

# Public Law and the Puzzle of Democratic Decay in Brazil

Law and Society Association (LSA)/RCSL 2017

Mexico City, 20-23 June 2017

Panel: Law and Policy in Latin America

TOM GERALD DALY

MLS Fellow, Melbourne Law School

Associate Director, Edinburgh Centre for Constitutional Law

thomas.daly@unimelb.edu.au

## Abstract

Democratic decay, which may be loosely defined as the *incremental degradation of the structures and substance of liberal constitutional democracy*, has gathered pace in recent years. Decay in the democratic systems of states worldwide, such as Hungary, Poland, Venezuela, and South Africa, forms a sub-set of what Larry Diamond calls a global ‘democratic recession’. Public law is at the heart of this decay. Partly this is because various contemporary regimes have ‘weaponised’ public law to hollow out democratic rule, through increasingly sophisticated use of constitutional law to remove institutional constraints on political power. Partly it is because public law is also inevitably seen as an essential tool in the pushback against democratic decay, given that law has assumed an ever greater role in governance since the 1970s. Focusing on the impeachment of President Dilma Rousseff in August 2016 and its aftermath, this paper uses the Brazilian context as a way to explore three interrelated questions: (i) how might we define democratic decay?; (ii) can we say that Brazil is suffering democratic decay, and why?; and (iii) how does the Brazilian impeachment crisis add to, or complicate, our understanding of democratic decay, and the role of public law in such decay?

## Acknowledgments

I am greatly indebted to three scholars who assisted with the preparation of this paper, including discussion of the Brazilian context, commentary and insights, and providing me with relevant materials by Brazilian scholars: Fabia Fernandes Carvalho Veçoso, Luís Bogliolo Piancastelli, and Juliano Zaiden Benvindo.

## INTRODUCTION

When I first applied to speak at the LSA conference, back in October 2016, Brazil was reeling from the impeachment of President Dilma Rousseff some weeks earlier, on 31 August. The abstract I submitted sought to analyse Brazil as an interesting case-study of the growing global trend of ‘democratic decay’; that is, deterioration of democratic systems worldwide falling short of a democratic breakdown. In the initial submitted abstract I proposed to focus in particular on the way in which public law had been ‘weaponised’ in what Juliano Zaiden Benvindo has called the ‘abusive impeachment’ of President Rousseff,<sup>1</sup> how the deficiencies of the post-1988 constitutional framework led to impeachment, and how public law might be used to reinvigorate constitutional democracy in the post-Dilma environment.

Of course, since August 2016 a host of Brazilian authors have provided, and continue to provide, searching and detailed analysis of the Brazilian impeachment crisis, its context, its causes, and its aftermath, which, since May 2017 now includes the potential impeachment of the sitting President Michel Temer, under eight months since Dilma’s ousting. These include scholars such as Zaiden Benvindo, Conrado Hübner Mendes, Boaventura de Sousa Santos, and our LSA panel chair Mariana Mota Prado. The detailed analyses of these scholars consistently point to the complexity of the Brazilian context and to the pitfalls of any superficial analysis of the unfolding crisis of Brazilian democracy.

This paper therefore addresses the same questions set out in the original abstract but from a different angle. First is that I approach these questions as an outsider—a *gringo*, an *estrangeiro*—albeit an outsider who can read Portuguese and who has engaged for some years in analysis of Brazil’s constitutional and political system.<sup>2</sup> Second is that this paper forms part of a broader book project on how public law relates to democratic decay worldwide, both as a tool used by the powerful to hollow out democracy and as a protection against democratic decay. It therefore takes a wider conceptual and comparative approach to analysis of the Brazilian context. Here I use the Brazilian context as a “magnifying mirror” in addressing a number of key questions:

- How might we define democratic decay?
- Can we say that Brazil is suffering democratic decay, and why?
- How does the Brazilian impeachment crisis add to, or complicate, our understanding of democratic decay, and how public law can act as both a weapon furthering, and a shield against, such decay?

The paper as a whole approaches these questions as a form of thought exercise, aimed at testing the analytical utility of democratic decay as an organising concept, and underscoring how important it is to take an empirically grounded, context-sensitive approach to identifying and assessing democratic decay in any given state. The paper contains five parts. The first and second parts provide the global context and working definition of democratic decay. The third part briefly describes democratic decay in two different states: Poland and Venezuela. The fourth and final parts analyse whether Brazil can be said to be suffering democratic decay, the role of public law in this decay, and what public law solutions have been offered to date to counter this decay.

<sup>1</sup> J Zaiden Benvindo, ‘Abusive Impeachment? Brazilian Political Turmoil and the Judicialization of Mega- Politics’ *Int’l. J. Const. L. Blog* 23 April 2016 <http://bit.ly/1T7Xvs3>.

<sup>2</sup> See the extensive Brazilian case-study in TG Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge University Press, forthcoming, 2017). See also TG Daly, ‘Brazilian Supremocracy and the Inter-American Court of Human Rights: Unpicking an Unclear Relationship’ in P Fortes, L Boratti, A Palacios and TG Daly (eds), *Law and Policy in Latin America: Transforming Courts, Institutions, and Rights* (Palgrave Macmillan, 2017).

## 1 DEMOCRATIC DECAY AS A GLOBAL TREND

In 2015 Larry Diamond wrote of a ‘democratic recession’ sweeping the world since 2006, reversing hard-won gains in state after state and bringing a decades-long global expansion of democracy to a halt.<sup>3</sup> For Diamond, this democratic recession encompassed four categories: a deepening of authoritarianism in non-democratic states; an acceleration in the breakdown of democratic regimes; a decline in the stability or quality of democracy in younger democracies; and a decline in the vigour of long-established democracies, both in their internal democratic performance and in their faith in, and willingness to engage in, democracy promotion abroad. His analysis chimes with others, such as Freedom House, who similarly mark a year-on-year decline in democracy worldwide in the past decade.<sup>4</sup>

‘Democratic decay’ may be viewed as a subset of this alarming phenomenon, which broadly relates to the last two categories above; namely, a decline in the quality of democracy in both younger and long-established democracies, which falls short of a democratic breakdown.

The trend has seemed to gather pace in the last 18 months. For example, 2016 started with European Commission ‘rule of law’ investigations into Polish laws appearing to undermine the Constitutional Tribunal and media.<sup>5</sup> Spring 2016 brought a disturbing crackdown on dissent in India under Prime Minister Modi.<sup>6</sup> In October 2016 South Africa was removed from the highest band of best performers in the Mo Ibrahim Foundation’s report on ‘a decade of African democracy’.<sup>7</sup> The election of Donald Trump as President of the United States in the elections of 8 November, following a campaign unprecedented in modern US history for its attack on foundational tenets of American democracy, has focused many more minds on the global issue of democratic decay in the past six months.

Democratic decay is now being studied, discussed and addressed by a growing, and increasingly diverse, array of policymakers, international organisations, and scholars worldwide—the latter encompassing law, political science, political philosophy and sociology. However, the discussion is taking place under various rubrics, including ‘democratic backsliding’,<sup>8</sup> ‘democratic deconsolidation’,<sup>9</sup> the ‘democratic disconnect’,<sup>10</sup> ‘democratic crisis’,<sup>11</sup> ‘constitutional crisis’,<sup>12</sup> ‘rule of law’,<sup>13</sup> ‘militant democracy’,<sup>14</sup> the ‘rise of populism’,<sup>15</sup> ‘populist constitutionalism’,<sup>16</sup> and ‘abusive constitutionalism’.<sup>17</sup> This is far from an exhaustive list.

