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NO FACTS, NO FORUM: CONVICTED SOLELY FOR BEING AT THE 8 JANUARY ENCAMPMENT

I. INTRODUCTION

In this essay, I propose to develop critical reflections on Criminal Case No. 1,666/DF, adjudicated by the Supreme Federal Court, with Justice Alexandre de Moraes acting as the reporting Justice, in a judgment delivered by that Court's Full Bench.

This is a paradigmatic case in which not only the conduct imputed to the accused is at issue, but also the limits of the exercise of the State's punitive power in a democratic regime. The subject is all the more sensitive as it lies within the broader context of criminal proceedings linked to the so-called Inquiry No. 4,781, the "Fake News" inquiry, and Inquiry No. 4,874, on "digital militias", both established as derivative inquiries of an investigative line aimed at confronting attacks against institutions. It is also connected to the specific inquiries into the anti-democratic acts of 8 January 2023, notably Nos. 4,917, 4,918, 4,919, 4,920, 4,921, 4,922 and 4,923/DF, instituted to investigate crimes such as criminal association, incitement to crime, the violent abolition of the Democratic Rule of Law and coup d'état. Not by chance, many of the

different offences.

It should be recorded at the outset that, on an academic plane, a critical view of the jurisprudence adopted by the Supreme Federal Court in no way signifies ignoring that institution's relevance and dignity for Brazilian democracy, nor does it entail disregarding its essential role in preserving the Rule of Law. Quite the contrary: it falls to that very Supreme Federal Court to ensure and guarantee, in Brazil, the freedom to criticise judicial decisions as a legitimate expression of democratic pluralism^[1].

The defendant, Joel Muru Chagas Machado, a self-employed professional, was convicted, in a 2024 sitting, in a real concurrence of crimes, of criminal association (Article 288, caput, of the Penal Code) and of inciting animosity between the Armed Forces and the Branches of the Republic (Article 286, sole paragraph, of the Penal Code).

The sentence imposed consisted of one (1) year's imprisonment, substituted by community-based penalties, together with twenty (20) day-fines, each unit being fixed at half the minimum wage in force at the time of the facts. In addition, payment of R\$ 5,000,000.00 (five million reais) was set as compensation for collective moral damages, to be fulfilled jointly and severally with the other defendants convicted in criminal cases related to the events of 8 January 2023^[2].

The scope of this article is strictly limited to the leading opinion of Justice Alexandre de Moraes, which prevailed as the ground of the conviction before the Full Bench. Thus, it is not my intention to revisit the entire case file or the dissenting opinions, but rather to examine critically the arguments set out in the majority opinion.

The analysis seeks to verify whether the conviction of Joel Muru Chagas Machado, as grounded in the reasoning set forth in the judgment assessed herein, is compatible with the constitutional principles of legality, typicity, culpability, subjective criminal liability, and the individualisation of criminal conduct – all enshrined in the 1988 Constitution and consolidated in the Supreme Federal Court's traditional jurisprudence and in the case law of the

Moreover, these constitutional principles are intrinsically connected to fundamental rights – human dignity, due process of law (in both its procedural and substantive dimensions), and the offence-based criminal law model – civilisational achievements inherent to the Democratic Rule of Law.

II. JURISDICTION OF THE SUPREME FEDERAL COURT AND THE FORUM PRIVILEGE

Article 102, item I, subparagraph (b), of the 1988 Federal Constitution provides that it falls within the original jurisdiction of the Supreme Federal Court to hear and judge, in common criminal offences, the President of the Republic, the Vice-President, members of the National Congress and other authorities therein listed. This is the so-called forum privilege, an institution which, far from constituting a personal prerogative, serves to protect the office institutionally, ensuring that certain functions of high national relevance are adjudicated by the country's highest court. It should be noted, however, that although the constitutional text does not restrict the privilege to crimes committed in the exercise of, or in relation to, the office, the Supreme Federal Court, in Criminal Case (Ação Penal) 937 – Question of Order (2018), settled the understanding that forum privilege is limited to offences perpetrated during the tenure of office and related to the office-holder's official duties.

It should further be clarified that individuals without forum privilege may be tried jointly with those who enjoy it, provided that the indictment and, above all, the conviction judgment demonstrate the connection between the crimes imputed to the privileged agent and to the co-defendant who lacks such privilege, pursuant to Supreme Federal Court Súmula (Precedent) 704. In that sense, the institutes of joinder by contenance (Article 77 of the Code of Criminal Procedure) and by connection (Article 76 of the Code of Criminal Procedure) must be duly evidenced in the accusatory pleading and in the judicial decision, so as to legitimise the attraction of jurisdiction to the Supreme Federal Court.

