

DOES BRAZIL'S MODEL OF FEDERALISM REQUIRE INSTITUTIONAL REFORM? A DISCUSSION BASED ON THE WILTON PAES DE ALMEIDA'S TRAGEDY

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RESUMO: A rentabilidade política de estratégias de *blame-shifting*, que produzem incentivos para políticas públicas de baixa qualidade e criam um problema de *accountability* democrático, torna-se particularmente evidente em tragédias urbanas como a de Wilton Paes de Almeida, um edifício em São Paulo detido pelo governo federal e ocupado por população de baixa renda. Investigamos se o modelo de federalismo do Brasil requer reforma institucional para endereçar o problema do *blame-shifting*, usando a tragédia de Wilton Paes de Almeida como um estudo de caso. Primeiro, exploramos até que ponto se pode esperar que estratégias *blame-shifting* sejam, no agregado, corrigidas pelo que chamamos da “regulação” do federalismo brasileiro por meio de ações judiciais. Segundo, investigamos se uma reforma arriscaria reduzir níveis atuais de *accountability* democrático ao alterar um quadro institucional desejável, em que cidadãos recorrem a mais de um nível de governo para resolver seus problemas. Concluimos que a reforma institucional do federalismo do Brasil não deveria estar fora de cogitação.

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PALAVRAS-CHAVE: Blame-shifting; Cidades; Accountability democrático; Federalismo; Reforma institucional.

ABSTRACT: The political cost-effectiveness of blame-shifting strategies, which produces incentives for low-quality policy responses and creates a democratic accountability problem, becomes particularly apparent in the context of urban tragedies such as the one involving Wilton Paes de Almeida, a low-income residential building in São Paulo owned by the federal government and occupied by a low-income population. We seek to respond to the question of whether Brazil's model of federalism requires institutional reform in order to address the blame-

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shifting problem using the Wilton Paes de Almeida tragedy as a case study. First, we ask to what extent can expect blame-shifting strategies to be ultimately corrected by what we call the “regulation” of Brazilian federalism through litigation. Second, we investigate whether institutional reform risks reducing current levels of democratic accountability by altering a desirable institutional framework, where citizens can turn to more than one level of government to address problems. We conclude that the institutional reform of Brazil's model of federalism should be on the table.

KEYWORDS: Blame-shifting; Cities; Democratic Accountability; Federalism; Institutional reform.

INTRODUÇÃO

In the middle of the night, on May 1, 2018, a fire broke out in a well-known, residential building in downtown São Paulo called *Wilton Paes de Almeida*. The building, which was 24 stories high and the home to approximately 150 families, collapsed in a matter of hours (JIMENEZ, 2018). São Paulo awoke that day in a state of shock. Nine of the nearly 400 people who were living in the building died (ARAÚJO, 2018). The families that had been living in the building were extremely poor and were irregularly occupying the building (JORNAL USP, 2018). The media covered the tragedy extensively, and immediately started its pursuit to understand what exactly had happened, and who was responsible.

Soon it was revealed that the owner of the building was the federal government, but that it was temporarily in the possession of the Municipal Government of São Paulo.³ It was also revealed – to the outrage of the population – that the risk of a fire breaking out had been identified by governmental authorities linked to the municipal and state governments of São Paulo in 2015. However, there seemed to be no real clarity on who was responsible for complying with the safety, zoning and urban regulations applicable to the building. An entanglement of legal responsibilities among federative entities led to a sort of state of inaction – or, to

³ Although originally built in 1961 to host the offices of a company active in the glass industry, the building was subsequently placed in the hands of the federal government when the company went bankrupt a few years later. The building then became the headquarters of several governmental entities, most notably the Federal Police in São Paulo, and remained so until 2003, when it was abandoned by the government. In 2002, the federal government, which had been occupying the building for some time, became the formal owner of the building after a decision concerning the bankruptcy of its private owners became final and subject to no appeals. As a result of this abandonment, more and more disadvantaged families started occupying the building, which throughout the 2000's switched hands in a bizarre back-and-forth fashion: it was first turned over to the Municipal Government of São Paulo, and then returned to the Federal Government, after which it was handed over on a “temporary basis” to the City of São Paulo once again in October, 2017 (although it was still formally owned by the federal government until the tragedy occurred) (JIMENEZ, 2018).

say the least, to ineffective governmental response – to the safety risks that had been revealed in 2015.

This state of affairs reflected on the quality of the responses to the problem: the complex interaction of all the governmental actors involved was used by public officials as a justification to shun responsibility for the tragedy. We call this phenomenon “blame-shifting”. Blame-shifting strategies encompass, most obviously, situations where public authorities explicitly point the finger to other levels of the federation when pressured by the public opinion in the context of policy failure or omission. Take the following examples: when asked why he had done nothing to address the safety risk in the *Wilton Paes de Almeida* building while there was still time, the acting Mayor of the City of São Paulo, Bruno Covas, replied that his hands were tied because the building was owned by the Federal Government, but that he did all that he could (GIANCOLA & TAVARES, 2018; SPUTNIK BRASIL, 2018). Implicit in the Mayor’s statement is the belief that this meant that the federal government was “primarily responsible” for the fire hazard in the building, and that any municipal policy efforts to address this risk (by, for example, removing the population from the location, and by investing in safety equipment in the building) would necessarily have to be carried out in cooperation with the federal government instead of independently. This is the most obvious expression of a blame-shifting strategy: it is easily identifiable; all you need to do is turn on the news.

