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Constitutional Jurisdiction and Democracy: Linguistic Apprehension of Legal Events

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Abstract

The central problem addressed is "what is political in constitutional jurisdiction?" exploring the role of constitutional courts in democracy. Authors such as Kelsen, Schmitt, Grimm, Arendt, Nietzsche, and Schlieffen offer diverse perspectives. While Schmitt emphasizes the importance of identity and political representation, and Arendt promotes a pluralistic view of democracy, Grimm, on the other hand, analyzes the "gap between norm and concrete case" in constitutional jurisdiction. We propose an approach employing the philosophy of language for this problem analysis. Divergent positions include debates on the legitimacy of constitutional courts and the reconciliation between democratic principles and the protection of fundamental rights. The proposed solution involves strengthening institutions that uphold constitutional principles and promoting an inclusive and participatory democracy where different voices can be considered.

Keywords

Constitutional Jurisdiction, Democracy, Dieter Grimm, Language Theory

1. Introduction

The analysis of constitutional jurisdiction involves a wide range of issues, from its theoretical foundation to its practical implications in modern democracy Sandro (2022), Mendes (2014). In this context, authors such as Hans Kelsen, Carl Schmitt, and Dieter Grimm have played fundamental roles in formulating and debating these issues. While Kelsen and Schmitt represent opposite sides in

the discussion about the judiciary's role in democracy, with contrasting views on the relationship between law and politics, Grimm emerges as a contemporary voice seeking to reinterpret and expand this controversy. Nonetheless, the role of constitutional jurisdiction is vital in contemporary democracy because it ensures that all arms of government adhere to their designated authorities and safeguards individuals' rights. It serves as a means of monitoring governmental authority and deterring instances of power abuse. In addition, constitutional jurisdiction enables the resolution of conflicts between government branches and establishes a framework for interpreting the constitution in a coherent and principled way. In general, constitutional jurisdiction plays a crucial role in preserving the supremacy of the law and ensuring a fair distribution of power in a democratic society (Chai, 2007).

The central problem permeating this investigation is the role of constitutional jurisdiction in upholding the rule of law and democracy, especially in times of increasing challenges such as reactionary populism and the deterioration of democratic institutions. According to a populist conception of constitutional law, the courts do not possess any unique normative authority when it comes to interpreting the constitution. The increased weight of judicial interpretations stems from the judges' experience and thoughtful analysis rather than from their position alone. Some scholars contend that the existence of judicial review can reduce the motivation of legislators to safeguard constitutional ideals, as they are aware that the courts will fulfill this role. Moreover, constitutional errors can arise in both legislative and judicial contexts, making it crucial to establish a robust theory of constitutional interpretation that extends beyond the realm of the courts to tackle this problem. Some individuals argue in favor of judicial supremacy to prevent "interpretative anarchy" and guarantee the synchronization of acts within society, as argued by Tushnet (1999). From the divergent perspectives of Kelsen, Schmitt, and Grimm, the need to understand the nature and limits of constitutional jurisdiction, as well as its impact on democratic legitimacy and institutional stability, emerges.

Furthermore, the investigation focuses on the relationship between legal interpretation and democracy, exploring how concepts such as truth and language influence the practice of constitutional jurisdiction. By examining the contributions of the philosophy of language to the understanding of law and democracy, the aim is to provide adequate guidance and insight into the challenges and possible solutions for constitutional jurisdiction in the contemporary era, because the philosophy of language plays a crucial role in the social sciences by providing a framework for understanding how language shapes our perception of reality and influences social interactions. By examining the underlying assumptions and implications of different linguistic theories, social scientists can gain insights into how language constructs and reflects social norms, power dynamics, and cultural values. This critical analysis of language helps researchers to uncover hidden meanings, challenge dominant discourses, and ultimately contribute to a

more nuanced and comprehensive understanding of human behavior and society (Kramsch, 2014).

In light of this panorama, the research questions guiding this study are: 1) what is the role of constitutional jurisdiction in sustaining democracy and the rule of law? 2) how do Kelsen's, Schmitt's, and Grimm's views contribute to our understanding of the role of constitutional jurisdiction in sustaining democracy and the rule of law? 3) in what ways can the philosophy of language contribute to the practice of legal interpretation and its relationship with modern democracy?

Through the critical analysis of these questions and the presentation of new theoretical and methodological perspectives, this study seeks to contribute to a better understanding of the role and challenges faced by constitutional jurisdiction in the contemporary context and to developing more robust and democratic approaches to legal interpretation.