The Supreme Federal Court itself has already established that the consolidation of proceedings by connection or contenance cannot be presumed; concrete evidential grounds are required to demonstrate the nexus

active corruption, passive corruption, embezzlement, money laundering, conspiracy, unlawful remittance of funds abroad and fraudulent management of a financial institution.

On that occasion, the Court underscored the understanding crystallised in Súmula 704 of the Supreme Federal Court to the effect that “the attraction, on account of contiguity or connection, of a co-defendant’s case to the forum privilege of one of the accused does not violate the guarantees of the natural judge, of full defence, or of due process of law.”

Likewise, in AP 937 – Question of Order (2018), reported by Justice Luís Roberto Barroso, in which an indictment for passive corruption against a federal parliamentarian was under scrutiny, the Court fixed the following theses: “(i) Forum privilege applies only to crimes committed during the exercise of the office and related to the functions performed; and (ii) after the close of evidential proceedings, with publication of the order summoning the parties to file closing submissions, jurisdiction to hear and judge criminal actions shall no longer be affected by the office-holder coming to assume or to leave office, for whatever reason.”

In Criminal Case No. 1,666/DF, Justice Alexandre de Moraes grounded the Supreme Federal Court’s jurisdiction not only on the gravity of the facts associated with the events of 8 January 2023, but also on the evidential connection with investigations already pending before the Court involving authorities possessing forum privilege.

In his opinion, the Reporting Justice made express reference, *inter alia*, to Inquiry No. 4,781/DF (known as the “Fake News Inquiry”), in which federal parliamentarians are investigated for conduct related to the dissemination of hate speech, attacks on institutions and encouragement of anti-democratic acts. In this context, he named authorities with forum privilege, such as: Senator Flávio Bolsonaro; Federal Deputies Otoni de Paula, Cabo Júnior do Amaral, Carla Zambelli, Bia Kicis, Eduardo Bolsonaro, Filipe Barros, Luiz Phillipe de Orleans e Bragança, Guiga Peixoto and Eliéser Girão; as well as other parliamentarians mentioned in related inquiries, such as Carlos Jordy, Cabo Gilberto Silva and Gustavo Gayer.

connected to the same factual and evidential context of those inquiries. For that reason, the attraction of the Supreme Federal Court's jurisdiction was justified on the basis of Article 76, items II and III, of the Code of Criminal Procedure, thereby avoiding procedural fragmentation and the possibility of contradictory decisions.

Notwithstanding, within the reasoning of the conviction judgment, there is no reference to any co-perpetration between the convicted defendant and parliamentarians or authorities possessing forum privilege, whether as regards the crime of criminal association (Article 288 of the Penal Code) or the crime of inciting animosity between the Armed Forces and the Branches of the Republic (Article 286, sole paragraph, of the Penal Code). Indeed, there is a descriptive lacuna that disconnects the defendant from any link with a privileged authority within the criminal sphere, such that, at the level of the accusatory and condemnatory narratives themselves, the Supreme Federal Court's jurisdiction is emptied.

As regards typicity, the crime of criminal association requires the description of a bond between the defendant and other determined persons, in a specific and concrete manner. Such an association cannot be conceived as an abstract, invisible entity devoid of any identification. To justify the Supreme Federal Court's jurisdiction, the reasoning of the judgment should have pointed out, expressly, at least one authority with forum privilege as an integral member of the criminal association of which the defendant Joel Muru Chagas Machado was said to be part, as well as demonstrated how the bond between them, and with the other supposed associates, was formed.

With respect to the crime of inciting animosity between the Armed Forces and the Branches of the Republic (Article 286, sole paragraph, of the Penal Code), the conviction likewise failed to describe the role of any authority holding forum privilege or that authority's alleged protagonism as a co-perpetrator with the defendant. Consequently, it is not known whether Joel Muru Chagas Machado was incited by some authority to join the encampment, whether he himself incited the privileged authority to any criminal practice, or whether

This deficit becomes even more evident when the Supreme Federal Court's jurisdiction is examined in the light of the institutes of connection and contenance. Both are provided for in the Code of Criminal Procedure as hypotheses for consolidating proceedings, but they have distinct grounds: connection (Article 76 of the Code of Criminal Procedure) occurs when two or more offences bear between them an evidential, objective or subjective nexus such that the investigation of one influences that of the other; contenance (Article 77 of the Code of Criminal Procedure) is verified when there is a concurrence of persons in the same offence or when several offences result from a single act, requiring joint judgment.

