

DESIGNING RESISTANCE

Democratic Institutions and the Threat of Backsliding



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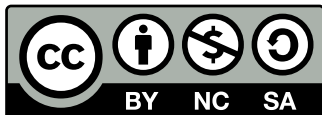
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EXECUTIVE SUMMARY

FRAMING AND DEFINITION

The International IDEA *Global State of Democracy 2023: The New Checks and Balances* Report highlights the importance of countervailing institutions in strengthening democracy. This Report illustrates how episodes of democratic backsliding attack such institutions and considers how to build institutions that are more resistant to backsliding.

It is clear that there is no perfect institutional design which can ensure 'proofing' against backsliding. However, that does not mean that institutional design is unimportant. As we have seen in numerous cases, poor institutional design can make the path easier for backsliders, while strong institutional design can strengthen the resistance of democracy. Even if we cannot make buildings earthquake-proof, we can learn how to make them more earthquake-resistant.

Further, many other factors affect resistance to backsliding. These include state capacity to deliver democratic dividends for the citizenry; an educated and engaged public; a media culture which avoids gratuitous political polarization; and a political culture which values the ground norms of democracy. However, institutional design should not be seen as separate from and irrelevant to these factors; it may encourage and facilitate these aspects of democracy, just as it may hinder them.

There is no perfect institutional design which can ensure 'proofing' against backsliding. However, that does not mean that institutional design is unimportant.

Ultimately, a determined leader supported by a significant part of the electorate will find a way to weaken or dismantle any institutional check on their power. However, James Madison aptly summed up the importance of institutions as follows: ‘A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions’ (Publius 1788).

In recent years, numerous stable democracies have proactively undertaken initiatives to review their democratic frameworks in order to examine potential weaknesses and generate ideas for improvements. This Report is intended for public bodies engaged in reviewing legal and constitutional frameworks, civil society organizations seeking to advocate for strengthening their democracy and the international democracy assistance community engaged in supporting democracy worldwide.

The definition of backsliding used in this Report has three elements:

- It involves a government which comes to power through competitive elections.
- It is achieved through legal means.
- It alters the core of constitutional democracy to create an unfair electoral playing field or weaken constraints on the power of the executive.

HOW BACKSLIDING TAKES PLACE: AN INSTITUTIONAL PERSPECTIVE

Annex A of this Report lists numerous strategies that have been used to weaken the guardrails of constitutional democracies. This Report distills 12 general themes from that larger list, which are summarized briefly here. These general themes are made up of many possible combinations of specific steps—undermining the courts, for example, could include lowering the judicial retirement age or restricting the court’s jurisdiction—and are carried out through different institutional channels—such as legislation, constitutional amendment or even

changes to sublegislative procedure. The choice of tactic will depend on the institutional and political context, the amount of political capital available and larger strategy choices (whether the backslider's strategy is to hollow out institutions, usurp them or overhaul them).

As will be discussed in this Report, stanching one hole in the dam may cause a leak to spring up elsewhere. Current trends, however, suggest that being mindful of these institutional design vulnerabilities and giving appropriate consideration to the context can make a meaningful difference at the margins.

The following (non-exhaustive) list outlines 12 of the most frequently seen trends in backsliding:

1. *Draining, packing and instrumentalizing the judiciary.* This process begins by diluting the power of the judiciary—for example, by restricting its jurisdiction or lowering judicial retirement ages to purge sitting judges from the bench. The court is then packed, either by filling newly vacant seats or by adding or expanding tribunals in order to allow the current majority to confirm several judges at once. Once reconstituted, power is reinfused into the judiciary, who can act to enable and legitimize the backsliding regime's policies as well as to attack the opposition.
See: Bolivia, Ecuador, El Salvador, Hungary, Israel, Nicaragua, Maldives, Poland, Türkiye, United States of America, Venezuela.
2. *Tilting the electoral playing field.* This involves making changes to the electoral system to heavily favour the incumbent. This can include changing electoral districts and apportionment (gerrymandering), curating the electorate through selective enfranchisement/disenfranchisement and changing the way that surplus votes and seats are distributed between winners and losers. It might also include finding ways to disqualify opposition members from standing for election or reducing transparency or independence in election management and oversight.
See: Albania, Benin, Bolivia, Dominican Republic, Ecuador, Georgia, Hungary, India, Mongolia, Nicaragua, Poland, Serbia, Türkiye, Ukraine, USA, Venezuela, Zambia.

A list of 12 of the most frequently seen trends in backsliding has been identified.

3. *Weakening the power of the existing opposition.* Limiting the ability of the existing opposition to check the government complements the tactic of working to keep the opposition from gaining power. It has been achieved by using disciplinary sanctions against opposition members to remove them from parliament and amending parliamentary procedures to reduce the floor time or bargaining power of the minority.
See: Ecuador, Hungary, India, Türkiye, Ukraine, USA (Tennessee), Venezuela, Zambia.
4. *Creating a democratic shell.* This tactic involves incorporating measures into the constitution or legal system which are ostensibly democratizing or liberalizing but do not necessarily have that effect in practice. This might occur when design choices are imported from other democratic systems but are divorced from other elements central to their functioning or lack the enforcement mechanisms that give them teeth. This strategy allows the backslider to point to design elements borrowed from strong democratic countries and insist that criticism is unfounded or even hypocritical.
See: Hungary, North Macedonia, Türkiye.
5. *Shifting competencies/parallel institutions.* This strategy entails shifting powers from a non-captured institution to a captured one. This can be useful when the existing institution has effective safeguards for independence. For example, a backslider could set up a new elections oversight committee, which is then given some powers previously held by an independent election management board. While this may, at first glance, appear simply to give greater attention to an important issue, it ensures that this attention is exercised by those chosen by the administration.
See: Hungary, Israel, Poland, Venezuela.
6. *Political capture: realigning chains of command and accountability.* This involves changing appointment procedures or bringing an office under the command of a different (political) office, thus infusing civil service offices with a political pressure that is difficult to detect from the outside. For example, independent prosecutors may be brought under the command of the Minister

of Justice, having originally been accountable to an independent judicial oversight board chosen by judges and lawyers.

See: Hungary, Israel, Poland.

7. *Selective prosecution and enforcement.* Selectivity is one of the most common and liberally used of the backsliding methods. On the prosecution side, it may include prosecuting political opponents for low-level non-political crimes—such as building code violations or tax infractions—which are not generally strictly enforced. On the rights side, it might include having laws on the books that ostensibly protect minorities but failing to enforce them when certain unfavoured minorities are affected.

See: India, Türkiye, Ukraine, USA, Zambia.
8. *Evasion of term limits.* Eliminating term limits is usually justified by one of two arguments. One is that they obstruct the ability of the people to choose their own leader. The other is that they impede the ability of the backslider—portrayed as the only true representative and defender of the interests of ‘the people’—to vindicate those interests. Term limits may be evaded in a number of ways beyond mere elimination. The toolkit includes examples such as enacting term limits that do not apply retroactively (El Salvador); rotating out of office and then back in (Russia); and delaying elections on purportedly emergency grounds (Ethiopia).

See: Armenia, Bolivia, Burkina Faso, Burundi, El Salvador, Ethiopia, Honduras, Nicaragua, Sri Lanka, Venezuela.
9. *Expanding executive power.* Most tools in the toolkit involve eroding the checks on the exercise of executive power. The converse of these strategies is the direct expansion of that power. Expanding executive power is, in some sense, the most direct form of backsliding because backsliding largely serves the main end goal of aggrandizing power personally to the backslider. While more efficient and effective, directly expanding power is more transparent and thus politically costly than the subtler art of shaving down checks. Executive powers that have been expanded include control over appointments (Ukraine), control over finances (Hungary) or even the power to decree laws on certain topics, like banking or use of national resources (Venezuela).

See: Armenia, Hungary, Türkiye, Ukraine, USA, Venezuela.

10. *Temporal entrenchment ('harpooning')*. This refers to a strategy whereby backsliders make major changes while they enjoy a supermajority and then move to make it as difficult as possible for those changes to be undone. This involves (a) requiring a future supermajority to undo the changes and (b) relying on other measures, such as tilting the electoral playing field, to make it difficult for the opposition to acquire such a supermajority. We refer to this strategy as 'harpooning' because the backslider penetrates the halls of power, makes changes and then makes these difficult to undo—much in the way that a harpoon opens and cannot be pulled back out.

See: Hungary.

11. *Shrinking the civic space*. This tactic includes attacks on the media, civil society organizations and the civil liberties of the electorate. These should normally act as checks on government by demanding government transparency and promoting government accountability, facilitating the organization of opposition and protest, and, of course, by exercising the franchise. However, the backslider can significantly impair the ability of these non-government 'institutions' to act as a check by buying up, shutting down or regulating the media; placing onerous requirements on unfriendly civil society organizations; and using libel laws or states of emergency to restrict freedoms of expression and association among the electorate.

See: Hungary, Poland, Türkiye, Zambia.

12. *Non-institutional strategies*. While this Report canvasses institutional tactics by which backsliding is achieved, it is still imperative for the constitution-builder to consider non-institutional strategies, such as using populist rhetoric or supporting discriminatory policies. Account should be given to how institutional design choices can help (a) to address a backslider's ability to use such non-institutional tactics to their advantage and (b) to prevent the conditions that give rise to backsliding in the first place. Regulation of political parties, for example, may help prevent backsliding candidates from entering office at all.

LESSONS LEARNED FOR INSTITUTIONAL DESIGN

The essence of backsliding

The recommendations for consideration are based on the following understanding of backsliding:

Backsliding leaders are often popular and populist, typically feeding off mass discontent with democratic politics.

Backsliding leaders tend to come into government with a significant amount of popular support, mobilized through a rhetoric of ‘elites’ who are deliberately blocking the will of ‘the people’. Their support is often fuelled by a general discontent with political elites and a frustration over the capacity of democratic politics to cater to everyday needs and priorities.

Therefore, in terms of institutional design, this Report recommends using counter-majoritarian mechanisms with care; rather, the focus is on clearly differentiating between decisions of policy (where majorities should be allowed more space to govern) and decisions which change the basic rules of constitutional democracy (which should not be left to the discretion of one-time majorities). It is also important to think beyond purely numerical supermajorities—which are only a proxy for political consensus—and look instead to explicitly endowing the political opposition, no matter how small, with powers to check the majority.

Political pluralism and deliberation are critical and should be institutionalized.

Backsliding often involves a one-time majority unilaterally attacking the guardrails of democracy. Sometimes these majorities have constitutional supermajorities which enable them to make self-serving changes to the constitution; sometimes they attack the critical legislation which safeguards the independence of countervailing institutions and the integrity of elections. Furthermore, this often happens ‘quickly’—that is, within one term of government—so that the next elections are not contested on a level playing field. Indeed, certain actions have sometimes been pushed through in hours or days.

Therefore, many of the recommendations focus on extending the political sphere so as to ensure plurality of voice in decisions affecting the legal and constitutional framework of the democratic core. This can be achieved through, for example, empowering opposition parties or creating delay mechanisms to provide opportunities for transparency, for the opposition to organize and for public mobilization.

Democracy needs to defend itself.

As will be discussed in Chapter 1 of this Report, backsliding governments do not need to work particularly hard to tilt the electoral playing field because incumbents have an inherent advantage in democratic elections. Beyond direct manipulation of the electoral rules, they may use control of state broadcasting, influence over the public prosecution system or advantageous access to political financing to make a critical difference between fair and unfair elections. Thus, this Report also reflects on mechanisms which ‘tame the incumbency advantage’ to level the playing field between government and opposition at elections.

Further, this Report examines mechanisms of militant democracy. For reasons explained in Chapter 2, measures such as disqualification of parties and candidates should be approached with extreme caution and may not address the direct danger of backsliding, which occurs once a party is already in government. Nevertheless, such measures may help at the extremes, to limit fringe actors exhibiting antidemocratic intentions from entering government, as well as to curtail their ability to polarize political actors who might otherwise be more moderate.

Recommendations for reviewing political and constitutional frameworks

It is important to emphasize that this Report does not make universal recommendations. Rather, the recommendations put forward in Chapter 2 (and summarized here) are intended for consideration by actors reviewing their political system, who will need to evaluate each recommendation in the light of their unique social, political and historical context.

1. Identify the elements of the minimum core of constitutional democracy.

What are the key elements of the constitution which are necessary to preserve democracy? These elements should be protected beyond the reach of one-time majorities.

A proposed checklist for the minimum core is provided in Chapter 2 (see 2.3.1: Constraining decisions by one-time majorities) and may serve as a guide, but this list may vary for different countries.

2. Empower the opposition.

The effectiveness of checks and balances between institutions becomes extremely weak when one party controls these different institutions. The real check on government power comes from opposition parties. Consider giving opposition parties explicit powers to check, delay and scrutinize government actions and performance, as well as powers over certain key appointments (Bulmer 2017). At the same time, be careful not to create outright vetoes which take away the power of the majority to govern.

3. Buy time.

When it comes to actions that change the minimum core of constitutional democracy, consider utilizing mechanisms which force delay—allowing for transparency, scrutiny and mobilization—but at the same time allow decisions to be made if a majority which is sustained over time remains insistent. For example, the constitutional amendment rule in the Netherlands requires a majority vote in one parliament, followed by elections, followed by a ratification vote of two-thirds in the subsequent parliament. This may be too rigid for all issues, but such an approach of deferring the adoption of decisions may be useful to consider for critical elements of the minimum core.

4. Consider triggers and responses.

When certain conditions arise, constitutions establish states of emergency which provide for different rules for governance and enable them to respond appropriately to the temporary needs of the situation. Can something similar be envisaged for threats to democracy? For example, in Belgium, when there are serious threats to democracy, judges are permitted to engage in extra-court activity (e.g. protests) which would normally be prohibited. In Sweden, if a

law is to affect fundamental rights, 10 members of parliament (MPs) may request a delay of 12 months.

As a further consideration, where there are proposals to change the structure of the constitutional court or the electoral commission, can the opposition trigger a delay and request a report from the court or the electoral commission?

5. Tame the incumbency.

Consider mechanisms to attenuate the unfair advantage enjoyed by the incumbent government at elections. Above all, this means having carefully drafted term limit provisions, but it could also include installing caretaker governments during electoral campaign periods and introducing regulations which allow opposition parties more resources than the incumbent during elections.

With regard to term limits, consider:

- limiting the number of consecutive terms rather than the total number of terms;
- making term limit provisions unamendable or including a provision which prevents incumbents from benefiting from changes to the term limit provision; and
- having explicit provision for constitutional replacement—separate from and more difficult than the amendment procedure—to avoid plebiscitary referendums which allow leaders to replace constitutions to avoid term limits.

6. Consider militant democracy and constitutionalize public values.

Provisions which prohibit certain parties or individuals from running for office may be effective only against fringe or extreme actors. Nevertheless, they are still useful to consider as a first line of defence against antidemocratic parties. It is important also to think carefully about how to prevent governments from abusing such provisions to eliminate political competition.

Further measures to consider are:

- constitutionalizing values and standards for public leaders—both to serve as the basis of legislation for codes of conduct and as a way of framing public discourse in election campaigns; and
- establishing a specialized Office of the Registrar of Political Parties responsible for monitoring and enforcing political party regulations—to reduce the risk of the electoral commission becoming overpoliticized and allow it to focus on its core business of managing elections.

7. Fix the roof while the sun is shining.

Consider processes to increase the resistance of constitutions to potential backsliding. Examples include the State Commission on the Political System of the Netherlands or the Swedish Riksdag's Constitutional Committee's Study on Enhanced Protection for Democracy and Judicial Independence. These initiatives should be established with bipartisan support.

INTRODUCTION

DEFINITION AND SCOPE

Democratic backsliding—broadly taken to mean ‘state-led debilitation or elimination of any of the political institutions that sustain an existing democracy’ (Bermeo 2016: 5)—has become a global phenomenon. According to International IDEA’s *Global State of Democracy Report 2022*:

between 2016 and 2021, the number of countries moving towards authoritarianism was more than double the number moving towards democracy. During that time, 27 countries experienced a downgrade in their regime classification, while only 13 improved. The world also lost two more democracies in 2021—Myanmar and Tunisia. Moreover, 52 democracies are now eroding, experiencing a statistically significant decline on at least one sub-attribute—compared to only 12 a decade ago.

(International IDEA 2022: 6)

In many of these cases, the cause of the deterioration in democracy was deliberate, government-driven weakening of safeguards for democracy and the rule of law.

In many of these cases, the cause of the deterioration in democracy was deliberate, government-driven weakening of safeguards for democracy and the rule of law.

The desired end state in these cases is a hollowed-out simulacrum of constitutional democracy. The method is usually an attack on two overlapping fronts. Firstly, political competition is tilted in sometimes

subtle yet always significant ways in order to favour the incumbent. This may be achieved through changes to the legal and institutional frameworks for the electoral system, electoral management and dispute resolution, the media, campaign finance or other essential cogs in the machine of free and fair elections. Secondly, the incumbent seeks to weaken constraints on the executive through attacks on judicial independence; capture of other state institutions, including public media, public administration and security sector agencies; and harassment of the political opposition.

Backsliding includes a number of state, political and social elements, from political rhetoric and social media to electoral fraud and judicial independence. It also involves a wide variety of methods and tactics. For example, electoral fraud could consist of hacking by foreign patrons, jailing of opposition leaders, bribing voters or undue interference in election management to ensure a vote count friendly to the incumbent. Alternatively, it may entail more subtle methods such as skewing the amount and tone of the media coverage devoted to political opponents. Similarly, attacks on judicial independence may involve replacing judges, altering the judiciary's powers and jurisdiction or affecting court administration to manipulate the court docket.

Furthermore, backsliding is a broad term under which a number of different phenomena are often grouped. This Report builds on the definitions used by Bermeo (2016), Choudhry (2018a) and Huq and Ginsburg (2018).

Choudhry (2018a: 577) defines democratic backsliding as a situation whereby 'a democratically elected government or president uses legal means to manipulate rules and institutions to remain in power in future electoral cycles'.

Ginsburg and Huq, in their book *How to Save a Constitutional Democracy*, define a constitutional democracy as resting on three pillars. The first is a basic requirement of periodic free and fair elections. The second is a liberal element, narrowly defined as 'a core of "first generation" rights of speech, assembly, and association' that are 'necessary for the democratic process' and that 'facilitate political competition'. The third element is constitutional governance, whereby

Backsliding includes a number of state, political and social elements, from political rhetoric and social media to electoral fraud and judicial independence.

'democratic government and the state apparatus ... must be held accountable to, and become habituated to, the rule of law' (Ginsburg and Huq 2018: 11–13). These definitions provide the lenses for the review of backsliding in this Report (see Chapter 1: A review of democratic backsliding: The backslider's playbook).

Thus, firstly, we look only at cases where leaders were elected to power. In many cases (e.g. Venezuela), these elections may not have met the highest standards in terms of being free and fair, but any case where elections took place is included. Coups (including both military coups and popular uprisings) are excluded.

Secondly, backsliding occurs through 'legal' means, in the sense of both (a) acting within the formal constraints of the law and (b) instrumentalizing the law to further self-serving partisan ends of insulating the regime from constraints and competition. Sometimes, this means utilizing existing laws, or loopholes therein, including the violations of longstanding practices and conventions. In other cases, it involves changing the law to establish new rules. This may occur at the level of the constitution, statute or regulations (see Chapter 1).

Thirdly, the ultimate ends of the manipulation and instrumentalization of the law are to remain in power through weakening the three elements of constitutional democracy described by Ginsburg and Huq—through electoral manipulation, attacks on 'core' rights necessary for political competition or weakening the rule of law by eroding (or removing) institutional checks and balances.

There are a number of actions by government actors which are often included in democratic backsliding literature and certainly run counter to the common values of liberal constitutional democracies but which are not directly linked to efforts to remain in power, in terms of the manipulation of the criteria enumerated by Ginsburg and Huq (2018). For example, India's Bharatiya Janata Party (BJP) government (as well as the opposition Congress party) have been accused of 'deploying religiosity as a strategy for electoral mobilization' (Mate 2018: 379), which has included the instrumentalization of legal instruments to target Muslims (Khosla and Vaishnav 2021). Mate terms this constitutional 'erosion', as it weakens the constitutional principle of secularism found in the preamble to the Constitution of

India. Although such actions are likely intended to, *inter alia*, serve the electoral ambitions of the governing party by mobilizing their political base, they fall beyond the scope of this Report since they neither directly target the laws and institutions which safeguard the principle of rotation of power nor serve to directly weaken checks and balances on executive power.

The definition of democratic backsliding in this Report consists of three elements:

1. It involves a government which comes to power through competitive elections.
2. It is achieved through legal means.
3. It alters the core of constitutional democracy to create an unfair electoral playing field or weaken constraints on the power of the executive.

There are other concepts similar to backsliding and other terms which describe the same, or an almost identical, phenomenon. For example, David Landau uses ‘abusive constitutionalism’ to refer to ‘the use of mechanisms of constitutional change to erode the democratic order’ (Landau 2013: 189). The practices described in Chapter 1 could be considered as part of the same phenomenon to the extent that they affect the small ‘c’ constitution—that is, not just the constitutional text but also key elements of legislation, regulations and practice which previously had broad acceptance across political divides (Dixon and Landau 2021). Similarly, Ozan Varol uses the term ‘stealth authoritarianism’ to refer to practices which ‘use the law to entrench the status quo, insulate the incumbents from meaningful democratic challenges, and pave the way for the creation of a dominant-party or one-party state’ (Varol 2015: 1678–79). This Report avoids the term ‘authoritarians’ in favour of ‘democratic backsliders’ as, beyond their use of the law as their preferred tool of oppression, there is an important factor that distinguishes the actors described below from many authoritarian leaders: they not only claim genuine popular support but in most cases actually maintain majority popular support. It is this which makes the rule of law element of the Ginsburg and Huq definition so important. Constitutional democracy is not majoritarian democracy;

indeed, a central function of constitutions is to constrain the will of the popular majority.

Over the past six years, the number of countries moving towards authoritarianism is more than double the number moving towards democracy.

THE PROBLEM

According to the International IDEA *Global State of Democracy 2022* Report, over the past six years, the number of countries moving towards authoritarianism is more than double the number moving towards democracy. Among those countries that are democracies, half are experiencing a decrease in the quality of democracy as measured across a number of indicators, while in only 14 (out of a total of 104 democracies worldwide) is democracy improving.

Social attitudes have compounded and contributed to this overarching trend. The 2022 World Values Survey, covering 77 countries, finds that the number of people who believe democracy is important is now less than 50 per cent (47.4 per cent), which represents a decrease of almost five points since 2017 (International IDEA 2022).

This gloomy global context represents an ideal scenario for democratic backsliding. Dissatisfaction with living standards and economic inequality feeds the idea that democracy is a sham and is not delivering for the masses. Majority groups perceive their place in society to be under threat from a variety of minorities and seize the opportunity to support a leader who tells them that the problem is with the system of political and state institutions, which must be torn down and rebuilt to serve the majority. Social media has increased both the spread and the impact of disinformation, as well as heightening societal polarization through the echo chamber effect of filter bubbles (Sunstein 2018).

Many of the strategies and tools described in Chapter 1 are not new. The ancient Roman Republic gave way to tyrannical imperial rule through mechanisms and pathways somewhat similar to those seen in recent examples of backsliding (Watts 2018). Electoral manipulation has existed as long as elections have, whether it be through rotten boroughs in England in the early 19th century or gerrymandering, a term coined in the USA in 1812 for a practice

which had already existed for some time. There are more recent examples, too. In Italy in 2005, the incumbent government was almost certain to lose the upcoming elections and so changed the electoral law to install a system which increased its own chances of winning—the so-called ‘Porcellum’ law (Cartabia and Lupo 2022: 59). In Belize in 1988, the incumbent government, using its three-quarters supermajority in the legislature built on only 54 per cent of the total vote, passed a constitutional amendment to change the composition of the electoral commission, thereby giving the government control over the majority of appointments (Vernon 2022: 56). In India in the 1970s, Prime Minister Indira Gandhi engaged in a series of battles with the judiciary aimed at gaining political control over the Supreme Court, which eventually resulted in a 21-month state of emergency (Austin 2003: 293–391).

There are perhaps three factors which differentiate the current phenomenon from previous instances. Firstly, the data show that backsliding is taking place against a background of decreasing support for democracy and that this is the first decade since the end of the Cold War to have seen the number of democracies diminish. This has fed into an unprecedented roll-back of democratic gains across the world, encompassing supposedly consolidated democracies as well as emerging and transitional democracies. Democratic backsliding is not an isolated or sporadic phenomenon taking place in certain countries because of specific political contexts; rather, it is a trend whereby, as the catalogue of backsliding in Chapter 1 shows, antidemocratic leaders seem to be learning from each other and feeding off a general malaise and frustration with politics in democratic systems.

Secondly, previous instances of incumbent manipulation of the democratic constitutional framework—such as those documented in Italy, Belize and India as mentioned above—can be described as opportunistic. The current cases of democratic backsliding appear opportunistic and self-serving, without doubt; however, they also seem to be ideological in the way that populist leaders are challenging internationally recognized norms of democratic governance and purporting to offer another, more democratic paradigm. Thus, they are unlike the regression of democracy in the 1930s; whereas then fascism was the alternative proposed in

countries such as Germany, Italy and Spain, the alternative now being espoused is one of improved democracy.

Thirdly, thanks to three decades of experimentation with democratic constitutional design on a global scale, there is an ever-expanding set of options for constitutional design mechanisms. During the liberal consensus of the 1990s, the assumption was that the US or western European constitutions provided a template which any country simply had to follow to develop a stable, consolidated democracy. In contrast, much of this current expansion has happened in contexts where constitutional innovation was necessary to respond to recent and immediate threats of democratic capture. Thus—should one choose to look for them—there are a wide range of experiences with different constitutional design options which could be used by a constitutional review commission as part of its response to potential threats of backsliding.

OVERVIEW OF THE LITERATURE

The academic and practitioner literature on democratic backsliding is ever-expanding. In particular, there has been a great deal of research on the theme of why democratic backsliding occurs (e.g. Bermeo 2016; Abramowitz 2018; Levitsky and Ziblatt 2018; Przeworski 2019). There have also been a number of excellent detailed accounts of country cases (e.g. Graber, Levinson and Tushnet 2018; Sadurski 2019b; Sajó 2021). The goal of Chapter 1 of this Report is to take the granular details of these country case studies and put them into an overarching framework of the strategies, means and ends of backsliding.

While valuable studies have focused on sociological, economic and cultural responses to backsliding, little has been written with regard to considerations for institutional design to ward against backsliding. However, there are some exceptions. In 2016, the Council of Europe published a 'Plan of Action on Strengthening Judicial Independence and Impartiality' (Council of Europe 2016), which contains several useful guidelines for designing mechanisms to safeguard the independence of judges. In 2019, the Brookings Institute published its 'Democracy Playbook: Preventing and Reversing Democratic

Backsliding’ (Eisen et al. 2019: 9), which ‘highlights strategies and tactics for pro-democracy actors to not only push back against illiberal and authoritarian-leaning actors, but also to renew the promise and resiliency of democratic institutions’. In their books, Ginsburg and Huq (2018) and Dixon and Landau (2021) both include chapters which focus on institutional design recommendations. Meanwhile, two blogs—iConnect and Verfassungsblog—have conducted online symposia on the theme. This Report builds on this literature to develop recommendations targeted at those engaged in constitutional review who seek to learn from the recent backsliding phenomenon as an important input into making constitutional design decisions.

The remainder of this Report is thus divided into two main parts:

Chapter 1 provides an overview of the strategies, means and ends of backsliding, using several country case examples. A more detailed account of some of these cases is provided in Annex A.

Chapter 2 then discusses some proposals for future-proofing against backsliding.

Before turning to the catalogue of backsliding, it is useful to address several common underlying questions which came up in discussions and reviews of drafts of this Report.

FREQUENTLY ASKED QUESTIONS

Institutional design can only go so far. Will a determined backslider not always find a way to subvert the rules?

Institutional design cannot prevent backsliding. There is no absolute remedy against a powerful individual or group that is intent on weakening or destroying safeguards for the rule of law and democracy and aided by a supportive, or even apathetic, public. That is not the same as saying institutional design does not matter. Careful institutional design can heighten the thresholds that potential backsliders need to surpass in order to damage or destroy democratic freedoms, as well as giving the opposition and public more tools to block backsliding efforts. Analogy can be made to

No design can make institutions backsliding-proof, but it can make them more backsliding-resistant.

building design in earthquake-affected areas. No building can be designed to be completely earthquake-proof; rather, building codes in these vulnerable areas seek to provide rules which will make buildings more earthquake-resistant. This will ensure that buildings are able to resist earthquakes of a higher magnitude, and that with very strong earthquakes, loss of life is minimized (SEAO 1999: 1). Similarly, no design can make institutions backsliding-proof, but it can make them more backsliding-resistant.

Are attitudes as manifested in political culture and public civic awareness not more important than institutional design?

There are likely a number of factors which affect the likelihood of democratic backsliding. These include level of civic awareness, prevailing political culture, economic inequality, state capacity, disinformation and political polarization. Institutional design is not a magic bullet which alone can safeguard democracy and the rule of law. However, our starting point is that institutional design does matter and that it is a necessary, if insufficient, element of democracy and the rule of law.

In addition—and as discussed further in Chapter 2—institutional design is not independent from and irrelevant to drivers of backsliding such as economic inequality or potential backsliding deterrents such as mass protests. Certain forms and facets of institutional design may act as enabling or disabling factors for issues beyond the nuts and bolts of structures of governance.

Stable democracies do not really change their constitutional frameworks. Is there not therefore a risk that the relevance of recommendations to safeguard against backsliding will only occur to stakeholders once it is too late?

Indeed, large-scale constitutional change tends to occur mostly in situations where there has been a crisis—a popular revolution, coup d'état, civil war, secession or similar situation of major political and societal upheaval. However, large-scale constitutional review processes are taking place with surprising frequency: as part of the development of the *Annual Review of Constitution-Building*, International IDEA regularly counts around 20 countries where there are serious, formal political debates over constitutional change and many of these are in stable countries. For example, in the past five

years, the following countries have all established constitutional review commissions to assess the need for constitutional reform without a major triggering conflict or crisis: Armenia, Barbados, Belize, Botswana, Georgia, Ghana, Grenada, Guyana, Jamaica, Panama and Tuvalu.

Further, recent initiatives show that, in some instances, governments and civil society organizations (CSOs) are seeking to engage directly with the challenge of strengthening institutions pre-emptively to increase resilience to potential backsliding efforts in the future. Examples include Sweden (Sweden Constitutional Committee 2023) and the Netherlands (Netherlands State Commission 2018), as well as the project of the National Constitution Center in the USA (National Constitution Center n.d.).

Constitutional design is an oxymoron (Horowitz 2000): constitutions are formed through political negotiations based on self-interest. Thus, while recommendations on resisting backsliding may be fine in theory, is it not unlikely that they will be used in practice?

Jon Elster posited that constitutional negotiations were based on interest, passion and reason, and that while reason may triumph over passion, its real challenge would be to overcome interests. In reality, reason makes its way into constitutional negotiations in various ways (Elster 2009: 2).

