

Facing disinformation in democratic backsliding: the role of courts in Brazil

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Abstract: This paper examines how democratic institutions respond to disinformation when it is weaponized by elected officials for illiberal purposes. It focuses on the role of courts in countering disinformation in Brazil from 2018 to 2022, when the country experienced threats to democracy, marked by the use of disinformation to undermine electoral and judicial checks. In response, Brazil's High Courts took an array of measures against disinformation, including content removal, social media regulation, and criminal proceedings. While these actions were crucial in promoting democratic resilience, they also raised concerns about judicial aggrandizement and its implications. The paper discusses the tension between the courts' role in protecting democracy and their institutional limitations as well as the potential impact on the public perception of courts and freedom of expression, of having judges taking the leading role in fighting disinformation.

Keywords: Disinformation; Democratic Backsliding; Courts; Brazil; Freedom of Expression; Democratic Resilience

A. Introduction

Information manipulation has long been a contingency of democratic politics. However, disinformation – the spread of false information aiming at a certain harm, whether economic, political, or reputational – acquired global salience in connection with various political processes that threaten liberal democracy. As a symptom or even a vector of a deeper democratic crisis, disinformation weakens the public sphere, enabling authoritarian politicians to bypass institutional and societal controls and promote the gradual erosion of

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key democratic commitments. Countermeasures against disinformation have been largely explored by academics, civil society, and politicians.¹ Popular prescriptions – such as fact-checking, media literacy, and regulating social media platforms – mostly emphasize disputes over facts (i.e. how to ensure that people have access to accurate information) and perhaps the transformation of flows of information and attention in extensively digitalised public spheres. But how do democracies respond when, beyond its communicational dynamics and implications, disinformation is directly weaponized by elected actors for illiberal purposes?

Using Brazil as a case study, we investigate how judicial institutions have been coping with disinformation in contexts of democratic backsliding – here understood as the gradual, state-led undermining of key features of liberal democracies as political regimes.² We use this case to understand both the potential contribution to democratic resilience of particular features of judicial institutional design and the implications of judges acting as protagonists in dealing with disinformation. While the country has been in political turmoil for over a decade, the rise of Jair Bolsonaro to the presidency presented unprecedented challenges. Between 2018 and 2022, he largely used disinformation to pollute public debate and mobilize extremist supporters against electoral and judicial checks on his powers. For years now, Brazilian debates on threats to democracy and how to face them have centred around disinformation, from Congress to the press, from academia to civil society organizations. Amidst unsuccessful legislative attempts to enact rules on disinformation and regulate social media,³ the *Supremo Tribunal Federal*, or STF, and the *Tribunal Superior Eleitoral*, or TSE (here the “High Courts”), took on a leading role in checking Bolsonaro’s attacks on institutions, within which disinformation played a central role. By means of a combination of different powers that often challenge typical conceptions of the judicial role, judges issued injunctions to remove content and block social media profiles and adopted new rules and expansive interpretations of electoral laws, while also initiating and promoting criminal proceedings against those deploying disinformation practices.

These judicial interventions, however, highlight a tension between the democracy-protecting role of courts and their institutional limitations. Courts are generally expected to act as bulwarks of liberal democracy, either by dampening majoritarian decision-making

1 Clara Iglesias Keller / Charlotte Freihe / Cathleen Berger, Towards a Healthy Public sphere: State Actions against Disinformation, Gütersloh 2024; Samuel Cipers / Trisha Meyer / Jonas Lefevere, Government Responses to Online Disinformation Unpacked, Internet Policy Review 12 (2023).

2 e.g. Nancy Bermeo, On Democratic Backsliding, Journal of Democracy 27 (2016).

3 Despite disinformation implicating various actors, public debates in Brazil have approached it largely as a social media contingency, to the point that digital-platforms regulation to counter disinformation became the epitome of democratic reconstruction after Bolsonaro’s term was over. Since 2020, a series of legislative proposals for digital platforms have been discussed in Congress under the scope of what is now Bill of Law 2.630. Despite the ongoing presence of regulation of digital communications in the political debate, the proposal did not move forward, and the possibility of approving a comprehensive, national regulatory framework for digital platforms in the country remains uncertain.

that threatens fundamental rights or by exerting horizontal accountability over incumbents. For the same reasons, they are often targeted by illiberal leaders. At the same time, courts are peculiar institutional actors. With their selective case-by-case approach, they were not designed to act as the prime policy makers on complex societal phenomena such as disinformation.⁴ Moreover, as judges interpret existing provisions to streamline prosecutions and adapt electoral law to the realm of digital communications, they attract heightened public scrutiny. While judicial resistance against the flood of disinformation has been considered a key element in democratic resilience in Brazil, it also increased the country's High Court's public exposure and raised legitimate concerns over judicial excesses and restrictions on free speech, with consequences for the public perception of courts as impartial guardians of constitutional and electoral norms.

In section B, we reconstruct the Brazilian case in consideration of existing perspectives on democratic backsliding, highlighting the role of disinformation campaigns and the courts' (contingent) potential to promote resilience. In section C, we describe the main features of judicial engagement with disinformation in the context of threats to democracy. Rather than exhaustively listing the many procedures and mechanisms available to judges, we discuss key cases that illustrate the features of institutional design that have been crucial for judicial scrutiny of disinformation in Brazil. In the penultimate section, we lay out an analysis of institutional repercussions, with a focus on the potential impact of judicial protagonism against disinformation in cases of democratic backsliding on (i) societal perception of courts' legitimacy and (ii) the country's freedom-of-expression landscape, as well as courts' ability to hold politicians accountable for similar abuses in the future.

B. Disinformation in democratic crisis

1. Autocratization, backsliding, self-coups, and democratic resilience (so far)

Where, why, and how do democracies end? In some countries, different political processes have led to the visible breakdown of the norms of liberal democracy,⁵ regardless of whether these developments are understood as constituting a "global wave" or not.⁶ There are a variety of versions of this story: from gradual, "stealth" processes ultimately leading to regime changes, as has been the case in Venezuela or Hungary, to a decrease in the stability, integrity, or quality of political institutions and processes, both in recent (like Brazil and Poland) and older (like the UK and the US) democracies. To better capture the piecemeal nature of these processes, scholars both adjusted older concepts (like "populism" and

4 Clara Iglesias Keller, Policy by Judicialisation: The Institutional Framework for Intermediary Liability in Brazil, *International Review of Law, Computers & Technology* 35 (2021).

5 Aziz Huq / Tom Ginsburg, How to Lose a Constitutional Democracy, *UCLA Law Review* 65 (2018).

6 Andrew Little / Anne Meng, Subjective and Objective Measurement of Democratic Backsliding, *PS: Political Science & Politics* 57 (2024).

“authoritarianism”) and crafted novel ones, such as “democratic backsliding”, “democratic decay”, or “constitutional erosion”.⁷

In the Brazilian case, the same factual backdrop can also be read through a variety of frameworks. From 2018 to early 2023, the country underwent processes that illustrate the different threats that democracy faces. First, Brazil experienced a gradual decrease in its “Liberal Democracy Index (LDI)” in several consecutive V-DEM reports,⁸ especially in view of factors such as government intimidation, electoral intimidation, polarization, and (in)tolerance for counter-arguments.⁹ Yet, already from 2022 on, even before Jair Bolsonaro left office (2019–2022), the indicators have shown improvement along some of these dimensions, partially due to pro-democracy mobilization in the 2022 electoral process. The 2024 V-DEM report presents Brazil as a “U-turn democratization” case – a country that has “bounced back” from previous processes of autocratization.¹⁰

Second, there were visible elements of democratic backsliding, defined as “the state-led debilitation or elimination of the political institutions sustaining an existing democracy”.¹¹ If we understand backsliding as a process of regime change¹² that is the outcome of purposeful institutional changes,¹³ President Bolsonaro promoted measures typically associated with backsliding. This includes, for example, him adopting decrees that would disempower mechanisms of accountability within the public administration, and his security forces establishing “checkpoints” that made it harder for voters in pro-Lula regions to reach the ballot box on election day.¹⁴ Specifically aimed at the courts, he petitioned for the

7 Marianne Kneuer, *Unravelling Democratic Erosion: Who Drives the Slow Death of Democracy, and How?*, Democratization 28 (2021); Tom Gerald Daly, *Democratic decay: Conceptualising an emerging research field*, Hague Journal on the Rule of Law 11 (2019).