Blame-shifting can however be a much subtler strategy. The relevant public authorities need not explicitly point fingers to identifiable governmental authorities at other levels of the federation, and nonetheless still avoid a substantial portion of responsibility. Blame-shifting strategies also encompass “transfer attributions”, which “recognize a failure of one actor (or government entity) yet excuse the actor by implicating the actions of another” (MAESTAS *et. al.*, 2008).⁴ An example of this political behavior is the following. The now-extinct Ministry of Planning, Development and Management (part of the federal government) issued an official statement explaining that the building was supposed to be renovated to be used by the Municipality to house the new offices of its Secretariat of Education and Culture, and that for this reason the federal government and the Municipality of São Paulo were engaged in joint “repossession efforts” at the time of the tragedy so as to remove the families and transfer them to public housing facilities. The statement highlighted that these efforts were not “an exclusive responsibility” of either the Municipality of São Paulo or of the federal government. Behind the lines, one could clearly grasp what the municipality and the federal government were getting at: they were shunning responsibility for the governmental inaction that

⁴ Transfer attributions may include: (a) to claim that they are not the only ones responsible for addressing the problem; (b) to claim that their policy response depends on the performance of prior policy actions by another federative entity; (c) to claim that they did “their part” and that the source of the problem arose from a lack of or a low-quality response from another federative entity.

had led to the tragedy. Relatedly, Roberto Tuma, the head of the agency in charge of federal property and assets in São Paulo was even more direct, stating that "This is not the moment to place responsibility on anyone, as all governmental entities are responsible for this" (MERENGUE, 2018). This statement could arguably be interpreted as recognition of blame and a call to action, but what happened in the aftermath of the tragedy seems to suggest otherwise, as the federal government ended up not delivering any identifiable policy response. Thus, it remains as yet another example of a blame-shifting strategy.

One of the central ideas behind Brazil's attempted decentralization of power through federalism was to deepen democracy by providing citizens with a greater ability of controlling the government by punishing underperformance in elections.⁵ Brazil's hybrid model of federalism is based largely on the belief that decentralization of power will result in a distribution of legislative and administrative responsibilities that is comprehensible to citizens, and cohesive. However, the reality is (a) that cooperation between federative entities is weak and unpredictable; and (b) it is also extremely difficult to devise reliable rules for the allocation of responsibilities for many essential public policies. These two factual attributes of Brazilian federalism produce the conditions for blame-shifting strategies to be politically cost-effective. The result is that citizens have a hard time identifying who is actually responsible for a given policy area, which in turn raises democratic accountability problems.⁶

Assuming that this state of affairs is accurate, a question that emerges is the following: to be adequately addressed, does this problem – the political cost-

⁵ As noted above, other benefits associated with decentralization through federalism are fostering economic development and increasing the quality of public services. See ROBINSON, 2007; LEVINSON, 2000; BLANCHARD & SCHLEIFER, 2001; SCOTT, 2009. In Brazil, scholars have also questioned the alleged impact of decentralization on economic development and enhanced public services. See MELO, 1996; OLIVEIRA, 2007.

⁶ To the extent that one could argue that in a decentralized federal regime level of performance of federative entities could reasonably be expected to diverge, empirical research in Brazil is telling in this regard. In 2013 and 2018 public opinion surveys, Brazilians required to rate the performance of heads of government in the three levels of the federation and the responses largely converged. In May 2018, during presidential election season in Brazil, Brazilians were asked to rate the overall performance of their state governor and mayor as either "great", "good", "regular", "bad", or "terrible", and the results for the three levels of the federation converged significantly. 40.9% thought that the overall performance of their state governor was either bad or terrible, while 37% had the same opinion of their mayors; 33.2% rated the performance of the former as "regular", while 32.2% of their rated the latter the same way. The federal government was an outlier in that survey: 82.5% disapproved of President Michel Temer, who was very unpopular at the time (mainly due to the way in which he rose to power, by articulating the prior President's impeachment) (CNT, 2018). In a 2013 survey asking similar questions, the general perception of the federal government was also largely the same as that of the municipal and state governments. 54% of Brazilians gave the President of the country a rating of 0-6 (out of 10). 65% gave their mayor a similar rating; 61% gave their governor a similar rating; 77% gave the representatives of their municipal legislatures a similar rating; 78% gave federal senators a similar rating; 77% gave state and federal legislators a similar rating (CNT/IBOPE INTELIGÊNCIA, 2013).

effectiveness of blame-shifting strategies, which produces incentives for low-quality policy responses and creates a democratic accountability problem – require institutional reform? For example, it might be desirable to redesign constitutional attributions to reduce overlaps of responsibility between federative entities or limit the policy areas requiring federative cooperation – these are just a few examples of some institutional reform proposals that might address blame-shifting.

However, institutional reform involves substantial costs, particularly in the context of Brazil’s model of federalism, which is substantially detailed in the Constitution and would thus require constitutional amendments to alter. Thus, one must have a clear picture of the flaws of a given set of institutions before reaching a definitive conclusion on the need to engage in institutional reform. Furthermore, it is important to not lose sight of the fact that institutional reform can address one problem at the expense of creating another – which usually occurs when the benefits of a given set of institutions are not fully accounted for. An inquiry into whether institutional reform is warranted requires exploring not only the shortcomings of the *current* institutional framework, but also the potential benefits (some less obvious than others) that this framework might produce.

In light of the above, in this paper we will seek to respond to the question of whether Brazil’s model of federalism requires institutional reform in order to address the blame-shifting problem by focusing on two points. the “regulation” of Brazilian federalism. Brazilian institutions with the legal and political authority to regulate governmental underperformance from public officials at all levels of the federation include federative entities themselves, the Federal Prosecutor’s Office, the Federal Public Defense’s Office and courts. Our conclusion is that, although far from negligible, these litigation efforts are insufficient to fully address the blame-shifting problem.

