

# The Electoral Protection of Democracy: The Case of Jair Bolsonaro's Ineligibility in Brazil

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## Abstract

The constitutional erosion experienced in Brazil in recent years culminated in a dramatic series of events on January 8th, 2023. An attempted coup d'état took place in Brasília, where thousands of people demanded military intervention, with some resorting to violence. The understanding of this scenario, however, can only be adequately developed if it is analyzed within the context of the authoritarian use of electoral law. Such usage corresponds to the interpretation of legality as an instrument that would supposedly ensure insecure electronic voting. In this context, it is important to analyze the electoral response to these claims, particularly considering that the Superior Electoral Court declared Bolsonaro ineligible in 2023. Was the judicial review in this case strong enough to protect democracy, specifically in the electoral context? To answer this question, one must interpret the Court's decision in a way that strengthens its potential use by other agents within the judicial system. The methodology of this paper employs a case study involving the Electoral Judicial Investigation, and it concludes that this precedent may be considered a strong one in the field of judicial protection of democracy, because it correctly limited freedom of speech and presidential powers.

## Keywords

Electoral Law, Abuse of Power, Fake News, Coup d'état, Ineligibility

## 1. Introduction

The constitutional erosion experienced in Brazil in recent years culminated in a dramatic series of events on January 8th, 2023. An attempted coup d'état took

place in Brasília, where thousands of people demanded military intervention, with some resorting to violence against the Federal Supreme Court, the National Congress, and the Presidential Palace. The failure of this infamous attempt prompted a judicial response, led primarily by Supreme Court Justice Alexandre de Moraes, who authorized a series of measures to ensure accountability for those involved. The understanding of this scenario, however, can only be adequately developed if it is analyzed within the context of the authoritarian use of electoral law<sup>1</sup>. This practice encompasses a series of strategies to manipulate electoral rules aimed at facilitating the victory of the current officeholder and hindering the electoral efforts of opponents. In Brazil, the military dictatorship implemented such practices by using legal norms applicable to the electoral sphere to revoke the mandates of opposition figures and reconfigure the party system, allowing for only two parties to exist. More recently, as will be demonstrated, Jair Bolsonaro attempted something similar by seeking legislative changes to promote the implementation of printed ballots, attacking the reliability of the electronic voting system without any evidence.

Such usage corresponds to the interpretation of legality as an instrument that would supposedly ensure insecure electronic voting, whose counting would not be conducted impartially by the Superior Electoral Court (SEC), which would necessarily act against the interests of then-candidate Jair Bolsonaro. This constitutes an authoritarian practice insofar as doubts about the reliability of the electronic system are raised repeatedly and systematically, without any minimal evidentiary basis to support the accusations.

It is within this context that this article will analyze how these practices can be framed as crimes against the Democratic Rule of Law, seeking to analyze how the conspiracy against the SEC contributes to the attempted coup d'état in Brazil. This question is significant because, depending on the strategies employed to delegitimize the Court and the elections themselves, the serious threat required for the characterization of the crime of violent abolition of the Democratic Rule of Law may be demonstrated.

During his presidential term from 2019 to 2022, then-President Jair Bolsonaro repeatedly made false accusations against Brazil's electronic voting system and the Electoral Justice, particularly the Superior Electoral Court<sup>2</sup>. This situation reached its peak in July 2022, when Bolsonaro gathered several ambassadors in the Presidential Palace, a public building, and, in front of an international audience, aired his grievances against Brazilian institutions.

He attempted to use his political power to gain some sort of undue advantage in the elections and, ultimately, to create the conditions for contesting the results and for a coup d'état. In this context, it is important to analyze the electoral response to these actions, particularly considering that the Superior Electoral Court

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<sup>1</sup>Foreign scholarship has also been attentive to this instrumental use of law in electoral contexts, as notably highlighted by scholars such as Gábor Attila Tóth (Tóth, 2019).

<sup>2</sup>The process of constitutional erosion in Brazil and the rise of Jair Bolsonaro is deeply analyzed by: Meyer, 2021; Nobre, 2020; Daly, 2020.

declared Bolsonaro ineligible in 2023, just months after the coup d'état attempt in Brasília. Was the judicial review in this case strong enough to protect democracy, specifically in the electoral context? To answer this question, one must interpret the Court's decision in a way that strengthens its potential use by other agents within the judicial system.

The methodology employs a case study involving the Electoral Judicial Investigation Action (Ação de Investigação Judicial Eleitoral—AIJE), which culminated in the declaration of Jair Bolsonaro's ineligibility, within the context of the aforementioned meeting. This factual basis will serve as the starting point for a critical analysis of the role played by false narratives widely disseminated on social media.

The text begins by contextualizing recent legislative changes aimed at implementing printed ballots. The judicial response of the Federal Supreme Court (Supremo Tribunal Federal—STF) will be examined, particularly as this debate was reignited by Congresswoman Bia Kicis (PSL), a staunch supporter of former President Jair Bolsonaro, when she sought to elevate the issue to the constitutional level through Proposed Constitutional Amendment No. 135/2019. Subsequently, the events surrounding the ineligibility ruling will be detailed, seeking to understand how the SEC argued its case—with particular emphasis on the vote of the Reporting Justice, Benedito Gonçalves, and the dissenting opinions of Justices Raul Araújo and Nunes Marques, who accepted many of the defense's arguments.

Finally, the mechanism behind the spread of falsehoods will be analyzed based on recent research highlighting how echo chambers and conspiracy theories erode democracy. The conclusion asserts that, when the facts are systematically examined, the diffuse and repeated efforts to delegitimize the SEC constitute a scenario of severe institutional threat—one that cannot be downplayed and justifies the robust judicial oversight applied in this case.

