

Diagnosing Democratic Decay

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Abstract

Decay in the democratic systems of states worldwide, such as Hungary, Poland, Venezuela, South Africa, and the US, has gathered pace in the past decade, forming a subset of what Larry Diamond calls a global 'democratic recession'. After briefly sketching the decline of democracy worldwide, this paper considers the challenge of diagnosing and framing democratic decay as a phenomenon in three parts. The first part examines existing concepts and rubrics used in relation to this phenomenon, with a central focus on Aziz Huq and Tom Ginsburg's concept of 'constitutional retrogression'. The second part compares the constitutional retrogression framework and the author's democratic decay framework. Third, the democratic decay framework is applied to four separate country case-studies: Venezuela, Poland, South Africa, and Brazil. This demonstrates the framework's ability to capture common dynamics and patterns from state to state, while also accommodating divergences and local factors. On the basis of close analysis of the four country case-studies, it is argued that existing frameworks do not fully capture the variety and complexity of dynamics of democratic decay in different states, and that greater attention must be paid to what democratic states can be compared.

INTRODUCTION

This paper forms part of a project on the growing global trend of ‘democratic decay’—that is, deterioration of democratic systems worldwide falling short of a democratic breakdown—and why this raises such a challenge for public law, in terms of constitutional law, regional law, and international law more widely.¹

One of the most pressing questions at present is how to define democratic decay, and how to diagnose whether democratic decay is affecting a given state. This paper, building on the author’s recent blog posts and conference papers, and a forthcoming book chapter,² is an exercise in sketching clearer conceptual boundaries for the phenomenon of democratic decay, and at the same time, fashioning a usable analytical framework for assessing the presence and extent of democratic decay in a given state. In doing so, the paper builds on recent work by scholars such as Tom Ginsburg, Aziz Huq, David Landau, Ros Dixon, Kim Lane Scheppele, and Tomasz Tadeusz Konieczny, among others.

The paper contains four parts. The first part briefly describes the decline of democracy worldwide, especially during the past decade. The second part examines existing frameworks for understanding this phenomenon and how they fit together, with a central focus on the concept of “constitutional retrogression” set out by Aziz Huq and Tom Ginsburg in a recent ground-breaking paper.³ The third part sets out the divergence and commonalities between the constitutional retrogression framework and the author’s organising concept of democratic decay, fleshing out the thumbnail definition used by the author since September 2016—the *incremental degradation of the structures and substance of liberal constitutional democracy*—into a fuller analytical framework. The fourth part analyses four country case-studies, Venezuela, Poland, South Africa, and Brazil, in order to test the viability and analytical utility of the democratic decay framework.

The paper ultimately argues that the democratic decay framework has significant utility, explains how it differs from the concept of constitutional retrogression, and underscores how important it is to take an empirically grounded, context-sensitive approach to identifying and assessing democratic decay in any given state. On the basis of close analysis of the four country case-studies, it is argued that existing frameworks do not fully capture the variety and complexity of dynamics of democratic decay in different states, and that greater attention must be paid to what democratic states can be compared.

1 THE DECLINE OF DEMOCRACY WORLDWIDE

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.⁴ 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

¹ The working title of the project is ‘Toward Tyranny: Inside Law’s Struggle Against Democratic Decay’.

² I-CONnect blog posts and columns include: ‘When is a Limp More than a Limp? Diagnosing Democratic Decay’ 12 July 2017 <http://bit.ly/2uArSCs>; ‘The “C word”: Democratic Decay and the New Frontiers of Comparative Law’ 8 March 2017 <http://bit.ly/2u1eLaw>; ‘Enough Complacency: Fighting Democratic Decay in 2017’ 11 January 2017 <http://bit.ly/2uuLGXe>; ‘Constitutional Ignorance and Democratic Decay: Breaking the Feedback Loop’ 17 November 2016 <http://bit.ly/2IGlfco>; ‘Time to View Democratic Decay as a Unified Research Field?’ 30 September 2016 <http://bit.ly/2dp64yW>; and ‘The Democratic Recession and the ‘New’ Public Law’ 22 April 2016 <http://bit.ly/1rWXNlp>. Recent conference papers include ‘Public Law and the Puzzle of Democratic Decay in Brazil’, Law and Society International Meeting ‘Walls, Borders, and Bridges: Law and Society in an Inter-Connected World’, Mexico City, 22 June 2017; and ‘Preventing ANC Capture of South African Democracy: A Missed Opportunity for Other ‘Constitutional Courts’?’, I-CON Society annual conference ‘Courts, Power, Public Law’, Copenhagen, 6 July. See also TG Daly, ‘Democratic Decay in 2016’ in International IDEA, *Annual Review of Constitution Building: 2016* (International Institute for Democracy and Electoral Assistance, forthcoming, 2017).

³ AZ Huq and T Ginsburg, ‘How to Lose a Constitutional Democracy’ *UCLA Law Review*, Vol. 65, 2018. The page references herein are from the version of the paper posted on SSRN on 20 January 2017: <http://bit.ly/2t7QXjP>.

⁴ L Diamond, ‘Facing Up to the Democratic Recession’ (2015) 26(1) *Journal of Democracy* 141.

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.⁵

'Democratic decay' may be viewed as a subset of this 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.⁶ Spring 2016 brought a disturbing crackdown on dissent in India under Prime Minister Modi.⁷ 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'.⁸ The election of Donald Trump as President of the United States in the elections of 8 November, following a campaign notable for his multiple attacks on foundational tenets of American democracy such as free speech and freedom of religion, has focused many more minds on the global issue of democratic decay in recent months. As discussion of the four country case-studies below shows, the trend of decay has continued and worsened in many states during 2017, despite the seemingly misplaced hope that the victory of centrist forces in the French and Dutch elections in Spring 2017 means the tide is turning.

It should be emphasised here that this paper is wedded to a thicker conception of democracy than the Schumpeterian thin procedural conception of democracy, focused on elections. The thicker conception here includes the regular holding of full, free and fair elections, protection of core democratic rights (e.g. free speech, freedom of association, the right to protest), and adherence to constitutional and ordinary law as a meaningful constraint on political power. This chimes with Aziz Huq and Tom Ginsburg's use, in their recent paper, of the term "constitutional liberal democracy" to include "the civil and political rights employed in the democratic process, and the availability of neutral electoral machinery, and the stability, predictability, and publicity of legal regime usually captured in the term "rule of law.""⁹

Indeed, Huq and Ginsburg's approach reflects a broad consensus among scholars, practitioners and other analysts. As Freedom House in its report on 2016 observes: "A constant refrain among democracy advocates is that "democracy is more than just elections."¹⁰ While there is evidently significant contestation regarding how thick our conceptions of democracy must be, this paper does not address this issue in the abstract. Instead, it acknowledges that this contestation is itself an important part of discussing how we diagnose democratic decay. This is discussed in more detail below.

2 EXISTING FRAMEWORKS FOR UNDERSTANDING DEMOCRATIC DECAY

What this paper calls '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. This discussion is taking place under a wide variety of rubrics, which approach the issue from different angles, and with different analytical predilections. The last five years, in particular, has witnessed a profusion of different concepts and frameworks, and a re-tooling of existing concepts, as scholars struggle to capture the nature and dynamics of democratic decline in states worldwide.

⁵ See e.g. Freedom House, *Populists and Autocrats: The Dual Threat to Global Democracy. Freedom in the World 2017* <http://bit.ly/2kNaJR5>.

⁶ 'Rule of law in Poland: Commission starts dialogue', 13 January 2016. <http://bit.ly/1OjAbUp>.

⁷ Editorial, 'India's Crackdown on Dissent', *New York Times*, 22 February 2016. <http://nyti.ms/1KDoidR>.

