

## SYMPOSIUM

## Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law

By *Michael Riegner*\*

**Abstract:** This overview article introduces the special issue on “Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law”, which concludes a collaborative research project with the same theme. The project mapped liberal, illiberal, and transformative varieties of constitutionalism and assessed contestations of, and alternatives to, liberal constitutionalism in Germany, Brazil, and the respective regional contexts. This introductory article summarizes findings from the project, discusses its contributions to extant literature, and points out avenues for future research. It argues that, firstly, from a global comparative perspective, constitutionalism does not come in one but several varieties, including liberal, social, transformative, directive, illiberal, and authoritarian types. Secondly, these ideal-typical varieties come in multiple variants, localized adaptations, and hybrid combinations in actual constitutional reality, as our case studies from Brazil and Germany illustrate. Thirdly, to remain resilient in times of global polycrisis, democratic constitutionalism not only needs to resist external pressures and shocks, but also adapt to legitimate critiques, changing contexts, and new environments full of challenges. Understanding constitutionalism in its varieties offers a comparative framework to distinguish between these two paths, and thus contributes to constitutional resilience at home and abroad.

**Keywords:** Varieties of constitutionalism; Transformative Constitutionalism; Autocratic Legalism; Authoritarianism; Populism; Constitutional Resilience

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\* Assistant Professor of Public International Law and International Administrative Law at the University of Erfurt, Germany. Email: michael.riegner@uni-erfurt.de. I would like to thank Diego Werneck Arguelles, Evandro Süsskind, Florian Hoffmann, Jessica Holl, Jasmin Wachau and my colloquium group in Erfurt for comments on an earlier version of this paper, and the entire VACON project group for productive discussions and inputs over the past years. That said, this article does not purport to speak for the group as a whole, and any remaining errors are all mine.

## A. Introduction: Between transformation and backsliding in Brazil, Germany and beyond

Liberal constitutionalism is under pressure. The wave of transitions to constitutional democracy and market economy in the 1990s marked the end of the Cold War, but not the end of history. Today, economic crises, increasing inequalities, the rise of authoritarian regimes, the resurgence of populism, and democratic backsliding pose renewed challenges to liberal constitutionalism. Autocratic legalism and constitutional authoritarianism are promoted as alternative models of governance. The distinctive constitutional experiences of the Global South, shaped by postcolonial contexts of greater inequality and poverty, have pluralized the global constitutional canon, and transformative constitutionalism has been hailed as a Southern counter-concept to Northern liberal constitutionalism.<sup>1</sup>

Against this background, a group of German and Brazilian researchers set out in 2020 to investigate contestations of, and potential alternatives to, liberal constitutionalism in a collaborative research project, entitled “Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law” (VACON) and co-funded by the German national science foundation DFG and its Brazilian counterpart CAPES. This special issue presents selected findings from the project and complements earlier publications, including two special issues in this journal, a joint blog symposium, and a series of individual articles and chapters.<sup>2</sup>

The VACON project pursued three main objectives: First, our “varieties” framework aimed to pluralize comparative constitutional law and to capture variation within and beyond the liberal constitutional type, especially with regard to transformative and authoritarian varieties. The second objective was to get a better understanding of transformative and authoritarian contestations of liberal constitutionalism in past and present Brazil and Germany and to assess the extent to which these two cases fit into global patterns and frameworks described in extant literature. Thirdly, in bringing together scholars, case studies, and perspectives from Brazil and Germany, the project sought to practice what is often preached, namely genuine “slow comparison”, i.e., a longer-term, context-sensitive, and

1 For an overview of these debates, see only *Philipp Dann / Michael Riegner/ Maxim Bönnemann* (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020; *Ran Hirschl*, *Comparative Constitutional Law: Reflections on a Field Transformed*, in: *Madhav Khosla / Vicki C. Jackson* (eds.), *Redefining comparative constitutional law*, Oxford 2025, p. 12.

2 See symposium on “The Directive Constitution in the Varieties Constitutionalism” in special issue 3-2023, *World Comparative Law* 56 (2023), and the collaboration with the autocratic legalism project in special issue 3-2022, *World Comparative Law* 55 (2022). See also our blog symposium on the 2022 elections in Brazil, *Philipp Dann / Conrado Hübner Mendes / Michael Riegner*, *Bolsonaro at the Ballot Box*, *Verfassungsblog*, 20.09.22, <https://verfassungsblog.de/category/debates/bolsonarism-at-the-ballot-box-debates/> (last accessed on 20 December 2024), DOI: 10.17176/20220920-230907-0; The full range of project activities and outputs are documented at our project website <https://www.uni-erfurt.de/en/faculty-of-economics-law-and-social-sciences/fields-of-study/law/administrative-law-and-public-international-law/projekte/varieties-of-constitutionalism> (last accessed on 20 December 2024).

iterative research collaboration among equal partners from North and South. Focusing on Brazil and Germany not only ensured contextual expertise, but also promised comparative insights from two major constitutional democracies beyond the anglophone world that share important post-authoritarian legacies, socio-political challenges, and global entanglements.

This overview article introduces the special issue, summarizes findings from the project, discusses its contributions to extant literature, and points out avenues for future research. It makes three related arguments: Firstly, when analyzed from a global comparative perspective, constitutionalism does not come in one but several varieties. We can identify a (limited) number of global varieties of constitutionalism, including liberal, social, transformative, directive, illiberal, and authoritarian types, that help capture the patterned diversity of distinct constitutional experiences across the Global North and South. Secondly, these ideal-typical varieties rarely exist in pure form in specific jurisdictions, but rather come in multiple variants, localized adaptations, and hybrid combinations. In Brazil and Germany, liberal elements co-exist with social-transformative features; the transformative variety appears as the younger variant of an older lusophone tradition of directive constitutionalism; and current right-wing contestations draw on a global autocratic playbook but also add distinctive features to it, such as the militarist variant of constitutional authoritarianism in Brazil. Thirdly, to remain resilient in times of global polycrisis, democratic constitutionalism not only needs to resist external pressures and shocks, but also needs to adapt to legitimate critiques, changing contexts, and new environments full of challenges. Understanding constitutionalism in its varieties offers a comparative framework to distinguish between these two paths, and thus contributes to constitutional resilience at home and abroad.

The other contributions to this special issue elaborate specific aspects of these arguments and deepen selected questions from our conversations that have not been analyzed in such detail in extant literature. In the first article, Clara Iglesias Keller and Diego Werneck Arguelhes analyze the peculiar role of Brazilian courts in the fight against disinformation-driven democratic backsliding.<sup>3</sup> Jessica Holl and Jasmin Wachau examine the rise of historical revisionism by right-wing populists in Germany and Brazil and compare how the legal systems of both countries address their respective authoritarian pasts today.<sup>4</sup> Fernando Leal provides a critical account of how Brazilian judges have justified public participation in judicial proceedings and the expansion of potentially transformative judicial authority, by borrowing the concept of “open community of constitutional interpreters” from German scholarship.<sup>5</sup> Next, Diego Pereira compares how German and Brazilian courts interpret constitutional objectives (also known as directive principles), which set both constitutional

3 Clara Iglesias Keller / Diego Werneck Arguelhes, Facing disinformation in democratic backsliding: the role of courts in Brazil, *World Comparative Law* 57 (2024), in this issue.

4 Jessica Holl / Jasmin Wachau, Responding to the Instrumentalization of the Past by Right-Wing Actors: Analyzing the Varieties of Law and Memory in Brazil and Germany, *World Comparative Law* 57 (2024), in this issue.

5 Fernando Leal, Rethinking the concept of an open society of constitutional interpreters: Lessons from Germany and Brazil, *World Comparative Law* 57 (2024), in this issue.

orders apart from purely liberal systems.<sup>6</sup> Thilo Herbert provides an eye-opening case study of “authoritarian federalism” during the last civil-military dictatorship in Brazil, challenging the widespread assumption that federalism necessarily functions as a barrier to autocratization and democratic backsliding.<sup>7</sup> In a final addition to our special issue, Antonio Maués demonstrates that parallel constitutional entrenchment of social and fiscal policies has led to some social progress but also limited the transformative impact of the Brazilian constitution of 1988.<sup>8</sup>

The remainder of this overview article proceeds in four steps: Part B asks how we can understand and research “varieties of constitutionalism” in terms of comparative constitutional theory and methods. Part C addresses how transformative constitutionalism fits into these varieties and to what extent it differs from liberal constitutionalism when analyzed from a Brazilian and German perspective. Part D asks what German and Brazilian constitutional law and history can contribute to the debate on constitutional authoritarianism and autocratic legalism. Section E concludes with some pointers for future research on constitutional resilience.

## **B. Comparative theory and method: Constitutional variety in North-South comparison**

In 2016, Mark Tushnet called for “a richer taxonomy of varieties of constitutionalism” that would “unsettle the view that liberal constitutionalism simply *is* constitutionalism, and that all other varieties are defective”.<sup>9</sup> Since then, a growing literature has discussed several varieties beyond liberal constitutionalism, ranging from “social-democratic” and “transformative” to “illiberal” or “authoritarian”.<sup>10</sup> These categorizations echo older attempts at classifying and typologizing constitutional systems to capture the patterned diversity of

6 *Diego Platz Pereira*, The Influence of Constitutional Objectives on Constitutional Interpretation: Some Propositions Based on the Brazilian and German Cases, *World Comparative Law* 57 (2024), in this issue.

7 *Thilo Herbert*, Authoritarian Federalism in its own right? The case of Brazil, *World Comparative Law* 57 (2024), in this issue.

8 *Antonio Moreira Maués*, Constitutional Entrenchment and Social Policy in Brazil, *World Comparative Law* 57 (2024), in this issue.

9 *Mark Tushnet*, Editorial: Varieties of constitutionalism, *ICON* 14 (2016), pp. 1-2. Italics in original.