Firstly, in general, all sides are interested in maintaining the system they agree to. Thus, there is a level of 'cooperative bargaining' over many issues which are common to the interest of different sides in the basic functioning of the agreed-to constitution (Negretto 2013). For example, assuming that the different parties to constitutional negotiations want to protect the deal they agree to from one-sided, partisan abuse by one party or another, they should reach a consensus on robust and independent judicial review powers (Dixon and Ginsburg 2018).

Secondly, processes of constitution-making vary from country to country and do not all take the 'delegates at a convention' form on which Elster's seminal work was based. In contexts where expert commissions conduct their own research and consultations and

develop a draft for political negotiations, much of the initial draft is often based on reasoned negotiations and in-depth research. The draft then has to overcome political negotiations. Sometimes it passes this hurdle unscathed (as with Kenya's 2010 Constitution), sometimes it is subject to change (as in Tanzania in 2014) and sometimes it is rejected (as in The Gambia in 2018). However, in the latter case, there is also the possibility of an 'afterlife' for the draft as it may resurface as an input into future constitutional negotiations.

But even in contexts where political negotiations are the primary forum for developing a constitutional draft, putting more 'good' options on the table can help parties arrive at a consensus which tends towards a pro-democracy outcome (Bisarya 2022).

Proposing institutional design solutions is easy and it is possible to dream up an infinite number of ideas. Are these not all academic if they are not rooted directly in the relevant country context?

Another potential objection to recommendations such as those presented in Chapter 2 is that developing institutional design options is easy: anyone versed in comparative constitutional design could develop numerous ideas and options, but these would not be worth much unless they are rooted in the specific country context and political dynamics which define the parameters of what is possible.

This is undoubtedly true. However, there is an inherent conservatism bordering on parochialism in processes of constitutional change. The two most likely determinants of the content of a new constitution—besides the time period in which it is drafted—are the previous constitution and the constitutions of neighbouring countries (Elkins 2022). There are many reasons for this, but an important factor is lack of knowledge about innovations from lesser-known jurisdictions further afield.

Another important issue to grapple with is the trend 'towards juristocracy' (Hirschl 2008). Often, the solution to ward against overconcentration of power in political majorities has been to take the issue out of representative politics and place it in the hands of judges. The recent explosion in the number and variety of fourth-branch institutions can be seen as part of the same trend—a distrust

of elected officials in favour of increasing the power of (hopefully) independent institutions.

Viewed through the lens of backsliding, there are two important problems with this. Firstly, the more powerful a constitutional court or electoral commission may be, the more attractive it becomes to political capture (Dixon and Landau 2021: 19–20). Secondly, the growth in power of unelected officials has been fuel to the fire of populism, whose leaders have pointed at judges and ‘bureaucrats’ as agents geared towards blocking the will of the majority in favour of some other interest.

Chapter 2 highlights the importance of a strong and independent judiciary, as well as other key independent state institutions, and offers ideas for strengthening their independence given the experience of backsliding in recent years. However, it also stresses the value of deliberative politics as a check on majoritarian democracy (Bisarya and Bulmer 2017). Specifically, it views the principal threat of backsliding to be that a one-time majority (or supermajority) can change the rules of the game such that it (a) becomes a permanent majority elected at regular intervals through a system which favours the incumbent and (b) weakens the constraints on the majority to impose its will on society while it is in power.

Thus, the departure point of institutional design to combat backsliding should be (a) deliberation between political majorities over time and (b) strengthened checks and balances which include both the judiciary/independent institutions and checks and balances within politics. In practice, with regard to (a), this would mean mechanisms which enable political majorities to decide but also to delay such decisions, thus allowing for deliberation and potential reconsideration. With regard to (b), it would entail mechanisms that not only empower courts as a check on majoritarian politics but also facilitate interparty dialogue, deliberation and moderation.

Chapter 1

A REVIEW OF DEMOCRATIC BACKSLIDING: THE BACKSLIDER'S PLAYBOOK

The primary component of this review of democratic backsliding centres on what might be called the democratic backslider's 'playbook'. This involves analysing each 'play' or 'tactic'—each change to the institutional structure—employed in the service of backsliding. These can also be thought of, by way of analogy, as 'tools' to be used or 'moves' to be made (the terms 'play', 'tactic', 'tool', 'move' and 'strategy' are used interchangeably throughout this Report). Annex A contains a full catalogue of the different plays that have been employed in furthering backsliding, with examples from a variety of countries and regions. Based on a review of this catalogue, this chapter presents a digested overview of the common tactics, which are grouped thematically into 12 major threads. These themes illustrate the major pitfalls and constitutional loopholes that constitution-builders should be aware of in building a resilient constitution.

This chapter is divided into three parts, each of which looks at different facets of the mechanics of backsliding. This is a loose categorization—there is not always a clear line between overarching strategy and specific tactic, for example—but it is designed to allow the user of this Report to look more closely at the facets most relevant to their project.

1. **Overarching strategies.** Section 1.1 looks at the bird's-eye-view approaches taken by backsliders. These might include hollowing out governmental institutions, packing them and using them as an arm of the regime, or overhauling the system completely.

2. **Specific tactics.** Section 1.2 focuses on the particular tactics—the ‘plays’ in the ‘playbook’—that backsliders use to carry out their project. These tactics are numerous, from lowering judicial retirement ages to selective prosecution of opponents and gerrymandering. The various tactics are organized into 12 major themes or threads to provide an overview. (See Annex A for a more in-depth look at each tactic.)
3. **Legal channels.** Section 1.3 describes the legal channels or mechanisms through which these tactics are effected, such as constitutional replacement, constitutional amendment or legislation. Each channel offers a different balance between flexibility and resilience, and this is important for the constitution-builder to take into account—for example, in considering amendment thresholds or replacement mechanisms.

1.1. OVERARCHING STRATEGIES

1.1.1. Approaches to governmental institutions

Democratic backsliders have taken different approaches in attacking horizontal checks on government power—that is, checks rooted in other governmental branches. Some choose to hollow out institutions that they find unfavourable, while others may instead pack those institutions and wield them offensively. They may make changes by bringing them in incrementally or by overhauling the system in one fell swoop. The most effective strategy will depend on the context; factors affecting this choice may include the amount of political support enjoyed by the backslider, amendment thresholds or different pre-existing institutional designs.

Of course, backsliders will generally use these strategies simultaneously and in combination with each other. One such combination can be seen in what Jan Petrov describes as the ‘de-judicialization’ of politics followed by ‘extreme politicization’ of the constitutional courts (Petrov 2022). This process, which Petrov observes in both Poland and Hungary, can be boiled down to two component strategies which are often used sequentially or even simultaneously. First, the backsliding party hollows out the capacity of the constitutional tribunal while it works to implement its agenda

and take over the court. Then it reinfuses the court with power once it is under the party's control. This pattern of weaken, fill, rehabilitate, wield is in many ways the basic template of a backslider's playbook.

While more numerous and nuanced 'approaches' certainly exist, this section lays out the four overarching strategies that encompass most of the tactics in the playbook: (a) hollow and undermine, (b) pack and commandeer, (c) overhaul and (d) subterfuge.

Hollow and undermine

First, the backslider may attempt to weaken horizontal checks on their (usually executive) power by hollowing out the institutions that serve as such a check. In the judiciary, for instance, the democratic backslider may slowly drain the court of its constitutional checking power by restricting its jurisdiction to review certain government actions or changing removal or disciplinary procedures to undermine judges' independence. In Poland, for example, various procedural adjustments—including requiring cases to be heard in order and increasing the number of judges required to constitute a quorum—worked in conjunction to slow the court's ability to review legislation. This bought the Law and Justice Party (PiS) time to pursue its agenda and work towards appointing loyal members to the court.

Other institutions, such as electoral management bodies, ombudspersons or the civil service, may also be a target of this approach. For example, statutes limiting staff, redirecting funding or narrowing competencies can be used to maintain the outward appearance of the existence of such bodies while rendering them impotent in fact.

Pack and commandeer

Second, the backslider may choose instead to fill these institutions with loyal supporters and use their power to further their policy programme. For example, packing the judiciary with judges who will rubber-stamp an administration's actions converts the court's checking power into an additional weapon of the backslider. In both Hungary and Venezuela, backsliding regimes increased the number of seats on their constitutional tribunals to allow them to appoint several judges at once, pulling the balance of the court towards their respective ends of the ideological spectrum. Similarly,

commandeering media outlets (whether through ownership or influence) can provide the administration with a powerful message-broadcasting apparatus and prevents the press from criticizing or investigating the government's actions, as took place in Nicaragua (Haggard and Kaufman 2021: 136). Yet another example is changing appointment procedures to make it easier for the party in power to fill fourth-branch institutions with loyal supporters. These supporters are then in a position to use those theoretically independent institutions to further the aims of the dominant party.

Overhaul

If the democratic backslider enjoys a supermajority of the legislature or massive public support, they may be able to simply push policies past any existing safeguards. This 'sheer force' approach requires a majority large enough to overcome existing countermajoritarian constraints (both legal constraints and extralegal appeals to popular sovereignty) or a massive amount of political capital. One typical manifestation of this strategy is the 'popular mandate' approach, in which a leader claims that their widespread popular support gives them a mandate of popular sovereignty which is of a higher order than the constitution. They can then rely on that mandate to justify circumnavigating the constitution or other legal safeguards. In Venezuela, for instance, Hugo Chávez relied on his extensive public support to justify bringing in an entirely new Constitution instead of following the amendment procedures contained in the existing Constitution.

Subterfuge

This refers to shrouding undemocratic changes in democratic rhetoric or bringing in subtle, undemocratic changes on the coat-tails of seemingly democratic changes. It also includes what Dixon and Landau (2021) have termed 'abusive constitutional borrowing', in which liberal-democratic elements are imported into a constitution but cherry-picked such that they lose their democratic function. One example of this approach comes from Türkiye. In 2017, President Erdoğan proposed a package of constitutional amendments, some of which appeared democratic on their face and were ostensibly designed to aid European Union accession. However, also included in the package—which was subject to a single up-or-down vote—were

other amendments weakening the judiciary and expanding executive power.

1.1.2. Approaches to non-governmental institutions

A different set of tactics is required when dealing with a broader range of countervailing institutions (International IDEA 2023) comprising non-governmental checks on power such as opposition members, the media, CSOs and the public. Unlike the approaches to government institutions above, these strategies do not fall into such clear-cut categories. A couple of particularly common strategies, however, are worth noting.

The first, and possibly most widespread, is the use of selectivity. Selectivity can refer to selective prosecution of facially neutral laws, selective enforcement of rights, and reliance on vague criteria or requirements to selectively provide or withhold certain benefits, among other tactics. President Erdoğan of Türkiye, for example, used selective prosecutions for small, pretextual charges such as housing code violations to harass and disempower political opponents (Varol 2018: 354). Similarly, in Zambia, selective enforcement of the tax code was used to shut down the primary opposition newspaper, despite the fact that the state-run papers were worse offenders (Hinfelaar, Rakner and van de Walle 2022: 196). And in North Macedonia, vague criteria have been used to grant or deny broadcast licences and other benefits (Haggard and Kaufman 2021: 126).

Another main strategy focuses on choking off space for public debate, which inhibits the ability of the civic sphere to disseminate information, organize and effectively protest. Myriad tactics contribute to this strategy, including decreasing transparency, limiting international funding to CSOs, restricting freedoms of speech and assembly, and buying up the media.

1.2. SPECIFIC TACTICS

Annex A outlines over 50 specific tactics that have been employed by democratic backsliders. This chapter provides an overview of 12 general trends, or common threads, that represent most of the tactics

observed. (See Annex A for more information on each specific tactic, including analysis and examples.)

Two important theoretical points common to all of these threads are worth mentioning here. The first is that backsliders use the letter of the law in order to carry out anti-liberal-democratic ends—what has been called ‘rule by law’ (Sajó 2021: 10). The second is that each tool, no matter how far removed from the executive branch on its face, is largely a form of executive aggrandizement.

Leaders who ‘rule by law’ maintain strict adherence to the letter of the law in ways that undermine its spirit. As Annex A demonstrates, backsliding occurs almost exclusively through a series of entirely legal acts, which themselves often claim the support of a majority of legislators, if not also a majority of voters. In this way, backsliding is not so much the abolition of democracy as a perversion or a falsification of democracy.

The second theoretical point is that all of the backsliding tactics are used in service of the goal of expanding, entrenching or protecting the power of the backsliding figure or party. This has led some commentators to argue that, to some extent, all backsliding is an indirect form of executive aggrandizement (Khaitan 2020). Thus, even where the direct target of the changes is far from the executive branch, the ultimate goal is often to concentrate power in the executive, whether by weakening checks, bringing decision-making power to those under their control or tilting the electoral playing field to their advantage.

Direct executive aggrandizement—the straight expansion of executive power—is one of the main themes in this chapter’s survey of backsliding regimes and it is included as its own thread in the overview below. However, backsliders appear to understand that the bluntness of simply increasing their powers comes with a political visibility that heightens its cost. Therefore, they have increasingly turned to subtler methods of aggrandizement. Two aspects of this phenomenon make it difficult to combat. First, it is often difficult to identify as executive aggrandizement. This may be because it involves the absence of a negative—such as when checks are weakened—or because the change is far enough removed from the

executive branch that only the second- or third-order effects inure to the benefit of the executive themselves. Second, these measures are often broken down into small incremental changes, each of which may be democratically justifiable on their own. This makes it difficult to take issue with any particular change, while, in the aggregate, these measures all contribute to what Khaitan (2020) has aptly called executive aggrandizement 'by a thousand cuts'.

Under the umbrella of these two overarching elements, several more specific strategies can be identified. This section enumerates 12 general trends that can be derived from these many specific 'moves'. These represent the main threads which can be used on their own or in conjunction to further democratic backsliding. Not all of the 'plays' in the backslider's playbook are captured by these primary strategies. As an overview, however, they represent the most prominent approaches that have been taken and thus the most important in terms of considering lessons learned for institutional design.

1.2.1. Draining, packing and instrumentalizing the judiciary

The strategy most commonly associated with backsliding is draining the court of its independent personnel, packing it with loyal jurists and then wielding it as a tool to legitimize the actions of the ruling administration and attack the opposition. In terms of the overarching strategies above, these tactics are used first to hollow out an unfavourable judicial branch before packing and commandeering. Examples of the draining phase include lowering the judicial retirement age to purge senior judges or limiting the jurisdiction of the court to restrain the power of those still sitting. Packing can include either (a) replacing those judges who have been forced off the bench or (b) expanding the size or number of the tribunal(s) in order to dilute the voice of independent judges. Finally, by reinfusing the judiciary with any powers that had been restricted during the draining phase (or undoing other incapacitating measures), the backslider can affirmatively wield it. This process is the dejudicialization and rejudicialization of politics (Petrov 2022).

An example of this occurred in Poland in 2016, when both the outgoing leftist government and the incoming populist government (PiS) appointed three candidates to the same three open seats on the Constitutional Tribunal. President Andrzej Duda, part of the PiS

party, refused to swear in the prior government's nominees, and the Constitutional Tribunal refused to seat PiS's nominees (who were sworn in during an ad hoc ceremony in the middle of the night). This created a stand-off, to which PiS responded by passing a law raising the number of judges required to constitute a quorum. This made it impossible for the court to make any decisions at all without the presence of the three disputed seats. By holding out until the current president of the tribunal's term expired, PiS was then able to institute its own president of the court, who immediately sat the three PiS judges, and the effect of the incapacitating quorum requirement was lifted. (See Annex A, p. 99.)

However, despite the attractiveness of reducing judicial independence, it is important to note that a strong and independent judiciary is not necessarily the most important safeguard against backsliding. Positing that courts generally tend to make a difference in rights enforcement only at the margins, Chilton and Versteeg (2018: 302) argue that a court's strength is, to some degree, a function of the extent to which 'stakeholders view the court as the rightful arbiter of constitutional rights'. In other words, where the court does not enjoy a strong norm of being the rightful and legitimate constitutional umpire, it may be a less important safeguard and thus a less valuable target.

On the other hand, there is also less political cost in attacking judiciaries that lack broad support, and so even courts with weak norms of serving as an important check are still generally targeted. As Bojan Bugarič and Tom Ginsburg note, 'rule of law institutions in Central and Eastern Europe always lacked the necessary support of genuinely liberal political parties and programs, leaving the courts vulnerable to attacks from populists' (Bugarič and Ginsburg 2016: 16). In Poland, for example, PiS was able to refer to widespread complaints of corruption in the judiciary to provide backing for its legislation 'reforming' the court system. Meanwhile, in Israel, a series of Supreme Court decisions favouring individual rights over national security was met with proposals to restrict the court's powers and amend appointment procedures (Scheidlin 2021).

The rejudicialization process brings a threefold benefit for backsliders. Firstly, the pliancy of the resulting court makes it unlikely

to act as a check on the government's actions, making its reinstated power a minimal threat. Secondly, the reconstituted court may be counted on to reject legal challenges to government actions, thereby donating to those actions the 'presumptive legitimacy' of the court. This, in turn, makes international criticism more difficult and creates confusion among the domestic audience as to whether the actions are truly unconstitutional or not. Thirdly, the court itself can also be an active partner in dismantling the democratic constitutional framework—for example, by voiding laws that stand in the backslider's way. See, for example, the Polish Constitutional Tribunal voiding an inconvenient law on the Judicial Council (Sadurski 2018). In addition to this threefold benefit, the court may even be used to attack the opposition, such as by constraining the opposition-held legislature in Venezuela (Dixon and Landau 2021: 94–98).

Box 1.1. Draining, packing, and instrumentalizing the judiciary: Overview of tactics

Observed tactics include:

- lowering the judicial retirement age (p. 100);
- restricting jurisdiction or access to the court (p. 101);
- adding quorum requirements (p. 102);
- expanding the court (p. 102);
- reassigning jurisdiction to another tribunal (p. 103);
- changing judicial appointment procedures (p. 103);
- failing to appoint or vote on judicial nominees (p. 106);
- adjusting judicial administration (assignment of cases) (p. 105);
- adjusting oversight of the judiciary (p. 107);
- selective non-removal of judges (p. 107);
- replacing judges (p. 108);
- nullifying judicial decisions (p. 108); and
- reinstating powers and wielding the judiciary (p. 109).

1.2.2. Tilting the electoral playing field

A second key tactic is making changes to the electoral system to favour the incumbent so heavily that their success is essentially guaranteed. This process can be thought of as reapportioning power among the electorate in order to strengthen the impact of loyal voters and dilute the votes going to the opposition. Of course, to some

extent, this is simply unavoidable in politics. 'It is unreasonable,' writes Przeworski, 'to expect that competing parties would abstain from doing whatever they can do to enhance their electoral advantage, and incumbents have all kinds of instruments to defend themselves from the voice of the people' (Przeworski 2019: 20). Where this practice tips into backsliding, then, is not always clear. One touchstone may be the point at which this interference begins to infringe on the 'constitutional minimum democratic core'—the institutions, procedures and rights 'necessary to maintain a system of multiparty competitive democracy' (Dixon and Landau 2016: 277). Another may be to differentiate between seeking advantage within fair rules (i.e. neutral pre-existing rules that still allow for routine turnover) and changing the rules to serve one's advantage. A certain amount of mathematical disparity between the strength of one person's vote and that of another has also been proposed as a metric (*Rucho v Common Cause* 588 US (2019)).

Gerrymandering is the classic example of this tactic, but, increasingly, creative alternatives are surfacing. One way to amplify the representation of the ruling party is to make changes to the rules or formula by which seats are allocated among parties and candidates. One party may also gain an advantage over another by adjusting the methods by which surplus seats or 'wasted votes' are distributed in a proportional representation system—as happened in Georgia (Zedelashvili 2020)—or by choosing a party list or single transferable vote system rather than a plurality system. Albania, Hungary and Ukraine all changed the way seats are distributed within complex apportionment schemes so as to substantially favour the incumbents (Ibrahimi 2016). And in Mongolia, the election law was amended to eliminate a provision previously forbidding rule changes within six months of the election, allowing for a plethora of last-minute changes favouring the incumbent party (Croissant 2019: 19).

An additional tactic to changing the electoral system is targeting members of the opposition to exclude them from standing for election. In the run-up to the 2016 presidential election in Nicaragua, the Supreme Court disqualified opposition candidate Eduardo Montealegre 'at [President] Ortega's demand' (US Congress 2018) stripping him of his position as the head of the opposition party on shaky-at-best grounds (Haggard and Kaufman 2021: 137).

It has also been possible to change the make-up of the electorate itself. Viktor Orbán achieved this by enfranchising the Hungarian diaspora, which overwhelmingly skews conservative. While this, on its own, may be portrayed as democratizing in terms of broadening suffrage, the initiative made it far more difficult for Hungarians abroad to vote in those areas where the diaspora tends to lean to the left than in areas where it leans to the right (Scheppelle 2022). Republican-controlled governments in the USA have increasingly moved in this direction as well, with thinly veiled attempts to screen out immigrants, poor people and people of colour, who tend to vote Democrat. Strict voting laws have been implemented, for example, in the name of eliminating voter fraud. The same laws, however, have included measures that make it harder for people in left-leaning precincts to vote, with one such law going so far as to prohibit giving water to those waiting for several hours in line (Karimi 2021).

Box 1.2. Tilting the electoral playing field: Overview of tactics

Observed tactics include:

- packing the electoral management body (p. 123);
- changing election rules and electoral disqualification (p. 124);
- increasing ballot access hurdles (p. 126);
- changing the electoral system: gerrymandering (p. 125);
- changing the electoral system: changing the allocation of representation (p. 127);
- changing the electoral system: other changes (p. 128);
- voter suppression (p. 129);
- ‘curating’ the electorate (p. 129);
- leveraging the media advantage (p. 130); and
- using public funds to support incumbency advantage (p. 130).

1.2.3. Weakening the power of the existing opposition

Separate from attempts to exclude the opposition from power by fixing elections is the attempt to silence the voices of opposition in government. Essentially, this aims to ‘hollow out’ or undermine the role of the opposition as a check on majority power. This can happen in the more obvious way of expelling opposition members for trumped-up violations of parliamentary rules. In a recent and vivid

example from Tennessee, USA, two black Democratic legislators in a white-Republican-dominated legislature were recently expelled for 'disrupting' the legislature after participating in a non-violent protest against gun violence. This move has been described as 'part of a larger story that is unfolding all around the country: [Republican] state legislatures ... resorting to increasingly novel, overbearing and indefensible power plays to hold off the rising tides of backlash unleashed by their descent into reactionary rule' (Sargent 2023).

However, this can also happen through quashing deliberation in parliament, usually by making changes at the parliamentary procedure level. In Poland, for example, several aspects of parliamentary procedure were changed—such as the method for calculating debate floor time and the number of questions that a party can pose—in ways that significantly disadvantaged the opposition (Sadurski 2018: 267–68).

Box 1.3. Weakening the power of the existing opposition: Overview of tactics

Observed tactics include:

- selective audits or prosecutions (p. 134);
- expulsion from parliament or disqualification (p. 135);
- parliamentary disciplinary sanctions (p. 136);
- tweaking procedure to disadvantage the opposition (p. 136);
- delegating power to the executive (p. 138); and
- transferring power from the legislature to 'the people' (p. 139).

1.2.4. Creating a democratic shell

Creating a democratic shell includes incorporating ostensibly democratic elements into a country's legal system—but elements that, robbed of their institutional or cultural context, do not have the same democratic effect. Many of the tactics in this category are used as part of a 'subterfuge' approach to backsliding. Varol (2018: 344) notes that masking antidemocratic measures behind facially democratic reforms creates 'a significant discordance between appearance and reality by concealing antidemocratic practices under

the mask of law. In the modern era, authoritarian wolves rarely appear as wolves. They are now clad, at least in part, in sheep's clothing'.

In some instances, this practice includes cherry-picking institutional design choices from liberal democratic constitutions in ways that rob them of their liberal functions, dubbed by Dixon and Landau as 'abusive constitutional borrowing' (Dixon and Landau 2021: 19). This involves decoupling the form of democratic institutions from their intended functions (Dixon and Landau 2021: 19). Similarly, institutional design choices may be adopted in countries lacking particular norms or 'supporting social, economic, and political conditions that give those institutions a pro-democratic operation' (Dixon and Landau 2021: 19). Such acontextual borrowing allows a regime to tout its commitment to liberal democratic constitutionalism while using those very structures to advance authoritarian projects (Dixon and Landau 2021: 19).

Another form this can take is adopting liberal democratic rights and protections without any intent or effort to enforce them. A package of constitutional amendments adopted in Türkiye, for example, gave the legislature broad powers to pass laws protecting minorities such as women, people affected by a disability and religious minorities. This amendment package allowed Erdoğan to show a convincingly democratic face and the reforms were warmly welcomed by the EU as a leap towards accession (Varol 2018: 348). However—crucially—these amendments allowed, not required, such protections; the legislature was equally free to do nothing at all.

Separately, Erdoğan was also able to use this set of reforms as cover to bring in dangerously aggrandizing measures on their coat-tails. While his messaging heralded the democratic strides being made, he simultaneously included amendments increasing presidential power and expanding the Constitutional Court and Supreme Council to make way for court packing. Bundling the bad with the good and then requiring an up-or-down vote can usher in changes that may not pass on their own.

'Even where international actors understand the true intent or likely effect of a given move,' note Dixon and Landau, 'they may still have more difficulty calling out or sanctioning a regime that clothes its

actions under the guise of liberal democratic constitutionalism' (Dixon and Landau 2021: 18). Indeed, this is a general problem with many elements of backsliding: any strategy that involves using facially similar provisions or taking actions that are not obviously distinguishable from what other leaders have done allows the backslider to cry hypocrisy in the face of any criticism.

Box 1.4. **Creating a democratic shell: Overview of tactics**

Observed tactics include:

- abusive constitutional borrowing (p. 33);
- cloaking undemocratic reforms in democratic clothing (p. 33);
- up-or-down voting (p. 33); and
- adopting hollow protections (p. 33).

1.2.5. **Shifting competencies or parallel institutions**

A potential alternative to overhauling an institution is to create a parallel institution and give it some of the competencies previously held by the pre-existing institution. This strategy is often used either for smaller-scale institutions or for only part of an institution.

One clear-cut example of this strategy comes from Venezuela. In 2008, popular opposition member Antonio Ledezma won the mayoral race in Caracas, Venezuela's capital and largest city. In response, the legislature under Hugo Chávez passed a law designating Caracas as 'Capital District', its own 'administrative region' with a designated head of state. While this law did not touch Ledezma's status as mayor of Caracas, it transferred most of the authority that would normally rest with the mayor to the new administrator of this Capital District (Pearson 2009; Huq and Ginsburg 2018: 137). Another example comes from Poland, where two new chambers were added to the Supreme Court to hear particular questions (electoral disputes, for example) which were then removed from the jurisdiction of the pre-existing panel.

The problem with criticizing or countering this tactic, of course, is that creating new institutions to take on new problems and build capacity

is often defensible. As with so many other aspects of backsliding, much of the problem comes from motive: is the administration setting up a new institution in order to increase capacity for social services? Or are they attempting to take policy decisions out of the hands of a particular actor?

Box 1.5. Shifting competencies: Overview of tactics

Observed tactics include:

- setting up new institutions and shifting powers (see e.g. p. 145);
- transferring competencies between existing institutions (see e.g. p. 146); and
- combining or splitting offices (see e.g. p. 146).

1.2.6. Political capture: Realigning chains of command and accountability

Realigning the chains of command or accountability, such that an institution is directly or indirectly brought under the control of the ruling administration, may be done by changing the criteria or decision maker for appointment, removal or disciplinary processes. Alternatively, and even more subtly, it may involve bringing the head of one lower-level office under a different supervisor, who themselves is accountable to a political office.

Making changes higher up the chain of command in order to redirect the flow of control allows the backslider to leave the institution itself (ostensibly) untouched. This can be useful for institutions that are either traditionally more removed from the executive, such as career civil service or administrative offices, or touted as independent, such as prosecutors, electoral management boards and human rights institutions. This has been a staple of the backsliding process in Poland, where complex institutions provide political cover to an administration with limited political capital. In one example, the public prosecutor system was brought under the control of the Minister of Justice by combining certain aspects of the offices of the Minister of Justice and the Prosecutor General, who has an uncommon amount of power to act personally in individual cases (Sadurski 2019b: 125). Whereas prosecutors were previously (and purposefully) independent,

they are now accountable to a government minister. Under the new system, the same person can remove prosecutors from cases (as the Prosecutor General), assign specific judges to specific prosecutors (as the Minister of Justice) and keep prosecutors under control by, for example, transferring them to remote parts of the country with total discretion. On the whole, the system gives a single member of the ruling coalition vast control over the administration of justice.

While conveniently buried under layers of bureaucracy and technocracy, these changes can realign the channels of control in such a way as to allow political power to flow all the way down into the depths of the state's non-political machinery.

Box 1.6. Political capture: Overview of tactics

Observed tactics include:

- incapacitating fourth-branch institutions (e.g. ombudspersons or human rights councils) (p. 141);
- changing appointment procedures to the civil service (p. 142) or fourth-branch institutions (p. 145);
- replacing technocratic officers with political officers (packing the civil service) (p. 142);
- changing the scope or substance of powers (pp. 143; 145);
- changing chains of command and accountability (pp. 144; 146);
- combining offices (p. 146); and
- changing disciplinary oversight and removal (p. 144).

1.2.7. Selective prosecution and enforcement

The tactic of selective prosecution and enforcement is one particular manifestation of the concept of 'rule by law'. For the most part, this entails prosecuting members of the opposition for non-political crimes, where frequent transgressions by non-opposition members or the public at large go unenforced. These are often low-level infractions or violations of complex administrative codes like taxes: in one example from Türkiye, a member of the opposition was sentenced to over 16 years in prison for violations of various building codes (Varol 2018: 345).

Also under this umbrella is using anti-terrorism or libel laws to chill critical speech from the opposition or the media. Legitimate grounds for utilizing anti-terrorism laws or other emergency-justified restrictions on rights are rare—one example might be restrictions on freedom of assembly during the Covid-19 pandemic—but once in place, they may prove easier to maintain than undo. Libel laws, on the other hand, have long been on the books in many countries and lie latently at the backslider’s disposal.

Recep Erdoğan has been perhaps the most prolific when it comes to selective prosecution and enforcement. In addition to the example given regarding building code violations, Erdoğan’s government has pursued media outlets for tax evasion, even where their tax liability is small compared to state-friendly competitors. He leveraged a coup attempt in 2016 to purge the military, prosecutors, judges and academics of potential opponents, who were not given the opportunity to return when the emergency passed (Varol 2018: 351–52). And he has been relentless in bringing both criminal and civil libel suits against any vocal criticism, whether from his main competitors or from schoolchildren. These suits have ranged from the conviction of a journalist for ‘liking’ a post criticizing President Erdoğan on Facebook to jailing an opposition supporter for the crime of depicting his face on the body of a dog (Varol 2018: 343–44).