## **2. The Superior Electoral Court as an Enemy: Jair Bolsonaro's Abuse of Political Power in the Meeting with the Ambassadors**

It is necessary, as an introductory matter, to briefly examine the attempts to implement printed ballots in Brazil, as they formed the basis of the reasoning employed by then-President Jair Bolsonaro and his supporters against the Superior Electoral Court (SEC). As will be demonstrated later, efforts were made to normalize the then-President's conduct by arguing that he was not the first to advocate for printed ballots, equating his actions with those of Presidents Fernando Henrique Cardoso and Luiz Inácio Lula da Silva, both of whom had sanctioned similar legislative proposals. Thus, to assess this purported consistency, it is essential to understand how printed ballots were initially conceived and the institutional response of the Federal Supreme Court (STF) to the issue. Moreover, the distrust toward electoral institutions—which reached its peak during the 2022 meeting with ambassadors—was already evident in the STF, though the Court initially failed to take seriously the concerns raised by Justice Cármen Lúcia in the

preliminary ruling of ADI (Direct Action of Unconstitutionality) No. 4543 (Brasil, 2011).

The printed ballot procedure was first introduced in Brazil in 2002 through Law No. 10,408, which granted voters the right to verify their electronic vote against a printed receipt, with provisions for revoting in case of discrepancies (Brasil, 2002). However, this innovation faced multiple obstacles. A SEC report concluded that the proposed change represented a regression, citing issues such as printing delays and an increase in blank and null votes (Brasil, 2011: p. 4). The Court further argued that the intended security could be achieved by monitoring digital signature generation and validation, conducting preliminary voting machine tests, and, if necessary, verifying digital vote records (RDV files) without relying on paper (Brasil, 2011: pp. 4-5).

In 2009, Law No. 12,034 reintroduced the printed ballot, stipulating that after final confirmation, the electronic voting machine would print a unique vote number linked to its digital signature (Brasil, 2009). The law guaranteed ballot secrecy by ensuring no manual contact between the voter and the printed receipt, which would be automatically deposited in a sealed compartment (Brasil, 2009). The printed vote was intended as an audit tool, with post-election independent software reviews comparing electronic votes against paper records (Brasil, 2009). Crucially, voter identification would remain impossible unless biometric verification was used—provided the identification machine remained disconnected from the voting system (Brasil, 2009). In 2011, the STF granted a preliminary injunction suspending this procedure (scheduled for the 2014 elections (Brazil, 2009)) on the grounds that it violated ballot secrecy. By 2013, the Court definitively ruled the measure unconstitutional (Brasil, 2013).

A key argument in Justice Cármen Lúcia's opinion was the principle of non-retrogression in political rights, as the proposed changes would foster distrust in the electronic voting system—a tactic typical of authoritarian regimes: “Instead of fostering trust, the system outlined in Article 5 of the law in question breeds distrust in the electoral process. Distrust is a hallmark of dictatorships, not a safeguard of democracy.” (Brasil, 2013: p. 18). Despite this reasoning, the Court's final decision rested solely on ballot secrecy. Justice Gilmar Mendes resisted the non-retrogression argument, asserting that the legislature retained discretion in policymaking and that a law could not be shielded from amendment merely because the Court deemed it “good” (Brasil, 2011: p. 44).

The Court's summary of the ruling, while not legally binding, aligned with the prevailing reasoning—omitting any reference to political retrogression (Brasil, 2011: pp. 1-2). This missed an opportunity to reinforce Justice Cármen Lúcia's argument, which would have gained even greater relevance in 2021 when a constitutional amendment sought to reintroduce printed ballots, as will be demonstrated in the next section. In 2015, Congress passed Law No. 13,165, another attempt to mandate printed ballots, albeit with simplified regulations. The law reiterated that votes would be automatically printed in sealed compartments without voter contact, requiring confirmation that the printed receipt matched the elec-

tronic vote (Brasil, 2015a).

By June 2018, the STF suspended the law's enforcement via a preliminary injunction. Justice Gilmar Mendes, in subsequent rulings (ADI No. 4543 (Brasil, 2013) and ADI No. 5889 (Brazil, 2018)), continued to defend legislative discretion over printed ballots, downplaying concerns about institutional distrust: "In the ADI challenging the 2009 law, the rapporteur claimed that printed ballots 'foster distrust' in the system. This does not seem to be the case. Distrust in elections is omnipresent—no election is free from it (Brasil, 2018: p. 22)." Conversely, Justice Luís Roberto Barroso emphasized the lack of evidence supporting fraud allegations against electronic voting machines, rendering the proposed doubts unjustified (Brasil, 2018: p. 89).

The dissemination of false information about the reliability of the electronic voting system reached a new level on July 18, 2022, as said before. On that date, then-President Jair Bolsonaro met with Heads of Diplomatic Missions at the Palácio da Alvorada, where he delivered a speech riddled with falsehoods about the Brazilian Electoral Court—a fact that later led to his declaration of ineligibility (Brasil, 2023). This meeting was hastily conceived and carried out by the then-President as a sort of "response" to the Informational Session for Embassies, an event held by the Superior Electoral Court (SEC) in May 2022, during which the then-President of the Court urged participants to seek reliable sources to learn about the Brazilian voting system, warning them against the "virus of disinformation" (Brasil, 2023: pp. 7, 104, 113).

