

HAPSc Policy Briefs Series

Vol 2, No 1 (2021)

HAPSc Policy Briefs Series



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doi: [10.12681/hapscpbs.27653](https://doi.org/10.12681/hapscpbs.27653)

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To cite this article:

Castelo Branco, P. H. V. B., & Gouvêa, C. B. (2021). Blind Spots of Brazilian Law: Encouraging Insurrection, Parliamentary Immunity and the Defense of Institutional Safeguards. *HAPSc Policy Briefs Series*, 2(1), 31–36. <https://doi.org/10.12681/hapscpbs.27653>

Blind Spots of Brazilian Law: Encouraging Insurrection, Parliamentary Immunity and the Defense of Institutional Safeguards¹

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Abstract

In almost the whole world, distrust of political institutions delegitimizes their representation, leaving us without a shelter that protects us in the name of common interest (Gouvêa & Castelo Branco, 2020). The rupture in the relationship between the rulers and the ruled makes this conflict even more profound, with devastating consequences that arise from the inability to deal with the multiple crises that are being decanted and mapped in the internal political system. Democratic recession⁴ contributes to the boiling of politicians who do not take constitutional ideals seriously, who do not see constitutions as a source of constraints to their powers, and instead use the constitution and legal rules to self-perpetuate, to legitimize arbitrary government and to ensure who will be re-elected as many times as possible. Populisms and populist movements represent the instrumental degradation of the power structures of democratic systems. In a recent published survey, we found that populisms (Gouvêa & Castelo Branco, 2020) have a conceptual-instrumental nature and can be defined as democratic illiberalism⁵ with variable properties⁶. They represent

¹ To cite this paper in APA style: Castelo Branco, P. H. V. B. & Gouvêa, C. B. (2021). Blind spots of Brazilian law: Encouraging insurrection, parliamentary immunity and the defense of institutional safeguards. *HAPSc Policy Briefs Series*, 2(1): 31-36. DOI: 10.12681/hapscpbs.27653

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⁴ According to the Freedom House Report (2021), the impact of long-term democratic decline has become increasingly global in nature, broad enough to be felt by those living under the cruelest dictatorships, as well as by citizens of older democracies. Nearly 75% of the world population lived in a country that experienced a democratic recession in 2020. As COVID-19 spread throughout the year, governments across the democratic spectrum have repeatedly resorted to over-vigilance, discriminatory restrictions on freedoms and arbitrary or violent applications of such restrictions by police and non-state actors. The expansion of populist and authoritarian regimes, combined with the weakening and inconsistent presence of major democracies on the international scene, has had tangible effects on human life and security, including frequently resorting to military force to resolve political disputes.

⁵ Democratic illiberalism represents the disintegration of the system in which liberalism and democracy are in conflict. The term illiberalism has been widely used by the doctrine. See: Zakaria, Fareed (1997). *The rise of illiberal democracy*. Foreign Aff., v. 76, p. 22; Mounk, Yascha (2018). *The people vs. democracy: Why our freedom is in danger and how to save it*. Harvard University Press; Puddington, Arch (2017). *Breaking down democracy: Goals, strategies, and methods of modern authoritarians*. Washington, DC: Freedom House. For Puddington (2017), illiberalism involves a rejection of liberal values and democratic norms in the specific political context. Contemporary populism emerged in a context of economic and financial crises and a deeper crisis of liberal democracy. The rise of economic inequality and the intensification of disbelief in politics would represent the failure of liberal elites to fulfill their promise of a political practice based on moderation and consensus, recognition of minority rights and mutual tolerance. This led to the crisis of liberal democracy. In this context, populism presents premises that are very different from those that underlie pluralist liberalism, such as the polarization of politics, in detriment of the search for consensus; popular homogenization, in detriment of the recognition of the heterogeneity of groups in the political community; the overlapping of conservative and exclusive values on progressivism (Gouvêa & Castelo Branco, 2020).