⁸ See the second page of Mo Ibrahim Foundation, *A Decade of African Governance 2006-2015* (October 2016).

⁹ Huq and Ginsburg, 'How to Lose a Constitutional Democracy' (n 3) 8.

¹⁰ Freedom House, *Populists and Autocrats* (n 5) 3.

Some scholars have used existing concepts, such as ‘constitutional crisis’¹¹ and ‘democratic crisis’,¹² as labels for analysis. However, such scholarship has not expended much energy on analysing what is distinctive about contemporary democratic decay, often tending to focus instead on historical comparisons, with the end of democratic rule in Weimar Germany the leading referent.

Political science scholars employ two key existing concepts, ‘democratic backsliding’,¹³ and ‘democratic deconsolidation’.¹⁴ The central framework analysed here is that developed by Aziz Huq and Tom Ginsburg. Drawing on the existing political science literature, they seek to provide a typology of different types of democratic backsliding, dividing the phenomenon into what they call “authoritarian reversion”, which refers to a rapid and wholesale collapse into authoritarianism, and “constitutional retrogression”, which refers to

a process of incremental (but ultimately still substantial) decay in the three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law. It captures changes to the quality of a democracy that are (1) on their own incremental in character and perhaps innocuous, that (2) happen roughly in lockstep; and involve (3) deterioration of (a) the quality of elections, (b) speech and association rights, and (c) the rule of law.¹⁵

For Huq and Ginsburg, the latter is a much greater threat, in the US and the wider world, in a context where illiberal leaders appear to have shifted to subtler methods of capturing the political system than the *coups* of yesteryear. On the basis of comparative analysis ranging across a variety of states (particularly Russia, Hungary, Poland, Thailand, Turkey, Sri Lanka and Ukraine) they identify five ways in which such constitutional retrogression unfolds:

(i) constitutional amendment; (ii) the elimination of institutional checks; (iii) the centralization and politicization of executive power; (iv) the contraction or distortion of a shared public sphere; and (v) the elimination of political competition.”¹⁶

Huq and Ginsburg’s framework is incisive, illuminating and useful for a range of reasons. First, it focuses on the trajectory of the erosion of democratic rule, observing that the end-point of constitutional retrogression, unlike authoritarian reversion, is not outright authoritarian rule but a form of hybrid governance regime (with the possibility to descend further into ‘harder’ forms of authoritarian rule).¹⁷ Second, it explains that this incremental cutting into democratic constraints may be more attractive to illiberal governments given that it provokes less resistance than more blatant means, such as a *coup* or declaration of emergency.¹⁸ Third, they pinpoint the central difficulty, regarding diagnosis, that this kind of manipulation is harder to spot. As they put it:

Because no democratic system is perfect, there will always be some quanta of [violations of democratic, liberal, and constitutional norms]. The precise point, however, at which the volume of democratic and constitutional backsliding amounts to constitutional retrogression will be unclear—both *ex ante* and a contemporaneous matter.¹⁹ (...) Like the proverbial boiling frog, a democratic society in the midst of retrogression may not realize its predicament until matters are already beyond redress.

¹¹ 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).

¹² See e.g. E Kanterian, ‘The Crisis of Democracy in Hungary and Romania – Learning from Weimar?’ *Verfassungsblog* 13 May 2013 <http://bit.ly/2r1TtrQ>.

¹³ See e.g. N Bermeo, ‘On Democratic Backsliding’ (2016) 27(1) *Journal of Democracy* 5.

¹⁴ R Foa and Y Mounk, ‘The Danger of Deconsolidation: The Democratic Disconnect’ (2016) 27(3) *Journal of Democracy* 5.

¹⁵ Huq and Ginsburg, ‘How to Lose a Constitutional Democracy’ (n 3) 6, 16.

¹⁶ *Ibid.* 35.

¹⁷ *Ibid.* 15.

¹⁸ *Ibid.* 35.

¹⁹ *Ibid.* 35-36.

Fourth, and perhaps most importantly, their approach provides an overarching framework for understanding a range of concepts employed to capture the manipulation of constitutional law. The leading concept, coined by David Landau in his 2013 article of the same name, is ‘abusive constitutionalism’: “the use of [formal] mechanisms of constitutional change to erode the democratic order.”²⁰ These include the removal of presidential term-limits, elimination of institutional checks (e.g. through packing the courts, interfering with electoral commissions, or increasing government control over the media), or even the wholesale adoption of a new constitution (as seen in Hungary).

Huq and Ginsburg draw heavily on Landau’s insights, and other scholars have adopted Landau’s terminology. For instance, as discussed below, the Brazilian scholar Juliano Zaiden Benvindo has called the impeachment of President Dilma Rousseff in 2016 an ‘abusive impeachment’.²¹ Cognate terms include “bad faith constitutionalism” and “de-constitutionalism”.²² Richard Albert in a forthcoming article employs the term “constitutional dismemberment” to describe “self-conscious efforts to repudiate the essential characteristics of a constitution and to destroy its foundations” through amendment of the constitutional text.²³ However, Huq and Ginsburg, and Landau, note that extraconstitutional means are also employed, including ordinary legislation, abuse of police and prosecution power, and manipulation of bureaucratic processes (e.g. for registration of political parties and media outlets).²⁴

Huq and Ginsburg also refer to the range of terms used to describe the resulting regimes, but appear to downplay the significant tension between scholars who appear to still recognise these as corroded forms of democracy, and others who wish to withdraw the label of ‘democracy’ from such regimes. Thus, on the one hand we have terms such as ‘semidemocracy’ and ‘illiberal democracy’ mentioned by Huq and Ginsburg,²⁵ as well as ‘majoritarian democracy’, ‘façade democracy’, and the term ‘hegemonic democracy’ used by the French political scientist Alain Rouquié to describe systems where the rule of law and rights of minorities are not respected, but political alternation remains possible through elections.²⁶ We also see public law scholars beginning to use the term ‘majoritarian autocracy’ rather than illiberal democracy or majoritarian democracy for regimes (e.g. 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.²⁷ This latter term resonates more strongly with terms such as ‘electoral authoritarianism’ and ‘competitive authoritarianism’.

While, as Huq and Ginsburg observe, some seemingly different terms can be applied to the same state, some of these terms may be best viewed as describing governance arrangements (or levels of decay) across a spectrum. The ultimate dividing line, again, is whether one cleaves to thinner or thicker conceptions of democracy. Huq and Ginsburg’s focus on a thicker conception appears to resonate with the approach of other scholars, such as David Landau and Ros Dixon, to identify a “democratic minimum core”: the web of “longstanding commitments to free and fair elections, the separation of powers, basic human rights and government accountability” without which democratic governance is not possible.²⁸

²⁰ D Landau, ‘Abusive Constitutionalism’ (2013) 47 *UC Davis Law Review* 189, 189.

²¹ 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>.

²² A Acar, “‘De-constitutionalism’ in Turkey?” *Int’l. J. Const. L. Blog* 19 May 2016 <http://bit.ly/2uqQVrq>.

²³ 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).

²⁴ P.46ff.

²⁵ Huq and Ginsburg, ‘How to Lose a Constitutional Democracy’ (n 3) 39.

²⁶ See e.g. A Rouquié, ‘Un nouveau paysage politique en Amérique latine’ (2007) 406 *Études* 729.

²⁷ See e.g. L Pech and KL Scheppele, ‘Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law’ *Verfassungsblog* 6 January 2017 <http://bit.ly/2p35tuy>.

²⁸ See R Dixon, ‘Populist Constitutionalism and the Democratic Minimum Core’ *Verfassungsblog* 26 April 2017 <http://bit.ly/2tKhGHp>.

