

ARTÍCULO DE INVESTIGACIÓN

## Brazilian autocratic infra-legalism: a response to Kim Lane Scheppele

*Infralegalismo autocrático brasileño: una respuesta a Kim Lane Scheppele*

Marina Shlessarenko Fraife Barreto 

marinasfbarreto@gmail.com

*Universidad de São Paulo, São Paulo, Brasil*

**ABSTRACT** Kim Lane Scheppele claims that “autocratic legalism” is a new form of political authoritarianism, characterized by the use of laws and constitutional engineering. I argue that the Brazilian case provides two counterarguments to this thesis, first refuting the idea that lessons learned from past authoritarianism do not involve the use of law for non-democratic purposes, and then arguing that there are other legal instruments suitable for the implementation of political authoritarianism besides constitutions and laws. To this end, I divide the article into five parts. First, I sketch the theoretical approach and methodology. Second, I consider a broader literature on the significance of law in non-democratic regimes. Next, I report the importance of the use of law in the Brazilian military dictatorship (1964-1985). Fourth, I explain the use of administrative legal tools in contemporary Brazil and how this use evidences the existence of an “autocratic infra-legalism.” Finally, I present some concluding remarks, and a postscript written in the light of the presidential elections of 2022.

**KEYWORDS** Authoritarianism; non-democratic regimes; legalism; authoritarian legality.

**RESUMEN** Kim Lane Scheppele afirma que el “legalismo autocrático” es una nueva forma de autoritarismo político, caracterizada por el uso de las leyes y la ingeniería constitucional. Sostengo que el caso brasileño proporciona dos contraargumentos a esta tesis, primero refutando la idea de que las lecciones aprendidas del autori-



Este trabajo está sujeto a una licencia de Reconocimiento 4.0 Internacional Creative Commons (CC BY 4.0).

arismo pasado no implican el uso de la ley para fines no democráticos, y después argumentando que hay otros instrumentos legales adecuados para la implementación del autoritarismo político además de las constituciones y las leyes. Para ello, divido el artículo en cinco partes. En primer lugar, esbozo el enfoque teórico y la metodología. En segundo lugar, considero una literatura más amplia sobre la importancia del derecho en regímenes no democráticos. A continuación, expongo la relevancia del uso del derecho en la dictadura militar brasileña (1964-1985). En cuarto lugar, explico el uso de herramientas jurídicas administrativas en el Brasil contemporáneo y cómo denuncia un "infralegalismo autocrático". Por último, presento algunas observaciones finales y un post-scriptum, a la luz de las elecciones presidenciales de 2022.

**PALABRAS CLAVE** Autoritarismo; regímenes no democráticos; legalismo; legalidad autoritaria.

## 1. Introduction

In *Autocratic Legalism*, published in 2018, Kim Lane Scheppele claims that a new form of political authoritarianism is underway<sup>1</sup>. She names it “autocratic legalism” and affirms that it is characterized by the use of laws and constitutional engineering to implement an illiberal agenda – one that goes against the set of values underpinning individual rights. This concept is useful to describe the comparative political reality of countries such as Hungary, Poland, Russia, and Turkey because it highlights law as a method for establishing a non-democratic political regime. According to the author, this legal veneer would make it more difficult for us to diagnose the autocratic intent of the new incumbents. In her words, “rather than rejecting the language of constitutionalism and democracy in the name of a grand ideology as their authoritarian forebears did, the new legalistic autocrats embrace constitutional and democratic language while skipping any commitment to the liberal values that gave meaning to those words”<sup>2</sup>.

To develop this argument, the author refers to two major historical figures, Hitler and Stalin – the “authoritarian forebears”. The former made use of a strong ideology and, once in power, abused the emergency powers provided by Article 48 of the Weimar Constitution. The latter also employed a strong ideology and, to come to power, took control of the Party and employed violence. Common to both cases would be a “brutal, complete and completely obvious”<sup>3</sup> concentration of power in the name of a strong authoritarian ideology.

---

1. In the present article, I use the terms “political authoritarianism”, “autocracy”, and “non-democratic regime” as synonyms, even though this erases significant differences between them.

2. SCHEPPELE (2018) p. 562.

3. SCHEPPELE (2018) p. 572.

This is, however, a limited caricature of 20th century authoritarian political ideology. It is not true that all leaders of past regimes rejected democratic or constitutional language<sup>4</sup>, as already stated by Müller (2011). According to this author, with the exception of National Socialism in Germany, all the other authoritarian regimes made use of the language of democracy to achieve their non-democratic ends. Scheppele herself acknowledges that “history is more complicated than either scenario”<sup>5</sup>, nonetheless she argues that the “lessons learned” tend to diminish the actual complexity of the facts and leave “a lot of room to repeat history using some of the less well-known subplots”<sup>6</sup>. Nonetheless, whilst acknowledging the richness of history, the author still leaves the argument about the non-use of democratic and constitutional language by past autocrats untouched, although it is not appropriate in all contexts.

As Brooker (2014) contends, the modernization of non-democratic regimes, even in the nineteenth century, involved allusion to a supposed “democracy”<sup>7</sup>. The political leaders of the time paid lip service to what they interpreted as democratic, using this concept to justify their actions. Moreover, several authors who have studied non-democratic regimes of the last century recognize a myriad of functions performed by the law, well beyond mere window-dressing of the exercise of power<sup>8</sup>.

---

4. David Landau offers a similar account in terms of “abusive constitutionalism,” see LANDAU (2013) p. 189.

5. SCHEPPELE (2018) p. 572.

6. SCHEPPELE (2018) pp. 572-73.

7. BROOKER (2014).

8. Drawing on the work of Linz, O’Donnell, Pereira, and Barros, I suggest it is possible to extract at least four functions exercised by law in the non-democratic regimes of the shortened 20th century (1914-1989): (i) a “façade” to attribute legitimacy to governments; (ii) a tool for the implementation of their ideologies; (iii) means for the organization of power in plural coalitions; and (iv) an instrument for resistance against extralegal repression (see Juan José Linz, *Totalitarian and Authoritarian Regimes* (Colorado: Lynne Rienner, 2000); Guillermo A O’Donnell, *Modernization and Bureaucratic-Authoritarianism: Studies in South American Politics* (Berkeley: University of California, 1973); Anthony W Pereira, *Political (in)justice. Authoritarianism and the rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005); Robert Barros, *Constitutionalism and Dictatorship. Pinochet, the junta, and the 1980 Constitution* (Cambridge: Cambridge University Press, 2004)). For a similar standpoint, see Ginsburg and Simpsen, who enunciate constitutions in authoritarian regimes as façades, blueprints, instruments for political signaling, and “operative manual” (GINSBURG and SIMPSEN (2014)).

In the present article, I propose two points to counter Scheppele's argument, based on the Brazilian case: (i) that legal forms have been widely employed and recognized in contexts of political authoritarianism in the past; (ii) that the authoritarian play-book can go beyond legal and constitutional engineering, resorting to the administrative sphere. This debunks the claim of originality (which I call the "originality mistake") made by the author when she says that a *new* form of political authoritarianism is underway; it also broadens the depiction of the phenomenon observed, since the author essentially proposes that authoritarian legalists make use of laws and constitutions to achieve their undemocratic ends<sup>9</sup>.

I divide the article into five parts. First, I outline the methodology used. Second, I examine a broader literature on the use of law in non-democratic regimes<sup>10</sup>. Then, I reconstruct the uses of law during the last Brazilian dictatorial experience (1964-1985), based on one of the authors mentioned in the first part. Fourth, I frame the recent authoritarian experience from the rise of President Jair Bolsonaro to the presidency of the Republic as a case of "autocratic *infra*-legalism"<sup>11</sup>. Finally, I present some concluding remarks; and, by way of a postscript, some political developments in Brazil taking the 2022 presidential elections into consideration.

