The 'Constitutional Military Intervention': Brazil on the Verge of Democratic Breakdown

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Would-be authoritarians often turn to apex courts at some point throughout the process of democratic erosion. Rather than packing them with loyalists, autocrats can also resort to stealth forms of co-optation. In Brazil, Bolsonaro lacks the necessary support in Congress to pass constitutional amendments. After numerous judicial defeats in the past couple of months, Bolsonaro chose to travel down the path of intimidation and defiance rather than institutional reform: Through dubious constitutional interpretation, he and his supporters are ascribing to the armed forces the role of a "constitutional moderator" in order to undermine the independence of the Supreme Court.

Bolsonaro's Dalliance with the Military

President Bolsonaro's involvement with the military is nothing new. A former army captain himself, Bolsonaro does not conceal his appraisal for the military dictatorship that ruled the country for decades after the 1964 coup. The Brazilian "red scare" prompted a regime based on torture, fundamental rights restrictions, and extra-judicial killings.

In 1999, Bolsonaro said that nothing will change in Brazil through democratic means and that real transformation will only be achieved when "we do the work that the military regime refrained from doing, killing some thirty thousand people [in a civil war]". At a time when Brazil just surpassed thirty thousand deaths due to COVID-19, no one can claim ignorance towards his authoritarian aspirations.

Throughout the COVID-19 crisis, Bolsonaro attended multiple rallies where demonstrators called for the closure of Congress and the Brazilian Supreme Court (STF), mimicking the actions taken at the overture of the dictatorship in the 1960s.

In addition, Bolsonaro changed his Health Minister twice during the COVID-19 pandemic. The Ministry is now run by General Eduardo Pazuello, who appointed nine members of the Armed Forces to the Ministry's staff. This configuration was nicknamed by some a "Milistery" due to the unusually high number of military personnel.

Currently nine out of twenty-two of Bolsonaro's Ministers are linked to some extent to the armed forces, including General Pazuello. That bring us to a total of 40,9% of Ministries that are now headed by members of the armed forces.

Supreme Defiance

The antidemocratic protests in Brazil are fueled in part by recent Supreme Court rulings that represent major defeats for Bolsonaro. The President has been downplaying the pandemic since the first COVID-19 case was confirmed in the national territory. According to Bolsonaro, the disease that killed over 370 thousand people worldwide is just "a little flu" and a "media trick".

Bolsonaro's unparalleled stubbornness prompted local level authorities into action. Although the President fiercely attacked governors that opted to impose regional and local lockdown orders in response to the pandemic, 25 out of 27 states kept them in place regardless of the President's opposition. Bolsonaro argued that States and Municipalities in Brazil could not act independently.

The case eventually reached the Supreme Court. Justice Marco Aurélio issued a provisional order recognizing the joint competence of the Union, States, and Municipalities in the area of public health. The decision empowered local authorities to declare lockdown orders without the federal government's acquiescence.

When Bolsonaro created a piece of propaganda named "Brazil can't stop", a lower federal court judge in Rio de Janeiro prohibited the federal government from using the piece to advertise against social isolation on social media platforms. Justice Barroso, later affirming the lower court's decision, said that "it is the duty of the Union to adequately inform the public about the circumstances that can endanger their lives, health, and safety".

Moreover, Justice Alexandre de Moraes rejected Bolsonaro's request to extend the validity of presidential decrees during the coronavirus pandemic. In Brazil, the President can issue provisional acts (*medidas provisórias*) to regulate urgent matters, but the decree needs to be approved by a majority in Congress within 120 days to remain in force. The Court, nonetheless, decided that an extension of the constitutional deadline would amount to an undue encroachment over the legislature's law making powers.

Moraes was involved in another major setback for the federal government. On April 24, Justice Minister Sérgio Moro (known for his role in the Car Wash operation) resigned and accused Bolsonaro of politicizing the Federal Police. According to Moro, the President was pushing for a change in the Police's leadership. His objective, Moro said, was to aid his sons and close friends who were implicated in ongoing investigations.

After Moro's resignation, Bolsonaro appointed Alexandre Ramagem, a family friend and former head of the Brazilian Agency of Intelligence, to be the next head of the Federal Police. Nevertheless, Justice Moraes barred the appointment over evidence that Bolsonaro was trying to co-opt the institution.

Another blow came when Justice Celso de Mello authorized an investigation into the President's actions and decided to release the recording of a cabinet meeting in which Bolsonaro admits that he is trying to politically interfere with the workings of the Federal Police. At one point in the meeting Bolsonaro said to his Ministers that he is not going to "wait for [his] family or friends to get screwed [by police investigations]" before taking action.

Summoning the Armed Forces

As the judicial defeats were piling up, Bolsonaro started to attack the Justices and call for his supporters to protest against the Court for allegedly overstepping its constitutional bounds. *Bolsonaristas* (Bolsonaro's supporters) started to evoke Article 2 of the Brazilian Constitution, according to which the three branches of government are "independent and harmonious with each other". They believe that the STF is a threat to the independence and harmony between the branches and should be restrained accordingly.