This is far from an exhaustive list of the concepts currently in use to analyse democratic decay. There is clearly a need for a more systematic mapping of the expanding conceptual landscape, which is beyond the scope of this paper.

3 DEMOCRATIC DECAY AND CONSTITUTIONAL RETROGRESSION: COMPARING TWO ANALYTICAL FRAMEWORKS

Parallel to other scholars, since April 2016 I have been slowly developing a framework for understanding what I term democratic decay. As indicated in the introduction, in a series of blog posts and columns on the blog of the International Journal of Constitutional Law (I-CONnect), conference papers, and a forthcoming short book chapter,²⁹ I have developed a summary definition of democratic decay as the *incremental degradation of the structures and substance of liberal constitutional democracy*.

Resonance with the constitutional retrogression framework

Even from this thumbnail definition, it is clear that the democratic decay framework resonates strongly with that of Huq and Ginsburg, in that it focuses on the incremental nature of such decay, the trajectory of such decay, the way in which it affects the structures of the democratic system, and is predicated on a thicker conception of democracy beyond elections.

As indicated above, the democratic decay framework takes the same fundamental stance as the constitutional retrogression framework by adhering to a thicker conception of liberal constitutional democracy (what Huq and Ginsburg call “constitutional liberal democracy”). Whether we use the term ‘liberal constitutional democracy’ or ‘constitutional liberal democracy’, both speak to an understanding that a thin procedural conception based on elections is insufficient and also that ‘liberal democracy’ is an incomplete label in that it tends to elide the outsized role that constitutional law and constitutionalism have increasingly played in our prevailing understandings of ‘true’ democracy, 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.³⁰

Is there, then, any need for ‘democratic decay’ as an alternative analytical framework to ‘constitutional retrogression’? This section does not take a definitive stance on this question, but opts instead to examine the key ways in which the democratic decay framework diverges from the constitutional retrogression framework.

Questioning the ‘constitutional retrogression’ label

The first question is whether ‘democratic decay’ might be viewed as a more apt term than ‘constitutional retrogression’. It is argued here that it is more appropriate, in that the phenomenon concerns the decay of the democratic system as a whole, rather than simply the constitutional system. For some, the distinction may appear nebulous. However, as suggested below, the emphasis on the constitutional in Huq and Ginsburg’s framework appears to have a significant effect on the identification of what states fit within the framework.

In addition, the term ‘retrogression’ may be misleading: retrogression suggests the return to a former state, typically a worse state, whereas for many of the states under discussion they are moving to a governance model that is novel for the state, and which has only limited resemblance to previous governance modes (e.g. the hybrid form of government in contemporary Hungary, which combines democratic and authoritarian elements, and which operates quite differently to Communist rule).

²⁹ See (n 2).

³⁰ See e.g. S Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 *Georgetown Law Journal* 961, 967.

It is notable, in this connection, that Huq and Ginsburg also employ the terms ‘democratic decay’ and ‘democratic erosion’ in their paper,³¹ and that they explain their use of the term retrogression as derived from the case-law developed under section 5 of the Voting Rights Act, which, spliced with the adjective ‘constitutional’, “transpose a familiar concept employed at a local level to a national context.”³² It is perhaps the fact that their focus rests mainly on the US in their paper that they selected this label.

Over-inclusion and under-inclusion

A central divergence between the constitutional retrogression framework and the democratic decay framework concerns the states they include for analysis.

The democratic decay framework appears less inclusive given that it considers the term ‘decay’ applicable solely to democratic orders that have attained a sufficient level of maturity. The framework draws on the literature concerning the consolidation of democracy in ascertaining what states would be considered sufficiently mature to be amenable to decay. The starting-point of a given democracy (before decay can be said to have set in) is crucial. For this reason, the framework would exclude a range of states included by Huq and Ginsburg, such as Russia, Turkey, Ukraine and Sri Lanka.

Huq and Ginsburg are not alone in their approach. In many analyses, democracies of all hues are lumped together. 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.”³³ Some states in this list, such as Tunisia and Serbia, have not reached a sufficient level of democratic maturity and cannot reasonably be said to be suffering democratic decay, but rather problematic democratisation trajectories. Others, such as Brazil, the Czech Republic, Hungary, Poland, South Africa, 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, 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.³⁴ ‘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. That said, some states such as Russia, Turkey, Ukraine and Sri Lanka, on any analysis, would not fit within the democratic decay framework. Some states, such as Turkey, have never had a truly free media, for instance, and it remains an open question whether serious internal armed conflict in all four states just listed means that they can be put in the same bracket as other states.

To some extent, this issue may come back to nomenclature: if our central focus is on degradation of the constitutional system, this tends toward a more inclusive approach and away from a focus on the democratic starting point of a given state before decay becomes clearly manifest. Perhaps this also explains why two key states which appear to be suffering democratic decay, Brazil and South Africa, are not mentioned by Huq and Ginsburg: as discussed below, their experiences do not fit neatly, or only partly fit, within the framework for constitutional retrogression.³⁵

³¹ See Huq and Ginsburg, ‘How to Lose a Constitutional Democracy’ (n 3) 1, 3, 27, 40.

³² Ibid. 16.

³³ Freedom House, *Populists and Autocrats* (n 5).

³⁴ A Stepan, ‘India, Sri Lanka, and the Majoritarian Danger’ (2015) 26(1) *Journal of Democracy* 128, 128–129.

³⁵ See the list labelled ‘democratic retrogression’ in Huq and Ginsburg, ‘How to Lose a Constitutional Democracy’ (n 3) 38.

Constitutional liberal democracy: Capturing complexity, contestation, and core

As indicated above, this paper generally agrees with Huq and Ginsburg's approach to proceed with a thicker conception of democracy that goes beyond elections alone. Their term constitutional liberal democracy also reflects the manner in which liberalism, constitutionalism, and democracy have become tightly conceptually braided in recent decades, especially since the third wave of democratisation from the 1970s onward. However, their analysis does not capture the extent to which the very notion of a universal model of constitutional liberal democracy has become increasingly contested, and how this raises two problems: first, it forms an additional dimension of contestation which can stymie reaction against hollowing out of democratic governance, by presenting the aims or end-point of transformation as legitimate; and second, it poses the question of whether we can truly judge democracies worldwide against a universal yardstick.

Indeed, in all four states examined below, there have been, and continue to be, counter-arguments to the claim that democratic decay is occurring, all claiming merely a shift to a different kind of democracy: a 'post-liberal' socialist revolutionary democracy, partly achieved through constitutional experimentation (Venezuela);³⁶ a valid shift from liberal democracy to a more traditional republican form of government (Poland);³⁷ the move from a Western-style liberal democracy to an African-style 'liberationist democracy', which focuses more strongly on economic development than classic civil rights (South Africa);³⁸ or a rebalancing of social democracy toward a more strongly neo-liberal model, with a corresponding correction of corruption (Brazil).³⁹ All of these arguments can appear somewhat convincing (at least, on a superficial analysis), and are not always made by servants of the increasingly illiberal regime.

There is also a highly complex interaction of the three elements of constitutional liberal democracy that also requires significant exploration in the diagnosis of democratic decay. In states suffering democratic decay the mutual antagonisms of liberalism, constitutionalism, and democracy come to the fore in different ways. The global focus on populism, for instance, has been described by Francis Fukuyama as "the democratic part of the political system rising up against the liberal part".⁴⁰ Indeed, developments in many states 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, as Huq and Ginsburg emphasise, do not operate as traditional dictatorships. While liberal democracy is openly derided by governments in states such as Poland, Venezuela, and Hungary, which respectively refer to 'conservative democracy', 'illiberal democracy' and 'post-liberal democracy', these states would still lay claim to being constitutional democracies. 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 in states where the scales of

³⁶ See R Uprimny, 'The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges' 89 *Texas Law Review* 1587 (2010-2011).

