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Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro

Abstract: On 28 October 2018 Jair Bolsonaro, a pro-dictatorship authoritarian candidate, won the presidential elections in Brazil with 55% of the vote. His election marks, not the beginning of a democratic crisis for Brazil, but the punctuation and intensification of a process of decay that has affected the country's democratic system for some time. How do we characterise democratic decay in Brazil from a global perspective? In recent years numerous states have fallen to a form of authoritarian populism, which has led public lawyers to analyse how public law is 'weaponised' to incrementally hollow out democratic rule, as well as how public law can act as a bulwark against creeping authoritarianism. In states such as Hungary and Poland anti-democratic governments have used law as part of a multi-step 'masterplan' to subvert democracy, while in others, such as the USA the picture is more scattered and diffuse, although abuse of law – in the form of extreme gerrymandering and voter suppression, for instance – is also present. Brazil presents an even more complex picture which highlights how democratic decay can arise as a result of multiple forms of populism, different strains of anti-democratic élitism, a constitutional system suffering significant design and implementation flaws, and the lingering legacy – and re-assertion – of military power in politics. More fundamentally, the Brazilian context underscores the highly contested nature of liberal democracy itself, and how the Constitution can become the battleground for competing – if not irreconcilable – visions of state and society.

Introduction: The *Sui Generis* Nature of Democratic Decay in Brazil

On 28 October 2018 Jair Bolsonaro, a pro-dictator authoritarian candidate, won the presidential elections in Brazil with 55% of the vote. His election marks, not the beginning of a democratic crisis for Brazil, but the punctuation and intensification of a process of decay that has affected the country's democratic system for some time.

This article seeks to provide an account of this process of democratic decay in Brazil, and how it differs from decay elsewhere. In recent years numerous states have fallen to a form of authoritarian populism, which has led public lawyers to analyse how public law is 'weaponised' to incrementally hollow out democratic rule, as well as how public law can act as a bulwark against creeping authoritarianism. In states such as Hungary and Poland anti-democratic governments have used law as part of a multi-step 'masterplan' to subvert democracy, while in others, such as the USA the picture is more scattered and diffuse, although abuse of law – in the form of extreme gerrymandering and voter suppression, for instance – is also present. In each case we see incremental degradation of both the 'structures' of democracy, such as courts and free media, and the 'substance' of democracy, such as public faith in democratic rule and the willingness of politicians to play by the 'rules of the game' and act in the public interest.

Brazil presents an even more complex picture which highlights how democratic decay can arise as a result of multiple forms of populism, different strains of anti-democratic élitism, a constitutional system suffering significant design and implementation flaws, and the lingering legacy of military

power. Over a decade of what was often termed left-wing populist governance, under Presidents Lula and Dilma, is viewed in some quarters as having produced not only a revenge of the élites in the “abusive impeachment” of Dilma Rousseff, but also a wider right-wing populism, and an even wider disenchantment with the political system, which has propelled Bolsonaro to the presidency. More fundamentally, the Brazilian context underscores the highly contested nature of liberal democracy itself, and how the Constitution can become the battleground for competing – if not irreconcilable – visions of state and society.

The paper proceeds in five parts. Part I briefly defines four key terms used in the article: populism; democratic decay; liberal constitutional democracy; and self-sustaining democracy. Part II, which is the core of the article, analyses the diffuse decay of Brazil’s democratic system up to the holding of the presidential elections in October 2018, with the impeachment of President Rousseff in 2016 as a focal point in a much broader pattern. Part III addresses the significance of Bolsonaro’s victory in the presidential elections, highlighting his long-stated antipathy to liberal democracy and the accompanying rise of a large far-right party in his image, the election of a large number of military candidates to political office, renewed talk of adopting a new Constitution, and serious deficiencies in the fairness of the elections themselves. The conclusion sets out a brief reflection on the future of Brazilian democracy.

I Defining Our Terms

It is crucial to first define key terms used in this paper, in order to provide clarity for the discussion that follows. These are: populism; democratic decay; liberal constitutional democracy; and self-sustaining democracy.

A Populism

Populism is one of the most common – and misused – concepts used to analyse the global phenomenon of political movements and leaders that appear fundamentally opposed to liberal constitutional democracy.¹ This section aims to provide some clarity on the varying definitions of populism and highlights the crucial distinction between authoritarian populism and populism rooted more solidly in a democratic critique of social injustice and élite power.

Cas Mudde offers a rather inclusive basic definition of populism, as

a thin-centered ideology that considers society to be ultimately separated into two homogenous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite,’ and which argues that politics should be an expression of the *volonté générale* (general will) of the people.²

Taking a global view, Pippa Norris provides two key distinctions. First, populism is best viewed as a governing style with three defining features: an insistence that popular sovereignty and majority rule are the valid basis of political authority; challenging the legitimacy of the establishment (broadly

¹ See e.g. D Landau, ‘Populist Constitutions’ (2018) 85 *The University of Chicago Law Review* 521; C Mudde, ‘Are Populists Friends or Foes of Constitutionalism?’ (The Foundation for Law, Justice and Society, 2013); J-W Müller, *What Is Populism?* (Penguin UK, 2017); P Norris, ‘Is Western democracy backsliding? Diagnosing the risks’ (2017) 28(2) *Journal of Democracy* 1; R Howse, ‘Populism and Its Enemies’. Workshop on Public Law and the New Populism, Jean Monnet Center, NYU Law School, 15-16 September 2017; and Populists and Autocrats: The Dual Threat to Global Democracy. Freedom in the World 2017 (Freedom House, February 2017).

² C Mudde, ‘The Populist Zeitgeist’ (2004) 39(3) *Government and Opposition* 541, 543.

understood as those holding economic, political, and cultural power); and often is driven by a (sometimes self-proclaimed) outsider who claims to speak for ‘the people’.

Second, not all populist leaders are authoritarian. Norris, like Mudde and Rovira Kaltwasser,³ observes that some populist leaders – the likes of Donald Trump, Turkey’s Recep Tayyip Erdoğan, or Hungary’s Viktor Orbán – engage in nativist rhetoric, fear-mongering, and espouse authoritarian values downplaying the importance of the individual, placing primacy on a strictly ordered society and strict conformity to conventional norms, such as in the spheres of the family, religion, and gender roles (even where they do not conform to these ideals), and exhibiting hostility to checks on executive power, whether internal (e.g. courts) or external (e.g. international organisations). As Norris puts it

Populism undercuts the legitimacy of the checks and balances on executive power in liberal democracies, thereby leaving the backdoor ajar, and turning off the burglar alarm, protecting citizens from strong leaders advocating authoritarian values attacking the heart of liberal freedoms, social tolerance, and cosmopolitanism.⁴

Other populist leaders and movements, such as Bernie Sanders in the USA or Podemos in Spain, espouse anti-élitist but progressive platforms. Rob Howse argues for a clear distinction between ‘good’ populism and ‘bad populism’:

Good populism [like ‘bad’ populism] entails a claim against the elites, but the claim is a pluralist, not an antipluralist one. It is not a demand for popular hegemony but a critique of the underinclusiveness and underrepresentation of (large elements of) the “people” in a political system dominated by entrenched elites. Good populism seeks a polity where decisions are made for the good of all, not a minority; but “all” includes even the interests of the elites. (...) Bad populists will take aim at minority rights, they will engage in actions such as arbitrary seizure or nationalization of the property of the “elites”, punitive taxes, deportation of foreign workers, and so on. (...) The policies of good populists will be consistent with inclusion and pluralism-on the economic side, as Rodrik suggests, these would be New Deal-like initiatives that tax and regulate the wealthy, large businesses, but all the while allowing them to participate and continue to thrive in the polity.⁵

Although Howse’s analysis is a theoretical critique pitched toward the US context, it has global resonance. In particular, it resonates with valid criticisms of (and significant evidence of) serious corruption among political élites in states such as Brazil and South Africa.⁶

The discussion in this article adds to this complexity. Brazil demonstrates that populism is no monolith: a decade of left-wing populist government (and declining economic fortunes) have led to the emergence of what is perhaps best described as a far-right backlash that contains features of both élitism and populism. The Brazilian context also shows that we cannot always make simple demarcations between ‘good’ and ‘bad’ populism, in their relationship to the deterioration of democratic governance. Successive Workers’ Party (PT) governments, even if understood as falling largely in Howse’s ‘good’ sense – to the extent that they espouse policies based on economic redistribution and inclusive governance – are far from blameless in the deterioration of democracy, as discussed below. However, it is clear that the form of far-right populism represented by president-

³ C Mudde & C Rivera Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press, 2017) 34.

⁴ P Norris, ‘Is Western democracy backsliding? Diagnosing the risks’ HKS Working Paper No. RWP17-012 (March 2017) 14-15.

⁵ Howse, ‘Populism and Its Enemies’. Workshop on Public Law and the New Populism, Jean Monnet Center, NYU Law School, 15-16 September 2017 3.

⁶ See B Magyar, *Post-Communist Mafia State. The Case of Hungary* (CEU Press, 2016); and H Bhorat, M Buthelezi, I Chipkin, S Duma, L Mondli, C Peter, M Qobo & M Swiling, *Betrayal of the Promise: How South Africa is Being Stolen* (State Capacity Research Project, May 2017).

elect Jair Bolsonaro (who is far from alone in the political scene) represents a worldview that is far more categorically antithetical to liberal democratic governance.