<sup>3</sup> L Diamond, ‘Facing Up to the Democratic Recession’ (2015) 26(1) *Journal of Democracy* 141.

<sup>4</sup> See e.g. Freedom House, *Populists and Autocrats: The Dual Threat to Global Democracy. Freedom in the World 2017* <http://bit.ly/2kNaJRs>.

<sup>5</sup> ‘Rule of law in Poland: Commission starts dialogue’, 13 January 2016. <http://bit.ly/1OjAbUp>.

<sup>6</sup> Editorial, ‘India’s Crackdown on Dissent’, *New York Times*, 22 February 2016. <http://nyti.ms/1KDoidR>.

<sup>7</sup> See the second page of Mo Ibrahim Foundation, *A Decade of African Governance 2006-2015* (October 2016).

<sup>8</sup> See e.g. N Bermeo, ‘On Democratic Backsliding’ (2016) 27(1) *Journal of Democracy* 5.

<sup>9</sup> R Foa and Y Mounk, ‘The Danger of Deconsolidation: The Democratic Disconnect’ (2016) 27(3) *Journal of Democracy* 5.

<sup>10</sup> Ibid.

<sup>11</sup> E Kanterian, ‘The Crisis of Democracy in Hungary and Romania – Learning from Weimar?’ *Verfassungsblog* 13 May 2013 <http://bit.ly/2r1TtrQ>.

<sup>12</sup> See e.g. A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Bloomsbury Publishing, 2015).

<sup>13</sup> See e.g. A Magen, ‘Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU’ (2016) 54(5) *Journal of Common Market Studies* 1050.

<sup>14</sup> See in particular M Thiel (ed), *The Militant Democracy Principle in Modern Democracies* (Routledge, 2016).

<sup>15</sup> See e.g. *Populists and Autocrats: The Dual Threat to Global Democracy. Freedom in the World 2017*; and C Mudde, *The Populist Radical Right: A Reader* (Routledge, 2017).

<sup>16</sup> See in particular a number of contributions to the recent I-CONnect-Verfassungsblog mini-symposium on populism and constitutional courts, including P Blokker, ‘Populist Constitutionalism’ *Int’l J. Const. L. Blog* 4 May 2017 <http://bit.ly/2qV5P6N>; and R Dixon, ‘Populist Constitutionalism and the Democratic Minimum Core’ *Int’l J. Const. L. Blog* 26 April 2017 <http://bit.ly/2rFq2yg>.

<sup>17</sup> D Landau, ‘Abusive Constitutionalism’ (2013) 47 *UC Davis Law Review* 189.

Public lawyers have become particularly preoccupied with the subject of democratic decay as it has gathered pace worldwide. Partly this is because various contemporary regimes have ‘weaponised’ public law to hollow out democratic rule. Partly, it is because law is also inevitably seen as an essential tool in the pushback against democratic decay, given that law has assumed an ever greater role in governance since the 1970s—reaching its apotheosis in the (now crumbling) post-1989 ‘liberal consensus’.<sup>18</sup> Speaking out against the rising threat of populist leaders in September 2016, for instance, the UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, insisted: “Ultimately, it is the law that will safeguard our societies”.<sup>19</sup>

How does Brazil fit into this picture? First, it is necessary to provide an overarching definition of democratic decay.

## 2 HOW MIGHT WE DEFINE DEMOCRATIC DECAY?

In this paper the term ‘democratic decay’ is used as an umbrella term for the many rubrics listed above, as a way of seeking more systematic analysis of this phenomenon. In a series of blog posts and columns on the blog of the International Journal of Constitutional Law (I-CONnect),<sup>20</sup> as well as a forthcoming contribution to International IDEA’s *Annual Review of Constitution Building*,<sup>21</sup> I have developed a summary definition of democratic decay as the *incremental degradation of the structures and substance of liberal constitutional democracy*. If we home in on each aspect of the definition, the severity of the challenge facing democracies worldwide—and of fully understanding this phenomenon—comes into sharper focus. After this initial exercise in definition, it is applied to the Brazilian context to test its relevance, resonance, and utility as an analytical construct.

### Incremental decay

First, in a range of states worldwide, the degradation of democracy is an incremental, step-by-step process, across multiple dimensions. This reflects a fundamental distinction in scholarship on ‘democratic breakdown’ between the ‘quick death’ of a *coup d’état*, invasion or other crisis, and the ‘slow death’ of successive authoritarian advances and a weakening of existing democratic structures.<sup>22</sup> It is the incremental nature of decay that renders it so insidious. Bit by bit, not only the structures of democratic governance but also the substance, the animating spirit, of a democratic political community are eroded, chipped away, sapped of their vitality. It is often impossible to identify the precise point at which a functioning democracy shifts to a non-democracy: unlike a *coup d’état* or even self-coup, for instance, there is usually no ‘flash point’ heralding the end of democratic rule, or galvanizing remedial action against decay. The term ‘degradation’ here is intended to capture dynamic, linked, and often iterative processes of both a ‘structural’ deterioration of, and a cheapening and devaluing of, democratic governance.

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

<sup>18</sup> See e.g. I Krastev, ‘The Strange Death of the Liberal Consensus’ (2007) 18(4) *Journal of Democracy* 56.

<sup>19</sup> Speech, The Hague, 6 September. See <http://bit.ly/2rc25dW>.

<sup>20</sup> Search for “Tom Gerald Daly” at <http://www.iconnectblog.com/>.

<sup>21</sup> TG Daly, ‘Democratic Decay in 2016’ in International IDEA, *Annual Review of Constitution Building: 2016* (International Institute for Democracy and Electoral Assistance, forthcoming).

<sup>22</sup> See e.g. See G O’Donnell, ‘Transitions, Continuities, and Paradoxes’ in S Mainwaring, G O’Donnell & J Valenzuela (eds), *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective* (UNDP, 1992) 19, 33.

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.<sup>23</sup>

## Structures

As regards the structures of democracy, the global conversation has centred on the ways in which the foundational pillars of democratic governance and the key mechanisms for holding political powers to account—civil liberties, a free media, a genuinely independent judiciary, democratic political opposition, and civil society organisations—have been attacked and undermined in state after state. In recent years many ostensibly democratic governments engaged in systematic assaults on these structures, not least Polish laws enhancing government control of the media and Constitutional Tribunal, or attempts to curb the right to protest in Venezuela (discussed below).<sup>24</sup> However, there are also more diffuse causes. The democracy-reinforcing role of the media as the ‘Fourth Estate’ has been significantly compromised not only by the advent of ‘fake news’, largely circulated through social media,<sup>25</sup> but also by the crisis facing the economic viability of the print media in particular. The nuts-and-bolts functioning of electoral processes has also taken a hit through concerns surrounding Russian hacking of electoral systems during the US presidential election, and the threat of interference with forthcoming European elections.

## Substance

The degradation of the structures of liberal constitutional democracy is intimately linked to the degradation of the ‘substance’ of democracy. Any number of indications, based on sociological analysis, point to deeply concerning trends. Roberto Foa and Yascha Mounk, for instance, employ four separate measures: public support for democracy as a system of governance, including individuals’ support for the entire 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).<sup>26</sup> In this connection it is alarming that a September 2016 poll revealed 29% of Americans would support a military *coup*,<sup>27</sup> for instance. However, as Foa and Mounk observe, this is just part of a more deeply rooted trend: trust in democratic institutions such as parliaments and courts has suffered a precipitous decline across the established democracies of North America and Western Europe in the last three decades<sup>28</sup> which is mirrored by declining faith in younger democracies.<sup>29</sup> They also make the point that the youth in many countries show ambivalent attitudes to democracy. Support for mainstream political parties as capable of delivering public goods such as prosperity and security has fallen in states worldwide, with a marked shift in democracies worldwide to insurgent far-right, nativist, populist, xenophobic and extremist parties.<sup>30</sup> Democracy, long the ‘only game in town’ in whole swathes of the world, especially since the collapse of the Soviet Union in 1989, is under challenge once again.