8 V-DEM, *Democracy Report 2023: Defiance in the Face of Autocratization*; https://v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf (last accessed on 30 July 2024).

9 According to the report that was “the fourth consecutive Democracy Report featuring Brazil among the top 10 autocratizers in the world”, *Ibid.*, p. 22,

10 V-DEM, *Democracy Report 2024: Democracy Winning and Losing at the Ballot*, https://www.v-dem.net/documents/43/v-dem_dr2024_lowres.pdf (last accessed on 13 November 2024).

11 Bermeo, note 2, p. 5.

12 Laura Gamboa, *Resisting Backsliding: Opposition Strategies against the Erosion of Democracy*, Cambridge 2022.

13 Stephan Haggard / Robert Kaufman, *The Anatomy of Democratic Backsliding*, *Journal of Democracy* 32 (2021).

14 See, e.g., Oscar Vilhena Vieira / Rubens Glezer / Ana Laura Barbosa, *Supremocracia e Infralegalismo Autoritário: O Comportamento Do Supremo Tribunal Federal Durante o Governo Bolsonaro*, *Novos Estudos CEBRAP* 41 (2022). For a description of the politicization of the Federal Highway Police (*Policia Rodoviária Federal*) and the “checkpoints” on election day, see Marcelo Roubicek, *Como a PRF caminhou para a ação política no governo Bolsonaro*, *Nexo*, 01.11.2022, <https://www.nexojornal.com.br/expresso/2022/11/01/como-a-prf-caminhou-para-a-acao-politica-no-governo-bolsonaro> (last accessed on 30 July 2024).

impeachment of a Supreme Court judge and defended an amendment proposal to increase the size of the court.¹⁵

Yet, such backsliding measures failed to gain traction in Congress,¹⁶ and the ones that were adopted by executive decree were subsequently suspended or annulled by the judiciary.¹⁷ Ultimately, Bolsonaro lost the elections and stepped down. In Brazil, then, the president purposefully promoted backsliding, but - despite attacking central norms of democratic governance - was not successful in remaining in power and consolidating a regime reversal. This does not mean that Brazilian democracy is safe, however, since future illiberal politicians might follow in Bolsonaro's footsteps - perhaps more effectively exploiting the same political, institutional, and social fault lines in the country. Nonetheless, it is undeniable that backsliding did not lead to regime change in Brazil.

Third, there were plans for an old-fashioned self-coup attempt. Information revealed in criminal investigations in 2023 shows that, while publicly mobilizing his voter base to disregard electoral results in case of a defeat in October 2022, Bolsonaro and his inner circle spent months trying to enlist the armed forces to disregard a Lula victory and help them to remain in power against constitutional rules.¹⁸ However, they were unable to muster the support of the army or the air force. His radicalized followers that stormed through the buildings of Congress, the Presidency, and the Supreme Court on January 8th, a week after Lula's inauguration, were pleading for the armed forces to seize power and reinstate Bolsonaro - to no avail.

Autocratization, backsliding, and the spectre of an old-fashioned self-coup for which the president actively sought military support: Brazilian democracy faced all these persistent threats, but survived. The country might still find itself in a broader arc of backsliding over the next few elections, and Bolsonaro left a legacy of damage to several norms, communities, and rights. But democracy has so far resisted. How so? While the answer is multi-faceted, we focus here on the role of courts in dealing with disinformation

15 These measures are associated with events that led to backsliding in other countries (see, e.g., *Rosalind Dixon / David E. Landau*, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, Oxford 2021). In *Haggard / Kaufman*, note 13, terms, Bolsonaro "eroded" Brazilian democracy (backsliding did not result in regime change), even though he was not successful in promoting a reversal of democracy by seeking support in the armed forces and his constituents to remain in power even after suffering an electoral defeat.

16 *Marcus André Melo / Carlos Pereira*, *Why Didn't Brazilian Democracy Die?*, Latin American Politics and Society 2024.

17 *Vieira / Glezer / Barbosa*, note 14.

18 See *Kareem El Damanhoury / Julia Vargas Jones*, Brazil's ex-president Bolsonaro presented coup plot to military leaders, court documents allege, CNN, 16.03.2024, <https://edition.cnn.com/2024/03/15/americas/brazil-bolsonaro-coup-plot-allegations-intl-hnk/index.html> (last accessed on 30 July 2024); *João Fellet*, Quanto o Brasil esteve perto de um golpe militar em 2022?, BBC News Brasil, 09.02.2024, <https://www.bbc.com/portuguese/articles/ce942rp236yo> (last accessed on 30 July 2024).

weaponized against key aspects of a liberal democracy – e.g. the conditions for public deliberation, electoral integrity, rule of law, and checks and balances.¹⁹

II. *Disinformation and the communicational dimension of democratic backsliding*

The question of why and to what extent disinformation is harmful is inseparable from its role in recent processes of democratic transformation. Disinformation's supposed immediate effects are disputed, with popular assumptions – such as the idea that it necessarily swings voter preferences or that it is widespread across populations – having already been debunked by international empirical evidence.²⁰ Still, of greater concern are the ways in which disinformation puts democracies at stake.

Disinformation's most toxic traits target the pillars of participation and deliberation that constrain political power and allow democracies to function. It affects public trust in accountability institutions, such as parliaments and courts, potentially lowering the costs for authoritarian politicians to bypass societal and institutional checks on their power. This clears the way for authoritarian politics, where disinformation takes the stage as a means for creating segmented narratives and engaging right-wing and populist supporters.²¹ In this context, people usually spread disinformation not necessarily because they believe it, but as a means to what Mourão and Robertson call “discursive integration”, that is, “a form of political narrowcasting targeted at particular partisan audiences and designed to flare up their passions”.²² Disinformation also stokes distrust of legacy media and professional journalism, harming their ability to report on key political disputes and hold power accountable. In fact, in a “post-truth” context, adherence to disinformation expresses “rejection and devaluation of the dominant institutions of knowledge production, including their norms and procedures for examining claims to validity”, affecting not only professional journalism but also “law, science and public administration”.²³

When disinformation turns into political action particularly directed at these democratic standards, it is no wonder that it becomes salient in scenarios of backsliding. In these contexts, Bennet and Kneuer associate disinformation with the “rise of illiberal public spheres”, where communications systems contribute to the decay of liberal democracy norms through “violations of basic norms of civility, tolerance, inclusion, mutual recognition, and reasoned exchanges of different views, along with attacks on the independent

19 Huq / Ginsburg, note 5.

20 Jeanette Hofmann, *Desinformation Als Symptom: Ein Überblick*, in Bundesamt für Verfassungsschutz (ed.) *Tagungsband Wissenschaftskonferenz 2023: Meinungsbildung 2.0 – Strategien im Ringen um Deutungshoheit im Digitalen Zeitalter*, Köln 2023.

21 Ibid., p. 22.

22 Rachel R. Mourão / Craig T. Robertson, *Fake News as Discursive Integration: An Analysis of Sites That Publish False, Misleading, Hyperpartisan and Sensational Information*, *Journalism Studies* 20 (2019), p. 2091.

