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PRESENTATION

Law is a field of knowledge in which different disciplines intertwine to form a greater whole. **Legal Frontiers: The Intersection of Law, Technology and Innovation - 2 ed** is a work that expands this interconnection, together 14 articles on various topics, written by experts from different areas of knowledge.

Developed by **Seven Publications**, this book presents a broad overview of the challenges, discoveries and advances in fields such as freedom of expression, digital security technologies, normative gaps in data-driven educational governance and much more.

SUMMARY

FREEDOM OF EXPRESSION, INSTITUTIONAL ARCHITECTURE OF INFORMATION, AND DIGITAL PLATFORMS: THE EXHAUSTION OF THE BRAZILIAN SUPREME COURT'S COMMUNICATIVE PARADIGM

LIBERDADE DE EXPRESSÃO, ARQUITETURA INSTITUCIONAL DA INFORMAÇÃO E PLATAFORMAS DIGITAIS: O ESGOTAMENTO DO PARADIGMA COMUNICATIVO DO SUPREMO TRIBUNAL FEDERAL

LIBERTAD DE EXPRESIÓN, ARQUITECTURA INSTITUCIONAL DE LA INFORMACIÓN Y PLATAFORMAS DIGITALES: EL AGOTAMIENTO DEL PARADIGMA COMUNICATIVO DEL SUPREMO TRIBUNAL FEDERAL DE BRASIL

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ABSTRACT

This article critically examines the communicative paradigm consolidated by the Brazilian Supreme Court, especially through ADPF 130 and RE 511.961/SP, in light of the structural transformation of the public sphere in the age of digital platforms. It argues that this paradigm has aged poorly because, by radicalizing freedom of the press under a logic of precedence and predominantly ex post forms of accountability and, subsequently, by bringing professional journalism closer to individual freedom of expression, it produced a dogmatic architecture that is now insufficient to distinguish, in constitutionally adequate terms, personal expression, the institutional architecture of information, and the private intermediation of informational circulation. The study adopts a hypothetico-deductive method, combining dogmatic-jurisprudential reconstruction with critical-systemic analysis, and articulates the case law of the Brazilian Supreme Court and the Inter-American Court of Human Rights with the relevant scholarship on the right to information, the institutional structure of informational circulation, the platformization of the public sphere, and algorithmic mediation. It further argues that freedom of expression can no longer be understood solely through a subjective and negative lens, since it also has an objective and institutional dimension linked to pluralism, the formation of a free public opinion, and the protection of the structural conditions for the social circulation of information. Finally, the article proposes a dogmatic reconstruction grounded in the differentiation between individual expression, professional journalism, and digital platforms, in order to restore the normative capacity of democratic constitutionalism in the face of the contemporary erosion of the institutional architecture of information.

Keywords: Freedom of Expression. Right to Information. Digital Platforms. Brazilian Supreme Court. Journalism. Democracy.

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RESUMO
Este artigo examina criticamente o paradigma comunicativo consolidado pelo Supremo Tribunal Federal, especialmente a partir da ADPF 130 e do RE 511.961/SP, à luz da transformação estrutural da esfera pública na era das plataformas digitais. Sustenta-se que esse paradigma envelheceu mal porque, ao radicalizar a liberdade de imprensa sob lógica de precedência e responsabilização predominantemente ulterior e, em seguida, aproximar o jornalismo profissional da liberdade individual de expressão, produziu uma arquitetura dogmática hoje insuficiente para distinguir, de modo constitucionalmente adequado, expressão pessoal, arquitetura institucional da informação e intermediação privada da circulação informacional. O estudo adota método hipotético-dedutivo, com reconstrução dogmático-jurisprudencial e análise crítico-sistêmica, articulando jurisprudência do Supremo Tribunal Federal e da Corte Interamericana de Direitos Humanos com bibliografia sobre direito à informação, estrutura institucional da circulação informacional, plataformização da esfera pública e mediação algorítmica. Argumenta-se que a liberdade de expressão não pode mais ser lida a partir de uma compreensão apenas subjetiva e negativa, pois também possui dimensão objetiva e institucional, vinculada ao pluralismo, à formação de uma opinião pública livre e à proteção das condições estruturais de circulação social da informação. Ao final, propõe-se uma reconstrução dogmática fundada na diferenciação entre expressão individual, jornalismo profissional e plataformas digitais, de modo a restabelecer a capacidade normativa do constitucionalismo democrático diante da erosão contemporânea da arquitetura institucional da informação.

Palavras-chave: Liberdade de Expressão. Direito à Informação. Plataformas Digitais. Supremo Tribunal Federal. Jornalismo. Democracia.

RESUMEN
Este artículo examina críticamente el paradigma comunicativo consolidado por el Supremo Tribunal Federal, especialmente a partir de la ADPF 130 y del RE 511.961/SP, a la luz de la transformación estructural de la esfera pública en la era de las plataformas digitales. Se sostiene que dicho paradigma ha envejecido mal porque, al radicalizar la libertad de prensa bajo una lógica de precedencia y un régimen predominantemente ulterior de responsabilidad y, acto seguido, al aproximar el periodismo profesional a la libertad individual de expresión, produjo una arquitectura dogmática hoy insuficiente para distinguir, de manera constitucionalmente adecuada, la expresión personal, la arquitectura institucional de la información y la intermediación privada de la circulación informativa. El estudio adopta un método hipotético-deductivo, con reconstrucción dogmático-jurisprudencial y análisis crítico-sistémico, articulando la jurisprudencia del Supremo Tribunal Federal y de la Corte Interamericana de Derechos Humanos con la bibliografía sobre derecho a la información, estructura institucional de la circulación informativa, plataformización de la esfera pública y mediación algorítmica. Se argumenta, además, que la libertad de expresión ya no puede ser leída únicamente a partir de una comprensión subjetiva y negativa, pues también posee una dimensión objetiva e institucional, vinculada al pluralismo, a la formación de una opinión pública libre y a la protección de las condiciones estructurales de la circulación social de la información. Por último, se propone una reconstrucción dogmática fundada en la diferenciación entre expresión individual, periodismo profesional y plataformas digitales, con el fin de restablecer la capacidad normativa del constitucionalismo democrático frente a la erosión contemporánea de la arquitectura institucional de la información.

Palabras clave: Libertad de Expresión. Derecho a la Información. Plataformas Digitales. Supremo Tribunal Federal. Periodismo. Democracia.

1 INTRODUCTION

Freedom of expression occupies a central position in democratic constitutionalism. Without it, there is no legitimate dissent, effective public criticism, free formation of opinion, or social control of power. This centrality, however, does not authorize simplifying readings. The contemporary constitutional problem is no longer limited to the classic opposition between the individual who speaks and the State that censors. The digital transformation of the public sphere has shifted the axis of controversy: the social circulation of information has started to occur in environments structured by private intermediaries who select, hierarchize, recommend, amplify, and obscure content according to their own algorithmic, economic, and infrastructural logics. The constitutional question, therefore, no longer concerns only the freedom to express ideas, but also the material conditions of visibility and circulation of public discourse.

It was in a scenario prior to the consolidation of this new communicative architecture that the Federal Supreme Court established, in 2009, two decisive precedents: ADPF 130 and RE 511.961/SP. In the first, by declaring the non-reception of the 1967 Press Law by the Federal Constitution of 1988, the Court built an especially robust understanding of freedom of the press, rejecting prior censorship and favoring the logic of subsequent accountability. In the second, by removing the requirement of a specific diploma for the exercise of the profession of journalist, the STF approximate, from a structural perspective, journalism, professional freedom, freedom of expression and freedom of information, establishing that journalistic activity constitutes a professionalized manifestation of communicative freedoms and, therefore, does not admit state barriers incompatible with the Constitution. Together, these judgments formed a constitutional paradigm of communication that had undeniable historical importance in overcoming authoritarian residues and in the affirmation of the free press as a condition for pluralism and democratic control of power.

It turns out that the historical strength of a paradigm does not make it immune to the aging of its premises. The informational ecosystem on which ADPF 130 and RE 511.961/SP focused no longer corresponds, in its central elements, to the contemporary communicational environment. The old centrality of professionalized means of mediation has given way to digital platforms oriented by data extraction, segmentation, personalization, algorithmic recommendation, and maximization of engagement. Information and opinion have ceased to circulate predominantly in recognizable editorial structures and have begun to travel in privatized spaces of visibility, governed by business models that transform attention, behavior, and predictability into economic value.

It is at this point that the insufficiency of the consolidated framework in 2009 is revealed. The new digital mediators do not operate as neutral supports for the speech of others. They organize circulation, modulate reach, repetition and permanence, define practical relevance and interfere directly in the public experience of what is the objective truth of the facts. In this environment, the constitutional problem ceases to reside only in the content of the discourse and begins to encompass the structure of its dissemination, and it is no longer enough to ask who can speak. It is necessary to inquire under what systemic conditions speech circulates, who controls these conditions, and to what extent this private control affects pluralism, informational autonomy, and, consequently, the Democratic Rule of Law itself.

It is in this context that the assumptions articulated by the STF in 2009 require a critical rereading. ADPF 130 radicalized the protection of press freedom based on a logic of precedence and subsequent accountability compatible with a universe in which the press still occupied a central position in the social organization of information. On the other hand, RE 511.961/SP, by bringing journalism and generalized freedom of expression closer together, weakened the dogmatic distinction between the individual manifestation of thought and professional journalistic activity as a practice institutionally mediated by investigation, editorial criteria, public responsibility and commitment to informative relevance. What was then justified as a legitimate reaction to corporate or state controls today reveals a relevant theoretical cost: the fusion between constitutionally connected but normatively distinct categories obscures the difference between individual expression, journalistic institutionality, and private algorithmic intermediation.

This insufficiency became even more visible with the judgment of RE 1.037.396/SP, in 2025, when the STF itself began to operate with categories such as systemic risks, duty of care, safe and transparent digital environment, and insufficient protection of fundamental rights. Brazilian constitutional jurisprudence has thus begun to register that the grammar based almost exclusively on the rejection of prior censorship and strictly subsequent accountability no longer responds, by itself, to contemporary forms of damage, viralization, opacity, and private infrastructural power.

The argument of this article, however, is not to nostalgically restore the requirement of a diploma for journalists, nor to legitimize generic forms of prior control of public discourse. The question is more precise: to demonstrate that the Brazilian constitutional paradigm consolidated by the STF in 2009 has aged badly because it was formulated for a communicative environment whose structural premises no longer exist. Individual freedom to give an opinion, the institutional function of journalism and the private power to structure the circulation of content belong to the same thematic field, but not to the same dogmatic plane.

The central hypothesis is, therefore, negative: the paradigm resulting from the combination of ADPF 130 and RE 511.961/SP no longer offers sufficient categories to understand, in a constitutionally adequate way, the contemporary informational ecosystem. Its deficit is not in having overprotected freedom of expression, but in having erected beacons through a conceptual architecture incapable of distinguishing, with the necessary rigor, individual freedom, journalistic institutionality and algorithmic intermediation. When these plans are dogmatically merged, the ability to protect, at the same time, the communicative autonomy of the subjects, the right to information, pluralism and the integrity of the democratic conditions for the formation of public opinion is lost.

The general objective of this study is to demonstrate this insufficiency and to propose a dogmatic reconstruction of freedom of expression capable of distinguishing individual expression, professional journalism and private digital intermediation. To this end, the text adopts a hypothetical-deductive method, with dogmatic-jurisprudential reconstruction and critical-systemic analysis, articulating jurisprudence of the Federal Supreme Court and inter-American and European standards with bibliography dedicated to the right to information, new digital mediators, platform and surveillance capitalism, privacy and informational disorder.

It is argued here that the current crisis does not stem from excessive protection of freedom of expression per se, but from the use of a constitutional grammar that is not very differentiated for communicative realities that are no longer equivalent. In more direct terms: the problem is no longer just in knowing who can speak, but in determining who structures, on a large scale, the conditions under which speech becomes visible, credible, and politically effective.

2 FREEDOM OF EXPRESSION, JOURNALISTIC INSTITUTIONALITY AND THE RIGHT TO INFORMATION

The first premise of this article is that freedom of expression is not exhausted in its subjective dimension. It is true that it protects the individual externalization of thought, criticism, opinion, dissent, and the discursive participation of citizens. But its constitutional significance is not limited to this plan. In complex democratic societies, freedom of expression also has an objective dimension, because it protects the structural conditions for the circulation of discourse, the formation of public opinion, pluralism and social access to information. From this perspective, the right to information cannot be reduced to the individual ability to seek, receive and disseminate content, as it is also projected as a collective good, insofar as it interferes in public opinion and conditions the informed political participation of citizens.

Although often handled in an approximate way, freedom of expression, freedom of information and freedom of the press are not fully covered. The first operates as a broader category; On the one hand, there is a distinction between expression in the strict sense, linked to ideas, opinions and value judgments, and, on the other hand, freedom of information, aimed at the public circulation of relevant facts and data, normatively connected to the veracity and diligence of the informant. Freedom of the press, in turn, designates the institutional exteriorization of these freedoms by the media, bringing together both the circulation of information and the dissemination of ideas in the public space (Steinmetz; Favero, 2016, p. 641-642).

This understanding prevents the communicative problem from being absorbed by the negative grammar of state non-intervention. What the Constitution protects is not only the freedom to speak, but also the integrity of the normative environment in which society informs itself, discusses and deliberates on matters of public interest. Constitutional protection thus reaches not only individual acts of discursive emission, but also institutional mediations without which the public sphere degrades into asymmetry, opacity or private capture of social visibility. Freedom of expression protects the sender, but it also protects the conditions of possibility of a publicly relevant communication.

Here the right to information acquires its own importance. Although articulated with freedom of expression, it is not to be confused with it. The distinction retains dogmatic utility: freedom of expression in the strict sense refers, at its core, to the expression of ideas, judgments and opinions; Freedom of information focuses on facts, data and content that interfere in the formation of public opinion and, therefore, are not indifferent to the problem of veracity and informative diligence. Hence the relevance of Barroso's doctrinal formulation (2004, p. 18-25), corroborated by Steinmetz and Favero (2016, p. 641-645), which recognizes his commitment to the truth in a subjective sense, that is, to the seriousness of the investigation and to the diligence of the informant, and not to an absolute claim of objective truth.

From this stems a central point: the political self-direction of citizens depends on the existence of minimally reliable, pluralized and institutionally structured information flows. Constitutional democracies do not require consensus, but they presuppose some common basis of intelligibility of the social world. Without it, dissent ceases to operate as a public controversy and begins to function as cognitive fragmentation, strategic manipulation or simple excitation of affections. It is not by chance that disinformation has been associated, in contemporary contexts, with a true political and cultural production of ignorance, through which economic and political groups benefit from the formation of audiences that are increasingly adaptable by dubious information and parallel realities (Segurado, 2021, p. 19).

In this sense, in terms of politically relevant information, democracy cannot be indifferent to the distinction between verifiable information and deliberate disinformation, because a concept of information entirely detached from the truth may be sufficient for the technical functioning of systems and networks, but not for the sustenance of a free and fair public order (Bucci, 2019, p. 54-55). Freedom of expression, therefore, cannot be read only as a shield against censorship; it must also be understood as a guarantee of the conditions under which democratic controversy remains possible.[2]

It is from this requirement that the constitutional importance of journalism arises. Journalism is not to be confused with the general freedom to express one's opinion, although it participates in it and finds a basis in it. Its constitutionally relevant core is not in the simple emission of content, but in the institutional mediation of information of public interest. This mediation involves verification, checking, contextualization, hierarchization, editorial responsibility and insertion in routines oriented to the production of socially verifiable information. The decisive point, therefore, is not corporate, but functional: journalism has reinforced prominence not because it constitutes a category privilege, but because it performs a material public function in the informational architecture of democracy.

From this perspective, the insufficiency of the jurisprudential paradigm consolidated from ADPF 130 and, subsequently, RE 511.961/SP is evident. In the first, the STF attributed to the press centrality in the formation of public opinion, qualifying it as an instance of critical thinking and an alternative to the official version of the facts. In the second, by removing the requirement for a specific diploma, the Court brought journalism closer to the freedoms of expression and information and rejected state controls on access to the activity. Each movement, taken in its context, had a robust constitutional justification. The critical point lies in the dogmatic result of their combination: if, on the one hand, it radicalized the protection of freedom of the press against censorship and state dirigisme, on the other hand, jurisprudence excessively approximated journalistic practice to individual freedom of expression, compressing normatively relevant differences between personal speech, journalistic activity and intermediation of information circulation.

This compression has become especially costly in the digital ecosystem. While the public sphere was predominantly organized by traditional means, the distinctions between

[2] At this point, the warning of Adriano Duarte Rodrigues, professor emeritus at the New University of Lisbon, for whom veracity does not depend on communication itself, is useful; once communicated, however, the information is understood under pragmatic conditions of enunciation, which makes the problem of its public circulation more complex without removing the democratic centrality of truth (Rodrigues, 2016, p. 34).

individual expression, the press, and the distribution of information remained stabilized by relatively visible institutional mediations. In the digital environment, however, mediation does not disappear; it is reconfigured in private infrastructures that order reach, repetition, priority, and visibility according to their own economic rationalities.[3] The difficulty no longer consists only in protecting expression against the State, but in dogmatically reconstructing freedom of expression and the right to information in the face of private environments that structurally condition the circulation of the credible, the visible and the relevant. That is why the collective dimension of the right to information and the need to face the effects of private powers on the public sphere assume renewed centrality (Steinmetz; Favero, 2016, p. 648-653).

Recent literature on disinformation reinforces this diagnosis. The authors of *The Science of Fake News* note that the rise of the phenomenon reveals the erosion of old institutional safeguards against disinformation and that this content imitates — most often in a crude and ostentatious way — the appearance of journalistic news without reproducing its editorial filters, its validation procedures, and its institutional logic of credibility (Lazer *et al.*, 2018, p. 1094-1095). The formulation is particularly important because it reveals that the contemporary problem does not consist only of error, excess or noise, but in the proliferation of content that simulates journalism without sharing its editorial norms, its internal brakes and its accountability mechanisms.

The dogmatic consequence is unequivocal: not all discursive circulation is press; Not all visibility is qualified public information; Not every speaker who reaches an audience performs a journalistic function. What gives differentiated constitutional relevance to journalism is not the mere externalization of messages, but the insertion in an institutional practice of mediation of social reality guided by duties of verification, verifiability and public responsibility. When this trace is erased, freedom of expression tends to be read only from its subjective and negative side, losing sight of its objective and democratic-structural dimension.

The urgency of this differentiation appears, finally, on the empirical plane. In a large-scale study on the spread of true and false news on the social network *Twitter* — currently known as "X" — researchers at the Massachusetts Institute of Technology (MIT) concluded that falsehood circulates further, faster, deeper, and broader than truth in all categories

[3] The notion that informational mediation, far from disappearing, is reconfigured in private infrastructures that organize public circulation according to hierarchical and economic logics dialogues directly with Francisco Balaguer Callejón's analysis of the "new digital mediators" and their algorithmic ecosystems (Callejón, 2022, p. 179-180, 186-190 and 200-202). In a close perspective, András Koltay highlights that platforms play a role analogous to that of the media in the public sphere and that their prioritization activity decisively influences the way users perceive available content, with effects on access to information and equality in the circulation of opinions (Koltay, 2024, p. 5-6 and 20).

analyzed, with an even more pronounced effect on political information. In addition, they maintain that this diffusive advantage derives mainly from human behavior, and not from automated action (Vosoughi; Roy; Aral, 2018, p. 1146-1151).

Although the authors adopt, for methodological reasons, a broad and non-institutional concept of *fake news*, the finding is eloquent for the argument developed here: in high-speed and enormous-scale digital ecosystems, the structural asymmetry between verification and viralization converts the distinction between institutional journalism and mimetic circulation of content into a constitutional issue of the first magnitude. What once might have sounded like conceptual refinement has become a condition for reconstructing, in adequate terms, the relationship between freedom of expression, the right to information, and democracy.

3 A COMMUNICATIVE PACKAGE IN 48 DAYS: NORMATIVE PURGE AND REORDERING OF THE COMMUNICATIVE FIELD BY THE SUPREME COURT

The combination of ADPF 130 and RE 511.961/SP reveals more than the simple thematic proximity between two relevant precedents. It exposes, in a very short time interval, a true jurisprudential block of communicative reordering: only 48 days elapsed between its judgments. In such a short period, the Federal Supreme Court not only acted as a negative legislator, by purging the 1967 Press Law from the system, but also produced, in a material-hermeneutic sense, relevant conforming effects on the communicative field, by establishing operative interpretative parameters with an unequivocal capacity to shape conducts, communicative markets and normative expectations far beyond concrete cases. This cumulative action was historically decisive, but, precisely for this reason, it calls for a critical reading: when the constitutional jurisdiction restructures, in a few days, the legal regime of public communication, the institutional breadth of its effects requires argumentative density and proportional dogmatic caution.

In ADPF 130, the Court took the protection of freedom of the press against censorship and against the legislative discipline of its essential core to the maximum. It was not only a matter of removing an authoritarian diploma incompatible with the 1988 Constitution, but of formulating a strongly preferential understanding of communicative freedom. The press was conceived as a central institution of democratic life, the matrix of public opinion, a space for critical thinking and an instance of social control of power. The most dogmatically sensitive point, however, is in the way in which the ruling structures the relationship between freedom of the press and personality rights: the latter do not disappear, but tend to be shifted to the plane of subsequent accountability, in a logic of temporal precedence of freedom over its limits.

It is not by chance that Cunha e Cruz (2010, p. 402) read the ruling as a theoretical inflection of high intensity, marked by a very preferential understanding of freedom of expression, in tension with practical agreement and with the axiological unity of the Constitution. In the development of the critique, the author observes that the leading vote goes so far as to affirm a "chronological preference" of freedom of expression in the face of its constitutional restrictions, establishing a "primacy or precedence" of the freedoms of thought and expression *lato sensu*, an operation that stresses the practical agreement and the hierarchical-normative unity of the Constitution itself (Cunha and Cruz, 2010, p. 408-409).