## 2. Approach and methods

This paper raises two caveats to Kim Lane Scheppele's main argument in *Autocratic Legalism*, questioning two of the author's assumptions: firstly, that the phenomenon discussed is new; and secondly, that it is characterized only by the traits depicted in the article<sup>12</sup>. In order to make such counterarguments, this paper departs from Scheppele's moderate institutionalist approach and aims to bridge a gap acknowledged by a likewise institutionalist body of literature: the lack of legal studies of politically non-democratic regimes.

---

9. It is true that the author also admits the use of "institutional reform" to autocratic legalist purposes – it may be noted that she uses both "legalistic autocrats" and "autocratic legalists" to mention the agents of the phenomenon she describes. Nonetheless, she does not discuss this modality of autocratic legalism in depth, as she does with the legal and constitutional measures. The only example that she gives is that of court-packing procedures. See footnote 101, SCHEPPELE (2018), p. 574.

10. This part relies widely on the article BARRETO (2022).

11. My aim is not to compare these two moments from Brazilian history. Undoubtedly, there are significant differences, which go far beyond the contrast between the seizure of power through a coup d'état in 1964 and through elections in 2019. The two moments analyzed, however, provide interesting counterarguments to Scheppele's thesis, which serve the modest purposes of the present article.

12. For another account on the first caveat see BARRETO (2022).

It is true that Scheppele does not only look at institutions in order to depict authoritarian legalism. On the one hand, she draws on studies of the Executive power, and of institutions for accountability, to make her argument that the Executive somehow bypasses the checks, or packs the bodies, that would render it accountable. On the other hand, she also tends to identify the Executive power as an individual political leader, studying the behavior of “clever autocrats”, whom she calls “legalistic autocrats” or “autocratic legalists” – she uses both terms – both from the present and from the last century.

Her view appears to be that legalistic autocrats pit law against democracy, and institutions against constitutional democracy, and in this sense her study seems to remain largely within the bounds of institutionalist approaches. But institutions alone do not account for the recent autocratization of political systems; it is necessary to look beyond, to political actors who express antidemocratic behaviors. While she does consider both approaches, the institutionalist seems to predominate, since the main concepts constructed in the paper focus on institutions, instead of on citizens and the social basis of democracy<sup>13</sup>.

Departing from this moderate institutionalist approach, I analyze the institutionalist critique made by Anthony Pereira, a Brazilianist author who studied law in the context of the Brazilian dictatorship from 1964. According to Pereira<sup>14</sup>, few studies of authoritarian regimes have taken law into consideration; on the contrary, they have generally assumed – on the basis of the non-democratic political background – that law was irrelevant, which is misleading. The fact that institutional politics are non-democratic does not prevent law from playing specific roles within these regimes. As I have written elsewhere<sup>15</sup>, law could, at least, have served as a means of (i) sharing political power in heterogenous power coalitions, (ii) implementing ideologies, (iii) legitimizing regimes – as a façade for arbitrary measures – and (iv) exercising resistance.

Pereira’s critique still echoes in Scheppele’s article, written more than ten years later. Taking for granted the irrelevance of law in non-democratic contexts, she alleges that a new phenomenon is underway. In fact, the same mistake seems to have been noticed by Jan Werner Müller, a scholar who studied fascism and European ideologies from the last century<sup>16</sup>.

---

13. Democracy is basically seen as “a political system in which leaders are accountable to the people”; and in constitutionalism, not only are they accountable to the people, but also act “within a system of constitutional constraint to uphold basic values that transcend the moment”, see SCHEPPELE (2018) p. 557.

14. PEREIRA (2005) p. 5.

15. See BARRETO (2022).

16. This author depicted Mussolini’s fascism as “authoritarian legalism”. In his words, “Moreover, it is largely forgotten that Mussolini governed for years within the structures of Italy’s democra-

But the present article does not only look to the past. It considers not only alternative studies of classic authoritarian regimes, notably Pereira's work on the Brazilian dictatorship, but also contemporary studies of non-democratic regimes – namely recent analyses of Brazil under the Bolsonaro administration. Both serve as counterexamples to Scheppele's argument on the strict limits of autocratic legalism. It should be noted that a significant part of the analysis of the Bolsonaro administration draws on the "Emergency Agenda" project<sup>17</sup>, which maps, through a notably institutionalist lens, the policies applied in Brazil at the Federal level since 2019. Vieira, Barbosa and Glezer's work<sup>18</sup> also serves as a fundamental research basis for consideration of the administrative measures undertaken by Bolsonaro administration; this provided the inspiration for the name of "autocratic infra-legalism" that I apply to Bolsonaro's method, in an analogy of Scheppele's concept.

Finally, as I remark in section 5.5, Scheppele's article could be described as rather essayistic in tone. It does not aspire to map thoroughly what it calls "autocratic legalism" but seems rather to have the experimental aim of introducing an interesting idea into the public sphere. This is consistent with the author's lack of attention to pinpointing the particular autocratic measures undertaken, instead setting up a common authoritarian ground based on national experiences collected from comparable contexts in Hungary, Poland, Turkey and other countries. It explains why, for instance, the author does not discuss the role of the Legislative branch within these contexts. While this observation weakens the stringency of her argument as a whole, it also opens up ample scope room for discussion, which is my main goal here.

### **3. Law in non-democratic regimes from the past**

As outlined above, the employment of democratic language by non-democratic regimes is far older than commonly assumed by this literature on "autocratic legalism". Brooker (2014) claims that one of the cornerstones of the modernization of non-democratic regimes is the use of constitutional language to describe and justify the abuse of power. According to Brooker's thesis, there were three major phases in the modernization of non-democratic regimes, and in all of them "democratic" language was used to legitimize authoritarian projects.

---

cy, even including plenty of self-declared liberals in his cabinet. He practiced what today is often described as "autocratic legalism." He followed the letter of the law while violating its spirit; or he enacted legislation in ways that were procedurally correct but that put the rule of men over the rule of law." See "What makes a fascist", Project Syndicate, November 7th, 2022, <https://www.project-syndicate.org/commentary/what-makes-a-fascist-giorgia-meloni-by-jan-werner-mueller-2022-11?barrier=accesspaylog>.

17. See "Emergency Agenda", *Centro de Análise da Liberdade e do Autoritarismo*, May 28th, 2021, <https://agendadeemergencia.laut.org.br/en/>.

18. See VIEIRA, BARBOSA, GLEZER (forthcoming).

The first phase of modernization would have begun in the 19th century, with the use of referenda by Napoleon Bonaparte “to legitimize his military dictatorship and possible assumption of the title of Emperor”<sup>19</sup>. Throughout the century, several Latin American governments also made use of justifications expressed in democratic language to attain authoritarian ends, a tendency which persisted into the following century. The second phase of modernization, beginning in the first half of the 20<sup>th</sup> century, incorporated two new elements into “democratic” interpretation: first, the ideology of a one-party state; and second, the claim to represent the “unified will of the people”, in a scenario where political parties were still a new form of societal organization. The third and final phase, in turn, began at the end of the 20<sup>th</sup> century, with the form of “democratically disguised dictatorship” and the use of semi-competitive elections<sup>20</sup>.

Although Brooker inserts the employment of democratic language in his analysis of modern non-democratic rule, he sets law as such aside. This omission is common in comparative political analysis and is recognized as a blind spot by Pereira (2005). One argument for the irrelevance of the analysis of law in non-democratic regimes is that these regimes have often been inaugurated by brute force or unlawful seizure of power; it would therefore be naive to consider law to be relevant in the development of their political systems: only the practices of political actors would be important, since these would reflect the actual directives of governments.

Another argument – which relates to the first – is that institutionalist analyses in these contexts are misleading, since most countries that experience non-democratic rule have weak and ineffective formal institutions<sup>21</sup>, as claimed by Levitsky and Way (2010). In this sense, studying law would paint a false picture of reality. A third argument is that since law is endogenous to these regimes, it would be tautologous to appeal to law to explain them: legal mechanisms would be the *results* (effects) of these regimes, not their *causes*. In other words, legal mechanisms do not explain their existence, but the reverse<sup>22</sup>.

