

Constitutional Repair Working Paper Series

We are increasingly confronted by a pressing question: how can a democracy be repaired after being deeply degraded, but not ended, during a period of anti-democratic government? This working paper series aims to provide a space to showcase works in progress and forthcoming publications on these challenges. Launched in March 2022, the aim of the series is to provide a space for scholars across multiple disciplines, including early career and established scholars, to showcase works in progress and forthcoming publications on the challenges of repairing democracy after democratic decay.

The series reflects the belief that repairing the damage caused by democratic decay presents distinctive challenges. The impact and legacy of often subtler, sophisticated, and piecemeal measures by which liberal democracy is hollowed out in contexts of democratic decay challenges our existing analytical frameworks and toolkits for achieving, restoring or improving democratic functioning, which have largely been developed in relation to two key scenarios: (i) transitions from authoritarian rule to democracy; and (ii) major constitutional reform in broadly stable democracies.

The series welcomes submissions on themes including, but not limited to:

- Paradigms of political and constitutional transition;
- Theories of constitutional change;
- Constitutional amendment and replacement;
- Court reform and court-packing;
- Repairing institutions (e.g. parliament, fourth branch organs, public service);
- Bypass institutions (where existing institutions cannot be replaced);
- Repairing electoral processes, oversight, and laws;
- Repealing and reversing legislation;
- Political reform pacts in contexts of decay;
- Political party regulation and reform;
- Deliberative innovations and reform processes;
- Repairing and re-making norms and conventions;
- Repairing information ecosystems;
- Transitional justice;
- Lustration;
- International dimensions of repair.



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Please include the subject: 'Submission – Constitutional Repair' and a short statement indicating how the submitted paper fits the series theme.

2025/1

From Constitutional Repair to Democratic Resilience: Brazil in Comparative Perspective

Tom Gerald DALY

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Author

Tom Gerald Daly is Professor at Melbourne Law School, Convenor of the Constitution Transformation Network (CTN), Director of the Electoral Regulation Research Network (ERRN), and Director of the online knowledge platform Demoptimism (www.demoptimism.org). He also serves on the Editorial Board of the *Journal of Public Law/Zeitschrift für öffentliches recht (ZöR*).

His comparative research, drawing on public law and political science, focuses on democratic crisis, resilience, and renewal from a global perspective. His current project focuses on 'constitutional repair', which analyses the challenges of repairing damage caused to a democratic system after a period of anti-democratic government, including an article, 'Constitutional Repair: A Comparative Theory', recently published in the American Journal of Comparative Law. His broader research includes co-edited books such as Democratic Consolidation and Constitutional Endurance in Asia and Africa: Comparing Uneven Pathways (OUP 2024) as well as articles in the International Journal of Constitutional Law and German Law Journal.

As well as extensive experience in the university sector (principally at Melbourne, Edinburgh and Copenhagen universities), Tom has worked in a variety of roles in government and international organisations, including clerking for the Chief Justice of Ireland (6 years), designing a pan-continental African Judicial Network for the African Union, and most recently, authoring a landmark report on democracy in Asia for International IDEA: *Designing Resilient Institutions: Countering Democratic Backsliding in Asia*. He has also led or worked on constitutional, political and judicial reform projects and reviews in states and territories including Australia, Ireland, Georgia, Kyrgyzstan, Lebanon, Maldives, Palestine, Sri Lanka, Turkey, Uzbekistan and the Pacific.

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Cover image

From Constitutional Repair to Democratic Resilience: Brazil in Comparative Perspective

Tom Gerald Daly

This is the edited transcript of a keynote speech delivered at the first International Conference on Law and Politics on the theme 'Democracy, Justice and Constitutionalism' held in Maceió, Brazil, on 5-6 August 2025. Footnotes have been added to identify key sources. In this speech I examine the state of democracy in Brazil by comparing its democratic crisis to the three other biggest democracies in the world—the USA, India, and Indonesia. I then analyse what short-term repair of Brazil's institutions might involve, focusing on the judiciary and the response to former president Bolsonaro's attempted self-coup of 2023. Finally, I reflect on the challenge of enhancing the resilience of Brazil's democratic system in the medium-term and the long-term.