23 Hofmann, note 20, p. 26.

press, civil society organizations, and various ethnic, racial, religious, and sexual minorities”.²⁴ This communicational dimension has been deemed by Jee et al. as one of the political arenas where backsliding takes shape.²⁵ In this sense, disinformation is understood as a crucial part of institutional erosion aimed at the conditions that enable “political representatives to implement their decisions effectively” – like the “shared understanding of facts” that ground “rational-critical public discourse”.²⁶

Empirical evidence on how disinformation has unfolded in Brazil’s political landscape is, to some degree,²⁷ in tune with international experiences. Studies show that, while disinformation does not outnumber legitimate information in social media, it is particularly present within specific groups. The 2018 presidential elections are considered a landmark for the use of digital disinformation as political communication.²⁸ Studies on the use of X (formerly Twitter) during the electoral period indicated greater exposure to hyper-partisan and disinformation content by individuals who identify as “right-wing”,²⁹ even though Twitter users in general were found to share more professional journalism than disinformation sources.³⁰ Similarly, during the COVID-19 pandemic, users shared more content to raise awareness about the virus and containment measures from professional journalism than content classified as disinformation; nonetheless, disinformation content received more engagement than reliable sources.³¹

In this context, disinformation’s effects have proven both “minimal and powerful”,³² with significant impact among its targeted audiences. Right-wing groups are commonly moved by popular social network profiles that act as “opinion leaders” and who attract

- 24 *W. Lance Bennett / Marianne Kneuer*, Communication and Democratic Erosion: The Rise of Illiberal Public Spheres, *European Journal of Communication* 39 (2024), p. 179.
- 25 *Haemin Jee / Hans Lueders / Rachel Myrick*, Towards a Unified Approach to Research on Democratic Backsliding, *Democratization* 29 (2022).
- 26 *Ibid.*, p. 761.
- 27 This diagnosis is necessarily limited and tentative, due to the so far small number of empirical studies available on the Brazilian case.
- 28 *Patricia Campos Mello*, A Máquina Do Ódio: Notas de Uma Repórter Sobre Fake News e Violência Digital, São Paulo 2020; *Rafael Evangelista / Fernanda Bruno*, WhatsApp and Political Instability in Brazil: Targeted Messages and Political Radicalisation, *Internet Policy Review* 8 (2019).
- 29 *Felipe Bonow Soares / Raquel Recuero*, Hashtag Wars: Political Disinformation and Discursive Struggles on Twitter Conversations During the 2018 Brazilian Presidential Campaign, *Social Media + Society* 7 (2021).
- 30 COMPROP Data Memo, News and Political Information Consumption in Brazil: Mapping the First Round of the 2018 Brazilian Presidential Election on Twitter, https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2018/10/machado_et_al.pdf (last accessed on 30 July 2024).
- 31 *Luisa Massarani / Igor Waltz / Tatiane Leal*, COVID-19 in Brazil: An Analysis about the Consumption of Information on Social Networks, *Journal of Science Communication* 19 (2020), p. 15.
- 32 *Hofmann*, note 20, p. 23.

enough attention to significantly spread narratives amongst their followers.³³ These narratives promote a strong relationship between supporters of the former president, the use of right-wing sources of information, and belief in disinformation about the COVID-19 pandemic, and ultimately lead to individuals “becoming more misinformed over time”.³⁴ Similarly, support for right-wing politics and the use of WhatsApp and Facebook as news sources were strongly associated with persistent and growing engagement with disinformation. Overall, this scenario limits the effectiveness of content-based countermeasures. In this vein, a study on the 2018 elections showed fact-checking initiatives were mostly unsuccessful in reducing the acceptance of rumours about political candidates, as political preferences have become the main determinant for engagement with content.³⁵

Disinformation has been deployed as a political tool in many contexts, and the studies we briefly review here show that its political relevance and impact transcend a dispute over facts. In countries such as Brazil, it has become part of a broader, deliberate backsliding process promoted by political actors, thus inviting judicial intervention in a twofold way: courts engage with these processes not just as arbiters of the limits of free speech in the public sphere, but also as guardians of democratic governance more generally.

III. Courts as protectors of democracy

During the Bolsonaro government, Brazilian courts checked illiberal policies in many different fields, from science and public health (especially during the COVID-19 pandemic) to budgetary rules, from the rights of indigenous communities to the regulation and use of personal data, as well as the regulation of digital content and disinformation.³⁶ While these judicial checks did not fully prevent setbacks in rights and democratic norms, they are decisive in explaining why, after all that happened, the political regime in Brazil remains a democracy.³⁷ In scenarios of backsliding, it might seem intuitive that judges would occupy a central role – both as actors resisting democratic erosion and as targets of illiberal polit-

33 Tatiana Maria Silva Galvão Dourado, *Fake News Na Eleição Presidencial de 2018 No Brasil*, Salvador 2020.

34 Patricia Rossini / Antonis Kalogeropoulos, *Don't Talk to Strangers? The Role of Network Composition, WhatsApp Groups, and Partisanship in Explaining Beliefs in Misinformation about COVID-19 in Brazil*, *Journal of Information Technology & Politics* 2023.

35 Frederico Batista Pereira et al., *Fake News, Fact Checking, and Partisanship: The Resilience of Rumors in the 2018 Brazilian Elections*, *The Journal of Politics* 84 (2022).

36 See Vieira et al., note 14; Juliana Cesario Alvim Gomes / Diego Werneck Arguelhes / Thomaz Pereira, Brazil, in: Richard Albert / David Landau / Pietro Faraguna / Simon Drugda / Rocio De Carolis (eds.), *2021 Global Review of Constitutional Law*, Trieste 2022; Vanessa Elias de Oliveira / Lúcia Mori Madeira, *Judicialização Da Política No Enfrentamento à Covid-19: Um Novo Padrão Decisório Do STF?*, *Revista Brasileira de Ciência Política* 35 (2021).

37 Diego A. Zambrano / Ludmilla Martins da Silva / Rolando Garcia Miron / Santiago P. Rodriguez., *How Latin America's Judges Are Defending Democracy*, *Journal of Democracy* 35 (2024); Melo / Pereira, note 16.

icians. In the first dimension, recent quantitative studies suggest that independent judges might be a key ingredient to democratic resilience,³⁸ and scholars have documented cases in which democracy was protected by non-democratic, independent judges precisely because they were insulated from current political tides.³⁹

However, judicial resistance is contingent on the broader political context. It is shaped by executive-legislative and party dynamics,⁴⁰ and it is not the historical norm in Latin America.⁴¹ Political dynamics affect judicial behaviour in both the short and the long run. Over time, appointment mechanisms can lead to courts aligning with or being captured by autocrats,⁴² as in Hungary. Moreover, even in the short run, individual judges might be intimidated into submission,⁴³ as in Venezuela. Whatever the mechanisms employed, judges are bound to be prime targets of rising authoritarian politicians everywhere.⁴⁴ In Latin America, in particular, as Llanos and Weber remark, the combination of strong courts and a strong executive has often been a “recipe for conflict”.⁴⁵

These dynamics were visible in Brazil between 2018–2022. The more judges performed their role and checked illiberal initiatives, the more Bolsonaro attacked courts as agents of the ruling elites who oppose measures favoured by the “true people” of Brazil. The relationship between Bolsonaro and the Supreme Court was never amicable, but the conflict escalated quickly in the second year of his presidency (2020), especially once the COVID-19 pandemic began in earnest. Since that moment, presidential threats against judges became a recurring feature of Brazilian politics under Bolsonaro, and the president-candidate turned attacking the High Courts into a rallying cry for his re-election bid. Judges were at the very centre of Bolsonaro’s crosshairs, but they managed to resist.

While judicial protagonism did prove effective against backsliding in Brazil, judges are far from a “silver bullet” in the protection of democracy. The question of *how* exactly

- 38 e.g., Vanessa A. Boese / Amanda B. Edgell / Sebastian Hellmeier / Seraphine F. Maerz / Staffan I. Lindberga, *How Democracies Prevail: Democratic Resilience as a Two-Stage Process*, *Democratization* 28 (2021).
- 39 Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, *Drake Law Review* 66 (2018); Mila Versteeg *et al.*, *The Law and Politics of Presidential Term Limit Evasion*, *Columbia Law Review* 120 (2020).
- 40 Julio Ríos Figueroa, *El poder judicial ante el populismo y la erosión democrática. El caso de México, 2018-2021*, *Revista de Estudios Políticos* 198 (2022).
- 41 Zambrano *et al.*, note 37.
- 42 Dixon / Landau, note 15; Aziz Huq, *Why Judicial Independence Fails*, *Northwestern University Law Review* 115 (2021).
- 43 Jeffrey K. Staton / Christopher Reenock / Jordan Holsinger, *Can Courts Be Bulwarks of Democracy? Judges and the Politics of Prudence*, Cambridge 2022.
- 44 For examples in different national contexts, see e.g., Dixon / Landau, note 15; Erik Voeten, *Populism and Backlashes against International Courts, Perspectives on Politics* 18 (2020); Ríos Figueroa, note 40; Michael Zürn, *How Non-Majoritarian Institutions Make Silent Majorities Vocal: A Political Explanation of Authoritarian Populism, Perspectives on Politics* 20 (2022).
- 45 Mariana Llanos / Cordula Tibi Weber, *Facing the Stress Test: Courts and Executives during the COVID-19 Pandemic*, *GIGA Focus Latin America* 6 (2022).

courts mattered in a certain context is crucial to understanding *if* and *when* they will matter in other contexts. Available quantitative studies provide limited answers at this point, since they typically operate with highly stylized, abstract conceptions of courts and judicial power.⁴⁶ Case studies are necessary for us to better understand how different courts in different systems can, due to their specific design and powers alongside the political context in which they operate, contribute to checking threats to democracy effectively. Brazil's recent history provides such an opportunity – with the added feature of being able to highlight politicians' weaponization of mass disinformation in digital media against judicial and electoral institutions.

