

Democracies Can Perish Democratically Too: Brazilian Democracy on Edge

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INTRODUCTION: FOUR ANTIDEMOCRATIC COMPONENTS WITHIN DEMOCRACIES

We have long been accustomed to the idea that political regimes are divided into two major types: democracy and dictatorship. After the fall of the Berlin Wall in 1989, (liberal) democracy came to be almost universally regarded as the sole legitimate political system. Notwithstanding their internal diversity, the two types are basically contradictory in nature. They cannot coexist in the same society, and opting for one or the other always spells political struggle, which in turn entails some kind of rupture with the existing legal order. During the last century there was a growing belief that democracies could only collapse through an abrupt and almost invariably violent interruption of constitutional legality, carried out by a military or civilian coup aimed at imposing a dictatorship. This narrative used to be largely accurate, but not any more. Violent disruptions and coups d'état are still possible, but it has become increasingly obvious that the dangers that now beset democracy are of a different kind, and that they originate, paradoxically, in the normal functioning of democratic institutions. Antidemocratic political forces infiltrate the democratic system and then set about hijacking and decharacterizing it in a more or less stealthy and steady fashion, through legal means and no constitutional changes. Then there is a moment when the existing political system, without having formally ceased to be a democracy, appears as completely devoid of democratic content as regards the lives of both people and political organizations, until finally individuals and organizations alike begin to behave as if they were living

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under a dictatorship. The following is a description of the four main components of that process.

Electing Autocrats

From the USA to the Philippines, to Turkey, Russia, Hungary, India, Poland and Brazil, we have witnessed the democratic election of authoritarian politicians who, while being the product of the political and economic establishment, present themselves as antisystem and antipolitics and insult their opponents, whom they view as corrupt and as enemies to be brought down. They reject the rules of democracy, make intimidating appeals for the violent resolution of social problems, flaunt their contempt for freedom of the press and pledge to repeal the laws that guarantee the social rights of workers and of those who are discriminated against on ethnoracial, sexual or religious grounds. In short, they stand for election on the basis of an antidemocratic ideology and still manage to secure a majority of votes. Autocratic politicians have always been around. What is new is how often they manage to rise to power these days, and apparently by democratic means.

The Plutocratic Virus

Money has decharacterized electoral processes and democratic deliberations at an alarming rate. One should even question whether, in many instances, elections are truly free and fair, and whether political decision-makers are ultimately driven by conviction or by the money paid to them. Liberal democracy rests on the notion that citizens have the means to access an informed public opinion and use it as a basis on which to freely elect their rulers and assess their rulers' performance. For this to be possible at all, the market of political ideas (i.e. of the values that are priceless, because they are deeply held beliefs) has to be totally separated from the market of economic goods (i.e. of the values that have a price and get to be bought and sold on that basis). In recent times, these two markets have been merging under the aegis of the economic market, so that nowadays everything is bought and sold in the realm of politics. Corruption has become endemic. In today's world, the financing of parties and candidates in election campaigns and the lobbying actions directed at parliaments and governments have gained central importance in the political life of many countries. In its 2010 decision *Citizens United v. The Federal Election Commission*, the US Supreme Court struck a fatal blow to US democracy when it allowed unlimited and private funding of elections and political decisions by large corporations and the super-wealthy. Hence the emergence of so-called "Dark Money," which is nothing other than legalized corruption. This "dark money" is what helps explain the preponderance of the bullet (firearms industry), bible (conservative

evangelism) and bovine (industrial agriculture and cattle raising) benches – that cruel caricature of Brazilian society – in Brazil’s Congress.

Fake News and Algorithms

For a time, both the internet and the social networks made possible by it were seen as capable of enabling an unprecedented expansion of citizen participation in democracy. After Brexit and in light of what is currently happening in the USA and Brazil, we can say that unless they are properly regulated, they will end up being the gravediggers of democracy. I allude here to two specific tools. Fake news has always existed in societies marked by deep divisions, especially in times of political rivalry. However, nowadays its destructive potential through disinformation and the dissemination of lies is alarming. This is particularly grave in countries such as India and Brazil, where social networks, notably WhatsApp (whose content is the least controllable of all, by reason of its being encrypted), are widely used, to the point of being the major, if not the sole, source of citizen information (Brazil has 120 million WhatsApp users). According to a denunciation by Brazilian research groups published in *The New York Times* (October 17, 2018), of the fifty most widely shared (viral) images generated by the 347 WhatsApp public groups supporting presidential candidate Jair Bolsonaro, only four were truthful.¹ One of those fake photos was that of Dilma Rousseff, the impeached President in 2016 and at the time a candidate for the Senate, seen with Fidel Castro in the Cuban Revolution. This was actually a montage based on a 1959 piece by John Duprey for the *New York Daily News*.² Dilma Rousseff was an 11-year-old child at the time. Supported by large international corporations and national and foreign military counterintelligence services, Bolsonaro’s campaign, which led to his election, was a monstrous montage of lies Brazilian democracy will find it most difficult to survive.