The discussion on constitutional jurisdiction and democracy remains open, with debates on reconciling the majority principle with protecting fundamental rights. While some question whether constitutional courts that overturn majority decisions are at odds with democracy, others raise doubts about whether suppressing constitutional jurisdiction would resolve this tension. On the one hand, Carl Schmitt's perspective highlights the importance of identity for democracy, emphasizing the pursuit of homogeneity between rulers and the ruled, whereas, on the other, he raises questions about the need for difference and political representation. Hannah Arendt's approach, in turn, offers a pluralistic view of democracy, valuing the diversity of opinions in the public sphere and recognizing the importance of institutions that ensure respect for constitutional principles. This pluralistic conception of democracy and protecting fundamental rights by constitutional jurisdiction can promote a more authentic (in the Greek sense) and participatory democracy.

2. Hans Kelsen, Carl Schmitt, Dieter Grimm, and Constitutional Jurisdiction: Framing the Issue

In the last thirty years, Western liberal democracies have experienced turbulence, discontinuities, and declines stemming from various historical processes and converging to some extent, due to a common factor: globalization. Characterized not only by the expansion of access to information and the weakening of traditional types of communication but also by the emergence of new forms of human interaction through social networks, this phenomenon is a complex process influenced by internal and external elements. By contesting conventional ideas of sovereignty and legal authority, globalization has had a major effect on constitutional jurisdiction. Legal systems must change to handle worldwide problems and disputes as nations become more linked by trade, technology, and communication. Because constitutional courts must consider the global consequences of rulings, their interpretation and application of laws have changed.

Globalization has also raised concerns about the role of treaties and international organizations in forming national legal systems, complicating the concept of constitutional jurisdiction.

The deterioration of democracies is not merely the result of organized conspiracies but also a possible result propelled by the actions of elected leaders. In many cases, these leaders are the ones to subvert the process that brought them to power, maintaining a democratic facade while undermining its essence (Levitsky and Ziblatt, 2018).

In Brazil, this process was experienced (2019-2022) and, especially after the 2022 elections (through the attempted coup d'etat and antidemocratic acts on Jan. 8, 2023), the Supreme Court was targeted by attacks and repeated attempts to weaken its power, sometimes manifested by the slogan "Supreme is the people," a way to delegitimize the constitutional authority of the Supreme Federal Court (STF) by a supposed democratic majority defeated at the polls in the 2022 electoral process.

Indeed, not only constitutional jurisdiction but also constitutional review have emerged as central themes in the debate about the nature of Constitutional Courts—or, more precisely, apex courts with constitutional functions—and whether constitutional review constitutes a predominantly legal or political activity (Grimm, 2023: p. 31). This is a technical formulation of the legal-political problem that echoes the circumstances experienced in Brazil, manifested employing the language of reactionaryism, reflected in calls for a coup, military intervention, arrest of STF justices, and even the use of the "moderator power", among other aspects.

In contrast to the scenario outlined in the first paragraph of this section, this controversy has been the subject of legal-political debate in Europe since the early decades of the 20th century, especially in the context of the Austrian Constitution of 1920, and during the period of the Weimar Republic, highlighting the clash between Schmitt (2007: p. 193, 234) and Hans Kelsen. This debate will be discussed through Dieter Grimm's approach and analyses.

According to Grimm (2023: p. 62), "functionally considered, judicial control of the constitutionality of legislative acts is part of legislation." He argues that a body with powers to annul laws participates in the legislative process, albeit negatively. In contrast to creating a law where political freedom prevails over legal binding, the dynamic is reversed when it comes to the annulment of a law through judicial constitutional review; in such a case, the enforcement element prevails. The political reasons that have led to the law's approval are irrelevant. In this sense, constitutional review represents genuine constitutional jurisdiction.

Grimm (2023: p. 78) points out that, until the early 1900s, the concept of "democracy" had not significantly influenced Schmitt's arguments against constitutional jurisdiction. It was only when he designated the president of the Reich as the predestined guardian of the Constitution—personifying the unity of

the people (which, in turn, found its form in the Constitution)—that he felt the need to delegitimize the Constitutional Court democratically, portraying it as a threat to democracy (Schmitt, 2007: p. 193, 234). On the other hand, Kelsen (2003: pp. 237, 298), grounded in his pluralistic understanding of democracy, considered constitutional jurisdiction an almost natural consequence of the democratic principle.

Schmitt opposed relinquishing political decisions to the Judiciary, while Kelsen did not believe compliance with the Constitution was subject to political whims. At this point, the controversy between these two antagonistic viewpoints, each with its justification, can be seen.

