

# Contemporary Legal History and Ideology: The Search for an Effective Way to Protect Democracy after the Attempted Coup d'état in Brazil

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## Abstract

There is no doubt about the global erosion of liberal democracy, which has been under attack from severe authoritarian practices, including coup d'état attempts, as happened recently in the United States and Brazil. In this context, the present paper aims to investigate the following question: how must a constitution be interpreted in order to be an effective tool against authoritarianism? The quest for an effective way to protect democracy passes through a methodology that takes very seriously concerns over ideology, a theme rarely discussed by liberal constitutionalism, but one that has an enormous impact on the actual practices of officials like Donald Trump or Jair Bolsonaro. The methodology under discussion here considers contemporary legal historical inquiry as it relates to the continuities of military dictatorship and—now—takes into account the context of yet another coup d'état in Brazil. In conclusion, it is argued that an effective protection of democracy demands that legality must be used to identify and overcome unconstitutional ideologies.

## Keywords

Constitutional Law, Ideology, Coup d'état

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## 1. Introduction

There is no doubt about the global erosion of liberal democracy, which has been under attack from severe authoritarian practices, including coup d'état attempts, as happened recently in the United States and Brazil. Constitutional theory offers

a rich grammar and vocabulary for defining this phenomenon: constitutional erosion (Meyer, 2021), constitutional hardball (Tushnet, 2004), stealth authoritarianism (Varol, 2015), autocratic legalism (Scheppele, 2018), democratic decay (Daly, 2019; Daly, 2020a; Daly, 2020b), and abusive constitutionalism (Landau, 2013) together make for a simple list of terms that aim to explain how law and, especially, constitutions may be used for authoritarian ends. However, research in these areas has not paid sufficient attention to the relationship between ideology and the role that a constitution and its history may play with regard to overcoming a set of ideas used to justify authoritarian practices such as a coup d'état.

In this context, the present paper aims to investigate the following question: how must a constitution be interpreted in order to be an effective tool against authoritarianism? The quest for an effective way to protect democracy passes through a methodology that takes very seriously concerns over ideology, a theme rarely discussed by liberal constitutionalism<sup>1</sup>, but one that has an enormous impact on the actual practices of officials like Donald Trump or Jair Bolsonaro. A careful consideration of ideology, on the other hand, must take into account the constitution itself, particularly with regard to comprehending its history and how actual officials operate within a given state. An authoritarian past that includes, for instance, a military dictatorship that was never held accountable for its crimes against humanity, as happened in Brazil, represents a fundamental point of consideration for new ways of thinking about constitutional theory.

The methodology under discussion here considers contemporary legal historical inquiry as it relates to the continuities of military dictatorship and—now—takes into account the context of yet another coup d'état in Brazil. As I will explain in what follows, the difficulties concerning this kind of approach, which is very near to a present problem, may be faced by comprehending that it is possible to find secure sources for research, so long as the researcher does not try to describe a whole structure or scenario. In the rest of this paper, I describe a case concerning the commemoration of the bicentenary of Brazil's independence in Rio de Janeiro that illustrates both the argument about research sources and the material aspects of an ideology that is apparently unconstitutional.

In this paper, the question raised above is analyzed from both a) a post-authoritarian perspective—i.e., in a scenario in which the authoritarianism was defeated (at least in electoral terms), as in the case of the US's 2020 election or in Brazil's 2022 election and b) from the perspective of an ongoing illiberal government. In the first scenario, some kind of transitional justice is needed, and its tasks must be rethought, especially those concerning institutional reforms to the judicial system, in cases where the ideology of the previous regime strongly persists in that system. In the second scenario, institutional changes are harder to make, but the consti-

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<sup>1</sup>For example, consider the case of the “effective doctrine,” one of the most influential constitutional theories in Brazil, developed by constitutional scholar and Supreme Court Justice Luís Roberto Barroso. While advocating for judicial interpretation to protect the constitution effectively (which may be correct to some extent), Barroso conceals his neoliberal approach in several cases, avoiding an open discussion about an ideology that conflicts with the social rights enshrined in the constitution. See: Bustamante, 2021.

tution still has a role to play if jurists concentrate their constitutional argumentation around ideology.

