

THE CONTRIBUTION OF THE SOCIAL SCIENCES IN THE INTERPRETATION OF THE "COUP D'ÉTAT" TYPIFIED IN ARTICLE 359-M OF THE PENAL CODE



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ABSTRACT

This article presents the historicity of Crimes against the State and its representatives from the republican period to the 1988 Constitution. In view of this contextualization, the wording of the new and ambiguous crime of Coup d'état provided for in article 359-M of the Penal Code was analyzed, based on the contribution of the Social Sciences in the interpretation of the criminal type. It was intended, therefore, to clarify the intention of the legislator, as well as to suggest a precise and rigorous application of the norm within the dynamics of a Democratic State of Law, based on the knowledge developed by the Social Sciences, which can and should be considered in the application of the Law in the case of the Coup d'état.

Keywords: Coup d'état. Democratic Rule of Law. Social sciences. Far Right. 359-M.

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INTRODUCTION

The democratic (liberal) rule of law is in crisis in Brazil, as well as around the world, a fact that highlights the weaknesses of the system, notably the inability of the rulers to guarantee the existential minimum of people, who are discursively transmuted into citizens, especially during electoral periods.

In the midst of this context, there were many solutions listed to mitigate and/or reverse this erosion of liberal democracy, including the criminalization of conduct contrary to the Democratic Rule of Law by Law 14,197/2021, inspired by the old National Security Law, granted by Decree-Law 314 of 1967.

In this sense, the new criminal type provided for in article 359-M⁵ (Coup d'état), inserted in 2021 in the Penal Code, coincides with the legislative eagerness to (try) to preserve both the form and the regime of government today on Brazilian soil, but a question arises: how to interpret it?

To this end, the Social Sciences, especially with the traditional contributions of Caio Prado Júnior, Norberto Bobbio, Paulo Bonavides, as well as with the current notes of Christian Lynch, Leonardo Avritzer, Paulo Henrique Cassimiro and many others, stand out as indispensable references to the thinker of Law, whether for analyses *in abstracto*, or for *applications in concreto*, given that knowledge is made up in a unit and not only in hyper-specialized micro-plots atomized and alien to each other. For this reason, Norberto Bobbio's studies borrow as a theoretical framework, the work "The Theory of Forms of Government".

Therefore, based on the above, this work, initially, seeks to expose, historically, the legal norms correlated and past to the legislative insertion of crimes against the Democratic Rule of Law in title XII of the Penal Code through ordinary law 14.197/2021.

Next, the emergence of the extreme right in Brazil will be presented, in order to set the moment of legislative innovation in 2021. Finally, it was investigated how the concepts developed by the Social Sciences and the Humanities are indispensable in the interpretation of article 359-M of the Penal Code, specifically in the analysis of the conception of the "coup d'état", as opposed to the Revolution and related themes also coming from the Social Sciences and the Humanities.

⁵ "Coup d'état, art. 359-M. Attempting to depose, by means of violence or serious threat, the legitimately constituted government: Penalty - imprisonment, from 4 (four) to 12 (twelve) years, in addition to the penalty corresponding to violence" (Brasil, 2021).

Therefore, it is demonstrated that the knowledge present in the Social Sciences is necessary for a better understanding, whether in the legislative sphere or in the context of the interpretation of the new legal norms introduced in the national legal system, always guided by the following question: how to interpret article 359-M of the Penal Code in line with the Social Sciences?

BRIEF HISTORY OF CRIMES AGAINST THE STATE AND ITS REPRESENTATIVES IN BRAZIL

Punishments for crimes committed against State institutions and their members of leadership have been discussed for hundreds of years around the world.

In Brazil, Law 38/1935 (Brasil, 1935), during the government of Getúlio Vargas, typified military crimes and crimes against the security of the State. In 1953, during the democratic period of Getúlio Vargas, Law 1,803/1953 (Brasil, 1953) updated the rules of the 1930s. Subsequently, during the authoritarian military regime (1964-1985), the country experienced decades of a state of exception⁶, repeatedly justified under alleged protection against socialism and, consequently, with the intention that a supposed "communism of Moscow" (Branco *apud* Gaspari, 1978) would not take over the homeland.

