

Brazilian's Supreme Court in a Democratic Coup d'état

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Abstract

Research Question (RQ): Would such attacks on the democratic game be sufficient grounds for restrictive decisions made by the court? If so, or if not, what are the resulting effects on the democratic game itself?

Purpose: Understanding the movements of the Brazilian constitutional court during the 2022 presidential elections.

Method: The measures adopted by the STF are characteristics of what Issacharoff (2015) read as a “fragile democracy”, in which the discourse during the electoral process needs to be linked to democratic achievement, where everything that contrasts with it is out of the possibility of the exercise of the right, on the grounds of guaranteeing the freedom to vote. Challenging the conventional view, Varol (2017) understands that there are measures usually used in authoritarian regimes that, sometimes, promote and help to develop the democratic game more and better than those typically used by the democratic system itself. The research proposes a dialogue between the authors.

Results: The research is able to demonstrate that, despite having taken authoritarian decisions, the court managed to contribute to guaranteeing the normality of the elections.

Organization: Debating the limits of the court's action, as well as the legitimacy of its decision-making is a key element of the very possibility of the existence of a constitutional state, it impacts the work of judges, lawyers, and prosecutors, and allows for better social scrutiny.

Society: Bolsonarism raised its tone against the court and reinforced questions about the legitimacy of the institutions and the voting process. The issue, however, is that Bolsonaro's campaign was largely based on fighting a democratically established system, in the same tone in which he attacked the human rights of minority groups. Understanding these complex dynamics of power in the social context, the impact on future elections, or even the quality of the democracy game is an essential part of the contribution of this work.

Originality: It is correct to say that Bolsonaro was not able to conceive his re-election bid as he would have liked, much of it due to the decision-making expansionism of the STF. The method employed does not necessarily see such a situation, even if it is atypical, as negative, as long as it enhances democracy.

Limitations / further research: This research is limited by its specific temporal scope, unable to accurately predict the behavior of the Brazilian Supreme Court beyond the 2022 electoral period. Furthermore, the theoretical framework is also insufficient to anticipate or fully represent the nuances of the Brazilian democratic system. A research suggestion would be the continuous monitoring of the Supreme Court and its decisions regarding fundamental rights, particularly considering the political landscape beyond the studied period, to determine whether it was an idiosyncrasy specific to that moment or something that has become entrenched in the court's ideology.

Keywords: brazilian's supreme court, democratic coup d'état, elections, bolsonaro.

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1 INTRODUCTION

During the 2022 electoral period in Brazil, the stance taken by the Federal Supreme Court (STF) was the subject of intense criticism from supporters of President Bolsonaro who have now been defeated in the polls. The court was able to exercise significant control over the possibilities of political-electoral discourse through a series of decisions that restricted the scope of protection for freedom of expression. Before this, the court tended towards a more expansive and comprehensive interpretation of freedoms, however, this changed when the current president began attacking the polls and raising doubts about the reliability of the electoral process, which prompted the STF to investigate him for “undemocratic acts”. In response, Bolsonarism increased its opposition to the court and reinforced questions about the legitimacy of the institutions and the voting process, sometimes calling for the military's intervention.

The measures taken by the Brazilian Constitutional Court are indicative of what Issacharoff (2015) referred to as a “fragile democracy” in which discourse during the electoral process must be aligned with democratic values and anything that contrasts with these values is excluded from the realm of exercising rights in the interest of preserving the freedom to vote. However, it is worth noting that Bolsonaro's campaign was largely focused on fighting against the established democratic system, including the functioning of institutions and the culture of corruption, as well as attacking the human rights of minority groups. Based on populist narratives, it is correct to say that his re-election bid did not unfold as he had hoped, in part due to the expansive decision-making of the Supreme Court.

Challenging conventional views, Varol (2017) argued that there are measures typically used in authoritarian regimes that, under certain circumstances, can promote and enhance the democratic process more effectively than measures typically used by democratic systems themselves. The research aims to facilitate a dialogue between these authors while considering the actions of the Brazilian constitutional court and demonstrates that, despite having taken authoritarian decisions, the court was able to contribute to ensuring the normalcy of the elections.

The research presents the positions of former President Bolsonaro throughout his extensive political career, including controversial events and statements opposing human rights. When he became the president of the republic, he directed his attention to the Federal Supreme Court (STF) and its justices, as well as the entire electoral system, to the point where he was ultimately prevented from continuing his re-election campaign due to decisions made by the Supreme Court. The work then addresses relevant aspects of the democratic process arising from the interaction between the court and Bolsonaro and his supporters and concludes with considerations regarding the possibilities of a supreme court's actions in cases like Brazil's.

2 THEORETICAL FRAMEWORK

The phenomenon of Bolsonarism cannot be fully comprehended through isolated analysis, as it is intertwined with the political history of Latin America and its long-standing relationship with authoritarian regimes, as well as the growing trend of flirtation with such regimes globally. Bolsonaro holds a Bachelor's Degree in Physical Education from the Brazilian Army and a Master's Degree from the Rio de Janeiro's Parachute Brigade. He held the rank of Captain in the 8th Campaign Artillery Group during his tenure in the military. However, he was apprehended for contravening army disciplinary regulations. Specifically, he published an article titled "The Salary is Down", in which he censured his remuneration and intimated that it could have been a contributing factor to certain dismissals, as opposed to the supposed wrongdoing by the army leadership. Consequently, he was sentenced to a term of 15 days in jail (InfoMoney, 2022). Another significant infraction was Bolsonaro's and his associates' plan to bomb units at *Vila Militar*, the Military Academy of the Black Needles, and other locations if their salary adjustment was less than 60%. Despite substantial evidence linking him to the plan and the conclusion of an army investigation that led to his exclusion from the military, Bolsonaro was acquitted by the Superior Military Court (STM) in 1988 due to procedural deficiencies (FGV, 2019).

His political career began in 1988 when he became a reserve officer with the rank of Captain and was elected to the Rio de Janeiro Municipal Chamber as a member of the Christian Democratic Party (PDC). He concluded his term when he was elected as a federal deputy in 1990. In 1993, he established the Progressive Reformist Party (PPR), which later merged with the Progressive Party (PP) to become the Brazilian Progressive Party (PPB). During the same year, he caused bewilderment in the National Congress by advocating for a state of emergency and the closure of the National Congress, and he repeated this position the following year when he was reelected (FGV, 2019).

In 1998, he ran for the position of President of the House of Representatives Human Rights Commission, a decision that sparked controversy due to his views, which were not in line with the commission's objectives, including support for the death penalty, life imprisonment, birth control as a solution to poverty and violence, revision of indigenous lands, etc. In August 1999, after being reelected, Bolsonaro was accused of nepotism for employing his then-girlfriend, father-in-law, and cousin in his office. He defended himself by claiming that he was not married to her. In December of the same year, he even advocated for the shooting of then-President Fernando Henrique Cardoso (FGV, 2019). In 2000, he supported the death penalty for premeditated crimes and the use of torture in drug trafficking and kidnapping cases.

In 2005, the *mensalão* scandal brought some notoriety to Bolsonaro as he criticized the Workers' Party (PT) and the politicians involved in the corruption scheme. Initially, Bolsonaro was a declared supporter of former President Lula and a backer of his

administration during his first term. However, he soon began to have political disagreements with Lula, and this tension only escalated over time.

Although Bolsonaro was the 11th most voted federal deputy in Rio de Janeiro during his fifth re-election, he only received 9 votes in a bid to become the president of the Chamber of Deputies. In 2011, he referred to an educational material produced by the Ministry of Education to combat homophobia as a “gay kit”. The same year, while Senator Marta Suplicy was being interviewed about a bill aimed at making homophobia a crime, Bolsonaro positioned himself at the back with a flyer that accused the government of promoting homosexuality in schools. When approached by another parliamentarian, he accused her of being “heterophobic”. In 2014, he claimed that Brazilians do not like homosexuals and that they were a result of drug use, or were born with a “factory defect” (FGV, 2019).

During his seven-term tenure as a deputy, Bolsonaro: voted in support of the impeachment of former Presidents Fernando Collor and Dilma Rousseff; voted in favor of ending the state monopoly in the distribution of piped gas, telecommunications, and oil exploration sectors; opposed the opening of cabotage navigation to foreign vessels, the Provisional Contribution on Financial Movement (CPMF), and the provisions of the 1999 pension reform; was the sole deputy to vote against the creation of the Anti-Poverty Fund, which is funded by the CPMF; and opposed the disarmament campaign that was put to a popular vote (FGV, 2019).