⁶ The variable properties can manifest themselves through different political-cultural and ideological manifestations; from the intimidation of free press; to the rejection of election results; in the weakening and attacking institutional safeguards; in the massive use of intelligence and data control and surveillance services; in the polarization of sectarian politics by charismatic leaders; in the routinization of charisma; in rhetorical and demagogue speeches as particular styles of extremist communication; in the formulation of policies driven by impulses and subject to sudden changes and upheavals

a certain type of ideology, discourse, strategy, mobilization and political action in the specific cultural and political context. They decant themselves through formal and/or informal movements directly or indirectly in the democratic system by a charismatic leader who represents and leads an anti-establishment force resting their beliefs in moral and ethical institutions in order to consolidate and legitimize a populist political regime under the mantle of popular sovereignty and democracy. To subvert democracy, you have to become democratic.

Keywords: insurrection; parliamentary immunity; defense of institutional safeguards; populisms; Federal Supreme Court.

Introduction

The populist Bolsonaroist movement⁷ in Brazil represents an affront to democratic values and principles and, consequently, to the democratic rule of law (Gouvêa & Castelo Branco, 2020). According to Daly and Jones (2020) these concerns end up highlighting the problem of how to identify and punish the political power that resides outside formal institutions, as in the case of the “almost political parties”⁸. These organizations are not presented as parties to the electorate and, crucially, they avoid the formal channels of power dodging accountability and corrective measures specific to political parties. The movement, far from being representative, becomes a faction representing a certain extremist ideology, effectively a “shadow party”.

Main Issues

The populist movement has formal, informal, direct and indirect aspects that constitute variable properties of populism. These are strategies commonly used in different specific contexts and are intended to expand their political strength. In Bolsonaro's populist movement, the use of political and

because it is designed to respond to the political climate of the moment; in undemocratic behavior; the rhetorical use of government policies and actions; exploring the popular feeling of disbelief in institutions; in the segregationist political agenda and agenda; in the systematic use of the media environment on social platforms such as WhatsApp, Twitter, Facebook; in the unrestrained use and promotion of misinformation and fake news; in the subversion of the constitutional process and the rejection of the rules of the game; in the tolerance or encouragement of violence; in the excessive use of referendums; in the propensity to restrict liberties and culture; in the use of political and religious moralism; mythical politics; the politicized supervisory body; populist governance of the use of military power in politics and the “militarization of politics”, among other behaviors that fit the anti-democratic and illiberal principles. These variables decant themselves through formal and informal movements directly or indirectly in the field of democratic illiberalism. (Gouvêa & Castelo Branco, 2020).

⁷ A populist movement is understood as the way it manifests itself in the social, political and legal context.

⁸ For example, in Brazil, the movement entitled “300 do Brasil” is investigated by Police Inquiry No. 4,828, which points to evidence of the digital influencers that make up the core of the support base for the Bolsonaro government and that is related to actions of considerable harmful potential, taking into account that their manifestations, promoted both on social media and physically on the street, have instigated a portion of the population that, with ideological affinity, has been used to drive the extremism of the polarization and antagonism discourse, by illegal means, to the Powers of the Republic, more precisely the Federal Supreme Court and the National Congress (Gouvêa & Castelo Branco, 2020).

religious moralism, the unrestrained impetus for misinformation and fake news, the polarization and militarization of politics stands out (Gouvêa & Castelo Branco, 2020).

Inquiry 4,781 pending confidentiality at the Supreme Federal Court, established by Ordinance No. 69, of March 14th, 2019, is intended to investigate, considering the existence of fraudulent news, slanderous denunciations, threats and infractions covered by *animus caluniandi*, *diffamandi* or *injuriandi*, which attack the honorability and security of the Supreme Federal Court, which are the results of these movements. On February 16th, 2021, a Youtube video⁹ came to the attention of the court, published by federal congressman Daniel Siveira, in the Youtube channel called “Política Play”, where the said deputy during 19m9s, attacks the head of the Ministers of the Supreme Federal Court, through various threats and offenses to honor, expressly propagates the adoption of anti-democratic measures against the Supreme Federal Court, defends the AI-5¹⁰; also incites the immediate replacement of all Ministers as well as instigates the adoption of violent measures against their security, in a clear affront to democratic, republican principles and the separation of powers¹¹.

