

## **Brazil: Democracy on the Edge of Chaos and the Dangers of Legal Disorder**

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With legal order turned into legal disorder and democracy being highjacked by the non-elected sovereign body, political and social life has become a potential field of spoils at the mercy of political adventurers and vultures.



Federal Supreme Court of Brazil

When I began studying the judicial system of various countries, almost thirty years ago, the administration of justice had the least public visibility among the state's institutional dimensions. The big exception was the US, because of the central role played by the Supreme Court in defining the truly decisive public policies. Being part of the sole non-elected sovereign body and given their reactive nature (for as a rule they cannot be mobilized of their own initiative) as well as the fact that they depend on other state institutions (correctional services, public administration) to have their decisions enforced, the courts tended to play a relatively modest role within the organic life of the separation of powers introduced by modern political liberalism, so much so that the judicial function was viewed as apolitical. The reason for that had also to do with the fact that the courts dealt exclusively with individual rather than collective disputes and were designed not to interfere with the ruling classes and elites, which were protected by immunity and other privileges. Little was known about how the judicial system worked, the citizens who typically used it and their purpose in doing so. Since then everything has changed. This was caused, among other things, by the crisis of political representation that hit elected sovereign bodies, by the citizens' growing awareness of their rights, and by the fact that, when faced with political deadlocks in the midst of controversial issues, the political elites began to regard the selective use of the courts as a way of lifting the political weight off certain decisions. Equally important was the fact that the neoconstitutionalism that came out of the second world war assigned a considerable weight to the control of constitutionality by constitutional courts. This novel development lent itself to two opposite readings. According to one reading, ordinary legislation had to be subjected to control in order to prevent it from being instrumentalized by political forces bent on scrapping all constitutional requirements – as had been the case, in the most extreme fashion, with the Nazi and fascist dictatorships. According to the other interpretation, the control of constitutionality was the tool used by the ruling political classes to defend themselves against potential threats to their interests, as a result of the vicissitudes of democratic politics and of “majority tyranny”. Be it as it may, these developments all led to a new kind of judicial activism that came to be known as the judicialization of politics and inevitably led to the politicization of justice.

The high public visibility of the courts over the last decades was largely caused by court cases involving members of the political and economic elites. The major watershed was the series of criminal proceedings known as Operation Clean Hands (Mani Pulite), which struck virtually all of Italy's political class and much of its economic elite. Starting in Milan in April 1992, the operation comprised the investigation and arrest of cabinet ministers, party leaders, members of parliament (with about one third of all members being investigated at one point), businessmen, civil servants, journalists and members of the secret services, variously accused of such crimes as bribery, corruption, abuse of power, fraud, fraudulent bankruptcy, false accounting, and illegal political funding. Two years later, 633 people had been arrested in Naples, 623 in Milan and 444 in Rome. As a result of its having hit the entire political class under whose leadership the country had been governed in the recent past, the Clean Hands investigation shook the foundations of the Italian political system and led to the emergence, years later, of the Berlusconi "phenomenon". Given these and other reasons, the courts of many countries have gained much public notoriety ever since. The most recent, and perhaps the most dramatic of all, to my knowledge, is Brazil's Operation Lava Jato ("Car Wash" – or rather, and literally, "speed laundering").

This anti-corruption operation mounted by the judiciary and the police was first launched in March 2014. Targeting more than a hundred politicians, businessmen and managers, it has gradually come to occupy centre stage in Brazil's political life. As it enters its 24th phase, and in view of the criminal charges brought against former President Lula da Silva and the way this was effected, it is generating a political crisis similar to that which led to the 1964 coup whereby a vile military dictatorship was established that was to last until 1985. The judicial system — supposedly the ultimate defender and guarantor of the legal order — has become a dangerous source of legal disorder. Blatantly illegal and unconstitutional judicial measures, a crassly selective persecutory zeal, an aberrant promiscuity in which media outlets are at the service of the conservative political elites, and a seemingly anarchic judicial hyper-activism — resulting, for instance, in 27 injunctions relating to a single political act (President Dilma's invitation to Lula da Silva to join the government) —, all these bespeak a situation of legal chaos that tends to foster uncertainty, deepen social and political polarization and push Brazilian democracy to the edge of chaos. With legal order thus turned into legal disorder and democracy being highjacked by the non-elected sovereign body, political and social life has become a potential field of spoils at the mercy of political adventurers and vultures. At this point, several questions have to be addressed. How did it come to this? Who benefits from the present situation? What should be done to save Brazilian democracy and the institutions on which it stands, including its courts? How is one to attack this many-headed hydra, so that new heads do not grow for each severed head? In the present text I suggest a few answers.

