

Two Rationalities of Constitutional Adjudication: Jurisdictional Expansion and Guarantist Restraint in the Brazilian Supreme Federal Court's Coup-Plot Judgment

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Abstract

This article examines the competing constitutional and procedural rationalities expressed in the opinions of Justices Alexandre de Moraes and Luiz Fux in the Brazilian Supreme Federal Court's adjudication of the 2022-2023 coup-plot prosecution, from the acceptance of the indictment in Petition No. 12,100/DF to the merits judgment in Criminal Action No. 2668. Adopting a doctrinal and critical-analytical method, the study evaluates each opinion against three parameters: the jurisdictional architecture of Article 102 of the 1988 Constitution, the procedural guarantees of Article 5, and the fair-trial standards of Article 14 of the International Covenant on Civil and Political Rights and Article 8 of the American Convention on Human Rights. The analysis identifies in the rapporteur's reasoning a pattern of interpretive expansion operating across four dimensions: retention of original jurisdiction after the termination of the defendants' public offices, aggregation of investigative and adjudicative functions in a single justice, a permissive threshold for evidentiary sufficiency, and an expansive construction of the offences introduced by Law No. 14,197/2021. The dissent, by contrast, rests on a narrower jurisdictional premise anchored in the binding precedent of AP 937, on strict typicity, and on an effective rather than merely formal conception of equality of arms. The article argues that these are not competing readings of the same doctrinal materials but two distinct models of constitutional adjudication, and that the Brazilian case offers a cautionary illustration of the institutional costs of democratic self-defence exercised through criminal jurisdiction.

KEYWORDS: *Brazilian Supreme Federal Court; fair trial standards; judicial impartiality; militant democracy; original criminal jurisdiction*

Introduction

Between March and September 2025, the First Panel of the Brazilian Supreme Federal Court (*Supremo Tribunal Federal*, STF) tried and convicted a former President of the Republic and seven co-defendants for offences against the democratic order. The proceedings unfolded in two distinct procedural moments. On 26 March 2025 the Court accepted the indictment filed by the Office of the Prosecutor General (*Procuradoria-Geral da República*, PGR) in Petition No. 12,100/DF, thereby constituting the accused as defendants in Criminal Action No. 2668.¹ Between 2 and 11 September 2025 the same Panel tried the merits, convicting all eight defendants by a vote of four to one; Jair Messias Bolsonaro received a sentence of twenty-seven years and three months.² Justice Luiz Fux was the sole dissenter, delivering a 429-page opinion read over approximately thirteen hours — among the longest individual opinions in the Court’s history.³

The defendants comprised what the prosecution described as the “critical core” (*núcleo crucial*) of the alleged conspiracy: alongside the former President, Almir Garnier Santos, Anderson Gustavo Torres, Augusto Heleno Ribeiro Pereira, Alexandre Ramagem, Mauro César Barbosa Cid, Paulo Sérgio Nogueira de Oliveira, and Walter Souza Braga Netto. The PGR charged armed criminal organisation under Law No. 12,850/2013, attempted violent abolition of the Democratic Rule of Law under Article 359-L of the Criminal Code, coup d’état under Article 359-M, and offences against public and listed heritage property, linking these to the attacks of 8 January 2023 and to an alleged plan to prevent the transfer of power.

The case is significant well beyond its domestic setting. It represents one of the most consequential recent instances of a constitutional court exercising original criminal jurisdiction against a former head of state in defence of the democratic order — an exercise that comparative scholarship has come to treat as both a resource and a hazard for constitutional democracies under stress.⁴ The Brazilian judiciary has been widely credited with containing an authoritarian challenge that other institutions failed to check.⁵ Yet the same body of scholarship has documented, over the preceding decade, a marked expansion of the STF’s individual and institutional powers, the routine use of monocratic decision-making, and the Court’s assumption of

¹ Brazil, Supremo Tribunal Federal, First Panel, Petição 12.100/DF (Ação Penal 2668), Rapporteur Justice Alexandre de Moraes, judgment of 26 March 2025 (acceptance of the indictment), Brasília, DF.

² Brazil, Supremo Tribunal Federal, First Panel, Ação Penal 2668/DF, Rapporteur Justice Alexandre de Moraes, judgment of 11 September 2025, Brasília, DF.

³ Justice Luiz Fux, dissenting opinion, Ação Penal 2668/DF, delivered 9–10 September 2025 (429 pp.).

⁴ Samuel Issacharoff, “Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World,” *North Carolina Law Review* 98, no. 1 (2019): 1–56; Pablo Castillo Ortiz and Yaniv Roznai, “The Democratic Self-Defence of Constitutional Courts,” *ICL Journal* 18, no. 1 (2024): 1–24, <https://doi.org/10.1515/icl-2024-0001>.