Box 1.7. Selective prosecution and enforcement: Overview of tactics

Observed tactics include:

- selective prosecution of non-political infractions (pp. 134; 151);
- selective enforcement of rights and protections (p. 157);
- use of vague criteria to grant or withhold benefits (p. 147);
- granting favours to loyal media and civil society organizations (p. 149);
- redirection of discretionary advertising spending (p. 150); and
- selective redirection of public funds (p. 154).

1.2.8. Evasion of term limits

There are two primary justifications for eliminating term limits—one democratic and the other populist. The democratic justification

stems from the notion that disqualifying a candidate based on prior service denies the people the right to elect the leader of their choice. (The counter to this, in constitutional theory, is that constitutions exist precisely for this reason—as a precommitment device to prevent ourselves from making unwise decisions based on short-term gratification.) The populist justification is the notion that this leader is the only person who can vindicate the true will of the true people and thus that keeping them in power is the only way to bring the will of the people to fruition.

Annex A canvasses several ways term limits can be circumnavigated beyond simply eliminating them. Such tactics have included promulgating a new constitution and claiming that the term limits clock is reset, or rotating into other offices. When faced with presidential term limits in Armenia, for example, President Serzh Sargsyan launched a constitutional reform process transforming the country from a semi-presidential to a parliamentary system, and then promptly ran for prime minister. This rotation allowed him to de facto remain in power without technically running afoul of term limits. In both Honduras and Nicaragua, a 'subservient Supreme Court' overturned constitutionally imposed term limits relying on the 'unconstitutional constitutional amendment doctrine' (discussed in Chapter 2) (Landau 2015; Haggard and Kaufman 2021: 136). A final ploy is using emergencies as a pretext for suspending elections, as happened in Ethiopia during the Covid-19 pandemic (Button 2022). Emergencies generally allow leaders to take measures that would otherwise be difficult to get away with and which are then easier to maintain.

Box 1.8. Evading term limits: Overview of tactics

Observed tactics include:

- eliminating term limits (p. 114);
- rotating into other offices (p. 116);
- rotating in and out of office (p. 116);
- non-retroactive term limits (p. 116);
- lengthening terms (p. 117);
- suspending elections (p. 118); and
- declaring a state of emergency (p. 118).

1.2.9. Expanding executive powers

As discussed at the beginning of this section, most of what is explored here has the effect of increasing the power of the executive. The actual direct expansion of executive power is also a common component of backsliding and serves two important functions, one offensive and one defensive. Offensively, broad powers allow the executive to implement policies that help maintain their popularity; fill offices in fourth-branch institutions to bring them under executive control; direct resources and other benefits towards themselves, their families and loyal supporters; and offer other desirable advantages. But expanding executive power is also important to a backslider because it helps them protect themselves. Two of the backsliders in this survey faced coup attempts during their tenure and others have faced declining support. The power to silence dissent, steer electoral advantages and blunt the effectiveness of the legislative opposition may prove the difference between holding onto power and being forced out of office.

Different backsliders have used the expansion of executive powers in different ways. In Venezuela, Hugo Chávez used massive personal incoming support to promulgate an entirely new Constitution, giving himself certain expanded powers and extending his control over the legislative branch. In Türkiye, Erdoğan increased presidential powers over the course of many years through both constitutional amendments and informal changes in practice. Notably, he did much of this while holding the office of prime minister, giving the appearance of siphoning power away from himself—only to reclaim it when he later became president. And in Sri Lanka, earlier restrictions on presidential power were repealed, relying on the justification that such restrictions had too severely impeded the efficacy of the government (Welikala 2020).

1.2.10. Temporal entrenchment or harpooning

Executive aggrandizement and tilting the electoral playing field are two of the primary ways in which backsliders attempt to maintain their power, but a third method warrants its own consideration. This strategy involves gaining power, making changes and then making it as difficult as possible for those changes to be undone in the future. This can be thought of as a harpoon tactic; after penetrating the halls of power, the ruling party changes the legal/constitutional framework

Box 1.9. Expanding executive power: Overview of tactics

Observed tactics include:

- new constitution with expanded powers (p. 119);
- constitutional amendment expanding powers (pp. 119; 120);
- transferring from a parliamentary to a presidential system (p. 120);
- delegating powers from the legislature to the executive (p. 121);
- exercising power outside of the executive office (p. 123);
- expanding executive power over government finances (p. 121);
- expanding executive power over use of resources and public policy (p. 112); and
- party dominance (p. 123).

in such a way that it is difficult to pull the party or its policies back out. In this way, backsliders can protect their interests against future changes in public opinion—by both (a) making it difficult to dislodge them from power when their fortunes turn and (b) protecting their interests and policies even in the event that the change in public opinion is large enough to bring new actors into power.

Hungary is illustrative in this regard. Because the Fidesz party enjoyed a strong supermajority in the legislature, with no second parliamentary house or independent executive to serve as checks, then-Prime Minister Viktor Orbán certainly did not face the same incentives to funnel power away from the legislature. Indeed, with a large enough majority to make any desired changes to the Constitution, cardinal laws or government structures, Fidesz did not have to worry about changing the rules to increase its power. This allowed the party to focus instead on entrenching those changes, making them harder to undo in the future. To this end, Fidesz opted to make most of these changes through amendments to the Constitution and cardinal laws—requiring a supermajority, which it possessed—rather than through statutory measures, which require only a simple majority. This ensures that such changes (policy and institutional) will remain in place even if Fidesz loses its supermajority—and even if it loses a simple majority, so long as the opposition does not manage to acquire a supermajority of its own. This can be described as a defensive use of executive aggrandizement; the aim is not to accrue power but rather to keep it.

By amending parliamentary procedure to permit a two-thirds majority to end debate on any topic, Fidesz can shut down proposals from the opposition while ensuring that the procedure is not likely to be used against the party in the future (Scheppele 2015): using the higher supermajority threshold helps maintain the legitimacy of the move, while allowing a simple majority to silence the opposition is difficult to justify in a deliberate legislative body, limiting that power to a supermajority could, theoretically at least, be easier to justify on grounds of efficiency and majoritarian democracy. Another use of this strategy was aimed at controlling judicial appointments. Previously, the committee tasked with selecting nominees included one member from every represented party (ensuring that a majority of parties was required for judicial appointments). A constitutional amendment then adjusted the composition of the committee to reflect instead the proportion of seats held by each party. By translating its supermajority into the nominating committee, Fidesz strengthens its ability to control who sits on the bench well into the future. This is because (a) it can control appointments down the line and (b) the long tenure of judges means that Fidesz's policy choices will be protected by loyal judges for several decades to come. Finally, Fidesz's supermajority allows it, in effect, to override Supreme Court decisions by simply amending the Constitution to make constitutional any actions that have been struck down by the court. This strengthens the power of the legislature vis-à-vis the judicial branch—at least for now. In the future, however, when Fidesz has filled the judiciary with sympathetic jurists, rulings favourable to the party will be vulnerable only in the unlikely event that the opposition gains a supermajority of its own.

1.2.11. Shrinking the civic space

Shrinking the civic space erodes the 'checks' provided on the government by (a) the media, (b) civil society organizations and (c) the electorate.

The media may be attacked in a variety of ways, including buying up news outlets (whether with direct government ownership or 'crony ownership'); strengthening government control over news media; or restricting the freedom of the press. In Nicaragua, the Ortega administration creatively redirected government advertising revenue

Box 1.10. Temporal entrenchment: Overview of tactics

Observed tactics include:

- transferring policy choices from ordinary legislation to 'basic' or 'organic' laws (p. 139);
- entrenching a current supermajority (p. 139);
- preventing a future adverse supermajority (p. 140);
- changing the meaning of 'majority' (a majority of what?) (p. 103);
- changing judicial appointment procedures (p. 103);
- expanding the court (p. 102);
- failing to appoint or vote on judicial nominees (p. 106);
- replacing judges (p. 108); and
- undoing restrictive measures on the judiciary (p. 109).

as leverage over broadcasters, resulting in direct control of roughly half of the country's media outlets (Colburn and Cruz 2012: 116).

CSOs—which can be important players in holding government accountable, maintaining transparency and organizing opposition—are often attacked politically, such as by requiring that they receive foreign funding to register as 'foreign agents'.

In 2010, the Zambian Parliament passed a law giving the government broad discretion to deny registration to CSOs and imposed a mandatory requirement for them to re-register with the government every five years. The act also provided the government with 'powers to dictate [CSOs'] thematic and geographical areas of work' (Hinfelaar, Rakner and van de Walle 2022: 198). In addition, laws are used to steer funding away from unfavourable organizations. In Poland, for example, women's equality organizations, which generally opposed PiS's platform, were denied state funding under a non-discrimination statute on the grounds that they discriminated against men (Sadurski 2019b: 145).

Finally, attacking civil liberties is, in a sense, an attack on the ultimate 'check' on government—the electorate. Tightening freedoms of association and expression by strengthening libel and terrorism laws, for example, reduces the ability of the electorate to access and share information, organize themselves in opposition and, of course, effectively protest. As discussed above, President Erdoğan of Türkiye

has relied heavily on civil and criminal libel laws to shut down protest and opposition by labelling it as libel.

Box 1.11. Shrinking the civic space: Overview of tactics

Observed tactics include:

- incapacitating fourth-branch institutions (e.g. ombudspersons or human rights councils) (p. 144);
- media capture: creating, modifying or circumnavigating oversight institutions (p. 147);
- crony ownership (p. 149);
- redirection of advertisement spending (p. 150);
- government control of news media (p. 150);
- selective prosecution and enforcement of media regulations (p. 151);
- repressing civil society organizations (p. 153);
- restricting freedom of expression and association: states of emergency (p. 155);
- restricting freedom of expression and association: libel laws (p. 156);
- backsliding 2.0: threatening violence against protestors (p. 157);
- selective enforcement of rights and protections (p. 157); and
- use of vague criteria to grant or withhold benefits (p. 155).

1.2.12. Epilogue: Leveraging holes in institutional safeguards ('Looking where the bullet holes aren't')

During World War II, the US military sought to determine where best to place additional armour on their bomber aircraft. They examined returning planes to see where the majority of bullet holes were and noticed that the fuselage and wings were covered in bullet holes, whereas the engines were not. The initial conclusion was therefore to add armour to the fuselage and wings. They later realized that the planes that had been hit in the engine never came back—because the engine was, in fact, more vulnerable (Ellenberg 2015: 6).

Because this Report focuses on cataloguing institutional tools that backsliders have used to further authoritarian projects, it does not generally include tactics that involve opportunistically taking advantage of a lack of institutions that require dismantling. Thus, while the collapse of political parties and extreme polarization have had major causal roles in backsliding projects, they are not discussed at length here.

This, however, does not diminish the importance of these factors for the institutional designer. For this reason, this section recognizes examples of this opportunism as a strategy. Potential lessons to be learned from some of these problems will be addressed in Chapter 2.

Such gaps might include the absence of affirmative requirements to carry out a duty, for example. This occurred in Poland, where the Constitution stipulated that judges would be seated after being sworn in by the president but did not explicitly require the president to do so. The refusal of the US Senate to vote on a Supreme Court nominee during the term of President Barack Obama may also fall into this category. Another interesting example is political party regulation. Kim Lane Scheppele illustrates with great precision some of the ways in which partisan polarization and the evolution of political divides from traditionally left-wing versus right-wing to increasingly cosmopolitan/global versus nationalist/local has led to a pronounced weakening of traditional political parties; this, in turn, has opened up the opportunity for non-traditional parties with extreme platforms and dominant populist leaders to come into power through free and fair elections. In many cases, Lane Scheppele notes, the political systems in these countries lacked robust party governance measures. Instead, 'the internal organization of [these] parties was hierarchical and dictatorial ... leaders governed their own party faithful with iron-fisted control' (Scheppele 2018: 511). This state of affairs prevented effective screening of 'new autocrats lurking in these anti-system parties', leading voters to 'inadvertently vot[e] to kill their democratic institutions' (Scheppele 2018: 508).

These same considerations are important in determining how institutional design can incorporate safeguards against 'softball' backsliding tactics. Intricately bound up with the success of backsliders (see Yatsyk 2020) are strategies such as the (political) dissolution of church and state in India, leading to increased violence against Muslims; the redirection of funding away from women-centred CSOs in Poland on the grounds that they were 'discriminatory'; and selective protection of minority rights across the board. This should not be overlooked when examining the broader strategies, tools and ends of backsliding.

1.3. LEGAL CHANNELS

This section outlines the various institutional channels through which attacks on constitutional democracy can be launched. These are not limited to changes to the constitution itself; in some cases, elected leaders have been able to command a constitution-making majority, either in parliament (as in Hungary) or at referendum (as in Venezuela). But in many cases, changes have occurred through legislation and regulation. Where a choice exists, constitutional changes may provide more visibility and symbolic significance; they are also—importantly—more difficult to reverse. Changes in legislation or regulation, on the other hand, may be quicker and less likely to raise the attention of broader civil society and the international community.

1.3.1. New constitution

A new constitution allows the backslider to design an entire system that best serves their purposes, by enhancing their power and fortifying their incumbency. Further, as the foundational expression of ‘the will of the people’, a constitution is a strong source of popular legitimacy.

Depending on the political culture and constitutional context, a constitutional convention can sometimes be called for through a legislative supermajority or referendum. In some cases, backsliders have gone outside the existing institutional channels for calling for a constitution-making body, relying on the claim that their popular mandate supersedes the constitution. Regardless of the route, the best fuel for carrying this out is incoming momentum. Backsliders often run on a platform of ‘revolutionary’ rhetoric, painting themselves as the liberator of ‘the people’ from an elite and removed government. This feeling of revolution in the leader’s victory often creates a honeymoon period of massive support at the beginning of a backslider’s term. In Venezuela, Ecuador and Hungary, for example, such momentum enabled the Chávez and Correa camps and Fidesz party to push through entirely new constitutions. In Türkiye, on the other hand, Erdoğan began this push after multiple terms and faced a much steeper uphill battle.

There are two important considerations in calling for a new constitution. The first is who will have the power to write or negotiate the draft; the second is who will have the power to adopt it. Backsliders look to the locations of their loyal bases—parliament, the people or hand-picked delegates—and choose a combination that will allow them maximum control over both the content of the constitution and its ratification.

In Venezuela (which set the template for later similar backsliding episodes in countries such as Ecuador and Bolivia), Hugo Chávez rode his wave of popular support to push through a new Constitution, despite facing significant opposition in the legislature (Landau 2018: 164–65). Chávez redirected the decision process to his loyal base—the electorate—by initiating the process outside of the amendment procedures provided for in the existing Constitution (Landau 2018: 163–64). He justified this move on the basis that his popular mandate should trump the Constitution because it represented the will of the people. Interestingly, this extraconstitutional procedure was upheld by the Supreme Court, which, though under political pressure, had not yet been captured by the Chávez administration (Landau 2018: 164). The court made the ruling on popular sovereignty grounds, validating Chávez's argument that 'the "people" had the right to remake their constitution, and could do so via an extra-textual constitutional mechanism such as a referendum and a constituent assembly' (Landau 2018: 164).

The next step in Chávez's project was to design a constituent assembly in which his party would enjoy as much control as possible. He achieved this by writing the rules by which delegates would be elected and placing those rules directly into the referendum on whether to call a new assembly (Landau 2018: 164). It is important to note that Chávez was also able to take advantage of a circumstance that crops up often in backsliding countries—an opposition boycott. The major opposition parties did not participate in the election for the assembly in an effort to paint the entire exercise as illegitimate. The result, however, was that when the assembly went forward anyway, 93 per cent of the seats were held by the Chavista party (Landau 2018: 164).

Once the Constitution had been drafted, Chávez—facing a strong opposition in the legislature but widespread public support—opted to submit the Constitution to ratification by referendum (Landau 2018: 164). This allowed him to engage in a sort of ‘forum shopping’, choosing the ratifying body that was most likely to support the outcome.

Side note: Hungary

Fidesz’s constitutional replacement effort included a novel component that allowed them to begin with an even cleaner slate. As part of the overhaul, Fidesz included an amendment to its new Constitution that annulled all previous decisions of the Constitutional Court. ‘At one level,’ notes Halmai, ‘this makes sense: old constitution = old decisions; new constitution = new decisions’ (Halmai 2018: 247). However, Fidesz’s new Constitution contained several large swathes that were identical to the previous Constitution, including, most crucially, the sections on constitutional rights. This annulment thus wiped out a robust body of case law defining, interpreting, expanding and protecting those rights—many of which had also ‘harmonized domestic rights protection to comply with European human rights law’ (Halmai 2018: 247). Restarting the interpretive process with a bench full of hand-picked judges opened the door for the government to raise the possibility of reintroducing the death penalty and the principle of retroactive political justice, which had previously been deemed unconstitutional (Halmai 2018: 247).

1.3.2. Constitutional amendment

Stopping short of complete constitutional overhaul is the use of constitutional amendment procedures targeting the specific areas the backslider most hopes to change. This method can be just as effective while carrying a lower political cost and eliciting less resistance. Still, such changes require more political capital than legislation, which must be paid for with either widespread support or lowered accountability barriers. Largely for this reason, ‘[b]ig-ticket constitutional amendments have typically followed a systemic destruction of accountability mechanisms’ and have acted ‘mainly to make this destruction permanent’ (Khaitan 2020: 9). In other words, because of the required political capital, it has often not been possible to push through larger amendments until surrounding checks have been sufficiently softened, and because of their

relative permanence, these larger amendments are a useful tool for solidifying those softened checks.

Recep Erdoğan of Türkiye failed in an attempt to implement an entirely new constitution that would have moved the country from a parliamentary to a presidential system. Instead, he set out on a long journey to achieve the same result through incremental constitutional amendments. In combination, these amendments—which were passed in batches several years apart—did enough in themselves that by the time Erdoğan moved from the office of the prime minister to the presidency, the country was operating under a *de facto* presidential system (Varol 2018: 351).

Erdoğan also used a notable tactic to bring in more sinister changes on the coat-tails of ostensibly democratic ones. He achieved this by bundling a handful of individual amendment proposals into a single referendum package to be voted up or down as a whole (Haggard and Kaufman 2021: 201). In laying out this package of amendments, he touted several rights-expanding or democratizing reforms, many of which seemed designed to prepare the country for accession to the EU (Varol 2018: 348). These big-ticket items were also accompanied, however, by more technical-seeming amendments, like changes to the judiciary which would allow him to pack the court (Varol 2018: 348–49). Debates around the implications of these provisions were drowned out by the progressive and democratic rhetoric, which sugar-coated a more bitter pill.

1.3.3. Legislation

A surprising number of constitutionally debilitating policies can be achieved by legislation. These shifts are usually less direct, often targeting administrative agencies and the bodies in charge of judicial appointments or elections. Relying on legislation has the benefit of having a relatively low political cost. While not always the case, new legislation may be less likely than constitutional change to be covered by the media, may be more complex and difficult for the public to understand and typically does not require any public involvement for passage. This is even more true of amendments to existing legislation.

Given its lack of a constitutional majority, PiS in Poland has used legislation as its primary tool. From 2015 until the time of writing, PiS has used legislation to change the composition of oversight bodies, adjust judicial administration procedures to funnel specific cases to specific judges and dismantle the civil service (Sadurski 2019b: 260–71). It has also used legislation to informally change the Constitution or the meaning of constitutional terms (Drinóczi and Bień-Kacała 2019: 1153). In fact, PiS's sweeping capture and reformation of the judiciary happened almost entirely through legislation. The parliament was able to push major reforms by breaking them down into harder-to-discern component parts and scattering those parts throughout different bills. It then passed them under streamlined procedures and in rapid succession, ignoring transparency measures (Sadurski 2019b: 70–72, 133–35). Combined, these strategies made resistance or organization by the opposition almost impossible.

PiS has also recognized the important fact that procedure often dictates the outcome and has focused on procedure accordingly. For example, parliamentary rules allow for fast-tracking of bills introduced by a private member rather than by the government. PiS exploited this procedure by introducing bills as private member bills even where they were clearly government-sponsored. In 2016, over 40 per cent of bills were fast-tracked through this mechanism—up from 15 and 13 per cent respectively in the two preceding years (Sadurski 2018: 267). In addition, PiS effectively silenced the opposition by making other adjustments to parliamentary procedure, including (a) limiting the number of questions that may be raised during discussion of a bill to silence the opposition; (b) limiting speeches to one minute, which stifles debate; and (c) using 'procedural tricks ... to sidestep the opposition', such as by adding items to the agenda at the last minute (Sadurski 2018: 267). In one particularly stark example, PiS called a parliamentary session in a small side room immediately following a PiS caucus meeting. PiS used this ad hoc meeting, where no reliable record of votes could be documented, to pass the 2017 budget (Sadurski 2018: 267–68).

1.3.4. Referendums and public consultations

Referendums are particularly useful where backsliders enjoy widespread public support, especially if they are still restricted by checks and balances or opposition in other branches of government.

For this reason, this channel can be particularly important early in the backsliding process, before the backslider has enough control to use government channels (such as the legislature and agencies) to implement their policies.

As the examples above have illustrated, referendums have been used to ratify new constitutions and constitutional amendments. Hugo Chávez, for instance, repeatedly relied on referendums—first to enact a new constitution and eventually to do away with term limits. Similarly, Recep Erdoğan has used referendums both as prime minister and as president. In 2007 and 2010, he used referendums to enact the amendment packages described above, both of which enabled him to weaken government checks. And in 2017, he called a referendum (which was held while the country was under a state of emergency) to move the country from a parliamentary to a presidential system (Varol 2018: 353).

Similar procedures have been used for lower-level policy issues or to bolster the government's democratic legitimacy on specific topics. Hungary, for example, has used 'public consultation' as a validating mechanism for some of their controversial initiatives, like immigration restrictions. Here, millions of questionnaires were sent out to eligible voters as part of a 'national consultation'. These questionnaires posed questions such as:

whether or not illegal border-crossers should be detained for a period longer than 24 hours, despite the European Union prohibiting such a measure[;] whether immigrants who are proven to be taking advantage of European regulations should be immediately expelled[;] and whether they should be expected to work while in Hungary to defray the cost of accommodation and food.

(European Commission 2015)

Orbán's letter of introduction to the questionnaire called economic migration 'a threat we must stop in its tracks' and the questionnaire used overtly biased phrasings, such as: 'Do you agree with the Hungarian government that support should be focused more on Hungarian families and the children they can have, rather than on immigration?' (Miles 2015). The results were 'hailed as a success by

the government afterwards' (Inotai 2020), and when the consultation was repeated in 2020, the Hungarian Government reported that 99 per cent of respondents favoured the government's position (Inotai 2020; MTI-Hungary Today 2021).

1.3.5. Emergency powers

In some cases, backsliders have leveraged emergency powers—whether through emergency provisions contained in existing law or by resorting to extra-institutional emergency measures 'justified' by the situation. Crises giving rise to emergency provisions can be taken advantage of opportunistically; they can also be created for that purpose.

Emergencies justify a unilateral expansion of power on the part of the executive, which can be crucial in mobilizing a quick and effective response. The problem often comes when the emergency is no longer so grave as to justify the extra powers but the executive does not cede them. 'Faced with the continuous threat, or fear, of terrorism, emergency regimes tend to perpetuate themselves, regardless of the intention of those who originally invoked them. Once brought to life, they are not so easily terminable' (Gross 2018: 586). For this reason, the United Nations Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Fionnuala Ní Aoláin, has noted a 'proliferation of permanent states of emergency and the normalizations of exceptional national security powers within ordinary legal systems of states' (Gross 2018: 585).

In the midst of a 2016 coup attempt in Türkiye, for example, President Erdoğan invoked vastly expanded executive powers in declaring a state of emergency (Varol 2018: 351). While the coup attempt was put down in a matter of hours, the state of emergency stayed in place until 2018 (Human Rights Watch 2019). During this period, Erdoğan used his broadened powers to dismiss, suspend or arrest more than 120,000 police, civil servants, military personnel, teachers and academics; to reconstitute local-level governments and appoint loyal figures within them; and to pass a flurry of legislation unrelated to the actual emergency but further expanding the executive power (Varol 2018: 351–52).

Using emergency powers to further backsliding agendas was also seen in response to the Covid-19 pandemic. In both Ethiopia and Sri Lanka, for example, a state of emergency was used to justify a significant postponement of elections.

1.3.6. Extra-institutional tactics

Finally, a backslider may resort to extra-institutional tactics—sometimes referred to as ‘softball’ tactics in that they are subtler, political moves rather than formal changes to the ‘rules of the game’. This might include strategies such as:

- selective non-enforcement of minority rights, which feeds into the populist narrative of a single, pure ‘people’ juxtaposed against an enemy ‘other’;
- dissolving the separation of church and state, which can reinforce social norms that play to the backslider’s advantage in the policy sphere; or
- targeting and excluding immigrants, which can simultaneously stoke xenophobic biases to foster the populist narrative and exclude potential supporters of the opposition from the electorate.

These tactics can be just as powerful in furthering the backsliding agenda; however, because they centre on social and political, rather than institutional, changes, they are largely outside the scope of this Report. It is nevertheless important to recognize the damage these tactics can inflict through the erosion of democratic norms. In Türkiye, for example, widespread underenforcement of violence against women laws helps perpetuate the conservative patriarchal structure as part of Erdoğan’s strategy to desecularize the state (Human Rights Watch 2013; Varol 2018: 346). In India, ‘a series of sweeping measures’ codifying religious norms in the law—such as a ban on cow slaughter, a sacred animal in the Hindu tradition—has contributed to violence, including lynchings, against Muslims nationwide (Mate 2018: 389–93). And in Hungary, a law forcing all churches to re-register under new, more stringent recognition criteria, allowed the government to exclude unfavoured minority religious organizations from government recognition and benefits (Halmai 2018: 246).

Similarly, the 'channels' themselves may not always be 'institutional' per se. Changes in judicial interpretation, for example, have served as the 'channel' through which term limits have been eliminated or as a way to 'amend' constitutional provisions by changing their meaning via judicial interpretation. Lawsuits and prosecutions have provided a mechanism through which the opposition is attacked and civil society is throttled. Finally, even changes in custom, such as the disregarding of longstanding norms, have been used as a channel of backsliding. An example is the unprecedented decision to decline to vote on a Supreme Court nominee upon US President Barack Obama's nomination of Merrick Garland, which had the effect of changing how a core constitutional function—appointments to the Supreme Court—are carried out.

Chapter 2

LESSONS LEARNED

Having catalogued the recent phenomena of democratic backsliding in Chapter 1, it is important to examine the lessons that can be distilled from this for constitution review commissions, CSOs, democracy assistance providers and others engaging in political reform processes. This chapter proposes some considerations, both general and specific, which may be useful in strengthening the guardrails of constitutional democracy.

The universe of possible recommendations is vast. One could take any single example from the catalogue of backsliding in Chapter 1 and devise a rule which may have prevented it in hindsight. Or one could take any situation where a rule was changed and propose that such rules be more strongly entrenched. Indeed, perhaps the foremost trend characterizing institutional design since World War II has been the constitutionalization and judicialization of politics (Stone Sweet 2000) as a bulwark against authoritarian rule and the primary means of protecting fundamental rights. As a result, legal codes and constitutions have become longer, covering ever more issues, and judicial power has expanded to more frequently take on adjudication of ‘matters of outright and utmost political significance’ (Hirschl 2008: 1).

To illustrate, there are certainly places where a political majority was able to effect a change via statute which might—particularly in hindsight—seem befitting of constitutionalization. For example, in Poland and El Salvador, restructuring of the judiciary for political ends was furthered simply by amending the statutory rule on retirement. Over 60 countries worldwide constitutionalize the judicial retirement

age and had this been the case in Poland and El Salvador, it would have been more difficult (though surely not impossible) to weaken judicial independence.

In other cases, there was a constitutional rule but it was badly designed. For example, in Hungary's 2010 elections, Fidesz won 67 per cent of the seats—enough to meet the two-thirds majority required to amend the Constitution but not enough to meet the four-fifths threshold required to replace the Constitution under article 24(5) (Constitution of Hungary 1949). Undeterred, Fidesz amended the Constitution to repeal article 24(5), thus enabling the party to bring in a new Constitution with its two-thirds majority under the regular amendment procedure (Kis 2012: 4; Uitz 2015: 286). This seems to be a basic drafting error; higher thresholds for amendment should protect themselves by the same threshold. One cannot know for sure whether it would have mattered in the end or not, but poor constitutional drafting certainly made the Fidesz's objective of constitutional replacement easier than it should have been.

Nevertheless, the purpose of this section is not to revisit the catalogue on backsliding and propose in hindsight itemized institutional design ideas for avoiding each violation of democratic constitutional norms. Rather, it is to discern a set of general lessons learned for constitutional design from the backsliding experience, along with specific illustrations of approaches which constitutional review commissions should consider going forward.

2.1. THE LIMITATIONS AND OBJECTIVES OF INSTITUTIONAL DESIGN

It is evident that writing a norm in the constitution or statute is no guarantee it will be followed. Backsliding cases show that, in fact, laws are often not broken or violated but, rather, are slyly abused or manipulated to achieve objectives counter to the core values of liberal democratic constitutionalism. In many cases, instead of ignoring the laws, the leaders and their advisors have a keen sense of what the law is and where the weak links are which can be attacked. So if rules can be broken, abused or manipulated, what use is institutional design?

Firstly, as Ginsburg and colleagues note with regard to term limits (Ginsburg, Melton and Elkins 2011), the rules heighten the political cost of contrary behaviour. Wojcech Sadurski is sceptical in his assessment of whether different institutional design would have made any difference to the backsliding process in Poland. Nevertheless, he acknowledges that the leaders conducted a cost–benefit analysis in determining whether and how to follow or manipulate the law. It was simply that ‘the costs incurred—and they were real—were not considered to be particularly high in the overall calculation of costs and benefits’ (Sadurski 2019a: 8).

The introduction to this Report used the metaphor of constructing earthquake-resistant buildings and Gardbaum uses a similar metaphor: accepting the impossibility of stopping a Category 5 hurricane should not stop one from endeavouring to resist Category 1 and 2 events, containing the damage from a Category 3 or 4 event, or devising mechanisms to downgrade potential Category 5s (Gardbaum 2020: 23). As Sujit Choudhry puts it:

constitutions can reduce certain risks, even if they cannot eliminate them. On the margin, constitutional design can make a difference by making decisions more difficult, by creating delays and roadblocks. While these obstacles can eventually be overcome, in the interim they create focal points for mobilization in defence of the constitutional order. (Choudhry 2018b)

An additional point is that resistance to backsliding is irrefutably strengthened by a number of other factors beyond institutional design. These include factors exogenous to politics (e.g. stable and equitable economic growth) but also factors linked to political culture and practice, such as the strategies of the political opposition (Gamboa 2022) and a ‘decent measure of popular commitment to democracy’ among the citizenry (Ginsburg and Huq 2018: 245). But institutional design should not be considered as something separate from and irrelevant to factors like opposition mobilization or social norms; rather, institutional design choices should be informed by consideration of these other factors which may hinder or help democratic backsliding. For example, if one considers social protests to be an important factor in preventing backsliding, what

Rules heighten the political cost of contrary behaviours.

institutional design considerations might be important to protect freedom of assembly and opposition mobilization? Or if political culture and leadership are key factors in backsliding, are there forms of institutional design which are more likely to promote civic virtues and public good values in politics?