<sup>23</sup> This text is from an interesting review of Parfit’s work, see L MacFarquhar, ‘How to Be Good’ *The New Yorker* 5 September 2011 <http://www.newyorker.com/magazine/2011/09/05/how-to-be-good?currentPage=all>. The original work is D Parfit, *Reasons and Persons* (Oxford University Press, 1984).

<sup>24</sup> ‘Opposition protests high court ruling that bans marches in Venezuela’ Agencia EFE 25 May 2016 <http://bit.ly/2olve6t>.

<sup>25</sup> See e.g. H Allcott and M Gentzkow, ‘Social Media and Fake News in the 2016 Election’ National Bureau of Economic Research (NBER) Working Paper No. 23089 (January 2017) <http://bit.ly/2po1HIw>.

<sup>26</sup> R Foa and Y Mounk, ‘The Danger of Deconsolidation: The Democratic Disconnect’ (2016) 27(3) *Journal of Democracy* 5, 6.

<sup>27</sup> J Taranto, ‘Coup Coup G’joob’ *The Wall Street Journal* 3 August 2016 <http://on.wsj.com/2p22Gig>.

<sup>28</sup> R Foa and Y Mounk, ‘The Danger of Deconsolidation: The Democratic Disconnect’ (2016) 27(3) *Journal of Democracy* 5, 6.

<sup>29</sup> See M Riethof, ‘Why Brazil’s Political Crisis Matters for Latin American Democracy’ Global Observatory 7 September 2016 <http://bit.ly/2olOIrh>.

<sup>30</sup> See e.g. Gregor Aisch, Adam Pearce and Bryant Rousseau, ‘How Far Is Europe Swinging to the Right?’ *New York Times* (5 July 2016), <http://nyti.ms/25aJlue>.



## What does liberal constitutional democracy mean here?

Of course, one of the biggest sticking points in defining ‘democratic decay’ is the meaning of ‘democracy’ itself. It is the “quintessentially contested”<sup>31</sup> 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.

A preliminary point is that it would appear sensible to apply the term ‘decay’ solely to democratic orders that have attained a sufficient level of maturity. For instance, Freedom House, releasing its flagship report on freedom worldwide in 2016, noted “setbacks in political rights, civil liberties, or both, in a number of countries rated “Free” by the report, including the Czech Republic, Denmark, France, Hungary, Poland, Serbia, South Africa, South Korea, Spain, Tunisia, and the United States.”<sup>32</sup> Some states in this list, such as Tunisia and Serbia, have not reached a sufficient level of democratic maturity and cannot be said to be suffering democratic decay, but rather problematic democratisation trajectories. Others, such as Brazil, the Czech Republic, Hungary, Poland, South Korea and Spain are considered ‘consolidated’ democracies that arose during the so-called ‘third wave of democratisation’ from the 1970s until the 1990s. The last category includes more venerable democracies: Denmark, the US, and France.

However, none of these categories is definitive. ‘Consolidation’ is itself a highly contested concept and some prominent democracies, such as the Philippines and South Africa, are often viewed as not reaching this bar. It is also worth emphasising that France’s democratic system dates to the immediate post-war period and the US is now commonly viewed as having become a liberal democracy only with the passing of civil rights reforms in the 1960s.<sup>33</sup> ‘Democratic decay’, then, can be taken as covering consolidated and long-established democracies, but deciding which states fit into these categories is not always straightforward, and there is perhaps not as wide a gulf between long-established democracies and younger democracies as is often claimed.

Second, ‘liberal democracy’ is an insufficient 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, 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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

<sup>31</sup> G O’Donnell, ‘The Perpetual Crises of Democracy’ (2007) 18 *Journal of Democracy* 5.

<sup>32</sup> Freedom House, *Populists and Autocrats: The Dual Threat to Global Democracy. Freedom in the World 2017* <http://bit.ly/2kNaJRs>.

<sup>33</sup> A Stepan, ‘India, Sri Lanka, and the Majoritarian Danger’ (2015) 26(1) *Journal of Democracy* 128, 128–129.

<sup>34</sup> See e.g. S Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 *Georgetown Law Journal* 961, 967.

<sup>35</sup> See e.g. R Uprimny, ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’ (2010–2011) 89 *Texas Law Review* 1587.

<sup>36</sup> 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>.

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 ‘elites’ (including law as a form of elite power), or the achievement of a *more democratic* system of governance.

Policymakers and scholars alike are increasingly reacting to this trend. As Freedom House in its report on 2016 observes: “A constant refrain among democracy advocates is that “democracy is more than just elections.””<sup>37</sup> We see public law scholars beginning to use the term “majoritarian autocracy” rather than “illiberal democracy” or “majoritarian democracy” for regimes, such as those in Poland or Hungary, which enjoy the support of an electoral majority but which are jettisoning core tenets of liberalism and constitutionalism, such as concerns for minority rights, judicial independence, and limitations on executive power.<sup>38</sup> This resonates with terms such as ‘electoral authoritarianism’, ‘competitive authoritarianism’, ‘semidemocracy’ and others used by scholars of politics and governance.<sup>39</sup> Others have elaborated new conceptual frameworks such as the ‘Mafia State’ to describe specific undemocratic governance systems (e.g. Hungary, South Africa), based on a quasi-family structure maintained through legal, official, and even secret service coercion and incentives.<sup>40</sup>

Thus, notwithstanding the lack of any full consensus on what ‘democracy’ means, taking a negative approach to definition can assist in achieving some clarity. A governance system that evinces little concern for fundamental rights (especially minority rights), collects inordinate power at one site, or views political power as unconstrained by constitutional law quite simply cannot be a liberal constitutional democracy, no matter how much electoral support it commands. We increasingly a shift from ‘rule of law’ to ‘rule by law’, where law is viewed as a tool to serve the ends of government rather than setting the framework and boundaries for government.

### 3 TWO EXAMPLES OF DEMOCRATIC DECAY: POLAND AND VENEZUELA

#### Poland: Significant democratic decay

Poland was once a poster child for democracy in the post-Communist sphere. The state’s prominent democratic transition under the Solidarity Movement, and its adoption of all the trappings of a European *Rechtsstaat*—complete with a liberal democratic constitution, constitutional court, and central preoccupation with human rights—secured the state a special place in the narrative asserting the triumph of Western-style liberal constitutional democracy after 1989. By the time of its entry into the European Union in 2004 it was widely viewed as a securely consolidated democratic system, having met the EU’s ‘Copenhagen criteria’ demanding not only that aspirant members prove the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”, but

<sup>37</sup> P.3.

<sup>38</sup> See e.g. L Pech and KL Scheppele, ‘Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law’ 6 January 2017 <http://bit.ly/2p35tuy>.

<sup>39</sup> See e.g. S Levitsky and LA Way, ‘The Rise of Competitive Authoritarianism’ (2002) 13(2) *Journal of Democracy* 51.