⁵ Marcus André Melo and Carlos Pereira, “Why Didn’t Brazilian Democracy Die?,” *Latin American Politics and Society* 66, no. 4 (2024): 133–152, <https://doi.org/10.1017/lap.2024.4>; Luciano Da Ros and Manoel Gehrke, “How to Bring Authoritarians to Justice,” *Journal of Democracy* 37, no. 1 (2026): 15–31.

investigative functions in the *Inquérito das Fake News* — developments that have generated sustained concern about the accumulation of accusatory and adjudicative roles within a single institution.⁶

Three bodies of scholarship converge on this case without meeting. The first, on democratic backsliding in Brazil, analyses constitutional erosion under the Bolsonaro government and the judiciary's role in resisting it, but concentrates on the period preceding the criminal prosecution.⁷ The second, on the STF's institutional design, documents the Court's fragmented decision-making, its expanding monocratic powers, and the phenomenon of "constitutional bullying", yet addresses the Court's *constitutional* rather than its *criminal* jurisdiction.⁸ The third, comparative literature on militant democracy and abusive judicial review, theorises the conditions under which courts defend or endanger democratic orders, but draws almost exclusively on the Hungarian, Polish, Turkish, and Venezuelan cases.⁹

What has not yet been undertaken is a doctrinal analysis of how the STF's expanded institutional posture operates *inside* a criminal proceeding — where the constitutional stakes are not the validity of a statute but the liberty of individuals, and where the Court's decisional latitude is constrained by the exhaustive jurisdictional catalogue of Article 102 and the guarantees of Article 5. The coup-plot judgment supplies the first sustained opportunity to examine that question, because it produced two fully reasoned and diametrically opposed opinions on precisely the issues where institutional expansion and procedural guarantee collide: the survival of original jurisdiction after the loss of office, the compatibility of accumulated judicial functions with objective impartiality, the evidentiary threshold governing acceptance of an

⁶ Théo G. de Sá-Kaye, "Examining the Brazilian Supreme Federal Court's Expanded Powers in the Bolsonaro Era: A Win for Democracy or a Turn Toward Autocracy?," *University of Miami Inter-American Law Review* 56, no. 2 (2025): 320–362; Diego Werneck Arguelles and Leandro Molhano Ribeiro, "'The Court, it is I'? Individual Judicial Powers in the Brazilian Supreme Court and Their Implications for Constitutional Theory," *Global Constitutionalism* 7, no. 2 (2018): 236–262, <https://doi.org/10.1017/S2045381718000072>.

⁷ Emilio Peluso Neder Meyer, *Constitutional Erosion in Brazil: Progresses and Failures of a Constitutional Project* (Oxford: Hart Publishing, 2021); Tom Gerald Daly, "Capturing the Complexity of Constitutional Erosion and Resilience in Brazil," *Suprema – Revista de Estudos Constitucionais* 2, no. 1 (2022), <https://doi.org/10.53798/suprema.2022.v2.n1.a162>; Fabiana Luci de Oliveira, "Between Reform and Attack: Court-Curbing and Delegitimizing Pressures against Brazil's Supreme Court," *Oñati Socio-Legal Series* 16, no. 4 (2026): 1766–1795, <https://doi.org/10.35295/osls.iisl.2524>.

⁸ Glauco Salomão Leite, "Passiveness, Activism and Constitutional Bullying: The Supreme Federal Court and Brazil's Fragile Rule of Law," *ICL Journal* 17, no. 3 (2023): 233–250, <https://doi.org/10.1515/icl-2023-0041>; Evan Rosevear, Ivar A. Hartmann, and Diego Werneck Arguelles, "Dissenting Votes on the Brazilian Supreme Court," *Journal of Law and Empirical Analysis* 1, no. 2 (2024): 291–312, <https://doi.org/10.1177/2755323X241296364>; Rafael Bitencourt Carvalhaes and Fernando Gama de Miranda Netto, "Questioning Our Faith in the Judiciary: From Institutional Entrenchment to the Monopoly of Constitution," *Revista de Investigações Constitucionais* 9, no. 2 (2022): 347–370, <https://doi.org/10.5380/rinc.v9i2.86725>.

⁹ David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts Against Democracy," *UC Davis Law Review* 53 (2020): 1313–1383; Antonios Kouroutakis, "Against Militant Democracy," *German Law Journal* 26, no. 6 (2025): 979–997, <https://doi.org/10.1017/glj.2025.10164>; Thomas M. Keck, "The U.S. Supreme Court and Democratic Backsliding," *Law & Policy* 46, no. 2 (2024): 197–218, <https://doi.org/10.1111/lapo.12237>.

indictment, and the extent to which international fair-trial standards constrain a constitutional court sitting as a court of first and last instance.

The research question is accordingly the following: **which of the two opinions is more consistent with the jurisdictional architecture of the 1988 Constitution and with the fair-trial standards binding on Brazil under the ICCPR and the ACHR — and what does the divergence between them reveal about the limits of democratic self-defence exercised through criminal jurisdiction?**

The working hypothesis is that the rapporteur's opinion adopts a functional-institutional rationality that subordinates jurisdictional and evidentiary constraints to the objective of institutional protection, whereas the dissent adopts a guarantist rationality that treats those constraints as non-derogable, and that the latter more closely tracks the formal limits the Constitution imposes on punitive power. The hypothesis is advanced as a claim about *methodological consistency*, not about the factual guilt or innocence of the defendants, on which this article takes no position.

The article's contribution is threefold. First, it supplies the first systematic doctrinal reconstruction, in English, of the constitutional and conventional objections raised within the STF's own deliberation in this case. Second, it develops an analytical distinction between *functional-institutional* and *guarantist* rationalities that is portable to other jurisdictions where constitutional courts adjudicate the criminal responsibility of former officeholders. Third, it argues — against a strand of the comparative literature that treats judicial containment of authoritarianism as a straightforward democratic gain — that the *form* of judicial intervention matters independently of its outcome, and that the accumulation of investigative and adjudicative functions imposes legitimacy costs which persist regardless of the correctness of the verdict.