How did it come to this?

Why has Operation Lava Jato gone well beyond the limits of the controversies that habitually arise in the wake of any prominent case of judicial activism? Let me point out that the similarity with Italy's Clean Hands probe has often been invoked to justify the public display and the public unrest caused by this judicial activism. But the similarities are more apparent than real and there are indeed two very definite differences between the two investigations. On the one hand, the Italian magistrates always kept a scrupulous respect for the criminal proceedings and, at most, did nothing but apply rules that had been strategically ignored by a judicial system that was not only conformist but also complicit with the privileges of the ruling political elites in Italy's post-war politics. On the other hand, they sought to apply the same unvarying zeal in investigating the crimes committed by the leaders of the various governing political parties. They assumed a politically neutral position precisely to defend the judicial system from the attacks it would surely be subjected to by those targeted by their investigations and prosecutions. This is the very antithesis of the sad spectacle currently offered to the world by a sector of the Brazilian judicial system. The impact caused by the activism of Italy's magistrates came to be called the Republic of Judges. In the case of the activism displayed by the sector associated with Lava Jato, it would perhaps be more accurate to speak of a judicial Banana Republic. Why? Because of the external push that

clearly lies behind this particular instance of Brazilian judicial activism, but which was largely absent in the Italian case. That push is what is dictating the glaring selectivity of such investigative and accusatory zeal. For although it involves the leaders of various parties, the fact is that Operation Lava Jato — and its media accomplices — have shown to be majorly inclined towards implicating the leaders of PT (the Workers's Party), with the by now unmistakable purpose of bringing about the political assassination of President Dilma Rousseff and former President Lula da Silva.

In view of the importance of this external push and of the selective nature of the legal action it tends to generate, Operation Lava Jato shares more similarities with another judicial investigation, one that took place in the Weimar Republic after the failure of the German revolution of 1918. Starting that year, and in a context of political violence originating both in the extreme left and the extreme right, Germany's courts showed a shocking display of double standards, punishing with severity the kind of violence committed by the far left and showing great leniency towards the violence of the far right — the same right that in only a few years was to put Hitler in power.

In Brazil, the external push comes in the shape of the economic elites and the political forces at their service, which did not accept the fact that they lost the 2014 elections and, in the midst of the current global crisis of capital accumulation, felt seriously threatened by the prospect of another four years with no control over that government-dependent portion of the country's resources on which their power has always rested. The height of that threat was reached when Lula da Silva — viewed as the best Brazilian president since 1988, with an 80% approval rate at the end of his term — began being regarded as a potential presidential candidate for 2018. At that moment Brazilian democracy ceased to be functional for this conservative political bloc, and political destabilization ensued. The most obvious sign of the anti-democratic drive was the movement to impeach President Dilma Rousseff within a few months of her inauguration — a fact that was, if not totally unheard of, at least highly unusual in the democratic history of the last three decades. Realizing that their struggle for power was blocked by democracy's majority rule ("majority tyranny"), they sought to make use of that sovereign body which is the least dependent on the rules of democracy and specifically designed to protect minorities, i.e., the courts. Operation Lava Jato — an otherwise highly worthy investigation — was the tool to which they resorted. Backed by the conservative legal culture that is widely predominant in Brazil's judicial system, its Law Schools and the country at large, as well as by a full arsenal of high-powered, high-precision media weapons, the conservative bloc did everything it could to distort Operation Lava Jato. It thus diverted it from its judicial goals, which in themselves were crucial for the consolidation of democracy, and turned it into an operation of political extermination. The distortion consisted in keeping the institutional façade of Operation Lava Jato while profoundly changing its underlying functional structure, which was accomplished by seeing to it that the political took precedence over the judicial. Whereas the judicial logic is based on the fit between means and ends, as dictated by procedural rules and constitutional guarantees, the political logic, if propelled by the anti-democratic drive, subordinates ends to means and defines its own efficacy according to the degree of that subordination.