At the Palácio da Alvorada, Jair Bolsonaro delivered a speech that was analyzed by the SEC in its full context, highlighting the harmful potential of his words, which alone could produce concrete effects in reality (Brasil, 2023: p. 114). The full transcript of his presentation was included in the vote of the Reporting Justice in the respective Electoral Judicial Investigation Action (AIJE) (Brasil, 2023: pp. 120-147), emphasizing: a) the creation of distrust in the electronic voting system, when he stated: "I want to base myself exclusively on a Federal Police investigation opened after the second round of the 2018 elections, where a hacker claimed there had been fraud during the elections." However, this was not the subject of said investigation, which solely examined the hacking of the SEC's systems, with no indication of any tampering with election results (Brasil, 2023: p. 122); b) the alleged negligence of the SEC in investigating the cyberattack, suggesting a form of criminal collusion, when, in reality, the Court promptly launched an internal investigation that assisted the Federal Police in their own inquiry (Brasil, 2023: pp. 123-124); c) the suggestion that he was not the one conspiring against Brazilian democracy, but rather the SEC itself (Brasil, 2023: p. 125).

Military coup rhetoric was clearly present in the speech when the then-President emphasized that the Armed Forces had been invited to join the Electoral Transparency Commission, using the first-person plural to refer to the military: "*What are the Armed Forces doing in the electoral process? We were invited. I am the Supreme Commander of the Armed Forces. We would never, with this invi-*

*tation, participate just to give an appearance of legality*” (Brasil, 2023: p. 137). He then asserted that “*the Armed Forces have never participated in a farce*” (Brasil, 2023: p. 140), suggesting that the SEC’s refusal—even if partial and related to the 2022 elections—to fully adopt the military’s proposals would be unacceptable, even asking: “*Did they think they could dominate the Armed Forces? Did they forget that I am the Supreme Commander of the Armed Forces?*” (Brasil, 2023: p. 140). As highlighted by the Reporting Justice, the President’s rhetoric subverts Article 142 of the Constitution: instead of upholding the constitutional principle of military subordination to civilian authority, Jair Bolsonaro sought to embed himself within the military structure, as if he still held that position (Brasil, 2023: p. 137).

A conspiracy falls within the realm of those “complex phenomena that have an internal dynamic difficult to elucidate, but which always exist in a territory where particular interests seek to replace the common good” (Bignotto, 2021: p. 24). This understanding aligns with theories of coup d’état<sup>3</sup>, being intimately connected with the corruption of the Republic’s fundamental values and the attempt to establish a government serving only personal interests and those of allies (Bignotto, 2021: pp. 24-25). Thus, the meeting with ambassadors represents a key event in the development of the conspiratorial plot, as Jair Bolsonaro sought to obtain undue electoral advantages in upcoming elections by misusing public resources.

This conspiratorial process becomes even more serious given the militarized tone of the discourse, considering Brazil’s authoritarian past. As is known, in 1964, the Armed Forces carried out a coup d’état in Brazil, and numerous perpetrators of grave crimes against humanity were never punished (Acunha & Benvido, 2012; Swensson Junior, 2017; Silva Filho, 2015; Meyer, 2012). Furthermore, the military has never acknowledged the coup nature of that event, still referring to it today as a “revolution”<sup>4</sup>.

The entire scenario described is therefore extremely serious because, if the allegations made by the then-president had been true, it would have violated one of the fundamental principles of constitutional electoral law: electoral authenticity. This principle represents the pursuit of protecting both equality and freedom in voting, including through criminal law measures to prevent fraud (Salgado, 2015:

<sup>3</sup>According to Newton Bignotto, the term “coup d’état” has not maintained a univocal meaning throughout the centuries. Initially, it carried a positive connotation regarding emergency powers, not necessarily opposing the legal order as a whole, but rather serving as an instrument to confront the fundamental enemies of the regime. Following the French Revolution, the expression became opposed to revolution, and in the 18th century, it acquired a negative meaning as something that interrupts normal political processes. With Louis Napoleon’s coup and Marx’s Eighteenth Brumaire, a third layer of meaning was introduced to the concept of coup d’état—now considering law (not just politics) as one of the analytical paradigms, understanding the coup as an assault on laws and the Constitution. (Bignotto, 2021: pp. 30-33).

<sup>4</sup>According to Bonavides, this selective use of the term “revolution,” particularly in underdeveloped countries, relates to the discrediting of the expression “coup d’état,” signifying “political instability or the pursuit of selfish and personal ends contrary to the common good” (Bonavides, 2003: p. 404). Thus, given this strongly negative connotation of the concept, coup plotters employ the term “revolution” to cunningly attempt to conceal their authoritarian reality.

p. 33). However, as will be shown, it was actually the abuse of freedom of expression and presidential prerogatives that constituted the most dangerous factors for Brazil's democratic system. Thus, using the law to counter this state of affairs constitutes a task that can be framed within a form of "constitutional repair" (Daly, 2025), as noted by Tom Daly—a concept that will be further developed in the Brazilian context below.

### 3. The Role of Electoral Justice

Electoral doctrine is attentive to the justification behind the proscription of the abuse of political power, considering that "mayors and other public agents enjoy advanced positions of advantage, leading electoral legislation, in its mission to ensure full competitiveness of the election, to prohibit a series of acts"<sup>5</sup> (Alvim, 2019: p. 192). This is the starting point for analyzing the conduct of then-President Jair Bolsonaro, who, as head of the Executive Branch, used public resources to gain undue electoral advantage.

The Reporting Justice's decision addresses the facts through an interdisciplinary approach, adopting a methodology in which legal aspects concerning freedom of expression, empirical elements within social science and neuroscience research on the impacts of fake news, and philosophical considerations in the realm of the philosophy of language and mind are developed around the question: "Are there, in fact, circumstances that legitimately allow for establishing a connection between, on one end, a discourse that calls into question the credibility of electronic voting machines and, on the other, harm or serious threat to the electoral process?" (Brasil, 2018: p. 87)

To demonstrate the falsity of the discourse, the Reporting Justice focuses on the strategy of how an existing factual basis, such as a document, can be used to create scenarios in a decontextualized manner or even completely divorced from the actual facts. The Reporting Justice also highlights the formulation of "intrusive thoughts" (Brasil, 2023: pp. 93, 140)—that is, the paradoxical declaration of a state of affairs that, allegedly, is not intended to be achieved but which, in practice, is precisely what occurs through the mere utterance of certain statements.