<sup>40</sup> See e.g. Bálint Magyar, *Post-Communist Mafia State. The Case of Hungary* (CEU Press, 2016); and a new report asserting that South Africa has also become a Mafia State, H Bhorat, M Buthelezi, I Chipkin, S Duma, L Mondli C Peter, M Qobo and M Swilling, *Betrayal of the Promise: How South Africa is Being Stolen* (State Capacity Research Project, May 2017) <http://bit.ly/2raXcTK>.

also “the existence of a functioning market economy”, with its economy growing apace in the post-Communist era.

It is perhaps this highly positive narrative that blinded outside observers to the challenges facing the sustainability of Polish democracy after 1989. These briefly came into stark relief after EU accession, long after Solidarity had become a spent political force, with the entry of the new ultra-conservative, Catholic and nationalist Law and Justice (PiS) party into government after the 2005 elections (in coalition with two other ultra-conservative parties). PiS attacks on the judiciary, media, independent Central Bank, and rights of sexual minorities meant that by 2007 the scholar Ivan Krastev was calling Poland “the capital of Central European illiberalism today”<sup>41</sup> However, the PiS-led coalition only lasted until 2007. Fears concerning illiberalism receded somewhat.

After an eight-year interlude of government under the liberal Civic Platform (PO) party (in coalition with smaller parties), the PiS returned to government in October 2015 with the first outright majority since the fall of Communism, handing it the opportunity to remake the political system according to its worldview. Having seemingly discarded previous plans to adopt an entirely new constitution,<sup>42</sup> the PiS quickly launched an assault on liberal democratic structures through a raft of legislation aimed at *de facto* constitutional change: rendering the Constitutional Tribunal “ineffective and toothless”<sup>43</sup> (including measures to annul judicial nominations made by the previous Parliament, curtailing access to the Tribunal, and introducing quorum and voting majority rules with the effect of hindering the Tribunal’s effective functioning); increasing government control of the media (by transferring control over appointment of governance boards of public broadcaster from an independent body to the government); and permitting more extensive police surveillance. These strongly echo the path of legislative and constitutional reform taken by the illiberal Fidesz party government in Hungary since 2010.

The initial draft laws alarmed close observers of Poland, but it was not until the last days of 2015 and the start of 2016 that they started to attract more intense external scrutiny. After weeks of fruitless back-and-forth communications between the European Commission and the Polish government, in January 2016 Poland enjoyed the dubious honour of being the first state to undergo the Commission’s new ‘rule of law’ monitoring process, which inserts a phase of structured dialogue before possible activation of the sanctioning procedure in Article 7 of the Treaty on European Union (TEU) to address “a clear risk of a serious breach” or a “serious and persistent breach” of fundamental EU values (human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities).<sup>44</sup>

Spatial constraints preclude discussion of all developments in Poland since PiS came to power in October 2015. This account focuses on the Law on the Constitutional Tribunal, which has been a particular bone of contention. In a judgment of 9 March 2016, following previous issue-specific judgments in December 2015, the Constitutional Tribunal held the Law to be unconstitutional in its entirety. In an Opinion issued two days later, echoing European Commission concerns regarding the rule of law in an Opinion of 1 June,<sup>45</sup> the Council of Europe’s Venice Commission stated: “Crippling the Tribunal’s effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of

<sup>41</sup> I Krastev, ‘The Strange Death of the Liberal Consensus’ (2007) 18(4) *Journal of Democracy* 56, 56.

<sup>42</sup> See the interview with Wojciech Sadurski: ‘What is Going on in Poland is an Attack against Democracy’ *Verfassungblog* 15 July 2016 <http://bit.ly/2ae5Won>.

<sup>43</sup> TTKonczewicz, ‘Of Constitutional Defiance, Migration and Borrowing of Unconstitutional Tactics and European Resistance’ *Int’l J. Const. L. Blog*, 17 August 2016 <http://bit.ly/2oblU4m>.

<sup>44</sup> See *Commission Recommendation of 27.7.2016 regarding the rule of law in Poland* C(2016) 5703 final <http://bit.ly/2aC3TrT>.

<sup>45</sup> See L Pech, ‘Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland: Full text now available’ *EU Law Analysis* 19 August 2016 <http://bit.ly/2rKLa6L>.



justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective. Making a constitutional court ineffective is inadmissible...”.<sup>46</sup>

As 2016 progressed, alongside additional external interventions (including a report by the Helsinki Foundation for Human Rights) and domestic interventions (including a resolution of the Supreme Court of Poland affirming the continuing validity of Constitutional Tribunal judgments), a steady stream of leading Polish scholars, both within and outside Poland, have voiced increasingly acute concerns regarding the trajectory of Polish democracy. This appears to have had little effect. The government steadfastly refused to acknowledge or adequately address the problematic aspects of its plans identified by the Constitutional Tribunal, various EU organs, and Council of Europe organs in particular (including the Venice Commission and the Commissioner for Human Rights). Of perhaps most concern, the government refused to publish the Constitutional Tribunal’s 9 March judgment in the Official Gazette, thereby preventing it from having legal effect. The new Law on the Constitutional Tribunal was passed by the Parliament (Sejm) on 22 July 2016. Five days later the European Commission issued a formal Recommendation reiterating its warning of a “systemic threat to the rule of law in Poland.”<sup>47</sup>

Speaking shortly before passage of the new Law in July 2016, the leading Polish scholar Wojciech Sadurski warned of “an assault on the very foundations of democracy.”<sup>48</sup> As the Tribunal crisis deepened during 2016, a flurry of legislation has been passed, often through accelerated legislative procedures, affecting the civil service and ombudsman, among other institutions. By December the PiS was viewed as having “captured” the Constitutional Tribunal through a range of additional laws, including installation of three “unconstitutionally appointed” judges active as members of the Tribunal.<sup>49</sup> In an article published at the very end of 2016 another leading scholar, Tomasz Koncewicz, argued that the specific attack on the Tribunal forms part of a wider and more sophisticated plan “aimed at debilitating possible pockets of resistance and independence, curbing democracy, the rule of law and the division of powers”, concluding: “It is now beyond dispute that there is a gradual constitutional *coup d’état* in Poland whereby the Constitution is being modified through legislative sleight of hand”.<sup>50</sup>

In Poland, then, 2016 witnessed the development of an increasingly firm consensus that the State is suffering significant democratic decay, actively orchestrated by the sitting government. However, despite intensifying concerns (and mirroring its approach to democratic decay in Hungary), the European Commission’s continued failure to robustly confront Poland for violation of the EU’s fundamental values has drawn the ire of many commentators. As Laurent Pech and Kim Lane Scheppele observed in January 2017: “Any aspiring demagogue with an authoritarian streak will conclude from the EU’s latest failure to do anything meaningful against Polish authorities that you can brutally undermine the rule of law in the EU and expect no response until you have already consolidated all power in very few hands.”<sup>51</sup>

Of course, it is unclear what precise impact, if any, a more robust approach by EU institutions would have yielded. Identifying alternative solutions is also no easy task. The rise of populism in Poland is blamed, by some, on an elite-led democratic project which placed excessive emphasis on liberal constitutionalism and which broke the core democratic promise of giving the Polish people a real say in governance after 1989: they could vote, but policies remained the same.<sup>52</sup> Beyond potential institutional

<sup>46</sup> ‘Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland’, 11-12 March 2016 CDL-AD(2016)001 24.

<sup>47</sup> Commission Recommendation of 27.7.2016 regarding the rule of law in Poland C(2016) 5703 final. 20.

<sup>48</sup> See the interview with Sadurski (n 42).

<sup>49</sup> TT Koncewicz, ‘Constitutional Capture in Poland 2016 and Beyond: What is Next?’ *Verfassungsblog* 19 December 2016 <http://bit.ly/2qHEZ3v>.