³⁷ See the response of Justice Lech Morawski of the Polish Constitutional Tribunal to the Verfassungsblog symposium: 'A Critical Response' 3 June 2017 <http://bit.ly/2u3Mgv1>. Justice Morawski was appointed under dubious circumstances by the sitting PiS government.

³⁸ J van der Westhuizen, 'South Africa's soft power conundrum: how to win friends and influence people in Africa' (2016) 9(3) *Journal of Political Power* 449, 451.

³⁹ See e.g. P Millard, 'Brazil's Economic Policy Lurches Right' *Bloomberg Businessweek* 1 September 2016 <https://bloom.bg/2tjrPH9>.

⁴⁰ F Fukuyama, 'US against the world? Trump's America and the new global order' *Financial Times* 11 November 2016 <http://on.ft.com/2ti8iGP>.

governance are claimed to have tipped too far toward liberal constitutionalism to the detriment of the democratic element.

However, the movement is not all in one direction, toward a purported reassertion of the democratic element of constitutional liberal democracy. As discussed below, in other states such as Brazil, there is a strong argument that the liberal element (or neoliberal element) is suffocating the other two elements, in that political actors with a neoliberal agenda have used constitutional means to subvert the Constitution, and to take power without a democratic mandate. To further add to the complexity, Brazil also demonstrates that populism is no monolith: a decade of left-wing populist government and declining economic fortunes have led to the emergence of a more anti-democratic right-wing populism.

In sum, one of the most difficult sticking points in defining ‘democratic decay’ is the meaning of ‘democracy’ itself, and what we view as ‘true’ democracy. It is the “quintessentially contested”⁴¹ 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. One approach may be to add to positive approaches to definition, such as the “democratic minimum core” by taking a negative approach to definition, which may assist in achieving some clarity. A governance system that evinces little concern for core democratic rights and 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. Where law is viewed as a tool to serve the ends of government rather than setting a meaningful framework and boundaries for government we cannot talk of the ‘rule of law’ but rather ‘rule by law’.

Drawing these distinctions and lines is evidently not a simple exercise, and appears to require sophisticated marshalling of evidence, sufficient knowledge of governance and law in any given state, sufficient comparative knowledge in order to make useful comparisons, and at times, educated guesswork and the assessment of whether good faith or bad faith is motivating the transformation.

The place of corruption in the analysis

A possibly crucial element, which is not a central focus in Huq and Ginsburg’s framework, is corruption, and how it may not just present an additional complicating factor in diagnosing democratic decay, given that it is by its very nature covert, but lies at the very centre of understanding the dynamics of democratic decay in a variety of states. The concept of ‘Mafia State’ has been introduced to describe specific undemocratic governance systems (e.g. Hungary, South Africa), which began with the negative hollowing out of democratic constraints by majority-backed governments but which are now based on a quasi-family structure maintained through legal, official, and even secret service coercion and incentives.⁴²

In the South African context, for instance, a recent report offered the following:

In our view the South African case is just one quite typical example of a global trend in the growth of increasingly authoritarian, neopatrimonial regimes where a symbiotic relationship between the constitutional and shadow states is maintained, but with real power shifting increasingly into the networks that comprise the shadow state.⁴³

In its references to the “constitutional state” and the “shadow state” the report points to a particularly pressing problem in that existing frameworks for diagnosing democratic decay tend to focus on overt hollowing out of the democratic order, whether this is through constitutional amendments, laws, practices or rules aimed at curbing free speech, constraining the courts, or subduing the opposition. They

⁴¹ G O’Donnell, ‘The Perpetual Crises of Democracy’ (2007) 18 *Journal of Democracy* 5,

⁴² 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>.

⁴³ Bhorat et al., *Betrayal of the Promise* *ibid.* 3.

do not appear well calibrated to fully integrate the covert dynamics of corruption into the analysis, and this does not appear to be an easy task. It is partly an expertise issue: many of us engaged in comparative constitutional law, both lawyers and political scientists, simply lack adequate knowledge of corruption as a phenomenon, or of anti-corruption measures and mechanisms.

This paper does not attempt to resolve this issue. It is enough here to note that serious, widespread and high-level corruption is a clear theme running through at least three of the four other case-studies considered below: Venezuela, South Africa and Brazil. This requires us to understand a shifting threat: democratic decay may start through the action of a populist or majority-backed government at the outset, but may itself transform into a form of élite capture. Indeed, Samuel Issacharoff at a recent conference offered the view that it seems increasingly impossible to understand the dynamics of democratic decay in states worldwide without grappling with the issue of corruption.⁴⁴

Focusing on the background context

Diagnosing democratic decay also appears to require an appreciation of the background context and decline in the animating spirit and values of democracy: in the definition of democratic decay above this refers to the ‘substance’ of democracy, as opposed to the ‘structures’ of democracy, which is the main focus of the constitutional retrogression framework. (Although it should be acknowledged that their analysis does appreciate that attacks on the structures of democracy can also affect its substance, e.g. attacks on media freedom corrode the shared epistemic foundation necessary for a functioning democracy.⁴⁵)

Roberto Foa and Yascha Mounk, for instance, speak of ‘democratic deconsolidation’ and the ‘democratic disconnect’ to describe the decline in public support for democratic governance in states worldwide. They employ four separate measures: public support for democracy as a system of governance; 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).⁴⁶ For instance, a September 2016 poll revealed 29% of Americans would support a military *coup*.⁴⁷ However, the decline is deeply rooted: 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 decades⁴⁸ which is mirrored by declining faith in younger democracies,⁴⁹ and by a decline in support among young people. 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 to insurgent far-right, nativist, populist, xenophobic and extremist parties.⁵⁰ 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.

Two points may be made here. First, looking at polls on the level of public support for democratic rule, and especially sharp declines, in a given state can prove a useful additional indication of democratic decay. Second, in diagnosing democratic decay it appears important to analyse how incremental degradation of the structures and substance of democracy is a linked and iterative process. Jack Balkin uses the term “constitutional rot” to describe the decades-long trends in the US through which the

⁴⁴ Remarks made as discussant at the panel, ‘Courts, Constitutions and Democratic Hedging’, ICON Society annual conference, ‘Courts, Power, Public Law’, Copenhagen, 6 July 2017.

⁴⁵ Huq and Ginsburg, ‘How to Lose a Constitutional Democracy’ (n 3) 46ff.

⁴⁶ Foa and Mounk, ‘The Danger of Deconsolidation’ (n 14) 6.

⁴⁷ J Taranto, ‘Coup Coup G’joob’ *The Wall Street Journal* 3 August 2016 <http://on.wsj.com/2p22Gig>.

⁴⁸ Foa and Mounk, ‘The Danger of Deconsolidation’ (n 14) 6.

⁴⁹ See M Riethof, ‘Why Brazil’s Political Crisis Matters for Latin American Democracy’ Global Observatory 7 September 2016 <http://bit.ly/2olOIrH>.

⁵⁰ 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>.

political system has slowly become less representative, less responsive to the electorate, less democratic, less republican, and which has culminated in the current dysfunctional politics of the Trump era, which threatens to further corrode the structures and substance of the democratic system.⁵¹ Balkin in his analysis focuses on factors similar to those identified by Foa and Mounk, such as a significant decline in public trust in government, but also lists increasing economic inequality and policy disasters such as the Iraq War and the 2008 financial crisis.

Significantly, in Balkin's picture Trump is merely a symptom of this rot, and his analysis questions the utility of the growing trend to refer to a 'rise of populism'⁵² worldwide by arguing that Trump may have campaigned on a populist platform, but is governing as an oligarch. In terms of diagnosing democratic decay, Balkin's analysis points again to the limits of populism as an overarching concept to analyse the nature of democratic decay in states worldwide, cautions us to strive to understand the complex background dynamics behind the active dimension of political moves to degrade the democratic system, and to understand that the threat to democracy can shift over time.