B Democratic Decay

In this paper the term ‘democratic decay’ is used as an umbrella term for a variety of concepts which all, in different ways, focus on the creeping deterioration of democratic rule in states worldwide. Here, the summary definition of democratic decay is the *incremental degradation of the structures and substance of liberal constitutional democracy*. If we home in on each aspect of this definition, the broad contours of the phenomenon come into sharper focus.

‘Incremental’ refers to the subtle, step-by-step hollowing out of democratic governance. Huq and Ginsburg use the ‘boiling frog’ analogy to emphasise that contemporary threats to democracy are often not obvious until they are well advanced.⁷ The incrementalism of democratic decay is perhaps best captured by the philosopher Derek Parfit’s interesting thought experiment on transformation:

Suppose that a scientist were to begin replacing your cells, one by one, with those of Greta Garbo at the age of thirty. At the beginning of the experiment, the recipient of the cells would clearly be you, and at the end it would clearly be Garbo, but what about in the middle? It seems implausible to suggest that you could draw a line between the two—that any single cell could make all the difference between you and not-you. (...) There is no simple answer—it is a matter of degrees.⁸

The term ‘structures’ in the thumbnail definition of democratic decay above refers to democratic institutions. It is clear that in a range of states authoritarian-leaning governments, albeit democratically elected, have actively rolled out a ‘masterplan’ to hollow out democratic structures vital to limiting government power and holding it accountable – including courts, media, and civil society organisations – and to entrench themselves in power for the long term. As Kim Lane Scheppele argues in her work on ‘autocratic legalism’ and ‘rule of law backsliding’, Hungary is perhaps the paradigmatic case, but its trajectory has been preceded by states such as Venezuela, and is now being emulated in states such as Poland and Romania.⁹ Landau has used the term ‘populist constitutionalism’ to capture this practice, describing it as “the employment of constitutional change by populists to carry out three functions: deconstructing the old institutional order, developing a substantive project rooted in a critique of that order, and consolidating power in the hands of populists.”¹⁰

In other states we see, not a masterplan, but a form of reactionary, opportunistic undermining of democratic structures by political actors — as seen in South Africa under former President Zuma, where attacks against democratic organs, such as the Constitutional Court or anti-corruption investigators, tended to be haphazard, somewhat unplanned, and focused on the perceived enemy of the moment.¹¹ Developments in the USA under the Trump administration also appear to follow this more haphazard and diffuse pattern. Although sustained attacks on the structures of democratic rule

⁷ AZ Huq & T Ginsburg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Review* 95, 130.

⁸ This text is from an interesting review of Parfit’s work, see L MacFarquhar, ‘How to Be Good’ *The New Yorker* 5 September 2011 <https://bit.ly/2hKHLi6>. The original work is D Parfit, *Reasons and Persons* (Oxford University Press, 1984).

⁹ See KL Scheppele, ‘Autocratic Legalism’ (2018) 85 *The University of Chicago Law Review* 545; and L Pech & K Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

¹⁰ See: D Landau, ‘Populist Constitutions’ (2018) 85 *The University of Chicago Law Review* 521.

¹¹ See TG Daly, ‘Preventing ANC Capture of South African Democracy: A Missed Opportunity for Other ‘Constitutional Courts?’’ I-CON conference, 5-7 July 2016. Panel on ‘Courts, Constitutions & Democratic Hedging’.

are clearly evident at the state level, in the form of extreme gerrymandering and voter suppression¹² (see e.g. Stephanopoulos 2018), it is increasingly evident that it is possible to seriously undermine the legitimacy of democratic institutions without engaging in any formal legal assault.¹³

The term ‘substance’ in the thumbnail definition of democratic decay above refers to the ‘soft matter’ of democratic governance, including public faith in democratic rule and the willingness of political actors to play by the rules of the game and to act in the public interest. Even analyses strongly focused on ‘masterplan’ exercises in degrading or ending democratic governance, such as ‘autocratic legalism’, ‘constitutional retrogression’ or ‘constitutional capture’, remain cognisant of the fact that these processes are couched in a wider socio-political context.¹⁴ This strain of decay is discussed by various scholars under rubrics including ‘democratic deconsolidation’ and ‘constitutional rot’.¹⁵

Democratic decay therefore works as a sort of ‘meta-concept’ that relates not only to express executive attacks on the structures of democratic government, but also more diffuse undermining of democratic structures by a variety of other political actors, and to the wider and longer-term processes that undermine democratic systems, such as declining faith in democracy and a declining willingness of politicians to ‘play by the rules of the game’.

The Brazilian context, as discussed below, emphasises the need for an appreciation of threats to democratic governance that does not focus predominantly on executive-led attacks on the democratic system; particularly by authoritarian populist governments. In Brazil we see democracy undermined not only by the executive — if one accepts that impeachment of President Rousseff in 2016 constituted a ‘constitutional coup’¹⁶ — but also a highly independent yet corrupt and self-serving judiciary and a problematic Supreme Court, some judges of which have close ties to political actors. We also see a diffuse deterioration of the ‘substance’ of democratic rule and a re-emergence of the military as a politically powerful actor.

C Liberal Constitutional Democracy

Of course, one of the biggest sticking points in defining ‘democratic decay’ and identifying threats to democracy is the meaning of ‘democracy’ itself. It is the “quintessentially contested”¹⁷ concept of our age and one that perennially evades any full consensus on its conceptual coordinates. It is not possible to capture that debate here. It is perhaps sufficient to emphasise that the term ‘liberal constitutional democracy’ is employed to capture the complexity of our prevailing understandings of ‘true’ democratic governance, and also to draw out the different flanks on which it is suffering decay and attack.

Contemporary understandings of democracy focus not only on giving effect to the democratic will through elections and other mechanisms such as referendums, but also assume a commitment to core liberal tenets such as judicial independence and protection of minority rights, and a commitment

¹² See e.g. NO Stephanopoulos, ‘The Causes and Consequences of Gerrymandering’ (2018) 59(5) *William & Mary Law Review* 2115.

¹³ GP Magarian, ‘Forward into the Past: Speech Intermediaries in the Television and Internet Ages’ (2018) 71(1) *Oklahoma Law Review* 237

¹⁴ See Scheppele, ‘Autocratic Legalism’ and Pech & Scheppele, ‘Illiberalism Within’ (n 9); Huq & Ginsburg, ‘How to Lose’ (n 7); and J-W Müller, ‘Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission’ in C Closa & D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

¹⁵ See R Foa & Y Mounk, ‘The Danger of Deconsolidation: The Democratic Disconnect’ (2016) 27(3) *Journal of Democracy* 5; and J Balkin, ‘Constitutional Crisis and Constitutional Rot’ (2017) 77 *Maryland Law Review* 147.

¹⁶ See G Lins Ribeiro, ‘The Brazilian Political Conundrum’ (2016) XLVII(3) *LASAForum* 12.

¹⁷ G O’Donnell, ‘The Perpetual Crises of Democracy’ (2007) 18 *Journal of Democracy* 5, 6.

to constitutionalism or the rule of law (often used as synonyms despite conceptual differences). This thick conception of democracy, expressed as ‘liberal constitutional democracy’ (e.g. Scheppele, Daly¹⁸) or ‘constitutional liberal democracy’ (e.g. Huq and Ginsburg¹⁹), reflects the manner in which liberalism, constitutionalism, and democracy have become tightly conceptually braided in recent decades, especially since the global ‘third wave of democratisation’ from the 1970s onward. Ginsburg and Huq, for instance, describe constitutional liberal democracy as a democratic system that, at minimum, includes:

political rights employed in the democratic process, the availability of neutral electoral machinery, and the stability, predictability, and publicity of a legal regime usually captured in the term “rule of law.”²⁰

Huq and Ginsburg's use of the term reflects their understanding that a thin procedural conception of democracy based on elections is insufficient and also that ‘liberal democracy’ is an incomplete label in that it tends to elide the outsized role that constitutional law and constitutionalism have increasingly played in our prevailing understandings of ‘true’ democracy. The latter is evidenced in the triumph in recent decades of ‘thicker’ conceptions of democracy and the ‘constitutionalisation’ of democracy, as bills of rights have grown progressively longer and constitutions have become more prescriptive regarding the functioning of democratic institutions.²¹

That said, any monolithic or universal understanding of what liberal constitutional democracy means has come under increasing attack from different fronts. One is the emergence in Andean states of a conception of ‘post-liberal’ constitutional democracy, which proclaims a new social compact and an experimental ‘new constitutionalism’ tailored to local needs, but which has in some states, such as Venezuela, merely proved to be a cover for the concentration of power in the executive.²² On another flank, liberal democracy is openly derided by governments in states such as Poland and Hungary, which respectively refer to ‘conservative democracy’ and ‘illiberal democracy’ and which would still lay claim to being constitutional democracies.²³

Third, these specific developments at their core tend to speak to the wider re-assertion of a conception of democracy that places much greater emphasis on majority rule, with a more dyadic relationship between the government and the electoral majority, sidelining other sites of governance power, and evincing a particular distaste for counter-majoritarian mechanisms such as rights and courts, at both the national and international levels. Importantly, these are not presented as alternatives to democracy itself, and do not operate as traditional dictatorships. In many states degradation of the democratic system has been explained away as simply legitimate constitutional change, taking power back from ‘élites’ (including law as a form of elite power), or the achievement of a *more democratic* system of governance. In Brazil, we see again a more complex pattern of democracy being rendered synonymous with chaos and lawlessness, and the need for a strong leader to bring order back to the state.