RE 511.961/SP preserves this same theoretical atmosphere, but shifts it from the level of the press to the level of the profession. By removing the requirement of a specific diploma for the practice of journalism, the Federal Supreme Court not only rejected a state access filter, but did so based on a certain understanding of journalism itself: an activity intrinsically linked to the freedoms of expression and information, whose restriction would ultimately be equivalent to an unconstitutional obstacle to the flow of communication. in line with the orientation formulated 24 years ago by the Inter-American Court of Human Rights (Inter-American Court of Human Rights, 1985).[4]

The decision undoubtedly had relevant anti-state and anti-authoritarian force. The problem, however, lay in the underlying conceptual operation: by bringing journalism so intensely closer to individual freedom of expression, the ruling weakened the distinction between personal manifestation and institutional mediation of information. It is precisely this point that Cunha and Cruz (2010, p. 414) emphasize when they state that the decision did not sufficiently incisively differentiate "the two relevant constitutional goods inserted therein: freedom of expression and the right to information". Later on, when reconstructing the difference between the two, the author observes that, while freedom of expression operates in the field of ideas, opinions and value judgments, freedom of information refers to facts and, therefore, brings with it requirements of veracity, diligence and public relevance, which cannot be dissolved without conceptual loss (Cunha e Cruz, 2010, p. 415-416).

In an even more incisive sense, it argues that the right to information, due to its democratic importance, is not exhausted as a diffuse subjective right, but also demands

4 The contours of the ruling were so controversial that the National Federation of Journalists (FENAJ) and the Union of Radio and Television Companies of the State of São Paulo (SERTESP) filed declaratory motions alleging a defect in the *extra petita judgment*, an unconstitutional omission regarding the differences between journalists and mere collaborators, as well as obscurity and contradiction about possible damages caused by poorly executed journalism and the requirement of specific techniques for your exercise. In view of the problematic temporal and selective curatorship operationalized by the STF, these motions were only judged a decade later, in 2019, being considered merely infringing and, therefore, rejected (Brasil, STF, RE 511.961/SP ED, 2019).

reinforced protection when institutionally exercised by information professionals, through vehicles socially recognized as such (Cunha and Cruz, 2010, p. 418).

Read together, the two judgments produced a powerful result: strongly protected freedom, rejected censorship, compressed prior restrictions and accountability shifted, as a rule, to a later moment. At the same time, journalistic institutionality was constitutionally valued in ADPF 130 and conceptually desubstantiated in RE 511.961/SP, to the extent that the profession came to be thought of, almost entirely, as an extension of general freedom of expression. This combination was consistent with the communicative environment of the time, still structured by traditional means, visible editorial routines and relatively stable distinctions between those who gave opinions, those who informed and those who socially distributed information.

However, it was precisely this historical coherence that concealed its dogmatic limitation. The paradigm proved to be highly capable of confronting state authoritarianism and the corporate closure of the public word. He proved to be much less apt, however, to distinguish, with the precision required today, individual expression, professional journalism and structural intermediation of the circulation of information. The criticism formulated here, therefore, does not diminish the constitutional importance of those precedents; on the contrary, part of it. The historical success of 2009, therefore, does not eliminate the diagnosis of its current insufficiency; It is precisely because that paradigm was emancipatory in its time that its present limitation needs to be recognized with dogmatic frankness.

4 THE TRANSFORMATION OF THE PUBLIC SPHERE AND THE CRISIS OF INSTITUTIONAL MEDIATION

The insufficiency of the communicative paradigm established by the STF only becomes fully visible when the focus of jurisprudence is shifted to the material transformation of the public sphere. The decisive point is not to affirm, in a simplistic way, that the internet would have eliminated mediations. Mediation has not disappeared; it has changed form, scale, and rationality. What was previously carried out predominantly by recognizable journalistic institutions, subject to editorial routines, professional criteria, and relatively visible public responsibilities, began to operate through private infrastructures that select, hierarchize, recommend, amplify, and obscure content according to their own algorithmic and economic logics.

In strict terms, there was a private, platformized and opaque reintermediation of the circulation of information. As Callejón (2022, p. 188-191) observes, the decisive feature of this process lies in the fact that platforms no longer only convey content, but shape, through algorithmic mechanisms of selection and hierarchization, the very environment in which public opinion is formed.

In the ecosystems thus produced, freedom of expression is no longer exercised in an open and relatively common public space, but within closed environments, designed, managed, and monetized by private companies, in which the impact of the messages, their reach, and their relevance are defined by internal criteria of the system itself (Callejón, 2022, p. 200-201).

This mutation cannot be understood only from a communicational perspective, because it is inseparable from the economic model that sustains it. Srnicek (2017, p. 29; 56-60) shows that platforms are not mere neutral supports of interaction, but specific business forms of contemporary capitalism: digital infrastructures aimed at intermediation between groups, the extraction and processing of data, and the production of competitive advantages based on network effects and informational centralization. Zuboff (2015, p. 75; 78-79; 88-89), in turn, radicalizes this diagnosis by demonstrating that, in surveillance capitalism, lived reality is converted into observable, quantifiable, and *monetizable behavior*, so that the capture, analysis, and modification of behaviors cease to be side effects of the digital economy and become the very center of its logic of accumulation. The problem, therefore, no longer resides only in the content that circulates, but in the material architecture that observes, classifies, prioritizes, and exploits it economically. The old visible editorial mediation is progressively replaced by an infrastructural mediation guided by *the monetization* of attention, behavioral profiling and behavior prediction.

It is precisely at this point that the economic reconfiguration of the public sphere finds its most acute political-communicative translation. Unlike what occurred in previous contexts of relative scarcity of transmitters, the contemporary dispute is no longer only for the dissemination of information, but for the capture of the public's attention in an environment of informational abundance. As Barroso (2025, p. 136) observes, false, defamatory, sensationalist, or content loaded with anger and hatred tends to produce more engagement than factual, moderated, and rational publications, generating perverse incentives for recommendation systems oriented by views, permanence, and advertising revenue. The consequence is structural: the expansion of participation in public debate, although it has democratized access to speech and multiplied sources of information, has been accompanied by the exponential expansion of disinformation campaigns, hate speech, conspiracy theories, and large-scale discursive manipulation strategies.

In fact, this ambivalence was well captured by Luís Roberto Barroso, then minister of the STF, and Luna van Brussel Barroso, when they argued that digital platforms, while breaking down old barriers to entry into the public space, began to play a central role in shaping who can participate, be heard and influence the collective debate, due to the growing algorithmic intermediation of content visibility (Barroso; Barroso, 2023, p. 53; 56-59). From 2016 onwards, this situation ceased to be a mere theoretical possibility and became a democratic-electoral problem on a global scale, associated with the influence of disinformation in episodes such as *Brexit*, the 2016 US elections, and the 2018 Brazilian elections, further aggravated by the emergence of *deepfakes*, capable of simulating speeches, images, and contexts with an increasing degree of verisimilitude and perceptive opacity for the common citizen (Barroso, 2025, p. 43).

Studies on informational disorder give empirical and conceptual consistency to this diagnosis. Wardle and Derakhshan (2017, p. 20-25) propose to abandon the imprecise notion of "*fake news*" in favor of the broader category of "*information disorder*", distinguishing "*mis-information*", "*dis-information*" and "*mal-information*" and showing that the contemporary phenomenon cannot be understood without simultaneous attention to the agents, the messages, the interpreters and the phases of creation, production and distribution of the content. The analytical relevance of this reconstruction lies in showing that contemporary falsehood is not limited to an isolated misleading content, but integrates complex chains of production, amplification and recirculation, often crossed by financial, political, social and psychological incentives.

In a similar vein, Lazer *et al*. (2018, p. 1094-1096) speak of the erosion of old institutional shields against disinformation and the need for new safeguards, noting that the contemporary crisis stems precisely from the weakening of journalistic norms, the fragmentation of the media environment, and the fall in trust in traditional sources of information. Vosoughi, Roy, and Aral (2018, p. 1146-1151) empirically demonstrate that falsehood circulates further, faster, deeper, and broader than truth, with an even more pronounced effect in political content, not because of automation, but because human users themselves tend to share with greater intensity what is presented as novelty, surprise or emotional upset. The structural asymmetry between verification and viralization ceases to be a simple informational dysfunction and starts to directly affect the institutional conditions for the formation of a minimally informed and discernible public opinion.

The reading of Callejón (2023, p. 141-143), in *The constitution of the algorithm*, becomes decisive in elevating the diagnosis from the communicational plane to the constitutional plane. The author argues that the crisis produced by the large technological agents should no longer be read only as an external democratic crisis, in the manner of global economic and financial impositions on states, but as a form of internal democratic involution, because it reaches the very core of state political processes through the interference of technology companies in public debate, electoral processes and the social circulation of information. The progressive segmentation and disaggregation of public space becomes, in this environment, economically productive for these corporations, which benefit from instability, polarization, and radicalization.

The result is twofold: on the one hand, the minimum constitutional consensus that sustains common coexistence becomes more difficult; on the other hand, the shared social perception of reality itself is weakened, as the new communicative environments favor the spread of fake news, post-truths, and parallel realities (Callejón, 2023, p. 143-151). The crisis of institutional mediation, in this context, does not only mean the weakening of traditional journalism, but the fragmentation of the symbolic infrastructure on which democratic constitutionalism presupposes some degree of common intelligibility of the social world.

That is why the old opposition between the individual who speaks and the state that censors becomes insufficient to grasp the contemporary problem. Between the two, a third pole of power is installed: that of private infrastructures that organize, on a systemic scale, the material conditions of visibility of public discourse. And this power does not act only through the circulation of content, but also through the massive collection of data, profiling, automated inference, and the opacity of decision making of the systems that govern the distribution of care.

Rodotà (2004, p. 105-107; 116-117) already warned that law cannot succumb to the fascination of a technology perceived as spontaneously self-regulated, under penalty of abdicating its function of evaluative mediation in the face of innovation. Hirsch (2011, p. 439-441; 480), in examining online privacy, shows that the internet has intensified the collection, aggregation, and use of personal information in an unprecedented way, eroding users' trust and evidencing the failure of purely self-regulatory models. In the same sense, Solove (2025, p. 5-6; 25; 61-65) demonstrates that artificial intelligence does not inaugurate new problems out of nowhere, but recomposes and intensifies old modalities of surveillance, inference, identification, and decisional opacity, making legal architectures based on fictitious consent, low *accountability* even more fragile and insufficient protection against systemic risks. The circulation of discourse, therefore, can no longer be dissociated from the data infrastructure and the automated mechanisms that observe, order, and condition it.

The theoretical consequence of this mutation is decisive for the article's argument. The constitutionalism of communication can no longer be satisfied with categories constructed for an environment in which public mediation was visible, predominantly journalistic and relatively separable from the technical infrastructures of circulation. The digital public sphere is communicative, economic, algorithmic and informational. In this environment, individual expression, professional journalism and platforms remain connected, but they can no longer be described under the same normative grammar. Confusing them under a unitary grammar of freedom of expression means losing the ability to perceive who speaks, who informs and who structures, on a systemic scale, the visibility of what can be heard, believed and shared. This transformation makes the communicative package signed by the STF in 2009 insufficient and prepares the ground for the subsequent jurisprudential inflection.

5 FROM PRECEDENCE TO SUFFICIENT PROTECTION: THE INFLECTION OF THE STF IN RE 1.037.396/SP

If the 2009 communicative package condensed, in a short interval, a jurisprudential reorganization based on the radicalization of press freedom and the expansion of distrust in the face of prior controls, RE 1.037.396/SP represents, in 2025, an inflection of a qualitatively different nature. It is not just a matter of jurisprudential updating in the face of new technologies, nor of a mere case-by-case adaptation of the Civil Rights Framework for the Internet to contemporary problems. What the ruling reveals is something deeper: the constitutional dogmatics of communication itself is beginning to shift from a grammar focused almost exclusively on the prohibition of censorship and subsequent accountability to another, concerned with sufficient protection of fundamental rights, systemic risks, duties of care and security of the digital environment.

The very summary of the judgment is eloquent because it abandons the framework of the classic bilateral conflict and starts to name the problem in a structural key: transformation of the digital environment, regulatory insufficiency, systemic risk, duties of care and deficit in the protection of fundamental rights. This displacement, by the way, is theoretically decisive. At the time of ADPF 130 and RE 511.961/SP, the dominant concern was oriented towards the containment of state power and the rejection of previous filters incompatible with freedom of communication. In 2025, without abandoning the constitutional centrality of freedom of expression, the STF will recognize that the normative architecture based on article 19 of the Civil Rights Framework for the Internet does not offer sufficient protection to highly relevant legal assets, including the democratic regime itself.

The starting point of the ruling is clear: the model of prior and specific court order for the civil liability of the provider, conceived as a safeguard mechanism against private censorship and excessive removals, is insufficient to address the systemic risks that have emerged in digital environments due to new business models and their impact on economic relations, social and cultural aspects. The Court thus affirms the partial and progressive unconstitutionality of the regime of article 19, not because it repudiates in the abstract its original logic, but because it has become deficient in the face of the contemporary infrastructural power of the platforms.

The mutation is not only in the conclusion, but in the categories mobilized to achieve it. The ruling describes the regulatory insufficiency of the internet as a cause of systemic communication disturbances: hate speech, conspiracy theories, anti-democratic acts, disinformation, fraudulent news campaigns, crimes, fraud, and digital violence. More than that, it argues that such phenomena do not only harm isolated individuals, but spread deleterious effects through societies and democratic institutions, whether by the creation of parallel realities dissociated from factual truth, or by the intensification of polarization and extremism, or by the sneaky exclusion of minorities repeatedly attacked on social networks.

The formulation is revealing: the STF starts to see communicative damage not only from a subjective, reparatory and bilateral perspective, but as diffuse damage to the democratic information ecosystem. As a result, freedom of expression is no longer thought of from the classic issuer-State axis and is now inserted into a broader problem, which involves the architecture of circulation, digital vulnerability and the protection of the collective conditions of public deliberation. It is precisely for this reason that RE 1.037.396/SP should be read less as a simple case of civil liability of platforms and more as a symptom of the mutation of the constitutional dogmatics of communication.

The Court does not abandon the prohibition of censorship, nor does it adhere to a general model of strict liability or universal monitoring of speech. On the contrary, it preserves important differentiations and cautions. The ruling points out, for example, the lack of strict liability in the application of the established thesis, maintains a different treatment for hypotheses such as crimes against honor — to which the regime of article 19 of the Brazilian Civil Rights Framework for the Internet continues to apply, without prejudice to the possibility of removal by extrajudicial notification — and excludes certain services from the most intense core of the new rationality, such as *emails*, closed meetings by video or voice, and instant messaging in interpersonal communications protected by secrecy. It is, therefore, not a pure and simple suppression of the previous grammar, but of its selective reconfiguration, based on the recognition that wide-ranging platforms can no longer be understood as simple neutral supports of the speech of others.

The most dogmatically innovative point lies in the passage from the model of neutrality to the model of duties. The thesis established by the Federal Supreme Court recognizes the duty of care of platforms in relation to the prevention and mitigation of systemic risks, including based on the idea of systemic failure, defined as the absence of adequate measures to prevent or remove serious illegal content. Here the change is unequivocal: the problem is no longer just the subsequent omission in the face of individually pointed content and starts to encompass the very organization of the platform's activity, its technical capabilities, its amplification mechanisms, its advertisements and boosts, its artificial distribution systems and its duty to act in a responsible, transparent and cautious manner. This language brings constitutional law closer to the communication of more complex regulatory rationality, in which liability does not arise only from ignoring a court order, but also from inadequately structuring an environment whose architecture enhances serious and diffuse damages.

This inflection becomes even more significant when observed in contrast to the 2009 paradigm. In ADPF 130, freedom of the press was elevated to a preferential position, with displacement of conflicts to a later moment and strong distrust in the face of prior containment. In RE 511.961/SP, journalism was brought closer to general freedom of expression, reinforcing hostility to state barriers to access to communicative activity. In RE 1.037.396/SP, the center of gravity shifts and starts to speak of insufficient protection, systemic risks, safe and transparent environment, duty of care, digital vulnerability, and the need for regulatory improvement. Instead of the old almost exclusive primacy of communicative freedom conceived against the State, there is a concern with the deficit of protection of fundamental rights and democracy in the face of private power that organizes, monetizes and scales the circulation of discourse. The STF thus begins to register that the contemporary constitutional threat does not come only from state repression of speech, but also from opacity, viralization, and the private engineering of communicative environments capable of eroding factual truth, pluralism, and the integrity of the democratic process.

This does not mean, it should be insisted, that the Court has resolved in an entirely satisfactory way the tension between freedom of expression, duties of moderation and regulation of the power of platforms. The judgment itself reveals a transitional solution: it recognizes the partial and progressive unconstitutionality of article 19, interprets it in accordance with the Constitution, imposes additional duties and, at the same time, calls on the legislator to produce more appropriate normative discipline.

There is, therefore, a double movement: on the one hand, the Supreme Court overcomes the sufficiency of the previous frame; on the other hand, it recognizes that the institutional reconstruction of the digital environment cannot be fully carried out only through jurisprudence. This displacement, it must be recognized, brings with it a real risk of excessive removals and the strengthening of private speech codes. The point, however, is that the insufficiency of the previous model also produced structural damage. The constitutional problem, therefore, is no longer in choosing between freedom without mediation and control without freedom, but in designing safeguards against both excesses.

Even so, this transitory character does not diminish its relevance. On the contrary, it shows that the Court realized that the constitutional grammar inherited from 2009 is no longer enough and that the constitutional right of communication needs to operate with categories that are more apt to face algorithmic mediation, industrial scale of viralization, massive circulation of serious illicit content and structural risks to the democratic process.

The deeper meaning of RE 1.037.396/SP, therefore, is not only in making the model of article 19 of the Brazilian Civil Rights Framework for the Internet more flexible, but in putting the communicative problem back on a new theoretical plane. The STF now recognizes that freedom of expression, when inserted in digital ecosystems governed by platforms with enormous power of distribution, recommendation, and behavioral induction, can no longer be read under the same framework that served for the traditional press or for individual manifestation in less asymmetrical communicative contexts. The ruling does not yet formulate, in a fully systematic way, a differentiated theory for individual expression, professional journalism and platforms. But its merit lies precisely in opening up this need. He indicates that Brazilian constitutional dogmatics began to move, albeit incompletely, from the abstract precedence of freedom to the requirement of adequate protection of the structural conditions of democratic communication. It is this opening, still provisional and tensioned, that authorizes the dogmatic reconstruction proposed in the following section.

6 FOR A DIFFERENTIATED DOGMATICS OF COMMUNICATION: INDIVIDUAL EXPRESSION, PROFESSIONAL JOURNALISM AND DIGITAL PLATFORMS

The path developed in the previous sections leads to a conclusion that is difficult to avoid: the constitutionalism of communication no longer has adequate categories if it continues to treat, from the same normative perspective, individual expression, professional journalism and digital platforms. The structural error of the previous paradigm did not lie in overprotecting freedom of expression, but in operating with an insufficient degree of differentiation between communicative functions that, although connected, are not equivalent either from a conceptual point of view, or from an institutional point of view, or from a constitutional point of view.

The dogmatic reconstruction proposed in this article is based on a basic premise: there is not a single communicative freedom with merely contingent applications to different subjects; There is, rather, a common matrix of freedom that unfolds according to the constitutional function exercised by each actor in the informational ecosystem.

Individual expression remains situated at the hard core of freedom of expression. It protects the expression of thought, opinion, conviction, belief, criticism, satire, dissent, and the discursive participation of citizens in public life. Its constitutional foundation is primarily subjective and negative: to ensure the individual space of communicative autonomy against undue interference by the State and against pretensions of silencing incompatible with democracy. In this domain, the issuer cannot be required to have a general duty of neutrality, balance, impersonality or commitment to professional standards of verification, because individual speech, especially in political matters, is not to be confused with institutional information activity. That is why freedom of expression, in the strict sense, protects even harsh, scathing and merciless criticism of public figures, without prejudice to ulterior, strict and individualized liability, when configured as a constitutionally relevant unlawful in the specific case.[5] Its legal regime thus continues to call for the prohibition of prior censorship, strict limits on generalized filtering mechanisms, and the rejection of abstract controls on access to public space.

Professional journalism, however, does not allow itself to be fully absorbed by this same framework. Although it is based on freedom of expression and presupposes it, it constitutes a functionally distinct communicative practice, aimed at collecting, ascertaining, verifying, editing, selecting, hierarchizing and publicly disseminating facts and information of collective relevance. Here, the decisive point is not corporate, but institutional. Journalism deserves constitutional protection reinforced not because it has a class status, but because it performs a material public function in the democratic architecture of information. What matters, in this plan, is not a formal seal of belonging, but the recognizable presence of verification routines, editorial responsibility and regular public supply of factual information.

In this sense, András Koltay (2024, p. 12-13) makes a central contribution by arguing that freedom of the press is, at the same time, broader and narrower than general freedom of expression: broader, because it demands additional rights and specific guarantees so that information activity can perform its constitutional function; narrower, because it admits limitations, responsibilities and standards of its own, linked to its role in the public sphere.

Journalism is not, therefore, legitimized by a diploma or market reserve, but neither can it be dissolved in a mere sum of deinstitutionalized individual manifestations. From this stems the first normative consequence of the reconstruction proposed here: professional journalism must be protected by its own regime of institutional guarantees. Among these

[5] In a relevant precedent on the constitutional protection of public criticism, the Second Panel of the Federal Supreme Court, under the rapporteurship of Justice Celso de Mello, recognized that the publication of journalistic material with scathing or ironic remarks, as well as with opinions conveyed in a tone of severe, harsh or even merciless criticism, when directed at public figures, may qualify, in this context, as "a true soul exclusionary, capable of removing the malicious intention to offend" (BRASIL, STF, AI 690.841 AgR/SP, 2011, p. 306).

guarantees, the following stand out: reinforced protection of sources, protection of editorial independence, protection against undue interference and recognition of their function of public oversight, production of social intelligibility and mediation of democratic debate. At the same time, because it operates in the field of factual information and institutionalized public influence, journalism is subject to demands that do not fall with the same intensity on individual expression: duties of diligence, minimum standards of verification, responsibility for distinguishing between fact and opinion, and openness to corrective mechanisms, such as the right of reply and subsequent reparation in case of abuse. Freedom of the press, in this perspective, is not a state privilege, but a freedom functionally reinforced and correlatively accountable.

Digital platforms, in turn, occupy a dogmatic position that is different from both individual expression and professional journalism. They are not mere subjects of speech, although they can also exercise their own expression; nor are they, in the strict sense, organs of the press, although they play a structural role in the public circulation of information. Their constitutional specificity stems from the fact that they do not act only as broadcasters or classic editorial mediators, but as private infrastructures for organizing the visibility, priority, recommendation, amplification and reduction of the reach of social discourse.

