

# Healing Liberal Democracies: The Role of Restorative Constitutionalism

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**W**e live in an age of abusive constitutionalism.<sup>1</sup> Democracies in recent years have seen myriad and repeated attacks on their core institutions and commitments.<sup>2</sup> Yet the trajectory of democratic change is not unidirectional. In some countries, there are signs that previously authoritarian systems may be inching further toward democracy or competitive authoritarian rule. And in others, there are new signs of democratic resistance and renewal.

This raises an important question: How do countries seeking to reverse a process of abusive constitutional change go about restoring constitutional democracy?

In this short piece, we explore this question by considering the range of mechanisms by which constitutional democracy is both degraded *and* rebuilt. In so doing, we contrast two forms of constitutional change. First, we review “abusive” forms of change, through which the tools of formal and informal constitutional change such as amendment, replacement, judicial interpretation, legislation, and changes in practice are used to erode the democratic order. Would-be autocrats often borrow from concepts, designs, and doctrines drawn

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from liberal democracies as justification or inspiration for authoritarian moves—a phenomenon we call “abusive constitutional borrowing.”

The second form of change we outline here is one we call “restorative constitutionalism,” which we define as an attempt to carry out constitutional change to return to some prior constitutional status quo, or, in other words, to return to a constitutional path. Restorative constitutional projects are multifaceted, since there are many kinds of constitutional pacts, but one of their uses can be to repair damage after democratic or constitutional erosion has occurred. Ironically, as we show below, the same kinds of mechanisms now commonly used to degrade democracy—formal amendment, legislation, and more informal changes—are also necessary to heal democracies by undoing or limiting past damage. The attractiveness and effectiveness of different mechanisms will depend on the relative power of different political actors and past and prevailing norms and practices.

The remainder of the piece is divided into three sections. The first section sets out the pathways and discourses of abusive constitutional change, while the second does so for restorative constitutional change. The final section offers a brief conclusion.

## ABUSIVE CONSTITUTIONALISM

Understanding how democratic orders are best healed or restored requires first understanding the tools through which they are usually attacked. Several scholars have noted a marked empirical change in the methods of democratic degradation. Whereas democratic orders historically were more likely to implode via a rapid anti-constitutional event such as a military coup, they are now more likely to erode gradually through legalistic means such as constitutional amendment, replacement, legislation, and judicial interpretation. Various changes at both the international and domestic levels have incentivized these shifts across many regions of the world. Here, we highlight the variety of legal means that can be used for abusive ends to attack a democratic order.

Abusive constitutionalism is the use of democratic constitutional tools and procedures to degrade democracy from within—or specifically, to undermine the “minimum core” of democracy, commitments to free and fair multiparty elections, political rights and freedoms, and basic institutional checks and balances.<sup>3</sup> As one of us (Landau) noted in 2013, formal procedures for constitutional

amendment are a frequent conduit for abuse. Formal procedures for constitutional change can serve multiple purposes, but one of their core functions is to allow democratic majorities to update the terms of a democratic constitution in line with changing needs and circumstances.<sup>4</sup> They also permit democratic majorities to reassert their preferred understanding of constitutional norms in the face of disagreement from courts.<sup>5</sup> More fundamentally, they provide an opportunity for the regular renewal of democratic consent to a constitutional order.<sup>6</sup> In each case, constitutional amendment procedures play important democratic purposes. Yet formal amendment has been used with increasing frequency as a tool to amend and repeal core democratic guarantees. Landau in 2013 called this a process of abusive constitutional change.<sup>7</sup> Below, we refer to examples from Latin America, where constitutional amendments were used to stretch or eliminate presidential term limits in contexts where there were significant concerns that incumbents were seeking to undermine the liberal democratic order. In recent years, such formal expansions of term limits have occurred in several countries throughout the region, including Ecuador, Colombia, Venezuela, and Nicaragua. Consider also Hungary, where the Fidesz Party, after winning the requisite two-thirds of Parliament in 2010, embarked on an ambitious antidemocratic project of constitutional change, first undermining the jurisdiction of the constitutional court by amendment, and then replacing the entire constitution to consolidate power and further undermine checks imposed by the court and other bodies.<sup>8</sup>