The SEC emphasized how then-President Jair Bolsonaro's speeches normalized conspiracy theories and "flirted with coup rhetoric" (Brasil, 2023: p. 231). The Court noted that Bolsonaro's concern with the security and transparency of voting machines was insincere, as he consistently imposed conditions for accepting election results—implying that it was up to him and the Armed Forces, not the SEC, to determine whether the elections had been fair (Brasil, 2023: p. 231).

The Reporting Justice recalled how the then-President never explicitly accepted the 2022 election results and even appeared sympathetic to protests against them. In this regard, the Justice argues that "a coup d'état is never announced as such. Its perpetrators seek to convince society of the legitimacy of seizing or retaining

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<sup>5</sup>It is also important to highlight that the manipulation of electoral law is a form of stealth authoritarianism. See Varol, 2015: pp. 1673-1742.

power outside pre-established rules” (Brasil, 2023: p. 232). He then examines the use of TV Brasil, a public broadcaster, to air the event, which was also disseminated on the then-President’s social media channels (Brasil, 2023: p. 233). On social media, the engagement metrics were significant as of August 18, 2022: “a) Facebook: 589,000 views, 55,000 comments, and 72,000 likes; b) Instagram: 587,000 views and 11,000 comments” (Brasil, 2023: p. 148). Similarly, substantial viewership numbers were recorded on TV Brasil’s online broadcast<sup>6</sup> (Brasil, 2023: pp. 149-150). Thus, contrary to the defense’s claims, this was not a low-reach event limited only to the ambassadors present.

This entire campaign against electoral institutions carried out by Jair Bolsonaro sought to amplify previous attempts to implement printed ballots in Brazil. As said before, supporters of the then-President sought to normalize his conduct by arguing that he was not the first to advocate for printed votes, equating his actions with those of Presidents Fernando Henrique Cardoso and Luiz Inácio Lula da Silva, who had sanctioned similar legislative proposals. However, the cases are significantly different, particularly given the context of massive disinformation campaigns against the electoral system, which had a clear coup-oriented intent.

In this context, after multiple unconstitutional attempts to introduce printed ballots, Congresswoman Bia Kicis (PSL) sought support for Proposed Constitutional Amendment No. 135/2019. This amendment sought to add Paragraph 12 to Article 14 of the Constitution, stipulating that in elections, plebiscites, and referendums, “the issuance of physical ballots, verifiable by the voter and automatically deposited—without manual handling—into secure ballot boxes for auditing purposes, shall be mandatory” (Brasil, 2019). In her justification, Kicis levied severe criticisms against the electoral system, claiming that “Brazil, in electoral matters, has become hostage to the juristocracy of the Superior Electoral Court (SEC)” (Brasil, 2019: p. 1) within a framework of “totalitarianism concentrated in the electoral body” (Brasil, 2019: p. 1). According to her, the SEC’s resistance to printed ballots allegedly undermined transparency in vote counting (Brasil, 2019: p. 1).

The history of Brazilian law helps contextualize the falsehoods being spread, as there are well-documented precedents of electoral fraud under the old paper ballot system. In 1948, Victor Nunes Leal published his thesis on Brazil’s representative system in the context of coronelismo (political clientelism) and municipal politics, highlighting how rural oligarchies—though declining in the face of expanding state authority—were paradoxically sustained by the state, which still relied on rural votes (Leal, 2012: p. 44). This perpetuated abuses such as mandonismo (bossism), ballot stuffing, and voto de cabresto (coerced voting), reinforcing the dominance of landowners over dependent rural populations (Leal, 2012: pp. 44-46, 56). Thus, a serious historical analysis of electoral practices reveals no evidence supporting claims of fraud in electronic voting—quite the opposite, given the well-doc-

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<sup>6</sup>It should be noted that these figures regarding the publication’s engagement were obtained from information provided by the Brazilian Communication Company itself, as reported in the Justice’s own vote.

umented vulnerabilities of the old paper-based system.

The foundation for the authoritarian use of Electoral Law was thus established. The developments surrounding the proposed amendment revealed how pro-government lawmakers sought, in reality, to constitutionalize electoral fraud, legally paving the way for another attempted coup through electoral means. Electoral judges were repeatedly called upon to debunk false claims against the electronic voting system, as seen, for example, in the case of then-Congressman Fernando Francischini—the first Brazilian legislator to have his mandate revoked by judicial order for spreading fake news about electronic voting.

Jair Bolsonaro's defense argued that the event with ambassadors should be interpreted systematically, forming part of a broader scenario of healthy "institutional dialogue" between the Executive and Judiciary branches, especially considering the SEC's organization of a similar event with ambassadors. To support this judicial argument, they invoked the precedent established in ADI No. 4650 (Brazil, 2015b), which prohibited corporate funding of electoral campaigns. Understanding this argument requires analyzing dialogue theories and their influence on the cited precedent.

The starting point for properly understanding the possibility of inter-branch dialogue is the concept of deliberation. This can be understood as a decision-making mode seeking consensus among deliberators or at least reducing dissent<sup>7</sup>. The court's understanding as a deliberative public body considers that it consists of "a small group of individual judges committed to each other in an argumentative enterprise seeking to produce a final decision" (Mendes, 2013: p. 3), viewing deliberation as "an interpersonal argumentative enterprise" (Mendes, 2013: p. 11).