Assuming a master plan

The penultimate point is that, although it may be unintended, Huq and Ginsburg's framework, like others, tends to suggest that there will paradigmatically be some form of 'master plan' to capture the democratic system. This certainly appears true in some states, especially where governments have steadily and systematically dismantled democratic constraints on political power—most notably in the adoption of new constitutions in Hungary and Venezuela—and it is also important to emphasise how other governments are actively adopting tactics from others: the Polish government's action to capture the Constitutional Tribunal and exert greater control over the media closely mirrors the moves taken in Hungary, for example, but in a context where the government lacks the two-thirds majority to amend the 1997 Constitution.⁵³ Opportunism and execution are also factors. The piecemeal and badly executed attempts by President Zuma to bring numerous independent organs to heel, across a number of years, suggests little overall scheme in mind beyond cowing the enemy of the day. The Brazilian context suggests that shifting political dynamics—here, the plummeting support for President Rousseff shortly after her second election win in late 2014—can provide an opening for swift action to capture power. Importantly, the Brazilian context also emphasises that decay can arise from the very complex interaction of anti-democratic political forces, a poorly designed political system, and a badly functioning, unaccountable, and even corrupt judiciary. It is crucial to acknowledge that it is not always easy to distinguish the 'good guys' from the 'bad guys'.

Methodological approaches

The final point, as regards diagnosing democratic decay, is what might be the best methodological approach. Huq and Ginsburg in their analysis take both a quantitative approach and a comparative approach. Their quantitative analysis includes reference to POLITY scores indicating declines in the level of democracy in given states (although they recognise this is a rather crude way of measuring constitutional retrogression).⁵⁴ As discussed above, their comparative approach is quite inclusive and rather broad-ranging, looking to multiple states for examples of the trends and manipulations discussed under their constitutional retrogression framework.

⁵¹ JM Balkin, 'Constitutional Rot' in CR Sunstein (ed), *Can It Happen Here?: Authoritarianism in America* (Harper Collins, 2018, forthcoming).

⁵² See e.g. *Populists and Autocrats* (n 5)..

⁵³ For an illuminating account see KL Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559.

⁵⁴ Huq and Ginsburg, 'How to Lose a Constitutional Democracy' (n 3) 37.

While recognising the very valuable insights gleaned from this approach, the democratic decay project takes a more qualitative approach, focusing on more extensive analysis of a smaller number of key case-studies. This, it is argued, is vital in order to capture the commonalities and divergences of the dynamics in different states, and to capture the sheer complexity of each scenario. The short vignettes provided below will be extended in later work. A key issue here, mentioned above, is what countries are selected for analysis. The four states selected here have been chosen according to four main criteria: (i) they had generally been considered consolidated democracies and had therefore reached a certain level of maturity before decay started to set in; (ii) they represent decay in three key regions (Latin America, Europe, and Africa); (iii) they show different stages of democratic decay; and (iv) they all provide ways of showing the diversity of dynamics regarding democratic decay.

A final point to note, as regards methodology in diagnosing democratic decay and as regards divergence from the constitutional retrogression framework, is that the democratic decay framework places significant focus on the actions of international actors as an additional signal that democratic decay is occurring: this is clear from the discussion of Venezuela and Poland below.

4 FOUR EXAMPLES OF DEMOCRATIC DECAY: VENEZUELA, POLAND, SOUTH AFRICA AND BRAZIL

This section examines four different states as a way of exploring the different ways in which democratic decay has proceeded in different states. The case-studies are used to test the analytical utility of the democratic decay framework, its ability to capture the dynamics of different contexts, and its flexibility.

Venezuela: From perceived stability to potential democratic breakdown

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.⁵⁵ Consensual politics and economic progress, equalling the GDP of Israel or Ireland by the 1980s,⁵⁶ 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.⁵⁷ 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 extra-constitutional action; and another military *coup* attempt in 2002 as both élite and popular disaffection with *Chavismo* set in.

The decline has been incremental, across a relatively long time period, but the concerted assault on the democratic system began in the late 1990s. 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.⁵⁸ Through the new constitution, Chávez expanded the powers of the presidency and the hard-wired deficiencies of Venezuela's "petro-State"—

⁵⁵ See Ch.3 'Venezuela: Democratic Decay' in M Ottaway, *Democracy Challenged: The Rise of Semi-Authoritarianism* (Carnegie Endowment, 2013).

⁵⁶ RS Foa and Y Mounk, 'The Signs of Deconsolidation' (2017) 28(1) *Journal of Democracy* 5, 10.

⁵⁷ For a detailed account, see AR Brewer-Carías, *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment* (Cambridge University Press, 2010).

⁵⁸ See e.g. Uprimny, 'The Recent Transformation' (n 36).

corruption, rent-seeking, and obstacles to building strong democratic institutions—worsened.⁵⁹ The new Supreme Court, established in 2000, quickly gained a reputation as a tool of the Chávez regime.⁶⁰ Concerted moves were made to repress media freedom,⁶¹ and the electoral rules rewritten to secure majorities for Chávez.⁶² 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”,⁶³ 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 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.⁶⁴ 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”.⁶⁵

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*.⁶⁶ 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 2017,⁶⁷ despite the spiralling crisis and clear intransigence of President Maduro.⁶⁸

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

⁵⁹ 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.

⁶⁰ 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).

⁶¹ In 2000 a media law was introduced according the government carte blanche to suspend or revoke broadcasting licences, followed in 2004 by a law prohibiting electronic transmission of material “foment anxiety in the public or disturb public order”. Huq and Ginsburg, ‘How to Lose a Constitutional Democracy’ (n 3) 47-48.

⁶² Landau, ‘Abusive Constitutionalism’ (n 20) 206.

⁶³ ‘Venezuela election: Maduro’s Socialists trounced’ *BBC News* 7 December 2015 <http://bbc.in/1Q9IW7F>.

⁶⁴ 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>.

⁶⁵ See A Cawthorne, ‘Venezuela delays state elections to 2017, opposition angry’ *Reuters* 19 October 2016 <http://reut.rs/2ejjH6E>.

⁶⁶ 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.

⁶⁷ See the updated report of the OAS Secretary General, issued on 14 May 2017: <http://bit.ly/2nsAODa>.

⁶⁸ See e.g. ‘Maduro to OAS: “Shove Democratic Charter Up You Know What”’ *Pan Am Post* 2016 <http://bit.ly/2sgOPXf>.

“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.⁶⁹ 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.⁷⁰

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. On 16 July over 7 million Venezuelans (representing 37% of the electorate) took part in an unofficial symbolic vote of dissent organised by the opposition against President Maduro’s constitutional reform plan, overwhelmingly rejecting the proposed constitutional assembly; requesting the military to defend the existing constitution; and calling for elections before the expiry of Maduro’s term in 2019.⁷¹ The result has emboldened the opposition to seek nomination of new Supreme Court judges in protest at the Court’s capture by the Chavista regime, raising the prospect of two parallel judicial systems emerging.⁷² With talk of Venezuela’s democracy facing “zero hour” and the prospect of full-blown dictatorship, democratic decay in Venezuela, it seems, has reached its endgame and threatens to culminate in full democratic breakdown.⁷³ 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.”⁷⁴

One reason for Maduro’s stubborn refusal to relinquish power may be that he and his predecessor appear to have leveraged power to enrich themselves and their supporters to the tune of billions. As one observer put it:

Chávez and Maduro came to preside over a kleptocracy. State contracts were awarded without competitive bidding to companies connected to the leadership. Huge amounts of money have simply disappeared.⁷⁵

Poland: Democracy, populism and popular pushback

Poland was once a poster child for democracy in the post-Communist sphere.⁷⁶ 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 dignity and 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 also “the existence of a functioning market economy”, with its economy growing apace in the post-Communist era.