2.2. THE ESSENCE OF BACKSLIDING

When it comes to institutional design aimed at strengthening resistance to backsliding, it is important to move beyond generalities of countermajoritarian institutional design aimed at constraining tyranny and consider the specific nature of backsliding.

Firstly, backsliding leaders are often both popular and populist. They are elected with large-scale support and often with a highly loyal base, and they commonly rely on populist rhetoric to maintain support and mobilize their base. A common gripe in their political messaging is that of an elitist deep state that frustrates the will of 'the people'. When other actors seek to constrain their actions—whether they be the courts, legislature, election commission, political opposition or others—such actors are portrayed as the enemies of the people. The resistance of these unelected bureaucrats or minority representatives then serves only to add fuel to the populist fire and further embolden the populist leader to depart from democratic norms. Thus, the populist backslider presents a Hobson's choice: they can either allow them to attack democratic institutions or seek to constrain them from doing so—which may then further strengthen their ability to do so.

Similar concerns arise when considering the scope for regional/international bodies to enforce constitutional norms. The political rhetoric accompanying backsliding is not only populist but often nativist, depicting bodies of supranational governance as cosmopolitan, elitist organizations which seek to impose a foreign ideology on the country at the expense of its own traditions and the will of the people (see e.g. Varga 2019; Peña 2022). Condemnation from regional/international bodies may often backfire, therefore, by strengthening the sense of siege perceived by supporters of populist leaders. This is accentuated by the difficulty of providing

robust and objective critiques of many backsliding actions, which are often formally legal and—when analysed by themselves and not as a complete package—may be similar to actions taken or rules formulated in other liberal constitutional democracies (Scheppelle 2013). Thus, backsliding leaders are able to portray international criticism as subjective.

In general, therefore, with regard to populist-powered backsliding, it is important to carefully consider the problem of ‘perversity trade-offs’, whereby ‘the very elaborateness of the designers’ precautions against dictatorship creates pent-up demand that itself leads to dictatorship’ (Vermeule 2014: 66). Institutions designed to constrain the power of an elected government may—by being portrayed as frustrating the will of the majority—embolden the executive to break with established norms and contribute to executive aggrandizement.

Moreover, it is not solely a question of perceptions. At the heart of popular discontent with democratic politics is ‘a view of the state as a privileged elite domain incapable of addressing the concerns of everyday citizens and disrespecting the central cultural markers of their lives’ (Issacharoff 2023: 189). The balance is a difficult one. Governments must be empowered to govern—to lead on policy and deliver on the promises for which they were elected. Yet, at the same time, they must be constrained from unilaterally manipulating the safeguards of constitutional democracy.

Beyond the popular/populist aspect, a second important characteristic of backsliding relates to timing. Democratic backsliding is often described as something which happens slowly. Terms such as ‘democratic decay’ and ‘democratic erosion’ signal that this is a gradual process, where democracy dies a slow death, rather than decapitation with a single blow. This is undoubtedly true when compared with the classic military coup d’état, where democratically elected leaders are removed from power and the constitution is suspended in a single day. It is also true in the sense that backsliding has been described as ‘killing a constitution with a thousand cuts’ (Khaitan 2020): each may be minor when taken by itself, but when these cuts are sequenced together, they represent a concerted and fatal attack on liberal constitutional democracy.

Governments must be empowered to govern—to lead on policy and deliver on the promises for which they were elected. Yet, at the same time, they must be constrained from unilaterally manipulating the safeguards of constitutional democracy.

However, from another perspective, backsliding happens quickly. As Christoph Grabenwarter, the Austrian Constitutional Court President, has remarked,

[t]ime is an important issue when it comes to resilience. Experience with governments aiming at radical changes in a democratic system shows that these bodies proceed with remarkable speed when it comes to legislative acts or even to the election of judges. Chronologies in Venice Commission opinions show this very clearly. Governments push laws through Parliament within days, opposition parties do not have enough time to scrutinise the law, the role of Parliament to discuss laws is to a large extent neglected, public debate is cut off by speed. As to election of judges, the most remarkable example is the taking of the oath of some new judges of the Constitutional Court in the middle of a December night.

(Grabenwarter 2018)

Time is also important when thinking about the standard time period of democracy—the electoral cycle. The experience of backsliding is that elections bring a certain individual or group into power and then, within one electoral cycle, the democratic framework is changed such that the next election is not contested on a level playing field. Electoral democracy can be viewed as a game which only works because when you lose, there is always a chance you can win the next time; in this analogy, backsliding involves an election where one side gets its turn but then changes the rules of the game so that the other side(s) cannot have a turn.

In summary, when looking for lessons learned for institutional design from democratic backsliding, it is important to (a) carefully evaluate the potential for populist backlash from countermajoritarian rules and (b) consider specifically rules designed to slow down changes to the level playing field of democracy.

2.3. PROPOSALS FOR RESILIENCE

In recent years, scholars, think tanks and practitioners have put forward a number of proposals to strengthen constitutional resilience based on the recent experiences of democratic backsliding. The aim of this section is to reflect on some of those proposals, incorporating many of them while adding additional specific reflections based on the detailed analysis of backsliding experiences outlined in Chapter 1. Note that this is different from reversing backsliding, which requires a different set of considerations but has also begun to be explored (e.g. Arato and Sajó 2021; Daly 2022; Dixon and Landau 2022). The proposals discussed here are more about inoculation than remedy.

The section addresses two broad themes of institutional design which have been discussed in the backsliding literature: (a) rules designed to constrain the powers of political majorities once they are in government and (b) rules designed to constrain who can enter politics. The latter broadly fits within the term ‘militant democracy’ (Lowenstein 1937), while the former has been termed ‘militant constitutionalism’ (Gutmann and Voigt 2019).

It is also important to note what is not included here. This section does not consider first-order decisions over the system of government, electoral system or structure of state. Ginsburg and Huq (2018), Gutmann and Voigt (2019), Gardbaum (2020) and Issacharoff (2023) all rightly highlight a number of considerations in regard to these issues which can further the goal of deconcentration of power and thus, they posit, lead to a greater resilience to backsliding. Such issues are excluded here not because they are unimportant with regard to backsliding but because choices over these issues are nearly always determined by path dependency (Horowitz 2000; Sadurski 2019a), by the rational choice of political actors based on electoral expectations (Negretto 2013) or by both of these. Rather than consider the system of government choice from the perspective of resilience to backsliding, it is more realistic to think about how to build resilience given the system of government and as this is determined by the path-dependence, historical/cultural and political dynamics at hand.

There are few 'one-size-fits-all' solutions and what works well in one context may have no effect, or the opposite effect, in another.

A necessary caveat must be made before proceeding to the main discussion of proposals for strengthening democratic resilience. The business of making general proposals for constitutional design is a hazardous one. There are few 'one-size-fits-all' solutions and what works well in one context may have no effect, or the opposite effect, in another. For this reason, this section approaches remedies from a relatively high level of generality, looking at trends that have tended to prove useful or detrimental in various constitutional systems. It is not meant to be prescriptive but to demonstrate practical considerations for constitution-makers while encouraging them to think deeply about how the ideas presented, or modifications thereof, might be adapted to their own contexts.

2.3.1. Constraining decisions by one-time majorities

Proposing countermajoritarian rules as a reaction to the phenomenon of backsliding is open to numerous critiques. Firstly, as noted above, populist backsliding feeds off a notion that the will of the majority has been frustrated and further blocking of majority decisions—whether it be through courts, independent commissions, supranational organizations or the opposition—may embolden the majority to depart from existing norms. Thus, a critical departure point in considering backsliding-resistant institutions should be an effort to distinguish those areas where the government should not be overly burdened and prevented from delivering on its electoral programme, and those areas in which—in a constitutional democracy—no one-time majority should have unilateral discretion to act.

Secondly, as already discussed (see 2.2: The essence of backsliding), such an approach can be a double-edged sword. For example, for many, a strong constitutional court with centralized powers of judicial review has been a *sine qua non* element of a constitutional democracy. But the backsliding experiences have demonstrated that it also represents a target to be tamed and then turned from a shield against an overreaching executive into a shield for executive aggrandizement.

However, the risks to the survival of democracy are sufficiently severe to warrant serious consideration of strengthening protections around specific key issues which may be viewed as the 'load-bearing pillars'

of the democratic constitutional architecture. In this regard, there are two questions to address:

1. What critical issues should be put beyond the reach of transient political majorities?
2. How should such protections be designed?

Substantive issues: Outlining the minimum democratic core

With regard to the first question—the critical pillars of constitutional democracy—the focus is on rules which, should they be changed by the incumbent government, would tilt the playing field of democracy such that the opposition would have neither a fair chance of winning the next election nor sufficient space during the political term to hold the government accountable.

In this respect, Dixon and Landau have developed the useful term ‘minimum core of a democratic constitution’, which ‘likely includes the core set of institutions, procedures and individual rights that are necessary to maintain a system of multiparty competitive democracy’ (Dixon and Landau 2016: 277).

Dixon and Landau wisely refrain from providing a precise definition of the minimum core, noting incontrovertibly that what this general definition would specifically entail varies across countries—although with some degree of commonality regionally, if not globally (Dixon and Landau 2015). However, based on the backsliding playbook detailed in Chapter 1, this Report proposes the following as a basic ‘checklist’ of considerations for constitution review commissions—that is, issues which may require some form of protection to place them beyond the reach of one-time majorities:

Elections:

- electoral law (including changes to the electoral system, voter eligibility and constituency boundaries);
- electoral management (including the establishment, composition, budget, appointment and removal mechanisms for the electoral management body);
- political parties (registration, prohibition, campaign finance rules and regulation of the body responsible for oversight of parties).

Core civic and political rights:

- rights relating to voting, expression, media freedom and assembly registration and operations of civil society organizations.

Judiciary:

- rules for selecting judges (e.g. the composition of judicial service councils/commissions);
- rules for dismissing judges;
- the size of the apex court responsible for judicial review;
- judicial tenure (including specification of retirement ages);
- jurisdiction and standing rules of apex courts;
- salaries and budget.

Effective parliament:

- dissolution;
- prorogation;
- term lengths and rules regarding extension;
- selection and powers of the speaker;
- fundamental aspects of the legislative process and opposition responsibilities which provide for scrutiny and deliberation.

Public administration:

- composition;
- terms;
- tenure and responsibilities of public service commission (or other such body responsible for management of civil service);
- tenure of civil servants.

Oversight institutions:

- composition;
- terms;
- tenure and responsibilities of key oversight institutions (including anti-corruption commission, auditor general, public prosecutor, media commission, human rights commission and ombudsperson).

In any given context, this list may be underinclusive, overinclusive or both. The catalogue of backsliding experiences demonstrates both great variety and creativity in the ways in which the guardrails of constitutional democracy are weakened, and it would be impossible to provide a universal template for future-proofing against backsliding that is applicable in all contexts. Nevertheless, there is also a degree of commonality across the backsliding cases; the above checklist therefore provides a sound departure point for actors who are considering where weak links in the fence of constitutional democracy might make it vulnerable to attack.

Decision making

The next step is to turn from the what to the how. How can protections be designed to address the issues outlined above? A range of possible options exists for rule-making through constitutions. At one end of the spectrum are ‘eternity clauses’, whereby rules are established in the constitution and specified as unamendable (Suteu 2021). Some of these may be general principles. For example, the Constitution of Brazil prohibits amendments to ‘the federalist form of the national government’, ‘direct, secret, universal and periodic suffrage’, ‘separation of powers’ and ‘individual rights and guarantees’ (Constitution of the Federative Republic of Brazil 1988: article 60(4)). Other rules are more specific provisions. For instance, the Constitution of the Central African Republic makes the number and duration of presidential terms unamendable (Constitution of the Central African Republic 2016: article 153). At the other end of the spectrum are ‘constitutional silence’ or ‘explicit delegation to law’, which allow for the legislature to regulate as it sees fit.

Not every element of the democratic core can or should be detailed in the constitutional text. However, selected critical decisions over changes to the democratic core should be put beyond the control of a transient political majority. This can sometimes happen by including such decisions explicitly in the constitutional text. At other times, it involves entrusting decisions to independent bodies whose composition is designed so as to be beyond the control of the government of the day. At still other times, it will require a supermajority consensus or consensus between different institutions.

Ultimately, however, the meta-rules determining the composition of independent bodies, or rules defining decision-making rules, have to be placed in the constitution. Thus, a logical place to begin is with constitutional amendment rules.

Constitution amendment rules

There is much to be said regarding constitutional amendment rules from the perspective of backsliding. Tiered amendment procedures, whereby different amendment rules apply to different constitutional provisions, are becoming increasingly common. A logical conclusion to draw from the backsliding experience is that rules which delineate the democratic core—that is, those with paramount importance for the very essence of democratic constitutionalism—should not be subject to the same amendment rule as, for example, the selection procedure for the deputy speaker.

Eternity clauses may seem attractive but expanding them too far runs the risk of entrenching issues which may require modification over time. For example, in the Central African Republic, the eternity clause placed the country in a constitutional crisis as the presidential term was ending; yet elections were not possible due to the Covid-19 pandemic and the presidential term could not be extended as the relevant provision was unamendable (Vohito 2020). Further, in cases where eternity clauses are general or vague, deciding on whether a proposed amendment contravenes the unamendability provision will fall to the courts. This makes them a key target for political capture or, should they reject a popular government's proposal, the target of populist ire. There is also the danger that when powerful presidents are confronted with an eternity clause that presents a key obstacle to democratic backsliding—for example, presidential term limits—they may decide to crash the system completely and seek to replace the constitution.

A more general approach is to use legislative supermajorities as a proxy for cross-party consensus and thus a constraint on political majorities. The challenge with regard to backsliding is that such rules are a proxy for either cross-party consensus or significant support for one party; thus, if one group manages to win sufficient support at one election, they can remake the rules of the game entirely (as happened in Hungary).

A better approach—suggested by both Dixon and Landau (2018) and Ginsburg and Huq (2018)—is based on amendment rules which create temporal constraints on changes to the constitution, as in countries such as the Netherlands and Finland. The rule varies in different countries, but the general parameters are that a constitutional amendment is proposed in one parliament but can only be adopted by the successive parliament. In the shadow of backsliding, this rule choice is attractive for several reasons. Firstly, it does not allow the incumbent to change the rules of the game before the opposition has a chance to compete again according to the original rules. Secondly, it forces a long period of delay, which allows for deliberation, public awareness raising and mobilization. Thirdly, it gives the public a chance to have their say through elections, bringing in a degree of public accountability for the changes to the constitutions being proposed. And lastly it does permit a significant majority, sustained over time, to make decisions. The risk with this approach is that such a rigorous requirement will make the constitution too difficult to change (as has arguably been the case in the Netherlands). The risk is mitigated, however, if this particular amendment rule applies only to select ‘democratic core’ provisions.

Another option is to provide that amendments cannot benefit the incumbent. For example, the 1987 Constitution of Haiti provides that ‘the amendment passed may enter into effect only after installation of the next elected President. In no case may the President under the Government that approved the amendment benefit from any advantages deriving there from’ (Constitution of Haiti 1987: article 284(2)). While this provision could be critiqued as being too vague, it could be fine-tuned so that it refers to specific provisions of the Constitution relating to the democratic core.

With regard to constitutional amendments, there have been notable cases of courts stepping in to block democratically regressive amendments through the doctrine of ‘unconstitutional constitutional amendments’, whereby courts have held that proposed amendments are themselves unconstitutional as they would alter the basic structure, or fundamental principles, of the constitution. The cases are now numerous (see Albert 2019 and Roznai 2019 for a review of the jurisprudence). One of the best-known examples dates back to the 1970s, when the Indian Supreme Court nullified constitutional

amendments which sought to weaken the judiciary. Another occurred in Colombia in 2010, when the Constitutional Court prevented a referendum to approve the eligibility of then-President Alvaro Uribe to run for a third term, contrary to the two terms stipulated in the Constitution.

Adam Abebe (2022) suggests in a publication by International IDEA that constitutions should explicitly provide for and regulate judicial power of constitutional amendment, both (a) to empower the courts to act when faced with democratically regressive amendments and (b) by framing how the unconstitutional constitutional amendment doctrine should be applied, to serve as a constraint on judicial overreach. If such a provision were to be considered in a constitutional design context in view of preventing democratic backsliding, what factors should be taken into account? Roznai and Brandes (2020) highlight three challenges one might encounter in applying the doctrine to democratic backsliding, together with suggestions for mitigating these challenges. Specifically, they suggest two factors which are of particular relevance here. Firstly, the court should look at the aggregation of actions, rather than be limited to the law or act before them. This would counter the challenge of gradual erosion of constitutional democracy through amendments which, taken separately, may be justifiable but which, when seen as a package, have the effect of damaging the democratic core of the constitution. Secondly, courts should be empowered to review constitutional replacements in addition to constitutional amendments—for example, by examining the breadth and depth of public involvement in the replacement process. From a constitutional design perspective, this could be addressed directly in the text by providing for a separate mechanism for constitutional replacement—one which seeks to promote values such as transparency, deliberation, political inclusion and public participation.

Supermajority rules

Often constitutions seek to place certain decisions beyond the reach of one-time majorities by requiring supermajority consensus. Such rules are commonly used for constitutional amendments, but also for appointments to certain offices, often including apex courts. In Poland, however, the Constitution provides that judges of the Constitutional Tribunal are elected by a simple majority of MPs

(Constitution of Poland 1997: article 194(1)). Similarly, in El Salvador, the members of the Supreme Court are elected by a majority of the Legislative Assembly, and the Division of the Supreme Court tasked with constitutional review is similarly elected by a majority of Legislative Assembly members (Constitution of El Salvador 1983: articles 173–74). If it was not clear before, the democratic backsliding experiences of both these countries highlight the danger of leaving such decisions to one-time political majorities.

When it comes to issues such as the appointment of apex court judges, electoral commissioners or other members of key guardian institutions, most modern constitutions require supermajority thresholds in the legislature, interinstitutional consensus (e.g. one body nominates and another body approves) or both. What this supermajority threshold should consist of is expanded further below.

Separation of parties not powers and delaying mechanisms

Contrary to the original conception of Montesquieu, Madison and others, the rise of political parties has meant that the principal source of checks and balances in government is not between institutions but between government and opposition parties (Levinson and Pildes 2006). As discussed above, where one party manages to win a supermajority in the legislature or controls both institutions required to make decisions, there is likely to be little actual control on a one-time majority's ability to alter the democratic core of the constitution. Thus, when considering how to constrain a one-time elected majority from changing the rules of the game while in power, it is useful to think beyond numerical thresholds or interinstitutional requirements and focus instead on roles and responsibilities for the opposition as a countervailing force to slow down backsliding majorities.

There are, in practice, a number of common mechanisms to empower the opposition/legislative minorities to play their role in scrutinizing and opposing government, as a publication by International IDEA reports (Bulmer 2021). These mechanisms provide roles and responsibilities explicitly to the political opposition qua opposition, rather than using supermajority thresholds as a proxy for cross-party consensus. Many of these—such as chairing parliamentary committees or nominating members of courts/independent commissions—'might do little in the face of a majority intent on

Where one party manages to win a supermajority in the legislature or controls both institutions required to make decisions, there is likely to be little actual control on a one-time majority's ability to alter the democratic core of the constitution.

pushing through its agenda by dismantling the checks' (Huq, Ginsburg and Versteeg 2018: 249). Nevertheless, there are some mechanisms which may be valuable to consider in the context of resilience to backsliding.

Examples include minority delay and minority referendum mechanisms. Under the Swedish Constitution (Instrument of Government 1974: Chapter 2 article 22), as few as 10 MPs can force a delay of one year for any legislation affecting fundamental rights. Denmark's Constitution allows for 40 per cent of MPs to delay any legislation—except money, naturalization and emergency bills—for the much shorter time period of 12 days. It is important to note that these mechanisms do not take decision-making authority away from the governing majority but they do allow for a period of 'sunlight', affording more time for the opposition to organize and greater opportunity for public scrutiny and mobilization.

Denmark's Constitution, as well as that of Latvia, also provides for a minority referendum through which one-third of MPs can halt the passage of a bill pending a nationwide referendum. This takes the decision away from a political majority and puts it in the hands of a majority of voters, as an International IDEA publication has observed (Bulmer 2021: 37). These rules would be most effective where either (a) a party has gained a majority of seats but without the support of the majority of voters, as was the case with PiS in Poland, or (b) a government seeks to push through unpopular legislation which its electoral base does not support.

Numerous further examples and ideas could be proposed. However, the fundamental idea is to:

- provide roles and responsibilities specifically for the political opposition, as opposed to (solely) using supermajority thresholds as proxies for cross-party consensus; and
- provide mechanisms which give the opposition voice and opportunities to delay, scrutinize and mobilize, but not a veto.

Other options could also be considered. For example, there could be a requirement that in order to change specified aspects of the

democratic core, a certain majority be attained in the legislature in addition to a certain majority of votes at election.

Minority vetoes have also been proposed. For example, in relation to preventing unilateral amendments in the Africa context, Adem Abebe proposes, in an International IDEA Report, adopting constitutional amendment rules of 'inclusive majoritarianism'. This would require an overall majority of parliamentary votes including a predetermined number of votes from non-government parties (Abebe 2020). Similar rules are in place in the Caribbean Commonwealth, where some countries require a supermajority in the senate, which is composed of sufficient members appointed by the opposition to block any constitutional amendment. Another example is Thailand, where the 2017 Constitution provides that amendments require the consent of 20 per cent of the opposition party (Constitution of Thailand 2017: article 256(6)). In the context of one-party or dominant-party systems, these rules may be important bulwarks against authoritarianism. However, from a backsliding perspective, the power of small minorities to block the will of an overwhelming and sustained majority may lead to the perverse effects of encouraging, rather than dampening, antidemocratic sentiment. One could consider instead combining such rules with an alternative. For example, a law/amendment may be passed either (a) by a majority of legislators as long as this includes at least X per cent of the opposition or (b) through a majority of legislators in one parliament and a supermajority of the successive parliament following elections.

Another point relating to delay is also worth emphasizing, with regard to certain issues: it is advisable to delay not the decision making itself but its effect. This is to minimize the risk of manipulation. For example, it is a widespread principle that the salaries and benefits of judges should not be diminished during their term (e.g. Constitution of USA 1789: article 3 section 1). This principle could, and should, be extended to retirement ages (International Bar Association 1982; Bulmer 2017: 8). In this way, should a one-time majority believe it is necessary to change the retirement age, it can, but in so doing, it does not replace senior members of the courts and receive a bonanza of judicial appointments, as happened in Hungary.

Temporal deliberation without delays

As well as being delaying mechanisms, the amendment rules which require intervening elections discussed above can also be considered as mechanisms of intertemporal deliberation. They require the political representation of the demos at the time of one election to agree with the political representation of the demos four or five years later. If there is such agreement, changes can be made, as the rule assumes that these reflect the will of a majority which is stable over time. This ensures that such changes are beyond the reach of a one-time majority.

However, delays can also be undesirable. For decisions which require a more urgent timeframe, how can mechanisms be devised to allow for intertemporal deliberation but without spreading decision making out over several years?

Apex courts or electoral management bodies where members have staggered terms can be considered under this concept. Where political actors can replace only a part of the membership of the body during one electoral cycle, the resulting membership should be a combination of the desires of different political majorities over time. It is true that where the same political group has received a majority in several consecutive elections, the body's composition will reflect the wishes of the majority which has been stable over time. Nevertheless, complete control over the body is put beyond the hands of a one-time majority (or supermajority).

Could this concept be generalized to the legislature? For example, might it be extended to a legislative committee whose consent is required for changes to the legal framework of the democratic core (such as a judicial act or electoral law)? A legislative committee must be composed of sitting members elected in the previous election, but one could envisage a system whereby the appointments to the committee are shared between the current government and the previous government or governments. In this way, a one-time majority cannot change key aspects of the democratic core (e.g. the jurisdiction of courts or the retirement age of judges) without at least partial consent from legislators selected by previous governments. At the same time, (super)majorities which are sustained over time can make decisions. Madison described a large republic as a means

to 'extend the sphere'—to take in a plurality of interests and make it less probable that a tyrannical majority would emerge (Publius 1787). Mechanisms of intertemporal deliberation also seek to extend the sphere but in time rather than in space.

Triggers for a 'constitutional safe mode'

In discussing states of emergency in India, Madhav Khosla observes that 'by creating special emergency-related provisions, constitutions present the possibility of two choices: a state of normalcy and a state of emergency' (Khosla 2012: 24). Can something similar be applied to democratic backsliding? That is, could there be a set of constitutional provisions which provide extra protection for the democratic core and come into effect once there is a threat of backsliding?

Such a system would require three sets of choices:

1. What grounds could trigger these extra protections?
2. Who can decide that the extra protections should be activated?
3. What would be the content of the extra protections?

This can be illustrated using the example from the Swedish Constitution mentioned above. In this case, the trigger is a proposal for legislation which affects fundamental rights; the protection is activated by a minimum of 10 MPs; and the protection consists of a mandatory delay of 12 months before passing the legislation.

This concept could be expanded to other issues, actors and mechanisms. For example, consider the role of judges outside the courtroom in protecting judicial independence and constitutional democracy more broadly. Countries vary in their approach to balancing protections for the perception of judicial independence with judges' freedoms of association and speech. Some approaches are extremely restrictive (e.g. in Romania, the relevant legislation expressly prohibits judges from political activity); others are more permissive (e.g. in France, judges can be members of political parties and even stand for political office, and may only be sanctioned for speech which is intentionally provocative or undermines judicial independence). Belgium, on the other hand, through the Belgian

Judicial Code (Belgium 1967), establishes a general principle that there must be a balance between the role of a judge and individual rights. It also provides that ‘when democracy and fundamental liberties are in danger, (judicial) reserve cedes before the right to express indignation’. The wording is broad, but nevertheless the overall approach resonates with the ‘triggers and safe mode’ paradigm.

Such an approach could be made more specific and tailored to numerous circumstances. For example, whenever proposals are tabled to change the legislation affecting the courts or elections, it could trigger a mandatory delay to allow a public response from the judicial service commission or electoral commission respectively. This might take the form of a report on the proposed legislation submitted for parliamentary debate.

As with the other proposals discussed above, the notion is not to provide vetoes on the elected majority’s responsibility to pass legislation. Rather, the proposal promotes reflection, deliberation and political and public debate to slow down—and hopefully thereby resist—attempts to weaken democratic safeguards.

The proposals put forward are based on carefully tailoring safeguards for the democratic core of the constitution which do not necessarily place a veto on the will of a large and sustained majority.

In sum, the proposals put forward in this section are based on carefully tailoring safeguards for the democratic core of the constitution which do not necessarily place a veto on the will of a large and sustained majority. Rather, they protect the democratic core from attack from one-time majorities by forcing more transparency, delay and deliberation (and opportunity for public/opposition mobilization) before decisions to alter the relevant rules can be made.

2.3.2. Restrictions on entering politics

Having considered ways to constrain the actions of a majority once it is elected to power, this section focuses on measures designed to place limits on who can become a candidate for election.

Term limits

In some ways, executive term limits are a paradigmatic safeguard against backsliding as they (seek to) prevent incumbents from

competing in elections. Why manipulate the democratic core if you will not be around to reap the benefits?

Term limits have become a standard feature of constitutions in presidential and semi-presidential systems, but they have often been manipulated through a variety of strategies (Ginsburg, Melton and Elkins 2011). However, the vast majority of these cases are in authoritarian contexts. In the post-Cold War era, perhaps the only example of ‘overstaying’ constitutional term limits in an electoral democracy was in Argentina, in the constitutional reforms of 1994, which were negotiated with the opposition, albeit under great pressure from the incumbent President Menem (Negretto 2017).

However, term limits are yet to be a significant topic for debate in parliamentary systems. As noted by Juan Linz, ‘[a]n interesting paradox in parliamentary systems is that the possibility of one person occupying the office of prime minister over a prolonged period of time, through successive legislatures, does not generate the hostility with which the possibility of re-election is seen in presidential systems’ (Linz 1998: 25). Indeed, in some contexts, such term limits may be ineffectual. For example, in Poland, it is widely accepted that it is not the prime minister but the party leader, Jarosław Kaczyński, who is the main driver behind government strategy and policy. However, in other contexts, the personality of the prime minister is more important, particularly where populism has been a key engine of backsliding, as in Hungary. Thus, term limits may be an important option to consider from the perspective of safeguarding against backsliding. Notably, in South Africa—one of the few parliamentary democracies which currently has constitutional executive term limits—they were important in bringing an end to the reign of Jacob Zuma.

Taming the incumbency advantage

As a mechanism to tackle the incumbency advantage, term limits have been described as a ‘blunt instrument’ (Ginsburg, Melton and Elkins 2011: 1865) which acts more on the ‘incumbency’ portion than on the actual ‘advantage’ (Cheibub and Medina 2019: 531). Instead, Ginsburg, Melton and Elkins (2011) suggest a range of institutional design alternatives which focus more on the ‘advantage’ element, including ‘handicapping incumbents’.

The primary mechanism for this—and one that is common in Latin American constitutions—is to explicitly prohibit incumbents from using state resources during the period of the election campaign. Ginsburg, Melton and Elkins, drawing on a Vermont state law which was later struck down by the court, also raise the possibility of (a) imposing lower campaign spending limits for incumbents than for challengers or (b) allowing more media time for challengers than for incumbents: ‘monetizing the incumbency advantage,’ they claim, ‘would surely help to overcome it’ (Ginsburg, Melton and Elkins 2011: fn 277).

The most drastic version of taming the incumbency advantage at elections comes in the form of requirements for incumbents to leave office ahead of elections, to be replaced by caretaker governments until the election is decided. Such a rule is rare, perhaps due to fears of a governance vacuum during the period preceding elections and the risk of an inexperienced administration with no political support being faced with an unexpected emergency. But it is notable that the two countries in Africa to use the caretaker government rule (Madagascar and Cabo Verde) are ‘two of a handful of African countries that saw opposition victories in the first elections’ following the 1990s democratic transitions and are both ‘among the few countries of the region that have seen recurrent alternations of power since then’ (Abebe 2021: 4).

Militant democracy restrictions on political parties

‘Militant democracy’ is a term coined by Karl Lowenstein at the time of the Nazi Party’s rise to power in 1930s Germany (Lowenstein 1937). Lowenstein argued that democratic systems should deny certain freedoms to antidemocratic actors to prevent them from destroying democracy. The measures he proposed were drawn from a review of legislative frameworks around Europe, but one in particular—prohibiting parties based on certain criteria—became widespread and now appears in 20 to 25 per cent of constitutional texts (Elkins 2022). Other measures in practice today include restrictions on freedom of speech in electoral campaigns and restrictions on freedom to run for political office (Issacharoff 2015: 77–99). Despite remaining contentious, bans on political parties have been recognized as falling within the bounds of constitutional

democracies, at least in the European context (Venice Commission 2020).

Grounds for taking such measures vary but generally involve some form of discrimination, incitement to hatred/violence, threats to territorial integrity or explicit threats to overthrow the republican or democratic system of government.

