodies work. As a result of changes in their operation (including replacing key people), the ruling majority achieved the effect of a transformation of the regular, constitutional, or legislative functions of those bodies. Instead of serving the law and the constitution, they became obedient to those holding political power. This transformation allowed for a further centralization of power. Furthermore, at a later stage those institutions that had been taken over started to work as guarantors of the process, as they become instruments in the hands of the ruling majority. For example, the Constitutional Court issued an important judgment that ultimately heavily restricted legal access to abortion.³ It stopped being a passive player, and instead became fully involved in political life and constitutional interpretation. Since then, we can observe a process whereby the constitution is referred to by politicians or dependent institutions, but in a flawed way – in order to maintain the status quo and safeguard a new political system. In political theory, such a process is called “abusive constitutionalism.”⁴

¹ The leading authority on constitutional amendment is Sanford Levinson, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton University Press, 1995.

² Poland's move in an illiberal direction was analyzed by Wojciech Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, 2019.

³ Aleksandra Gliszczyńska-Grabias, Wojciech Sadurski (2021). *The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20*, *European Constitutional Law Review*, 17(1), 130-153. doi:10.1017/S1574019621000067.

⁴ The theory of abusive constitutionalism was first developed by David Landau, David Landau, *Abusive Constitutionalism*, 47 *University of California in Davis Law Review*, 189 (2013). It has been applied to analyze recent constitutional changes in selected countries by Rosalind Dixon, David Landau, *Abusive Constitutional Borrowing. Legal globalization and the subversion of liberal democracy*, Oxford University Press, 2021.

Unlike Poland, the process of constitutional change in Hungary was possible by winning the required two-thirds majority in parliamentary elections. But there is also an interesting aspect of Hungarian law, which is the use of organic laws (cardinal laws) to regulate the operation of different state institutions. Changing organic laws requires a higher threshold than regular legislative acts. The ruling Fidesz party has had a large enough majority to be able to change numerous such laws in order to appoint numerous key state officials to different institutions. If Fidesz were to lose an election, then the higher threshold for changing organic laws would impede any real changes in the administration of the state by the new majority.⁵

During the COVID-19 pandemic, different states took different approaches to dealing with the crisis. One of the measures that some states took was to announce an official constitutional state of emergency. Another was to make legislative and administrative changes in an extraordinary way, but without resorting to any special constitutional procedure. The use of the latter scenario empowered certain governments (including those in Poland and Hungary) to abuse the law and extend their competences without any significant check. According to scholars, the measures taken during the pandemic were used by some non-democratic states to concentrate power even further.⁶ In Poland, the decision not to introduce a state of emergency was predominantly motivated by the desire to secure victory in the presidential elections. The introduction of such a state would have led to a delay in the organization of the elections. In contrast, in Hungary, the “state of emergency” giving the government a mandate to introduce extraordinary legal measures was applied, and augmented by the “enabling act” passed by the parliament, which essentially allowed the government to rule by decree for an indefinite period.

These examples show that comprehensive constitutional regulation and strict rules of amendment may be important for making the constitution resilient against attacks and helping avert a constitutional crisis.⁷

Nevertheless, they will not prevent attempts to violate or to circumvent constitutional regulations, if there is the political will behind it. Any loopholes, any weakness of the system, could be used to concentrate power or violate the rule of law. Therefore, constitutional resilience cannot depend only on the constitutional scope or rules for amendment but should take into account the values of checks and balances and constitutionalism.

2.2 Checks and balances

Checks and balances are a fundamental principle of government whereby separate branches are empowered to prevent actions by other branches and are induced to share power. Checks and balances are often designed and enshrined in constitutions, as they define prerogatives and divide the powers given to separate branches of government (executive, legislative, and judicial). The vast majority of stable democracies in the world today are parliamentary systems, where executive power is generated by legislative majorities and depends on such majorities for survival.

A system of checks and balances is important for democracy and for the rule of law, as it provides for different means of political and legal accountability. Accordingly, the government should act only on the basis of the law that is adopted by the parliament and should not abuse the law for political purposes. The opposition in the parliament should have different instruments to control the operation of the government. The judiciary must be independent in order to adjudicate cases without any political bias, and to apply the law in an objective and transparent way, thus securing citizens’ trust in the democratic system. Moreover, the judiciary must be able to hold politicians accountable for any violations of the law.

