

A Trial for Lula and Brazilian Democracy: What's Next for Brazil?

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Brazil has just taken another step toward the dismantling of its democracy. On January 24, an appeals court confirmed a previous ruling against former President Luiz Inácio Lula da Silva (Workers' Party), sentencing him to over 12 years in jail. Although there is no consensus among legal experts about what will happen next (some say Lula could be incarcerated by the end of next month), the political implications of this decision are, without a doubt, enormous.

Lula's sentencing was met with protests both in Brazil and internationally. The legality of the process against him has been questioned, not only due to lack of evidence, but also because it is probably one of the most emblematic cases of how the legal process can be instrumentalized to pursue a political agenda. However, the case against Lula is just another link in a long chain of events that has led to the steady deterioration of democracy and the Rule of Law in Brazil. Much like the unconstitutional impeachment that led to the removal of democratically elected president Dilma Rousseff, what we see now is the result of a coordinated maneuver to undermine the political project that was being implemented by the Workers' Party. This political maneuver gained traction with the support of Brazil's political and economic elites, aided by the judiciary and the media.

The Case Against Lula

On July 2017, a low-level judge, Sérgio Moro, charged Lula with nine and a half years in jail for passive corruption and money laundering. The prosecution claims that the former President received a bribe from one of Brazil's largest construction companies, OAS, in the form of a beachfront apartment. In exchange, Lula allegedly provided OAS with an undue advantage on contracts with Petrobras, Brazil's state-owned oil company. The charge of money laundering, subsequently, is related to Lula's alleged concealment of the property.



Several experts question the legality of the case. One of the most striking features of the entire process is the lack of evidence. After three years of a massive police operation -- which has reportedly violated basic principles of due process, acted against the Brazilian Constitution, hindered the Defense, and deprived Lula of his basic human rights -- the prosecutors were still not able to produce any concrete evidence to support their case. In the 218-page document presented by Moro, he failed to provide documentary proof that Lula was indeed the owner of the apartment. Furthermore, there were no elements that could assert that Lula was the author, co-author, or shareholder of the contracts deemed detrimental to Petrobras, or that any unlawful acts were carried out by OAS. Rather, Moro's case is based on the testimony of José Adelmário Pinheiro Filho, also known as Léo Pinheiro, a former OAS executive who had his own sentence reduced by more than 80% after he changed his testimony to accuse Lula of illegal deeds. Pinheiro is not a witness, but rather, a co-defendant in this case, and as such he is under no legal obligation under Brazilian law to tell the truth or to present any proof for his testimony.

What began as a (much-needed) investigation into the historical corruption that has been afflicting Brazil for decades rapidly acquired a flagrant political character. According to the Frente Brasil de Juristas pela Democracia (Brazil Front of Jurists for Democracy),

The criminal case [...] resulted in a sentence that revealed a trial based on the willingness to convict of the judge to sustain the decision; that uses the criminal process of exception typical of authoritarian regimes. The judge allows for wide use of the Law in order to combat a 'greater evil', systemic corruption, and proceeds to disrespect the legal principle of [presumption of] innocence [...].

The swiftness of the appeals court to review Lula's case is also suspicious. Other proceedings were postponed so that Lula's trial could take place on January 24, the first available date after the summer recess. For Supreme Court Justice Luis Roberto Barroso, it was important, "in the name of judicial security and stability of the democratic game, [...] to define very soon what the rules will be, who can be a candidate". If there was any doubt, the justice's statement makes it even more evident that what is at stake is not the prosecution of a corruption case, but rather the upcoming presidential elections.

Lula's conviction perfectly shows how the law can be misused for political purposes. There is a judge that has carte blanche to act beyond the scope of the Law, who frequently goes to the media to taint the image of the accused, and who uses his position for personal gain. Neither impartiality nor a fair trial can in any way be expected. As Juarez Cirino dos Santos, a Brazilian lawyer that has been working very closely with Lula's defense team points out, the



Judicial violence against the constitutional principles of due process, even if examined only from the general point of view [...], and even disregarding more visceral nullities that definitely invalidate the process, already configures sufficient material to determine the complete annulment of the criminal proceedings against Lula.