In this process, the intents of the conservative bloc had three major factors in their favour. The first was the dramatic change in character undergone by the PT as a democratic party of the left. Once in power, the PT decided to rule according to the "old style" (i.e., oligarchic style) to attain its new, innovative goals. Ignorant of the Weimar lesson, it believed that any "irregularities" it might commit would be met with the same leniency traditionally reserved for the irregularities committed by the elites and the conservative political classes that had ruled the country since its independence. Ignorant of the Marxist lesson it claimed to have absorbed, it failed to see that capital will allow no one to govern it but its own and is never grateful to any outsiders who happen to do it favours. Taking advantage of an international context in which, as a consequence of China's development, the value of primary products had an exceptional increase, the PT government encouraged the rich to get richer. This was seen as a precondition for raising the resources it needed to carry out the extraordinary measures of social redistribution that made Brazil a substantially less unjust country, thanks to which more than 45 million Brazilians were freed from the yoke of endemic poverty. When the international context was no longer favourable, nothing short of a "new style" type of

politics would do to ensure social redistribution. In other words, a new policy was required that, among other things, might use political reform to end the promiscuous relationship between political and economic power, tax reform to tax the rich as a way of financing social redistribution in the post-commodity boom period, and finally media reform, not to impose censorship, but rather to ensure diversity in published opinion. As it turned out, however, it was too late for all those things that should have been done in their own time and not in a context of crisis.

The second factor is linked to the first. It is the global economic crisis and the iron grip in which it is held by that which causes it – finance capital and its relentless self-destructiveness, which also destroys wealth under the pretext of creating wealth and turns money from a medium of exchange into a prime commodity of the speculation business. The hypertrophy of financial markets is an impediment to economic growth. Instead, it calls for austerity policies under which the poor are invested with the duty of helping the rich to stay rich and, if possible, to get richer. Under these conditions, the frail middle classes created in the previous period find themselves on the brink of sudden poverty. With their minds poisoned by the conservative media, they are quick to hold the very governments that turned them into what they are now responsible for what may befall them in the future. This is all the more likely to happen since a consumption ticket rather than a citizenship ticket was the fare they paid to travel from the slave quarters to the Manor's outside patios.

The third factor working in favour of the conservative bloc is the fact that, after its adventures in the Middle East, US imperialism has returned to the continent. Fifty years ago, imperialism knew no means other than military dictatorship to submit the countries of the continent to its own interests. Today, imperialist interests have other means at their disposal, namely the financing of local development projects run by non-governmental organizations whose gestures in defence of democracy are just a front for covert, aggressive attacks and provocations directed at progressive governments ("down with communism", "down with Marxism" "down with Paulo Freire", "we are not Venezuela," etc.). In such times as these, when the establishment of dictatorships can be avoided because democracy sees to it that the dominant economic interests are served, and when the military, still traumatized by past experiences, seem unwilling to embark on new authoritarian adventures, these forms of destabilization are viewed as more effective in that they allow replacing progressive governments with conservative governments while maintaining the democratic façade. All the financing currently abounding in Brazil comes from a wide variety of funds (the novel nature of a more pervasive imperialism), from the proverbial CIA-related organizations to the Koch brothers – who fund the most conservative policies in the US, their money coming mostly from the oil sector – to North-American evangelical organizations.

How can Brazilian democracy be saved?

