

## Autocratic Legalism 2.0: Insights from a Global Collaborative Research Project

By *Fabio de Sa e Silva*\*

**Abstract:** Since the 2000s, scholars have been faced with a new phenomenon, which political scientists eventually labelled democratic backsliding. Law has not been central in studies of democratic backsliding, but it has not been completely absent either. In the mid-2010s, scholars—mostly from political science and constitutional law—began tracing the links between legal norms/institutions and the degeneration of democracies in countries such as Venezuela, Hungary, Turkey, Russia, and Ecuador. These studies found that law had become central to the toolkit used by leaders with autocratic dispositions to undermine liberal democracies from within, while cloaking their moves in legal forms. Corrales called this practice ‘autocratic legalism’; Scheppele elaborated on this notion and popularized it in the law and society community. In 2019, a group of scholars from Brazil, India, and South Africa created a project to investigate the antidemocratic uses of law across the Global North–South. In homage to Scheppele, they labelled this the Project on Autocratic Legalism (PAL). This special issue reports on initial findings from PAL. The articles herein accomplish three remarkable feats: 1) they, of course, provide a rich body of data on the countries studied, including some where the relationship between law and anti-democratic politics has been relatively neglected; 2) they expand and enrich the analytical and methodological framework for studying such a relationship, and 3) very importantly, they challenge the existing geopolitics of knowledge on issues of law, democracy, and democratic backsliding. In this editorial, I draw from those contributions to outline an agenda for future research on these issues, which I call *autocratic legalism 2.0*.

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## A. Introduction

2019 should have been a great year for Brazilian academics. Their lives had not yet been disrupted by the pandemic, the exchange rate between the Brazilian *real* and the US dollar was reasonable, and there were still public funding sources for research—all of which meant they could travel and attend academic conferences within the country and abroad. And many of them did so, in fact, to participate in the annual meeting of the Law and Society Association (LSA) in Washington, DC, themed around ‘rule and resistance,’ the last in-person event the Association held until its Global Meeting in Lisbon in 2022. While these Brazilians had every reason to have a great time in DC, their faces and conversations expressed anything but joy. Jair Bolsonaro, a former army captain who became (in)famous for his remarks favoring military rule, for insulting women, Afro-Brazilians, and indigenous peoples, and for inciting violence against his opponents, had just been elected president. His first words after the initial tabulation of votes made it difficult to ignore his authoritarian leanings. He told his critics that “if they want to stay here [in Brazil], they will have to conform to ‘our laws’; either they leave or they will go to jail. These scoundrels wearing red [the color of Lula da Silva’s Workers’ Party] will be banished from our nation<sup>1</sup>”. Hence the anxiety and uncertainty predominant among the Brazilian LSA attendees. ‘Save me a spot as a visiting scholar or such if I ever have to go into exile’ was a joke I heard multiple times during that meeting. However, time would show that for some this was no joke. Suppression of academic freedoms increased sharply in Brazil under Bolsonaro’s rule, and indeed some scholars felt compelled to flee the country<sup>2</sup>.

It was in this atmosphere that many of those Brazilians gathered for one of the meeting plenaries, in which the then-LSA president, Kim Lane Scheppele, delivered the traditional presidential address. Scheppele’s point in that address, by now, is well-known to legal and sociolegal scholars and even the public at large: democracy no longer dies via military takeovers but rather through elected officials who systematically attack and ‘hollow out’ the same institutions that enabled their rise to power. Central to these attacks are legal reforms that make it increasingly difficult for political minorities and opposition groups to compete and win elections. This legalistic form provides current autocrats with a unique veneer of legitimacy and enables them to rule more effectively and under fewer constraints than their predecessors. Civil society, democratic institutions, and international actors no-

- 1 See video available at: <https://www.youtube.com/watch?v=7vxX3nQccTU> (last accessed on 7 January 2023).
- 2 *Bernardo Galvão-Castro, Renato Sérgio Balão Cordeiro, and Samuel Goldenberg*, Brazilian Science Under Continuous Attack, *The Lancet* 399 (2022), pp. 23–24; *Scholars at Risk Network*, Brazil: Decline in Academic Freedom Requires UN’s Attention, <https://www.scholarsatrisk.org/2022/04/brazil-decline-in-academic-freedom-requires-uns-attention/> (last accessed on 7 January 2023).

tice these key power-grabbing moves only when it is too late and they are difficult to resist. Following Corrales<sup>3</sup>, Scheppele<sup>4</sup> called this phenomenon “autocratic legalism”.

For the Brazilians in the room, Scheppele’s speech made things suddenly cohere. Going forward, they should pay close attention to Bolsonaro’s use and abuse of the law. For these Brazilians, the LSA meeting itself became a research workshop experience. Over lunches and informal gatherings, and encouraged by David M. Trubek—an emeritus law professor from Wisconsin with strong professional and personal ties with the Brazilian sociolegal community—they began to identify topics and contributors to an in-depth study of Brazil under Bolsonaro in what, in homage to Scheppele, they labelled the *Project on Autocratic Legalism* (PAL). They also learned that they were not alone in their concerns. Scheppele’s speech had strongly resonated with others in countries like India and South Africa, where undemocratic winds were also blowing. These scholars were also very interested in comparative and collaborative work centered on the ‘Global South’ (the former Soviet bloc/ Eastern Europe, Latin America, Africa, South Asia)<sup>5</sup>, which the LSA was seeking to promote<sup>6</sup>. PAL grew into an LSA International Research Collaborative (IRC), bringing together scholars from those three countries (Brazil, India, and South Africa), as well as advisors (“Mavens”) based in the United States, France, and Norway<sup>7</sup>. PAL also inspired a Podcast (PALcast) where experts in law and democratic backsliding were interviewed and some of the project’s research has been showcased. In 2021, PAL was selected as a *pilot topical laboratory* in the LSA’s Global Collaboration Program<sup>8</sup>; moreover, between 2021 and 2022, it set the stage for a series of other research ventures covering new countries

3 Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, *Journal of Democracy* 26 (2015), pp. 37–51.

4 Kim Lane Scheppele, *Autocratic Legalism*, *The University of Chicago Law Review* 85 (2018), pp. 545, 583.

5 There is a debate about, e.g., where to place former Soviet countries in the global South–North distinction, but this is less relevant to the point made in this article and echoed in Scheppele’s essay in this special issue: democratic backsliding through law has become a common syndrome in both the Global North and the Global South, however these are defined.

6 At the 2019 LSA Annual Meeting, the Association’s presidency was handed over by Scheppele to Penelope (Penny) Andrews. Andrews, who is originally from South Africa and served as the Dean of the University of Cape Town Law School, was the first non-American to serve as LSA President. Penny’s term was marked by an emphasis on global sociolegal studies and a push toward global collaboration in the production and dissemination of sociolegal knowledge.

7 IRCS are defined by LSA as “groups of law and social science researchers that undertake sociolegal research projects with a global reach”. LSA currently has 41 IRCS. Participation of scholars from low- and middle-income countries in IRC ventures has been supported by grants from the US National Science Foundation. See: <https://www.lawandsociety.org/international-research-collaboratives/> (last accessed on 7 January 2023).

8 The GCP was approved by the LSA board of trustees in 2021. The program seeks to promote exchanges between Global South and Global North scholars.

and topics<sup>9</sup>, as well as transnational activities that resist anti-democratic turns around the world<sup>10</sup>.