Keywords: democratic decay; democratic backsliding; democratic resilience; constitutional repair; constitutional design; Brazil; USA; India; Indonesia

Introduction

Boa noite a todos e todas. I'm honoured to be with you for this first International Conference on Law and Politics and I am very grateful to the Alagoas Chapter of the Brazilian Bar Association and to the conference organisers, especially the amazing Dr Ingrid Dantas, and everyone for such a warm welcome this evening. I know it has been so much work to put this event together. As Ingrid said in her opening remarks: "Vale a pena, e a democracia vale a pena".1

This is my fourth time in Brazil. My first visit was in 2013 to conduct research for my doctoral thesis on the roles of courts in building democracy after dictatorship, with Brazil as the central case study. So I'm a strange creature: I'm an outsider – an Irish guy living in Australia – but I have been very engaged with developments here for over a decade and I spend a lot of my time thinking about Brazil. But I would emphasise that anything I say tonight, I say with the due humility of an outsider.

For a decade I have been studying democratic regression and crisis, and I take a broad comparative approach. The aim of my talk is to place Brazil's challenges in context through comparison to a range of states. And I want to go beyond the common comparators like the USA, Poland and Hungary, because a broader comparative approach generates additional insights. My talk will raise more questions than answers, but I hope it helps to frame the discussion.

¹ "It's worth it, and democracy is worth it."

At the heart of my talk is the question of hope. Is there hope for democracy? I say yes. Is there hope for Brazilian democracy? I say yes.

I'm going to make three main points in my talk:

First, I'll compare democratic backsliding in Brazil with the three other biggest democracies in the world – the USA, India, and Indonesia.² And I'll argue that Brazil may be in a better position than these states, despite many challenges.

Second, I'll look at what short-term repair of Brazil's institutions might involve, focusing on the judiciary and the response to the attempted self-coup of 2023. I'll argue that extreme measures are justified, but may need a more robust framework of principle.

Finally, I want to discuss the challenge of enhancing the resilience of the democratic system in the medium-term and the long-term. Here, I will argue that it's not enough to talk only about institutional and constitutional design and reform. In line with the conference's focus on the digital era, I want to talk about addressing Big Tech.

1 Democratic Backsliding: Brazil in Comparative Perspective

Hungary and Poland are often viewed as the paradigm cases of backsliding, where democracy is hollowed out through a systematic 'masterplan'. This includes government interference in independent bodies and changing the personnel in core state institutions. We commonly see changes to court jurisdiction, court packing, removal of judges, disabling the opposition in the legislature, and interference with other state institutions like the prosecutor's office, electoral commissions, and media regulators. Often the appointment processes for these bodies have also been changed.

But backsliding in Hungary and Poland has been achieved largely through legal measures; what is called 'autocratic legalism'. In other states there are different dynamics and for that reason I see the USA, India, and Indonesia as more useful comparators for Brazil. Law has been less central to backsliding in these states.

If we focus on the courts, the legislature and the executive, despite many challenges Brazil's institutions have arguably shown more resistance to backsliding. This is due to four main factors:

First, in the other three states, backsliding involves executive aggrandisement. In the USA right now, Trump is expanding presidential power with the aid of the Supreme Court he transformed during his first presidency. Prime Minister Modi in India and President Subianto in Indonesia are completely dominating their systems.

Brazil does not fit that picture. Bolsonaro failed to take over institutions as extensively, although of course he appointed partisan Attorneys-General and interfered with the prosecution and federal police. That has often been ascribed to the undisciplined nature of his administration and his focus on rhetorical attacks. But various Brazilian scholars have suggested to me that it is also

² The information on the USA presented in this speech is largely drawn from Tom Gerald Daly, 'Constitutional Repair: A Comparative Theory' American Journal of Comparative Law (published online: 24 July 2025): https://doi.org/10.1093/ajcl/avaf005. The information on India and Indonesia is mainly drawn from a report by the author: Tom Gerald Daly, Designing Resilient Institutions: Countering Democratic Backsliding in Asia (International IDEA, May 2025): https://doi.org/10.31752/idea.2025.15.