The Supreme Federal Court's case law establishes that consolidation by connection or contenance is neither automatic nor presumed. Concrete demonstration in the indictment and in the conviction judgment is required, evidencing a factual or evidential bond that justifies the Court's jurisdiction, as settled in Súmula 704. In AP 470, Justice Joaquim Barbosa emphasised that attraction of jurisdiction by connection presupposes clear reasoning as to the nexus between the co-defendants' conduct. Likewise, in AP 937 – Question of Order (2018), reported by Justice Luís Roberto Barroso, the Court delimited that forum privilege is only maintained where there is a direct functional link between the crime and the privileged authority.

In this context, it was incumbent upon the conviction judgment in AP No. 1,666/DF to make explicit what evidential connection or contenance link would attract the Supreme Federal Court's jurisdiction. The absence of a clear description on this point undermines the legitimacy of the jurisdiction invoked, for the generic gravity of the facts is insufficient: it is indispensable to demonstrate whether there was a concurrence of agents or evidential interdependence between the defendant and authorities with forum privilege.

Furthermore, when one observes the reasoning contained in the opinion of the eminent Reporting Justice, Alexandre de Moraes, no concrete connection is apparent between acts allegedly committed by the defendant and any specific act attributed to the deputies named by the Reporting Justice when justifying the evidential connection – an aspect that is striking.

acts committed by former President of the Republic Jair Bolsonaro – whose forum privilege was likewise recognised by the Supreme Federal Court, as is a matter of public knowledge – or by any other office-holder vested with forum privilege.

In this regard, the forum privilege applicable to the accused in Criminal Case No. 1,666 remains without a logical explanation or evidential basis, inasmuch as no link was demonstrated between his conduct and any chain of command involving a figure clothed with forum privilege. It suffices to note that, in the structure of the alleged criminal association that the defendant supposedly joined, no ostensible participation by any person with forum privilege was described; that is, no connection between the defendant and a privileged figure was indicated.

Accordingly, at least for the purpose of justifying the Supreme Federal Court's jurisdiction in the specific hypothesis, the individualisation of conduct in co-perpetration between the defendant and a holder of forum privilege was emptied, such that the principle of the natural judge was impaired, in breach of Article 5, items XXXVII and LIII, of the Federal Constitution, which guarantee that there shall be no exceptional court or judge and that no one shall be prosecuted or sentenced save by the competent authority.

III. THE ASSIGNMENT OF THE “FAKE NEWS” INQUIRY TO JUSTICE ALEXANDRE DE MORAES

The reasoning of Justice Alexandre de Moraes in Criminal Case No. 1,666/DF makes express reference to Inquiry No. 4,781/DF, known as the “Fake News Inquiry”, as one of the connecting bases that justify the Supreme Federal Court's jurisdiction.

The Reporting Justice recalls that this inquiry was not allocated by electronic random distribution, as ordinarily occurs in cases within the Court's original jurisdiction. Its origin stems from a decision by the Presidency of the Supreme Federal Court, then held by Justice Dias Toffoli, who instituted the inquiry ex officio and assigned it to Justice Alexandre de Moraes for rapporteurship.

affected the honour of the Justices and the institution itself.

Since then, Inquiry 4,781 has become a hub for investigations into attacks on democratic institutions, serving as the basis for the establishment of other related proceedings, such as Inquiry 4,874/DF (digital militias) and, subsequently, for the connection with the facts of 8 January 2023.

By invoking this line of continuity, the Reporting Justice underscored that the Supreme Federal Court's jurisdiction was already consolidated by the presence of authorities with forum privilege in Inquiry 4,781 and in inquiries connected to it. Thus, the criminal prosecution of individuals without such privilege – like Joel Muru Chagas Machado – would be justified by the attraction of jurisdiction provided for in Article 76, items II and III, of the Code of Criminal Procedure.

This point, however, raises significant constitutional and conventional discussions. The absence of random distribution and the direction of the inquiry by the Presidency – albeit subsequently endorsed by a majority of the Full Bench – have been questioned from the standpoint of the principle of the natural judge (Article 5, item LIII, of the 1988 Federal Constitution) and of the case law of the Inter-American Court of Human Rights.

IV. THE INDIVIDUALISATION OF THE DEFENDANT'S CONDUCT

In the opinion delivered, Justice Alexandre de Moraes set out the elements which, in his view, demonstrated Joel Muru Chagas Machado's adherence to the criminal association and to the offence of incitement.