Grimm (2023: pp. 80-81) reminds us that the prevalence of Kelsen's model does not imply that the origin of constitutional jurisdiction directly derives from the Pure Theory of Law. According to the author, the determining factor in Germany was the conviction that a constitution without constitutional jurisdiction would be vulnerable to its opponents. This argument was empirical, based on experience, although it was also found in Kelsen's writings within a context of purely legal argumentation. Renouncing constitutional jurisdiction would mean, according to this view, that the Constitution would cease binding. Such an outcome would be unacceptable because it would imply breaking with the hierarchical structure of the legal system.

So, for this reason, despite the prevalence of Kelsen's view, Schmitt's concern about the politicization of the Judiciary and the judicialization of politics remained latent, and, in contemporary times, its resonance seems even more pronounced. However, this discussion differs from that in the context of the Weimar Republic. Although the struggle between law and politics is still relevant, according to Schmitt's (2007: p. 229, 234) perspective and his arguments, it occurs. The current criterion for assessing constitutional jurisdiction is democracy (Grimm, 2023: p. 85).

Determining whether this tension can be mitigated with the abolition of constitutional jurisdiction, as it has been proposed often recently, depends in part on the conception of democracy adopted as a premise and, in part, on the precise understanding of the role of the Constitutional Court. When considering, initially, the conception of democracy, if this is associated with the principle of the majority, the substantive relationship between the majority and the constitutional courts, which have the power to invalidate majority decisions based on the Constitution, would effectively be incompatible with democracy (Grimm, 2023: p. 89).

From Grimm's (2023: p. 93) perspective, constitutional jurisdiction involves internalizing a legal culture in which holders of power accept their subordination to the Constitution while society rejects indifference towards the binding nature of the law. The discussion of whether constitutional jurisdiction is primarily a legal or political issue, which historically divided figures like Kelsen and Schmitt, remains on the agenda. Grimm suggests that considering the object, ef-

fect, and mode of operation of constitutional jurisdiction, a segmented approach may be more appropriate for understanding its complexity. He also questions whether the "legal or political" dichotomy is sufficient to adequately address constitutional review, indicating that both perspectives have their respective justifications.

Furthermore, Grimm (2023: pp. 95, 107) addresses the issue of the legal character of constitutional review, emphasizing that the focus should not only be on whether interpretation is necessary but also on how it is conducted. He highlights that the margin of interpretation is narrower from a legal standpoint, gradually shaped by legal doctrine, method, and precedents. These elements offer both tested and proven solutions and an understanding of legal norms. However, they do not bind courts similarly to the norms, allowing for a more dynamic approach to legal problem-solving.

The gap between the constitutional norm and the concrete case presents itself as an inherent challenge to constitutional jurisdiction, mainly due to the nature of constitutional principles, which tend to be vaguer than legislative norms:

Furthermore, vague legal norms are more common in Constitutional Law than in enacted law (Gesetzesrecht). Many constitutional norms are principles rather than rules, in the sense given to them by the terminology of Robert Alexy. Therefore, the gap between norm and case is almost always more significant than in ordinary law. Interpretative margins are thus opened to the judge who applies the Constitution to litigious cases. These margins do not allow for random interpretations (as every margin is also a limit), but they certainly tolerate more than one acceptable reading. Filling these spaces is not merely a cognitive task (kognitiver Vorgang). The interpretation of a norm is not exhausted in revealing a meaning already deposited in it at the moment of promulgation. The creative element is also part of the concretization of the norm. A concretized normative proposition (konkretisierte Normsatz) is not simply found; on the contrary, it is, to a certain extent, constructed, but within the scope of an argumentative chain that can lead it back to the norm (Grimm, 2023: p. 44).

Thus, Grimm asserts that filling this interpretative gap, rather than just a cognitive activity, involves a creative element intrinsic to concretizing the norm, requiring reasoned argumentation to lead it back to the original norm.

In light of this scenario, reflecting on the "size" of this gap between the norm and the case in constitutional jurisdiction raises crucial questions about the plurality or univocally—which Grimm rejects—of possible interpretation/modeling outcomes, as well as revealing the degree of creation, interference of pre-understandings and representations on the interpreter in this process. The author goes so far as to state that "one can never exclude the possibility that even those Constitutional Courts that take their legal function seriously may exceed the almost indefinable limit between constitutional interpretation and constitutional amendment" (Grimm, 2023: p. 49). Is there a limit between interpretation and constitutional amendment? What is its nature (ontological or linguistic)?