The absence of civility and a lack of proper etiquette were defining characteristics of his political career. In 2000, he insulted the then-appointed Defense Minister, Geraldo Quintão, calling him “incompetent”, “disreputable” and “immoral”. In 2006, he referred to Defense Minister Tarso Genro as a “terrorist” and a “liar”. In 2011, he made a derogatory remark about Deputy Jean Willys' sexual orientation, saying he “would not be proud to have a son like him” (FGV, 2019). In 2014, during a discussion on the age of criminal responsibility, after being referred to as a rapist by Deputy Maria do Rosário, he retorted by saying “I would never rape you ‘cause you’re not worth it” (Alter, 2014).

Despite serving 27 years as a member of the Chamber of Deputies, Bolsonaro only succeeded in passing two out of the 171 bill proposals he presented.

In 2018, Jair Messias Bolsonaro sought to run for the presidency of the republic and joined the Social Liberal Party (PSL). During his political campaign, Bolsonaro advocated for the right to bear arms, the legalization of gold mining, the privatization of state-owned companies, the adoption of a capitalization system for social security, the elimination of “fine industry”, referring to regulatory bodies, and the opposition to gender ideology. During a campaign event in Juiz de Fora, Minas Gerais, Bolsonaro suffered a serious stabbing incident in the lower abdomen that required hospitalization and several surgical procedures, which temporarily disrupted his campaign. In the end, Bolsonaro was elected president with 55% of valid votes in the second round. (FGV, 2019).

Upon assuming office, the president encountered challenges in maintaining stability within his administration. Several of his ministers, including the former federal judge and Minister of Justice, Sérgio Moro, resigned from their positions. Moro was a prominent figure in the president's political campaign, particularly regarding his efforts to combat corruption, but his resignation was due to allegations of the president's interference in the Federal Police and ongoing investigations (FGV, 2019).

The origin of the Jair Bolsonaro phenomenon can be traced to the political representation crisis that Brazil is currently facing. The recent history of the country can be summarized as follows: After a period of economic growth and reduction of poverty during the first two terms of President Lula, disappointment set in quickly due to the subsequent scandals, which led many Brazilians to lose faith in the government and the Workers' Party (PT). This resulted in a polarized political landscape, marked by anti-corruption demonstrations in 2013 and Operation Car Wash in 2014. This tension was further heightened by the rise of Bolsonaroism, with many people supporting him even if they did not agree with his other policies, due to his stance against corruption and the anti-Workers' Party sentiment.

The demonization of the Workers' Party, which functioned as a unifying element for the masses in the last election, led to the feeling that what the Workers' Party produced in government was bad, or more precisely, that the movements directed towards democratization were misguided or even attacks on the Brazilian family (Casara, 2020, pp. 98-99).

In this scenario, there was a sense of disbelief in the Brazilian Supreme Court, when the nullification of the Car Wash proceedings resulted in the release of former President Lula, leading many Brazilians to feel a sense of impunity and a disconnect with the concept of representation. The anti-corruption discourse served as a rallying point, reinforcing the narrative against the institutions of Brazilian democracy and targeting the Supreme Court. The central aspect of the anti-democratic discourse is its emotional appeal, attracting those who have lost faith in the political system, empowering irrationality, and fueling numerous radical demonstrations:

As the perception of corruption increases in the state due to the colonization of representative democracy by the economy, so does the popular appeal for measures to eliminate corruption. The commodity of 'anti-corruption' has captive consumers, a public that has been conditioned to applaud any act that claims to be 'against corruption,' even if it is ineffective or draconian (Casara, 2020, p. 55).

It is through the perception of the military as heroic, a symbol of breaking away from the establishment, that the image of "myth" emerges and becomes a hallmark of the subversion of the state embodied by Jair Messias Bolsonaro. In a ripple effect, upon realizing that he had support, he radicalized and broadened his discourse:

Bolsonaro's campaign was based on a fantasy, where he would be the character responsible for realizing the childish desires of his voters. Fantasy, by definition, is a substitute for reality. Bolsonaro was the old presented as new, the insubordinate military who was sold to the

electorate as a defender of order, etc. Produced as a commodity, candidate Bolsonaro was presented, especially to the younger ones, as pure positivity (Casara, 2020, p. 204).

The image of myth was reinforced in events organized (or at least attempts at events) by the former president. In the early days of his administration in 2019, plans were made to celebrate the 55th anniversary of the establishment of the Military Dictatorship (1964-1985), however, these plans were prevented by the judiciary. In 2021, a parade was held featuring 150 vehicles from the Brazilian Navy in an attempt to bolster the former president's image through military symbols. The effort to politicize the armed forces was a distinct endeavor during the Bolsonaro government, but not always successful. For example, in March 2021, the commanding officers of the Army, Navy, and Air Force were jointly dismissed following the departure of the defense minister due to dissatisfaction with the political shift of the forces and suggestions of a possible alliance with the government in support of military intervention.

Based on a highly conservative agenda, former President Jair Messias Bolsonaro consistently engaged his voters by promoting the protection of traditional Brazilian families, speaking out against homosexuality and abortion, emphasizing religion, and advocating for the establishment of a military regime as the new political order in Brazil. By incorporating religious themes into his political discourse, he particularly appealed to the Evangelical electorate, using the slogan in his presidential campaign, "Brazil Above All, God Above Everyone". Bolsonaro's often-provocative speeches created a platform for events such as motorcycle rides and photographs making gun symbols, including with children present.

The construction of Bolsonaro's political image was marked by the idea of a myth, which occupied a prominent place in the perception of part of his electorate. Some of his supporters viewed him as an extraordinary character with heroic touches, embodying exceptional powers (Casara, 2020, p. 204). The Bolsonaroist slogan "God, Fatherland, and Family", although appearing to be merely conservative, was actually created and widely used by the Brazilian fascist movement *Ação Integralista Brasileira* (AIB), founded and led by Plínio Salgado in 1932, inspired by Mussolini's Italian fascism :

On October 7, 1932, the Brazilian Integralist Action (AIB) launched a manifesto in which it advocated for the Christian character of Brazilian society as the guiding political principle of the nation. The manifesto begins with (...): "God directs the destiny of peoples". Throughout the text, the supernatural Christian force is repeatedly praised as the doctrine to be followed to achieve an ideal model of family, society, and a supposed indivisibility of classes, and thus economic and social functioning. As put by the AIB, this "deeply Brazilian thought" comes from "the Christian roots of our History": this is the meaning of the integralist program for a univocal model of fatherland, which came to be synthesized in the slogan "God, Fatherland and Family" (Almeida, 2022).

In his writing, Almeida (2022) delves into the underlying meaning of the slogan "God, Fatherland, and Family". He argues that the usage of the Christian Orthodox religion and its values as a way to determine social order and values is evident, creating an imbalanced

relationship between the speaker, the representative, and the listener, where the former is seen as connected to the divine and should not be questioned, fostering a vertical and authoritative discourse. The inclusion of “God” in the Bolsonarist slogan aligns Bolsonaro with the image of a myth, of the savior of traditional Brazilian family values and the hero of the homeland who will protect the nation from “Communist” threats.

However, Bolsonaro’s image is not solely based on the fascist slogan. The members of AIB were known for their green shirts, and Bolsonarist supporters have adopted the colors green and yellow as a uniform for the movement, by using the famous shirt worn by the Brazilian football team and fans. This appropriation of the patriotic feeling that connects the Brazilian people to their passion for sports further strengthens Bolsonaro’s image.

In 2018, when Bolsonaro was elected, it was already possible to anticipate what was to come. Even before significant popular discontent with the direction of Brazilian politics, the then-deputy had already expressed anti-democratic beliefs without hesitation. For example, in a 1999 interview with *Rede Bandeirantes*, when asked if he would close the National Congress, he replied, “There is no doubt. I would stage a coup on the same day. It doesn't work! And I'm sure that at least 90% of the population would celebrate and clap. The Congress today is good for nothing, buddy. It only votes for what the president wants. If he is the person who decides, who commands, who tramples on Congress, then give the coup and move on to dictatorship”. At the time, this response did not cause much concern, as the idea of a coup seemed far-fetched, and few people knew who the deputy was, much less the anti-democratic views he had proclaimed (Oyama, 2020, p. 64).