C. Judicial engagement with disinformation

Judicial engagement with disinformation in Brazil was shaped by the contextual background of Bolsonaro's political attacks⁴⁷ as well as the particular design and interaction between the STF and the TSE. The STF is the country's highest court. It has broad powers of constitutional review, via both appeals and direct, abstract challenges, as well as extensive original criminal jurisdiction (on investigations and lawsuits filed against members of Congress, ministers of State, high-ranking army officials, other High Court judges, and the president himself).⁴⁸ The TSE, the country's highest electoral authority, is a powerful and multi-faceted institution. Although formally part of the judiciary, the TSE acts in the electoral process as administrator, rule-maker, and adjudicator – enacting, enforcing, and monitoring electoral regulations as well as deciding cases concerning their application.⁴⁹

Due to this design, judicial resistance against disinformation took place across these two different institutions (STF and TSE) under three different judicial competences (constitutional, criminal, and electoral), with judges performing three different institutional roles (adjudicating, rule-making, and managing the electoral process). Moreover, there is an overlap of personnel between the STF and TSE, leading to a very close relationship

46 Boese *et al.*, note 38, for example, conclude that “stronger judicial constraints on the executive are significantly associated with greater democratic resilience to experiencing autocratization”. However, the judicial power variable used by the authors is built around the question “*To what extent does the executive respect the constitution and comply with court rulings, and to what extent is the judiciary able to act in an independent fashion?*”. Michael Coppedge *et al.*; V-DEM Codebook, https://v-dem.net/documents/24/codebook_v13.pdf (last accessed on 30 July 2024).

47 As described in the previous section.

48 For a critical reconstruction of the STF's design, procedures, and decision-making practices since democratization, see Diego Werneck Arguelles / Ivar A. Hartmann / Rafael B. Lima, *The Jurisprudence of the Supreme Federal Tribunal of Brazil*, in Johanna Fröhlich (ed.), *Constitutional Reasoning in Latin America and the Caribbean*, London 2024.

49 For a critical overview of the TSE's powers and role in Brazilian politics, see Muniz da Conceição / Lucas Henrique, *Electoral Justice and the Supreme Federal Court in Brazilian Democracy*, in: Cristina Fasone / Edmondo Mostacci, / Graziella Romeo (eds.), *Judicial Review and Electoral Law in a Global Perspective*, Rochester 2024; Eneida Desiree Salgado, *The Judicial Branch as a (Pretty) Bad Political Regulator: Notes from Brazil*, *Revista De Derecho Politico* 113 (2022).

between the two institutions.⁵⁰ Three STF judges also sit on the TSE, and the latter's Chief Justice who wields great power over the court's agenda and the prerogative to issue individual injunctions in urgent cases – is always one of the STF judges. This concentrated a wide array of competences amongst the same individual judges, who also became popular targets of disinformation campaigns steered by Bolsonaro and his supporters.

1. The STF: the constitutional review and criminal jurisdiction fronts

The pandemic brought the first direct clashes between Bolsonaro's use of disinformation and the STF. During that period (which witnessed almost 700k deaths in Brazil), Bolsonaro denied scientific evidence on COVID-19, on public health risks, even on official statistics and the efficacy and safety of vaccines, and he rejected most social distancing measures. In court, he fought and lost against vaccines, masks, and other public health measures. The STF unanimously affirmed, for example, that local governments could adopt their own restrictive measures,⁵¹ taking available scientific evidence, international guidelines, and local realities into consideration. Bolsonaro's radical laissez-faire stance was generally unpopular across the political spectrum,⁵² which made it easier for the court – which gained popularity during the pandemic⁵³ – to check him more aggressively, in contrast with traditional patterns of judicial deference towards the central government.

Public support built up by the STF during the pandemic was decisive in the court's stance against Bolsonaro.⁵⁴ However, the president used judicial resistance itself as a focal point for disinformation, further inviting judicial reaction. While the court launched public campaigns and a fact-checking platform,⁵⁵ its most significant reactions took place through its vast criminal jurisdiction. In 2019, the STF initiated the so-called "Fake News

50 Vitor Marchetti, *Justiça Eleitoral e a competição política no Brasil*, Santo André 2013; for a critical perspective on this institutional overlap, see *Salgado*, note 49.

51 Gustavo Ribeiro, *States Free to Continue Isolation Measures*, says Supreme Court, Brazilian Report, 09.04.2020, <https://brazilian.report/newsletters/brazil-daily/2020/04/09/brazilian-states-free-to-continue-isolation-measures-supreme-court/> (last accessed on 30 July 2024).

52 Lucio Rennó / Leonardo Avritzer / Priscila Delgado de Carvalho, *Entrenching right-wing populism under covid-19: denialism, social mobility, and government evaluation in Brazil*, *Revista Brasileira de Ciência Política* (2021).

53 Fabiana Luci de Oliveira / Luciana Gross Cunha / Luciana Ramos, *O STF na visão dos brasileiros: ruim com ele, pior sem ele*, Jota, 13.08.2021, <https://www.jota.info/opiniao-e-analise/colunas/judiciario-e-sociedade/o-stf-na-visao-dos-brasileiros-ruim-com-ele-pior-sem-ele-13082021> (last accessed on 30 July 2024).

54 Zambrano *et al.*, note 37.

55 For example, disinformation claiming that the Chief Justice of the TSE had said, in a lecture abroad, that Bolsonaro would only be re-elected "over his dead body". See this and other examples: Supremo Tribunal Federal, *Confira os últimos desmentidos de notícias falsas feitos pelo STF. Verificação de informações suspeitas antes do compartilhamento evita a propagação de fake news*, <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=464183&ori=1> (last accessed on 30 July 2024).

Inquiry”, which is still ongoing, as a reaction against online threats to Supreme Court justices. The Constitution grants the STF extensive original criminal jurisdiction regarding political authorities, and criminal rulings by the court against politicians have become a common feature of Brazilian politics in the last decade.⁵⁶ But the inquiry was a further and unprecedented expansion of these competences, because starting investigative procedures was traditionally outside of the court’s scope. The Fake News Inquiry was initiated by the Chief Justice to investigate online attacks against the judges and the “honourability of the institution”.⁵⁷ In doing so, the court took a narrow and previously unused internal rule allowing for the investigation and prosecution of conduct that takes place within the STF’s premises and extended it to cover all online threats to the court and its justices.

Although originally established to deal with direct threats to the STF and its members, from 2020 on, the Fake News Inquiry increasingly spawned a host of connected investigations at the intersection of digital disinformation against democracy and the Bolsonaro presidency, becoming a (controversial) tool to identify and check anti-democratic mobilization across many sectors of society – from politicians to businessmen, from ordinary Bolsonaro voters to military personnel and even digital platforms. Regarding the latter, for instance, in a 2022 injunction, Judge Alexandre de Moraes, who presided over both the Inquiry and the TSE (an example of the institutional overlap we mentioned), mandated blocking the Telegram messaging app from operating in Brazil after it failed to remove several messaging channels used by Bolsonaro, as per previous judicial decisions.⁵⁸ In another decision within the inquiry, Moraes pointed to a “digital criminal organization”⁵⁹ promoting disinformation against democracy, involving Bolsonaro and some of his key political allies.⁶⁰ Criminal investigations and correspondingly restrictive measures thus became a tool for real-time judicial engagement with anything associated with the organized dissemination of disinformation against democracy. Other decisions included expeditious content removal, blocking of social media profiles, and denying specific digital platforms’ access to the Brazilian public.