This special issue primarily reflects the results of PAL's first phase, which focused on the production of in-depth studies of autocratic legalism in Brazil, India, and South Africa (BISA), linked to initial efforts to locate those stories in a broader comparative perspective (hence, the special issue also includes studies of Hungary—a case that Scheppele<sup>11</sup> treats as “archetypal” of autocratic legalism—and the United States—a country long deemed “exceptional”, the beacon of the “rule of law” and almost immune to autocracy). While the special issue thus represents only an initial fraction of what PAL has set off to accomplish<sup>12</sup>, it generates much food for thought. Taken together, the articles in this issue accomplish three remarkable feats: 1) they, of course, provide a rich body of data on the countries studied, including some where the relationship between law and anti-democratic politics has been relatively neglected; 2) they expand and enrich the analytical and methodological framework for studying such a relationship, and 3) very importantly, they challenge the existing geopolitics of knowledge on issues of law, democracy, and democratic backsliding. In this editorial, I draw from those contributions to outline an agenda for future research on these issues. I focus especially on topics 2 (how the articles expand and enrich the analytic and methodological framework of studies on autocratic legalism) and 3 (how they challenge the existing geopolitics of knowledge around such studies), while integrating topic 1 (how the studies provide a rich body of data on their countries) into my analysis.

The editorial comprises four sections. I begin with a discussion of how PAL relates to earlier studies of *law*, *democracy*, and *democratic backsliding*, particularly those conducted by Scheppele. I then address the contributions of PAL's first phase and the articles in this special issue to those earlier studies. My analysis culminates by identifying new objects of study, domains of inquiry, and epistemological approaches scholars can deploy during the next wave of studies on autocratic legalism, or what I have termed *autocratic legalism 2.0*.

- 9 In 2022, PAL issued a broad call for papers, which PAL coordinators hope will lead to a series of books or a ‘handbook’.
- 10 Here I refer to the Global Resistance to Authoritarian Diffusion (GRAD) project, a spin-off of the PAL project launched in 2022 and based at the King’s College London’s Transnational Law Institute. See: <https://www.kcl.ac.uk/news/transnational-law-institute-launches-global-project-on-authoritarianism> (last accessed 7 on January 2023).
- 11 Scheppele, note 4, p. 549.
- 12 In addition to this special issue, PAL outputs already include two review essays (*Fabio de Sa e Silva*, *Law and Illiberalism: A Sociological Review and Research Road Map*, *Annual Review of Law and Social Science* 18 (2022), pp. 193–209 and *Fabio de Sa e Silva*, *Good Bye, Liberal–Legal Democracy*, *Forthcoming Law & Social Inquiry* (2023)); proceedings of a roundtable on India (*Deepa Das Acevedo*, *Autocratic Legalism in India: A Roundtable*, *Jinadal Global Law Review* 13 (2022), pp. 117–140); and a book with in-depth analyses on Brazil (*Oscar Vilhena Vieira*, *Raquel Pimenta*, *Fabio de Sa e Silva*, and *Marta Machado* (Eds.), *Estado de Direito e Populismo Autoritário: Erosão e e Resistência institucional no Brasil (2018–2022)*, FGV University Press, forthcoming).

## B. Law, democracy, and democratic backsliding

Research and activism on law and democracy date back to at least the mid-twentieth century<sup>13</sup>. The reigning approach was then informed by modernization theory<sup>14</sup> and what came to be known as the “law and development” movement<sup>15</sup>. Law and development scholars understood that law could be a tool for broad social engineering and that if “third world” countries could adopt the right laws and legal institutions, they would overcome their “backwardness”<sup>16</sup>. While law and development scholars were mostly concerned with legal changes intended to generate prosperous market societies, they had good reasons to assume that this could also lead to liberal democracy—a political regime in which rulers are selected through free and fair/competitive elections and, once in power, are subject to two types of constraints: accountability institutions (e.g., legislatures, courts, law enforcement agencies, the media) on the one hand, and protections of individual freedoms, political oppositions, and minorities on the other. In the view of law and development scholars, for example, property rights and capital markets would help create multiple centers of power outside of the state and the hands of state officials<sup>17</sup>, thus posing obstacles to autocratization and bureaucratic authoritarianism<sup>18</sup>.

The law and development movement eventually failed and some of its most iconic leaders went on “self-estrangement”<sup>19</sup>. But the faith in the law as a propeller of liberal democracy was renewed in the 1990s, following the end of the Cold War, the “democratic consensus”<sup>20</sup>, the rise of a “rule of law” industry<sup>21</sup>, and the global spread of liberal consti-

- 13 For a fuller account of these debates in the literature, see *Fabio de Sa e Silva*, *Law & Social Inquiry*, note 12.
- 14 *Nils Gilman*, *Mandarins of the Future: Modernization Theory in Cold War America*, Baltimore 2003).
- 15 *David M. Trubek*, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, *The Yale Law Journal* 82 (1972), pp. 1–50.
- 16 *David M. Trubek*, *Max Weber on Law and the Rise of Capitalism*, *Wisconsin Law Review* 720 (1972) pp. 721–753.
- 17 *David M. Trubek*, *Law, Planning and the Development of the Brazilian Capital Market: A Study of Law in Economic Change*, New York City 1971.
- 18 *Guillermo A. O'Donnell*, *Bureaucratic Authoritarianism: Argentina, 1966–1973*, in: *Comparative Perspective*, Oakland 1988).
- 19 *David M. Trubek* and *Marc Galanter*, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States Law and Society*, *Wisconsin Law Review* 1974 (1974), pp. 1062–1102.
- 20 *Juan J. Linz* and *Alfred C. Stepan*, *Toward Consolidated Democracies*, *Journal of Democracy* 7 (1996), pp. 14–33.
- 21 *Bryant G. Garth*, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, *DePaul Law Review* 52 (2014), pp. 383–400; *Robert W. Gordon*, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, *Theoretical Inquiries in Law* 11 (2010), pp. 441–468.

tutionalism through the codification of liberal rights in terms of free speech, reunion, and political organization, and the adoption of judicial review<sup>22</sup>.

This only began to change more recently, when scholars were faced with a new and “unwelcome” phenomenon<sup>23</sup>, which political scientists eventually labelled democratic backsliding<sup>24</sup>. Studies of democratic backsliding focus mainly on the reasons why and mechanisms through which (attention!) hitherto *liberal democracies* are transformed into *electoral autocracies*—regimes in which elections are still held but are no longer free and fair/competitive, nor do substantial constraints moderate the exercise of power by the rulers/‘autocrats’ (although a façade of accountability institutions and protections for individual freedoms and political oppositions and minorities may remain and deceive analysts and external observers).

Democratic backsliding differs considerably from the authoritarian “reversals” that concerned analysts and policy makers in previous decades<sup>25</sup>. In democratic backsliding, political change occurs not via coups and tanks but rather through electoral leaders who, once in office, begin to attack the very democratic institutions that enabled their rise to power. In addition, democratic backsliding does not affect solely—or even primarily—countries ‘transitioning’ to democracy. On the contrary, it also affects countries considered by many to be ‘consolidated’ democracies. Prominent examples of the political transformations covered by democratic backsliding scholarship are Venezuela under Hugo Chávez (1999–2013) and Nicolás Maduro (since 2013), Hungary under Viktor Orbán (since 2010), Turkey under Recep Tayyip Erdoğan (since 2014), Russia under Vladimir Putin (since 2012), and even the U.S. under Donald J. Trump (2016–2020). All these leaders came to power following elections deemed free and fair/competitive; all then took a series of steps to curtail accountability institutions and sideline opponents to maximize their chances of prevailing in the next cycles of elections which, as a result, could hardly be deemed free and fair/competitive.

