

Lula da Silva: Condemned by the courts, absolved by history

The Lula da Silva case blatantly shows that something is rotten in the Brazilian judicial system. It brings to the fore procedures and practices that are incompatible with the basic principles and guarantees of democracy and the rule of law, in a way that needs to be denounced and democratically opposed.

Totalitarianism and the selectivity of judicial action. The principle of the independence of the courts is one of the basic principles of modern constitutionalism. It ensures that citizens have the right to a justice that is free from pressures and interference on the part of political or factual powers, whether national or international. The strengthening of the conditions necessary for enforcing these principles requires models of judicial governance with ample administrative and financial autonomy. However, in a democratic society such strengthening cannot drift toward a selective and totalitarian kind of power, lacking supervision and a system of checks and balances. The Lula da Silva case has revealed that the Brazilian judiciary is drifting in that direction. Here are two examples. There is a flagrant disjunction between the judicial activism directed against Lula da Silva – swift, effective and ruthless (Sérgio Moro issued a warrant for Lula’s arrest only a few minutes after he was notified that the habeas corpus had been denied, although an appeal was still possible, and besides, the enforcement of the sentence came less than two years after the complaint was filed) – and the slowness of the legal action taken against Michel Temer and other politicians of the Brazilian right. Furthermore, it is impossible to argue that this inaction has been blocked by maneuvers on the part of the political establishment, because we have not heard of a similar activism of the

judiciary in denouncing such maneuvers and in seeking to overcome them. My second illustration is the totalitarian restriction of constitutionally enshrined rights and freedoms. In a context of democracy and the rule of law, the courts have to be an area for the deepening of rights. But what we are currently witnessing in Brazil is precisely the opposite. The Brazilian Constitution provides that no one shall be found guilty until there has been a final judgment, that is, until all the possibilities of appeal have been exhausted. The Portuguese Constitution contains a similar provision, and it would be unimaginable for Portugal's Constitutional Court to order someone's arrest while the case was still on appeal before the Supreme Court of Justice. This is exactly what the majority of the judges in Brazil's Federal Supreme Court have done: they have restricted constitutional rights and freedoms when they determined that Lula da Silva could begin to serve his sentence although the appeal is still pending. What social and political legitimacy does the judiciary have, to so restrict constitutionally enshrined fundamental rights and freedoms? How can a citizen or a society be at the mercy of a power that claims to possess legal reasons unknown to law? How trustworthy can a judicial system be when it gives in to military pressures that threaten with a coup in case the decision is not to their liking, or to foreign pressures such as those of the US Department of Justice and the FBI – of whose interference there is documentary evidence – to expedite Lula's sentencing and execute his arrest?

Lack of guarantees of criminal proceedings. The media debate with regard to Lula's arrest highlights the fact that the case was examined and decided by an appellate court that not only upheld his conviction but further increased the sentence. The increase is supposed to be based on additional justification of culpability. Regrettably, however, the right-wing ideological hegemony that is prevalent in the current media landscape does not permit a

serious debate on legality to take place. Were that possible, one would comprehend the importance of questioning the material, direct evidence of the facts on which the indictment and the conviction rested. But no evidence exists in the case. Lula da Silva's indictment and 12-year sentence are based mostly on information obtained through plea bargain agreements (literally, "rewarding for delation" in Brazil) and on presumptions. Furthermore, the conditions for evidence collection and validation are difficult to verify, because the person who presides over the investigation and validates the evidence is the same who first heard the case at first instance. This is the opposite, for example, of what is common practice in Portugal, where the judge who intervenes in the investigation stage cannot judge the case, thus allowing the evidence to be truly scrutinized. Having control over the process during the investigation and trial stages confers on the judge a power that is susceptible to manipulation and political instrumentalization. One can easily understand the magnitude of the risk involved for society and the political regime when this power lacks self-control.

Instrumentalizing the fight against corruption. The debate over the Lula Case led by a sector of the Brazilian judiciary polarizes the fight against corruption, setting the judicial actors of the Car Wash process – with the intransigent struggle against corruption latched on to them – in opposition to all those who question the investigation methods, the violation of constitutional rights and guarantees, faulty evidence, totalitarian attitudes on the part of the judiciary, and the selectivity and politicization of justice. This polarization is instrumental and aims precisely to conceal various violations on the part of the judiciary, both when it acts and when it refuses to act. The media script for demonizing the PT is as compulsive as it is grotesque and can be reduced to the equation corruption-equals-Lula-equals-PT, even though it is a known fact that corruption is endemic and that it affects

Congress in its entirety, as well as, supposedly, the current President. A piece published in the 7 April issue of *Estado de São Paulo* is paradigmatic in this regard. It wraps up the script with the following diatribe: “As happened with Al Capone, the notorious American gangster who was finally arrested not for his numerous criminal activities but for tax evasion, the case of the triplex apartment that got Lula into prison in no way summarizes the former president’s role in the *petrolão* scandal.” This narrative leaves out the most decisive detail: in the case of Al Capone, the courts managed to prove tax evasion, but in the case of Lula da Silva, the courts failed to prove the acquisition of the apartment. Incredible as this may sound, a reading of the sentences leads one to conclude that the alleged evidence is no more than presumptions and opinions of the magistrates. The anti-PT campaign brings to mind the anti-Semitic campaign of the Nazi period. In both cases, the evidence for substantiating a conviction consists in the obvious fact that no evidence needs be produced at all.

The democrats and the many Brazilian magistrates who, with civic and professional probity, serve the judicial system rather than putting it at their own service, are facing a demanding task. How can one leave with dignity this swamp of violations hidden behind a legal façade? Is there a preferential reform for the judicial system? How to organize those magistrates who are willing to erect democratic trenches against the viscous spread of the new type of juridical-political fascism? How can the teaching of law be reformed so as to avoid legal perversities from being transformed, by repetition, into legal normalities? How should magistratures seek internal self-discipline so that the gravediggers of democracy cease to be employed by the judicial system? The task is very demanding indeed, but it can count on the active solidarity of all those around the world who have their eyes set on Brazil and

who enlist in the same struggle for the credibility of the judicial system as a factor toward the democratization of societies.