Accountability in Brazil

Legal Developments After 8 January 2023

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The end of Jair Bolsonaro's presidency is far from marking a return to normality in Brazil. After the riots of 8 January, which aimed to create the conditions for a coup in Brazil, authorities and institutions had to deal with several turbulences and the issue of Bolsonaro's responsibilization has been a permanent concern.

Immediately after the invasion and destruction of the buildings of the Federal Supreme Court, the Presidency, and the National Congress on 8 January 2023, President Lula da Silva's government quickly responded with constitutional and legal measures to strengthen the role of institutions. To evaluate the efficacy of these responses, it is important to discuss how these institutions have been dealing with Jair Bolsonaro's legacy. Moreover, it is equally important to understand the challenges President Lula is facing, which are partly due to the difficulty to reach political compromises. The recent police raids that seized documents and devices in Bolsonaro's house, and arrested some of his direct aids, adds complexity to the situation, as we will attempt to explain.

Controlling the attacks: The executive measures

A couple of hours after the attacks on the constitutional branches' buildings, President Lula issued a decree of federal intervention in the Federal District that administrates the city of Brasília, where the events took place, suspending part of the powers of the governor and indicating a temporary administrator to act as head of the Federal District's police and security forces. The decree was based on Article 34, number III, of the 1988 Constitution and showed that the government would not request any assistance from the armed forces. The Federal Government's reaction to the coup attempt abided by the rule of law and avoided any intrusive measure that could be interpreted as reaching beyond the boundaries of legality.

Part of the task of the government, in the aftermath of the attack, was to send a message of resilience and assurance to citizenry and the political institutions. In a symbolical appearance, in the day after the attack, President Lula, accompanied by governors of different Brazilian states and members of the Federal Supreme Court, visited the buildings that were destroyed in the attacks. Meanwhile, the administrator of the federal intervention ordered the police to arrest more than 2.000 supporters of Bolsonaro on 9 January 2023, who participated in the attacks and were still camped in front of a military base. Some of them were gradually released depending on the gravity of their participation in the events.

The controversies surrounding what response to take on the night of 8 January illustrates the troubled relationship between civil and military officials in Brazil. Although the Minister of Defense, who legally commands the armed forces, defended that there should not be a conflict between policemen and hundreds of Bolsonaro's supporters who were camping outside military facilities in Brasília, the Minister of Justice advocated for immediate reaction. Ultimately, the decision was that they should be arrested the next day.

Security video footage would confirm that military officers (including the head of the Institutional Security Cabinet, a general indicated by Lula who would resign after the release of the videos) and policemen were extremely lenient with the violent demonstrators on the day of the attacks. They showed that Lula was right in dismissing the army commander one week after the coup attempt. These, however, are not enough to show the level of involvement of the armed forces in

the violence against Brazilian constitutional democracy.

The judicial oversight of the Brazilian democracy

The Federal Supreme Court also adopted several legal measures. Justice Alexandre de Moraes, the rapporteur of a large-scale investigation on digital militias that were harassing institutions at least since 2019 (the fake news inquiry), went further than Lula and removed the governor of the Federal District from office for ninety days. In addition, he arrested the Federal District's Secretary of Justice and former Bolsonaro's Minister of Justice (with whom a plan for illegally declaring a state of emergency was found, which came to be known as the "coup draft"), as well as the local commander of the military police. In the following months, Moraes would arrest several other people involved in the coup attempt for crimes against the constitutional democratic state, including a former lieutenant colonel. The decisions show that the Federal Supreme Court is willing to severely enforce the criminal provisions that aim at protecting the constitutional state against violent attacks that aim at seizing power.

One of the key aspects, however, of the judicial oversight of Brazilian constitutional democracy is the already mentioned "fake news inquiry". Although several rulings were dependent on the proactive performance of Justice Alexandre de Moraes (who also happens to be the Chief Justice of the Electoral Superior Court), most of them were confirmed by the full bench of the Federal Supreme Court.

However, more recent events, in the past couple of days, caused further concerns. For instance, while a bill to prevent the dissemination of fake news was being debated in the Chamber of Deputies, Google used its main website to take a stand against the legislative proposition, posting a statement that the bill would make the "internet worse". The company's interference in the legislative debate was surely subject to criticism and its lobby prevented the bill from being debated by the Chamber of Deputies – a major defeat for Lula's government. Nevertheless, Justice Alexandre de Moraes considered Google's position as a threat to the rule of law that could be addressed by the fake news inquiry and subpoenaed its Brazilian CEO (like other big techs directors) to testify to the Federal Police.