In Part II, we investigate, again using the *Wilton Paes de Almeida* case to give traction to the discussion, whether there is reason to believe that institutional reform could – counterintuitively – reduce current levels of democratic accountability. It may for example be the case that, as currently structured, in Brazil’s federation citizens can access more than one level of government to seek solutions to the problems that afflict them – which might be desirable. Existing comparative scholarship discusses potential democratic accountability benefits associated with multi-level governance regimes (such as Brazil’s three-level federation) and the question of whether institutional reform is required therefore requires investigating the availability of these magnitudes in Brazil’s current institutional scenario. We conclude that, under existing circumstances, the potential multi-level governance-related benefits of Brazilian federalism are meager at best, and do not suggest that institutional reform would be outright undesirable.



On a more general level, we argue that, at least based on what our analysis in this paper suggests, the institutional reform of Brazil's model of federalism should not be off the table.

2. Is blame-shifting corrected by public litigation brought by existing institutions?

Whether Brazilian federalism enhances democracy does not necessarily depend exclusively on the ability of citizens to attribute blame for policy failure and therefore effectively incentivize political actors to perform their best in the hopes of winning elections to stay in power. In modern democracies like Brazil, other forms of institutional oversight, not directly related to social control, may be capable of mitigating the concerns resulting from blame-shifting strategies and may ultimately contribute to making it possible for citizens to vote based on an accurate perception of the performance of the three levels of the federation. In this section, we turn to two of these forms of government oversight, both of which appeared in the *Wilton Paes de Almeida* case.

2.1. OVERSIGHT BY OTHER FEDERATIVE ENTITIES

Federative entities themselves are actors capable of exercising oversight analogous to social control and may have incentives of their own to act. They may be able to bring law suits or act through the political process itself to push back invasions of power by other levels of the federation or counter erroneous attributions of blame for failure to issue rules or to underperform in the delivery of public policies.⁷ The outcome of such actions could arguably be to ameliorate blame attribution and, at an aggregate level, improve the net quality of policies and services to which citizens have access. On this account, blame-shifting strategies would not be undesirable methods of shunning political responsibility for policy failures or omissions, but rather a healthy posture on behalf of a federative entity trying to pressure the level of government actually in charge of taking action regarding a given policy issue (under the constitutional framework of powers and responsibilities) to act as legally required. Blame-shifting could therefore, on the long run, help clarify the exact policy boundaries of federative entities, thus reducing incentives for "opportunistic" blame-shifting.

This account seems unpersuasive, given Brazil's federalist experience over the last thirty years since the enactment of the current Constitution. Indeed, if federative entities were indeed engaging in effective oversight, one would expect

⁷ On this point, Pires observes that: "As we can see, federalism bears the mark of decentralization, and it has deep and intense relations with the democratic principle. Indeed, by bringing the discussion about local interest, public entities and government officials closer to the affected populations, federalism facilitates government oversight and, consequently, holding public officials accountable. In addition, if this control function is also exercised reciprocally by federative entities, it has in the vertical decentralization an important ally, since the many levels of government control each other" (own translation of PIRES, 2006, p. 103).

that by now Brazil would be a reasonably decentralized country and Brazil's federalism on paper would not look different from the way Brazil's federalism actually functions. However, this is far from being the case. The central government is still the epicenter of political power, and centralization is gradually increasing.

In the *Wilton Paes de Almeida* case, the City of São Paulo asked the Ministry of Cities, part of the federal government, for funds (specifically, BRL 50 million) to develop housing projects in the city. The City of São Paulo's idea was to use the money to revive some of the many decaying, unoccupied buildings in downtown São Paulo, and to build new ones around the downtown area (AMARAL, 2018). The City also asked the federal government for assistance in renting out existing buildings owned by the federal government so that they could be transformed into housing projects.⁸ Thus, in the *Wilton Paes de Almeida* case, the Municipality of São Paulo sought to involve the federal government through political negotiation. However, although the money was requested, it has not, to date, been provided. In the meantime, the Municipality of São Paulo has made other ambitious promises but has failed to act on them.⁹

Thus, while arguably the *Wilton Paes de Almeida* case reveals some degree of federative oversight, it is far from effective, and could hardly be regarded as evidence that Brazilian federalism is performing well.¹⁰

2.2. OVERSIGHT BY THE FEDERAL PROSECUTOR'S OFFICE AND THE FEDERAL PUBLIC DEFENSE'S OFFICE

There may be a second, potentially more realistic form of government oversight unrelated directly to social control but nonetheless capable of mitigating the concerns resulting from blame-shifting concerns. It is the type of oversight exercised by the Federal Prosecutor's Office in Brazil (*Ministério Público Federal*) and the Federal Public Defense Office (*Defensoria Pública Federal*).

The Federal Prosecutor's Office is not legally subordinated to the Legislative, Executive and Judicial Powers. It possesses a large degree of autonomy and is considered the country's "Fourth Power". Federal prosecutors have the legal power to file collective lawsuits to protect (a) constitutional rights, (b) public and social patrimony, (c) the environment, (d) cultural heritage, (e) unalienable individual interests, homogeneous and social interests, diffuse and collective interests. Under Article 109, I of the Brazilian Constitution, they are also legally obligated to act in

⁸ Surprisingly, however, the City of São Paulo explained that the victims of the *Wilton Paes de Almeida* tragedy would not be prioritized should funding for these projects be secured.