The law has not been central in studies on democratic backsliding, but has not been completely absent from these studies either. In the 2010s, scholars—mostly from political science and constitutional law—began tracing the links between legal norms/institutions and the degeneration of democracies in countries such as Venezuela, Hungary, Turkey, Russia, and Ecuador. These studies caused a remarkable shift in the predominant scholarly

- 22 C. Neal Tate and Torbjörn Vallinder, *The Global Expansion of Judicial Power*, New York City 1995; Tom Ginsburg, *The Global Spread of Constitutional Review in*: Gregory A. Caldeira et al. (Eds.), *Oxford Handbook of Law and Politics*, Oxford 2008, pp. 81–98; Gregory Shaffer, Tom Ginsburg and Terence Halliday (Eds.), *Constitution-Making and Transnational Legal Order*, Cambridge 2019.
- 23 David Waldner and Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, *Annual Review of Political Science* 21 (2018), pp. 93–113.
- 24 Nancy Bermeo, *On Democratic Backsliding*, *Journal of Democracy* 27 (2016) pp. 5–19; Waldner and Lust, note 23.
- 25 Samuel P. Huntington, *The Third Wave: Democratization in the late Twentieth Century*, Norman 1991.

attitudes toward the role of law in promoting democracy. Previously, scholars thought of law as an intrinsic bulwark against autocracy. Now, they began contending that law was central to the toolkit used by leaders with autocratic dispositions to undermine liberal democracies from within.

Corrales<sup>26</sup> was quick to notice this in his studies of Venezuela under Chávez. In a 2015 essay, he identified three tactics used by Chávez to consolidate power that were centered around the use, abuse, and non-use of the law. According to Corrales, Chávez *used* the law by passing statutory and constitutional changes that supported his autocratic plans, *abused* the law by reinterpreting existing statutory or constitutional commands in ways that favored his pursuits, and *non-used* the law by denying enforcement to legal norms that could present obstacles to his concentration of power. Corrales termed this set of tactics “autocratic legalism”. Scheppele<sup>27</sup> built on these insights in studies that included a broader set of cases besides Venezuela—Russia under Putin, Hungary under Orbán, Turkey under Erdoğan, Ecuador under Correa. She placed greater emphasis on high-level statutory and constitutional change that, using congressional supermajorities or direct appeals to ‘the people’, leaders in those countries managed to pass. In principle and in isolation from one another, she noted, these changes did not seem inconsistent with liberal democracy (oftentimes they were promoted in the name of perfecting liberal democracy). In the aggregate, however, they helped undermine political freedoms, protections to oppositions and minorities, and accountability mechanisms or, in Scheppele's words<sup>28</sup>, “the liberal content from constitutionalism” and provided a *legal*—or at least *legalistic*—basis for the entrenchment of rulers/incumbents/autocrats in power. Although these changes could be sweeping—e.g., accomplished through wholly new constitutions—this need not have been the case. More common and intriguing were piecemeal changes targeting portions of the legal system one at a time to create systemic incoherence and make these systems more easily manipulable. (Scheppele<sup>29</sup> calls this a “Frankenstate”.) In a similar vein, Dixon and Landau wrote extensively on how constitutional amendments and replacements, judicial review, and even constitutional rights such as the right to free speech were being “abusively borrowed” by rising autocrats to undermine the “democratic minimum core”—defined in their work as “free and fair elections, with a minimum set of independent checks and balances on the elected government”—and promote regressive regime change<sup>30</sup>.

26 Corrales, note 3.

27 Scheppele, note 4.

28 Ibid., p. 556.

29 Ibid., p. 567; Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, *Governance* 26 (2013), p. 559.

30 Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, Oxford 2021; see also David Landau, *Abusive Constitutionalism*, *U.C. Davis Law Review* 47 (2013), pp. 189–260; David Landau and Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, *U.C. Davis Law Review* 53 (2020), p. 1313.

This use of legalistic tactics by autocrats is crucial because it adds legal legitimacy to processes of power concentration and makes it difficult for institutions and the citizenry to resist<sup>31</sup>. Notable examples in Scheppele’s studies include court-packing moves by Orbán and Erdoğan. Both these leaders began by expanding the jurisdiction of courts so that they could try more cases, including human rights cases—which, in principle, seemed an iteration of the liberal–legal script. Both then used this broader mandate of courts as an excuse to appoint more judges they or their parties could handpick. In both cases, the engineering-quality of the legal changes initially made it difficult for international observers and local civil society groups to see the danger they represented.

### C. PAL and the contributions from this special issue

PAL studies were designed to test the main assumptions established in earlier studies of autocratic legalism, i.e.:

- That elected leaders with autocratic leanings actively undermine the ‘liberal content from constitutionalism’ to consolidate power, causing political regimes in their countries to eventually change from *liberal democracies* to *electoral autocracies*;
- That, to undermine such ‘liberal content from constitutionalism’, consolidate power, and cause regime change in their countries, those leaders make systematic use of the law; and
- That this systematic use of the law is centered on high-level, formal legal changes—i.e., constitutional amendments and statutory reforms that make national legal orders internally inconsistent and more susceptible to manipulation for power-grabbing purposes.

At first sight, various studies in this special issue (Brazil, South Africa, the United States) seem an uneasy fit with the core propositions of studies on autocratic legalism, especially those in Scheppele’s work. For example, they involve neither countries that have gone fully autocratic (at least so far), nor the enactment of major changes in constitutional or statutory law.

This puzzle can be approached in two ways. One is to think of autocratic legalism as a *closed concept*, which additional data should corroborate, refute, or refine. Another is to think of it as a *research framework*, which points to variables and research questions that deserve further investigation. Thinking of autocratic legalism as a closed concept underlines but essentializes the *substantive findings* of the earlier studies. In this vein, it is tempting to say the concept ‘doesn’t work’ in all the cases studied in this special issue—or,

31 Ironically, this need of current illiberal or authoritarian leaders to use law to mask and legitimize their moves can be linked to the success that political liberalism and the ‘rule of law’ achieved under the “democratic consensus” of the 1990s. Because liberal legal democracy “is now widely seen as the only legitimate form of government, autocratic leaders have to cloak their authoritarian moves in liberal legal forms in ways that earlier generations of autocratic leaders didn’t have to bother with” (*Thomas M. Keck*, personal communication); see also *Dixon and Landau*, 2021, note 30.

to draw from Scheppele’s contribution to this issue, that these cases are documenting “a different disease” than the one she originally did. Thinking of autocratic legalism as a *research framework*, on the other hand, prioritizes the *problématique* that underlies those studies. In this essay, I adopt the latter approach. I initially define autocratic legalism as research on democratic backsliding which broadly examines *how law is used to support anti-democratic political transformations*. I argue that earlier studies specifically focused on transformations *from liberal democracy to electoral autocracy* and related *high-level, formal legal changes* (i.e., changes in constitutional and key statutory law); however, those studies merely opened the field: they did not define it. I thus argue that autocratic legalism research should welcome works that examine other forms of regressive political change carried out through other legal means with which the findings from earlier studies could be contrasted and compared.

Here is where PAL studies and the articles in this special issue play a constructive role. Together, they suggest that future waves of research on autocratic legalism should (1) consider conceptualizations of regressive political change beyond the liberal democracies–electoral autocracies binary, and how these changes are being resisted; (2) consider more forms and loci in which law is used to support such regressive political changes, or resistance to them; (3) openly and deliberately engage in interdisciplinary dialogue; and (4) broaden the geopolitical scope of studies and comparisons. I elaborate on each of these suggestions in the sections that follow.