10 *Michael Dowdle / Michael Wilkinson (eds.)*, *Constitutionalism beyond liberalism*, Cambridge 2017; *David Law*, Alternatives to Liberal Constitutional Democracy, *Maryland Law Review* 77 (2017), p. 223; *Kanad Bagchi*, Transformative Constitutionalism, Constitutional Morality and Equality, *World Comparative Law* 51 (2018), p. 367; *Helena Alviar Garcia / Günter Frankenberg (eds.)*, *Authoritarian constitutionalism*, Cheltenham 2019; *Dann et al.*, note 1. For a quantitative study of scholarship on “adjectival constitutionalism” see *Diana Kapiszewski / Deborah Groen / Katja Newman*, Constitutionalism with Adjectives: Conceptual Innovation in the Comparative Study of Law, *Law & Social Inquiry* 49 (2024), p. 178.

constitutional phenomena around the world at a time before liberal constitutionalism had become the global norm.<sup>11</sup>

This diversity had been somewhat forgotten during the transition of formerly socialist or authoritarian states to democracy and market economy in Eastern Europe, Latin America, and Africa. After the end of the Cold War, comparative constitutionalists were primarily interested in the global diffusion of liberal constitutionalism.<sup>12</sup> A widely, if not universally shared assumption in this literature was that constitutional orders were converging around a basic set of liberal principles and institutions, especially in the areas of judicial review, human rights, trade, and investment. Comparatists observed an “inevitable globalization of constitutional law” or the emergence of a “global constitutionalism”.<sup>13</sup> At the same time, skeptics worried about the democratic legitimacy of newly empowered constitutional courts and criticized one-size-fits-all “IKEA constitutionalism”.<sup>14</sup> More recently, comparative constitutionalists have expanded the case selection and acknowledged greater local variation and adaptation of constitutionalist principles even within the liberal tradition.<sup>15</sup>

Given the aims of our project, we took the call for varieties of constitutionalism seriously as an epistemic strategy, methodological approach, and theoretical framework. To do so, we did not adopt a definitional approach that equates “constitutionalism” with one specific set of ideas, institutions, and practices associated with a few Euro-American jurisdictions – such as liberalism, civil and political rights, competitive elections, separation of powers, and judicial review.<sup>16</sup> Instead, we adopted a typological approach that aimed to reconstruct a limited number of ideal-typical varieties of constitutionalism based on concept

- 11 Dieter Grimm, Types of constitutions, in: András Sajó / Michel Rosenfeld (eds.), *The Oxford handbook of comparative constitutional law*, Oxford 2012, p. 98; Karl Loewenstein, *Political power and the governmental process*, Chicago 1957. On legal families, see only H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in: Mathias Reimann / Reinhard Zimmermann (eds.), *The Oxford handbook of comparative law*, Oxford 2019, p. 422.
- 12 See e.g. Tom Ginsburg, *Judicial review in new democracies*, Cambridge 2003; Gretchen Helmke / Julio Ríos-Figueroa (eds.), *Courts in Latin America*, Cambridge 2011.
- 13 Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, *Virginia Journal of International Law* 50 (2009), p. 985; Wiener et al., *Global constitutionalism: Human rights, democracy and the rule of law*, *Global Constitutionalism* 1 (2012), p. 1. See also David Law, *Generic constitutional law*, *Minnesota Law Review* (2005), p. 669.
- 14 Günter Frankenberg, *Constitutional transfer: The IKEA theory revisited*, *ICON* 8 (2011), p. 563. On judicial legitimacy, see Alec Stone Sweet, *Governing with judges*, Oxford 2000; Ran Hirschl, *Towards juristocracy*, Harvard 2007; Conrado Hübner Mendes, *Constitutional courts and deliberative democracy*, Oxford 2013.
- 15 Cheryl Saunders, *Towards a Global Constitutional Gene Pool*, *National Taiwan University Law Review* 4 (2009), p. 1; Ran Hirschl, *Comparative matters*, Oxford 2014, pp. 192 ff.; Rosalinde Dixon / Tom Ginsburg (eds.), *Comparative constitutional law in Latin America*, Cheltenham 2017; Doreen Lustig / J. H. H. Weiler, *Judicial review in the contemporary world - Retrospective and prospective*, *ICON* 16 (2018), p. 315.
- 16 On these attributes of constitutional liberalism, see only Massimo Fichera, *Liberalism*, *Max Planck Encyclopedia of Comparative Constitutional Law*, 2017, <https://oxcon.oupplaw.com/home/MPECCOL> (last accessed on 20 December 2024).

formation through multiple observation (rather than based on specific prototypical jurisdictions). Building global typologies on a more representative case selection contributes to more finely grained comparative frameworks than transcend simple binaries of universal vs. particular, liberal vs. non-liberal, North vs. South. This required not only broadening the case selection to constitutional systems in the Global South like Brazil, but also rethinking constitutional concepts and theories in Northern jurisdictions like Germany in a spirit of epistemic reflexivity.<sup>17</sup>

In constructing our typology, we sought to avoid, or at least acknowledge, the methodological and epistemic problems that plague comparative constitutional law in general, and extant attempts at constitutional classification in particular.<sup>18</sup> We tried to be clear that what we call “varieties of constitutionalism” are conceptual ideal types, distinguishing them from historical prototypes, empirical real types, and taxonomies that exist in actual constitutional reality, as well as from explanatory and normative theories of constitutional variation.<sup>19</sup> Such ideal types then help comparatists understand the patterned diversity of constitutionalism as a global phenomenon, and they can serve as *tertium comparationis* when analysing the extent to which an actually existing constitutional system conforms to a particular type. They do not represent a global hierarchy, and cannot replace deeply contextual analyses of specific constitutional systems.

When it comes to analyzing specific cases like Brazil and Germany, it is important to acknowledge that ideal-typical varieties, by definition, do not exist in pure form in the constitutional reality of any one jurisdiction. Actual constitutional systems are often multidimensional combinations of multiple influences from different sources and types, with local adaptations and innovations that are not easily placed within one ideal-typical category. For instance, a constitutional system may be politically liberal and democratic,

17 Philipp Dann / Michael Riegner / Maxim Bönnemann, Towards a Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, p. 1.

18 See general only Günter Frankenberg, *Comparative law as critique*, Cheltenham 2016. On lege artis typological method in the social sciences, see David Collier / Jody LaPorte / Jason Seawright, Putting Typologies to Work, *Political Research Quarterly* 65 (2012), p. 217.

19 Conceptual ideal-types (in Max Weber’s sense) are analytical constructs that abstract and emphasize distinctive characteristics of a social phenomenon; they do not exist in pure form in empirical reality, unlike historical prototypes or real types, with which empirical taxonomies are constructed. On these distinctions see Kevin B. Smith, Typologies, Taxonomies, and the Benefits of Policy Classification, *Policy Studies Journal* 30 (2002), pp. 379, 381. Extant literature does not always make these distinctions: Tushnet, note 9, speaks of “taxonomy” but his approach seems more conceptual. Law, note 10, at p. 4, seems to abstract types from single or small-N case studies, e.g. his “social democratic” type from Scandinavian countries. Signe Rehling Larsen, Varieties of Constitutionalism in the European Union, *The Modern Law Review* 84 (2021), p. 477, builds a descriptive typology, which she then uses to explain different approaches to the EU, which in turn become a normative argument against the theory of constitutional pluralism. For a carefully constructed explanatory typological theory of judicial review systems, see Theunis Roux, *The politico-legal dynamics of judicial review*, Cambridge 2018.

but not evince the same degree of economic liberalism, as may be the case with many European welfare states. Or it may be economically liberal, but politically undemocratic, as has been argued for contemporary Singapore or “authoritarian liberalism” in late Weimar.<sup>20</sup> In Latin America, constitutional hybridity has been described as the norm rather than the exception, and hybrid systems pre-date many prototypically “liberal” or “social” constitutions in North America or Europe.<sup>21</sup>

What is more, these hybrid elements are not static over time but evolve in response to changing contexts, local contestations, and global influences. A transformative constitution may be designed as an anti-model to (neo)liberal systems, but may become more preservative (or liberal if you will) when faced with politically repressive, right-wing populists in power.<sup>22</sup> Right-wing populists, in turn, may borrow liberal constitutional forms for illiberal purposes or seek to entrench neoliberal economic policies.<sup>23</sup> In that sense, the varieties framework highlights not only differences but also transnational influences and entanglements. Ultimately, a typology of global varieties of constitutionalism can inform, but also needs to be informed by more in-depth case studies and contextual comparisons. Our project thus used Brazil and Germany as case studies to contribute to wider debates about transformative constitutionalism, democratic backsliding, and constitutional resilience.

Our selection of Brazil and Germany as case studies was motivated by several methodological considerations.<sup>24</sup> For one, selecting our own constitutional systems ensured the contextual expertise necessary for our in-depth studies. But beyond that, studying these two systems transcends the North-South divide that has long pervaded comparative constitutional law and thus enabled us to test both, claims to universality of Northern concepts

20 For an overview of possible combinations, see *Grimm*, note 11, pp. 115 ff. See also *Michael W. Dowdle / Michael J. Wilkinson*, On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity, in: *Michael W. Dowdle / Michael A. Wilkinson* (eds.), *Constitutionalism beyond liberalism*, Cambridge 2017, p. 17; *Hermann Heller*, Authoritarian Liberalism? *European Law Journal* 21 (2015), p. 295.

21 Constitutional hybridity can also take different forms and does not carry any normative valence though; for a discussion, see *Francisca Pou Giménez*, Hybridity and Constitutional Taxonomy in Latin America, *The Law & Ethics of Human Rights* 16 (2022), p. 245, discussing especially the influential account by *Roberto Gargarella*, *Latin American constitutionalism, 1810-2010*, Oxford 2013.