As part of the search for an effective way to protect democracies and prevent coups d'état, this paper tackles three topics. First, the possibility of contemporary legal history research will be discussed in the context of the persistent Brazilian authoritarianism. In the second, the institutional character of the law is presented, with an investigation of the importance of legal history for identifying the material aspects of an ideology. This part is important in developing an objective argument for the proposed judicial review presented in the third topic, which aims to scrutinize the limits of judicial review theories when dealing with ideologies. At this moment, a judicial ideology will be analyzed in the case mentioned before.

## 2. Contemporary Legal History in Times of Crises

Researching a given object in the heat of the moment is a dangerous task for the researcher. There are warnings, for instance, offered to young legal history researchers that advise them to “hold off from the present fires, so that the smoke of enthusiasm does not blind you and the proximity to the heat does not reduce the sensitivity of the hands that handle sources.” (Seelaender, 2017: p. 22) The greater risk, however, is the loss of scientific objectivity, which can transform the research into pure ideology, as occurs when political and party interests are transferred into the allegedly methodological arena. In that sense, one of the strongest charges that may be brought against research is to classify it as “militant,” which suggests the negation of reality and demands, instead, that the social scientist move away from that risk in order to seek “the predominance of the ideology of scientific neutrality.” (Seelaender, 2017: p. 22)

Another risk with regard to research is related to anachronism, which may also be found amidst contemporary historical studies and indicates the undue use of ideas or facts from the past to explain the present. Arno Wehling has given one such example of anachronism: would it be possible to understand the inflation process during the Weimar Republic via the inflation in western Europe after 1530? Comprehending the relevant difference between the two societies—the latter based on an agrarian economy, in contraposition to the former, which emerged in the context of 19<sup>th</sup> century industrial—one must recognize the error in such a comparative approach. (Wehling, 2021) This type of anachronism, however, is not present among contemporary history's attempts to deal with Brazil's tendency toward military coups d'état.

One must say, in this sense, that the present times are very risky and that avoiding any kind of bold approach<sup>2</sup> is not a valid option. Research that embraces the comfort of eschewing certain contentious themes—such as the origins of the gen-

<sup>2</sup>A bold approach can be understood as one that embraces the virtue of courage in constitutional adjudication. In times of crisis, when the very existence of a constitution is at stake, jurists must engage in the struggle to protect that fundamental source of law. Avoiding this task constitutes a betrayal of the most fundamental constitutional values. Only with a genuine commitment to the constitution can an authoritarian ideology be confronted and properly addressed through legal means.

ocide of indigenous people via the process of colonization and its suppression of indigenous culture<sup>3</sup> or, more recently, the coup d'état attempt—deserves criticism because, in those cases, it is clinging to temporal distance resembles a serious negation of reality and thus consists of something that approaches collaborationism.

That is the context in which the present research analyzes the role of the legal system in holding those who tried to effectuate a coup d'état in Brazil legally accountable on January 8, 2023. The general purpose is not limited to an analysis of Brazil's supreme court, which has become the main court responsible within the penal process for adjudicating crimes against democracy. Rather, I suggest that the extent of the coup d'état attempt represents a diffuse process: the events that took place in Brasilia were previously replicated in several cities in the country in a way very similar to the phenomenon that took place in front of the army's headquarters.

It turns out that if Brazil's supreme court has not been treating Brasilia's events as exclusive to Brasilia, other officials within the judiciary branch have not adopted a similar standard for confronting the diffuse aspects of the coup d'état. This suspicion arises from the lack of police operations and even—as concerns the work of the Federal Prosecution Office and Federal Justice—the absence of effective class actions and penal cases. In this scenario, it is important to ask: how are federal prosecutors and federal judges operating against any practices similar to the events that occurred in Brasilia? This question is important and very contemporary, thus raising those aforementioned concerns about the limits of this kind of near-contemporaneous research in legal history.