⁹ For example, in June 6, 2018, local government authorities announced their intention to develop a housing project in the location where the *Wilton Paes de Almeida* building had collapsed, and that the "initial idea" was for the families displaced by the tragedy to live in these new facilities on a permanent basis. This project is still only on paper (ARAÚJO, 2018).

¹⁰ Up until the time of writing, the victims of the tragedy have had to rely on the "housing assistance" compensation, which is barely enough to find comparable housing accommodations. Their situation has not been made better by the tragedy: by many measures they continue to be vulnerable and require governmental support. See DANTAS, *et. al.* 2019.

all cases involving the federal government, either as petitioner, respondent or interested third party – the only exception being bankruptcy law cases. It is reasonable to assume that most federative conflicts involve the federal government in Brazil, regardless of whether the lawsuits that result from them have the purpose of requiring the federal government or other levels of the federation to act.

The Federal Public Defense Office also enjoys a high level of independence, and its institutional task is to provide legal assistance for disadvantaged Brazilians (defined pursuant to legal criteria). Law No. 132, enacted in 2009, expanded the role of federal public defense attorneys in Brazil, granting them the power to file the same collective law suits that federal prosecutors may file. Like federal prosecutors, federal public defense attorneys are active in lawsuits within the jurisdiction of federal courts in Brazil, where litigation covering federative conflicts occurs. Their role, however, is more limited than that of federal prosecutors, as they are only legally authorized to act in the interest of groups of disadvantaged individuals.

Importantly, the *Ministério Público* of each state (state prosecutors) also has the power and responsibility to get involved in the aftermath of tragedies like the *Wilton Paes de Almeida*. However, their role is more limited to the opening of non-white collar criminal investigations, over which they have exclusive jurisdiction, as the *Wilton Paes de Almeida* case illustrates.¹¹

Citizens are only authorized by the Constitution to file collective lawsuits through associations legally established for at least one year that include, among their institutional goals, the protection of the environment, the consumer, the economic order, free competition or artistic, aesthetic, historical, tourist and landscape heritage. In light of this legal barrier, it is not common for ordinary Brazilian citizens to file collective lawsuits. Highly organized and well-funded interest groups do so, but this is largely an exception. Thus, citizens must generally rely on the Federal Prosecutor's Office and the Federal Public Defense Office to file collective lawsuits.

In light of these circumstances, federal prosecutors and – to a lesser, but still relevant extent – federal public defense attorneys have the potential of acting as effective “regulators” of Brazilian federalism, which may be desirable. They may, for example, bring lawsuits before Brazilian courts to compel federative entities responsible for policy failures (such as tragedies) to address them appropriately. They may also intervene in ongoing law suits filed by one level of the federation against another (e.g., a municipality against the federal government) and try to steer the outcome of the case in a direction compatible with Brazilian federalism “on paper” (i.e., where all levels of the federation effectively act on their shared

¹¹ On February 9, 2019, the investigation was narrowed down to three coordinators of the social movement that had occupied the *Wilton Paes de Almeida* building. They are the sole individuals being held, to date, responsible for the tragedy in Brazilian courts. It seems that they charged the residents of the building for “maintenance services” and however clearly did not deliver such services (THOMAZ, 2019).

responsibilities, and where each level of the federation has the incentives to act appropriately upon its sphere of exclusive powers).

Federal prosecutors and federal public defense attorneys are legally trained and thus may be better positioned than other citizens to identify, in a less costly and more effective manner, which federative entity is responsible for what policy failure. By bringing lawsuits before courts, which in turn issue binding orders, it may also be the case that they exercise a more concrete threat on political actors than the at times relatively distant, and probably not insurmountable threat of losing an election due to decreased popularity resulting from perceived governmental underperformance.

Furthermore, according to a recent survey by Datafolha, the degree to which Brazilians trust federal prosecutors and Brazilian courts is relatively high, at least when compared to other governmental institutions.¹² A question that emerges, therefore, is whether in practice one can identify that the Federal Prosecutor's Office and the Federal Public Defense Office are taking on this role of "regulators" of Brazilian federalism.

2.2.1. FEDERAL PUBLIC PROSECUTOR'S OFFICE

In the immediate aftermath of the Wilton Paes de Almeida case, the Federal Prosecutor's Office in São Paulo announced that three main investigations had been launched in connection with the tragedy (GIANCOLA & TAVARES, 2019; THOMAZ, 2019). The first was named the "National heritage protection investigation". The Wilton Paes de Almeida building had been declared a national heritage site, which, pursuant to the Constitution, all levels of the federation have a shared responsibility to preserve. This is the same investigation that we mentioned above, which initiated in 2016 and had the purpose of assessing the conditions of the building and ultimately address any problems that were identified. In the course of the investigations, the Federal Prosecutor's Office, finding that the conditions of the building were indeed problematic, had recommended that the federal government should be responsible for addressing them and for managing the building altogether. As anticipated above, however, this did not happen: the year before the tragedy, the building had been passed on to the Municipality of São Paulo on a "temporary basis", although the federal government retained ownership. Therefore, while one can argue that the Federal Prosecutor's Office attempted act as "regulators" of Brazilian federalism in this investigation, they were unsuccessful, and this is arguably because of their

¹² 68% of Brazilians have recently declared that they "trust somewhat" or "trust a lot" prosecutors, and 67% declared this same amount of trust for courts; in contrast, 64% of Brazilians declared that they did not trust political parties, 67% said they did not trust Congress, and 64% stated they do not trust the President (DATAFOLHA, 2018). The data revealed by DataFolha in 2018 contrasted significantly with the data published by FGV Direito SP in 2017: the latter reported that only 28% of Brazilians trusted prosecutors, and only 24% trusted courts (FGV DIREITO SP, 2017).