D Self-sustaining Democracy

¹⁸ TG Daly, ‘Democratic Decay in 2016’ in *Annual Review of Constitution-Building Processes: 2016* (International IDEA, 2017); and Scheppele, ‘Autocratic Legalism’ (n 9).

¹⁹ AZ Huq and T Ginsburg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Review* 95.

²⁰ Huq and T Ginsburg, *id.* at 108.

²¹ See e.g. S Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 *Georgetown Law Journal* 961, 967.

²² See e.g. R Uprimny, ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’ (2010-2011) 89 *Texas Law Review* 1587.

²³ See eg ‘Justice Minister Defends Hungary’s “Conservative Democracy”’, *Euractiv*, 21 April 2014 <http://hungarytoday.hu/news/euractiv-justice-minister-defends-hungarys-conservative-democracy-78848>.

Perhaps the clearest test for whether a given suite of developments present a threat to democracy is whether they close off the possibility of genuine political competition and alternation in government. Kim Scheppelle in her work has teased out the relationship between ‘liberal constitutionalism’ and ‘democratic constitutionalism’, emphasising that a true democracy must be a ‘self-sustaining’ system where genuine electoral competition continues and government is not held by one political party or group. She emphasises that liberal constitutionalism and democratic constitutionalism are conjoined in contemporary democratic practice and thought:

Democratic constitutionalism [honors] democracy by channeling it through institutions that would enable it to be self-sustaining. Liberal constitutionalism [honors] the rights of individuals by setting limits on what governments could do in the name of majorities and requiring that the institutions of a democratic state remain accountable and limited. Democratic and liberal constitutionalism put democratic electorates in charge of their own destiny, with political power controlled and checked in ways that would guarantee the continued respect for individuals and their ideas about self-governance.²⁴

...

In its simplest form, a constitutional commitment to self-sustaining democracy prohibits an elected leader from simply abolishing future elections. In its more complicated form, a constitutional commitment to self-sustaining democracy requires that leaders be prohibited from hampering the institutional prerequisites for free and fair elections, among which are a pluralistic media, a range of effective parties, an independent judiciary, recognition of a legitimate and loyal opposition, neutral election officials, a system of representation that does not unduly dilute the powers of minorities, and legally accountable police and security services, as well as a free and active civil society—all of which should have constitutional protection for a democracy to be considered self-sustaining. In its even more substantive varieties, democratic constitutionalism is bound to honor what democratic publics should want if they were able to follow liberal theoretical commitments through from beginning to logical end point. Starting from liberal premises, it is possible to construct the arguments for both constitutionalism and democracy together.²⁵

In many states suffering democratic decay, the attack on self-sustaining democracy has come in the form of amendments to electoral laws, in the form of extreme gerrymandering, the possibility to count spoiled ballots, and other measures. However, again Brazil presents a different case, discussed below, where competition exists in the form of the electoral process itself but the impeachment of President Rousseff may demonstrate a different avenue for certain political powers to entrench themselves in power, and where the election of Bolsonaro to the presidency has raised concerns regarding intensifying degradation of the system for holding free and fair elections.

II Understanding Democratic Decay in Brazil Until 2018

Brazil clearly provides a challenging testing ground for the definitions of populism, democratic decay, liberal constitutional democracy and self-sustaining democracy set out in the above section, especially regarding the aim of better understanding, from a comparative perspective, the current crisis of Brazilian democracy centred on the election of Jair Bolsonaro as president. At every turn, the Brazilian context reminds us that identifying democratic decay is difficult, that assessments cannot

²⁴ Scheppelle, ‘Autocratic Legalism’, *supra* note 9, at 560.

²⁵ *Id.* at 558.

be based on superficial analysis, and that what democracy means, and who ‘owns’ the democratic system, are far from settled questions.

This section begins an analysis of democratic decay in Brazil by briefly recounting Brazil’s complex relationship with democratic rule, narrating the democratic crisis occasioned by the impeachment of President Dilma Rousseff in August 2016, and then relating how this episode appears to speak not only to long-established fundamental fault-lines in Brazil’s post-authoritarian democratic system since 1985, but also forms part of a wider breakdown in political norms underpinning democratic governance.

A Brazil’s Complex Relationship with Democratic Rule

To understand democracy and constitutionalism in Brazil, it is vital to understand that the state has oscillated between democratic and authoritarian rule throughout the twentieth century. Oligarchic government during the First Republic (1889-1930) was displaced by revolution ushering in the Second Republic (1930-1937) and a new Constitution of 1934, followed by a *coup d’état* leading to President Getúlio Vargas’ semi-fascist ‘New State’ (*Estado Novo*) (1930-1945) and his personal ‘grant’ of a new Constitution of 1937. The state’s political development blurred the lines between democratic government and authoritarianism: Vargas was initially handed the presidency by the military following the *coup*, and ruled as a dictator from 1937-1945. However, he governed again as constitutionally elected president in the early 1950s (1951-1954)²⁶ during the fragile democratic period of 1945-1964, which introduced another Constitution in 1946.

A further military *coup d’état* by the military in 1964, to combat what they viewed as encroaching Communist subversion President João Goulart, led to two decades of direct military rule and systematic repression that left 10,000 Brazilian citizens in a form of exile, over 500,000 individuals ‘arrested, banished, exiled, removed from public office, forced into retirement, prosecuted or indicted,’²⁷ almost 500 killed²⁸ and hundreds ‘disappeared’ by the regime.²⁹ Two authoritarian constitutions, adopted in 1967 and 1969, wrote repression into the supreme law while seeking to maintain an outward appearance of democratic rule.³⁰ Political ‘opening’ (*abertura*) beginning in 1974 initiated a markedly slow transition to civilian rule managed at all times by the military,³¹ and underpinned in particular by a broad amnesty in the spirit of reconciliation—the Amnesty Law of 1979. With the adoption of the new democratic Constitution of 1988, the Brazilian republic had enacted no less than seven constitutions in its history.³²

Building the new democracy involved a certain act of forgetting the worst excesses of the military dictatorship. Despite making significant progress in consolidating democracy, assessments of Brazil’s democratisation process in the 2000s tended to view it as stalled and asymmetric, with serious inequality persisting, and lawlessness and violence worsening as the democratic period wore on.³³ After a series of centre-right governments in the 1980s and 1990s, the Workers’ Party (*Partido*

²⁶ See E Bradford Burns, *A History of Brazil* (3rd edn, Columbia University Press, 1993) 346–7.

²⁷ G Mezarobba, ‘Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil’ (2010) 13 *SUR – International Journal on Human Rights* 7, 10.

²⁸ D Politi, ‘Uncomfortable Truths’ *New York Times* 28 September 2012 http://latitude.blogs.nytimes.com/2012/09/28/brazils-truth-commission-gets-to-work/?_r=0.

²⁹ Mezarobba, ‘Legacy of the Dictatorship in Brazil’ 14.

³⁰ The 1969 Constitution, although technically an amendment significantly enhancing the repressive character of the 1967 Constitution, was a new constitution in all but name.

³¹ See, for example, N Schneider, ‘Impunity in Post-Authoritarian Brazil: The Supreme Court’s Recent Verdict on the Amnesty Law’ (2011) 90 *European Review of Latin American and Caribbean Studies* 39, 40–1.

³² 1891, 1934, 1937, 1946, 1967, 1969, and 1988.

³³ See e.g. P Kingstone, ‘Democratic Brazil Revisited’ (University of Pittsburgh Press, 2008).

dos Trabalhadores), under Luís Inácio ‘Lula’ Da Silva, claimed the presidency for the first time in 2003. Initially presiding over improved economic fortunes due largely to the commodities boom, after over a decade the economy began to enter serious difficulty.

B The Impeachment Crisis and Its Aftermath

Spatial constraints do not permit an exhaustive account of the impeachment crisis, but it is worthwhile to briefly describe the main timeline before proceeding. President Dilma Rousseff was elected in October 2010 after Lula’s two presidential terms since 2003. Although Rousseff was re-elected for a second term in the October 2014 elections, starting in January 2015, after years of economic growth under Lula (who benefited enormously from the global commodities boom) she was faced with sharply declining growth in the latter half of her first term and secured victory by a narrow margin, winning 51.6% of the vote against the centre-right candidate Aécio Neves, who won 48.4%.