Before addressing that question, it is important to develop a reliable way to analyze it, that is, a way that maintains the previously mentioned “scientific neutrality ideology.” Such analysis is possible through a methodology based on documentary sources, which must be read through the lens of Brazilian legal and political thought. In cases that concern democracy itself—which constitutes the basis for that peaceful life in common at stake in Brazil's 1988 constitution—it is necessary to take into account the complexity of reality and to develop a kind of study that aims to guarantee accountability among those who attacked Brazil's democratic regime. In doing this task, the work of a young legal historian researcher will, at some moments, resemble the work of a constitutionalist or a sociologist, but it will also keep its necessary autonomy to the extent that continuities with the 1964 military dictatorship are pursued.

Pursuing this continuity is possible if the research questions are analyzed through a serious consideration of the Brazilian history of constitutionalism that takes as its point of departure the persistent “peripheral style” denounced by Christian Lynch. This phenomenon is well demonstrated when, for example, constitutional ideas

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<sup>3</sup>Gustavo César Machado Cabral, for instance, has described how the Jesuits had contributed to the inclusion of indigenous people during the process of colonization, seeking to preserve the new order that came from Portugal through religion, which, at that time, was not separate from the law. That contribution, among several other research perspectives, raises questions about how the loss of indigenous identity contributed to the violent process of genocide, which remains one of the main problems of contemporary Brazilian authoritarianism. (Cabral, 2019b)

from the United States or Germany are used without a due accommodation to Brazilian reality—as jurists like Luis Roberto Barroso or Gilmar Mendes often do (Lynch, 2024: p. 68). It is therefore important to comprehend Brazilian authoritarian thought and the role of authors such as Miguel Reale (Reale, 1965; Cabral, 2014), Francisco Campos (Campos, 2001), or more currently, Ives Gandra da Silva Martins (Martins, 2011). We may read them within the context of possible collaborationism by judicial officials with the attacks on democracy. This practice is not new, as has been pointed out by Anthony Pereira, who describes the function of military justice during the dictatorship, which has since been renewed to the extent that such collaborationism now includes the federal justice system, as well.

Sources for contemporary research must be analyzed in a very cautious way because the events they document are very dynamic, and the researcher will not yet have the whole picture. However, it is still possible to study these sources if the objective is narrowed by the researcher by examining small parts rather than the whole structure. Let me now give an example related to the case studied below.

On the eve of the commemoration of the bicentenary of Brazil's independence, on September 7, 2022, there was some concern that the celebration, which took place in Rio de Janeiro, would be appropriated by the former President of the Republic, Jair Bolsonaro, in a political, partisan way. That worry was justified, as it turned out because a rally had already been organized by Bolsonaro's supporters to take place at the same site, on Atlantic Avenue. That year, Brazil also had presidential elections, and the Federal Prosecution Office had begun an investigation into the concurrence of the rally and bicentenary events because the risk of confusing the two events was real. The Office ultimately decided to file a class action suit against the Federal Union. (Federal Prosecution Office, 2022; Federal Prosecution Office, 2023) As will be explained below, the federal judge of the case terminated the process in a very quick way, denying that there was any risk to democracy in the military politization perpetrated by Bolsonaro. (Federal Prosecution Office, 2023)

If, while analyzing that case, the researcher tries to reach an answer about the judicial branch as a whole, seeking a general feature concerning the protection of democracy, then he will fail because the source in question is restricted to a decision made at the beginning of the adjudication process. That is not the goal of this research, however, which aims instead to analyze, precisely, this specific part of a broader series of events in order to question whether insufficient protection of democracy may be related to the judge's development of an authoritarian ideology. For that more narrow purpose, the sources used are relevant and correct and are related to the work already done by the federal prosecutors and the federal judge.