### *I. Political change*

PAL studies reveal forms of political change that differ from those highlighted in earlier studies of autocratic legalism. Without doubt, in all the countries studied by PAL researchers, political freedoms, protections to oppositions and minorities, and accountability mechanisms are being undermined; however, the binary *liberal democracies–electoral autocracies* seems insufficient to fully characterize the political transformations that those countries are undergoing.

Consider the examples from Brazil, South Africa, and the United States presented in this special issue. In Brazil, Bolsonaro routinely bypassed Congressional oversight using executive and regulatory orders<sup>32</sup>. He weakened the Federal Prosecutor’s Office in order to secure impunity for his violations of the law<sup>33</sup>. He dismantled anticorruption policies and transparency laws that had previously enabled media and civic accountability of the

32 Oscar Vilhena Vieira, Rubens Glezer, and Ana Laura Barbosa. *Infralegalismo autoritário: a estratégia do Governo Bolsonaro para implementar sua agenda iliberal sem apoio no Legislativo*, in: Vilhena Vieira, Pimenta, de Sa e Silva and Machado (Eds.), note 12.

33 Eloisa Machado de Almeida and Luíza Pavan Ferraro. *Arquitetura jurídica da desresponsabilização: Advocacia Geral da União e Procuradoria Geral da República nas ações contra o governo Jair Bolsonaro no Supremo Tribunal Federal*, in: Vilhena Vieira, Pimenta, de Sa e Silva and Machado (Eds.), note 32.

Executive<sup>34</sup>. He and his Justice Ministers even deployed the Federal Police to investigate journalists and critics under the provisions of a military-era National Security Law<sup>35</sup>. In South Africa, Zuma corrupted or damaged “almost all the institutions that were designed as constitutional guardrails”, including “the National Prosecuting Authority, the Public Protector, the South African Revenue Service, and the South African Police Service”<sup>36</sup>. Ruling in an “effectively one-Party state”, Zuma was also able to avoid basic forms of parliamentary accountability: he proposed laws that were admittedly unconstitutional, but which Members of Parliament felt powerless to stop “and are relying, they say, on civil society and Courts to do so”<sup>37</sup>. Courts, in turn, were also victims of Zuma’s attack. He “admonished people to ‘reject White man’s Justice’” while transferring some significant powers of judicial accountability from civil courts to the apartheid-era “traditional leaders” he was able to handpick<sup>38</sup>. In the U.S., Trump attempted to intervene in prosecutions that emerged from the Mueller investigation into the 2016 election, attacked the FBI, appointed a loyalist as the Attorney General who acted in the cases that stemmed from such an investigation, and pardoned the accused after conviction<sup>39</sup>. With support from his party, which controlled the U.S. Senate, he also broke unwritten rules of political conduct<sup>40</sup> to secure a conservative majority in the Supreme Court, appointing Justice Amy Coney Barrett only 38 days prior to the 2020 presidential election<sup>41</sup>.

Moreover, all these leaders displayed an unequivocal appetite for perpetuation in power. Bolsonaro signaled that he would not accept an electoral defeat<sup>42</sup>; Zuma tried to

- 34 *Raquel Pimenta*, Opacidade, transparência e sigilo sob o governo Bolsonaro, in: *Vilhena Vieira, Pimenta, de Sa e Silva and Machado* (Eds.), note 33.
- 35 *Daniel Carvalho*, Governo usa Lei de Segurança Nacional para investigar jornalista que publicou charge de Bolsonaro, <https://www1.folha.uol.com.br/poder/2020/06/governo-usa-lei-de-seguranca-nacional-para-investigar-jornalista-que-publicou-charge-de-bolsonaro.shtml> (last accessed on 7 January 2023).
- 36 *Dennis Davis, Michelle Le Roux, and Dee Smythe*, What Future for Constitutional Democracy in South Africa?, This Special Issue (2022).
- 37 *Ibid.*
- 38 *Ibid.*
- 39 *Richard L. Abel*, The Fate of Liberal Democracy under Donald Trump, This Special Issue (2022).
- 40 *Steven Levitsky and Daniel Ziblatt*, *How Democracies Die*, New York City 2018.
- 41 *Peter Baker and Maggie Haberman*, Trump Selects Amy Coney Barrett to Fill Ginsburg’s Seat on the Supreme Court. The New York Times, 25 September 2020, <https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html> (last accessed on 7 January 2023).
- 42 Sul 21, Bolsonaro tenta descreditar eleições e indica que não vai aceitar derrota, 18 July 2022, <https://sul21.com.br/noticias/politica/2022/07/bolsonaro-tenta-descreditar-el-eicoes-com-teorias-conspiratorias-e-indica-que-nao-vai-aceitar-derrota/> (last accessed on 8 January 2023).

cling to power himself and elect an ex-wife as his successor<sup>43</sup>; Trump tried to stage an unprecedented self-coup on January 6, 2021<sup>44</sup>. And yet all failed to secure additional time in office. Bolsonaro faced a tough election and eventually lost to former president Lula da Silva; Zuma's moves were blocked by others in his own African National Congress (ANC)<sup>45</sup>; Trump had to witness his Democratic opponent Joe Biden be sworn into office (albeit not in person). The bottom line is that, in all these three countries, the integrity of liberal-democratic institutions was severely downgraded, but in none of them did this lead to autocratization.

Even when countries become autocracies, the binary *liberal democracies–electoral autocracies* does not seem to fully account for what has occurred. Consider the example of India. Since 2014, the country has been ruled by Prime Minister Narendra Modi and his Bharatiya Janata Party (BJP). While in power, Modi has closely followed the autocratic playbook, pushing back against accountability institutions and the media and launching attacks against his opposition and political minorities. In 2021, the V-DEM Institute classified India as an “electoral autocracy<sup>46</sup>”.

PAL studies on India do not doubt the BJP's—or, as PAL authors rightfully say, Modi's BJP's—intentions to consolidate power. M. Mohsin Alam Bhat, Mayur Suresh, and Deepa Das Acevedo<sup>47</sup> report in this special issue that the party “altered campaign finance rules to advantage itself, exerted informal pressures on the judiciary ... and undermined fourth branch institutions through appointments of sympathizers to key oversight bodies”. They also note that the BJP adopted maneuvers in Parliament to avoid accountability, made heavy use of ordinances (executive legislation), and “weaponized anti-terror laws and financial regulations to target opposition parties and unsympathetic civil society actors”. However, they contend that more is happening in India than is contained in the term “autocratization”. Modi and the BJP exercise power, they claim, based on an ideology and

- 43 *Adam Taylor*, How South Africa's Political System Helped Jacob Zuma Cling to Power For So Long. *The Washington Post*, 15 February 2018, <https://www.washingtonpost.com/news/worldviews/wp/2018/02/15/how-south-africas-political-system-helped-jacob-zuma-cling-to-power-for-so-long/> (last accessed 8 January 2023).
- 44 *Lauren Leatherby*, *Arielle Ray*, *Anjali Singhvi*, *Christiaan Triebert*, *Derek Watkins* and *Haley Willis*, How a Presidential Rally Turned Into a Capitol Rampage, *The New York Times*, 1 December 2021, <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html> (last accessed on 8 January 2023); *Alex Woodward*, What Happened in Washington DC Yesterday? A Timeline of Insurrection, *The Independent*, 1 July 2021, <https://www.independent.co.uk/news/world/americas/us-politics/capitol-riots-what-happened-washington-dc-timeline-b1783562.html> (last accessed on 8 January 2022).
- 45 *Heinz Klug*, Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa, *Buffalo Law Review* 67 (2019), p. 701.
- 46 *Soutik Biswas*, Electoral Autocracy: The Downgrading of India's Democracy. *BBC News*, available at: <https://www.bbc.com/news/world-asia-india-56393944> (last accessed on 8 January 2023).
- 47 *Authoritarianism In Indian State*, *Law And Society*, This Special Issue (2022).

backed by mass organization and participation in the legitimization of the regime. This has important analytical implications: in the regime change they describe, the center of gravity is ideology, not the leader, and the primary goal or ambition is not to keep the leader in power but to remake society and the state in the image of that ideology. Indeed, their article goes to great lengths to provide examples that Modi's and the BJP's use of the law was intended to ensure not only their continuous prevalence in elections but also—and even more importantly—Hindu nationalist dominance<sup>48</sup>.