Rousseff’s first term had also been marked by widespread protests. In July-August 2013 I was in Brazil as the first mass protests erupted nationwide, starkly revealing widespread public dissatisfaction with the Brazil’s political and democratic system, encompassing left-wing claims against enduring socio-economic inequality, middle-class and elite unhappiness with the democratisation of public power and perceived ‘radicalism’ of the left-wing government, and all bemoaning entrenched and widespread corruption.³⁴ Meanwhile, official judicial action against corruption—the so-called ‘Lava Jato’ probe—had begun in 2014 and began to target and threaten politicians across the government and Congress, and serious political scandals, including a bribery scandal at the State oil company, Petrobras, unfolded. Subsequent mass protests, in March and April 2015, instead of involving all strata of society, expressed the anger of the right-wing, educated classes—one survey indicated 82% of protesters to have voted for Neves in 2014.³⁵ Well-prepared and bolstered by election of the most conservative Congress since the return to democratic rule in 1985, these protests squarely aimed at Rousseff and her government, opening a channel for opposition politicians to seek her removal.

This is the background to the impeachment of President Rousseff on 31 August 2016. A number of initiatives had been taken from early in Rousseff’s second term as president to trigger the impeachment process. However, the first of 34 impeachment requests was not approved by Eduardo Cunha, President of the Chamber of Deputies, until 2 December 2015. The grounds for impeachment centred, not on the sort of bribery and other corruption accusations against politicians in the *Lava Jato* investigations, but rather, on accusations that Rousseff’s administration had engaged in *pedaladas*, that is, manipulations of fiscal accounts to cover up budget deficits, in violation of the Fiscal Responsibility Law. This was a well-established practice of successive governments by the time Rousseff ascended to the presidency.

The impeachment process was notable for its procedural irregularities and the requested intervention of the Supreme Court at various intervals to achieve some procedural corrections. These included two Supreme Court judgments on 8 and 17 December suspending the establishment of a special 65-member impeachment commission on the basis that the secret ballot used to elect its members was contrary to both the Chamber’s internal rules and constitutional law, requiring re-election of the commission by open ballot, and affirming the Senate’s power to reject the impeachment process even if passed by the Chamber. A new impeachment commission elected published its report recommending Rousseff’s impeachment on 6 April. The Supreme Court rejected

³⁴ See e.g. A Saad Filho, ‘The Mass Protests in Brazil in June-July 2013’ *Global Research Project* 15 July 2013 www.globalresearch.ca/the-mass-protests-in-brazil-in-june-july-2013/5342736.

³⁵ J Zaiden Benvindo, ‘The Mass Protests of March and April 2015 in Brazil: A Continuation of June 2013?’ *Int’l J. Const. L. Blog* 29 April 2015 <http://bit.ly/2sat11b>.

Rousseff's application to halt the impeachment process on 15 April. On 26 April a special impeachment commission in the Senate with 21 members was elected, mostly from the PMDB (who had renounced their coalition with President Rousseff's PT party the previous month). After Rousseff's Senate trial in the final week of August, presided over by Supreme Court Justice Ricardo Lewandowski, the decision to impeach Rousseff was passed on 31 August.

Vice-President Michel Temer was immediately installed as Rousseff's replacement, but the crisis, instead of dissipating, worsened. Significant contestation has surrounded the caretaker government's enshrinement of an austerity package in the Constitution, through the so-called PEC 55 amendment, which effectively freezes annual public spending, in real terms, at 2016 levels for the next twenty years. The Temer government has managed to comfortably pass further labour law and trade union law reforms in Congress in April 2017, with further plans to address pension reform and the minimum wage. However, it has struggled to pass central pension reforms and the austerity drive has been met with strong opposition, not least the first general strike in Brazil for over two decades in April.³⁶

In 2017 the incumbent president and cabinet, and leaders of the initial impeachment drive, appeared to look increasingly vulnerable. In April 2017 a federal court sentenced Eduardo Cunha, one of the leaders in the congressional push to impeach Rousseff, to more than 15 years imprisonment for corruption. The same month a Datafolha poll showed approval of the Temer government at 9%.³⁷ In May 2017 the Supreme Court ordered additional corruption investigations against 98 politicians, including one-third of Michel Temer's cabinet. In late May Temer authorised the army to deploy to Brasília as a large mass of protesters, numbering in the tens of thousands, marched on Congress to demand his resignation. However, in the face of severe criticism, he rescinded his executive order, which would have granted the army powers of arrest for one week, the following day.³⁸ Amid speculation of a military *coup*, the commander of the army took to Twitter to reassure the public: "our democracy is not in danger".³⁹ The event signalled the return of the military to the forefront of Brazilian politics

In early June 2017, Temer's trial for illegal campaign funding activities during the 2014 election campaign began before the Supreme Electoral Court (TSE), raising the possibility of his removal from office.⁴⁰ However, the Court dismissed the case by a bare majority of 4-3.⁴¹ (Temer's removal from office would have seen him temporarily replaced by Speaker of the Chamber of Deputies Rodrigo Maia, giving Congress thirty days to select a caretaker president until elections scheduled for late 2018). Although polls showed some 85% of the population favoured the passing of a constitutional amendment to permit early direct elections as the only way to select a president with a democratic mandate (as opposed to the indirect election process set out in the Constitution for instances of removal or incapacity of a president)⁴² the elections were not moved to an earlier date.

Attention instead centred on allegations as to the unfairness of the election have centred on the jailing of former President Lula da Silva as he awaits trial. In an April 2018 ruling, the Supreme Court held that Lula must be imprisoned before he can take a further appeal against a corruption conviction, effectively removing him from the presidential race. Leading constitutional lawyers such as José

³⁶ D Gallas, 'Brazil: President Temer's first year after impeachment' BBC News 12 May 2017 <http://bbc.in/2sVYHpw>.

³⁷ 'Governo Temer tem aprovação de apenas 9%, aponta Datafolha' O Globo 30 April 2017 <https://glo.bo/2qBFh7w>.

³⁸ S Romero, 'Their Government in Chaos, Brazilians Fear the Joke Is on Them' *New York Times* 26 May 2017 <http://nyti.ms/2sJzC0S>.

³⁹ "Nossa democracia não corre risco": see General Villas Bôas diz que clima no Exército é de "consternação e preocupação" GCN 25 May <http://bit.ly/2rc19II>.

⁴⁰ 'Temer depõe sobre corrupção e é julgado no TSE por crime eleitoral' O Globo 6 June 2017 <https://glo.bo/2rcaxcY>.

⁴¹ 'Brazil Court Dismisses Corruption Case Against President Temer' Rio Times 10 June 2017 <http://bit.ly/2smaoZA>.

⁴² 'Com Temer rejeitado, 85% defendem eleição direta, aponta Datafolha' Folha de s. Paulo 30 April 2017 <http://bit.ly/2qxDGzV>.

Afonso da Silva argued that the decision is unconstitutional in its failure to guarantee of the presumption of innocence, contained in Art. 5° LVII of the federal Constitution, and a Supreme Court decision issued in 2016.⁴³ The decision has been viewed, by some, as coloured by the context of serious fears of a military coup. As an April 2018 report offers:

General Eduardo Villas Boas, the commander of the Brazilian Army, warned that the military “repudiates impunity and respects the Constitution, social peace and democracy” in what was widely interpreted as a threat to potentially intervene if the Supreme Court declines to jail Lula. The armed forces are already deployed in the country’s former capital of Rio de Janeiro as part of a targeted operation against drug gangs, which in hindsight might be seen as symbolic muscle-flexing that signals its intent to play a more active role in domestic affairs⁴⁴

C The Absence of Any Clear ‘Masterplan’ to Dismantle Democracy

When our focus remains on the Brazilian impeachment crisis itself, it does not seem to fully fit within the framework of ‘democratic decay’ set out above, especially when analysed against a legal literature heavily focused on executive assaults against democratic rule,⁴⁵ Brazil’s impeachment appears to be a very different problem. This section canvasses various arguments against characterising Brazil’s current democratic crisis as ‘democratic decay’, before making the argument that various patterns suggest that democratic decay might be an appropriate label.

Perhaps most clearly, unlike the growing focus on populism as the central common feature across states worldwide suffering decay, on a superficial analysis of the impeachment crisis the narrative in Brazil tends to centre on concerns of élite capture of the democratic order. This is quite different from the increasingly common pattern worldwide where governments with the majority support of the electorate are voted into power on platforms that appear at odds with liberal constitutional democracy, or which actively promise to transform the state into a less liberal state, and which ‘weaponise’ public law, with reform and manipulation of constitutional law as a key tool, to do so—the “abusive constitutionalism” discussed above.

Of course, various observers argue that the impeachment of Rousseff constitutes a ‘soft coup’ – suggesting a ‘weaponising’ of the public law mechanism of impeachment as a means of achieving undemocratic ends, due to repeated failure at the ballot box. Indeed, Juliano Zaiden Benvindo has spoken of the “abusive impeachment” of Rousseff.⁴⁶ Adherents to the ‘coup’ argument point to the fact that the impeachment of President Rousseff was a “foregone conclusion”, that the actual impeachment debates tended to focus on extraneous matters, that the charges laid against Rousseff did not constitute a “crime of responsibility” as required under the Constitution, and that none of the charges against Rousseff were in fact proven.⁴⁷

Rousseff herself—albeit admittedly not an objective observer—has consistently referred to the impeachment as a ‘coup’. In a May 2017 interview, she explained the impeachment as a result of Eduardo Cunha’s ability to “exert hegemony over the democratic centre” as an ultraconservative of what she called the ‘far right’. Rousseff has claimed that the motive behind the impeachment was to

⁴³ ‘Parecer do jurista José Afonso da Silva contra prisão de Lula é protocolado no STF’ Migalhas, 2 April 2018 <https://bit.ly/2M1s7vk>. The Supreme Court decision is HC 126.292 (17 February 2016).

