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Militant Courts and Private Power: Can Judicial Resistance to Big Tech Become Democratic Backsliding? The Brazilian Supreme Court and X (2024–2025)

Leandro Vusberg Coelho*

Abstract

In August 2024, a single justice of the Brazilian Supreme Court suspended X nationwide and fined citizens who circumvented the block; in 2025, the Court rewrote platform liability while Congress stood still. This brief asks whether such judicial resistance to a global platform can itself become democratic backsliding. Applying three markers — indivisibility of means, irreversibility towards non-parties, substitution of the legislator — it finds that the Brazilian path meets all three, whereas the EU Digital Services Act kept functions divided at the price of speed. It closes with recommendations for courts, national legislators and the European Commission.

Keywords: democratic backsliding; judicial review; platform regulation; Digital Services Act; Brazilian Supreme Court.

Introduction

On 30 August 2024, a single justice of the Federal Supreme Court (STF), in a single-judge ruling, immediately suspended, in full and in its entirety, the social media platform X in Brazil, ordered the regulatory agency to implement the measure within 24 hours, and imposed a daily fine of R$50,000 (approximately €8,000) on any person, whether a natural or legal person, who circumvented the block using a VPN[1]. Four days later, the First Chamber — comprising five justices — upheld the single-judge decision[2]. The platform was reinstated only on 8 October, after paying R$28.6 million (approximately €4.7 million) in penalty fines, appointing a legal representative in Brazil, and freezing the accounts specified in the rulings that had previously been disobeyed[3].

The question is not whether the Court was right — the threat was real, and the National Congress had not legislated on the matter — but whether the method, assessed against three indicators drawn from case law and legal doctrine on the exercise of judicial power, reveals the pathologies of democratic backsliding. The proposed indicators are: indivisibility of functions (a single body investigates, decides, and enforces), irreversibility in relation to non-parties, and substitution of the legislature. The answer is yes, subject to conditions — not because of the target, but because of the method. Two contrasts test this answer: the European

[1] STF, Pet 12.404/DF, rapporteur Justice Alexandre de Moraes, decision of 30 Aug. 2024, pp. 49–50. Euro equivalents at the ECB euro foreign exchange reference rates of 30 Aug. 2024 (BRL 6.2155) and 8 Oct. 2024 (BRL 6.0528).

[2] STF, Pet 12.404 Ref/DF, First Panel, 3 Sept. 2024, syllabus, items 8–11.

[3] STF, Pet 12.404/DF, decision of 8 Oct. 2024, pp. 6–8.

approach to the same platform under the Digital Services Act (DSA) shows the cost of dividing these functions; the US reaction in 2025 shows the cost of concentrating them.

Main Body

1. Militancy from within

'Militant' takes on the meaning given by Loewenstein: a democracy that recognises that its own legality is the gateway through which the enemy enters and, in order to survive, accepts the concentration of powers and the temporary suspension of rights[4]. His criticism, however, is directed at the Weimar courts, which were neutral due to their legalistic blindness in the face of fascism; the solution lies with the legislature; judges are required to be loyal to the democratic order, and the courts, he warned, settle political conflicts using legal instruments[5]. It was post-war constitutionalism that entrusted the constitutional courts with the task of defending democracy; Issacharoff, who advocates this transfer, sets out the condition: the power to annul lies beyond the reach of the political actors concerned, and the court exercises it as an arbiter of a request from the government or the Public Prosecutor's Office, not on its own initiative[6].

In the case of Brazil, militancy was judicial in nature and self-proclaimed. In 2019, the Court launched an inquiry, on its own initiative, into attacks against itself[7]; in 2020, it ruled that the procedure adopted for initiating proceedings was constitutional, "in the specific and particular factual circumstances exclusively involved in this act", as it constitutes "an instrument for the defence of the Constitution itself and, whilst a judge does not ordinarily have this function, institutional defence requires it where there has been inaction or omission on the part of the supervisory bodies"[8]. Legal scholars have already coined terms for this arrangement: 'supremocracy' — 'the expansion of the Supreme Court's authority at the expense of the other branches of government' — and 'ministrocracy' — 'a justice decides individually, and a justice decides individually whether and when there may be a collegial decision regarding his or her individual decision'[9].

