

# The Brazilian Federal Supreme Court's Reaction to Bolsonaro

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It is a relatively uncontroversial opinion that the Brazilian president Jair Bolsonaro has undermined the rule of law and its constitutional institutions. The naïve voices that suggested that his authoritarian practices could be restrained once he acceded to power were already proven wrong during the first months of his four-year term. Nonetheless, many analysts did not anticipate that he would go as far as he did with his attacks on the National Congress, the Federal Supreme Court, and other political institutions (including some sectors of the armed forces). In the following, we concentrate on the Brazilian apex courts to show how a mix of resilience in day-to-day work and a few confrontational positions played an important role in safeguarding the autonomy and independence of the judicial branch in Brazil during Jair Bolsonaro's term.

## Bolsonarism's Relationship with Courts

To understand the relationship between Bolsonaro's presidency and courts in Brazil, one must bear in mind that the Brazilian president has had some difficulties playing his institutional role as the highest official in the Brazilian constitutional order. These difficulties stem from two factors: the absence of a majority in the National Congress and the president's political inability. Firstly, Bolsonaro was elected by a political party (the Social Liberal Party, *Partido Social Liberal*) that, despite having the largest representation in the Chamber of Deputies, was not able to build a coalition strong enough to reach a constitutional amendment majority that could reform the judicial branch. Although some of its most radical representatives have proposed a [constitutional amendment](#) to change the retirement age of judges and give Bolsonaro further nominations to the Federal Supreme Court, the absence of legislative support – and the fact that Bolsonaro left the political party due to internal disputes – made it impossible to approve any ambitious changes in the structure of the judicial system. Secondly, although Bolsonaro has been able to gain support from the legislature in his economic agenda and attract enough parliamentary support to avoid an impeachment process, he was unable to satisfy the presidential burden of forming large political blocs, which is a condition for the success of any government in the Brazilian system of [coalitional presidentialism](#). As demonstrated in the literature, this political system demands a compromise with the opposition in specific cases and an ability to lead the legislature. Although Bolsonaro hoped to gain that kind of support to increase his influence on the judicial system, he has not been able to achieve it.

If we consider the distinction made by [Dixon and Landau](#) between “packing” and “curbing” courts, we can say that instead of packing the Federal Supreme Court and other Brazilian courts, Bolsonaro's main strategy was to constantly curb the judicial

branch. While he succeeded in nominating two Justices for the Federal Supreme Court (Justice Nunes Marques and Justice André Mendonça) and several judges for a new federal circuit court (most of them, however, coming from the very same judicial branch), Bolsonaro stuck to his extreme right rhetoric and constant attacks on the judicial branch.

## **Business-as-Usual: The Federal Supreme Court Caselaw**

As [Yaniv Roznai](#) pointed out, one of the responses to institutional bullying from proto-autocrats is to act as if the courts are doing business-as-usual: supreme and constitutional courts must take their backlogs on as if no attacks are taking place. This approach dominated the Federal Supreme Court's construction of its [caselaw](#) during the first days of Bolsonaro's government. The court's decision on how to interpret the Brazilian Racism Act, which held that the concept of racism also comprises acts of [homophobia](#), constitutes an interesting example of this approach. The court's ruling fiercely opposed the conservative agenda prompted by Bolsonaro and his supporters. By the same token, the Federal Supreme Court, in contrast to the conservative agenda promoted by Bolsonarism, halted a state act that aimed to restrict academic freedom and impose censorship upon teachers and professors controlling the subjects discussed in classes to supposedly avoid political [indoctrination](#).

The Federal Supreme Court also limited the way by which the federal government aimed at restricting the participation of civil society members in federal [councils of public policies](#). The protection of indigenous rights, severely attacked during Bolsonaro's term, was guaranteed through the annulment of an executive order which attempted to transfer the competence to demarcate [indigenous lands](#) from the Ministry of Justice to the Ministry of Agriculture, which is historically known for prioritizing the interests of the agrobusiness.

In the same vein, rulings from Justice Barroso and Justice Luiz Fux (the current Chief Justice) rejected the interpretation of Article 142 of the 1988 Constitution advocated by the most committed supporters of the Federal Government, who claimed that this provision would authorize the armed forces, under the command of the president, to interfere with other branches of government to perform a '[military intervention](#)'. These judicial orders were an important response to the president's continuous attacks on the Federal Supreme Court and its Justices. The presidential speeches in favor of a military intervention culminated in a failed attempt to gather support for a coup on 7 September 2021, in which the president declared that he would no longer abide by the Federal Supreme Court Justice Alexandre de Moraes' orders. With the enthusiastic support of the president, a mob rallied in front of the Federal Supreme Court and threatened to break into the premises of Brazil's highest court. The failure of this attempt made Bolsonaro back down on his aim of breaching the constitutional order and forced him to cultivate support from political parties that are dominated by pork barrel politics in order to avoid consequences like an impeachment process.