The Indian case thus denotes an even more structural limitation in the *liberal democracies–electoral autocracies* binary. This binary is concerned with power concentration in the hands of an individual ('the autocrat') and neglects all other changes in the state and society beyond the weakening of political freedoms, protections to oppositions and minorities, and accountability mechanisms (the 'liberal content from constitutionalism'). Yet there is more happening on the ground, and not only in India. PAL accounts from Brazil highlight the dismantling of social<sup>49</sup>, environmental<sup>50</sup>, and gender/racial equality policies, among others<sup>51</sup>. PAL accounts from South Africa highlight the capture of the state by "Zuma and his cohorts" for rent-seeking purposes<sup>52</sup>. In both cases, scholars contend that the victim is not merely the "liberal content of constitutions", but a bolder constitutional project that includes provisions on social, economic, and cultural rights, environmental protections, and racial/gender justice.

Future studies on autocratic legalism should thus contemplate a broader range of political change beyond the liberal democracies–electoral autocracies binary. Mainstream political science and efforts to measure democracy worldwide, such as the V-DEM project, already offer conceptual tools suitable to this process. A handy example is the distinction between *liberal democracies* and *electoral democracies*<sup>53</sup>. Electoral democracies are regimes that still hold relatively free and fair/competitive elections, while albeit not fully encompassing accountability institutions or protections of individual freedoms and political oppositions and minorities; Brazil, South Africa, and the U.S. could be treated as more

48 Ibid. In the same vein, see *Christopher Jaffrelot*, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy*, Princeton 2021.

49 *Alexandre Gomide*, *Michelle Morais*, and *Janine Mello*, *Desmonte de políticas federais*, Instituto de Pesquisa Econômica Aplicada 21 (2022); *Emilio Peluso Neder Meyer*, *Constitutional Erosion in Brazil*, London 2021.

50 *Mariana Mota Prado*, *Engrandecimento do Poder Executivo no Brasil: o caso dos incêndios na Amazônia*, in: *Vilhena Vieira*, *Pimenta, de Sa e Silva*, and *Machado* (Eds.), note 34; see also *Danielle Hanna Rached*, *Marco Antônio Moraes Alberto*, and *Bernardo Andreiuolo Tagliabue*, *Environmental Authoritarianism: A Case Study of the Bolsonaro Government (2019-2021)*, This journal issue.

51 *Vilhena Vieira*, *Pimenta, de Sa e Silva*, and *Machado* (Eds.), note 50; *Gomide*, *Morais*, and *Mello*, note 49; *Meyer*, note 49.

52 *Davis*, *Le Roux*, and *Smythe*, note 36.

53 *Vanessa A. Boese*, *Martin Lundstedt*, *Kelly Morrison*, *Yuko Sato*, and *Staffan I. Lindberg*, *State of the World 2021: Autocratization Changing its Nature?, Democratization* 29 (2022), p. 983.

moderate cases of autocratic legalism that only took them this far in the continuum. However, researchers may wish (or even need) to go further and adopt, or develop, broader definitions of democracy and democratic backsliding to use as benchmarks in their studies—although, of course, they should clearly state and justify the definitions they are using.

Earlier studies on autocratic legalism avoided looking at political change beyond the ‘liberal content from constitutionalism’ and the role played by the law in enabling it. It has always been known, for example, that Orbán in Hungary or Putin in Russia have threatened more than political freedoms, protection to oppositions and minorities, and accountability mechanisms. Orbán’s platform has strong religious, ethnonationalist, and gendered components<sup>54</sup>; Putin’s is centered on ideas of state sovereignty and tradition<sup>55</sup>. Studies on autocratic legalism considered that these were but populist rhetoric used to win elections while putting power consolidation by the autocrats at hand at the forefront of their inquiry; Scheppele, in this special issue, maintains that we should distinguish between promotion of ideology and autocratization.

PAL findings suggest two reasons why this could be reconsidered. First, rhetoric often translates into policy and adds to what comprises the ‘regime change’ at stake besides the more obvious and visible power concentration in the hands of an individual or the executive. In India, the ‘regime change’ under Modi also becomes about asserting Hindu nationalism<sup>56</sup>; in Brazil under Bolsonaro and South Africa under Zuma, it also becomes about protecting the status quo against struggles for social, economic, and racial/gender justice<sup>57</sup>; in the U.S. it also becomes about reinforcing a white, masculine, and Christian hegemony<sup>58</sup> while empowering corporations, as Trump did through a regressive tax ‘reform’ and by weakening business regulations. These power imbalances created by incumbents—here, again, through law—have political/electoral consequences as well: they disenfranchise political oppositions and minorities, help ensure the perpetuation of incumbents in power through elections (which become less and less free and fair), and ultimately create conditions for an ‘autocracy’ without an autocrat.

In addition—and as noted supra—countries under scrutiny may themselves adopt richer conceptions of democracy and constitutionalism. This is the case for all three BISA

54 BBC News, Hungary Tries for Baby Boom with Tax Breaks and Loan Forgiveness, <https://www.bbc.com/news/world-europe-47192612> (last accessed on 8 January 2023); see also *Andrea L. P. Pirro and Ben Stanley*, Forging, Bending, and Breaking: Enacting the “Illiberal Playbook” in Hungary and Poland, *Perspectives on Politics* (2021), pp. 86–101.

55 *Neil Robinson and Sarah Milne*, Populism and Political Development in Hybrid Regimes: Russia and the Development of Official Populism, *International Political Science Review* 38 (2017), pp. 412–425.

56 *Jaffrelot*, note 48; *Mohsin A. Bhat, Mayur Suresh, and Deepa Das Acevedo*, note 47.

57 *Vilhena Vieira, Pimenta, de Sa e Silva, and Machado* (Eds.), note 51; Meyer, note 49; *Davis, Le Roux, and Smythe*, note 52.

58 *Philip S. Gorski and Samuel L. Perry*, *The Flag and the Cross: White Nationalism and the Threat to American Democracy*, Oxford 2022.

countries, whose constitutions were once heralded with optimistic labels such as ‘transformative’<sup>59</sup> or ‘citizenry’s’<sup>60</sup>.

From this perspective, PAL findings contribute to what Dann, Riegner, and Bönne-  
mann<sup>61</sup> once called a “Southern turn” in comparative constitutional studies. The authors  
argue that the “Global South” is a useful concept “to capture a distinctive constitutional  
experience”, shaped by the distinctive colonial and peripheral history of Global South coun-  
tries and generative of three distinctive “themes”: socioeconomic transformation, struggles  
about political organization, and denial of/access to justice. They posit that taking this “dis-  
tinctive experience” seriously has broader implications for scholarship. It “improves our  
understanding of constitutional law both in the North and the South”, as it requires scholars  
in the field to develop a new “epistemic, methodological, and institutional sensibility” that  
“turns back to the North and to the world as a whole”. The unique contexts investigated  
in PAL studies, indeed, raise some thought-provoking questions for theory and research on  
law and democratic backsliding. Is it possible, for instance, to isolate the ‘liberal content’  
from the ‘substantive’ layers of constitutions when assessing the effects of democratic  
backsliding in a given country? Or aren’t attacks on ‘liberal content’ often linked to attacks  
on those ‘substantive layers’—to the extent, for example, that they have distributional  
effects, silencing some societal interests based, e.g., on race, class, gender, and religion  
while benefitting others? Moving past the liberal democracy–electoral autocracy binary  
will allow scholars to attain and address these questions and shed further light on the  
phenomenon central to studies of autocratic legalism: What is happening to democracy and  
what does the law have to do with it?