³ See e.g. Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11(1) *Hague Journal on the Rule of Law* 9.

due to the progressive weakening of presidential power since 1988 and the challenges of maintaining stable supportive party coalitions in Congress. So it's harder for a Brazilian president to completely dominate the system.⁴

The second factor is the operation of the legislature. In Brazil of course Bolsonaro was able to coopt legislators through budgetary grants (facilitated by cooperation with other parties and the Speaker) but party fragmentation provided some protection against takeover even though it presents a broader problem for the functioning of the democratic system. This is unlike the USA, where the two-party system and Trump takeover of the Republican party has drastically reduced Congress's capacity to act as a check on the president. It is also unlike India, where manipulation of the Speaker of the lower house has disabled the opposition in parliament. Or Indonesia where the government has co-opted all opposition parties by bringing them into government, leaving no political opposition at all in Congress.

The third factor is that the top courts in all of these other states have been disabled, distorted, or have lost a lot of their power. Brazil is unusual because courts have retained their independence, court-packing attempts were unsuccessful, and democratic threats have produced judicial aggrandisement. The roles of the Supreme Federal Court and the Superior Electoral Tribunal have become even more central and visible to the public.

The fourth factor is that, unlike other states, the integrity of the electoral system has not been compromised in any formal sense in Brazil, although anti-democratic politicians use social media to undermine the legitimacy of elections. This means Brazil's pro-democratic political parties are at least able to cooperate and challenge anti-democratic political forces in a fairer electoral competition, as seen in the 2022 presidential elections.

These factors have allowed for more robust and broad-based institutional pushback in Brazil compared to the comparator states. Examples include:

- Congress defeated a tabled constitutional amendment to return to a paper audit trail for e-voting based on groundless claims of electoral interference through the electronic system;
- o a motion to impeach Justice de Moraes did not proceed in the Senate;
- the Supreme Court blocked the president's attempts to make greater use of provisional measures during the Covid-19 pandemic.

In this sense, Brazil is in a much better position than India, where the main resistance remaining is through the political opposition, and Indonesia, where all that's left is public protest and, rarely, successful litigation in the courts.⁵

Brazil is closer overall to the USA given that more institutions are still functioning, including the independent media, as well as public protest, although they are all under pressure in the USA right now and of course the judiciary is more fully compromised there.

But four additional factors make Brazil's democratic challenges more complex:

The first is that rhetoric matters. Bolsonaro may not have changed the structure or personnel of many institutions, but he and the Bolsonarista movement have changed how institutions operate, how they interact, and how they are perceived by the public. They have polarised society, politics, and have changed political and institutional culture in ways that might be very hard to reverse.

⁴ The information on Brazil in this speech is largely drawn from Daly, 'Constitutional Repair' (n 2) 21-27.

⁵ See e.g. Ratu Nafisah, 'Popular Struggle for Democracy in Indonesia' *Verfassungsblog* (30 April 2025) https://verfassungsblog.de/popular-struggle-for-democracy-in-indonesia/.

And that includes generating further fragmentation in the way the Supreme Federal Court operates.

Second is the return of the military to politics, through both its engagement with electoral politics and its wider self-conception as a moderating power. That represents both a short-term and a longer-term challenge. Brazil shares this challenge with Indonesia, where there is also a past experience of military dictatorship and where the military are now found throughout cabinet and government.

The third factor is that, like the USA, Brazil has suffered an attempted self-coup. But it is more concerning in Brazil because it involved attempted cooperation with the military.

Finally, in addressing its challenges Brazil is facing more external interference, especially by the US government.

2 Constitutional Repair in the Short-Term

This is where I move to my second heading, about 'constitutional repair in the short-term', which looks at what immediate fixes for Brazil's democratic system might involve.

The US scholar Jack Balkin says that when a democracy is in trouble we must first diagnose what has gone wrong, and then consider 3 questions:⁷

- The first is what can we do in the short term to repair the damage caused to our democracy?;
- The other questions are about how we can strengthen and maintain democratic resilience in the medium-term and longer-term. That might involve major constitutional change, institutional reform, or even setting up new institutions to help maintain the democratic system.

Often people jump ahead to reform and maintenance without thinking first about repair. A good example is the US scholar Bruce Ackerman's suggestion in 2020 that Brazil should adopt a new constitution. Brazilian scholars criticised him for this because not only would this not solve any of Brazil's current challenges, but also major constitutional change is extremely risky at a time when anti-democratic political forces are very strong.⁸

In my view, constitutional repair after democratic backsliding is best understood as a distinctive form of constitutional transition:⁹

- It's different to transitions from authoritarianism to democracy because it's often not possible or desirable to establish a new Constitution or new institutions.
- And it's different to major constitutional change in stable democracies because the damage to the democratic system distorts institutions, anti-democratic political forces are able to win elections, and extreme measures might be needed to fix the system.