The individualisation of the conduct was described along three axes: (i) the confession given in the police sphere, in which the defendant admits having travelled from Santa Maria/RS to Brasília on 8 January 2023, remaining at the encampment until being arrested on 9 January; (ii) the indirect corroboration of that confession by the behaviour of another 529 accused persons, who acknowledged the same conduct and entered into Non-Prosecution Agreements (ANPPs) with the Office of the Prosecutor General; (iii) the use of

It is noteworthy that the judgment does not record any seizure of weapons or illicit objects, the identification of a vehicle used by the defendant, or any signs of recruitment or leadership. The individual proof is restricted to the extra-judicial confession, corroborated by an inference of collective adherence drawn from the context.

Such a mode of individualisation opens the way to critical analysis: the Constitution requires individualised criminal imputation (Article 5, items XLV and XLVI), whilst the Inter-American Court of Human Rights reiterates that criminal responsibility must be anchored in concrete acts attributable to the person, and not in collective presumptions.

It becomes evident that the judgment was not unanimous. Justice Nunes Marques, in a dissenting opinion, rejected any perspective of strict liability in criminal law and found not only the Supreme Federal Court's absolute lack of jurisdiction, but also the absence of conduct individualisation capable of supporting any conviction decree against the defendant, summarising his position in the following terms:

"It should be noted that the demonstrations carried out by those encamped were quite diverse and heterogeneous, ranging from agendas linked to customs to varied political demands. It cannot be asserted – indeed there is no evidence to that effect – that all members of the encampment, indiscriminately, shared the common purpose of inciting the Armed Forces to depose the constituted government or to bring about the violent abolition of the democratic rule of law. Nor are there material elements of proof pointing to the defendant's concrete conduct in instigating or encouraging the commission of any crimes."

Further regarding the lack of individualisation of the convicted defendant's conduct, attention is drawn to the ground employed in the judgment concerning the use of supposed confessions by other members of the same alleged criminal association, such confessions having occurred within Non-Prosecution Agreements. In his opinion, the eminent Justice Alexandre de Moraes stated that at least 529 defendants, in circumstances identical to

community service, participation in a course on democracy, restrictions on the use of social media, and payment of pecuniary contributions.

In other words, the reasoning of the judgment, by alluding to confessions obtained in the context of Non-Prosecution Agreements, proved entirely empty of any individualisation of the conduct imputed to the convicted defendant in Criminal Case No. 1,666. Should such statements have been limited to confirming the defendant's mere presence at the encampment, without any other element of authorship or participation, they are inoperative for purposes of conviction. Indeed, the defendant denied any criminal practice, admitting only that he had been present at the site.

In fact, the Reporting Justice's opinion did not name the co-defendants who are said to have confessed to unlawful acts in ANPPs, nor did it detail the content of those supposed confessions, rendering it impossible to use such elements to underpin a conviction decree against the accused Joel Muru Chagas Machado.

It should further be recorded that it would be inadmissible for the Supreme Federal Court to use confessions taken within a Non-Prosecution Agreement as borrowed evidence to support the conviction of Joel Muru Chagas Machado, inasmuch as confessions obtained for the purpose of an ANPP are not intended for that end. Quite apart from the fact that those co-defendants were not named and that the respective contents of their confessions were not detailed in the conviction decree, such confessions serve solely the limited purpose of the agreement entered into, and not the conviction of third parties, for they do not entail any judicial finding of guilt as to the facts narrated[3].

A question imposes itself: if the mere presence at the encampment were sufficient to characterise a crime, why did the authorities not dissolve it at an earlier stage? And further, why were Federal Police agents not previously embedded within the encampment?

If, in truth, the facts were connected with an attempted coup d'état, with the commission of anti-democratic acts, or with the operation of a criminal organisation and digital militias, Law No. 12,850/2013 would have applied, and

(wiretapping), and monitoring within the encampment by the Federal Police, with potentially high effectiveness.

However, none of this is substantiated in the individualisation of the accused's conduct and, by all indications, is not even present in the indictments filed against other accused persons in analogous conditions, likewise arrested solely for being encamped in the vicinity of the Supreme Federal Court.

Another decontextualised foundation of the judgment under examination refers to an excerpt taken from a different case, namely Criminal Case No. 1,060/DF, adjudicated on 10 May 2023, under the rapporteurship of the eminent Justice Rosa Weber, which the Reporting Justice, Alexandre de Moraes, reproduced to support the conviction of Joel Muru Chagas Machado, whose conduct consisted simply of being present at the encampment on 8 and 9 January 2023. In grounding the conviction, Justice Alexandre de Moraes referred to Justice Rosa Weber's judgment, in which a conviction was entered against another accused, mentioning the existence of an armed, stable and permanent human grouping, previously coordinated over social networks to commit indeterminate offences, manifested in attacks on Union property, on listed heritage assets, and in an attempt to abolish the Democratic Rule of Law, restricting the operation of the constitutional branches and seeking to depose the lawfully established government.