The destructive effects are maximized by another tool: algorithms. This word of Arab origin denotes the mathematical calculation for defining priorities and making rapid decisions based on big data and a number of variables, with a view to obtaining certain results (namely, success in a corporation or in an election). Despite their neutral and objective appearance, algorithms contain subjective opinions (What does being successful mean? How do you define best candidate?) that lie hidden in the calculations. When pressed to disclose their criteria, companies invoke business secrecy. In the domain of politics, algorithms make it possible to

¹ Cristina Tardáguila, Fabrício Benevenuto and Pablo Ortellado, “Fake News Is Poisoning Brazilian Politics. WhatsApp Can Stop It,” *New York Times*, October 17, 2018, www.nytimes.com/2018/10/17/opinion/brazil-election-fake-news-whatsapp.html.

² John Duprey, *New York Daily News*, April 22, 1959.

feedback on and amplify the topics that are widely disseminated via social networking and that are considered relevant by the algorithms for the very reason that they are popular. It thus happens that what is being widely disseminated may be the result of large-scale disinformation efforts performed by robot networks and automated accounts that send millions of people fake news and comments in favor of or against a given candidate, making the topic artificially popular and ultimately even more prominent thanks to the algorithm. An algorithm cannot tell true from false, and the effect of that is all the more destructive where people are especially vulnerable to lies. That is how, in recent times, electoral preferences have been manipulated in seventeen countries, including the United States (in favor of Donald Trump) and Brazil (in favor of Jair Bolsonaro), on a scale that could prove fatal to democracy. Will public opinion survive such levels of toxic information? Does real news stand a chance of resisting this avalanche of fake news? It is my contention that what people need most during flood situations is drinking water. Out of a similar concern regarding the rise of the computer-driven manipulation of our opinions, tastes and decisions, computer scientist Cathy O’Neil has termed big data and algorithms “weapons of math destruction.”³

The Hijacking of Institutions

The impact that authoritarian and antidemocratic practices have on institutions tends to be gradual and steady. The presidents and parliaments elected by the new type of fraud I’ve just described (fraud 2.0) are given free rein to instrumentalize democratic institutions, and they are free to do so supposedly within the boundaries of the law, no matter how blatant the abuses or how skewed the interpretations of the law or the Constitution. In recent times, Brazil has turned into an immense laboratory for the authoritarian manipulation of legality or lawfare. This hijacking was what made it possible for a neofascist presidential candidate, such as Jair Bolsonaro, to make it to the second round of the elections and get elected on October 28, 2018. As has been the case with other countries, the first institution to be hijacked is the judicial system. The reason for this is twofold: because it is the institution whose political power is most removed from electoral politics, and because, in constitutional terms, this sovereign body is viewed as a “neutral arbiter.” I shall analyze this hijacking process later in this chapter. What will Brazilian democracy be like if such hijacking comes to pass, followed by the hijackings it will render possible? Will it still be a democracy?

³ Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (New York: Penguin Random House, 2016).

DEMOCRACY AND JURIDICAL SYSTEMS

When, almost thirty years ago, I began studying the judicial system of various countries, the administration of justice had the least public visibility among the state's institutional dimensions.⁴ The big exception was the United States, because of the central role played by the Supreme Court in defining the truly decisive public policies. Being part of the sole nonelected 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 credibly viewed by liberal political philosophy 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 by, among other things, the crisis of political representation that hit elected sovereign bodies, the citizens' growing awareness of their rights, and 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 that 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

⁴ See Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 3rd ed. (Cambridge: Cambridge University Press, 2020); Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995); and Boaventura de Sousa Santos et al., *Os Tribunais nas Sociedades Contemporâneas: O Caso Português* (Porto: Afrontamento, 1996).

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 anticorruption operation mounted by the judiciary and the police was first launched in March 2014. Targeting more than a hundred politicians, businessmen and managers, it gradually came to occupy center stage in Brazil's political life. In view of the criminal charges brought against former President Lula da Silva, and the way this was effected, it generated 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 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 were at the service of the conservative political elites and a seemingly anarchic judicial hyper-activism – resulting, for instance, in twenty-seven injunctions relating to a single political act (President Dilma Rousseff's invitation to Lula da Silva to join the government) – all these bespeak a situation of legal chaos that tended 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 hijacked by the nonelected sovereign body, political and social life became a potential field of spoils at the mercy of political adventurers and vultures.