⁶ On this point, see Tom Gerald Daly, 'Understanding Multi-Directional Democratic Decay: Lessons from the Rise of Bolsonaro in Brazil' (2020) 14(2) *Law and Ethics on Human Rights* 199, 205-208, 212-213, 223-224.

⁷ See Daly, 'Constitutional Repair' (n 2) 5.

⁸ Daly, 'Constitutional Repair' (n 2) 23.

⁹ Daly, 'Constitutional Repair' (n 2) 14-20.

That raises the question: what are we trying to repair? When we see so many problems, what should we prioritise? And what is actually within our power to repair? It is helpful here to make a further distinction between two types of damage that happen during backsliding periods:

- 'Constitutional damage' results from government attacks on core state institutions, which impairs meaningful constraints on the government, an adequate separation of powers, and the electoral system.
- o Broader 'democratic damage' includes the rise of political leaders, parties and narratives that are hostile to liberal democracy and minority rights, declining public trust in democratic institutions, and hyperpolarisation which denies the validity of political pluralism. That not only allows constitutional damage to happen but in the longer term it makes it very hard for independent institutions to function because it undermines any belief in the possibility of objectivity and independence beyond the partisan struggle.
- o In extreme cases it changes the main political divide from one based on policy to one based on democracy versus autocracy.

In other states where an anti-democratic government has been removed, formal changes made to institutions and elections mean the focus has been on repairing constitutional damage. And the hope is that fixing core institutions might help to also deal with democratic damage by tackling the more extreme politicians and reducing polarisation.

- For example, in the USA, before and after Biden came into government, a central debate focused on what to do with the Supreme Court. Some people argued that the Court's membership should be expanded to reduce the distortion created by Trump's appointees. Others said that was too extreme because of a longstanding convention against court-packing. They said 18-year term limits could be introduced or Supreme Court benches could be formed by random selection from across the entire federal judiciary.
- o In the end, nothing was done, largely because Biden just viewed court expansion as too extreme. He wanted to focus on legislation that, in his view, would improve people's lives before the next election. And it's hard to judge him harshly for that, because every government has limited capacity to do what it thinks is necessary.
- But what you see is that the failure to tackle the Supreme Court opened the door to the second Trump presidency. The Court recognised absolute immunity for core presidential acts, made prosecution of January 6th insurrectionists more difficult, and made it harder for claims against racial gerrymandering in state electoral systems to be heard.
- Poland has had an even more intense debate about 'resetting' its Constitutional Tribunal by replacing all 15 members, who were all appointed by the previous government and who are now blocking any reforms by the new government. Some see it as an extreme but necessary measure. Others see it as too extreme.

So, once again, where does Brazil fit into this picture?

I think that in the Brazilian context constitutional damage and democratic damage overlap more fully. And I want to focus on two dimensions: (i) the judiciary; and (ii) the response to the attempted self-coup of 2023.

2.1 The Courts

As regards the courts, Bolsonaro's two appointees on the Supreme Federal Court have not affected the Court's operation in the same way as Trump's appointees to the US Supreme Court, and it's nothing like the Polish scenario. So there's no justification for removal of these judges, expansion of the Court, or a Polish-style 'reset'.

But we do see damage to the Court as an institution:

- (i) Internally, there is not only the longstanding issue of an atomised court that often speaks with 11 different voices. We also see public divisions becoming clearer, including with the very recent Supreme Court statement in support of Justice de Moraes against the US government's intimidation.
- (ii) Externally, the experience of backsliding, and the Court's response, has transformed the separation of powers, as regards interaction between the courts and the political branches, and the public perception of the Court. Even if you see the most assertive decisions of the Supreme Court and individual judges as necessary in many cases, the manner in which individual justices have cast themselves as the guardians of democracy outside the courtroom raises major questions. If judges start to speak like politicians, act like politicians, have ongoing public feuds with politicians, and see themselves as speaking directly to the public, there is the clear risk that they will be seen as politicians in robes. And similar problems have arisen in places like Poland, India, and the USA.