To guarantee the supposed security of the State against alleged "subversive enemies of the nation", decrees 314/1967 and 898/1969 were issued, in addition to law 6.620/1978 (Brasil, 1967; Brazil, 1969; Brazil, 1978). At the end of this period, during the democratic transition, Law 7.170/1983 was enacted, which typified 21 (twenty-one) "crimes against national security" (Brasil, 1983).

In 1985, the National Constituent Assembly began its work and, under the anxious eyes of the population, the Federative Constitution of Brazil was promulgated on October 5, 1988. Under strong social-democratic influence, contrary to all types of authoritarianism, the new Charter ensured individual, social and transindividual rights, inserted under the logic of a Rule of Law⁷, in its extensive 250 (two hundred and fifty) articles, in addition to bringing

⁶ The State of Exception is understood, in this work, as the use of the state apparatus for purposes unrelated to the legislation in force and to achieve objectives that disrespect rules, principles, postulates and legal-social guarantees. It is, therefore, an inadequate instrumentalization of the State to satisfy illicit desires and autocratic whims, in disagreement with the Constitution, legislation and legality in a broad sense.

⁷ The Democratic Rule of Law is already provided for in Article 1 of the Federative Constitution of Brazil, however the concept itself is not expressed in the Brazilian Magna Carta. In this sense, Norberto Bobbio's concept is used in this article, which is, "... Even for a minimum definition of democracy, such as the one I accept, neither the attribution to a large number of citizens of the right to participate directly or indirectly in collective decision-making, nor the existence of rules of procedure such as that of the majority (or, at the limit, unanimity) are not enough. A third condition is indispensable: those who are called upon to decide or to elect

an unbelievable 137 (one hundred and thirty-seven) transitional norms at the end of the document.

It should be emphasized the concern of the constituents to make democracy perennial in the country. They therefore inserted the constitutional commandment of criminalization in article 5, item XLIV, which provided, *in litteris*, that "*the action of armed groups, civilian or military, against the constitutional order and the Democratic State constitutes a non-bailable and imprescriptible crime*" (Brasil, 1988). From the Citizen Constitution, dubbed by Ulysses Guimarães, the New Republic and the hope of a pluralist democracy were born.

BRIEF HISTORICAL EXPOSITION OF THE NEW DEMOCRATIC REPUBLIC AND THE EMERGENCE OF THE EXTREME RIGHT IN BRAZIL

Brazil underwent substantial sociopolitical changes after the promulgation of the Federal Constitution of 1988, notably between the years 2013 and 2024. During this period, the Democratic Rule of Law faced political, institutional, and social turmoil, both in Brazil and in the international community (Castells, 2018; Mounk, 2021; Mudde, 2022; Saints; Wild; Krenak, 2021). Among them, the massive street demonstrations stand out, such as the June 2013 Days (Freixo; Pinheiro-Machado, 2019); the spectacular actions of the Federal Police in Operation Car Wash (Cassimiro; Lynch, 2022); the impeachment of President Dilma Vana Rousseff in 2016 (Avritzer; Kerche; Marona, 2021; Nobre, 2021; Ash; Pinheiro-Machado, 2019); the election, in 2018, of the representative of the national extreme right Jair Messias Bolsonaro, who benefited from the strong popular rejection of the Workers' Party (Bruzzzone, 2021); and the election of Luiz Inácio Lula da Silva in 2022, with a subsequent anti-democratic attack in the Praça dos Três Poderes in Brasília/DF, which took place on January 8, 2023 by supporters of the former president defeated at the polls, that is, Jair Messias Bolsonaro.