<sup>50</sup> TT Koncewicz, ‘The “emergency constitutional review” and Polish constitutional crisis. Of constitutional self-defense and judicial empowerment’ (2016) 2(1) *Polish Law Review* 73, 74.

<sup>51</sup> L Pech and KL Scheppele, ‘Poland and the European Commission, Part I: A Dialogue of the Deaf?’ *Verfassungsblog* 3 January 2017 <http://bit.ly/2obwWGB>.

<sup>52</sup> See Krastev (n 41) 58–59.

responses, such as the possibility of ordinary courts acting as grassroots defenders of the Constitution,<sup>53</sup> ‘people power’ remains the key for some: popular protests have achieved limited pushback against the PiS government’s agenda, but leading Polish scholars such as Koncewicz stress that Polish democracy cannot be saved without a wider “awakening” of the general public.<sup>54</sup>

### Venezuela: Advanced democratic decay

As Marina Ottaway has observed, in the ideological battleground of the Cold War, Venezuela was counted by the US as a dependable and stable democratic system. Under civilian control since 1958, it was—unlike many of its neighbours—free of radical and leftist political parties or armed leftist forces.<sup>55</sup> Consensual politics and economic progress, equalling the GDP of Israel or Ireland by the 1980s,<sup>56</sup> gave the impression of a democratic system close to finding its place among the top-tier democracies worldwide.

However, Venezuela has now become a by-word for decline. The sequence of events is clear in hindsight: a stark 40 per cent. drop in per capita income during the 1980s, exacerbated by neoliberal reforms; a failed *coup d’état* by Colonel Hugo Chávez in 1992; his ascent to the presidency in 1998 promising greater prosperity and an outsider’s ability to fix a broken political system; adoption of a new Constitution in 1999; distortion of the constitutional regime through governance that bypassed democratic institutions and included extraconstitutional action; and another military *coup* attempt in 2002 as both élite and popular disaffection with *Chavismo* set in.

As with Poland, the decline has been incremental, but across a longer time period and with more severe results. The 1999 Constitution, presented as entrenching a new type of ‘post-liberal’ democratic constitutional order, placed less emphasis on core tenets of liberalism such as judicial independence, and greater emphasis on social rights, direct democracy, and experimentation with a new separation of powers model.<sup>57</sup> In practice, Chávez successively expanded the powers of the presidency and the hard-wired deficiencies of Venezuela’s “petro-State”—corruption, rent-seeking, and obstacles to building strong democratic institutions—worsened.<sup>58</sup> The new Supreme Court, established in 2000, quickly gained a reputation as a tool of the Chávez regime.<sup>59</sup> The steady drumbeat of democratic decline sounded since the 1990s quickened after the death of Chávez in 2013 into a triple-pronged democratic, economic, and humanitarian crisis.

The crisis steadily worsened in 2016. Elections in December 2015 handed decisive control of the legislature (National Assembly) to the opposition for the first time in sixteen years, with the formal handover carried out on 5 January 2016. Although President Maduro claimed to accept the results, stating “the constitution and democracy have triumphed”,<sup>60</sup> 2016 was marked by a tug-of-war between the different powers in the State. Maduro twice declared a state of emergency, in January and May, while the opposition from March onward pursued two initiatives to oust Maduro: a referendum to recall him from office and force a fresh presidential election earlier than the slated elections in late 2018; and a

<sup>53</sup> See Koncewicz (n 50).

<sup>54</sup> ‘Of constitutional capture, alienating constitutionalism and constitutional fidelity. Quo vadis Poland... and Europe?’, presentation at the event ‘Oversight of the Rule of Law in the European Union: Opportunities and Challenges’, British Institute of International and Comparative Law (BIICL), 16 January 2017.

<sup>55</sup> See Ch.3 ‘Venezuela: Democratic Decay’ in M Ottaway, *Democracy Challenged: The Rise of Semi-Authoritarianism* (Carnegie Endowment, 2013).

<sup>56</sup> RS Foa and Y Mounk, ‘The Signs of Deconsolidation’ (2017) 28(1) *Journal of Democracy* 5, 10.

<sup>57</sup> See e.g. Uprimny, ‘Recent Transformation’ (n 35).

<sup>58</sup> See M Aach, ‘The Decline of Democracy in Venezuela: The Deterioration of Venezuelan Exceptionalism and the Rise of Hugo Chavez’ (2008) 16 *Lehigh Review* 88.

<sup>59</sup> RA Sanchez-Urribarri, ‘Between Power and Submissiveness – Constitutional Adjudication in Latin America’ in R Dixon and T Ginsburg (eds), *Comparative Constitutional Law in Latin America* (Edward Elgar, forthcoming).

<sup>60</sup> ‘Venezuela election: Maduro’s Socialists trounced’ *BBC News* 7 December 2015 <http://bbc.in/1Q9IW7F>.

constitutional reform to reduce his term from six to four years.

At various junctures, the ‘captured’ Supreme Court came to the embattled president’s aid.<sup>61</sup> However, its dismissal of the original opposition initiatives did not prevent the opposition from making official progress with its recall referendum campaign (which is a lengthy, multi-step process), easily garnering the required signatures to pass the first stages of the process, and almost half of all signatures (1.85m of 4m signatures) required to trigger a referendum. In September the Supreme Court declared all National Assembly decisions taken since 28 July to be unconstitutional, on the grounds that three opposition MPs suspended by the Court for alleged electoral fraud had been readmitted to the Assembly. On 20 October the National Electoral Council suspended the recall signature drive on the basis of allegations of voter fraud in previous rounds of signature collection. The Council also declared that governorship elections scheduled for December 2016 would be postponed to “mid-2017”.<sup>62</sup>

In a somewhat similar manner to Poland, the deepening crisis of Venezuelan democracy has sparked international intervention, with the Organization of American States (OAS) taking the lead. On 30 May 2016 the OAS Secretary General submitted a report to OAS member states on the Venezuelan crisis, referring to “alteration of the constitutional order” and the “democratic order”—terms in the OAS Inter-American Democratic Charter ordinarily applied to outright *coups*.<sup>63</sup> Although an emergency session of the OAS Permanent Council was convened on 23 June, no decision as to further action was taken amidst serious disagreement and a hope that dialogue and diplomacy might yet yield results. This pattern of inertia continued throughout 2016 and into 2017,<sup>64</sup> despite the spiralling crisis and clear intransigence of President Maduro.<sup>65</sup>

Concerns regarding the trajectory and future of Venezuela’s democratic order became increasingly acute in 2017. Two judgments issued by the Supreme Court in April 2017—seeking to transfer the National Assembly’s powers to the Court and strip parliamentarians of their immunity—prompted talk of an “internal *coup*” but were reversed within 48 hours in the face of intense pressure from both domestic and international actors, including an unexpectedly strong intervention by the Attorney General.<sup>66</sup> Weeks later, in response to President Maduro’s call for a new Constituent Assembly to rewrite the Constitution, the opposition leader, Henrique Capriles, denounced the move as “constitutional fraud” and the inauguration of a “dictatorship”, calling for citizens to engage in civil disobedience to defend their rights.<sup>67</sup>

At the time of writing, massive popular protests against the government are ongoing, calling for Maduro’s resignation and fresh elections, but faced at every turn with physical repression by State forces. Democratic decay in Venezuela, it seems, has reached its endgame and threatens to culminate in full democratic breakdown. The OAS Secretary General believes that point has already been reached, stating in May 2017: “Citizens have been left entirely at the mercy of an authoritarian regime that denies them their most basic rights.”<sup>68</sup>

For those tending toward complacency, Venezuela presents a stark lesson. Decay, once set in motion, can lead to extreme consequences. In Venezuela it is summed up, not just in the barricades strewn across Caracas, or the imprisonment of opposition figures, but in a soaring murder rate, rolling

<sup>61</sup> See e.g. A Meza, ‘El Supremo obstaculiza todos los caminos para desalojar a Maduro de la presidencia’ El País 26 April 2016 <http://bit.ly/1T1ywSK>.