In joint work, we have noted how the same dynamic can apply to a broader range of democratic constitutional tools and procedures. Would-be authoritarians can use processes of legislative change, including the drafting or amendment of quasi-constitutional or cardinal statutes, to erode previous constitutional checks and balances. Antidemocratic actors can also choose to repeal or reinterpret previous executive policies that played a critical role in reinforcing norms in democratic constitutional governance. They can distort or ignore long-standing constitutional conventions that sustain democracy. In Poland, for instance, the ruling party has relied heavily on the enactment of new laws and the undermining of informal norms to remake the judiciary, since they have not had the requisite supermajority needed to formally amend the constitution.<sup>9</sup>

Finally, would-be authoritarians can put pressure on courts and their independence in ways that ultimately mean that courts themselves become tools for the erosion of democracy. This last phenomenon is one that we label “abusive judicial review.”<sup>10</sup> Consider Cambodia, for example, an extreme case where the ruling

party turned to the Supreme Court to ban the only significant opposition party, with the court obliging in a 2017 decision.<sup>11</sup> Or Latin American countries such as Bolivia, Honduras, Nicaragua, and (most recently) El Salvador, where high courts have used judicial review to erase presidential term limits at the behest of incumbents and their allies.<sup>12</sup>

All of these tools and techniques have the capacity to undermine constitutional democracy and would-be authoritarians are likely to rely on them in combination, depending on the circumstances. The greater the majority enjoyed by a would-be authoritarian in the legislature, the more likely he or she is to rely on legislative or formal constitutional amendments as preferred tools. The weaker the potential authoritarian is legislatively, the more likely he or she is to rely on executive policy changes, distortions, or breaches of constitutional conventions. Changes to the composition of the judiciary are perhaps most likely in systems where incumbents have sole or outsized control over the process of judicial appointment and are thus able to capture the judiciary most easily.

## CONSTITUTIONAL CHANGE AND RESTORATION

A restorative project of constitutional change is a project that attempts to return to a prior constitutional status quo, or, in other words, that seeks to reestablish some constitutional past. The discourse of constitutional restoration is extremely complex, in large part because there are many different kinds of constitutional pasts—for example, more concrete vs. more imagined, and more or less distant in time. That is to say, all pasts must be interpreted and involve a degree of constructional overlay. But some versions of the past are more grounded in historical fact than others. And some draw on long-standing practices and traditions, and others on more recent changes in social and legal practices.

In some contexts, a restorative discourse may actually support a project of abusive constitutional change. Consider, for example, the Fidesz Party's use of a (largely imagined) constitutional past in Hungary, outlined in the preamble of the National Avowal to its 2011 constitution and elsewhere. This preamble was used as justification for changes that both are illiberal and reduce checks on the ruling party, which makes it harder to dislodge from power.<sup>13</sup>

However, the same tools used to carry out abusive forms of constitutional change can be used to reverse those changes in other contexts. That is, restoration can also serve as an antidote to prior episodes of abusive constitutionalism. Here,

we emphasize cases where a restorative discourse seeks to return to a constitutional status quo before a constitutional order was abused for authoritarian ends. Especially where abusive constitutional changes are seen as aberrational and short term, such a restorative project may be especially primed for success.

For example, just as formal constitutional amendment is one important way in which abusive constitutional projects are carried out, it is also an important pathway through which abusive change can be reversed. At least in certain conditions, where formal amendment is difficult to achieve, it can also provide a relatively enduring or stable mechanism for restoring prior democratic constitutional arrangements.<sup>14</sup>

Consider the 1977 amendments to the Constitution of India, passed by the Janata Party, that reversed many of the abusive constitutional changes introduced by Prime Minister Indira Gandhi during India's period of "emergency" from 1975 to 1977.<sup>15</sup> These amendments restored the role of courts and other independent institutions and thereby helped reverse many of Gandhi's centralizing antidemocratic moves.