2. Three indicators of backsliding, applied to a court

Bermeo defines 'backsliding' as the state-led weakening or dismantling of any institution that underpins an existing democracy, and warns that various state actors can initiate it; the process may be abrupt or gradual, overt or cloaked in

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[4] K. LOEWENSTEIN, Militant Democracy and Fundamental Rights, I, in: *American Political Science Review* 31 (1937), pp. 417–432, at 424, 432.

[5] LOEWENSTEIN (n. 4), at 424, 431–432; K. LOEWENSTEIN, Militant Democracy and Fundamental Rights, II, in: *American Political Science Review* 31 (1937), pp. 638–658, at 652, 654–655.

[6] S. ISSACHAROFF, *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, Cambridge 2015, ch. 2 (≈ pp. 43–46) and ch. 5 (≈ pp. 103–106).

[7] STF, Inq 4.781/DF (the "Fake News" inquiry), opened by the then President of the Court by Portaria GP no. 69 of 14 March 2019, under Art. 43 of the Court's Internal Rules.

[8] STF, ADPF 572/DF, Plenary, rapporteur Justice Edson Fachin, 18 June 2020, syllabus, item 2; rapporteur's opinion, p. 34 (our translation).

[9] O. VILHENA VIEIRA, Supremocracia, in: *Revista Direito GV* 4 (2008), pp. 441–464, at 445; D. WERNECK ARGUELHES / L. MOLHANO RIBEIRO, Ministrocracia: o Supremo Tribunal individual e o processo democrático brasileiro, in: *Novos Estudos CEBRAP* 37 (2018), pp. 13–32, at 24–25 (our translation).

legality[10]. Landau and Dixon show that cuts can drive this erosion. The Brazilian case is not, by definition, abusive judicial review — there is no intention to undermine the very foundations of democracy — but its context — courts acting as agents of erosion — allows us to assess the approach taken by an independent court that acted to protect democracy[11].

Indivisibility of functions. Petition 12.404 is linked to Inquiry 4.874/DF, which was initiated by a decision of the rapporteur himself when he dismissed Inquiry 4.828/DF (against the request of the Prosecutor General's Office) and assigned, on the grounds of precaution and evidential connection, to Inquiry 4.781/DF — the inquiry which the Court opened of its own motion in 2019 and declared constitutional in ADPF 572; in that case, the same body that ordered the investigation ruled (sitting alone) and enforced its decision (by issuing direct orders to the agency within 24 hours), whilst the collegial decision came later, when the suspension was already in force[12]. It is the role which, according to the Court itself in 2020, a judge does not ordinarily perform and which is only justified by the omission of others — and this is the condition set out by Issacharoff. Arguelhes and Ribeiro described the mechanism prior to the case: injunctions granted by a single judge "can be used in the opposite way, to neutralise the control exercised by the plenary", in a "loop" that produces "individual judicial review", which is "doubly counter-majoritarian — against the external legislative majority and against the internal judicial majority"[13]. Vieira had concluded that "the Court's authority cannot be exercised in a piecemeal manner by each of its Justices"[14].

Irreversibility in relation to non-parties. The fine imposed on "natural and legal persons" who used a VPN affected citizens who were not parties to any legal proceedings, and the Court upheld it[15]. On the same day, the rapporteur himself applied the criteria of reversibility and third parties, suspending the orders directed at app stores and service providers in order to avoid "unnecessary and reversible disruption to third-party companies"[16] — but only for businesses; for users, the fine remained in place. The European Court of Human Rights (ECtHR), in two cases concerning blanket internet blocks in Turkey, found a violation of Article 10 of the Convention due to the "significant collateral effect" on users who were "not directly targeted" and required an assessment of whether "a less far-reaching measure" was possible[17]. The asymmetry — reversibility granted to companies, denied to citizens — is the crux of the matter.

Substitution of the legislature. In June 2025, with the ruling revised on 17 June 2026, the Plenary Session of the STF declared Article 19 of the Brazilian Civil Rights Framework for the Internet