Political deliberation typically relates to ideas of dialogue, conversation, debate, justification, sympathy, engagement, publicity, rationality, persuasion, openness, sincerity, respect, consensus, and common good. These aspects would contrast with precisely opposite expressions like self-interest, closure, fixed preferences, lack of empathy, etc. Deliberation certainly does not correspond to mere bargaining (Mendes, 2013: p. 18) as a sort of "vote trading" seeking only advantageous

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<sup>7</sup>A conceptual framework of deliberation demonstrates how it constitutes a respectable and inclusive practice of collective argumentation, through which solutions are continuously sought through reason, aiming to achieve consensus—even when this does not always occur. In this process, after vote counting, the possibility remains for participants to change their positions based on argumentative persuasion. At least seven essential elements can be specified regarding deliberation's nature: a) It presupposes collective decision-making that will affect both deliberators and abstainers alike; b) The decision is not definitive but provisional, awaiting further rounds of deliberation; c) It is a cooperative practice, conducted jointly among interlocutors, requiring justification of positions—silence being unacceptable; d) It operates through the articulation of a specific type of reasoning: the most impartial possible, oriented toward the common good; e) It assumes deliberators are willing to revise their stances based on arguments, fostering an "ethics of consensus"; f) It involves the ethical principle of respect, whereby interlocutors deserve equal consideration; g) It is politically committed to empathy, inclusion, and respect for all viewpoints. This framework underscores deliberation's dual role as both a rational and ethical practice, demanding not only logical rigor but also a commitment to democratic values of mutual recognition and openness to revision. The absence of any of these elements risks distorting deliberation into mere negotiation or, worse, authoritarian imposition. (Mendes, 2013: pp. 13-14).

results in specific cases at the expense of developed reasoning.

These deliberation characteristics propose the maximum possible exclusion of authoritarian ideas from public debate, preventing continuous deliberation in such cases. The hypothesis assumes deliberation is not weakened but rather strengthened, as it presupposes respect between interlocutors—a respect that is nonexistent when even violence against the other party is contemplated, as in accepting a “defense state decree” targeting the supposed “interlocutor” (the SEC). This extreme situation occurs in societies experiencing intense polarization, when groups isolate themselves around their ideas without openness to contestation (Sunstein, 2002: p. 121).

Regarding consensus, even when unattained, deliberation’s virtue lies in its openness to recognizing its own fallibility, remaining open to challenge. Theories and practices that do not admit or tolerate challenges are typically authoritarian (Mendes, 2013: p. 16). Thus, deliberation has this epistemic character to also help identify authoritarian legal theories in practice.

A major obstacle to deliberation, particularly relevant to this research, concerns polarization, fear, and intolerance in society. Conrado Hübner Mendes characterizes this well:

These pre-conditions of deliberation are socio-economic and political: as to the former, excessive inequality roots a kind of power hierarchy and self-subordination that cannot be dissolved by deliberation or mere procedural fairness, and opens avenues for surreptitious threats and sanctions that perpetuate injustice; 93 as to the latter, individual interactions regulated by fear, embedded intolerance, and incivility would hamper any attempt to deliberate (Mendes, 2013: p. 36).

Isn’t this precisely the reality surrounding the ambassadors’ meeting? When a coup framework spreads nationwide through the systematic dissemination of fraudulent claims against electronic voting, it is challenging to suppose that deliberative practices could address this reality, as forces opposing the Judiciary would have no interest in consensus-seeking dialogue.

The falsehood also appears in precedent-based arguments. Analyzing the democratic legitimacy of constitutional jurisdiction exercised by the STF regarding corporate campaign financing in ADI No. 4650 (involving highly relevant political matters), Justice Rapporteur Luiz Fux argued for judicial intervention because: a) when facing institutional “pathologies” like those described, the STF must act subsidiarily to politics to correct them; b) especially when minority interests unlikely to be properly addressed in the self-interested legislative process are at stake (Brasil, 2015b: pp. 35-38). This judicial role is reinforced by the Constitution not expressly prescribing an electoral funding model, giving legislators more freedom but not a “blank check,” allowing “institutional dialogues” (Brasil, 2015b: pp. 42-45).

Note this was the context where institutional dialogue was considered: the Con-

stitution's lack of express norms about electoral funding types and limits. Thus, dialogue theories presuppose a minimum basis for honest deliberation, with interlocutors willing to learn honestly from each other with mutual respect. Recognizing this, the SEC deconstructed the fallacy about supposed "institutional dialogue" in this case, with the Rapporteur stating this defense argument caused "some perplexity" (Brasil, 2023: p. 224). He noted this was actually the then-President's monologue spreading falsehoods about electronic voting, distinguishing it from the ADI No. 4650 precedent where the STF's envisioned institutional dialogue involved Congress revisiting corporate funding forms (Brasil, 2023: p. 224)—at no point did the STF and Congress engage in conspiracy campaigns, unlike what this AIJE revealed.

The pursuit of changes in electoral laws has been a constant in Brazilian constitutional history. A notable example includes the strategy of normative fraud employed during the military dictatorship, which involved altering electoral regulations to modify competition conditions and ensure victory for the incumbent power group, while suppressing opposition growth (Salgado, 2018: pos. 114). It can be argued that this entire strategy of formal constitutional amendments aligns with such practices, revealing how the legacies of the military dictatorship remain deeply embedded in Brazilian constitutionalism, with electoral law being no exception to these enduring influences.

#### 4. The Dissenting Votes in the Court

Justice Raul Araújo filed the dissenting opinion at the SEC. The Justice dismissed the Electoral Judicial Investigation Action, arguing on the merits that: a) in cases involving risk of registration cancellation, diploma revocation, or potential application of ineligibility, the judge should adopt a stance of judicial restraint, considering the potential violation of the principle of popular sovereignty, and paying attention to the interpretation of the gravity of the facts from this minimalist perspective (Brasil, 2023: pp. 275-276); b) the understanding that "not all discourse conveys false statements, as there are equally present sections in which the investigated individual expresses his political position on matters open to public institutional dialogue, particularly the discussion about so-called printed ballots" (Brasil, 2023: p. 285). Thus, while acknowledging the existence of falsehoods in the discourse, he understood they were not serious enough for a condemnatory judgment (Brasil, 2023: p. 286).

