Globalization on the Right

Bolsonarism and the Circulation of Illiberal Legal Ideas

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When Brazilian president Jair Bolsonaro visited Hungary in Februar 2022, he was not only strenghtening political ties to his ideological "brother" Victor Orban, who had already attended Bolsonaro's inauguration in 2018. Bolsonaro's visit also put a spotlight on the transregional circulation of illiberal legal ideas. Over the past decade, conservative, religious and right-wing movements, activists and governments have built transnational networks in which they exchange legal ideas, forge common litigation strategies, and organize mutual intellectual and financial support.

This posts addresses the role of Brazil and Bolsonarism in these networks, and it points to some consequences for the wider research agenda of comparative constitutional law. If this agenda was mainly concerned with the diffusion of liberal constitutionalism and with the external promotion of democracy and rule of law since the 1990s, it now has to reckon not only with the partial reversal of liberalization and democratization, but also with a new wave of legal globalization on the right, in which Europe, North America and the Global South are deeply entangled.

Understanding the ideas, institutions and mechanisms that drive this form of globalization remains important even if an individual leader like Bolsonaro loses elections, as the circulation of illiberal legal ideas does not necessarily depend on, but is precisely intended to outlast, any one illiberal government.

From transnational culture wars to global circulation of illiberal legal ideas

Since the 1990s, comparative constitutional scholars and political scientists have observed the global diffusion of core elements of liberal-democratic constitutionalism, such as human rights, constitutional courts and judicial review, or competitive elections. These ideas have "migrated", or have been "transferred" and "borrowed", through a range of institutions and mechanisms: external advice in constitution-making processes; rule of law reform and democracy promotion projects; financial or membership conditionalities and incentives; international human rights courts like the ECtHR and IACtHR; and transnational advocacy networks formed by NGOs, human rights activists, philanthropic foundations, academics and the like.

More recently, observers have noted that some of these institutions and mechanisms are also involved in the diffusion of legal ideas that seem to contradict liberal values. After the rise of the conservative legal movement inside the US, faith-based groups and conservative legal organisations have taken their activities abroad and engaged in "transnational culture wars", lobbying and litigating for religious freedom and against abortion and LGBTIQ rights in Europe, Latin America and Africa. Comparative constitutional scholars have documented instances of "abusive borrowing" in constitution-making and interpretation, in which constitutional forms are borrowed for illiberal ends. One major example for this is Hungary, which Victor Orban has transformed into an "illiberal democracy" that borrows the form, but not the substance of constitutional democracy.

Nowadays, Hungary has moved on from abusive borrowing to becoming a hub for the global circulation of illiberal legal ideas. It is becoming a node in a global network of conservative, Christian and right-wing lawyers with their own academic institutions, think tanks, conferences and strategic litigation practices. This new form of legal globalization on the right has been bolstered by bilateral relations between like-minded governments like Orban's Hungary, the former

Trump administration, and Bolsonaro's Brazil, but also has an important non-governmental component involving conservative NGOs, faith-based organisations, academic institutions and legal activists that do not depend on formal governmental ties. Renata Uitz recently described on this blog how "illiberals of the world unite in Budapest" at conferences discussing freedom of religion and the persecution of Christians, family rights and anti-abortion- or LGBTIQ-policies, or free speech and woke "cancel culture" – among them prominent conservative lawyers from Brazil.

Brazil and Bolsonarism in the circulation of illiberal legal ideas

During his visit with Victor Orban, Bolsonaro affirmed that Brazil and Hungary shared common values that he summarized in four words: "God, fatherland, family and liberty". The first three – "god, fatherland, family" – were the historical slogan of the *integralistas*, a Brazilianized version of Italian fascism in the 1930s. The slogan, which is also being revived by the Italian far-right and Russian anti-liberal thinkers, illustrates how Bolsonaro taps both transnational and historical reservoirs of authoritarian thinking.