But one might wonder: if the case against Lula is so obviously botched, how has it manage to get this far?

“Judicial Activism” and Criminalization of Politics

For anyone who does not follow Brazilian politics closely, the political turmoil that has engulfed the largest country in Latin America during the past two years may have come as a shock. Yet the level of breakdown of the Rule of Law that Brazilians are currently experiencing cannot be achieved overnight. There needed to be a collective mindset that allowed a progressive undermining of individual and political rights in the name of the “greater good,” with little to no reaction. It is something similar to the “war on terror”: first, a state of constant fear must be created – fear for personal well-being, fear for life, fear for anything deemed valuable. Afterwards, an enemy must be chosen. Lastly, new, damaging jurisprudence is introduced on a case-by-case basis in order to make people feel that they are not directly affected.

For this process to occur, a series of elements need to align. First of all, a Judiciary that knows no boundaries. In 1988, when Brazil emerged from a 21-year-long military dictatorship, one of the social pacts that needed to be restored was the Constitution. According to Rogério Dutra dos Santos, a Brazilian law professor, “one of the actors who renewed itself with the [re]democratization and empowered itself with the Constitution of 1988 [...] was the Judiciary.” Although the constitution was being re-written, it reproduced and maintained much of the legal apparatus that was in place during the dictatorship. Reproducing the logic of that model, says Santos, the, “Brazilian Judiciary [acts] as a countermajoritarian force, unelected, with the capacity to exercise the so-called ‘balance’ between [State] powers [...]” under no regulation from the other branches of government, and even less, from the people. That superpower, Santos continues, creates a destabilizing force in the “relationship between law and politics” known as “judicial activism” or “judicialization of politics.” Thus, Santos points out, “the general political paradigm of exception oriented not only the renewal of institutional reactionaryism of the Brazilian Judiciary. It has [stimulated] the differentiation in the normative treatment between citizens and those considered undesirable or enemies of society, easing or even suppressing procedural guarantees.”



The Brazilian Judiciary is perhaps one of the most elitist institutions in the country, replicating its hierarchical social structure throughout Brazil. Shielded from public scrutiny and control, the Judiciary is driven by short-term opportunistic impulses generated by moments of commotion – which are largely driven by the stimulus coming from the media, the second most important element in this equation. According to Santos,

The [Brazilian] contemporary criminal system begins to operate in tune with economic and political interests reinforced by the mass media, in the so-called phenomenon of criminal populism. [...] The state of exception formula applied to the punitive system eliminates normative control over repressive activity, allows for differentiated public policies for different social extracts [...] and is justified by the emotional approval of the population through the media, [...] instead of justifications of a legal, analytical and technical nature.

Indeed, many Brazilians have suffered these double standards, particularly low-income, black men living in Brazilian slums; a quick look at the astounding statistics of the Brazilian prison system is a cruel illustration of this disparity. But in 2005, this logic of instrumentalization of the judicial system to achieve specific social interests started to be applied to the realm of politics. During that year, Brazilian authorities uncovered what was called at the time the “biggest corruption scandal in Brazil’s history”, known as the “mensalão” scheme. It was back then that many of the legal precedents that now allow Moro to act as if the Constitution and the basic principles of due process, such as *in dubio pro reo* (presumption of innocence), are mere suggestions. For example, one of the most iconic moments of that case was when Supreme Court Justice Rosa Weber said, during her ruling against Lula’s former chief of staff, José Dirceu, that she did not have “definitive evidence” against him, but that she would convict Dirceu anyway, since the “legal literature” allowed her to do so. This shameful episode in Brazilian legal history was recently re-enacted by the prosecutors in charge of Lula’s case, who said that they did not have any document-based evidence connecting Lula to the infamous apartment, but that they had a “strong belief” that he was guilty.