The dominant solution proposed by post-1945 constitutional doctrine sought the development of "more precise" interpretative techniques, relevant precedents, and solid legal argumentation that would lead to the consistent concretization of the norm. Understanding this "gap" is essential to improve the practice of constitutional jurisdiction and strengthen the Rule of Law, as will be sought to demonstrate.

3. Constitutional Jurisdiction and Legal Interpretation: A Contribution of the Philosophy of Language to Modern Democracy

The relationship between text, norm, and the specific situation in constitutional jurisdiction is indeed complex. Just as humans attempt to comprehend the world through metaphors and concepts, legal interpreters face the challenge of applying abstract norms to concrete cases. Similar to how humans seek truth through language and concepts, jurists seek justice by interpreting laws.

However, just as linguistic metaphors can distort the "essence of things", legal interpretation can distort the norm's application. Just as each metaphor is unique and not representative of "reality" (Adeodato, 2014: pp. 158-167), each legal interpretation is influenced by the specific context in which it occurs. Thus, among other reasons subsequently outlined, one agrees with Kelsen (1962: p. 290) in asserting that "all methods of interpretation developed up to the present always lead to only one possible result, never to a result that is the only correct one."

In the practical application of law by courts, it is imperative to have a legal basis that is objective and widely accepted by society. This common ground must maintain the appearance of a strict connection "between the text of the law and the result of its application by the public agent, even though this bond, in essence, is a fiction" (Krell, 2014: p. 298).

Therefore, the extent of the gap between the legal norm and the specific situation in constitutional jurisdiction is determined by the complexity of legal language, the individual evaluation of the jurist, and the social and cultural context in which such analysis occurs (Bercovici, 2004: pp. 21-24). Classical doctrine teaches that the degree of attachment of the interpreter in the relationship between the concrete case and the legal norm, represented by the interpretative margin in constitutional jurisdiction, is influenced by a series of factors, including the ambiguity of constitutional norms, legal tradition, the personal convictions of the interpreter, and society's expectations regarding the judiciary.

In Brazil, academic-dogmatic debates covering philosophical hermeneutics, kelsenianism, legal realism, and language analysis, among others, reflect a skeptical stance towards the classical canons of interpretation. However, according to Krell (2014: p. 297), this critical perspective hardly reaches legal practitioners, who pragmatically rely on the effectiveness of traditional methods to demonstrate legal truth.

The aforementioned skeptical stance is reaffirmed to highlight that the pursuit

of truth (veritas est adaequatio rei et intellectus) in legal interpretation, as well as in democracy grounded in the Rule of Law and ensured by constitutional jurisdiction, can be a trap for the sustainability of these democratic pillars and constitutional courts.

Nietzsche (2007: pp. 79-99) emphasizes that the concept of the "thing-in-itself" (which represents absolute truth without any implications) is completely unachievable, even for the one who created language. Therefore, it is not worth striving for.

This creator solely delineates the connections between objects and human beings, and he employs the most audacious metaphors to articulate these connections. First, he transforms a nerve signal into an image, serving as the initial metaphor. A sound replicates the image, creating a secondary metaphor. Furthermore, on each occasion, there is a total transition from one sphere to another, abruptly entering a completely distinct and separate realm. Imagine a person suffering from deafness who has never encountered the sensation of sound or music. Perhaps this individual will be amazed as they observe Chladni's sound figures; perhaps they will investigate the vibrations of the string and insist on understanding the true meaning of "sound." Regarding language, we all have the same experience: we mistakenly feel that we have knowledge about the actual objects when we use words like trees, colors, snow, and flowers. In reality, we only have metaphors that misrepresent the original entities. However, these metaphors often provide a useful framework for understanding complex concepts.

When employed as a conceptual framework, each term must include numerous instances, all of which are more or less similar but never completely identical. Every notion has a fundamental process of equalizing things that are not identical. For instance, labeling someone as "honest" does not imply the existence of an inherent trait known as "honesty," but rather categorizes a collection of separate activities under this term, regardless of their differences. Therefore, the notion emerges as a result of the rejection of the individual and the creation of an intangible attribute, a "*qualitas occulta*" (Nietzsche, 2007: pp. 83-84). As the philosopher ponders, what exactly is truth? Poetic and rhetorical means increase, transfer, and enhance a collection of metaphors, metonymies, and anthropomorphisms described in the text. However, it can be argued that some truths are not merely forgotten perceptions, but rather enduring realities that continue to hold significance and value, even if they are no longer immediately apparent or recognized. While it is true that symbols and language can become outdated or lose their meaning over time, it does not necessarily follow that the underlying truths they represent are also lost or diminished. In fact, it is possible that these truths may be rediscovered or reinterpreted in new ways, giving them renewed relevance and meaning. Over time, these expressions become permanent, accepted, and obligatory within a society. Truths are perceptions that have been forgotten; they are symbols that have lost their impact and become dull, like coins that have lost their markings and are now seen as just metal rather

than currency (Nietzsche, 2007: p. 84).