As I noted earlier, it is important to be familiar with the Brazilian jurists who have contributed to the development of the nation's constitutionalism since independence. There are several ways of approaching this topic, but it is possible to trace the following criterion in order to evaluate both its ideas and its relationship to judicial behavior: the level of support or resistance proportioned to the military

dictatorship and its legacies. To a jurist who lived practically his whole life under the validity of the 1988 Constitution, this exercise of intolerance toward those who joined the coup d'état seems reasonable. This argument does not mean that collaborators compose a homogeneous group or that they may not, eventually, reconsider their previous positions from the past or begin to criticize the period they had previously praised.<sup>4</sup> Nevertheless, this proposed criterion remains important because it creates a presumption about the necessity of promoting the radical criticism of any thinker or official, especially judicial ones, who did not, publicly and clearly, oppose the violence against João Goulart's presidency or the January 2023 coup d'état attempt.

Clearly, it is not the task of legal history to solve present-day problems, but eventually, this kind of research may find answers to some current questions (Stolleis, 2020: p. 44). That is the aim of the methodology developed in this research, meaning that, contingently, it may also be useful in solving a serious problem that, being historical, is also necessarily contemporary.

### 3. The Institutional Character of Law and the Material Aspects of Ideology

The complex character of law is emphasized by legal historians like António Manuel Hespanha (Hespanha, 1978), who argue that law has an institutional feature and thus claim the necessity for real analyses of the facts, thereby demonstrating the insufficiency of a mere ideal aspect of legality. One dimension of the reality of law includes the study of political ideologies and how they organize the behavior of those who use law as a tool for argumentation.

It is important, firstly, to understand several possible meanings of "ideology." In a negative way, Karl Marx (Marx & Engels, 1974) argued that ideology includes the creation of a "false conscience," in the sense that the political group in power (located in the "superstructure") develops a series of strategies to maintain domination. The common people are subject to that domination, living under the illusion of freedom as determined by the force of the capital (situated in the "infrastructure").

On the other hand, several political thinkers claim that "ideology" may be considered in a neutral way, meaning that it is possible for "good" or "bad" ideologies to exist. Freedden (Freedden, Sargent, & Stears, 2013) for instance, has developed a more virtuous conception of ideology, arguing that is important to understand ideologies as tools for understanding the political reality because, in a social context, social groups and officials act from an ideological basis. In this sense, the primary question is to identify the main aspects of a particular ideology, recogniz-

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<sup>4</sup>One must notice, for instance, the example of Afonso Arinos de Melo Franco, a liberal constitutional thinker who nevertheless supported the military coup and, later, became a critic of the authoritarian regime. (Ricken, 2022: pp. 37-38) If a conservative jurist opposes the politicization of the military, acknowledging that the Armed Forces perpetrated a coup d'état in Brazil in 1964 and that at least part of them attempted the same on January 8, this is strong evidence that they are not aligned with an authoritarian ideology. Again, it is important to emphasize that the argument developed in this paper is contextual, as it depends on the legal history of a given constitution and state.

ing that they may be used in either a virtuous or vicious way.

Authoritarians like Jair Bolsonaro in Brazil clearly use ideology as a tool for domination, creating a false consciousness through the denial of reality. As Brazilian constitutional thinkers Thomas Bustamante and Conrado Hubner Mendes have pointed out, this use of ideology has been in play in cases ranging from the military coup d'état in 1964 to the pandemic in 2020 (Bustamante & Mendes, 2021). In such cases, the negative aspect of ideology remains one of its important components, but Marx's comprehension of ideology as merely a repressive form of domination created by state officials must be criticized, at least in part, because there are other relevant elements of ideology related to its capacity for reproduction not only in the state, but even among other social groups.

In this sense, the negative way of comprehending ideology must be taken very seriously because it may be reproduced in several ideological state apparatuses, as described by the Marxist French philosopher Louis Althusser (Althusser, 2014). For Althusser, ideology is not only about political domination by force, but also exists through the normal function of several institutions, like religion, the education system, culture, and, of course, law (Althusser, 2014: p. 24). According to his thinking, the law has a dual ideological aspect, encompassing both a repressive form of domination and a type of ideological state apparatus that reproduces core aspects of the capitalist system through the functioning of the judicial system. However, the most important lesson from Althusser concerning those apparatuses is related to the methodology needed for discovering how an ideology is practiced. If it is objectively possible to identify those practices, then the law may be used against an authoritarian set of ideas in a more effective way.