But Bolsonaro's supporters did not stop there. They are now defending a purported "constitutional role" that was reserved by the Constitution to the armed forces when a conflict emerges between the three branches of government. Article 142 of the Constitution states that the armed forces are to "guarantee the constitutional branches of government and, on the initiative of any of these branches, law and order".

Bolsonaristas argue that the Constitution, under Article 142, delegates to the armed forces the role of a "constitutional moderator" that can be summoned by the President to reestablish law and order when the Supreme Court goes astray. However, nothing in the Constitution tells how this "moderation" is to take place or what is the mechanism through which any branch of government can summon the armed forces.

The lack of clarity in the constitutional text did not stop Bolsonaro and his cronies from advertising Article 142 as a solution to the stalemate between the Executive and the Judiciary, in a clear attempt at giving legal legitimacy to their authoritarian aspirations. In case the Supreme Court ventures too far off its constitutionally prescribed path, the Justices are reminded that the armed forces will be ready to intervene and restore the constitutional status quo.

In sum, *bolsonaristas* created a new constitutional emergency provision out of whole cloth. When the system of checks and balances devised to keep the separation of powers in place fails, the armed forces should intermediate institutional conflicts. Nevertheless, there is no good reason to believe that the 1988

Constitution created any additional checks beyond the structural limits provided by the separation of powers and the Madisonian checks and balances.

It is unthinkable that a Constitution that was established to repudiate the military dictatorship would provide for the possibility of the armed forces to assume such a prominent role on the national stage without any further elucidations. But this ludicrous thesis is supported by Ives Gandra Martins, a respected Professor of Law in Brazil. In 2013, Martins said during a speech that there was no dictatorship in Brazil, but instead a continuous "state of exception". He also argued that he and his colleagues were not censored during the period, shrugging off allegations of undue censorship.

Martins' interpretation of Article 142 was adopted by *bolsonaristas* and the President himself. On May 21, federal deputy Bia Kicis defended a "constitutional military intervention" to restrain the Supreme Court. In her speech, which was aired live from Congress, Kicis quoted Martins to argue that the Brazilian Constitution allows for the armed forces to interfere with national politics with the objective of restoring law and order.

More recently, on May 28, Bolsonaro shared a video on Twitter in which Martins voices his antidemocratic interpretation of Article 142. According to the President, the intervention will be "punctual" and is justified by the Supreme Court's growing "politicization". On June 2, the Prosecutor General Augusto Aras said during an interview that the armed forces can step up when one branch encroaches upon the other. According to Aras, if one of the branches invades the competencies of another, it does not deserve the protection of the Armed Forces.

Although Ives Gandra Martins later wrote an oped saying that he favors democracy and does not support a military coup, his unfortunate remarks continue to be shared on social media by *bolsonaristas,* top officials in the federal government, and the President to justify their antidemocratic agenda.

But the most warning sign came when General Augusto Heleno, the head of the Institutional Security Cabinet in the Bolsonaro administration, signed a brief statement in which he wrote that the actions of the Supreme Court are a "clear attempt at imperiling the harmony between the branches and it can lead to unforeseen consequences for the national stability".

Make or Break

When he was a presidential candidate, Bolsonaro threatened to create additional seats in the Supreme Court. Now that he lacks the votes in Congress to do that, the President is embracing an abusive interpretation of Article 142. Although the path to formal institutional change is blocked, Bolsonaro can still count on key figures in the military to bring the Court to its knees. Without the support of Congress and unable to change the Court's institutional features, Bolsonaro is trying to give the armed forces the status of a fourth branch of government, one that can serve his authoritarian project.

What we see in this unusual interpretation of Article 142 is what we call in Brazil a "constitutional mutation" (a change in meaning without a corresponding change in text) that is being used as a mechanism to erode the democratic order from the inside out. From this point of view, the armed forces can interfere with the separation of powers if one of the branches is not functioning "the right way".

Justice Celso de Mello will retire in November 2020, Bolsonaro will be able to appoint a new member to the bench. The president's promise is that he will select someone "terribly evangelical". In 2021, Justice Marco Aurélio de Mello will also retire. The President suggested he could nominate the current Prosecutor General, Augusto Aras, for a possible third vacancy at the Court, stating that "[he] hopes that no one will disappear" until then, meaning the other Justices of the STF.

If Bolsonaro can show that the Constitution allows for an intervention of the armed forces to "moderate" the struggle between the Presidency and the Court, his authoritarian project can go forward without the need for amending the Constitution. Thus, what we see in Brazil is not an ordinary debate over the correct interpretation of the constitutional text.

Instead, an abusive interpretation of Article 142 is advanced at the expense of democratic stability.

Brazil has not had a formal "constitutional moderator" since the Imperial Constitution of 1824, when the task was performed by the emperor. It was later abolished by the first Republican Constitution of 1891, which adopted the supremacy of the Constitution as a criterion for establishing (and keeping) the balance between the branches of government. This prerogative cannot be restored and entrusted to the armed forces without prompting a democratic breakdown.

Article 142 needs to be interpreted alongside other hallmarks of Brazilian constitutionalism. The 1988 Constitution represents a rupture with the military regime. From a democratic perspective, it did not entrust the task of keeping the harmony between the branches to the armed forces. Instead, the separation of powers is structurally enforced by a system of checks and balances that do not require tanks or machine guns.

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