“regulatory” approach was largely toothless: they issued a recommendation rather than pursued a court order.

The second was referred to as the “Human rights investigation”. This investigation was launched in the aftermath of the tragedy and its scope is to assess the situation of the families displaced by the tragedy and monitor what the government is doing for them. There is no public information available concerning the development of this investigation.

The third investigation was called the “Administrative misconduct investigation”. The scope of this investigation, launched after the tragedy, is to determine whether public officials contributed to the tragedy, i.e., if there was any type of administrative impropriety on behalf of public servants, who had the duty of approaching with the upmost care and zeal the task of protecting the federal government’s property. In this investigation, the Federal Prosecutor’s Office could potentially exercise its role of regulators of “federalism” in a way that yields concrete and desirable results, by correctly attributing blame to specific public servants across all levels of the federation and making the findings of the investigation publicly available. However, at the time of writing, this investigation is confidential and there is no public information available on its developments.

2.2.2. FEDERAL PUBLIC DEFENSE OFFICE

The Federal Public Defense Office also acted in the aftermath of the Wilton Paes de Almeida tragedy, as it involved the displacement of disadvantaged families. In a joint effort with the State of São Paulo’s Public Defense Office, it filed a collective lawsuit requesting, on the basis of injunctive relief, “emergency support” for the families that had been displaced as a result of the tragedy, naming all levels of the federation as defendants (i.e., the federal government, the State of São Paulo and the Municipality of São Paulo). The law suit’s initial brief highlighted that, although all levels of the federation were involved in the tragedy and had stated that they would provide assistance to the families, no adequate assistance had been provided up until that moment, roughly three weeks after the tragedy. The lawsuit acknowledged that the Municipality of São Paulo, in cooperation with the State of São Paulo, had initiated payment of “housing assistance” to some families (twelve monthly installments totalling BRL 1,600), but indicated that it was highly likely that after twelve months had elapsed, the families would be incapable of paying for housing. In other words, the initial brief signaled that the result of cooperation between federative entities had been unsatisfactory.

On June 13, 2018, a federal judge in the State of São Paulo granted injunctive relief to the victims of the Wilton Paes de Almeida tragedy and ordered the Municipality of São Paulo and the State of São Paulo to pay “housing assistance” in the amount of BRL 1,200 (first installment) and BRL 400 (all subsequent installments) to all those eligible for it until the government provided these families with “permanent housing facilities”. The decision was appealed by the Federal

Public Defense Office under the argument that the financial compensation the government was offering was not an adequate solution, and that the government needed to be forced to provide “permanent housing facilities” as soon as possible (AGÊNCIA BRASIL, 2018). Not long after, the Municipality of São Paulo, in response to the lawsuit, issued a public statement in which it committed to the monthly payment of BRL 400 to the families until a “permanent solution” could be achieved (this mainly amounted to compliance with a federal court order). The Municipality of São Paulo argued that this was the only feasible alternative of the three that had been listed in the collective lawsuit that was filed. It also stated that it was carefully approaching the problem due to the fact that it had identified opportunistic behavior in the aftermath of the tragedy: allegedly, a large amount of the people seeking housing entitlements and other support were not actual residents of the collapsed building.

2.3. ARE EXISTING INSTITUTIONS ENOUGH TO OFFSET THE ADVERSE EFFECTS OF BLAME-SHIFTING STRATEGIES?

Based on publicly available information, the Federal Public Defense’s Office has been, when compared to the Federal Prosecutor’s Office, more effective in providing an institutional response to the *Wilton Paes de Almeida* tragedy. And it also seems that took on its role as a “regulator” of federalism more actively, as it assigned responsibility for the provision of support to the Municipality of São Paulo and the State of São Paulo, requiring them to cooperate in order to provide a more appropriate policy response.

Interestingly, however, the Federal Public Defense Office did not make any specific requests, in the lawsuit, aimed at the federal government, also involved in the tragedy (the owner of the building) and named a defendant. A possible explanation for this may be that the Federal Public Defense Office was aware of the above-mentioned investigations being carried out by the Federal Prosecutor’s Office, which implicate, among others, officials in the federal government. In other words, taken together the actions of the Federal Prosecutor’s Office and the Federal Public Defense Office may exert “regulatory” pressure on federative entities, increasing the institutional conditions for Brazilian federalism to produce desirable results (i.e., results compatible with the institutional framework for federalism established by the Constitution).

In view the above, it seems to be an overstatement to conclude that the Federal Prosecutor’s Office and the Federal Public Defense Office do not, to any relevant degree, exercise what could be viewed as a “regulatory” role in Brazilian federalism. In the *Wilton Paes de Almeida* cases the Federal Prosecutor’s Office opened, and is currently still conducting, administrative malfeasance and national heritage protection investigations with the potential of producing positive externalities for Brazilian federalism through effective blame-attribution followed by sanctions – which may, at an aggregate level, generate desirable incentives for

federative entities to deliver better policies and services. The threat of investigations and administrative or criminal sanctions is not a remote or negligible one for Brazilian political actors. Furthermore, in the *Wilton Paes de Almeida* case Federal Public Defense office's "regulatory" actions could be viewed as largely complementing the "regulatory" actions carried out by federal prosecutors. As noted above, the net effect of this interaction could potentially yield even larger positive externalities for Brazilian federalism.