By interpreting the dynamics of the facts reported above, political scientist Rudá Ricci (2022) proposed to understand them within three major waves of the extreme right in the Brazilian context. The first is identified in the political and ideological activism of the military business, which took place within the scope of the Constituent Assembly in 1987;

those who will have to decide must be placed before real alternatives and put in a position to be able to choose between one or the other. (...) ... the liberal State is not only the historical but also the legal presupposition of the democratic State. (...) The historical proof of this interdependence lies in the fact that the liberal State and the democratic State, when they fall, fall together" (Bobbio, 2022).

the second, in the resurgence of antipetismo⁸, from the media Operation Car Wash, and in the exponential mobilization and popular organization since the June Days of 2013, specifically of the extreme right; and the third with the emergence of Bolsonarism, an updated version of the extreme right in Brazil. In view of this, the Academy began to suggest that a "new wave" of the extreme right was beginning to rage in Brazil (Lavareda, 2023; Mudde, 2022; Prado, 2023).

In fact, this new extreme right is understood, in this work, as the socio-political group that defends "*hierarchies and natural inequalities*"; supporter of institutional ruptures; fomenter of reactionary values in the agendas of customs; and apologist for authoritarian governments. This extremist facet has chosen social minorities as the focus of its attacks, especially LGBTIQAPN+; the black movements; immigrants and feminists (Bobbio, 2011; Nicolau, 2020; Nobre, 2022; Prado, 2023; Rocha, 2023; Rocha, 2021; Silam; Trindade, 2021).

It can be seen that these social and political changes, briefly exposed above, resulted in changes in the field of Law, by driving the deliberation and enactment of criminal laws with a strong punitive content, widely supported by the extreme right, in which the adversary, with whom one shares ethical-axiological principles, becomes an enemy, with whom consensus is impossible (Levitsky; Ziblatt, 2018).

This trend was reflected in the most recent criminal types inserted in the criminal legal system. From 1988 to 2024, the beacons and guidelines of the Citizen Charter were repeatedly tested at various times, among which the two *impeachment processes* of presidents of the Republic; the countless corruption scandals in the Public Administration; the insufficient public administrations and uncommitted to implementing constitutional provisions; and, in 2018, in the election of Jair Messias Bolsonaro, politician representative of the national extreme right, defender of ideas frontally opposed to the inclusive and democratic Federal Constitution of 1988.

It was, therefore, under Bolsonaro's presidency that ordinary law 14.197/2021 was enacted, which provided for 10 (ten) crimes, among which 4 (four) were vetoed (Brasil, 2021). In this legislative innovation, still in force, there is crime 359-M, inserted in chapter II,

⁸ Antipetismo, originally, was a strong rejection of the left, recognized by opponents in the Workers' Party. From 2013 onwards, anti-PT took on agendas contrary to representative politics itself, that is, to the institutional-constitutional democratic process and, in this sense, became part of the Brazilian Bolsonarist extreme right (Avritzer, 2020; Ricci, 2022).

named "Crimes against Democratic Institutions", which will be analyzed below in a multidisciplinary character with the Social Sciences and Humanities.

CONCEPTS FROM THE SOCIAL SCIENCES AND HUMANITIES: THE COUP D'ÉTAT (COUP D'ÉTAT), THE REVOLUTION, CONSERVATISM AND REACTIONARISM AND THEIR CONSEQUENCES

The terms "coup d'état", "revolution", "conservatism" and "reactionarism" are often confused both in common language and in academia. This misunderstanding can occur due to lack of clarity, intrinsic polysemy to expressions or convenience, which makes a careful and precise legal conceptualization essential, not through a hyperspecialized and atomized path, but in line with interdisciplinarity with the broad knowledge produced by scholars of the Social Sciences and Humanities in general.

