How Courts Became a Battlefront Against Disinformation

The 2022 Brazilian Elections

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This October, Brazilians will elect their next President amidst a wave of disinformation aimed at discrediting the electoral process, and the electronic voting system in particular. One of the main engines of disinformation has been President Jair Bolsonaro himself. His use of disinformation as a political tool paved his rise as a serious contender in the 2018 elections, which he ultimately won. Bolsonaro's electoral bid benefited from a Whatsapp-based digital disinformation campaign, which was then mostly focused on attacking political adversaries.

In view of the 2022 elections, a network of judicial and electoral institutions has been trying to prepare for a scenario similar to and potentially worse than 2018. Amidst inter-institutional friction (caused by Bolsonaro's constant attacks on the Supreme Court and the electoral courts) and an atmosphere of political instability, judicial precedents are currently the main potential deterrents against disinformation campaigns.

Current empirical evidence on disinformation's effects on elections is mixed. There are solid indications that it does not change voters' stances, even though it can strengthen the views they already have (if the disseminated narrative fits into their preconceptions). This does not mean, however, that the broader democratic process is unaffected. Disinformation is "fundamentally toxic" to well-functioning democracies. It undermines trust in professional journalism and in democratic institutions themselves, potentially lowering the cost for would-be authoritarian politicians to bypass societal, institutional, and electoral checks on their power. Furthermore, disinformation is often presented along with other harms to the democratic process, such as abuses of power, incitement to violence and hate speech, which should trigger legal responses.

Brazil is a case in point. In spite of (half-hearted at best) occasional attempts to display moderation, Bolsonaro's threats to the electoral processes have become a fixed feature of Brazilian politics. They have escalated in the last months. As he was lagging behind in electoral polls, Bolsonaro's false claims that the electronic voting system lacks transparency and reliability were supported in Congress by his minister of Defense, an army general, as well as by other military actors. Even though, at this point, the military does not seem willing to support an outright self-coup, the institution has echoed Bolsonaro's disinformation, endorsing his false claims. In an interview with a major TV channel, the President has recently said he will obey electoral results *if* elections are fair and transparent – a form of dog whistle immediately recognized in the media as another threat not to accept a defeat at the ballot, thus increasingly undermining institutional trust and "governing norms that stand as a bulwark against elite corruption and abuse of power".

The problems created by the President's constant spreading of disinformation – now targeting the core of Brazil's representative democracy – go beyond the (in itself very serious) question of whether he could or could not pull off an outright refusal to leave office, in spite of an electoral defeat. Bolsonaro's unsubstantiated charges of fraud can contribute to and encourage confusion and violence during and after the elections. Even if, ultimately, disinformation does not lead to Bolsonaro winning the elections, or build enough support to perform a "self-coup" and ignore the ballot

results, at the very least, it is likely to disrupt the electoral procedure and the peaceful exercise of the right to vote in many ways. In fact, it has already done so.

What has changed from 2018 to 2022?

Bolsonaro's disinformation has remained largely constant – and has arguably become more egregious since his rise to power, with the resources of the presidential office at this disposal. Is the country better prepared to deal with a disinformation campaign this time around? Since 2018, Brazilian political institutions have learned important lessons regarding the engines and implications of disinformation campaigns. However, whether they have adequately prepared themselves to implement such lessons is debatable. Civil society and private initiatives aside, state action against disinformation has taken place on at least three fronts. Courts, in particular, have had a decisive role in building institutional constraints.

Electoral administrative measures

The first front is the set of administrative measures deployed by the country's highest electoral authority, the *Tribunal Superior Eleitoral* (Superior Electoral Court, "TSE"). While formally a judicial institution, the TSE plays multiple roles – executive, legislative, and judicial – in the electoral process. It enacts and enforces electoral rules; it organizes and supervises elections; and it has special jurisdiction to adjudicate electoral matters. The TSE's preparation to face disinformation in 2022 has included digital literacy campaigns, fact-checking (including Bolsonaro's constant claims of electoral fraud) and agreements with digital platforms, by which they commit to deploy a set of countermeasures against the online spread of electoral disinformation.

While collaboration with private platforms is more than welcome, these agreements have been criticized for their "lack of teeth" and limited scope, since state authorities remain unable to hold platforms liable for non-compliance. Still, there are several pending lawsuits in the STF and other courts involving many aspects of the regulation of platforms. Even if the agreements are in themselves not enforceable, platforms could chart their course under the shadow of future judicial intervention – and legislative debates on these issues will most likely return to the national agenda in 2023.

Legislative Proposals

The second front refers to regulatory initiatives in Congress. Notably, since 2020, a number of bills meant to regulate disinformation on digital platforms have been discussed. TSE judges have actively participated in many of such debates. In Congress, these proposals evolved into comprehensive regulatory frameworks for social networks, showing some similarities to recent international trends, such as the European Digital Services Act. Notwithstanding their importance, these legislative debates are still ongoing. They will provide no timely checks on disinformation circulating in this year's electoral campaign.

The role of Courts

In the judiciary, a few high court decisions have laid the legal bases for holding regular citizens and politicians directly accountable for disinformation campaigns.