Bolsonaro’s notoriety gradually increased, largely due to his actions lacking parliamentary decorum, which, amidst one controversy after another, began to draw attention. One of the many atrocities he committed was invoking the name of Carlos Brilhante Ustra, who was notorious for torturing prisoners during the military dictatorship when voting in favor of the impeachment of Dilma Rousseff, who had also been arrested and tortured during that regime: “For the memory of Colonel Carlos Brilhante Ustra, the fear of Dilma Rousseff” (Souza, 2022, p. 93).

It can be argued that the pinnacle of Bolsonaro's political trajectory occurred during his 2018 election campaign, during which his popularity grew exponentially. There are two crucial elements to understanding the phenomenon known as “bolsonarism”: the first, is the dissatisfaction of many Brazilians with the exposure of various corruption schemes through Operation Car Wash; the second is the growth of conservative, often radical rhetoric that pointed to a new military dictatorship as the solution to a variety of problems plaguing Brazil.

Even after being elected, the then-president did not waste time criticizing the electoral system, which he repeatedly claimed was susceptible to fraud, despite never presenting any evidence to support his allegations.

In 2019, commenting on the situation in Bolivia, President Bolsonaro tweeted: “The allegations of election fraud that led to the resignation of President Evo Morales serve as a reminder of the importance of ensuring democracy and transparency through auditable vote counts. PRINTED VOTE is the key to a clear and fair election process in Brazil!” (Folha de São Paulo, 2023). During a live broadcast on his Instagram, he stated: “Many people believed that I was going to win the election by a landslide, but in the end, the results were 55% for me and 45% for the other candidate. What if the outcome had been different? How would we have been able to audit those votes? This is why we need to adopt a secure voting system in Brazil to prevent manipulation and fraud” (Folha de São Paulo, 2023).

In 2020, President Bolsonaro claimed to have evidence of election fraud: “I have in my possession evidence that I was elected in the first round, but I believe that there was fraud involved. I will soon be presenting this evidence to show why we need to adopt a secure voting system in Brazil to prevent manipulation and fraud”. (Folha de São Paulo, 2023). However, no evidence was ever provided to support these claims, and in November 2022, the Brazilian Armed Forces released a report on the electronic voting machine process to the Superior Electoral Court (TSE), which found no irregularities, only excuses such as lack of data and technical clarification, and the complexity of the voting system.

In 2021, the tone escalated, and subtle threats, offenses, and attacks against representatives of the Federal Supreme Court (STF) and some other democratic institutions began. When commenting on the invasion of the U.S. Capitol, Bolsonaro stated: “If we don't have the printed vote by '22...a way to audit the vote, we will have a worse problem than the United States” (Folha de São Paulo, 2023). And: “Only in fraud the nine fingers return. Now, if Congress promulgates, we will have printed voting. It won't be a pen stroke from a citizen like this one, who won't have printed voting. You can forget that” (Folha de São Paulo 2023). In an interview with a radio station, also in the same year, he claimed: “They will find problems for next year. If this method continues here, without even public counting, they will have problems. Because one side may not accept the result. This one side is our side, may not accept the result” (Folha de São Paulo, 2023).

In the same year, in front of the Alvorada Palace, Bolsonaro said: “The fraud is at the TSE, without a doubt (...). I am not afraid of elections, I hand over the band to whoever wins, in the auditable and trustworthy vote. In this way, we run the risk of not having elections next year” (Folha de São Paulo, 2023). During a live stream on his social media, in which he had promised to present evidence of his allegations, the President dodged and claimed: “It is not possible to prove that the elections were not or were fraudulent. They are indications. Crime is revealed with many indications” (Folha de São Paulo, 2023). At a later point, Bolsonaro, also in a live stream, backed down and stated: “The election system is unauditable. It is not possible to compare if there was or was not fraud in the elections” (Angelo & Fagundes, 2021). In 2022, the election year, Bolsonaro, in an interview with *SBT*, stated that: “From my travels around the country, especially in the last two months, if we do not win in the first round, something abnormal happened inside the TSE (Superior Electoral Court)” (Correio

Braziliense, 2022). Similarly, on January 10th, 2023, two days after the Bolsonaro protesters invaded the headquarters of the Three Powers, causing the destruction of public property in the Executive, Judiciary, and Legislative branches, Bolsonaro posted a video on his Twitter account that claimed election fraud with the caption: “Lula was not elected by the people, he was chosen and elected by the STF and TSE” (Vasconcelos, 2023). Later, the video was deleted. On March 31st, 2022, during a ceremony at the *Planalto Palace*, Bolsonaro made the statement: “What would Brazil be without the contributions of the military government? It would be nothing! We would be a small republic...” (Valadares & Schuch, 2022).

The attacks were not limited to the Brazilian electoral system, as the Supreme Federal Court was also subjected to hate and misinformation. The relationship between then-President Bolsonaro and the court became strained as a result of Bolsonaro’s attacks on the election process and the developments in the Fake News Investigation. This is an inquiry that was initiated by the Supreme Federal Tribunal, commonly referred to as the “Inquiry of the End of the World”. The primary objective of this investigation was to scrutinize the propagation of misinformation regarding Supreme Court justices and their families, as well as the disclosure of their personal information and threats against them. Additionally, the inquiry sought to uncover the existence of the so-called Hate Bureau, a scheme within the National Congress that was created to fund and disseminate fake news. As a consequence of the inquiry, two federal deputies, Daniel Silveira, and Roberto Jefferson were apprehended. The latter, in response to his preventive arrest, fired shots from an assault rifle when confronted by the federal police.

The investigation involved the breaking of confidentiality and the search and seizure of several Bolsonaro-aligned lawmakers suspected of being involved in a massive fake news dissemination scheme. In June 2020, during a conversation with his supporters, Bolsonaro stated, “I won't be the first to go. They are overstepping their bounds, and that is clear. The breaking of parliamentary confidentiality that happened yesterday and today has no parallel in democratic history, no matter how fragile it may be. The time has come for everything to be put in its proper place”. (UOL, 2020)

In response to the Justice of the STF Luís Roberto Barroso, who criticized him for his controversial speeches, the former president replied: “The response is from an individual lacking intelligence. I regret making such a statement about the authority of the Supreme Federal Court. Only a foolish person would do so. Our future and livelihood are at stake and a person cannot seek to determine the future of Brazil through fraud”, and later in the following month, he stated: “That individual (...) is targeting me. That individual is Barroso”. (Peixoto, 2021). The climax of the personal attacks on justice occurred in August 2021, when Bolsonaro linked him to pedophilia: “I did not insult any minister, I simply spoke about Mr. Barroso’s record. Advocating for abortion, drug legalization, and reducing the age for sexual abuse of vulnerable persons. He wants our daughters and granddaughters of 12 years to engage in sexual relationships without any issue” (Carta Capital, 2021).

Amid the numerous attacks, the most insulting ones were directed at Justice Alexandre de Moraes. In September 2021, Bolsonaro proclaimed: “This President will no longer comply with any decision made by Mr. Alexandre de Moraes” (Ferraz, 2021). He later added: “There's still time for him to submit his inquiries, or better yet, his time is up. Get out, Alexandre de Moraes. Stop being a rogue” (Mendonça & Peixoto, 2021). The following year, Bolsonaro publicly challenged the justice, stating: “A few weeks ago, Alexandre de Moraes said that anyone who distrusts the election process would be impeached and arrested. Oh, Alexandre, I am suspicious. Will you arrest me? Will you revoke my registration? What kind of democracy is this? We can distrust everything, and when we distrust, we are perfect” (Ferraz, 2021). Later that same month, the former president made another statement: “And then Alexandre de Moraes comes with these low-downs, breaking the confidentiality of my order aide. It was my confidentiality that was broken, Alexandre. That's not a man's role, it's a child's (...) Stop being a rogue, Alexandre de Moraes, a rogue (...) cheeky (...) Be a man once in your life” (Porcella, 2022).

The Federal Supreme Court did not remain passive in the face of Bolsonaro's attacks on various democratic institutions in Brazil, particularly his attacks on the court itself, which called into question its legitimacy and competence, and the moral integrity of its justices. The actions taken by the STF during Bolsonaro's presidency, particularly during the election period, have been the subject of intense controversy, criticism, and debate.