In this sense, "*coup d'état*", or *coup d'Etat*, is generally understood as the illegitimate seizure of political power by a sectarian social segment against an established ruler. It is based on the premise that society is composed and organized under a clash between social groups, as opposed to the homogenizing liberal abstract idealism of "sovereignty of the people", as if, in fact, there was the entity "people", as a unit, with strictly common interests and objectives (Araújo; Belinelli, 2021; Costa, 2012; Toscano, 2024).

In some cases, the coup d'état can also refer to the attempt of a certain ruler to perpetuate himself in power, in an autocratic and arbitrary manner, by unduly usurping the command of the country without significantly altering the social-institutional structure (Bonavides, 1976; Bonavides, 1995; Bianchi, 2019).

In the case of the "revolution", it is seen as a mass movement that provokes profound changes in paradigms, ideas, ideologies and social structures, a dynamic that results in sensible social transformations, that is, materially real (Bonavides, 1976; Bonavides, 1995; Prado Júnior, 2014). It should be noted that the maintenance or alteration of political, social, cultural and ideological foundations are determining factors in the differentiation between "coup d'état" and "revolution".

If, on the one hand, the "coup d'état" is understood as a simple exchange of dominant groups in political-institutional power, without significant changes in the social structure, with the objective of maintaining the *status quo* of society and/or with autocratic intentions; on the other hand, the "revolution" is defined as any alteration in the institutional-

social regime that implies effective changes in social structures, cultural and ideological aspects.

"Conservatism", as opposed to "revolutions", is a political-social current that seeks to preserve the institutions, values, customs and culture of a given society and that accepts punctual, serene and consensual changes, which makes it, therefore, compatible with democracy. In this sense, "traditional conservatism" refers to the maintenance of the institutions and values of a society, by promoting collective structural continuity, although with attention to punctual and moderate changes.

"Reactionarism", on the other hand, can be interpreted as an attempt at a social return to a certain idealized and mythical vision of the past. It is a repressed perspective, based on the illusion that the past was the most glorious and best period in all aspects, in the expression of a return to the foundational myth of the community, where the peak of social splendor would have been reached (Cassimiro; Lynch, 2022). Therefore, "reactionarism" defends an abrupt rupture, which aims, therefore, at a return to the idealized and mythical past (Cassimiro; Lynch, 2022).

As a consecration of the dynamics indicated above, Caesarism, also called Bonapartism, is chosen for this work. This concept is presented as a form of authoritarian regime, usually the result of a coup d'état, in which a charismatic leader seizes political-institutional power with the support of the Armed Forces, although he later seeks popular legitimation, through referendums and/or plebiscites, a practice reiterated in the recent Latin American context (Avritzer, 2020).

From the delimitation of these concepts, it is necessary to make the typical-material analysis of article 359-M of the Penal Code.

INTERPRETATION OF ARTICLE 359-M OF THE PENAL CODE FROM THE SOCIAL SCIENCES AND HUMANITIES

Article 359-M of the Penal Code, nomen *iuris* "Coup d'état", inserted by Law 14,197/2021, has a short, open and, at the same time, objective wording, which prescribes that "*attempting to depose, by means of violence or serious threat, the legitimately constituted government*". This is a crime against democratic institutions in Brazil, with a penalty of imprisonment of 4 (four) to 12 (twelve) years, in addition to the penalty corresponding to violence.

In fact, the text of the aforementioned criminal rule expressly conceptualizes the *coup d'État* along the lines of the Social Sciences and Humanities, developed earlier in this article, given that the attempted conduct of violent and, therefore, undue dismissal of a political agent (political power) is criminalized.

In this vein, this criminal typicity respects the causal-material rationality of the conduct and its factual developments, because it is not restricted to the abstract idealist-liberal discourse of "popular sovereignty", flaunted in the molds of a civil religion by a large portion of jurists, in which an abstract and homogeneous entity laconically called "people" could be used as a basis for any political act, including a *coup d'état* (Araújo; Belinelli, 2021; Costa, 2012; Toscano, 2024). It is noted that the legislator started from the premise that, when the institutional-democratic pact is broken, the *ratio* that maintained it no longer exists and, therefore, it no longer makes sense to punish for the consummation of the *coup d'état*, from the moment that the domination of the country passes into the hands of new holders of power, uninterested in enforcing past rules contrary to their aspirations.