The impulse towards truth seems to arise from the social obligation to tell the truth, a convention established for society's existence. Thus, even unconsciously following ingrained habits, man lies according to this convention, eventually leading to a feeling of truth. The emotion aroused when designating something as "red," "cold," or "mute" is morally linked to truth, as it contrasts with the exclusion and distrust reserved for the liar. This obligation to truth makes man rationalize his actions, universalizing his impressions into colder and more colorless concepts, thereby aligning his behavior with abstract principles. This ability to transform intuitive metaphors into concepts allows man to construct an ordered structure of laws, privileges, and subordinations, contrasting with the intuitive world of first impressions. In this way, Nietzsche (2007: p. 85, 89) reminds us that while metaphors are individual and escape categorization, concepts offer strict regularity.

When someone hides something behind a bush, looks for it again in the same place, and finds it there, there is not much to praise in such seeking and finding. Yet this is how matters stand regarding seeking and finding "truth" within reason. If I make up the definition of a mammal and then, after inspecting a camel, declare, "Look, a mammal," I have indeed brought a truth to light in this way, but it is a truth of limited value. That is to say, it is a thoroughly anthropomorphic truth that contains not a single point that would be "true in itself" or really and universally valid apart from man. At the bottom, what the investigator of such truths is seeking is only the metamorphosis of the world into man. He strives to understand the world as something analogous to man, and at best, he achieves the feeling of assimilation through his struggles. Through this analogy, one can appreciate the intricate relationship between the individual and the world they inhabit, and the constant search for balance and harmony in the face of adversity.

The skeptical perspective regarding concepts, especially legal ones, represents a response to the challenges of modern constitutional jurisdiction in the face of reactionary populism. Added to this conception is the revival of the Greek conception of democracy; this approach does not represent a dead end for concepts but rather a relevant alternative in the current context. The following section will explore this perspective in detail; however, it is essential to demonstrate its application within legal dogmatics beforehand.

Schlieffen (2022: p. 45, 47) emphasizes that intentionally replacing concepts with ambiguous metaphors is an effective way to maintain skepticism about them. The "web" metaphor exemplifies this approach, contrasting with the apparent clarity of the term "system." While the latter suggests a precise and scientific order, the web metaphor evokes a complexity in which concepts are fluid and do not offer definitive guidance to scientists searching for truth. This idea, rooted in a philosophical tradition, is illustrated by Nietzsche's comparison between the world of concepts and a "spider's web construction". Schlieffen points out that for Nietzsche, all "truth," including the most basic categories of orienta-

tion, is produced internally and externally, similar to spider webs. She argues that we are not mere external observers but immersed in our own network of meanings, acting as if we were the measure of everything. This reflection indicates an understanding of reality as more imponderable and paradoxical than scientific optimism might suggest.

This approach seeks to shed light on the controversy raised by Grimm (2023: p. 49) regarding the boundary between constitutional interpretation and constitutional amendment, proposing a solution grounded in the constraints outlined by Schlieffen (2022: pp. 48-58). The constraint of the decision, for example, highlights the need to end legal debates and the importance of legal procedures and language in resolving conflicts, indicating that a definitive answer is not always reached. Still, the need to close the debate is imperative.

The coupling constraint highlights the interdependence of law with social practices, emphasizing that the legal system is vulnerable to a lack of social energy and stressing the need for coherence and openness in its structure. However, the constraint of invention indicates the continuous creation of legal concepts through language and its role in constructing a legal reality. Meanwhile, the constraint of self-reference focuses on the authoritarian nature of legal self-representations, showing that such representations are not merely descriptive but also guide action.

The constraint of reflexivity, in turn, underscores the dynamic interaction between action and representation, drawing particular attention to the importance of ethical reflection in the construction and interpretation of law. Conversely, the constraint of latency highlights the need to conceal the legal construction processes and the law's semantic complexity. At the same time, adequacy emphasizes the importance of adapting legal discourse to its context to ensure persuasion and acceptance by the audience.