One of the initial decisions that caused friction between the former president and the Supreme Court was in 2020 when the appointment of Alexandre Ramagem as the director-general of the Federal Police was suspended, pending a decision based on non-compliance with the constitutional principles of impartiality, morality, and public interest (MS 37097). This decision was in response to accusations by the former Minister of Justice, Sérgio Moro, of Bolsonaro's interference with the police, which was being investigated by the Supreme Court.

During the COVID-19 pandemic, the tensions were further escalated by the measures taken by the former president, such as vetoing the publication of patient data, suspending provisions of a Provisional Measure that did not consider COVID-19 infection in the workplace as an occupational disease, recognizing the autonomy of states and municipalities to maintain isolation and determining concurrent competence for federal entities to adopt COVID-19 combat measures (ADI 6341), as Bolsonaro only supported vertical isolation, prohibiting the “Brazil Cannot Stop” campaign that advocated against isolation (ADPF 668), and opening an investigation against the then-president for associating the COVID-19 vaccination with the risk of developing AIDS.

The Supreme Court also suspended parts of decrees aimed at expanding the carrying of weapons, one of Bolsonaro's most strongly held positions, declared a Provisional Measure that made changes to the Access to Information Law unconstitutional (ADI 6351), and suspended the expulsion of employees from the Venezuelan Embassy (HC 184.828).

Among various legal disputes, it can be stated that the ring of the greatest confrontation between the justices of the Brazilian Supreme Court and the former president was the aforementioned Fake News Inquiry, which placed its reporter at the center and symbol of the conflicts, Justice Alexandre de Moraes. One of the most controversial aspects of this inquiry lies in the fact that its initiation was carried out *ex officio* by the Brazilian constitutional court, based on its internal regulations that allow such a situation when investigating crimes against the court itself. With the inclusion of the former president in the inquiry, he was investigated for the following crimes:

- libel;
- slander;
- injury;
- incitement to crime;
- advocacy of crime;
- criminal association;
- malicious prosecution; attempting to change, with the use of violence or serious threat, the order, the prevailing regime or the rule of law;
- publicly advocating violent or illegal processes to change the political or social order, etc.

In addition to launching new attacks on the STF and its justices, Bolsonaro appealed the decision and filed an Action Against a Violation of a Constitutional Fundamental Right (ADPF), challenging the opening of the inquiry, the lack of exceptionality for such, and interposing various appeals.

It is noteworthy to mention certain actions resulting from the Fake News Inquiry, which were perceived by the former president and his supporters as personal persecution. These actions include the decision to block profiles on social media associated with the former president, which was criticized as censorship against those who oppose the court; the decision to shut down websites that propagated extreme views such as the closure of the National Congress and the Supreme Federal Court, seen as a violation of freedom of expression; and the violation of confidentiality of parliamentarians who support the former president, among others.

Another controversial moment of direct friction between the supreme court and Bolsonaro was the imprisonment of Deputy Daniel Silveira, who had been sentenced to 8 years in prison due to the Deputy's demonstrations for the closing of the National Congress and the STF, as well as for recording videos on his social media inciting a coup d'etat. It is worth noting that one of the most emblematic issues surrounding Daniel Silveira's arrest is that it was determined *ex-officio* by Minister Alexandre de Moraes, after the posting of a video criticizing STF ministers and supporting the Institutional Act No. 5 (AI-5). In response to the act which can be seen as tyrannical, since it was not provoked by a competent body (Judicial Police or Federal Public Prosecutor's Office), Silveira received a pardon from the former President almost instantly.

In 2021, the Superior Electoral Court (TSE), approved the initiation of an inquiry into former President Bolsonaro regarding allegations of attacks on the Brazilian electoral system and electronic voting machines. The investigation was initiated to examine several charges against the former President, including libel, defamation, incitement to crime, criminal association, malicious prosecution, and violations of the National Security Law and the Electoral Code. The inquiry was conducted in conjunction with the Fake News Inquiry, with Alexandre de Moraes serving as the rapporteur, who had already become one of Bolsonaro's main adversaries at the time.

In response to the investigation, Bolsonaro stated that "His time will come. Because he has been playing outside the boundaries of the Constitution for a long time. I do not intend to leave the boundaries to question these authorities, but I believe that the moment is coming" (Folha de São Paulo, 2023).

In August 2021, Bolsonaro became the subject of another investigation, this time for his attacks on the credibility of the voting machines and the spread of false information and offenses against democratic institutions. In response, Bolsonaro stated that: "I am President 24 hours a day. My game is within the boundaries, but if I leave the boundaries, I am forced to leave the boundaries. It's like Alexandre de Moraes's inquiry: he investigates, he punishes, and he imprisons. If I lose, will I appeal to the TSE itself? That doesn't make any sense" (Folha de São Paulo, 2023).

The TSE's actions during the 2022 election campaign dealt a fatal blow to Bolsonarism. For example, the airing of a documentary about Jair Messias Bolsonaro's knife attack was suspended, the analogy between former President Lula as the mastermind behind the murder of leftist Celso Daniel was prohibited, the use of images of a speech given by Jair Bolsonaro in London during his election campaign was prohibited, and the use of images of September 7 celebrations was also prohibited. Additionally, the TSE reduced the television network election campaign by 10 minutes to allow for Lula to have more airtime, after Bolsonaro made false accusations about his opponent. These measures, among others, were viewed by Bolsonaro and his supporters as an imbalance in the elections in favor of the other candidate and a violation of the Right to Reply (Abramo, 2022).

The stance of the Brazilian Federal Supreme Court (STF), during the 2022 electoral period, was heavily criticized by supporters, now defeated at the polls, of President Bolsonaro. From a block of decisions, the court was able to control the possibilities of political-electoral discourse, restricting the scope of protection of freedom of expression. The turning point in the institutional behavior took place when the current president began to attack the polls and put in check the reliability of the electoral process, a reason that proved to be sufficient for the STF to investigate him for "undemocratic acts". The RQ is: Would such attacks on the democratic game be sufficient grounds for restrictive decisions made by the court? If so, or if not, what are the resulting effects on the democratic game itself?

3 METHOD

The measures implemented by the STF align with the concept of a “fragile democracy” as described by Issacharoff (2015). According to this perspective, in a fragile democracy, the discourse during the electoral process must be connected to democratic progress. Anything that contradicts this notion is deemed incompatible with the exercise of the right to vote, as it aims to ensure freedom in the electoral process. In contrast to the conventional view, Varol (2017) argues that there are measures commonly employed in authoritarian regimes that, at times, foster and enhance the democratic game more effectively than those typically used by democratic systems themselves. This research aims to facilitate a dialogue between these two authors.

Thus far, this work has constructed a narrative that, to a greater or lesser extent, attempts to demonstrate the necessary nuances for understanding the historical context that informs its conclusions. In line with what Burke (1993, p. 28) would refer to as a “model of a model”, it presents a complex syncretic narrative aimed at enabling diverse conclusions regarding the elements contained within it. It is a retrospective examination that considers present challenges to establishing a model for envisioning the future. Burke identifies this as the method of historical-cultural revision, which allows for a (re)interpretation of knowledge to simplify reality – a structured model of what is real. The outcome of this approach is a micro-model of the constructed reality. The proposed dialogue between the ideas of Issacharoff (2015) and Varol (2017) only makes sense when considered within the framework of the preceding narrative model. Therefore, they are constrained by the reality that the narrative seeks to induce (based on the narrative constructed thus far) and the deductions derived from the authors' literature review.