The above notwithstanding, the oversight functions of independent government entities like the Federal Prosecutor's Office or the Federal Public Defense Office do not, individually or collectively, undercut the fact that blame-shifting adversely affects democratic accountability. Acknowledging the potential benefits of this second type of oversight for Brazilian federalism leaves us with uncomfortable yet necessary questions. How much can we say that democratic accountability really is being promoted when social control is heavily outsourced to unelected governmental bodies with no political legitimacy towards citizens? More importantly, what is the democratic significance of the possibility that these unelected bodies, in their role of "regulators" of Brazilian federalism, may produce "positive" externalities?

Furthermore, one positive externality of oversight might be to lower the costs citizens must incur in order to adequately attribute blame, given that citizens would be able to "free ride" (the term here is not meant pejoratively) on the blame attribution efforts of the "regulators" of Brazilian federalism. However, if the complexity of Brazilian federalism remains fixed (at least with respect to the relationship between citizens and the government), this externality in essence only adds up to the already impracticable pile of information that citizens must digest if they are to adequately monitor the three levels of the Brazilian federation and effectively attribute blame. Most citizens do not accompany the institutional responses of federal prosecutors and federal defense attorneys to tragedies or other policy failures. This informational cost reduction therefore may not have any practical effect on the ability of the population to hold their elected representatives accountable through blame attribution. Given the complexity of Brazil's federalism in reality, it is unreal and largely infeasible to expect that citizens will, if provided more information, be more capable of effectively monitoring and controlling the three levels of the federation (BARCELLOS, 2018, p. 14). In other words, it seems that, if the level of complexity remains fixed, more information – however reliable – will still be insufficient to increase the effectiveness of social control.¹³

¹³ Brazil's unique level of federal complexity seems to hamper the assignment of responsibilities to an extent greater than other federal regimes. It does not necessarily follow that as a result of the complexity of the contemporary administrative state, it is outright impossible for citizens to be effective in assigning responsibility for policy failures. Empirical evidence in the United States of America suggests that citizens do appear to understand what level of government is responsible for areas such as agricultural policy, foreign policy, assistance to young and old, education and economic issues (ATKESON *et. al.*, 2001, p. 801). However, just how capable Americans are of

On a final note, the desirability of regulating Brazilian federalism through public litigation is far from clear. A major premise of our analysis in this paper is that the quality of public policy provision depends, among other things, on how Brazil's model of federalism is implemented in concrete cases. There is reason to believe that court orders may, in certain circumstances, be well suited to produce concrete results when political actors are relying on strategies such as blame-shifting to justify omissions from acting. As Rosanvallon observes, "(...) political decisions are also frequently omissions rather than decisions". In contrast, courts cannot decline to rule on an issue because it is too delicate or controversial: "What distinguishes the decision of a court is that it ends dispute, fixes responsibility, or punishes an action. It marks a definitive end, a final resolution" (ROSANVALLON, 2008, pp. 232-235).

However, to entirely or predominantly transport policymaking to courts has costs of its own which must be accounted for: too much litigation questioning core policy decisions issued by governmental entities may lead to deadlock, content distortion, and delays, all undesirable in their own right. Kagan's analysis of what he calls *Adversarial Legalism* in the United States – a phenomenon that he argued was country-specific – highlights these problems, which may emerge in the Brazilian context as well if the "regulators" of Brazilian federalism are not cautious or do not act in a coherent, coordinated fashion.¹⁴ Otherwise, instead of "regulating" federalism, public litigation may risk producing disparate policy requirements across the Brazilian territory, or substantially distorting the substance of public policies produced by public officials better equipped (in terms of technical expertise and democratic legitimacy) to design and implement public policies addressing the concerns of Brazilian citizens.

3. Does Brazil's three-tiered federation produce democratic accountability benefits that should not be overlooked?

The net effect of reducing the complexity of Brazilian federalism, through institutional reform, to make blame attribution more feasible and effective may be negative if one concludes that democratic accountability is actually enhanced by the fact that citizens have more than one federative entity to which they can turn in order to pressure for responses to certain policy issues. In other words, Brazilian federalism – with its three layers of power – may provide for the possibility of a

correctly attributing blame is contested. Another study focused on the regime of federalism in the United States reached a contrasting conclusion, highlighting that 47% respondents of their survey, when asked what level of government was responsible for government responses to the Katrina Hurricane, incorrectly attributed blame (MAESTAS *et. al.*, 2008, p. 619).

¹⁴ Kagan argues that: "In this harried condition government seems doomed to fail-incapable of living up to the demanding legal duties imposed on it, bogged down in costly legal disputes or in legal defensiveness. Perceiving governmental failure, public cynicism grows and governmental authority is diminished further. Those seeking to achieve their ends or influence government feel compelled to arm themselves with lawyers, insist on strict observation of legal rules, and threaten to go to court, simply because their opponents are likely to do the same" (KAGAN, 1991, p. 399).

“multi-level and networked governance”, with accountability benefits that cannot be overlooked.¹⁵

Mulgan points to four different potential accountability mechanisms – or sources of accountability – available in systems of networked governance. The first set of mechanisms is the news media, which may investigate and report the policies delivered jointly by federative entities, and the social media, which can share their experiences and views as users of these policies. The second is the allegedly higher degree of government transparency produced networked governance – as Mulgan explains, “(...) the pluralistic nature of many networks, in which different members pursue different, if overlapping, agendas”, which “(...) often allows for more open disclosure of information than is found in more closed, hierarchical structures” (MULGAN, 2017, p. 84). The third potential source of accountability resulting from networked governance could be describe as follows: if provided a sufficient amount of discretion to make decisions, members of these governmental networks can be quicker and more effective in addressing problems citizens may have because they do not need to incur in the transactional costs associated with obtaining instructions from hierarchically superior governmental bodies.¹⁶ A fourth potential source of accountability resulting from networked governance relates to the subscription to joint objectives. Provided that members of the network agree to publicly report their performance (as measured by the extent to which they achieved these objectives), or to be assessed by independent regulators or watchdogs, subscription to joint objectives may increase the level of transparency and accountability of the government (MULGAN, 2017, p. 85).