The bulk of the business-as-usual rulings, however, were made by the Federal Supreme Court in the context of the [COVID-19 pandemic](#). In a landmark decision on the competences of federal entities (the federal government, the states, and the municipal governments) to respond to the pandemic, the court defended the shared powers of federal, state, and municipal levels to define the appropriate policies in fighting the pandemic and protecting the constitutional right to health. It decided that both federal, state and local authorities can limit the free circulation of persons in order to contain the spread of the pandemic. It ordered the federal government, in addition, to provide adequate information on the pandemic based on the constitutional right to information, and halted state propaganda based on false information that could expose people to the virus. In a structural remedy, the court also ordered federal authorities to provide a plan for the protection of indigenous communities during the COVID-19 pandemic, suspended police operations during the pandemic in Rio de Janeiro's poor communities and restricted them only to exceptional cases. Moreover, the court also decided that although people cannot be forcefully vaccinated, public officials – including state and municipal authorities – can make vaccines obligatory in the sense that the state can restrict certain activities (such as entering public spaces or travelling) for unvaccinated people. Finally, in one of the most important decisions to contradict Bolsonaro's COVID-19 denialism, the court decided that, as soon as constitutional requirements are accomplished, the Federal Senate speaker cannot deny the creation of an [investigative committee](#) to assess the failure of the federal government to respond to the pandemic.

In the end, the Federal Supreme Court contributed to enforcing constitutional obligations that the federal government was simply ignoring. Contrary to a more deferential, and even omissive position that dominated the years 2014-2018, the court engaged in a more pro-active role that was fundamental to hold Bolsonaro's government accountable to the law. Nonetheless, in some cases, the Brazilian Federal Supreme Court, as also the Superior Electoral Court, opted for a more aggressive and contentious position.

## **Showing their Teeth: The Federal Supreme Court and Superior Electoral Court's Reactions**

The most confrontational decision of the Federal Supreme Court concerns an investigative procedure (the fake news inquiry) that was opened by the court in 2019 based on its internal rulings. The inquiry divided the opinion of lawyers in Brazil since it was opened without previous request from the prosecutor's office or a police authority. In effect, the court both makes an investigation (lead by Justice Alexandre de Moraes) and determines procedural measures based on it. Questioned about the constitutionality of the exceptional procedure, the Federal Supreme Court justified the investigation by pointing to the victims: the court and its Justices are the main target of the attacks that aim at the institution. Most of them took place on the internet and involve threats of crimes against the Justices and their relatives. Bolsonaro's supporters were dragged into the case for the continuous harassment against the institution; in August 2021, President Jair Bolsonaro himself was [included](#) in the investigations. From the legal perspective, the procedure has clay feet; in

terms of constitutional politics, however, the enquiry gained force because it was a response to the fact that the authority that should investigate these cases – the Prosecutor-General of the Republic – had been already captured by Bolsonaro. In effect, the Prosecutor-General of the Republic has constantly refused to take any measures that could displease the president and his supporters. Although he started another investigation on anti-democratic acts, the fake news inquiry seems to be more promising since it is beyond his control. But, as we mentioned, it is not part of the business-as-usual workload of the court.

The procedure to investigate anti-democratic acts resulted in one of the acutest crises between the president and the Federal Supreme Court. In February 2021, a federal representative and former policeman supportive of the president threatened the court and its Justices in a YouTube video, declaring that they should be beaten and that he would persecute them. He was [arrested](#) for almost seven months and finally convicted, on April 2022, for eight years in prison for crimes of coercion in legal procedures and attempt to restrict or prevent the functioning of the constituent powers – a crime that was provisioned by the revoked [National Security Act](#) and now by the provisions on the [protection of the constitutional democratic state](#). The Federal Supreme Court ruled that freedom of expression and parliamentary immunity could not protect illegal acts against the constitutional order.