Of course, State-led political persecution is nothing new. Yet the past year’s events stand out in that they are being carried out “under the veil of a Democratic State of Law, and under the appearance of the normal functioning of its political institutions,” as Santos points out. This is true for the judicial persecution against Lula and also applies to Rousseff’s illegal impeachment. Once again, “the country observes the establishment of the state of exception” through the action of an increasingly politicized judiciary – the *modus operandi* of dictatorships. Furthermore, the media plays a crucial role in this process. Mass media operates in Brazil as a political power. As Santos defined, “guided by economic and political interests not reachable by the public, without



any limits and control over their activities and concentrated in the hands of a few [and] capable of producing the narrative that it wishes in order to preserve its interests”, Brazilian mass media has been able, over the years, to have a real, profound effect on the course of Brazilian politics. For the Brazilian mass media, Moro is the hero who will save the country from pernicious corruption and Lula and the Workers’ Party are the villains that invented it... and all evidence of right-wing corruption going back decades, or that may tarnish the reputation of right-wing parties and politicians, is just a footnote.

Burying a Political Project

The political project implemented by the Workers’ Party in its 13 years of government was perceived not only as a threat to the Brazilian political establishment (Lula’s election was the first time in over 50 years that an opposition party came to power), but also to the privileges of the economic ruling class. Unable to regain the country’s presidency through democratic elections, Brazil’s economic and political elites instead planned a political scheme to bring down a democratically elected president through illegal and unconstitutional means, imposing an economic and social agenda that had been rejected by the Brazilian people in four consecutive elections.

Although Brazil has a long history of democratic ruptures (which is also quite telling since those ruptures always occur during periods of social progress in the country), one of the most striking features of recent events, starting with the coup against Rousseff, is the instrumentalization of the legal framework and process to lend formal legitimacy to the illegitimate overthrow of power. Following this logic, the current *de facto* government would need to win the next presidential elections to continue to present itself as a “legitimate government” – even though it is to be expected that those elections will be nothing more than an undemocratic sham, comparable to what is happening now in Honduras. However, the coalition that staged the coup against Rousseff now faces a dilemma: not only were they unable to reach a consensus on a viable candidate to carry out their neoliberal agenda, but they were also unable to damage Lula’s popularity. Despite the constant flux of accusations against him, Lula is still the frontrunner. If the elections were held today, Lula would probably win in the first round (recent polls shows him with 38% of voter intention), and his return would represent the complete failure of last year’s coup and the interruption of the neoliberal program currently being implemented by Michel Temer. Thus, the need for the outrageous case against the popular favorite.

Despite right-wing wishes to the contrary, it is vital to note that although Moro, the prosecution, and even Justices from the Supreme Court are trying to politicize Lula’s case, the confirmation of his conviction does not prevent him from running in the next presidential elections. Lula has the right to present his candidacy, although it would probably be contested shortly after his



registration and a higher court would probably prevent him from taking office, due to the Brazilian “Clean Record Law” (*Lei da Ficha Limpa*), that prevents candidates whose sentences are confirmed by an appeals court to hold office. The report presented by the *Frente Brasil de Juristas pela Democracia* states that even though Electoral authorities seem to be in a hurry to define the 2018 electoral scenario without Lula, the latest development in his case will not prevent him from presenting his candidacy. The Workers’ Party has already announced his pre-candidacy, and according to Brazilian electoral law, he will be able to exercise his electoral rights until all legal formalities regarding his case are exhausted.

What’s Next for Brazil?

One of the most distinct features of any democracy is the fact that litigations are not subject to the scrutiny of a discretionary power. Rather, democratic societies build independent, secular institutions to guarantee, to the best of their abilities, that each and every person subjected to its rule is treated with as much equality as possible. However, the case against Lula is, to say the least, one of the most sordid examples of systematic violation of these principles. Indeed, Lula’s candidacy is at stake. His freedom is at stake. But more than that, what is at stake now is the future of Brazilian society and the vitality of democracy in Latin America’s largest country. As writer Guilherme Santos Mello points out,

In a coup d'état, one can know when it starts, but it is almost impossible to predict its end. The fear of those who promoted the coup [against Rousseff] to bear the political and legal costs of what they did [...] forces them to deepen the state of exception rather than soften it in the hope of promoting the ultimate destruction of their opponents. The only way out is to amplify the arbitrariness, to hunt down its enemies and to remain in power. As in 1968, the prospect of a free and truly democratic electoral process profoundly shocks the coup advocates [...].

After going to such lengths to regain power, it is clear that Brazil’s economic and political elites will not let go easily -- no matter what it takes.

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