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Populism, Authoritarianism, and Institutional Resistance

Constitutional Courts in the
Game of Power

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Carr Center
Discussion Paper

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ABSTRACT

Democratic constitutionalism was the victorious ideology of the 20th century, having defeated the alternatives that appeared over the decades: communism, fascism, Nazism, military regimes, and religious fundamentalism. However, in these first decades of the 21st century, something seems to not be going very well. Some describe it as a democratic recession. This paper identifies three phenomena that underlie this historical process: populism, extremism, and authoritarianism, as well as their political, economic-social, and cultural-identity causes. Then, after an analysis of the world context, this article focuses on the Brazilian experience in recent years, narrating the threats to constitutional legality and the institutional reaction. The final part discusses the limits and possibilities of constitutional courts in the exercise of their role of defending constitutionalism and democracy.

SUMMARY³

I. Introduction

II. Democracy in the World: The Rise of Authoritarian Populism

1. Constitutional democracy and courts
2. Democracy as the victorious ideology of the 20th century and the current backsliding
3. Three different phenomena and their causes: populism, extremism, and authoritarianism

III. Democracy in Brazil: Threats, Resistance, and Overcoming

1. The context of the rise of Jair Bolsonaro
2. Threats to institutions
3. Institutional resistance

IV. How Democracies Survive

1. The decisive (and ambiguous) role of the Supreme Courts and Constitutional Courts.
2. Stories of success and failure in democratic resistance
3. Constitutional courts in the game of power

V. Conclusion

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I. INTRODUCTION

The text that follows seeks to make an objective reflection on the state of the art of democracy in the world and in Brazil. To begin, it explores the concept of constitutional democracy, with the conclusion that it was the victorious ideology of the 20th century. Next, it analyzes the democratic backsliding in the contemporary world, in a context that has also been referred to as democratic recession, illiberal democracies, and abusive constitutionalism, amongst others. The diagnosis of current problems involves the identification of three conceptually distinct, but often associated phenomena: populism, extremism, and authoritarianism, as well as their political, economic-social, and cultural-identity causes. Next, a specific chapter is dedicated to the state of democracy in Brazil, notably after the 2018 elections and on the eve of the 2022 elections. The final chapter discusses how democracies survive, with an emphasis on the role of supreme or constitutional courts, narrating stories of success and failure. In conclusion, we seek to identify the factors underlying the cases in which constitutional courts were able to protect democracy in the face of authoritarian populism.



II. DEMOCRACY IN THE WORLD: THE RISE OF AUTHORITARIAN POPULISM

1. Constitutional democracy and courts

Democratic constitutionalism was the victorious ideology of the 20th century. This institutional arrangement combines two ideas—which are not to be confused with each other, neither in their origin, nor in their content: constitutionalism and de-

mocracy. *Constitutionalism* dates to the liberal revolutions of the 17th and 18th centuries and essentially means rule of law, limited power, and respect for fundamental rights. Its consolidation in European countries and the United States took place throughout the 19th century. In Brazil, the 1824 Constitution had some liberal traits, but, in its essence, bore the mark of an absolutist origin imprinted by D. Pedro I (although substantially attenuated during the second reign). *Democracy*, in turn, since its Greek origins, means popular participation in the exercise of power, the sovereignty of the people, and majority rule. The democratic ideal is only truly consolidated in the first half the 20th century, with the recognition of universal suffrage. Only then were the inadequate restrictions on participation in the electoral process, such as wealth, religion, race, and gender, completely overcome.

Nevertheless, most democracies in the world reserve a portion of political power for a body whose members are not elected, but that derives its legitimacy from technical competence and impartiality. This is the Judicial Branch, at the top of which, in many countries, stands a supreme or constitutional court. Since the end of World War II, virtually all democratic states have adopted a model of *supremacy of the Constitution*, as interpreted by a supreme or constitutional court, granted with the power of judicial review. It represented the victory of the American model of constitutionalism over the European alternative of *supremacy of Parliament*. Such courts can declare the unconstitutionality of acts of the Legislative and Executive, having as one of their main roles to arbitrate the tensions that often exist between constitutionalism and democracy—i.e., between fundamental rights and popular sovereignty. It is up to these courts to protect the rules of the democratic game and the rights of all against eventual abuses of power by the majority. In many parts of the planet, they have been an important antidote to authoritarianism³.

In short: Constitutional democracy is a political regime based on popular sovereignty, with free elections and majority rule, as well as limited power, rule of law, and respect for the fundamental rights of all, including the existential⁴ or social minimum⁵. Without having their vital needs met, people cannot be truly free and equal. There is also an emotional, humanistic element in democracy, which is the feeling of belonging, and of effective participation in a partnership of self-government,

³ See SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (Cambridge Univ. Press 2015) at i.

⁴ This is the literal translation of the term used by German authors and courts (Existenzminimum). See ROBERT ALEX, *A THEORY OF CONSTITUTIONAL RIGHTS* 87 (Julian Rivers, trans., Oxford Univ. Press 2004), at 290.

⁵ Jeremy Waldron, John Rawls and the Social Minimum, 3 *JOURNAL OF APPLIED PHILOSOPHY* 21, 1986.

in which each individual deserves equal concern and respect⁶. Those who feel excluded have no reason to support it and are easy prey to populist and authoritarian temptations.

2. Democracy as the victorious ideology of the 20th century and the current backsliding

As pointed out in the beginning, democratic constitutionalism historically prevailed, in many parts of the world, over the competing alternatives that appeared throughout the 20th century, which were: (i) communism, after the Russian Revolution of 1917; (ii) fascism, radiating from Mussolini's Italy, beginning in the 1920s; (iii) Nazism, under Hitler's leadership in Germany, from the 1930s onwards; (iv) the military regimes, which dominated Latin America, Asia, Africa, and even some European countries in the post-war period; and (v) religious fundamentalism, which was marked by the revolution of the ayatollahs in Iran in 1979. The winning model consecrated the centrality and supremacy of the Constitution—and not of a single-party, the Armed Forces, or religious scriptures. Some authors even went as far as to speak of the *end of history*, celebrating liberal democracy as the culmination of humanity's institutional evolution⁷.

In fact, there were several waves of democratization⁸. One of them took place at the end of the Second World War, in a cycle that included Germany, Italy, Japan, and even Brazil, which, nonetheless, fell back into authoritarianism in the 1960s. The second wave came in the 1970s, reaching countries like Portugal, Spain, and Greece. A third wave formed in the 1980s in Latin American countries such as Brazil, Chile, Argentina, and Uruguay. And, just ahead, with the fall of the Berlin Wall, the 1990s saw the democratization and reconstitution of Central and Eastern European countries, including Hungary, Poland, and Czechoslovakia. Also in the 1990s, with the end of Apartheid, came the democratization

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of South Africa and other countries in the continent. By the turn of the 21st century, more than a hundred countries had adopted this model, according to Freedom House⁹.

Despite the success narrated in this brief retrospect, in recent times, something seems to not be going well. There is a populist, extremist and authoritarian wave reaching multiple parts of the world, leading many authors to refer to a *democratic recession*¹⁰ or a *democratic retrogression*¹¹, as mentioned earlier. Examples have been accumulating over the years: Hungary, Poland, Turkey, Russia, Georgia, Ukraine, Belarus, Philippines, Venezuela, Nicaragua, and El Salvador, among others. In all these cases, the erosion of democracy did not occur through a coup d'état, under the arms of some general and his subordinates. In the examples above, the process of democratic subversion took place at the hands of presidents and prime ministers initially elected by popular vote¹².

⁶ RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE at xii (Princeton 2008); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 181 (Harvard 1997).

⁷ Francis Fukuyama, *The End of History*, THE NATIONAL INTEREST (1989); FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992); see also Yascha Mounk, *The End of History Revisited*, 31 JOURNAL OF DEMOCRACY 22 (2020).

⁸ See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 2 JOURNAL OF DEMOCRACY 12 (1991). Huntington was the first to use the idea of “waves of democratization.”