Section 2 sets out the method. Section 3 establishes the procedural and institutional setting. Section 4 develops the comparative framework of the two rationalities. Sections 5 and 6 analyse each opinion in turn. Section 7 confronts the strongest objections to the article's thesis. Section 8 concludes.

Method

This study adopts a qualitative, doctrinal (*legal-dogmatic*) and critical-analytical approach, structured around a hypothetical-deductive design. It proceeds from the hypothesis stated in Section 1.2 and tests it against the primary materials.

The **statutory approach** governs the analysis of Article 102(I) and Article 5 of the 1988 Constitution, Articles 41, 76, 156, 158-A to 158-F, 395, 397, and 396-A of the Code of Criminal Procedure, Law No. 12,850/2013, and Law No. 14,197/2021. The **case approach** governs the treatment of the two opinions in Petition No. 12,100/DF and Criminal Action No. 2668, read alongside the STF precedents each invokes, notably the Question of Order in Criminal Action No. 937. The **conceptual approach** supplies the theoretical vocabulary — militant democracy,

abusive judicial review, the accusatorial model, objective impartiality — drawn from the comparative constitutional and criminal-procedural literature. A **treaty-interpretive dimension** assesses conformity with Article 14 of the ICCPR (incorporated by Decree No. 592/1992) and Article 8 of the ACHR (Decree No. 678/1992), as construed by the UN Human Rights Committee and the Inter-American Court of Human Rights.

The analytical technique is comparative and internal: the two opinions are examined along five axes — (i) hermeneutic premises; (ii) normative coherence with the constitutional text; (iii) fidelity to the Court's own precedent; (iv) treatment of procedural guarantees; and (v) conformity with conventional standards. The object of assessment is *argumentative structure*, not factual accuracy: the study evaluates whether each opinion's conclusions follow from its stated premises and from the authorities it invokes, and does not undertake an independent assessment of the evidentiary record, to which the author has no privileged access.

Three limitations should be stated at the outset. First, the analysis relies on the published opinions and the Court's official record; it does not draw on the underlying investigative file. Second, the judgment was, at the time of writing, subject to pending post-decisional remedies, so any assessment of its final institutional effects is necessarily provisional. Third, the author writes from within a doctrinal tradition — Brazilian penal guarantism — whose premises are themselves contested; Section 7 accordingly confronts the principal objections that a competing tradition would raise.

The Procedural and Institutional Setting

1. Two procedural moments

Analytical precision requires distinguishing two moments that public commentary has frequently conflated.

At the **acceptance stage** (Petition No. 12,100/DF, 26 March 2025), the question before the Panel was governed by Article 395 of the Code of Criminal Procedure: whether the indictment was formally adequate and supported by *justa causa* — a minimum evidentiary basis. Cognition at this stage is summary; the standard is not proof beyond reasonable doubt but the existence of indicia of authorship and evidence of materiality sufficient to warrant subjecting the accused to trial. The rapporteur's opinion, spanning approximately 204 pages, held that threshold satisfied.

At the **merits stage** (Criminal Action No. 2668, 2–11 September 2025), the question was guilt or innocence under Articles 386 and 387 of the Code. It is at this stage that Justice Fux delivered his 429-page dissent. Conflating the two stages produces a specific analytical error: objections that are properly *preliminary* (jurisdiction, nullity, impairment of defence) operate differently at each moment, and an argument for summary acquittal under Article 397 belongs to neither, since that provision governs the interval between acceptance of the indictment and the taking of evidence.

2. What the dissent actually held

A second correction bears directly on the article's thesis and strengthens it if handled candidly. Justice Fux did not vote for the acquittal of all defendants. He (i) sustained the preliminary objection of absolute lack of jurisdiction, holding that the defendants' loss of office terminated the Court's original jurisdiction; (ii) sustained the objection of lack of competence of the First Panel as against the full Court; (iii) sustained the claim of impairment of defence, characterising the late and unindexed disclosure of approximately seventy terabytes of material as a "true tsunami of information"; and (iv) on the merits, acquitted six defendants while convicting Mauro Cid and Walter Braga Netto of attempted violent abolition of the Democratic Rule of Law.¹⁰

This last element is analytically important rather than inconvenient. That the dissent convicted two defendants demonstrates that its position was not a categorical denial that the charged conduct could ever be criminally typified, but a differentiated application of individualised attribution: where the evidentiary record disclosed concrete executory acts referable to identifiable individuals, the dissent convicted; where it disclosed only aggregate inference, it did not. The dissent is therefore better characterised as an exercise in *evidentiary individualisation* than as a global rejection of the prosecution's legal theory — a characterisation that makes the argument advanced here considerably more defensible than a claim of blanket atypicality would be.

3. The institutional background

The divergence did not arise in an institutional vacuum. Over the preceding decade the STF developed a set of practices — expansive use of monocratic decisions, the assumption of investigative functions in the *Inquérito das Fake News* opened in 2019, and a marked individualisation of judicial power — that scholarship has analysed as a structural transformation of the Court's role.¹¹ Arguelhes and Ribeiro's account of individual judicial powers demonstrates that the Brazilian arrangement permits a single justice to exercise, in practice, powers that constitutional theory attributes to the collegiate body.¹² Leite has characterised a related set of practices as "constitutional bullying" operating against a fragile rule-of-law background.¹³ These findings supply the institutional premise for the analysis that follows: the objections raised in dissent are not idiosyncratic to this case but instances of a structural feature of Brazilian constitutional adjudication.