In fact, the reference made in the reasoning to the judgment handed down in Criminal Case No. 1,060/DF, reported by Justice Rosa Weber, proved decontextualised and disconnected from the situation of the accused Joel Muru Chagas Machado, because the individualisation of his conduct reveals no premeditation to attack the institutions of the Democratic Rule of Law, much less indicates coordination over social networks to that end, nor any behaviour aimed at restricting the operation of the constitutional branches or at deposing the lawfully established government.

On the contrary, the only conduct attributed to the defendant by the conviction judgment was that of being present at the encampment; from that mere circumstance, his participation in a multitudinous crime was presumed, based

It cannot be denied that we are facing an absolutely innovative precedent in criminal matters within the Brazilian legal system.

There was no investigation, it bears repeating, into any possible *modus operandi* for recruiting the defendant, his speeches at the encampment, or his subjective interaction with third parties. No weapons were seized from him; nor were his social networks even investigated. If this was the standard model used to underpin convictions – and if such mass convictions replicated this pattern – a serious investigative deficit on the part of the State is established. Nevertheless, it is neither possible nor legally permissible for the Judiciary to remedy such *lacunae* by abolishing the accused persons' fundamental rights.

Furthermore, Justice Nunes Marques, in his dissent, rightly highlighted the heterogeneity of the encampment, a circumstance recorded, indeed, in indictments brought by the Federal Prosecution Service itself. Note that those indictments narrated that the encampment “already operated like a sort of village, with a place for meals, a market, transport, medical care, [and] a room for puppet theatre.”

The manner in which arrests at the encampment were carried out is also worthy of record and was noted by Justice Nunes Marques in his vote, stressing that, on the morning of 9 January 2023, the Military Police merely requested that the encamped gather their belongings and board a bus, without prior notice that they would be arrested, a situation in which all complied with the police authority's instructions.

It is not known, in truth, whether the arrests of those encamped – similarly situated to Joel Muru Chagas – were ordered by a court, supposedly on grounds of *in flagrante delicto*, and, if so, for which offence.

In this perspective, it is worth recalling that both the Supreme Federal Court and the Superior Court of Justice have repeatedly held that the individualisation of conduct is an indispensable requirement for the validity of an accusation and of a conviction in criminal matters. Criminal responsibility, in a Democratic Rule of Law, must always be subjective – never objective –

generic indictments for lack of concrete description of the conduct attributed to the accused, affirming that mere collective imputation violates the adversarial principle and the right of defence. Along the same lines, the Superior Court of Justice has held that accusatory pleadings that fail to individualise conduct – generically imputing crimes such as corruption or laundering to several defendants – must be quashed for ineptitude.

These precedents confirm that it is impermissible to legitimise convictions grounded solely on the accused's physical presence within a given collective context, absent a minimal factual description of their concrete acts. On the contrary, Brazilian constitutional and infra-constitutional jurisprudence reinforces the requirement of a subjective nexus clearly and individually demonstrated, so as to avoid the application of strict liability in criminal law, expressly repudiated by the Constitution and by the inter-American human rights system.

In this vein, the mere generic imputation of crimes, unaccompanied by a minimal description of concrete acts attributable to the accused, does not meet the constitutional and conventional requirements of due process of law. The individualisation of conduct is an indispensable requirement for the validity of criminal prosecution; its absence is cause for ineptitude of the indictment and for nullity of any conviction. The Supreme Federal Court and the Superior Court of Justice have repeatedly affirmed that generic imputations do not allow the full exercise of the right of defence and must therefore be quashed in habeas corpus or related appeals[4]. By admitting convictions based solely on presumptions derived from an accused's physical presence within a certain collective context, the judgment in Criminal Case No. 1,666/DF adopts a form of strict criminal liability, in blatant violation of the principle of culpability and of the postulate of subjective responsibility – structuring pillars of democratic criminal law.

V. THE IMPOSSIBILITY OF USING ANPP CONFESSIONS AS EVIDENCE FOR CONVICTION

In the conviction entered in AP No. 1,666/DF, Justice Alexandre de Moraes employed, as a reinforcing element, confessions given by co-defendants within

support in the jurisprudence of the Supreme Federal Court and of the Superior Court of Justice.