In contemporary democracies, the traditional separation of powers and checks and balances are supplemented with additional constitutional organs or state bodies, exercising specific functions.⁸ Constitutional courts are

⁵ On the use of organic laws see e.g., Mauro Mazza, *The Hungarian Fundamental Law, the New Cardinal Laws and European Concerns*, *Acta Juridica Hungarica*, 54, No 2, pp. 140-155 (2013) DOI: 10.1556/AJur.54.2013.2.2.

⁶ An overview of state practices in populist regimes was made by Wojciech Sadurski, *A Pandemic of Populists*, Cambridge University Press, 2022.

⁷ Christoph Grabenwarter, *Constitutional Resilience*, *Verfassungsblog*, 06 Dezember 2018, <https://verfassungsblog.de/constitutional-resilience/>.

⁸ The development of institutions responsible for safeguarding the democratic model, but being outside of the traditional division of powers was analyzed by Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy*, Cambridge University Press, 2021.

responsible for judicial review, i.e., compliance checks of legislation and other legal acts in light of the constitution. Ombudspersons supervise the authorities' compliance with human rights obligations. Audit chambers or courts of auditors verify public spending and the effectiveness of the operation of state organs. Broadcasting councils regulate the media landscape. Prosecutors should be responsible for the independent investigation of crimes, including the abuse of law by state officials. Central banks are responsible for the sound monetary policy of the state. Each of these organs limit the power of the other branches of power. Their independence is crucial to the good operation of the state and respect for the rule of law.

In Poland, by the end of 2016, the Constitutional Court had been captured. This process happened as a result of packing the court with loyal judges and the unconstitutional appointment of three judges instead of those who had been selected by the previous parliament (but not yet sworn in by the Polish president). The full political control over the constitutional court allowed the ruling Law and Justice party to adopt several laws that changed the operation of other organs of the state (e.g., state-controlled media, prosecution service, secret service, civil service). As a result, these bodies have lost their ability to act independently and check the operations of the government. Total political control over the prosecution service created almost complete legal unaccountability for any abuse of power by governmental officials. Meanwhile, as a result of the political control over the constitutional court, the role of the parliament has been marginalized. Laws can be adopted in a rapid fashion, without the proper parliamentary consideration and debate. Quite simply, there is no risk that these laws will be overturned by the constitutional court.

But interestingly, constitutional resilience started to play an important role after parliamentary elections in 2019. Since 2019 the Senate (upper chamber of the Parliament) is controlled by the political opposition. The Senate by virtue of the constitution does not have a blocking majority. It has only 30 days for review of any laws

adopted by the lower chamber of the Parliament (Sejm). However, any resolution of the Senate against certain laws may be rejected with absolute majority by Sejm. Nevertheless, this "cooling and reflection" allows for a serious debate, listening to opinion of experts, international bodies, public consultation. As a result, the public awareness and political costs of adopting laws increases. There were examples that after these 30 days of discussion, the Sejm had a difficulty in finding once more the absolute majority to reject "veto" by the Senate. Even if it happened, later on the President of Poland faced dilemmas regarding his decision to sign the law, veto it or ask the Constitutional Court for judicial review before signing. It means that simple constitutional provision concerning the Senate's power in legislative process may become crucial when political circumstances change, when there are different majorities in lower and upper chamber of the Parliament.

In Hungary, there have been numerous examples of the violation of checks and balances between the government and judiciary. For example, as a result of the lowering of the retirement age for judges, several of them were dismissed from their positions as court presidents. This move allowed for the appointment of new presidents who were carefully selected to ensure they were loyal to the government.⁹ The supreme court has been replaced with a new body, whose name refers to old Hungarian traditions – the Kuria. But this change allowed for the shortening of the term of office of the former president of the Supreme Court, András Baka. This issue was the subject of the case *Baka v. Hungary*, which was ruled upon by the European Court of Human Rights.¹⁰

Another Hungarian example concerns the data protection commissioner. As a result of a legislative change, the commissioner's term of office was shortened due to the creation of a new national agency responsible for data protection. However, this change was assessed by the Court of Justice of the European Union (CJEU) as being contrary to the principle of independence of such bodies.¹¹

⁹ Gabor Halmai (2017). *The Early Retirement Age of the Hungarian Judges* [in] F. Nicola & B. Davies (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Law in Context, pp. 471-488). Cambridge: Cambridge University Press. doi:10.1017/9781316340479.024.