⁴⁴ A Korubko, ‘Is Brazil On The Cusp Of A Military Coup?’ Eurasia Future 4 April 2018 <https://bit.ly/2M23EWL>.

⁴⁵ See e.g. AZ Huq & T Ginsburg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Review* 95.

⁴⁶ See Zaiden Benvindo, ‘Abusive Impeachment? Brazilian Political Turmoil and the Judicialization of Mega- Politics’ Int’l. J. Const. L. Blog 23 April 2016.

⁴⁷ J Webber, *The Last Day of Oppression, and the First Day of the Same: The Politics and Economics of the New Latin American Left* (Haymarket Books, 2017) p.62.

stymie the ongoing *Lava Jato* anti-corruption investigations threatening Cunha and his allies, but that it also had wider motives:

The other part of the reason had to do with trying to bring Brazil economically, socially and politically into neoliberal policies, because we had blocked part of the neoliberal policies, which would transform the public budget into a budget empty of any social content. And this part, this was the most important part. It was strategic to draw part of the market, the media, the big Brazilian media, to support impeachment, because they were losing the hope of their programs becoming viable by democratic means. So they had to suspend democracy. But you can't suspend democracy like you might have suspended a military coup before. But they introduced exceptional measures into democracy. And one of these, which would be an exception in the United States and Brazil, would be impeachment without what is called a crime of responsibility. And that is equivalent to what in the U.S. Constitution is called high crimes and misdemeanors.⁴⁸

Yet, even if one sides with the view of the impeachment as a 'soft coup', it is hard to argue that Brazilian democracy has suffered outright breakdown. The Constitution remains in force, no parts of the Constitution have been formally suspended, democratic institutions including Congress and the courts remain in place (with the courts continuing the anti-corruption purge), and the public, media and academe remain free to voice their concerns, frustration and disagreement with government policy. Unlike the clear attacks on democratic structures, such as courts and the media, seen in many other states (from Poland to South Africa to Venezuela), in Brazil there has been no immediately obvious government scheme. The Temer government did not seek to pass any laws to interfere with the functioning of the Federal Supreme Court, for example, there has been no external political interference with the Court's functioning similar to Hungary, Poland, or Venezuela. The government did not issue significant threats against the judicial branch, or the Supreme Court, as seen in states such as South Africa.⁴⁹ There has been no barring of any political parties or legal interference with civil society organisations (violence against activists protesting government policy has continued but is a longstanding issue⁵⁰). With the exception of Temer's executive order in May, there has been no concerted legislative activity aimed at curbing the right to protest.

This is of course a far cry from the aftermath of the military *coup d'état* in 1964, which ousted the sitting president, João Goulart, by unconstitutional force. However, even then it was not until the military government's fifth Institutional Act of 1967 and successive constitutional reforms, including the quasi-new Constitution of 1969, that the democratic order was comprehensively hollowed out, through suspension of individual rights, active suppression of Congress, packing of the Supreme Court, and the installation of a form of 'show democracy' where many political parties were banned but a form of competition between political parties was permitted (albeit solely parties willing to avoid questioning of the fundamental legitimacy of military rule).

In contemporary Brazil there does not appear, overall, to have been any articulated or systematic plan to hollow out the democratic system. There was never any call by Temer and others to re-make the Brazil's liberal constitutional democratic order as a non-liberal order; unlike government calls for "conservative democracy" in Hungary and Poland, or "socialist revolution" in Venezuela. Indeed, the language used by Temer and allies is familiar neo-liberal language, common to governments in the US and Europe, for example. In particular, it is arguable that the PEC-55 amendment to enshrine an

⁴⁸ 'Full Interview with Dilma Rousseff on Her Ouster, Brazil's Political Crisis & Fighting Dictatorship' Democracy Now! 29 May 2017 <http://bit.ly/2r112Ns>.

⁴⁹ See Daly, 'Preventing ANC Capture of South African Democracy' (n 11).

⁵⁰ See 'Civic Freedom Monitor: Brazil', 8 September 2018, The International Center for Not-for-Profit Law (ICNL) <http://www.icnl.org/research/monitor/Brazil.html>.

austerity measure in the Constitution itself is comparable to constitutional amendments (and attempts at amendment in the US) enshrining a requirement to produce balanced budgets.⁵¹

In fact, to outside observers, the spreading net of the *Lava Jato* probe and the unhindered interventions of the Supreme Court might tend to suggest a well-functioning and independent judiciary. Temer's immediate *volte-face*, regarding calling in the army to face down protesters in Brasília in May 2017, might be said to suggest a government that still displayed a democratic sensitivity to criticism and some respect for the right to protest.

D Is This Simply a Continuation of Existing Patterns?

Discussing the Brazilian impeachment crisis with Brazilian scholars in the past years, the above issues have been raised time and again. A common refrain is that the impeachment crisis was simply a continuation of familiar patterns in Brazil's history of constitutionalism and governance. Clientelism and corruption in Brazil's politics, both before and after 1985, is nothing new. The politically powerful playing fast and loose with the Constitution (and law more widely), both before and after enactment of the 1988 Constitution, is nothing new (Indeed, some, such as Augusto Zimmermann, have gone as far as to say that post-1988 Brazil has been a state with a constitution, but "without constitutionalism". The current author views this as a serious oversimplification.⁵²) Nor is this the first impeachment crisis since Brazil's return to democratic rule—President Collor faced impeachment in 1992 (however, he resigned before the impeachment process concluded in the Senate).

Much of the present contestation in Brazil could also be characterised as simply a renewal and intensification of contestation that is hard-wired into the founding constitutional moment of 1988 itself, and the constitutional text that it produced. Due to various factors, including a maximalist drafting approach by Congress, a political context in which constitutional negotiations lacked 'any sort of political trust and credibility', and the radically different ideological backgrounds of the framers (especially concerning economic and fiscal matters), the text constitutionalises a vast array of matters that ordinarily would be left to legislation; 'hard-wires' certain policy preferences into the Constitution to remove them from the political arena; and contains significant internal contradictions.⁵³ The resulting text, with what has been called its 'open texture, programmatic norms and indeterminate provisions',⁵⁴ 'trivial details and unaffordable promises',⁵⁵ and dependence on ordinary legislation to put many of its provisions into effect, not only constitutionalised politics, but also set the scene for the 'judicialisation of politics'.⁵⁶

The Temer reforms might be characterised as simply an extension of a view of the 1988 Constitution since the 1990s, in certain political circles, as a poor co-ordinating device for effective governance, with amendment of the long provisions on economic and fiscal matters becoming a 'major orientation' in order to achieve the aim of effecting a full transition to a free market economy.⁵⁷

⁵¹ See e.g. M Azzimonti, 'The Political Economy of Balanced Budget Amendments' (2013) *Business Review* 11 <http://bit.ly/2skTfiu>.

⁵² A Zimmermann, 'Constitutions without Constitutionalism: The Failure of Constitutionalism in Brazil' in M Sellers & T Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (Springer, 2010).

⁵³ See LJ Alston, MA Melo, B Mueller & C Pereira, 'On the Road to Good Governance: Recovering from Economic and Political Shocks in Brazil' in E Stein, M Tommasi, CG Scartascini & PT Spiller (eds), *Policy Making in Latin America: How Politics Shapes Policies* (Inter-American Development Bank, 2008) 119.

⁵⁴ L Prado Verbicaro, 'Um Estudo Sobre as Condições Facilitadoras da Judicialização da Política no Brasil' (2008) 4 *Revista Direito GV* 389, 390.

⁵⁵ A Zimmermann, 'Constitutions without Constitutionalism' (n 52) 137.

⁵⁶ Prado Verbicaro, 'Judicialização da Política'.

⁵⁷ C Hübner Mendes, 'Judicial Review of Constitutional Amendments in the Brazilian Supreme Court' (2005) 17 *Florida Journal of International Law* 449, 453.