A more recent example in South Asia is the Nineteenth Amendment in Sri Lanka, passed in 2015, which restored presidential term limits and other constitutional democratic checks and balances.<sup>16</sup> These changes reflected a broader move away from autocratic forms of politics toward democratic political change, but also advanced this restorative project at an institutional level—including by reweighting the power of Parliament and the executive branch, and shoring up the independence of institutions appointed by the president. However, the Nineteenth Amendment ultimately proved less enduring, and the Twentieth Amendment reversed most of its reforms.

Fights over presidential term limits have frequently involved such an oscillation between abuse and restoration. Consider two key contexts in the Andes region of Latin America. In Colombia, former president Álvaro Uribe, a populist who put pressure on Colombia's liberal democratic constitution, amended the Colombian constitution in 2004 to allow immediate presidential reelection. However, an effort for a further amendment to allow a third consecutive term was blocked by the Constitutional Court of Colombia amid significant concerns regarding the erosion of democracy. Uribe's successor and ally-turned-rival, Juan Manuel Santos, led the effort to amend the constitution in order to reimpose a one-term limit. A similar situation occurred in Ecuador, where Rafael Correa removed all presidential term limits by amendment in 2015. Again, his

handpicked successor, Lenín Moreno, held a 2018 referendum that resulted in the restoration of a two-term limit on presidents. Moreno stated that he would restore what he considered the true nature of the 2008 constitution by reimposing its original presidential term limit.

A second important tool of restoration involves legislative change. Where organic or quasi-constitutional legislation—or legislation that is deemed fundamental to the functioning of government—has been amended or repealed, all that the legislature needs to do to restore the status quo ante is to reenact those prior provisions or amend existing legislation to make it more democratic in nature. One difficulty with this strategy is that, in some cases, what helped make legislation quasi-constitutional in nature was its subject matter and long-standing status.<sup>17</sup> Legislative reenactment will be sufficient to restore its ordinary legislative status, but not necessarily its quasi-constitutional or organic status—unless and until it remains on the books for an additional period of time and gains a greater degree of political and popular acceptance.

The length of time for which it must remain in force will vary by context and the degree to which de facto entrenchment vs. other factors are considered pivotal to the small *c* constitutional status of a norm. It may likewise depend on how long the revoked provisions were in force for, relative to the period for which they were amended or suspended. But there is inevitably some contingency to the attempt to restore small *c* constitutional norms via this path: Its success will depend on events that occur after the relevant changes are enacted. It will be difficult to ensure, in other words, that reinstated legislation will actually develop the kinds of constituencies and popular support needed to make the norm a durable part of the constitutional order.

A third approach involves the use of executive orders or other forms of executive lawmaking to reaffirm and restore liberal democratic norms and practices. Some of these efforts are more likely to succeed than others. Rules and regulations can generally be changed in either an anti- or pro-democratic direction. But softer norms and conventions may be much harder to restore than to degrade. For instance, constitutional conventions, by definition, depend on a long-standing (or perhaps even uninterrupted) period of settled practice where they are viewed by participants as required rather than optional or useful only if in accord with self-interest. Once undermined, practices of this kind can be difficult to recreate. Conventions and other informal norms may therefore be the most difficult (and time-consuming) aspects of a constitutional order to rebuild.

Take norms of prosecutorial independence. These norms involve an institutional dimension, but also a legal-cultural commitment to prosecuting individuals based on the strength of the case against them rather than a desire to avoid charging those with connections to powerful political or economic interests, or to target political opponents. Further, legal-cultural norms are generally transmitted person to person through junior lawyers working with senior prosecutors committed to the norm. Yet if a dominant party, or would-be authoritarian, undermines the independence of a prosecutorial body, existing staff will often leave and be replaced by party or government loyalists. And those loyalists will then operate in an environment where there is little commitment to independence. When a new government is elected or comes to power, and wishes to affirm norms of independence, the challenge will therefore be to recruit and (re)train lawyers to understand this commitment—often in the absence of the kind of leadership structure that can make this easy to achieve.