On the other hand, all these three arguments are contestable. The history of the shortened 20<sup>th</sup> century (1914-1989) shows evidence of the mobilization of law by non-democratic regimes, even though several of them were established by military coups. Moreover, Levitsky and Way's contention of the existence of weak formal institutions

---

19. BROOKER (2014) p. 6.

20. BROOKER (2014) p. 8.

21. In addition to formal institutions, more attention should be paid to informal institutions. Institutions, in this register, are “formal or informal rules and procedures that structure social interaction by constraining and authorizing behavior”, while informal institutions in particular are “socially shared, commonly unwritten rules that are created, communicated and enforced outside officially sanctioned channels” (see HELMKE and LEVITSKY (2004) p. 727).

22. LEVITSKY and WAY (2010) p. 80.



is not equivalent to a finding of their non-existence or absolute irrelevance. It is true that the authors are concerned with the political authoritarianism inaugurated after the end of the cold war (“competitive authoritarianism”)<sup>23</sup>, and so with a different context from that which existed between 1914 and 1989; but at the same time, the study of formal institutions in these new contexts – as well as in those portrayed previously – can serve precisely to reinforce the argument of detachment between institutional ideals and political-institutional praxis. Moreover, institutional effectiveness is not an easy and stable variable to measure, and verification of such detachment is not sufficient to invalidate study. If the dimension of direct correspondence between formal institutions and political practice is relevant to the authors, there are other equally important dimensions that stand beside it, such as the symbolic and performative dimension of institutions – which create or reduce incentives for civil action.

The alleged tautology of explaining regimes by an outcome endogenous to their nature (law) also does not hold good. Even if the “undemocratic rise to power” is the cause, and law its effect, the mechanisms through which this cause operates must still be explained. Furthermore, the fact that law may be a non-democratic outcome (effect) does not prevent it from having explanatory potential for the continuance of the regime (rather than its emergence). Thus, even if it does not explain the conditions of their non-democratic emergence, study of law offers insights into the consolidation and existence of these regimes.

Having countered these arguments against the study of law in non-democratic regimes and its explanatory potential, I turn now to a study of this phenomenon in the Brazilian military dictatorship (1964-1985), according to Pereira’s (2005) account. This offers a concrete example of the use of law as a tool to restrict political repression, materializing the first point I raise to counter Scheppele’s argument.

#### **4. Brazil’s authoritarian legality (1964-1985)**

To see law as a mere rubber stamp on the exercise of political power in the Brazilian military dictatorship is to erase a considerable part of its functions. Though it is true that maintaining a veneer of legality can serve the purposes of legitimization nationally and abroad, it does not account for all aspects of the exercise of political power. This is particularly relevant for the Brazilian regime, because it was based on the uneasy coexistence between a constitutional system and a parallel system of institutional acts, which went so far as to claim to limit the scope of – or even modify – the constitution. In the vocabulary proposed by Pereira, the Brazilian case has a very

---

23. As the authors claim, “competitive authoritarianism” does not fit well with the existing subtypes of authoritarianism, since they are mostly non-competitive. Competitive authoritarianism, on the other hand, would be a new authoritarian political form.



particular “authoritarian legality”<sup>24</sup>, being more conservative than its Argentinian and Chilean neighbors.

To measure authoritarian legality, the author relies on two indicators: (i) judicial and military-civilian integration, and (ii) consensus between judicial and military elites<sup>25</sup>. Brazil, in contrast to Chile and Argentina, was the country that presented the greatest civil-military integration and consensus, leading to a greater judicialization of political repression<sup>26</sup>. Even though it obviously resorted to extra-legal repression, the Brazilian regime was moderated by judicial proceduralization in military courts – which did not routinely lead to draconian penalties and sentences. In other words, managing the political opposition by legally permitted means contributed to a more limited recourse to violence outside the parameters regulated by law, reducing the number of disappearances and deaths in comparison with the Argentinian (1976-1983) and Chilean (1973-1990) cases<sup>27</sup>. This is not to say, certainly, that the Brazilian dictatorship was not extremely brutal or deadly; it only reveals that it could have been worse if the regime had not made use of available legal means.

---

24. The concept of Authoritarian legality is not explicitly formulated, even though it is widely used by Pereira. From a systematic reading of the author's work, it is possible to deduce that it designates the application of legal provisions by authoritarian regimes, notably the courts. This application, in turn, may reveal manipulation, abuse, distortion or maintenance of existing legal forms, which may be pre-authoritarian or created by the regime itself.

25. Judicial and military (civilian) integration and consensus between the two indicators do not always coincide. The first concerns the use of the civilian justice apparatus or the independence of the courts and was measured by the organization and structure of the judicial system, such as the distribution of competencies. The second refers to the “substantial agreement of the [judicial and military] elite on the general design, objectives, and tactics of public policies”, ranging from the most general agreement on the rules of the game to positions on more specific cases. In turn, it was measured in a more diffuse way through votes and opinions published in newspapers, memoirs, legal decisions, academic studies and specialized journals dealing with law, the military, and military justice (see PEREIRA, (2005) p. 10).

26. The judicialization of repression refers to the legal regulation of the treatment of political prisoners and implies the existence of political trials.

27. While the number of deaths and disappearances in Brazil was less than 500, in Chile the rate was somewhere between 3,000 and 5,000, and in Argentina between 20,000 and 30,000 people. As for the number of political trials, Brazil's ranks highest among the three countries: there were more than 7,000 cases that resulted in appeals to the Superior Military Court (STM) alone. In Chile, there were around 6,000 cases judged by extraordinary military courts, and in Argentina, barely 350. The ratio between trials in military courts and extrajudicial killings is estimated at 23:1 in the Brazilian case, 1.5:1 in the Chilean case, and an alarming 1:71 in the Argentinean case (see PEREIRA, (2005) p. 21).

Apart from putting a brake on the political regime by imposing a procedure for the treatment of the political opposition, the law offered resistance to the political regime in other ways. These are, at least: (i) the use of norms already existing in the pre-authoritarian judicial system, casting doubt on the legality of new national security measures, (ii) the relatively high acquittal rate of defendants, and (iii) the system's permeability to the theses of defense lawyers and to public opinion.

First, the remarkable continuity of the use of legal norms previously employed by the pre-authoritarian judicial system reveals a conservative<sup>28</sup> tendency in the military justice system under the dictatorship. Some provisions on jurisdiction and organization for political trials were inherited in part from the period before the regime and, over time, promoted procedural standardization for political prisoners. Moreover, research has indicated a greater likelihood of convictions based on crimes already existent at the time of the coup than those based on the expanding authoritarian legislation<sup>29</sup>.

Second, political prosecutions often did not result in convictions and high sentences. Instead of convicting opponents, the courts appear to have preferred to increase the costs of political opposition. On the part of the security forces, Pereira says that there seems to have been no pressure for military justice to become more punitive, which at the least reveals acquiescence with existing patterns of judicial repression.

Finally, defense lawyers and civil society could also reshape the boundaries of authoritarian legality and criticize the regime. Lawyers used various strategies, some successfully, to free political opponents from conviction. Thus, for example, they pushed for legal interpretations in accordance with human rights, rejecting the framing of certain conducts in repressive legislation. As stated by the author, they achieved a true dialog with judges, and therefore acted as “active shapers” of authoritarian legality, managing to stretch the limits of permissible activities and speeches<sup>30</sup>. Nor was civil society totally demobilized. It was possible, in some cases, to publicly criticize the military courts, which sometimes heard the claims and conducted new trials.

---

28. Pereira also uses the distinction between the different ideological inclinations of dictatorships to build his argument, proposing that there are two basic types of dictatorship: conservative and revolutionary. In political practice, dictatorships would oscillate between the two poles over time, which demonstrates their non-definitive character. In a conservative dictatorship, “an already existing legal entity authorizes the dictatorship, the old constitution remains a point of reference, and the dictatorship does not exercise legislative powers”. In contrast, the revolutionary dictatorship “rejects the need for legal continuity, conjoins executive and legislative power, and attempts to legitimate itself by invoking the ‘will of the people’ or the revolution rather than the prior constitution” (see PEREIRA, (2005) pp. 32, 68).