The arrest of the congressman was decreed by the Federal Supreme Court, which unanimously understood that there was a need to adopt vigorous measures to prevent the perpetuation of criminal activity. The Federal Supreme Court considered it imperative to prevent the perpetuation of criminal activity with the intention of harming or exposing the independence of the instituted powers and the Democratic Rule of Law to harm. The Court interpreted the crimes contained in the video as blatant because of their availability and accessibility to users connected to the worldwideweb. The crimes against the democratic constitutional order contained in the video inserted in a global system of interconnected computer networks and accessible at any time, were understood as crimes of prolonged consummation, which would constitute permanent criminal conduct.

In the decision, some signs that represent the legitimacy of the arrest are evidenced: (i) the author of the conducts repeatedly¹² attacks institutional safeguards in order to modify the current regime and the rule of law, through structures and financing aimed at mobilizing and inciting the population to subvert the political and social order; (ii) created animosities between the Armed Forces and the institutions; (iii) there is no possibility of spreading ideas contrary to the constitutional order and to

⁹ Available at: <https://youtu.be/jMfInDBItog>.

¹⁰ Institutional Act No. 5 represented the definitive insertion of the National Security doctrine in Brazilian legislation in Brazil's dictatorial period. It granted almost absolute powers to the President of the Republic, intending to combat subversion and ideologies contrary to Brazilian traditions. It is considered the most repressive of acts in the Brazilian legal field (Torres, 2018).

¹¹ Inquiry 4,781 Federal District. Available at: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5651823>.

¹² Representations against the Congressman on the Ethics Council of the Chamber of Deputies (REP1 / 21, REPs 3/21 to 9/21) include illegally recording his party's meeting held in October 2019; responds to lawsuit for breach of parliamentary decorum for offenses and possible threats to members of the Supreme Court, and for making an incitement for AI-5

the Democratic State (CF, articles 5, XLIV; 34, III and IV) nor the demonstration on social networks aimed at breaking the rule of law, with the extinction of the constitutional fixed clauses - Separation of Powers (CF, article 60, paragraph 4), with the consequent installation of arbitration; (iv) freedom of speech and pluralism of ideas are structural values of the democratic system, however, conduct and manifestations that have the clear purpose of controlling or even annihilating the power of critical thinking, indispensable to the democratic regime, are unconstitutional; (v) he preached violence, arbitrariness, disrespect for the Separation of Powers and fundamental rights, in short, pleading for tyranny, violence and the breach of republican principles, as evidenced by the criminal and inconsequential manifestations of the aforementioned parliamentarian. In these unprecedented circumstances, the National Congress, in a historical decision, maintained the arrest of the congressman¹³ by 364 votes.

Conclusions

Brazilian democracy has been showing resistance when trying to prevent the legitimization of Bolsonaro's populist movement through the backlashing effects of democratic institutions, civil society and non-governmental organizations (Gouvêa & Castelo Branco, 2020).

Two hypotheses represent the key points of this discussion: parliamentary immunity whose foundation is the defense of democracy and not the other way around; and the concept of the act, which can no longer be thought of outside the digital revolution that expands its semantic extension.