In its fundamentals, the debate could be boiled down to whether Brazil is to be a neo-liberal constitutional democracy, or a social democracy where the Constitution's talk of 'social justice' and long raft of social rights take precedence. This argument, although carried out on the specific terrain of Brazil's constitutional and democratic system, echoes debates in states worldwide regarding what counts as 'true' democracy and the democratic legitimacy of redistributing wealth. Indeed, Temer's attempt to convert the lack of a democratic mandate for such measures – that only an unpopular government can achieve these reforms – indicates a preference for what Mounk has called 'undemocratic liberalism' in states such as Greece under technocratic liberal government, i.e. a scenario where "elites are taking hold of the political system and making it increasingly unresponsive: the powerful are less and less willing to cede to the views of the people."⁵⁸ In the face of this government, analysts have begun speaking of 'good populism', drawing on the Harvard scholar Dani Rodrik's work (as Howse does in the discussion of good populism above), as a way of addressing an entrenched economic and political system that has "ultimately benefited castes of individuals and corporations operate within the system, to the detriment of the workers, the middle class, and ultimately the 'people.'"⁵⁹

Finally, the anti-corruption purge itself is most often compared to Italy's *Mani Pulite* ('clean hands') anti-corruption probe during the 1990s, which rocked the Italian political system to its core, leading to resignation or removal of most leading political figures, the disappearance or radical transformation of the country's major political parties established in the post-war era, the emergence of new political parties, the rise of the populist politician Silvio Berlusconi, and exacerbation of strong institutional tensions between the political and judicial branches of government. That episode in Italy (which has never quite reached a full resolution) has not commonly been characterised as democratic decay, as defined in this paper, but rather as the anomalous presence of widespread corruption in an otherwise advanced democracy.⁶⁰

All of these arguments have tended to suggest that what is happening in Brazil is, if not quite 'business as usual', at least deeply rooted in existing patterns that have long bedevilled Brazil's democratic system, and not necessarily indicative of a reversal of the overall positive trajectory of Brazil's democratic development since 1985. What becomes the crucial question, then, is whether recent and ongoing events are of a larger magnitude, order, and intensity and trajectory that indicates a serious negative shift in Brazil's democratic progress, which cannot be simply explained as a continuation of previous levels of dysfunction in the state's system of democratic politics

E Do we See Attacks on the Structures of Liberal Constitutional Democracy?

As discussed above, there is, at first glance, nothing in Brazil like the sorts of attacks on courts, the media, and civil society rights activists—achieved through constitutional enactments, law, and political force—in states such as Poland, Hungary, and South Africa, or Venezuela.

However, a closer look suggests that core structures of Brazilian democracy are under extreme stress. The impeachment crisis, and the ongoing potential for impeachment of a second president in quick succession, can be viewed as a degradation of the office of the presidency itself. If impeachment can be abused for political ends, it is hard to see how the presidency can operate in the manner envisaged under the 1988 Constitution, or in a state of 'democratic normality' where impeachment is utterly exceptional and is wielded in only the utmost good faith. Rather than bringing future presidents more strongly in line with the strictures of the Constitution, and law more broadly, it could well leave

⁵⁸ Mounk p.13

⁵⁹ M de Bolle, 'Bom populismo é um oximoro?' *Época* 19 April 2018. The translation is my own.

⁶⁰ See e.g. A Vannucci, 'The Controversial Legacy of 'Mani Pulite': A Critical Analysis of Italian Corruption and Anti-Corruption Policies' (2009) 1(2) *Bulletin of Italian Politics* 233.

them operating defensively, and hamstrung by the prospect of impeachment if their popularity falls or, worse, if their policies threaten entrenched political and economic élites.

The Federal Supreme Court has also appeared under threat of ‘capture’ to a greater extent than is commonly acknowledged, especially outside Brazil. The death of Justice Teori Zavascki in January 2017 allowed President Temer to appoint a political ally to the Court, Justice Alexandre de Moraes—a man who was serving as justice minister in the Temer cabinet and whose credentials for the position, in terms of objectivity and academic ability, have been questioned. As Zaiden Benvindo asserts:

His nomination is emblematic of the moment Brazil is going through and points to how the current government seems to be taking advantage of the Supreme Court’s institutional flaws and its soaring power to set up a political court. This is a critical moment in Brazilian democracy.⁶¹

Factor in the view that the President of the Supreme Court, Justice Gilmar Mendes, is also commonly viewed as a Temer ally,⁶² and the prospect of something closer to a ‘captured’ court becomes more plausible (if, at present, far from a certainty).⁶³ Again, this did not appear to be playing out according to any ‘master plan’ by the Temer government or its wider congressional support base. It is also important to bear in mind that the Brazilian Supreme Court functions in a much more atomised way than apex courts in other states, with much more autonomy for each justice and a stronger tendency toward significant decisions by individual justices even in the most important cases, with the result that it is harder to speak of the Court as a monolithic entity that is even prone to full capture.

However, in Brazil the clearest concerns do not focus on external attacks against the judiciary, but the activity of the judiciary itself. The leading constitutional scholar Conrado Hübner Mendes decries the dawn of a new era of “populist jurisprudence”, where judges – from the Supreme Court all the way down to the lower courts – have become players in the political game, offering personal and political views from the bench, ‘transcending’ the law, and often falling in line with public prosecutors and police agents. Hübner Mendes emphasises that, contrary to the expected role of the courts in moderating populism by safeguarding the separation of powers and protecting rights, the Brazilian judiciary has been infected by a cult of ‘personalism’, which vaunts the personality of the judge but which is wrapped in the impersonal language of justice.⁶⁴

In particular, the manner in which the *Lava Jato* anti-corruption probe has been conducted is seen by some as striking at the structures of Brazilian democracy and “legal order”. For instance, Boaventura de Sousa Santos offers that, unlike Italy’s *Mani Pulite* probe, the anti-corruption drive in Brazil has been rather one-sided, focused on the leaders of the Workers Party (PT):

The judicial system — supposedly the ultimate defender and guarantor of the legal order — has become a dangerous source of legal disorder. Blatantly illegal and unconstitutional judicial measures, a crassly selective persecutory zeal, an aberrant promiscuity in which media outlets are at the service of the conservative political elites, and a seemingly anarchic judicial hyper-activism — resulting, for instance, in 27 injunctions relating to a single political act (President Dilma’s invitation to Lula da Silva to join the government) —, all these bespeak a situation of legal chaos that tends to foster uncertainty, deepen social and political polarization and push Brazilian democracy to the edge of chaos. With legal order thus turned into legal disorder and democracy

⁶¹ J Zaiden Benvindo, ‘Brazil’s Increasingly Politicized Supreme Court’ Int’l J. Const. L. Blog 16 February 2017 <http://bit.ly/2r2azoL>.

⁶² See e.g. J de Souza, ‘Relator troca farpas com Gilmar e pede julgamento rigoroso de Temer e Dilma’ UOL 7 June 2017 <http://bit.ly/2sJpWU1>.

⁶³ It is worth noting here that Justice Gilmar Mendes is also President of the Supreme Electoral Court, which acquitted Temer in the Temer-Rousseff electoral corruption case on 10 June 2017.

⁶⁴ C Hübner Mendes, ‘Populispudência’ Época 27 April 2018 <https://glo.bo/2JXDSSV>.

being hijacked by the non-elected sovereign body, political and social life has become a potential field of spoils at the mercy of political adventurers and vultures.⁶⁵

Beyond the presidency and the judiciary, we could say that there is a much more diffuse attack on the Constitution itself as a constraint on the exercise of political power, and a stronger shift to ‘rule by law’ rather than ‘rule of law’, not only through the manipulation of constitutional mechanisms (i.e. impeachment) by political actors to achieve political ends without a democratic mandate, but also to fundamentally transform the very character of the Constitution through successive reforms. Indeed, Richard Albert has recently referred to the PEC-55 amendment in Brazil as possibly an example of “constitutional dismemberment”, which he defines as “self-conscious efforts to repudiate the essential characteristics of a constitution and to destroy its foundations.”⁶⁶ In the Brazilian context this relates to the Constitution’s commitment to the social state. However, Albert does not probe further into the wider manipulation of the Constitution that has set the scene for this “dismemberment”.

F Do we See Decay of the Substance of Liberal Constitutional Democracy?

Perhaps much more concerning again are negative trends regarding the substance of liberal constitutional democracy, which can be described as relating to individuals’ support for the entire democratic system; support for key institutions of liberal democracy (e.g. civil rights); willingness to pursue political causes through the extant political system; and openness to undemocratic government systems (e.g. military rule).

A number of signs point to serious degradation in public faith in Brazil’s democratic system. For instance, a poll in Brazil in September 2016 suggested that support for democratic governance has dropped to a mere 32% of the population.⁶⁷

Brazil’s ... support for democracy dropped from its highest level of 55% in 2009 to 32% in 2016, according to the Latinobarómetro poll. Confidence in political institutions and the judiciary has also decreased over the last six years, while only 9% of Brazilians believe that their country is governed for the benefit of the people. Temer himself also has very low approval ratings—14% in July 2016—indicating that Brazilians are unhappy with the government, their economic situation, and the way democracy works in the country.

These figures are stark. Indeed, that the high-point in support for democracy was 55% in 2009 is itself rather revealing, indicating that a very significant portion of the Brazilian public has long viewed democracy as not ‘delivering’ for them, despite efforts by successive PT administrations, under Lula and Rousseff, to target inequality and poverty. The figure had at least been stable for some years, still at 54% in 2015,⁶⁸ but the impeachment crisis appears to have tarnished the perception of the existing democratic political system as capable of delivering the stability, prosperity, and rights protection hoped for in the new political climate surrounding the democratic transition in the mid-1980s. In a country where seven people are killed every hour, and with a homicide rate six times that of the USA, nostalgia for the law and order under the military dictatorship of 1964-1985 is growing:

⁶⁵ B de Sousa Santos, ‘Brazil: Democracy on the Edge of Chaos and the Dangers of Legal Disorder’ *Critical Legal Thinking* 26 March 2016 <http://bit.ly/1UBwA9M>.

⁶⁶ R Albert, ‘Constitutional Amendment and Dismemberment’, Boston College Law School Legal Studies Research Paper No. 424 (April 2017); *Yale Journal of International Law*, Vol. 43 (2018, forthcoming).