Koltay (2024, p. 5-6; 14-20; 22-23) is again decisive in observing that, although they are not to be confused with traditional media, platforms play an analogous role in the public sphere and directly affect access to information, equality between broadcasters, and equity in the circulation of ideas. Tim Wu (2019, p. 771-774) illuminates the specific economic trait of this power by describing such companies as central agents of the attention economy, dependent on markets in which scarce and valuable human attention is attracted by apparently free content and services and then resold to advertisers. In this logic, platforms and search engines are not just spaces in which discourses appear; They are structures that dispute, capture, organize, and monetize time, attention, and public exposure.

Also for this reason, in the precedent *Google Spain*, judged by the Court of Justice of the European Union (EU, CJEU, Case C-131/12, 2014), the reading of the search engine as a purely neutral medium was refused, recognizing that the activity of locating, indexing, temporarily storing and making available results constitutes processing of personal data and that the operator of the search engine is legally responsible for such processing. It is not a matter of transplanting, without mediation, the European dogmatics of deindexation to Brazilian constitutional law, but of registering a point methodologically relevant to this final section: the private ordering of informational visibility produces its own legal effects and, therefore, cannot be absorbed without rest by the general category of individual speech.

This finding leads to the second normative consequence of the proposed reconstruction: platforms should not be treated either as neutral communicative subjects, nor as traditional press, nor as simple passive intermediaries. When they exercise governance power over the flow of information — whether by moderation, prioritization, boosting, recommendation, demonetization, or architectural design of the circulation environment — they perform an infrastructural function with a systemic impact on the freedom of expression of others, on the right to information, and on the democratic process itself. It is in this domain that their subjection to reinforced duties becomes constitutionally legitimate.

Such duties are not to be confused with prior state censorship nor do they authorize universal monitoring of speech. Its core lies in three requirements: procedural transparency, effective contestability, and diligence proportional to the systemic risk produced by the platform's architecture itself. The center of regulation, here, shifts from isolated content to moderation processes, visibility criteria, and the structural effects of private governance of information circulation.

On this point, recent United Nations reports offer convergent and particularly useful normative support. The 2021 High Commissioner report insists that the more intense the impacts of automated systems on privacy and related rights, the more necessary a combination of transparency, explainability, human oversight, human rights *due diligence* , independent audit, and access to effective remedies becomes; furthermore, it stresses that in high-risk contexts, certain uses should be limited, suspended or even prohibited if adequate safeguards are not in place (United Nations, 2021, p. 11-14). The 2023 report, prepared in the context of the right to privacy, refines this framework by emphasizing that transparency and explainability must allow the individual to understand, in clear language, the basic elements of the decision-making logic, the effects of automated processing, and the specific reasons for the decision, in order to enable adversarial proceedings, defense, and control over the use of their personal data (United Nations, 2023, p. 9-17).

Cautiously transposed to the domain of digital platforms, these premises reinforce the idea that the algorithmic governance of public circulation is not constitutionally indifferent: the greater the potential for affecting rights, the greater the requirement for transparency, auditability, the duty of procedural reasoning and contestability.

The third normative consequence concerns the very structure of constitutional weighting. If individual expression, professional journalism and platforms perform different functions, the normative conflicts produced by them cannot be resolved by the same decision-making scheme. In individual expression, the emphasis is on autonomy, non-censorship and strict subsequent accountability. In professional journalism, the weighting must take into account, in addition to the freedom of the issuer, the public function of the informative activity and the need to preserve an institutionality capable of sustaining the collective right to information. On the platforms, the central point is no longer just the freedom to say but also includes the power to order the conditions of visibility of what will be heard, found, boosted or silenced.

In other words, while individual expression is analyzed primarily from the perspective of content and subjective freedom, platforms require analysis from the perspective of architecture, governance, process, and systemic risk. Journalism, in turn, occupies an intermediate and proper position, because it is simultaneously an exercise of freedom and a social institution of information. This is where Brazilian constitutional dogmatics still need to advance: not only in the content of the restrictions, but in the very object of the consideration.

This reconstruction also allows us to reread, in a systematic perspective, the jurisprudential evolution of the Federal Supreme Court. The 2009 paradigm was decisive in protecting public communication against authoritarian residues and undue prior controls, but it failed to sufficiently distinguish individual speech, journalistic institutionality, and private intermediation from informational circulation. The inflection of 2025, in turn, recognized that the architecture of the digital environment produces systemic risks and that article 19 of the Civil Rights Framework for the Internet no longer offers sufficient protection for fundamental rights and democracy. The step that is still missing, and that this section proposes to take at a dogmatic level, consists in making explicit the criterion that connects these movements: it is not the same thing to speak, to inform and to structure the conditions of circulation of what is spoken and what is informed. Each of these functions demands its own constitutional treatment, even if articulated by a common horizon of freedom, pluralism and dignity.

The final formulation can be summarized in the following terms: individual expression is part of the core of citizens' communicative autonomy and must remain under a regime of maximum protection against censorship and general controls; professional journalism constitutes institutionally qualified communicative freedom, endowed with reinforced guarantees and correlated responsibilities due to its material public function in the informative sphere; and digital platforms, finally, exercise infrastructural power over the media and, therefore, cannot invoke, en bloc, the same protective regime applicable to the individual who speaks or the journalist who informs, since their constitutional position is inseparable from duties of transparency, due process, duty of procedural reasoning and prevention of systemic risks, to be implemented by legislative, regulatory and jurisprudential design compatible with the prohibition of censorship and the protection of democracy.

7 FINAL CONSIDERATIONS

This article sought to demonstrate that the communicative paradigm consolidated by the Federal Supreme Court in 2009, although historically decisive for overcoming authoritarian residues and for the affirmation of a specially protected freedom of the press, no longer offers a sufficient response to the contemporary configuration of the public sphere. The combination of ADPF 130 and RE 511.961/SP bequeathed a vigorous constitutional grammar of censorship containment and resistance to undue state restrictions, but based on structural assumptions that have aged in the face of the platformization of informational circulation and the private concentration of the power of mediation of public discourse.

In this new environment, the constitutional question can no longer be formulated only in terms of abstract precedence of freedom of expression or opposition between individual manifestation and state restriction. It is precisely for this reason that RE 1.037.396/SP acquires relevance: more than revising a specific rule of civil liability, the precedent signals the perception, by the STF itself, that the protection of freedom also requires consideration of the structural conditions of public deliberation and the systemic risks produced by the digital communication architecture. The insufficiency of the previous paradigm, therefore, does not result from its original mistake, but from the transformation of the informational ecosystem for which it is no longer sufficient.

The thesis sustained, therefore, does not consist in restricting freedom of expression, but in qualifying it constitutionally based on the function effectively performed by each actor in the public circulation of information. Individual expression, professional journalism and digital platforms belong to the same problematic field, but they can no longer be treated, without conceptual loss and without normative deficit, under the same dogmatic framework. The contemporary challenge is no longer just to ensure that everyone can speak, but to prevent a few from governing, without sufficient constitutional control, the conditions under which everyone will be heard, read, and shared.

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DIGITAL SECURITY TECHNOLOGIES AND THE RECONFIGURATION OF THE CRIME TRIANGLE: EVIDENCE OF THE STRENGTHENING OF THE "CAPABLE GUARDIAN" IN THE CONTEXT OF THE STATE OF TOCANTINS

TECNOLOGIAS DE SEGURANÇA DIGITAL E A RECONFIGURAÇÃO DO TRIÂNGULO DO CRIME: EVIDÊNCIAS DO FORTALECIMENTO DO "GUARDIÃO CAPAZ" NO CONTEXTO DO ESTADO DO TOCANTINS

TECNOLOGÍAS DE SEGURIDAD DIGITAL Y LA RECONFIGURACIÓN DEL TRIÁNGULO DEL DELITO: EVIDENCIAS DEL FORTALECIMIENTO DEL "GUARDIÁN CAPAZ" EN EL CONTEXTO DEL ESTADO DE TOCANTINS

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ABSTRACT

The increasing complexity of contemporary crime has driven the incorporation of digital technologies as a central strategy in public security, especially in the context of smart cities. In this scenario, the problem arises of understanding how these technologies contribute to the reconfiguration of the conditions that favor the occurrence of crime, in light of the Crime Triangle Theory. Thus, the present study aimed to analyze how security technologies, especially video surveillance systems and digital applications, act in the reconfiguration of the elements of the Crime Triangle in the State of Tocantins. Methodologically, this is a qualitative, descriptive, and exploratory literature review, conducted based on the PRISMA protocol and Bardin's content analysis. Data collection was carried out in the Scopus, Web of Science, and Google Scholar databases, resulting in a final corpus of 20 analyzed studies. The results show that security technologies predominantly act in strengthening the "capable guardian" through the expansion of surveillance, response capacity, and data integration. It

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was also observed that collaborative applications contribute to reducing the vulnerability of the “suitable target,” while systems based on artificial intelligence and data analysis increase the perceived risk for the “motivated offender,” albeit indirectly. However, the effectiveness of these technologies depends on factors such as institutional integration, infrastructure, and professional training. It is concluded that security technologies reconfigure the elements of the Crime Triangle, with greater impact on strengthening the guardian, constituting relevant tools for crime prevention, provided they are integrated into institutional strategies and adapted to the local context.

Keywords: Situational Crime Prevention. Digital Surveillance. Predictive Analysis. Smart Public Security.

RESUMO

A crescente complexidade da criminalidade contemporânea tem impulsionado a incorporação de tecnologias digitais como estratégia central na segurança pública, especialmente no contexto das cidades inteligentes. Nesse cenário, emerge o problema de compreender como essas tecnologias contribuem para a reconfiguração das condições que favorecem a ocorrência do crime, à luz da Teoria do Triângulo do Crime. Assim, o presente estudo teve como objetivo analisar de que forma as tecnologias de segurança, especialmente sistemas de videomonitoramento e aplicativos digitais, atuam na reconfiguração dos elementos do Triângulo do Crime no Estado do Tocantins. Metodologicamente, trata-se de uma revisão de literatura de abordagem qualitativa, descritiva e exploratória, conduzida com base no protocolo PRISMA e na análise de conteúdo de Bardin. A coleta de dados foi realizada nas bases Scopus, Web of Science e Google Acadêmico, resultando em um corpus final de 20 estudos analisados. Os resultados evidenciam que as tecnologias de segurança atuam predominantemente no fortalecimento do “guardião capaz”, por meio da ampliação da vigilância, da capacidade de resposta e da integração de dados. Observou-se também que aplicativos colaborativos contribuem para a redução da vulnerabilidade do “alvo adequado”, enquanto sistemas baseados em inteligência artificial e análise de dados aumentam o risco percebido pelo “infrator motivado”, embora de forma indireta. Contudo, a efetividade dessas tecnologias depende de fatores como integração institucional, infraestrutura e capacitação profissional. Conclui-se que as tecnologias de segurança reconfiguram os elementos do Triângulo do Crime, com maior impacto no fortalecimento do guardião, constituindo instrumentos relevantes para a prevenção criminal, desde que integradas a estratégias institucionais e adaptadas ao contexto local.

Palavras-chave: Prevenção Situacional do Crime. Vigilância Digital. Análise Preditiva. Segurança Pública Inteligente.

RESUMEN

La creciente complejidad de la criminalidad contemporánea ha impulsado la incorporación de tecnologías digitales como estrategia central en la seguridad pública, especialmente en el contexto de las ciudades inteligentes. En este escenario, surge el problema de comprender cómo estas tecnologías contribuyen a la reconfiguración de las condiciones que favorecen la ocurrencia del delito, a la luz de la Teoría del Triángulo del Delito. Así, el presente estudio tuvo como objetivo analizar de qué forma las tecnologías de seguridad, especialmente los sistemas de videovigilancia y las aplicaciones digitales, actúan en la reconfiguración de los elementos del Triángulo del Delito en el Estado de Tocantins. Metodológicamente, se trata de una revisión de literatura de enfoque cualitativo, descriptivo y exploratorio, realizada con base en el protocolo PRISMA y el análisis de contenido de Bardin. La recolección de datos se llevó a cabo en las bases Scopus, Web of Science y Google Académico, resultando en un corpus final de 20 estudios analizados. Los resultados evidencian que las tecnologías de seguridad actúan predominantemente en el fortalecimiento del “guardián capaz”, mediante la ampliación de la vigilancia, la capacidad de respuesta y la integración de datos. También se observó que las aplicaciones colaborativas contribuyen a reducir la vulnerabilidad del “objetivo adecuado”, mientras que los sistemas basados en inteligencia artificial y análisis de datos aumentan el riesgo percibido por el “delincuente motivado”, aunque de forma indirecta. Sin embargo, la efectividad de estas tecnologías depende de factores como la integración institucional, la infraestructura y la capacitación profesional. Se concluye que las tecnologías de seguridad reconfiguran los elementos del Triángulo del Delito, con mayor impacto en el fortalecimiento del guardián, constituyendo instrumentos relevantes para la prevención del delito, siempre que estén integradas en estrategias institucionales y adaptadas al contexto local.

Palabras clave: Prevención Situacional del Delito. Vigilancia Digital. Análisis Predictivo. Seguridad Pública Inteligente.

1 INTRODUCTION

Contemporary public security has been deeply impacted by the growing complexity of criminal phenomena, driven by social, urban, and technological transformations that challenge traditional models of prevention and control. In this scenario, a paradigmatic transition from predominantly reactive approaches to data- and technology-driven preventive strategies is observed, especially in the context of smart cities. The incorporation of digital systems, such as video surveillance, artificial intelligence, data mining, and security applications, has expanded the capacity of police institutions to monitor, analyze, and respond to criminal dynamics in a more efficient and integrated manner (Hamada; Nassif, 2018; Ishaphiad; Bagula, 2020; Laufs; Borrion; Bradford, 2020).

In the field of criminology, the understanding of the occurrence of crime has been strongly influenced by the Theory of Routine Activities, which underlies the Crime Triangle, according to which criminal practice results from the convergence between motivated offender, appropriate target (victim) and absence of a capable guardian/crime scene. This perspective has guided situational prevention strategies, in which the modification of environmental conditions and the strengthening of surveillance act directly to reduce criminal opportunities. In this sense, security technologies emerge as central tools in the reorganization of these elements, by expanding surveillance, reducing the vulnerability of victims, and increasing the risk perceived by offenders (Moyo, 2019; Suslov, 2025; Abdullahi et al., 2025).

Several studies show the potential of digital technologies in crime prevention, highlighting the role of video surveillance (CCTV) in deterring crimes and producing evidence (Papale, 2023; Abdullahi et al., 2025), as well as the use of data-driven intelligent systems to identify criminal patterns and support decision-making in urban control centers (Leal & Gomes-jr., 2022; Choi; Na & Lee, 2024). In addition, collaborative applications and digital platforms have expanded social participation in public security, contributing to the construction of distributed surveillance networks and strengthening informal control (Kadar et al., 2016; Ogbu; Excellence, 2025). At the same time, data-driven policing has been consolidated as a relevant strategy, by integrating real-time information and statistical analysis into police action, promoting greater efficiency and predictive capacity (Drenth; Van Steden, 2020).

However, despite the technological advances and empirical evidence available, the literature points out that the effectiveness of these tools in crime prevention is not homogeneous, being conditioned to factors such as infrastructure, institutional integration, data governance, and training of professionals. Studies indicate that the simple adoption of technologies does not guarantee the reduction of crime, and there may be operational limitations, displacement of crime, and challenges related to privacy and social control (Mihale-Wilson; Felka; Hinz, 2019; Laufs, 2022). In addition, the implementation of these technologies in specific institutional contexts, such as police organizations, requires structural and operational adaptations that are still in the process of consolidation (Miranda et al., 2020).

In the Brazilian context, the challenges of public security are even more complex, marked by regional inequalities and heterogeneous criminal dynamics. Data from the Brazilian Forum on Public Security indicate the persistence of high crime rates, especially in property crimes and urban violence, reinforcing the need for innovative and evidence-based strategies (FBSP, 2025). In this scenario, initiatives such as the use of institutional applications and digital systems by the military police represent important advances in the modernization of management and in the improvement of operational efficiency, as evidenced in the case of the PMTO Mobile system, which has contributed to the improvement of police service and the integration of information in the State of Tocantins (Ferreira et al., 2022; Tavares; Fernandes; Oliveira, 2023).

Despite this set of evidence, there is a significant gap in the literature regarding the integrated analysis between security technologies, Crime Triangle Theory and specific regional contexts, especially in the State of Tocantins. Although there are studies on smart cities and surveillance technologies, few studies systematically address how these tools act to break the elements of crime in local realities marked by structural inequalities and institutional limitations (Laufs; Borrion; Bradford, 2020; Laufs, 2022).

In view of this scenario, the following research problem emerges: how have security technologies, especially video surveillance systems and digital applications, contributed to the rupture of the elements of the Crime Triangle Theory in the State of Tocantins?

In view of this scenario, the present investigation is justified by the need to understand, in an integrated way, the role of security technologies in crime prevention, especially in regional contexts still little explored by the literature, such as the State of Tocantins. The analysis of these tools in the light of the Crime Triangle Theory allows us to advance in the understanding of how technology can act in breaking the conditions that favor the criminal occurrence, contributing both to the theoretical development and to the improvement of public security policies.

Thus, this article aimed to analyze the effectiveness of security technologies in crime prevention, in the light of the Crime Triangle Theory, focusing on the context of the State of Tocantins, seeking to understand how these tools act in the reorganization of the conditions that favor the occurrence of crime.

2 METHODOLOGY

The present study is characterized as a qualitative, descriptive and exploratory literature review, structured based on the guidelines of the PRISMA protocol (*Preferred Reporting Items for Systematic Reviews and Meta-Analyses*) and on the content analysis technique proposed by Laurence Bardin, with the objective of ensuring methodological rigor, transparency and reproducibility in the selection process. organization and interpretation of data. The methodological approach adopted allowed a critical analysis of the scientific production related to the use of security technologies in crime prevention, in the light of the Crime Triangle Theory, focusing on the context of smart cities and their application in the State of Tocantins.

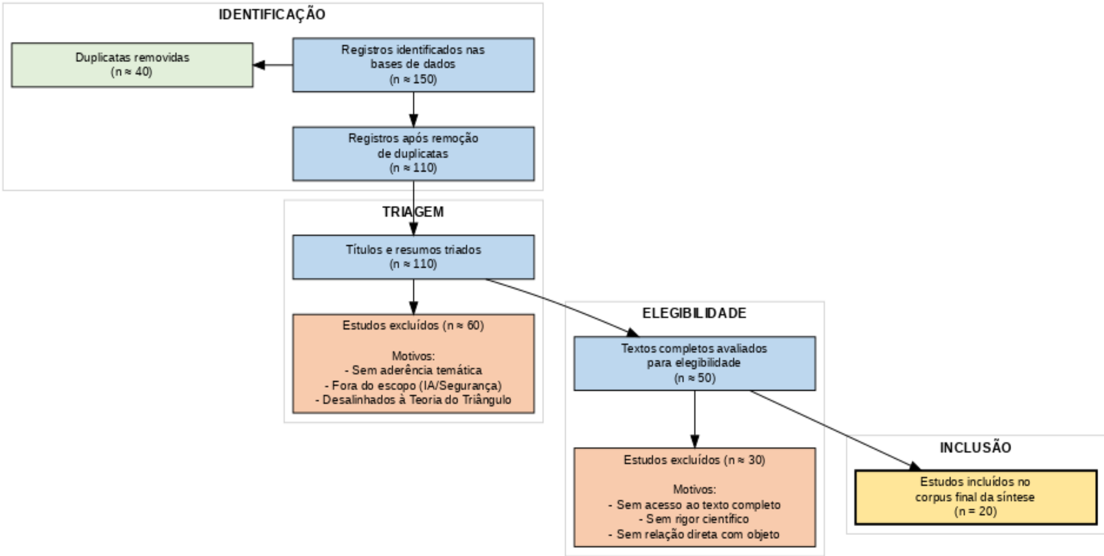
Data collection was carried out through systematized searches in three databases widely recognized in the academic environment: *Scopus, Web of Science (*WoS) and Google Scholar. The choice of these databases is justified by their interdisciplinary scope and relevance in the indexing of studies in the areas of public security, criminology, digital technologies and smart urbanism. Structured search strategies with Boolean operators were used, combining descriptors related to four main axes: crime prevention, *Routine Activity Theory*, smart cities and security technologies, including terms such as *"crime prevention", "crime triangle", "routine activity theory", "smart city", "CCTV", "digital surveillance" and "security technology*". The time frame adopted comprised the period from 2000 to 2026, considering the consolidation and expansion of digital technologies applied to public security in this interval.

The study selection process strictly followed the steps of the PRISMA protocol. In the identification phase, approximately 150 records were recovered in the consulted databases. After consolidating the data in a single database, duplicates were removed, resulting in about 110 unique studies. In the screening stage, the titles and abstracts were read, and approximately 60 studies were excluded because they did not present thematic adherence to the scope of the research, especially those that did not directly address the relationship between technology and crime prevention or that did not align with the perspective of the Crime Triangle Theory. Thus, about 50 potentially relevant studies remained.

In the eligibility phase, the selected texts were read in full, with strict application of the previously defined inclusion and exclusion criteria. Studies that addressed technologies applied to public security, situational crime prevention, smart cities or digital surveillance, published in Portuguese or English, and that presented consistent theoretical or empirical foundations were included. Duplicate works, studies without access to the full text, productions without scientific rigor, and those that did not establish a direct relationship with the object of study were excluded. As a result, approximately 30 studies were excluded at this stage, leaving a final corpus composed of 20 studies, as shown in Figure 1.

Figure 1

Research Selection Flowchart



Source: The authors (2026).

Data analysis was conducted using Laurence Bardin's content analysis technique, structured in three main phases: pre-analysis, exploration of the material and treatment of the results. In the pre-analysis phase, the corpus was organized, the texts were read fluctuatingly, and the analytical categories were defined, guided by the elements of the Crime Triangle (motivated offender, appropriate target, and capable guardian) and by the technological dimensions associated with crime prevention. In the material exploration stage, the contents were codified, patterns were identified, and the studies were classified according to the established categories, allowing the analysis of how different technologies impact each element of the triangle. Finally, in the treatment and interpretation phase, the data were synthesized and interpreted in the light of the adopted theoretical framework, enabling the identification of convergences, divergences and gaps in the literature.