22 On anti-models, see *Heinz Klug*, Model and Anti-Model, *Wisconsin Law Review* 597 (2000); *Kim Scheppele*, Aspirational and aversive constitutionalism, *ICON* 1 (2003), p. 296. On preservative aspects of transformative constitutionalism, see *James Fowkes*, Transformative Constitutionalism and the Global South: The View from South Africa, in: *Armin von Bogdandy et al.* (eds.), *Transformative constitutionalism in Latin America*, Oxford 2017, p. 97, and the discussion below in part C and D.

23 *Rosalinde Dixon / David Landau*, *Abusive Constitutional Borrowing*, Oxford 2021, and the discussion below in part D.

24 Cf. *Ran Hirschl*, The Question of Case Selection in Comparative Constitutional Law, *American Journal of Comparative Law* 53 (2005), p. 125.

and claims to particularism of a constitutionalism of the Global South.<sup>25</sup> Finally, the two systems display sufficient similarities, but also variations, that make comparison both possible and productive.

In some respects, Brazil and Germany are unlike cases: their constitutions emerge from different historical processes, periods, and waves of constitution-making; their socio-economic contexts are shaped by differing levels of wealth, inequality, varieties of capitalism, and positions in the global economy; and their political systems, parties, and power structures differ in important respects. In other aspects, however, Brazil and Germany share important features. Both share a history of constitutional borrowing and legal entanglements, for example with respect to the legacies of the Weimar constitution.<sup>26</sup> Their current constitutional systems both emerge from post-authoritarian transitions, enshrine similar basic principles such as democracy and federalism, and combine liberal with social-transformative elements.<sup>27</sup> Both are influenced by relatively thick regional legal orders such as the EU and the Inter-American system.<sup>28</sup> And, as analyzed in detail below, both face similar challenges and contestations, such as increased political mobilization from the far-right, economic pressures from a changing global economy, and the digitalization and polarization of the public sphere by global internet platforms.

To study the two systems, we adopted a contextual and collaborative approach of “slow comparison”.<sup>29</sup> Scholars from both jurisdictions collaborated for a prolonged period of four years, met for multiple workshops and events, discussed shared readings, and reflected without pressure to publish results immediately. As importantly, the conveners and

25 To what extent Brazil qualifies, or self-identifies, as part of the “Global South” is a contested and complicated question that depends on perspective and in turn influences conceptions and categorizations of Brazilian constitutionalism. In relevant comparative literature, however, it is usually not counted among the Global North. See only *Daniel Bonilla Maldonado (ed.)*, *Constitutionalism of the global South*, Cambridge 2013; *Oscar Vieira / Upendra Baxi / Frans Viljoen (eds.)*, *Transformative constitutionalism*, Pretoria 2013; *Dann et al.*, note 1.

26 See e.g. *Mônica Clarissa Henning Leal*, *Die brasilianische Verfassungsgerichtsbarkeit zwischen US-amerikanischer Institutionalisierung und deutschem Rechtsdenken*, in *Uwe Kischel (ed.)*, *Der Einfluss des deutschen Verfassungsrechtsdenkens in der Welt*, Tübingen 2014.

27 For a partial comparison, see *Rainer Schmidt / Virgílio Afonso da Silva*, *Verfassung und Verfassungsgericht: Deutschland und Brasilien im Vergleich*, Baden-Baden 2012. For overviews of the two constitutional systems, see *Virgílio Afonso da Silva / Thomaz Pereira*, *The Constitution of Brazil in Context*, in: *Roberto Gargarella / Conrado Hübner Mendes / Sebastián Guidi (eds.)*, *Oxford Handbook of Constitutional Law in Latin America*, Oxford 2022, p. 57; *Virgílio Afonso da Silva*, *The Constitution of Brazil*, Oxford 2019; *Werner Heun*, *The constitution of Germany*, Oxford 2011; *Donald P. Kommers / Russel A. Miller*, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Berlin 2012; *Matthias Herdegen / Johannes Masing / Ralf Poscher / Klaus Gärditz (eds.)*, *Constitutional law in Germany*, München 2025.

28 *Armin von Bogdandy et al. (eds.)*, *Transformative constitutionalism in Latin America*, Oxford 2017.

29 For a similar approach see *Philipp Dann / Arun Thiruvengadam*, *Comparing constitutional democracy in the European Union and India: an introduction*, in: *Philipp Dann / Arun Thiruvengadam (eds.)*, *Democratic Constitutionalism in Continental Politics*, Cheltenham 2021, pp. 1, 5–8.



principal investigators did not prescribe a predefined conceptual framework or normative theory for comparison, but rather encouraged an incremental and iterative dialogue guided by the varieties of constitutionalism theme. As a result, the project did not purport to produce one internally coherent output, such as one edited volume, but rather inspired a range of different reflections and publications by its members. Some of these contributions are in-depth single-country studies that situate Brazil or Germany in a broader context, while others compare the two jurisdictions. This introductory article tries to pull together some threads from the project, but does not purport to speak for all project members as a group.

### C. Transformative constitutionalism and its varieties

When we started discussions on the VACON project in 2018, the debate on varieties of constitutionalism was driven by increasing engagement with economically rising constitutional democracies like Brazil, India, and South Africa. Rather than liberal convergence, this literature identified a “Constitutionalism of the Global South” with distinct features.<sup>30</sup> In contexts of greater material inequality and poverty, this “Southern” constitutionalism arguably placed greater emphasis on social rights, material equality, positive state obligations, and social change through judicial activism and public interest litigation.<sup>31</sup> In post-colonial or post-authoritarian transition contexts, these features crystallized in the concept of transformative constitutionalism. Initially developed with a view to South Africa’s post-apartheid constitution, the concept diffused to other constitutional orders like India, Colombia, and Brazil.<sup>32</sup> Brazil was hailed as one instance of transformative constitutionalism, marked by an increasingly activist supreme court and progressive social programs aided by a commodity boom during President Lula da Silva’s first two terms (2003–2011).<sup>33</sup>

Given its origins, many authors conceived transformative constitutionalism as a “post-liberal” Southern counter-concept to Northern liberal constitutionalism.<sup>34</sup> Excessive inequality, poverty, and exclusion in postcolonial contexts arguably required stronger emphasis on social rights, material equality, active states, and activist courts. Other scholars rather considered transformative elements a variation and adaptation of the liberal tradition to new

30 Bonilla Maldonado, note 25.

31 Florian Hoffmann / Fernando R. N. M. Bentes, Accountability for Social and Economic Rights in Brazil, in: Varun Gauri / Daniel M. Brinks (eds.), *Courting social justice*, Cambridge 2008, p. 100; Henriette Aasen et al. (eds.), *Juridification and social citizenship in the welfare state*, Cheltenham 2014. For a broader argument in that vein, see Dann et al., note 17.

32 Karl Klare, Legal Culture and Transformative Constitutionalism, *South African Journal on Human Rights* 14 (1998), p. 146; Vieira et al., note 25; Fowkes, note 22; Bagchi, note 10.

33 See e.g. Vieira et al., note 25.

34 Klare, note 32; Upendra Baxi, Preliminary notes on transformative constitutionalism, in: Oscar Vieira / Upendra Baxi / Frans Viljoen (eds.), *Transformative constitutionalism*, Pretoria 2013, p. 19; David Bilchitz, Constitutionalism, the Global South, and Economic Justice, in: Daniel Bonilla Maldonado (ed.), *Constitutionalism of the global South*, Cambridge 2013, p. 41.

contexts.<sup>35</sup> Some comparatists went further and argued that transformative elements could equally be found in Northern constitutions like the German basic law.<sup>36</sup> Other scholars extended the concept to capture transformative aspects of regional integration and multi-level constitutionalism in both Europe and Latin America.<sup>37</sup>

These debates raised important questions for our project: Does transformative constitutionalism embody distinct Southern constitutional experiences and mark categorical differences to, and contestations of, Northern liberal constitutionalism? Or is it rather an adaptation and development of liberal-democratic constitutionalism in the context of the Global South? And to what extent are these models living up to their emancipatory and transformative promises in our case studies?<sup>38</sup>

### *1. Typology and genealogy: The many faces of transformative constitutions*

The discussions in our project suggested differentiated responses to these questions that depend on prior conceptual choices, methodological approaches, and theoretical assumptions. In this vein, we made three related findings regarding the typology, genealogy, and hybridity of transformative-type constitutions in Brazil and Germany.

In a first step, we noted that as transformative constitutionalism has become part of the global constitutional canon, its meanings and uses in extant literature have multiplied: it can designate a historically specific, prototypical constitutional enactment (the post-apartheid constitution in South Africa); a collective constitutional identity (as a legal product and innovation of and by the Global South); a normative constitutional theory (about the purpose of the constitution and the state); a set of constitutional doctrines (including social rights, positive obligations, expanded judicial remedies, etc.); a method of constitutional interpretation (purposive and anti-formalist); a conceptual transplant whose meaning changes with context (including in the Global North and regional systems); and a conceptual ideal type in a global typology of varieties of constitutionalism. For the purposes of our project, we found it useful to distinguish liberal and transformative varieties of constitutionalism as analytical ideal types, with ideal-typical differences in, *inter alia*, constitutional purpose (limited government vs state-driven transformation), values (liberty vs equality), rights

35 *Theunis Roux*, Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?, Stellenbosch Law Review 20 (2009), p. 258.

36 *Michaela Hailbronner*, Overcoming obstacles to North-South dialogue, World Comparative Law 49 (2016), p. 253; *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law 65 (2017), p. 527. See also *Mark A. Graber*, What's in crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy, in: Mark A. Graber / Sanford Levinson / Mark Tushnet (eds.), Constitutional democracy in crisis?, Oxford 2018, p. 665.

37 *von Bogdandy et al.*, note 28.

38 For a recent reformulation and discussion of these questions with regard to India and South Africa, see *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 5.

doctrines (civil-political vs social rights, positive obligations, horizontal effect, etc.), and associated implications for the role of courts and separation of powers.