It is hard to think about what might be the repair options here. A lot of this is rooted in long-term trends that have simply intensified since the Bolsonaro presidency, including judges taking very public stances on controversial issues and acting individually instead of as part of a collective institution.

My understanding is that it would not be feasible to make any major changes to the courts before the next presidential and congressional elections in 2026, although I welcome your thoughts on that.

Possible short-term measures might include:

- o reforms on ethical guidance to provide a fuller framework of principle for how judges communicate from the bench, the kind of language they use, and how and when they communicate publicly;
- o changes to internal court procedures. Could there be new regulations to reduce monocratic decision-making in such cases, for instance? You will know more than me whether that's possible. Where a judge is in a very public feud with a politician, should there be a fuller process for considering their recusal from a case, or for instance a requirement that they sit in future sittings with at least 2 other judges?
- Of course, any reforms would have to be very carefully handled. Taking lessons from India and Poland, there is a danger of excessively empowering the Court's leadership to manipulate benches or remove judges from specific cases. I'm mindful that soon Bolsonaro's appointees will be taking up leadership positions. So we're stuck with perhaps accepting the lesser evil of problematic actions that nevertheless help to defend the democratic system in the immediate term.
- So perhaps for now what's needed is to promote internal discussions among judges on the principles governing measures taken.

2.2 Response to the Attempted Self-Coup

The experience of an attempted self-coup really sets countries like Brazil and the USA apart from the others. Unlike subtler democratic backsliding, it really puts institutions into emergency mode. But again, this can't simply give institutions a completely free hand to act without thinking about the longer-term damage that might be caused to constitutional democracy.

And again, a comparative perspective can help us to see matters a little more clearly.

The most obvious difference is between Brazil and the USA. To any outsider, Brazil's institutional response is remarkable, including the congressional investigation commission, Supreme Court charges against the rioters, the Superior Electoral Court's ban on Bolsonaro running for office until 2030 and fining his party for groundless claims undermining the integrity of the electoral process. And now there's Bolsonaro's pending trial for leading an armed criminal organization and the attempted coup.

It's such a striking contrast to the USA, where it took two years after Trump's loss in the 2020 elections for the Attorney General to appoint a special prosecutor to look into criminal investigations. Four indictments were started but they all went nowhere. And the Supreme Court was always going to be an obstacle to any actions taken.

An interesting additional comparison here is South Korea, another country with a history of military rule. ¹⁰ After President Yoon attempted a self-coup in December last year, the opposition in Congress was the central actor. They started impeachment within days and it was confirmed by the Constitutional Court in April. The opposition was also determined to appoint special prosecutors for a separate trial for the crime of insurrection, and they impeached multiple Acting Presidents when they vetoed laws to appoint these prosecutors. In the end it was only the opposition winning the June 2025 presidential election that allowed for this to proceed.

The centrality of the judiciary in Brazil compared to South Korea seems mainly due to the different constitutional frameworks and the measures used to attempt a self-coup. But in both cases we see that extreme times call for extreme measures. And whether you look at the USA, Poland or South Korea it's clear that you have often a very narrow window for repair.

But even if you see Brazil's current challenges as an emergency, it should be treated in the same way as other states of emergency: care should be taken to only take measures that are absolutely necessary, measures should be proportionate, and such measures should only be taken as long as the emergency requires them. Because there is a real danger of normalising emergency measures. I say that as someone from Ireland, where we were under a state of emergency almost continually from the 1920s to the 1990s due to the conflict in Northern Ireland, and it really distorted both our law and our politics.

So a framework of principle for repair is needed. It's not enough for any government, state institution, or individual office-holder to simply say "Trust me, I'm acting to defend democracy" – because anti-democratic actors say this all the time in backsliding contexts. In my recent research I have offered that five factors should be considered when assessing whether an extreme repair measure is justifiable:¹¹

- (i) the overall context of democratic threat including the strength of anti-democratic political forces. Here I'm mindful that Bolsonaro's Liberal party is the biggest party in Congress and elections are coming next year;
- (ii) the repair options here, an extreme measure can only be justified if less extreme measures won't be sufficient;

¹⁰ The information here is drawn from Jeong-In Yun, 'Challenges and Responses of the South Korean Parliament to the Presidential Coup' *Zeitschrift für Parlamentsfragen* 56. Jahrgang Heft 2/2025, 405-417.