The Supreme Federal Court has already established that “the ANPP is exhausted at the pre-procedural stage, especially because the consequence of its refusal, non-approval or breach is the initiation of the phase of offering and receiving the indictment.”^[5] In other words, the confession given in that context is not intended to form guilt, but merely to fulfil a formal requirement that enables the agreement’s execution.

In the same sense, the Superior Court of Justice has consolidated the understanding that “the extra-judicial assumption of guilt within an ANPP is akin to the content of a confession of the criminal offence before the police or prosecutorial authority, having probative value solely as extra-judicial data, and only being usable to support an indictment in the event of breach of the agreement, leading the Prosecution Service to file charges.”^[6]

More recently still, the Supreme Federal Court has recognised that “in the ANPP, the confession is not intended for the formation of guilt”^[7], reinforcing that its use as evidence for conviction violates due process of law.

It appears, therefore, that the function of the confession in an ANPP is not to serve as an evidential element in court, but solely as an extra-judicial, formal requirement for the agreement’s celebration. The case law of the Supreme Federal Court and of the Superior Court of Justice is firm in recognising that this confession is exhausted at the pre-procedural stage, and is not even admissible within the same proceedings as evidence of criminal responsibility.

Accordingly, by relying on confessions by co-defendants taken within ANPPs, without concrete individualisation of the conduct of the defendant Joel Muru Chagas Machado, the majority opinion fell into a flagrant contradiction with the consolidated jurisprudence of the Higher Courts, treating a pre-procedural datum as suitable judicial proof. Such a practice results in a distortion of the agreement’s purpose and in a violation of the principle of subjective criminal responsibility^[8].

In the opinion delivered, Justice Alexandre de Moraes invoked the notion of a multitudinous crime to uphold the conviction, citing precedents from the 1990s (HC 71,899/RJ, HC 73,638/GO and HC 75,868/DF, reported by Justice Maurício Corrêa). Those precedents, however, were limited to admitting a generic indictment in situations involving multitudinous crimes, always conditioning any conviction on an individualised imputation and on the demonstration of concrete proof of the accused's participation.

In Criminal Case No. 1,666/DF, by contrast, that criterion – originally restricted to the admissibility stage – was transposed to the judgment on the merits, such that mere presence at the encampment came to be deemed sufficient to support a conviction.

Accordingly, the majority opinion fell into a manifest distortion of the precedents cited, unduly expanding their *ratio decidendi* and weakening Brazilian criminal dogmatics by admitting criminal liability without individualisation of conduct.

VII. THE DEFICIENCY OF THE INVESTIGATION AND OF THE EVIDENTIAL PHASE

The conviction of Joel Muru Chagas Machado resulted from an evident deficit both in the investigation and in the evidential phase. No concrete acts were identified that could be attributed to him as incitement or criminal association. Nor was it ascertained how he entered the encampment, whether there had been any recruitment, associative links, or specific logistics related to his presence at the location.

The criminal proceedings did not produce testimony or records capable of proving the defendant's active participation in the facts narrated. Moreover, the exercise of the right to silence was interpreted in a biased manner, to the defendant's manifest detriment.

Thus, the conviction rested on generic presumptions, in direct affront to the principle of culpability and to the fundamental guarantees of due process of law.

The absence of consistent investigation into financing, logistics or associative links transformed mere presence at the encampment into sufficient indicia of guilt. This investigative deficit resulted, in practice, in the adoption of a form of strict criminal liability, in direct breach of Article 5, items XLV and XLVI, of the 1988 Federal Constitution, as well as of the consolidated case law in *Baena Ricardo et al. v. Panama* of the Inter-American Court of Human Rights, which established the need for subjective responsibility and individualisation of conduct as indispensable conditions for the validity of criminal or administrative sanctions[9].

More serious still, this deficient pattern of imputation, according to the Reporting Justice himself, was replicated in 1,557 serial decisions, consolidating a corrosive precedent for democracy by normalising convictions without individualisation of conduct. By legitimising violations of constitutional and conventional guarantees, the precedent compromises the integrity of the justice system, since, in the Reporting Justice's words, "the SUPREME FEDERAL COURT's jurisdiction over the criminal actions concerning the extremely serious crimes committed on 8 January was examined and recognised by the Court's FULL BENCH in 1,557 (one thousand, five hundred and fifty-seven) decisions." This automatic alignment undermines the coherence of the constitutional process and affects, at the very least, all individuals who were encamped near the Supreme Federal Court – whose number was not even duly ascertained.