Moreover, he argued that the conduct would still not be serious enough to justify granting the action, since the then-President's statements did not substantially differ from those made in previously held livestreams, meaning there would be no surprise capable of tainting the elections, especially because the discourse was primarily intended for his supporters (Brasil, 2023: pp. 289-290). Still in this context, the Justice pointed out that the attempt to discredit the electronic voting system would not have had any effect, given the low abstention rate detected (20.95%) (Brasil, 2023: p. 290).

Justice Nunes Marques joined the dissent, revisiting the issue of printed ballots from the various legislative attempts to implement it, to emphasize that “the role of main antagonist of the system, however, was not always played by the currently investigated individual” (Brasil, 2023: p. 427). Thus, the Justice sought to equate the conduct of former President Jair Bolsonaro with that of former Presidents Fernando Henrique Cardoso and Luiz Inácio Lula da Silva, since both, as previously highlighted, had sanctioned laws providing for printed ballots.

This equivalence, for the Justice, is possible to the extent that then-President Jair Bolsonaro did not seek to obtain electoral advantages in the meeting with ambassadors, that act not being part of a “plan to discredit the election results in order to, after the election results, give rise to a hypothetical coup d’état” (Brasil, 2023: p. 439). Finally, he did not recognize the gravity of the conduct as capable of justifying the declaration of ineligibility, also taking into account the low viewership of TV Brasil during the broadcast, which would have reached, at most, about 70 thousand households in August 2022 (Brasil, 2023: p. 433). At no point, however, did the Justice mention the impact of the dissemination of false messages through social media.

Critically analyzing the votes, the most prominent characteristics are the theoretical fragility and the minimization of the falsehoods uttered. Regarding the first aspect, it appears that virtually no theorization was developed by the Justices, who did not seek support in specialized doctrine, as the Reporting Justice did. The cited works referred solely to procedural law or electoral law (Brasil, 2023: pp. 268, 275, 26, 430), which, although important, by no means provide the necessary foundation for such a complex issue as the dissemination of fake news and its respective impacts on democracy. It is certain that a judge does not need, in every case they adjudicate, to develop more complex reasoning or necessarily use doctrine. The dissenting decision, however, if it is serious and seeks adherence, must be capable of respectfully countering the Reporting Justice’s vote, engaging in argumentation to, by offering a robust counterpoint, seek to achieve its rejection by the majority of the Court.

The second characteristic of the vote, however, is much more serious. Even while acknowledging, at some points, that part of the then-President’s statements were false, the Justices, at no moment, specifically analyzed such declarations. By not exposing the content of the statements, they failed to thoroughly assess the gravity of each one of them, a strategy that aligns with the normalization of the meeting with ambassadors, exactly as argued by Jair Bolsonaro. Thus, such omission does not address with due rigor the falsehoods developed, contributing to the minimization of the serious attacks on the electronic voting system.

The minimization of the harmful effects of Jair Bolsonaro’s dissemination of falsehoods is clearly demonstrated when Justice Raul Araujo argues that, since the then-President had already adopted a similar stance at other events, repeating similar discourse would not constitute a relevant novelty:

From this perspective, the symmetry between the content of the speech

under analysis and those disseminated by the first investigated party on other occasions is undeniable, as evidenced by the transcripts of livestreams contained in records no. 158764865, 158764856, and 158764866. This reduces the capacity of the imputed event—which is the focus of the judge’s analysis—to produce strong and surprising impact and damaging results (Brasil, 2023: p. 289).

Thus, rather than recognizing that the repetition of events itself constitutes a serious matter—a form of reiteration of the unlawful act—the Justice uses this fact to absolve the former President. Justice Nunes Marques, in turn, also minimizes the effects of the former President’s speech, arguing that the discourse, even though it occurred during the electoral period, was not intended to garner votes, but rather formed part of a normal context of debate with the then-President of the Superior Electoral Court, Justice Edson Fachin:

I reaffirm, despite the irrefutability of the electronic voting system’s integrity, that Jair Messias Bolsonaro’s actions in the event under investigation were not aimed at obtaining advantages over other contenders in the 2022 presidential election, nor were they part of an alleged plan to discredit the election results in order to justify a hypothetical coup d’état after the election results, as the investigating party sought to imply.

(...)

From my analysis of the evidentiary framework, the investigated party ultimately sought, through the event, to promote public confrontation with the then President of the Superior Electoral Court, Justice Edson Fachin (Brasil, 2023: p. 499).

The Brazilian justice system’s collaboration with authoritarianism is not new. As Anthony Pereira has demonstrated, the Military Justice system played a key role in maintaining a veneer of legality for the military dictatorship through the conviction of civilians deemed subversive (Pereira, 2010). More recently, Emilio Peluso has highlighted the role of judges and federal prosecutors in Brazil’s democratic erosion, exemplified by abuses committed during the so-called “Car Wash” operation (Meyer, 2018). Thus, it can be argued that these minority opinions are consistent with this long-standing judicial tradition that does not fully embrace democratic rule.