In April 2019, the then Chief Justice of STF (the country's constitutional court), Dias Toffoli, announced an unprecedented reading of the Court´s internal rules of procedure: in case of online crimes against the judges, their families or the "honor" of the institution, the Chief Justice could appoint a fellow judge to begin investigations. That is, under this new interpretation, the STF itself could start a criminal inquiry to investigate such potential crimes – a major exception to how the criminal justice system typically operates in Brazil. The usual path would be for the Attorney General or the federal police to begin investigations before a lower court; but neither of such actors had come to the Court's defense, even in cases of online threats. While the judges' inquiries (originally nicknamed the "Fake News Inquiry", Inquérito das Fake News) initially focused on right-wing outlets and individuals not directly connected to Bolsonaro, the scenario changed considerably from 2020 onward. In more than one occasion, the Court has ruled for the

removal of social media profiles of Bolsonaro supporters accused of hate speech, or of promoting attacks on the Supreme Court (both mingled with the spread of disinformation). In June 2020, when the full Court rejected a constitutional challenge against its new, expansive reading of its internal rules, the meaning of the so-called "Fake News Inquiry" had expanded – from a tool to protect the judges to a broader mechanism to investigate and prosecute attacks on all democratic institutions. Due to the presidential immunities enshrined in the Brazilian constitution, the Court cannot do much to Bolsonaro himself – but the investigations affected several of his allies and discouraged many others, seemingly resulting in structural impacts to the financing and functioning of networks that promote disinformation against judicial and political institutions.

In early 2022, for example, the presiding judge of the inquiry, Alexandre de Moraes, ordered the blocking of the Telegram app within Brazilian territory, after the company failed to respond to the Court's demands regarding the removal of channels associated with Bolsonaro (a decision later overturned, as Telegram complied with the Court's request). In connection with the same inquiry, the STF in 2021 first detained and suspended, then eventually convicted Representative Daniel Silveira, a member of Congress, for posting videos with threats to the Justices and for defending violently overthrowing of democratic institutions.

Abuse of communication media - the 2018 elections trial

The judicial precedent with arguably the most potential to deter or to potentially sanction this years' disinformation campaign was decided by the Electoral Court, the TSE. In 2021, it ruled on a lawsuit contesting Bolsonaro's 2018 disinformation campaign, holding that the distribution of micro-targeted disinformation through messaging applications with electoral purposes amounts to abuse of economic power and of communication media. According to Brazilian law, such conduct is subject to removal from office – which did not happen in this case, as the Court considered it impossible to determine the "severity" of the disinformation campaign's effects. The Court said that it *could have done* something as drastic as a removal of office, even if it ultimately refrained from doing so in that particular case, due to the lack of sufficient evidence on the "severity" of the disinformation.

Nevertheless, this decision stands as a "loaded gun" against would-be agents of disinformation. Whether the TSE will be willing and able to use it against the current President himself is debatable – and unprecedented. Beyond the delicate issue of enforcement, however, the content of the 2021 decision on micro-targeted messaging illustrates some of the key struggles that policy and academic debates on disinformation face. On the one hand, it states that it is not necessary to prove the influence of the disinformation campaign in the final result of the election for it to be considered illegal – which is in tune with the scholarship mentioned above.

On the other hand, the decision states that the severity of the campaign must be proved through its repercussions – how many voters were reached and how the campaign affected them, which requires complex empirical investigation and may not be possible. Furthermore, the rationale for the decision rests on equating messenger apps with social communications media. This approach comes with far-reaching consequences for future internet regulation that are not accounted for in the decision's text. These determinations should not be left to courts, as such issues belong to the realm of regulatory policy making.

In any case, the TSE's precedent has the potential to tilt pre-election political tensions and behaviors in the right direction, as it establishes sufficient legal grounds (and advance warning) for future accountability over private messenger-based disinformation campaigns. In fact, the TSE has already stripped a member of the Paraná state legislative assembly, Fernando Francischini, of his mandate for spreading disinformation about the electronic voting system during the 2018 electoral process.

The road ahead

While legislators lag behind, courts have been the main arena when it comes to fighting disinformation

in Brazilian elections and holding politicians accountable. This is in part understandable, considering Brazil's system of electoral courts and the fact that judges will inevitably face cases involving the scope of freedom of expression and its abuses. However, courts are institutionally constrained in many ways, and are not ideally equipped to assess the consequences of disinformation campaigns – a task that is challenging enough for interdisciplinary scholarship -, nor of the full implications of specific policy choices, like equating social communications media and messenger apps.

Judicial instruments are also "blunt", focusing on the retrospective application of criminal or civil liability or electoral sanctions. The severity of such sanctions, in particular the possibility of removal from office, makes it perhaps less likely that they will even be used against electoral contenders (especially Bolsonaro himself) in the first place, given the polarized, conflict-riddled political environment. Moreover, facing these new challenges might involve a level of judicial creativity – like in the STF's "fake news" inquiry mentioned above – that creates its own problems, as the public perceives judges devising new rules and powers as they go along.

In the long run, there is little to suggest that disinformation will cease to be a challenge in Brazil. It will persist as a political phenomenon that the country's democratic institutions must cope with, beyond the formal electoral calendar itself. It will certainly put judicial efforts to test. More than other institutions, courts have stepped up to face this challenge in the short run. But while Brazilian judges have taken initiative, it remains to be seen if and how judicial precedents can effectively prevent worse case scenarios.

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