56 *Luciano da Ros / Matthew M. Taylor*, Bolsonaro and the Judiciary: Between Accommodation and Confrontation, in: Peter Birlle / Bruno Speck (eds.) *How endangered is democracy?*, Berlin 2022.

57 See Supremo Tribunal Federal, Gabinete da Presidência, Portaria n. 69, 14 March 2019.

58 DW, Brazil blocks messaging app Telegram, 19.03.2022, <https://www.dw.com/en/brazil-telegram-messaging-app-blocked-by-top-court/a-61183805> (last accessed 13 November 2024). Telegram later complied with the Court’s decision, and the blockage was lifted.

59 *Márcio Falcão / Fernanda Vivas*, Moraes arquiva inquérito dos atos antidemocráticos no STF e abre outro sobre organização criminosa, G1 Globo, 01.07.2021, <https://g1.globo.com/politica/noticia/2021/07/01/moraes-arquiva-inquerito-dos-atos-antidemocraticos-no-stf-e-abre-novo-inquerito-sobre-organizacao-criminosa-contr-a-democracia.gh.html> (last accessed on 30 July 2024).

60 *Márcio Falcão / Fernanda Vivas*, Polícia Federal abre inquérito sobre atuação de milícia digital contra a democracia, G1 Globo, 16.07.2021, <https://g1.globo.com/politica/noticia/2021/07/16/pf-abre-inquerito-sobre-atuacao-de-milicia-digital-contr-a-democracia.gh.html> (last accessed on 30 July 2024).

II. The TSE and the electoral front

The TSE engaged with disinformation across its multidimensional competences. Administrative measures in preparation for the 2022 national elections included digital literacy campaigns, fact-checking (largely dedicated to Bolsonaro's constant claims of electoral fraud), and agreements with digital platforms⁶¹ by which they committed to deploy soft countermeasures against the online spread of electoral disinformation.⁶² In comparison with the 2018 elections, the TSE increased the use of its administrative competences across several different dimensions.⁶³

In its rule-making capacity, the TSE enacted Resolution n. 23714/2022, expanding its own competences to act without provocation by external parties regarding “disinformation that jeopardizes the integrity of the electoral process”. This gave the TSE grounds to order platforms to immediately suspend content with “gravely decontextualized or knowingly false facts” that affected the integrity of the electoral process, as well as to suspend social media profiles or channels characterized by their recurring promotion of disinformation. The resolution also empowered the TSE's Chief Judge to individually determine the removal of content identical to already flagged disinformation and the suspension of access to online platforms in case of “reiterated non-compliance of injunctions based on this Resolution”. Despite criticisms from across the political spectrum, the STF upheld the resolution – hardly a surprising outcome since, given their composition, the two courts display a close relationship.⁶⁴ That norm remained in force throughout the elections, having been used in individual injunctions to suspend profiles and content involving disinformation.

Beyond Resolution 23714/2022, the TSE shaped the law on disinformation through adjudication, revisiting its previous interpretations of existing rules to maintain the removal of online disinformation content and impose fines on disseminators. From the elections on, the TSE established that it could issue fines and suspend content even after the electoral

61 Tribunal Superior Eleitoral, TSE e plataformas digitais assinam acordo nesta terça-feira (15), <https://www.tse.jus.br/comunicacao/noticias/2022/Fevereiro/tse-e-plataformas-digitais-assinam-acordo-nesta-terca-feira-15> (last accessed on 30 July 2024).

62 The agreements vary considerably for each platform. Overall measures include labelling elections-related content, investment in media literacy initiatives, and implementation of direct channels with the electoral authority for it to report Terms of Service infringing content regarding the elections. *Tribunal Superior Eleitoral*, TSE e plataformas digitais assinam acordo nesta terça-feira (15), <https://www.tse.jus.br/comunicacao/noticias/2022/Fevereiro/tse-e-plataformas-digitais-assinam-acordo-nesta-terca-feira-15> (last accessed on 30 July 2024).

63 *Emilio Peluso Neder Meyer / Fabricio Polido*, International Law, Constitutions, and Electoral Content Moderation: Overcoming Supranational Failures Through Domestic Solutions, *Chicago Journal of International Law* 24 (2023).

64 Especialistas criticam TSE por mudar regras a 10 dias da votação e se autoconceder mais poderes, <https://www.estadao.com.br/politica/especialistas-criticam-tse-por-mudar-regras-a-10-dias-da-votacao-e-se-autoconceder-superpoderes/> (last accessed on 30 July 2024); *Supremo Tribunal Federal*, Plenário Mantém Resolução Do TSE Sobre Combate à Desinformação, <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=496383&ori=1> (last accessed on 30 July 2024).

period had passed whenever disinformation was targeted at the electronic voting system itself and, in the court's words, its "content could be used for new and unwarranted aggressions in future electoral disputes".⁶⁵

In its judicial capacity, the TSE had issued two rulings that revoked a politician's eligibility for office due to them spreading disinformation. Three years after a widespread pro-Bolsonaro Whatsapp-based microtargeting campaign in the 2018 elections, the court held that the distribution of microtargeted disinformation for electoral purposes via messaging applications could be treated as an abuse of economic and communicational power.⁶⁶ This entailed treating these digital platforms as social communications media – a category generally limited to broadcasters and legacy media. While the TSE did not find a violation of electoral law due to the specifics of that case, it made clear that, if such a violation was found, the court could remove from office any politician accused of spreading digital electoral disinformation through messaging apps. This judicial warning turned into an actual conviction in the case of Fernando Francischini, a state legislator in Paraná, who was stripped of his mandate for spreading disinformation about the electronic voting system during the 2018 electoral process.⁶⁷ During the 2022 elections, the same precedent posed a warning to Bolsonaro as the country waited for the TSE to begin ruling on the merits of several lawsuits filed against the former president, charging him with several types of illegal behaviour in the elections.

On June 30th, 2023, months after Bolsonaro's defeat, the TSE finally ruled on the first of these lawsuits. It began nearly a year before, in July 2022, when Bolsonaro had called a meeting with dozens of foreign diplomatic representatives, claiming that the Brazilian electoral system was not transparent or reliable and that his potential defeat would not be legitimate. Rehashing long-debunked false stories that had echoed amongst his followers, he suggested to the diplomats that judicial-electoral authorities were working to favour Lula.⁶⁸ After the meeting, the TSE issued another official statement debunking Bolsonaro's claims.⁶⁹ But judicial measures went far beyond fact-checking. In August 2022, the TSE is-

65 TSE, Representação n.0601365-65.2022.6.00.0000, Rel. Ministro Benedito Gonçalves, decided on 23 May 2023.

66 TSE, AIJE 0601968-80 and AIJE 0601771-28, <https://www.tse.jus.br/comunicacao/noticias/2021/Outubro/tse-julga-improcedentes-aco-es-contra-jair-bolsonaro-e-hamilton-mourao> (last accessed on 1 June 2024).

67 Tribunal Superior Eleitoral, Deputado Francischini é cassado por propagar desinformação contra a urna eletrônica, <https://www.tse.jus.br/comunicacao/noticias/2021/Outubro/plenario-cassa-deputado-francischini-por-propagar-desinformacao-contra-o-sistema-eletronico-de-votacao> (last accessed on 30 July 2024).

68 *Mauricio Savarese*, Brazil's Bolsonaro Meets Diplomats to Sow Doubts on Election, AP News, 19.07.2022, <https://apnews.com/article/jair-bolsonaro-elections-caribbean-voting-brazil-8acf78e1e58650424b1dec4ecfc35ce4> (last accessed on 30 July 2024).