The relative attractiveness of these different mechanisms will vary according to the context. One key factor is the relevant distribution of political power. The stronger the new prodemocratic majority, the more feasible it will be to attempt to rebuild constitutional democratic norms via processes of formal constitutional amendment, whereas the weaker that majority, the more need there will be to rely on ordinary legislation, executive rulemaking, or processes of judicial review. Furthermore, the relative attractiveness of these various “informal” mechanisms of change may depend on the prevailing system of judicial appointment, and the lag time between changes in the composition of the political and elected branches of government. The closer the alignment between the two, the greater the danger of abusive judicial review, but also the easier it will be for prodemocratic forces to use courts as a forum for democratic rebuilding.

Paradoxically, then, some of the same factors that make a constitutional order open for abuse may also be the ones that open the pathway for democratic restoration. This point has potential implications for design—a constitution that is in some respects more robust against democratic erosion may also, and unfortunately, slow or derail some efforts to restore democracy once authoritarians have left the scene. This insight may also have implications for the way domestic and international audiences respond to potentially problematic constitutional changes. The impact of these changes must be assessed by examining their effects on constitutional democracy in a particular context, rather than merely assigning a label to a particular maneuver and viewing it as out of bounds in all circumstances.

Court-packing, for example, is one such maneuver that is commonly viewed as part of an abusive constitutionalism strategy—and so it has been in recent contexts like Venezuela and Poland, where authoritarian actors have used such a strategy to construct courts that would rubber-stamp their antidemocratic initiatives. But in some cases, court-packing may also be a necessary response to a judiciary that has been stacked by a prior authoritarian regime. The line between these two uses can, admittedly, become murky. In Ecuador, for instance, Lenín Moreno’s successful 2018 referendum reinstating term limits also created a temporary version of a constitutional body, the Council for Citizen Participation, with sweeping powers to investigate and remove judges. This body then removed all nine justices of the constitutional court, reasoning that they had all been appointed with a clear agenda to favor Correa’s partisan interests.<sup>18</sup> Correa’s supporters understandably cried foul and even labeled the move a “coup,” but the council was correct in noting that the justices had been appointed to support Correa’s authoritarian political agenda.

## CONCLUSION

In this brief essay, we have defined and identified two forms of constitutional change—the abusive form of change through which constitutional democracies around the world have been eroded in a range of cases and the restorative form through which they might be rebuilt.

Ironically, as we have shown, the same mechanisms used to attack democracy are also important for rebuilding it. We hope, in future work, to examine the restorative mode of constitutional change as a response to authoritarian abuse of constitutional orders, and to highlight its promise and limitations.

## NOTES

<sup>1</sup> David Landau, “Abusive Constitutionalism,” *UC Davis Law Review* 47 (2013); David Landau and Rosalind Dixon, “Abusive Judicial Review: Courts against Democracy,” *UC Davis Law Review* 53 (2020); and Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021).

<sup>2</sup> Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018).

<sup>3</sup> Rosalind Dixon and David Landau, “Competitive Democracy and the Constitutional Minimum Core,” in Tom Ginsburg and Aziz Huq, eds., *Assessing Constitutional Performance* (Cambridge, U.K.: Cambridge University Press, 2016); and Dixon and Landau, *Abusive Constitutional Borrowing*.

<sup>4</sup> Rosalind Dixon, “Constitutional Amendment Rules: A Comparative Perspective,” in David Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law* (Cheltenham, U.K.: Edward Elgar, 2011); Richard Albert, “Constitutional Handcuffs,” *Arizona State Law Journal* 42, no. 3 (2010); and Rosalind Dixon and David Landau, “Tiered Constitutional Design,” *George Washington Law Review* 86, no. 2 (March 2018).