⁹ *Freedom in the world*. FREEDOM HOUSE (1998-1999). https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_1998-1999_complete_book.pdf. See also Luís Roberto Barroso, CONSTITUCIONALISMO DEMOCRÁTICO: A IDEOLOGIA VITORIOSA DO SÉCULO XX [DEMOCRATIC CONSTITUTIONALISM: THE VICTORIOUS IDEOLOGY OF THE TWENTIETH CENTURY] (Migalhas 2019).

¹⁰ Larry Diamond, *Facing up to the Democratic Recession*, 26 JOURNAL OF DEMOCRACY 141 (2015).

¹¹ Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA Law Review 91 (2018).

¹² STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 3 (Crown 2018).

After their election, they gradually pave the way for authoritarianism: concentration of powers in the Executive branch, persecution of opposition leaders, changes in electoral rules, curtailment of freedom of expression, weakening of the supreme courts, with the appointment of submissive judges and the purge of the independent ones, new constitutions or constitutional amendments with abuse of power by majorities, in addition to extending the period of permanence in power, with successive reelections.¹³ The big difficulty in fighting these *illiberal democracies*¹⁴ is that each brick is individually placed without any clear direct violation of the constitutional order. The result, however, leads to the suppression of liberties, of free and competitive elections, and the debilitation of independent institutions and neutral arbiters. This process has been characterized as *abusive constitutionalism*¹⁵ or *autocratic legalism*.¹⁶

3. Three different phenomena:

POPULISM EXTREMISM AUTHORITARIANISM

There are three distinct phenomena occurring in different parts of the world: a) populism; b) extremism; and c) authoritarianism. They are not to be confused with each other, despite many overlaps, but when they manifest simultaneously—which has happened often—they bring grave problems for constitutional democracy. *Populism* is a concept that has been intensively revisited in recent times, with the often-negative connotation of manipulating the fears, needs, and desires of the population. As a rule, it offers simple—and wrong—solutions to complex problems, meeting immediate demands at high future cost¹⁷. *Extremism*, which can be from any side of the political spec-

trum, is characterized by intolerance, the repudiation of what is different, and rejection of political pluralism, commonly using threats of violence. *Authoritarianism* involves brutal repression of opponents, intimidation or co-optation of institutions of control, and different forms of censorship, allowing authoritarian rule without accountability. The following is a brief note on each of these dysfunctions.

Populism has a very tenuous ideological core, which is the artificial division of society into “we, the people” and “them, the elite”. In most cases, it bears the mark of personalistic and charismatic leaders, who come to power with an anti-establishment discourse—even when they are clearly part of it—and present themselves as “different from all that is out there.” Populism also has an anti-pluralist nature, insofar as its leaders present themselves as the only legitimate representatives of the people, excluding all the other political forces. Strictly speaking, it is not truly an ideology, because it is imperative that it be accompanied by some external political doctrine, whether it be conservative, liberal, or socialist. In fact, populism can be left-wing (Perón, Evo Morales, Rafael Correa) or right-wing (Orbán, Erdogan, Duterte). Within this vision, populism falls short of being an ideology, since it needs to be combined with another substantive conception, constituting rather a strategy of discourse and action. It is often associated with a nationalist stance and the exploitation of religious sentiment. Another characteristic is the need to choose an enemy, to sustain the antagonistic and belligerent discourse, whether against communism, globalization, Jews, immigration, Muslims, a party, a political leader or any other that the occasion offers.¹⁸

Political extremism¹⁹ manifested itself, throughout history, in both ideological fields.²⁰ In the current period, the world is witnessing a radical wave of right-wing extremism. Three of the most populous countries in the world—India, the United States,

¹³ On the subject, see the extensive survey carried out by Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion*, 12 COLUMBIA LAW REVIEW 173 (2020), where she registered: “Globally, no fewer than one-third of the incumbents who reached the end of their prescribed term pursued some strategy to remain in office”.

¹⁴ Apparently, the term was first used by Fareed Zakaria, *The Rise of Illiberal Democracies*, 76 FOREIGN AFFAIRS 22 (1997). In contemporary political practice, Hungarian authoritarian leader, Viktor Orbán, embodied the term.

¹⁵ David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

¹⁶ Kim Lane Scheppele, *Autocratic Legalism*, 85 THE UNIVERSITY OF CHICAGO LAW REVIEW 545 (2018).

¹⁷ In this regard, Samuel Issacharoff, *The Corruption of Popular Sovereignty*, 18 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1135 (2020), at 1135.

¹⁸ On the definition and characterization of populism, see BENJAMIN MOFFITT, POPULISM 10 (2020); Cas Mudde, *The populist zeitgeist*, 39 GOVERNMENT AND OPPOSITION 543 (2004); and Jan-Werner Müller, *What is Populism?* (Pennsylvania 2016). ProQuest Ebook Central, <http://ebookcentral.proquest.com/lib/harvard-ebooks/detail.action?docID=4674419>. Created from harvard-ebooks on 2022-01-07 14:01:50.

¹⁹ Extremism can manifest itself in different domains of life, including the religious plane, as numerous historical events documents, from the Inquisition to Jihadism.

²⁰ On the left-wing, for example, with Stalin and Pol Pot, and on the right-wing with Mussolini and Hitler.

and Brazil—are or were, recently, under leaderships of this doctrinal identity. Naturally, political conservatism, whose philosophy does not undermine traditional democratic institutions,²¹ does not appear under this label. The menacing extremism is the one which advocates for measures such as the closure of Congress, the complete replacement of supreme court judges, and the demonization of the “elitist” press, and “leftist” NGOs, seeing communists everywhere. Intolerance, aggression, and violence often accompany the ideology marked by nativism (nationalism plus xenophobia), machismo, misogyny, homophobia, racism, scientific and environmental denialism, rejection of international human rights organizations, abusive exploitation of religion, and hate speech of different natures.²² Except for dictatorial regimes, such as Franco, in Spain, and Pinochet, in Chile, the far-right, since the second World War, had been confined to minorities situated on the sidelines of history. In recent years, however, it entered the political mainstream, coming to power through popular vote and undermining democracy “from within.”²³

Authoritarianism, in turn, is recurrent since the beginning of the civilizing process. Except for the brief and limited periods of the golden age of Athens and the Republic, in Rome, despotism, feudal rule, and absolutism accompanied the entire human trajectory. This picture only began to change with the liberal revolutions of the late 17th and 18th centuries, and democracy only came to be genuinely established during the 20th century, as already noted. Still, there were dramatic relapses. After the second World War, democracy spread throughout the western world in historical processes that took place successively in different parts of the planet, including continental Europe, Latin America, Central, and Eastern Europe, and Africa, as already detailed. Despite these waves of democratization in the second half of the last century, however, authoritarianism remains a permanent temptation in all continents. Authoritarian regimes imply a concentration of power, with little or no degree of control, weakening of the rule of law and the separation of powers, resulting in the persecution of political opponents, censorship of the press, and the absence of free and competitive elections. In the world of extremist populism, a phenomenon that

has been disseminating is the abusive appropriation—as it is formal, not substantive—of the institutional design, concepts, and doctrines of constitutional democracy to mask authoritarian projects.²⁴

As we tried to demonstrate above, populism, extremism, and authoritarianism are distinct phenomena, despite possible overlaps. Recently, however, they have been walking together, threatening the livelihoods of countless democracies. In more acute cases, they can degenerate into fascism.²⁵ Episodes such as Brexit and the election of Donald Trump, and the reaction to his defeat show that not even consolidated democracies have escaped contemporary windstorms. In countries like Turkey, Hungary, and Poland, it is even difficult to say that democracy has survived in all its essential elements. The extremist, authoritarian populism uses similar strategies in the different countries in which it seeks to establish itself, which includes: a) direct communication with its supporters, more recently through social media; b) by-pass or co-option of intermediary institutions, which mediate the interaction between citizens and the government, such as the Legislative, the press, and civil society organizations; and c) attacks on the supreme and constitutional courts, in an attempt to capture them and occupy them with submissive

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²¹ Conservatism, in the sense of preserving traditional values, prudence in the processes of social transformation, and emphasis on the individual over the collective, is one of the legitimate options of the political mainstream, being or having been in power in consolidated democracies, such as Germany, the United Kingdom, France, and United States.

²² On the emotional appeal of conspiracy theories and the degeneration of conservatism into extremism, see ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY* 45 et seq. (Doubleday 2020).