¹¹ This is a summary of the Repair Assessment Framework set out in Daly, 'Constitutional Repair' (n 2) 13, 29, 39. An earlier version of the framework is elaborated in Tom Gerald Daly, 'Good' Court-Packing? The Paradoxes of Constitutional Repair in Contexts of Democratic Decay' (2022) 23(8) *German Law Journal* 1071.

- (iii) *justification* the need for all state institutions to very fully explain and justify publicly why they are taking certain measures and why they are necessary;
- (iv) reform process this factor emphasises that process is a central way of ensuring that repair measures are carried out in a justifiable manner. For government, that might be ensuring that any reform process is inclusive and transparent to the public. For specific institutions like the judiciary, it might require greater attention to the way they issue their judgments, the forums in which they discuss their decisions.
- (v) repetition risk the fifth factor requires institutions and individual office-holders to consider whether the measures they are using to repair or protect the democratic system could be later used by an anti-democratic government to undermine the system. So for example, if the framework of principle is weak, and you have too much individual action, with too few guidelines around process, that is very risky.

3 Democratic Resilience in the Medium Term and Long Term

In the final part of my talk I want to consider the possibility of enhancing democratic resilience in the medium-term and long-term. Democratic backsliding has generated a lot of new thinking in constitutional and institutional design. But, in line with this conference's focus on "the digital era", I also want to argue that democratic resilience requires us also to think about how to address Big Tech and its increasingly negative effects on our political systems.

3.1 Brazil in Comparison

When you take a comparative look at backsliding states worldwide, you encounter all sorts of proposals for enhancing democratic resilience.

Regarding the courts, in Poland a central proposal is to switch from completely centralised constitutional review to decentralised review, based on the view that a decentralised system will be harder for any government to take over. Of course, Brazil already has a form of decentralised review. That brings challenges for the functioning of the system but might also provide protection. The major challenge instead might be to improve the collective functioning of the Supreme Federal Court in particular.

Possible options to consider might include:

- establishing specialised chambers, which exist in a variety of other supreme courts worldwide, especially constitutional chambers, and has been raised in India recently;
- o reforms on appointments in the US context the scholar Amal Sethi has proposed the establishment of a specialised office for federal judicial appointments to ensure that more state offices and actors are involved in appointments and to help ensure that consensus candidates are generally nominated and appointed to the Supreme Court;¹³ and
- o possibly re-thinking the Supreme Court's role as a court of original jurisdiction for trying politicians. Could that be moved to a specialised chamber or even a separate institution?

¹² See Lech Garlicki and Marta Derlatka, 'Constitutional Review in the Abusive Constitutionalism (Continuation, Corruption or Disappearance?)' in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court:* A View from Europe (Routledge, 2023) 178

¹³ See Amal Sethi, 'Sub-Constitutionally Repairing the United States Supreme Court' (2023) 52 *Common Law World Review* 128, cited in Daly, 'Constitutional Repair' (n 2) 33.

As regards political institutions, ideas in the USA to enhance resilience include Rick LaRue's proposal of a major constitutional amendment to establish a 'Bill of Structures' in the Constitution.¹⁴ This would include an obligation to vote as well as a right to vote, replacement of the Electoral College by a national popular vote, and congressional term limits.

In Brazil perhaps there is a different set of priorities:

- o reforms to address fragmentation in the political party system, including possibly returning to the idea of thresholds for entering Congress;
- o reforms to prevent anti-democratic leaders using parties as vehicles;
- regulating military figures standing for election-although I know that would be very tricky;
- o looking at regulating internal party democracy; and
- o a fuller constitutional and legal framework to govern impeachment processes.
- In forthcoming research, Desiree Salgado also even talks about the need to reform the physical structure of Brazil's parliaments, given that she sees the current prevalent 'classroom' style as hindering debate and deliberation among elected representatives.¹⁵

3.2 Bigger Reform Ideas

Bigger ideas for reform include adding more features to constitutions. In forthcoming research Ros Dixon and David Landau suggest two possibilities:¹⁶

- Setting different rules for amending different parts of the Constitution. So e.g. provisions on courts or fundamental rights can be made the hardest to amend.
- Using different kinds of delay in decision-making. You might require two successive congressional majorities to approve a constitutional amendment, with elections in between. Or in Sweden the opposition can delay ordinary laws affecting fundamental rights for up to one year.¹⁷

3.3 Thinking Beyond Constitutional Design - Addressing Big Tech

Beyond these design issues, how do we address the elephant in the room? I'm referring to the fundamental issue of how Big Tech is distorting politics here in Brazil and around the world.