In a second set of findings, our case studies illustrated that transformative-type constitutions have multiple genealogies, traditions, and variants that predate the South African example and are often overlooked in the anglophone debates. From the Brazilian and German perspective, the concept of “transformative constitutionalism” is not a homegrown innovation primarily designed to overcome a repressive colonial past as in South Africa or India. It is rather a conceptual transplant that interacts with and reinterprets older constitutional traditions of state-led social transformation in the wake of right-wing authoritarian regimes. One manifestation of this older tradition in the Lusophone world is the concept of the “directive constitution”, associated with the Portuguese constitution of 1973 and developed by Portuguese scholar Gomes Canotilho, who was in turn influenced by German debates on the obligations flowing from the social state principle.<sup>39</sup> The Brazilian constitution of 1988 incorporated ideas of directive constitutionalism, while also carrying forward earlier influences of the Weimar Constitution of 1919, the Mexican Constitution of 1917, and other models.<sup>40</sup>

As discussed in our prior special issue, directive and transformative constitutions share important features but differ with respect to their protagonists: In the directive constitution, as originally conceived, the main driver of transformative change was the (politically progressive) legislator (with legislative omissions subject to judicial review), whereas transformative constitutionalism centered on courts from the outset.<sup>41</sup> Although the differences turned out to be less pronounced in practice, there may be an argument to analytically distinguish transformative and directive variants: the first as a form of legal constitutionalism primarily driven by courts, and the second as a form of political constitutionalism driven by legislatures and executive branches.<sup>42</sup>

In a third set of findings, our case studies also illustrated that at the level of actual constitutional systems, liberal and transformative features come in local variants that are not

39 Mariana Canotilho, “Constitucionalismo dirigente” and Transformative Constitutionalism: Common Elements, Differences and Methodological Challenges, *World Comparative Law* 56 (2023), p. 506.

40 Diego Arguelhes Werneck / Evandro Süsssekind, *Constitucionalismo transformador*, *Revista Direito E Práxis* 13 (2022), p. 2557 (finding transformative characteristics as far back as in the Mexican constitution of 1917); Florian Hoffmann / Fabio Carvalho Leite, *Transformation by Decree? A (Brief) Reflection on the ‘Directive Constitution’ (Constituição Dirigente) in Brazil*, *World Comparative Law* 56 (2023), p. 549; Deo Campos Dutra, *The Theories of Constituição Dirigente and Transformative Constitutionalism and their Reception by Brazilian Constitutional Theory: An Approach Based on Critical Comparative Law*, *World Comparative Law* 56 (2023), p. 568.

41 Canotilho, note 39, p. 520. That said, the Portuguese constitution of 1973 also introduced expanded forms of judicial review, such as review of legislative omissions.

42 Michael Riegner, *The Directive Constitution in the Varieties of Constitutionalism: An Introduction*, *World Comparative Law* 56 (2023), pp. 493, 497. See also Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism*, *Modern Law Review* 82 (2019), p. 603.

necessarily mutually exclusive but can form multidimensional hybrids. Marxist readings of transformative constitutionalism may be the antithesis of a market-radical constitutional neoliberalism, but more social-democratic interpretations of transformative constitutionalism may well co-exist or compete with (neo-)liberal and conservative elements within the same constitutional order.<sup>43</sup>

Both Germany and Brazil have developed locally adapted variants of constitutional liberalism, which they combine with social-transformative elements. Post-war Germany, in turn, has often been considered a posterchild of liberal-democratic constitutionalism, but more recent analyses have also highlighted transformative elements of the Basic Law, shaped by its powerful constitutional court, post-authoritarian ethos, social state principle, value-oriented rights doctrine, horizontal effect, etc.<sup>44</sup> In the absence of explicit social constitutional rights, however, much of the German welfare state system has been developed by political majorities and legislative action, enabled but not necessarily driven by the social state principle and its judicial interpretation.<sup>45</sup>

The system that emerged under the 1988 constitution of Brazil combines liberal principles – civil and political rights, separation of powers in a system of coalitional presidentialism, independent courts with judicial review powers, etc. – with social rights, directive principles creating positive obligations, and an empowered Supreme Court.<sup>46</sup> The makers of the 1988 constitution of Brazil originally placed hope in a legislative transformation driven by progressive political forces, but also expanded judicial review, e.g. to legislative omissions. When conservative majorities in the Brazilian Congress hampered the realization of transformative aspirations and a new generation of constitutional judges took office, the Brazilian Supreme Court became a judicial protagonist.<sup>47</sup> Yet, as critical observers in Brazil have argued, not all elements of a constitutional system have been equally transformative at all times, and the transformative rhetoric of the Brazilian Supreme Court has not

43 Contrast e.g. *Baxi*, note 34; *Kim Scheppele*, Liberalism against Neoliberalism, in: Carol Greenhouse (ed.), *Ethnographies of neoliberalism*, Philadelphia 2012, p. 44; *Guy Scott*, Resisting Neoliberalism: Developing a New Social Democratic Conception of Constitutionalism, *Maquarie Law Journal* 10 (2012), p. 23; *Benjamin Alemarte*, Towards a theory of neoliberal constitutionalism: Addressing Chile's first constitution-making laboratory, *Global Constitutionalism* 11 (2021), p. 83.

44 *Hailbronner*, note 36; and in detail *Michaela Hailbronner*, *Traditions and transformations*, Oxford 2015, p. 41 et seq.; *Justin Collings*, *Democracy's guardians*, Oxford 2015. On German (ordo-)liberalism see *Hans Vorländer*, The Case of German Liberalism, in: Patrick van Schie (ed.), *The dividing line between success and failure*, Berlin 2006, p. 55; *Jens Hacke*, Die Bundesrepublik als Ergebnis liberaler Lernerfahrung?, in: Karsten Fischer / Sebastian Huhnholz (eds.), *Liberalismus*, Baden-Baden 2019, p. 99.

45 On social policy, see *Peter Caldwell*, *Democracy, Capitalism, and the Welfare State*, 2019; on the constitutional framework, see *Heun*, note 27, pp. 44-46; *Pereira*, note 6, and the summary below.

46 *Werneck / Süsskind*, note 40; *da Silva*, note 27, pp. 175 et seq. On Brazilian varieties of liberalism, see only e.g. *Milton Tosto*, *The meaning of liberalism in Brazil*, Langham 2005.

47 *Hoffmann / Leite*, note 40, p. 555.

always led to transformative change in practice.<sup>48</sup> Prior contributions from our project have also pointed out that the Brazilian constitution, initially designed for progressive change, has increasingly been mobilized as a shield against retrogression in the face of right-wing attacks against progressive achievements, such as guarantees of the right to health during the pandemic.<sup>49</sup>

From the perspective of our project, one possible conclusion is that liberal and transformative constitutionalism in Brazil and Germany can be conceived as distinct layers within the same constitutional system that receive different emphasis in different contexts and periods. In other words, transformative constitutionalism may be considered as “para-liberal”, rather than “post-liberal”.

## II. *Evolution and variation: Constitutional hybridity, objectives, openness*

Several articles in this special issue elaborate on these themes and add nuance to prior debates about Brazil and Germany as examples of transformative constitutionalism. In his contribution to this issue, Antonio Maués goes beyond the dominant, court-centric perspective on transformative constitutionalism and focuses on constitution-making and constitutional amendments by political (super-)majorities.<sup>50</sup> In his perspective, the implementation of social policies was less driven by judicial enforcement of social rights and more by constitutional mandates for social policy and social spending, which *inter alia* prescribed minimum spending floors for education (at least 18% of federal tax revenue) and health (15%). These social mandates clashed, however, with equally constitutionalized rules on fiscal policy and fiscal adjustment, which constrain public spending and entrench a regressive tax system based on indirect taxes. As Maués argues, it is the parallel constitutional entrenchment of both redistributive social policies and neoliberal and conservative fiscal policies that characterizes and limits the transformative nature of the Brazilian constitution. This fiscally conservative, neoliberal side of the constitution limited the redistributive consequences of otherwise transformative elements and resulted in a hybrid constitution that contributed to alleviating poverty, but did not significantly reduce inequality.

In a second contribution to this special issue, Diego Pereira takes an in-depth look at a distinctive element of transformative and directive constitutionalism in Brazil and Germany – namely, the judicial interpretation of constitutional objectives (also known as “directive

48 Diego Arguelhes Werneck, Transformative Constitutionalism in Latin America: A view from Brazil, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, p. 165.

49 Juliana Cesario Alvim, Bridging Past and Future: Transformative Constitutionalism and Directive Constitutions Amidst Authoritarian Challenges, *World Comparative Law* 56 (2023), p. 587. For a similar point on South Africa, see also Fowkes, note 22.

50 Maués, note 8.

principles” in anglophone discourse).<sup>51</sup> These objectives contain potentially transformative aims, such as the social state principle in Art. 20 (1) of the German Basic Law, or the reduction of poverty and inequality in Art. 3 of the Brazilian constitution. Pereira shows that these objectives have significant effects on constitutional interpretation and separation of powers: In Germany, constitutional objectives often weigh in favor of the proportionality of rights-restrictive measures and thus empower legislators to pursue social ends, making liberal rights and social ends compatible at a doctrinal level. In contrast, Brazilian courts have used constitutional objectives for purposive interpretation of, e.g., non-discrimination provisions in order to fill perceived legislative gaps.

In a third contribution, Fernando Leal turns attention back to the judicial branch and analyses how apex courts have opened up judicial proceedings to public participation by diverse social groups.<sup>52</sup> The procedural inclusion of civil society and NGOs into strategic litigation has often been associated with the broadening of access to justice in the context of transformative constitutionalism.<sup>53</sup> Leal highlights another, less well-known aspect: In Brazil, the expansion of public hearings, *amicus curiae* briefs, and other forms of third-party involvement has been justified by the concept of an “open society of constitutional interpreters”, originally developed by German constitutionalist Peter Häberle.<sup>54</sup> The idea that openness improves the deliberative quality and democratic legitimacy of constitutional interpretation has been borrowed enthusiastically by Brazilian judges, legislators, and scholars. Yet, as Leal critically argues, it is not self-evident that these procedural mechanisms actually democratize or otherwise improve constitutional interpretation. The contribution thus highlights the global entanglements of judicial doctrines and practices as much as the complications that arise in borrowing, transplantation, and migration of constitutional ideas, especially if they involve presumed (but unjustified) hierarchies between North and South.