To systematize the results, an analysis matrix was elaborated containing information on perpetrators, technologies used, elements of the Crime Triangle affected, and main contributions of the studies, as shown in Table 1. This strategy allowed a comparative and integrated analysis of the evidence, contributing to the construction of a critical and reasoned interpretation. The reliability of the research was ensured through the rigorous application of the PRISMA protocol, the clear definition of the selection criteria and the triangulation of sources and methods, ensuring consistency and validity to the results obtained.

Table 1

Content Analysis Matrix (Bardin)

Author	Technology/Approach	Analytical Category	Crime Triangle	Unit of Analysis	Interpretative Synthesis
Abdullahi et al. (2025)	CCTV	Electronic surveillance	Capable Guardian	Urban monitoring	Reduces crime by increasing surveillance and perceived risk
Choi et al. (2024)	Intelligent Systems (CPTED + AI)	Situational Avoidance	Capable Guardian	Decision making	Intelligent technologies optimize preventive decisions
Drenth; Van Steden (2020)	Data-driven policing	Police management	Capable Guardian	Police interaction	Data increases efficiency and strategic action
Ferreira et al. (2022)	PMTO Mobile	Operational technology	Capable Guardian	Police service	Agility and integration improve crime response
FBSP (2025)	Crime data	Empirical context	All	Crime indicators	Highlights the need for technological strategies
Hamada; NasSIF (2018)	Smart cities	Urban security	Capable Guardian	Urban infrastructure	Technology integrates security and urban management
Ishaphiad; Bagula (2020)	Big Data/Data Mining	Criminal intelligence	Motivated offender	Criminal patterns	Allows anticipation of criminal behavior
Kadar et al. (2016)	Collaborative apps	Social surveillance	Suitable target	Data sharing	Reduces vulnerability through social cooperation
Laufs (2022)	Technologies in smart cities	Critical analysis	All	Digital infrastructure	Effectiveness depends on integration and governance
Laufs; Borrion; Bradford (2020)	Smart cities	Systematic review	All	Urban systems	Technology expands prevention, but with limitations
Leal; Gomes-Jr. (2022)	Smart monitoring	Urban intelligence	Motivated offender	Spatial patterns	Detects changes in crime
Mihale-WiLSON et al. (2019)	Smart lighting	Environmental prevention	Suitable target	Urban environment	Reduces criminal opportunities
Miranda et al. (2020)	Institutional digital system	Public management	Capable Guardian	Administrative proceedings	Increases efficiency and transparency

Author	Technology/Approach	Analytical Category	Crime Triangle	Unit of Analysis	Interpretative Synthesis
Moyo (2019)	CCTV	Urban surveillance	Capable Guardian	Case Studies	Effectiveness depends on implementation
Ogbu; Excellence (2025)	ICT security	Educational technology	Capable Guardian	Institutional environment	Technology improves security in institutions
Papale (2023)	CCTV Operators	Operational surveillance	Capable Guardian	Human monitoring	Efficiency depends on human action
Suslov (2025)	Crime prevention	Theoretical basis	All	Criminological theory	Underpins situational prevention
Tavares et al. (2023)	PMTO Mobile	Applied technology	Capable Guardian	Operationalization	Benefits and limitations of police technology

Source: The authors (2026).

In this way, the methodology adopted enabled a comprehensive and in-depth analysis of the literature, allowing us to understand how security technologies act in crime prevention, especially in the context of smart cities, and how these mechanisms can be interpreted in the light of the Crime Triangle Theory, with direct implications for the reality of public security in the State of Tocantins.

3 LITERATURE REVIEW

3.1 PUBLIC SAFETY AND TECHNOLOGICAL INNOVATION

Contemporary public security has undergone a process of paradigmatic transformation, characterized by the transition from reactive models to preventive approaches guided by data and technology. In this context, the incorporation of digital tools and intelligent systems has been consolidated as a central element in the modernization of police institutions, allowing greater efficiency in crime management and strategic decision-making. This movement is directly associated with the advancement of the so-called smart cities, in which the integration of technology, governance, and urban infrastructure contributes to the improvement of public services, including security (Hamada; Nassif, 2018).

Technological innovation in public security involves the use of devices and systems capable of collecting, processing, and analyzing large volumes of data, enabling real-time monitoring and the identification of criminal patterns. Technologies such as video surveillance (CCTV), predictive analytics systems, artificial intelligence, and mobile security applications have expanded the surveillance and response capabilities of security forces, making policing more proactive and evidence-driven. Studies show that these tools allow not only the detection of occurrences, but also the anticipation of criminal behaviors, contributing to the reduction of criminal opportunities (Isafiade; Bagula, 2020).

In addition, the use of digital technologies has favored the development of data-driven *policing*, in which operational decisions are based on statistical analysis and patterns identified in criminal databases. This model represents a significant advance in relation to traditional practices, by allowing a more precise and efficient performance of police teams, especially in complex urban contexts. In this sense, the interaction between technology and police practice redefines the role of the security agent, who also starts to act as an information analyst and risk manager (Drenth; Van Steden, 2020).

In the field of smart cities, the application of technologies aimed at public safety has expanded through integrated systems that combine urban sensors, digital platforms, and data visualization tools. These solutions allow for the continuous monitoring of occurrences and the identification of changes in crime patterns, subsidizing more assertive preventive actions. Tools based on data mining and spatio-temporal analysis have shown great potential in identifying criminal trends, contributing to the formulation of more effective control and prevention strategies (Isafiade; Bagula, 2020; Leal; Gomes-Jr., 2022).

However, despite the advances provided by technological innovation, its implementation in public security still faces significant challenges, especially in relation to infrastructure, systems integration, and training of professionals. The adoption of these technologies requires continuous investments and strategic planning, as well as efficient articulation between different institutions and levels of government. In addition, issues related to privacy, data governance, and inequality in access to technologies also emerge as critical points in the debate on digital public security (Laufs, 2022).

In this way, technological innovation is configured as a structuring axis of contemporary public security, by enhancing the capacity for monitoring, analyzing and preventing crime. However, their effectiveness depends on the way these tools are integrated into institutional strategies and adapted to local specificities, highlighting the need for studies that analyze their application in regional contexts, such as the State of Tocantins.

3.2 CRIME TRIANGLE THEORY AND SITUATIONAL PREVENTION

The contemporary analysis of crime has been strongly guided by situational approaches that privilege the understanding of the immediate conditions that favor the occurrence of crime. In this context, the *Routine Activity Theory*, proposed by Cohen and

Felson (1979), constitutes the foundation of the so-called Crime Triangle, according to which criminal practice results from the convergence, in the same space-time, of three essential elements: a motivated offender, an adequate target (potential victim) and the absence of a capable guardian/place of the crime. This perspective shifts the explanatory focus from structural causes to contextual and operational factors, allowing for more direct interventions in the environment where the crime occurs (Suslov, 2025).

From this theoretical framework, the situational prevention of crime is consolidated, whose central logic consists of the reduction of criminal opportunities through the modification of physical and social environments. This approach seeks to increase the effort required to commit the crime, increase the risk perceived by the offender and reduce the expected rewards, acting directly on the elements of the triangle. In this sense, strategies such as surveillance, access control, and spatial reorganization are used as deterrence and control mechanisms, contributing to the reduction of crime incidence (Suslov, 2025; Moyo, 2019).

The incorporation of security technologies has significantly expanded the scope of situational prevention, especially with regard to strengthening the "capable guardian". Video surveillance systems (CCTV), for example, are widely used as electronic surveillance tools, allowing both the detection and deterrence of criminal behavior. Empirical evidence indicates that these technologies contribute to the reduction of crimes in monitored areas, in addition to helping to identify offenders and produce evidence for investigations and prosecutions (Papale, 2023; Abdullahi et al., 2025).

In addition, the advancement of digital technologies has enabled the development of intelligent crime prevention systems, based on data and algorithms. Within the scope of *Crime Prevention Through Environmental Design* (CPTED), computational tools have been used to support decision-making in urban control centers, allowing more precise interventions in areas of greater risk. These systems integrate spatial and temporal data to identify patterns and guide preventive strategies, reinforcing the logic of situational prevention and the proactive action of security forces (Choi; Na; Lee, 2024).

In the context of smart cities, crime prevention is mediated by a complex technological infrastructure, which combines urban sensors, digital platforms, and large-scale data analysis. Tools based on data mining and spatio-temporal analysis allow identifying crime patterns and detecting anomalies, subsidizing more effective preventive actions. In this sense, solutions such as continuous monitoring systems and automated alerts contribute to the anticipation of criminal events and the more efficient allocation of police resources (Isafiade; Bagula, 2020; Leal; Gomes-Jr., 2022).

In addition, social participation mediated by digital technologies has emerged as a complementary element in situational prevention. Collaborative platforms and security applications allow the sharing of information between citizens and institutions, expanding the surveillance network and strengthening informal control. This model, often associated with the concept of "digital neighborhood", contributes to the construction of safer environments through cooperation between social and technological actors (Kadar et al., 2016; Ogbu; Excellence, 2025).

On the other hand, the literature also shows that the effectiveness of security technologies in crime prevention is not uniform, being conditioned by factors such as infrastructure, institutional integration and operational capacity. Studies indicate that the simple installation of surveillance systems does not guarantee the reduction of crime, and there may be a displacement of crime to unmonitored areas or limitations in the effective use of technologies. In addition, challenges related to data management, system interoperability, and professional training still represent significant obstacles to the full implementation of these strategies (Mihale-Wilson; Felka; Hinz, 2019; Laufs, 2022).

In this scenario, *data-driven policing* emerges as a complementary approach to situational prevention, by integrating data analysis and operational practices. The use of real-time information and patterns identified in criminal databases allows for a more strategic and efficient performance of police teams, redefining the role of the security agent as a risk manager and information analyst. This integration between technology and police practice reinforces the institutional capacity to intervene in the elements of the Crime Triangle in a more assertive way (Drenth; Van Steden, 2020).

Finally, the literature shows that situational prevention mediated by security technologies represents a promising strategy for reducing crime, by acting directly on the conditions that enable crime. However, its effectiveness depends on the articulation between different technologies, institutional actors, and local contexts, especially in urban environments characterized by structural inequalities. Thus, the Crime Triangle Theory provides a robust analytical framework to understand how these technologies contribute to the disruption of criminal opportunities, guiding their application in specific contexts, such as that of Brazilian cities and, particularly, of the State of Tocantins (Hamada; Nassif, 2018; Laufs; Borrion; Bradford, 2020).

3.3 SURVEILLANCE AND SOCIAL CONTROL TECHNOLOGIES

The advancement of digital technologies has promoted a structural reconfiguration of public security strategies, especially in the mechanisms of surveillance and social control.

Surveillance, previously centered on face-to-face practices, now incorporates technological systems capable of monitoring, recording and analyzing data in real time and on a large scale. This movement is directly associated with the development of smart cities, in which the integration between technological infrastructure and urban management enhances operational efficiency and strengthens crime prevention strategies (Hamada; Nassif, 2018; Ishaphiad; Bagula, 2020).

Among the surveillance technologies applied to public security, video surveillance systems (CCTV) stand out as central instruments in the control of urban spaces. These systems enable the continuous monitoring of strategic areas, expanding the capacity to detect occurrences, the operational response and the production of evidence for investigation. Empirical evidence indicates that CCTV contributes to the deterrence of criminal behavior, especially in property crimes, by increasing the risk perceived by the offender, although its effects are conditioned by the context of implementation and integration with other security strategies (Abdullahi et al., 2025; Moyo, 2019; Papale, 2023).

In addition to video surveillance, intelligent technologies based on artificial intelligence and data mining have expanded social control through automated information analysis. These systems make it possible to identify criminal patterns, detect anomalies, and anticipate occurrences, favoring a more proactive and data-driven action. The integration of spatial and temporal data allows for the continuous monitoring of criminal dynamics and subsidizes strategic decisions in command and control centers, increasing the efficiency of police interventions (Choi; Na; Lee, 2024; Leal; Gomes-Jr., 2022).

In this context, surveillance is mediated by digital networks that expand social participation in the control of security. Collaborative applications and platforms enable the sharing of information between citizens and institutions, configuring forms of distributed and decentralized surveillance. This model, associated with the concept of "digital neighborhood", strengthens informal control and expands the perception of security, while intensifying the continuous monitoring of urban spaces (Kadar et al., 2016; Ogbu; Excellence, 2025).

In the context of smart cities, the integration of surveillance technologies has structured security ecosystems based on the articulation between urban sensors, smart lighting and digital platforms. This technological convergence expands the monitoring and response capacity, allowing for faster and more targeted interventions. Connected infrastructures, such as smart lighting systems, act preventively by changing environmental conditions and reducing criminal opportunities, reinforcing the logic of situational prevention (Mihale-Wilson; Felka; Hinz, 2019; Laufs; Borrion; Bradford, 2020).

On the other hand, the expansion of these technologies intensifies debates about social control, privacy, and data governance. Large-scale monitoring can result in excessive surveillance practices, with impacts on individual rights and civil liberties. In addition, the centralization of data and the use of algorithms in decision-making raise issues related to transparency, *accountability* , and analytical biases, highlighting the need to balance technological efficiency and ethical guarantees in the management of public security (Laufs, 2022).

Another relevant aspect refers to the effectiveness of these technologies in the practice of public security. Although there is evidence of its contribution to crime prevention, its results depend on factors such as territorial coverage, integration between systems, and operational capacity of institutions. The absence of technological coordination and insufficient professional qualification tend to limit their performance, reducing the expected impact on the reduction of crime (Drenth; Van Steden, 2020; Abdullahi et al., 2025).

In this sense, surveillance technologies are central instruments in the restructuring of social control and crime prevention strategies, by expanding monitoring, analysis and intervention capacities. However, its effectiveness is conditioned to the integration between technology, management and institutional context, requiring approaches that articulate technical and social dimensions. From this perspective, the Crime Triangle Theory offers a relevant analytical framework to understand how these technologies act in the reorganization of the conditions that favor crime, especially in regional contexts such as the State of Tocantins.

3.4 CONTEXT OF PUBLIC SECURITY IN TOCANTINS AND THE USE OF SMART TECHNOLOGY IN PREVENTION

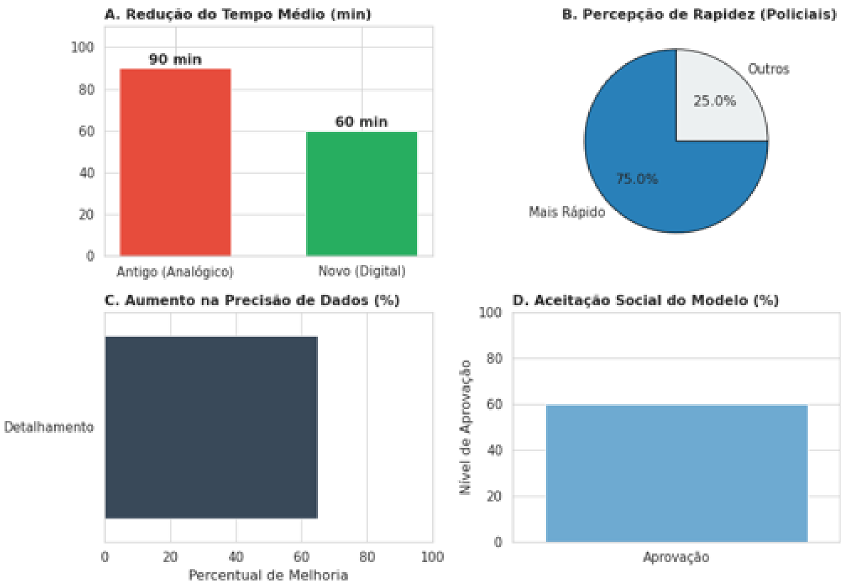
The analysis of public security in Brazil shows a scenario marked by regional inequalities, heterogeneous criminal dynamics and persistent structural challenges, which demand strategies adapted to local specificities. Recent data indicate that, although there is a downward trend in some indicators of lethal violence, crime remains high in several regions, with emphasis on property crimes, violence against vulnerable groups, and the growth of crimes associated with the use of technologies, such as fraud and cybercrime. In this context, the adoption of technological tools has been consolidated as a relevant strategy to improve the monitoring, prevention, and response capacity of public security institutions (FBSP, 2025).

Within the State of Tocantins, public security has its own characteristics, influenced by factors such as recent urban expansion, territorial configuration and the need for integration between different municipalities and regions. In this scenario, the Military Police of the State of Tocantins (PMTO) has sought to incorporate information and communication technologies as a way to optimize response to occurrences and improve operational efficiency. The implementation of digital systems and mobile applications represents a significant advance in the modernization of the police service, allowing greater agility in the registration of occurrences, data integration, and real-time communication between teams in the field and command centers (Ferreira et al., 2022).

The adoption of the PMTO Mobile system is a concrete example of this technological transformation, by enabling the digital registration of occurrences directly at the scene of the fact, immediate consultation of databases and the reduction of response time to the demands of the population. This tool contributes to improving the quality of the service provided, while strengthening the preventive action capacity of police teams. Studies indicate that the use of this type of technology results in greater operational efficiency, reduction of failures in the recording of information and better management of available resources, evidencing its potential as an instrument to support crime prevention (Tavares; Fernandes; Oliveira, 2023), as shown in Figure 2.

Figure 2

Impact of PMTO Mobile implementation on operational efficiency and security perception



Source: Adapted from (Ferreira et al., 2022; Tavares; Fernandes; Oliveira, 2023).

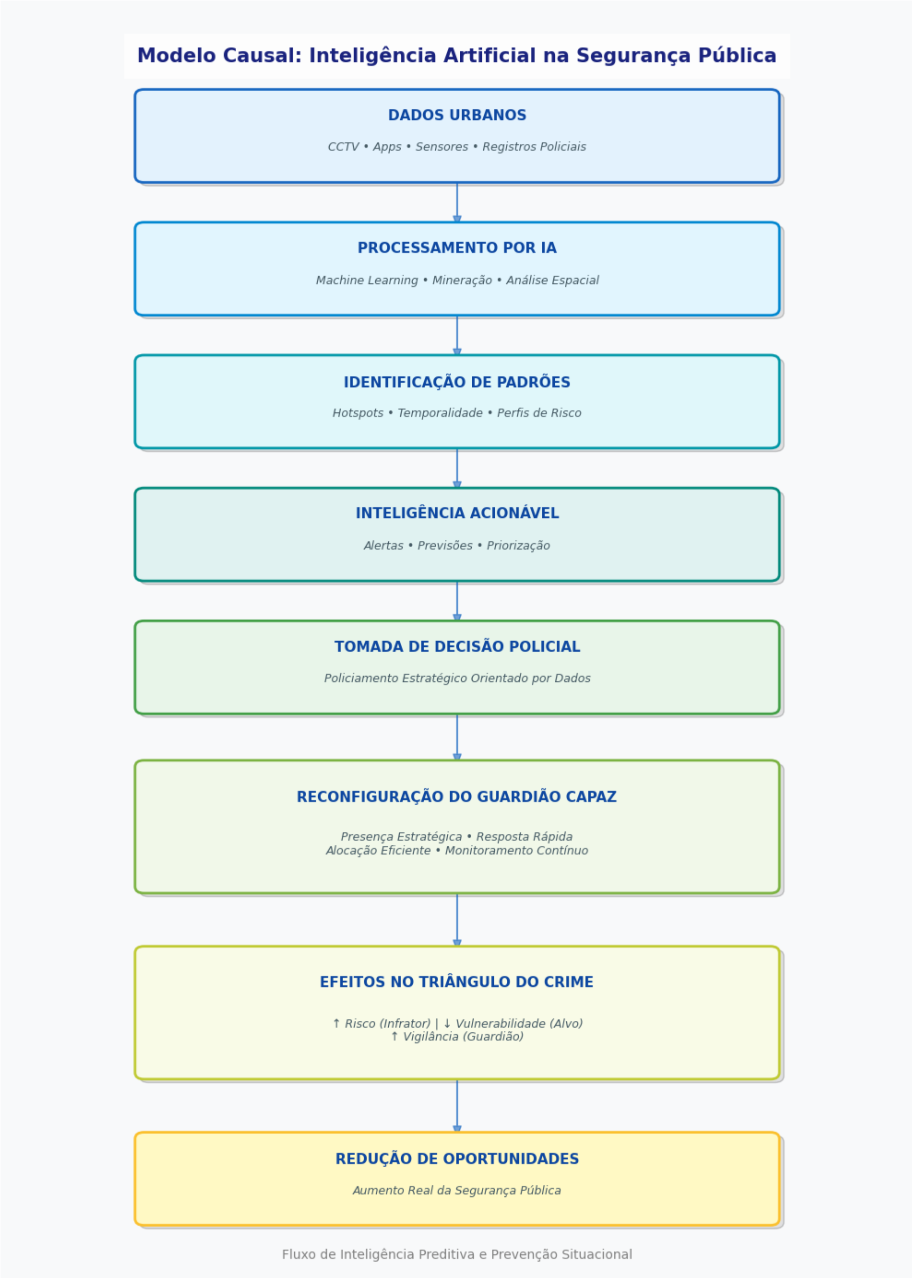
The results presented indicate consistent gains associated with the adoption of digital technologies in public security. Initially, there was a significant reduction in the average service time, from 90 minutes in the analog model to 60 minutes in the digital model, evidencing greater operational efficiency and speed in responding to incidents. This performance is corroborated by the perception of the police officers themselves, of whom 75% consider the service faster after the implementation of the technologies. In addition, there is a significant increase in data accuracy, with an approximate improvement of 65%, reflecting a higher quality of information used in decision-making and reinforcing the data-driven policing model. In the social sphere, the acceptance of the model is also relevant, with about 60% approval, indicating that the incorporation of these technologies contributes to the strengthening of institutional trust. Taken together, these results show that digitalization enhances the performance of the "capable guardian" by increasing the efficiency, analytical capacity, and effectiveness of police interventions (Ferreira et al., 2022; Tavares; Fernandes; Oliveira, 2023).

In this regard, it is verified that in addition to operational applications, the digitalization of administrative processes in police institutions has also contributed to the modernization of public management and to the strengthening of governance in public security. The implementation of electronic protocol and document processing systems allows for greater transparency, agility and accessibility to services, facilitating citizen service and the internal organization of corporations. These initiatives reflect a broader trend of digital transformation in the public sector, in which technology acts as a central element in improving efficiency and scaling institutional capacity (Miranda et al., 2020).