- 59 The term “transformative constitution” was drawn from *Klare E. Klare*, *Legal Culture and Transformative Constitutionalism*, *South African Journal on Human Rights* 14 (2017), p. 146, and originally applied to South Africa, but it has also been used to name other experiences in the Global South, including Brazil’s and India’s: see, e.g., *Arvind Narrain*, *Brazil, India, South Africa: Transformative Constitutions and their Role in LGBT Struggles*, *Revista Internacional de Direitos Humanos* 11 (2014), pp. 151–165; *Gautam Bhatia*, *The Transformative Constitution: A Radical Biography in Nine Acts*, New York City 2019; *Oscar Vilhena*, *Upendra Baxi and Frans Viljoen* (Eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India, and South Africa*, Pretoria 2013. More recently, the term has become controversial in South Africa. Some scholars critique the South African constitution for falling short of the more radical transformation they understand the country needs, especially in areas such as the economy and racial equality, while others critique it as too Western-centric.
- 60 This is how the Brazilian Constitution was labelled by the Chair of the National Constitutional Assembly, Ulysses Guimarães. The term became largely used to stress the broad aspirations of Brazil’s constitutional text.
- 61 *Philipp Dann*, *Michael Riegner*, and *Maxim Bönnemann*, *The Southern Turn in Comparative Constitutional Law*, in: *Dann, Riegner, Bönnemann* (Eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, pp. 1–136.

## II. Uses of law

As mentioned above, earlier studies of autocratic legalism emphasized—and helped illuminate—the law’s central role in the political moves and transformations experienced in backsliding democracies. The literature placed particular emphasis on formal, high-level changes (constitutional amendments or key statutory reforms). Although PAL studies confirmed the centrality of the law in the political dynamics investigated, they also revealed other ways in which the leaders/governments they studied deployed the law in their remaking of states and societies.

One of these ways affects the *middle* or *lower* levels of legal systems. Brazil provides the clearest example. Studies of that country<sup>62</sup> note that, for much of his time in Office, Bolsonaro was unable or unwilling to build a majority in congress (a complicated task in a political system with a president and multiple parties represented in Congress). Hence he could not pass any major constitutional or statutory reform to entrench himself in power, but he could cause great harm to the Brazilian democracy by using—and abusing—his presidential lawmaking powers and prerogatives. This included, for example, his ability to compulsively issue executive orders, appoint unfit officials to head key government agencies and pardon some of his allies who were behind the online attacks against the Supreme Court and its justices<sup>63</sup>. The courts did respond to some of these abuses<sup>64</sup> but, at some point, these abuses became too widespread for judges to oversee.

The realization that anti-democratic activity can take place not only through formal, high-level legal change but also through changes at the *middle* or *lower* level of legal systems, will lead scholars to explore a broader range of institutional and organizational domains—or what David Trubek recently called *loci of legalistic autocratic activity*<sup>65</sup>. Formal, high-level legal change occurs primarily through the *legislature* via bills or constitutional amendments; changes at the middle or lower levels of legal systems usually occur throughout the *administrative state*, including Cabinets, regulatory agencies, etc.

A second way in which the law is used in regressive political change as demonstrated by PAL studies involves not the formal enactment of new laws but *maneuvers in the shadow of or amid gaps in existing laws* (in this special issue, Scheppele views this as an exploitation, by rising autocrats, of “weaknesses” or “pre-existing conditions” in legal

62 Vilhena Vieira, Glezer, and Barbosa, note 57; Rached, Alberto, and Tagliabue, note 50.

63 Fernando Bizarro, Are Brazilian Institutions Working? Well, It’s Complicated. Brazilian Report, 29 April 2022, <https://brazilian.report/opinion/2022/04/29/institutions-silveira-supreme-court/> (last accessed on 7 January 2023).

64 Luciana Gross Cunha, Fabiana Luci de Oliveira e Livia Gonçalves Buzolin. O STF e a judicialização de políticas: locus de resistência ou governança autoritária?, in Vilhena Vieira, Pimenta, de Sa e Silva and Machado (Eds.), note 57. Oscar Vilhena Vieira, Rubens Glezer, and Ana Laura Barbosa. A Supremocracia e Infralegalismo Autoritário: Comportamento do Supremo Tribunal Federal nos dois primeiros anos do governo Bolsonaro, in Vilhena Vieira, Pimenta, de Sa e Silva and Machado (Eds.), Ibid.

65 Personal communication.

systems). For instance, in India, Modi and the BJP came up with an ingenious solution to bypass Congressional oversight. The Indian constitution grants the leader of the opposition the power to appoint several positions in accountability bodies. The BJP's Speaker of the House did not recognize the Leader of the Opposition, which caused those seats to remain vacant and the accountability bodies to become inoperative<sup>66</sup>. The BJP-appointed Attorney General claimed that this did not violate the law, as "there is no law that obliges the Speaker to recognize a Leader of the Opposition if no opposition party's numerical strength is at least equal to the quorum of the House (i.e., one tenth of its membership, or 55 seats)"<sup>67</sup>. Similarly, Modi failed to pass constitutional amendments to pack the high courts, but he seems to have found other ways to "meddle with [the] judicial function behind the scenes", which did the job and let him rule without fear of judicial accountability<sup>68</sup>. In Brazil, Bolsonaro did something similar with the Federal Prosecutor's Office: following all the formal legal procedures governing the appointment of the Chief Federal Prosecutor (aka PGR), Bolsonaro picked a loyalist to serve in this role. He secured that prosecutor's loyalty by promising to appoint him to a Supreme Court seat. Since the PGR has a monopoly over investigations and criminal lawsuits involving the President, this meant that Bolsonaro could get away with countless of his wrongdoings<sup>69</sup>.

There are various reasons why anti-democratic leaders may resort to these maneuvers to change how legal systems operate without formally changing laws. Bolsonaro—even Modi in his court-packing effort—may have lacked the capacity to build support in Congress to accomplish major constitutional or statutory changes; in these cases, one could say they resorted to maneuvers in existing legal forms as a suboptimum solution to their autocratic plans. But sometimes formal legal changes are not even necessary. Legal systems can have norms on the books that are supportive of the goals of autocrats, who can simply decide to activate or mobilize them further. Das Acevedo<sup>70</sup> makes this case for India, stating that, in that country, illiberal elements are "baked into ostensibly liberal-constitutional and legal texts". The Indian constitution authorizes preventive detention, grants the state substantial emergency powers, and also grants it impunity. In addition, countries may have adopted liberal laws, but these coexist with institutionalized practices antithetical to those laws, which incumbents can bolster and expand. This is the case in Brazil where, as Marta Rodriguez de Assis Machado and Raquel de Mattos Pimenta<sup>71</sup> note, deficits in 'rule of law' consolidation, despite the successful adoption of elections, left open persistent "zones

66 *Tarunabh Khaitan*, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, *Law and Ethics of Human Rights* 14 (2020), p. 64.