These constraints suggest a vibrant democracy maintained by means of a legal process that seeks to achieve internal balance within a perceived fair culture. This notion of justice is not necessarily tied to the average opinion of all involved participants but represents a legal diversity of social conformity. Contrary to what one might think, there is the possibility that the majority's sense of justice could be influenced by the refinement of a unique legal theory, resulting in a process capable of constructing a lasting structure of norms over the constant flow of human life—a kind of second world of norms that are delicate enough to be shaped by circumstances. Such a process is capable of "erecting a lasting structure of webs over the flowing water of human existence—a second world of webs that are both delicate enough to be carried by the waves and firm enough not to be destroyed by the wind" (Schlieffen, 2022: pp. 57-58).

4. Democracy, Truth, Politics, and Constitutional Jurisdiction

The relationship between constitutional jurisdiction and democracy, especially

concerning the supremacy of the majority principle, remains open. We return to a vicious cycle without a clear indication of this relationship. While some argue that constitutional courts that overturn majority decisions in the name of the Constitution are at odds with democracy (Schmitt, 2007: p. 193, 234), others question whether the suppression of constitutional jurisdiction would resolve this tension (Bercovici, 2004: pp. 5-24; Bonavides, 2004: pp. 127-150). The interpretation of the Constitutional Court's activity—analyzed in the previous section—and the understanding of democracy are crucial points in this debate, raising questions about reconciling the majority principle with the protection of fundamental rights guaranteed by the Constitution (Grimm, 2023: p. 89).

Schmitt returns the analysis core through the approach of the principle of identity in political theory, highlighting its relation to democracy and political representation. According to Schmitt (2001: p. 205), identity is essential for democracy, which is based on the homogeneity of the people and internal equality. However, this homogeneity presupposes the existence of an external difference, which allows certain people to identify others as strangers or enemies. For Schmitt, a society can only exist if it can determine who its friends and enemies are (Maia, 2010: p. 169).

Democracy, understood as such, seeks identity between rulers and the ruled, eliminating qualitative differences between them. However, Schmitt (1992: p. 72) emphasizes that this identity requires internal and external differences. Democracy, in seeking homogeneity, also resorts to measures such as exile, banishment, and imprisonment to purify heterogeneous elements. Schmitt also compares identity with the principle of representation in the formation of the State, highlighting the tension between them. While identity seeks a minimum of government and personal direction, representation implies a maximum of government, which can lead to the loss of the State's content as an expression of the people. Thus, identity and representation are political-formal principles that form the State's political unity.

Finally, Schmitt (2001: p. 80) argues that, even in a democracy based on identity and representation, it is by way of such representation that any person has an origin in the public sphere. As a fiction of homogeneity, the people need to be represented, as their absence allows their representation and makes their presence visible. This complex relationship between identity and representation raises questions about how to develop and understand the concept of the people in political theory.

The epistemological and tyrannical prejudice in the history of philosophy and political science originates in the condemnation of Socrates, according to Arendt (1990: pp. 73-103). The rupture between philosophy and politics began with the Greek philosopher's death, leading Plato to disregard life in the polis and question Socrates's teachings. Socrates' inability to persuade his judges of his innocence and merits made Plato doubt the efficacy of persuasion (doxa).

This doubt regarding persuasion is closely linked to Plato's fiery denunciation

of doxa, or opinion. For Plato, truth directly opposes opinion, even when doxa is not explicitly mentioned. The fact that Socrates subjected his views to the irresponsible opinions of the citizens of Athens and was defeated by the majority led Plato to disdain doxa and seek absolute standards, thus contaminating Western political thought from its inception.

Philosophical and political skepticism has the potential to challenge and reverse this theoretical formulation that disqualifies democracy, both in antiquity, represented by Plato, and in modernity, as expressed by Schmitt (1992). In this context, the ideas of David Hume (1985) stand out:

Nothing appears more surprizing to those who consider human affairs with a philosophical eye than the easiness with which the few govern the many and the implicit submission with which men resign their sentiments and passions to those of their rulers. When we enquire about what this wonder means, we shall find that, as force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded, and this maxim extends to the most despotic and most military governments and the most free and popular.

Thus, he saw truth as the opposite of mere opinion, which he considered illusory. This disdain for opinion gave the conflict political intensity, as it is an opinion and not the truth fundamental to all kinds of power. Arendt (2016: pp. 289-290) revisits Madison's assertion that "every government rests upon Opinion" and not even the most autocratic tyrant or government can achieve or maintain power without the support of those who share a similar way of thinking. On the other hand, any claim in the realm of human affairs to an absolute truth, whose validity does not depend on the support of opinion, deeply undermines politics and governments. This antagonism between truth and opinion was elaborated by Plato, especially in his work "Gorgias", as a conflict between communication in the form of dialogue, appropriate to philosophical truth, and communication in the form of "rhetoric", through which the demagogue, as he would be called today, persuades the multitude.