51 *Pereira*, note 6. On directive principles, see also *Khaitan*, note 42; *Fernando Leal*, National Objectives, Max Planck Encyclopedia of Comparative Constitutional Law, 2024, <https://oxcon.oup.com/display/10.1093/law-mpeccol/law-mpeccol-e391?rsk=EHYK4J&result=203&prd=MPECCOL> (last accessed on 20 December 2024); *Luis Malheiro Meneses do Vale*, Asking for directions: the origins of Gomes Canotilho Directive Constitutionalism at the Crossroads of Contemporary Constitutional Thought, *World Comparative Law* 56 (2023), p. 524.

52 *Leal*, note 5.

53 *Marcela Fogaça Vieira / Flavia Annenberg*, Remarks on the role of social movements and civil society organisations in the Brazilian Supreme Court, in Oscar Vilhena Vieira / Upendra Baxi / Frans Viljoen (eds.), *Transformative constitutionalism*, Pretoria 2013, p. 491; *David Bilchitz*, Socio-Economic Rights and Expanding Access to Justice in South Africa, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, p. 210.

54 *Peter Häberle*, Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und „prozessualen“ Verfassungsinterpretation, *Juristenzeitung* 30 (1975), p. 297; english translation in *Markus Kotzur* (ed.), *Peter Häberle on Constitutional Theory*, Baden-Baden 2018.

#### D. Varieties of constitutional authoritarianism and autocratic legalism

By the time our VACON research group met for its first workshop in 2020, the context had changed considerably: A pandemic was raging across the globe and leading to often unprecedented restrictions of public and academic life, forcing our project into online mode. Concerns about democratic backsliding and constitutional erosion were intensifying not only in newer democracies like Hungary and Poland, but also in established ones like the United States under the first Trump administration.<sup>55</sup> In Germany, the far-right party “Alternative for Germany” (AfD) was rising in the polls. And in Brazil, right-wing nationalist and ex-military Jair Bolsonaro had been elected to the presidency and was directing attacks against democratic, legal and scientific institutions.<sup>56</sup>

The developments in Brazil and Germany occurred within a broader pattern of contestations of liberal democracy driven by rising populism and nationalism, illiberal governments, and authoritarian regimes. These contestations were not necessarily rejecting law and constitutions as such, but rather promoting alternative models of legal governance, conceptualized variously as “authoritarian constitutionalism”, “autocratic legalism” or “illiberal” constitutional democracy.<sup>57</sup> As with transformative constitutionalism, these purported alternatives to liberal constitutionalism were not all new but rather poignant reminders of the long history of illiberal and autocratic uses of constitutional law.<sup>58</sup>

Against this background, our VACON project analyzed past and present contestations of liberal constitutional democracy in Brazil and Germany: To what extent do these contestations fit the general patterns and global playbooks of autocratic legalism and constitutional authoritarianism? What specific role did constitutions, law, and courts play in our case studies – and how did constitutional law and institutions change in the process of resistance against backsliding? What new insights could our case studies contribute to the comparative study of constitutional erosion and resilience more broadly?

55 Mark A. Graber / Sanford Levinson/ Mark Tushnet (eds.), *Constitutional democracy in crisis?*, Oxford 2018; Tom Ginsburg / Aziz Z. Huq, *How to Save a Constitutional Democracy*, Chicago 2018.

56 Emilio Peluso Neder Meyer, *Constitutional Erosion in Brazil*, London 2021; Tom Gerald Daly, *Understanding Multi-directional Democratic Decay: Lessons from the Rise of Bolsonaro in Brazil*, *Law and Ethics of Human Rights* 14 (2022), p. 199.

57 From the literature, see only *Turkuler Isiksel*, *Between text and context: Turkey's tradition of authoritarian constitutionalism*, *ICON* 11 (2013), p. 702; *Tom Ginsburg / Alberto Simpser (eds.)*, *Constitutions in authoritarian regimes*, Cambridge 2014; *Mark Tushnet*, *Authoritarian Constitutionalism*, *Cornell Law Review* 100 (2015), p. 392; *Roberto Niembro Ortega*, *Conceptualizing authoritarian constitutionalism*, *World Comparative Law* 49 (2016), p. 339; *Kim Scheppele*, *Autocratic legalism*, *University of Chicago Law Review* 85 (2018), p. 545; *Weitseng Chen*, *Same bed, different dreams?*, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, p. 250; *David E. Landau*, *The Myth of the Illiberal Democratic Constitution*, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), *Routledge handbook of illiberalism*, Oxfordshire 2022, p. 425.

58 See only *Grimm*, note 11, pp. 119 ff., and as *locus classicus* *Loewenstein*, note 11.



### *I. Typology and genealogy: Of nerds, punks and soldiers*

From our project's comparative perspective, it quickly became clear that contemporary right-wing contestations of constitutional democracy in Brazil and Germany have been neither locally isolated nor historically new phenomena. They have been drawing on a globalized playbook as well as specific historical authoritarian legacies, and they display common features as well as distinctive characteristics shaped by local contexts. It is thus important to understand these challenges in both their global, local, and historical contexts and to develop more finely grained comparative typologies of constitutional authoritarianism and autocratic legalism. In this regard, our project made three sets of findings concerning global entanglements, local variations, and historical legacies.

Firstly, in terms of the global context, we found that right-wing actors and movements in Brazil and Germany have been influenced by, and have contributed to, multidirectional processes of legal diffusion, networking, and globalization on the right. For some time, comparative lawyers have noted changing patterns of legal diffusion: rather than the spread of liberal norms and ideas, they now observe the diffusion of autocratic legalism, abusive borrowing of constitutional forms for illiberal ends, and the emergence of a global right-wing populist playbook.<sup>59</sup> Going beyond the contents of these new globalization processes, our project highlighted the global networks and advocacy coalitions in which right-wing governments, parties, activists, associations, and faith-based organizations exchange legal ideas, forge common strategies, and organize mutual intellectual and financial support.<sup>60</sup> Both Bolsonaro under Brazil and the German far-right have been inserted in, and connected through, these global networks. Brazilian conservative and radical Christian lawyers have an even longer history of building transnational advocacy networks that serve as transmission belts for ideas and resources between the US, Latin America, and Europe. These connections indicate that the current wave of legal globalization on the right is not marked by one-way transfers and unidirectional borrowing, but rather by the multidirectional circulation of illiberal legal ideas in which Europe, North America, and the Global South are deeply entangled.<sup>61</sup>

59 Dixon / Landau, note 23; Scheppele, note 57.

60 Christopher McCrudden, Transnational culture wars, *ICON* 13 (2015), p. 434; René Urueña, Evangelicals at the Inter-American Court of Human Rights, *AJIL Unbound* 113 (2019), p. 360; Alicja Curanović, The International Activity of *Ordo Iuris*. The Central European Actor and the Global Christian Right, *Religions* 12 (2021), p. 1038; A. Meyerrose, International Sources of Democratic Backsliding, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), *Routledge handbook of illiberalism*, Oxfordshire 2022, p. 88.

61 Michael Riegner, Globalization on the Right: Bolsonaroism and the Circulation of Illiberal Legal Ideas, *Verfassungsblog*, 28.09.2022, <https://verfassungsblog.de/globalization-on-the-right/> (last accessed on 20 December 2024), DOI: 10.17176/20220928-230529-0; Benjamin Cowan, A hemispheric moral majority: Brazil and the transnational construction of the New Right, *Revista Brasileira de Política Internacional* 61 (2018), p. 1.



Secondly, these global influences do not translate into uniform contestations of constitutional liberalism at the national level but meet with distinctive political and social contexts, historical legacies, and constitutional responses. Both Brazil and Germany have gone through historical periods of backsliding and (re-)autocratization, and authoritarian (dis)continuities also influence the role of law and courts in contemporary processes of erosion and backsliding. Contemporary contestations thus show some parallels but also variations of, deviations from, and distinctive contributions to, the global playbooks of right-wing populism, autocratic legalism, and constitutional authoritarianism.

Both Bolsonaro and the German far-right have been following global patterns in some respects, e.g. with regard to populist anti-establishment sentiments, claims to unmediated representation of a homogeneous people, a revival of nationalism, revisionist memory politics, and intensive use of disinformation and hate speech on social media. In other respects, the two right-wing movements display similarities that are not (yet) established parts of the global playbook, namely with regard to their embrace of economic neoliberalism, which calls into doubt simplistic binary oppositions of liberalism and illiberalism.<sup>62</sup>

With regard to other aspects, the two case studies do not fit the global patterns described in the literature. In Germany, the far-right party AfD has had increasing electoral success and has become the largest party in a few federal states, but until now has not managed to control political majorities, executive power, and apex courts in ways comparable to Hungary under Orban, or Poland under the right-wing PiS-government. So far, Germany has seen the erosion of political norms but has not become a case of democratic backsliding, let alone autocratic legalism. Its constitutional system remains shaped by a distinctively post-fascist variety of constitutionalism, informed by a strong commitment to militant democracy and judicial checks on electoral majorities.<sup>63</sup> This is, of course, a legacy of historical experiences of backsliding and authoritarianism: the Weimar Republic has been studied intensely as a prototypical historical case of constitutional erosion and democratic backsliding.<sup>64</sup> And while the National Socialists never enacted their own writ-

62 For an overview of the two cases, see *Rafael Mafei Rabelo Queiroz / Thomas Bustamante / Emilio Peluso Neder Meyer*, From Antiestablishmentarianism to Bolsonaroism in Brazil, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), *Routledge handbook of illiberalism*, Oxfordshire 2022, p. 778; *Talita Tanscheit*, Jair Bolsonaro and the defining attributes of the populist radical right in Brazil, *Journal of Language and Politics* 22 (2023), p. 324; *Ralf Havertz*, Right-Wing Populism and Neoliberalism in Germany: The AfD's Embrace of Ordoliberalism, *New Political Economy* 24 (2019), p. 385. On this ideological combination, see generally *Michael Wilkinson*, *Authoritarian Liberalism and the Transformation of Modern Europe*, Oxford 2021.