How is that possible? It is possible through an analysis of the ideology's material aspects, meaning the rituals and forms of expressions inherent to every ideology that clearly demonstrate its character. For example, a religious person must go to the church or in the province of law: "If she believes in justice, she will unquestioningly submit to the rules of law and, when they are violated, may well protest in the profound indignation of her heart, or even sign petitions, take part in a demonstration, and so on." (Althusser, 2014: p. 185) With that lesson in mind, it is possible to use the history of law to comprehend that some officials' conduct is, in reality, the manifestation of an unconstitutional ideology.

To identify an unconstitutional ideology, the jurist must understand:

- 1) the history of law, particularly the fundamental features of constitutional authoritarianism in a specific state, such as the military dictatorship in Brazil;
- 2) the main characteristics of the set of ideas capable of influencing the public process of collective decision-making, including the adjudication process;
- 3) the constitution and how it may be violated by that ideology. In those cases, constitutional law must be even more cautious.

If a jurist, like a judge, expresses a clear acceptance of authoritarianism, it is not enough to argue for the opposite approach, as if the disagreement were reasonable. Officials who act according to an unconstitutional ideology must be identified, and

if said officials are judges, they must be avoided if an effective protection of democracy is the real goal. This point will be discussed further in the next section.

#### **4. Reasons for Democracy: Using the Constitution against Authoritarian Ideologies in an Effective Way**

Constitutional theory presents a series of important debates concerning the proper way to interpret a constitution. The classic debate between Ronald Dworkin and Cass Sunstein, for instance, shows how minimalism (Sunstein, 1995; Sunstein, 2000) and the theory of integrity (Dworkin, 1896; Dworkin, 1997), despite their differences, may converge when an authoritarian ideology like Nazism is in place. But these kinds of theories could not prevent jurists, including judges, from using the law itself for authoritarian techniques. Why? Because the real conduct of authorities, including the material aspects of their ideologies, as analyzed in the previous topic, was not seriously taken into account. Thus, this second topic describes how constitutional law may be used to access the deep features of ideology, making possible a more effective legal interpretation to protect democracy.

To facilitate comprehension of this argument, let's imagine a case concerning the limits of the freedom of speech and expression of former Brazilian President Jair Bolsonaro, who regularly praises the 1964 Brazilian military coup d'état. This conduct may endanger the whole political system, as it denies the crimes against humanity committed by the military officials at that time. How, then, must a judge argue in a case like this? As explained before, minimalism and law as integrity may converge, asserting that a broad theory of democracy must be developed against such practices, one that takes Brazilian constitutional history into account. That is important, but let's imagine that a given judge has no intention of doing so because, sadly, he also praises the military dictatorship, having no true commitment to democracy. In this scenario, a real one in Brazil and, to some extent, in the United States, as well, these theories fail to achieve proper efficacy with regard to the protection of democracy because they can't recognize how ideology really works.

Achieving this understanding is important, and the interpreter must uncover the material aspects of any given authoritarian ideology. Those aspects may be discovered through real analyses of the judge's conduct, concerning, for instance, a) the judge's use of time when working on the case, including asking whether she is procrastinating with regard to the adjudication of a core case for democracy; b) the acceptance of a coup d'état attempt as an act of freedom of expression; c) denying the crimes against humanity committed under military dictatorships; d) an incoherent use of the law, such as protecting friends and attacking enemies in Carl Schmitt's dualistic sense (Schmitt, 2007); or e) the acceptance of state violence, especially that committed by law enforcement officers against poor people, a reality even more dramatic in Brazil, where public security is militarized, as it was during the dictatorship.