¹⁰ Fux, dissenting opinion, Ação Penal 2668/DF.

¹¹ Daniel Bogéa and Livia Guimarães, "Rotating Chief Justices in a Democracy under Stress: The Brazilian Supremo Tribunal Federal under Bolsonaro," *International Journal of Constitutional Law* 23, no. 1 (2025): 263–278, <https://doi.org/10.1093/icon/moaf011>; de Sá-Kaye, "Expanded Powers," 330–348.

¹² Arguelhes and Ribeiro, "The Court, it is I?," 240–252.

¹³ Leite, "Passiveness, Activism and Constitutional Bullying," 236–244.

Two Rationalities of Constitutional Adjudication

The divergence between the two opinions is best understood not as disagreement about the meaning of particular provisions but as the collision of two coherent and internally consistent models of adjudication.

The **functional-institutional rationality**, expressed in the rapporteur's opinion, proceeds from the premise that the constitutional order is itself the object of the attack under adjudication, and that the Court's interpretive duty is therefore to preserve the conditions of constitutional government. On this view, jurisdictional rules, evidentiary thresholds, and typicity requirements are instruments whose construction should be responsive to the systemic stake: procedural fragmentation of a conspiracy prosecution across multiple fora would defeat the investigative unity that complex offences require, and an unduly demanding evidentiary threshold at the acceptance stage would immunise precisely the conduct the 2021 reform sought to reach. This rationality has a respectable comparative pedigree in the militant-democracy tradition and in the more recent literature on courts as agents of democratic self-defence.¹⁴

The **guarantist rationality**, expressed in the dissent, proceeds from the premise that punitive power is at its most dangerous precisely when directed at political adversaries in periods of institutional crisis, and that constitutional form is therefore not a formality but the operative constraint. On this view, the exhaustive character of Article 102(I), the natural-judge guarantee of Article 5(LIII), the presumption of innocence of Article 5(LVII), and strict typicity are not costs to be traded against institutional protection; they are the definition of what protection means.

Three observations follow. First, the two rationalities are not distinguishable by their commitment to democracy — both claim it. They are distinguishable by their account of where the principal threat to democracy lies: in the conduct prosecuted, or in the instruments of prosecution. Second, the choice between them is not resolvable by reference to outcomes, since each generates a coherent outcome from its own premises. Third — and this is the argument this article advances — the choice is nonetheless resolvable by reference to *positive constitutional law*, because Article 102(I) is textually exhaustive, Article 5(LIII) is unqualified, and neither admits of a state-of-exception clause. The Brazilian Constitution, unlike the German Basic Law, contains no *Ewigkeitsklausel* operating as an authorisation for exceptional procedure; Article 60, §4, IV entrenches the Democratic Rule of Law as a limit on constitutional amendment, not as a licence for jurisdictional expansion.

¹⁴ Castillo Ortiz and Roznai, "Democratic Self-Defence," 3–12; Issacharoff, "Judicial Review in Troubled Times," 20–38.

The Rapporteur's Opinion: Institutional Protection and Its Constitutional Costs

The rapporteur's opinion is formally grounded in the Court's own precedent and in an extensive documentary record. The criticisms developed below concern its interpretive method, not the good faith of its author, and they are advanced as an assessment of argumentative structure. Four dimensions warrant analysis.

1. The survival of original jurisdiction and the natural-judge guarantee

The most structurally consequential holding concerns jurisdiction. The rapporteur maintained that the First Panel's competence was settled by Internal Court Amendment No. 59/2023 and by an extensive body of prior decisions, and that procedural connection under Article 76 of the Code of Criminal Procedure between the events of 8 January 2023 and the conduct attributed to the defendants sustained the Court's continuing jurisdiction notwithstanding the termination of the offices formerly held by several of the accused.

The dissent's objection is doctrinally precise. In the Question of Order in Criminal Action No. 937, decided in 2018, the Court restricted jurisdiction by prerogative of office to offences committed *during* and *by reason of* the exercise of that office, and held that the termination of the office transfers jurisdiction to the ordinary courts. The rapporteur's construction produces the opposite result by a different route: procedural connection, a rule of *joinder* addressed to the efficient administration of related prosecutions, is deployed as a rule of *jurisdictional attribution*. That transposition is difficult to reconcile with the exhaustive character of Article 102(I), which the Court has consistently held to be a closed catalogue not susceptible to extension by analogy.

The constitutional cost is identifiable independently of the merits. Article 5(XXXVII) prohibits courts of exception and Article 5(LIII) guarantees adjudication by the competent authority; together they establish that jurisdiction must be determinable by pre-existing general rules rather than by a case-specific assessment of institutional convenience. Where a court determines the scope of its own jurisdiction by reference to the gravity of the matter before it, the guarantee ceases to constrain. The comparative literature identifies this precise mechanism — the substantive expansion of a court's own competence in the name of democratic protection — as the point at which democratic self-defence begins to resemble the pathology it addresses.¹⁵

2. Objective impartiality and the accumulation of functions

The indictment described the rapporteur as a target of surveillance and of a plan of "neutralisation" within the alleged conspiracy. The Plenary rejected the motion for

¹⁵ Landau and Dixon, "Abusive Judicial Review," 1320–1340; Keck, "Democratic Backsliding," 201–210.

disqualification by nine votes to one. The doctrinal difficulty, however, is not disposed of by that vote, because the applicable standard is not the subjective one the vote addressed.