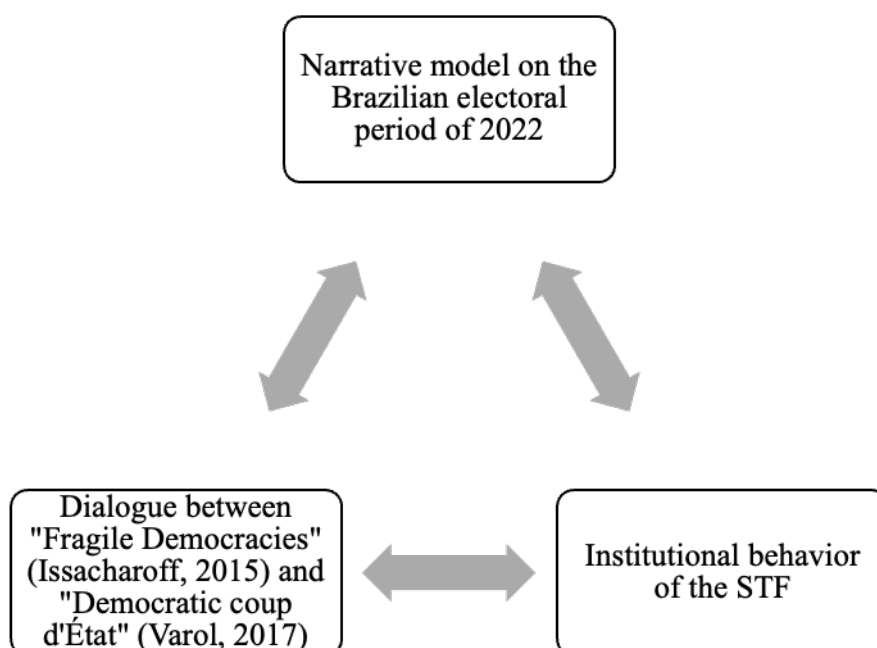


Figure 1. Research model

4 RESULTS

The research explores the impact of the decision-making expansionism of the Federal Supreme Court (STF) on the re-election bid of Bolsonaro. The approach employed does not view this situation as necessarily negative, as long as it strengthens democracy. The measures taken by the STF are a hallmark of what is referred to as a “fragile democracy” by Issacharoff (2015), where the discourse during the electoral process must be aligned with democratic values, and any deviation from this is deemed unacceptable for the exercise of the right to free speech. However, Varol (2017) challenges this conventional view and argues that sometimes measures typically employed in authoritarian regimes can better promote and develop democracy than those used by democratic systems.

Although it is possible to conclude from the reading of Issacharoff and Varol that there may be moments when a country's supreme court should or must intervene to defend the democratic game, it is not clear that such circumstances were present in the Brazilian case, even with the attacks by Bolsonaro and his supporters on the electoral system or the democratic governance. It is necessary for the court to maintain a pacifying tone and to ensure parity and equality among competitors, especially during the second round when the choices are limited to only two candidates. Otherwise, the court, which should act as the guardian of the constitutional text, risks violating the constitution itself by indirectly favouring the campaign of one candidate over another.

The research aims to initiate a dialogue between these two perspectives. The findings suggest that despite the STF taking authoritarian decisions, it was able to contribute to the normalization of the elections. Bolsonaro's campaign, which was largely based on challenging the democratic system and attacking the human rights of minority groups, raised concerns about the legitimacy of institutions and the voting process. Further research is needed to fully understand the complex dynamics of power in the social context and the impact on future elections and the quality of democracy. The study is limited in that it only focuses on the Brazilian's 2022 elections and does not take into account past events.

5 DISCUSSION

The Brazilian Constitution of 1988 established a new system that disregarded the country's constitutional history and relegated it to being unreliable (Barroso, 2012, p. 111). The idea of effectiveness argues that there is a tradition of ineffectiveness in the Brazilian constitutions, resulting from the flaws of the elites, leading to a lack of trust in norms (Bonavides & Andrade, 1991, p. 12). To address this issue, a new model of constitutionalism was introduced, which gave a lot of power to the Supreme Court. The court was meant to play a significant role in politics and law and be seen as the guardian of democracy. However, this decision was made for political reasons and ignored that many of the political and legal institutions had already existed in previous constitutions. There is debate about whether there is an ineffectual constitutional order or if it's just some provisions that are less effective (Lynch & Mendonça, 2017).

Thirty-five years later, the Brazilian Constitution that was meant to be effective is facing questions about its efficiency and legitimacy. The “emancipatory” order appears to be repeating history by becoming a mere tool for domination and formal legitimization of the arbitrary will of those in power. Brazilian’s Federal Supreme Court Justice, Luís Roberto Barroso (2008, pp. 327-329), advocates that:

Brazil's political and constitutional experience, from independence to 1988, is the melancholic history of a country's misalignment with its people and destiny. Almost two centuries of persistent illegitimate power, lack of effectiveness of multiple Constitutions, and an endless succession of violations of constitutional legality. An accumulation of lost generations. The ancestral illegitimacy materialized in the domination of a narrow-sighted, patrimonialism elite that never had a country project for everyone. (...) The lack of effectiveness of successive Brazilian constitutions resulted from the non-recognition of normative force to their texts and the lack of political will to give them direct and immediate current applicability. The European tradition of the first half of the century prevailed among us, which saw the fundamental law as merely an ordering of action programs, calls to the ordinary legislator, and public powers in general. Hence, the Brazilian Charters have always allowed themselves to be inflated by promises of action and pretended rights that never came to fruition in practice. A history marked by insincerity and frustration. Disrespect for constitutional legality accompanied the Brazilian political evolution like a curse (...). Intolerance, immaturity, and social insensitivity defeat the Constitution. A country that didn't work out. The 1988 Constitution was the zero milestones of a restart, from the perspective of a new history.

Barroso (2012, p. 57-58) raises the expectation of a “new history” by asking "Why not a constitution 'to be effective'?" His original publication in 1987 helped to establish the Brazilian doctrine of effectiveness, which represented a change in mentality toward the role of the Constitution. It helped to address the chronic problems of Brazilian constitutionalism, such as the lack of trust in norms, ideological mystification, and neglect by the public powers. In the words of Barroso (2012, p. 58):

After denouncing the chronic lack of real compliance with constitutional norms, and seeking to overcome it, the article elaborates on the concept of effectiveness and formulates a classification for constitutional norms (...). This text was one of the pioneers in defending the ascent and centrality of the Judiciary in the protection and realization of the Constitution (...). The conquest of effectiveness by constitutional norms was the rite of passage to the material and axiological supremacy of the Constitution, which opened the way for democratic constitutionalism in the country.

The process that resulted in the constitutional text of 1988 cannot be solely attributed to popular forces, as they were not organized or capable of exerting this type of pressure (Sodré, 1984, p. 131). However, participation from civil society gradually increased and became relevant in the political process after the opening (Barbosa, 2012, p. 145). The constitution emerged from a process with significant popular participation, broke with the past, and brought together diverse political and ideological forces into a reasonably advanced text.

Neglecting the past, however, is a thankless task: it implies renouncing one's own identity to emptiness (Burke and Stets, 2009, pp. 112 et seq.) - worse, it means not learning from its lessons (Burke, 2000, pp. 70 et seq.). The Brazilian doctrine of effectiveness ignores that a Constitution distorted from the historical and democratic constitutionalism is a mere fantasy of normativity - it contributes to a symbol of organized power, with low legitimacy and deficient social participation: "it is not the monologue from the top or the political-strategic agreements that shape constitutionalism and affirm democracy" (Benvindo, 2014), it is the social experience that builds the law and the interpretation that it must be given, it is necessary to live the Constitution.

The "approach of constitutionalism from Latin American constitutional sociology aims to critically investigate its development, not in its normative sense, but as it faces political and social challenges" (Vieira, 2016). Whereas before the issue of the narrative of the failure of Brazilian constitutionalism was focused on a "non-effective" constitutional order, the 1988 Constitution resolves this formally by enhancing the functions and competencies of the Judiciary - the protagonism would be based on the "inexorability of fundamental rights, which are not exhausted in the constitutional text, and on the sophistication of the instruments of constitutional control and constitutional process" (Moreira & Da Escossia, 2016).

In the Brazilian system, the judiciary has become a crucial component in ensuring the legitimacy and effectiveness of the constitutional text. The Brazilian constitution, crafted in 1988, prioritized the role of the judiciary in enforcing the constitution and safeguarding fundamental rights. However, it is important to note that the constitution was written by a third of the senators who were not elected, with strong influence from conservative business sectors, and its language was designed to avoid conflict (Aráujo & Maués, 2016).

The rise of the judiciary as a key player in constitutional systems is not unique to Brazil and can be seen globally. The concept of judicial review, where the judiciary has the power to review and potentially strike down legislation that is deemed unconstitutional, has become the dominant model in many countries in the past century. This trend is a result of the recent wave of democratization and can be observed in the creation of constitutional courts or the expansion of existing ones in many countries.

The post-World War II era inaugurated, in the Western world, a second wave of democratization (Huntington, 1991, pp. 579-616), with a liberal bias, with political-social sentiments that favored democratic quality and the majoritarian political game, while at the same time allowing for the coexistence and strengthening of the participation and safeguarding of the fundamental rights of minority groups in institutionalized desires, in the paths of the state. Just like the first, once imagined as consolidated, a process of deconstruction of political gains was perceived, as well as a mischaracterization of the systems of government or the quality of the power political game for authoritarian or low popular participation regimes, such as military coups in Latin America or the suffocating context of the Cold War (1947-1991).