In the context of backsliding, militant democracy measures taken against electoral challengers also raise other concerns. One is that they may stoke populists' fire and be perceived as an elite conspiracy to deny the people their voice; another concern is that such measures may be powerful weapons in the hands of a backsliding regime seeking to restrict political competition. Further, there is the problem of identification. Would-be backsliding regimes disavow neither the language nor the institutions of democracy. Indeed, the rhetoric accompanying attacks on the courts or the media is generally one of expanding or defending democracy against elite capture. Thus, 'it is challenging to provide evidence that a regime is antidemocratic because, unlike in the case of racists or the typical Cold War phenomena of fascist and Communist parties, there is no official language directed against democracy' (Müller 2016: 262).

As Samuel Issacharoff insightfully notes, militant democracy measures examine a party's structures and organization, and aims to gauge whether it is fit to enter power. However, the challenge posed by democratic backsliding is how to deal with parties which may pass the military democracy test when vying for elections but who, once ensconced in government, may take actions which would have merited their exclusion before elections (Issacharoff 2015: 123).

Nevertheless, it cannot be overlooked that backsliding is often linked to populist nativism, which feeds on discriminatory rhetoric. In addition, there remain around the world certain extremist parties who would fall foul of even general 'low-bar' proscriptions such as 'undermine or abolish the free democratic basic order' (Basic Law of Germany 1949: article 21). It may be valuable to consider such general provisions as this, or speech restrictions such as that found in the Indian electoral law (prohibiting electoral speech that propagates hate 'on grounds of religion, race, caste, (or) community').

Not only might these provisions keep overtly antidemocratic actors away from political power but they might also reduce the temptation for more moderate parties to move to the extremes for fear of losing votes. (However, the case of the BJP in India cautions us that these measures, too, can be circumvented.)

A counterpoint to prohibiting antidemocratic activities and behaviour is the constitutionalization of prodemocratic values for public officials. A paradigmatic example of this is found in Chapter 6 of the 2010 Kenya Constitution ('Leadership and Integrity'). Such principles and value statements in a constitution may be criticized as being idealistic and unenforceable. However, they can have two very realistic and concrete effects. Firstly, even though they may, in part, be too general and vague to be directly enforceable by a court, they can help frame political discourse around elections. They give the critics of candidates who may fall foul of such values a concrete standard as a reference against which to contrast the (mis) behaviour of the candidate in question. And secondly, they can form the framework for a code of conduct which can be enforced by the relevant body.

This raises a further question, who should be responsible for the enforcement of rules regulating political parties and candidates? It is useful to distinguish between the final arbiter on such questions (often a Constitutional Court or specialized Electoral Tribunal) and the body responsible for implementing the regulations and overseeing political party activity to ensure compliance with the law (including registration, administration of public funding, monitoring of political party accounts and reviewing candidates against eligibility requirements). The Venice Commission provides overall guidance (Venice Commission 2020: 75–78), which delineates important considerations regarding safeguarding the non-partisan and independent nature of the political party regulator. Specifically, from a backsliding perspective, it is worthwhile to consider establishing a 'registrar for political parties' responsible for party regulation. This role is separate from that of both an independent court (responsible for appeals and electoral disputes) and an electoral commission (primarily responsible for organizing and managing elections)—for example, as found in Kenya. This allows for a specialized, Independent actor focused on political party regulation.

It also insulates the body responsible for vote counting and the body responsible for deciding electoral disputes from any day-to-day conflicts with parties, and fragments control over the electoral process to make political capture more difficult.

Chapter 3

CODA: USING THIS REPORT

As stated throughout this Report, there is no magic recipe to build backsliding-proof institutions. A determined antidemocrat, with a supportive or apathetic citizenry, is likely to find ways around any legal rule or institutional constraint. However, while there are no perfect institutions, there are considerations which can help design better institutions.

The playbook in Chapter 1 has presented a broad background to some of the most common weak links in the fence of constitutional democracy which backsliders have exploited in recent years. Chapter 2 has then provided an analysis of these themes and tactics, proposing considerations for how the design of institutions can respond to these threats. Some of the considerations are well known and already in common practice (e.g. term limits); others are more innovative (e.g. intertemporal deliberation and 'triggers and responses'). If there is one commonality to the proposals in Chapter 2, it is an endeavour to strike a balance between (a) constraining unilateral, self-serving attacks on democratic safeguards and (b) ensuring governments are not prevented from delivering on their policy platforms.

Windows for reforming institutions are not frequent, but they are also not as infrequent as some might assume. As discussed in the introduction to this Report, some 20 countries each year are engaged in formal processes of constitutional review. Added to this are initiatives such as those recently conducted in the Netherlands and Sweden, where public bodies reviewed the legal and political framework with an explicit forward-looking lens, to anticipate whether

and how backsliding might occur, should antidemocrats accede to the seat of government.

Beyond formal exercises of review, this Report is commended to civil society actors who wish to examine the structural foundations of what ails their democracy. Initiatives such as the Restoring the Guardrails of Democracy project of the US National Constitution Center can be useful not only in developing proposals for protecting democracy but also in encouraging debate about what makes up the institutional backbone of our democracies, and why and how it should be protected beyond the reach of one-time majorities.

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Annex A. Strategies that have been used to weaken constitutional democracies

INTRODUCTION

This Annex contains the ‘backslider’s playbook’, a catalogue of specific tactics that have been used to weaken checks, aggrandize power and otherwise erode the guardrails of liberal democracy. Its focus reflects the working definition of ‘backsliding’ adopted in this Report—‘state-led debilitation or elimination of any of the political institutions that sustain an existing democracy’ (Bermeo 2016: 5), wherein ‘a democratically elected government or president uses legal means to manipulate rules and institutions to remain in power in future electoral cycles’ (Choudhry 2018: 577). This catalogue is therefore limited to legal changes, and focuses on institutional actions, rather than political or rhetorical ones.

In contrast to the summarized playbook in Chapter 1 of this Report, which is organized into themes, this Annex is organized by institution as follows:

- the judiciary;
- the executive;
- the opposition and elections;
- the legislature and the sitting opposition;
- the civil service and fourth-branch institutions;
- the media;
- civil society organizations; and
- civil liberties.

A.1. THE JUDICIARY

The judicial branch is often the first, and primary, target of backsliding reforms. Debilitating the judiciary—whether by weakening judicial independence or

restricting judicial power—is crucial for the democratic backslider because of the function of the judiciary as an independent check and constitutional umpire. Often, the existing highest constitutional tribunal can be a formidable countermajoritarian force against the populist agenda of the incoming administration. For example, in Türkiye in 2008, the Constitutional Court came remarkably close to voting to dissolve Erdoğan’s party—the Justice and Development Party (AKP)—for running an impermissible platform under the laws regulating political parties (Haggard and Kaufman 2021: 201). Though the party came just short of the required two-thirds majority, the episode demonstrated the potential of the court to stanch a backsliding agenda if left untouched (Haggard and Kaufman 2021: 201).

This checking potential has prompted each of the democratic backsliders reviewed for this survey to prioritize disabling the judiciary in some form. From a bird’s eye view, this tactic generally takes the shape of (a) disabling the court’s checking power, (b) packing the court with loyal and cooperative judges and (c) reenabling the court to exercise judicial review over—and inevitably approve and legitimize—the actions of the regime in power. These tools range from the specific (lowering the retirement age in order to remove and replace sitting judges) to the generic (adjusting the scope of the court’s jurisdiction), but all provide concrete and legal channels to implement the overarching goal of capturing the courts.

A.1.1. Lowering the judicial retirement age

Lowering the judicial retirement age both removes senior judges who may block the backsliding agenda and creates vacancies that the administration in power can fill with judges loyal to its political agenda. As well as fitting within the rubric of populist promises to ‘drain the swamp’, such a measure can be defended on its face with claims that it is bringing more youth and diversity to the judicial corps.

Sixty-four countries have specified a judicial retirement age in their constitutions. In many other countries, however, the judicial retirement age is set by statute, giving the legislature the legal authority to control when judges must step down. One such law in Hungary removed more than 270 judges from the courts in one fell swoop; each of these judges could then be replaced by the Fidesz-dominated legislature (Haggard and Kaufman 2021: 108). Similarly, in El Salvador, allies of President Nayib Bukele in Congress used their supermajority to institute mandatory retirement for all lower court judges and prosecutors who reach 60 years of age or 30 years of service (Due Process of Law Foundation 2022: 13). The 2021 law bypassed ordinary legislative channels: it was passed ‘exempt from procedure’—essentially fast-tracked—without disclosed grounds. It also stepped outside of the traditional legislative power, arguably illegally, by legislating subject matter

constitutionally reserved to the judicial branch (Constitution of El Salvador 1983: article 133). Ultimately, the change ousted a third of the country's judiciary and created vacancies for regime-friendly appointees.

A.1.2. Restricting the jurisdiction of the court or access to it

Restricting the court's jurisdiction limits the types and number of questions where the court has authority to pass judgement, essentially bleeding the judicial branch of its constitutionally envisaged function. Often, the precise bounds of a court's jurisdiction are inscribed by statute, giving the legislature meaningful power to loosen or constrict the reach of the court.

Hungary illustrates how to restrict an existing court's jurisdiction, having curbed the judiciary's ability to hear cases on three fronts: (a) statutory jurisdiction, (b) standing and (c) judicial review (Haggard and Kaufman 2021). First, in 2010, Fidesz passed an amendment to the 1949 Constitution limiting the ability of the court to review fiscal initiatives, simply removing such questions from the court's jurisdiction (Haggard and Kaufman 2021: 109). Second, Fidesz limited the court's authority to review constitutional claims by abolishing the *actio popularis*, a device included in the 1949 Constitution by which members of the public could seek constitutional review even in cases where they did not meet normal standing requirements (Constitution of Hungary 1949: article 32(A); Gárdos-Orosz 2012: 302). Instead, this 'voice of the people' power was given to a national human rights institution tasked with bringing such cases on the public's behalf—an institution staffed and controlled by Fidesz (Kovács and Scheppele 2018: 9). Third, the government severely restricted the court's ability to exercise judicial review by stipulating (through an amendment to article 24(5)) that constitutional amendments could only be reviewed for 'procedural defects', rather than substantive constitutionality (Sadurski 2019). By combining these measures with the structural changes to the court, Fidesz was able to render the Constitutional Court, in the words of one senior judge, 'not fit for purpose' (Haggard and Kaufman 2021: 108).

The Israeli Knesset has made similar attempts—although, at the time of writing, largely unsuccessfully. In 2017, for example, legislative proposals aimed to curb the court's competence 'to review legislation and invalidate unconstitutional laws, to insert an override clause into the Basic Law: Human Dignity and Freedom, [and] to limit standing for petitioning the [High Court of Justice]' (Mordechai and Roznai 2017: 254).

Box A.1. Poland: Crippling by quorum

In addition to lowering judicial retirement ages and adding new tribunals to pack the court, the Polish Sejm employed several novel tactics to stymie the ability of the constitutional tribunal to function while the Law and Justice Party (PiS) carried out the packing process. (An overview of these elaborate and interlocking mechanisms is provided below and discussed more fully in Sadurski 2019.) One such tactic was reducing the ability of the tribunal to hear cases by

increasing the number of judges required to hear a case. Raising the quorum requirement in this way had a specific goal: because of a disagreement over who had been rightfully appointed to three empty seats—and a refusal by the president of the tribunal to seat the judges appointed unconstitutionally by PiS—this rule prevented the tribunal from hearing any cases at all until the president agreed to seat PiS's appointees (Wyrzykowski 2017: 371–78).

A.1.3. Expanding the court

Expanding the court can involve either adding to the number of seats on the highest court ('court packing') or creating separate courts which are the court of last resort for particular subject areas. Broadening the court can be justified as a democratizing measure: expanding the size allows for wider representation and helps avoid the concentration of power in few hands. In reality, however, doing so allows the administration to hand-pick a large number of judges and control the decision-making majority on the court in one fell swoop. This gives the current administration an outsized 'voice' on the court, counter to the gradual turnover that is usually designed to help maintain judicial independence.

In 2005, the Chávez administration amended the Organic Law on the Supreme Court, raising the number of seats on the court from 20 to 32 (Sanchez Urribarri 2011: 872). In Türkiye, the same tactic was used to expand the court from 11 to 17 members, giving each of these administrations the opportunity to appoint a full third of the court at once (Kosař and Šipulová 2023: 93).

In Nicaragua, a 1999 law expanded the size of the Supreme Court from 12 to 16 seats. This change was the result of a pact between two parties to form a legislative alliance, a political deal in which each party would get to appoint judges in exchange for the votes necessary for the appointments to be confirmed (Haggard and Kaufman 2021: 133).

The creation of separate tribunals was used in Poland and Hungary—for example, by establishing a court to hear specific questions, such as electoral disputes

(Sadurski 2018: 266). Poland, through the creation of additional chambers to its Supreme Court, was able to add 20 seats to its courts of last resort, each of which it then got to fill (Sadurski 2018: 266). Making the inaugural appointments to these tribunals gives the administration total and long-lasting control that it could otherwise only hope to achieve incrementally.

A.1.4. Reassigning jurisdiction

A second way to restrict jurisdiction is to simply reassign areas of the court's jurisdiction to a new tribunal—either a different existing court or one of the new subject-specific panels discussed above. The latter route allows the government to carve out legal issue areas of their choosing and assign them to a hand-selected panel of judges. Just as with expanding the court, this move is easy to support with democratic justifications, such as expanded access to justice and increased judicial efficiency. In addition to the access to justice argument, specialized courts could be supported on the basis that they arguably promote thoughtful jurisprudence by allowing judges to build expertise in a certain arena, reduce the concentration of power in the highest court, and provide additional bodies to serve as checks on legislative and executive power. The problem, of course, is with the way that democratic backsliders use this tool to serve a particular motive and purpose—namely, taking the checking power from Peter to be exercised instead by Paul.

Poland, for example, created a new 20-judge chamber within the Supreme Court dedicated to 'extraordinary review and public affairs' (Sadurski 2019: 112). This new chamber was allocated jurisdiction over, among other things, determining the legality of election results (Sadurski 2019: 112). Although it was theoretically easier to challenge election results with a forum dedicated for that purpose, such challenges would be presented to a panel chosen entirely by PiS—who, in an election challenge, would also likely be an interested party.

A.1.5. Changing appointment procedures

Adjusting the process by which judges are appointed can erode the hurdles meant to ensure that only qualified and independent jurists end up on the court. The appointment process is, by definition, decisive in determining who has the power to declare government action invalid; thus, the democratic backslider must ensure that they control this process with a firm grip. The examples discussed in this section illustrate three different ways in which appointment procedures have been changed: (a) changing the make-up of the decision-making body, (b) changing the vote threshold to confirm appointments and (c) transferring the appointment power to a different decision-making body. They also exemplify the use of these

tactics in four different institutions—legislative committee, independent committee, legislative plenary and the electorate.

One way to adjust the judicial appointments mechanism is to change the body—or the composition of the body—that nominates or selects judicial candidates. Under the Hungarian Constitution as it stood in 2010, for example, judges on the Constitutional Court were nominated by a parliamentary committee and then confirmed by two-thirds of parliament (Haggard and Kaufman 2021: 108). This committee was structured to ensure that each political party that had a seat in parliament was represented on the committee itself (Haggard and Kaufman 2021: 108). Fidesz, upon gaining a supermajority in parliament, changed the constitutional procedure governing how the committee was composed, replacing its representation scheme with one of proportional representation (Haggard and Kaufman 2021: 108). Their supermajority in parliament resultingly translated to a supermajority in the nominating committee and removed the partial control that minority groups had previously enjoyed over which candidates were put forth for confirmation (Haggard and Kaufman 2021: 108). In Poland, PiS used a similar (though far more complex) tactic—changing the procedures for selecting members of the body which, in turn, was responsible for selecting judges for nomination. Members of this body (the National Council of the Judiciary, or KRS) had previously been elected primarily by judges (Sadurski 2018: 264). Giving the judiciary the primary voice in the composition of the nominating council enhanced judicial control over which judges were nominated, while still giving the legislature the final political choice among qualified nominees. Under the new statute on the KRS, however, members of the council would be primarily elected by parliament, ‘giving majority politicians a decisive say in the composition of the [council]’ and placing both the nomination and confirmation functions in the hands of the same branch (Sadurski 2018: 264).

Similarly, at the time of the writing of this Report, a bill was pending in the Israeli Knesset to restructure the judicial appointment procedures to the Israeli Supreme Court. The proposed law would change the make-up of the Judicial Appointments Committee, which holds the power to select judges (Haaretz 2023). Currently, the committee is comprised of nine members—three judges, two representatives of the Israeli Bar Association, two government officials and two members of the Knesset. The law would alter this composition by expanding the committee to 11 members and replace the Bar Association members with ‘representatives of the public’ to be selected by the justice minister (Haaretz 2023). This formulation would guarantee that the government maintained a majority on the committee, giving it de facto control over judicial appointments.

The picture in Venezuela was different. There, the legislature already enjoyed the power to nominate and confirm judges, but Chávez's party did not enjoy the requisite supermajority to do so (Haggard and Kaufman 2021: 263). Therefore, rather than focusing on which body had the power to nominate judges, he needed to adjust how *much* of that body was required to exercise that power. In 2005, the National Assembly passed a new Organic Law of the Supreme Court, which adjusted the threshold for appointing a Supreme Court judge to a simple majority (Haggard and Kaufman 2021: 266). Notably, this law also allowed a simple majority to remove currently seated judges. Not only did this allow the National Assembly to purge the judiciary and replace judges but it also remained a sword of Damocles hanging over those remaining judges who might be tempted to act independently.

Chávez complemented this move by transferring some of the judicial nomination power out of the legislature (where his majority was thin), and into the hands of a more reliably supportive body—the public. His new Constitution of 1999 envisioned a Civil Society Commission which would be a key institution in the process of selecting judges (Venezuela 1999: article 270). In 2004, legislation passed pursuant to the new constitutional provision established a Judicial Nominating Committee comprising 11 members—five elected from within the National Assembly and six ‘from sectors of the society elected by the Assembly in a public proceeding’ (Brewer-Carias 2010: 107). Incorporating a civil society component is, again, on its surface, a democratizing measure, and one typical of left-wing populist regimes (Tushnet 2018: 645). However, popular majority control over the judges is problematic given the judiciary's independent and countermajoritarian functions, and the process in Venezuela, which gives the National Assembly a substantial degree of control over which sectors of society are represented, is clearly open to manipulation by the incumbent majority.

A.1.6. Adjusting judicial administration

‘Judicial administration’ refers to the mechanics by which the judicial branch operates. Making behind-the-scenes changes to this administration can have the potent effect of dictating outcomes through procedure. Changing procedure is a powerful tool in part because the change happens several levels below the surface of political policy—hence appearing dry and innocuous to the casual observer—and yet often has the potential to change outcomes. This makes it a device that can allow the user to control policy without outwardly appearing to do so.

Hungary changed many of the mechanics of judicial administration by first creating the National Judicial Office (NJO) to oversee the judiciary, formerly a responsibility of the independent National Judicial Council (NJC) (Haggard and Kaufman 2021).

Box A.2. The USA: Failing to vote on judicial nominees

The appointment procedure to the US Supreme Court is constitutionalized and thus outside the power of Congress to change. Congress has, however, used the sublegislative means of congressional procedure to de facto change the process. Briefly, the Constitution allows the president to appoint Supreme Court justices ‘by and with the Advice and Consent of the Senate’ (USA 1789: article 2 section 2). Yet Senate rules do not require issues to be brought to a vote; by failing to do so, the Senate can thus ignore a candidate chosen by the president indefinitely. In 2016, when the Republican Party controlled the Senate and the Democratic Party controlled the White House,

the Senate used this (lack of a) procedural rule to refuse to consider a judicial nominee put forward by President Obama (Elving 2018). After the 2016 election, however, the Republican Party controlled both the Senate and the presidency. The Senate then reversed its course, allowing President Trump to nominate three judicial candidates in a single term, all of whom it promptly confirmed. This had the effect of adjusting the appointment procedure in practice: rather than candidates being selected by the president ‘with the advice and consent’ of the Senate as constitutionally envisioned, candidates would be selected by the president *when permitted* by the Senate.

Under the new Constitution, the president of the NJO is nominated by the national president and approved by a two-thirds majority of the legislature for a nine-year term. This term is automatically renewed unless a new president is elected by two-thirds of the parliament. Among the powers of the NJO is the judicial administration function of assigning civil and criminal cases to particular courts. This power allows them to choose which panels—and thus which judges—hear certain cases (Haggard and Kaufman 2021: 108).

The Polish legislature also changed procedure in a way designed to straitjacket the court from reviewing their more controversial policies. It implemented a law requiring the Constitutional Tribunal to decide cases in the order in which they were received (Wyrzykowski 2017: 377). This prevented the tribunal from prioritizing constitutionally dubious legislative enactments, and, given the large number of already-docketed cases, created an enormous bottleneck which would prevent the tribunal from reaching these issues for several months. This, in turn, bought PiS time to continue to nominate loyal judges as sitting judges’ terms expired, such that, by the time the cases did come before the court, they would be heard by a more heavily PiS-appointed panel.

A.1.7. Adjusting oversight of the judiciary

Changing the oversight of the judiciary can happen through changing either its content (what can be punished) or the actor (who does the overseeing). Changing the content entails changing the criteria by which judges can be disciplined or removed. This tactic is less common, perhaps partly due to the difficulty of crafting criteria which are facially neutral but target particular undesired judges.

In El Salvador, a legislative decree gave the Supreme Court of Justice (which had been fully replaced with loyal judges) remarkably wide discretion in transferring lower court judges to any court ‘of the same category’ in any part of the country—regardless of whether the judge resides there (Due Process of Law Foundation 2022: 15). Similarly, in North Macedonia, amid a storm of political pressure on judges, the ruling party established a new council ‘responsible for initiating disciplinary proceedings before the Judicial Council, providing still more leverage over judges’ (Haggard and Kaufman 2021: 125).

Combining the general approaches of shifting powers and subterfuge, one popular strategy in South America has been to transfer power from an uncooperative institution to ‘the people’. This shift has generally been illusory, however; such citizen ‘councils’ have largely been covers for direct executive involvement. In the realm of judicial oversight, a referendum in Ecuador established a Council of the Judiciary to replace the former Judicial Council, which had been composed of independent jurists (Human Rights Watch 2011). The ostensible function of this council was to allow for civilian oversight of the judiciary; however, one of the council’s five members was to be chosen directly by the executive, while two other slots were to be filled by the Attorney General and the Public Defender respectively (Human Rights Watch 2011). The council proceeded to suspend and remove hundreds of justices throughout the judiciary (Haggard and Kaufman 2021: 79).

A.1.8. Selective non-removal

A consequence of lowering the judicial retirement age may be losing loyal judges as well as independent ones. Some countries, such as Hungary, have chosen to accept this cost of such a move, but others have circumnavigated it by creating procedures for selective *non*-removal of judges.

The retirement age law passed in El Salvador contained two such provisions. It gave power to the Supreme Court (which had been replaced with loyal judges) to extend the terms of judges ‘due to reasons of necessity or speciality’ and the Attorney General was permitted to retain prosecutors ‘for reasons of convenience’ or ‘due to the complexity or speciality of their services’ (Human Rights Watch

2021a). As Human Rights Watch pointed out in a report at the time, '[s]uch provisions are vague and could easily be used to reward judges and prosecutors loyal to the government while ensuring that only those who are independent or perceived as independent are ousted' (Human Rights Watch 2021a).

Poland allocated this power directly to the president. The law lowering the judicial retirement age gave the president power to extend any judge's term by five years (Sadurski 2019: 106–07). The decision was to be completely at the president's discretion, with no formal or informal decision-making criteria (Sadurski 2019: 106). This provision was eventually found illegal by the European Court of Justice (Walsh 2019).

Box A.3. Replacing judges: Ecuador, El Salvador and Ukraine

In Ecuador, the government of Rafael Correa established a Council of the Judiciary, which was empowered to appoint, suspend and remove judges 'through highly questionable mechanisms [believed to] seriously undermine judicial independence in the country' (Human Rights Watch 2021b). In Ukraine, four judges were forced to resign in the run-up to a decision to invalidate the premier-presidential system that was in place and reimplement the president-parliamentary system favoured by Yanukovich. According to Kramer et al. (2011: 11), 'there were also concerns that the arrest of the son-in-law of the Constitutional Court's chairman, combined with a criminal case against his

daughter, represented a not-so-subtle form of pressure on the court'. Finally, in 2021, the legislature of El Salvador voted to fire and replace all five members of the Supreme Court. Removing the court in this manner was criticized as unconstitutional. The El Salvador Constitution does permit a supermajority of the legislature to remove judges from the Supreme Court 'for specific causes previously established by the law'; however, in this case, the legislature relied solely on disagreement with the court's rulings regarding pandemic lockdown measures in their justification for removal (Constitution of El Salvador 1983: article 186; Human Rights Watch 2021a).

A.1.9. Nullifying decisions of the court

This tactic is usually only necessary at the beginning of the process of democratic backsliding, before the court can be properly packed or disabled. Nullifying decisions of the court of last resort can be difficult to justify legally. In the two examples given below, the legal arguments were extremely attenuated and received vocal political pushback, both domestically and internationally. Nullifying court

decisions is thus rarely used as a democratic backslider's tool and, unlike some of the other measures described above, is simply illegal as well as being illegitimate.

Poland attempted to find legal cover for this exercise in procedure. Polish law stipulates that decisions of the Constitutional Tribunal are sent to the prime minister for publication, and upon publication become binding (Wyrzykowski 2016: 172). The role of the prime minister in publishing decisions is not discretionary; it is a procedural function of the office in the process of promulgating a judicial decision (Wyrzykowski 2016: 172). In response to an unfavourable court ruling in 2015, however, the prime minister simply refused to publish the decision, leading to a legal grey area: is it law if it has been decided but not published?

Recently, the President of El Salvador employed the more brazen tactic of defying rulings of the Supreme Court without a positive law justification, relying instead on arguments of necessity (Human Rights Watch 2020). During the early months of the Covid-19 pandemic, the Supreme Court ruled that authorities were constitutionally forbidden from holding people in detention centres for violating lockdown rules (Human Rights Watch 2020). The next day, the president announced that the practice would continue (Human Rights Watch 2020). Upon another ruling by the court ordering the president to comply with their previous ruling, President Bukele tweeted that he 'could not follow' the order of 'five people' on the grounds that, given the importance of lockdown rules, doing so could 'decide the deaths of thousands' of Salvadorans (Human Rights Watch 2020).

In one example emerging at the time of writing this Report, the Israeli Knesset has placed a new law on their legislative agenda for the present legislative term. The law would allow a bare majority in the legislature to override decisions of the Supreme Court (Haaretz 2023). It would also allow a simple majority to make changes to Israel's 12 Basic Laws, which codify most of the important principles that countries with written constitutions have constitutionalized. Some versions of the proposed law would also give a majority the power to pre-emptively shield laws from judicial review (Haaretz 2023). Because Israel lacks a formal constitution, these changes would create complete legislative supremacy, with a bare majority of the legislature holding the power to supersede actions of other branches and make any desired changes to the foundational legal system.

A.1.10. Reinstating powers and wielding the judiciary

Once a judiciary has been replaced with loyal (or at least ideologically aligned) jurists, reinfusing any powers that had been previously stripped allows the backslider to use the court as an arm of the state. This process brings a threefold

benefit for backsliders. Firstly, due to the pliancy of the resulting court, it is unlikely to act as a check on government actions, making its reinstated power a minimal threat. Secondly, the reconstituted court may be counted on to reject legal challenges to government actions, thereby donating to those actions the ‘presumptive legitimacy’ of the court. This, in turn, makes international criticism more difficult and creates confusion among the domestic audience as to whether the actions are truly unconstitutional or not. Thirdly, the court itself can also be an active partner in dismantling the democratic constitutional framework—for example, by voiding laws that stand in the backslider’s way. See, for instance, the Polish Constitutional Tribunal voiding an inconvenient law on the Judicial Council (Sadurski 2019: 79). In addition to this threefold benefit, the court may even be used to attack the opposition, such as by constraining the opposition-held legislature in Venezuela (Dixon and Landau 2021: 94–98).

Once the Constitutional Tribunal had been captured in Poland, the laws meant to create procedural hurdles to paralyse the court were no longer useful. There was now a court that PiS was ‘confident ... would be an obedient servant of the executive branch, and would not dare decide contrary to political expectations’; this meant that restricted powers would have ‘impeded the new role the [court was] performing, namely that of legitimizing the new statutes and delegitimizing the old ones’, according to Sadurski (2018: 85). Once these procedural barriers were removed, the tribunal proceeded to legitimize PiS actions and aid in the attack of opposition members. One of several examples included invalidating a regulation regarding the selection of candidates for Chief Justice of the Supreme Court, which was used to target the outspoken and independent current Chief Justice, Małgorzata Gersdorf (Sadurski 2018: 81).

In El Salvador, this tactic has even extended to using the Supreme Court to control the rest of the judiciary. Under a 2021 law setting judicial retirement ages, the Supreme Court may discretionarily extend the term of retirement-age judges ‘due to reasons of necessity or specialty’. A report by Human Rights Watch notes that ‘[s]uch provisions are vague and could easily be used to reward judges and prosecutors loyal to the government while ensuring that only those who are independent or perceived as independent are ousted’ (Human Rights Watch 2021a)

Box A.4. Brazil: A notable outlier

Jair Bolsonaro, elected to the presidency in 2018, resembles other democratic backsliders in many ways. A populist who rose to power amid economic turmoil in a political environment with weakened parties, Bolsonaro aggrandized power and targeted the media and urban elites using several tools from the backslider's toolkit. However, Bolsonaro was markedly less successful at capturing the judiciary than the other cases surveyed for this overview. At the time of Bolsonaro's election, the Supreme Court appeared to some commentators to be susceptible to capture (Daly 2020). However, in his first term, Bolsonaro did not engage in the sort of systemic dismantling of the judicial checking power seen elsewhere.

This may be due to both institutional and political incapacity rather than a strategy choice. Institutionally, the Brazilian Supreme Court is highly independent and, throughout Bolsonaro's first term, remained staffed with appointees from previous administrations (Haggard and Kaufman 2021: 50). And politically, a 'precarious' legislative coalition and rifts within his own cabinet may mean that he simply lacks the political capital (Haggard and Kaufman 2021: 50). Whatever the reason, Bolsonaro's attacks on the judiciary have remained largely verbal, with a high-water mark of veiled threats and 'extolling disobedience to judicial decisions' in early 2022 (Reuters 2022).