According to Arendt, the rupture on the juridical plane occurs when the logic of the reasonable, which pervades legal reflection, fails to deal with the unreasonableness that characterizes an experience like the totalitarian one. The latter has not arisen from an external threat but from an internal production at the heart of modernity as an unexpected and irrational outgrowth of its values (Lafer, 1997: pp. 55-65).

Arendt (2016: p. 297) highlights that truth carries an element of coercion with it, and the often-oppressive tendencies, so clearly deplorable among those who claim the truth, may be caused less by a weakness of character than by the need to live under a kind of compulsion habitually. Statements, such as "the three angles of a triangle are equal to the two angles of a square," "the Earth revolves around the sun," "it is better to suffer evil than to practice it," "in Aug. 1919 Germany invaded Belgium", differ significantly in how they were arrived at. Still,

once perceived as trustworthy and declared as such, they have in common that they are beyond agreement, dispute, opinion, or consent. Those who accept them are not altered by crowds or the absence of crowds that agree with the same proposition; persuasion or dissuasion is futile, as the content of the assertion is not persuasive but coercive.

From this perspective, there is a preservation of unawareness of the true essence of political life—the rewarding joy that arises from being in the company of our peers, from acting together and appearing in public, from engaging with the world through words and actions, thereby acquiring and sustaining our identity and initiating something entirely new.

By grounding a political conception of democracy in the reflections of Arendt (1990: pp. 73-103), it becomes possible to steer clear of the pursuit of homogeneity and unity in public affairs and also to combat the notion of truth in political matters and the prejudice against doxa, or opinion. Arendt also advocates for an understanding of democracy that embraces plurality and recognizes the diversity of views as essential for the healthy functioning of the political system. From this standpoint, democracy is perceived as a space of dialogue and debate where different viewpoints can coexist and be considered.

This pluralistic approach to democracy is inseparable from the model of constitutional jurisdiction intended to be ensured through the activity of Constitutional Courts, especially in Brazil. Constitutional Courts play a crucial role in protecting fundamental rights and safeguarding the constitutional order, ensuring that laws and political interests are under democratic principles and values enshrined in the Constitution.

Acknowledging the importance of plurality and diversity of opinions in the public sphere and strengthening the institutions that ensure respect for constitutional principles, it is possible to promote a more enduring and inclusive democracy where all citizens have a voice and feel represented (Campos, 2022: pp. 316-325). In this sense, Arendt's (1990: pp. 73-103) approach offers a valuable perspective guiding political theory and constitutional practice towards a more authentic and participatory democracy.

5. Conclusion

Given the complexity and diversity of the issue of constitutional jurisdiction, the turbulence faced by Western liberal democracies in recent decades has expanded the scope of this debate. Globalization, with its impact on the dissemination of information and the transformation of social interactions, has become a catalyst for democratic challenges, exacerbated by elected leaders who undermine democratic principles to maintain their power.

In the Brazilian context, the confrontation between the President and the Supreme Court, especially after the attempted coup d'etat on Jan. 8, 2023, highlighted the importance of constitutional jurisdiction as the guardian of the Constitution in the face of antidemocratic assaults. This controversy echoes histori-

cal debates, such as those between Schmitt (1992) and Kelsen (2003), about constitutional courts' legitimacy and political role.

In this context, Grimm's (2023) analyses offer a valuable perspective, highlighting constitutional jurisdiction's ambiguous and challenging nature. His focus on the gap between norm and concrete case underscores the complexity of legal interpretation, especially in a context of vague norms and abstract constitutional principles. Similar issue was raised by Appiah and Klu (2021) regarding the Ghanaian judicial review experience.

From this context arises the methodological importance of the philosophy of language in understanding the dynamics between legal text, legal interpretation, and social context. The metaphor of the web proposed by Nietzsche (2007) and Schlieffen (2022) highlights the fluidity and complexity of concepts, especially legal ones, challenging the notion of an objective and immutable legal truth.