Mainly due this grotesque lawfare experiment, Jair Bolsonaro was elected President of Brazil in 2018. Proudly claiming that he knew nothing about economics, Bolsonaro chose Paulo Guedes to head the ministry of finance – an extreme neoliberal economist who trained at the Chicago School of Economics. Having collaborated with the Pinochet regime, Guedes proposed dismantling whatever remained of the (always weak) welfare state and to bring about a sweeping process of privatization. The newly elected president combined this war against the popular classes (those most dependent on public social policies) with an extreme-right ideological outlook that included praising the military dictatorship that ran the country between 1964 and 1985

and, more specifically, the torture practiced by the dictators against political dissidents (including the former president Dilma Rousseff); nominating generals for key ministerial positions (besides having chosen a general as his vice-president); assuming a racist and sexist disposition to eliminate antidiscrimination, affirmative action and women's reproductive rights; deregulating the acquisition of weapons by civilians as the best policy to fight rampant crime rates; refusing to grant new territories to Indigenous peoples that he considered to be an obstacle to development; expanding industrial agriculture even at the cost of the final destruction of the Amazonian rain forest; condoning and even promoting an extreme politicization of the judicial system by choosing Sérgio Moro, the truculent and procedurally reckless coordinator of the Car Wash operation, to head the ministry of justice (with new national security functions); threatening to send to prison or into exile all the main leaders of the different left parties; banning thousands of Cuban doctors that provided primary health care to the impoverished communities of the vast hinterland, a highly ideological gesture; assuming an anti-immigrant politics (in a country of immigrants and slavery); and defending a mindless and belligerent alignment with the most reactionary imperialist policies of US President Trump, be it possible military intervention against Venezuela, denial of global warming or moving the Brazilian embassy to Jerusalem, against all the UN resolutions.

The Covid-19 pandemic exposed and intensified most dramatically the necropolitics that has characterized Bolsonaro's presidency all along. At the time of writing (early September 2020) the total deaths are coming close to 131,000, second only to the USA. More than grossly neglecting to protect the lives of Brazilian citizens, the government seems to be engaged in a sinister contempt for life (negationism combined with measures that willfully endanger lives) – so much so that several criminal complaints have been filed against Bolsonaro in the International Criminal Court: he is accused of crimes against humanity and of genocide against the Indigenous peoples.

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? I suggest a few answers in the following sections.

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? The similarity with Italy's Clean Hands probe was often invoked to justify the public display and the public unrest caused by this judicial activism. But the similarities were more apparent than real and there were 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 postwar 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 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.

Indeed, an external push clearly lay behind this particular instance of Brazilian judicial activism, one which was largely absent in the Italian case: the illegal interference of the FBI and the US Department of Justice under the umbrella of the so-called war against corruption. That push dictated the glaring selectivity of the investigative and accusatory zeal toward implicating the leaders of the progressive social-democratic party, PT (the Workers' Party), with the unmistakable purpose of bringing about the political assassination of former Presidents Dilma Rousseff and Lula da Silva, thus clearing the ground for the election of Bolsonaro. In view of the selective nature of the legal action it generated, Operation Lava Jato shared more similarities with another judicial investigation: that which 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 toward the violence of the far right – the same right that within only a few years was to bring Hitler to power. In Brazil, the US imperialistic interference came to the rescue of the national and global economic elites which, 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 had always rested. The height of that threat was reached when Lula da Silva – viewed as the best Brazilian president since 1988, with an 80 percent approval rating 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 antidemocratic 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 the sovereign organ, the judicial system, least dependent on the rules of democracy and specifically designed to protect minorities, namely the courts. Operation Lava Jato – in theory, a 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 ensuring that the political took precedence over the judicial. Whereas judicial logic is based on the fit between means and ends, as dictated by procedural rules and constitutional guarantees, political logic, if propelled by the antidemocratic drive, subordinates ends to means and defines its own efficacy according to the degree of that subordination.

In this process, the intentions of the conservative bloc had three major factors in their favor. 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 (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 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 people and is never grateful to any outsiders who happen to do it favors. Taking advantage of an international context in which, as a consequence of China's development, the value of primary products saw 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 favorable, nothing short of a "new style" 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, which 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 finance capital and its relentless self-destructiveness, which destroys wealth under the pretext of creating wealth and turns money from a medium of exchange into a prime commodity of financial speculation. The hypertrophy of financial markets 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 found themselves on the brink of sudden poverty. With their minds poisoned by the conservative media and fake news, they were quick to hold responsible for what might befall them in the future the very governments that turned them into new middle classes. This was all the more likely to happen since people were promoted as consumers (access to consumer society) rather than as citizens (political activism). This was the fare they paid to travel from the slave quarters to the Manor's outside patios.

The third factor working in favor of the conservative bloc was the fact that, after its fatal adventures in the Middle East, US imperialism returned to the Latin American sub-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 sectors of the judicial system and US-financed local development projects run by nongovernmental organizations whose gestures in defense of democracy are just a front for covert, aggressive attacks and provocations directed at progressive democratic 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 by low-intensity democracy and when the military, still traumatized by past experiences, seems 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 USA, their money coming mainly from the oil sector – and 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 re-establishing 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 toward 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 directed the investigation in a blatantly biased manner, but against all those who 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 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. There are some signs that the judicial system is trying to recover its credibility. The Lava Jato Operation is now being discredited and may be dismantled. Unfortunately, this may be the result of yet another spell of politicization of the judiciary, rather than of the renewed strength of the rule of law.

The second task is even more complex, because Brazilian democracy now has to be defended both in the country's institutions and in the streets (more difficult in conditions of pandemic crisis). 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. 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.