Table A.1. The judiciary: More examples

Tactic	Country/ year	Channel	Notes
Lowering the judicial retirement age	Poland (2016)	Legislation	The Polish Sejm's Law of 12 July 2017 lowered the judicial retirement age for all judges. Originally, the law lowered the retirement age to 65 for men and 60 for women—which it justified as a compensatory measure for the challenges women faced in the workplace (Case 192/18 <i>Commission v Poland (Independence of ordinary courts)</i> [2019] ECR II–924). However, a finding from the European Court of Justice that the law violated EU law was accompanied by widespread protests in Poland. In response, the law was eventually changed to mandate the same retirement age (65) for men and women (Case 192/18 <i>Commission v Poland (Independence of ordinary courts)</i> [2019] ECR II–924).
Crippling by quorum	Israel (2017)	Legislation	Proposed amendments to the Basic Law in 2017 would have increased the number of judges required to strike down legislation, stipulating both a minimum of a nine-judge panel and a two-thirds majority of that panel (Roznai 2018: 356).
Expanding the court	Venezuela (2005)	Legislation	In 2005, the Chávez administration amended the Organic Law on the Supreme Court, raising the number of seats on the court from 20 to 32 (Sanchez Urribarri 2011: 872).
Expanding the court	Türkiye (2012)	Legislation	In Türkiye, the same tactic was used to expand the court from 11 to 17 members, giving each of these administrations the opportunity to appoint a full third of the court at one time (Kosař and Šipulová 2023: 93).
Adjusting appointment procedures	Bolivia (2009)	New constitution	The new Constitution ushered in under Evo Morales provided for the direct election of judges; this was intended to take the choice out of the legislature and put it in the hands of the public, who were largely pro-Morales (Haggard and Kaufman 2021: 38).

Table A.1. The judiciary: More examples (cont.)

Tactic	Country/ year	Channel	Notes
Adjusting oversight of the judiciary	Ecuador (2011)	Referendum	A Council of the Judiciary was established to replace the former Judicial Council, which had been comprised of independent jurists (Human Rights Watch 2011). The function of this council was to exercise oversight over the judiciary. However, one of the council's five members was to be chosen directly by the executive; two other slots were to be filled by the Attorney General and the Public Defender respectively (Human Rights Watch 2011). The council proceeded to suspend and remove hundreds of justices throughout the judiciary (Haggard and Kaufman 2021: 79).
Selective non-removal	Venezuela (2004)	Legislation	The 2004 Organic Law of the Supreme Tribunal of Justice 'increased the [Chávez] regime's ability to remove non-pliant judges' (Landau 2018: 166). This was used to replace defiant judges, 'including the annulment of the designation of then vice president of the Court Franklin Arrieché' (Sanchez Urribarri 2011: 872–73).
Replacing judges	Bolivia (2005)	Executive action	In 2005, President Evo Morales replaced the president of the National Electoral Court with a political loyalist.
Replacing judges	Maldives (2013)	Legislation	The legislative majority of incoming president Abdulla Yameen amended the statute regulating the composition of the country's top court. This allowed for the removal of the Chief Justice and a lower judge, 'both of whom were known for their relative independence', and 'effectively made the judiciary dependent on the executive branch' (Croissant 2019: 10).

A.2. THE EXECUTIVE

Executive aggrandizement has two components: (a) increasing the powers wielded by the executive and (b) weakening the checking mechanisms meant to ensure executive accountability. To a certain extent, many, if not all, of the institutional tools examined here are used in the service (directly or indirectly) of executive aggrandizement. For that reason, this section will focus narrowly on direct

efforts to consolidate executive power rather than efforts to weaken checks and accountability, which are catalogued throughout the rest of this Annex.

In many of the cases surveyed for this Report, the executive has laid the political groundwork for aggrandizement by adopting a populist persona that frames him or her as the champion and representative of the people. He or she becomes ‘the sole repository of the democratic mandate and checking institutions are seen to constitute the anti-people “establishment”’ (Khaitan 2020: 2). This democratic mandate gives the executive political cover for seeking to dismantle these checking institutions, which, it claims, pose obstacles to its ability to vindicate the will of ‘the people’.

A.2.1. Circumventing term limits

Term limits are important mechanisms for ‘minimizing the potential for tyranny and shifting the focus away from an individual candidate toward policies and political structures to implement them’ (Ginsburg, Melton and Elkins 2011: 1823).

Circumventing term limits has become a common tool for the would-be despot and has taken a variety of forms across backsliding countries. Notably, Versteeg et al. (2020: 176–77) have observed that ‘none of the twenty-first century’s evasion attempts [have] involved ignoring the constitution outright. Instead, incumbents universally [have shown] nominal respect for the constitution by using constitutional rules and procedures to circumvent term limits’. While these changes have primarily been enacted via constitutional amendment (or replacement), other channels have included judicial (re)interpretation of constitutional provisions and constitutional emergency provisions (Dixon and Landau 2020: 361–62). The primary tactics in circumnavigating term limits generally involve:

- eliminating term limits outright;
- remaining in power by alternating between the roles of president and prime minister;
- enacting reforms without a retroactive effect, thus allowing the backslider more terms than constitutionally mandated; and
- either lengthening terms or de facto eliminating limits by suspending elections.

From an institutional design standpoint, the tendency of backsliders to evade term limits does not necessarily mean that heightened protection of such limits (by higher constitutional amendment thresholds, for example) is the most effective strategy to prevent it. Dixon and Landau (2020), for instance, argue that *softer* impediments to returning to office—such as limits on consecutive terms with

the possibility of return—weakens the incentive to overthrow term limits entirely because the backslider knows they are not necessarily losing power permanently.

Eliminating term limits

The paradigmatic case of successful term limit elimination is Venezuela. President Chávez originally attempted to eliminate term limits by way of referendum in 2007 but was voted down by a margin of 51 per cent to 49 per cent (BBC News 2007). Over the following two years, he continued to weaken horizontal checks, undermine media independence and otherwise sow the ground for further aggrandizement, before repeating the attempt in 2009. This time, he was successful.

Making this final leap required enormous political capital, as evidenced by the fact that implementing the process took several years, involved multiple attempts and required withstanding several electoral challenges as well as an attempted coup. Using other backsliding tools to weaken resistance is thus often a key component of being able to do so successfully.

Term limits have also been eliminated by captured courts, which have struck them down as antidemocratic. In Nicaragua, for example, President Daniel Ortega challenged articles 147 and 178 of the Constitution, which limited terms. Ortega argued that these articles were inconsistent with other constitutional provisions protecting the principle of ‘unconditional equality’ (Library of Congress 2009). He also argued that term limits should be struck down

based on [their] violation of the principles of equality before the law, equality in the exercise of the political rights of the office holders to participate in the political affairs of the country, and sovereignty and national self-determination, among other constitutional guarantees, all of which are in accordance with international human rights conventions by which Nicaragua is bound.
(Library of Congress 2009)

The Supreme Court agreed, and partially annulled both articles of the Constitution. While the case before the court applied only to the 2011 election, Ortega’s party in the legislature was eventually able to amend the Constitution to remove them entirely, allowing Ortega to run for a third term in 2016 and a fourth in 2021 (Stuenkel 2021).

Alternating offices

The Russian Constitution prohibits more than two consecutive terms but allows former presidents to run again after one term out of office (Constitution of the Russian Federation 1993: article 81). This provision allowed Vladimir Putin and his political partner Dmitry Medvedev to rotate between the offices of president and prime minister, with Putin assuming the presidency from 2000 to 2008 and again from 2012 onwards. The play earned the nickname *rokirovka*, or ‘castling’, a chess move in which the king and the rook switch places to protect the king (Kramer and Herszenhorn 2011).

In a similar vein, in 2013, President Serzh Sargsyan of Armenia was facing term limits and decided to launch a constitutional reform process which transformed the system from semi-presidential to parliamentary. He then promptly ran in the next legislative elections to become prime minister. This triggered large-scale protests which ultimately led to his removal.

The Rajapaksa family in Sri Lanka have employed a roughly similar (though more ad hoc) tactic (Fonseka, Ganeshathasan and Welikala 2021). Mahinda Rajapaksa was first elected president in 2005 and held the post until he was defeated in the 2015 election by Maithripala Sirisena. During the term of Sirisena, term limits were reinstated in the Constitution, meaning that Mahinda Rajapaksa could not run for president. After Sirisena was in turn defeated by Gotabaya Rajapaksa—Mahinda Rajapaksa’s brother—in 2019, Gotabaya Rajapaksa appointed his brother to the post of prime minister. Trading between the office of president and prime minister in this way allowed Mahinda Rajapaksa to both remain in a position of power and keep the presidency in the family. After a vote of no confidence directed at Mahinda Rajapaksa in May 2022 and growing protests against the administration of Gotabaya Rajapaksa, the family (five others of whom held seats in parliament) turned to increasingly autocratic methods of protest suppression, ultimately leading to their overthrow and exile in the July protests of 2022.

Non-retroactive reforms

A good example of using a principle of non-retroactivity to expand term limits comes from Bolivia. During President Evo Morales’s first term, a new Constitution was implemented capping the president at two terms. The Bolivian Constitutional Court—which Morales had been systematically compromising with criminal investigations and threats of impeachment (Castagnola and Pérez-Liñán 2011: 296)—ruled that the constitutional provision would only apply prospectively. The court determined that his first term, which he had begun before the Constitution’s ratification, could not be retroactively counted in that total, as a result of which

he was able to run for three consecutive terms (Haggard and Kaufman 2021: 38). Additionally, as in Nicaragua, Morales was eventually able to parlay his control of the Constitutional Court into complete elimination of term limits. While serving his third term, Morales called a referendum which would have allowed him to run for a fourth term—a referendum which, amid economic downturn and fading popularity, was narrowly defeated. Here, again, Morales turned back to the captured Constitutional Court, which ruled that the very implementation of any term limits violated Morales’s ‘human rights’, citing the American Convention on Human Rights. The ruling was purportedly held on grounds of popular sovereignty, with the court claiming that it was ‘for the Bolivian people to decide’ who they wanted to lead them—despite the recent referendum in which the Bolivian people had made it clear that what they wanted was, in fact, term limits (Reuters 2017; Haggard and Kaufman 2021: 39).

This argument has been used liberally, from Bolivia and Nicaragua to Burkina Faso and Burundi. For example, after holding the office of president for more than a decade, President Blaise Compaoré of Burkina Faso acceded to the restoration of a previously abrogated constitutional article capping the president at two terms and shortening the term’s length from seven years to five (Opalo 2014). As with Evo Morales, President Compaoré argued that the clause should not apply retroactively—and after persuading the Supreme Court to uphold his interpretation, went on to win the two following presidential elections (Opalo 2014). Similarly, under the Arusha Agreement which ended civil war in Burundi, President Nkurunziza took office in 2000. In 2005, a new Constitution was put in place which included a two-term limit. After being reelected once under the new Constitution, President Nkurunziza argued that his first term, under the Arusha Agreement, should not count toward this limit. This disagreement eventually led to a coup attempt, followed by unfair elections resulting in his election to a third term (Gathii 2018: 316–17).

Lengthening terms

Lengthening terms has been a less common tactic, but it has been attempted. In El Salvador, where the Constitution allows for only a single five-year presidency, President Bukele attempted to lobby for extending the term from five years to six (Renteria 2021). When this proposal failed to gain traction, Bukele adjusted his strategy from political persuasion to a popular sovereignty argument, claiming in 2022 that he should be able to run for multiple terms regardless of the Constitution’s term limits because ‘the people should have the right to reject or continue down the road on which they are travelling’ (*The Economist* 2022).

Suspending elections

Finally, '[a] classic move in the autocrat's handbook is a blatant attempt to stay in office beyond a term limit—for example, by declaring a state of emergency, dissolving the legislature, and/or suspending elections' (Choudhry 2018: 573–74). These tactics are often extreme enough to merit the judgement that a regime has become fully authoritarian, but when used under a legitimate legal framework for rationally supportable reasons, they can serve as tools for a democratic backslider as well.

In Sri Lanka, President Gotabaya Rajapaksa took advantage of coinciding circumstances which afforded him the opportunity to consolidate his power. Under legitimate Sri Lankan law, Rajapaksa dissolved the legislature, triggering elections within a constitutionally specified time limit. After the dissolution of the legislature, however, the Covid-19 pandemic hit and Rajapaksa used a state of emergency to justify postponing the elections. Without a functioning legislature, Rajapaksa remained the primary functioning branch of government and took on significant powers which would likely not have been possible with a legislature available to check his actions. In this circumstance, Rajapaksa was called upon (and arguably legally required) to reconvene the previous legislature. Instead, however, Rajapaksa used ad hoc appointments of ex-military officials to civil administration roles to carry out lockdown-related services (and enforcement). This raised concerns about the 'increasing ... militarization of the government', as an International IDEA publication reports (Molloy 2020: 12).

Similarly, in Ethiopia, pandemic-based postponement of elections played distinctly to the advantage of the ruling federal party. As observed by International IDEA (Molloy et al. 2021),

[s]ome opposition groups, particularly the Tigray's People's Liberation Front (TPLF), considered the decision as 'gamed.' This exacerbated the political contestation between the federal government and the Tigray politicians, who resigned after accusing Prime Minister Abiy of authoritarian tendencies. The delaying of elections, therefore, fed into an already volatile political climate and subsequently provided the catalyst for renewed conflict.

A.2.2. Expanding executive power

Hand in hand with the ability to remain in power is the ability to exercise power. Expanding executive power serves two important functions, one offensive and one defensive. Offensively, broad powers allow the executive to implement policies

that offer various desirable advantages. For example, such policies may help maintain their popularity; fill offices in fourth-branch institutions to bring them under executive control; or direct benefits towards themselves, their families and their loyal supporters. But expanding executive power is also important to a backslider because it helps them protect themselves. Two of the backsliders in this survey faced coup attempts during their tenure and others have faced declining support. The power to silence dissent, steer electoral advantages and blunt the effectiveness of the legislative opposition may prove the difference between holding onto power and being forced out of office.

This expansion of powers has been achieved through various combinations of constitutional amendment, delegation from parliament, executive decree and declaring states of emergency. Because of the complexity and variety of these combinations, they are best illustrated through a case-by-case overview.

Venezuela

In Venezuela, Hugo Chávez entered office in 1999 with a massive amount of momentum, which he used to launch a constitutional convention. Chávez was able to stock the convention almost entirely with his own supporters, thanks to (a) large swathes of the opposition boycotting the vote to elect delegates and (b) the fact that Chávez wrote the rules by which delegates would be chosen (Landau 2018: 164). The Constitution produced by the resulting assembly vastly expanded the powers of the president and replaced many institutional checks with popular ones in order to weaken the other branches of government (Landau 2018: 165). It also gave the National Assembly the ability to delegate law-making power to the president, with no limit on what powers could be delegated (Brewer-Carias 2010: 123).

Hungary

The Fidesz party enjoyed a strong supermajority in the legislature, with no second parliamentary house or independent executive to serve as checks. This meant that Prime Minister Viktor Orbán certainly did not face the same incentives to funnel power away from the legislature. Indeed, Fidesz had a large enough majority to make any desired changes to the Constitution, cardinal laws or government structures, and did not therefore have to worry about changing the rules to increase its power. This allowed the party to focus instead on *entrenching* those changes, by making them harder to undo in the future. To this end, Fidesz opted to make most of its changes through amendments to the Constitution and cardinal laws—requiring a supermajority, which the party possessed—rather than through statutory measures, which only require a simple majority. This ensures that such policies will remain in place even if the party loses its supermajority—and even if it loses

a simple majority, so long as the opposition does not manage the rare feat of acquiring a supermajority of its own. This can be described as a defensive use of executive aggrandizement: the aim is not to accrue power, but to keep it.

In one clever example, Fidesz amended parliamentary procedure to allow a two-thirds majority to end debate on any topic. This enables Fidesz to routinely shut down proposals from the opposition while ensuring that the procedure will not likely be used against it down the line (Scheppelle 2015: 115). Moreover, using the higher supermajority threshold helps paint the procedure as fair (or less unfair) and democratic. While allowing a simple majority to silence the opposition is difficult to justify in a deliberate legislative body, limiting that power to a supermajority could theoretically be justified on grounds of promoting efficiency and majoritarian democracy.

Additionally, Fidesz's supermajority allows it in effect to override decisions of the Supreme Court, by simply amending the Constitution to make constitutional any actions the court has struck down. This strengthens the power of the legislature vis-à-vis the judicial branch—at least for now. In the future, however, when Fidesz has filled the judiciary with sympathetic jurists, rulings favourable to Fidesz will be vulnerable only in the unlikely event that the opposition gains a supermajority of its own.

Türkiye

Anticipating a future move to the office of president, Recep Erdoğan began the project of expanding presidential power while he was still prime minister—an arrangement which gave him the serendipitous, difficult-to-criticize appearance of giving his own power away. This process began with a 2007 amendment package referendum, which changed the presidential election procedure to one of direct election rather than selection by parliament. Though it added no formal powers, the change enabled the president to 'claim a popular mandate to push his views of public policy' (Varol 2018: 350). By 2010, the conversation had turned to replacing the Constitution entirely. In 2011, the AKP-led Parliament authorized a Constitutional Conciliation Commission to draft a proposed new constitution. Notably, the AKP did not succeed in giving itself a controlling majority on the commission; instead, it contained three members from each of the four major parties. In deliberations, the AKP argued that a strong, US-style president was a necessary antidote to the problems the political system had suffered as a result of weak coalition governments. The attempt ultimately failed, likely due to the equal representation of the opposition—an important contrast to majority-dominated constitutional conventions such as those in Venezuela and Hungary.

However, between 2011 and 2014, when Erdoğan stepped down as prime minister and successfully ran for president, his party continued to incrementally increase the president's powers, such that by the time he took office, Türkiye was 'already operating under a de facto presidential system' (Varol 2018: 351). This transformation was furthered by the implementation of emergency powers in the wake of the 2016 attempted coup and was completed a year later, when a constitutional referendum—conducted under this state of emergency—made the change to a presidential system official (Haggard and Kaufman 2021: 202).

Poland

In Poland, PiS has taken an interesting approach to consolidating power by dividing it between different members of a loyal coalition using a combination of congressional delegation and dominant party leadership. Though the leader of PiS, Jarosław Kaczyński, is widely considered the operative power in Poland, he does not occupy a constitutionalized position within the government other than being an MP. His role as head of the party, however, has enabled him to maintain control over members occupying different offices through party dominance, such that he exercises most of the de facto power of government. First, the (non-executive) president, Andrzej Duda, has been delegated broader powers under PiS—a siphoning of power away from the government that might seem counterintuitive. As Choudhry (2018: 576) observes, however, 'because decisions of the president of Poland have less visibility than ordinary law, this creates the incentive for the Sejm to shift decisions to the president via grants of statutory discretion'. Simultaneously, Prime Minister Mateusz Morawiecki exercises most of the executive power as the head of the government. Meanwhile, Kaczyński uses his party discipline power to control the lower house of Parliament, in addition to his influence over Duda and Morawiecki. This division creates the illusion of a separation of powers while giving one person significant control over three separate government bodies.

A.2.3. Delegating powers from the legislature

The most direct way to weaken the legislature vis-à-vis the executive (and, concomitantly, strengthen the executive vis-à-vis the legislature) is to siphon power from the legislature by delegating it straight to the executive branch.

Delegation presents a puzzle in that, ordinarily, actors do not voluntarily give up political power. Why, then, are there examples of legislatures voluntarily surrendering their own powers? Modern experience suggests it may be a collective action problem, in which individual members or groups gain power even if the body as a whole loses it. In the USA, for example, traditional government theory dating to James Madison holds that the legislature will jealously guard its powers

Box A.5. Hungary: Controlling finances

The budget is, in most democratic systems of government, the purview of the legislature. The granting or withholding of funds can as such act as a check on executive power, as fiscal decisions are made through a deliberative process necessarily involving the opposition to some degree. In Hungary, Fidesz used a loophole through which it could circumnavigate the deliberative process and funnel resources directly to the executive for its own discretionary spending. Under the Hungarian budgetary scheme, funds left in the general reserve after the legislature has

set its own budget fall to the discretion of the cabinet for reallocation. By simply leaving an increasing portion of the budget in the general reserve, Fidesz makes it available to the government, free from the democratic accountability, transparency and deliberation to which it would be subject in parliament. As there is nothing in the Hungarian Constitution which prevents this practice, it allows the party to bypass the separation of powers and allocate government resources in a way that maximizes domination through legitimate means (Sajó 2021: 261).

against the president, and the two branches, in wrestling over power, will hold each other in a rough equilibrium. As it happened, however, the US political system evolved quickly from legislature-versus-executive to Democrat-versus-Republican. Within a two-party system, the incentives change: Republicans in the legislature will be incentivized to transfer power to a Republican president and thus away from the Democrats (and vice versa). Elsewhere, it could depend on the incentives for individual actors. In Hungary, for instance, Viktor Orbán is purported to have long exercised tight control over the members of his party through personal ties and patronage, control over political opportunities like nominated or appointed positions, and even outright corruption (Scheppele 2022). In this circumstance, an individual legislator may see their political career prospects come to depend on their compliance with the will of the executive and may, in that sense, be motivated to hand over power now in exchange for power down the line.

Essentially, any time a legislature uses a legislative channel to transfer competencies from themselves to the executive, this can be considered delegation and many of the tactics showcased here are examples of this. In one particularly explicit example from 2000, the Venezuelan National Assembly passed what was termed the 'Enabling Law', which granted the president 'the power to enact laws addressing a broad range of issues without legislative debate or approval' (Garcia-Serra 2001: 265). This applied primarily to areas traditionally considered legislative, such as 'finance, the economy and society, infrastructure, personal and legal security, science and technology, and the civil service' (Garcia-Serra 2001: 276).

A.2.4. A note on party dominance

A backslider's personal dominance over their party is not strictly an institutional tool, but it is worthwhile to note the important role that it plays in democratic backsliding. In many of the cases surveyed, a certain degree of formal separation of powers and checks and balances has remained in place, even as these lose all of their intended restraints. To a large extent, this appears to be attributable to the personal control of a party leader who is often charismatic and popular, displays stereotypical 'machismo' and appears to embody success through wealth, self-confidence or the power they have obtained. 'Through long-standing personal ties, control of nominations, patronage, and outright corruption', backsliding leaders can erode functional checks and separations of power (Haggard and Kaufman 2021: 107). All the party leaders surveyed in this Report have been noted for their personal party dominance, in some instances being compared to 'mob bosses' or other domineering figures (Karasz 2017; Polityce 2020; Haggard and Kaufman 2021: 29). This does not fall squarely into our definition of democratic backsliding, as it is not an institutional change designed to alter the rules of the game to entrench their own power. However, alongside other important non-institutional factors (such as political polarization and the relative strength of democratic norms), it potentially explains why similar systems of checks and balances stave off backsliding attempts in some circumstances and exhibit little resistance in others.

A.3. THE OPPOSITION AND ELECTIONS

Targeting the opposition carries the double benefit of weakening any checking power the opposition exercises in the political process and eliminating any meaningful opportunity for them to challenge the incumbent regime in future elections. In contrast to the criticism of the opposition that might be expected in any political arena, backsliders deny the legitimacy of the opposition altogether, treating them as an existential threat. 'Parliamentary and extra-parliamentary opposition,' Sadurski (2019: 132) notes, 'is an important element of checks and balances in any democracy, and the treatment of the opposition by the ruling parties is a test of how seriously they take the idea that alternation in power is a crucial criterion of democratic government.'

In a backsliding constitutional democracy, elections continue to be held, with enough of the trappings of free and fair elections to maintain outward legitimacy. However, the electoral process itself is systematically undermined to reduce the feasibility of unseating the incumbent regime.

A.3.1. Capturing the electoral management body

As discussed throughout this Report, the capture of oversight bodies is key to implementing a backsliding agenda, and the same is true in the realm of elections. ‘Capture’ can refer to a variety of specific tactics, which may include packing a body, realigning chains of command or accountability to bring an office under the control of a political party or moving from an independent technocracy to a system of political appointments. Capture of independent ‘fourth-branch’ institutions, including electoral management bodies (EMBs), is discussed in its own section below; here, we focus on this process as it has manifested specifically regarding elections.

Taking control of the electoral system is arguably among the most important goals for the democratic backslider, as remaining in power is a condition requisite to pursuing all other agenda items—and often the end goal. Capturing the country’s EMB has thus been a top priority in each of the cases surveyed.

The feasibility of EMB capture depends largely on the institutional safeguards designed to ensure that body’s independence. In systems which give the political majority the power to make appointments directly to the EMB, the independence of the body will be compromised—a condition which will be greatly exacerbated if the power to remove members also rests with the political majority.

The 1999 Venezuelan Constitution gives civil society a role in nominating members of the Electoral Council—a five-person council that oversees the National Board of Elections—but confirmation and removal of these members ultimately lies with the legislative majority. Using this confirmation power in the run-up to the 2006 elections, the legislature replaced the entire council—in addition to staffing the subordinate National Board of Elections with Chavista loyalists—cementing their control over the supposedly independent body. Though the Electoral Council maintained enough independence for the elections to be generally considered free and fair, Haggard and Kaufman (2021: 265) note that the council was ‘ineffectual at limiting Chávez’s massive advantages in the use of public television, infrastructure investment, and the promotion of social projects’.

In Hungary, members of the National Election Council are also appointed by parliament, allowing Fidesz to fill the council with loyal members. The Fidesz-filled council allowed ‘the virtual comingling of state and ruling party resources, which made government advertising campaigns indistinguishable from ads for Fidesz’ (Haggard and Kaufman 2021: 111). Additionally, the council has the power to take disciplinary action against candidates; by 2018, all disciplinary actions were instituted against opposition parties (Haggard and Kaufman 2021).

In Bolivia, the 2009 Constitution—instated by a legislative supermajority of President Evo Morales’s party, the Movement towards Socialism (MAS)—replaced the former National Electoral Court with an entirely new body, the Plurinational Election Organ (Bolivia 2009: articles 158, 205, 206). The Plurinational Election Organ is headed by the Supreme Electoral Tribunal, which has seven members: six elected by a two-thirds majority of the legislature and one selected by the president (Bolivia 2009: article 206). Dissolving one body and replacing it with another allowed the MAS to hand-pick the tribunal responsible for deciding any election disputes affecting them or their opponents. As tracked by Freedom House, this move led to a decline in EMB autonomy (Puddington 2011).

A.3.2. Changing election rules and electoral disqualification

The rules and procedures governing elections are potentially outcome-determinative. Manipulating these rules—often through the captured EMB—can steer advantages to the incumbent and virtually eliminate the possibility of launching a successful challenge against them. These rules can focus on preventing parties or candidates from entering the race in the first instance, making it easier to disqualify them, or disadvantaging their campaigns, as by shutting them out of the public eye. For example, stringent party registration requirements may prevent challengers from registering as candidates; overwhelmingly complex financial disclosure rules might provide for disqualification in the event of an inadvertent violation; and airwave regulation or public demonstration permit requirements may shut the opposition out of television coverage or public spaces.

Hurdles to keep opposition candidates from successfully gaining seats in parliament—or even entering political contests in the first place—can include stringent party registration requirements and high voting thresholds required for parties to win seats in parliament. In Türkiye, for example, a high 10 per cent threshold requirement for parties to win representation in parliament not only excluded minor opposition parties but allowed the party of Recep Erdoğan to amplify their vote share—at 34 per cent—to 66 per cent of legislative seats (Haggard and Kaufman 2021: 200).

Disqualification has been a similarly popular tactic. In the run-up to the 2016 presidential election in Nicaragua, the Supreme Court disqualified opposition candidate Eduardo Montealegre ‘at [President] Ortega’s demand’, stripping him of his position as the head of the opposition Independent Liberal Party (PLI) (US Congress 2017; Haggard and Kaufman 2021: 137). The court made this decision by ruling on a dispute between the PLI’s factions dating back to 2011—namely, that the role of party leader ‘in fact’ rested with another party member more sympathetic to Ortega (Latin News 2016: 15). According to testimony in front of the US Congress

Box A.6. Benin: A unique approach

After the 2019 elections in Benin, the National Assembly passed a constitutional amendment and changes to the electoral code designed to increase hurdles to running for office for opposition members. The amended electoral code requires that presidential candidates obtain the endorsement of 10 per cent of both the members of the National Assembly and the country's mayors (US Department of State

2021). This threshold requirement gives members of the National Assembly 'a direct role in determining presidential candidates' (US Department of State 2021). Given that all 83 seats in the National Assembly and all but 6 of the country's 77 mayoral seats were held by the incumbent majority, the change effectively bars opposition members from breaking into the race (US Department of State 2021).

by former Ambassador Michael Kozak, '[w]hen opposition National Assembly members objected, Ortega had the Supreme Electoral Council remove 16 of 27 opposition members from the National Assembly' (US Congress 2018: 3). Similar tactics have been used in Ukraine, where the government manoeuvred to split up an opposition party, leading to the party's disqualification (2010), and in Venezuela, where individual candidates were disqualified based on corruption charges (2008) (Haggard and Kaufman 2021: 173, 221, 265).

A.3.3. Changing the electoral system: Gerrymandering

Gerrymandering—the art of drawing electoral districts in such a way as to favour one party in an election—is a simple and highly effective way to entrench the existing administration's power by protecting it from electoral challengers. Gerrymandering allows the party currently in control to ensure that it is elected to an outsized share of seats in the legislature. This tactic can be especially important for keeping the backslider in power in the event that public opinion begins to turn against them, as it gives the supportive minority a majority of the political voting power. In this way, gerrymandering becomes a tool for the government to select the electorate, rather than the other way around.

In the USA, partisan gerrymandering has been used to increase the number of seats of both major political parties (McCarty, Poole and Rosenthal 2009). In 2012, for example, Democrats received 1.4 million more votes than Republicans in the election to the House of Representatives. Because of a Republican redistricting plan called REDMAP, however, the Republicans were able to win 234 seats, compared to the Democrats' 201 (Haggard and Kaufman 2021: 239). Under one redistricting plan in North Carolina, Republican candidates were virtually guaranteed 10 of the state's 14 seats in the House of Representatives, despite

the fact that more of the state's population was registered as Democrat than Republican (Tippett 2020; Associated Press 2022). In this particular case, the map was extreme enough to eventually be struck down by the Supreme Court. However, in most instances of gerrymandering, challenges have been unsuccessful due to the Supreme Court's general refusal to rule on them as a 'nonjusticiable political issue' (*Rucho v Common Cause* 588 US (2019)).

Gerrymandering has also been used in Hungary to entrench Fidesz's supermajority. A 2011 amendment to the electoral law made several changes to the parliamentary districting scheme. One adjustment, for example, affected the size of certain districts, such that the population in left-leaning districts exceeded the population in right-leaning districts by approximately 6,000 people, diluting the representation of those on the left (Krugman 2014). New district boundaries were also used to break up traditionally left-leaning districts: in the county of Hajdu-Bihar, for example, three of its nine districts voted for the socialist party in the 2006 elections. Under the new districting map, these nine districts were combined into six new districts, splitting the three left-leaning districts into majority right-leaning ones and giving Fidesz a high likelihood of winning all six seats in the region (Scheppele 2014).

A.3.4. Changing the electoral system: Changing the allocation of representation

Amplifying the ruling party's representation is frequently aided by changes to the rules or formula by which seats are allocated among parties and candidates. For example, one party may be favoured over another by adjustments to the methods by which surplus seats are distributed in a proportional representation system or by the use of a party list or single transferable vote system rather than a plurality system.