The congressman's repeated criminal conduct constitutes an imminent threat to Brazilian democratic stability and to the constitutional order foundations. Its practices typify a pattern of anti-democratic insurrectionary behavior, incompatible with the mandate given to him by the popular vote. His conduct demonstrates and warns, if he remains in the position, that he will be a clear and present danger to the foundations of our constitutional order itself and the security and protection of our nation. If the parliamentarian remains in the position, he and his followers will feel empowered and

¹³ According to article 53 §2 of the 1988 Federal Constitution, Deputies and Senators are inviolable, civilly and criminally, by any of their opinions, words and votes and, since the issuance of the diploma, members of the National Congress cannot be prisoners, except in the act of committing an unbailable crime. In this case, the records will be sent within twenty-four hours to the respective House, so that, by the vote of the majority of its members, it can decide on the arrest. On a continuous basis, the Chamber of Deputies voted on February 24, 2021, the admissibility of Proposed Amendment to the Constitution (PEC) 3/21 which determines that the arrest of deputies and senators in the act can only be decreed if it is related to unbailable crimes listed in the Constitution such as racism and heinous crimes. The proposal aims to change constitutional provisions that provide for parliamentary prerogatives. According to Conjur, the PEC wants to veto the possibility of a Minister of the Supreme Court decreeing the provisional arrest of a parliamentarian in a monocratic way, such as that which occurred with Deputy Daniel Silveira, detained by order of Minister Alexandre de Moraes (see: Conjur. Câmara aprova admissibilidade da PEC sobre imunidade parlamentar. Pub. Feb 2nd, 2021. Available at < <https://www.conjur.com.br/2021-fev-25/camara-aprova-admissibilidade-pec-imunidade-parlamentar>> (Accessed: 24/02/2021).

allowed to continue to attack democratic institutions. Material parliamentary immunity cannot be used to shield the practice of crimes, especially against democracy, which is the condition for the possibility of the constitutional prerogative of inviolability.

The judicial review at this point remains an intractable tension. What are the criteria used to decree the arrest of a parliamentarian, as in the case of Brazil, which has a double protection of freedom of expression? It is not enough to affirm that there was an incitement or crime against the democratic order, but to justify why it is not affected by material parliamentary immunity. The need for fundamentality is justified as populist forces of authoritarian inclination can be strengthened by granting the status of victims of “entrenched elites” like the Ministers of the Brazilian Supreme Court.

Brazil has an authoritarian populist president, and, at this moment, the formal and informal democratic institutions must take the stage. The systems of checks and balances are capable of restricting and constraining the populist movement. The backlash effect, arising from both formal and informal institutions, represents the active and boiling exercise of Brazilian democracy, which has acted in a way to prevent the legitimization of the populist bolsonarist movement. In this sense, the movement's strength has brought together institutions, civil society, non-governmental organizations, political parties to incorporate diffuse manifestations of popular power in the name of democratic and constitutional values¹⁴. When the parliamentarian concludes by threatening democratic institutions, corrupting or interfering in the pillars that support their values, he denies the very premise of the constitutional system.

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¹⁴ LSN in Brazil was invoked to prosecute opponents of Jair Bolsonaro (youtuber, businessman and influencer Felipe Neto will launch a project to defend people prosecuted by the government. The “Shut up is already dead” front has the idea of offering free defense to citizens who criticize President Bolsonaro's government or any public authority. The project intends to fight against authoritarianism and that it will be driven by the principle that, when a citizen is silent in the exercise of his legitimate right of expression, the voice of democracy weakens (Legal Consultant, 2021). In the same sense, the Federal Public Defender's Office and a group of lawyers have sued the Federal Supreme Court, in different petitions, with the request of a collective Habeas Corpus, in favor of all persons prosecuted, investigated or threatened with an investigation for a national security crime through manifestation of political opinion or the practice, in theory, of crimes against the honor of Jair Bolsonaro, ministers of state or other federal public agents (Migalhas, 2021) and it also supported the Supreme Federal Court's order for Congressman Daniel Silveira to be arrested. Congressmen, political parties and civil society organizations have been mobilizing for the Court to evaluate the repeal or updating of the law and the main argument is the restriction of freedom of expression (Folha de São Paulo, 2021).

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