29. PEREIRA (2005) pp. 84-9.

30. PEREIRA (2005) p. 156.

The experience of the Brazilian military dictatorship thus exemplifies the use of law far beyond a mere veneer on the raw exercise of political power. In opposition to the idea that in the past authoritarian leaders did not use democratic and constitutional language, dictatorial Brazil shows how “authoritarian legality” was able to hold political repression back, even if, in terms of legal architecture, the system was disturbed by the coexistence of a constitution with unconstitutional presidential decrees, the institutional acts<sup>31</sup>.

And Brazil is far from being an exception. Past political regimes have been fully acquainted with the use of law to destroy democracy from within. It would go far beyond the purpose of this article to extend the analysis of past legalities to other regimes, but I have argued elsewhere<sup>32</sup> that it is possible to draw up a catalog of functions that the law has exercised in past non-democratic regimes, for instance:

i. law as a façade for the exercise of power, which implies concern for the maintenance of a formal legality, but the actual distortion or perversion of it, as stated by Linz (2000);

ii. law as a tool for the regime's ideology, which refers to the use of legal forms to implement the regime's purposed morality – in slogans, law and morality should be seen as in a sense identical<sup>33</sup>;

iii. law as a means for the maintenance of capitalism, alluding to the segregation (adopted by National Socialism, according to Fraenkel (2017)) of two spheres of legality, one of which would serve the development of capitalism;

iv. law as a mode for the organization of power, which applies to regimes in which a non-monolithic coalition of power takes control of the government and, consequently, mechanisms must be ensured that promote decisions and outcomes acceptable to all parties; and

v. law as an instrument of resistance, as already shown in the work of Pereira (2005) on the Brazilian dictatorship.

---

31. For further reading on this matter see BARBOSA (2009).

32. See BARRETO (2022).

33. Citing a speech by Hitler, FRAENKEL (2017) pp. 110, 111 points out that beyond the relationship between law and ideology, the very relationship between law and morality is affected in totalitarianism. In the Third Reich, “law and morality are identical.” This, however, could mean either the subordination of law to the imperatives of morality or the opposite, considering valid only the morality that is in accordance with the norms of law. In the case under examination, there would have been an assimilation of morality – which is also reflected in ideology – to National Socialist law, so that anything that did not conform to it would not be considered valid law. Law, in this sense, would not have an “intrinsic value”; rather, it would – like morality – be at the service of the ethnic community.

Acknowledging this still experimental catalog helps us not to make the “originality mistake” found in the literature on “autocratic legalism”. According to this literature, as already formulated (but not in these terms), the new authoritarianisms – unlike the authoritarianisms of the past – would use the language of law and democracy to counter liberalism. In another formulation, they make use of abusive forms of law to undermine democracy, but not openly as occurred in the past. Thus, they would use ambiguously constitutional means to erode democratic political regimes.

The “originality mistake” can be demonstrated in both historical times and contemporary events; I have already discussed the past and now I turn to the present. In the following section, I report the recent Brazilian experience to make this second point to counter Scheppele’s argument. My aim is to show that the institutional engineering of non-democratic regimes does not necessarily demand consensual instances of the exercise of power, notably in Parliament<sup>34</sup>. Instead of autocratic legalism, in contemporary Brazil we could suggest the existence of an autocratic *infra*-legalism<sup>35</sup>.

This does not mean, however, that the diagnoses made by the literature on “autocratic legalism” are completely wrong. Comparing historical regimes with those of the present, we can say that current strategies for implementing non-democratic projects are more sophisticated in legal terms than were those of the past, but this is not to say that in the past there was no strategy at all.

## 5. Autocratic *infra*-legalism in contemporary Brazil

When Scheppele alludes to “autocratic legalism”, she does not restrict the concept strictly to “laws”. Indeed, the author recognizes that the authoritarian playbook can make use not only of laws, but also of constitutional amendments and institutional reforms<sup>36</sup>. My contention is that the recent autocratic experience in Brazil made use not only of laws and constitutions for the implementation of its authoritarian projects, but also – indeed principally – of unilateral administrative instruments; hence the term “autocratic *infra*-legalism”. Examples of instruments employed by autocratic *infra*-legalism include: *executive orders* (in Portuguese, “decretos”), *ordinances* (“portarias”), *normative instructions* (“instruções normativas”), and even *emergency decrees*<sup>37</sup>. Other researchers have been expanding studies on this matter; Sá e Silva,

---

34. This argument is stated by VIEIRA *et al.* (forthcoming).

35. The exercise of authoritarian action through decrees has also been diagnosed, for example, by Helena Alviar García in the context of Colombia and Ecuador (see ALVIAR GARCÍA (2020)).

36. In referring to institutional changes, the author has in mind mainly the legal tools used for packing the courts (see SCHEPPELE (2018) p. 574).

37. *Provisional measures or emergency decrees* (in Portuguese, “medidas provisórias”), although unilaterally issued by the President of the Republic, are valid for 60 days, extendable only once for a further 60 days – according to Article 62, §3, Federal Constitution – and must be approved by the

for instance, point to sociological foundations of the contemporary illiberal turn in legislation<sup>38</sup>.

On the one hand, we may think that the existence of an autocratic *infra*-legalism denotes a radicalization of the authoritarian experience. After all, the fact of no longer resorting to Parliament – the consensus-building *locus* par excellence in the democratic system – as the arena of normative genesis and dispute, but making use instead of the administrative bureaucracy, which is the habitual arena for sheer norm execution, is a clear indication of a turn towards unilateralism. That is, instead of seeking to co-opt parliamentarians or to articulate consensus with the other branches of government, the Executive power simply shifts its efforts to the implementation of a unilateral authoritarian agenda.

Hypothetically, we could argue that the change of the *locus* where laws are generated would not represent a radicalization of the authoritarian experience, but rather the opposite. Instead of achieving authoritarian radicalization by changing the constitution and the laws for its own purposes, the Federal government would opt for a more conservative strategy of “respecting” hierarchically higher norms, operating instead at the administrative level supported by the mask of administrative discretion. The result, in the end, is the same: the hollowing out of constitutional and legal content by improper means, dressed up as mere regulation of the norms via administrative tools.

In the next section I will attempt to systematize the characteristics of Brazilian autocratic infra-legalism diagnosed above. Before doing so, however, I would like to stress that it would be incorrect to give Jair Bolsonaro entire credit for the recent Brazilian authoritarian experience. As already signaled in the previous section, Brazilian authoritarianism is a complex historical legacy.

Pereira states, for example, that the Brazilian transition to democracy was incomplete, leaving an important “authoritarian legacy”. In this sense, the tendency towards institutional continuity and the maintenance of corporate interests is a hallmark of the country. According to the author, several institutions remained after the regime transition, and instead of abrupt ruptures, there would have been, in fact, the adaptation of already existing institutional practices to the new scenario. The judiciary and the military, which built a consensus on patterns of repression during the dictatorship, would have been major winners in the transition, maintaining their prerogatives and ways of functioning, while the transitional justice established in the country was very limited.

---

National Congress or they lose effectiveness. They are the proof *par excellence* of the maintenance of considerable legislative power by the President of the Republic, which was widely used during the military dictatorship (see FIGUEIREDO and LIMONGI (2001)).

38. SÁ E SILVA (2022).

At this juncture, the author remarks on a paradox. If the judiciary managed to some extent to contain political repression during the dictatorship, it also restrained the transition to democracy; in other words, the judicial institutions also limited democratic desires at the end of the regime. This may perhaps be explained precisely by their conservative character: judicial conservatism not only limits authoritarian repression, but also entrenches bureaucratic interests and hinders change. With the democratic transition, the same judicial players that guaranteed human rights to defendants proved averse to deepening democracy.