In Hungary, a major overhaul of the electoral system was tailored to advantage Fidesz and ensure an ongoing dominant majority. The reform featured a sprawling set of interlocking measures, namely:

- reducing the number of seats in parliament;
- changing the ratio of single-member district seats to seats allocated by proportional representation; and
- adjusting the way surplus seats were redistributed to give parties winning single-member districts 'seat bonus[es] for the surplus votes they received rather than compensating losing parties in proportion to the wasted [minority party] votes' (Ahluquist et al. 2018: 909).

In addition to giving a massive advantage to Fidesz, the system overhaul used smoke and mirrors to disguise the built-in bias it created. First, it was not any

individual change that unfairly disadvantaged the opposition but rather the way these changes interacted as a whole, which made it difficult to complain about any particular move. Second, the sheer complexity of the measures made the system change difficult to understand, which weakened resistance to it (Haggard and Kaufman 2021). Georgia, in a controversial constitutional amendment in 2018, adopted Hungary's system of awarding surplus seats to the party that received the most total votes (Larsen 2017). A statistical analysis performed by researchers at the Caucasus Research Resource Centers found that this adjustment 'would tip the scales strongly in favor of the leading party', bolstering their incumbent advantage (Larsen 2017).

In Ukraine, a reform to the electoral law restored an old electoral system mixing proportional representation and majority districts. Under the mechanics of this system, Yanukovich's Party of Regions was able to strengthen its parliamentary majority despite sharply decreasing popular support (Haggard and Kaufman 2021: 221). Additionally, a rule allowing individuals (rather than just party factions) to defect enabled the party to add dozens of candidates who had been elected as 'independents' to their coalition. These two measures in combination allowed the Party of Regions to increase their seat share by about 63 seats or 14 per cent.

Finally, in Albania in 2008, the Constitution was amended to change the mixed-member electoral system, in which 70 per cent of legislative seats were directly elected and 30 per cent chosen by parties in proportion to the national vote. This was replaced with a regional-proportional system, in which 12 regional constituencies were allotted a specific number of seats. This change is certainly legitimate and reasonable minds can disagree about the relative merits of the two systems. It is of note, however, that this change dramatically favoured the incumbent parties, who were able in the next election to increase their number of seats from 98 to 136—of 140 (Ibrahimi 2016).

A.3.5. Changing the electoral system: Other changes

Changes to districts and allocation of representation are not, of course, the only ways in which an electoral system can be adjusted to favour the incumbent. This section includes a selection of the more notable but less categorizable tactics we have seen.

In Hungary, two further tweaks helped bolster Fidesz's electoral advantage. First was the elimination of the second-round run-off (Scheppelle 2022). A double round of run-off elections allows opposition parties that are not aligned with each other to put forth their own candidates without causing a split vote. Even if non-Fidesz votes are divided between opposition parties in the first round, one party will survive to

the second run-off and voters from the other parties may then choose to back the other non-Fidesz candidate. However, the anti-Fidesz opposition is split into two major groups (those left of Fidesz and those to the right, such as the Jobbik party) and even more parties. Therefore, a single-round run-off almost guarantees that the non-Fidesz vote will be divided among multiple candidates to the benefit of Fidesz (Scheppelle 2022).

Second, a change to the election law required ‘all parties running a party list [to] also run candidates in at least 71 of the 106 constituencies, up from the previous threshold of 27’ (Scheppelle 2022: 54). Thus, notes Scheppelle (2022: 54), ‘[e]ven if fewer parties ran against [Orbán], there would still be plenty of candidates to divide the vote and hand Fidesz candidates a victory’.

Another component here is timing: changes made to the electoral system during or immediately before an election can scatter the opposition’s ability to organize. An episode from Mongolia illustrates this well. In December 2015, the Parliament amended the electoral law to drop a provision forbidding rule changes within six months of the election. The ruling coalition was then free to make a flurry of changes just weeks before the following election (Croissant 2019: 19).

A.3.6. Voter suppression

Vertical accountability—the ability of the populace to check the government—is primarily rooted in the franchise. Suppressing the votes of opposition voters weakens the efficacy of this check, manipulating the rules by which the backslider gets to stay in power.

In the USA, voter ID laws have been used to ‘effectively suppress the votes of minorities, low-income voters, felons, and urban voters more generally’ (Haggard and Kaufman 2021: 249). In the state of Georgia, access to the polls was made more arduous by a 2021 law which prohibited giving food or water to people waiting in line to vote. Sherman (2021) notes that ‘[f]or years, voting rights advocates have organized efforts to give away bottles of water or food near voting sites where residents sometimes wait in line for hours to vote’. These volunteer efforts had been particularly focused on serving black-majority neighbourhoods, which, due to the state’s allocation of polling stations, have experienced disproportionate waiting times (Sherman 2021). The bill drew widespread criticism as an effort to disenfranchise voters of colour (Karimi 2021) but was upheld by Georgia’s federal district court (Wickert and Niese 2022).

A.3.7. 'Curating' the electorate

A close correlate of voter suppression is what might be thought of as 'curating' the electorate: tailoring who is enfranchised and who is not to create the most supportive electorate possible.

In Hungary, Viktor Orbán has made efforts to maintain a supportive electorate by re-enfranchising the Hungarian diaspora. By virtue of a law passed in 2014, over 500,000 ethnic Hungarians living abroad gained the right to vote in Hungarian elections. Hungarians living abroad overwhelmingly skew conservative: in the 2018 parliamentary elections, for example, 96 per cent of the 225,000 Hungarians abroad who participated in the election voted for Fidesz (Lendvai 2017: 90; Makszimov 2022). Absorbing over 200,000 reliable supporters into the electorate effectively watered down the growing opposition in the domestic voting pool. In the 2014 election, in which the number and percentage of votes abroad were similar to 2018, the over-the-border vote gave Fidesz an extra 15 seats in parliament—a number which made the difference between a simple majority and a supermajority (Lendvai 2017: 130). This effect was exacerbated by the fact that the voting procedures made voting substantially easier for the 'near diaspora'—those Hungarians living in neighbouring countries, who skew overwhelmingly conservative—than for those living in areas where the diaspora tends to lean left, such as in the UK (Rutai 2022; Scheppele 2022).

Conversely, in the Dominican Republic, massive efforts have been made to ensure that ethnic Haitians—who have been subjected to particularly harsh discrimination by the sitting government—are not able to gain the right to vote. This has included court decisions restricting the conditions under which ethnic Haitians can claim *ius soli* citizenship, and even a provision new to the 2010 Constitution denying birthright citizenship to children of illegal immigrants—a provision robbing at least 2.5 per cent of the population of their political rights (Haggard and Kaufman 2021: 62).

A.3.8. Harnessing the incumbency advantage

As a general rule, incumbents enjoy a significant advantage in elections simply by virtue of being incumbents. Their high re-election rates stem from factors including name and face recognition, existing fundraising war chests and the free media attention that comes with conducting the activities of their office (Fourinaies and Hall 2014). Many of the tactics in the rest of this section also contribute to the incumbency advantage by interfering with the ability of the opposition to effectively organize; an opposition 'that is fragmented, regardless how widespread its electoral base, is always at a disadvantage vis-à-vis the incumbent party' (Corrales 2020: 45).

The incumbency advantage can be leveraged through institutional channels, particularly by relaxing (or failing to implement) (a) restrictions on the use of public funds by incumbents in elections and (b) fair coverage requirements that prevent the incumbent from shutting the opposition out of the public eye by dominating the media. Instances of these tools being employed are less explicit than others in this toolkit, but there is evidence of their use. For example, between 2004 and 2018, one metric of election irregularities was found in no fewer than 19 Venezuelan elections (at various levels of government)—namely, the ‘gross, overt use of state resources – funds, state offices, armed forces, other public officials, materials, social welfare programs – for partisan or campaign purposes’ (Corrales 2020: 46, 49). The Hungarian opposition, on the other hand, was subjected to the effects of tilted media ownership: during the 2022 elections, ‘every broadcasting outlet and almost all print media regularly repeated government campaign slogans’ (Scheppele 2022: 47). The opposition, however, was limited to a small number of limited-research media outlets. ‘The opposition’s leader,’ points out Scheppele (2022: 48), ‘got all of five minutes on public television to present his program—on a Wednesday morning. If Hungarian voters wanted to understand what the opposition coalition stood for, they had to hunt to find out.’

Side note: Using other tools to harass the opposition

Several other backsliding tools can be used as a means to harass the opposition. Media capture, for example, allows the incumbent to dominate the airwaves with their own image and message—a tactic used in both Türkiye and Venezuela. State-controlled media can also attack opposition groups on the government’s behalf. Using the media as a proxy for smear campaigns may appear more reliable: rather than biased opponents making such statements, they come from journalists whose role, as it is generally understood, is to uncover and spread the truth. Similarly, packing the EMB can be used to selectively target opposition groups for disciplinary investigations as a form of harassment, as can selective prosecution or audits.

A wide variety of softball tactics exist to exert pressure on elections in subtler ways. In the run-up to the 2016 elections in Serbia, for example, such tactics included ‘pressure on public-sector workers to vote for the ruling party; an outsized presence at official events during the campaign by the Serbian Progressive Party and the Socialist Party of Serbia, which blurred the line between state and party activities; and self-censorship among media outlets, which was attributed to government pressure and effectively narrowed the coverage available to voters’ (Freedom House 2017). Though not ‘institutional’ per se and thus beyond the immediate focus of this Report, the ability of an incumbent regime to engage in such activities may speak to underlying institutional weaknesses, such as a non-independent EMB or insufficient safeguards for freedom of the press.

Table A.2. The opposition and elections: More examples

Tactic	Country/ year	Channel	Notes
Packing the electoral management body	Zambia (2016)	New constitution	The 2016 Constitution of Zambia enhanced the powers of the executive in controlling appointments to the Electoral Commission of Zambia (and, further, removed that commission's tenure protections) (Hinfelaar, Rakner and van de Walle 2022: 190).
Changing the electoral system: allocation of representation	Ecuador (2013)	Presidential veto	President Correa was able to use a line-item veto power contained in the 2008 Constitution to selectively veto election legislation and, in so doing, surgically change parliamentary seat allocations to favour his own party (Haggard and Kaufman 2021: 76).
Raising voting thresholds	Hungary (2013)	Legislation	Amendments to the electoral law included raising the threshold for the percentage of the vote required to win party-list seats: 5% for a single party, 10% for two combined parties and 15% for three combined parties (Scheppele 2022). This placed opposition parties in a bind: running separate candidates raised the risk of a split vote, but running together heightened the required threshold. In the end, the worst-case scenario occurred: some, but not all, of the parties formed an alliance, meaning the allied parties faced a high threshold and the vote was split (Scheppele 2022).
Changing the electoral system: allocation of representation	Bolivia (2009)	New constitution	A provision in the new Constitution increased the number of legislative seats to be filled in first-past-the-post elections, which favoured the ruling party and boosted their majority from a simple majority to a supermajority (Haggard and Kaufman 2021: 36).
Raising voting thresholds	Russia (2003)	Legislation	In Russia, the 5% threshold for party representation was raised to 7%, the formation of blocs was prohibited and state funding was made proportional to vote share, all in order to make it more difficult for parties to gain access (Haggard and Kaufman 2021: 168).

Table A.2. The opposition and elections: More examples (cont.)

Tactic	Country/ year	Channel	Notes
'Curating' the electorate	India (2021)	Legislation	A 2021 law (the Citizenship Amendment Act) expanded the basis for particular persecuted religious minorities from neighbouring countries to become eligible for citizenship. 'Persecuted minorities' conspicuously excludes Muslims (who are majority in many, but not all, neighbouring states). As an effect, the law tips the scales in favour of adding religious groups that are more likely to vote for the current administration, diluting the voting power of the Muslim community in India (Gill 2021).
Harnessing the incumbency advantage	Russia (2003)	Legislation	When shifting to a proportional representation system, changes to the electoral law also included a provision that made the use of public funds for campaigning proportional to the vote share of the party sitting in parliament (Haggard and Kaufman 2021: 168; Roshkov, Melnikov and Panasik 2023).

A.4. THE LEGISLATURE AND THE SITTING OPPOSITION

By its very nature, the legislature is the branch in which backsliding changes are most frequently made. Thus, legislatures are generally used as a tool, rather than a target, of the democratic backslider. For this reason, changes are not frequently made to the legislature itself—although in some instances there is a weakening of the legislature vis-à-vis the executive. Rather, backsliding tactics in the legislature generally take the form of undermining the opposition in an attempt to diminish their power. Another interesting and understudied facet of the legislature's role in backsliding is its ability not only to make changes but to make them virtually impossible to undo in the future—what this Report refers to as 'harpooning'. This extends beyond entrenchment of the ruling party to entrenchment of their policies, even after the individuals involved have long gone. Because harpooning, unlike other forms of power aggrandizement, is not squarely about the immediate power or gratification of an individual, it presents an interesting and separate ideological aspect of backsliding. It is for this reason that it is discussed in its own right.

This section looks at three ways in which the legislature effects or is affected by backsliding: (a) undermining the opposition, (b) weakening the legislature vis-à-vis the executive and (c) temporal entrenchment.

A.4.1. Undermining the opposition

Selective audits and prosecutions

Selective audits and prosecutions usually concern non-political crimes that are easy to violate unintentionally, such as tax laws or building codes. Audits, investigations and prosecutions can be used to harass or disqualify the opposition—even, in some instances, to incarcerate them. As with all selective enforcements, backsliders are able point to existing, democratically legitimate laws and to claim such enforcement actions as proof of their dedication to the rule of law, in the sense that no one, including the opposition, is above the law. In this way, selective prosecutions demonstrate how backsliding rulers use rule by law in order to pervert the rule of law. For this reason, Cheung (2018: 4) refers to this strategy as ‘abusive legalism’, which, he notes, is ‘ultimately inconsistent with the rule of law, either because on closer examination [it is] lacking in certain formal or procedural attributes of legality, or because [it] frustrate[s] the underlying purpose of having the rule of law in the first place’.

Further, the fact that all executive powers exercise some amount of prosecutorial discretion allows backsliders to point to instances in other countries, responding to accusations of illegitimacy with claims of hypocrisy.

Recep Erdoğan has relied particularly heavily on this tactic. In one paradigmatic example, according to Varol (2018: 354), Sevan Nişanyan, an opposition member and vocal critic of Erdoğan’s administration, was sentenced to more than 16 years in prison for violating various building codes. The convictions may have been legally accurate, but in Türkiye, illegal construction is the norm, not the exception. Erdoğan’s own thousand-room presidential palace was constructed in violation of numerous zoning laws and court decisions. Nişanyan’s infractions would likely have escaped notice, were it not for his political activism.

Similarly, media conglomerates and other companies critical of the government were subjected to tax audits and inspections. For example, a hotel owned by Türkiye’s largest company, the Koc Group, offered shelter to protesters escaping tear gas during the Gezi Park protests. The Group was then raided by the Ministry of Finance carrying out ‘routine’ financial audits. In another instance, Türkiye’s largest media company, the Dogan Media Group, was faced with a fine of USD 600 million

for tax code violations. Notably, the group was forced to sell two major newspapers and its main television station because of the fine—an outcome which paves the way for such outlets to be bought up by supporters of the regime (Varol 2018: 345).

In Hungary, there has been a marked disparity in the investigation and prosecution of corruption charges against Fidesz and the opposition. Nearly all investigations in corruption cases involving people close to Fidesz have failed to progress beyond the investigative or prosecution phases. Yet such investigations have been numerous, successful and public when geared towards the opposition. According to Kornai (2015: 35–36),

[d]ramatic arrests are carried out for the benefit of the cameras, which arrive in droves. Compromising facts are often leaked while investigations are still in progress. No effort is spared to make sure that these cases come to court, though charges often must be dropped in the prosecution phase for lack of evidence; in other cases, the court rejects the charges. Moreover, a leak, the bringing of charges, or a court hearing often is timed to coincide with some political event: The bomb that will destroy a rival's reputation is detonated just before an election.

Finally, this tactic was also used under Yanukovich in Ukraine. Former Prime Minister Yulia Volodymyrivna Tymoshenko, for example, was prosecuted on the charge of having 'exceeded her authority', for which she received a seven-year prison sentence (BBC News 2011). Both Tymoshenko and former Interior Minister Yuriy Lutsenko 'were brought up repeatedly on charges until prosecutors found ones that would stick'; in addition, Tymoshenko's lawyer was accused in 2013 of car theft, robbery and failing to obey a court order stemming from his divorce several years prior (Associated Press 2013; Haggard and Kaufman 2021: 220).

Expulsion from parliament

Expelling an opposition member from parliament conveniently reduces the number of votes available to the minority party, while also denying that member access 'to the microphone' in government business and silencing dissent from other opposition members. Expulsion (and disqualification from future elections) can occur due to criminal charges, procedural violations or political devices like impeachment.

In India, selective prosecution of opposition member Rahul Gandhi led to a court conviction on charges of defamation. Despite the low-level nature of the crime, the conviction robbed Gandhi of his seat in parliament and will prevent him from being

able to access the ballot in the upcoming 2024 elections (NPR 2023). Meanwhile, in the USA, in the state legislature of Tennessee, two black Democratic legislators in a white-Republican-dominated legislature were recently expelled for ‘disrupting’ the legislature after participating in a non-violent protest against gun violence—a move which has been described as ‘part of a larger story that is unfolding all around the country: [Republican] state legislatures ... resorting to increasingly novel, overbearing and indefensible power plays to hold off the rising tides of backlash unleashed by their descent into reactionary rule’ (Sargent 2023). Significantly, a third, white legislator had also participated in the protests; she, however, was not expelled by the assembly (Sargent 2023).

Disciplinary sanctions

Short of expulsion, of course, MPs may face disciplinary sanctions, which might be used to punish opposition members or keep party members in line.

In Poland, disciplinary rules have been used to exclude opposition members from the parliamentary floor. According to Sadurski (2019: 135):

[a] symbolic instance of penalizing the opposition occurred at the beginning of June 2018 when one of the most outspoken opposition MPs, Mr Sławomir Nitras [of the Civic Platform party] was denied the right to go on a pre-election mission to Turkey on behalf of the Parliamentary Assembly of the Organization for Security and Cooperation in Europe. The denial was issued by the deputy speaker of the Sejm, Mr Ryszard Terlecki (PiS). The decision was expressly based on Mr Nitras’s conduct during a parliamentary debate on the vote of no-confidence in Deputy PM Beata Szydło, in which the Information Centre of the Sejm established laboriously that Mr Nitras interrupted PM Morawiecki’s speech thirty-two times. This type of sanction is unprecedented in the history of the Sejm. As of the writing of this book [2018–2019], eight MPs (including only one PiS MP) have been fined for their conduct during this parliamentary term (beginning 2015) (just to provide some perspective, in the entire previous parliamentary term, 2011–2015, such fines were imposed only twice).

Tweaking procedure to disadvantage the opposition

One institutional channel that can be used to carry out backsliding tactics is amendment to sublegislative rules, such as regulations or parliamentary procedure. These rules are low-level, technical and dry, and often do not appear substantive on their face, meaning such changes come with a low political cost. Procedure,

however, can dictate outcome, and using and changing parliamentary procedure can be effective in stifling the opposition's voice in parliament.

The heaviest use of this tactic has come from Poland. For example, parliamentary rules allow for fast-tracking of bills introduced by a private member rather than by the government. PiS exploited this procedure by introducing bills as private member bills even where these were clearly government-sponsored. In 2016, over 40 per cent of bills were fast-tracked through this mechanism—up from 15 and 13 per cent respectively in the two years before (Sadurski 2018: 267). In addition, PiS effectively silenced the opposition by making such adjustments to parliamentary procedure as:

- limiting the number of questions that may be raised during discussion of a bill to silence the opposition;
- limiting speeches to one minute, which stifles debate; and
- using 'procedural tricks ... to sidestep the opposition', such as by adding items to the agenda at the last minute (Sadurski 2018: 267, 2019: 134). In one particularly stark example, PiS called a parliamentary session in a small side room immediately following a PiS caucus meeting. PiS used this ad hoc meeting, where no reliable record of votes could be documented, to pass the 2017 budget (Sadurski 2018: 267–68).

A.4.2. Weakening the legislature vis-à-vis the executive

In some cases, the goal is in fact to weaken the legislature, rather than to use it to effect changes. This may be because an executive backslider faces obstinate opposition in the legislature (as happened in Venezuela) or because institutional hurdles in the legislative system make legislation harder to implement.

In Zambia, the new Constitution ushered in under incoming president Edgar Lungu contained a provision enabling the president to dissolve parliament 'if the Executive cannot effectively govern the Republic due to the failure of the National Assembly to objectively and reasonably carry out its legislative function' (Zambia 1991: article 81(4)).

Additionally, Haggard and Kaufman (2021: 202) note that a 2016 constitutional amendment in Türkiye removing legislators' immunity was useful not just in attacking the opposition but in weakening the legislature more generally. This mechanism opens the legislature not just to checks from the executive, in the form

of prosecution, but also to lawsuits from individuals, prosecution by lower-level governments and the requirement to cooperate with their peers' investigations. This reduces legislative capacity in the form of time and political capital, stifles debate and discourages members from holding the government accountable.

Delegation of power to the executive

Because this tactic equally implicates the legislature and the executive, it is included in both Section A.2 and this section. (For more on the delegation of power to the executive in the context of executive aggrandizement, see X.)

The most direct way to weaken the legislature vis-à-vis the executive (and, concomitantly, strengthen the executive vis-à-vis the legislature) is to siphon power from the legislature by delegating it directly to the executive.

Delegating power presents a puzzle in that, ordinarily, actors do not voluntarily give up political power. Why, then, are there examples of legislatures voluntarily surrendering their own powers? The answer may depend on the context. In the USA, for example, traditional government theory holds that the legislature will jealously guard its powers against the president, and the two branches, in fighting over power, will hold each other in a rough equilibrium (Publius 1787). As it happened, the US political system evolved quickly from legislature-versus-executive to Democrat-versus-Republican. Within a two-party system, the incentives change: Republicans in the legislature will be incentivized to transfer power to a Republican president if they will carry out the party's agenda more easily than the legislature can. Elsewhere, it could depend on the incentives for individual actors. In Hungary, for instance, Viktor Orbán is purported to have long exercised tight control over the members of his party through personal ties and patronage, control over political opportunities like nominated or appointed positions, and even outright corruption (Scheppele 2022). In this circumstance, an individual legislator may see their political career prospects come to depend on their compliance with the will of the executive and may, in that sense, be motivated to hand over power upon request.

Essentially, any time a legislature uses a legislative channel to transfer competencies from themselves to the executive, this can be considered delegation and many of the tactics showcased here are examples of this. In one particularly explicit example from 2000, the Venezuelan National Assembly passed what was termed the 'Enabling Law', which granted the president 'the power to enact laws addressing a broad range of issues without legislative debate or approval'. This applied primarily to areas traditionally considered legislative, such as 'finance,

the economy and society, infrastructure, personal and legal security, science and technology, and the civil service' (Garcia-Serra 2001: 265, 276).

Transferring power from the legislature to 'the people': Case study of South America

In many backsliding countries—but particularly in South America—backsliders have enjoyed more widespread popular support among the electorate than in the legislature, making it desirable to transfer decision-making power from the legislature to 'the people'. In South America in particular, this has often taken the form of creating citizen councils, which are ostensibly erected in order to increase democratic participation in government decision-making processes. In the execution, however, access to these councils is often dependent on the executive, or the decision-making capacity of the council is unduly subject to executive influence or control.

In Ecuador, for example, the creation (by means of a new constitution) of a Council of Citizen Participation and Social Control was touted as a conduit for social and CSO participation in government processes. In effect, however, the council served as a 'de facto extension of the executive', extending presidential control over theoretically independent offices (Conaghan 2016: 112). While the council was placed in charge of appointments to important semi-autonomous offices, members of the council were pulled from executive branch offices and, in making their appointments, were required to choose 'from short lists of nominees provided by the president and his aids' (Haggard and Kaufman 2021: 76).

A.4.3. Temporal entrenchment and 'harpooning'

Besides using the legislature to effect changes and attacking the legislative opposition, another facet of the legislature's role in the backsliding process has gone largely overlooked—that of securing the longevity of the backsliding project. This concept goes beyond simply making it more difficult for the opposition to gain power (as with tilting the electoral playing field); it extends to ensuring that the policies of the backsliding regime endure even to outlive the regime itself. In this sense, this facet is less about an individual's desire to hold onto power and more to do with a concern for legacy, entrenchment of policy choices and national identity, and other long-term outcomes. We refer to this process as 'harpooning': beyond penetrating the halls of power and making desired changes, how do backsliding regimes lock in their policy preferences to ensure these outlast even their own tenure—just as a harpoon, once lodged, cannot be pulled back out?

Hungary provides the best case study of this process, through which Fidesz has been able to create a sort of feedback loop and ensure that its power is self-reinforcing. This has enabled the party to take the system from one in which it lacked the power to make major changes (such as replacing the Constitution) to one in which it is able to influence the controlling law in Hungary for generations to come.

The first move Fidesz made in this process was to use its incoming supermajority to amend the constitutional provision requiring a four-fifths supermajority to replace the Constitution. (Perhaps due to an oversight, the Constitution did not contain a provision prohibiting the use of the normal amendment procedure—which only required a two-thirds majority—to amend the four-fifths provision.) This allowed Fidesz to implement a new Constitution with policy decisions it preferred and establish the procedures dictating how future policy choices would be treated (through legislation—so-called cardinal laws—and future constitutional amendment or replacement).

Having removed this first obstacle and replaced the old Constitution with a more favourable one, Fidesz could then turn to implementing changes to extend into the future. From the outset, Fidesz enjoyed (a) a legislative supermajority (despite receiving a relatively low percentage of the overall vote; see Carr n.d.) and (b) a unicameral parliamentary system and thus no external checks from an upper chamber or independent executive. This allowed the party to place any changes that were not, for one reason or another, included in the 2011 Constitution in cardinal laws and constitutional amendments. This, in turn, subjected such changes to a supermajority requirement to be undone in the future.

Third, Fidesz all but eliminated the possibility of the opposition gaining such a required future supermajority. It did this by tilting the electoral playing field to such an extent that Fidesz will still enjoy a supermajority should its popularity fall below 50 per cent of the electorate. The opposition thus faces a steep barrier to gaining a simple majority of its own—and a nearly impossible barrier to gaining a supermajority. Fidesz cemented this conundrum particularly well in that the electoral changes it made (such as gerrymandered districts) were placed in cardinal laws themselves. This means that the electoral advantage cannot be undone until the opposition is able to garner a supermajority—which is made nearly impossible by that very cardinal law (Scheppele 2015: 115, 120). This cycle, in turn, allows Fidesz to cement policy preferences even further down the line by appointing judges who will remain on the bench for decades to come and who

will set precedent regarding interpretation of the 2011 Constitution, which may theoretically last even further into the future.

Again, because this process entrenches substantive policies well beyond the terms—and perhaps even the lives—of sitting members of government, this tactic is categorically different from that of simply entrenching oneself in government. This, perhaps, pushes against the assertion by some scholars that all democratic backsliding is in essence executive aggrandizement (see, for example, Khaitan 2020). Leaving aside the possible difference in motive (ideological rather than self-aggrandizing), this difference is important for the institutional designer to consider. First, it suggests that institutional design choices geared towards counteracting self-serving incentives may miss an important facet of backsliding. And second, it reinforces the notion—discussed in Chapter 2 of this Report—that the temporal component of constitutional function plays an important role in the performance of a constitution and should equally play an important role in considerations of institutional design.

A.5. THE CIVIL SERVICE AND FOURTH-BRANCH INSTITUTIONS

The civil service and fourth-branch institutions play very different roles in the function of government: respectively, they carry out the actions of the government and check the government and keep it accountable. However, they share important similarities as potential backsliding targets. First, they both ideally maintain a certain amount of independence from the political control of the government. The civil service is comprised of non-political career technocrats and thus insulated to a certain extent from changing political winds, while fourth-branch institutions sometimes play an actively political role but are ideally beyond the reach of political influence or control. Both groups carry out important government functions at a lower level of visibility than the primary branches of government and both—importantly—are generally appointed one way or another by the political branches, rather than by the electorate.

Like other targets of backsliding, the civil service and fourth-branch institutions may be approached with different strategies. They may be hollowed out and undermined, or packed and commandeered; they may be incrementally and surreptitiously brought within the ruling party's control or overhauled as part of 'reform' or 'revolution'.

The similarities between these two groups mean they are subject to very similar backsliding tactics. These generally include:

- influencing the manner in which officials take office;
- packing offices with compliant personnel;
- changing the substance or scope of the office's powers, whether by restricting power, shifting competencies to another office or changing the focus and duties of the office;
- reorganizing chains of command to bring 'independent' offices under political control; and
- adjusting disciplinary oversight and removal.

A.5.1. The civil service

While the top layer of the civil service may be politically appointed or even elected, underneath this layer usually lies a vast non-appointed technocratic bureaucracy which, in actuality, constitutes the great majority of government personnel and activity. Theoretically, this 'branch' of the government is able to maintain its independence largely because it is comprised of non-political, non-appointed career technocrats who carry out their functions from one administration to the next, relatively insulated from swings in power. Of course, rotating political appointees at the tops of these agencies are able to set priorities and change policy, but much of the day-to-day decisions remain relatively unaffected by most political choices. Because of the civil service's scope and reach, politicizing the service allows a backsliding regime to infiltrate and capture a significant component of the country's governance.

Changing appointment or selection

Under the previous civil service model in Poland, 'senior officials' (those at the top of the bureaucracy but below political appointees) were selected via a competition process designed to ensure both equal access to opportunities and top-quality professionals (Wyrzykowski 2016: 160–62). In fact, while the mechanics of the hiring process are left to legislation, the idea of equal access to public service is constitutionally enshrined (Constitution of Poland 1997: article 60). However, this constitutional promise was diminished in 2015, when PiS amended the civil service law to dramatically change the hiring process for both senior and lower-level civil servants.

By virtue of the statutory amendments, '[t]he mechanism[s] of verifying the correct observance of the constitutional requirements to fill senior positions in the civil service guaranteeing professional, diligent, impartial, and politically neutral execution of the duties of the state [were] removed' (Wyrzykowski 2016: 163). At the senior level, the competition-based hiring process was eliminated and replaced by a system of appointments, allowing the PiS-controlled legislature, rather than the pre-existing bureaucracy, to select candidates for important roles. In conjunction with this change, the professional skill requirements for these positions were lowered and a requirement that senior position vacancies be made public was eliminated. Each of these amendments further contributes to PiS's ability to keep these positions in the hands of close allies. Finally, upon implementation of these provisions, the law stipulated that everyone in the civil service would automatically lose their position 30 days from the law taking effect unless 'a new term of employment was imposed in the meantime'. This essentially created a selective purge, under which PiS could pick whom it wanted to keep and whom it wanted to replace (Wyrzykowski 2016: 160–64).

Changing the scope or substance of power

One way to change the scope or substance of an office's power is to transfer competencies exercised by one office to another office. One example of this tactic comes from Brazil, where the responsibility of supervising Indigenous lands was transferred from the Indigenous Affairs Agency to the Department of Agriculture, which contained more allies of President Jair Bolsonaro. This shift placed regulatory decisions affecting Indigenous lands (i.e. the use of such lands, meaning the use of resources on such lands) in loyal hands, who then used their powers to make decisions favouring Bolsonaro's anti-cosmopolitan (*ruralista*) supporters (Stargardter and Boadle 2019).