Justice Alexandre de Moraes's ruling mixes legislative and judicial procedures in a controversial way. While the fake news inquiry has played a capital role to respond to the attacks on Brazilian democracy, that does not entail that judicial authority shall be expanded in an uncontrollable way, with the risk of compromising the legitimacy of the court's constitutional procedures.

Jair Bolsonaro's accountability

From the beginning, the involvement of former President Jair Bolsonaro has been under consideration. One must bear in mind that he left Brazil (and the presidency's chair) before the end of his mandate and returned three months later. In his absence, beyond the coup attempt, investigations moved on and started to produce results. Bolsonaro is currently facing sixteen accusations before the Electoral Justice for his constant attacks on electronic ballots and electoral institutions that can lead to his ineligibility for public office. He also needs to respond to criminal procedures that were at the Federal Supreme Court involving his role in COVID-19 health policies.

These later investigations gained momentum in the past couple of days, after a series of raids of the Brazilian Federal Police, on May, 3rd 2023, that searched former president Jair Bolsonaro's house, seized his personal mobile phone, and arrested several of his aids, including a lieutenant-colonel that is regarded as his closest aid and worked in the Presidential Cabinet. Apparently, this investigation concerns a minor fraud in Bolsonaro's and his daughter's vaccination cards, but there is potential that the documents, devices, and data seized in the raid reveal more serious offences and a direct involvement of the former president.

This is, in fact, the case in which the judicial authorities have got the nearest to Jair Bolsonaro until now. The police raid is linked to an investigation into the fraud of Jair Bolsonaro's and his daughter's data on vaccination cards. Allegedly, some of Bolsonaro's aids

produced fraudulent vaccination certificates for Bolsonaro and his daughter to travel to the United States, which were required by the US authorities during COVID-related travel restrictions. The police operation is a taint on his political support and maybe just the start of further accountability procedures, given that there appears to be evidence of further delicts in the messages exchanged between some of Bolsonaro's aides. Nonetheless, again, there is a concern about the protection of the rule of law, since the police raid was also ordered by Justice Alexandre de Moraes in a request supposedly linked to the fake news inquiry, on the basis that the fraud was part of a major disinformation campaign on COVID-19 vaccination led by Bolsonaro.

That is not all for Bolsonaro. He will also need to face investigations for receiving gifts from the Saudi Arabia authorities consisting of several jewels between 2019 and 2021. He received million dollars Rolex and Chopard presents and allegedly incorporated them into his personal property, since they were not left by Bolsonaro in the presidency's cultural heritage, only to be returned when they were discovered and some of them would also not be declared to the Brazilian fiscal authorities.

There are also investigations related to Bolsonaro's speeches against Brazilian democracy on 7 September 2021. In addition to his involvement with 8 January 2023 attacks, there seems to be plenty of room to hold him accountable.

Dealing with Bolsonaro's legacy

The first days of the new presidential term were dedicated to starting to rebuild the 1988 Constitution's public policies and fundamental rights structures dismantled by Jair Bolsonaro. The new government recovered the participation of civil society representatives in public councils, rebuild the Human Rights Ministry, acted to remedy human rights violations committed against indigenous people, created a fiscal bill (still to be approved) to substitute a previous debt ceiling that will include the protection of socio-economic rights, and acted to address the coup attempt – especially trying to control military authorities. Nonetheless, the government is facing difficulties in its relationship with the National Congress.

During Bolsonaro's term, one of the most important forms to control his most outrageous policies was made by the National Congress. At first, the legislature rejected several decrees that aimed at expanding access to guns, reducing the oversight of financial crimes, and expanding rural activities in indigenous lands. Later, however, Bolsonaro ceded to pork-barrel politics through the reinforcement of obscure parliamentary control over budgetary law with legislative amendments. Legislators could amend the budget with no clear explanation of how – and on which scale – the changes benefitted their constituencies. The so-called secret budget was struck down by the Federal Supreme Court. However, the conservative legislature elected in 2022 did not give good hopes for Lula's presidency.

Up to now, representatives and senators have kept asking for more participation in the executive branch and more direct influence on budgetary matters that can favor their particular interests. The absence of the secret budget is imposing a high political cost on Lula's administration. The result is that the fake news bill had its discussion suspended, to avoid a major defeat, and a decree on basic sanitation was rejected, all in the same week.

The scenario indicates that there is, still, space for political deadlock. Whereas Bolsonaro and his supporters were recently hit by judicial oversight, Lula must fight more difficult legislative political practices than the ones he faced at the start of the 2000s. In this sense, constitutional resilience and reconstruction in Brazil are far from reaching a stable stage.

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