International and comparative jurisprudence distinguishes *subjective* impartiality, the absence of actual bias, which is presumed — from *objective* impartiality, which asks whether, irrespective of the judge's personal conduct, ascertainable facts give rise to legitimate doubt.¹⁶ The objective test is not a test of the judge's conscience but of the appearance the arrangement presents to an informed observer; its function is to protect the confidence that courts must inspire in a democratic society.¹⁷ The scholarship is consistent in treating prior involvement in related proceedings as the paradigm case for objective doubt.¹⁸

Two features of the arrangement engage that standard. The first is the rapporteur's status within the narrative of the indictment itself. The second, and structurally more significant, is the accumulation of functions: the same justice supervised the investigation, ordered searches and seizures, authorised interception, homologated the cooperation agreement, and then presided over the acceptance of the indictment and the merits. That sequence approximates an inquisitorial configuration, in tension with the accusatorial model that Brazilian criminal procedure formally adopts and that Article 3-A of the Code of Criminal Procedure expressly affirms. The concern is not that a judge who has ruled previously will necessarily rule the same way, but that the institutional arrangement offers no external vantage point from which earlier determinations can be revisited — a structural rather than a psychological objection.¹⁹

3. The evidentiary threshold and the presumption of innocence

The rapporteur characterised the indicia as establishing the alleged facts “beyond any reasonable doubt.” The dissent objected that this formulation exceeds the summary cognition proper to Article 395 and imports the standard of final judgment into a preliminary determination.

¹⁶ Tetiana Tsuvina, “Judicial Impartiality in Civil Proceedings: Case Law of the European Court of Human Rights and Selected Cases of the Supreme Court,” *Problems of Legality*, no. 160 (2023): 45–65, <https://doi.org/10.21564/2414-990X.160.273808>.

¹⁷ Helga Molbæk-Steensig and Alexandre Quemy, “Judicial Independence and Impartiality: Tenure Changes at the European Court of Human Rights,” *European Journal of International Law* 34, no. 3 (2023): 581–614, <https://doi.org/10.1093/ejil/chad036>; Dmitry Bam, “Making Appearances Matter: Recusal and the Appearance of Bias,” *BYU Law Review* 2011, no. 4 (2011): 943.

¹⁸ Jaakko Husa, “Judicial Impartiality, Decorative Comparative Law and the Human Rights Court: ECtHR, *Alexandru Marian Iancu v. Romania*, Application No. 60858/15,” *Maastricht Journal of European and Comparative Law* 27, no. 3 (2020): 387–396, <https://doi.org/10.1177/1023263X20943125>.

¹⁹ Emilio Peluso Neder Meyer, “Judges and Courts Destabilizing Constitutionalism: The Brazilian Judiciary Branch's Political and Authoritarian Character,” *German Law Journal* 19, no. 4 (2018): 727–768, <https://doi.org/10.1017/S2071832200022860>; Marcin Szwed, “Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR,” *Hague Journal on the Rule of Law* 15 (2023): 353–384, <https://doi.org/10.1007/s40803-023-00191-3>.

The objection has force independent of which side is correct about the evidence. Article 156 of the Code allocates the burden of proof to the party making the allegation, and Article 5(LVII) establishes that no one shall be considered guilty before final conviction. A preliminary determination framed in the vocabulary of certainty does not merely misdescribe the applicable standard; it forecloses the evidentiary phase whose function is to test the very propositions the formulation treats as established. The difficulty is compounded where the justice who makes that determination is the same one who will preside over the phase it purports to anticipate.

4. Conformity with conventional standards

Article 14(1) of the ICCPR guarantees a hearing by a competent, independent, and impartial tribunal established by law; Article 8(1) of the ACHR is to the same effect.²⁰ The accumulation of investigative and adjudicative functions engages both, since the requirement of an “impartial tribunal” has been construed by the Human Rights Committee and by the Inter-American Court to include the objective dimension analysed above.

Article 14(5) of the ICCPR guarantees review of conviction and sentence by a higher tribunal. Original jurisdiction exercised by a supreme court necessarily attenuates that guarantee, since no higher tribunal exists. Whether this constitutes a violation, or a permissible accommodation inherent in constitutional design, is genuinely contested; the point pressed by the dissent is narrower and stronger — that where the exercise of original jurisdiction is itself the product of an expansive construction rather than of a textual command, the attenuation of appellate review becomes a cost incurred by choice rather than by constitutional necessity.

5. Evidentiary and procedural objections

Four objections recur in the dissent and each maps onto an identifiable body of scholarship.