One tactic unique to Venezuela's Maduro administration is closely related to shifting or shrinking power but was effected in a way that gave the legislature expansive and flexible control over civil service officers. Instead of formally changing the office or its powers, the power to interpret the scope of the existing powers was placed in the hands of the Constituent Assembly. This made the powers of 'elected posts contingent on what the Constituent Assembly determine[d], and thus, subject to permanent, discretionary change' (Corrales 2020: 57). This tactic is somewhat analogous to a court or legislature getting to determine the meaning of a key term in a legal provision. In this case, the office and the officer are untouched, but what it means to be that officer is subject to change.

Realigning chains of command and control

In Poland, the amendments to the civil service law were designed not only to make it easier to install loyal bureaucrats but also to increase legislative control over those bureaucrats. The law achieved this by abolishing the National School of Public Administration, which was responsible for training civil servants, and establishing a new PiS-created training programme. The new programme was heavily criticized for being politically biased and promoting a pro-government agenda, pouring a particular message into the ears of new civil service recruits (Sadurski 2019: 136).

Meanwhile, in Venezuela, Nicolas Maduro's slide into authoritarianism has been facilitated by increasing government control over the civil service. Maduro's National Constituent Assembly—a body that was given the power to rewrite the Constitution and override the opposition-controlled National Assembly—was also given the power to dismiss civil servants, leading to fears that the government is using it to purge the civil service of opposition supporters. Additionally, Maduro's government has introduced new laws that allow for the arbitrary dismissal of civil servants and has created a new system of appointments that is more centralized and controlled by the government.

Adjusting disciplinary oversight and removal

In the same volley of legislation that reorganized the civil service in Poland, senior civil service positions lost tenure protections that had previously been protected by statute. The resulting lack of clear removal criteria exposed such officials to increased leverage from the party in power, who now held the ability to fire them (Sadurski 2019: 135–36).

A.5.2. Fourth-branch institutions

Fourth-branch institutions vary from country to country, but might include electoral management bodies, independent judicial appointment commissions, ombudspersons or human rights commissions, public service commissions (who guard the independence and professionalism of the civil service), an Auditor General, an anti-corruption commission, or similar offices, as reported in an International IDEA publication (Bulmer 2019: 6). 'Independent, unelected, state institutions are best fitted for keeping the party and the political executive in check—as long as they remain independent. This aptitude also makes them extremely attractive targets for executive subordination or party capture' (Khaitan 2020: 7). Further, the dedicated purpose of such offices is generally to monitor and check government actions that exceed enumerated power or infringe on individual rights, and as such are likely to draw particularly keen attention from a backsliding regime.

Changing appointment or selection

Fourth-branch institutions will necessarily be connected in some way with the elected government. Because of this, '[t]he appointment mechanism' of these institutions, 'especially the balance between the respective roles of the political executive and the political opposition in appointments, is key to their independence' (Khaitan 2020: 6–7).

In Ecuador, new citizen councils centralized presidential control over the appointment of quasi-independent officers, such as the Comptroller General, Attorney General and Human Rights Ombudsperson. The Constitution ushered in under Correa provided for a Council of Citizen Participation and Social Control, which was given the power to appoint these independent officers. Members of this council, however, were imported directly from the executive branch under Correa and were required to choose their nominees from a shortlist selected by the president. Additionally, previous requirements for legislative approval of these appointments—the only check on the president's ability to control the appointees—were eliminated (Haggard and Kaufman 2021: 67).

In Israel, the appointment process was kept in the same body (the Knesset) but made more political. A bill introduced in the Knesset in 2017 changed the way legal advisors would be appointed to government ministries. 'Instead of a professional tender, in which a minister is unable to influence the outcome of the nomination,' explains Roznai (2018: 363), the bill provided that 'candidates [would] be selected by a search committee in which the minister has a de-facto majority'.

Changing the scope or substance of power

The pre-2011 constitutional system in Hungary did not provide for an ombudsperson. It did, however, provide for a similar checking power to be exercised by the public. This device, termed the *actio popularis*, allowed private citizens to challenge government action by requesting constitutional review by the courts, even in cases where they themselves lacked standing. Under the new Constitution of 2011, this device was eliminated and the power to challenge government action on those grounds was transferred to a national 'human rights institution' tasked with bringing these cases on the people's behalf—an institution effectively controlled by Fidesz (Kovács and Scheppele 2018: 192).

This shifting tactic was also used in South Africa to target the office of the National Prosecuting Authority and its Directorate of Special Operations, which served as an important independent anti-corruption agency (Issacharoff 2018: 455). The legislature abolished this office and transferred the applicable powers into the

ambit of the national police, who answered to the Security Ministry (who, in turn, answered to the president himself) (Issacharoff 2018: 455).

In 2017, the Israeli Knesset attempted to simply restrict the power of an independent office—in that instance, the comptroller. A government-supported bill (which was later shelved) ‘prevent[ed] the comptroller from the executive branch’s ongoing decision-making process, limiting him to commentary on past decisions and conduct’ (Newman and Pileggi 2017). Further, while the comptroller would still be able to issue reports, the bill stipulated that the office would lose the authority to affirmatively order state bodies to address the shortcomings identified in those reports (Newman and Pileggi 2017).

Realigning chains of command and control

Poland provides an example in which the chain of command was realigned such that political control flowed down into offices that had previously been insulated from political influence. Specifically, the public prosecutor system, which was located underneath the Prosecutor General, was brought under the control of the Minister of Justice. This was achieved by combining certain aspects of the offices of the Minister of Justice and the Prosecutor General, who has an uncommon amount of power to act personally in individual cases (Sadurski 2019: 125). Whereas prosecutors were previously (and purposefully) independent, they are now accountable to a government minister. Under the new system, the same person can remove prosecutors from cases (as the Prosecutor General), assign specific judges to specific prosecutors (as the Minister of Justice) and keep prosecutors under control by, for example, transferring them to remote parts of the country with total discretion. On the whole, the system gives a single member of the ruling coalition vast control over the administration of justice.

A.6. THE MEDIA

The media—particularly television news media—is a highly visible, ubiquitous and efficient conduit of information to the general public. The democratic backslider who can capture the media has a powerful megaphone that they can use to drum up support, stoke nationalist sentiments and attack their opposition. If the backslider can do so while maintaining an outward appearance of freedom of the press, their messages also then have a veneer of objectivity and credibility. Though targeting the media does not always involve weakening a constitutional structure, it is institutional in both its initial means and its ends. In its initial phase, capturing the media entails creating, debilitating or circumnavigating institutions established

either by the constitution or through constitutionally enumerated powers. And, though the use of the media once captured is largely political, the eventual ends are institutional in nature as well: media coverage has a significant effect on the relative strength of an incumbent's advantage and an opponent's ability to effect a challenge. In this way, control of the media is used directly to entrench the democratic backslider in office, a key requisite for executive aggrandizement.

A.6.1. Media capture

Creating, modifying or circumnavigating oversight institutions

As with exerting influence over the judiciary and EMBs, controlling the referees of media regulation entails enormous power—in this case, over the ability of media platforms to choose their content. Gaining control over media oversight bodies can take many forms, but the process generally comprises three parts. The first step is to bring the oversight body under the control of the legislature. This can be achieved by:

- creating a new oversight body to be filled by parliament;
- shifting oversight power from an existing independent body to another body which is less independent; or
- changing the structure or appointment procedures of an existing independent body to make that body more dependent on the legislature.

Parliament can also circumnavigate any existing body completely by passing legislation directly applicable to media outlets, which the government (via the executive branch) then has the power and discretion to enforce.

The second step is to implement oversight guidelines or criteria. This can be done through legislation or delegated to the oversight body to regulate. Generally, these criteria restrict the content of permissible media output, such as by forbidding content that engenders 'lack of respect' for the authorities (Haggard and Kaufman 2021: 265). Violations of content rules can be accompanied by steep fines, prohibitively raising the literal cost of critical journalism.

The third component of this strategy is enforcement, which can selectively target media outlets producing unfavourable journalism. Selective enforcement can be aided by the fact that content guidelines are often vague. For instance, a rule in Hungary requires reporting to be 'thorough' and 'responsible' without providing

concrete definitions of those terms (Haggard and Kaufman 2021: 109). This gives a great deal of discretion to the oversight body—which, in turn, is controlled by parliament. The various aspects of each of these three steps can be mixed and matched, as demonstrated by the examples below.

In Hungary, the process began with the legislature consolidating the existing media regulation bodies into a single entity and creating a 'Media Council' to steer the agency (Haggard and Kaufman 2021: 109). Members of the Media Council are elected by a two-thirds majority of the legislature to nine-year terms, and the president is appointed directly by the prime minister. As a result, the council is staffed entirely by Fidesz nominees. The president of the council has the power to select the heads of all media outlets, subject only to approval 'by a Fidesz-dominated board of trustees' (Haggard and Kaufman 2021: 109). Once formed, this council then promulgated 'vaguely-defined content rules' such as one requiring content to be 'balanced, accurate, thorough, objective, and responsible' (Kelemen 2017: 12). The council is empowered to impose fines and even revoke media licences for infractions of these rules, subject to its own prosecutorial discretion.

The National Assembly of Venezuela began by giving itself the power to enforce new statutory content guidelines for news media, including a prohibition on content that 'foments citizen anxiety', 'disrespects authority' or 'incites ... lack of respect for the legitimate institutions and authorities' (Haggard and Kaufman 2021: 266). Later, in 2010, the assembly expanded the powers of the Venezuelan National Telecommunications Commission. The commission was then used to launch 'harassment investigations' against television, radio and Internet media, revoking the licenses of 32 radio stations for 'procedural and administrative problems' (Haggard and Kaufman 2021: 266). Additionally, Chávez created a 'People's Watch Council' under Venezuela's Citizen Participation Law—consistent with his general strategy of shifting power to the hands of a loyal and riled-up voter base. This council was given the mandate 'to monitor the print media, empowering it to penalize those outlets that [did] not report in a true and impartial manner' (Andersen 2004).

Poland combined two strategies: (a) bringing existing oversight bodies more closely under the control of the legislature and (b) creating new oversight boards to supplement the work of the existing body. Regarding the existing Council of National Media, the president exercised his power to appoint the president of the council, while the legislature used its appointment powers to install highly loyal members within it. The legislature then attacked the other existing regulatory and oversight bodies through 'no less than 107 resolutions'. These included 'resolutions

concerning removals of the President of the Management Board of Polish Television, the members of the Management Board of the Polish Press Agency, the President of the Board of Polish Radio, [and] the members of the Board of Polish Radio' (Sadurski 2018). These boards and councils together make up the National Broadcasting Board—a constitutional body which by 2018 was completely staffed by PiS. The board immediately used its powers to target the liberal media outlet TVN-24, imposing fines for 'reporting demonstrations around the parliament in December 2016; although subsequently annulled, the message was sent' (Haggard and Kaufman 2021: 149).

Finally, Türkiye went through a similar pattern. The legislature arrogated oversight power to itself by enacting legislation directly applicable to the media, imposed strict and highly indeterminate content guidelines and allowed the executive branch to enforce these rules selectively and vigorously. By the end of 2011, press groups in Türkiye reported that thousands of criminal prosecutions were pending (Freedom House 2011). Türkiye, however, used stringent regulations not only to pressure existing media into line but to create legal justification for shutting media companies down altogether. In this way, increasing media oversight was simply the first step in the deployment of another backsliding tool: crony ownership.

Crony ownership

Crony ownership occurs when a democratic backslider rigs the market of media ownership to ensure that outlets end up in the hands of loyal supporters. The administration can control the content the media produces through private relationships behind closed doors, while outwardly maintaining the appearance of formal independence. Because these new owners are private actors with no government position, they are not governed by the same mechanisms of public accountability. This veil of privacy can then be used to cloak backroom deals and, by extension, shield the government actors from public accountability themselves.

Türkiye's AKP party used restrictive regulation to facilitate crony ownership of media companies. By creating stringent regulations that were easy to violate, the government ensured there was ample possibility to charge companies with regulatory violations (Varol 2018: 343). These violations could then be used as grounds to revoke the licence of the outlet, causing the owner to forfeit their claim to the company (Cagaptay 2017: 123). Upon this forfeiture, the media outlet would then default to the regulatory body in charge of enforcing the government's strict regulations. Squarely in the hands of the government, these media companies could be easily auctioned off in single-bidder transactions to AKP-friendly investors (Cagaptay 2017: 123).

The ruling party in Serbia similarly employed ‘the cynical use of privatization to ensure that previously independent media outlets were acquired and controlled by cronies of the regime’ (Haggard and Kaufman 2021: 188). These outlets quickly became ‘not only uncritical of the regime, but fawningly laudatory of it’, while also being vocally critical of political opponents and ‘the few remaining media companies not under regime control’.

Redirection of advertisement spending

Another tool available to exert influence over the media is the redirection of advertisement spending to favourable media outlets—and away from critical ones. Because the government is such a large customer, advertising expenditure can be a powerful instrument in media control. This patronage thus gives the regime a significant amount of leverage over media companies and allows the government to discretionarily spend or withhold funding without being tied down by any neutrality requirements governing other public funding. The regimes in Hungary, Poland and Serbia have all employed this tactic to incentivize and reward favourable coverage while choking off funding from sources of criticism (Haggard and Kaufman 2021: 188). By channelling ‘significant sums’ of advertising spending, President Ortega of Nicaragua came to directly control nearly half of all Nicaraguan news outlets—control he then delegated to his children, who now run many of Nicaragua’s media outlets (Colburn and Cruz 2012: 116).

A.6.2. Government control of news media

Government control of news media often takes the form of either crony ownership or de facto control stemming from financial or prosecutorial leverage, as discussed in the previous section. This section focuses on formal control, in which the government obtains ownership of, or legal decision-making power over, news media outlets. Where a regime is able to establish formal control, the news media becomes a powerful propaganda machine, echoing the government’s agenda and messaging on any given subject. State media is used both to praise the current administration and to attack the opposition. It allows the backslider to fill airtime with their own speeches, press briefings and advertisements, while criticizing or squeezing out coverage of their opponents. This latter move can be particularly effective on the campaign trail, as name recognition and household familiarity are major factors in a candidate’s electoral success, particularly for non-incumbents (Schaffner and Wandersman 1974; Kam and Zechmeister 2013: 983–84).

The tactic of taking control of or exerting control over state-owned media has been employed in each of the core countries surveyed for this Report. In Venezuela, media policies were implemented which required all media outlets to broadcast Chávez’s speeches (Landau 2018: 167). In Hungary, Fidesz turned the state-

Box A.7. Nicaragua: Side note

In addition to redirection of advertisement spending, President Ortega of Nicaragua employed a non-institutional cousin of the tactic. Besides withholding funding, Ortega also began withholding information from unfavoured media outlets, favouring left-wing outlets over the centrist media (Roberts 2008). The administration has been known to conceal information regarding actions of the government, the president's agenda and his schedule, leaving some journalists to monitor state-favoured outlets to find out whether the president is even in the country. This favouritism also extends to allowing

certain hand-picked journalists to attend briefings and other events. In one particularly stark example, certain outlets were admitted to a press event, 'while other journalists had to stand outdoors in the rain and follow the proceedings on the Sandinista radio' (Rogers 2007). Shutting out all independent media allows the Ortega administration to completely determine what information does—and does not—reach the general public, the tone in which that information is conveyed, and whether to attack the opposition in the news media or omit mention of them entirely.

sponsored public news agency into a 'propaganda organ' (Haggard and Kaufman 2021: 109). And upon taking power in Poland, PiS immediately purged hundreds of journalists and replaced them with journalists from far-right-wing media and a Catholic fundamentalist 'media empire' (Sadurski 2019: 138).

Selective enforcement

As discussed above, selective enforcement has been used to target members of the opposition and critics within society. Unsurprisingly, this tactic has also been used to punish or shut down critical and opposition-owned news sources. In one prominent example, the ruling administration in Zambia shut down the leading opposition-led newspaper, *The Post*, in an effort to influence upcoming elections. After tightly contested presidential by-elections in 2015, and before the 2016 legislative elections, the party of incoming President Edgar Lungu deployed the Zambia Revenue Authority (ZRA) to investigate *The Post*. Using a valid tax law, the ZRA shut down *The Post* in the course of levying unpaid tax obligations. Both the law and the enforcement were perfectly legal on their face; the political motivation, however, is thrown into relief by the fact that both of the state-run newspapers owed the ZRA more money in unpaid taxes than *The Post* (Hinfelaar, Rakner and van de Walle 2022: 196).

Table A.3. The media: More examples

Tactic	Country/ year	Channel	Notes
Creating, modifying or circumnavigating oversight institutions	Timor Leste (2015)	Legislation	In 2015, the Parliament of Timor Leste adopted a new Media Law severely curbing press freedoms, as part of a campaign that has been considered a trend of democratic backsliding (Croissant 2019: 9).
Creating, modifying or circumnavigating oversight institutions	Ecuador (2011)	Referendum	As part of a larger referendum, voters approved the establishment of a media oversight body with powers to monitor and impose restrictions on media content and financial holdings (Haggard and Kaufman 2021: 79).
Crony ownership	North Macedonia	Sub-institutional	During a period of backsliding charted by Haggard and Kaufman (2021: 125), a significant portion of the private media came under the ownership of allies with close ties to the ruling party.
Government control of news media	Ecuador (2015)	Constitutional amendment	Akin to government ownership, a 2015 constitutional amendment passed by the Parliament of Ecuador made media communications—even those from private entities—a ‘public service’, opening the media up to government regulation (Conaghan 2016: 115).
Redirection of advertisement spending	North Macedonia	Policy	Government advertising in North Macedonia ‘accounts for a large share of the advertising market ... [and] at least 1 percent of the annual national budget is spent on state advertising campaigns’ (Dimishkovska 2014: 419). Between the government’s large market share and the large portion of its own budget devoted to advertising through private media, power can be exercised over media by favouring government-friendly media over others.

Table A.3. The media: More examples (cont.)

Tactic	Country/ year	Channel	Notes
Selective prosecution and enforcement	Guatemala (2023)	Policy	The Attorney General's office has simultaneously directed corruption cases focused on party members away from the docket, while launching investigations into journalists reporting on graft (Papadovassilakis 2023).
Selective prosecution and enforcement	North Macedonia (2013)	Selective enforcement	In December 2013, the legislature 'rammed through two new laws on media and audiovisual media services that created a new regulator broadly empowered to impose fines and revoke broadcast licenses. The criteria for such sanctions were left vague, and violations targeted political adversaries. Fines were levied against the owner and editors of the independent Telma TV, for example, for failure to provide sufficient air time for folk music' (Haggard and Kaufman 2021: 126).

A.7. CIVIL SOCIETY ORGANIZATIONS

A.7.1. Repression of civil society organizations

Many of the tactics discussed in the context of the media, such as intimidation and oversight, may also be applied to CSOs. So too may tools aimed at restricting civil liberties, such as using anti-terrorism or libel laws to restrict freedom of association and expression, which are discussed below. But there are also strategies which are particularly suited to being used against CSOs.

Registration requirements

Raising the hurdles to register as a CSO has been one such tactic. This allows the state to selectively deny the legitimacy of unfavourable organizations, as well as to deny them any public funding that would otherwise be accessible.

In Zambia, CSOs had been remarkably adept at organizing themselves, having created an umbrella association—the Oasis Forum—to coordinate and amplify their messages. As has been seen throughout this Report, the lack of opportunity (or ability) for the opposition to organize is often a convenient facilitator enabling

backsliding regimes to carry out their agendas; an organized civil society thus poses a potent threat to a party that is beginning to aggrandize power at the expense of the people. In response to the traction garnered by the Oasis Forum, therefore, the Zambian Parliament passed the Non-Governmental Organization Act of 2010. This act gave the government broad discretion to deny registration to CSOs and imposed a mandatory requirement for CSOs to re-register with the government every five years. It also provided the government with ‘powers to dictate [CSOs’] thematic and geographical areas of work’ (Hinfelaar, Rakner and van de Walle 2022: 198).

Foreign funding restrictions

A related tactic is the implementation of restrictions or regulations on foreign funding received by domestic CSOs. Foreign funding restrictions provide a double benefit: not only do they constrict a CSO’s funding by discouraging it from seeking support from abroad but they may also be used to mar the image of the CSO at home by inviting the accusation that it is controlled by ‘cosmopolitan elites’. Indeed, this measure is often paired with reporting requirements that label CSOs as ‘foreign agents’ and, as a result, subject them to stricter scrutiny or oversight criteria. These and other similar measures give an administration leverage to publicly attack such CSOs, tax their time and money, and erect legal hurdles in the way of their mission and agenda.

In Hungary, for example, new legislation required such CSOs both to register themselves as ‘foreign funded’ and to disclose their donor list. Requiring foreign registration allowed the Hungarian Government to point to such CSOs as foreign agents, a label it could use as a soundbite for attack. In conjunction, the law required all public communications from such CSOs to be clearly labelled as ‘foreign supported’, ensuring that such ‘foreign agent’ organizations would have to wear this badge publicly.

In Venezuela, the Chávez administration took the gambit a step further, stipulating that CSOs were simply not part of civil society at all if they (a) received any funds from foreign governments or (b) had any leaders who were not Venezuelan. This stipulation acted as more than just an exclusionary label: it had the legal effect of barring such CSOs from representing citizens in court.

Selective denial of funding

As with other examples of selectivity, the door is opened to favouring loyal players and disadvantaging critics any time a government (a) controls a distributable resource and (b) subjects the distribution of that resource to a discretionary

judgement. The same is no less true of government control of public resources earmarked for civil society.

In Poland, a law governing public funding of CSOs was amended to include a preference for 'projects concerning the Christian heritage of national and local tradition' in determining the distribution of public funds (Sadurski 2019: 145). Such vague terms as 'concerning', 'heritage' and 'tradition' provide broad latitude for preference disguised as discretion. Similarly, a prohibition in the law on 'discrimination' has been used to target CSOs critical of PiS policies. In one particularly stark example, funding was denied to organizations representing and focusing on aid for women—a cohort of organizations that largely opposes PiS's platform—on the basis that their organizations were 'discriminatory' against men (Sardurki 2019: 145).

A.8. CIVIL LIBERTIES

A.8.1. Emergency-justified restrictions on freedom of expression and association

Coup attempts, terrorism threats and states of emergency often provide opportunities for democratic backsliders to further entrench or enhance their own power. In times of crisis, the public is more likely to prefer strong leadership with ample power to act quickly and decisively over the normal deliberative process. With threats to security or stability, the citizenry is willing to 'trade' some restrictions on their civil liberties in exchange for more security (Yang 2020). This situation is an unmatched opportunity for the democratic backslider, as they are able to restrict civil liberties with permission from the people themselves and with unquestioned legitimacy. These restrictions, however, are more easily instated than they are repealed, and once the emergency passes, the government may be unwilling to restore full civil liberties. What is more, the public then faces the problem of lacking the political rights—such as expression and association—necessary to fight for the return of those very political rights.

Restrictions on the freedom of expression and association are prime targets in times of crisis, and these rights are usually curtailed by means of anti-terrorism laws. Six days after the 2016 coup attempt in Türkiye, the government announced it would suspend the European Convention on Human Rights and, with it, its protections of freedom of speech, association and political dissent, and against torture (Council of Europe 2016). At the same time, the government throttled political and academic freedom by engaging in a mass purge of civil servants and

academics. This included the removal of 2,777 judges and prosecutors, dozens of governors and 49,321 civil servants, along with the revocation of 21,000 private school teaching licences, requests for the resignation of 1,600 university deans and a general order to Turkish academics to return home and remain in the country (Varol 2018: 352).

Further, in the absence of an actual emergency, some democratic backsliders may choose to create one or to trump up the threat of a possible emergency to achieve the same effect. Well before the coup attempt in Türkiye, the AKP used heated rhetoric to paint the Kurdish opposition party—the People’s Democratic Party (HDP)—as associated with the indisputably terrorist Kurdish Worker’s Party (PKK) (Freedom House 2011). Pointing to the HDP as a threat to the people, the AKP passed legislation amending Türkiye’s anti-terrorism laws to criminalize dissemination of statements of terrorist organizations. Because of the HDP’s alleged association with the PKK, the law chilled journalistic coverage of the HDP and their statements—essentially silencing the entire Kurdish minority. After the law’s passage, covering the ‘Kurdish issue’ at all could earn journalists long prison sentences and even scholars with an academic interest in the Kurdish minority were subject to ‘increased intimidation and in some cases detention’ (Haggard and Kaufman 2021: 205).

In cases where backsliding has progressed to more overtly authoritarian tactics, one of the next steps in the attack on civil liberties is threatened—and then overt—violence against protesters.

A.8.2. Restricting freedom of expression and association through libel laws

Libel laws are promulgated under the reasoning that untruthful attacks against the state have a detrimental effect on public morale and undermine respect for the legitimacy of authority. As with libel suits against the media, forcing individuals to defend against these suits extracts enormous costs from defendants both financially and reputationally, as well as taxing the defendant’s time, dignity and right to self-express.

Though using libel laws to chill political expression has been a common tactic of democratic backsliders, nowhere has it been so central to the authoritarian project than in Türkiye. Erdoğan’s strategy in this regard began with civil suits early in his term as prime minister. Hundreds of suits were filed, including against ‘a student theater troupe that does skits wearing long black hippie wigs; unemployed siblings who posted a song about Mr. Erdoğan on the internet; and a British teacher-cum-anti-Iraq war activist-cum-fortune teller, who made a collage showing Mr. Erdoğan’s

Box A.8. Venezuela: Threatening violence against protesters

In Venezuela, there was a tilt from democratic backsliding under Chávez to full-blown authoritarianism under Maduro. During Chávez's presidency, there were threats against human rights defenders and reports of occasional, scattered attacks against protesters. After Maduro took power in 2013, however, this became sustained violence against protesters, with dozens of casualties, hundreds of injuries and thousands of arrests to date (Landau 2018: 168–69).

head on a dog' (Champion 2011). The burden of these suits was felt. The siblings, for example, reported being unable to find work in the aftermath of the lawsuit and Mr Dickinson, the British teacher, was dragged through four years of costly litigation and a judgement against him before telling reporters '[h]e ruined my life' (Champion 2011). Most recently, Erdoğan filed a lawsuit against a political opponent—whom Erdoğan himself has described as 'a walking lie machine' as well as 'shameless, immoral and low-down' (Champion 2011)—for claiming that Erdoğan was planning to leave the country should he lose the next election (Ahval News 2022).

Side note: Selective enforcement of civil rights

Selective protection of minority rights falls outside of the institutional focus of this Report, but it serves as an important example of the backslider's theme of selectivity. Selective enforcement—whether of rights or of laws (such as selective prosecutions)—allows the backslider to target and punish members of disfavoured minorities while maintaining liberal and protective laws on the books, creating the outward appearance of democratic liberalism. Further, because selective enforcement of rights happens through omission rather than affirmative action, it is less visible to the public.

In Türkiye, when the AKP first took control of parliament, it originally expanded minority rights protections and broadened opportunities for political participation (Varol 2018: 342). Despite such implementations, however, the government declined to enforce them in many cases and continued to affirmatively discriminate against members of these minority groups (Varol 2018: 346). These tactics work in conjunction with the institutional tools laid out in this toolkit, contributing to the same goals. For example, a Human Rights Watch (2013) report noted that opposition members were repeatedly held in long periods of pre-trial detention, despite a recent reform establishing alternatives to pre-trial incarceration. This selective detention not only served as punishment but prevented such opposition members from taking their seats in parliament in the meantime. Similarly, a law

Box A.9. Türkiye: Criminal libel

As backsliding in Türkiye progressed, libel laws were tightened such that offenders could be subject to criminal prosecution rather than just defamation suits. Thousands of cases were prosecuted under these laws, which criminalize, among other things, insults against the president and against a person's honour (Champion 2011; Varol 2018: 344).

Prosecutions have been used to ruthlessly punish criticism and dissent. In 2017, Human Rights Watch reported that more than 6,000 criminal cases were brought in that year alone for the crime of insulting the president—following nearly 2,000 in 2015 and over 4,000 in 2016—in addition to countless libel suits. In one particularly famous episode, criminal charges were brought against a doctor who had depicted Erdoğan as Gollum from *The Lord of the Rings*, requiring expert testimony as to whether the character is good or evil (Varol 2018: 344). Other instances have included the following:

- Three students were prosecuted for holding a satirical banner at their graduation ceremony. Making banners for the ceremony was a tradition at the school, not a form of protest; rather, it was merely the satirical content that was culpable (Human Rights Watch 2018).
- A former MP was convicted for a speech in which he mentioned 'that would-be sultan in the palace' (Human Rights Watch 2018).
- A singer was convicted after inserting Erdoğan's name into a song called 'I Have Given Up on this World' (Human Rights Watch 2018).
- A journalist was convicted and incarcerated for quoting the proverb 'When a beast enters a palace, it does not become a king, but the palace becomes a barn' (Armenia News 2022).
- A journalist was convicted for 'liking' a post criticizing President Erdoğan on Facebook (Dogan News Agency 2015).

The effect of these crackdowns has been tangible. 'It's ridiculous,' observed a professor at one Istanbul University, 'but it sows fear.' Their success emboldens the sentiments behind them, which have spread throughout civil society. This was exemplified in 2016, when a Turkish man filed a criminal complaint against his wife for insulting Erdoğan (Reuters 2016).

'suspend[ing] investigations, prosecutions, and convictions of speech-related offenses ... provided the offense is not repeated within three years' was ostensibly intended to improve the freedom of the press; the 'repeated within three years' clause ensured that the affected journalists would continue to self-censor out of fear of reincarceration (Human Rights Watch 2013).

CONCLUSION

As one may notice in perusing the backslider's playbook, constitutional design always involves attempting to find an equilibrium between risks and benefits that cut both ways. Many of these questions are as old as constitutional design itself. Is it better to adopt easier amendment procedures to facilitate democracy and flexibility, or to protect ourselves from our worst impulses and momentary whims? Is it better to give the courts more strength to check—and abusively obstruct—the majoritarian branches, or to increase judicial accountability—or subservience—to those who have been elected? The hope in studying democratic backsliding is to learn more about how to maintain these equilibriums by evaluating the efforts of those who have sought to upend them. This Report is founded on the belief that while there is no such thing as the perfect constitution, striving to create a 'more perfect' constitution may still act as a north star in moving towards increasingly sustainable and just constitutional democracy.

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Democratic backsliding has been driven in large part by elected governments who have purposefully attacked vulnerabilities in the constitutional and legal framework of democracy to dismantle checks on power and hinder free competition at elections.

This Report provides a thorough catalogue of backsliding, detailing strategies employed and actions taken affecting the core institutions of democracy. It distils lessons learned from different cases of backsliding and offers recommendations for improving institutional design to strengthen the guardrails of constitutional democracy. Based on a meticulous study of how backsliding happens, the recommendations go beyond pure counter-majoritarian checks to propose additional mechanisms which promote democratic deliberation, transparency and moderation.

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