Other authors refer to the incompleteness of the rule of law in Brazil, or its (in) effectiveness after democratization. O'Donnell<sup>39</sup>, for example, affirms that in several Latin American countries the incompleteness of the State, and especially of the rule of law, has even increased during periods of democratization. Economic crises and anti-statist economic policies account for this incompleteness, being the motto of the late 20th century. Several problems affecting these countries – including Brazil – are involved in this diagnosis; they could be summarized as: (i) flaws in the existing law, which may be discriminatory to minorities; (ii) deficient or non-existent application of the law; (iii) difficulties in the relations between the bureaucracy and “ordinary citizens”; (iv) precarious access to the judicial system and fair process; (v) sheer lawlessness in regions far from political centers and in urban peripheries; and (vi) renegotiation of the boundaries between formal and informal legalities, based on very unequal power relations and abundant violence. In sum, if it is true that there were political developments tending towards democracy, it is also true that the latter concept did not spread to all spheres of social life in Brazil. In this sense, democratizing the rule of law would be an urgent task.

It cannot be ignored that authoritarianism has deepened substantially in Brazil in recent years. Other important historical milestones prepared the ground for Jair Bolsonaro's rise to power. The 2013 protests; the rejection of the electoral result in which Dilma Rousseff was elected president in 2014, by her main opponent (Aécio Neves); and Rousseff's impeachment without legal basis<sup>40</sup> in 2016, all certainly paved the way for the 2018 electoral result that led Jair Bolsonaro to the presidency of the republic<sup>41</sup>. Since then, however, there has been a substantial decline of democratic values, widely denounced by international rankings that measure the quality of democracies. According to the annual report of the Varieties of Democracy institute (V-DEM), for example, Brazil was one of the ten countries with the highest autocratizing trends in 2020, characterized by fake official campaigns, government censorship, and re-

---

39. O'DONNELL (1998).

40. On this matter, see MEYER (2018).

41. See NOBRE (2022).

striction of press freedom<sup>42</sup>. Meanwhile the organization Reporters without Borders stated that, for the first time in two decades, Brazil had entered the “red zone” of press freedom, being considered “difficult” for journalistic work<sup>43</sup>.

### 5.1. Unilateralism as a method

The use of administrative tools to exercise normative power, at least during the first two years of the presidential term, implies unilateral conduct by the Executive branch<sup>44</sup>, to the neglect of negotiation with other political branches, notably the Legislative. In this scenario, the Legislative and Judicial branches should act as brakes on the normative activity of the Executive; however, as Vieira et al. (forthcoming) and Marona and Magalhães (2021) point out, the Federal Supreme Court (STF) only began to acquire real control over the government's agenda after the beginning of the pandemic<sup>45</sup>.

It would be misleading to squeeze the whole range of strategies employed by the Federal government to implement its political project into the framework of unilateralism. Certainly, other forms of action are recorded, some of which even presuppose interlocution with other political actors. The activation of an authoritarian rhetoric illustrates this point. In the field of the environment, for example, Kathryn Hochstetler claims that the speeches of the president and his ministers promoted the expansion of predatory practices by loggers and deforesters<sup>46</sup>. On more than one occasion, Jair Bolsonaro and the former Environment Minister Ricardo Salles rejected inspections promoted by the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) and supported illegal practices<sup>47</sup>. My goal, however, is to flesh out the idea of autocratic *infra-legalism* in Brazil. I will therefore limit my remarks here to some of the strategies that make up this particular government toolbox, with special focus on administrative practices.

---

42. ALIZADA *et al.* (2021).

43. “2021 World Press Freedom Index”, *Reporters without Borders*, May 28th, 2021, <https://rsf.org/en/ranking>.

44. It is true that a lot has changed since Bolsonaro's first two years in office. The changes, however, cannot be thoroughly thematized in this article.

45. VIEIRA *et al.* (forthcoming). MARONA and MAGALHÃES (2021).

46. HOCHSTETLER (2021).

47. On July 17<sup>th</sup>, 2019, for example, Ricardo Salles gave a speech in support of loggers in Espigão D'Oeste (in the State of Rondônia), two weeks after they burned a tanker truck belonging to IBAMA inspectors. On November 5<sup>th</sup>, 2019, the president promised measures against IBAMA's enforcement actions in a conversation with miners. To track these measures, see “Emergency Agenda”, *Centro de Análise da Liberdade e do Autoritarismo*, May 28th, 2021, <https://agendadeemergencia.laut.org.br/en/>.



Brazilian researchers have already diagnosed this shift in government action toward unilateralism under the presidency of Jair Bolsonaro, who took office in January 2019. Magna Inácio, for example, claims that “administrative unilateralism” coupled with the “politicization of the Executive” is one of the main presidential strategies, stating that it is characteristic of presidential action to go “beyond the discretion delegated to the president”, as can be seen in the large number of executive orders issued by Bolsonaro. There were, on average, 440.5 executive orders per year in two years, which is higher than the average number of decrees issued during the whole presidential terms of Dilma Rousseff I (2011-2014), Dilma Rousseff II (2015-2016), and Michel Temer (2016-2018)<sup>48</sup>.

Marjorie Marona and Lucas Magalhães, in turn, note a “presidential unilateralism”, as opposed to the presumed normal relationship between the Executive and Legislative branches. This lack of dialog between the two led to checks by the Judicial branch, especially the STF. Lawsuits against the president have been filed at an increasing rate over the course of his term – although they have enjoyed limited success, and that only since the start of the pandemic<sup>49</sup>.

Presidential unilateralism is expressed in diverse spheres of governmental action and implementation of public policies. The norms produced by this practice concern both the rights and duties of citizens *vis-à-vis* the state, and the competencies of different state authorities. Below I discuss three strategies generally applied in the implementation of presidential unilateralism in Brazil, illustrating their use with specific cases. The first refers to the method of implementing unilateralism, and the following two to its content. My intention is merely to explore them, without offering an exhaustive or statistically complete list of their application.

## 5.2. Normative harassment and the hollowing out of legal goals

Normative harassment involves the issue of an abundance of regulatory rules in a given administrative sphere, so as to promote a frantic rate of change in regulatory standards. Changes in regulation can be pernicious because they imply learning and adaptation costs, which impact not only private players, but also the very administrative bureaucracies directly responsible for their application. They can thus cause regulatory confusion and disorientation, which was precisely the case with the series of regulations issued to expand access to firearms and ammunition since the beginning of 2019.

---

48. INÁCIO (2021).

49. MARONA and MAGALHÃES (2021) p. 122.

The Brazilian rules on this matter, established by the Disarmament Statute (Act n. 10.826/2003), stipulated, among other provisions: (i) minimum age of 25 years for the purchase of firearms; (ii) demonstration of actual need to acquire a firearm, associated with psychological and technical handling tests; and (iii) general prohibition of the carriage of firearms, with prescribed exceptions. Several of these exceptions have been relaxed through the series of executive orders, ordinances and normative instructions implemented by the Federal government. It is no longer necessary, for example, to demonstrate the actual need to own a firearm, which is now presumed; nor is it necessary to pass a technical capacity test to acquire the possession of a firearm as a collector, shooter or hunter.

A report from August 2020 revealed that the Federal government had issued at least 23 regulations in the weapons sector up to that date, some of which did not remain effective for more than a few days; one of them did not even last 24 hours<sup>50</sup>. A parallel report indicated that, up to February 2021, 14 decrees on firearms and 15 ordinances on ammunition had been issued. As Ludmila Ribeiro and Valeria Oliveira point out, the government was in a hurry to change legal provisions through infra-legal channels, leading to several lawsuits in the STF and the National Congress<sup>51</sup>. When the norms issued were on the verge of being subjected to Legislative and Executive control, the Federal government opted to revoke them preventively<sup>52</sup>.

Finally, normative harassment can lead to the frustration of purposes established by higher norms, such as laws and even the Constitution. In the case of the Disarmament Statute, for example, the idea was to contain and control the carriage and possession of firearms in the country, as was widely recognized at the time of its promulgation (2003), in response to the high number of deaths and the massive circulation of small weapons. The successive issuing of executive orders, normative instructions and ordinances in the sector ended by subverting its basic principle. The maximum number of rounds of ammunition that could be purchased annually by an individual was increased by 3,200% in 2020. The previous maximum was 200 units per year; under Interministerial Ordinance n. 1634, issued in April 2020, the limit was raised to 550 per month<sup>53</sup>.