²³ On the subject and ideas of this paragraph, see CASS MUDDE, *THE FAR RIGHT TODAY* 2, 3, 18, 20, 168, 172 (2019).

²⁴ ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* 3, 176 (2021).

²⁵ Fascism is characterized by leaders who divide rather than unite, the suppression of the rights of the non-aligned, the exaggerated exaltation of the greatness of the nation, and the willingness to use violence and any other means to achieve their goals. On the subject, see Madeleine Albright, *Fascism: A Warning* 11, 118, 245 (HarpersCollins 2018).

judges. Such courts have, precisely, the constitutional role of limiting power. In fact, constitutions institutionalize and limit political power, and attribute to these courts the capacity to enforce them.

It is impossible not to register, in this context, the impact of the technological or digital revolution on contemporary life, with emphasis on the role played by social media. The internet has revolutionized the world of interpersonal and social communication, exponentially expanded access to information and knowledge, and, in addition, created a public space where anyone can express their ideas, opinions and disseminate facts. In this sense, it is impossible to exaggerate its importance for the democratization of society on a global scale, universalizing assets and utilities that were previously the privileges of a few. On the political level, it was equally fundamental for major historical processes—although not entirely successful—such as the *Arab Spring*.

Prior to the internet, the publishing of news and opinions depended, to a considerable extent, on the professional press. It was up to these institutions to ascertain facts, disseminate news, and filter opinions according to the criteria of journalistic technique and ethics. There was, therefore, a minimum editorial control of the quality and veracity of what was published. Not that there were no problems: the number of communication outlets was limited, and not always plural, journalistic companies had their own interests and, moreover, not all of them distinguished with the necessary care, between fact and opinion. Still, there was a finer degree of control over what was made public. The internet, with the emergence of websites, personal blogs, and, above all, social media, allowed the wide dissemination and circulation of ideas, opinions, and information without any filter. The negative consequence, however, was that it also allowed for the broadcast of ignorance, lies, and attacks on democracy.

Around the world, technological platforms such as Facebook, Instagram, YouTube, Whatsapp, Twitter, and TikTok have come to have a relevant weight in the political-electoral process.²⁶ Although it varies from country to country, social media played a decisive role in elections in the United States, India, Hungary, and Brazil, among others, as well as in the Brexit referendum. One of the major problems today has been the use of the internet and its applications for the dissemination of hate, fake news, disinformation, and conspiracy theories by populist, extremist and authoritarian movements, as a strategy for coming



The internet has dramatically transformed the way news is consumed around the world.

to power and maintaining it. For this reason, in different parts of the world, legislators and regulators are discussing the best way to exercise control over the internet, without compromising freedom of expression.²⁷ The main targets are inauthentic coordinated behaviors—such as robots, fake profiles, and other manipulative schemes to forge engagement and drown out third-party discourse—and disinformation campaigns, in addition to the practice of crimes (terrorism, pedophilia, etc.). In this new digital environment, people no longer differ only on their opinions, but also on the facts they believe. *Post-truth* and *alternative facts* are phrases that have entered the contemporary vocabulary. Furthermore, one of the manifestations of authoritarianism is precisely the attempt to discredit the electoral process so that, in case of defeat, it can allege fraud and delegitimize the winner.

4. Some causes of the democratic erosion

Several factors led to the advance of right-wing populism in numerous countries, including the United States, Great Britain (Brexit), and Brazil. It is possible to systematize these different factors into three categories: political, economic-social, and cultural-identity.²⁸ The political causes lie in the crisis of representativeness of contemporary democracies, in which the electoral

²⁶ In Brazil, according to a survey carried out by the Chamber of Deputies and the Federal Senate in 2019, 79% of the population has Whatsapp as their main source of information. In second place comes television (50%), followed by Youtube (49%), Facebook (44%) and news portals (38%). Printed newspapers, only 8%. <https://agenciabrasil.ebc.com.br/geral/noticia/2019-12/whatsapp-e-principal-fonte-de-informacao-do-brasileiro-diz-pesquisa>.

²⁷ On social media and its impact on contemporary life and democracies, see Luna Van Brussel Barroso, *Liberdade De Expressão E Democracia Na Era Digital* [Freedom Of Expression And Democracy In The Digital Era (Forum 2022, forthcoming). See also Francis Fukuyama, *Making the Internet Safe for Democracy*, 32 *Journal of Democracy* 37 (2021).

²⁸ On the subject, see Luís Roberto Barroso, *Technological Revolution, Democratic Recession and Climate Change: The Limits of Law in a Changing World*, 18 *INT. J. CONST. LAW* 334 (2020), at 349.

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In this sense, it is impossible to exaggerate its importance for the democratization of society on a global scale, universalizing assets and utilities that were previously the privileges of a few.”

process fails to give adequate voice and relevance to citizenship. “They don’t represent us” is the catchphrase of the moment.²⁹ In part, because the political class has become a world apart, detached from civil society, and in part because of the feeling that globalized economic-financial power is what truly calls the shots. Hence the rise of those with the anti-elite, anti-globalization, and against the “old politics” discourse.

The *economic and social causes* lie in the large contingent of workers and professionals who lost their jobs³⁰ or saw their prospects for social ascension reduced,³¹ either because of endemic poverty or because they became less relevant³² in the world of globalization, the new knowledge economy, and automation, which weaken more traditional industries and activities.³³ Not to mention the austerity measures defended

on for informing public policies, among other “modern” agendas. These people, who feel disadvantaged or excluded in the world of “political correctness”, cling to traditional values that give them security and hope of recovering a lost hegemony.³⁵

In an interesting insight, Yascha Mounk notes that liberal democracy can degenerate into two dysfunctional alternatives: (i) illiberal democracies or democracies without rights; and (ii) liberalism without democracy or rights without democracies. When analyzing illiberal democracies, in which elected populist leaders gradually suppress rights, he identifies three factors underlying their rise: social stagnation, the loss of racial hegemony, and the loss of the media filter in social communication, due to the advent of social networks. On the other hand, analyzing liberalism without democracy, he associates the phenomenon with the greater complexity of modern life and the loss of the Legislative branch’s leading role as a body of popular representation. In fact, in recent decades, we have witnessed the rise of non-elective decision-making bodies that drastically influence people’s lives, such as regulatory agencies, central banks, constitutional courts, and international organizations and agencies, along with their international treaties and conventions.³⁶

III. DEMOCRACY IN BRAZIL: THREATS, RESISTANCE, AND OVERCOMING

Having established some theoretical bases and described the world scenario, it is now necessary to analyze how the historical process of authoritarian extremist populism impacted Brazil. On January 1st, 2019, Jair Bolsonaro assumed the presidency after defeating Fernando Haddad, from the Workers’ Party, obtaining almost 58 million votes (55.13%). Former President Luís Inácio Lula da Silva could not run due to a Brazilian law called Clean Record Law, which bars candidates who had a criminal conviction imposed or sustained by an appellate court (which was the case at the time). A retired army captain, the President-

“The political causes [of democratic erosion] lie in the crisis of representativeness of contemporary democracies, in which the electoral process fails to give adequate voice & relevance to citizenship.”

by international organizations and countries with world economic leadership,³⁴ which reduce social safety nets programs. Finally, the *cultural-identity* causes: there is a contingent of people who do not profess the cosmopolitan, egalitarian, and multicultural creed that drives the progressive agenda of human rights, racial equality, feminist politics, gay marriage, defense of native populations, environmental protection and decriminalization of drugs, and the use of science as a criteri-

²⁹ See Manuel Castells, *Ruptura: A Crise Da Democracia Liberal* [Rupture: The Crisis Of Liberal Democracy 103 (Digital 2018).

³⁰ Mark S. Langevin, *Brazil’s persistent unemployment challenge*, Georgetown Journal Of International Affairs (May 3, 2019).

³¹ Samuel Issacharoff, *Populism versus democratic governance*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 447 (Mark A. Graber, Sanford Levinson & Mark Tushnet 2018).

³² See YUVAL NOAH HARARI, 21 LESSONS FOR THE 21ST CENTURY (Harper Collins 2015) 34 et seq.

