

Judicial Responses to Bolsonarism: The Leading Role of the Federal Supreme Court

Emilio Peluso Neder Meyer

2020-06-16T16:34:58

Criticism against the Brazilian judiciary, especially the Supreme Court, has been on the rise in the past couple of decades.

Under Jair Bolsonaro's presidency, however, courts are experiencing a more radical and dangerous form of opposition, which transcends the borders of legitimate criticism and undertakes a direct attack on the judicial branch. In the dawn of [May 31th 2020](#), far-right protesters rallied in front of the building of the Federal Supreme Court, wearing masks and torches that mimic those of the Ku-Klux-Klan. Later on that day, president Jair Bolsonaro joined a small group of street demonstrators waving banners demanding a [shut down](#) of the Federal Supreme Court. Moreover, in response to a petition brought to the court to apprehend the president's cell phone, a retired military and current member of Bolsonaro's cabinet, General Augusto Heleno, made a public pronouncement threatening the court with [unpredictable consequences](#) and the possibility of civil war, in case the injunction were granted. Although Justice Celso de Mello, the rapporteur in this case, dismissed the claim to seize the president's mobile phone, he explicitly criticized those threats and wrote a comment in a social network comparing contemporary Brazil to [Weimar](#) and the context of Hitler's rising towards Nazism.

Such critical scenario must be understood in light of the Federal Supreme Court's backlash against Bolsonaro's maneuvers to flame his supporters and violate the Brazilian Constitution of 1988. This article aims at recollecting the most important rulings and procedures that take part in this reaction.

The Fake News Criminal Investigation

Everything began when a former ally of President Bolsonaro denounced the creation of a scheme for disseminating fake news and stimulating threats to and attacks against legislative and judiciary institutions and individual persons, with the participation of public servants working inside the presidential palace. Allegedly there is an informal office which coordinates these attacks; by the media it is referred to as Bolsonaro's 'hate cabinet'. Chief Justice Dias Toffoli created a heterodox investigation procedure inside the Federal Supreme Court, based on Article 43 of the court's [internal regulations](#) in order to investigate these allegations. ([inquiry 4.781](#)). According to Article 43, a criminal investigation can be installed by the Federal Supreme Court when a crime occurs within its premises. On Chief Justice Toffoli's interpretation, this can be read in an expansive way, to include offenses committed through the internet having the court, or one of its members, as a victim. It was in the

course of this procedure that Bolsonaro's supporters faced police searches in their houses, prompting the president's [anger](#).

Legal scholars disagreed about the legality of this investigative procedure, since it can be interpreted as harming the accusatory system envisaged by the 1988 Brazilian Constitution—inasmuch as it fuses in the same organ accusatory and adjudicative functions. In support of the procedure, [scholars](#) argued that although the investigation lies with the court, the final word on whether to file a criminal lawsuit against the persons investigated in the procedure remains with the Prosecutors Office. To dispel any doubts on the legitimacy of the investigation, a political party brought a concentrated constitutional review lawsuit to the Federal Supreme Court, whose judgment is pending at the full bench of the court. To this date, only the opinion of [Justice Edson Fachin](#) has been delivered in this direct action. According to Justice Fachin, there are no legal vices in the procedure; although prosecutors have the constitutional duty of filing criminal lawsuits when they learn of an offense, they do not have an exclusive investigative prerogative.

The investigation on the 'hate cabinet' plays an important part in the court's strategy of self-preservation, providing a constitutional response to the current attacks.

Corruption and Police Cooptation

Sérgio Moro became one of the most salient figures in Brazilian politics. His controversial methods led to the controversial imprisonment of former president Lula da Silva. However, he did not hide his far-right political preferences: right after the election of Jair Bolsonaro, Moro accepted an invitation to become the Minister of Justice and Public Security. Following sixteen months in government without any significant public policy, Moro resigned accusing Bolsonaro of pressing him for changing the Director of the Federal Police—possibly in the hope that this could undermine the ongoing investigations against his sons in the cases of the 'hate cabinet' and in a corruption scheme in the Legislative Assembly of the state of Rio de Janeiro.

Moro's accusation led to a criminal inquiry ([4.831](#)), this time brought to the court by the Federal Prosecutor's Office. The rapporteur, the most senior Justice in the Federal Supreme Court, Celso de Mello, has been strictly legalistic in supervising the investigation. He requested and publicly disclosed the video recording of a meeting between Bolsonaro and his ministers, which prompted Moro to accuse Bolsonaro of pressing him for political influence in investigations conducted by the Federal Police. In this meeting the president declared, that he would not wait for his sons to be harmed and would change any position in the government to avoid it. In the same occasion, the Minister of Education, Abraham Weintraub, said that the Justices of the Federal Supreme Court were '[bums](#)' that should be 'imprisoned'.

Deepening the Institutional Warfare

Bolsonaro and his supporters have intensified their attacks on Brazilian institutions, targeting not only the Federal Supreme Court but also the Speakers of the Chamber of Deputies and the Federal Senate, Rodrigo Maia and Davi Alcolumbre. In April 2020 Jair Bolsonaro engaged in another manifestation where protesters asked for a 'military intervention' to shut the National Congress and the Supreme Court. This time, the General Prosecutor of the Republic filed another [inquiry](#) in the Federal Supreme Court to investigate if the protesters violated the [National Security Act](#). Although this act was approved during the 1964-1985 dictatorship, it expressly provides for criminalizing activities that can result in violent political regime change, violent breaching of the rule of law or violations against the autonomy of any of the branches of government.