In the context of smart cities, the use of security technologies in Tocantins should be understood as part of a broader process of integration between data, urban infrastructure, and public management. Monitoring systems, mobile applications, and digital platforms contribute to the construction of a more dynamic and responsive security ecosystem, in which real-time information becomes a strategic resource for decision-making. This perspective is in line with the literature that highlights the role of smart technologies in the reorganization of crime prevention strategies, by allowing for more precise and evidence-based interventions (Isafiade; Bagula, 2020; Laufs; Borrion; Bradford, 2020), as shown in figure 3.

Figure 3

Causal model of the reconfiguration of the "capable guardian" based on the use of artificial intelligence in public security



Source: The authors (2026).

However, despite the advances observed, the implementation of security technologies in Tocantins still faces challenges related to infrastructure, systems integration, and human resources training. The effectiveness of these tools depends not only on their availability, but also on the institutional capacity to use them strategically and integrated with public security policies. In addition, the inequality in the distribution of technological resources between different regions can limit the reach of these initiatives, reinforcing the need for continuous planning and investment (Laufs, 2022).

From the perspective of the Crime Triangle Theory, the use of intelligent technologies in Tocantins can be understood as a mechanism to strengthen the "capable guardian", by expanding the surveillance and response capacity of the security forces. At the same time, these technologies contribute to reducing the vulnerability of the targets and increasing the risk perceived by the offender, acting directly in breaking the conditions that favor the occurrence of the crime. Thus, the integration between technology and police strategy is a fundamental element in the construction of more effective prevention policies (Choi; Na; Lee, 2024; Abdullahi et al., 2025).

In addition, the use of digital platforms and collaborative systems expands social participation in the public security process, allowing the sharing of information and the strengthening of informal control. This dynamic contributes to the construction of safer environments, by integrating citizens and institutions into surveillance and cooperation networks. However, it also raises important issues related to privacy, data protection, and governance, which should be considered in the formulation and implementation of these policies (Kadar et al., 2016; Ogbu; Excellence, 2025).

Finally, it is observed that the context of public security in Tocantins shows a transition scenario, in which the incorporation of smart technologies represents an opportunity to improve crime prevention strategies. However, its effectiveness is conditioned to the integration between technology, management and social context, reinforcing the need for approaches that consider both technical and institutional aspects. Thus, the analysis of the use of these technologies in the light of the Crime Triangle Theory allows us to understand in a more in-depth way their impacts on criminal dynamics, contributing to the development of more efficient public policies adapted to the local reality.

4 RESULTS AND DISCUSSION

The analysis of the selected studies, based on Bardin's content matrix, showed that security technologies act differently on the elements of the Crime Triangle, with a significant predominance of interventions aimed at strengthening the "capable guardian". Video surveillance systems (CCTV), digital applications and data-driven policing platforms were identified as the main technological mechanisms used to expand the surveillance and response capacity of security institutions. Empirical studies show that the presence of surveillance cameras contributes to the deterrence of crimes and the production of evidence, reinforcing the perception of risk by the offender and reducing the incidence of crimes in monitored areas (Moyo, 2019; Papale, 2023; Abdullahi et al., 2025).

The integration of smart technologies, such as systems based on artificial intelligence and data mining, has also stood out as a relevant advance in crime prevention, especially in supporting decision-making in command and control centers. These systems allow the identification of criminal patterns and the anticipation of occurrences, promoting a more proactive performance of security forces. In this context, the articulation between data and police practice strengthens the evidence-driven policing model, increasing operational efficiency and the capacity for strategic intervention (Isafiade; Bagula, 2020; Leal; Gomes-Jr., 2022; Choi; Na; Lee, 2024;).

Regarding the "appropriate target" element, the results indicate that technologies such as collaborative applications and urban monitoring systems contribute to reducing the vulnerability of victims, by enabling the sharing of information in real time and the strengthening of informal control. The so-called distributed surveillance, mediated by digital platforms, expands social participation in public security, creating cooperation networks between citizens and institutions. This model, while promising, also entails challenges related to privacy and data governance, requiring regulatory mechanisms that ensure the ethical use of these technologies (Kadar et al., 2016; Ogbu; Excellence, 2025).

Regarding the "motivated offender", it was observed that the use of technologies based on data analysis and artificial intelligence allows not only the identification of criminal patterns, but also the anticipation of criminal behavior. Data mining and spatio-temporal analysis tools contribute to the identification of risk areas and to the more efficient allocation of police resources, acting in a preventive manner to reduce criminal opportunities. In this sense, technology does not eliminate the offender's motivation, but acts to modify the environment, increasing the perceived risk and reducing the chances of success of the criminal action (Isafiade; Bagula, 2020; Leal; Gomes-Jr., 2022).

The literature also shows that the effectiveness of security technologies is directly related to their integration with the institutional structure and the context of application. Although there is consensus on the potential of these tools, several authors highlight limitations associated with infrastructure, system interoperability, and professional training. The lack of integration between different technologies and the inappropriate use of systems can compromise their effectiveness, resulting in limited impacts on crime reduction or even on the spatial displacement of crime (Laufs, 2022; Mihale-Wilson; Felka; Hinz, 2019).

In the Brazilian context and, specifically, in the State of Tocantins, the results indicate that the adoption of digital technologies by police institutions has contributed to the modernization of public security and to the improvement of operational efficiency. The use of institutional applications, such as PMTO Mobile, highlights the potential of mobile technologies to improve police service, data integration, and reduce response time to incidents. This technological transformation reinforces the role of the "capable guardian", by expanding the institutional presence in the territory and strengthening the capacity for preventive intervention (Ferreira et al., 2022; Tavares; Fernandes; Oliveira, 2023).

In addition, the digitization of administrative processes and the incorporation of electronic systems in police organizations contribute to strengthening governance and transparency in the management of public security. These initiatives reflect a broader trend of digital transformation in the public sector, in which technology acts as a structuring element in improving institutional efficiency and expanding the State's response capacity (Miranda et al., 2020).

However, the integrated analysis of the studies shows that technology, by itself, does not constitute a sufficient solution for reducing crime. Its effectiveness depends on factors such as strategic planning, institutional integration, and adaptation to local specificities. In the case of Tocantins, challenges related to infrastructure, unequal distribution of technological resources, and professional training still represent important limitations for the consolidation of a fully data-driven public security model (Hamada; Nassif, 2018; Laufs, 2022; Tavares; Fernandes; Oliveira, 2023).

Finally, the theoretical and empirical triangulation of the results confirms that security technologies play a fundamental role in breaking the Crime Triangle, by acting simultaneously on its three elements. By strengthening the guardian, reducing the vulnerability of the target, and increasing the risk perceived by the offender, these tools contribute to the reduction of criminal opportunities and the construction of safer environments. However, its effectiveness is conditioned by the integration between technology, management, and social context, highlighting the need for systemic approaches adapted to the local reality, especially in emerging contexts such as the State of Tocantins (Suslov, 2025; Laufs; Borrion; Bradford, 2020; FBSP, 2025).

5 FINAL CONSIDERATIONS

It is concluded that these technologies, especially video surveillance systems and digital applications, act significantly in the reconfiguration of the conditions that favor the occurrence of crime, contributing to the strengthening of the "capable guardian", the reduction of the vulnerability of the "appropriate target" (victim) and the increase in the risk perceived by the "motivated offender". Thus, it is confirmed that the incorporation of technologies in the field of public security constitutes a relevant mechanism for breaking criminal opportunities, especially when integrated with situational prevention strategies.

The main findings indicate that security technologies have a greater impact on strengthening surveillance and expanding the response capacity of police institutions, especially through the use of CCTV, intelligent systems, and operational applications, such as PMTO Mobile. In addition, it was found that data-driven tools and artificial intelligence contribute to the anticipation of criminal patterns and strategic decision-making, while collaborative technologies expand social control and citizen participation. However, the analysis also revealed that the effectiveness of these technologies depends on structural factors, such as systems integration, institutional capacity, professional qualification, and data governance, showing that their adoption alone does not guarantee a reduction in crime.

In view of these results, it is recommended to strengthen public policies that promote the integration between technologies, management and social context, with investments in infrastructure, professional training and interoperability of systems. It is also suggested the development of data-driven public security models adapted to regional specificities, such as in the State of Tocantins, as well as the adoption of governance mechanisms that ensure the ethical and transparent use of technologies. Finally, the need for future research that empirically explores the relationship between security technologies and crime reduction in different territorial contexts is highlighted, contributing to the theoretical and practical advancement of the field of public security.

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THE EFFECTIVENESS OF THE OVER-INDEBTEDNESS LAW IN ADDRESSING THE VULNERABILITY OF ELDERLY CONSUMERS

A EFICÁCIA DA LEI DO SUPERENDIVIDAMENTO FRENTE A VULNERABILIDADE DO CONSUMIDOR IDOSO

LA EFICACIA DE LA LEY DE SOBREENDEUDAMIENTO FRENTE A LA VULNERABILIDAD DEL CONSUMIDOR ADULTO MAYOR

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ABSTRACT

This article analyzes the effectiveness of Law No. 14,181/2021, known as the over-indebtedness law, in relation to the vulnerability of elderly consumers. The study is based on the observation that the increase in credit supply and the expansion of consumer relations have contributed to the growth of indebtedness among the population, especially among older adults. In this context, it seeks to understand whether the mechanisms introduced by this legislation are capable of providing effective protection to this social group. In light of this, the study addresses the following question: Can Law No. 14,181/2021 truly protect elderly consumers? Therefore, the general objective of this research is to analyze the effectiveness of the Over-Indebtedness Law in relation to the vulnerability of elderly consumers, seeking to understand how the legal instruments provided by the legislation contribute to preventing and addressing situations of excessive indebtedness. As a specific objective, the study aims to reflect on how the judiciary can resolve disputes and protect elderly consumers. The methodology adopted consists of a bibliographic review based on the analysis of doctrine, legislation, and case law related to the topic. Regarding its objectives and methods, the research is classified as qualitative, descriptive, and explanatory. The results indicate that Law No. 14,181/2021 represents an important advancement in consumer protection by introducing mechanisms aimed at preventing over-indebtedness and preserving a minimum standard of living. By promoting responsible credit practices and financial reorganization, the legislation seeks to ensure greater balance in consumer relations. However, its effectiveness depends on the joint action of the judiciary, consumer protection agencies, and the implementation of public policies focused on financial education. It is concluded that the enactment of Law No. 14,181/2021 represents a significant advancement in the protection of Brazilian consumers.

Keywords: Over-Indebtedness. Elderly Consumer. Vulnerability. Law No. 14,181/2021. Consumer Law.

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RESUMO
O presente artigo analisa a eficácia da Lei nº 14.181/2021, conhecida como lei do superendividamento, frente a vulnerabilidade do consumidor idoso. O estudo parte da constatação de que o aumento na oferta de crédito e ampliação das relações de consumo contribuíram para o crescimento do endividamento da população, principalmente entre os idosos. Nesse contexto busca-se compreender se os mecanismos introduzidos pela referida legislação são capazes de oferecer proteção efetiva a esse grupo social. Diante do exposto, o trabalho responde o seguinte questionamento: A lei nº 14.181/2021 pode realmente proteger o consumidor idoso? Sendo assim, a presente pesquisa tem como objetivo geral analisar a eficácia da Lei do Superendividamento frente à vulnerabilidade do consumidor idoso, buscando compreender de que maneira os instrumentos jurídicos previstos na legislação contribuem para prevenir e enfrentar situações de endividamento excessivo. E como objetivo específico tem-se: refletir como o poder judiciário poderá resolver as demandas e proteger o consumidor idoso. A metodologia adotada consiste em pesquisa bibliográfica baseada na análise da doutrina, legislação e jurisprudência relacionadas ao tema. Quanto aos objetivos ou meios, a pesquisa é classificada como qualitativa, descritiva e explicativa. Os resultados indicam que a Lei nº 14.181/2021 representa um avanço importante na proteção do consumidor ao introduzir mecanismos voltados à prevenção do superendividamento e à preservação do mínimo existencial. Ao introduzir mecanismos voltados à prevenção do superendividamento e à promoção do crédito responsável, a legislação busca garantir maior equilíbrio nas relações de consumo e possibilitar a reorganização financeira do consumidor. Entretanto sua efetividade depende da atuação conjunta do Poder Judiciário, dos órgãos de defesa do consumidor e da implementação de políticas públicas voltadas à educação financeira da população. Conclui-se que, diante dessa realidade, a promulgação da Lei 14.181/2021, representa importante avanço na proteção do consumidor brasileiro.

Palavras-chave: Superendividamento. Consumidor Idoso. Vulnerabilidade. Lei nº 14.181/2021. Direito do Consumidor.

RESUMEN
El presente artículo analiza la eficacia de la Ley n.º 14.181/2021, conocida como la ley de sobreendeudamiento, frente a la vulnerabilidad del consumidor adulto mayor. El estudio parte de la constatación de que el aumento en la oferta de crédito y la ampliación de las relaciones de consumo han contribuido al crecimiento del endeudamiento de la población, especialmente entre las personas mayores. En este contexto, se busca comprender si los mecanismos introducidos por dicha legislación son capaces de ofrecer una protección efectiva a este grupo social. Ante lo expuesto, el trabajo responde a la siguiente pregunta: ¿Puede realmente la Ley n.º 14.181/2021 proteger al consumidor adulto mayor? Por lo tanto, el objetivo general de esta investigación es analizar la eficacia de la Ley de Sobreendeudamiento frente a la vulnerabilidad del consumidor adulto mayor, buscando comprender de qué manera los instrumentos jurídicos previstos en la legislación contribuyen a prevenir y enfrentar situaciones de endeudamiento excesivo. Como objetivo específico, se propone reflexionar sobre cómo el poder judicial puede resolver las demandas y proteger al consumidor adulto mayor. La metodología adoptada consiste en una investigación bibliográfica basada en el análisis de la doctrina, la legislación y la jurisprudencia relacionadas con el tema. En cuanto a sus objetivos y métodos, la investigación se clasifica como cualitativa, descriptiva y explicativa. Los resultados indican que la Ley n.º 14.181/2021 representa un avance importante en la protección del consumidor al introducir mecanismos orientados a la prevención del sobreendeudamiento y a la preservación de un mínimo vital. Al promover prácticas de crédito responsable y la reorganización financiera, la legislación busca garantizar un mayor equilibrio en las relaciones de consumo. Sin embargo, su efectividad depende de la actuación conjunta del poder judicial, los organismos de defensa

del consumidor y la implementación de políticas públicas orientadas a la educación financiera de la población. Se concluye que la promulgación de la Ley n.º 14.181/2021 representa un avance significativo en la protección del consumidor brasileño.

Palabras clave: Sobreendeudamiento. Consumidor Adulto Mayor. Vulnerabilidad. Ley n.º 14.181/2021. Derecho del Consumidor.

1 INTRODUCTION

In recent decades, consumer relations have undergone profound transformations due to the expansion of the financial market and the expansion of access to credit. The ease of obtaining loans, financing and other types of credit has become part of the daily lives of a large part of the population, allowing the acquisition of goods and services that were previously not within the immediate reach of many consumers. Although this scenario has contributed to boosting the economy and expanding access to consumption, it has also brought relevant consequences, among which the growth of the population's indebtedness stands out.

In this context, the phenomenon of over-indebtedness stands out, which can be understood as the situation in which the individual consumer, even acting in good faith, is unable to meet his financial obligations without compromising resources necessary for his own subsistence. More than a merely economic problem, over-indebtedness reveals a relevant social issue, as it can directly affect the dignity of the consumer and compromise their financial stability.

The expansion of access to credit, associated with the complexity of contracts and the intense offer of financial products, has contributed to the emergence of situations in which consumers assume obligations that are incompatible with their ability to pay. Often, the contracting of loans and financing occurs without a full understanding of the contractual conditions or the risks involved in financial operations.

Among the social groups most exposed to these situations, the elderly consumer stands out. The aging process of the Brazilian population has increased the presence of elderly people in consumer relations, especially in the credit market. However, factors such as the reduction in income after retirement, possible cognitive limitations and the difficulty in understanding complex contracts can intensify the vulnerability of this group in consumer relations.

In view of this reality, the Brazilian legal system has come to recognize the need for specific mechanisms aimed at preventing and treating over-indebtedness. In this scenario, the enactment of Law No. 14,181/2021, known as the Over-indebtedness Law, stands out, which promoted important changes in the Consumer Protection Code by introducing instruments aimed at preventing excessive indebtedness and enabling the consumer's financial reorganization.

This legislation also incorporated into the Brazilian legal system the concept of preservation of the existential minimum, ensuring that over-indebted consumers can reorganize their financial life without compromising essential resources for their subsistence.

Such a measure reveals the legislator's concern to reconcile consumer protection with the stability of economic relations.

In this sense, there is a need to analyze whether the mechanisms introduced by Law No. 14,181/2021 are capable of offering effective protection to elderly consumers, considering their condition of vulnerability in consumer relations. The investigation of this theme becomes especially relevant in view of the growth of situations of indebtedness among the elderly and the need to ensure decent living conditions for this social group.

In view of the above, the problematizing question of the research is: Can Law No. 14,181/2021 really protect the elderly consumer?

Thus, the present work has as its general objective to analyze the effectiveness of the Over-indebtedness Law in the face of the vulnerability of the elderly consumer, seeking to understand how the legal instruments provided for in the legislation contribute to prevent and face situations of excessive indebtedness. And the specific objective is to reflect on how the judiciary can resolve the demands and protect the elderly consumer.

To achieve these objectives, bibliographic and documentary research was carried out based on the analysis of legislation, specialized doctrine and jurisprudence related to the theme, in addition to the use of scientific articles and theses related to the theme of the work. As for objectives and means, the research is classified as qualitative, descriptive and explanatory in nature.

The hypothesis of this research is that Law No. 14,181/2021, by introducing mechanisms aimed at preventing over-indebtedness and promoting responsible credit, contributes significantly to the protection of elderly consumers, reducing their exposure to abusive practices in consumer relations, however its effectiveness still depends on the proper application by the bodies of the Judiciary, the performance of consumer protection agencies and the implementation of public education policies financial.

Based on this analysis, it is intended to identify the advances provided by Law No. 14,181/2021, as well as the challenges that still persist to ensure effective protection for the elderly consumer.

The research begins with the Introduction, which addresses a general context of the theme explained, also presents the justification, the problematizing question, the objectives, the methodology and the hypothesis of the work. The theoretical foundation of the present study is mainly based on the contributions of authors such as: TARTUCE, Flávio. **Manual de Direito do Consumidor**. Rio de Janeiro: Forense, 2023; MIRAGEM, Bruno. **Consumer Law Course**. São Paulo: RT, 2022; NUNES, Rizzatto. **Consumer Law Course**. São Paulo: Saraiva, 2021; BRAZIL. Law No. 14,181/2021. Available at:

https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/l14181.htm. Accessed on February 24, 2026; MARQUES, Cláudia Lima. **Contracts in the Consumer Protection Code**. São Paulo: RT, 2016; BRAZIL. **Statute of the Elderly.** Law No. 10,741/2003. Available at: https://www.planalto.gov.br/ccivil_03/leis/2003/l10.741.htm. Accessed February 24, 2026; BRAZIL; **Consumer Protection Code.** Law No. 8,078/1990. Available at: https://www.planalto.gov.br/ccivil_03/leis/l8078compilado.htm. Accessed on February 24, 2026 and BRAZIL. **Constitution of the Federative Republic of Brazil of 1988**. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on February 24, 2026.

In view of the authors presented, the research explains about Over-indebtedness in Consumer Law, presenting the concept and reality. Then, the work explains about the consumer society and credit expansion, addressing how access to financial mechanisms contributed to the increase in the population's indebtedness and to the emergence of over-indebtedness situations. The phenomenon of over-indebtedness in the scope of consumer law is analyzed, highlighting its main concepts, characteristics and legal implications, dedicating itself to the verification of the vulnerability of the elderly consumer in consumer relations, emphasizing their conditions of hyper vulnerability and the factors that contribute to their greater exposure to abusive practices, especially in the credit market. Subsequently, Law No. 14,181/2021, known as the over-indebtedness law, is examined, focusing on the mechanisms introduced by it, such as responsible credit and the preservation of the existential minimum, as well as its application in the protection of elderly consumers. Finally, the work presents a critical analysis of the effectiveness of this legislation in the face of the vulnerability of this social group under study.

In view of the above, it is concluded that the over-indebtedness law represents an important advance in the protection of consumers, especially the elderly, by seeking to balance consumer relations and ensure minimum conditions of dignity, even though its effectiveness depends on the proper practical application and strengthening of public policies aimed at financial education.

2 OVER-INDEBTEDNESS IN CONSUMER LAW

2.1 CONCEPT OF OVER-INDEBTEDNESS

The phenomenon of over-indebtedness has come to occupy a prominent position in legal discussions related to consumer relations, especially in societies in which access to credit has become widely disseminated. The ease of contracting loans, financing and other financial instruments, although it represents an important mechanism for economic inclusion, can also generate situations of excessive indebtedness when not accompanied by an adequate assessment of the consumer's financial capacity.

In this context, over-indebtedness can be understood as the situation in which the individual consumer, even acting in good faith, is unable to meet his financial obligations without compromising resources essential to his subsistence. As Marques (2016) explains, over-indebtedness consists of the "global impossibility of the individual consumer, in good faith, to pay his current and future debts without compromising the existential minimum necessary for a dignified life" (Marques, 2016, p. 302).

The same understanding is shared by Kirchner (2021, p. 137), who characterizes over-indebtedness as "the manifest, durable, and structural impossibility of the consumer in good faith to pay the set of his or her non-professional debts due and falling due".

According to Moraes (2020), over-indebtedness is the "pathology of credit", that is, the distortion of a mechanism originally intended for inclusion.

This definition shows that over-indebtedness is not limited to the simple default of a specific obligation. It is a structural situation in which the set of debts assumed by the consumer prevents the maintenance of a minimum balance between income and expenses, compromising their financial stability and, often, their own dignity.