The Carnation Revolution (April 25, 1974) in Portugal marked the start of the third wave of democratization (Huntington, 1991, pp. 579-616), which influenced the political and ideological turning point in various parts of the world, from then-called Eastern Europe to countries such as Argentina (1994 constitutional reform), Chile (1990), and Brazil (1985, resulting in the 1988 Constitution), with transformative effects on diplomatic, commercial, and cultural relationships in the most influential and stable process of reshaping the world's power order. Countries that remained aloof from its foundational cornerstone (democracy as a system of government) were left on the margins of subsequent and frequent technological, political-legal, socio-economic innovation processes, etc.

The impacts resulting from September 11, with subsequent and ongoing upheavals in the Middle East dominated by ideologies and practices contrary to human rights, as universalized by the West, posed the first challenges to the democratic paths of the third wave in the 21st century. However, nothing was as severe from a political-ideological perspective as the rise of conservatism in the 2010s, a phenomenon observable from one of the intrinsic virtues of the democratic model, the vote. Ultra-right populists, ultra-conservative groups that, by preaching easy solutions with outrageous rhetoric, to complex economic issues or the reordering of social customs, were able to garner considerable and relevant popular support, while conquering power, especially in the executive and legislative branches typically elected by the majority logic.

Many thinkers have reached the same conclusion: “something is happening” (Przeworski, 2019, p. 12), some previously disregarded and weak force has grown and begun to act acutely to discredit the liberal conception of the state and democracy. Even “matured” systems have begun to experience “anti-system feelings” (Przeworski, 2019, p. 13), resulting in a decrease in electoral participation and the electorate’s confidence in institutions or even in democracy as the best (or least bad) form of government. This has led to the resurgence of sentiments from the first quarter of the 20th century, where “people of different political orientations, values, and cultures saw each other increasingly as enemies” (Przeworski, 2019, p. 23) as a hindrance to the civilization process, deserving of extermination instead of equal respect and consideration.

There is a contemporary dilemma within liberal thought: has democracy ceased to be an active subject in the realization of human rights, a characteristic feature of globalization for the stabilization of more fundamental political aspirations, and instead become a pejorative adjective to be combated? Whether yes or no, what does this scene reveal as a narrative of power and possibilities for the future of political organization of government systems in contemporary states: is democracy doomed to succumb under current conditions? (Przeworski, 2019, p. 33).

The contemporary understanding of democracy goes beyond simply being a system in which government occupants lose elections and leave. Today, the term seems to indicate a type of representative, an indirect political system that allows (or should allow) pluralistic

participation in the formation of relevant and irrelevant public interest political choices in a given society, including clear delimitation of the limits and conditions of participation in public, political life. In other words, the system must establish what is or is not within the possibilities of the democratic game. If it does not do so, it will necessarily be subject to the dictates of political-party eventuality or to the traps of other interests that are not those of legitimate people.

The concept of “democracy” has been the center of various conceptual disputes and narratives of power, and has become a central element in Western political, legal, socio-economic, and political-ideological debates, especially as a stabilizing factor and a minimum element for the effective implementation and protection of human rights on a global level. It is from this point on that the conceptual construction goes beyond being just a more or less representative system of government and becomes an object of desire for those who wish to see their political project within the realm of state accomplishments, as a stable and mature democracy is seen as the way to follow the steps of the civilizing process, moving further away from authoritarianism.

In addition, in a constitutional system that privileges the centralizing position of the Judiciary as a source of political power disputes and stabilization of constitutional legal norms, distortions will be present if the limits and possibilities are not properly delimited by the legislative or by the Constitution itself. What can be perceived, when analyzing the relevant events that composed the 2022 election, is that Bolsonaro, in his attempt to be reelected, stretched the acceptable limits as far as he could in a democratic political game. The same can be said, with some clarity, of the institutional posture of the Supreme Court, as it felt that more than just a mere antagonistic political interest dispute or different state projects was at stake, and began to act as if democracy itself was under attack and needed its institutional support. Democracy, as if the STF were the only owner of it, chose a side.

The critique of the performance of democratic institutions as actors that negatively impact democracy is not new, they can be organized into two major trends of constitutional thought: In the first, the focus is on the actions of spheres composed of representatives of the popular vote, which establish an abusive dynamic by “representing” particular interests in acts of political power to the detriment of the popular will and at the risk of erosion or, for some, destruction of democracy, even under the constitutional umbrella – another variation of constitutionalism that would be beyond its genesis. The second says that constitutional jurisdiction under the competence of the court implies an authoritarian or dysfunctional relationship with democracy, leading to another variation of liberal constitutionalism that diverges from its concept of limiting the exercise of power.

In Brazil, the Supreme Federal Court (STF) and the legislative and executive branches of power have not been immune to such criticisms, and various voices have risen against the actors with significant political-legal actions. “Judicial activism”, “supremocracy” (Vieira, 2008, pp. 444-464), and “ministrocracy” (Arguelhes & Ribeiro, 2018, pp. 13-32) are some of

the Brazilian versions to question elements of judicial supremacy and their impact on democracy; “representation crisis”, “outdated coalition presidentialism” are some of the terms that warn of the problematic relationship of representative voting powers to a democratic society. Diversifications arising from universalized criticisms that transcend borders and models of legal systems (Brinks & Blass, 2017, pp. 296-331): wherever there is constitutional jurisdiction, there are voices opposing the activity as “counter-majoritarian” (Brown & Waller, 2016, pp. 817-850); wherever there is a legislative or executive power, there will be opposition or political minorities that will attempt to attack the democratic legitimacy of the government or parliament.

Worse still, the younger and less experienced a democracy or a country's re-democratization process is, the more daunting the observation is of authoritarian elements and nostalgic remnants of different, already surpassed times, disregarding humanitarian dictums or even satisfactory political representation. Bolsonaro is, in a sense, the result of such dissatisfaction with Brazil's recent democratic history, and was able to represent “those who were frustrated with unfulfilled constitutional promises; and, on the other hand, those dissatisfied with promises that were fulfilled” (Barroso, 2022, pp. 1-34). As Luis Roberto Barroso (2022, pp. 1-34) analyzed, the populist discourse of Bolsonarism would not find refuge in constitutional terms, as populism in its essence represents a march against sophisticated and corrupt elites: “Bolsonaro was elected following the traditional populist doctrine: the simple, pure and conservative people against the sophisticated, corrupt and "leftist" elites. As inevitable, the conflict that marks the relationship between populism and democracy was soon placed: there is no way to fulfill campaign promises without confronting the institutions supposedly occupied by representatives of these elites”.

That Jair Bolsonaro acted contrary to democratic principles and public interest, including using aggressive language incompatible with the office he held, seems undeniable. However, there is another relevant part of this story. At the same time that the former president moved the political-institutional scenario to less republican paths, it is possible to say that the STF acted in the same way.

The striking difference between the actions of power of the actors in question is that Bolsonaro used the public machinery in an authoritarian manner, attacked the democratic system of government as an end in itself, and there did not seem to be a well-elaborated coup plan, but rather a kind of authoritarian sadism aimed at weakening a democratic model with empty speeches and words of order to the wind, for those who follow him, not necessarily for the construction of a different legal order, even though it is authoritarian. The Federal Supreme Court, in turn, upon identifying Bolsonaro's moves, acted in an authoritarian manner to protect the democratic game. An authoritarian posture does not justify another, but without the energetic reaction of the court concerning the acts committed by the then-president, it is possible to consider a political scenario very different from the current one for Brazil, perhaps, who knows, with antidemocratic intentions in power. According to Justice Luís

Roberto Barroso (2022, pp. 1-34), the STF played a relevant role in curbing Bolsonaro, but it was not the only one to act to prevent coup attempts:

The repeated threats to constitutional legality and the stability of institutions have generated a strong reaction from multiple sectors. First, the press, despite advertising boycotts and the contemporary difficulties of its business model, was a bastion of resistance. Properly distinguishing between fact and opinion, it maintained a critical tone and performed its role of watchdog with unflinching courage. Despite many fears of involvement by the Armed Forces, their leaders also resisted undue temptations. The defense minister and military commanders left their positions with dignity, reportedly because they disagreed with the political and intimidatory use of the institution. The Supreme Federal Court, which had been divided on the issue of combating corruption, united in defense of democracy. In this line, it reaffirmed its commitments to freedom of expression, preservation of civil society councils, the due legislative process, and above all, confronting attacks on institutions by extremist groups. In different investigations, which were later combined into a single inquiry into the activities of criminal organizations, the Court prevented threats of violence against its Ministers and facilities with hearings, searches and seizures, and even preventive arrests. The Higher Electoral Court, composed of three Supreme Court Justices, also faced undemocratic behavior by instituting procedures to investigate false allegations of fraud against the electronic voting system, as well as ordering the “de-monetization” of websites and channels that spread disinformation against the electoral process and democracy.