69 TSE divulga resposta a 20 acusações de Bolsonaro contra as eleições, <https://veja.abril.com.br/coluna/radar/tse-divulga-resposta-a-20-acusacoes-de-bolsonaro-contra-as-eleicoes/> (last accessed on 30 July 2024).

sued an injunction to remove videos of Bolsonaro's speech in said meeting from Facebook, Instagram, and YouTube. A centre-left political party (PDT) also filed a lawsuit arguing that Bolsonaro's meeting with foreign diplomats was an abuse of the powers of his office to spread disinformation on the voting system.⁷⁰ It was in this lawsuit that, in 2023, in a 5 to 2 decision that included a long, detailed list of deliberate falsehoods uttered and promoted by Bolsonaro, the TSE declared him ineligible for eight years due to "abuse of political and communicational power".⁷¹ Bolsonaro has since appealed to the STF, and at the time of writing, the case is still pending.⁷²

D. Outcomes of judicial engagement with disinformation in democratic backsliding

While democratic resilience to backsliding is shaped by many factors, judicial institutions have played a key role across the globe.⁷³ However, their capacity to check illiberal actors and protect key aspects of democratic governance depends on their structure and the distribution of power within a given system. The institutional independence of Brazilian High Courts has certainly been decisive.⁷⁴ But independence is not the only relevant dimension configuring apex courts; their authority also varies, with different implications for their political power.⁷⁵

Institutional design contingencies largely shaped our case study, notably with the overlap of constitutional review, civil, criminal, and electoral competences, from jurisdictional to administrative and rule-making – an expansive combination of powers that can be hard to reconcile with typical images of what "courts" and "judges" are expected to do. Moreover, these courts provide their individual members with an array of agenda-setting and decision-making competences that allow for flexibility in applying these different remedies to different actors (government agents, politicians, citizens, and even digital platforms). As other institutions have lagged behind in dealing with the upsurge in disinformation, Brazil's unusual judicial design placed judges in a powerful position to check Bolsonaro and his extremist supporters.

70 See Tribunal Superior Eleitoral, Referendo Na Ação de Investigação Judicial Eleitoral Nº 0600814-85 (Pje) – Classe 11527 – Brasília – Distrito Federal, https://www.migalhas.com.br/arquivos/2022/12/E5A076E1E8393F_AIJE0600814-85-0-relatorioevot.pdf (last accessed on 30 July 2024).

71 Tribunal Superior Eleitoral, Por maioria de votos, TSE declara Bolsonaro inelegível por 8 anos, <https://www.tse.jus.br/comunicacao/noticias/2023/Junho/por-maioria-de-votos-tse-declara-bolsonaro-inelegivel-por-8-anos> (last accessed on 30 July 2024).

72 Supremo Tribunal Federal, Recurso Extraordinário Com Agravo (ARE) 1474354, <https://portal.stf.jus.br/processos/detalhe.asp?incidente=6820240> (last accessed on 30 July 2024).

73 Boese *et al.*, note 38; Melis G. Laebens / Anna Lührmann, What Halts Democratic Erosion? The Changing Role of Accountability, *Democratization* 28 (2021).

74 Zambrano *et al.*, note 37.

75 Daniel M. Brinks / Abby Blass, Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice, *International Journal of Constitutional Law* 15 (2017).

These contingent features limit the possible takeaways of the Brazilian case in terms of a broader theory of judicial resistance to backsliding. But the case allows us to explore the conditions under which courts *can* exercise their powers and independence – such as political fragmentation, public support, and elite support –,⁷⁶ and it shows that the kind of powers that courts have in the first place is a decisive factor. Moreover, we can ask, what are the potentially troubling implications of these same institutional contingencies that made Brazilian High Courts powerful enough to act to buffer backsliding? The fact that a few individual judges could do so much, so flexibly, and so visibly is potentially in tension with established expectations for the role of the judiciary and, substantively, the scope of freedom of expression in Brazil. We discuss these two sets of implications below.

1. Judicial resistance and the political context: judicial capture and public support

In Brazil, disinformation has functioned less as a widespread digital manipulation strategy and more as a communication practice willingly adopted to manifest one's ideological affiliations.⁷⁷ This makes it all the more challenging to hold politicians accountable for spreading disinformation and for their misconduct in various ways. For instance, civil society initiatives on information quality, like fact-checking, can still provide information plurality and public debate. Such measures are less likely to alter the *status quo*, however, as supporters will endorse incumbents regardless of how harmful their information manipulation proves to democracy.⁷⁸ In this scenario, independent accountability institutions become decisive.

Courts were crucial channels for holding accountable citizens and politicians who were popular disinformation spreaders. The STF's criminal jurisdiction includes the president, his cabinet, and members of Congress; with the Fake News Inquiry expansion, the STF was able to exert horizontal accountability over some of Bolsonaro's disinformation practices as they unfolded on the ground. As the body responsible for managing and overseeing elections, the TSE was a central institution promoting both vertical accountability (ensuring that elections would happen on fair terms and that the legitimate result from the polls would be respected) and horizontal accountability (imposing electoral sanctions on actors who engaged in disinformation).⁷⁹

However, the fact that courts can take on this role does not mean they will – or that it will come without political costs. Even when judges have vast powers to contain backsliding, they will be more or less likely to exercise such powers under different political

⁷⁶ e.g., Zambrano *et al.*, note 37; Ríos Figueroa, note 40.

⁷⁷ Galvão Dourado, note 33; Rossini / Kalogeropoulos, note 34.

⁷⁸ Batista Pereira *et al.*, note 35.

⁷⁹ For a conceptual clarification on different paths for accountability, see Laebens / Lührmann, note 73.

conditions.⁸⁰ For the promotion of accountability, a general commitment to democracy and its institutions is insufficient;⁸¹ institutional design and political context, including the various interests and forces that shape judicial behaviour, are also decisive. The STF and TSE judges' array of powers were expanded – mostly by new judicial interpretations – amidst the judicial-executive conflict of the Bolsonaro era, regarding both criminal law and constitutional review; some of those STF judges also had been granted access to the TSE's electoral rule-making and adjudication powers. Appointed by previous governments, with guarantees of independence and a significant level of public and political support, these judges were able to reign in the spread of disinformation both in- and outside of elections. Moreover, since Bolsonaro's attacks and disinformation were often directly aimed at these two judicial institutions and specific judges within them, they had an even greater incentive to present a united front and resist.⁸²

While this scenario made judicial resistance possible and effective, it is also heavily dependent on changes in the political context over time. First, this concentration of powers in the hands of a few judges arguably makes political capture more dangerous. In the next presidential elections (2026), the two judges to be appointed (potentially by Bolsonaro) will be the TSE's President and Vice-President, with access to the same array of institutional powers that were deployed against disinformation in 2022. The interests or political outlook shaping the court's jurisprudence could thus drastically change, together with the use of this institutional legacy – from protecting democracy, perhaps, to enabling attacks on democracy. Comparative studies show how courts can, over time, become empowering instead of constraining factors for would-be authoritarian leaders.⁸³ Courts that are excessively powerful – and that concentrate power in the hands of individual judges – make these institutional dynamics even more problematic.

Second, in contexts of political crisis and polarization, judges who embody the highly visible function of holding elected politicians accountable will invite more political exposure. Polarization fuels and is fuelled by mistrust that political adversaries are committed to democratic norms.⁸⁴ Bolsonaro's official electoral campaign and speeches, beyond mass disinformation coming from his political camp, largely centred on questioning the High Courts' commitment to democracy. He successfully mobilized followers against judges who – according to this narrative – abused their powers and wanted to interfere with elections. In such a scenario, the more judges use their expanded powers to fend off attacks on judicial and electoral institutions, the more they might be perceived as political players themselves – that is, as taking a side in the political conflict – potentially undermining

80 *Ríos Figueroa*, note 40.

81 *Laebens / Lührmann*, note 73, p. 913.

82 *Felipe Recondo / Luiz Weber*, *O Tribunal: Como o Supremo Se Uniu Ante a Ameaça Autoritária*, São Paulo 2023.

83 see e.g., *Dixon / Landau*, note 15.