## **5. Analyzing the Judicial Review Strength: Technology, Coup-Mongering, and the Court’s Theoretical Robustness**

The Court analyzed Jair Bolsonaro’s conduct through a constitutional lens, examining, for instance, the boundaries of free speech and presidential powers within an electoral context. Although it did not constitute a judicial review of specific legal norms, it represented a form of constitutional scrutiny that can be classified as robust, given how it advanced theoretical frameworks concerning law, freedoms, political power, and technology—as will be further elaborated. Further-

more, it establishes a precedent set by the highest electoral court in the country, which must be followed by other electoral judges across Brazil. Another aspect underscoring the strength of the judicial ruling in this case is its engagement with another significant precedent from the Court, which had previously revoked the mandate of a congressman for spreading false information about electronic voting machines during the 2018 elections, thereby reinforcing judicial protection of electoral integrity in defense of democracy<sup>8</sup>.

In this scenario, why is that detailed analysis of Justice Benedito Gonçalves' decision so important? The study of this vote reveals its central characteristics: the pursuit of deep theoretical<sup>9</sup> development as a tool to counter authoritarianism, taking seriously the impacts of falsehoods. This strategy is crucial because the authoritarian use of law can also be theorized, with sophisticated intellectual constructions aimed at constitutional erosion (Ferreira, 2023b: p. 371).

The facts presented regarding the meeting with ambassadors reveal a series of systematic falsehoods propagated by then-President Jair Bolsonaro against the SEC. The gravity of such conduct can only be properly assessed by considering the potential dissemination of this content through the internet, necessitating essential reflections on law and technology for the possible characterization of the serious threat, potentially constituting the crime of violent abolition of the Democratic Rule of Law.

Given all the arguments developed thus far, it becomes evident how technology, particularly the spread of messages via the internet, fundamentally relates to democracy. To understand the mechanisms behind the diffusion of coup-mongering ideologies and the rapid spread of unconstitutional ideas, deeper questions about the worldwide web must be asked—moving beyond an exclusively optimistic view of the “digital revolution.” This is the objective of Robert W. McChesney, who argues that a more realistic approach to technology must place capitalism at the center of the discussion, as “the way capitalism works (or doesn't) determines the role the Internet can have in society” (McChesney, 2013: p. 13). And there is no evidence that capitalism is becoming “an environmentalist, socialist, and democratic utopia” (McChesney, 2013: p. 16).

Many of the arguments in the dissenting votes analyzed in the previous section reflect the optimistic view of the internet, celebrated as a space of free interaction that fosters media pluralism and knowledge dissemination, ultimately benefiting democracy (McChesney, 2013: p. 8). Another school of thought, however, adopts a more skeptical stance, pointing out how technology can be both progressive and destructive, questioning its supposed democratic development given the real interests of powerful actors—whether public or private—and its negative impacts on knowledge production due to the unchecked spread of online misinformation (McChesney, 2013: pp. 10-11). The events of January 8, 2023, with coup supporters broadcasting scenes of violence live on the internet, demonstrate how reality

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<sup>8</sup>For an analysis of the case, see Ferreira, 2023a.

<sup>9</sup>In favor of judicial theorization in adjudication, see: Dworkin, 1986; Dworkin, 1997: pp. 353-376.

diverges from this optimistic technological narrative—especially when considering that coup attempts are orchestrated by professionals skilled in manipulating social media.

In this context, one of the most frequently cited works in Justice Benedito Gonçalves' vote is "Engenheiros do Caos" ("The Engineers of Chaos") by Giuliano da Empoli. Although the author focuses on recent examples from Italian populist politics, he acknowledges similar realities elsewhere—explicitly mentioning Jair Bolsonaro. Da Empoli argues that without the active participation of ideologues and major tech companies, "the leaders of new populism would never have come to power" (Empoli, 2019: pp. 9-19).

These "engineers of chaos" specialize in manipulating the internet, particularly social media algorithms, which identify public discontent and, at the opportune moment, activate the emotions of key voters—especially the fears of undecided individuals—to secure electoral support with surgical precision (Empoli, 2019: pp. 9-10). They operate through international collaboration, as exemplified by: a) Donald Trump's support for Jair Bolsonaro; b) Steve Bannon's alliance with Olavo de Carvalho (a Bolsonarismo ideologue whom Bannon hailed as "a seminal thinker") (Empoli, 2019: p. 19).

One of the key elements enabling the precise dissemination of messages, ensuring they reach their intended targets, lies in the data individuals generate in their digital lives. These records allow for the creation of models that, in the political sphere, can direct messages to specific audiences (Empoli, 2019: p. 77). As a result, voter-targeted messaging becomes personalized—an unthinkable feat before the advent of social media (Empoli, 2019: p. 81). This personalization fosters a greater sense of belonging, as the message no longer appears to be hierarchically imposed from the top down but rather as a form of peer-to-peer communication (Empoli, 2019: p. 82). Social media platforms, primarily profit-driven through advertising, prioritize engagement—keeping users active on the platform (Empoli, 2019: p. 83). Consequently, they have little incentive to moderate posted content, as they were not designed for such purposes (Empoli, 2019: p. 12).

The notion of "neutrality" in the internet or in the mathematical models used for data "mining," such as consumer behavior analysis by big tech companies, is flawed. This is one of the central theses in mathematician Cathy O'Neil's *Weapons of Math Destruction*, which makes it clear that behind programming lie fallible human beings—computer scientists and mathematicians—who may inadvertently exacerbate inequality between the rich and poor (O'Neil, 2020: p. 5).

The complex task assigned to algorithms is "to reduce human behavior, performance, and potential" (O'Neil, 2020: p. 7), with the risk of becoming "mathematical weapons of mass destruction" (O'Neil, 2020: p. 5). These models (O'Neil, 2020: p. 16) can have devastating real-life consequences, such as when used to evaluate professionals like teachers, applying opaque and rigid standards that punish low performance without allowing for feedback-based adjustments (O'Neil, 2020: p. 8). Teachers who complained about the lack of transparency in scoring were simply

told: “It’s an algorithm... It’s very complex” (O’Neil, 2020: p. 9).