What Barroso treats as a union of the STF in favor of democracy, with repeated commitments to freedom of expression, can be read as follows: a zero-tolerance exercise to any speech contrary to the democratic game or offensive to the members of the court. It is an institutional behavior that in Samuel Issacharoff's fragile democracy, is related to the judiciary as an inability to effectively dispose of institutionalized mechanisms for democratic protection, which places the author in an interesting interlocution with his contemporaries, as he assumes that “strong democracies need strong institutions” (Issacharoff, 2015, p. 196).

Issacharoff's theory posits that contemporary democracies are vulnerable to diverse pressures that may undermine their stability and compromise their democratic values and institutions. In his view, democracies that exhibit weak institutions, low levels of legitimacy, and an inability to adequately manage crises and challenges are considered fragile (Issacharoff, 2015, pp. 12-23). The challenges faced by fragile democracies, according to Issacharoff, stem from their difficulty in balancing the fundamental principles of democracy, such as individual rights and liberties, with the rule of law and the need to address security and safety threats. In many cases, democracies are faced with the dilemma of choosing between safeguarding individual rights and liberties and preserving national security, a situation that may have adverse effects on democratic institutions and values. Issacharoff contends that the court system plays a critical role in maintaining stability and legitimacy in fragile democracies by upholding the rule of law and safeguarding individual rights and liberties (Issacharoff, 2015, pp. 120-124).

The problem, however, is when, in the name of the fundamental rights and freedom of citizens, the court enters directly into the political-electoral field, in order to, with its

decisions, actively affect the outcome of the elections because it understands that one side is more democratic than the other. It is for the defense of democracy that the Supreme Court, as an institution dedicated to defending the Constitution, acts in such a way as to weaken one of the sides, in the Brazilian case, which is what happened to Bolsonaro in his campaign.

In an attempt to strengthen the democratic game, the result represents a curious paradox, in which, while the court's decisions helped to strengthen a candidate seen as the best for democracy, in an undemocratic way they help to undermine the opponent's campaign. "The problem goes beyond the restrictions on ideological commitments of a democratic state" (Issacharoff, 2015, p. 146), Issacharoff (2015, p. 146) argues that: "Political parties play a key role in providing a mechanism for informed popular participation in a democracy precisely because they are organizationally independent of the state".

Although it is correct to state that Issacharoff accepts the court to interfere in the electoral dispute to protect democracy, he envisions the possibility of interference based on the so-called "Procedural Protections", which refers to the legal principles regarding the protection of constitutional rights during the election period. These protections include measures to ensure that voters have equal access to the ballot, that their votes are counted accurately, and that election disputes are resolved fairly and efficiently. These procedural protections are crucial for ensuring the integrity and fairness of elections:

The more difficult concern is with parties that genuinely vie for governmental office and even majority status to unwind liberal democracy. It is easy to imagine what may go wrong with party prohibitions. The ability to cordon off certain areas of democratic deliberation from particular kinds of speech invites censorship or suppression of political opposition, a move that can be utilized to insulate incumbents from an electoral challenge or as a pretext to impose the ruling majority's form of orthodoxy on political exchange. But if history is a guide, excessive tolerance is dangerous as well. We can begin to test the range of permissible state responses to antidemocratic mass movements through the familiar categories of procedural limitations and substantive definitions of prohibited conduct (Issacharoff, 2015, p. 153).

Three procedural concerns emerge in cases where democratic regimes try to prevent antidemocratic elements from gaining advantages through the electoral process. First: the most important safeguard is the concentration of power to suppress away from self-interested political actors to an independent judicial review (Issacharoff, 2015, p. 164). It is interesting to note that, for Issacharoff, the main defense that the democratic system can have is the political choice made by Brazil: a judicial system that strongly concentrates the decision-making powers over constitutional issues, a type of legal constitutionalism in which the court, under the argument of protecting democracy, can do a lot, almost everything, which becomes accentuated and quite public when using its powers during the electoral game:

Independent judicial review takes on particular significance in parliamentary systems. There is an ever-present risk in democratic systems that the claimed exigencies necessitating the use of emergency powers, including the power to suppress antagonistic political speech, will become

the rule that swallows the exception. Too many putative democracies, particularly in the immediate post-colonial world, have succumbed to one-party rule under the claimed necessity of domestic emergencies for any prescriptive account to ignore this threat. The common feature of fledgling democracies that collapse into strongman regimes is the concentration of unilateral power in the executive, an inherent risk whenever there is a claimed threat to national security (Issacharoff, 2015, p. 164).

The second is preventing antidemocratic elements in the form of governmental action taken, which should not include criminal sanctions. The typical sanctions are removing members from legislative office, disbanding parties, and seizing party assets. The evidentiary requirements for the government's action are tied to the interests and potential severity of punishment. In discussions of thwarting antidemocratic elements, there should also be consideration of whether the government's conduct is excessive in light of the perceived threat, and that the least restrictive means should be employed to achieve the objective (Issacharoff, 2015, p. 164).

The solution of Issacharoff appears, once again, excessive and consistent with the possibilities presented by the Brazilian case of the 2022 elections. However, the problem is that the author only accepts the use of such extreme resources to ensure that voters have equal access to the ballot, that their votes are counted accurately, and that election disputes are resolved fairly and efficiently, which does not seem to be the case. The Supreme Court acted in a way to prevent a potential threat, Bolsonaro's offensive speeches helped to build an image of a "myth" for his voters, while also allowing an authoritarian view in the general public. For the court, it is clear to say that Bolsonaro, myth or not, was more than someone bluffing, but a figure to be repelled from democracy.

This is the key issue of the problem: that Bolsonaro is an authoritarian figure, with repugnant speeches that manifested disdain for human rights and the democratic rule of law, is something that proves to be unquestioned. However, his criticisms of the Supreme Court, although disrespectful, and lacking in decorum, have at their core a respectable concern about the limits of a supreme court's actions in the name of democracy, when, it is worth remembering, even with all its negative points, Bolsonaro was and continues to be a politically influential figure with a significant democratic base of voters.

Varol's (2017, p. 6) research explores a rarely studied phenomenon referred to as the "democratic coup d'etat". Traditionally, academic legal literature has viewed all military coups as anti-democratic and carried out by power-hungry military officers looking to establish a long-lasting rule. However, Varol argues that not all military coups are anti-democratic and that some may even promote democracy by overthrowing authoritarian regimes and facilitating free elections. After a democratic coup, the military serves as the interim government until elections occur and during the transition, they may try to influence the new constitution being drafted (p. 7). This influence can take form in three ways: (i) institutional, (ii) substantive, and (iii) procedural.

Varol (2017, p. 128) explains that the concept of constitutional entrenchment, from an institutional perspective, involves the establishment of counter-majoritarian institutions that have significant supervisory power over elected officials. These changes divide the exercise of political power between political institutions and independent counter-majoritarian institutions that align with the policy views of the military and virtually mark the end of Parliament's supremacy. This can allow the military in power to protect certain types of basic principles in society: "In establishing these institutions, the military sought to protect the founding principles of the Republic—primarily secularism and national unity—which, according to the military, had preserved stability the face of threats to revert to theocratic governance structures". Citing the case of the Turkish coup (1960), the author concludes that such institutions should be a constitutional court and a National Security Council. Regarding the constitutional court:

The military leaders believed that an independent judiciary was necessary to prevent government oppression and abuse of power by elected officials and to protect the founding principles of the Republic, primarily secularism and national unity, much cherished by the military. As Cener Belge and Hootan Shambayati have observed, the formation of the Turkish Constitutional Court supports Ran Hirschl's hegemonic preservation thesis. The military leaders, foreseeing their inevitable loss of power through democratic elections, created and empowered a sympathetic Constitutional Court to preserve their values and interests (Varol, 2017, p. 129).