According to Pagnozzi *et al* (2025):

> Consumer over-indebtedness is today a latent and worrying reality in the Brazilian context. More than a reflection of individual financial lack of control, it expresses the contradiction of a model of society that, while stimulating consumption, imposes on people the solitary responsibility of dealing with the consequences of an aggressive and often opaque credit system. In this scenario, the need to rethink the role of the State, the market and the consumer himself emerges, in order to establish a balance between contractual freedom and the preservation of human dignity. (Pagnozzi *et al*, 2025)

In view of the above, over-indebtedness cannot be understood only as a matter of default or inability to pay, but as a structural problem that involves vulnerability, asymmetry of information and the absence of effective financial education and responsible credit policies. The over-indebted consumer is, above all, a victim of a system that encourages him to consume, but which rarely prepares him to manage the credit offered to him. (Pagnozzi *et al*, 2025)

In this sense, the doctrine highlights that over-indebtedness must be analyzed not only from an economic perspective, but also from a social and legal perspective. Miragem (2022) observes that the phenomenon is directly related to the transformations that have occurred in the contemporary consumer society, marked by the expansion of credit and the growing complexity of contractual relationships established between consumers and suppliers.

In addition, over-indebtedness can generate consequences that go beyond the individual scope, affecting family organization and the consumer's own social inclusion. In many situations, the excessive commitment of income to the payment of debts makes it difficult to meet basic needs, such as food, housing and health.

In view of this reality, the need for legal mechanisms capable of preventing situations of excessive indebtedness and ensuring greater balance in consumer relations becomes evident.

2.2 CONSUMER SOCIETY AND CREDIT EXPANSION

The expansion of credit in recent decades is directly associated with the development of the so-called consumer society. The possibility of immediate acquisition of goods and services through financing or installments has become a central element in the functioning of the contemporary economy.

In this scenario, credit has started to play a fundamental role in making consumption viable, allowing consumers to have access to products and services even when they do not have sufficient financial resources at the time of purchase. However, the expansion of this dynamic has also brought new challenges to the legal system.

According to Nunes (2021), the structure of the contemporary consumer market tends to favor suppliers, who have greater technical and informational mastery over the products and services offered. The consumer, in turn, often finds it difficult to fully understand the contractual conditions, especially when it comes to complex financial transactions.

In this sense, the massive supply of credit, associated with marketing and advertising strategies, can encourage the contracting of loans and financing without an adequate assessment of the economic impacts of these decisions. In many cases, the consumer assumes financial commitments that are incompatible with his ability to pay.

This reality highlights the need for Consumer Law to act in order to establish protection mechanisms capable of reducing the existing asymmetry in market relations.

2.3 OVER-INDEBTEDNESS AND HUMAN DIGNITY

The discussion about over-indebtedness is also directly related to the principle of human dignity, which constitutes one of the foundations of the Brazilian legal system, as provided for in article 1, item III, of the Federal Constitution.

When consumers commit a large part of their income to paying off debts, their ability to meet basic needs can be severely affected. In these cases, the problem of indebtedness ceases to be just an economic issue and starts to represent a risk to the individual's own dignity.

In this sense, the doctrine highlights that the protection of over-indebted consumers must be guided by constitutional principles that ensure minimum conditions of dignified existence. As Miragem (2022) observes, the preservation of the existential minimum is an essential element to ensure that debt collection does not fully compromise the resources necessary for the consumer's survival.

Over-indebtedness, when it reaches the level of compromising the existential minimum of the individual, is not only an economic failure: it is a violation of human dignity, as it prevents the person from maintaining an existence consistent with the minimum standards of dignified living. (Pagnozzi *et al*, 2025)

Brazilian jurisprudence has also recognized the importance of this protection. The Superior Court of Justice has already highlighted that the interpretation of consumer protection rules must consider the vulnerability of the consumer and the constitutional principles that guide the legal system. In a relevant decision, the court stated that:

> "the principle of private autonomy is not absolute, and must respect other principles of our legal system (social function of the contract, objective good faith), including one of the most important, which is the principle of the dignity of the human person, affirmed in article 1, III, of the Federal Constitution" (STJ – REsp 1.586.910/SP, 2017, p. 11)

Thus, the fight against over-indebtedness should be understood as part of a legal policy aimed at protecting the dignity of the consumer and promoting more balanced consumer relations.

3 THE VULNERABILITY OF THE ELDERLY CONSUMER IN CONSUMER RELATIONS

3.1 VULNERABILITY AS THE FOUNDATION OF CONSUMER LAW

The recognition of consumer vulnerability is one of the fundamental pillars of the protection system established by the Consumer Protection Code. Consumer legislation is based on the understanding that, in consumer relations, the consumer is usually in a disadvantaged position in relation to the supplier, either due to economic power, or due to technical and informational mastery over the products and services offered in the market.

In this sense, article 4 of the Consumer Protection Code establishes that the national policy on consumer relations has as one of its principles the recognition of the vulnerability of the consumer in the consumer market. Such recognition justifies the creation of rules aimed at balancing the relationship between consumers and suppliers.

As Nunes (2021) explains, consumer vulnerability stems from the very structure of contemporary consumer relations, in which suppliers have greater economic capacity and greater control over information related to the products and services offered. For the author:

"Vulnerability is the basis of the consumer protection system, as it highlights the need for State intervention to balance the relationship between consumer and supplier" (Nunes, 2021, p. 127).

Thus, consumer protection is not justified only by the existence of contractual conflicts, but by the structural inequality present in market relations.

3.2 THE HYPERVULNERABILITY OF THE ELDERLY CONSUMER

Although all consumers are considered vulnerable in consumer relations, certain groups have conditions that intensify this fragility. In these cases, the doctrine uses the concept of **hypervulnerability,** which refers to situations in which personal or social factors increase the vulnerability already recognized by the legal system.

Among the groups that fit this condition, the elderly consumer stands out. The aging of the Brazilian population has increased the participation of older people in consumer relations, especially in access to financial services and credit agreements.

However, the aging process can bring significant changes in people's economic and social lives, influencing their participation in the consumer market. The reduction in income after retirement, possible cognitive limitations and the difficulty in understanding complex contracts can increase the exposure of the elderly to abusive practices. Marques (2016) highlights that the hypervulnerability of the elderly consumer requires special attention from the legal system, since the particularities of this group can increase the risks of indebtedness and exploitation in consumer relations.

In this sense, the legal protection of elderly consumers must take into account their specific characteristics, ensuring mechanisms capable of preventing abusive practices and ensuring greater balance in contractual relations.

3.3 THE STATUTE OF THE ELDERLY AND PROTECTION IN CONSUMER RELATIONS

The protection of older people in Brazil was significantly strengthened with the enactment of the Statute of the Elderly (Law No. 10,741/2003). This legislation established a set of rules aimed at ensuring fundamental rights to people aged sixty and over, guaranteeing conditions of dignity, respect and participation in society.

The Statute of the Elderly recognizes that the aging of the population requires public policies and legal instruments capable of protecting this social group against situations of exclusion and vulnerability.

In the context of consumer relations, the Statute reinforces the need to guarantee special protection to the elderly, especially in the face of practices that may compromise their economic security. This protection becomes particularly relevant in the context of the expansion of the credit market, which has started to direct various types of loans and financing to the elderly public.

According to Miragem (2022), the protection of elderly consumers requires a systematic interpretation of legal rules, in order to ensure that consumer relations are guided by good faith, transparency, and contractual balance. Such understanding reinforces the need for preventive action of Consumer Law, especially in situations involving the granting of credit.

In addition, the Statute of the Elderly establishes important guidelines related to protection against abusive practices, especially those that may compromise the economic security of the elderly. In this context, situations in which elderly consumers are induced to contract financial services or products without full understanding of their conditions stand out, which can result in excessive impairment of their income.

Another relevant point concerns the priority given to the elderly in access to justice and state protection. The Statute ensures mechanisms that facilitate the defense of their rights, allowing greater effectiveness in legal protection in cases of abuse in consumer relations.

In this sense, the performance of consumer protection agencies, such as the Consumer Protection and Defense Programs (PROCONs), becomes essential to ensure the effectiveness of protective rules. These bodies play an important role in mediating conflicts, guiding consumers, and monitoring abusive practices in the market.

Thus, the Statute of the Elderly, combined with the Consumer Protection Code, constitutes an important instrument of legal protection, especially in a context marked by the growing supply of credit and the increase in over-indebtedness. The combination of these rules allows not only the repression of abusive practices, but also the promotion of policies aimed at the protection and inclusion of elderly consumers in consumer relations.

3.4 PAYROLL LOANS AND INDEBTEDNESS OF THE ELDERLY POPULATION

One of the factors that contributed to the increase in indebtedness among the elderly in Brazil was the expansion of payroll loans. This type of loan is characterized by the automatic discount of installments directly from the consumer's payroll or social security benefit.

Although payroll loans have interest rates that are generally lower than other types of credit, its wide offer and ease of contracting can generate negative consequences when there is no adequate analysis of the consumer's ability to pay.

In many cases, the elderly consumer takes out successive payroll loans to pay off previous debts, creating a cycle of indebtedness that compromises a significant portion of their monthly income.

In this scenario, the over-indebtedness of the elderly consumer comes to represent not only an individual economic problem, but also a relevant social issue that requires the action of the legal system to ensure adequate protection for this group.

In addition, it is important to highlight that the vulnerability of elderly consumers in the context of payroll loans is also related to aggressive and sometimes non-transparent commercial practices, which make it difficult to fully understand the contractual conditions. Many of these contracts occur in environments marked by informational asymmetry, in which the consumer does not have sufficient elements to adequately assess the risks involved.

In this scenario, the absence of adequate financial education and public policies aimed at consumer guidance further aggravates the situation, contributing to the perpetuation of the debt cycle.

Thus, it is evident that confronting the over-indebtedness of elderly consumers requires not only normative intervention, but also preventive and educational action, capable of promoting greater awareness and autonomy in financial decisions, thus reinforcing the need for an effective and integrated application of consumer protection rules.

4 THE LAW OF OVER-INDEBTEDNESS AND ITS EFFECTIVENESS IN PROTECTING THE ELDERLY CONSUMER

4.1 LAW NO. 14,181/2021 AND TACKLING OVER-INDEBTEDNESS

In view of the growth of the indebtedness of the Brazilian population and the difficulties faced by consumers who are in a situation of personal insolvency, the Brazilian legislator began to discuss the need to create specific legal mechanisms aimed at the prevention and treatment of over-indebtedness. As a result of this legislative process, Law No. 14,181/2021, known as the Over-indebtedness Law, was enacted.

This legislation promoted important changes in the Consumer Protection Code, introducing instruments aimed at preventing excessive indebtedness and enabling the financial reorganization of the consumer. Among the objectives of the law are the promotion of responsible credit, the expansion of transparency in contractual relations and the creation of debt renegotiation mechanisms.

According to Marques (2016), the legal recognition of over-indebtedness represents a significant advance in consumer protection, as it allows the problem to be faced more adequately by the legal system. For the author, the treatment of over-indebtedness should seek to reconcile the satisfaction of credits with the preservation of the consumer's dignity.

In this sense, Law No. 14,181/2021 establishes a set of measures aimed at preventing abusive practices in the granting of credit and ensuring greater protection for consumers in vulnerable situations.

In view of this, it is observed that the referred law represents not only a normative update, but a paradigm shift in the way the Brazilian legal system starts to deal with over-indebtedness. By recognizing the over-indebted consumer as a subject of specific protection, the legislation overcomes the traditional view that treated default only as a breach of contract, also considering it as a social phenomenon that requires state intervention.

Such a change is especially relevant when it comes to the elderly consumer, whose condition of hypervulnerability demands differentiated attention from the Law. The new legislation, by establishing guidelines aimed at the prevention of indebtedness and debt restructuring, creates instruments that can contribute significantly to the protection of this social group, especially in the face of recurrent practices of indiscriminate granting of credit.

In this way, the Over-indebtedness Law not only expands consumer protection mechanisms, but also reinforces the need for balance in consumer relations, by imposing stricter duties on credit providers. This normative advance shows the legislator's concern to promote greater contractual justice and ensure minimum conditions of dignity for consumers, especially those who are in a situation of greater economic and social fragility.

4.2 THE PRINCIPLE OF RESPONSIBLE CREDIT

One of the most relevant aspects introduced by the Over-indebtedness Law is the strengthening of the principle of responsible credit. This principle establishes that financial institutions and other credit providers must carefully assess the economic capacity of the consumer before granting loans or financing.

The adoption of this principle seeks to avoid situations in which the consumer assumes financial obligations that are incompatible with his economic reality, helping to prevent situations of excessive indebtedness.

Miragem (2022) highlights that responsible credit is a fundamental element for the balance of consumer relations in the financial market. For the author, the granting of credit should be associated with the analysis of the consumer's ability to pay and the provision of clear information about the contractual conditions.

In addition, the legislation reinforces the importance of transparency in credit relationships, requiring suppliers to present complete information on interest rates, charges, and consequences of default.

In this context, the implementation of the principle of responsible credit is essential for consumer protection, especially those who are in a situation of greater vulnerability, such as the elderly. The granting of credit without proper analysis of the consumer's ability to pay may constitute an abusive practice, as it directly contributes to the aggravation of over-indebtedness.

In view of the above, it is observed that the responsibility of credit providers is not limited to the provision of formal information, and it is necessary to ensure that such information is provided in a clear, adequate and understandable manner, considering the particularities of the consumer public. In the case of elderly consumers, this requirement becomes even more relevant, given the possible difficulties in understanding technical terms and complex contractual clauses.

In this case, the principle of responsible credit assumes a preventive role in the fight against over-indebtedness, by requiring a more cautious posture on the part of financial institutions. Its effective application contributes not only to the protection of the individual consumer, but also to the promotion of greater balance and justice in consumer relations, reducing the incidence of practices that may compromise the dignity and financial autonomy of consumers.

4.3 THE EXISTENTIAL MINIMUM

Another central element introduced by Law No. 14,181/2021 is the protection of the so-called **existential minimum.** This concept refers to the set of resources necessary to ensure minimum conditions for dignified survival for the consumer.

The preservation of the existential minimum prevents debt collection from totally compromising the consumer's income, ensuring that he can continue to meet his basic needs.

In this sense, the doctrine highlights that the protection of the existential minimum represents a fundamental instrument to ensure that the treatment of over-indebtedness is compatible with the constitutional principles of human dignity and consumer protection.

As Tartuce (2023) observes, the recognition of the existential minimum reinforces the need for balance between the economic interests of creditors and the protection of consumer dignity.

It is clear that the preservation of the existential minimum should be understood as a legal limit to the action of creditors, preventing the satisfaction of financial obligations from occurring to the detriment of the basic conditions of survival of the consumer. Such an understanding reinforces the need to interpret consumerist norms in the light of constitutional principles, especially that of the dignity of the human person.

In the case of elderly consumers, the protection of the existential minimum takes on even greater relevance, since, in many cases, their income is composed exclusively of social security benefits, which makes any excessive commitment particularly burdensome. The significant retention of these amounts can directly compromise essential expenses, such as food, medicines, and housing.

In addition, the effectiveness of this principle requires active action by the Judiciary and consumer protection agencies, in order to ensure that debt renegotiation agreements and collection measures respect the limits necessary to preserve the dignity of the consumer. In this context, the existential minimum is not presented only as a theoretical concept, but as a practical instrument of social protection.

Therefore, it can be seen that the protection of the existential minimum is a central element in the policy to combat over-indebtedness, contributing to ensure not only the fulfillment of obligations, but also the maintenance of decent living conditions for consumers, especially those in situations of greater vulnerability.

4.4 JURISPRUDENCE AND APPLICATION OF THE LAW

The practical application of the Over-indebtedness Law has been the subject of analysis by the Brazilian courts, which have recognized the need to interpret the consumer protection rules in the light of constitutional principles.

The Superior Court of Justice has already highlighted the importance of consumer protection in consumer relations, recognizing the need to interpret consumer rules in favor of the vulnerable party in the legal relationship.

In this sense, the following jurisprudential understanding stands out:

> "… since in the checking account discounts are also entered from third parties, including a financial institution (credit union), which are on the margins of what was decided without isonomy, reaching only one creditor. In fact, it is not justified, in the absence of a legal provision, to establish a limitation only to loans involving the bank and its account holder, since, for consistency and isonomy, the same solution would have to be adopted for payments with post-dated checks, carnets, bills, among other well-known forms of loan and payment." (STJ – REsp 1.586.910/SP, 2017, p.2.)

Decisions such as the one verified above demonstrate that the Judiciary has recognized the importance of legal mechanisms capable of preventing situations of over-indebtedness and ensuring adequate protection for consumers in vulnerable situations.

In this scenario, it is observed that the consolidation of a jurisprudence aimed at protecting over-indebted consumers plays a fundamental role in the effectiveness of Law No. 14,181/2021. The performance of the Judiciary, by interpreting consumer rules in the light of constitutional principles, contributes to the construction of more balanced solutions that are compatible with the social reality of consumers.

With regard to the elderly consumer, this action becomes even more relevant, since their condition of hypervulnerability requires a more sensitive analysis by the judges. The adoption of measures that consider the particularities of this group, such as the limitation of discounts on social security benefits and the facilitation of debt renegotiation, demonstrates the evolution of the jurisprudential understanding in order to promote greater justice in consumer relations.

Furthermore, it is verified that the effectiveness of the Over-indebtedness Law depends not only on the existence of legal provisions, but also on their interpretation and consistent application by the courts. The construction of solid precedents in line with the principles of human dignity and consumer protection contributes to the standardization of decisions and the strengthening of legal certainty.

Therefore, the joint action of the Judiciary, consumer protection agencies, and financial institutions is essential to achieve the objectives of Law No. 14,181/2021. Only through this integrated action will it be possible to ensure the effective protection of the consumer, especially the elderly, promoting more balanced consumer relations compatible with constitutional values.

5 FINAL CONSIDERATIONS

The phenomenon of over-indebtedness has been consolidated as one of the main challenges of consumer relations in contemporary society. The expansion of the credit market and the growing complexity of financial operations have contributed to the increase in the population's indebtedness, highlighting the need for legal mechanisms capable of promoting greater balance in consumer relations.

Throughout the present work, it was possible to observe that over-indebtedness does not represent only an individual economic problem, but also a relevant social issue that can compromise the dignity of the consumer. In this context, vulnerability plays a central role in understanding the inequalities that exist in consumer relations.

The analysis carried out showed that the elderly consumer is in a situation of special fragility in the consumer market. Factors such as the reduction in income after retirement, the difficulty in understanding complex contracts, and the wide supply of payroll loans contribute to increasing the risks of excessive debt among older people.

In view of this reality, the enactment of Law No. 14,181/2021 represents an important advance in the protection of the Brazilian consumer. By introducing mechanisms aimed at preventing over-indebtedness and promoting responsible credit, the legislation seeks to ensure greater balance in consumer relations and enable the financial reorganization of the consumer.

The protection of the existential minimum is a fundamental element of this legislative policy, as it ensures that over-indebted consumers can reorganize their financial life without compromising resources essential to their subsistence.

However, although the Over-indebtedness Law represents a significant advance in the Brazilian legal system, its effectiveness depends on the joint action of the Judiciary, consumer protection agencies, and the implementation of public policies aimed at the financial education of the population.

Therefore, it is concluded that Law No. 14,181/2021 is a relevant instrument for the protection of elderly consumers in consumer relations, contributing to the promotion of more balanced relationships and to the effectiveness of the principles of human dignity and consumer protection.

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THE PRONOUNCEMENT DECISION IN LIGHT OF DISCOURSE GENRES

A SENTENÇA DE PRONÚNCIA À LUZ DOS GÊNEROS DO DISCURSO

LA SENTENCIA DE PRONUNCIAMIENTO A LA LUZ DE LOS GÉNEROS DEL DISCURSO

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ABSTRACT

This article aims to carry out a linguistic-discursive analysis of the genre indictment decision, in light of the theory of speech genres proposed by Bakhtin (2011), taking as corpus a feminicide case that occurred in the municipality of Marabá, Pará, Brazil. The study is situated within the field of research that articulates language and law, seeking to understand how the dimensions of legal discourse are constituted in this genre. Methodologically, this is a qualitative study based on the documentary analysis of an indictment decision available on the JusBrasil platform. Through careful reading of the corpus, we examined the three Bakhtinian dimensions of genre: theme, composition, and style, with special attention to the management of voices within the utterance. The results show that the indictment decision presents a relatively stable compositional organization, structured into report, reasoning, and operative part, while simultaneously mobilizing multiple voices, such as those of the prosecution, defense, witnesses, and the judge, thus configuring a polyphonic and socially situated discourse. It is concluded that the analyzed genre is fully consistent with Bakhtin's theoretical framework, revealing itself as a privileged space for articulating language, law, and social practices, as well as for expanding linguistic perspectives on legal discourse.

Keywords: Speech Genres. Utterance. Genre Dimensions. Indictment Decision Genre.

RESUMO

Este artigo tem por objetivo realizar uma análise linguístico-discursiva do gênero sentença de pronúncia, à luz da teoria dos gêneros do discurso postulada por Bakhtin (2011), tomando como corpus um caso de feminicídio ocorrido no município de Marabá/PA. O estudo insere-se no campo das investigações que articulam linguagem e direito, buscando compreender como se constituem, nesse gênero, as dimensões do discurso jurídico. Metodologicamente,

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realizamos uma pesquisa de natureza qualitativa, baseada na análise documental de uma sentença de pronúncia disponível na plataforma JusBrasil. A partir de uma leitura minuciosa do corpus, procedemos ao exame das três dimensões do gênero bakhtiniano, que são tema, composição e estilo, com especial atenção ao gerenciamento das vozes no interior do enunciado. Os resultados evidenciam que a sentença de pronúncia apresenta uma organização composicional relativamente estável, estruturada em relatório, fundamentação e dispositivo, ao mesmo tempo em que mobiliza múltiplas vozes, como as do Ministério Público, da defesa, das testemunhas e do próprio juiz, configurando um discurso polifônico e socialmente situado. Conclui-se que o gênero analisado se mostra plenamente compatível com os pressupostos teóricos de Bakhtin, revelando-se como um espaço privilegiado para a articulação entre linguagem, direito e práticas sociais, além de permitir a ampliação do olhar linguístico sobre os discursos do domínio jurídico.

Palavras-chave: Gêneros do Discurso. Enunciado. Dimensões do Gênero. Gênero Sentença de Pronúncia.