<sup>62</sup> See A Cawthorne, ‘Venezuela delays state elections to 2017, opposition angry’ Reuters 19 October 2016 <http://reut.rs/2ejjH6E>.

<sup>63</sup> See e.g. H de Zela Martínez, ‘The Organization of American States and its Quest for Democracy in the Americas’ (2013) 8 *Yale Journal of International Affairs* 23.

<sup>64</sup> See the updated report of the OAS Secretary General, issued on 14 May 2017: <http://bit.ly/2nsAODa>.

<sup>65</sup> See e.g. ‘Maduro to OAS: “Shove Democratic Charter Up You Know What”’ Pan Am Post 2016 <http://bit.ly/2sgOPXf>.

<sup>66</sup> See J Couso, ‘Venezuela’s Recent Constitutional Crisis: Lessons to be Learned From a Failed Judicial Coup D’état’ *Int’l J. Const. L. Blog* 12 April 2017 <http://bit.ly/2pApRQn>.

<sup>67</sup> See ‘Capriles tilda de “fraude” la Asamblea Constituyente convocada por Maduro y pide “desobedecer semejante locura”’ *Europapress Internacional* 2 May 2017 <http://bit.ly/2rHB0UC>.

<sup>68</sup> See the OAS Secretary General’s updated report (n 64) 2.

blackouts, citizens crossing the border to sell their hair, hunting dogs, cats, and pigeons for food, and risking their lives to reach countries once viewed as tourist destinations.<sup>69</sup> This, in a state that was once one of the wealthiest and most stable in Latin America.

#### 4 IS BRAZIL SUFFERING DEMOCRATIC DECAY?

Brazil provides an extremely interesting testing ground for the definition of democratic decay set out earlier in this paper, not only in helping us to understand the definition better, but also to achieve a better understanding, from a comparative perspective, of the current crisis of Brazilian democracy centred on the impeachment, its aftermath and its implications for Brazilian democracy. At every turn, the Brazilian context reminds us that identifying democratic decay is difficult, assertions of decay are likely to be highly contested, and assessments cannot be based on superficial analysis. The complexity of the Brazilian experience provides a particularly challenging subject of analysis for a foreigner. This analysis rests on my understanding of the Brazilian context from reading across English-language and Portuguese-language accounts and conversations with a number of Brazilian scholars. It is not intended to present definitive conclusions but to provide a basis for discussion at the conference, especially with my Brazilian colleagues.

##### 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 the two presidential terms of Luís Inácio ‘Lula’ da Silva, leader of the Worker’s Party (*Partido dos Trabalhadores*) as President of Brazil since 2003. Although 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 a global commodities boom) Rousseff 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.<sup>70</sup> 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.<sup>71</sup> 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

<sup>69</sup> See e.g. ‘Venezuelan women sell their hair in order to buy basic necessities’ *The Guardian* 6 December 2016 <http://bit.ly/2gxR8To>.

<sup>70</sup> 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](http://www.globalresearch.ca/the-mass-protests-in-brazil-in-june-july-2013/5342736).

<sup>71</sup> 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>.



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.

Spatial constraints preclude a full re-cap of the entire impeachment process, but the 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 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, has 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.<sup>72</sup>

In recent months the incumbent president and cabinet, and leaders of the initial impeachment drive, have looked 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%.<sup>73</sup> 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.<sup>74</sup> Amid speculation of a military *coup*, the commander of the army took to Twitter to reassure the public: "our democracy is not in danger".<sup>75</sup>

In early June, 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.<sup>76</sup> However, the Court dismissed the case by a bare majority of 4-3.<sup>77</sup> (Temer's removal from office would

<sup>72</sup> D Gallas, 'Brazil: President Temer's first year after impeachment' BBC News 12 May 2017 <http://bbc.in/2sVYHpw>.

<sup>73</sup> 'Governo Temer tem aprovação de apenas 9%, aponta Datafolha' O Globo 30 April 2017 <https://glo.bo/2qBFh7w>.

<sup>74</sup> S Romero, 'Their Government in Chaos, Brazilians Fear the Joke Is on Them' *New York Times* 26 May 2017 <http://nyti.ms/2sJzC0S>.

<sup>75</sup> "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/2rcI9II>.

<sup>76</sup> 'Temer depõe sobre corrupção e é julgado no TSE por crime eleitoral' O Globo 6 June 2017 <https://glo.bo/2rcaxeY>.

<sup>77</sup> 'Brazil Court Dismisses Corruption Case Against President Temer' Rio Times 10 June 2017 <http://bit.ly/2smaoZA>.



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). Some 85% of the population favour 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).<sup>78</sup>

### **Is this democratic decay, or is this simply a continuation of familiar patterns?**

When our focus remains on the Brazilian impeachment crisis itself, it does not seem to fit within the framework of ‘democratic decay’ set out above. In many ways, when analysed against the framework set out above, and the experiences of Poland and Venezuela, 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 elite 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 drawn on the “abusive constitutionalism” concept, speaking of the “abusive impeachment” of Rousseff.<sup>79</sup> 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.<sup>80</sup>

Rousseff herself—albeit admittedly not an objective observer—has consistently referred to the impeachment as a ‘coup’. In a recent 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 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

<sup>78</sup> ‘Com Temer rejeitado, 85% defendem eleição direta, aponta Datafolha’ Folha de s. Paulo 30 April 2017 <http://bit.ly/2qxDGzV>.

<sup>79</sup> See Zaiden Benvindo, ‘Abusive Impeachment’ (n 1).

<sup>80</sup> 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.[x].

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.<sup>81</sup>

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 is no immediately obvious government scheme. The Temer government has not sought 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 has not issued significant threats against the judicial branch, or the Supreme Court, as seen in states such as South Africa. There has been no barring of any political parties. 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).

There does not appear, overall, any articulated or systematic plan to hollow out the democratic system. There is no 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 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.<sup>82</sup>

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 has a democratic sensitivity to criticism and some respect for the right to protest.

Discussing the Brazilian impeachment crisis with Brazilian friends and scholars, these issues are raised time and again. A common refrain is that the impeachment crisis is 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

<sup>81</sup> ‘Full Interview with Dilma Rousseff on Her Ouster, Brazil’s Political Crisis & Fighting Dictatorship’ Democracy Now! 29 May 2017 <http://bit.ly/2rl12Ns>.

<sup>82</sup> See e.g. M Azzimonti, ‘The Political Economy of Balanced Budget Amendments’ (2013) *Business Review* 11 <http://bit.ly/2skTfiu>.

author views this as a serious oversimplification.<sup>83</sup>) 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.<sup>84</sup> The resulting text, with what has been called its 'open texture, programmatic norms and indeterminate provisions',<sup>85</sup> 'trivial details and unaffordable promises',<sup>86</sup> 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'.<sup>87</sup>

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.<sup>88</sup>

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.