³³ Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-nots and Cultural Backlash*, HKS WORKING PAPER 2 (2016). See also PIPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT AND AUTHORITARIAN POPULISM (Cambridge 2019).

³⁴ Andrew Trotman, Angela Merkel: ‘Austerity makes it sounds evil, I call it balancing the budget’, THE TELEGRAPH (Apr. 23, 2013); Laurens Cerulus, Sigmar Gabriel: ‘Merkel’s austerity is driving EU to brink of collapse’, POLITICO (Jan. 8, 2017).

³⁵ See Manuel Castells, note 29, at 178.

³⁶ YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY Parts I and II (Harvard, Digital 2018).

elect presented himself as an anti-establishment candidate, despite having been a Federal Deputy for seven terms, between 1991 and 2018. His three older children also had political careers. Despite the irony, it is not uncommon for members of the traditional political, economic, or business elite to present themselves as “true” representatives of the people. Viktor Orbán, from Hungary, for example, studied at the University of Oxford on a scholarship funded by none other than George Soros, who would later become his archenemy. And Donald Trump, a populist icon, is a billionaire heir who attended some of the most famous American universities.³⁷

1. The context of Jair Bolsonaro’s rise to power

President Dilma Rousseff was temporarily removed from office on May 12, 2016, after the impeachment procedure was authorized by the Chamber of Deputies, being definitively removed by the Federal Senate on August 31, 2016. The formal justification was a “crime of responsibility” nicknamed “*fiscal pedaling*”—which, put simply, is a violation of budget laws—although the real reason was her loss of political support. Vice-President Michel Temer took office until the end of the presidential term. He sought to implement a pro-business and anti-big state agenda, however, his success was undermined by successive accusations against him of corruption. On two occasions, the Chamber of Deputies, relying on a constitutionally attributed power, prevented the initiation of criminal proceedings against the acting president.

Until the downfall of President Dilma Rousseff, the Workers’ Party had remained in government for 14 years. This article’s purpose is not to detail or balance achievements and errors of this period. Nonetheless, the inexorable fact is that, as happens often, after a decade and a half in power, political wear-out was inevitable. There was a notable demand in society for alternation of power, deepened by several corruption scandals throughout the period, including *Mensalão* (a political corruption scandal involving bribes paid to members of Congress), *Petrolão* (Petrobras’ corruption scandal), *Sanguessugas* (“Ambulance Mafia”), amongst others, involving several public agents and businessmen. Compounding the problem, there was a lack of fiscal control was revealed in the end of 2014, culminating in a grave recession and consequent unemployment and disinvestment, with the country losing investment grades awarded by international agencies. In 2009, the country dreamed that the future had arrived, with extremely favorable indicators, which even led *The Economist* magazine of November 12, 2009 to celebrate the take-off and the prospect of Brazil becoming the fifth largest economy in the world. It did not happen. On September 24, 2013, four years later, the same magazine reported that Brazil, once again, had wasted a chance. The fall was traumatic.



Jair Bolsonaro in 2019; photo by Augusto Severo

It was in this context that the unlikely candidacy of Jair Bolsonaro emerged and took shape. A politician who had never been in the mainstream or at the center of decision-making processes, he was known for radical rhetorical speeches and views, such as the defense of the Brazilian military dictatorship, torture, and the declaration that, if possible, he would shoot ex-President Fernando Henrique Cardoso. During his vote in favor of the impeachment of President Dilma, he paid tribute to a military officer accused of being a notorious torturer during the dictatorship. Bolsonaro’s rise coincided with the success of far-right movements in all four corners of the world, which captured a significant part of the conservative bases, from the United States to Hungary. With professional and efficient use of social media, the candidate managed to catalyze the electorate that no longer wanted the Worker’s Party (PT, acronym in Portuguese) in power. Many of his radical visions ended up being overlooked by many, in name of his promises that met important demands of society, such as fighting corruption, economic liberalism, and suppression of the old “*give-and-take*” political dealing.

When Bolsonaro’s government began, his agenda against corruption was promoted by the appointment of former judge Sergio Moro to the Ministry of Justice. It didn’t last. Moro left the Ministry just over a year after his appointment, accusing Bolsonaro of interfering in the Federal Police to inhibit corruption investigations (allegedly because investigations were reaching one of his sons). To promote his agenda against big state, he appointed economist Paulo Guedes, a graduate of the University of Chicago, who had a messianic promise of solving all problems of Brazilian economy. This agenda did not last either. Although Paulo Guedes remains in office and successfully approved an important Social Security Reform, he failed to approve other important projects related to fiscal responsibility and privatization. And because

³⁷ NICK FRIEDMAN, THE IMPACT OF POPULISM ON COURTS: INSTITUTIONAL LEGITIMACY AND THE POPULAR WILL 2 (Foundation for Law 2019).

he conceded to President Bolsonaro's demands on certain occasions, against the smaller state agenda, there were numerous resignations of important members of his ministerial team. As for the alleged agenda of overcoming the *old politics*, the President allied himself with the traditional *Centrão* (centrist political bloc), the most traditional bloc in Brazilian politics, renowned for its voracity for political offices and public funds. As Stephen Holmes famously put, indeed "democracy is made of promises, deceptions and the management of deception".³⁸

2. Threats to institutions

Bolsonaro was elected following the traditional populist booklet: a discourse of the simple, pure, and conservative people against the sophisticated, corrupt, and "leftist" elites. Inevitably, the conflict that characterizes the relationship between populism and democracy soon emerged: there is no way to fulfill campaign promises without working with the institutions supposedly occupied by the elites. Populism has a conceptual flaw of origin: *elites* are not a homogeneous category; they do not correspond to a single social bloc. On the contrary, there are several "elites". There are, of course, extractive elites that need to be confronted, because they put the State at the service of their interests. They are powerful in Brazil. But there are qualified and indispensable elites in the public service, from the diplomatic career to researchers at leading institutions; there are intellectual elites who study and indicate directions for the country, in universities and various think tanks; there are truly entrepreneurial business elites, decisive for employment and wealth production. In practice, the anti-elite discourse ends up degenerating into an anti-democratic, anti-scientific, and anti-entrepreneurship discourse. Furthermore, *people* are not a unitary concept either.³⁹ In a plural world, any group that presents itself as the *only* representative of the people assumes an excluding and authoritarian facet.

The attacks on Brazilian institutions came articulately from websites, blogs, and channels of the far-right, preaching invasion and closure of the National Congress and the Supreme Court, with the forced withdrawal of their members. The existence of professional groups dedicated to destabilization schemes was revealed, with suspicion of public funding in some cases, strengthened by the massive use of social networks, fueled by fanatics, mercenaries (who monetize hatred and lies), trolls,⁴⁰ and blindly devoted followers. The President's participation in

anti-democratic demonstrations raised concerns even in sectors that supported him politically. The examples multiplied: a) attendance at a demonstration at the door of the army command headquarters, during which the return of the military dictatorship was demanded; b) daily attacks on the Electoral Court, personal offenses to its members, and false claims of electoral fraud in prior elections; c) parade of war tanks in "*Prça dos Três Poderes*" (or "Three Powers Plaza", which is Brasília's political center, surrounded by the buildings that host the three branches), with clear intimidating purpose; d) impeachment request of a Justice of the Supreme Court, for rendering decisions that displeased the President; e) change of the general director and superintendents of the Federal Police for acting independently and conducting investigations that the President wanted to halt; and f) repeated attacks on journalists and press agencies, as well as the use of official advertising funds to co-opt support from media conglomerates.

“Populism has a conceptual flaw of origin: elites are not a homogeneous category; they do not correspond to a single social bloc.”

Curiously and paradoxically, the moment that generated the greatest dread for the stability of the democratic regime was also the turning point of the institutional coup. On September 7th, Brazilian Independence Day, the President gave his support to a great demonstration in favor of his government and against the other political branches and democratic institutions. With the rental of hundreds of buses to leave with supporters from the countryside to São Paulo and Brasília (two major cities), with sponsored meals, the organizers expected to have more than a million people in each of these two cities. The banners shown in the demonstrations were heterogeneous and included calls for the closing of the Supreme Court, the impeachment of the Court's Justices, and the printed ballot vote, with public manual counting. Some protesters defended the return of the military regime, with the President in power. Others demanded the closing of China's diplomatic representation, apart from

³⁸ Stephen Holmes, *How Democracies Die* (2017), <https://www.youtube.com/watch?v=nHr6Mcqq-Ek>.