These are only some of the material aspects of authoritarian ideologies that, in

the end, tend toward accepting a coup d'état. In that scenario, it is still important to exercise a strong judicial review in the form defended by Dworkin, thereby creating a deeply theorized decision that is capable of overcoming, in the legal field, the coup d'état ideology. Even Jeremy Waldron, a critic of constitutional adjudication, may accept judicial review in such a scenario, where there is no common ground for reasonable arguing and where fundamental rights are not protected in good faith by at least some part of the judicial system (Waldron, 2016). Nevertheless, as explained previously, this step is not enough.

When practices like those outlined above are present, constitutional interpretation must also be fortified because arguments alone will not work. Some kind of strategy must be developed to avoid authoritarian judges, including a) declarations of partiality, where a fair trial is violated; b) disciplinary proceedings; c) impeachment. Democratic jurists, therefore, must be prepared to identify those officials who will uphold authoritarianism and, even more importantly, to create the conditions necessary to achieve their removal. In order for that task to succeed, one must seek democratic cooperation among institutions that have not been entirely dominated by the unconstitutional ideology. Independent media may be an ally to, or at least publicize, the material aspects of that ideology, and the political branch may pressure judicial system leadership into seeking due punishment for the offending agents.

This set of considerations is consistent with any new tasks that transitional justice must pursue to achieve its goals<sup>5</sup>. Such efforts are situated in the field of institutional reforms needed to protect democracy, but have the advantage of requiring only simple means of implementation because they require only one thing of democrats: the courage to use the current legal instruments essential for constitutional vitality.

### **The Commemoration of the Bicentenary of Brazil's Independence in Rio de Janeiro and Judicial Ideology**

As noted earlier, the case of the commemoration of the bicentenary of Brazil's independence shows us a huge risk related to military politicization, which was further empowered by the political climate surrounding the 2022 presidential elections. In this section, the legal arguments and the procedural behavior of the federal judge are analyzed through the lens of ideology and its material aspects.

In order to properly understand judicial conduct, including legal arguments and how and when procedural acts are adopted, it is necessary to know that the Federal Prosecution Office ultimately required that the Federal Union be convicted and obliged to: a) make a public act of apology, recognizing its error in promoting military politicization; b) begin an administrative process to investigate the facts and, eventually, apply due sanctions on the militaries; c) create norms regulating

<sup>5</sup>For example, in Brazil, the Superior Electoral Court has attempted to use the law to confront the ideology behind the coup d'état when it declared Jair Bolsonaro ineligible. In that case, the Court developed a broad constitutional theory against authoritarianism, demonstrating the connection between fake news targeting the electoral system and the crimes against democracy witnessed on January 8 in Brasília.

the participation of militaries in acts such as that which took place during the bicentennial and promoting and improving military education on human rights (Federal Prosecution Office, 2023). However, after analyzing these requests, a federal judge, without even notifying the Federal Union to exercise its defense, terminated the process in just 10 days,<sup>6</sup> arguing that: a) it was impossible to determine the nature of a public apology because that demands regret and no military was directly charged; b) besides, such an act could “wake political rivalry, with unpredictable outcomes” (Federal Prosecution Office, 2023); c) the costs necessary to make effective the ruling were not justified; d) there was no need to begin an administrative process, because the Federal Prosecution Office was already acting; e) the separation of powers forbids a judicial order determining the creation of norms by the executive branch; and f) the need for better military education on human rights in order to prevent politization was a result of a subjective interpretation of the Federal Prosecution Office, which could not possibly be judicially controlled (Federal Prosecution Office, 2023).

What do that procedural conduct and those arguments teach us when we read them as material aspects of a *prima facie* undiscovered judicial ideology? Two aspects are important and must be highlighted concerning the judge’s decision: a) the complete disdain for the human rights precedents put forth by the Interamerican Court of Human Rights and discussed by the Federal Prosecution Office in its response to the case and b) the use of time in the process and the particular moment at which the sentence came.