63 *Larsen*, note 19, pp. 482 et seq.; *Jan-Werner Müller*, Militant democracy, in: Michel Rosenfeld / András Sajó (eds.), *The Oxford handbook of comparative constitutional law*, Oxford 2012, p. 1253. With regard to the AfD, a party ban has been discussed, but no formal procedure has been brought before the Constitutional Court.

64 *Peter C. Caldwell*, *Popular sovereignty and the crisis of German constitutional law*, Durham 1997; *Arthur J. Jacobson / Bernhard Schlink*, *Weimar. A Jurisprudence of Crisis*, Oakland 2000; *Steven Levitsky / Daniel Ziblatt*, *How democracies die*, New York 2018; *Ellen Kennedy*, *Constitutional*

ten constitution, the role of law, courts and constitutional theorists like Carl Schmitt in Nazi rule has been well documented.<sup>65</sup>

In Brazil, Bolsonaro's presidential rule from 2019-2022 also displayed distinctive features. The label of "populism" only partly describes his peculiar type of rule that became known as Bolsonarism, which relied on deeply rooted authoritarian legacies, militarist traditions, religious conservatism, as well as neoliberal economic ideology, developmentalist anti-environmentalism and libertarian reflexes against public health measures.<sup>66</sup>

With respect to the role of law and courts, Bolsonarism was also not a typical case of autocratic legalism as originally defined, i.e. the use of high-level legal changes, namely constitution-making, constitutional amendment, or at least ordinary legislation, to undermine democratic processes and checks and balances.<sup>67</sup> Despite his autocratic pretensions, Bolsonaro did not succeed in controlling Congress or the courts in ways that enabled such high-level legal changes. He remained trapped, to a considerable extent, in the "legal maze" of the thoroughly judicialized Brazilian political system constrained by coalitional presidentialism.<sup>68</sup> Consequently, Bolsonaro pursued his agenda at lower levels of the legal system through executive orders, appointments, pardons, surveillance and prosecution of opponents, and other mechanisms of the administrative state – a strategy that has been labeled "autocratic legalism 2.0" or "authoritarian infra-legalism".<sup>69</sup>

At the same time, many of Bolsonaro's executive measures were invalidated by the courts. Our project participants discussed to what extent this was part of a strategy, i.e.

Failure Revisited, in: Mark A. Graber / Sanford Levinson/ Mark Tushnet (eds.), *Constitutional democracy in crisis?*, Oxford 2018, p. 67.

- 65 *Ellen Kennedy*, *Constitutional Failure: Carl Schmitt in Weimar*, Durham 2004; *Peter C. Caldwell*, *Controversies over Carl Schmitt*, *Journal of Modern History* 77 (2005), p. 357; *Fernando Leal*, *Zwischen Nützlichkeit und Ablehnung: die hartnäckige Positivismuslegende und ihre Auswirkungen auf den brasilianischen Konstitutionalismus*, in: Rodrigo Borges Valadão (ed.), *Rechtspositivismus und Nationalsozialismus*, Berlin 2021, pp. 301 ff.; *Thomas Wischmeyer*, *Verfassung*, in: Benjamin Lahusen et al. (eds.), *Das Erbe der Diktaturen*, München forthcoming 2025.
- 66 *Rafael Mafei Rabelo Queiroz / Thomas Bustamante / Emilio Peluso Neder Meyer*, *From Antiestablishmentarianism to Bolsonarism in Brazil*, in: András Sajó / Renáta Uitz / Stephen Holmes (eds.), *Routledge handbook of illiberalism*, Oxfordshire 2022, p. 778; *Emilio Peluso Neder Meyer*, *Illiberalism in Brazil: From Constitutional Authoritarianism to Bolsonarism*, *Journal of Illiberalism Studies* 3 (2023), p. 21; *Danielle Hanna Rached / Cecilia Oliveira*, *Right-Wing Populists and the Global Climate Agenda: What Does Jair Bolsonaro Bring to the Playbook of Autocratic Leaders?*, *Verfassungsblog*, 21.09.2022, <https://verfassungsblog.de/right-wing-populists-and-the-global-climate-agenda/> (last accessed on 20 December 2024), DOI: 10.17176/20220921-230800-0.
- 67 *Fabio de Sa e Silva*, *Autocratic Legalism 2.0: Preliminary Insights from a Global Collaborative Research Project*, *World Comparative Law* 57 (2022), pp. 419, 435. For the original definition, see *Scheppele*, note 57, drawing on Hungary as the archetypal case.
- 68 *Florian Hoffmann*, *Constitutionalism under Bolsonaro: The Legal Maze and the Tchutchuca do Centrão*, *Verfassungsblog*, 21.09.2022, <https://verfassungsblog.de/constitutionalism-under-bolsonaro/> (last accessed on 20 December 2024), DOI: 10.17176/20220921-230738-0.
- 69 *de Sa e Silva*, note 67, p. 435; *Oscar Vilhena Vieira / Rubens Glezer / Ana Laura Pereira Barbosa*, *Supremocracia e infralegalismo autoritário*, *Novos estudos CEBRAP* 41 (2022), p. 591.

the systematic use of illegal measures to overwhelm courts and to use them as stages for revolt and provocation, rather than for confirmation and legitimation. In our VACON blog symposium, Philipp Dann has usefully contrasted two archetypes of autocratic rulers: the punk and the nerd.<sup>70</sup> Nerds know how to manipulate the system and skilfully use the whole array of legal means to legitimate and entrench their own power (think Orban in Hungary and Modi in India). In contrast, punks rather seek to trash the system through systematic legal provocations, institutional vandalism, incompetence, and disinformation (Bolsonaro and Trump). While nerds may be more efficient while in office, punks pose particular threats when faced with electoral defeat – as illustrated by the post-election violence and resistance to peaceful transition in the case of Trump and Bolsonaro. Unlike Trump, however, Bolsonaro was able to appeal to a distinctive constitutional legacy of authoritarian militarism, and a third archetype of an autocratic ruler: the soldier.

Our third set of findings relates to this distinctive militarist variety of constitutional authoritarianism that has evolved in Brazilian constitutional history. The Constitution of 1988 has been hailed as an instrument of liberalization and democratic transformation, but a closer look also uncovers legacies and continuities from the authoritarian past. Criticism in extant literature has focused on the incompleteness of the transitional justice process, especially continued impunity under the controversial (self-)amnesty law.<sup>71</sup> Our project has highlighted another aspect, namely the continued constitutional role of the military.

As Evandro Sússekind has argued in our blog symposium, Bolsonaro also represented the return of the military to political power – this time not through a coup but through elections.<sup>72</sup> Not only was Bolsonaro himself a former military officer, but he also appointed nu-

70 Philipp Dann, *Of Punks and Nerds: Two Types of Authoritarian Leaders and Their Meaning for Constitutionalism*, *Verfassungsblog*, 27.09.2022, <https://verfassungsblog.de/of-punks-and-nerds/> (last accessed 20 December 2024), DOI: 10.17176/20220927-230626-0. For further attempts to distinguish difference types of populist regimes, see also Stephen Gardbaum, *The Counter-Playbook: Resisting the Populist Assault on Separation of Powers*, *Columbia Journal of Transnational Law* 59 (2021), p. 1.

71 Fabia Fernandes Carvalho, *Whose exceptionalism? Anti-impunity and the human rights agenda: Debating the Inter-American View on Amnesty and the Brazilian Case*, in: Karen Engle / Zinaida Miller / D. M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda*, Cambridge 2016, p. 185; Emilio Peluso Neder-Meyer, *Criminal responsibility in Brazilian transitional justice*, *Indonesian Journal of International and Comparative Law* 4 (2017), p. 41; Andrea Ribeiro Hoffmann / Giancarlo Summa, *Memória Coletiva no Cone Sul - Bolsonaro, Milei e a justiça transicional*, in: Giancarlo Summa / Monica Herz (eds.), *Multilateralismo na mira. A direita radical no Brasil e na América Latina*, Rio de Janeiro 2024, p. 131.

72 Evandro Sússekind, *The Armed Forces and the Constitution in Brazil*, *Verfassungsblog*, 22.09.2022 <https://verfassungsblog.de/the-armed-forces-and-the-constitution-in-brazil/> (last accessed 20 December 2024), DOI: 10.17176/20220922-230632-0. For earlier problematizations of the continued role of the military, see Jorge Zaverucha, *The 1988 Brazilian Constitution and its authoritarian legacy: Formalizing democracy while gutting its essence*, *Journal of Third World Studies* 15 (1998), p. 105; Emilio Neder-Meyer / Marcelo Andrade Cattoni de Oliveira / Thomas da Rosa Bustamante, *The Brazilian Constitution of 1988, the Armed Forces, and the Coup d'Etat*, *I-CONnect*, 03.10.2017, <https://www.iconnectblog.com/the-brazilian-constitution-of-1988-the-arm>

merous other officers and generals to civilian leadership positions in his government. This re-militarization of government was enabled by a range of provisions in the 1988 constitution that preserve the interests and influence of the military. Most controversially, Art. 142 of the constitution continues to enshrine internal powers for the military to “guarantee the constitutional branches of government” – a provision that Bolsonaro and his supporters relied on in calling for a military intervention to keep him in power, almost turning backsliding into a classical (self-)coup.<sup>73</sup>

This problematic role of the military is rooted in a comparatively less well-known, yet distinctive tradition of authoritarian constitutionalism that developed in Brazil since the beginning of the 20<sup>th</sup> century. More so than in Germany, authoritarian regimes in Brazil at least since the Estado Novo under Getúlio Vargas relied intensely on constitution-making and constitutional law, inspired by constitutional theorists like Francisco José Oliveira Viana and Francisco Campos – the Brazilian Carl Schmitts, so to speak.<sup>74</sup> Characteristically, the Brazilian military also took painstaking care to justify successive coups with constitutional arguments, to the point that coup-supporting officers became known as “legalists”. The idea that the military acted as a politically “neutral” guarantor of the constitutional order with a “moderating role” was instrumental in the 1964 military coup that ushered in the last civil-military dictatorship, and the new military rulers also quickly enlisted constitutionalist Francisco Campos, to draft constitutional amendments (so-called “Institutional Acts”) that legitimated their dictatorial regime.<sup>75</sup> If there is thus one contribution of Brazil to the global playbook of constitutional authoritarianism, it is the distinctive variant of constitutional militarism.