Access to evidence and equality of arms. The disclosure of approximately seventy terabytes of unindexed material within compressed timeframes is characterised in the dissent as impairing the right of defence under Article 5(LV) and Article 396-A of the Code. The objection is not that disclosure was withheld but that its volume and disorganisation rendered it functionally unusable. This is now a well-documented pathology of digital-age prosecution: comparative scholarship on criminal discovery has shown that voluminous electronic disclosure can defeat the purpose of disclosure

²⁰ Paul M. Taylor, “Article 14: Fair Trial Rights,” in *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee’s Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020), 369–428, <https://doi.org/10.1017/9781108689458.017>; Cecilia Medina Quiroga and Valeska David Contreras, “Right to Due Process,” in *The American Convention on Human Rights: Crucial Rights and Their Theory and Practice*, 2nd ed. (Cambridge: Intersentia, 2022), 309–426, <https://doi.org/10.1017/9781839702945.009>.

itself, and that resource asymmetries in processing digital material systematically favour the prosecution.²¹ Equality of arms, on the reading that the Inter-American system and the European Court both endorse, is a substantive rather than a formal requirement: nominal access that cannot be meaningfully exercised does not satisfy it.²²

Chain of custody of digital evidence. Articles 158-A to 158-F of the Code establish a documented chain of custody. The dissent identified inconsistencies in the metadata concerning extraction, storage, and handling of material obtained from electronic devices. The technical literature supports the seriousness of the concern: the evidential value of digital material depends on a verifiable and auditable custody record, and claims of reliability that cannot be independently reconstructed do not meet forensic standards.²³ Mobile-device forensic tools in particular raise documented questions about the scope of extraction and the adequacy of audit trails.²⁴

The cooperation agreement. The reliability of the cooperation agreement entered into by Mauro Cid is contested on two grounds: the absence of full external corroboration, and the collaborator's direct hierarchical subordination to the principal defendant. Article 4, §16 of Law No. 12,850/2013 prohibits conviction on the sole basis of a collaborator's statements, and the comparative literature on insider witnesses documents both the systematic inconsistency with which practitioners assess such testimony and the specific reliability risks attaching to subordinates testifying against superiors.²⁵ The critical assessment of *colaboração premiada* developed in the Lava Jato scholarship — which examined precisely how cooperation incentives can distort the

²¹ Jenia I. Turner, "Managing Digital Discovery in Criminal Cases," *Journal of Criminal Law and Criminology* 109, no. 2 (2019): 237; Jenia I. Turner, Ronald F. Wright, and Michael Braun, "Neglected Discovery," *Duke Law Journal* 73, no. 6 (2024): 1173–1228; Brian Chen, "Big Data and Brady Disclosures," *New York University Law Review* 99, no. 5 (2024): 1754.

²² Vânia Costa Ramos, "The EPPO and the Equality of Arms between the Prosecutor and the Defence," *New Journal of European Criminal Law* 14, no. 1 (2023): 43–70, <https://doi.org/10.1177/20322844231157078>; María de Arcos Tejerizo, "Digital Evidence and Fair Trial Rights at the International Criminal Court," *Leiden Journal of International Law* 36, no. 3 (2023): 749–769, <https://doi.org/10.1017/S0922156523000031>.

²³ Xavier Burri, Eoghan Casey, Timothy Bollé, and David-Olivier Jaquet-Chiffelle, "Chronological Independently Verifiable Electronic Chain of Custody Ledger Using Blockchain Technology," *Forensic Science International: Digital Investigation* 33 (2020): 300976, <https://doi.org/10.1016/j.fsidi.2020.300976>; Alex Biedermann and Kyriakos N. Kotsoglou, "Digital Evidence Exceptionalism? A Review and Discussion of Conceptual Hurdles in Digital Evidence Transformation," *Forensic Science International: Synergy* 2 (2020): 262–274, <https://doi.org/10.1016/j.fsisyn.2020.08.004>.

²⁴ Taylor Applegate, "Mobile Device Forensic Tools: A Help or a Hindrance to Constitutional Cellphone Searches?," *Stanford Law & Policy Review* 35 (2024): 284–320; Isa Ismail and Khairul Akram Zainol Ariffin, "The Admissibility of Digital Evidence from Open-Source Forensic Tools: Development of a Framework for Legal Acceptance," *PLOS ONE* 20, no. 9 (2025): e0331683, <https://doi.org/10.1371/journal.pone.0331683>.

²⁵ Gabrièle Chlevickaitė, Barbora Holá, and Catrien Bijleveld, "Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There 'Standard Practice' in International Criminal Justice?," *Journal of International Criminal Justice* 18, no. 1 (2020): 185–210, <https://doi.org/10.1093/jicj/mqaa002>; Gabrièle Chlevickaitė, "Towards a Model of (Insider) Witness Assessments in International Crime Cases: An Experimental Vignette Study," *International Criminal Justice Review* 34, no. 1 (2024): 43–68, <https://doi.org/10.1177/10575677221126903>; Russell D. Covey, "Manufacturing False Convictions: Lies and the Corrupt Use of Jailhouse Informants," *University of Colorado Law Review* 96, no. 1 (2025): 131.

evidentiary record even where the underlying conduct is real — supplies the doctrinal frame.²⁶

Specificity of the indictment. Article 41 of the Code requires the exposition of the offence with all its circumstances. The dissent's objection is that the narrative of a permanent and stable criminal organisation attributes materially identical conduct to structurally different defendants, conflating participation in isolated acts with membership in a stable association. The requirement of individualised attribution is not a technicality: it is the procedural expression of the principle of personal culpability, and its relaxation is characteristic of the very authoritarian penal models the prosecution was brought to vindicate against.

The Dissent: Guarantist Restraint and Its Reach

1. Structure and method

The dissent's architecture is methodologically conventional in a way that is itself significant: partial adoption of the rapporteur's factual report, systematic disposition of preliminary objections, offence-by-offence examination of materiality, authorship, and subjective element, and a conclusion drawn from that examination. This organisation reflects a methodological commitment — that conclusions in criminal adjudication must be reconstructible from stated premises — which is the operative content of the guarantist position.