³⁹ David Prendergast, *The Judicial Role in Protecting Democracy from Populism*, 20 GERMAN LAW JOURNAL 245, 246 (2019): "Populist claims are misconceived to begin with in presupposing a definitive unitary people".

⁴⁰ *Troll*, in internet parlance, identifies the user who delivers inflammatory, aggressive, and often false messages to produce engagement out of anger, indignation, hatred, and radicalism.

other idiosyncrasies. The President attended both demonstrations, directly offended a Justice of the Supreme Court, accused another of intending to rig the elections, and stated that he would no longer comply with judicial decisions with which he did not agree.

Popular turnout, however, was less than a tenth of what was expected, evidencing the diminutive size of the far-right. The non-adherence of the military police to the demonstration also caused frustration to many in the President's base, with the state troops remaining disciplined. No senior military officers made any sign of support. In addition, there was an immediate reaction from the institutions and the press. In short, there was no popular support—or, at least, no support from any relevant sector—for the breach of legality. The surprising truth is that 48 hours after the demonstration, the President completely modified his speech, justifying his allegations during the riots as influenced by the “heat of the moment”⁴¹ and contacting those whom he had offended to explain himself as best he could. Days later, in an interview to a major Brazilian magazine (*Veja*), he denied any intentions to conduct a coup and, suddenly, began to claim to have confidence in electronic voting machines and the electoral process, which he had attacked for months on end.⁴²

3. Democratic resistance

The repeated threats to constitutional legality and the stability of institutions generated a strong reaction from multiple sectors. First, the press, despite governmental boycotts to reduce revenue and the contemporary difficulties of its business model, was a bastion of resistance. Properly distinguishing between fact and opinion, it sustained a critical tone and exercised with independence its role as a watchdog. Furthermore, despite the many fears of involvement of the Armed Forces, their leaders also resisted the undue seduction. The Minister of Defense and the military commanders resigned with dignity, as they did not agree, according to reports, with the political use of the Armed Forces to intimidate other institutions.⁴³ The Supreme Court, which had been divided on cases related to the fighting of corruption, joined in the defense of democracy. Along these lines, the Court reiterated commitments to freedom of expression, to the preservation of civil society councils, to the due process



Protests against Bolsonaro on September 7, 2021; photo courtesy of Tetizeraz

of law, and, above all, to confronting attacks on institutions by extremist groups. In different investigations, which were brought together into a single proceeding investigating the activities of criminal organizations, the Court restrained, with summons for hearings, searches and seizures and even preventive arrests, the threats of violence against its Justices and the Court's facilities.

Regarding the pandemic, against authorities who denied or minimized its importance and consequences, the Supreme Court rendered a series of decisions that preserved the health of the population and saved thousands of lives. The Court: (i) assured the power of states and municipalities to take measures to protect the population, despite the federal government's inaction; (ii) prevented the launch of the federal government's campaign calling on the population to return to the streets and to work, at a time when all medical entities recommended social distancing; (iii) stated that the non-observance of medical-scientific consensus constitutes “gross negligence” and may result in civil and administrative personal liability of the agent involved; (iv) mandated the disclosure of the COVID vaccination plan; (v) ordered compulsory vaccination; and (v) rendered decisions protecting indigenous communities, among other judgments. In a lawsuit filed by Senators, the Supreme Court also prescribed the launch of a Parliamentary Committee of Investigation (CPI, acronym in Portuguese) by the Federal Senate to investigate the performance of the federal government during the pandemic. Under the terms of the Constitution, if a third of the members of any

⁴¹ *Bolsonaro recua e diz que fala golpista no 7/9 decorreu do calor do momento* [Bolsonaro backs off and says the coup talks on 9/7 stemmed from the heat of the moment], UOL (Sept. 9, 2021).

⁴² *A chance de um golpe é zero, diz Bolsonaro em entrevista à Veja* [“The chance of a coup is zero,” Bolsonaro says in an interview with *Veja*], *VEJA* (Sept. 24, 2021). <https://veja.abril.com.br/politica/a-chance-de-um-golpe-e-zero-diz-bolsonaro-em-entrevista-a-veja/>.

⁴³ According to the former Minister of Defense and Public Security, Raul Jungmann, the President of the Republic ordered jets from the Brazilian Air Force to fly over the Supreme Court building above the speed of sound to burst the building's windows, in a threat to the judges of the Court. The refusal would have motivated the dismissal. Jungmann: Bolsonaro ordered jets to fly over STF to break the glass. *Power 360*, Aug. 20, 2021. <https://www.poder360.com.br/brasil/jungmann-bolsonaro-determinou-que-jatos-sobrevoassem-stf-para-quebrar-vidros/>.

of the Congressional houses so requests, the launch of the CPI is mandatory, as it constitutes the right of parliamentary minorities. Although the minimum number of signatures had been achieved, the president of the Senate refused to initiate proceedings, thus the need for the Court to intervene. The CPI's final report was devastating for the government.

Finally, after the September 7th demonstrations, with the President's serious attacks on institutions, there were harsh pronouncements by the President of the National Congress, the President of the Supreme Court, and, equally, the President of the Superior Electoral Court, condemning the institutional attacks.

After analyzing the global context of the rise of authoritarian populism and its specific impact in Brazil, it is finally time to analyze how democracies have reacted to this phenomenon, with a special focus on the role played by supreme and constitutional courts.

IV. HOW DEMOCRACIES SURVIVE

1. The decisive (and ambiguous) role of the supreme and constitutional courts

It has been solidly established in constitutional theory that, when supreme courts or constitutional courts exercise judicial review, they play two major roles that legitimize this power: (i) the protection of the procedural and substantive rules of democracy and (ii) the protection of fundamental rights. The courts act as an antidote to the abuse of power by majorities. Populist governments, however, are often hostile to constitutional values,⁴⁴ as they defend the unlimited power of political majorities, attack checks and balances mechanisms, despise minorities (political, racial, religious, sexual), and even subordinate fundamental rights to the “will of the people.” Unsurprisingly, there is often an exacerbated tension between populist governments and supreme courts, whose role is precisely to check political power and keep it within the limits of the Constitution. It is not by chance that they are—together with the electoral authorities—frequent targets of authoritarian populism.

Supreme courts and constitutional courts play a decisive role in populist governments, sometimes for good and other times for bad. When they can preserve their effective independence,

“In the fight against extremist and undemocratic populism, supreme courts and constitutional courts can be part of the solution or part of the problem.”

they function as an important barrier against the advance over democratic institutions. There are some stories of success in courts playing this role. It is true, on the other hand, that authoritarian leaders seek to capture or weaken the supreme courts, attacking them verbally and, also, through two concrete actions replicated around the world: (i) “packing” the courts with submissive judges, forcing the opening of vacancies with changes in retirement rules, impeachments or an increase in the number of chairs; and (ii) approval of constitutional amendments and legislation that remove jurisdictional and administrative powers from the courts or hinder their performance. Anti-democratic actors use these two strategies to put the courts at the service of governmental purposes, benefiting from the legitimacy that the Judiciary endorsement can bring to their actions.⁴⁵ In some countries, these two strategies worked, transforming the courts into auxiliary lines of authoritarian political power. When this happens, they fail, for example, to declare the unconstitutionality of amendments, laws, and acts that clearly defy the Constitution, due to their subordinate position to the other branches. Or, in an even more serious situation, they take a proactive role in authoritarianism, banishing opposition parties and contributing to the persecution of its members.⁴⁶ In short: in the fight against extremist and undemocratic populism, supreme courts and constitutional courts can be part of the solution or part of the problem. A few examples illustrate the point.

2. Stories of success and defeat in the democratic resistance

As reported above, Brazil has so far been a success story in democratic resistance to extremist and authoritarian populism. The Supreme Court reacted with vigor to the attacks against the institutions and against the court itself, through decisions

⁴⁴ Jan-Werner Muller, *supra* note 18.

⁴⁵ Rosalind Dixon and David Landau, *supra* note 24, at 92 and 177.