## II. Resistance and militant democracy: Federalism, memory, courts

Understanding different autocratic types, playbooks and legacies is a first step in devising effective strategies of resistance and militant democracy. In this special issue, several contributions deepen the analysis in this regard.

ed-forces-and-the-coup-detat/ (last accessed 20 December 2024). On the broader Latin American trend towards remilitarization at the behest of civilian politicians, see *Julio Ríos-Figueroa*, The “new militarism” and the rule of law in Latin American democracies, in: Rachel Sieder / Karina Ansolabehere / Tatiana Alfonso, Routledge handbook on law and society in Latin America, London 2019, pp. 433.

73 *Süssekind*, note 72; *Vanessa Barbara*, Brazil Is in Grave Danger. These 1,105 Pages Prove It, New York Times, 08.01.2025, <https://www.nytimes.com/2025/01/08/opinion/bolsonaro-brazil-coup.html?smid=nytcore-ios-share&referringSource=articleShare&trp=sty&pvid=096FB768-6E23-4EE1-BA48-6E3B2AEC3B47> (last accessed on 20 January 2025).

74 *Luis Rosenfield*, The history of ideas of Brazilian authoritarian constitutionalism, in: Draiton Gonzaga de Souza / Evandro Pontel / Jair Tauchen (eds.), *A democracia: uma urgência educativa*, Porto Alegre 2021, p. 77.

75 *Peluso Neder Meyer*, note 66.

Thilo Herbert provides an in-depth analysis of the ways in which the Brazilian civil-military dictatorship has organized, entrenched, and legitimated its power through constitutional law in general, and through a distinctive form of “authoritarian federalism” in particular.<sup>76</sup> Mainstream accounts typically conflate liberal constitutionalism, democracy, and federalism, claiming that “all cases of genuine federal states are founded upon liberal democratic constitutionalism.”<sup>77</sup> Cautioning against such generalizations, Herbert argues that federalism not only continued to exist during the military dictatorship installed by the 1964 coup, but that the military regime actively utilized the country’s federal structure through constitutional means for its own benefit, co-opting local and regional elites into its own form of “authoritarian federalism”. His contribution thus serves as a warning that autocratic “nerds” are able to manipulate federal systems for their own ends and adds a novel analytical dimension to the study of constitutional authoritarianism, calling for closer contextual analysis of constitutional designs and concepts typically associated with liberal democracy.

In the next contribution, Jessica Holl and Jasmin Wachau compare the ways in which Brazilian and German law deal with the memory of authoritarian regimes and atrocities, and analyze how the two legal systems respond to revisionist and denialist speech.<sup>78</sup> While extant literature on memory laws is largely focused on Europe<sup>79</sup>, they expand the case selection and analytical framework to other legal approaches to dealing with the past outside Europe. They show that contemporary right-wing populists in both Germany and Brazil instrumentalize memory by glorifying the authoritarian past, downplaying and/or denying past injustices. While German law criminalizes certain forms of public Holocaust denial and glorification of Nazi atrocities in punitive memory laws, legal responses in post-authoritarian Brazil remain shaped by an incomplete transitional justice process and the continued enforcement of its (self-)amnesty law. Rather than memory laws, Brazil has adopted transitional justice measures such as truth commissions and an amnesty commission that seeks to ensure victims have a voice and receive reparations. This is often criticized as insufficient, but the German approach also poses risks for free speech and the courts, which risk being instrumentalized as political stages by punk-type right-wing provocateurs.

Last but not least, Clara Iglesias Keller and Diego Werneck Arguelhes detail how Brazilian courts have responded to disinformation-driven backsliding with an array of measures, including content removal, social media regulation, criminal prosecutions, and disqualifications for future elections.<sup>80</sup> Keller and Arguelhes analyze how systematic disin-

76 Herbert, note 7.

77 Michael Burgess / Alain G. Gagnon, Introduction: federalism and democracy, in: Michael Burgess / Alain-G. Gagnon (eds.), *Federal Democracies*, London 2010, p. 9.

78 Holl / Wachau, note 4.

79 See e.g. *Uladzislau Belavusau / Aleksandra Gliszczynska-Grabias* (eds.), *Law and memory: Towards legal governance of history*, Cambridge 2017.

80 Iglesias Keller / Werneck Arguelhes, note 3.

formation, such as election fraud claims, has become a symptom and vector of democratic backsliding, as it undermines public trust in traditional accountability institutions and creates anti-pluralist illiberal public spheres. They also show how Brazilian courts became protagonists in the fight against disinformation and election fraud claims, expanding their own powers over social media platforms, launching criminal investigations, and declaring political candidates ineligible for public office for spreading disinformation. While these judicial measures protected the electoral process and contributed to Bolsonaro's electoral defeat, Keller and Arguelhes caution against considering the Brazilian experience as an unqualified success that *can* be emulated, given the institutional peculiarities of the Brazilian apex courts, and that *should* be emulated, given the risks associated with the expansion of judicial powers.

Overall, Germany and Brazil can be read as case studies of constitutional resilience in different ways: German legal and democratic institutions have resisted right-wing threats largely through political strategies and some individualized criminal proceedings. Brazil, in turn, can be considered as a case of bouncing back from backsliding: its democracy has outlasted Bolsonarism (for now) and stands out as one of the few jurisdictions in Latin America where courts have put up considerable resistance against re-autocratization.<sup>81</sup>

## E. The way forward: Constitutional resilience in times of polycrisis

In sum, our project has highlighted the patterned diversity of constitutionalism as a global phenomenon, and its adaptation, variation, and contestation in domestic contexts. Liberal and transformative constitutionalism have diffused and diversified globally, as have different varieties of autocratic legalism and constitutional authoritarianism.

Going forward, constitutional democracy is faced with an increasingly unfavorable global environment, shaped by what has been called the "polycrisis": a combination of multidimensional crises that are interconnected and mutually reinforcing, including the climate crisis, pandemic threats, devastating wars in Ukraine, the Middle East and Africa, rising geopolitical tensions with increasingly aggressive authoritarian regimes, a new wave of military coups, an empowered far-right emboldened by the return of Donald Trump, and an increasingly oligarchic and securitized global political economy.<sup>82</sup> Whether and how constitutional democracy can remain resilient and preserve the relative autonomy of law in times of polycrisis, will likely be a key question for comparative constitutional law in the decade to come.

81 For an overview, see *Diego A. Zambrano / Ludmilla Martins da Silva / Rolando Garcia Miron / Santiago P. Rodriguez*, How Latin America's Judges are Defending Democracy, *Journal of Democracy* 35 (2024), p.118.

82 On the concept, see *Adam Tooze*, Defining polycrisis, Substack, 24.06.2022, <https://adamtooze.substack.com/p/chartbook-130-defining-polycrisis> (last accessed 20 December 2024); *Michael Lawrence / Thomas Homer-Dixon / Scott Janzwood / Johan Rockström / Ortwin Renn / Jonathan Donges*, Global polycrisis, *Global Sustainability* 7 (2024), p. 1.

To contribute to the resilience of constitutional democracy, future comparative research will need to address questions and challenges along three main axes: how to conceptualize and theorize constitutional resilience, how to capture the main actors and sites of the struggle for resilience, and how to make global cooperation, including in comparative research, itself resilient.

The first set of questions concerns the conceptual and theoretical frameworks that will enable comparatists to research how constitutional democracy can resist, and adapt to, the challenges of the polycrisis. This work can build on long-standing debates on militant democracy in liberal constitutional systems and on more recent experiences with transformative constitutions under pressure. But to survive, constitutional democracy will not only need to resist external pressures and shocks, but will also have to adapt to legitimate critiques, changing contexts, and new environments full of challenges. This dialectic of resistance and adaptation may be best captured by the concept of resilience, which implies a certain internal elasticity and flexibility that allows it to adapt to new circumstances and bounce back from temporary deformation. Future research should thus explore this theoretical potential of resilience and understand its patterns, concepts, and determinants.<sup>83</sup>

Understanding constitutionalism in its global varieties offers a framework for distinguishing between the two paths of resistance and adaptation. Acknowledging the patterned diversity of constitutional experiences by way of more representative global typologies not only gives comparatists a better sense of what needs to be defended, but also of what has been, and can be successfully adapted to new circumstances. After all, many constitutional orders in the Global South have been faced with multiple crises at once, have eroded and been reconstructed multiple times, and thus offer important experiences of constitutional resilience also for jurisdictions in Euro-America. Future research on the varieties and resilience of constitutionalism thus faces important questions: How can we treat constitutional liberalism not as a fixed monolithic category, but as an open source and a model susceptible to adaptation and development in both the Global North and South?<sup>84</sup> Similarly, rather than giving up on transformative constitutionalism as a hopeless endeavor in the face of polycrisis, how can we understand it as a global resource to draw from

83 For discussions of resilience as a conceptual framework see *Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne*, Constitutional Resilience in South Asia: A Primer, in: *Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne* (eds.), *Constitutional Resilience in South Asia*, London 2023, p. 3 and the other contributions to that volume; *Vanessa A. Boese / Amanda B. Edgell / Sebastian Hellmeier / Seraphine F. Maerz / Staffan I. Lindberg*, How democracies prevail: democratic resilience as a two-stage process, *Democratization* 28 (2021), p. 885.