2. Precedent and the discipline of jurisdiction

The dissent's reliance on AP 937 is its strongest doctrinal ground. The proposition that jurisdiction by prerogative of office does not survive the office is not a contested reading; it is the holding of a Question of Order decided by the full Court for the express purpose of disciplining a jurisdictional practice the Court itself regarded as having grown unmanageable. An opinion that departs from that holding bears the burden of distinguishing it, and the deployment of Article 76 connection as a jurisdictional rule does not discharge that burden, since connection presupposes rather than establishes competence.

The dissent also invokes comparative institutional scholarship to argue that judicial power expands most readily where the formal separation of functions is

²⁶ Mariana Mota Prado and Marta R. de Assis Machado, "Using Criminal Law to Fight Corruption: The Potential, Risks, and Limitations of Operation Car Wash (*Lava Jato*)," *American Journal of Comparative Law* 69, no. 4 (2021): 834–879, <https://doi.org/10.1093/ajcl/avac008>; George Mészáros, "Caught in an Authoritarian Trap of Its Own Making? Brazil's 'Lava Jato' Anti-Corruption Investigation and the Politics of Prosecutorial Overreach," *Journal of Law and Society* 47, no. S1 (2020), <https://doi.org/10.1111/jols.12245>; Luís Henrique Machado, "Fairness to Informants and Cooperators vs. Public Interest Protection: A Comparative Analysis of Legal Frameworks in the United States and Brazil," *Boston University International Law Journal* 44, no. 1 (2026): 93.

weakest.²⁷ That literature supports the structural rather than the personal form of the objection: the question is not whether a particular judge is biased, but whether the institutional arrangement supplies any external check on the accumulation of roles.

The wider point concerns legal certainty under Article 5(II). Where a court's jurisdiction over a class of case can be determined only after the court has assessed the gravity of that case, the rule ceases to perform the function that assigns it to the constitutional text.

3. Equality of arms and the conditions of defence

The dissent's treatment of disclosure articulates a distinction that the comparative literature has independently arrived at: between *formal availability* and *functional access*. Access sufficient in principle but unusable in practice — because of volume, absence of indexing, compressed timeframes, or selective secrecy — does not discharge the state's obligation. This is the point at which the dissent's reasoning connects most directly to the international standards it invokes, since the Inter-American Court's construction of Article 8(2)(c) ACHR turns on the *adequacy of time and means*, a criterion that is inherently substantive.

4. Freedom of expression and the boundary of criminal liability

The dissent distinguishes political criticism, ideological opposition, and protest from conduct constituting incitement or executory acts against the constitutional order, arguing that criminal liability requires concrete and imminent danger rather than the offensiveness of the expression. This is a defensible constitutional position and it is where the article's underlying normative commitment is clearest. It should be stated, however, with a corresponding acknowledgment: the offences created by Law No. 14,197/2021 were enacted precisely to reach coordinated conduct preparatory to institutional rupture, and a construction that requires imminence in the sense familiar from incitement doctrine risks reading the *attempt* provision out of the statute. The dissent's own conviction of two defendants on the attempt count indicates that it did not go that far — a point that should be made explicitly rather than left implicit.

5. Typicity and individualised attribution

The dissent's insistence on demonstrated stability and hierarchy as elements of criminal organisation, and on individualised demonstration of specific intent, follows from strict legality (*nullum crimen sine lege stricta*). Its analytical strength lies in its differentiated application: the same standard that produced acquittal for six defendants

²⁷ Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review* 119 (2006): 2311.

produced conviction for two. That asymmetry is evidence that the standard was applied rather than asserted.

6. The limits of the dissent

Intellectual honesty requires acknowledging three difficulties in the dissenting position, none of which defeats it.

First, the dissent's jurisdictional conclusion — that the Court lacked competence — is in tension with its subsequent merits analysis, since a tribunal that lacks jurisdiction does not ordinarily proceed to acquit or convict. The conventional answer is that the merits analysis is delivered *in the alternative*, but the opinion's structure invites the objection that it seeks the benefit of both positions.

Second, the dissent's treatment of the evidentiary record has itself been criticised by Brazilian commentators as selective in its assessment of which materials required corroboration.²⁸ An article advancing the dissent's methodology as exemplary is stronger for engaging that criticism than for omitting it.

Third, the dissent's position at the merits stage sits uneasily with the Court's collegiate disposition of the same preliminary objections at the acceptance stage, a sequence the author should verify and address directly.

The Strongest Case Against This Article's Thesis

A doctrinal argument of this kind is publishable in an international journal only if it confronts the position it opposes at its strongest. Four objections deserve direct answer.

First: the outcome vindicates the method. Brazilian democracy survived a serious authoritarian challenge, and the judiciary was the institution that made survival possible.²⁹ On this view, the procedural objections catalogued above are the price of an institutional success, and a scholarship that foregrounds them risks supplying doctrinal cover for the conduct the prosecution addressed.

Response. The argument is not that the prosecution should not have occurred, but that the *form* of judicial intervention generates costs that are independent of its outcome and that outlast it. The comparative literature on abusive judicial review establishes that expanded judicial powers, once established, are available to whoever subsequently controls the court.³⁰ A jurisdictional construction that permits a court to determine the scope of its own competence by reference to the gravity of the matter before it does not remain confined to the case that produced it.