Again, the Supreme Federal Court in Brazil has gone farther than courts and institutions in the rest of the world in confronting Elon Musk and Twitter over the use of that platform to harass office-holders and intimidate institutions. In Australia the government has taken the lead by introducing legislation banning social media for children under 16. The aim is to shift the responsibility from parents and schools back to the Big Tech companies.

But this kind of minimal regulation puts single regulatory institutions like the courts or the Information Commissioner in Australia in a very difficult position. And it focuses on constitutionalism as merely a weak constraint on the excesses of Big Tech's power. So I want to raise three

¹⁴ Rick LaRue, We Love the Bill of Rights. Can We Like a Bill of Structures? (2022) 21 *Election Law Journal.: Rules, Politics, and Policy* 308; cited in Daly, 'Constitutional Repair' (n 2) 32.

¹⁵ Eneida Desiree Salgado, 'Re-thinking Legislatures' in Tom Gerald Daly and Anna Dziedzic (eds), *Research Handbook on Constitutions and Democracies* (Edward Elgar Publishing, forthcoming).

¹⁶ Rosalind Dixon and David Landau, 'On Constitutional Design and Democratic Resilience' in Daly and Dziedzic (eds), *Research Handbook* (n 15).

¹⁷ Sumit Bisarya and Madeleine Rogers, *Designing Resistance: Democratic Institutions and the Threat of Backsliding* (International IDEA, October 2023) 78.

further possibilities that would pursue digital justice and digital constitutionalism rooted in a fuller recognition of the reality of Big Tech and a rebalancing of power between Big Tech and ordinary citizens.

- Oversight of design social media and apps are designed to be addictive. Social
 psychology literature sets this out in detail. We regulate other addictive products like
 alcohol or tobacco, so why not regulate how social media and smartphones are designed.
- Deliberative practices oversight could be made more robust and transparent by mandating by law more citizen and expert involvement in the governance of Big Tech. We already have the model of workers sitting in governance mechanisms for companies in countries like Germany. This could be one more way to prevent Big Tech from capturing regulatory processes. Because current systems like Meta's court and associated processes barely deal with a tiny percentage of the problems that arise.
- o Digital benefit-sharing a more fundamental change would be to require Big Tech companies to share their profits with the public. So much of Big Tech's success for the past 2 decades has been based on data theft. This idea is inspired by a project I worked on many years ago about benefit-sharing for Indigenous communities where there is extractive activity like mining on their land. We now have UN, Inter-American and often national standards requiring that if you are mining on Indigenous lands you have to share a portion of your profits with them. So here you have Big Tech and social media as another extractive activity where our data has been stolen for decades. And generative AI is making this worse. Large Learning Models (LLMs) are being trained through comprehensive breach of copyright.
- And in so many countries worldwide there is little regulation, because of lobbying of politicians by Big Tech. What we see in the USA this year in the intertwining of Big Tech power and Government Power is just revealing dynamics that are happening in the dark in most states. So to achieve digital benefit-sharing we would need more robust regulation of lobbying itself. That is no easy task but the technical possibility is right there in front of us.

Conclusion: The Importance of Collaboration and Solidarity

I want to finish by emphasising the importance of collaboration and solidarity in addressing these challenges. We need more cross-country discussions, especially where comparison is very rare. We need scholars and practitioners to collaborate more, nationally and internationally. And that's why conferences like this are so important. We can only move forward by working together. That doesn't mean we always have to agree.

I went to an exhibition of the artist Manuel Messias' work in São Paulo two weeks ago, and I was struck by a painting called 'Nossa Lagrima é Sua'. It reminds us that your challenges in Brazil are the world's challenges. Your successes will help the world in its fight for democracy. The world has so much to learn from Brazil, and Brazil has so many friends around the world who stand with you and care deeply about your future and our shared future.

Thank you for listening to me, *muito obrigado*.

¹⁸ 'BENELEX – Benefit-sharing for an equitable transition to the green economy: the role of Law', led by Elisa Morgera and funded by the European Research Council.