President Bolsonaro promptly reacted with a presidential prerogative rarely used since the 1988 Constitution, an individual pardon, in this case justified in the name of freedom of expression. Although collective pardons are common in Brazil and were recently the subject of a Federal Supreme Court [ruling](#) that restricted the power of the president to concede them, the [presidential decree](#) was a clear backlash of the president against the court and a form of warning on what is to come in this year's elections. [Lawsuits](#) were filed in the Federal Supreme Court aiming at nullifying the decree, and Justice Barroso publicly declared in an off-the-bench pronouncement that the armed forces were being manipulated to raise doubts on the legitimacy of the Brazilian electoral process – a declaration to which the Minister of Defense responded harshly. Political parties supportive of the president further contributed to increase the crisis by appointing the condemned federal representative to important positions in the Chamber of Deputies, including a seat in the Commission of Constitutional Issues and Legality (“Comissão de Constituição e Justiça”), the most important Commission in the National Congress. The temperature only decreased when members of the court silenced and postponed the discussion of the presidential pardon, as well as its effects on subjects such as the representative's political rights suspension and removal from public office.

In the same confrontational fashion, the Electoral Superior Court was also to called to resist the president's authoritarian rhetoric. Emulating Donald Trump, Jair Bolsonaro promoted a raid against the Brazilian electoral electronic system, the Superior Electoral Court (the organ that supervises Brazilian elections), and the 2020-2022 Chief Justice of this tribunal (and also member of the Federal Supreme Court), Justice Roberto Barroso. In response, the Superior Electoral Court launched an inquiry against him for disturbing the [normality and legitimacy of the elections](#), this

time with a strong legal basis that can even result in Jair Bolsonaro's ineligibility, if finally convicted.

In addition, the same court ruled on an investigation into the abuse of economic power in the presidential elections of 2018: Bolsonaro was accused of having used WhatsApp illegally for electoral purposes. The investigations showed that companies and the president's supporters worked in three turns a day for sharing more than 75.000 daily messages, flooding electors with misinformation and false accusations against other parties. The Superior Electoral Court argued that electronic communication used to spread fake news concerning other candidates can result in an illicit abuse of economic power, something that undermines the fairness of the elections and is prohibited by constitutional and legal norms. Nonetheless, despite building a very strong thesis for future elections, the court refused to nullify the 2018 results based on the fact that it lacked the devices to measure the amount of the harm on the electoral process. In a sense, the Superior Electoral Court was maxi-minimalist, producing strong warning argumentation for the future and a limited holding, to use [Yvonne Tew's](#) classification.

## **Conclusion: A Predominantly Confrontational and Business-as-usual Response with some Occasional Conciliatory Reactions**

Although Brazilian courts have shown some reaction to Bolsonaro's most authoritarian objectives, there are limits to the efficacy of judicial review. Brazil still has a very conservative judiciary (with several judges publicly supporting Bolsonaro) and this branch can even be held partially [responsible](#) for his ascent to power. Some of the judicial rulings that contradict Bolsonaro's interests have been overturned by the same courts that denounce them when political pressure increases.

For instance, the already mentioned pork barrel politics empowered the Speaker of the Chamber of Deputies to adopt several legislative amendments on the federal budget to allow extraordinary expenses without any transparency. These amendments favored the constituencies of representatives who support the coalition created between Bolsonaro and the House Speaker, creating severe inequality in the allocation of federal resources among the states and empowering Bolsonaro's allies. While the Federal Supreme Court acknowledged the illegality of those practices and issued rulings to resist it, fierce political pressure from the National Congress made the court reconsider its ruling, limiting its efficacy in a move that favored Bolsonaro.

Moreover, from time to time, Justices of the Federal Supreme Court endeavor to achieve a reconciliation with the Executive and arrange political meetings to lower the political tension among the three branches. These meetings are hardly compatible with the institutional principles that define the content of the value of judicial independence. The term of office of a Chief Justice in the Federal Supreme Court is two years, and since Dilma Rousseff's impeachment in 2016, different Chief Justices participated in these meetings with the President and the Speakers of the two Houses in the Legislative Branch, with harmful results to the credibility and the

authority of the court. Those attempts to compromise are generally perceived as a violation of the role obligations of the courts and do not have any positive outcome with a self-declared authoritarian president. The clearest example of this failure is the already mentioned case of the criminal conviction of the federal representative who openly attacked the court and received a presidential pardon shortly after the Federal Supreme Court's ruling. Our analysis reveals, therefore, that the Federal Supreme Court was more successful on the occasions that it focused on doing business-as-usual and, when it is necessary, adopted a more confrontational attitude. This attitude seems to be more promising for the court and for the Brazilian constitutional democracy than the attempt to compromise.

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