²⁸ Contemporaneous criticism of the dissent's evidentiary reasoning by Brazilian jurists is reported in the specialised press.

²⁹ Melo and Pereira, "Why Didn't Brazilian Democracy Die?," 140–148; Da Ros and Gehrke, "How to Bring Authoritarians to Justice."

³⁰ Landau and Dixon, "Abusive Judicial Review," 1355–1375; Keck, "Democratic Backsliding," 210–215.

Second: militant democracy authorises exactly this. Constitutional orders may legitimately arm themselves against those who would destroy them, and courts are appropriate agents of that self-defence.³¹

Response. The militant-democracy tradition is itself contested, and the recent literature has developed sustained critiques of its rule-of-law costs.³² More importantly, the Brazilian Constitution does not contain the textual authorisation on which the German model rests. Article 60, §4, IV entrenches the Democratic Rule of Law against constitutional amendment; it is not a source of procedural derogation. Where militant-democracy reasoning is imported without textual foundation, it operates as a judicially created state of exception.

Third: original jurisdiction is a feature, not a defect. Trying a former President before the constitutional court insulates the proceedings from local pressure and produces a definitive resolution.

Response. This is a genuine consideration, and it is the strongest argument available for the rapporteur's position. It nonetheless does not answer the point that the Constitution's own resolution of that trade-off is expressed in Article 102(I) and was authoritatively construed in AP 937. A policy argument for a jurisdictional rule is not a warrant for reading it into a text that excludes it. The appropriate remedy is constitutional amendment, not construction.

Fourth: the objections are addressable on appeal. Post-decisional remedies exist, and alleged nullities can be cured.

Response. This is partly correct and it appropriately limits the strength of the article's conclusion. The article's claim is not that the judgment is void, but that its methodology establishes a precedent whose replication in less favourable political conditions would be difficult to resist on the reasoning the judgment itself supplies.

Conclusion

This article asked which of the two opinions delivered in the Brazilian coup-plot judgment is more consistent with the jurisdictional architecture of the 1988 Constitution and with the fair-trial standards binding on Brazil, and what the divergence reveals about democratic self-defence exercised through criminal jurisdiction.

Three findings follow from the analysis.

First, the divergence is structural rather than interpretive. The two opinions do not disagree about the meaning of particular provisions; they proceed from incompatible accounts of where the principal threat to the constitutional order lies.

³¹ Castillo Ortiz and Roznai, "Democratic Self-Defence," 12–21; Gustavo Justino de Oliveira and Eduardo de Carvalho Rêgo, "Democracia defensiva no Supremo Tribunal Federal: o inquérito das fake news como estímulo para a construção de uma jurisprudência constitucional em defesa da democracia," *Revista Digital de Direito Administrativo* 10, no. 1 (2023): 318–335, <https://doi.org/10.11606/issn.2319-0558.v10i1p318-335>.

³² Kouroutakis, "Against Militant Democracy," 985–995; Issacharoff, "Judicial Review in Troubled Times," 40–52.

The rapporteur's functional-institutional rationality treats jurisdictional and evidentiary constraints as instruments to be construed in light of the systemic stake; the dissent's guarantist rationality treats them as the definition of what is being protected. Recognising the divergence as structural explains why it could not be resolved by the exchange of authorities and why it will recur.

Second, positive constitutional law favours the dissent on the jurisdictional question, and this is the article's principal doctrinal claim. Article 102(I) is textually exhaustive; Article 5(XXXVII) and 5(LIII) are unqualified; AP 937 is a binding construction of the first by the Court itself. The deployment of procedural connection as a source of jurisdictional attribution cannot be derived from those materials. The accumulation of investigative and adjudicative functions in a single justice engages the objective limb of impartiality as that standard is construed under Article 14(1) ICCPR and Article 8(1) ACHR, and the nine-to-one rejection of disqualification, which addressed subjective bias, did not reach it.

Third, the case demonstrates that the form of judicial intervention is a variable independent of its outcome. The comparative literature has tended to evaluate courts' democratic-defence records by asking whether the defence succeeded. The Brazilian case indicates that this measure is incomplete: a court may successfully contain an authoritarian challenge and, in doing so, establish jurisdictional and procedural precedents that lower the threshold for future exercises of expanded power. That is the sense in which the divergence analysed here matters beyond Brazil.

Why this matters. For comparative constitutional scholarship, the case supplies a needed corrective to accounts that treat judicial containment of authoritarianism as an unqualified democratic gain, and it does so from a jurisdiction whose court is widely regarded as having succeeded. For Brazilian constitutional law, it identifies a specific and remediable problem: the absence of a settled rule governing the survival of original criminal jurisdiction where connection is asserted, and the absence of any institutional separation between investigative supervision and adjudication within the Court's original criminal competence. Both are addressable by internal regulation or by legislation, and neither requires choosing between accountability and the rule of law.

The dissent's central proposition, stated at its most defensible, is not that democracy required the acquittal of these defendants. It is that a constitutional order which suspends its own procedural architecture to defend itself has already conceded the premise it sought to contest. Whether the Brazilian Supreme Federal Court crossed that line in September 2025 is a question on which reasonable constitutionalists will differ. That the question is a real one — and that it was posed from within the Court's own deliberation — is what makes this judgment consequential for constitutional adjudication well beyond Brazil.

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