From a substantive perspective, Varol (2017, p. 159) refers to how a military junta or an institution that has staged a coup may appropriate the constitutional terms by directly controlling the work of the constituent assembly. Using the example of the Portuguese coup (1974), he argues that this way of influencing a constitution may be viewed as more democratic than allowing authoritarian elements and interests contrary to the popular will to spread through society as political choices of government:

The substantive entrenchment found in the post-coup constitution in Portugal is the most drastic example of constitutional entrenchment. Despite its drastic nature, or perhaps because of it, the entrenchment did not have long-lasting effects. Under the constitution, the Council of the Revolution would perform its functions until at least the end of the first legislative session of five years. In 1982, it thus became possible to amend the constitution and eliminate the Council. That year, a coalition of the existing political parties garnered the requisite two-thirds majority to revise the constitution. The amendments decreased the powers of the President, transferred them to the Parliament or other institutions, and most importantly, abolished the Council of the Revolution. The Council of the Revolution was replaced with "a civilian advisory body, the Council of State, and the Constitutional Court." The amendments also established a legal framework for democratic civilian control of the military. Following the amendments, Portugal has remained "not simply a democracy, but a relatively high-quality democracy. (Varol, 2017, p. 159)

With regards to procedural ways, the author explains that it refers to the control over the method in which a constitutional text will be drafted, who will do it, the way it will (if at all)

be put to a popular referendum, and he also uses the example of the Egyptian coup (2011) to show how the takeover of power can lead to a better enshrining of democratic principles:

To date, the military has influenced the constitution-making process in Egypt through procedural entrenchment, orchestrating the transition process so that the new constitution that will eventually be drafted will favor its institutional and policy preferences. The military has attempted to achieve that outcome in four primary ways: (1) by holding elections under a condensed timeframe, (2) by holding parliamentary elections before the constitution drafting process begins, (3) by influencing the political makeup of the first People's Assembly and Shura Council, and (4) by favoring a presidential system over a parliamentary system (Varol, 2017, p. 175).

It can be perceived that all of Varol's concerns can be summarized in an institutional view of how a democratic game can function from an authoritarian intervention in the direction of the state. It is necessary to draw some considerations about the Brazilian case based on the insights of Issacharoff and Varol. Brazil was dominated by a military dictatorship from 1964 to 1985, and since then has been a democratic republic. Nevertheless, the legacy of the dictatorship can still be felt in the country's political institutions, such as the justice system, the legislative, and the executive. In light of the insights of Varol and Issacharoff, it is important to question the role played by the Brazilian Supreme Court in the democratization process and the consolidation of democratic institutions.

The essence of the thought corresponds to considering the possibilities of the court to move to repress extreme acts aimed at putting the democratic nature of the political-electoral game into question while insisting on the implementation of preventive barriers, legal obstacles aimed at not allowing authoritarian incursions, at which time the author recognizes that the pluralistic deliberation necessary for the maintenance of democracy, may be at risk when there is a narrowing in the public space for the circulation of ideas (Issacharoff, 2015, p. 196).

6 CONCLUSION

It is noteworthy that both Varol and Issacharoff seem to share a romanticized, utopian view of the role played by a supreme court in a democracy: the court is seen as a moral virtue of any and every system that prides itself on being democratic, acting in opposition to the illicit interests of those who seek to distort an undefined sense of democracy, a sense that only the supreme court under the constitutional aegis would be authorized to reveal to society. It is striking how, despite intriguing research, they fail to present democratically satisfying answers to the problems that drive them. Instead of being viewed with distrust, the constitutional court is treated as synonymous with hope and civilizational evolution. The authors ignore that, despite playing an essential role in the stability and democratic gameplay, the supreme court has its political-ideological preferences that, when manifested in a political-electoral context, considering the powers of the institution, can create an unnecessary, inappropriate, or even intentional imbalance to the outcome of the vote.

In the same vein, to assert that a supreme court can protect a democratic game better than well-defined political choices made by the people themselves is contrary to the very essence of democracy. Similarly, considering that military interventions can legitimately represent popular aspirations is equally a fantasy. Brazil has undergone a long period of military regimes in its history, the most recent from 1964-1985, which culminated in the so-called democratic opening with the creation of a new constitution. The framers, elected there, were various representatives of the former authoritarian militarism, which refused to relinquish power. Many said that the current 1988 Constitution would be the consecration of the coup d'état victory.

Varol's notion is flawed when he believes that history has only one side. For each military figure who takes power, or for each institutional act that is not safeguarded by a popular vote, democracy fails, the system fails, and, worse, it is the same as allowing a strong concentration of power in the hands of a few. In the Brazilian case, what military interventions revealed, all of them, were deaths, tortures, and daydreams. Everything that democracy should not be.

It should be noted that, despite the theoretical efforts made by the authors, both Varol and Issacharoff do not provide a description or even a solution that appears to be suitable for the Brazilian case. This is a legal extravagance, in which the supreme court moves according to what it understands to be the most correct for the defense of the democratic game without taking into account the degrading effects that its decision-making acts may have on the democracy itself.

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Povzetek:

Brazilsko vrhovno sodišče v demokratičnem državnem udaru

Raziskovalno vprašanje (RV): Ali bi bili takšni napadi na demokracijo zadostna podlaga za omejevalne odločitve sodišča? Če je tako ali če ne, kakšni so posledični učinki na samo demokracijo?

Namen: Razumevanje premislekov brazilskega ustavnega sodišča med predsedniškimi volitvami leta 2022.

Metoda: Ukrepi, ki jih je sprejelo sodišče, so značilnosti tega, kar je Issacharoff (2015) razlagal kot »krhko demokracijo«, v kateri mora biti diskurz med volilnim procesom povezan z demokratičnimi dosežki, kjer je vse, kar je v nasprotju z njim, zunaj možnosti uresničevanja pravice na podlagi zagotavljanja volilne svobode. V nasprotju s konvencionalnim pogledom Varol (2017) razume, da obstajajo ukrepi, ki se običajno uporabljajo v avtoritarnih režimih, ki včasih bolj in bolje spodbujajo in pomagajo pri razvoju demokratične igre od tistih, ki jih običajno uporablja sam demokratični sistem. Raziskava predlaga dialog med avtorjema.

Rezultati: Raziskava lahko dokaže, da je sodišče kljub avtoritarnim odločitvam uspelo prispevati k zagotavljanju normalnosti volitev.

Organiziranost: Razprava o mejah delovanja sodišča, pa tudi o legitimnosti njegovega odločanja je ključni element same možnosti obstoja ustavne države, vpliva na delo sodnikov, odvetnikov in tožilcev ter omogoča za boljši družbeni nadzor.

Družba: Bolsonarizem je okrepil diskurz proti sodišču in okrepil vprašanja o legitimnosti institucij in volilnega postopka. Težava pa je v tem, da je Bolsonarova kampanja v veliki meri temeljila na boju proti demokratično vzpostavljenemu sistemu, v enakem tonu, v katerem je napadel človekove pravice manjšinskih skupin. Razumevanje te kompleksne dinamike moči v družbenem kontekstu, vpliv na prihodnje volitve ali celo kakovost demokratične igre je bistven del prispevka tega dela.

Izvirnost: Pravilno je reči, da Bolsonaro ni mogel zamisliti svoje kandidature za ponovno izvolitev, kot bi si želel, večinoma zaradi ekspanzionizma odločanja sodišča. Uporabljena metoda takšne situacije, tudi če je netipična, ne vidi nujno kot negativno, če le krepi demokracijo.

Omejitve/nadaljnje raziskave: Ta raziskava je omejena s posebnim časovnim obsegom, saj ne more natančno napovedati vedenja brazilskega vrhovnega sodišča po volilnem obdobju 2022. Poleg tega je tudi teoretični okvir nezadosten za predvidevanje ali popolno predstavitev raznolikosti brazilskega demokratičnega sistema. Raziskovalni predlog bi bil nenehno spremljanje vrhovnega sodišča in njegovih odločitev v zvezi s temeljnimi pravicami, zlasti ob upoštevanju politične pokrajine izven preučevanega obdobja, da bi ugotovili, ali je šlo za posebnost tistega trenutka ali za nekaj, kar se je zasedrilo v ideologiji sodišča.

Ključne besede: brazilsko vrhovno sodišče, demokratični državni udar, volitve, Bolsonaro.

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