The first and most pressing task is to save the Brazilian judiciary from the abyss into which it is sinking. In order to achieve that, its wholesome sector – surely the majority of the judicial system – must take upon itself the task of reestablishing order, serenity and restraint among its members. The guiding principle is simple enough to state: the independence of the courts under the rule of law is intended to allow them to fulfill their share of responsibility in consolidating democratic order and democratic coexistence. For that to happen, they are barred from putting their own independence at the service of any corporate or sectorial political interests, no matter how powerful. Although easy to state, the principle is very difficult to enforce. The top responsibility for enforcing it, at this point, lies with two different bodies. The STF (Federal Supreme Court) must assume its role as the ultimate guarantor of the legal order and put an end to the spreading legal anarchy. The STF will be faced with many important decisions in the near future, which must be obeyed by all, irrespective of what it decides. At present, the Supreme Court is the only institution capable of halting the plunge towards the state of emergency. As to the CNJ (National Council of Justice), which has disciplinary power over the magistrates, it should initiate immediate disciplinary proceedings by reason of reiterated prevarication and procedural abuse, not only against judge Sérgio Moro, who is directing the investigation in a blatantly biased manner, but against all those who have conducted themselves in similar fashion. If no exemplary disciplinary action is taken, the Brazilian judiciary runs the risk of squandering the institutional sway it has earned in recent

decades, which, as we know, has not even been used to benefit left-wing forces or policies. It was earned simply by ensuring sustained consistency and the right balance between means and ends. If the first task is successfully carried out, the separation of powers shall be preserved and the democratic political process shall resume its course. President Dilma Rousseff's cabinet has decided to include Lula da Silva among its ministers. It is its right to do so and no institution, least of all the judiciary, has the power to prevent it. We are not talking about dodging justice on the part of a politician who never backed away from a fight, for he will eventually be tried (if that be the case) by that entity – the Supreme Court – which in the last analysis would try him anyway. From the legal point of view, it would be an aberration to apply here the principle of the “natural court”. One may, of course, disagree with the political decision in question. Lula da Silva and Dilma Rousseff know they are making a risky move, all the more risky in case Lula's joining the cabinet does not translate into a change of course to wrest from the hands of the conservative forces the control over the extent and the pace of the erosion they have caused in the government. In fact, only early presidential elections could bring normalcy back. If the Lula–Dilma decision goes wrong, their careers will have come to an end, and a very undignified end it shall be, especially in the case of a man who restored dignity to so many millions of Brazilians. Besides, it will take PT many years to restore its credibility among the majority of the Brazilian people, not to mention that it will have to undergo a process of radical change. If all goes well, the new government will have to effect a change in policy, starting immediately, so as not to let down the trust of the millions of Brazilians who are taking to the street to protest against the putschists. If the Brazilian government has any desire to find help on the part of so many demonstrators, it will have to help them find reasons to help. Which is to say that, whether as opposition or as government, the PT will be forced to reinvent itself. And we know, this will be a lot more difficult to do when in government.

The third task is even more complex, because in the near future Brazilian democracy will have to be defended both in the country's institutions and in the streets. And since policy-making is not conducted in the streets, institutions will be given due priority even in these times of authoritarian drive and antidemocratic emergency. The attempts at destabilization will continue and become more aggressive as the weakness of the government and the forces that support it become more visible. Popular organizations and movements, as well as peaceful demonstrations, will be infiltrated by provocateurs. Constant watchfulness is in order, as this type of provocation is currently being used in many contexts to criminalize social protest, reinforce state repression and declare states of emergency, albeit behind a façade of democratic normalcy. As Tarso Genro has argued, the state of emergency is somehow in place, which is why the “There will be no coup” flag has to be understood as a denunciation of the political-judicial coup that is already underway. A new type of coup, that needs to be neutralized.

Finally, Brazilian democracy can benefit from the recent experience of some neighbour countries. The way in which the progressive policies were implemented on the continent made it impossible to shift towards the left the political centre from which the positions of both the left and the right get to be defined. That is why, when progressive governments are defeated, the right comes to power possessed with an unprecedented virulence and bent on destroying, in no time, all that was built in favour of the popular classes during the previous period. Then along comes the right in its vindictiveness, to nip in the bud the possibility of a progressive government reemerging in the future. For that, it counts on the complicity of international finance capital to instil in the popular classes and in the excluded the notion that austerity is not a policy that can be challenged but rather a fate to which they must resign themselves. Macri's government, in Argentina, is a case in point.

The war is not lost, but it will not be won if one battle after another is lost, which is what will happen if one keeps repeating past mistakes.

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