84 *Andreas Schedler*, *Rethinking Political Polarization*, *Political Science Quarterly* 138 (2023).

their own legitimacy as impartial guardians of constitutional and electoral rules. This is particularly true considering that some decisions taken within the arc of resistance to Bolsonaro can reasonably be framed as examples of judicial “hardball”.⁸⁵

Judicial protagonism against disinformation, however decisive in the short run, might have troubling implications for the STF’s public standing, creating conditions that will make it harder for judges to perform the same role in future rounds of backsliding. Recent surveys suggest that public perceptions of the STF might be shifting, becoming increasingly politicized. In a national survey conducted in 2021, 49% of respondents agreed with the statement “STF judges are just like other politicians”.⁸⁶ In a survey conducted shortly after the January 8th, 2023, unrest in Brasília, around 44% of respondents declared they did not trust the court (against 45% that trusted it). When the same survey was conducted one year later, the results changed to nearly 51% (do not trust) versus 42% (trust).⁸⁷ In September 2023, a different survey showed that the number of respondents who did not trust the court had increased since previous editions.⁸⁸

These apparent trends might not remain stable in the following years, and we should be careful not to rely too much on survey results that refer to a critical, conflictive period in Brazilian politics. Still, if public support was a key factor empowering judges to resist Bolsonaro,⁸⁹ they give plausibility to the dynamics and concerns described above. Considering that the next presidential elections might take place under similar political instability,

85 See *Rubens Glezer*, *Catimba constitucional: o STF, do Antijogo à Crise Constitucional*, Belo Horizonte 2020. Moreover, criticisms of excessive politization by the STF are not new in Brazilian politics. Even before the Bolsonaro era, scholars were already discussing whether the STF’s role in the ongoing constitutional crisis was overly political, although the context and nature of those earlier debates were very different. See, e.g., *Emilio Peluso Neder Meyer*, *Judges and Courts Destabilizing Constitutionalism: The Brazilian Judiciary Branch’s Political and Authoritarian Character*, *German Law Journal* 19 (2018); *Juliano Zaiden Benvindo*, *Brazil’s Increasingly Politicized Supreme Court*, *ICONnect*, 16.02.2017, <https://www.iconnectblog.com/brazils-increasingly-politicized-supreme-court/> (last accessed 20 September 2024).

86 *de Oliveira et al.*, note 36.

87 *Carolina Ingizza*, 50,9% afirmam não confiar nos ministros do STF e 42,3% dizem confiar, aponta pesquisa, *JOTA*, 15.02.2024, <https://www.jota.info/stf/do-supremo/509-afirmam-nao-confiar-nos-ministros-do-stf-e-423-dizem-confiar-aponta-pesquisa-15022024> (last accessed on 30 July 2024). The complete survey results are available at Atlas Intel, *Confiança No Judiciário & Imagem Dos Ministros Do STF*, <https://slack-files.com/T0A5W4YA0-F06K6EZ4T25-b44bfe6a59> (last accessed on 30 July 2024).

88 *Nicolas Iory*, *Partidos, Congresso, igrejas, STF: o quanto o brasileiro confia nessas e em outras instituições?*, *O Globo*, 13.09.2023, <https://oglobo.globo.com/blogs/pulso/post/2023/09/partidos-congresso-igrejas-stf-o-quanto-o-brasileiro-confia-nessas-e-em-outras-instituicoes.ghtml> (last accessed on 30 July 2024).

89 *Zambrano et al.*, note 37; *Diego Werneck Arguelles*, *Public Opinion, Criminal Procedures, and Legislative Shields: How Supreme Court Judges Have Checked President Jair Bolsonaro in Brazil*, *Georgetown Journal of International Affairs* (GJIA), 25.04.2022, <https://gjia.georgetown.edu/2022/04/25/public-opinion-criminal-procedures-and-legislative-shields-how-supreme-court-judges-have-checked-president-jair-bolsonaro-in-brazil/> (last accessed on 30 July 2024).

this scenario could soon provide politicians with grounds to mobilize support for constitutional or statutory reforms against judicial power and create further resistance towards their decisions. The post-2022 Congress has already signalled that it will keep considering proposals to reform and even curb the court's powers, and a constitutional amendment that would limit the STF judges' powers to issue individual rulings was approved in the Senate in November 2023.⁹⁰ While no such drastic legislative reform has been approved yet, a court with legitimacy problems would make it less costly for its opponents in Congress to publicly promote such measures before their constituents. Judicial resistance against disinformation in 2022, then, might have contributed to worsening conditions for the same institutions to perform this role in the future.

II. *Communications, free speech, and courts' institutional limitations to rule on disinformation*

Courts are legitimate arbiters of the scope of freedom of expression, and their competence to adjudicate disinformation is well-established: cases involving disinformation practices would inevitably reach judicial dockets as matters of abuse of freedom of expression, both in and outside of elections.⁹¹ In this sense, it is expected that courts would figure as one of several institutional actors countering the complex societal phenomenon that is disinformation.⁹² But, in Brazil, where legislative initiatives to mitigate disinformation never came through, High Courts had to play the main role in coping with a problem whose roots and consequences extend far beyond their competences and capacities. First, because even though disinformation is essentially about what can and cannot be said within democratic standards, its socio-political significance goes beyond the regulation of speech and its limits. Its instrumental use by political elites and popularity within specific political crowds indicate that, in scenarios of backsliding, disinformation functions as a form of political action that often expresses deep dissatisfaction towards democracy. In this sense, as we mentioned in section B.II, people share disinformation regardless of whether they believe it or not and, most importantly, they often do so to signal political identity. While courts must

90 Senado aprova PEC que limita decisões individuais em tribunais, Agência Senado, <https://www12.senado.leg.br/noticias/materias/2023/11/22/senado-aprova-pec-que-limita-decisoes-individuais-em-tribunais> (last accessed on 13 September 2024).

91 Which is not to say that judges in Brazil have adequately performed this role. See, e.g. *Ivar A. Hartmann*, Protecting Online Speech in Latin America: Are Courts the Answer?, Centre for International Governance Innovation, 13.06.2022, https://www.cigionline.org/articles/protecting-online-speech-in-latin-america-are-courts-the-answer/?utm_source=twitter&utm_medium=social&utm_campaign=platform-governance-series (last accessed on 13 September 2024) (arguing that “the track record of Latin American courts on freedom of expression has not been stellar, however”, and these institutions “have missed the opportunity to adequately help minorities in speech cases by favouring powerful plaintiffs, suppressing speech based on erratic legal reasoning, on one hand, and refusing to enforce criminal sanctions that would protect historically oppressed groups, on the other”).

92 Iglesias Keller *et al.*, note 4.

sanction abuses of speech and protect the integrity of the electoral process, adjudication alone is not fit to address the deep, broader socio-political crisis where disinformation thrives. Brazil is a case in point. Despite strong judicial action against disinformation – and the fact that Bolsonaro was not re-elected – disinformation and its democracy-eroding effects remain a distinguished feature of the country’s political debate.

Even within their competences, courts are limited by essential features of their institutional design.⁹³ For instance, courts are essentially selective decision-makers, meaning that they will only decide if disinformation abuses the scope of freedom of expression when provoked. In this case, litigating constitutional guarantees – like free speech itself, access to information in and outside of elections, and participation in public debate – is limited to those with material and subjective conditions to access the judiciary. This narrows the set of controversies that reach judicial scrutiny, leaving mitigation of disinformation to civil society (including fact-checkers, whose effectiveness has proved limited) and digital platforms – whose incentives to engage in this task are mixed. Selectivity can also explain why most cases tried within the Fake News Inquiry and during the 2022 electoral period referred to online disinformation. But disinformation is not a phenomenon restricted to the digital sphere, despite the fact that digital intermediaries are considered central, as their privately-owned infrastructures allow for speedy content distribution at scale.⁹⁴ Critical studies on the topic have shown that other powerful actors, like traditional media and governments, have a relevant role in replicating and diffusing manipulated information in the public sphere.⁹⁵ Regarding the interactions between digital and traditional media, empirical studies conducted in other jurisdictions have shown that news media sometimes amplify selected, even false content from social media, which can lead to “blowing marginal phenomena out of proportion”,⁹⁶ as information that was shared within a certain online community gets covered and thus disseminated by professional wide-reach outlets.⁹⁷

93 *Clara Iglesias Keller*, Policy by Judicialisation: The Institutional Framework for Intermediary Liability in Brazil, *International Review of Law, Computers & Technology* (2020). For an organization of the critiques towards court’s institutional limitation, see *Jane Reis Gonçalves Pereira*, *Direitos Sociais, Estado de Direito e Desigualdade: Reflexões Sobre as Críticas à Judicialização dos Direitos Prestacionais*, *Quaestio Iuris* 8 (2015).

