Brazil's Democracy Tomorrow

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A historic runoff election took place in Brazil last month. Lula da Silva defeated the far-right candidate Flávio Bolsonaro by nearly 4.4 million votes. Flávio left the country and arrived in the USA seeking asylum, despite a judicially imposed travel ban on leaving Brazil and the suspension of his passport in connection with an investigation into alleged corruption and money laundering. His father, Jair Bolsonaro, was convicted of attempting a coup. In the original version of a letter addressed to "the Brazilian people and the international community", Flávio declared himself the elected President.

The outcome of this election, together with Flávio's early attempts and those of some of his supporters to cast doubt on the result, provides an opportunity to take stock of the resilience of Brazilian democracy and the pressures it continues to face. This electoral period has made clear that the future of Brazilian democracy will depend heavily on two things. First, on social mobilization and engagement – as the unprecedentedly intense coordinated digital mobilization of the pro-Lula movement showed. Second, on curbing potentially abusive powers of digital platforms – such as those apparently exercised by Meta against Lula and pro-Bolsonaro. Yet I believe there is a further, institutional layer to this discussion that should not be overlooked: Tomorrow's Brazilian democracy urgently needs stronger institutions and the strategic reduction of excessive decision-making powers concentrated in individual actors.

Mapping Individual Powers in Brazil

In Brazil, far too few people can make far too many decisions. Across the central institutions of the Brazilian state, there are opportunities to reduce these powers, which carry significant risks of abuse — risks that have become particularly visible over the past decade. This applies not only to the Presidency of the Republic but also to the Federal Supreme Court (STF), the National Congress, and the Office of the Prosecutor-General of the Republic, to name just a few. The prospects for Brazilian democracy will be considerably more uncertain if these entrenched forms of institutional individualization are not addressed.

The Presidency of the Republic

Within the Brazilian state, the institution currently in the spotlight is the Presidency of the Republic. Among the many controversies surrounding its individualized powers, one is particularly timely: the appointment of justices to the STF, a power vested exclusively in the President (Articles 84, XIV, and 101, sole par., of the Brazilian Constitution).

Two ways can mitigate the problems arising from this individualized appointment power. As I have discussed elsewhere, the first option is to reduce *politicagem*: to end the practice of appointing persons suspected of benefiting from personal favoritism with the President or of lacking the qualifications required for the position, in accordance with the criteria established by Article 101 of the Constitution.

The second option is a structural approach, one Lula has already considered. The model for selecting STF justices is not constitutionally immutable, nor does it need to be so heavily centered on the President. Entrenched eternity clauses may impose limits on appointment models (in particular, Article 60, par. 4, III of the Brazilian Constitution). There would nevertheless appear to be room for formal changes to the appointment process. Even without amending the Constitution, it is possible to develop constitutionally acceptable ways to informally change how candidates for the STF are proposed. In this respect, the possibility of establishing institutional councils to participate in the selection process, as Lula has proposed, may offer a starting point. Any such arrangement would, of

course, need to preserve the role of the Federal Senate in approving appointments.

The Federal Supreme Court (STF)

Distrust of the STF has reached record levels in recent months. This distrust has been fueled by accumulating non-collegial practices within the Court, which reached a peak in a disastrous plenary session held shortly before the first round of the elections. The session was called by the Chief Justice after three different Justices had issued conflicting monocratic decisions surrounding a major corruption scandal. Two of these Justices, in particular, ordered the Federal Police to investigate the other respective Justice. As a result, the broadcast session became a public display of virulent personal disputes that worryingly overshadowed the very first round of the elections.

Against this background, the need to reform the STF has become something of a national consensus. The Court's problem of structural individualization, especially as manifested in its lack of collegiality, has persisted for far too long. Its legitimacy has suffered from the extensive use of powers that allow Justices to issue monocratic decisions with far-reaching structural effects, to postpone collective voting through *pedidos de vista*, and, in the case of the Chief Justice, to exercise extensive individual agenda-setting powers – to name just a few.

The problem, moreover, does not end with the Court's formal decision-making powers. Most STF Justices have been involved in publicly reported activities that have raised serious questions about their (appearance of) impartiality. This has intensified the discussion about abuses of individual powers outside the Court, including serious suspicions concerning influence-peddling through recurrent non-transparent meetings between Justices and selected groups of lobbyists, entrepreneurs, and politicians, as well as allegations of unethical or even illegal financial benefits associated with their activities outside the Court.

The core of the various reform proposals is, and should be, one and the same: to strengthen the STF as an institution by reducing the individualized powers of its Justices, both inside and outside the Court. The precise form of such reform will require further maturation, but it should be guided by one central objective: to maximize, both in fact and in appearance, the practice of the STF as a genuinely impartial and collegial court, without undermining the functional conditions necessary for the exercise of its constitutional competences.