⁴⁶ This is what happened, for example, in countries like Cambodia and Thailand, where the superior courts used the doctrine of “*militant democracy to suppress electoral competition*”, and in Venezuela, a country in which the Supreme Court acted to neutralize and paralyze the opposition Congress. See Rosalind Dixon and David Landau, *supra* note 24, at 178.

“There is often an exacerbated tension between populist governments and supreme courts, whose role is precisely to check political power and keep it within the limits of the Constitution.

It is not by chance that they are—together with the electoral authorities—frequent targets of authoritarian populism.”

that preserved democracy, criminal proceedings against those responsible for orchestrating institutional attacks, and incisive pronouncements by the Court's president. Likewise, the Superior Electoral Court (TSE, acronym in Portuguese), a body of the Judicial Branch that organizes and supervises national elections in the country, also played a decisive role in the reaction to anti-democratic attacks. Since 1996, Brazil has adopted an electronic voting system that overcame a past of electoral fraud that existed with paper voting. The President of the Republic, for months on end, falsely accused the voting system of being fraudulent, in the old logic of authoritarian populism of anticipating an eventual defeat and accusing the system of not being trustworthy. In the Brazilian case, giving a touch of surrealism to the plot, the President attacked the system by which he had been elected by a large margin. The TSE strongly and successfully opposed the bill presented to the National Congress—with the President's support—with a proposal to return to the printed ballot vote "with public manual counting." The bill was ultimately rejected by Congress. As paper ballots with manual counting have always been the instrument for electoral fraud in Brazil, many suspected the hidden intentions of the attempt to revert to the old model. Unsurprisingly, this happened at a time when the President appeared at a large disadvantage in the voting intention polls for the 2022 elections.

As known, in the 2020 elections in the United States, President Donald Trump, candidate for re-election, claimed with no evidence the existence of fraud, even before voting began. He was defeated by Joe Biden in the Electoral College—306 votes to 232—and in the national count by over 7 million votes. Still, Trump never acknowledged his defeat. On the contrary, his supporters have filed more than 60 lawsuits seeking to annul elections in different states, failing in all of them. The Supreme Court itself rejected two lawsuits endorsed by the President.⁴⁷ On January 6, 2021, hundreds of people stormed and vandalized the Capitol in an attempt to halt the proclamation of the election result. There were seven dead and over a hundred wounded. A week after the attack, Trump was impeached in the House of Representatives for inciting insurrection. He was also convicted in the Senate, by 57 votes to 43—a number that,



The storming of the U.S. Capitol on January 6th, 2021

nonetheless, did not reach the 2/3 majority of 67 votes necessary for his removal. The point that I want to emphasize here, however, is that the Judicial Branch, including the Supreme Court, did not give in to the appeals of the populist leader who was discontent with his defeat, preserving the electoral result and democracy.⁴⁸ Yet, on the first anniversary of the episode, on January 6, 2022, there was still a war of narratives and many open wounds.⁴⁹

A few years earlier in 2010, in a less dramatic scenario, but in a decision of great historical importance, the Constitutional Court of Colombia, in 2010, declared unconstitutional an amendment to the Constitution that allowed the reelection of the President of the Republic for a third term, a change that would have benefited the incumbent Álvaro Uribe.⁵⁰ The decision followed an old precedent by the Supreme Court of India⁵¹ and came to reinforce a trend that would consolidate further ahead—for better and for worse—of recognizing the unconstitutionality of constitutional amendments, on procedural or substantive grounds.⁵² Such unconstitutionality is characterized by amendments that rupture with the identity of the original constitutional text, in violation of structuring principles, characterizing a true *repla-*

⁴⁷ William Cummings, Joey Garrison and Jim Sargent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Elections*, USA TODAY, January 6, 2021.

⁴⁸ This statement does not undermine the critical view that some authors have about the role played by the U.S. Supreme Court in decisions on other matters over the years. See Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, *Annals, AAPSS*, January 2022.

⁴⁹ The Editorial Board, *Every Day is Jan. 6 now*, THE NEW YORK TIMES (Jan. 1, 2022); Jimmy Carter, *I Fear for our Democracy*, NEW YORK TIMES (Jan. 6, 2022).

⁵⁰ Constitutional Court of Colombia. Judgment C-141/10. Announcement of Feb. 26, 2010. See also Carlos Bernal Pulido, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT. J. CONST. LAW 339 (2013).

⁵¹ *Kesavananda v State of Kerala* (1973) SCR (Supp) 1 (India). <https://indiankanoon.org/doc/257876/>.

⁵² One of the pioneers in the doctrinal discussion of this theme was Richard Albert in *Nonconstitutional Amendments*, 22 CAN. J. L. & JURIS. JOURNAL OF LAW AND JURISPRUDENCE 5, 21-31 (2009).

cement of the Constitution, as emphasized by the Colombian Constitutional Court.⁵³ The first precedent in the matter, concerning the prohibition of reelection, occurred in Costa Rica, in the opposite situation: the Constitutional Chamber of the Supreme Court, in 2003, stated that the absolute prohibition of reelection, even for a non-consecutive term, interfered unconstitutionally with a fundamental political right. As a result, former President Oscar Arias was able to run again, sixteen years after leaving office. Such a decision, which was reasonable and rendered in a country with a stable democracy, would later come to be invoked by authoritarian populists to overturn barriers to reelection and perpetuate themselves in office.⁵⁴

The populist practice of emptying, capturing, and rigging supreme courts has as its historic landmark the purge of four of the five judges of the Supreme Court of Argentina by Juan Domingo Perón, shortly after his election in 1946.⁵⁵ There began a long tradition of interference by the Executive in that country's court.⁵⁶

“An icon of the right-wing authoritarian populism in the world, Orbán is considered by some scholars to be ‘the ultimate twenty-first-century dictator.’”

In recent history, many cases have followed this path. One of the most emblematic examples is that of the Constitutional Court of Hungary, which relished in power, prestige, and independence after the country's re-democratization, with the dissolution of the Soviet Union. After Viktor Orbán and his Fidez party came to power in 2010, however, the situation progressively deteriorated. The script followed was predictable: packaging, stripping of relevant powers and capture. Along these lines, constitutional amendments and broad legislation approved in the Fidez-dominated Parliament increased the number of Court judges from 11 to 15, reduced the retirement age to open new vacancies,⁵⁷ changed the criteria for appointing judges to increase party-political interference and removed powers of judicial review, especially regarding constitutional amendments. In 2013, the government had already obtained full control of the Court and other institutions, such as Parliament, the media, and universities. An icon of the right-wing authoritarian populism in the world, Orbán is considered by some scholars to be “the ultimate twenty-first-century dictator.”⁵⁸

The Constitutional Court of Poland also went through similar vicissitudes, until it was entirely controlled by the Law and Justice Party. Tensions between the Court and the government began in 2015, when there was a refusal to call to office five judges who had been appointed by the Sejm (Chamber of Deputies), which was at the end of its term.⁵⁹ In sequence, came laws that anticipated the retirement of judges⁶⁰, limited their jurisdiction, required a supermajority for the invalidation of laws (the majority increased to 2/3), and, even more serious, gave the Execu-

⁵³ On the subject, see See LUÍS ROBERTO BARROSO, *The Life and Death of Constitutions in Latin America: Constitutional Amendments, the Role of Courts and Democracy*, in RICHARD ALBERT, CARLOS CARLOS BERNAL PULIDO & JULIANO ZAIDEN BENVINDO, *CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA* (Bloomsbury 2019) (Foreword). See also Carlos Bernal Pulido, *supra* note

⁵⁴ See Yaniv Roznai, *Constitutional Unamendability in Latin America Gone Wrong?* In Richard Albert, Carlos Bernal Pulido & Juliano Zaiden Benvindo, *supra* note 52, at 93-116.

⁵⁵ Andrew Arato, *Populism, the Courts and Civil Society* (December 4, 2017). Available at SSRN: <https://ssrn.com/abstract=3082596>, p. 1: “Admittedly, no current populist government has gone as far as Peron’s in 1947 when he has initiated the impeachment and trial of 4 out of 5 Supreme Court justices, with one of them resigning before impeachment succeeded”.