---

50. Executive Order n. 9,844/2019, issued and revoked on June 25<sup>th</sup> of 2019.

51. RIBEIRO and OLIVEIRA (2021).

52. This was the case when Executive Order n. 9,847/2019 was issued on June 25<sup>th</sup>, 2019. It repealed Executive Orders n. 9,844/2019, 9,797/2019, and 9,785/2019.

53. In March 2021, Interministerial Ordinance n. 1.634/2020 was annulled by a decision by the Federal Court of São Paulo.

### 5.3. Structural changes in institutions and attributions of control bodies

On the first day of his term – January 1st, 2019 – President Jair Bolsonaro issued an emergency decree that reorganized the Federal Executive Branch. Among its 86 articles, it decreased the number of existing ministries, transferred competence over the demarcation of indigenous and *quilombola* lands from the Ministry of the Environment to the Ministry of Agriculture, and established that the Secretary of Government should “supervise, coordinate, monitor and accompany the activities and actions of international organizations and non-governmental organizations in the national territory”. Although the transfer of competence over land demarcation and the monitoring of NGOs did not remain valid for a considerable amount of time, being barred by the National Congress when the emergency decree was converted into law, these measures had already set the tone of the government’s relationship with civil society and with minorities that historically have struggled for recognition<sup>54</sup>.

This emergency decree was a prelude to the government’s unilateral stance in the coming years. In environment policies, for example, there were numerous infra-legal changes. The Minister of the Environment even defended regulatory simplification and the relaxation of checks during the pandemic, taking advantage of the reduced media coverage on matters not related to COVID-19<sup>55</sup>.

The government effectively implemented several changes by means of ordinances, executive decrees, and similar tools. According to the Public Acts Monitor initiative, “*Política por Inteiro*”, at least 89 acts of institutional reform and 79 of flexibilization and deregulation were issued between 2019 and 2020<sup>56</sup>. Prominent among the changes are those relating to appointments in institutions responsible for environmental inspections, and their attributions; for example, the dismissal of the managers of IBAMA and the Chico Mendes Institute for Biodiversity Conservation (ICMBio) in February and October 2019 respectively, and their replacement by persons without technical qualifications. This trend is also illustrated by the unprecedented subordination of IBAMA’s powers of inspection in the Amazon Forest to the Ministry of Defense in May 2020, which resulted in lower enforcement of fines despite the larger number of inspectors employed.

---

54. Throughout the first two years of his term, the president made speeches alluding to the deleterious character of NGOs, issued an executive order extinguishing participatory councils, and tried again to transfer the competence for demarcating indigenous and *quilombola* lands (via Emergency Decree n. 886/2019), which is forbidden by the Constitution and was suspended by the STF (see CASTRO *et al.* (forthcoming 2023).

55. This speech, given in a Ministerial Meeting on April 22<sup>nd</sup>, 2020, became a hallmark of the anti-environmental policies adopted by the government.

56. Between 2019 and 2020, the government issued 568 ordinances, 118 executive orders, 112 resolutions and 58 normative instructions (see “Monitor de Atos Públicos”, *Política por Inteiro*, May 28<sup>th</sup>, 2021, <https://www.politicaporinteiro.org/monitor-de-atos-publicos/>).

The acts reported above concern decreases in the supervisory competencies or capacities of public bodies. The creation of institutional controls in disagreement with Brazilian and international regulatory parameters was also observed. According to Coutinho and Miola, the Secretariat for Competition and Competitiveness Advocacy, linked to the Ministry of Economy, unduly allocated itself the competence to check decisions made by regulatory agencies – which are characterized precisely by their institutional autonomy – through Normative Instruction n. 97/2020<sup>57</sup>. In March 2021, the Secretariat even accepted complaints against the National Land and Waterway Transportation Agencies, for alleged abuse of regulatory power.

#### **5.4. Political-ideological pressure of employees and critics**

Several administrative tools have been mobilized by the Federal government to dissuade political opposition; three of these are: (i) police inquiries and other administrative procedures based on alleged violations of the National Security Law (Act n. 7.170/1983, dating from the military dictatorship); (ii) technical notes limiting the expression of public servants in social networks, as well as dossiers on the ideological profiles of public servants and of government critics; and (iii) official letters and ordinances requiring prior approval by higher hierarchical levels for institutional and scientific publications.

The number of police inquiries opened for alleged violations of the National Security Law increased by 285% between 2019 and 2020<sup>58</sup>. Among the accused were journalists, digital influencers, opposition politicians, demonstrators, the Supreme Court Justice Gilmar Mendes, and even a young man who sarcastically tweeted about a presidential visit to the city where he lived. Public servants in the Health Ministry with access to the office of the former Health Minister (and serving army general) Eduardo Pazuello were also threatened with application of the law; they were constrained by means of a confidentiality agreement from disclosing any information coming from Pazuello's office.

In addition to being targeted by the National Security Law, public servants have also been targeted for manifestations on social media. In May 2020, the Ethics Commission of IBAMA issued a technical note warning public servants on this matter. In the following month, the Office of the Comptroller General also issued a note stating that Federal employees who published opinions on “internal affairs” or “critical manifestations” relating to the agencies to which they belong would be subject to disciplinary measures. In the very same month, the Economy and Health Ministries took a similar stance. Moreover, in July 2020 it was made public that a secretariat of

---

57. COUTINHO, and MIOLA (forthcoming, 2023).

58. GODOY (2021).

the Ministry of Justice had drawn up a secret dossier on the alleged “anti-fascist” leanings of 579 Federal and State security officials.

Last but not least, Federal government agents have imposed limits on the institutional publications of specific agencies. In September 2020, for example, the then Secretary of Culture, Mario Frias, sent an official letter to all agencies linked to his portfolio, determining prior control of the Secretariat over all changes and relocation of personnel, auction notices, and publications on websites and social networks. In March 2021, a press investigation revealed that the president of a foundation linked to the Ministry of Economy, the Institute for Applied Economic Research (IPEA), sent a letter to its directors establishing the need for “final approval” for the disclosure of studies and research, under penalty of disciplinary infraction. In the same month, an ICMBio ordinance (Ordinance n. 151, March 10th, 2021) established that all scientific productions of the agency should be evaluated and controlled by the agency's director before publication.

### **5.5. Standards of autocratic legalism and infra-legalism**

Even if the contentions made regarding contemporary events challenge the argument posed by Scheppele in *Autocratic Legalism*, they do not imply its simple rebuttal. This is because the purpose of the author seems to be more than anything to experiment: she does not encapsulate her diagnosis with a wide range of quantitative data. Instead, she seems to be more interested in outlining some features of the phenomenon she observes. The analysis does not present extensive quantitative data; it is based on some striking impressions of the operative changes in legal systems – such as those concerning constituencies and electoral rules. This explains why there is plenty of space to build on the original features sketched by the author.

Here, I will simply mention two points for consideration – that may either challenge the original outlines of the diagnosis given by Scheppele or add more complexity to the original proposal. First, although the author names various presidents or prime ministers of countries as autocratic legalists, she does not expressly state that they are the exclusive formal proponents of legal and constitutional changes. It is to be conjectured that, besides probably requiring coalitions between the Executive and Legislative branches, the autocratic changes considered may even have been formally initiated by proposals of parliamentarians.

This raises the second point for consideration: the role of the Legislative branch in autocratic change. It is conceivable that it may be an agent of such autocratizing changes, and this reading does not appear to be excluded from Scheppele's (2018) proposal, even if the author only mentions this power in passing. It may be noted that articulation between the Executive and Legislative branches can take place in very

different ways in the countries analyzed: Hungary, for example, has a parliamentary system of government, which certainly differs widely from the Brazilian presidential system.