None of the Interamerican Court of Human Rights arguments presented by the Federal Prosecution Office in the Gomes Lund case were taken seriously by the judge, who deliberately ignored that Court’s determinations concerning the need for a public act of apology. There is judicial bad faith<sup>7</sup> here because that precedent is explicitly cited in the case, and it is qualified as an international obligation for Brazil, according to Article 68 of the Interamerican Convention of Human Rights. That bad faith was demonstrated through the strategic and authoritarian use of processual law, thereby displaying the judge’s will to choose only some of the party’s arguments to deliberate. That practice occurred because not following the precedent in a direct manner would usually demand some sort of argumentation, which is a harder task than just ignoring it. According to Article 489, paragraph 10., IV of the Brazilian processual code, such judicial behavior is capable of nullifying the sentence.

Yet there is even more judicial disdain concerning the international laws on human rights. As mentioned before, the judge argued that the request related to the necessity of a better education in the Armed Forces was a kind of “invention”

<sup>6</sup>The class action was distributed in 02/24/2023 in 15:52:26 and the sentence was published in 03/07/2023 in 14:22:24, according to the process report. (Federal Prosecution Office, 2023)

<sup>7</sup>Judicial abuse occurs through the use of false argumentation and composes something like the “constitutional markers of authoritarianism.” (Tóth, 2023) Francisco Tarcísio Rocha Gomes Júnior also shows how “abusive constitutional borrowing,” meaning the appropriation of democratic theories for authoritarian ends, compromises law by demanding some kind of “anti-abusive” interpretation in order to identify those practices in judicial review. (Gomes Júnior, 2023: pp. 6-7)

created by the Federal Prosecution Office. It turns out that, in the Gomes Lund case, one of the orders from the Interamerican Court of Human Rights was specifically related to the improvement of human rights education in military formations as a way to prevent authoritarianism. (*International Court of Human Rights*, 2010: p. 102) That scenario is coherent with Emilio Peluso Neder Meyer's criticism of the role of the judicial branch in Transitional Justice—as happened, for instance, when the Supreme Court of Brazil ruled on the constitutionality of the amnesty law issued during the military dictatorship (*Meyer*, 2021: p. 51). The case under study in this paper indicates, once again, the submission of civil power to military power, which erodes the independence of the judiciary. Indeed, this disrespect toward international precedents was followed by a dangerous argument based on fear, as when the judge suggested that a public act of apology could “wake political rivalry, with unpredictable outcomes,” as explained earlier.

As demonstrated previously, the judge issued a sentence on the case in just ten days without even notifying the Federal Union to exercise defense. The fast judicial action demonstrated a lack of due care for democracy, especially when we consider that judicial argumentation and conduct were made after the January 8 coup d'état attempt. Again, the Federal Prosecution Office argued in a clear way that military politicization and the lack of a proper institutional response to the attempt contributed to the perpetration of crimes against democracy. Yet even in this scenario, where the crisis of Brazilian democracy was very real, the federal judge demonstrated no special interest in even judging the case within a proper timeframe, i.e., after taking the time to analyze more calmly the reasons presented by the parties.

This judicial behavior contrasts starkly with the federal prosecutors' conduct, which unfolded quickly with the aim of more effectively protecting democracy. It is important to note that the class action was presented in the month following the attempted coup d'état, suggesting that inter-institutional authoritarian collaboration could possibly be challenged through constitutional resistance. (*Ferreira*, 2023a; *Ferreira*, 2023b) Nevertheless, it is possible to criticize some aspects of the Federal Prosecution Office's work because a) cases related to the protection of democracy are urgent and demand an immediate judicial response, yet no injunction was requested; b) the prosecutors could more directly make demands from the military and not just acted against the Federal Union; and c) some sort of indemnity related to the collective moral damage was necessary, but no request in this vein was made. These omissions, however, do not resemble the judicial ideology, which was based, as described earlier, on the concrete negation of human rights.