[10] N. BERMEO, On Democratic Backsliding, in: *Journal of Democracy* 27 (2016), pp. 5–19, at 5–6.
[11] D. LANDAU / R. DIXON, Abusive Judicial Review: Courts Against Democracy, in: *UC Davis Law Review* 53 (2020), pp. 1313–1387, at 1321–1322, 1326, 1332.
[12] STF, Inq 4.828/DF, rapporteur Justice Alexandre de Moraes, decision of 1 July 2021, operative part, items 3–4; Prosecutor General's Office, submission of 16 June 2021, paras 7, 25–26; Pet 12.404 (n. 1), p. 49; Pet 12.404 Ref (n. 2), item 11; ADPF 572 (n. 8), p. 34; ISSACHAROFF (n. 6), ch. 5.
[13] WERNECK ARGUELHES / MOLHANO RIBEIRO (n. 9), at 25, 28–29 (our translation).
[14] VILHENA VIEIRA (n. 9), at 457–458 (our translation).
[15] Pet 12.404 (n. 1), p. 50; Pet 12.404 Ref (n. 2), item 11(B); STF, Pet 12.404/DF, second decision of 30 Aug. 2024.
[16] Pet 12.404, second decision (n. 15) (our translation).
[17] *Ahmet Yıldırım v Turkey*, App no 3111/10, ECtHR, 18 Dec. 2012, paras 52, 54, 64, 66–68; *Cengiz and Others v Turkey*, App nos 48226/10 and 14027/11, ECtHR, 1 Dec. 2015, paras 54–56, 62–65.

to be partially and progressively unconstitutional, recognised a state of partial omission, established a valid regulatory framework pending the enactment of new legislation, imposed on platforms duties of self-regulation and the requirement to appoint a legal representative with 'full powers' in the country, and called upon the National Congress to enact legislation on the matter[18]. The mandatory legal representative is precisely what Pet 12.404 required of X in order for the suspension to be lifted; thus, this requirement has now become the general rule. Landau and Dixon identify the mechanism — whereby the court assumes legislative powers by invoking the legislature's 'omission' — in the Venezuelan court; the parallel lies in the mechanism and the basis, not in the outcome or the intention[19].

3. The European path and its cost

On 18 December 2023, the European Commission launched four proceedings under the DSA against the same platform (X): one on illegal content and systemic risks, and three on transparency — dark patterns, the ad repository, and access for researchers[20]. On 5 December 2025, the Commission imposed fines of €45 million, €35 million and €40 million respectively on the three breaches of transparency rules; the proceedings concerning content remained open and were extended in January 2026; in July 2026, the Commission accepted X's action plan, which the European Board for Digital Services – consulted in June – had deemed insufficient, but made its acceptance conditional upon clarification of implementation details, an independent external audit and six months of enhanced supervision[21]. In 39 days, the Brazilian Court achieved what Brussels, in almost three years, has still not achieved: full compliance and a ruling on the substance of the case.

The difference lies in the architecture. The DSA divides up what has been centralised in Brazil. The standard is set by the federal legislature; supervision of large platforms is shared between the national coordinator of the country of establishment and the European Commission, which has exclusive competence only over the specific obligations of these platforms and concurrent competence over the others, with the expectation that it will act 'only when things get really serious'[22]; enforcement proceedings against a platform follow a formal procedure, with fines and interim measures provided for by law, and the final decision is subject to appeal to the Court of Justice of the European Union (CJEU), whilst private enforcement before national courts remains unaffected[23]. Husovec describes the result as "a system of checks and balances between state, providers, and individuals […] Everyone keeps everyone else in check", and warns that "simply swinging the pendulum of power from companies back to the

[18] Law no. 12.965 of 23 April 2014 (Marco Civil da Internet), Art. 19; STF, RE 1.037.396 ED/SP (Tema 987), Plenary, 17 June 2026, thesis, items 1, 2, 7, 8, 10, 12, 14, in: *Informativo STF* 1222 (30 June 2026), pp. 6–9; merits: RE 1.037.396/SP, 26 June 2025 (our translation).

[19] LANDAU / DIXON (n. 11), at 1368–1370 (TSJ, Decision 156/2017); VILHENA VIEIRA (n. 9), at 445.

[20] Commission Decision C(2023) 9137 final of 18 Dec. 2023 (Cases DSA.100100–100103).

[21] Commission Decision C(2025) 8630 final of 5 Dec. 2025, Arts 1–4 and para 644; Commission, press release IP/26/203, 26 Jan. 2026; Commission, Commission accepts X's action plan to comply with Digital Services Act, 16 July 2026.

[22] Regulation (EU) 2022/2065 (DSA), Art. 56(2)–(3); M. HUSOVEC, *Principles of the Digital Services Act*, Oxford 2024, pp. 420–423.