Even allowing for these differences, we may note that there are agency elements of the Brazilian Legislative branch that deserve to be considered in this context. For example, the loosening of rules for attendance at voting sessions of the Brazilian parliament, triggered by COVID-19, has resulted in higher quora and greater ease in passing bills. Furthermore, in May 2021 the so-called “filibuster kit” was approved, diminishing the obstruction power of minorities in the Lower House — such as the speaking time of opposition deputies and the possibility of extending Legislative sessions. Arthur Lira's (Lower House Speaker) handling of the recently approved electoral reform (EC 111/2021) was also target of criticism, given the speed of its Legislative process in the shadow of public debate. In July 2022 a new constitutional amendment was approved (PEC 01/2022, also called the “Kamikaze amendment”), which altered electoral rules to benefit the incumbent only three months ahead of the elections.

## 6. Concluding remarks

In the current debate about an alleged crisis of constitutional democracies, it is not uncommon for authors to proclaim the phenomena observed as if they had no precedent. I call this the “originality mistake” and have demonstrated it in two different periods, based on past and present experiences in Brazilian politics.

I contest Professor Kim Lane Scheppele's argument on at least two points. First, that it relativizes the idea that past authoritarian leaders – or the lessons learned from them – tend to disregard the importance of law in the consolidation of non-democratic regimes. Today's authoritarian leaders are depicted as shrewd manipulators of the law in favor of their power projects, and the echoes of what was experienced in the past are sometimes caricatured as if they offered no parallel with the current situation. In fact, law has also been used in non-democratic regimes of the past, and this article has indicated some functions that it served.

Second, that it broadens the range of legal strategies already mapped according to the authoritarian playbook: not only have constitutions and laws become important arenas of normative dispute, but administrative tools also have become means for the implementation of authoritarian projects. This article has presented three strategies employed to consolidate autocratic infra-legalism in Brazil, namely, normative harassment – with consequent frustration of original legal purposes; changes in the institutions and competencies of control organs; and political-ideological pressure on civil servants and critics. This exploratory mapping, somewhat impressionistic, reveals an important research agenda, to be expanded in the future. After all, only by knowing the causes of democratic decline can we defend ourselves against it.



## 7. Postscript

The analyses used to write this article were based mainly on facts occurring between 2019 and 2021. In the presidential election held in October 2022, Jair Bolsonaro was not returned to office; this was unprecedented in the current Brazilian political system, which establishes four-year terms of office and allows for a single re-election. It was the first time a president had not been re-elected since re-democratization (1985). The effects of Bolsonaro's autocratic infra-legalism on the electoral result have yet to be analyzed. It probably affected the result in a variety of ways, based on the strengths and the weaknesses of his government; our readings will depend on the perspective from which we analyze the situation. Moreover, not only did autocratic infra-legalism have multiple effects on Bolsonaro's loss, but the loss itself may without doubt be attributed to multiple factors.

It would be misleading to suggest that the impact of Bolsonaro's method on the election result was exclusively positive or negative. It depends, among other things, on the audience under consideration, the goals assumed for his actions, and his prior achievements. If it is true that Bolsonaro lost, it is also true that his loss triggered a series of demonstrations and rallies around the country, which culminated in the invasion of "Three Powers Plaza" in Brasilia – where the apex bodies of the Legislative, Executive and Judiciary powers are located – and the depredation of its public institutions.

If we analyze the general populace, Bolsonaro's assault on democratic and legal institutions drew attention across the country, provoking institutional reactions to protect democracy. Many national and international scholars, think tanks, activists, politicians, and journalists rang the alarm bells for Brazilian democracy, and this attention was converted into reports, articles, books, and political statements against the course of his administration. The Bolsonaro government was also brought before international courts (Permanent People's Tribunal, International Criminal Court) for gross violations of rights of indigenous peoples and other minorities during the pandemic, and for his attacks on the Amazon Forest. National courts are also investigating the now ex-president; he is the target of six inquiries (five from his actions as president – for political interference in the Federal Police, disclosure of state information, support of "digital militias", fake news on the voting system and ballot integrity, and fake news on COVID-19; and one for his role in the Brasilia riots after President Lula's inauguration). In this sense, his political behavior weakened his electoral strength, and a significant part of this behavior was modeled by his autocratic infra-legalism. Administrative decrees and other infra-legal measures (such as ordinances and normative instructions) – or precisely the lack of them – framed allegations of Bolsonaro's interference in the Federal Police, his neglect of vulnerable minorities during the pandemic, his pandemic denialism as a whole and the de-regulation of Amazon



protection, among others. In other words, his autocratic infra-legalism weakened his power and led to his electoral defeat.

On the other hand, Bolsonaro's radical conduct increased the loyalty of a part of the electorate. This "Bolsonarista" fringe saw his administrative measures, political stances and other official acts as a powerful new way of governing, in which constitutional and legal ties, or their "spirit", could be abandoned in order to bring about "real freedom" or "real democracy". That is to say, for the loyal Bolsonaro audience, his true believers, the ex-president's method was positive: it was important in cementing their loyalty and radicalizing their attitudes. After his electoral defeat, his supporters gathered outside army barracks and called for military intervention. Worse, on January 8th, 2023, they invaded Congress, the Supreme Court and the Presidential Palace – all located in the Three Powers Plaza, in Brasilia – and caused extensive damage, in an unprecedented and open assault on democratic institutions. From this perspective, his political behavior strengthened and radicalized his electoral base.

By the same token, it would be misleading to say Bolsonaro's electoral loss can be attributed exclusively to his "failed" autocratic infra-legalism and had an entirely negative impact on his political career. In a sense, for his extreme supporters Bolsonaro lost despite his autocratic infra-legalism. The former incumbent did everything he could to change the Brazilian legal system and hollow it out from the inside. Indeed, he even co-opted the Federal Highway Police to such an extent that, on the second-round election day, they attempted to hinder people from voting by means of illegal roadblocks and other practices, against the orders of their superiors. This occurred in poor areas of the country, known historically to be populated by Lula voters.

Bolsonaro also radicalized his method immediately before the elections, adopting a script common to many of the "legalistic autocrats" depicted by Kim Lane Scheppele. For example, he pushed for a constitutional amendment – known as the "Kamikaze amendment", because of its radical fiscal effects – to declare a state of emergency in the country due to high fuel prices. Under this amendment, parallel fiscal rules were created that allowed faster, increased and exceptional cash transfers to vulnerable groups, which may be seen as abuse of political power.

Furthermore, he used the institutions to promote his government before the campaign period – which is forbidden by Brazilian law – and cast doubt on the integrity of ballot boxes among international authorities, a trademark of Trumpist denialism and authoritarian rule not frequent among East European countries. On the other hand, Hungary, for example, had already made deep changes to electoral rules that could threaten the Orbán's authoritarian government, making it unnecessary for the government to cast doubt on the ballot boxes. Nonetheless, conspiracy theories are a commonality seen both in the Trump/Bolsonaro brand of authoritarianism, which denies electoral integrity, and the Orbán brand, which frequently alludes to the hostile plots of international agents.

Moreover, as observed by Timothy Power and Wendy Hunter<sup>59</sup>, Bolsonaro left office in an extremely polarized country, and only 1.8% separated him from Lula in the second-round vote. The states of São Paulo, Rio de Janeiro, and Minas Gerais, which contribute a large percentage of Brazil's GDP, also voted to be governed by pro-Bolsonaro politicians. So, the horizon is grayer than it appears, despite the immediate relief of Lula's victory.

Some optimistic scholars are already proclaiming that autocratization is being defeated or that populism is not so dangerous and strong as it seemed to be<sup>60</sup>. Others doubt that democratic backsliding was global at all<sup>61</sup>. There are also studies on how to re-build democracy – democratic “front-sliding” is a wisely constructed parody by Aziz Huq and Tom Ginsburg (despite their eloquent silence on the Brazilian context)<sup>62</sup>. Only the future will show which of these diagnoses holds good, but it is certainly not realistic to down-play still standing (and politically unconvicted) figures such as Bolsonaro and Trump. It looks more like wishful thinking and a form of reverse denialism.