¹⁰ *Baka v. Hungary*, application No. 20261/12, judgment of 23 June, 2016 (Grand Chamber).

¹¹ *Commission v. Hungary*, C-282/12.

Meanwhile, in Poland, there have also been several attempts to restrict the independence of the Polish Ombudsman (Commissioner for Civil Rights Protection). Most notably the ombudsman could not serve until the appointment of their successor. The Polish constitutional court in the judgment of 15 April, 2021 (K 20/20), decided that provisions allowing for the interim service of the ombudsman were contrary to the constitution. As a result, the ombudsman had to leave office three months later. But interestingly, the constitutional resilience played an important role. By virtue of the Constitution, the ombudsman is elected by two chambers of the Parliament. The ruling majority was not controlling the Senate. After a few unsuccessful attempts to elect the new ombudsman, finally the agreement has been reached and by the end of July 2021 the new ombudsman was elected. There was a risk that the ruling majority would try to circumvent constitutional regulation and create some new law on the ombudsman. But at the end of the day, due to domestic and international pressure, the ruling majority complied in its actions with the constitutional regulation.

These examples show that the principle of checks and balances depends to a large extent on the existence of proper judicial review. Without it, the balance of power can easily be shifted to the executive power and the parliamentary majority. At the same time, the opposition is losing important mechanisms of control. Independent courts and other constitutional bodies (like the ombudsman) can play an important role in protecting constitutional values, as long as they are not silenced or removed from their position. But as long as they remain in position, they can be an important element of constitutional resilience. Moreover, it is difficult to rule the country and not to obey formal rules, which are strictly provided in the constitution (like in case of ombudsman selection or strict legislative process requirements in Poland). Within the context of the European Union, one should mention the important role played by the Court of Justice of the European Union, which started – within the limits of its competence – to safeguard EU values, which were not different from the values expressed in the constitutional principles in selected member states (like

judicial independence and the rule of law). This became increasingly important because these constitutional principles lost their domestic “protector” and there was a need for EU intervention.

3. Constitutionalism

Similar to other legal acts, in the end, any constitution is as strong as the will of the government to uphold it. Therefore, the power of a constitution as a fundamental law stem from the institutionalized mechanisms of power control that protect the rule of law and civil liberties, and legitimize the government. A longstanding and established tradition of constitutionalism can be expected to become part of citizen identity, institutional ethos, and political culture, thus making them more resilient against attempts at autocratic changes.

The constitution cannot operate in a vacuum. It has to be supported by the people, who believe in its values, who regard the constitution as their “own,” who were involved in the process of its drafting and adoption. There are different experiences across the world of how constitutions gain their popular recognition. For some countries, constitutions are embedded in a certain historic moment, when the constitutional change was made possible and was accepted by citizens. Mark Tushnet calls such windows of opportunity for constitutional change “constitutional moments”.¹² For some other countries, constitutions gain power over time, within the process of daily application and interpretation. In some countries, it is the constitution that connects the divided and diverse societies – the law prevails over ethnic or religious tensions. There are also state practices that build allegiance to the constitution. One should mention here, in particular, the practice of constitutional patriotism (Verfassungspatriotismus), defined by Juergen Habermas and developed in German practice.¹³

Strong popular support for the constitution is one of the mechanisms of resilience. Instead of relying on institutional mechanisms for defending the constitution, it is the people who defend the constitution by exercising their civil and political rights – freedom of speech, freedom of

¹² Mark Tushnet, Living in a Constitutional Moment: Lopez and Constitutional Theory?, Case Western Reserve Law Review, 46 (3), pp. 845-875 (1996).