⁶⁷ M Riethof, ‘Why Brazil’s Political Crisis Matters for Latin American Democracy’ *Global Observatory* 7 September 2016 <http://bit.ly/2olOIrH>.

⁶⁸ See A Ituassu, ‘A dialectic tradition: brazil’s re-democratization process and the country’s current political crisis’ <http://bit.ly/2rUPvTH>.

polls show popular support for a temporary military government rose from 35 per cent in 2016 to 43 percent in 2017,⁶⁹ and intensified from May 2018, as a nationwide truck strike over rising fuel prices has metastasised into protests against political corruption, increasing violence, and poor healthcare, education, and infrastructure.⁷⁰

Two developments appear related to this trend. One is the increasingly reflexive recourse to the Supreme Court to act as an arbiter in all cases, in a context where the political process has become increasingly unable to deliver solutions. This not only, for some, has the direct effect of politicising the Court, it also has led to what Juliano Zaiden Benvindo calls an “abusive judicial activism”, which, like “abusive constitutionalism”, tends toward erosion of the democratic order:

If the Supreme Court has been dubbed the institutional arbiter of the current political turmoil by trying to pacify conflicts, which might justify its activism, it has nonetheless been engulfed by the same political dynamics in which it is supposed to be intervening. Daniel Vargas, Professor at the Getúlio Vargas Foundation in Rio de Janeiro, has argued, for instance, that the Brazilian Supreme Court is not the medicine but rather a symptom of a disease that has spread throughout Brazilian democracy: We, Brazilians, always resort to the Supreme Court whenever we need a political or economic decision, which shows that “Brazilian democracy bleeds more and more.”⁷¹

This is (perhaps counter-intuitively) set against a wider cynicism regarding the judiciary as a whole, which has deep roots in the democratic era, and which goes far beyond perceptions of the highest judges as rather too close to politically powerful figures. William Prillaman, for instance, bemoaned Brazil’s “failed” judiciary in 2000 as corrupt and inefficient, utterly unaccountable, and subject to no external checks on its power, which had contributed to ‘democratic decay’ rather than democratic consolidation:

At the state and federal levels, Brazil demonstrated declining confidence in the courts [by 1999], increased cynicism about democracy and the rule of law, an increased tolerance for vigilante justice, a hardening of public attitudes that reflected a nearly complete lack of faith in the judiciary, and prominent sentiments that democracy was no real improvement over authoritarian rule.⁷²

The second trend is even more pernicious. In 2017 Jeffery Webber spoke of the political momentum in Brazil having increasingly shifting to “a rightwing, antiparty populism”.⁷³ This, the despair among swathes of the electorate regarding over a decade of rule by the Workers’ Party, and the imprisonment of former president Luis Inácio ‘Lula’ da Silva – barring his candidacy for the presidential elections – has resulted in Bolsonaro’s victory in the October 2018 presidential elections.

⁶⁹ M Lopes, ‘In Brazil, nostalgia grows for the dictatorship — not the brutality, but the law and order’ *Washington Post* 15 March 2018 <https://wapo.st/2JR2exr>.

⁷⁰ S Cowie and D Phillips, ‘Brazil faces calls for return to military dictatorship amid truckers’ strike’ 30 May 2018 <https://bit.ly/2H4LElj>.

⁷¹ J Zaiden Benvindo, ‘Abusive Judicial Activism and Judicial Independence in Brazil’ *Int. Comst. L. Blog* 22 December 2016 <http://bit.ly/2svtA6G>. Of course, concerns regarding the increasingly overweening power of the Supreme Court have been voiced since at least 2009, captured in Oscar Vilhena Vieira’s characterisation of Brazil as a ‘supremocracy’. O Vilhena Vieira, ‘Supremocracia’ (2009) 8 *Revista Direito GV* 441 (2009).

⁷² WC Prilliaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Greenwood Publishing Group, 2000) 76.

⁷³ Webber, *The Last Day of Oppression* p.64.

III From Democratic Decay to Democratic Survival? Bolsonaro's Victory in the 2018 Presidential Elections

Once the wider context and consequences of the Brazilian impeachment crisis are examined, there is a compelling argument that Brazil can be said to be suffering democratic decay, with familiar elements from the democratic decay framework set out at the start of the paper, including degradation of structures and substance of democracy, and a rise in authoritarian populist politics at odds with liberal constitutional democracy.

Jair Bolsonaro's victory in the October 2018 presidential elections itself poses further serious questions about the trajectory of democratic governance in Brazil and is accompanied by two developments that raise serious concerns. First is the entry of many military candidates to power. Second is renewed discussion of enacting a new Constitution. These are addressed in turn. As the purpose of this paper is to explain the contest of Bolsonaro's rise, the analysis below is relatively brief.

A Bolsonaro's Express Hostility to Liberal Democracy and the Rise of 'Bolsonarism'

Having long been a marginal figure in Brazilian politics, with a long career in Congress, from 2016 onward Jair Bolsonaro unexpectedly became the fastest-rising recent political star in Brazil and one of the country's most popular politicians. Running as the Social Liberal Party's presidential candidate, Bolsonaro began to come second only to Lula in polls of voter intention as the presidential elections of 2018 loomed closer. As Open Democracy noted in April 2017, he stood in polls of voter intention at 13.7% support against—less than half of Lula's 30.8%, but with a sharply rising trend against Lula's slow decline in support.⁷⁴ June 2018 polls showed that Lula's electoral power remained strong but that his removal from the presidential race had strengthened Bolsonaro's chances to win the election.⁷⁵

Known for 'plain talking' and presenting himself as a political outsider capable of reforming a corrupt and elitist political system (despite his long career in Congress), Bolsonaro is often likened to Donald Trump in the English-language press. However, his recorded utterances are far more alarming in many ways. Throughout his career he has issued statements indicating his support for torture, his antipathy to Brazil's minorities, including ethnic, religious, and sexual minorities, and extreme misogyny. Crucially, Bolsonaro is not only an apologist but an ardent admirer of the military dictatorship in power from 1964 to 1985. Indeed, as Webber notes, he dedicated his speech, when voting for the impeachment of Dilma in Congress, to Carlos Alberto Brilhante Ustra, chief of Brazil's secret police during the dictatorship⁷⁶—a man against whom strong allegations of torture and forced disappearance were made in the National Truth Commission's report of December 2014.⁷⁷ On the campaign trail he suggested that police officers should receive a bonus for every person they shoot, and has repeatedly called for the militarisation of Brazilian society.⁷⁸ His campaign has focused on bringing order to the state, by whatever means necessary.

In this sense, Bolsonaro presents a much more explicitly anti-democratic figure than the likes of Donald Trump or — across the political aisle — the Socialist Nicolas Maduro in Venezuela.

⁷⁴ PH Leal, 'Bolsonaro and the Brazilian far right' *DemocraciaAbierta* 24 April 2017 <http://bit.ly/2sMsAYq>.

⁷⁵ L Leme, 'Poll Update: Brazil's Uncertain Presidential Race' *Americas Society Council of the Americas* 14 June 2018.

⁷⁶ Ibid. See National Truth Commission (Brazil), *Relatório da Comissão Nacional da Verdade*, 10 December 2014 www.cnv.gov.br.

⁷⁷ See *Relatório da Comissão Nacional da Verdade*, 10 December 2014 www.cnv.gov.br.

⁷⁸ B Winter, 'What to Expect from Jair Bolsonaro' *Americas Quarterly* 9 October 2018.

However, during the campaign he managed to muddy the waters just enough to appeal to a broader swathe of the electorate repelled by his politics but eager for order and prosperity, offering statements that cut against his aversion to democracy; for instance, that he would be a “slave” to the Constitution if elected, and walking back statements describing the media as enemies.⁷⁹ However, his final speech before the vote returned to his central themes: hatred of minorities; fake news; closing down NGOs; and promising to imprison his opponent in the race, Fernando Haddad.⁸⁰ Longtime observers remain convinced that he is a serious threat to democracy:

Bolsonaro despises democracy, at least the version that has been practiced in Brazil over the past 30 years.

Over the years, Bolsonaro has repeatedly called for Congress to be closed, said the last military government’s biggest mistake was “to torture instead of kill,” and said that if elected president he would “start a dictatorship right away.” More recently, he has vowed to stack the Supreme Court with sympathetic judges. His distrust of civilian politicians means his Cabinet is likely to be composed mostly of former military men, aides say. Bolsonaro’s running mate, a recently retired general, has raised the possibility of a “self-coup,” in which the military would help the president secure greater powers, under certain circumstances.