There also appears to be a common argument that, in analysing the impeachment crisis, it must be emphasised that Brazil as a democracy is still developing, still finding its feet—that Brazil's democratic transition and democratisation process remains a live issue in the growing crisis affecting Brazil's democratic system. This reflects the general definitional issue discussed at the outset of this paper, suggesting that some states cannot be said to be suffering democratic decay, but rather problematic democratisation trajectories. However, we see some backlash against this view. Mariana Mota Prado, for instance, discussing the anti-corruption process, appears to argue that it is time to stop approaching Brazil as a society in transition, stating: "Brazil needs to recognise that the democratic transition is over."<sup>89</sup> Certainly, Brazil has widely been considered a consolidated democracy for the past 10-15 years (albeit through a non-linear democratisation process marked by a "pattern of advances and setbacks").<sup>90</sup> This

<sup>83</sup> 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).

<sup>84</sup> 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.

<sup>85</sup> L Prado Verbicaro, 'Um Estudo Sobre as Condições Facilitadoras da Judicialização da Política no Brasil' (2008) 4 *Revista Direito GV* 389, 390.

<sup>86</sup> 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) 137.

<sup>87</sup> Prado Verbicaro, 'Judicialização da Política'.

<sup>88</sup> C Hübner Mendes, 'Judicial Review of Constitutional Amendments in the Brazilian Supreme Court' (2005) 17 *Florida Journal of International Law* 449, 453.

<sup>89</sup> M Mota Prado, 'O Brasil precisa reconhecer que a transição democrática acabou, por Mariana Mota Prado', *Folha de S. Paulo* 24 April 2017 <http://bit.ly/2oXiGnY>. Translation by the author.

<sup>90</sup> P Kingstone and T Power, *Democratic Brazil Revisited* (University of Pittsburgh Press, 2008) p.x.

would suggest a level of maturity where it is perhaps more appropriate to speak of democratic decay than a problematic democratisation process.<sup>91</sup>

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 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.<sup>92</sup>

All of these arguments tend 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 simply explained as a continuation of previous levels of dysfunction in the state's system of democratic politics.

Once the wider context and consequences of the Brazilian impeachment crisis are examined, there is a significant 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 populist politics at odds with liberal constitutional democracy. This is analysed below according to two key questions.

### **Do we see incremental degradation of 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 contemporary states such as Poland, Hungary, and South Africa, or Venezuela in the late 1990s and early 2000s, for instance.

However, a closer look suggests that core structures of Brazilian democracy are under extreme stress. The impeachment crisis, and the potential for impeachment a second president in under a year, 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 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 also appears 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:

<sup>91</sup> See e.g. Adriano Nervo Codato's introduction to A Nervo Codato (ed.), *Political Transition and Democratic Consolidation: Studies on Contemporary Brazil* (Nova Science, 2006) p.xix.

<sup>92</sup> 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.

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.<sup>93</sup>

More importantly, two of the Court's justices will retire in the coming months. Should Temer cling to power long enough to appoint both replacements, he will have directly appointed three of the Court's eleven justices. Factor in the view that the President of the Supreme Court, Justice Gilmar Mendes, is also commonly viewed as a Temer ally,<sup>94</sup> and the prospect of a 'captured' court becomes more plausible (if, at present, far from a certainty).<sup>95</sup> Again, this does 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. 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 being highjacked 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.<sup>96</sup>

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."<sup>97</sup> 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".

<sup>93</sup> J Zaiden Benvindo, 'Brazil's Increasingly Politicized Supreme Court' Int'l J. Const. L. Blog 16 February 2017 <http://bit.ly/2r2azoL>.

<sup>94</sup> 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>.

<sup>95</sup> 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.

<sup>96</sup> 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>.

<sup>97</sup> 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).



## Do we see incremental degradation of the substance of liberal constitutional democracy?

Perhaps much more concerning again are negative trends regarding the substance of liberal constitutional democracy—described above 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:<sup>98</sup>

Brazil’s own 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,<sup>99</sup> 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 euphoria surrounding the democratic transition in the mid-1980s.

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. This not only, for some, has the direct effect of politicising the Court, it also has led to what Julianio 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.”<sup>100</sup>

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

<sup>98</sup> M Riethof, ‘Why Brazil’s Political Crisis Matters for Latin American Democracy’ Global Observatory 7 September 2016 <http://bit.ly/2olOIrH>.

<sup>99</sup> See A Ituassu, ‘A dialectic tradition: brazil’s re-democratization process and the country’s current political crisis’ <http://bit.ly/2rUPvTH>.

<sup>100</sup> J Zaiden Benvindo, Abusive Judicial Activism and Judicial Independence in Brazil *International Journal of Constitutional Law 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).

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.<sup>101</sup>

The second trend is even more pernicious. Jeffery Webber speaks of the political momentum in Brazil increasingly shifting to “a rightwing, antiparty populism”.<sup>102</sup> The standard-bearer of this new movement is a starkly anti-democratic politician, Jair Bolsonaro, currently a sitting member of the Chamber of Deputies (although he is not alone: others include Marco Feliciano). Known for ‘plain talking’ and presenting himself as a political outsider capable of reforming a corrupt and elitist political system, Bolsonaro is often likened to Donald Trump in the English-language press, although his recorded utterances are perhaps even more alarming, including breath-taking statements denigrating Brazil’s minorities (e.g. quilombolas, sexual minorities) and women. 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 dictatorship<sup>103</sup>—a man against whom strong allegations of torture and forced disappearance were made in the National Truth Commission’s report of December 2014.<sup>104</sup>

Bolsonaro is, according to recent polls, the fastest-rising political star in Brazil and one of the country’s most popular politicians, second only to Lula as the presidential elections of 2018 loom 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.<sup>105</sup> If successful, a Bolsonaro presidency could see a much more extensive attack on the 1988 Constitution, far beyond the current re-orientation away from the ‘social justice’ pledge and social and economic rights provisions in the text, to encompass undermining of the rights to equality and protest, among others. It is, of course, as yet unclear whether this success in the polls could turn to success in the presidential elections slated for 2018. However, as with the rise of far-right leaders elsewhere (e.g. Geert Wilders in the Netherlands, Marine Le Pen in France), his rise threatens to leave deep changes in the political landscape, irrespective of his ultimate electoral success.

More generally, the fundamental implication of the impeachment crisis is that it suggests a fraying, if not a breakdown, of a willingness to play ‘by the rules of the game’, which is essential to the functioning of any democratic system. This is allied to the ‘rule by law’ mentality discussed above, but is a broader concern. It refers, not only to the unwillingness of political actors to submit to the results of elections and seek to realise their preferred policies by democratic and constitutional means, but a wider unwillingness among significant sectors of the electorate to accept the outcome of free and fair elections. (This, of course, is not solely a right-wing pathology; one might refer to the common liberal/left wing refrain of ‘not my president’ since the election of Donald Trump in November 2016<sup>106</sup>).

## 5 HOW IS PUBLIC LAW OFFERED AS A PROTECTION OR SOLUTION?

Regardless of whether one accepts that Brazil is experiencing identifiable democratic decay, a number of possible public law solutions to the current democratic crisis appear to have been forwarded by observers. This section, which is significantly briefer than the foregoing section, discusses some of the principal proposals, underlining that all appear to suffer from significant defects.

<sup>101</sup> WC Prilliaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Greenwood Publishing Group, 2000) 76.

<sup>102</sup> Webber, *The Last Day of Oppression* p.[x].

<sup>103</sup> Ibid. p.[x].

<sup>104</sup> See *Relatório da Comissão Nacional da Verdade*, 10 December 2014 [www.cnv.gov.br](http://www.cnv.gov.br).

<sup>105</sup> PH Leal, ‘Bolsonaro and the Brazilian far right’ *DemocraciaAbierta* 24 April 2017 <http://bit.ly/2sMsAYq>.