RESUMEN
Este artículo tiene como objetivo realizar un análisis lingüístico-discursivo del género sentencia de pronunciamiento, a la luz de la teoría de los géneros del discurso propuesta por Bakhtin (2011), tomando como corpus un caso de feminicidio ocurrido en el municipio de Marabá/PA. El estudio se inscribe en el campo de las investigaciones que articulan lenguaje y derecho, buscando comprender cómo se constituyen, en este género, las dimensiones del discurso jurídico. Metodológicamente, se realizó una investigación de naturaleza cualitativa, basada en el análisis documental de una sentencia de pronunciamiento disponible en la plataforma JusBrasil. A partir de una lectura minuciosa del corpus, se procedió al examen de las tres dimensiones del género bakhtiniano—tema, composición y estilo—con especial atención a la gestión de las voces en el interior del enunciado. Los resultados evidencian que la sentencia de pronunciamiento presenta una organización composicional relativamente estable, estructurada en informe, fundamentación y parte dispositiva, al mismo tiempo que moviliza múltiples voces, como las del Ministerio Público, la defensa, los testigos y el propio juez, configurando un discurso polifónico y socialmente situado. Se concluye que el género analizado se muestra plenamente compatible con los presupuestos teóricos de Bakhtin, revelándose como un espacio privilegiado para la articulación entre lenguaje, derecho y prácticas sociales, además de permitir la ampliación de la perspectiva lingüística sobre los discursos del ámbito jurídico.

Palabras clave: Géneros del Discurso. Enunciado. Dimensiones del Género. Género Sentencia de Pronunciamiento.

1 INTRODUCTION

When we deal with the textual and discursive genres of the legal domain, we are faced with a wide variety of productions, such as the letter, the subpoena, the testimony, the sentence, among other genres that circulate in this sphere. Within this set, there are genres that are regulated by the Code of Criminal Procedure (CPP), which strictly obey the guidelines contained in this document.

Among these genres, we highlight the sentence of indictment, which has the function of a declaratory act through which the defendant, in a criminal proceeding of crime against life, is brought to popular trial, that is, has his conviction or acquittal democratically decided by Brazilian society, materialized in the Jury Body.

The selection of this genre is extremely relevant for our studies, especially when we seek a deepening of its linguistic-discursive issues. In addition, we know that the sentence of pronunciation is a document/genre widely studied by researchers of the Doctrine of Law, Social Sciences and other areas who are interested in investigating different aspects of the text.

In this sense, a linguistic-discursive approach sheds light on theoretical issues present in this genre that have not yet been widely explored by Linguistics researchers.

Thus, this article aims to analyze a sentence of pronouncement of a case of femicide that occurred in Marabá/Pá, in the light of the genres of discourse postulated by Bakhtin (2011). We sought to verify the applicability of these postulates in the sentence selected for the present study.

We justify that the process was chosen because it is the first case of femicide registered in the municipality of Marabá/PA, which made it emblematic in the region. It should be noted that the process is not under judicial secrecy, which facilitates access to the document through the JusBrasil platform.

In addition, the city of Marabá, in 2017, was appointed by the Institute of Applied Economic Research (IPEA) as the worst municipality in which a woman lives, with its municipal human development index (HDI) of 0.7657 (IPEA, 2017). We also highlight the low result in relation to education, longevity and income.

The article is divided into two parts, the first being dedicated to the theoretical review of discourse genres according to Bakhtin (2011), when we propose a reflection on some fundamental concepts such as enunciation, gender formation, classifications and the ideological sign. The second part brings a linguistic-discursive analysis of the sentence of pronunciation, identifying in the *Corpus* the three dimensions of the genre, which are theme, composition, and style. To carry out the analyses, we worked with excerpts taken from the sentence to verify the applicability of the theory to the *Corpus* of the research.

In the end, the study concludes that it is possible to study the sentence of pronunciation through the genres of discourse, in a linguistic-discursive perspective, thus bringing another look to this document.

2 THE GENRES OF DISCOURSE

We know that there are several theories that address the genres of discourse, which are necessary for the construction of a broad and democratic knowledge, which highlights multiple possibilities for studying the same phenomenon. As usual in the construction of scientific knowledge, we often select, or confront, or contribute, or diverge from one perspective to the detriment of another.

For the purposes of this study, we selected the studies postulated by Bakhtin (2011) and his collaborators so that we can understand in more depth the aspects that surround the formation of genres, in order to study the particularities of the pronunciation sentence genre, which is configured as the materiality of this work.

In this sense, it is salutary that we understand several concepts postulated by Bakhtin (2011), especially when the author presents his understanding of the genres of discourse:

> To speak, we always use the genres of discourse, in other words, all our **utterances** have a **standard** and **relatively stable** form of structuring a whole. We have a rich repertoire of **oral** (and **written) discourse genres**. In practice, we use them safely and dexterously, but we can totally ignore their theoretical existence. (Bakhtin, 2011, p. 301-302) (emphasis added)

From the above statement, we have selected some words or ideas that arouse further reflection, one of them being the question that, in order to interact through language, the subjects use the genres of discourse, which reveals that the entire process of interaction in linguistic practices is mediated by a genre, in which, Often, the enunciator is unaware of its theoretical nature, as the author states. Another highlight is the moment when Bakhtin (2011) states that we use genres with great dexterity, which allows us to reflect on the process of knowledge and language construction, which is made possible through dialogue.

A third point is the distinction that the author brings between genres in an oral and written perspective, which can sometimes be confused with issues of primary and secondary genres, but this distinction has nothing to do with these concepts, as they are different theoretical natures. On this last statement, in the course of this section we will reflect in more detail.

Finally, it is interesting to highlight the author's understanding of the relativity of genders, that is, genera undergo changes despite their standardized forms, since they are formed from a set of various characteristics, which the author calls dimensions.

In this sense, we need to point out that his theory is called dialogism, since he conceptualizes enunciation as a process of socially organized interaction between two or more voices to establish a concrete utterance. For Bakhtin and his collaborators, "tEvery word serves as an expression of *a* in relation to the *Other*. Through the word, I define myself in relation to the other, that is, in the final analysis, in relation to the collectivity" (Bakhtin; Voloshinov, 2006, p. 117), thus, we are led to reflect again on dialogism in the construction of statements.

According to Bakhtin (2011):

> The use of language is carried out in the form of concrete and unique utterances (oral and written), uttered by the members of this or that field of human activity. These utterances reflect the specific conditions and purposes of each field, not only for their **(thematic) content** and **language style**, that is, for the selection of lexical, phraseological and grammatical resources of the language, but, **above all**, for their **compositional** construction. All these three elements – the thematic content, the style, the compositional construction – are indissolubly linked in the whole of the utterance and are equally determined by the specificity of a given field of communication. Of course, each particular utterance is individual, but each field of language utilization elaborates its relatively stable types of utterances, which we call genres of discourse. (Bakhtin, 2003, p. 261-262) (emphasis added)

In view of the above statement, we understand that there is a need to explore some points in more depth. With this, we note that the author states that genres are structured in three dimensions: I- thematic content, II- style and III- compositional aspects.

Before entering into the definitions of each dimension mentioned above, it should be noted that the emphasis given by the author to the compositional structure of the genre does not point to a hierarchy or exclusivity of this dimension to the detriment of the others, but only evidences a very striking characteristic in the composition for the analysis of the genre.

Another extremely important aspect is the fact that genres and utterances are shaped according to the needs of their area, as each field of knowledge produces its enunciation according to its specificities, which makes us reflect, for example, that the same genre, but in different areas, behaves in different ways due to its stable relativity with regard to its three dimensions.

In the table below, we present the definitions of each dimension synthetically.

Table 1

The dimensions of gender

FEATURE	DEFINITION
Theme	The theme refers to the subject it is about, that is, the information that the speaker addresses to the speaker, because the genre occurs in a dialogical relationship.
Overall plan or compositional aspects	The overall plan is the structure of organization and the formal characteristics of the genre, for example, the structure of a letter is different from the structure of a poem. In this sense, it has to do with the organicity of the theme.
Style	Style is the form and linguistic and discursive mobilization that the speaker adopts to adapt to the genre chosen in the act of interaction, as it is worth remembering that each genre adopts a more or less formal language.

Source: Prepared by the authors based on Bakhtin's definitions (2011)

In view of the above picture, we can understand each dimension proposed by Bakhtin (2011), each of which is indispensable for the formation of the whole.

Advancing in the study of discursive genres, it is appropriate to discuss primary and secondary genres formulated by Bakhtin (2011).

According to Possenti and Mussalin (2013):

> Primary genres are constituted and developed in circumstances of spontaneous verbal communication (but not exclusively oral) and are in direct relation to their most immediate context. These are the genres of family conversation, spontaneous narratives, ephemeral activities of everyday life. Secondary genres, in turn, appear in circumstances of more elaborate cultural communication (they are, in general, but not necessarily, written) and refer to those generated and used in scientific, artistic, political, philosophical, legal, religious, formal education activities, etc. (Possenti; Mussalin, 2013, p. 4 - 5)

In this sense, we can observe that there is no relationship in which the primary ones are oral and the secondary ones are written, what there is is a predominance of forms of one to the detriment of the other. It should be emphasized, again, that genres are shaped by certain areas or fields of knowledge, that is, social spheres, in which one can determine the use of one more stable and elaborate than the other.

Finally, one last point to be highlighted is that Bakhtin, Voloshinov (2006) state that every sign is ideological, as it is loaded with the enunciator's ideas and thoughts:

The structure of the enunciation and the mental activity to be expressed are of a *social nature*. The stylistic elaboration of enunciation is of a sociological nature and the verbal chain itself, to which the reality of language is ultimately reduced, is *social*. Each link in this chain is social, as is the entire dynamics of its evolution. (Bakhtin; Voloshinov, 2006, p. 126)

We can then infer that one cannot dissociate the word (its linguistic form) from its ideological content (its ideologies), because the construction of an utterance is the result of a verbal interaction between two subjects, who have histories, ideas and knowledge. Therefore, this whole relationship of gender construction is dialogical.

3 THE SENTENCE GENRE OF INDICTMENT

The sentence of indictment is a document regulated by legal provisions, such as the Federal Constitution and the Code of Criminal Procedure. Thus, the indictment is a procedural act that occurs during the course of the criminal process and serves to determine if there is sufficient evidence of authorship and materiality of the crime to bring the defendant to trial by jury, which makes it one of the most important moments of the criminal process, representing the judge's decision that there is evidence to justify the defendant's submission to trial by the people's court.

The document that provides the guidelines for the indictment is the Code of Criminal Procedure (CPP), updated on November 23, 2021, which defines in its article 408, the conditions and procedures for the preparation of this decision by the judge. According to Brasil (2021), the sentence of indictment must be reasoned and contain the qualification of the defendant, the succinct statement of the facts imputed to him, the classification of the crime and the determination of the grounds for submitting the defendant to trial by jury. In addition, the CPP also establishes that the sentence of indictment must be rendered within a maximum period of 10 days, counted from the receipt of the complaint or complaint by the judge. After the delivery of this decision, the defendant will be submitted to trial before the Jury Court, which is the competent body to decide on his guilt or innocence.

In view of this preamble on the sentence of pronunciation, we will adopt it as a genre of discourse and analyze it in the light of the theories that underlie this study. To carry out the proposed study, we selected a sentence of pronouncement of a case of femicide that occurred in the city of Marabá/PA, whose documents are public and available on the JusBrasil platform.

This sentence upholds the request of the Public Prosecutor's Office to take the defendant to a popular trial, that is, the defendant will be tried by the Court of Jury. Our objective is to analyze this sentence to point out the dimensions of gender advocated by Bakhtin (2011).

3.1 THE SUBJECT OF THE INDICTMENT

As we have seen, the purpose of the indictment is to relate evidence and the materiality of the criminal act to bring the defendant to a popular trial, that is, it is the document that states the necessary conditions to validate the speech act of the judge.

Thus, we can say that the discursive topic of a sentence of indictment is the decision on the materiality and authorship sufficient for subsequent judgment. The following excerpt is taken from the report of the *Corpus* that we have selected:

> The pronouncement must be limited to the indication of the materiality of the fact and the existence of sufficient evidence of authorship. As it is a merely declaratory decision, only in the face of unequivocal evidence is the magistrate authorized to remove the defendant from his natural judge, the Jury (Pará, 2018)

We note that the issue is a declaratory decision on the materiality and authorship of the crime against life, which in the case of this case was femicide, which is the crime against women because of the reason for being a woman or in a domestic environment.

When it comes to femicide, it is worth highlighting some aspects about what the law brings about this crime and other aspects of the process analyzed, as we can point out that this is also part of the thematic content.

The criminal type of femicide is an important categorization used in Brazil for crimes committed against women on the basis of gender, and was implemented through Law 14.994/2024. This law changed the Brazilian Penal Code, including femicide as an autonomous crime, since it was a circumstance of homicide, that is, a qualifier.

In this way, femicide can be understood as a crime that involves hatred, contempt, discrimination and gender violence against women, which demonstrates a structural inequality that exists in society. In this sense, article 121-A of the Penal Code seeks to highlight the specific motivation of the crime, taking into account factors such as the relationship of intimacy or affection between the perpetrator and the victim, the practice of torture, rape, mutilation, or any act of violence that causes physical or psychological suffering before or after femicide.

According to Brazil (2024):

> Article 121-A. Killing a woman for reasons of the condition of the female sex: Penalty – imprisonment, from 20 (twenty) to 40 (forty) years. Paragraph 1 - It is considered that there are reasons for the condition of the female sex when the crime involves: I - domestic and family violence; II – contempt or discrimination against the condition of woman. (Brazil, 2024)

Article 121-A and its subparagraphs are justified by the need to highlight the seriousness of this type of crime, which affects not only the life of the victim, but also the entire female community. With this, by raising the minimum sentence (20 years) and the maximum sentence (40 years) for the perpetrators of these crimes, the State seeks to demonstrate the importance of curbing and combating gender violence, as well as ensuring equal rights and respect for the dignity of women.

This law also amends other rules for the protection of women, such as the Maria da Penha Law, which aims to curb domestic and family violence. By incorporating femicide as an autonomous crime, the legislator recognizes the need to confront the macho culture and stereotypes that perpetuate gender inequality.

In the case under analysis, as already stated, it is a crime of femicide, in which the perpetrator of the crime used his relationship of trust with his ex-wife to cruelly commit her murder, stabbing her several times in a motel and asphyxiating her in his car after realizing that she had not died from her injuries. However, we clarify that this case was judged when the crime was still a qualifier of article 121 of the Penal Code (Law 13.104/2015), so, sometimes, we can use the qualifier to talk about the specific document, that is, ours *Corpus*.

Let us observe the complaint of the Public Prosecutor's Office so that we can understand what grounds were listed to indict the defendant:

> The STATE PUBLIC PROSECUTOR'S OFFICE denounces the defendant for the crime of homicidequalified by the use of a resource that made it impossible for the victim to defend himself, for the futile reason and use of cruel means, prevailing over the condition of the female sex and family relations, cumulated with the crime of concealment of the victim's corpse; Conducts typified in art. 121, Paragraph 2, items II, III, IV e VI and art. 211, all of the Penal Code. (Pará, 2018)

Therefore, based on the Penal Code and supported by the qualifier of femicide and others, we observe that the document also has femicide as a discursive topic.

3.2 THE COMPOSITIONAL ASPECTS OF THE SENTENCE OF INDICTMENT

We have seen that the sentence consists of a discursive topic, which meets the first dimension of the genre for Bakhtin (2011). With regard to the second dimension, we can observe, as regulated by the CPP, that there is an extremely stable sequence in its elaboration, in addition to being complex, mobilizing various social and linguistic skills for its construction.

In view of this fact, we can affirm that this genre is characterized as a secondary genre. As for its structure, the indictment is composed of three parts: I- report, II- ground III- operative part.

The report in the indictment refers to a document written by the judge that contains an analysis of the evidence presented during the criminal investigation phase. The report is prepared after the end of the investigations, when the judge decides whether there are sufficient elements of authorship and materiality of the crime to submit the accused to trial by a popular jury.

In this way, the judge must collect all relevant information about the case, such as witness statements, documents, expert reports, among other evidence. In addition, the magistrate must set out in a clear and reasoned manner the reasons why he or she believes that there is sufficient evidence that the accused was the perpetrator of the crime.

The following excerpt, extracted from the report, presents these characteristics:

> It is stated in the complaint that the parties lived together for 21 years and had 4 children. He informs that on 09/20/2017, in the middle of the afternoon, in this city, the accused met his ex-partner at her workplace and (...). After an argument about the children, the victim went to take a shower and the accused went to his car, armed himself with a knife, went to the bathroom stall and struck a blow near the victim's neck region, while the victim was on his back. Then they engaged in a physical struggle, and E. threw the knife out of the bedroom window and asked to be taken to the hospital. (...) (Pará, 2018)

The report in the indictment has an impartial and objective character, and must be based on the evidence presented in the case file. It is an essential part of the criminal process, as it is from this decision that the accused will be submitted to trial by the popular jury, responsible for deciding whether or not he is guilty of the crime charged.

Then, the basis in the sentence of indictment is the legal basis on which the judge relies to decide that there is sufficient evidence of authorship and materiality of a crime, leading the defendant to be submitted to trial by the Court of Jury. In this sense, the basis consists of the statement of the reasons why the judge understands that the defendant should be pronounced, that is, that there are indications of the criminal practice and that the case should be submitted to popular trial. Let us observe the excerpt that brings the foundation:

> Thus, the evidence of authorship of the crimes of qualified homicide and concealment of a corpse emerges from the witnesses' reports, with reports of confession by the accused, who even indicated where he had hidden the victim's body. I recall, however, that they are mere indications, whose conclusions and certainties can only be transmitted by the Juries, natural judges of this case, after the complete procedural instruction in plenary. (Pará, 2018)

We can observe that the judge is based on the facts, but does not point out the certainty of the defendant's guilt, seeking to protect himself also in the face of the possibility of exceeding his functions and attributing such judgment to the Jury Court, since this is the function of the pronouncement.

Finally, the provision refers to the final part of a judicial decision or a legal document, in which the determinations, conclusions or final results on the subject in question are presented. It is in this section that the decisions, convictions, acquittals or other measures taken by the court or the competent authority are found. In short, the provision summarizes the main obligations, rights or penalties established in the sentence or in the legal document. Below we find an excerpt that demonstrates the judge's decision, that is, the provision:

> Based on art. 413 of the Code of Criminal Procedure, I declare the PRONUNCIATION of the accused R, already qualified, so that he may be timely tried by the Jury, due to having allegedly committed the crime typified in article 121, § 2, items II, III, IV and VI, § 2-A and art. 211, all of the Penal Code, in accordance with the provisions of Law no. 11.340/06; having as victim V. (Pará, 2018)

In this sense, we observe that there is a final decision which is presented in the provision. Therefore, we can observe the compositional characteristics of the pronunciation sentence genre.

3.3 THE STYLE OF THE SENTENCE OF PRONUNCIATION

As we have seen, style refers to some peculiar characteristics of the genre, such as the language and textual typology used. In the case of language, we observe that there is a choice of a standard variation, extremely far-fetched, full of technical jargon and Latin expressions.

We can observe that the statements are constructed objectively, with no room for different interpretations. It should also be noted that even in the citations, the use of the standard norm is recommended, thus adapting to the situation of production of the statements.

As for the typology, we observed that there are several, such as the narrative, at the time of the report; the essay-argumentative, in the reasoning; and the injunctive, at the time of the provision. However, starting from the social function of a sentence of indictment, we risk saying that there is a predominance of the injunction, since it is a decision.

Another extremely relevant point is the management of voices within the sentence of pronunciation. For Bakhtin (2008), voice management or polyphony refers to the presence of multiple voices and perspectives in discourses and texts.

According to the author, every discourse is formed by a multiplicity of voices, representing different social, ideological and cultural positions. In this way, such voices can express conflicting ideas and can be manifested by characters, the author or the readers.

Voice management is an ability of the author or speaker to balance these voices, allowing them to dialogue with each other. This creates a complex and dynamic interaction, enriching the meanings of the discourse. The management of voices allows the expression of heterogeneity and plurality of points of view, contributing to a more complete and deeper understanding of the discourses.

In this sense, we find several voices present in the genre, such as the voice of the Prosecutors, who represent the Public Prosecutor's Office; the voice of the defense lawyer; the voice of the witnesses; the voice of the police authority; the voice of the defendant and the voice of the judge.

At the beginning of the sentence, we observed that the voice of the prosecutor was used to talk about the complaint: "The STATE PUBLIC PROSECUTOR'S OFFICE denounces the defendant for the crime of homicidequalified by the use of a resource that made it impossible for the victim to defend himself, for the futile reason and use of cruel means" (Pará, 2018). With this, we can see that there is a distancing of the enunciator when bringing the voice of the Public Prosecutor's Office to his discourse. This distancing can often be interpreted as an authority to validate what is said.

As we have seen, in order to pronounce the defendant to popular trial, it was necessary to find evidence of authorship of the crime. Many of these indications were made possible by the testimonies of witnesses. These voices are present in the genre and underlie the act of the judge:

> (...) The victim's sister, reported that the couple had been separated for 7 months and had conversations because of their children, who were in the possession of the accused. One day she saw the victim with a black eye and was informed by her that R had assaulted and strangled him, but that she would not report it in the face of the threats received. (Pará, 2018)

This is the account of the victim's sister that sheds light on the defendant's personality and points to evidence of his criminal behavior against his ex-wife. It is worth mentioning that femicide is extreme violence against women, but this violence begins with small aggressive actions that culminate in death. The sister's testimony reveals this trajectory, that is, it is a voice that is managed to support the thesis that the defendant should be taken to the People's Jury.

Another emblematic voice in this process is that of the victim's mother, stating that the defendant: "he hurt his daughter's whole afternoon, because he picked her up at work at 2 pm, he hurt her before killing, he put toilet paper in her mouth, tied her hands, broke her legs, put a stick on her back, pierced her entire neck (...)" (Pará, 2018). We observe that the witness's voice brings a narrative that reveals the cruelty employed by the defendant when committing the crime of femicide. The management of this voice points to evidence of the authorship of the crime.

Also in this process, other witnesses were listed and heard, such as the friend who lent the car to the defendant, the delegate responsible for the case and the civil police officer who attended the occurrence. All these voices were orchestrated to point out the evidence of authorship of the crime. Another emblematic voice is that of the defendant who:

> (...) he clarified that he was going to be in a relationship for 21 years and they had been separated for less than 6 months, and all the children stayed with the deponent; that the relationship was normal, but they always complained about their children, because the victim abandoned them; that the victim assaulted him several times, but the deponent did not retaliate; that he did not see the victim on the day of the facts, after receiving a phone call from her. Pará, 2018)

We can observe that there is an attempt by the defendant to blame the victim for her death, since the defendant claims that she was violent, that she abandoned her children, that she assaulted him but that he never retaliated against such aggressions. In addition to being faced with an appeal to the supposed myth of maternal love as postulated by Badinter (1985): by implicitly stating that the mother should take care of the children, he tries to disqualify the image of the victim as mother, woman and wife.