This could be pursued through measures such as strategically reducing the scope for Justices to issue monocratic decisions (such as those in abstract judicial review); adopting rules governing Justices' conduct before, during and after their time in office (for example, through a Code of Ethics); and subjecting the Chief Justice's agenda-setting powers to collective control, or at least the possibility of review by the Court as a whole.

Brazilian democracy's tomorrow will need a well-functioning, impartial, independent, and genuinely collegial STF. The pressure for reform is increasing, and an unreformed Court may not be able to sustain its institutional and sociological legitimacy for much longer.

A Brief Digression: The Extended Voting Period in the Brazilian Elections

A brief observation is warranted here. The power of monocratic decision-making was felt particularly strongly during the second round of the elections, when a decision was issued to extend the voting period. This episode provides a useful opportunity to clarify that not all exercises of monocratic power should be restricted in the same way. Measures adopted under conditions of extreme urgency raise a different set of considerations.

After what amounted to a "non-decision" by TSE President Justice Kássio Nunes Marques, and following requests from both Lula's and Flávio's parties to extend the voting period, STF Justice Cristiano Zanin monocratically decided to extend voting hours throughout Brazil by two hours. Zanin could only make this decision less than 30 minutes before voting was due to end, when voting machines were already being closed across the country. As Zanin's decision was published shortly after the official end of the voting

period (5 pm), most machines had already been closed before the officials responsible for them learned of Zanin's decision, and they could not be reopened — as Zanin and Nunes Marques themselves subsequently confirmed.

Shortly after the elections, it became mathematically evident that the election result would not have been different, even if all machines had remained open. But regardless of the decision's impact, because it established the same conditions nationwide, its urgency both substantiated its equal application and justified its individual character. The extreme urgency, combined with the fact that both opposing parties had requested an extension, justified the exceptional adoption of a monocratic decision. All polling stations across the country were subjected to the same situational and urgent measure of remaining open. There was no discrimination, and the measure did not produce the worst possible outcome under the given circumstances. To paraphrase Aury Lopes Jr., in many situations, a suboptimal decision is better than no decision at all.

But the very special circumstances of Zanin's decision should not obscure the broader picture: abuses involving monocratic decisions and Justices' conduct must urgently be curtailed.

The National Congress

There are at least two areas in which Brazil's democracy tomorrow depends on curbing individualized power within the National Congress.

The first concerns the powers of the presidents of the Chamber of Deputies and the Federal Senate. The main problem is the lack of adequate checks and balances, as well as procedural rights that enable parliamentary minorities to challenge or counterbalance these powers. These powers include extensive discretion over agenda-setting, initiating (or not) impeachment procedures, shelving requests, and various procedural maneuvers.

The second concerns parliamentary budget amendments. It is not democratically justifiable for one-fifth of the federal government's discretionary budget to be controlled through parliamentarians' individual allocation of resources. The National Congress shares responsibility for formulating the public budget and overseeing its implementation, but it should do so as a collective body, not as a collection of individual islands.

Representative democracy rests on political contestation, deliberation, and the formation of collective decisions. Excessive individualized powers within parliament undermine democratic conditions by detaching them from broader collective priorities and accountability.

The Prosecutor-General of the Republic

Last but not least, Conrado Hübner Mendes has explored how the Prosecutor-General of the Republic holds what he describes as the most powerful unreviewable power in the Brazilian Republic: the sovereign authority to exercise or refrain from exercising the office's exclusive powers. These include decisions on whether to investigate or prosecute the country's leading political figures. Mendes denounced that the abuse of this power can bring the Republic to a standstill, as it did during Jair Bolsonaro's government.

Reform could involve both formal and informal changes to the internal structures within the Public Prosecution Service that hold the Prosecutor-General accountable. The aim should be to ensure that decisions of such consequence do not depend excessively on the discretion of a single officeholder, while preserving the institutional independence necessary for the exercise of prosecutorial functions.

Brazilian Democracy Lives

The continued resilience of Brazil's democracy will depend in part on social mobilization and engagement (including digital engagement), as well as on the capacity to investigate and constrain the partisan political influence of media companies and the predatory interests of foreign actors. But social mobilization alone is unlikely to secure Brazil's democratic future. That future will also depend on institutional restructuring and the strategic reduction of individualized decision-making powers to contain risks to democracy and the rule of law.

The strategic reduction of individual powers means preventing attacks on, and distrust of, democracy from originating in the stroke of a single person's pen. It means building institutions that can withstand the choices, interests, and abuses of individual office-holders.

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