67 Khaitan, note 66.

68 *Ibid.*, p. 75.

69 *Vilhena Vieira, Pimenta, de Sa e Silva, and Machado* (Eds.), note 64.

70 *Das Acevedo*, note 12.

71 *Authoritarian Zones Within Democracy: The Rule of Law in Contemporary Brazil*, *This Special Issue* (2022).

of authoritarianism”, which Bolsonaro could tap onto and expand. Lastly, presidents or prime ministers can radically subvert the legal landscape in which they operate simply by refusing to follow customary/unwritten rules of political conduct<sup>72</sup> or by tweaking reigning interpretations of existing laws. In these cases, they respect the letter of the law but violate its spirit, thus confusing things for citizens and observers.

Future research on autocratic legalism should not lose sight of high-level, formal legal change used to promote regressive political change. Yet scholars should also explore and expand the other modalities revealed in PAL studies and discussed herein: legal change beneath the level of constitutions and statutes, as well as maneuvers that subvert the meaning of or exploit the gaps in existing laws to favor anti-democratic interests. This expansion has crucial implications for the interdisciplinary configuration of the field by creating space for researchers with backgrounds in administrative law, as well as in other disciplines such as sociology and anthropology (see below).

### *III. Areas of knowledge and research approaches*

As PAL studies call attention to new forms of regressive political change, as well as new ways in which the law is used to support such processes, the breadth of (inter-)disciplinary knowledge needed for researchers to address their potentially new objects of study also needs expansion. In this vein, four research approaches or traditions of inquiry can be useful, adding to the emphasis on constitutional law and political science behind earlier studies of autocratic legalism.

The first approach comes from political economy, which helps researchers understand the distributional effects of autocratic legalism (who gains and who loses from the legal-political order it produces) more fully. The essay on Hungary in this special issue takes this approach. The author highlights both the socioeconomic factors that explain Orbán’s rise and the effects of his rule on the Hungarian socioeconomic structure. He pays great attention to economic variables (neoliberalism x social democracy and developmentalism<sup>73</sup>), but

<sup>72</sup> Levitsky and Zibblat, note 40.

<sup>73</sup> The relationship between neoliberalism and current autocratic movements is complex. Some (e.g., Bugaric in this special issue) argue that adherence of countries to neoliberal scripts left millions of people without prospects of socioeconomic mobility and their grievances were taken advantage of by right-wing populists. Others argue that current autocratic turns were needed to secure the reproduction of neoliberalism and that autocratization is the apex, not the opposite, of a neoliberal order: *Wendy Brown, The Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West*, New York City 2019; *Pierre Dardot and Christian Laval, Never Ending Nightmare: The Neoliberal Assault on Democracy*, London 2019; *Berch Berberoglu, The Global Rise of Authoritarianism in the 21<sup>st</sup> Century: Crisis of Neoliberal Globalization and the Nationalist Response*, London 2021. Still others argue that there are fractures in the business sector and that some forces pushing for free-market policies can also be allies in the fight against autocrats. Future studies should provide more clarity on this issue.

we can also envision in his analysis how Orbán's political project caters to a constituency that shares a given racial/ethnic and gender identity<sup>74</sup>.

A second useful approach comes from sociology (e.g., organizational sociology, sociology of culture, and social movement studies) and anthropology. This sociological/anthropological turn in research on autocratic legalism can help illuminate both the maneuvers used by anti-democratic leaders to push politics away from democracy in the shadow of or amid gaps in existing laws, and the extra-institutional reach of these processes, i.e., how they might be connected to 'ideologies' and 'mass social organization' outside the state.

A third useful approach comes from history. The studies on Brazil, India, and South Africa in this special issue all show that the ability of current leaders to use law to assault democracy is best understood as a product of historical (dis)continuities. The article on India<sup>75</sup> starts by recognizing that "elements of India's ongoing political transformation ... resemble ... events in the country's past", including the colonial rule and the emergency declared by Indira Gandhi between 1975 and 1977. Authors of the article on South Africa note that the Zuma government used the past and an appeal to "tradition" to institute a new governance scheme that enables its leaders and loyalists to evade accountability<sup>76</sup>. It took advantage of colonial and apartheid laws that designated "tribes" (now recast as "traditional communities") and allowed "tribal authorities" (now recast as "traditional councils" and handpicked by the government) to bypass the legislature and courts. Yet it is in the article on Brazil<sup>77</sup> that the issue of historical (dis)continuities appears most forcefully and consciously articulated. Drawing on studies of Latin American politics (e.g., O'Donnell), the authors consider that the Brazilian transition to democracy (1985–1989) had always been "incomplete" and "zones of authoritarianism" remained, despite the successful adoption of elections. They claim, furthermore, that Bolsonaro's assault on Brazilian democracy was based at least in part on simply expanding such "authoritarian zones" rather than creating new ones. Grounding future studies in history will add depth to the empirical accounts while also moderating the idea that the use of law for anti-democratic purposes is new<sup>78</sup>—although, as Scheppele often argues, strategies in this vein may have become much more sophisticated.

A final useful approach comes from comparative studies, in particular the kind of "slow comparison" proposed by Dann, Riegner, and Bönnemann<sup>79</sup>. PAL was originally anchored in a more traditional idea of comparison, which intends to document similarities and

74 Here I use political economy in this broader (and perhaps inaccurate) sense to include all distributional effects of law, not only linked to markets. The main question in this political economy is 'who gains and who loses from a given legal order?'

75 Bhat, Suresh and Das Acevedo, note 56.

76 Davis, Le Roux, and Smythe, note 57.

77 Machado and Pimenta, note 71.

78 de Sa e Silva, Annual Review of Law and Social Science, note 12; Marina Shlessarenko Fraife Barreto, *Funções do direito em regimes não democráticos do século XX*, São Paulo 2021.

79 Dann, Riegner, and Bönnemann, note 61.

differences in legal/political change across countries. As the articles in this special issue demonstrate, however, the project has come a greater distance. It has captured and contrasted “distinctive experiences” with law, democracy, and democratic backsliding, whose richness leads to themes that warrant deeper scrutiny and new approaches. Beyond simply producing data and analyses about variables that reflect conventional understandings of democracy and constitutionalism, subsequent studies should maintain and deepen this same “sensibility” that, amid all the difficulties faced by PAL researchers—a pandemic, the need to work across different languages, time zones, academic schedules, and intellectual affiliations, to name a few—they were able to develop and exercise.

By taking seriously the idea of “slow comparison” and of capturing “distinctive experiences” related to the law, democracy, and democratic backsliding, research into autocratic legalism can also devote more attention to issues that are relatively absent from the literature, including the outputs from PAL’s first stage. Two of these gaps have been identified by PAL participants themselves, giving rise to a spinoff project labelled Global Resistance to Authoritarian Diffusion (GRAD)<sup>80</sup>. The first involves resistance to autocratization or regressive political change, however defined. The existing literature has placed a great deal of emphasis on what autocrats are doing via the law to undermine democracy, but less so on how this has been resisted and what role the law plays in such a resistance. Resistance, however, is an integral part of the story; it—or the lack of it—helps explain what is happening in a given country and why some efforts to undermine democracy via the law may succeed, while others fail. Another gap involves the transnational links that support both the promotion of, and resistance to, autocratic legalism. Scheppele’s seminal work had already indicated that autocrats actively import and export legalistic tactics of power consolidation; in addition, there is evidence, for example, that the Brazilian far right emulated Trump’s ‘big lie,’ as Bolsonaro falsely claimed that Brazilian ballot machines were unreliable, blaming—albeit unsuccessfully—his election defeat on ‘fraud’. These links, however, have been only marginally explored by PAL researchers; their analyses remain largely focused on the nation-state. In future studies on autocratic legalism, the transnational aspect could take center stage<sup>81</sup>.