<sup>106</sup> See e.g. T Lee, A Rafferty and C Siemazsko, ‘America Gives Trump an Earful at ‘Not My President’s Day’ Rallies’ *NBC News* 20 February 2017 <http://nbcnews.to/2kShyMW>.

Discussion of public law solutions might be viewed as ranging in concentric circles from narrow constitutional reforms to address the most urgent challenges, to ‘mezzanine’ proposals that advocate wider structural reform, to much more fundamental calls for a new constitution.

On the narrow side of the equation, the current focus rests on the desirability of a constitutional amendment to permit direct presidential elections in the event of Temer’s removal. However, even this discussion speaks to wider considerations. Thiago de Pádua, for instance, frames the problem as relating to the tension between his wish, as a citizen, for direct presidential elections versus his wish, as a jurist, for fidelity to the literal text of the Constitution, and the need to adhere to the text of the Constitution.<sup>107</sup> This discussion speaks to deep-seated concerns regarding the view of the Constitution as a framework to be constantly amended and manipulated to serve political ends, whether noble or ignoble, as opposed to a framework for the democratic order, which should be taken seriously as a constraint, interpreted faithfully, and amended only sparingly. As Conrado Hübner Mendes observed in an interview last year: “When legal interpretation cannot be differentiated from political conflict, it means that the rule of law has reached its limit”.<sup>108</sup>

In terms of ‘mezzanine’ options, the need to reform the political party system and the electoral system has become a common refrain. De Pádua expressly asserts this, as have many others.<sup>109</sup> Indeed, reform of the electoral and political party system has been on the table for years, but flagship measures aimed at reform, such as a law increasing electoral thresholds for parties’ entry into the National Congress, have been struck down by the Supreme Court.<sup>110</sup>

Indeed, there is significant focus in the current debate on the Supreme Court as an institution capable of imposing some form of order on the political and legal disarray. De Sousa Santos, for instance, suggested in 2016:

The STF (Federal Supreme Court) must assume its role as the ultimate guarantor of the legal order and put an end to the spreading legal anarchy. The STF will be faced with many important decisions in the near future, which must be obeyed by all, irrespective of what it decides. At present, the Supreme Court is the only institution capable of halting the plunge towards the state of emergency.<sup>111</sup>

Mendes suggests that it is the responsibility of the legal community to “stabilise” constitutional interpretation, but suggests also that the Supreme Court has suffered from a “chronic difficulty” in asserting institutional positions that are not merely the sum of individual justices’ opinions. Of course, scholars such as Virgílio Afonso da Silva have urged the need for reform of procedural rules to improve the Supreme Court’s functioning in this regard.<sup>112</sup>

Others go further again. Emir Sander, for instance, argues: “There will be no democracy in Brazil without a Judicial System that is elected and controlled by the citizens, with fixed mandates and limited powers.”<sup>113</sup> This would clearly constitute a root-and-branch reform of Brazil’s judiciary, and one that could serve to further politicise the judiciary, rather than improving its functioning, especially given the intense polarisation of Brazilian politics.

At the wider macro-level of reform are ex-president Rousseff’s calls for a new Constituent National Assembly to conduct a wholesale revision of the Constitution to achieve political reform.<sup>114</sup> This is not entirely novel: as Zimmermann notes, by 2010 a range of politicians, judges and organisations had suggested that a new constitution was needed, whether to achieve a new popular constitution (in the eyes

<sup>107</sup> T Aguiar de Pádua, ‘Democracia resiliente ou incerta’ Jota 20 May 2017 <http://bit.ly/2rUYBAb>.

<sup>108</sup> L Maklouf Carvalho, ‘Impeachment não é recall’, afirma jurista’ 31 March 2016 <http://bit.ly/2rUTPT7>. Author’s translation.

<sup>109</sup> de Pádua, ‘Democracia resiliente ou incerta’ (n 107).

<sup>110</sup> See STF Electoral Thresholds Case, ADI 1.351 (7 December 2006).

<sup>111</sup> de Sousa Santos, ‘Brazil: Democracy on the Edge of Chaos’ (n 96).

<sup>112</sup> VA da Silva, ‘Deciding without Deliberating’ (2013) 11 *International Journal of Constitutional Law* 557.

<sup>113</sup> de Sousa Santos, ‘Brazil: Democracy on the Edge of Chaos’ (n 96).

<sup>114</sup> See e.g. ‘Full Interview with Dilma Rousseff on Her Ouster’ (n 81).

of President Lula) or to construct a new “national project” for Brazil (in the view of Édson Vidigal, former Chief Justice of the Superior Tribunal of Justice (STJ)).<sup>115</sup> However, few contemporary Brazilian scholars appear to favour the enactment of a new Constitution. De Pádua, for instance, dismisses calls for a new Constituent National Assembly (ANC) to draft a new Constitution, seeing it as somewhat naïve.<sup>116</sup> Indeed, in the current divisive state of Brazilian politics, it is difficult to imagine a constitution-drafting process with sufficient consensus and good faith to produce a viable, coherent and sustainable constitutional text.

At a more fundamental level, 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 the adoption of the new Basic Law in Hungary in 2011, or the 1999 ‘socialist’ Constitution of Venezuela. Scholars such as Will Partlett, for instance, speak 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.<sup>117</sup>

This is not to definitively argue that the same is a likely outcome in Brazil, but to say that the combined trends of a shift toward right-wing populism and the fact that direct presidential elections will take place soon (whether as scheduled in 2018, or sooner), set within the wider context of the crisis of Brazilian democracy, suggest that this is not a threat to be dismissed lightly, and helps to emphasise the dangers inherent in calls for a new constitution as a solution to the current crisis.

## CONCLUDING REMARKS

This paper has attempted to sketch an analytical framework for understanding a phenomenon of ‘democratic decay’ affecting a range of democratic states worldwide, and has sought to use this framework to analyse the impeachment crisis in Brazil. As suggested at the outset, the Brazilian context challenges and problematises various aspects of the overall definition of democratic decay provided at the start of the paper. However, when analysed through this analytical framework, various factors emerge which suggest that, viewed in its overall context, the Brazilian impeachment crisis can be argued to constitute a particular juncture in a process of democratic decay, whose end-point is unclear, and whose causes are diffuse. The paper has sought to demonstrate the highly complex role public law plays in processes of democratic decay, both as a ‘weapon’ used by the powerful to degrade the democratic system, and as a purported solution to democratic decay. In particular, the paper strikes at a central question of the wider project: do we place too much faith in public law as a solution to democratic decay?

Most fundamentally, the paper underlines the fact that while assessment of whether a state is undergoing democratic decay requires a highly context-sensitive and historically-grounded analysis, comparative analysis can nevertheless be helpful in seeking to draw out certain common dynamics that recur from state to state, as well as notable points of divergence. It is worthwhile to emphasise again that this paper forms part of an ongoing project to understand the phenomenon of democratic decay in states worldwide, and that this paper has not sought to make a definitive diagnosis of the maladies affecting Brazil’s democratic system. As an outsider seeking better understanding of a highly complex, and

<sup>115</sup> Zimmermann, ‘Constitutions without Constitutionalism’ (n 83) 144.

<sup>116</sup> de Pádua, ‘Democracia resiliente ou incerta’ (n 107).

<sup>117</sup> W Partlett, ‘The Dangers of Popular Constitution-Making’ (2012) 38(1) *Brooklyn Journal of International Law* 1, 1.

constantly unfolding, local crisis, I welcome feedback from Brazilian scholars in particular regarding the analysis presented in this paper.