- <sup>5</sup> Ibid.
- <sup>6</sup> Ibid.
- <sup>7</sup> Landau, “Abusive Constitutionalism.”
- <sup>8</sup> See Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, “Hungary’s Illiberal Turn: Disabling the Constitution,” *Journal of Democracy* 23, no. 3 (July 2012).
- <sup>9</sup> See Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford: Oxford University Press, 2019).
- <sup>10</sup> Landau and Dixon, “Abusive Judicial Review.”
- <sup>11</sup> See, for example, “Cambodia Top Court Dissolves Main Opposition CNRP Party,” News, BBC, November 16, 2017, [www.bbc.com/news/world-asia-42006828](http://www.bbc.com/news/world-asia-42006828).
- <sup>12</sup> See David Landau, Yaniv Roznai, and Rosalind Dixon, “Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America,” in Alexander Baturo and Robert Elgie, eds., *The Politics of Presidential Term Limits* (Oxford: Oxford University Press, 2019).
- <sup>13</sup> See, for example, Miklós Könczöl, “Dealing with the Past in and around the Fundamental Law of Hungary,” in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias, eds., *Law and Memory: Towards Legal Governance of History* (Cambridge, U.K.: Cambridge University Press, 2017), p. 246.
- <sup>14</sup> The alternative possibility, however, is a form of constitutional “tit for tat” or “ping-pong” between abusive and prodemocratic amendment. See Dinesha Samararatne, “Sri Lanka’s Constitutional Ping-Pong: The 20th Amendment in Historical Perspective,” *Himal South Asian*, September 25, 2020, [www.himalmag.com/sri-lankas-constitutional-ping-pong-2020/](http://www.himalmag.com/sri-lankas-constitutional-ping-pong-2020/).
- <sup>15</sup> *Minerva Mills v. Union of India*, 1980 A.I.R. 1789 (SC, July 31) (striking down parts of an amendment that immunized constitutional amendments from judicial review and giving directive principles priority over rights); *State of Uttar Pradesh v. Raj Narain*, 1975 A.I.R. 865 (SC, January 24) (striking down an amendment that removed jurisdiction over electoral disputes involving the prime minister and certain other high officials); and Rosalind Dixon and David Landau, “Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment,” *International Journal of Constitutional Law* 13, no. 3 (July 2015), pp. 606–38.
- <sup>16</sup> Samararatne, “Sri Lanka’s Constitutional Ping-Pong.”
- <sup>17</sup> See William N. Eskridge Jr. and John A. Ferejohn, “Super-statutes,” *Duke Law Journal* 50, no. 5 (2001). Rosalind Dixon and Eric A. Posner, “The Limits of Constitutional Convergence,” *Chicago Journal of International Law* 11, no. 2, art. 18 (2010).
- <sup>18</sup> See, for example, “Real Coup’: Ecuador Removes Constitutional Court Judges,” teleSUR, August 23, 2018, [www.telesurenglish.net/news/Real-Coup-Ecuador-Removes-Constitutional-Court-Judges-20180823-0019.html](http://www.telesurenglish.net/news/Real-Coup-Ecuador-Removes-Constitutional-Court-Judges-20180823-0019.html).

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Abstract: This brief essay contrasts two modes of constitutional change: abusive constitutional projects that seek to erode democracy and restorative constitutional projects that aim to repair eroded democratic constitutional orders. Constitutional democracies are eroded and restored via the same mechanisms: formal processes of constitutional amendment and replacement, legislative amendment, changes to executive policies and practices (or respect for conventions), and processes of judicial decision-making. Under the right conditions, abusive uses of these mechanisms for anti-democratic ends can be reversed by prodemocratic or restorative uses. The more difficult question is what kinds of political discourses are most likely to sustain successful processes of democratic rebuilding. In recent work, we have pointed to the role sometimes played by liberal democratic discourses as purported justifications for processes of abusive constitutional change: we label this the rise of “abusive constitutional borrowing.” Less well understood are the kind of discourses likely to sustain successful democratic healing or rebuilding. Often, the most popular discourse is a restorative one, which focuses on repairing damage caused by authoritarians and returning to a constitutional status quo ante. In this essay, we discuss the advantages and disadvantages of restorative constitutionalism as a response to prior episodes of democratic erosion.

Keywords: democracy, constitutionalism, constitutional change, constitutional borrowing, abusive constitutionalism, abusive constitutional borrowing, democratic restoration, restorative constitutionalism