We acknowledge that, provided that the right conditions are met, regimes of cooperative federalism have the potential of opening the government up to broader citizen scrutiny through a higher number of points of access to government, thus increasing the effectiveness of democratic accountability. If these conditions were present in Brazil, it would be reasonable to expect that the government would be “closer” to citizens, in line with one of Brazilian federalism’s most important original promises. However, these conditions do not seem to be satisfied in the

¹⁵ Networked governance is a term the literature uses to refer to “(...) processes of governing undertaken by more than one organisation working together in partnership or collaboration”. This concept can be applied in the context of cooperative federalism, as Mulgan observes: “Federal divisions of authority, where two constitutionally independent levels of government – central and provincial – work together on common policies or problems, can therefore be counted as a species of networked governance. In this light, however, federalism as a species of networked governance fits only with those aspects of federalism that exhibit features of ‘concurrent’ federalism involving overlapping responsibilities. (...) It does not apply to those areas of government that fit the theory of ‘coordinate’ federalism, where each level of government operates separately within its own sphere of activity (though each separate jurisdiction may itself exhibit aspects of networked governance, for example, between its different government departments and agencies and between each government and non-government organisations)” (MULGAN, 2017, p. 82).

¹⁶ As Mulgan argues, “(...) networks of committed professionals belonging to different organisations can offer individual citizens more direct accountability for government services than is provided through a standard hierarchical chain of command (...)” (MULGAN, 2017, p. 84).

Brazilian context, and evidence actually indicates that interactions between citizens and the government are low in the country. Notably, in 2017, 46% of Brazilians declared they had had no interaction with the government whatsoever in the last 12 months, as Table IV below describes. Only 4.6% declared that they had accessed a social program in the last 12 months, and only 9.8% declared that they had accessed health and education services in that same period. These numbers are striking for a country like Brazil, where governmental support is a necessity of a large part of the population.

Table I - "What is the last procedure that you did in any office in the state, or have you not done anything in the last twelve months?"		Nº of cases	%/Total
Request or renew an identity document or civil registration		200	16.7%
Access a social program		57	4.8%
Access an education or health service		118	9.8%
Register, buy or sell real estate property		20	1.7%
Open or close a company		12	1.0%
Pay taxes, pay for health insurance or contribute to the public pension system		54	4.5%
File a report for a crime		18	1.5%
Apply for a driving license or other transportation procedure		54	4.5%
Another type of procedure		74	6.2%
Did not go through any procedure in the last 12 months		552	46.0%
Does not know / Did not answer		41	3.4%
(N)		(1.200)	100%

Source: *Latinobarometro*, 2017.

Based on the networked governance account, a central requirement for cooperative federalism to produce higher levels of governmental accountability is the very difficult coexistence of governmental cooperation and a degree of decentralization of power that allows for public officials spearheading joint programs (in the name of two or three levels of the federation) to indeed become not only closer to citizens, but capable of acting in accordance with the information they provide on the overall quality of governmental policies. As indicated above, the way Brazilian federalism is working today does not suggest that this requirement is (even close to) realistic. Indeed, Brazilian federalism is marked by the combination of weak (but existing) cooperation, predatory competition, and centralization of power. Take the following events surrounding the *Wilton Paes de Almeida* case as an example.

The day after the tragedy, several reasons were given for why the building was burnt down: indeed, engineers identified a number of safety hazards in the building.¹⁷ These safety hazards were first identified in 2015 (thus three years before the tragedy) by the State of São Paulo's Fire Department officials. A now familiar question was raised: why were these fire hazards not addressed immediately, or at least sometime before the tragedy? It was revealed that, although the fire department officials drafted and submitted to the relevant local government authorities a report outlining the fire hazards they had identified in the *Wilton Paes de Almeida*, no specific action was carried out: the local government authorities did not attempt to force compliance with the regulations or to address the problem by transferring the residents to other public housing facilities. Instead, after two years and seven months of investigations, the authorities in charge of monitoring and securing compliance with safety regulations in the Municipality of São Paulo (the *Defesa Civil de São Paulo* and the *Secretaria Especial de Licenciamentos*) concluded that no specific action was required, despite the risk reported by the Fire Department of the State of São Paulo (JIMENEZ, 2018).

The federal government's attention, in turn, was completely unaligned with that of the State of São Paulo and the Municipality of São Paulo, as it had other plans for the building. Despite its statements to the contrary in the aftermath of the tragedy (see above), public documents reveal that the government wanted to sell the building – it effectively published a bidding notice (or invitation to bid) placing a BRL 21,595,779.08 price on the sale. Therefore, the federal government filed a repossession claim in the courts of the State of São Paulo, demanding the immediate removal of the over 140 families from the *Wilton Paes de Almeida Building*. The filing of this court action gave the federal government and the municipality leverage to negotiate with the families; the idea was for them to transfer to available public housing facilities. The federal government's approach seems to have followed the following line of thought: even if there were safety risks, soon enough the local residents would be removed, and the purchaser of the building would be able to address them when revamping the building. However, the negotiations were still in progress around the time in which the tragedy of May 1, 2018 occurred (MURARO, 2018).