Note, moreover, that if the encampment were indeed a coup-oriented structure and if those present there were all organised in an associative manner for a premeditated coup d'état, it would be expected that they would already have been on the investigative radar of the Federal Police and of the Federal Prosecution Service, given that the criminal investigation into anti-democratic acts and into the attempted coup d'état was already under way.

In that context, it is unclear why, at least at the investigative stage, that group was not brought under Law No. 12,850/2013, which defines criminal organisation and provides for criminal investigation. In such a scenario, the Federal Police and the Federal Prosecution Service could, by court order, have

individualise each participant's conduct.

In truth, even if a generic indictment without proper individualisation of conduct were admitted on the basis of precedents HC 71,899/RJ, HC 73,638/GO and HC 75,868/DF (reported by Justice Maurício Corrêa), those decisions could never have been used to authorise the conviction of the defendant Joel Muru Chagas Machado.

If the same decision-making pattern is being replicated in analogous cases, its urgent review is required—whether by the Supreme Federal Court, by the National Congress, or by the President of the Republic – each within their respective competences, so as to delimit with precision the scope of such cases.

IX. CONCLUSION

The analysis of AP 1,666/DF reveals investigative deficits, the adoption of strict criminal liability, and a serious irregularity in the allocation of the case. The assignment of Inquiry 4,781 to Justice Alexandre de Moraes without random distribution violates the principle of the natural judge (Article 5, items XXXVII and LIII, of the 1988 Federal Constitution) and Article 8(1) of the American Convention on Human Rights.

This flaw, combined with fragile evidence and the distorted application of the concept of a multitudinous crime, compromised fundamental rights and produced corrosive effects on Brazilian democracy.

In view of the serious violations of constitutional and conventional guarantees identified, correction of this state of affairs may proceed along three legitimate institutional avenues. It falls to the Supreme Federal Court, in criminal review proceedings, to examine the validity of convictions rendered in disregard of the requirements of due process of law and of the individualisation of conduct. The National Congress, in turn, holds the political prerogative to deliberate on the granting of amnesty, an institute expressly provided for in Article 48, item VIII, of the Federal Constitution.

the Armed Forces and the Branches of the Republic (Article 286, sole paragraph, of the Penal Code). The Constitution, in Article 5, item XLIII, limits amnesty solely in relation to heinous crimes, torture, illicit drug trafficking and terrorism, which do not apply to the offences at issue. Therefore, convictions that have already become final, as well as Non-Prosecution Agreements entered into by hundreds of persons as a result of the events of 8 January 2023, may be encompassed by a legislative amnesty, extinguishing their penal effects and restoring coherence to the constitutional system.

For his part, the President of the Republic is constitutionally empowered to grant pardons and commutation of sentences (Article 84, item XII, of the Federal Constitution). Among the possible modalities, humanitarian pardon stands out, aimed at safeguarding human dignity in the face of disproportionate convictions or in situations of manifest social, personal or procedural fragility. The Supreme Federal Court has already recognised, in precedents such as Direct Action of Unconstitutionality (ADI) No. 5,874/DF (Reporting Justice Alexandre de Moraes), the constitutionality of that measure, affirming the Executive's broad margin of political discretion. In this context, humanitarian pardon emerges as a legitimate instrument of sovereign clemency, capable of correcting punitive distortions and ensuring that criminal law is not converted into an instrument of oppression.

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Justice: Cármen Lúcia, Full Bench, judgment on 15-05-2020, ELECTRONIC CASE FILE DJe-142 RELEASED 08-06-2020 PUBLISHED 09-06-2020; ADPF 187, Reporting Justice: Celso de Mello, Full Bench, judgment on 15-06-2011, ELECTRONIC JUDGMENT DJe-102 RELEASED 28-05-2014 PUBLISHED 29-05-2014 RTJ VOL-00228-01 PP-00041; and RE 631053 RG, Reporting Justice: Ricardo Lewandowski, Justice writing for the judgment: Celso de Mello, Full Bench, judgment on 15-06-2012, ELECTRONIC CASE FILE DJe-213 RELEASED 29-10-2014 PUBLISHED 30-10-2014.

As to freedom of expression and criticism as upheld by the Supreme Federal Court, see the following precedents: STF – ADPF 130/DF, Reporting Justice: Carlos Britto, Date of Judgment: 30/04/2009, Full Bench, Date of Publication: DJe-208 RELEASED 05-11-2009 PUBLISHED 06-11-2009 EMENT VOL-02381-01 PP-00001; STF – Rcl 65017/AM, Reporting Justice: Dias Toffoli, Date of Judgment: 12/08/2024, Second Panel, Date of Publication: ELECTRONIC CASE FILE DJe-n/a RELEASED 27-08-2024 PUBLISHED 28-08-2024; STF – Rcl 62174/MG, Reporting Justice: Flávio Dino, Date of Judgment: 09/04/2024, First Panel, Date of Publication: ELECTRONIC CASE FILE DJe-n/a RELEASED 22-04-2024 PUBLISHED 23-04-2024; and STF – Rcl 23899/PR, Reporting Justice: Rosa Weber, Date of Judgment: 02/10/2023, Full Bench, Date of Publication: ELECTRONIC CASE FILE DJe-n/a RELEASED 27-10-2023 PUBLISHED 30-10-2023.