84 See e.g. *Philipp Dann*, Guest editorial: Liberal constitutionalism and postcolonialism in the South and beyond: On liberalism as an open source and the insights of decolonial critiques, *ICON* 20 (2022), p. 1 For a similar argument on the adaptability of liberal constitutionalism, see also *Roux*, note 38.



in attempts to build back better and to manage cyclical challenges of re-democratization, transitional justice, political economy, and ecological transformation?<sup>85</sup>

A second set of questions for future research concerns the main actors and sites of constitutional resilience. The Brazilian example of judicial resistance against backsliding suggests that we should not prematurely discount the potential of courts as actors and sites of resilience, all while remaining aware of the future risks and limitations of judicial interventions to protect democracy. At the same time, as constitutional law is becoming more ideologically diverse and more contested as a terrain for social struggles and political lawfare, a range of other actors and sites of constitutional resilience deserve more attention in future research. These actors include parliaments and parties, federal states and fourth-branch institutions, civil society and business, security forces, and the military.<sup>86</sup>

The sites of struggle include at least four battlefields where the polycrisis will play out and constitutional resilience will be won or lost: Firstly, the crisis of global political economy will make economic constitutionalism and the law of democracy even more contested battlefields, raising important questions such as: how can democratic constitutionalism address not only the problems of poverty and inequality, but also of concentrated wealth? How can it resist not only the threat of autocracy, but also of oligarchy? How can constitutional law adapt to geo-economic de-coupling and the securitization of economic relations? How can business corporations, as vehicles of concentrated wealth and foreign influence, be understood and regulated in constitutional law beyond the liberal canon?<sup>87</sup>

Secondly, growing geopolitical tensions, the return of military coups, and internal and external security threats draw renewed attention to the role of the military and security in the varieties of constitutionalism. Often neglected and treated as an apolitical monolith under civilian control in liberal research perspectives, the military needs to be understood as a complex constitutional actor and site of struggle across democratic and authoritarian regimes: How does the constitutional role of the military vary in authoritarian and democratic constitutional systems? How can constitutional law address the political instrumental-

85 For research in that direction, see *Lucas Delgado / Chris Thornhill*, *Conjunctures of democratic erosion: Is Brazil a global paradigm of resilience?*, *Direito Público* 21 (2024), p. 121; ConTrans conference “A Playbook for Reinstating the Rule of Law”, <https://ruleoflaw-freiburg.de/> (last accessed on 20 December 2024).

86 For a broadening of the actor perspective along these lines, see also *Jhaveri / Khaitan / Samararatne*, note 83, pp. 20 et seq.

87 On the different approaches to the corporation, see *Michael Riegner*, *Canonizing the corporation: Liberal, social and transformative varieties of corporate constitutionalism*, in: *Sujit Choudhry / Michaela Hailbronner / Michael Kumm* (eds.), *Global Canons in an Age of Contestation*, Oxford 2024, p. 531; *Mariana Pargendler*, *Corporate Law in the Global South: Heterodox Stakeholderism*, *Seattle University Law Review* 47 (2024), p. 535. On geoeconomic changes, see e.g. the programme on de-globalization and global decoupling at <https://www.uni-erfurt.de/en/research/researching/research-projects/doctoral-programme-de-globalisation-and-global-decoupling-deglobe> (last accessed on 20 December 2024). On the law of democracy, see only recently *Tom Ginsburg / Aziz Z. Huq / Tarun Khaitan*, *The Entrenchment of Democracy*, Cambridge 2024.



ization of the military by civilian populists without undermining civilian control? What role do internal constitutional beliefs, cultures, and dynamics within the military play in democratic backsliding and resilience?<sup>88</sup>

Thirdly, as the climate crisis and environmental stresses intensify, environmental constitutionalism will be another key battlefield for constitutional resilience: How can constitutional courts adapt liberal or transformative constitutional doctrines to nudge state and society towards more effective climate action? How do environmental movements and counter-movements mobilize constitutional law in struggles for their competing ecological, political, or economic goals? What role does (anti-)environmentalism play in the playbook of right-wing populists and in authoritarian constitutional systems?<sup>89</sup>

Finally, constitutional resilience will be defined by intensifying struggles over competing visions of gender, race, and other markers of identity and discrimination. Feminists and critical race theorists have long sought to transcend liberal theories of rights and constitutional categories like the public-private divide, but conservative counter-movements, religious groups, far-right populists and authoritarian regimes are also increasingly mobilizing constitutional arguments and human rights to entrench their own agendas. How to walk the line between adaptation and resistance in these struggles for resilience? How to respond to the globalization of exclusionary anti-feminist and anti-abortion activism?<sup>90</sup> To the instrumentalization of postcolonialism and the notion of the Global South by autocratic regimes?<sup>91</sup> And to illiberal re-interpretations of human rights more generally?<sup>92</sup>

88 On the complex roles of the military, see *Ozan Varol*, *The military as guardian of constitutional democracy*, *Columbia journal of transnational law* 50 (2013), p. 547; *Michael Head*, *Domestic Military Powers, Law and Human Rights*, Routledge 2019; *Nam Kyu Kim*, *Illiberalism of Military Regimes*, in: *András Sajó / Renáta Uitz / Stephen Holmes* (eds.), *Routledge handbook of illiberalism*, Oxfordshire 2022, p. 571; *Melissa Crouch*, *The Military Turn in Comparative Constitutional Law: Constitutions and the Military in Authoritarian Regimes*, *Annual Review of Law and Social Science* 20 (2024), p. 53.

89 On these questions, see *Rike Krämer-Hoppe*, *The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide*, *German Law Journal* (2021), p. 139; *Ingo Sarlet / Tiago Fensterseifer*, *Fundamental rights theory and climate protection through the lens of the Brazilian Constitution*, *e-publica* 9(3) (2022), p. 26; *Danielle Rached / Marco Alberto / Bernardo Tagliabue*, *Environmental Authoritarianism*, *World Comparative Law* 55 (2022), p. 542; *Cecilia Oliveira / Jens Marquardt / Markus Lederer*, *Same, same but different? How democratically elected right-wing populists shape climate change policymaking*, *Environmental Politics* 31 (2022), p. 777.

90 On gender, see *Ligia Fabris / Holly Patch / Karsten Schubert*, *Liberalism and the Construction of Gender (Non-)Normative Bodies and Queer Identities*, in: *Alexandra Scheele et al.* (eds.), *Global Contestations of Gender Rights*, Bielefeld 2022, p. 267; *Gabriele Dietze / Julia Roth*, *Right-Wing Populism and Gender*, in: *ibid.* (eds.), *Right-Wing Populism and Gender*, 2020, 1-20; *Martha Gayoye*, *Gendered Constitutionalism in the Global South*, *World Comparative Law* 56 (2023), p. 115, and the other contributions to that special issue.

91 *Ekaterina Degot / David Riff / Jan Sowa* (eds.), *Perverse Decolonization*, Berlin 2021.

92 *Alexandra Huneus*, *When Illiberals Embrace Human Rights*, *AJIL Unbound* 113 (2019), p. 380; *Marie-Luisa Frick*, *Illiberalism and Human Rights*, in: *András Sajó / Renáta Uitz / Stephen*

A third set of questions for future research concerns the transnational and global dimensions of constitutional resilience. Understanding the processes, networks, and institutions that enable the circulation of illiberal legal ideas remains an important task for research in comparative constitutional law and public international law alike. Do these ideas diffuse through the same channels as liberal-democratic norms, or can we observe different dynamics? Do captured constitutional courts engage in “judicial dialogue”, will we see autocracy-promotion projects in foreign aid, do illiberal lawyers spread their ideas at international conferences? Do international organizations become sites and actors of an authoritarian international law?<sup>93</sup>

In a next step, researchers will need to devise global strategies for resistance and adaptation in transnational spaces and collaborations. Universities, conferences, and research cooperations themselves will need to become sites of resilience where scholars not only research but also defend constitutional democracy. This raises complex ethical and practical questions of how to respond to the circulation of illiberal legal ideas in our own discipline, how to protect academic freedom and preserve a diversity of viewpoints, and where to draw red lines and practice solidarity against authoritarian abuse – questions that we have faced in our VACON project, and that are likely to recur in other contexts. In that sense, slow comparison remains as important as ever – but will also need to adapt and evolve towards new forms of more militant comparison.<sup>94</sup>



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Holmes (eds.), Routledge handbook of illiberalism, Oxfordshire 2022, p. 861; *Tobias Berger*, Human Rights beyond the Liberal Script, *International Studies Quarterly* 67 (2023), p.1.

- 93 See *Riegner*, note 61; *Tom Ginsburg*, Authoritarian International Law?, *American Journal of International Law* 114 (2020), p. 221; *Alejandro Rodiles*, Is there a ‘populist’ international law (in Latin America)?, *Netherlands Yearbook of International Law* 49 (2018), p. 69.
- 94 *Riegner*, note 61; *Brazilian scholars*, Academic Freedom as Democracy’s Last Defense: Open Letter in support of Professor Conrado Hübner Mendes, *Verfassungsblog*, 30.07.2021, <https://verfassungsblog.de/academic-freedom-as-democracys-last-defense/> (last accessed on 20 December 2024), DOI: 10.17176/20210731-015921-0. For another example, see the Consortium on Global Resistance to Authoritarian Diffusion, <https://www.kcl.ac.uk/tli/consortium-on-global-resistance-to-authoritarian-diffusion> (last accessed on 20 December 2024).