⁶⁹ See J Couso, ‘Venezuela’s Recent Constitutional Crisis: Lessons to be Learned From a Failed Judicial Coup D’etat’ *Int’l J. Const. L. Blog* 12 April 2017 <http://bit.ly/2pApRQn>.

⁷⁰ See ‘Capriles tilda de “fraude” la Asamblea Constituyente convocada por Maduro y pide “desobedecer semejante locura”’ *Europapress Internacional* 2 May 2017 <http://bit.ly/2rHBOUC>.

⁷¹ J Jones and S Pozzebon, ‘Venezuelans reject constitutional rewrite in non-binding referendum’ *CNN* 17 July 2017 <http://cnn.it/2utWmS>.

⁷² R Krygier and N Miroff, ‘After protest vote, Maduro’s foes warn of ‘zero hour’ for Venezuela’s democracy’ 17 July 2017 <http://wapo.st/2ttOi8j>.

⁷³ *Ibid.*

⁷⁴ See the OAS Secretary General’s updated report (n 67) 2.

⁷⁵ W Finnegan, ‘Venezuela, A Failing State’ *The New Yorker* 14 November 2016 <http://bit.ly/2egM6cX>.

⁷⁶ L Garlicki, ‘Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland) in A Smyt & B Banaszak, *The Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989-2015* (Gdańsk University Press, 2016) 63.

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”⁷⁷ 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,⁷⁸ 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”⁷⁹ (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).⁸⁰

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,⁸¹ 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

⁷⁷ I Krastev, ‘The Strange Death of the Liberal Consensus’ (2007) 18(4) *Journal of Democracy* 56, 56.

⁷⁸ See the interview with Wojciech Sadurski: ‘What is Going on in Poland is an Attack against Democracy’ *Verfassungsblog* 15 July 2016 <http://bit.ly/2ae5Won>.

⁷⁹ TT Konciewicz, ‘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>.

⁸⁰ See *Commission Recommendation of 27.7.2016 regarding the rule of law in Poland* C(2016) 5703 final <http://bit.ly/2aC3TtT>.

⁸¹ 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...”⁸²

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.”⁸³

Speaking shortly before passage of the new Law in July 2016, Wojciech Sadurski warned of “an assault on the very foundations of democracy.”⁸⁴ 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.⁸⁵ 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”.⁸⁶

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.”⁸⁷

Of course, it is unclear what precise impact, if any, a more robust approach by EU institutions would have yielded. 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.⁸⁸ Beyond potential institutional responses, such as the possibility of ordinary courts acting as grassroots defenders of the Constitution,⁸⁹ ‘people power’ remains the key for some: popular

⁸² ‘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.

⁸³ Commission Recommendation of 27.7.2016 regarding the rule of law in Poland C(2016) 5703 final. 20.

⁸⁴ See the interview with Sadurski (n 78).

⁸⁵ TT Koncewicz, ‘Constitutional Capture in Poland 2016 and Beyond: What is Next?’ *Verfassungsblog* 19 December 2016 <http://bit.ly/2qHEZ3v>.

⁸⁶ 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.

⁸⁷ 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>.

⁸⁸ See Krastev (n 77) 58–59.

⁸⁹ See Koncewicz (n 86).

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.⁹⁰

As seen in Venezuela, mass public pushback in Poland has been rather muted until the crisis has come to fever pitch, partly due to a public perception of courts and other organs as elite institutions. On 14 July, as the government had just unveiled a new bill to accord unlimited power to the Minister for Justice to appoint Supreme Court judges and to push retirement of existing judges, "Democracy Dies in Silence" was the headline on the daily newspaper *Gazeta Wyborcza*.⁹¹ However, the law, passed by the *Sejm* on 20 July, has provoked widespread and growing public protests.⁹² With the next general elections not due until 2019, weak parliamentary opposition, and amidst concerns that PiS may seek to adopt a new constitution through the holding of a referendum in the near future,⁹³ public protest appears to be the only remaining viable avenue for countering full capture of the democratic system.

South Africa: From dominant party threat to elite capture

From the very beginnings of South Africa's transition to democratic rule after minority governance under *apartheid* in the early 1990s, concerns focused on the potential for the advent of full, free and fair elections to simply constitute a short interregnum before the ANC would overwhelm the new democratic system and replace the authoritarian minority-power governance of the *apartheid* era with an authoritarian system by building on its overwhelming electoral success to accrete excessive power.⁹⁴

Such concerns mean that constraint of the majority, embodied in the political machine of the ANC, was a significant focus of South Africa's new democratic constitutions from the outset of the transition. The ANC won a landslide victory in the first full, free and fair elections, held in April 1994, with Nelson Mandela elected to the presidency. However, as mandated by the interim Constitution, the party was required to govern as part of a national unity government comprised of the ANC, the National Party (NP), and the Inkatha Freedom Party (IFP), a Zulu nationalist party. The permanent Constitution, produced by a Constituent Assembly after the 1994 elections and which entered into force in December 1996, enshrined a number of countermajoritarian mechanisms aimed at placing constitutional fetters on the ANC and providing guardrails for the fledgling democratic order. The constitutional text expressly states the political system to be based on the values of human dignity, equality, human rights, the supremacy of the Constitution and the rule of law, and a "multi-party system of democratic government, to ensure accountability, responsiveness and openness".⁹⁵

A central element of the permanent 1996 Constitution, aimed at constraining subversion of the new democratic order by the ANC, was the placement of a powerful domestic constitutional court as a central actor in the democratic constitutional order, with a wide range of powers aimed at constraining political powers, guarding the separation of powers, and upholding a long raft of fundamental rights. As a constitutional design option, the Court was designed to act as a protector of the white minority's rights in the new black-majority political system, and, as such, constituted a central guarantee in the political settlement underlying the democratic transition and the new constitutional order.⁹⁶

⁹⁰ '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.

⁹¹ "Demokracja umiera w ciszy".

⁹² See e.g. R Lyman, 'In Poland, an Assault on the Courts Provokes Outrage' *New York Times* 19 July 2017 <http://nyti.ms/2ubbJ56>.

⁹³ I am grateful to Tomasz Tadeusz Koncewicz for this insight.

⁹⁴ See e.g. H Buhr Giliomee, 'South Africa's Emerging Dominant-Party Regime' (1998) 9(4) *Journal of Democracy* 128.

⁹⁵ Article 1, Constitution of 1996.

⁹⁶ See, in particular, Theunis Roux's 2013 account of the 'first' Court under Chief Justice Chaskalson from 1995-2005: *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013).

The possibility of the ANC capturing South Africa's democratic system continued to be an acute concern as the party managed to grow its share of the vote with each successive election for the first three elections under democratic rule, winning almost two thirds of votes cast in the second general elections in 1999, with Thabo Mbeki succeeding Mandela as president, followed by seventy per cent. of the vote—its highest ever share—in the third general election in April 2004, which returned Mbeki for a second term as president, and in which the ANC also achieved majorities in seven of South Africa's nine provincial legislatures. However, despite significant challenges and concerns regarding excessive ANC hegemony, hope was the dominant register for discussion of South African democracy during its first decade, and into its second. In particular, the successes of the Constitutional Court in constraining the government, and the government's apparent willingness to abide by the Court's rulings, seemed to indicate a positive trajectory in the crafting of a functioning democratic order underpinned by a robust rule of law.⁹⁷

In the past ten years hope has turned to increasingly acute concern regarding the trajectory of South African democracy. Since the ascent of Jacob Zuma to the presidency following the ANC's victory in the 2009 general election, democratic institutions have been under increasing threat, the ANC, including Zuma himself, has been mired in high-profile corruption allegations and scandals, and the government under Jacob Zuma has appeared to grow increasingly unhappy with institutional constraints on its power.