It therefore does not seem that cooperative federalism in Brazil is capable of producing, under current institutional conditions, this delicate – yet desirable – balance between decentralization and cooperation could enhance democratic accountability. The large doses of complexity and unpredictability that characterize the interactions between federative entities in Brazil also makes it difficult for the news media and social media to exercise effective governmental oversight. In the Brazilian case, cooperative federalism works against democratic accountability. In

¹⁷ Among them were the following: an excessive amount of inflammable material, a lack of adequate escape routes, outdated and risky electrical apparatus, a strong reliability on bottled gas (more susceptible to leakage than piped gas) (JORNAL DA USP, 2018).

this scenario, it seems that democratic accountability would be best served in Brazil with a system of federalism that clearly allocated responsibility for a given policy area to a single level of government.¹⁸

4. CONCLUSION

There is a general dissatisfaction with Brazil's democratic system, which is currently exceptionally high when compared to other Latin American countries.¹⁹ Brazilian federalism is not the main factor for this dissatisfaction,²⁰ but it is doing no service to Brazilians either. Brazilians still value elections,²¹ but they want them to be a way of holding governments to account and, on the long run, to help select high quality political actors that implement policies compatible with the interests of the majority of the population.²² Brazilian federalism needs reform, particularly for the sake of the quality of policies in urban areas.

We have suggested here that Brazil's current model of federalism does not deliver on the promise of the 1988 Constitution: to bring citizens closer to the government and allow them to hold government effectively. Rather, it seems that Brazil's hybrid model of federalism has delivered the opposite: an accountability deficit, given that citizens are incapable of holding the government to account

¹⁸ Interestingly, the same conclusion seems to be popular in Australia, whose model of federalism, like Brazil, possesses strong features of "networked governance". As Mulgan acknowledges, "For the most part, Australians appear to prefer a structure that clearly allocates responsibility and accountability to a single level of government" (MULGAN, 2017, p. 85). It is also worth noting here the compelling conclusions reached by Gerring *et. al.* after conducting a careful empirical examination of factors that could explain why some democratic governments are more successful than the rest: that "democratic institutions work best when they are able to reconcile the twin goals of centralized authority and broad inclusion", and that "Good governance (...) arises from institutions that pull toward the center" (GERRING, *et. al.*, 2005, p. 567/580). One interpretation of these conclusions is that too much decentralization is bad; and a corollary implication could be that when power is more centralized, democratic accountability is rendered more effective (because, among other things, blame-shifting strategies would cease to be available to government officials).

¹⁹ According with Latinobarometro 2017, Brazil is the only Latin American democratic country in which the majority of its citizens (more than 50%) said that they were "not at all satisfied" with the functioning of democracy in their country. See Annex I below.

²⁰ Rather, it is most likely as a result of the recent corruption scandals involving politicians and leaders of the country's largest corporations (e.g., Operation Car Wash).

²¹ When asked whether they "strongly agreed", "agreed", "disagreed", or "strongly disagreed" with the statement that "legislative representatives should be selected like in Ancient Greece, through a lottery system", only 3.3% of Brazilians said they "strongly agreed" and 28.2% declared that they "agreed". 46% "disagreed" and 14.2% "strongly disagreed". Latinobarometro 2017, available at: <http://www.latinobarometro.org/latOnline.jsp>.

²² The ability to exercise accountability ranks high among reasons why Brazilians would deposit trust in governmental institutions. According to Latinobarometro 2017, 51.6% of Brazilians said that "Being monitored" was one of the main reasons to deposit trust in a governmental institution; 39.4% said that "Admitting responsibility when they are wrong" was also one of the main reasons to trust a governmental institution. The only reason that ranked higher than the preceding two is "They treat everyone alike": 61.3% of Brazilians agreed this was one of the main reasons to trust the government. Latinobarometro 2017, <http://www.latinobarometro.org/latOnline.jsp>.

based on their performance in government. This accountability deficit is made more problematic by the fact that it is accompanied – more generally – by substantial institutional underperformance from all levels of the federation. But the question here is narrower: assuming that this diagnosis of Brazil's model of federalism is correct, is institutional reform required or can we rely on existing institutions to address the problem?

As noted above, we do not believe that it would be appropriate to say that blame-shifting strategies remain *entirely* uncorrected by existing institutions such as prosecutors, public defenders and courts. In the *Wilton Paes de Almeida* case, we identified several promising efforts being carried out by public defenders and prosecutors, all of which have the potential of reducing the political cost-effectiveness of blame-shifting strategies and helping citizens correctly attribute blame for policy failure in such a complex area of law. This being said, practical concerns with the regulatory potential of these oversight entities are still present. Public litigation can get it right in some cases, but it is unclear just how much overall democratic accountability enhanced by it.

First, citizens are not likely to free ride on the blame attribution efforts carried out by federal prosecutors and public defenders in courts. Second, questions concerning the democratic legitimacy of prosecutors, public defenders and courts also remain open: the fact is that one of the primary goals of Brazilian federalism is to deepen democracy, citizens should play a more central – and direct - role in blame attribution and the punishment of political actors through elections or other means. Sometimes increasing democratic accountability might not be desirable, but Brazil does not seem to suffer from over-accountability problems, particularly in the context of urban tragedies, which affect many but nonetheless remain virtually unaddressed by political actors. Third, the institutional capacity of courts to rule on issues that affect the substance of public policies is highly questionable and can be extremely problematic.

While in theory there may be democratic accountability benefits associated with Brazil's three-tiered federation, they do not seem to be robust enough to withhold institutional reform from occurring. Under current circumstances, the optimal pairing between decentralization and cooperation in Brazilian federalism seems to be a distant reality, and institutional reengineering is required to make federalism work in favor of Brazilian citizens, creating the institutional conditions for their policy preferences to be discussed in the political arena and be the subject of some compromised form of public policy.

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