Historically, Brazil has been somewhat of a melting pot of illiberal ideas circulating in the 20th century: In the history of ideas of Brazilian authoritarian constitutionalism, integralism was soon superseded by Getúlio Varga's authoritarian *Estado Novo* (1937-45), whose thought leaders Oliveira Vianna and Franscisco Campos were well versed in Carl Schmitt's critique of liberal democracy. Campos also drafted the legal foundations of the military dictatorship after the 1964 coup, which had in turn been facilitated by the transnational militant anticommunism of the US. These traditions of authoritarian thinking receded with redemocratization under the 1988 constitution, but were not put to rest for good, as is illustrated by Evandro Sussekind's symposium post on the role of the military, Jessica Holl's post on transitional justice, and Geraldo Miniuci's on nostalgia for dictatorship.

Besides these legacies, Bolsonaro's ascent to power was facilitated by more recent socio-cultural changes, notably the rise of evangelical Christian churches as a political force in Brazil and Latin America more broadly. Partly transplantation of US megachurches from the US, partly a homegrown redeployment of popular religion, evangelical churches have grown across Latin America and taken more openly political stances since the 2000s, increasingly mobilizing supporters around legal issues of freedom of religion, abortion and LGBTIQ rights and engaging in strategic litigation all the way up to the Inter-American Court of Human Rights. In Brazil, they have fueled countermovements and conservative lawyering against marriage equality and other LGBTIQ rights. Bolsonaro's alliance with politicised evangelical movements helped him win the election in 2018 and has put considerable stress on constitutional secularism during his presidency, as Rafael Mafei details in his symposium post.

During Bolsonaro's term, Brazilian lawyers have also become increasingly active participants in the transnational networks facilitating the circulation of illiberal legal ideas. A case in point is the "Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family", which the Brazilian government co-sponsored in 2020 with the Trump administration, Hungary, Egypt, Uganda and Indonesia. Described by its promoters as an "international document" created at a "multinational convention", the initiative aims to "restore the true meaning of the concept of human rights" based on four pillars: "Concern for women's health, Protection of human life, Strengthening the family – the basic unit of society, Defense of the sovereignty of nations in creating their own life protection policies". At a follow-up conference in 2021, a keynote speaker was Brazil's "Secretary for the Family" at the "Ministry of Family and Human Rights", a lawyer and law professor at Universidade Presbiteriana Mackenzie.

Another avenue for transnational engagement has been participation in strategic litigation abroad. In the US Supreme Court case *Dobbs v. Jackson Women's Health Organization*, which overturned the decade-old precedent *Roe v. Wade* on abortion rights, 19 Brazilian jurists and legal scholars contributed to an *amicus curiae* brief by a larger group of foreign jurists, which

defended the state law restricting abortion . In the brief, they argued that international law offered no basis for the existence of a human right to abortion but rather protected the unborn as rights-holders, citing, among other legal materials and precedents, the "Geneva Consensus Declaration".

Besides such direct involvement, Brazilian conservative and Christian lawyers have an even longer history of building transnational advocacy networks, as illustrated by their role in the founding and support of the ultraconservative Polish NGO "Ordo Iuris Institute for Legal Culture". Ordo Iuris has become an important element of the societal support structure for the PiS Party's conservative agenda in Poland, and it has engaged in advocacy and strategic litigation before the Polish Supreme Court, the European Committee of Social Rights and the European Court of Human Rights. Ordo Iuris was established in 2013 by a foundation for religious education, which in turn was inspired and financed by a network of Catholic radicals, the Brazilian "Society for the Defence of Tradition, Family and Property", founded in the 1960s in Brazil. According to investigative reports, the Brazilian network learned from the American Christian Right and functioned as a "transmission belt" of the know-how for its Polish institutional offspring.