Justice Benedito Gonçalves’ opinion also references the concept of online “filter bubbles” (Brasil, 2023: pp. 4, 82, 246)—the idea that internet usage becomes personalized, delivering different information to users even for identical searches, turning computer screens into “a kind of mirror reflecting our own interests” (Pariser, 2012: p. 5). When individuals reject opposing viewpoints, they become trapped in these bubbles, no longer acknowledging even undeniable facts—all while tech companies exploit vast personal datasets to shape these filters without transparency (Pariser, 2012: pp. 6, 10).

With content personalization and data mining, fake news spreads even faster online. This aligns with research cited by Justice Benedito Gonçalves, which found that false news spreads more rapidly than true news on the internet. This conclusion was drawn from a methodology analyzing: a) extensive research involving over 126,000 Twitter posts from 2006 to 2017, encompassing 3 million users; b) the falsity of claims verified by six fact-checking organizations, which agreed on the fraudulent nature of the information 95% - 98% of the time (Vosoughi, Roy, & Aral, 2018: p. 1146). Surprisingly, the study found that while bots amplified fake news, humans were primarily responsible for its viral spread, demonstrating that people—not machines—are more likely to disseminate fabricated content (Vosoughi, Roy, & Aral, 2018: p. 1146).

Understanding coup-mongering thus requires analyzing how conspiracy-driven messages against democracy proliferate, placing communication at the heart of the legal debate. As Justice Benedito Gonçalves noted: “Due to its inflammatory nature, this mobilization channels a sense of grievance—often poorly articulated at an individual level—into collective anti-system and anti-democratic action” (Brasil, 2023: p. 91). Helena Martins recalls how, for many years, internet-based communication was viewed with hope, as it promised greater democratization of information, broader participation, and reduced social inequality (Martins, 2020: p. 15). While acknowledging that these virtues should still be pursued, she recognizes that “no technological development exists in a vacuum, separate from historical context and existing power structures. In the current era, as capitalism expands into all aspects of life, technology has been used to facilitate this encroachment” (Martins, 2020: p. 15).

It is no secret that popular sovereignty in Brazil has been undermined by politicians wary of the Constitution’s mechanisms for direct democracy, as argued by Paulo Bonavides. For him, the legal restrictions in Article 14 of the Constitution render “our representative system one of half-legitimacy, half-democracy, half-representation” (Bonavides, 2001: p. 112), requiring judges to advance jurisprudence through constitutional principles rather than outdated legislative hermeneutics (Bonavides, 2001: p. 113). Popular sovereignty was thus violated by these legal constraints, exposing the fear of “conservative elites wary of direct popular governance” (Bonavides, 2001: p. 117). Jair Bolsonaro sought to bypass this electoral disconnect through informal technological means, elevating political com-

munication to unprecedented levels—yet doing so by spreading falsehoods to fuel mobilization.

## 6. Conclusion

This study sought to examine how law, and particularly electoral law, can be utilized to restore democratic governance following periods of significant democratic backsliding. In specific cases where such regression has precipitated dramatic coup attempts, this undertaking becomes even more crucial—and challenging—as the pursuit of legal accountability proves particularly complex given the enduring influence potentially retained by supporters of the ousted administration.

Returning to the central question posed in the introduction, we maintain that the precedent established by Brazil’s Electoral Court in the ineligibility ruling against former President Jair Bolsonaro constitutes a robust foundation for strengthening constitutional protections. This precedent carries substantial weight for three key reasons: First, it bears strong formal binding authority as a decision issued by Brazil’s highest electoral court, which demonstrated remarkable institutional resilience against political capture. Second, it was rendered by an overwhelming majority, with only two dissenting votes—both exhibiting serious substantive deficiencies in their legal reasoning, as our analysis demonstrates.

The precedent’s strength further derives from its sophisticated judicial reasoning. The SEC rigorously addressed this weaponization of the internet to attack electoral institutions, highlighting:

- a) distrust fueled by fake news (Brasil, 2023: pp. 6, 91, 200, 216, 217);
- b) emotional reactions triggered by incendiary rhetoric that mobilize supporters (Brasil, 2023: pp. 6, 91, 247);
- c) conspiracy theories (e.g., that the SEC had a “favored candidate” who would benefit “at any cost”) (Brasil, 2023: pp. 9, 91, 150, 155, 170, 200, 203, 213, 216, 217, 222, 225, 230, 231, 232, 233, 243, 248, 253, 256).

Together, these elements posed a grave threat to the democratic rule of law. This precedent now carries significant weight, likely influencing future rulings—including criminal cases.

As our analysis reveals, the authoritarian arguments advocating Bolsonaro’s eligibility similarly deployed sophisticated constitutional theories, particularly through claims that his statements constituted legitimate “inter-branch dialogue” protected by free speech guarantees. This crucially illustrates that authoritarianism cannot be effectively countered through minimalist judicial approaches, especially when authoritarian strategies themselves operate through maximalist legal arguments.

The court’s decision proved constitutionally significant because it seriously engaged with Brazil’s contemporary authoritarian reality—a condition shared by numerous nations regardless of their specific histories with military dictatorship. Importantly, while disqualifying authoritarian leaders from elections does not permanently safeguard democracy—as legal appeals may prevail and reverse such

decisions—this judicial intervention plays vital reconstructive roles: It creates crucial temporal space for authorities to pursue comprehensive legal accountability in a more stable environment, while forcing autocratic figures to divert resources and attention toward their legal defense rather than political mobilization.

Ultimately, the ruling represents a meaningful judicial contribution to rebuilding democratic institutions, though it is never an exhaustive or permanent solution to authoritarian threats. Its true value lies in creating the necessary conditions for more sustained democratic recovery efforts.

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## Conflicts of Interest

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

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