As Issacharoff recounts, the Constitutional Court has been the central obstacle to various measures aimed at removing such constraints. By way of example, in 2011 the Court struck down a law empowering the president to extend the sitting Chief Justice's term beyond the twelve-year period expressly set down in the Constitution, emphasising the importance of the position and holding that this would cut against judicial independence by leaving the Chief Justice to serve, to an extent, at the pleasure of the president.⁹⁸ In two key cases taken against President Zuma in 2011 and 2012, the Court blocked amendments to the appointment process for the National Director of Public Prosecutions (NDPP) and the independence of the National Prosecuting Authority (NPA), respectively, aimed at attenuating the capacity of prosecutorial agencies to address official corruption.⁹⁹ In 2012 the Court held a parliamentary rule removing the opposition's power to force a debate in parliament on a given issue to be unconstitutional.¹⁰⁰

The government announced a review of the Court's powers in 2012.¹⁰¹ Although this has not yet led to any concrete reforms, it has highlighted the Court's more precarious position in the contemporary political order in which the ANC seeks to free itself from standard forms of democratic and legal accountability, and in which threats to the media and other democratic organs have become commonplace.¹⁰² As Raymond Suttner put it in 2014:

⁹⁷ See e.g. J Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, 2016).

⁹⁸ *Justice Alliance of South Africa v. President of the Republic of South Africa* 2011 (5) SA 388 (CC) (S. Afr.). See Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015) 263.

⁹⁹ *Democratic Alliance v. President of the Republic of South Africa and Others* 2013 (1) SA 248 CC (S. Afr.) and *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 CC (S. Afr.). See Issacharoff, *Fragile Democracies* *ibid.* Chapter 11 260ff.

¹⁰⁰ *Oriani-Ambrosini v. Sisulu* 2012 (6) SA 1 (CC) (S. Afr.).

¹⁰¹ S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285, 288.

¹⁰² See, for example, the yearly assessments by Freedom House in its flagship annual publication, *Freedom in the World*. See also Issacharoff, *Fragile Democracies* (n 99) Chapter 11; P de Vos, 'Let Me Tell You a Secret...' Constitutionally Speaking 31 May 2011 <http://bit.ly/2tFtrOm>; and S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285, 288. See also a speech by the South African journalist Raymond Louw to the 2012 Rhodes University graduation, 'Meddling with Constitutional Court powers a threat to all', 22 April 2012 <http://bit.ly/2tiqTTf>.

The entire period of Zuma's presidency has been marked by evasion of constitutional obligations and a sense of impunity on the part of those who breach regulations in order to enrich themselves or favour those who are their family or political allies.¹⁰³

Amidst corruption scandals and a widespread perception of economic mismanagement by the ANC, new opposition parties have appeared and the ANC has seen its vote share start to decline. It won power in the 2014 elections with a smaller vote share than in 2009, dropping from just under two-thirds (65.9%) of the national vote to 62.15%. In the 2016 municipal elections the ANC suffered a significant further drop in support compared to the 2014 parliamentary elections,¹⁰⁴ bringing its national vote share to 54% and losing its control of three key cities. This appears to have been spurred partly by the Constitutional Court's damning judgment of March 2016 in the *Nkandla*¹⁰⁵ corruption case against President Jacob Zuma, holding that he had violated the Constitution by failing to repay government money spent on his private residence. With thousands protesting in April 2017 to demand Zuma's resignation, there is increasing talk that the ANC's support could dip below 50% in the 2019 elections, or that it could even lose power.¹⁰⁶

External assessments have increasingly suggested a decline in the health of South Africa's democratic system. The leading democracy assessment organisation Freedom House has voiced increasing concerns in its annual reports. In October 2016 South Africa was removed from the highest band of best performers regarding 'overall governance' in the Mo Ibrahim Foundation's report on 'a decade of African democracy', ranking it among the ten "most deteriorated" democracies in Africa in the decade since 2006.¹⁰⁷ Significantly, South Africa was rated as showing the steepest decline in the measure "Safety and the rule of law", with a precipitous decline in the 'accountability' sub-category reflecting serious negative trends in the fight against corruption.¹⁰⁸ Issacharoff (among others) has spoken of "the peril of constitutional retreat" and even the "risk of descent into the excesses associated with strong-arm rule".¹⁰⁹ The ANC's declining electoral dominance raises the risk of manipulations aimed at clinging on to power, such as interference with the electoral system.

As discussed above, others have argued that the democratic system has already been captured by a cabal of public and private individuals and interests centred around President Zuma, and that governance in South Africa now consists of a constitutional state and a "shadow state". If that is true, the possibility of addressing democratic decay in the state appears more complex than merely ousting the ANC in the next elections. As the push to oust Zuma grows fiercer, one observer has emphasised what a partial remedy this presents, on the basis that South Africa's democracy also suffers elite capture at a structural level beyond Zuma's cabal, with the citizenry and civil society lacking any meaningful access and input to the legislative process: "Parliament has become a small elite engaging with another small elite to decide our collective futures."¹¹⁰ It seems that absent wholesale transformation of the democratic and political system it will remain unable to deliver on the promise of greater social justice, prosperity and participation in the 1996 democratic Constitution, thus feeding further public disillusionment with democracy.

¹⁰³ R Suttner, 'Op-Ed: Has democracy been consolidated in South Africa?' Daily Maverick 22 August 2014 <http://bit.ly/2tuo7i5>.

¹⁰⁴ See e.g. S Rykklief, 'South Africa's 2016 municipal elections – why the excitement?' *GroundUp* 23 August 2016 <http://bit.ly/2tjOsfk>.

¹⁰⁵ *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* [2016] ZACC 11.

¹⁰⁶ See e.g. 'Political parties stage anti-Zuma protests in Pretoria' *Al Jazeera* 12 April 2017 <http://bit.ly/2osBoU7>; and L Mkentane, T Monama and G Matlala, 'ANC 'faces real prospect of losing 2019 poll'' IOL 21 April 2017 <http://bit.ly/2ox7vPf>.

¹⁰⁷ See the second page of Mo Ibrahim Foundation, *A Decade of African Governance 2006-2015* (October 2016).

¹⁰⁸ *Ibid.* 26, 32. The state did, however, show a small improvement in the 'judicial independence sub-category. *Ibid.* 34.

¹⁰⁹ Issacharoff, *Fragile Democracies* (n 99) 242, 268.

¹¹⁰ See e.g. C Rutledge, 'Here Is the Real Question Save SA -- Who Are You Fighting For?' The Blog: HuffPost 20 July 2017 <http://bit.ly/2uDbyRf>.

Brazil: Diagnosing decay in a complex context

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 decay is not immediately obvious. The state has been viewed as suffering a democratic crisis since 2014, with the start of a wide-ranging judicial probe into widespread corruption (the *Lavo Jato* investigation) and the ousting of President Dilma Rousseff, who had been re-elected for a second term in late 2014, on 31 August 2016 through an impeachment trial in the Senate.

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.¹¹¹

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 poll showed approval of the Temer government at 9%.¹¹² 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.¹¹³ Amid speculation of a military *coup*, the commander of the army took to Twitter to reassure the public: "our democracy is not in danger".¹¹⁴ 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.¹¹⁵ However, the Court dismissed the case by a bare majority of 4-3.¹¹⁶ Congress is currently deciding whether he should be tried for corruption in the Supreme Court.¹¹⁷

None of this, on its face, looks like democratic decay as discussed above. 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 or laws to hobble the opposition. With the exception of Temer's executive order in May, there has been no concerted legislative activity aimed at curbing the right to protest. 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

¹¹¹ D Gallas, 'Brazil: President Temer's first year after impeachment' BBC News 12 May 2017 <http://bbc.in/2sVYHpw>.