In this sense, constitutional jurisdiction cannot be seen merely as a legal issue but as a dynamic process that reflects and shapes social norms and practices. The constraints outlined by Schlieffen (2022) point to the need for coherence, adaptation, and ethical reflection in exercising constitutional jurisdiction, seeking to build a lasting normative structure that adapts to the complexities of human life. For instance, in the context of environmental regulation, coherence, adaptation, and ethical reflection are essential in striking a balance between economic growth and environmental conservation. In this context, it is important to consider the various stakeholders involved and their differing priorities. For example, the government may prioritize economic growth, while environmental organizations may prioritize conservation efforts. Therefore, finding a balance that takes into account the needs and concerns of all stakeholders is essential for effective environmental regulation. Additionally, it is important to recognize that coherence, adaptation, and ethical reflection are not static concepts, but rather require ongoing evaluation and adjustment as new information and challenges arise.

Thus, adopting an approach that recognizes the fluid nature of the law, democracy, and constitutional jurisdiction can strengthen these fundamental pillars and ensure that they thrive in a constantly changing world. This approach addresses contemporary challenges and promotes a more inclusive and participatory vision of democracy, where different voices are heard, considered, and respected.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

Adeodato, J. M. (2014). *Uma Teoria Retórica da Norma Jurídica e do Direito Subjetivo*. Noeses.

Appiah, K. Y., & Klu, K. R. (2021). Invoking the Supervisory Jurisdiction of the Supreme Court of Ghana. The Case of a Meddlesome Interloper (Busybody). *Beijing Law Re-*

view, 12, 1179-1190. https://doi.org/10.4236/blr.2021.124061

Arendt, H. (1990). Philosophy and Politics. *Social Research, 57,* 73-103. http://www.jstor.org/stable/40970579

Arendt, H. (2016). *Entre o passado e o futuro* (8th ed.). Perspectiva.

Bercovici, G. (2004). Constituição e política: Uma relação difícil. *Lua Nova: Revista de Cultura e Política, No. 61,* 5-24. https://doi.org/10.1590/S0102-64452004000100002

Bonavides, P. (2004). Jurisdição constitucional e legitimidade (algumas observações sobre o Brasil). *Estudos Avançados, 18,* 127-150. https://doi.org/10.1590/S0103-40142004000200007

Campos, R. (2022). *Metamorfoses do direito global: Sobre a interação entre direito, tempo e tecnologia*. Contracorrente.

Chai, C. G. (2007). *Jurisdição constitucional em uma democracia de riscos* (556 p.). AMPEM.

Grimm, D. (2023). O que é político na jurisdição constitucional? In *Jurisdição Constitucional e democracia: Ensaios escolhidos* (pp. 31-50). Contracorrente.

Hume, D. (1985). Of the First Principles of Government. In *Essays Moral, Political, and Literary* (pp. 32-35). Liberty Fund.

Kelsen, H. (1962). *Teoria pura do Direito* (Tradução J. B. Machado, v. II). Arménio Amado.

Kelsen, H. (2003). *Jurisdição constitucional*. Martins Fontes.

Kramsch, C. (2014). Language and Culture. *AILA Review*, *27*, 30-55. https://doi.org/10.1075/aila.27.02kra

Krell, A. (2014). Entre desdém teórico e aprovação na prática: Os métodos clássicos de interpretação jurídica. *Revista Direito GV, 10,* 295-320. https://doi.org/10.1590/S1808-24322014000100012

Lafer, C. (1997). A reconstrução dos direitos humanos: A contribuição de Hannah Arendt. *Estudos Avançados, 11,* 55-65. https://doi.org/10.1590/S0103-40141997000200005

Levitsky, S., & Ziblatt, D. (2018). *Como as democracias morrem* (Tradução: Renato Aguiar). Zahar.

Maia, P. S. P. (2010). A crítica de Carl Schmitt à democracia parlamentar: Representação política como ato de fé, plebiscito como condição da identidade. *Brasília: Revista de informação legislativa, 47,* 161-177.

Mendes, C. H. (2014). *Constitutional Courts and Deliberative Democracy*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199670451.001.0001

Nietzsche, F. (2007). *O livro do filósofo. Coleção grandes obras do pensamento universal-76*. Editora Escala.

Sandro, P. (2022). *The Making of Constitutional Democracy*. Bloomsbury Publishing. https://doi.org/10.5040/9781509905249

Schlieffen, K. G. (2022). *Iluminismo retórico: Contribuições para uma teoria retórica do direito* (Trad. João Maurício Adeodato). Alteridade.

Schmitt, C. (1992). *O conceito do político* (Tradução de Álvaro Valls). Vozes.

Schmitt, C. (2001). *Teoría de la constitución* (Tradução de Francisco Ayala). Alianza Editorial.

Schmitt, C. (2007). *O guardião da constituição*. Del Rey.

Tushnet, M. (1999). *Taking the Constitution away from the Courts*. Princeton University Press. https://doi.org/10.1515/9781400822973