This kind of analysis demands the recognition that jurisprudence and philosophy of law must be in more direct contact with legal history because the manipulation of law to achieve authoritarian ends may not be identified only in a formalistic way, as some positivist theories sustain. The error detaching these disciplines from each other has been recognized by several authors, including Francisco Tarcísio Rocha Gomes Júnior and Gustavo César Machado Cabral, who show that monistic legal theories concentrated in the power of the state as the sole source of law cannot ex-

plain pluralistic realities like those represented in *ius commune*. (Gomes Júnior & Cabral, 2022: p. 131)<sup>8</sup> This issue is also a Brazilian problem because medieval law was brought to the colonies (Cabral, 2019a: pp. 6-7), and even today, several social practices not supported by state legalities nevertheless have a considerable effect on Brazilian reality—such as police violence and others legacies of the military dictatorship, including officials’ acceptance of the coup d’état—as the case previous studied well demonstrates.

It is important to clarify that this paper does not propose extensive legislative reforms to the judicial system. While such reforms may be important, it is possible to change judicial behavior from within, for instance, through disciplinary proceedings. In this context, one must return to the idea of legal courage, as it is the primary virtue needed to initiate this transformation.

To prevent the use of disciplinary power from becoming authoritarian itself, it is crucial to understand the authoritarian aspects of the ideology, as mentioned earlier. If a judge or federal prosecutor, for example, denies the crimes against humanity committed by military officials in Brazil—despite the overwhelming evidence supporting such conduct—punishing those officials is not an authoritarian practice but a justified method of democratic self-defense.

## 5. Conclusion

The present paper has aimed to investigate the possibility of considering authoritarian ideologies as an object for judicial review, taking into account a constitutional theory that may be more effective for protecting democracy. In this scenario, let’s ask again: how must judicial review deal with authoritarianism? According to the arguments developed previously, judicial review must do so in two ways: a) by creating a strong theory capable of overcoming any false arguments maintained by those who want a coup d’état, thus forming an important precedent for democracy and b) by identifying authoritarian officials, from a more important perspective, especially those who work in the judicial system, and then creating the conditions to achieve their removal from the case in question or, ultimately, from the office itself.

Both tasks are hard to accomplish in a reality characterized by deep constitutional erosion, like the situation we have in Brazil or even in the situation in the United States, as the last elections demonstrate very well. However, ideological debate must take place, especially within constitutional law, which is the more political part of the law. As the most famous and influential Brazilian constitutional thinker, Paulo Bonavides (Bonavides, 2001), has pointed out, there is no ideological neutrality concerning a jurist’s work. In times of deep disagreement, this kind of debate is even more important, because it is only possible to overcome authoritarianism by striking at its core ideas.

Contemporary legal history may provide important knowledge concerning pre-

<sup>8</sup>Maksymillian del Mar, in turn, recognizes that this debate is not new, but highlights that the collaboration between the disciplines may be enriched by the historical inquiry to the extent that it has a real object in time and space. (Del Mar, 2018: p. 6)

sent problems, helping, even in a contingent manner, to understand questions such as modern authoritarianism. One of the ways to avoid total confusion among dogmatics, philosophy, and sociology is to develop a local methodology, i.e., interest in a microhistory or in some diffuse or particular aspects of a given phenomenon. This methodology minimizes problems related to source scarcity because the goal is not to achieve a structural description of reality. Additionally, if the contemporary problem is a continuity of a historical problem—like military authoritarianism in Brazil—then contemporary legal history is not only possible but necessary for fully comprehending aspects of jurisprudence or philosophy of law that would otherwise be extremely abstract.

The case studied here demonstrates the material aspects of a judicial ideology indifferent to the need for strong democracy protections. In the context of presuming against those who do not resist the legacies of military dictatorship, it is possible to say that this judicial conduct is dangerous and does demand disciplinary proceedings against the judge in question. It is important to emphasize that such a conclusion is not subjective or based on prejudice, nor does it take into account the judge's personal ideology: it was possible to arrive at this conclusion through an objective inquiry related to the material aspects of ideology. In this vein, external signals and rituals regarding the deliberate omission of human rights and the strategic use of time serve as the sources that ground the main argument for this conclusion.

### Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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