¹¹² 'Governo Temer tem aprovação de apenas 9%, aponta Datafolha' O Globo 30 April 2017 <https://glo.bo/2qBFh7w>.

¹¹³ S Romero, 'Their Government in Chaos, Brazilians Fear the Joke Is on Them' *New York Times* 26 May 2017 <http://nyti.ms/2sJzC0S>.

¹¹⁴ "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>.

¹¹⁵ 'Temer depõe sobre corrupção e é julgado no TSE por crime eleitoral' *O Globo* 6 June 2017 <https://glo.bo/2rcaxcY>.

¹¹⁶ 'Brazil Court Dismisses Corruption Case Against President Temer' *Rio Times* 10 June 2017 <http://bit.ly/2smaoZA>.

¹¹⁷ See J Leahy and A Schipani, 'How Brazil's Michel Temer could be tried for corruption' *Financial Times* 16 July 2017 <http://on.ft.com/2tKAP7q>.

Constitution itself is comparable to constitutional amendments (and attempts at amendment in the US) enshrining a requirement to produce balanced budgets.¹¹⁸

In fact, to outside observers, the spreading net of the *Lava Jato* probe and the unhindered interventions of the Supreme Court in the impeachment process might tend to suggest a well-functioning and independent judiciary. Temer's immediate *volte-face*, as regards 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, there is serious contestation as to whether democratic decay is occurring. 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.¹¹⁹ 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, as to whether it founded a social democracy or neoliberal democracy.¹²⁰ 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. Nor is this the first impeachment crisis since Brazil's return to democratic rule—President Collor faced impeachment in 1992 (although he resigned before the impeachment process concluded in the Senate).

However, looked at from a number of angles, and in detail, there is a strong case for concluding that Brazil is suffering democratic decay. The impeachment of Rousseff itself has been called a 'soft coup' used as an alternative means by the opposition to achieve power due to repeated failure at the ballot box. Indeed, Juliano Zaiden Benvindo has evoked Landau's "abusive constitutionalism" concept, speaking of the "abusive impeachment" of Rousseff.¹²¹ Adherents to the 'coup' argument point to the fact that the impeachment of President Rousseff was a "foregone conclusion", that the process was marred by serious procedural irregularities, 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.¹²²

Whether this thesis is accepted or not, other signs, albeit diffuse, point to the advance of democratic decay. First, 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:

¹¹⁸ See e.g. M Azzimonti, 'The Political Economy of Balanced Budget Amendments' (2013) *Business Review* 11 <http://bit.ly/2skTfiu>.

¹¹⁹ Augusto Zimmermann has characterised post-1988 Brazil as a state with a constitution, but "without constitutionalism". This, however, appears to be an oversimplification. 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).

¹²⁰ 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.

¹²¹ See Zaiden Benvindo, 'Abusive Impeachment' (n 21).

¹²² 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].

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.¹²³

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 one Justice of the Supreme Court, Justice Gilmar Mendes, is also commonly viewed as a Temer ally,¹²⁴ and the prospect of a 'captured' court becomes more plausible (if, at present, far from a certainty).¹²⁵ Again, this does not appear to be playing out according to any 'master plan' by the Temer government or its wider congressional support base.

Second, 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, particularly in the early stages, on the leaders of the Workers Party (PT).¹²⁶ This is set against a wider public cynicism regarding the judiciary as a whole, as unaccountable, corrupt and inefficient, spurring the sentiment that democracy has brought no real change.¹²⁷

Third, Richard Albert has recently referred to the PEC-55 amendment in Brazil as possibly an example of "constitutional dismemberment" fundamentally undermining 1988 Constitution's core commitment to the social state.¹²⁸ Of relevance here is Temer's repeated insistence that his lack of a democratic mandate is an asset, allowing him to push through unpopular reforms. The continued lack of regard for the stated values of the Constitution is a troubling thread in the reform process, and suggests a harder shift to a 'rule by law' mentality by the governing élite.

Fourth, 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.¹²⁹ 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 Worker's Party (PT) administrations, under presidents Lula and Rousseff, to target inequality and poverty.

Fifth, allied to the above, and complicating the narrative of élite capture of the democratic order, Jeffery Webber speaks of the political momentum in Brazil increasingly shifting to "a rightwing, antiparty populism".¹³⁰ The standard-bearer of this new movement, and one of the front-runners in the 2018 presidential elections,¹³¹ is a starkly anti-democratic politician, Jair Bolsonaro, currently a sitting member of the Chamber of Deputies. A Trump-like figure presenting himself as a political outsider capable of reforming a corrupt and elitist political system, Bolsonaro's recorded utterances include breath-taking statements denigrating Brazil's minorities (e.g. quilombolas, sexual minorities) and women. Crucially, he is not only an apologist but an ardent admirer of the military dictatorship in power from 1964 to 1985.

¹²³ J Zaiden Benvindo, 'Brazil's Increasingly Politicized Supreme Court' *Int'l J. Const. L. Blog* 16 February 2017 <http://bit.ly/2r2azol>.

¹²⁴ 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>.

¹²⁵ 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.

¹²⁶ 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>.

¹²⁷ WC Prilliaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Greenwood Publishing Group, 2000) 76.

¹²⁸ Albert, 'Constitutional Amendment and Dismemberment' (n 23).

¹²⁹ M Riethof, 'Why Brazil's Political Crisis Matters for Latin American Democracy' *Global Observatory* 7 September 2016 <http://bit.ly/2olOIrH>.

¹³⁰ Webber, *The Last Day of Oppression* p.[x].

¹³¹ PH Leal, 'Bolsonaro and the Brazilian far right' *DemocraciaAbierta* 24 April 2017 <http://bit.ly/2sMsAYq>.

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 dictatorship¹³²—a man against whom strong allegations of torture and forced disappearance were made in the National Truth Commission's report of December 2014.¹³³

If successful in next year's elections, a Bolsonaro presidency could see a much more extensive attack on the 1988 Constitution and the democratic order, 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.¹³⁴ It is this, perhaps more than any other factor, that threatens the viability of Brazilian democracy.

CONCLUDING REMARKS

This paper has attempted to sketch an analytical framework for understanding and diagnosing 'democratic decay' affecting a range of democratic states worldwide, by analysing and contrasting this framework with the constitutional retrogression framework developed by Aziz Huq and Tom Ginsburg, and exploring four country case-studies. The paper has argued that the constitutional retrogression framework provides a very useful framework for analysis, but that it is open to various criticisms or questions. 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 that this paper forms part of an ongoing project to understand why democratic decay presents such a challenge for public law—including domestic constitutional law, regional law, and international law—and that therefore diagnosis of democratic decay is just one dimension of this project. Ultimately, the diagnostic or analytical framework requires a suite of line-drawing exercises, which may be different from scholar to scholar, depending on their disciplinary background and research aims. What seems important, in moving toward greater understanding of this phenomenon, is to be express about the reasons for making certain choices and for selecting states for analysis. It is not a question of one framework winning out over others, but of ensuring that each provides added value for those seeking a better appreciation of the nature and dynamics of democratic decay worldwide.

¹³² Ibid. p.[x].

¹³³ See *Relatório da Comissão Nacional da Verdade*, 10 December 2014 www.cnv.gov.br.

¹³⁴ This, of course, is not solely a right-wing or Brazilian pathology; one might refer to the common liberal/left wing refrain of 'not my president' since the election of Donald Trump in November 2016. 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>.