¹³ Die Unbestimmtheit der Verfassung: „Verfassungspatriotismus“ mit Jürgen Habermas nach 70 Jahren, Verfassungsblog, 23 May 2019, <https://verfassungsblog.de/die-unbestimmtheit-der-verfassung-verfassungspatriotismus-mit-juergen-habermas-nach-70-jahren/>.

assembly, freedom of association or right to petition. Moreover, the potential threat of people exercising their protest rights may chill any attempts to undermine the constitution. Thus, a major instrument of protecting the constitution is the power of protest.

In July 2017, Polish citizens protested against a sudden change concerning the status of the supreme court. Demonstrations were organized in more than 200 Polish cities. The Polish constitution became a symbol of those protests. Polish citizens realized that the proper mechanism of judicial review no longer existed. Therefore, by taking to the streets to voice their concerns, they started to act as guardians of the constitution. A symbol of those protests was the slogan “KonsTYtucJA”, where “TY” means “You” and “JA” means “I”, created by artist Luka Rayski. Posters and t-shirts were omnipresent among citizens. Former President Lech Wałęsa wore a t-shirt with this slogan at all the public events he attended. These protests are commonly regarded as the birth of constitutional patriotism in Poland. In later years Polish citizens organized different actions to protect the constitution. The most notable example is Tour de Konstytucja, which is a series of demonstrations and events organized across Poland over the summer, to demonstrate the value of the constitution.¹⁴ One should note, however, that these popular protests did not stop the process of change that has been destroying the value of the constitution. They have rather delayed these changes and empowered other actions, such as the strategic litigation of cases before the EU’s Court of Justice and the European Court of Human Rights. Moreover, the European Commission could refer to this popular dissent in its actions concerning the rule of law.

Another example are the recent protests in Israel. Israel does not have a written constitution, such as is typical in European states. However, its basic laws, as interpreted by the Israeli supreme court, have become the source of fundamental constitutional principles and civil liberties.

The attempt by the government of Prime Minister Benjamin Netanyahu to adopt laws restricting judicial independence resulted in massive protests in major Israeli cities. The magnitude of the protests, including the participation of trade unions, petitions at universities, and the involvement of army reservists, resulted in the suspension of further work on changes to the judiciary. As of now, the protests have proved to be successful, but the question remains whether such powerful resilience can be sustained over time.¹⁵

The recent protests in Georgia also symbolize the power of constitutionalism. The parliament wanted to adopt a “foreign agents” law that would restrict the operation of independent non-governmental organizations.¹⁶ It was clear to international observers that such a law threatened basic constitutional values, including the freedom of association. Therefore, people went out onto the streets to protest. Ultimately, the draft law was dropped. But one should not look at these protests only through the lens of a particular law. In fact, Georgian citizens were opting for a certain model of the state, that is enshrined in its constitution: a democratic and liberal state, independent from Russian influence, with aspirations of accession to the European Union. The “foreign agents” law became just a symbol of a possible constitutional overthrow and of turning the state in an illiberal direction. Constitutional practices and a strong civil society built over the last 30 years were crucial to making these protests successful.¹⁷

6. Conclusions

A strong constitution may be crucial in safeguarding democracy and the rule of law. However, recent examples show that it may not be sufficient, as backsliding on the rule of law may be achieved as a result of unpunishable anti-constitutional moves or through the takeover of independent institutions. Furthermore, resilience can be successful if different elements of the democratic state

¹⁴ Adam Bodnar, *Polish Road toward an Illiberal State: Methods and Resistance*, Indiana Law Journal, vol. 96 (2021), pp. 1059-1087.

¹⁵ See e.g. Joshua Leifer, *Whose Constitution, Whose Democracy?*, *New York Review of Books*, April 13 2013, <https://www.nybooks.com/online/2023/04/13/whose-constitution-whose-democracy-joshua-leifer/>.

¹⁶ The use of the “foreign agents” law by Russia was analyzed in the recent ECtHR judgment – *Ecodefence and others v. Russia*, Application No. 9988/13, judgment of 14 June 2022.

¹⁷ Ivan Nechepurenko, *Georgia drops a draft “foreign agents” law that set off mass protests over parallels to Russia*, *New York Times*, 10 March 2023, <https://www.nytimes.com/2023/03/10/world/europe/georgia-foreign-agents-protests.html>.

interact with one another – where strong constitutions are combined with the embeddedness of constitutional values in the society. If constitutional provisions are weaker or the balance of powers between branches of government is violated (especially as the result of an attack on the judiciary), then the power of protest is in the hands of citizens. They can act as the protectors of the democratic system.