### **About the author**

Marina Slhessarenko Fraife Barreto es estudiante de doctorado en ciencias políticas de la Universidad de São Paulo (USP) y licenciada en derecho por la misma universidad. Es investigadora del núcleo Derecho y Democracia del Centro Brasileño de Análisis y Planificación (CEBRAP) y del Centro de Análisis de la Libertad y el Autoritarismo (LAUT). Estudia teoría crítica, fascismo y teorías democráticas.

Marina Slhessarenko Fraife Barreto is a Phd student in political science at the University of São Paulo (USP) and holds a bachelor's degree in law from the same university. She is a researcher at the Law and Democracy cluster of the Brazilian Center for Analysis and Planning (CEBRAP) and at the Center for the Analysis of Liberty and Authoritarianism (LAUT). She studies critical theory, fascism, and democratic theories.

---

59. POWER and HUNTER (2023).

60. WEYLAND (2022).

61. LITTLE and MENG (2023).

62. HUQ and GINSBURG (2022).

## References

- ARANTES, Rogério (2021): “*STF e constituição policy-oriented*”. In: *SUPREMA: Revista de Estudos Constitucionais*, Brasília, vol. 1, n. 1, jan/ jun 2021, p. 299-342.
- AUTHOR (2022): “*Funções do direito em regimes não democráticos do século XX*”. In: *Leviathan*, Universidade de São Paulo, Brasil, vol. 19, jan/abr 2022, pp. 1-43.
- ALIZADA, Nazifa *et al.* (2021): “*Autocratization turns viral: Democracy Report*”. Gothenburg: Varieties of Democracy Institute (V-Dem).
- CASTRO, Henrique *et al.* (forthcoming). “*Espaço Cívico Sob Bolsonaro: Fechamento e Resiliência Institucional*”. In SILVA, Fábio Sá *et al.*: *A tool of autocracy or a force of resistance? Deciphering law's place in Brazil under Bolsonaro* (DC: FGV University Press and the Woodrow Wilson Center for International Scholars).
- ALVIAR GARCÍA, Helena (2020): “*The Legal Architecture of Populism: Exploring Antagonists in Venezuela and Colombia*”. In : NAUMAN, Gerald L. *Human Rights in a Time of Populism* (Cambridge: Cambridge University Press), pp. 81-99.
- BARBOSA, Leonardo (2009): “*Mudança Constitucional, autoritarismo e democracia no Brasil pós-1964*.” PhD diss., University of Brasilia.
- BARROS, Robert (2004): *Constitutionalism and Dictatorship. Pinochet, the junta, and the 1980 Constitution* (Cambridge: Cambridge University Press).
- BROOKER, Paul (2014). *Non-Democratic Regimes* (New York, Red Globe Press).
- COUTINHO, Diogo and MIOLA, Iagê (forthcoming). “*Alma gêmea ou vendida pro diabo? O estado regulador entre autoritarismo e neoliberalismo no governo Bolsonaro*.” In SILVA, Fábio Sá *et al.*: *A tool of autocracy or a force of resistance? Deciphering law's place in Brazil under Bolsonaro*, (DC: FGV University Press and the Woodrow Wilson Center for International Scholars).
- FIGUEIREDO, Argelina and LIMONGI, Fernando (2001): *Executivo e legislativo na nova ordem constitucional* (São Paulo FGV Editora).
- GINSBURG, Tom, and SIMPSON, Alberto (2014): *Constitutions in Authoritarian Regimes* (Nova Iorque: Cambridge University Press).
- GINSBURG, Tom, and HUQ, Aziz (2022): “The Pragmatics of Democratic Front-Sliding,” In *Ethics & International Affairs*, vol. 36, n. 4, pp. 437-453.
- GODOY, Marcelo (2021): “Inquéritos da PF com base na Lei de Segurança Nacional crescem 285% no governo Bolsonaro”, *Estado de S. Paulo*, 19 de março de 2021. Retrieved from: <https://www.estadao.com.br/politica/inqueritos-da-pf-com-base-na-lei-de-seguranca-nacional-crescem-285-no-governo-bolsonaro/>.
- HELMKE, Gretchen and LEVITSKY, Steven (2004): “*Informal Institutions and Comparative Politics: A Research Agenda*.” In *American Political Science Association: Perspectives on Politics, Gainesville*, vol. 2, n. 4, Spring 2004, pp. 725-744.

- HOCHSTETLER, Kathryn (2021): “O meio ambiente no governo Bolsonaro”, In: AVRITZER, Leonardo: *Governo Bolsonaro. Do retrocesso à degradação política* (Belo Horizonte, Autêntica), pp. 71-287.
- INÁCIO, Magna (2021): “Poder executivo: presidência e gabinete”. In AVRITZER, Leonardo: *Governo Bolsonaro. Do retrocesso à degradação política* (Belo Horizonte, Autêntica), pp. 67-83.
- LANDAU, David (2013): “Abusive Constitutionalism.” In: UCDL Rev., vol. 47, pp. 188-260.
- LEVITSKY, Steven and WAY, Lucan (2010): *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (Cambridge: Cambridge University Press).
- LINZ, Juan José (2000): *Totalitarian and Authoritarian Regimes* (Colorado: Lynne Rienner).
- LITTLE, Andrew T. and MENG, Anne (2023): “Objective Measurement of Democratic Backsliding”. SSRN manuscript.
- MARONA, Marjorie and MAGALHÃES, Lucas (2021): “Guerra e paz? O Supremo Tribunal Federal nos dois primeiros anos do governo Bolsonaro”. AVRITZER, Leonardo: *Governo Bolsonaro. Do retrocesso à degradação política* (Belo Horizonte, Autêntica), pp. 121-135.
- MEYER, Emilio Peluso Neder (2018): “Judges and Courts Destabilizing Constitutionalism: The Brazilian Judiciary Branch’s Political and Authoritarian Character”, In: *German Law Journal*, vol. 19, n° 4 (July 2018): pp. 727-768.
- MÜLLER, Jan Werner (2011): *Contesting Democracy: Political Ideas in Twentieth Century Europe* (New Haven, CT, Yale University Press).
- NOBRE, Marcos (2022): *Limits of democracy: from the June 2013 Uprisings in Brazil to the Bolsonaro Government* (Cham, Springer).
- O’DONNELL, Guillermo (1973): *Modernization and Bureaucratic-Authoritarianism: Studies in South American Politics* (Berkeley: University of California).
- O’DONNELL, Guillermo (1998): “Polyarchies and the (Un)Rule of Law in Latin America”, In: *Meeting of the Latin American Studies Association*, Chicago, September 1998, pp. 1-41.
- PEREIRA, Anthony W (2005): *Political (in)justice. Authoritarianism and the rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press).
- RIBEIRO, Ludmila and OLIVEIRA, Valeria (2021): “Eu quero que o povo se arme: a política de segurança pública de Bolsonaro”. In AVRITZER, Leonardo: *Governo Bolsonaro. Do retrocesso à degradação política* (Belo Horizonte, Autêntica), pp. 327-343.

- SÁ E SILVA, Fabio (2022): “*Law and illiberalism: A Sociological Review and Research Roadmap*”, In *Annual Review of Law and Social Science*, pp. 1-17.
- SCHEPPELE, Kim Lane (2018): “*Autocratic Legalism*”, In *University of Chicago Law Review* vol. 85, n°. 2, pp. 545-583.
- VIEIRA, Oscar; BARBOSA, Ana and GLEZER, Rubens (forthcoming): “*Populismo Autocrático e Resiliência Constitucional*.” (forthcoming) In SILVA, Fábio Sá *et al.*: *A tool of autocracy or a force of resistance? Deciphering law's place in Brazil under Bolsonaro*, (DC: FGV University Press and the Woodrow Wilson Center for International Scholars).
- WEYLAND, Kurt (2022): “*How populism Dies: Political Weaknesses of Personalistic Plebiscitarian Leadership*,” *Political Science Quarterly*, vol. 137, n. 1, pp. 9–42.