In the course of this inquiry, a far-right activist that explicitly threatened Federal Supreme Court Justice Alexandre de Moraes was [arrested](#) on the 15 June 2020. Moreover, another inquiry was prompted by the General Prosecutors Office to investigate the launch of [fireworks](#) against the Federal Supreme Court building on the 13 June 2020 night.

COVID-19 and Brazilian Federalism Resurgence

Bolsonaro's anti-scientific approach to [COVID-19](#) caused a lot of harm – but was mitigated by the federal structure of Brazil. The system designed by the 1988 Constitution followed the centralist tradition inaugurated with the 1891 Constitution, although some relatively small advances were made to protect the states' political autonomy. Nonetheless, statutory legislation throughout the past thirty years followed an anti-federalist pattern, strangling the states' financial capacity.

A recent decision of the Federal Supreme Court reversed this trend, in a claim filed by the Bar Association to enforce the provisions of the 1988 Constitution that define concurrent competences in the protection of health for all the members of the Brazilian federation. According to the court's ruling, states and municipal governments have priority in defining measures of social distancing, quarantine and suspension of public activities. Due to the ruling governors and mayors became important players in Brazilian politics, with unequivocal support from the Federal Supreme Court.

Before that ruling, Justice Roberto Barroso had already deterred Bolsonaro by issuing an order against a federal campaign entitled 'Brazil Cannot Stop' (*O Brasil não pode parar*), a political propaganda that minimized the risks of COVID-19 and invited people to go back to work ([ADPF 669](#)).

However, it was Justice Alexandre de Moraes who became the main target of Bolsonarism, not only for his decision in the fake news inquiry, but also because he would issue another provisional order ([ADPF 690](#)), in an action filed by a political party against the continuous limitation on the publicity of COVID-19 data about the number of contaminated people and the death toll. The federal government

had restricted the public pronouncements of the Ministry of Health, postponed the daily publication of the data to 10 p.m. and omitted data in the app that was made available to the population. Justice Alexandre de Moraes stated in his ruling that COVID-19 was an effective and damaging disease, leading to at least 30.000 deaths in Brazil, and ordered the unrestrained publication of data about the pandemic, as prescribed by Article 37 of the 1988 Constitution (the publicity principle).

Unconstitutionality of Military Intervention

At least since [2017](#), far-right politicians—such as Vice-President Hamilton Mourão — have been speaking of military intervention in the other three branches of government, supposedly authorized by Article 142 of the 1988 Constitution.

An important decision from Justice Barroso recently dismissed this thesis. In a lawsuit that aimed at interpreting Article 142 of the 1988 Constitution and its statutory [regulation](#), Justice Barroso [ruled](#) that since 1988, military power was submitted to civilian authority under a constitutional democracy. Despite the political turbulence of the years that followed the 1988 Constitution, the Armed Forces were not convened for any political interference beyond the law. From no interpretive perspective (literal, historical, systematic or teleologic) could Article 142 be read to grant to the Armed Forces a [moderating power](#) to control the other branches —this is the interpretation Bolsonaro’s supporters want to advance. However, the constitutional concept of a moderating power was only present in the 1824 Imperial Constitution as an authoritarian device for the Emperor to take precedence over the three branches. It was abolished by the 1891 Constitution.

Following this ruling, Justice [Luiz Fux](#)— the next Chief Justice of the Federal Supreme Court, from September 2020 on—also issued a provisional order to declare that the Armed Forces cannot be used to interfere in any of the branches of government.

In a day when the federal government was also demoralized by the National Congress, which refused to analyze a presidential provisional measure that aimed at changing the process of indication of public universities chancellors and made the president [revoke it](#), the president and his military aides confronted the Federal Supreme Court again. Right after Justice Luiz Fux’s order, the president, the vice-president and the Minister of Defense published a [note](#) stating that the Armed Forces do not obey ‘absurd decisions’, ‘political judgements’ and the attempt of one branch to capture another. They were probably referring to the impeachment threats and to a procedure in the Electoral Superior Court, which will hear a case about the legitimacy of using fake news in Bolsonaro’s electoral campaign.

Conclusion

Public politics or judicial rulings can be criticized and debated by citizens. But institutions, such as the presidential office, must oppose judicial rulings through the proper and rightful venue—they can appellate against it. The current moves of

president Bolsonaro can be classified as impeachable offenses and national security crimes: to stimulate attacks against other branches and to instigate military forces against the civilian power. Brazil has a long and turbulent history of institutional ruptures. One of the achievements of the 1988 Constitution—for which it shall be praised—was to set the conditions for adequate institutional responses to whatever sort of political crises. Bolsonaro is trying to further a constitutional crisis and to call for the military to solve it. If the military become seduced by Bolsonaro's illegal methods and antiestablishment rhetoric, they will show that this institution lacks respect for the rule of law. It is mandatory that Brazilians resist these attacks on political institutions, and praiseworthy that the Supreme Court has finally begun to resist this threat.