⁵⁶ ANDREA CASTAGNOLA, *MANIPULATING COURTS IN NEW DEMOCRACIES: FORCING JUDGES OFF THE BENCH IN ARGENTINA* (Routledge 2018).

⁵⁷ The Court of Justice of the European Union considered that the law that reduced the retirement age of judges, prosecutors and public notaries from 70 to 62 years was incompatible with the rules that governed the European Union. European Commission, *Court of Justice rules Hungarian forced early retirement of judges incompatible with EU law*. Nov. 6, 2012. https://ec.europa.eu/commission/presscorner/detail/mt/MEMO_12_832.

⁵⁸ Kim Lane Scheppele in an interview with Isaac Chotiner, *Why conservatives around the world have embraced Hungary's Viktor Orbán*. THE NEW YORKER, 21 Aug. 2021. On Hungary's institutional deterioration, see Kim Lane Scheppele, *Autocratic Legalism*, 85 THE UNIVERSITY OF CHICAGO LAW REVIEW 545, 549 et seq. (2018) and Rosalind Dixon and David Landau, *supra* note 24, at 89 and 92; and Yascha Mounk, *The end of history revisited*. 31 Journal of Democracy 22, 31 (2020).

⁵⁹ The Civic Platform Party's maneuver was indeed questionable since three of the five judges replaced would only complete their terms after the elections. See Andrew Arato, *Populism, the Courts and Civil Society*, *supra* note 54, at 6.

⁶⁰ As was the case with a similar procedure in Hungary, the Court of Justice of the European Union considered that such legislation violated European Union principles, in particular the irremovability of judges. Court of Justice of the European Union (CJEU), *Commission vs. Poland*, (June 24, 2019), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=eli%3AECLI%3AEU%3AC%3A2019%3A531>.

tive discretionary power to publish or not the decisions of the Court.⁶¹ In February 2020, an open letter signed by more than two dozen former judges who had integrated the Court, including several of its former presidents, denounced that it had “*virtually been abolished*.”⁶²

The Constitutional Court of Turkey, in turn, was known for its important role in promoting a secular state and government. In 2010, however, when Recep Tayyip Erdogan was Prime Minister, a constitutional amendment changed the rules concerning the composition of the Court, the process for selecting judges, and the voting laws.⁶³ According to critics, the Court was “tamed”, coming under government control.⁶⁴ Rare and eventual decisions unfavorable to the Executive arouse threats of retaliation, such as the closing of the Court⁶⁵ and the limitation or fragmentation of its powers by a new Constitution.⁶⁶

In Latin America, cases of retaliation against the constitutional courts and capture attempts have been frequent. A more remote precedent occurred in 1997, in Peru, when three judges of the Constitutional Court who voted against the interpretation that allowed a third term for President Alberto Fujimori were removed.⁶⁷ Nowadays, the most dramatic and emblematic case is that of the Bolivarian Republic of Venezuela. Hugo Chávez was elected president in 1998 and took office in 1999. The same year he had a new Constitution approved, and remained in power, in successive re-elections, until his death in 2013. In 2002, he suffered an attempted coup d'état but managed to return to power two

days later. In 2004, in retaliation to the Supreme Court of Justice, which had acquitted the rebel military commanders, the Chávez-dominated Congress increased the number of Court judges from 20 to 32, in the first “packing” intervention of the Judiciary’s highest court. The same law facilitated the removal of judges by Congress, which was soon put into effect with the removal of the Court’s vice president. Since then, Chávez and his government have taken control of the supreme court.⁶⁸



Mosaic of Hugo Chávez. Photo by Pavahk

Between 2005 and 2014, there was not a single decision unfavorable to the central government.⁶⁹⁻⁷⁰ After Chávez’s death in 2013 and the rise of Nicolau Maduro, economic deterioration led to a significant opposition victory in the 2015 parliamentary election. Before the inauguration of the new Congress, however, the Legislature that was concluding its term, on December 23, 2015, appointed 13 new tenured judges and 21 substitutes for the Court, without observing the proper procedure provided for in the Constitution and in the legislation.⁷¹ From then on, the Supreme Court of Justice played its worst role: it became an ally of the President to neutralize and paralyze Congressional opposition. Considering that a decision to remove elected par-

⁶¹ Rosalind Dixon and David Landau, *supra* note 24, at 93.

⁶² Rule of Law, *Constitutional Tribunal has virtually been abolished, announced retired judges*. Feb. 20, 2020. <https://ruleoflaw.pl/constitutional-tribunal-has-virtually-been-abolished-announce-retired-judges/>.

⁶³ Andrew Arato, *supra* note 54, at 5

⁶⁴ İlker Gökhan Şen, The final death blow to the Turkish Constitutional Court. *VerfBlog*, Jan. 28, 2021. <https://verfassungsblog.de/death-blow-tcc/>.

⁶⁵ Arab News, *Erdogan allies call for closure of Turkey's Constitutional Court*. Apr. 2, 2021. <https://www.arabnews.com/node/1836056/middle-east>.

⁶⁶ Erdogan’s nationalist ally prepares draft Turkish constitution. *Reuters*, May. 4, 2021. <https://www.reuters.com/world/middle-east/erdogans-nationalist-ally-prepares-draft-turkish-constitution-2021-05-04/>.

⁶⁷ Calvin Sims, *Peru’s Congress Is Assailed over Its Removal of Judges*, NEW YORK TIMES, May 31, 1997. <https://www.nytimes.com/1997/05/31/world/peru-s-congress-is-assailed-over-its-removal-of-judges.html>. The Inter-American Court of Human Rights, on 31 January. 2001, condemned Peru for violating the guarantees of the judiciary (the right to judicial protection) and for the payment of compensation to the three judges removed. *Case of the Constitutional Court vs. Peru* https://www.corteidh.or.cr/docs/casos/articulos/seriec_71ing.pdf.

⁶⁸ Venezuela: Chávez allies pack Supreme Court. *Human Rights Watch*, December 13, 2004.

⁶⁹ See Javier Corrales, *Autocratic legalism in Venezuela*. 26 JOURNAL OF DEMOCRACY 37, 44 (2015).

⁷⁰ During this period, the Court validated numerous laws that transformed Venezuela into a dictatorial regime, by curtailing freedom of expression, persecuting opponents, changing electoral rules in favor of the government and withdrawing the concession of opposition media outlets. See Raul A. Sanchez Urribarri, *Courts between democracy and hybrid authoritarianism: Evidence from the Venezuelan Supreme Court*. 36 LAW & SOCIAL INQUIRY 854, 876 (2011).

⁷¹ Diego Ore, *Venezuela’s outgoing Congress names 23 Supreme Court Justices*. REUTERS, Dec. 23, 2015. <https://www.reuters.com/article/us-venezuela-politics-idUSKBN0U626820151223>. See Constitution of Venezuela, art. 264 and Organic Law of the Supreme Court of Justice, art. 38.

liamentarians had not been complied with, the Court considered Congress to be in contempt and declared all the laws and acts it practiced unconstitutional. In 2017, the Court validated the convening of a Constituent Assembly, which did not produce any Constitution but concentrated the main powers of the Republic in itself, including anticipating a rigged presidential election, from which the main opposition parties were excluded.



Daniel Ortega in 2017, marking the 38th anniversary of the Nicaraguan revolution

In short: in Venezuela, the Supreme Court of Justice was a proactive actor in the deconstruction of the democratic state.

Another Latin American country that took the distorted path of dictatorship was Nicaragua. Also, with the Supreme Court of Justice as an

ally. Daniel Ortega, leader of the *Sandinistas* (Nicaraguan socialist party), had already been President in the revolutionary period, which began in 1979, and was elected by popular vote in 1984. In 1990 he was defeated, not being reelected. In 1995, the National Assembly approved a constitutional amendment to the 1987 Constitution, prohibiting successive re-elections. In 2007, Ortega was elected President again. It was then that, in 2009, he obtained from a highly partisan Supreme Court the unlimited elimination of the restriction on reelection, in a procedure considered cunning, if not dishonest: judges who did not support the measure were not properly summoned to the trial session and were replaced *ad hoc* by allies of the President.⁷² With the maneuver and numerous measures of persecution of opponents, he was re-elected in 2011, 2016, and 2021. International bodies denounced the elections in Nicaragua as an anti-democratic farce.⁷³

The wave of attacks on the constitutional limits to successive re-elections, which had already reached Venezuela, extended

to Bolivia, where the Supreme Court of Justice, in a decision of 2017, abolished the ban, paving the way for Evo Morales to run for a fourth mandate. This happened despite the express text of the Constitution forbidding more than two terms and the express rejection of the proposal in a popular consultation.⁷⁴ In the end, Morales was forced to step down in November 2019 and new elections were called.