In the European Union, constitutional resilience means something more these days. It is not only about the domestic constitution and the internalized value of constitutionalism. Membership of the EU could be regarded as a safeguard against most radical changes. It applies also to countries that aspire to be EU member states. Against this background, people's attachment to constitutional values and resilience activities may legitimize the EU for additional actions. Moreover, the Court of Justice of the European Union not only becomes a guarantor of legal stability for the EU, but it also fulfils the role of a quasi-constitutional court for some member states.

Therefore, constitutional resilience these days should take into account the operation of the state in a multi-layered legal and political system. No EU member state can act as an island. It has to take into account the need for the cooperation and mutual recognition of legal systems, in order to operate within the Single Market. This civilizational advantage brings limitations but at the same time contributes to the strength of resilience, in the case of attacks on fundamental rights, democratic principles, and the rule of law.

About the authors

Professor Adam Bodnar was the Commissioner for Human Rights of the Republic of Poland (2015-2021). Currently, he is Professor of Law at the University of the Social Sciences and Humanities in Warsaw (SWPS) and visiting professor at the University of Cologne. He serves as a board member of numerous international and domestic organizations (International IDEA, OMCT, World Justice Project, Liberties, ClientEarth Poland, Humanity in Action). He is also member of the OSCE ODIHR Panel of Experts on Freedom of Assembly and Association. He authored numerous scientific publications, in particular on human rights, EU citizenship, anti-discrimination laws and rule of law.

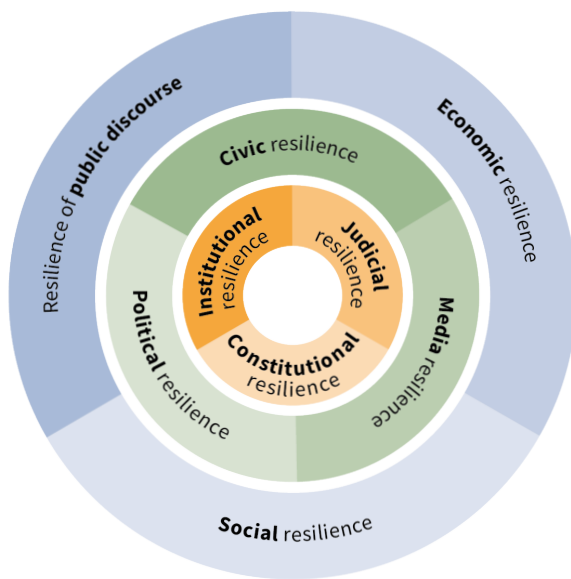
About the project

RESILIO aims to identify institutional and societal factors that make the rule of law more resilient, thus adding a constructive contribution to academic and policy debates. It draws on a “thick” definition of the rule of law, understood as closely connected to democracy and fundamental rights. The resilience of the rule of law means that the rule of law can experience hazardous events or incremental threats without losing its core function, structure and purpose.

About the paper

This paper is part of the **#RESILIOsnapshot** series, a collection of compact analyses that explain ties between resilience factors of the rule of law in the European Union, identified within the RESILIO model.

RESILIENCE FACTORS



RESILIO offers a multi-layered model of the rule of law resilience. Systemic dimension (orange) reflects upon the resilience of the legal setup; subsidiary dimension (green) looks at the phenomena and tendencies present in societies as possible facilitators; and contextual dimension (blue) analyses the broader habitat, determined by structural and systemic variables like economic growth, social cohesion, and general political climate. **RESILIO** also takes into account the horizontal effects of unpredicted and unprecedented crises that can affect all dimensions of rule of law resilience with different intensity. While each factor is necessary for a resilient rule of law, they are only sufficient in combination.

The considerations in this paper are compatible with the developed conceptual model of the resilience of the rule of law. They focus on **constitutional resilience** as a contextual factor strengthening the rule of law.

RESILIO is implemented by Institut für Europäische Politik in Berlin and funded by Stiftung Mercator.

For more information, visit the project website: <https://iep-berlin.de/en/projects/future-of-european-integration/resilio/>