[2] Note, moreover, that in Criminal Case No. 1,670/DF, in which the defendant Ademir Domingos Pinto da Silva was sentenced to one (1) year's imprisonment, substituted by community-based penalties, in addition to twenty (20) day-fines and the joint and several fixing of R\$ 5,000,000.00 (five million reais) by way of compensation for collective moral damages, for the offences of criminal association (Article 288, caput, of the Penal Code) and inciting animosity of the Armed Forces against the Branches of the Republic (Article 286, sole paragraph, of the Penal Code), there is an analogous description of conduct and of a model of criminal responsibility based on the defendant's mere presence at the encampment, as detailed in this essay.

scope of a Non-Prosecution Agreement (ANPP) has a merely formal nature and cannot be used as evidence for conviction, under penalty of violating due process of law and the principle of culpability. See, to that effect, the precedents: STF, HC 218.798/SP, Reporting Justice: Cármen Lúcia, j. 15.8.2022, Single-Justice Decision, DJe 17.8.2022; and STF, RHC 214.146/SP, Reporting Justice: André Mendonça, j. 4.3.2024, Second Panel, DJe 23.4.2024.

[4] In that sense, a paradigmatic precedent of the Supreme Federal Court addressed the ineptitude of the indictment and the prohibition of strict criminal liability due to the lack of individualisation of conduct, where the Court, under the rapporteurship of Justice Edson Fachin, examined a case in which the petitioner, a former public servant, was charged with alleged participation in a scheme of corruption and money laundering linked to the so-called Operation Zelotes, without the indictment describing any concrete act of requesting, receiving or concealing an undue advantage. The accusation limited itself to narrating, in generic terms, the existence of a group devoted to committing crimes against the public administration, without pointing to the accused's individual conduct or subjective elements of authorship and intent. The Supreme Federal Court recognised that such a generic imputation contravenes Article 41 of the Code of Criminal Procedure, due process of law and Article 8(2)(b) of the American Convention on Human Rights, as it does not allow the exercise of the right of defence nor the subsumption of the conduct to the criminal provision. The Court therefore granted the writ to quash the criminal action, reaffirming that criminal liability must be subjective and individualised, never presumed from collective contexts or abstract associations. See the relevant precedent: STF, HC 182.458/DF, Reporting Justice: Edson Fachin, Second Panel, judgment on 27/09/2021, DJe 08/11/2021.

[5] STF, HC 218.798/SP, Reporting Justice: Cármen Lúcia, judgment on 15.8.2022, Single-Justice Decision, DJe 17.8.2022.

[6] STF, HC 756.907/SP, Reporting Justice: Jorge Mussi, Single-Justice Decision, DJe 19.7.2022.

[7] STF, RHC 214.146/SP, Reporting Justice: André Mendonça, judgment on 4.3.2024, Second Panel, DJe 23.4.2024.

Administrative Sanctioning Law, including in cases involving multitudinous unlawful acts. In the case *Baena Ricardo et al. v. Panama* (2001), the President of that country ordered the dismissal of several civil servants on the allegation that there was a link between the stoppage of their activities and the movement led by Colonel Eduardo Herrera-Hassan, thereby presuming the workers' guilt. The Inter-American Court held that such State action, by presuming culpability without formal proceedings and without adequate proof, constituted a form of strict liability in sanctioning matters. It decided, therefore, that the principles of culpability and of due process of law must be observed in all punitive action by the State, even administrative, prohibiting the imputation of liability without demonstration of individual intent or fault. See the case: INTER-AMERICAN COURT OF HUMAN RIGHTS. *Baena Ricardo et al. v. Panama*. Judgment of 2 February 2001. Series C, No. 72. Available at: https://www.corteidh.or.cr/docs/casos/articulos/Seriec_72_ing.pdf

[9] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Baena Ricardo et al. v. Panama*. Judgment of 2 February 2001. Series C, No. 72. Available at: https://www.corteidh.or.cr/docs/casos/articulos/Seriec_72_ing.pdf

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