#### *IV. Geopolitical breadth*

Both the earlier studies on autocratic legalism and those originally envisioned in the PAL project shared the same geopolitical reach: they focused on young democracies from what many call the Global South. Comparisons were intended or sought within this spectrum of countries/cases. As PAL took off, however, it became increasingly clear to its participants that there were benefits in broadening this spectrum to include what political scientists

80 See note 10 *supra*.

81 Bugarcic’s piece in this special issue is an exception: it focuses on both resistance and transnational links. That Bugarcic is involved in GRAD might help explain the distinctive scope of his contribution.

had long thought of as “consolidated democracies”, namely the United States. As I note elsewhere<sup>82</sup>, this analytic move is taking place more generally in studies of democratic backsliding. In many ways, it has been motivated by Trump’s rise and rule and by the January 6<sup>th</sup> 2022 Capitol attacks. This expansion is momentous, considering earlier tendencies to think of American democracy as “exceptional”, reflected, for example, in the division between “American politics” and “comparative politics” in U.S. academia.

It is still too early to know where to position the United States vis-à-vis other cases featured in this special issue and beyond. In his contribution to this special issue, Abel claims to be offering at best a “second rough draft of history” on the harms to democracy and the rule of law caused by Trump. Some parallels between his account and others in this special issue, however, emerge with great clarity. Trump’s administration, like Bolsonaro’s, was based on extensive abuses of executive power and disregard for unwritten rules of political conduct, all of which allowed Trump to control law enforcement agencies and avoid accountability. Trump also benefited from historical (dis-)continuities, since many of his abuses were enabled by emergency measures enacted by his predecessors in the name of national security and elaborated during the COVID-19 pandemic, while his contempt for migrants, non-whites, women, and the LGBTQIA+ community has deeper roots in U.S. racial capitalism and the “dual legality” that grew in support of this system<sup>83</sup>. Efforts by the Republican Party (GOP) to entrench itself in key state governments through gerrymandering and other vote suppression laws and practices reinforce the need to look at power concentration through the law beyond the ‘autocrat’ and at lower levels of the legal system, including subnational levels<sup>84</sup>. Trumpism is also growing as a ‘social movement’ with a clearly defined racial/religious underpinning, and it blatantly uses the law to ‘remake’ North American society in pursuit of an ideology, as seen in areas such as abortion, church/state separation, and LGBTQIA+ rights<sup>85</sup>. This bears a frightening similarity to India’s regime change process and raises questions about the distributional effects of both GOP and BJP policies.

In future studies, scholars should explore these and other developments in U.S. politics and law and how they compare to other countries. Yet in this process they should also avoid adopting U.S. standards, categories, and sociolegal practices to name and measure phenomena across the board. This is admittedly a challenging task, given the gravitational force of scholarship produced in the U.S. and the fact that English has become the *lingua franca* of studies on law and democratic backsliding. However, it is not impossible, especially if they

82 *de Sa e Silva*, *Law & Social Inquiry*, note 12.

83 *Michael McCann* and *Filiz Kahraman*, *On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes...The Case of the United States*, *Annual Review of Law and Social Science* (2021), pp. 483–503.

84 *Jacob Grumbach*, *Laboratories against Democracy: How National Parties transformed State Politics*, Princeton 2022; *David Pepper*, *Laboratories of Autocracy: A Wake-Up Call from Behind the Lines*, Cincinnati 2021.

85 *Gorski* and *Perry*, note 58.

keep in mind the call for a “Southern turn” and the notion of “slow comparison” mentioned above and embraced by PAL researchers and PAL’s comparative practices.

#### D. Broadening the analytical repertoire: Autocratic Legalism 2.0

As noted at the outset, the articles in this special issue reflect merely the first phase of PAL research. Interest in law, democracy, and democratic backsliding is rapidly growing, and numerous studies will be undertaken by PAL and GRAD investigators or others in the years to come. Nonetheless, the insights available at this stage already suggest the need to broaden the analytical and epistemological repertoire of studies on autocratic legalism in a move toward what I call *autocratic legalism 2.0*. In Table 1 below, I sketch the terms of this move.

*Autocratic legalism 2.0* invites studies that look more broadly at political changes that, to quote from critical democratic theory and studies of democratic experimentalism<sup>86</sup>, move countries from *higher-intensity* to *lower-intensity* forms of democracy. The exact nature of these changes will need to be defined and justified by researchers and can include downgrades in both the liberal and the substantive content of legal-political orders. *Autocratic legalism 2.0* also looks at a broader set of legal uses supporting regressive political changes, which include not only high-level, formal legal changes, usually pursued through the legislature, but also middle- and lower-level formal legal changes, usually promulgated by executive and regulatory agencies. Similarly, *autocratic legalism 2.0* focuses on changes pursued through maneuvers in the shadow of or amid gaps in existing laws, e.g., by denying the effectiveness of unwritten rules of political conduct previously observed or by playing games intended to frustrate or subvert the meaning of existing written rules. In addition, it includes investigations on resistance to regressive political change and how the law has been used to resist it, if at all.

For these new themes and domains of inquiry to be adequately addressed, *autocratic legalism 2.0* invites contributions from several areas of knowledge and (inter)disciplinary traditions (administrative law, history, sociology, anthropology, political economy, and comparative studies) besides political science and constitutional law. Lastly, it also requires in-depth studies and cross-case comparisons that extend beyond the realm of young and transitional democracies to include what political scientists once considered consolidated democracies, namely the United States, while also paying growing attention to transnational

86 Boaventura de Sousa Santos and Leonardo Avritzer, Introduction: Opening Up the Canon of Democracy, in: Boaventura de Sousa Santos (Ed.), *Democratizing Democracy: Beyond the Liberal Democratic Canon*, London 2005; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, Oxford 2003; Adalmir Marquetti, Carlos E. Schonewald da Silva and Al Campbell, Participatory Economic Democracy in Action: Participatory Budgeting in Porto Alegre, 1989–2004, *Review of Radical Political Economics* 44 (2012), pp. 62–81.

links used both in the promotion of, and resistance to, regressive political change through law.

<b>Objects of study, domains of inquiry, epistemological attitudes</b>	<b>Autocratic legalism 1.0</b>	<b>Autocratic legalism 2.0 (additions to repertoire)</b>
Political change	From liberal democracies to electoral autocracies	From higher-intensity to lower-intensity democracy Resistance to change
Uses of the law	High-level, formal legal change	Middle- and lower-level, formal legal change Maneuvers in the shadow of or amid gaps in existing laws
	Of legislative nature	Of executive nature
	In support of regressive political change	In resistance to regressive political change
Areas of knowledge and (inter)disciplinary traditions of inquiry	Constitutional law and political science	Administrative Law History Sociology Anthropology Political Economy Comparative Studies
Geopolitical breadth	Young and transitional democracies	Consolidated democracies
	Transnational links	

There is no doubt that autocratization remains a real threat, and autocrats might prefer to deploy well-engineered, high-level change in constitutions and statutes that entrench them in power. At present, however, that is not possible in many countries and hopefully may never come to pass. By broadening the scope of autocratic legalism studies, we can build a larger but still coherent field in which these varied and distinctive legal-political “experiences” can be studied, compared, and contrasted, thus giving us a better opportunity to understand and appreciate the ties that bind law, democracy, and democratic backsliding.