94 A concern that the evolution of artificial intelligence technologies further fuels, as “generative AI” allows for the production and distribution of text, audio, image, and video content that can accurately mimic people and make disinformation even harder to debunk. See *Bobby Chesney/Danielle Citron*, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, *California Law Review* 107 (2019), pp. 1753-1819.

95 *Fernando Miró-Llinares / Jesús C. Aguerri*, Misinformation about Fake News: A Systematic Critical Review of Empirical Studies on the Phenomenon and Its Status as a ‘Threat,’ *European Journal of Criminology* 20 (2023).

96 *Shannon McGregor*, Social Media as Public Opinion: How Journalists Use Social Media to Represent Public Opinion, *Journalism* 20 (2019), pp. 1070–1086.

97 *Andreas Jungherr / Ralph Schroeder*, Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy, *Social Media + Society* 7 (2019).

Case-by-case decision-making is furthermore inadequate to assess effects beyond individual rulings; meanwhile, decisions on single cases might have unintended consequences beyond their original scope. For instance, in building the legal grounds for disqualifying politicians for spreading disinformation, the TSE equated messaging platforms with traditional social communication media for electoral law purposes. This interpretation would make existing provisions that sanction “abuse of communication media” with electoral ineligibility also applicable to misconduct through digital media, as per the decisions described in C.II. Although this can be a creative line of reasoning from a legal perspective, extending regulatory obligations reserved for traditional media to such online platforms is a double-edged precedent. While digital platforms may perform functions also associated with traditional media, the infrastructure and the means through which they do so require regulatory approaches that fit their influence in information and attention fluxes. In this case, equating messaging apps and traditional communication media empowered the court – but this understanding might lead to jurisprudential inconsistencies and undesired results in other cases. Consider, for instance, the ordering of messaging platforms to block content within the Fake News Inquiry (such as the Telegram case mentioned above). Should messaging platforms be equated to social communication media, judicial restrictions would need to articulate the extent of the constitutional requirements that apply, for instance, to broadcasters.⁹⁸

Finally, the overlap of jurisdictions in our case study implied a continuous interpretation of disinformation against dubious legal standards, i.e. the scope of freedom of expression in- and outside of elections. In Brazilian law, the electoral period abides by a special set of rules meant to both ensure voters’ access to pluralistic information and constrain electoral propaganda and speech in order to ensure electoral integrity. The overall assumption that elections require special standards has long-grounded strict rules for speech during elections, like the ones limiting the timing, media, and content of electoral propaganda.⁹⁹ For disinformation, this special regime justified the aforementioned Resolution n. 23714/2022 and its enforcement. However, as adjudicating elections began to mix with a broader task of protection of democracy itself, restrictions that traditionally make sense within the specific legal regime for elections can potentially spread to free speech adjudication in general.

While this jurisprudential turn is yet to be confirmed, a few STF decisions raise concerns about a potential trend to enforce stricter freedom of expression standards outside of elections. For instance, in November 2023, the Supreme Court held a newspaper liable for damages for publishing an interview in 1995, where a local politician was accused

98 See Brazilian Federal Constitution, section 222.

99 *Marilda De Paula Silveira / Amanda Fernandes Leal*, *Restrição de Conteúdo e Impusioamento: Como a Justiça Eleitoral Vem Construindo Sua Estratégia de Controle*, *Direito Público* 18 (2021), p. 582.

of committing a bomb attack.¹⁰⁰ Asserting that press freedom must be accompanied by responsible conduct, the STF established standards under which media outlets can be held liable for publishing false accusations of criminal activity – namely, whether there were concrete indications that the accusation was false and negligent in fulfilling the duty to verify the veracity of facts prior to publication.¹⁰¹ While balancing the constitutional values of freedom of the press against the rights to personal image and honour is a legitimate goal, this decision departed from the Court's landmark precedent for freedom of speech, known as "The Press Law" case. In that lawsuit, the Court struck down a law enacted during the military dictatorship to regulate press activities, declaring unconstitutional any sort of legislative intervention over press freedom. This included stripping broad legal concepts that had been used to suppress political dissent, such as bans on content deemed harmful to "morality and common decency". However, the ruling also nullified provisions that would not necessarily be interpreted as disproportionate restrictions on speech, such as the protection of a right to publish a reply in the same outlet.¹⁰² In years following "The Press Law" case, the Court's jurisprudence leaned towards a libertarian approach to speech. While it is too early to identify a definitive shift in the Court's stance related to disinformation adjudication, the possibility of a change in its standards already appears in public debates.¹⁰³

The political forces driving backsliding in Brazil did not prevent courts from holding political actors accountable for disinformation. Judges were indeed a key mechanism deterring backsliding in this dimension. Their high exposure and empowerment in this role, however, might have come at high institutional costs. In a context where democracy survived in the short run but might still be at stake in the next elections, the legacy of judicial engagement with disinformation remains ambiguous. The same factors associated with judicial effectiveness in the last election might compromise, in the future, judicial capacity to exercise accountability and adjudicate communication structures and freedom of expression.

100 Supremo Tribunal Federal, RE 107412, trialled on 29 November. 2023, <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5263701> (last accessed on: 19 September 2024).

101 The case was classified as one with "broad repercussions", meaning that the thesis stipulated by the court is a parameter of judicial interpretation applicable in general. See Supremo Tribunal Federal, Theme 995, <https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5263701&numeroProcesso=1075412&classeProcesso=RE&numeroTema=995> (last accessed on: 19 September 2024).

102 *Clara Iglesias Keller*, *Media Law in Brazil*, International Encyclopaedia of Laws, Alphen aan den Rijn 2022.

103 *Angela Pinho / Renata Galf*, STF engata decisões controversas sobre liberdade de expressão em sintonia com o TSE, Folha de S.Paulo, 02.12.2023, <https://www1.folha.uol.com.br/poder/2023/12/stf-engata-decisoes-controversas-para-liberdade-de-expressao-em-sintonia-com-tse.shtml> (last accessed on 19 September 2024).

E. Final remarks

Disinformation is at the centre of political disputes around the globe, expressing social, economic, and political power struggles that are contingent on context and transcend the digital realm, incurring old and new institutional stakeholders. It has recently become intertwined with processes of democratic backsliding in many countries, notably Brazil, where disinformation jeopardizes aspects of democratic governance, like trust in institutions, democratic standards for knowledge production and legitimation, as well as the very idea of a shared reality to ground public debate. If we conceive of backsliding as a phenomenon driven by the deliberate behaviour of political actors, disinformation can be weaponized by them, even if other societal actors also engage in producing and disseminating it. In such contexts, the usual public-sphere-focused prescriptions for the mitigation of disinformation have proved simply not enough to address the broader democratic crisis that it serves, and the actions of democratic institutions will be key to mitigating its effects and promoting resilience. From an institutional perspective, then, when backsliding and disinformation intersect in this way, courts can play an important role in this task. This is what happened in Brazil, where judges were the protagonists in the country's long engagement with disinformation promoted by President Bolsonaro in his attempt to undermine vertical and horizontal checks on his powers. In our reconstruction of the Brazilian case, we argue that the concentration and overlap of extensive powers of electoral rulemaking, administration and adjudication, criminal jurisdiction and investigation, and constitutional review powers in the hands of a limited set of judges made this protagonism effective. However, this same judicial protagonism has potentially troublesome implications for the future. The concentration of such varied powers in judicial hands made courts the main institutional check on this complex phenomenon, but it might have also reshaped the boundaries between the need to protect elections and the broader regime of freedom of expression in Brazil. Moreover, in a polarized public sphere, the extreme public exposure of individual judges wielding such a powerful (and, in some cases, controversial) combination of competences might have also impacted the court's standing before the public, arguably making it easier for future illiberal actors to mobilize against the judges – and perhaps harder for those judges to check them. While the Brazilian case shows that courts can help deter disinformation in democratic backsliding, it also shows that this role depends more on what judges can do, beyond simply having guarantees of independence, and that expansive powers to investigate and counter disinformation might create new problems on their own.



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