It is imperative to remember that, in Brazil, the rulers are democratically legitimized by periodic elections, in accordance with the Federal Constitution of 1988, and, consequently, the abrupt and disruptive takeover of the state apparatus by a sociopolitical group is essentially anti-democratic conduct. Despite this adequate reference to the knowledge of the Social Sciences and Humanities, the national nomothetas⁹ bequeathed to the operators of the Law a certain dubiousness in the laconic provision written in this normative novel, since the term "government" is not conceptualized, perhaps specifying the federative scope of the crime. In this way, the "government", provided for in the text of crime 359-M, must be understood in line with the fundamental choice of social organization expressed in the Federal Constitution, in its article 1, *caput*, that is, in which the Democratic Rule of Law was established, despite the conceptual richness¹⁰ historically debated in the Social Sciences and Humanities.

According to article 18 of the Federative Constitution of the Republic of Brazil, the *latu sensu* State, also called Public Administration in a broad sense, is composed of three types of federative entities, namely, Union, States and Municipalities, in which the Federal District combines and agglutinates state and municipal attributions and competences. In

⁹ Those who produce norms. Synonymous with "legislators".

¹⁰ The forms of government are diverse and plural, however it is possible to trace three major historical currents linked to the government of all, of the many or of the few, namely, democracy (isocracy), aristocracy (oligarchy) and monarchy (tyranny) (Araújo; Belinelli, 2021; Bobbio, 2020; Costa, 2012;).

this sense, jurisprudence, legal scholars, other academic and popular knowledge must debate and analyze the best way to apply the rule to concrete cases, a topic without a precise answer to this day, despite its great relevance and, moreover, outside the specific object of analysis of this article.

CONCLUSION

The recurrent crises that plagued the beginning of the twenty-first century reflected in a consequent distrust in democratic institutions around the world. In Brazil, the situation was no different. The legislator, in his eagerness to ensure the maintenance of the legitimacy of the democratic regime, ended up approving legislative measures that criminalized attempts to reverse the democratic order.

In this article, the normative provisions approved during the republican period, which concerned crimes against the State and against its representatives – elected or not, as was the case of the first Vargas government and the decrees approved during the civil-military regime – until the promulgation of the Citizen Constitution, in 1988, were rescued.

Based on this time frame, the objective was to demonstrate the evolution of the narrative defended by the far right in Brazil, divided into three major waves, according to Rudá Ricci (2022). Special emphasis was given to the updated version of the extreme right in Brazil, Bolsonarism, in which political minorities were heavily persecuted. In this context, article 359-M was approved, which criminalizes, in a short wording, what the Social Sciences would call a coup d'état.

Due to the breadth of this concept, it was recognized that it was necessary to differentiate what would be: Coup d'état, Revolution, Conservatism, Reactionarism and their consecrarians. In view of the centrality of the first term, it was clarified that the illegitimate seizure of political power can occur both by a sectarian social segment and by the attempt of a certain ruler to perpetuate himself in power.

In this context, a new interpretation was proposed for the brief and succinct article 359-M of the Penal Code, approved in 2019, whose wording leaves room for dubious interpretations for legal operators. There is, above all, the question about which entities of the federation would be supported by this wording, in view of the adoption of the term "government". In this sense, the legislator's intention to approve and enforce this rule was not clear, which leads to legal uncertainty on this subject, a result diametrically opposed to what was expected, which further aggravates the risk of democratic instability.

Therefore, in this work, it was intended to revisit this type of crime based on the contribution of the Social Sciences, in order to clarify the real intention of the legislator in its approval, so that, finally, the norm is applied by the operators of the law with the rigor and precision that the Democratic State of Law in Brazil deserves.

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