Finally, Bolsonaro's visit to Hungary marks a further step in the circulation of illiberal legal ideas that goes beyond transnational culture wars. When Bolsonaro visited Orban, both leaders were preparing themselves for re-election, and Orban won his soon after. Observers have noted that Orban has used legal tools to stay in power – constitutional change, voting rights reform, legal and financial restrictions on media, opposition and civil society, legislation against LGBTIQ rights, immigrants etc. – so methodically that they caught the interest of the extreme right in other countries, including Bolsonaro's. At the same time, the Orban playbook proved difficult to transplant into the Brazilian context. As Florian Hoffmann has argued in his symposium post, unlike Orban Bolsonaro never controlled the legislative and judicial branches, let alone the process of constitutional amendment. Yet, this has led Bolsonaro to turn to a different idea now circulating in the global market of anti-democratic ideas, namely the Trump playbook: Bolsonaro has taken to attack the election process itself with unfounded claims of electoral fraud, as Clara Iglesias Keller and Diego Werneck report in their post. If the comparison with the US tells us anything, then this playbook may still do considerable damage to democracy in the long term even if Bolsonaro loses the election.

Comparative constitutional law and globalization on the right

The role of Brazil and Bolsonarism in the circulation of illiberal legal ideas draws attention to the deep entanglements and interdependencies that shape constitutional law across the North-South divide today. Comparative constitutional law thus does well to continue its Southern turn and improve its understanding of different liberal and non-liberal varieties of constitutionalism. This requires the comparative study of authoritarianism, as Philipp Dann argues in his post, as much as analysis of the institutions, mechanisms and hubs that facilitate the global circulation of illiberal and authoritarian legal ideas.

Do these ideas diffuse through the same channels than liberal-democratic ones, or can we observe different dynamics? Do captured constitutional courts engage in "judicial dialogue" with each other? Will we see illiberal democracy promotion projects abroad? Do anti-environmentalist ideas, as detailed in Cecilia Oliveira's and Danielle Rached's post, also globalize through business and corporate networks? And what is the role of Germany in these processes of circulation – how internationally connected are the lawyers of the German new right, and what is the impact of illiberal networks on Germany, e.g. through interventions before the German Constitutional Court?

While these questions require empirical and analytical attention, they also raise normative and ethical issues that are even trickier. What should be the response of comparative constitutionalists to the circulation of illiberal legal ideas? Should it be countered, and by which means? Should we police funding programs for NGOs, research cooperations, scholarship

awards? After all, Victor Orban learned his law, and abusive borrowing, while on a Soros scholarship in Oxford.

One problem with such a policing approach is that what has been summarized under the term "illiberal" thus far denotes a spectrum of ideas ranging from traditional conservative to far right to genuine authoritarianism. A considerable part of this spectrum falls within the realm of legitimate disagreements, or at least within the range of opinions protected by academic freedom, free speech and freedom of religion. What is "abusive borrowing" or "illiberalism" to some is legitimate experimentation with new forms of democracy or a legitimate alternative to neo-liberal, market-radical economic constitutionalism to others, and broadening the epistemic horizon of comparative constitutional law towards the South does require a certain openness for different constitutional experiences, concepts and designs.

Even where we wholeheartedly disagree with "illiberal" ideas, they raise the dilemma of liberal tolerance. Is it wise to impose a "secular fundamentalism" on religious appropriations of human rights law, or should comparatists leave argumentative space for religious experiences to exist in the constitutional language, as has been argued with a view to Christian human rights litigation? Up to which point is the illiberal challenge an opportunity to broaden the appeal and inclusiveness of constitutionalism and to differentiate and sharpen legal arguments, and where do comparatists need to draw a clear line against authoritarian abuse? Such a line is certainly crossed where research cooperation partners are threatened by unfounded criminal complaints in violation of their academic freedom, as has been the case in our joint project and elsewhere. Ultimately, it remains the task for comparative constitutional law to sharpen our understanding of different varieties of constitutionalism and to openly debate their global entanglements and normative implications.

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