Also in Honduras, the 1982 Constitution only allowed for one presidential term, a provision contained in an “immutable” clause, meaning that it could not be subject to amendment.⁷⁵ However, in a 2015 decision, the Supreme Court of Justice overturned the clause contained in the *original* text of the Constitution claiming that it was unconstitutional, which, naturally, does not match the hypothesis that has gained momentum more recently of considering certain *constitutional amendments* unconstitutional.⁷⁶ The decision paved the way for the re-election of Juan Orlando Hernandez in the controversial dispute of 2017. Ironically, in the 2021 presidential election, the opposition candidate, Xiomara Castro, was elected. She is the wife of former President Manuel Zelaya, who had been overthrown by a coup d'état in 2009, on the charge of seeking to circumvent the ban on reelection through the transverse route of a constitutional amendment.

Finally, in Ecuador, Rafael Correa remained in power from 2007 to 2017. In a referendum validated by the Constitutional Court in 2011, he acquired broad powers in the process of appointing judges, which allowed him to fully replace the members of the Court.⁷⁷ In 2015, Correa managed to approve, through a questionable simplified procedure that came to be validated by the Court, a constitutional amendment allowing the unlimited reelection of the President.⁷⁸ After a wave of protests, a clause was included in the amendment whereby the rule would not apply to the immediately subsequent election, in 2017. In the historic sequence, in the government of the newly elected President Lenín Moreno, a plebiscite once again limited the stay in power to two terms.⁷⁹

⁷² Associated Press, *Nicaragua Court Allows Ortega to Seek New Term in 2011*, THE GUARDIAN (Oct. 20, 2009), <https://www.theguardian.com/world/2009/oct/20/nicaragua-ortega-sandinista-reelection>.

⁷³ IDEA – Institute for Democracy and Electoral Assistance, *The election has greatly aggravated the crisis*, November 7, 2021. <https://www.idea.int/news-media/news/election-has-greatly-aggravated-crisis-nicaragua>.

⁷⁴ Daniel Ramos, *Bolivia Morales' defies term limits, launches bid for fourth term*, REUTERS, May 18, 2019.

⁷⁵ Constitution of Honduras, art. 374.

⁷⁶ David Landau, *Honduras: Term Limits Drama 2.0 – How the Supreme Court Declared the Constitution Unconstitutional*. CONSTITUTIONET, May. 27, 2015.

⁷⁷ José Luis Castro-Montero & Gijs van Dijck, *Judicial politics in unconsolidated democracies: an empirical analysis of the Ecuadorian Constitutional Court*, 38 JUSTICE SYSTEM JOURNAL 380, 384 (2017); See also ROSALIND DIXON & DAVID LANDAU, *supra* note 24, at 95.

⁷⁸ *Ecuador legislature lifts presidential re-election limit*, BBC NEWS, December 4, 2015.

⁷⁹ Associated Press, *Ecuador Votes to Limit Presidents' Term in Blow to Rafael Correa*, THE GUARDIAN, February 5, 2018. <https://www.theguardian.com/world/2018/feb/05/ecuador-votes-to-limit-presidents-terms-in-blow-to-rafael-correa>.

3. Constitutional courts in the game of power

As can be seen from the narrative above, it is not easy for supreme courts to fulfill the role of democratic resistance well. A passive or omisive attitude of caution, to avoid clashing with populist leaders, frustrates its mission. On the other hand, open and solitary confrontation does not usually lead to a happy ending for the courts. What happened in Russia is exemplary. In 1989, after the fall of the Berlin Wall and already close to the end of the Soviet Union, the Constitutional Court rose as an important actor in the democratic transition. It thus rendered high-profile decisions, including the dissolution of the Communist Party and party reorganization. In 1993, however, the Court clashed with Boris Yeltsin over decrees suspending Parliament, on the understanding that the President had exceeded his powers. Yeltsin then called a popular referendum and won support to dissolve both Parliament and the Court itself. By the end of 1993, Russia had a new Constitution, but no longer a Constitutional Court. It was only reinstated in 1995, with a much smaller role, and already submissive to the new President, Vladimir Putin.⁸⁰

When there is a hegemonic party, which controls the Legislative and has broad support within the institutions of civil society and the public, halting authoritarian majority movements becomes much more difficult. When, on the other hand, there is greater equilibrium and political competition between different parties and segments, the role of containing anti-democratic processes becomes more viable. In fact, the specific situation and the constitutional culture of the people make all the difference. And the degree of independence and credibility of the constitutional court itself. In the United States, the attempted coup by invading the Capitol generated an immediate reaction from Congress and the press. Although, surprisingly, a substantial number of Republican Party voters, and many of its leaders, incited by the defeated President, still believe that the 2020 elections were frauded, despite the lack of evidence.⁸¹ In Brazil, although a much younger democracy—the military dictatorship ended in 1985 and the current Constitution dates back to 1988—there was also a massive reaction from institutions, the press and society, discouraging the coup discourse.

“[Courts] must escape the trap of becoming political actors themselves, driven by intrinsically personal (when not partisan) preferences or feelings, ceasing to ground their decisions, genuinely, on constitutional values and principles.”

Therefore, the ability of supreme courts and constitutional courts to prevent the authoritarian escalation of populist leaders depends on multiple factors: effective political pluralism in society, with strong ruling and opposition parties; free and competitive elections; courts with a tradition of independence and recognition in society; support from other institutions for democracy and the court itself; and a society that has a constitutional culture capable of repudiating dictatorial adventures. It is worth saying: courts are important, but they are not capable of doing the work alone. And,

of course, they must escape the trap of becoming political actors themselves, driven by intrinsically personal (when not partisan) preferences or feelings, ceasing to ground their decisions, genuinely, on constitutional values and principles.

⁸⁰ See Samuel Issacharoff, *supra* note 3, at 273.

⁸¹ Lane Cuthbert and Alexander Theodoridis, *Do Republicans Really Believe Trump Won the 2020 Election? Our Research Suggests that They Do*. WASHINGTON POST, January 7, 2022: “[A]mong a nationally representative sample of the US voting-age population, only 21 percent of Republicans say Joe Biden’s victory was legitimate”.

V. CONCLUSION

Contemporary democracy faces innumerable adversities. Some stem from its own inability to solve serious and long-standing problems, which weakens it before the people. While the scenario may vary substantially from country to country, some of these problems include: (i) extreme poverty, unfair inequalities, and other factors that lead to social exclusion or stagnation; (ii) the private appropriation of the State by extractive political and economic elites, who place it at the service of their interests, alienating the majority of the population; and (iii) the feeling of non-belonging of many, whether due to social exclusion or because the systems of political representation are no longer able to give voice and relevance to citizens. In a world defined by innovation and creative destruction, democracy needs to find new institutional designs capable of preserving it and reviving the values that made it the victorious ideology of the 20th century.

While it still faces old ghosts, constitutional democracy is also the target of new threats brought by extremist and authoritarian populism. All this in a world where much of the social and political communication has migrated from traditional media —press, television, and radio—to social media, which operates with few filters and, thus, open space for disinformation, conspiracy theories, or pure and simple hatred. Some countries have managed to resist this process of democratic backsliding, although not without scars. Others, however, have had their institutions succumb to the hegemony of populist leaders and parties with an anti-democratic bias. In this context, the supreme courts and the constitutional courts have been protagonists of both success and failure stories. In some cases, they were pillars of resistance. In others, they were unable to react. And, in more dramatic situations, they were part of the problem. One should not be so naïve as to believe that the courts alone can keep the constitutional construction standing. As a collective project, democracy needs participatory citizens, trustworthy statesmen, and a set of inclusive and independent institutions.

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