Bolsonaro has softened his tone somewhat as the election draws closer, saying previous statements were “figures of speech” and that his views on democracy (as with the economy) have evolved. He said on the country’s most popular newscast Monday night that he will be a “slave” to Brazil’s democratic 1988 Constitution and govern with authority, though not authoritarianism. But there is simply far more evidence that suggests Bolsonaro, when faced with resistance, will ignore or trample democratic practices and norms to get his way.⁸¹

It must be emphasised here that Bolsonaro’s victory is not limited to the presidency. Rather, his victory was accompanied by an unprecedented transformation of a fringe party – the Social Liberal Party (PSL) – to a central electoral force. The election saw centre and centre-right parties suffer heavy losses, while many PSL candidates won seats, riding on the “coat-tails” of Bolsonaro’s presidential campaign. Some half of the previous Congress failed to secure re-election, while many PSL newcomers have little prior political experience. The political landscape has therefore become much more polarised, between the socialist Workers’ Party and the birth of the PSL as a large radical far-right party; following an authoritarian ideology some have come to call ‘Bolsonarism’.⁸² Others go so far as to consider whether Bolsonaro is an outright fascist.⁸³

B The Military’s Return to Power

Perhaps more concerning again is the strong military presence in Brazil’s democratic institutions following the October 2018 elections. These include not only Bolsonaro’s running mate General

⁷⁹ See e.g. T Phillips, ‘Brazil’s far-right frontrunner Bolsonaro vows to rule with ‘authority not authoritarianism’ *The Guardian* 10 October 2018; and G Stargardter, ‘Right-wing Brazil candidate commits to free press after calling it ‘trash’ *Reuters* 12 October 2018.

⁸⁰ The video of the speech, with English subtitles, is available at https://twitter.com/octavio_ferraz/status/1055566020201594882.

⁸¹ B Winter, ‘What to Expect from Jair Bolsonaro’ *Americas Quarterly* 9 October 2018.

⁸² DW Arguelhes & T Pereira, ‘What does a Bolsonaro Presidency mean for Brazilian Law? Part 1: Reforms from the Far Right’ *Verfassungsblog* 24 October 2018.

⁸³ LD Valencia-Garcia, ‘Is He a Fascist? The Election of Jair Bolsonaro’ Centre for Analysis of the Radical Right blog 29 October 2018.

Antonio Hamilton Mourão, and election of over 70 military candidates to Congress in the congressional elections held parallel to the first-round of the presidential election on 7 October. As Bolsonaro's cabinet takes shape, the military ties have strengthened, including his selection of a long-time educator in military academies, the ultraconservative Ricardo Velez Rodriguez, as his education minister. The significance of this development is difficult to overstate in the context not only of Brazil's experience of military dictatorship from 1964-1985, but of the long tradition of the military as a tutelary power since the birth of the Brazilian Republic in 1891.

Until recently, it appeared that the military might have definitively returned to the barracks – especially the establishment of a National Truth Commission by President Rousseff in 2011 in the teeth of fierce military opposition.⁸⁴ For two years the Commission conducted hearings and gathered expert testimony concerning the military juntas of 1964-85 in particular. Its final report, issued in December 2014, found that torture, summary executions, and forced disappearances had constituted official State policy under the military government of 1964-85; documented a raft of politically motivated killings; called for the military to recognise their responsibility for the 'grave' rights violations perpetrated under their rule; identified by name 377 people as responsible for such abuses; recommended that those still alive should be brought to trial; and called for amendment of the Amnesty Law to preclude its application to such cases in light of their gravity.⁸⁵ A proliferation of truth commissions in individual states and even universities has been said to reflect 'growing civil society demand for accountability', in a historical context of weak civil society mobilisation to address impunity in Brazil.⁸⁶

While the work of the Truth Commission seemed to confirm full civilian control of the government apparatus and the clear limits of the military as an unconstitutional veto power, the recent elections appear to have reversed the momentum – indeed, it may be viewed as a direct backlash. Rather than returning to the barracks, the military has re-entered government – albeit without needing to stage a *coup*. It is too early to predict precisely what effect this may have on Brazil's democratic system, but it is certainly a negative development given Brazil's prior experiences of military in government. As mentioned above, Bolsonaro's running mate, retired general Hamilton Mourão, even spoke of an "auto-coup" being necessary if anarchy erupted after a victory for Bolsonaro in the elections.⁸⁷

C Renewed Discussion of Enacting a New Constitution

While Bolsonaro has spoken (unconvincingly) of being a slave to the 1988 Constitution, his ex-general running mate, Hamilton Mourão, has openly spoken of replacing the 1988 democratic Constitution with a new text, suggesting that the participatory process followed for the drafting of the 1988 charter lies at the root of present problems and that a new text should be drafted by a committee of "notable people".⁸⁸ The clear implication is that the new text would roll back the freedoms and focus on social justice in the 1988 Constitution, and that élite dominance is seen as preferable to participatory democratic government.

It is worth noting here that the uncertainty generated by a new constitution can in practice create space for greater capture of the political system and distortion of the separation of powers, as seen in

⁸⁴ See e.g. G Duffy, 'Brazil truth commission arouses military opposition' *BBC News* 11 January 2010 <http://news.bbc.co.uk/1/hi/8451109.stm>.

⁸⁵ *Relatório da Comissão Nacional da Verdade*, 10 December 2014 www.cnv.gov.br.

⁸⁶ F Lessa, TD Olsen, LA Payne & G Pereira, 'Persistent or Eroding Impunity; The Divergent Effects of Legal Challenges to Amnesty Laws for Past Human Rights Violations' (2014) 47 *Israel Law Review* 105, 124.

⁸⁷ R Tsvakko Garcia, 'Is Brazil heading towards a military dictatorship?' *Al Jazeera* 4 October 2018.

⁸⁸ *Ibid.*

the adoption of the new Basic Law in Hungary in 2011, or the 1999 ‘socialist’ Constitution of Venezuela. Will Partlett, for instance, has spoken of the serious risks entailed in moments of wholesale constitutional renewal, in that they open a period of unsettlement that can lead to a degraded new constitution and a degraded attachment to constitutionalism. As he puts it,

Popular constitution-making [in various states] has helped undermine constitutionalism by providing opportunities for charismatic politicians with little desire for constitutionally-limited government to appeal to the people. Claiming to be the agent of the people, these charismatic figures were then able to justify their decisions to sidestep parliamentary opposition and push through “authoritarian constitutions” that concentrated vast power in their own hands.⁸⁹

D The Deficiencies of the 2018 Elections: Free and Fair?

One response to the rise of Bolsonaro might be to offer that the people can always vote him out if they decide he is not the saviour he has presented himself to be. However, alongside the reshaping of the political landscape, serious concerns have arisen regarding the electoral process itself. Mirroring developments in other countries such as the USA, the 2018 elections have raised serious concerns regarding the health of the electoral process itself. Alongside his attacks on minorities, women and the idea of liberal democracy, Bolsonaro’s campaign featured regular attacks on the legitimacy of the media and political opposition. The campaign saw physical attacks on journalists increase amid an overall rise in political violence.⁹⁰ Raising the spectre of the severe economic, political and humanitarian crisis in Venezuela, Bolsonaro and his supporters demonised the Workers’ Party (PT) candidate, Fernando Haddad and supporters as enemies of Brazil. In a victory speech delivered on Facebook, Bolsonaro has repeated threats to imprison or exile key members of the PT; a tactic used by the military dictatorship for decades.⁹¹ Moreover – and mirroring the spread of misinformation (or so-called “fake news”) elsewhere – Bolsonaro’s campaign for the presidency was bolstered by a successful and pervasive misinformation campaign by his supporters, primarily on WhatsApp, which may have even swung the election in his favour.⁹² The result of this rather toxic mix is serious concern regarding not only the conduct of the 2018 elections, but also future elections. Self-sustaining democracy, as discussed at the outset of this paper, appears to be under threat.

Conclusion: Reflecting on the Future of Brazilian Democracy

This paper, through an account of the complex and multi-layered threats to liberal constitutional democracy in Brazil., has attempted to make one central claim: that the rise of Jair Bolsonaro must be understood as the culmination of a broader and more diffuse pattern of dysfunction and decay that has afflicted Brazilian democracy for some time, and which has gathered pace since 2014. That said, and while it is vital to understand the Brazilian context on its own terms, it is also helpful to adopt a comparative approach to identify patterns of democratic decay and warning signals for the future. It is too early to tell whether the Bolsonaro presidency will see Brazil emulate the likes of Hungary, Poland and Venezuela through a ‘masterplan’ to dismantle the democratic system, but it seems likely

⁸⁹ W Partlett, ‘The Dangers of Popular Constitution-Making’ (2012) 38(1) *Brooklyn Journal of International Law* 1, 1.

⁹⁰ See S Cowie, ‘Political Violence Surges in Brazil as Far-Right Strongman Jair Bolsonaro Inches Closer to the Presidency’ *The Intercept* 16 October 2018.

⁹¹ See ‘Bolsonaro wins Brazilian presidency’ *Washington Post* 28 October 2018.

⁹² C Long, ‘Did Coordinated Misinformation Campaigns on Social Media Affect the Brazilian Presidential Elections?’ *Pacific Standard* 2 November 2018.

that Brazil has moved from a context of democratic decay to a context of democratic survival. To conclude on a hopeful note, many fundamentals of a healthy democracy remain in place: a significant swathe of the public remains committed to democratic rule, civil society is vibrant and robust, and the core constitutional institutions for defending democracy – independent (if highly imperfect) courts, rights protections, and a free media – remain in place. Only time will tell whether the story of Brazilian democracy becomes one of democratic resilience, but even then, there is a long road to travel to renew hope in democratic rule in the world's fourth-largest democracy.