[23] DSA, Arts 66, 70, 73–74; TFEU, Art. 263; HUSOVEC (n. 22), p. 419.

state is no solution either"[24]. But name its price: "too few Commission officials chasing down too many problems" and "risks of politicisation of the oversight"[25]. The European model is divisible and reversible because it is slow and negotiation-based. This brief sets out the trade-off without sugar-coating it.

4. The external cost of concentration

On 30 July 2025, the US Executive Branch issued two acts. The first, addressed to the "Government of Brazil", declared a national emergency and imposed an additional 40 per cent *ad valorem* tariff on Brazilian goods imported into the United States, specifically naming the rapporteur of Pet 12.404 and describing the orders, fines and suspension imposed on X as censorship[26]. The second designated the rapporteur individually under the Global Magnitsky Act; in September, it extended the designations to his wife and the family holding company; in December, it revoked all the designations[27].

This brief does not endorse either narrative: unilateral sanctions against a judge for judicial decisions are, in themselves, an attack on judicial independence, and Landau and Dixon reserve a tough international response for judges who intentionally undermine the democratic order—which is not the case[28]. These actions reveal a structural problem: it is difficult to impose sanctions on a collegial body; on a judge, however, it is not. When another State attributes to the State as a whole the actions of a single body, internal concentration becomes an external liability to be borne by the country. The sanctions affected third parties — family and business —, the same flaw as in the second case.

Conclusion(s)

Issacharoff is right to argue that the courts have emerged as 'the stopgap protections' of democracy when the legislature fails[29]. But the condition it imposes — the power to suppress, without the involvement of those concerned, and subject to procedural controls — does not apply when the body itself requests, decides and enforces. The standard is not that 'courts should not take on platforms', but rather: the defence of democracy against private power becomes a step backwards when the measure is indivisible, irreversible for those who cannot appeal, and takes the place of the legislature — valid 'until new legislation is enacted', and nothing is enacted. The Court itself formulated the test on two occasions: in 2020, when it stated that investigating is not an ordinary function of a judge; and in 2024, when it suspended orders on the grounds of their "unnecessary and reversible disruption" to third parties[30].

This framework gives rise to measures affecting three categories of recipients. To the courts: measures against platforms that affect non-parties require a collegial decision in advance, not an *ex post* review; any measure affecting users must be separable from that affecting the platform and must include a time limit and a review clause; the standard of 'unnecessary and reversible disruption' must apply to citizens; regimes

[24] HUSOVEC (n. 22), pp. 11–12.
[25] HUSOVEC (n. 22), pp. 425, 442.
[26] Executive Order 14323 of 30 July 2025, 90 Fed. Reg. 37739, ss. 1–2.
[27] OFAC, 90 Fed. Reg. 36282 (1 Aug. 2025); 90 Fed. Reg. 46304 (25 Sept. 2025); 90 Fed. Reg. 59942–59943 (22 Dec. 2025); Department of State, 91 Fed. Reg. 14617 (25 Mar. 2026).
[28] LANDAU / DIXON (n. 11), at 1326, 1368–1369.
[29] ISSACHAROFF (n. 6), ch. 11.
[30] ADPF 572 (n. 8), p. 33; Pet 12.404, second decision (n. 15).

'pending the enactment of legislation' must have an expiry date. To national legislators: legislate on the procedural framework — notification channels, time limits, a statutory legal representative, an independent administrative authority subject to judicial oversight — because "legislatures must control the 'beast' that they have created"[31], and to specify who may order blanket blocking and under what oversight. To the European Commission: to rule on the content case against X, to demonstrate that the split model works in substance; to use the interim measures under Article 70 of the DSA in urgent cases; to publish prioritisation criteria and to move towards the independence of the supervisory authority[32]; and to propose this procedural model, in cooperation with democracies outside the European Union, as an alternative to the solitary judicial route.

In conclusion, if the digital public sphere rewards the body that acts most swiftly and independently, the constitutional framework for the coming decade must reward the opposite. When it comes to Big Tech, the temptation to concentrate power is strongest precisely where the threat is most real. The test lies in the separation of powers and the reversibility of effects, not in the nobility of the end.

* Attorney; I.I.LL.M. candidate in European Public Law, EPLO/ELGU/AEPL; Master's candidate in Constitutional Law, IDP/Brazil.

[31] HUSOVEC (n. 22), p. 14.

[32] DSA, Art. 70; HUSOVEC (n. 22), pp. 423, 425.