This voice is managed to elucidate the possible motivations of the crime, since the defendant had not yet been tried, that is, he had only been accused so far. Finally, we will bring the voice of the police chief, who points out the moment when the defendant confesses to the crime:

> The deponent saw relatives of the accused looking for the victim's body, which is why he returned to the hospital and questioned him again, and he confessed where the body of (...) was. (...) He went on to describe in detail what happened, confirming that they were at the motel and stabbed the victim and threw the knife out of the window. Pará, 2018)

In view of the new facts, we can see a change in the defendant's behavior, in which he assumes authorship and reveals in detail what happened and the place where the victim's body may be found. The defendant's voice is present in the testimony of the delegate responsible for the case, brought by her to validate her statement about the case.

We realize that all these voices were necessary for the construction of the genre and the decision making of the judge, who, through a performative act, as stated by Paulinelli (2011), enunciates the order, which in this case is the decision of the defendant to go to trial by the Jury Court.

4 FINAL CONSIDERATIONS

The sentence of indictment is a very important textual and discursive genre for scholars in the area of discourses in the legal domain, as it is a document that brings great complexity in its production and essential deliberations for the trial of crimes against life. Thus, as it is part of this field of study, this article shows us another look at this document, by analyzing it from a linguistic-discursive perspective.

By analyzing the sentences through Bakhtinian postulates, we perceive that there is a mobilization of knowledge and skills that go beyond the linguistic field, thus bringing socio-discursive crossings in their elaboration. In this context, when we approach the theme, the relevance and the functions of the sentence of pronunciation, we can observe that there is an outline of what and how the approach to the discursive topic should be.

When observing the compositional aspects, we notice that there is an organization of the text, which must be strictly followed, and there is a logic implied in this textual organization. In this sense, the first part brings a summary of the entire investigative process, which provides subsidies for the later parts.

In turn, the reasoning is based on the report and seeks to list the necessary arguments for the defendant's pronouncement to the popular trial or not. As for the device, as we have seen, it is the performative act in which the judge, vested with institutional power, declares his position in the face of the situation.

Finally, searching for the characteristics of the pronunciation sentence style reveals a very interesting perspective, especially when it comes to the management of the voices that constitute the document. In this sense, we observe that there are several discourses circulating within the same text, which sometimes converge and sometimes diverge from each other, but which are essential for the outcome of the Judge.

Therefore, it is worth pointing out that there are several ways of studying the same object, but the fact of conducting a study in the light of discourse genres broadens our horizons of analysis on the discourses of different social spheres.

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THE SILENCE OF THE LAMBS[1]: VICTIMS' RIGHT TO REMAIN SILENT AS AN INSTRUMENT FOR PREVENTING INSTITUTIONAL REVITIMIZATION AND THE PARADOX OF THE PROMOTION OF IMPUNITY AFTER LAW 14.321/2022

O SILÊNCIO DAS INOCENTES : DIREITO AO SILÊNCIO DAS VÍTIMAS COMO INSTRUMENTO DE PREVENÇÃO À REVITIMIZAÇÃO INSTITUCIONAL E O PARADOXO DO FOMENTO À IMPUNIDADE APÓS A LEI Nº 14.321/2022

EL SILENCIO DE LAS INOCENTES: EL DERECHO AL SILENCIO DE LAS VÍCTIMAS COMO INSTRUMENTO DE PREVENCIÓN DE LA REVICTIMIZACIÓN INSTITUCIONAL Y LA PARADOJA DEL FOMENTO DE LA IMPUNIDAD TRAS LA LEY 14.321/2022

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ABSTRACT

The article analyzes the procedural paradox arising in the context of combating domestic violence against women when the victim’s right to remain silent, understood as a legitimate instrument for preventing institutional revictimization, begins in practice to operate as a factor that weakens criminal prosecution and fosters impunity. Based on qualitative research of a bibliographic, normative, and jurisprudential nature, the study examines the evolution of the legal protection of women in Brazil, the evidentiary value of the victim’s testimony in crimes committed within the domestic sphere, and the psychological, social, economic, and institutional factors that influence withdrawal, abandonment, or refusal to testify. It is argued that, following Law No. 14,321/2022, the justice system came to recognize more strongly the need to avoid revictimizing practices, but without structuring, to the same extent, prior and interdisciplinary mechanisms of reception, qualified listening, emotional protection, and strengthening of the complainant’s participation. Within this gap, the hasty conclusion that there is insufficient evidence for conviction may transform a protective guarantee into an indirect vector of acquittals based on evidentiary insufficiency. In response to this problem, the article proposes a Protocol for Assistance and Strengthening of Victim Participation (PAFPV), aimed at ensuring humane assistance, interinstitutional integration, and concrete

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conditions so that the exercise of silence does not result from state abandonment, fear, or unaddressed vulnerability. It is concluded that the recognition of evidentiary insufficiency, in such cases, should not dispense with prior verification of adequate institutional support measures for the victim; otherwise, the duty of protection risks being replaced by a merely formal neutrality, incapable of preventing the reproduction of impunity.

Keywords: Domestic Violence. Victims' Right to Remain Silent. Revictimization. Need for an Institutional Protocol. Risk of Impunity.

RESUMO

O artigo analisa o paradoxo processual instaurado no enfrentamento da violência doméstica contra a mulher quando o direito ao silêncio da vítima, compreendido como instrumento legítimo de prevenção à revitimização institucional, passa a operar, na prática, como fator de enfraquecimento da persecução penal e de favorecimento da impunidade. Partindo de pesquisa qualitativa, de natureza bibliográfica, normativa e jurisprudencial, o estudo examina a evolução da proteção jurídica da mulher no Brasil, o valor probatório da palavra da vítima nos crimes praticados no âmbito doméstico e os fatores psicológicos, sociais, econômicos e institucionais que influenciam a retração, a desistência ou a recusa em depor. Sustenta-se que, após a Lei nº 14.321/2022, o sistema de justiça passou a reconhecer com maior intensidade a necessidade de evitar práticas revitimizantes, mas sem estruturar, na mesma medida, mecanismos prévios e interdisciplinares de acolhimento, escuta qualificada, proteção emocional e fortalecimento da participação da ofendida. Nessa lacuna, a conclusão apressada pela ausência de provas para a condenação pode converter uma garantia protetiva em vetor indireto de absolvições por insuficiência probatória. Em resposta a esse problema, propõe-se um Protocolo de Assistência e Fortalecimento da Participação da Vítima (PAFPV), destinado a assegurar atendimento humanizado, integração interinstitucional e condições concretas para que o exercício do silêncio não resulte de abandono estatal, medo ou vulnerabilidade não enfrentada. Conclui-se que o reconhecimento da insuficiência probatória, em tais hipóteses, não deve prescindir da verificação prévia de medidas institucionais adequadas de apoio à vítima, sob pena de o dever de proteção ser substituído por uma neutralidade apenas formal, incapaz de impedir a reprodução da impunidade.

Palavras-chave: Violência Doméstica. Direito ao Silêncio das Vítimas. Revitimização. Necessidade de Protocolo Institucional. Risco de Impunidade.

RESUMEN

El artículo analiza la paradoja procesal instaurada en el enfrentamiento de la violencia doméstica contra la mujer cuando el derecho al silencio de la víctima, entendido como un instrumento legítimo de prevención de la revictimización institucional, pasa a operar, en la práctica, como un factor de debilitamiento de la persecución penal y de favorecimiento de la impunidad. A partir de una investigación cualitativa, de carácter bibliográfico, normativo y jurisprudencial, el estudio examina la evolución de la protección jurídica de la mujer en Brasil, el valor probatorio de la palabra de la víctima en los delitos cometidos en el ámbito doméstico y los factores psicológicos, sociales, económicos e institucionales que influyen en la retracción, el desistimiento o la negativa a declarar. Se sostiene que, tras la Ley n.º 14.321/2022, el sistema de justicia pasó a reconocer con mayor intensidad la necesidad de evitar prácticas revictimizantes, pero sin estructurar, en la misma medida, mecanismos previos e interdisciplinarios de acogida, escucha calificada, protección emocional y fortalecimiento de la participación de la víctima. En esta laguna, la conclusión apresurada sobre la ausencia de pruebas para la condena puede convertir una garantía protectora en un vector indirecto de absoluciones por insuficiencia probatoria. Como respuesta a este problema, se propone un Protocolo de Asistencia y Fortalecimiento de la Participación de la

Víctima (PAFPV), destinado a asegurar una atención humanizada, integración interinstitucional y condiciones concretas para que el ejercicio del silencio no sea resultado del abandono estatal, del miedo o de una vulnerabilidad no afrontada. Se concluye que el reconocimiento de la insuficiencia probatoria, en tales hipótesis, no debe prescindir de la verificación previa de medidas institucionales adecuadas de apoyo a la víctima, so pena de que el deber de protección sea sustituido por una neutralidad meramente formal, incapaz de impedir la reproducción de la impunidad.

Palabras clave: Violencia Doméstica. Derecho al Silencio de las Víctimas. Revictimización. Necesidad de Protocolo Institucional. Riesgo de Impunidad.

1 INTRODUCTION

Domestic violence against women is one of the most persistent challenges to the realization of human rights and the effectiveness of the Democratic Rule of Law. Even in the face of normative advances such as the Federal Constitution of 1988 and Law No. 11,340/2006 (Maria da Penha Law), the persistence of patriarchal structures and the naturalization of gender violence continue to produce deep inequalities, compromising female dignity and citizenship (Martins; Moreira, 2023; Castro; Silva, 2017).

The creation of innovative legal instruments, such as Law No. 14,321/2022, which typified the crime of institutional violence, reveals the State's recognition of the role of the institutions themselves in the reproduction of revictimizing practices, exposing the need for a more humanized, intersectoral, and protective model of justice (Deiab Júnior; Carvalho, 2024).

Thus, the present work is based on the understanding that confronting domestic violence demands not only the punishment of the aggressor, but the construction of public policies that ensure the victim the leading role in criminal prosecution. The consolidation of an effective protective system requires integrated care protocols, capable of preventing re-victimization and strengthening women's trust in judicial instances.

According to Jordão (2025), institutional violence and revictimization are structural obstacles to access to justice, as they impose on women the burden of reliving the trauma in the face of bureaucratic and insensitive procedures, which reproduce the same cycle of oppression that the law intends to break.

In view of such a scenario, the problem that guides this Article lies in the following question: what are the determining factors for the victim's withdrawal in cases of domestic violence against women and how has this reality impacted judicial decisions and acquittal rates, especially after the enactment of Law No. 14,321/2022?

It is based on the hypothesis that the consolidation of interdisciplinary protocols, integrating legal, psychological and social services, is the most effective way to operationalize the normative command of this law, transforming the justice system into a space of protection and empowerment.

The general objective of this article is to analyze the relationship between the victim's withdrawal in domestic violence cases and the impacts of this dynamic on the increase in acquittals, with special attention to the consequences of Law No. 14,321/2022 and the need for assistance protocols that reduce revictimization and encourage the victim's participation in the criminal process.

Specifically, it seeks to investigate the psychological, social, economic, and institutional factors that lead to the victim's withdrawal, examine the jurisprudential and legislative evolution on the non-ratification or the victim's right to silence after Law No. 14,321/2022, proposing an assistance protocol that reduces the rates of refusal of judicial testimony, strengthening the production of evidence in court.

The methodology adopted is qualitative and bibliographic, based on the analysis of recent scientific productions, legislation and institutional documents, with the purpose of discussing the centrality of the victim in the criminal process and the need for ethical and institutional reformulation of legal practices.

The justification for the research is based on the urgency of promoting the effectiveness of protective norms and building instruments that guarantee active listening and humanized reception of victims. Despite normative advances, the Brazilian institutional reality is still marked by the reproduction of practices of symbolic violence and by the discrediting of women before the judicial system.

According to Jordão (2025) and Andrade (2024), the absence of technical training and social sensitivity of public agents aggravates revictimization, making the search for justice a new source of suffering. By proposing a protocol to strengthen the participation of the victim, this study contributes to the improvement of public policies and to an institutional culture guided by human rights and the dignity of the human person.

It is understood, preliminarily, that confronting domestic violence requires the transition from a policy of mere state tutelage to an emancipatory policy, centered on the victim as a subject of rights. Law No. 14,321/2022 emerges, in this context, as a milestone of ethical and normative transformation, but its effectiveness will depend on the adoption of concrete practices that unite theory and institutional action.

2 DOMESTIC VIOLENCE AND THE LEGAL PROTECTION OF WOMEN IN BRAZIL

The genesis of public policies to combat domestic violence in Brazil is linked to the consolidation of human rights and the search for substantial equality between men and women. As a kick-off to this topic, it is important to consider that since the Federal Constitution of 1988, the dignity of the human person has been enshrined as the foundation of the Democratic Rule of Law, in its article 1, III, and formal and material equality between genders has become a constitutional guarantee, already imposed in article 5, I (Brasil, 1988).

However, mere normative positivity was not enough to eradicate structural inequality and gender violence, which required the State to formulate specific and intersectoral public policies, aimed at the prevention, protection, and accountability of aggressors (Martins;

Moreira, 2023). In the respective scenario, it is observed that the Brazilian institutional evolution was consolidated from the integration between the Judiciary, the Executive, and organized civil society in the formation of a national confrontation network, which will be the subject of future discussions later in this work.

From the 1980s onwards, the first institutional instruments of protection emerged, which represented a milestone in the fight against domestic violence in Brazil, with the creation of the Women's Comprehensive Health Care Program (PAISM), which incorporated domestic violence as a public health theme, the National Council for Women's Rights (CNDM) and the Specialized Police Stations for Women's Assistance (DEAMs), in 1985, in addition to the Shelter Houses, in 1986, which symbolized the state's recognition of domestic violence as a structural problem (Castro; Silva, 2017; Melo; Soares, 2025).

In the following decade, Brazil's accession to CEDAW and the Convention of Belém do Pará (1994) imposed on the State the legal duty to prevent, punish and eradicate violence against women, driving the institutionalization of public policies structured under the principle of transversality, which culminated in the creation of the Special Secretariat for Women's Policies (SPM), in 2003, and in the National Pact to Combat Violence against Women, in 2007 (Castro; Silva, 2017; Melo; Soares, 2025).

According to Melo and Soares (2025), these mechanisms consecrated the idea of an articulated network of confrontation, involving public agencies, non-governmental organizations, and social movements, with integrated actions of prevention, care, and rehabilitation.

The enactment of Law No. 11,340/2006, better known as the "Maria da Penha Law", constituted the watershed in the legal and political confrontation of domestic violence, since, as Amaral et al. (2016) point out, this legislation profoundly changed the institutional treatment of gender violence by recognizing it as a violation of human rights and by creating specific protection mechanisms.

In addition to providing for emergency protective measures, the Maria da Penha Law integrated the social assistance, health, and education systems into the coping policy, and Amaral et al. (2016) present the perspective that after its enactment, the number of complaints increased and the recurrence of aggressions began to be faced with more rigorous instruments, which confirms its role as an instrument of social and legal transformation.

On the conceptual level, the Maria da Penha Law expanded the legal understanding of domestic violence, incorporating previously neglected dimensions, where, as highlighted by Gomes et al. (2020), the aforementioned norm began to typify, in addition to physical violence, psychological, sexual, moral, and patrimonial violence, recognizing the complexity of the dynamics of oppression, as a kind of semantic reformulation that evidences a multidimensional approach to the problem, supported by an intersectoral and interdisciplinary vision, capable of integrating the Judiciary, social assistance, and health services. Also according to the authors, confronting domestic violence requires a more welcoming, humanized, and faster judicial system, which overcomes the technicality and bureaucratic practices that perpetuate revictimization.

Despite the normative and institutional advances, the effectiveness of the Maria da Penha Law is still compromised by structural deficiencies, since Castro and Silva (2017) demonstrate that the coping network suffers from a lack of human and material resources, especially in the Specialized Women's Police Stations and in the Domestic Violence Courts.

Among such deficiencies, it is important to highlight the absence of trained professionals, the overload of demands and the procedural slowness generate social discredit and hinder the victims' trust in public institutions, denoting, moreover, that the fragmented implementation of public policies prevents the full and articulated performance of the protection system (Amaral et al., 2016; Castro; Silva, 2017; Santos, 2022).

Gomes et al. (2020, p. 4) corroborate this diagnosis based on their research on the social representations of women victims of violence, by indicating that, although 97% of the women interviewed defend the prosecution of the aggressor, judicial delays and lack of reception reduce the effectiveness of protective measures.

The persistence of an androcentric legal environment, in which legal operators reproduce stereotypes and minimize the severity of violence, perpetuates practices of revictimization and reinforces structural inequalities. From this perspective, public policies need to be accompanied by a continuous process of training, sensitization, and institutional monitoring.

In concrete experience, Amaral et al. (2016, p. 522) describe the example of Casa do Caminho, in Ceará, as a successful practice of integrated public policy, and it was diagnosed that the unit offered, at the time of the research, welcoming, legal and psychosocial assistance to women in situations of violence, configuring a model of care that combines the protective character with the promotion of autonomy, as a model that demonstrates that the effectiveness of coping policies depends on the consolidation of local networks that combine safety, dignity and multidisciplinary monitoring.

Thus, it is observed that the evolution of public policies to combat domestic violence in Brazil is the result of a historical and democratic construction, which moves from a welfare logic to a human rights paradigm, emphasizing that the effectiveness of these policies requires more humanized practices, which break with bureaucracy and excessive formalism, and promote the social participation of women in the process of building justice. That said, the genesis and evolution of these policies reflect the Brazilian institutional maturity, reaffirming that the fight against domestic violence is an expression of the very consolidation of citizenship and substantive democracy (Gomes et al., 2020; Melo; Soares, 2025).

Continuing the discussion proposed in the title of this topic, it is interesting to highlight and discuss the competence of the Specialized Courts in the care of victims of violence against women, whether physical, psychological, patrimonial, domestic, among other types, even more so due to the fact that the creation of the Courts of Domestic and Family Violence against Women, provided for in Law No. 11,340/2006, represented an institutional milestone in the reorganization of the Brazilian Judiciary, by introducing a specific jurisdictional structure aimed at confronting gender violence. It can be said that such innovation substantiated a paradigmatic break in relation to the traditional model of fragmented jurisdiction, replacing the logic of dispersion of demands with a unified system, of a hybrid nature, capable of integrating the civil and criminal dimensions in the same judicial unit (Azevedo; Soares. 2022; Campos; Severi, 2024).

Article 14 of the Maria da Penha Law enshrined the cumulative competence of the specialized courts, giving them the power to simultaneously process and judge cases arising from the practice of domestic and family violence against women, both from the criminal and civil aspects, in the expectation that this hybrid jurisdiction will ensure that the same magistrate has a broader view of the conflict, avoiding contradictory decisions and ensuring the victim a faster and more humanized procedure (Brasil, 2006; Jesus; Pacheco; Jesus, 2024).

As Campos and Severi (2024) demonstrate, the central objective of hybrid jurisdiction is to eliminate the "judicial pilgrimage" of women between different courts, avoiding revictimization and fragmentation of state responses. On the other hand, the implementation of this jurisdiction still faces structural obstacles, derived from insufficient resources and the absence of uniformity in Brazilian courts.

The structure of the Specialized Courts follows normative parameters established in article 33 of the Maria da Penha Law, which determined the provisional accumulation of jurisdiction by the Criminal Courts while the specialized courts were not fully structured (Brasil, 2006). This provision exposes a strategy of institutional transition, in which the legislator recognized the need for gradual implementation of specialized units throughout the national territory.

Furthermore, the model idealized by the law presupposes, therefore, a hybrid court equipped with a multidisciplinary team, composed of professionals from Law, Psychology and Social Work, acting from the perspective of integrality and interdisciplinarity, as a composition that aims to ensure a legal, social and psychological approach to violence, allowing the judicial decision to be supported by a technical diagnosis of the victim's situation of vulnerability (Campos; Severi, 2024; Santos, 2022).

It turns out that, as demonstrated by Campos and Severi (2024) in research carried out in the Specialized Courts, such as those of Cuiabá, the implementation of hybrid jurisdiction has occurred incompletely, resulting in a distance between the normative model and jurisdictional practice. Through the data collected, it was revealed that, although the courts formally accumulate civil and criminal jurisdiction, effective procedural adaptations are rarely observed, which compromises the speed and effectiveness of the system.

In practice, there is still a tendency to prioritize the criminal sphere to the detriment of the civil sphere, reinforcing the idea that confronting domestic violence is still predominantly conceived as a criminal matter, to the detriment of its relational and social nature. In a convergent way, Azevedo and Soares (2022) point out that the accumulation of competences represents an essential instrument for the full protection of women's rights, especially in cases where family actions, such as divorce and child custody, coexist with emergency protective measures.

Also according to the authors, the artificial separation between the civil and criminal branches reproduces the fragmentation of the justice system and deprives women of a unified and effective state response. The procedural concentration in hybrid courts is, therefore, a mechanism to guarantee access to justice, insofar as it allows the magistrate to decide in a coordinated manner on the multiple aspects of the domestic conflict, preserving the coherence of decisions and the dignity of the victim (Azevedo; Soares, 2022).

On the other hand, Jesus, Pacheco, and Nunes (2024) point out that the effectiveness of the specialized structure depends on the technical and ethical competence of the legal agents who work in it, as the authors argue that the effectiveness of the Maria da Penha Law is intrinsically linked to the qualification of magistrates, prosecutors, lawyers, and defenders, who must act with gender sensitivity and commitment to the promotion of social justice. The "permanent state of justice", in their expression, requires not only a robust normative framework, but also a transformative legal praxis, which recognizes the specificity of gender-based violence and overcomes the rigidity of traditional models of jurisdiction.

The structuring of EVs, however, responds to a double rationality, where, on the one hand, the guarantor rationality, aimed at the protection of women's fundamental rights and, on the other, the efficiency rationality, oriented to speed and procedural rationalization. Such duality, according to Cortez Campos and Severi (2024), explains the tensions observed between the ideal model of hybrid jurisdiction and the practical limitations of its execution, giving reason to the perspective that the absence of budgetary resources, the lack of technical teams, and the overload of processes often make the full functioning of the units unfeasible. Thus, no matter the available apparatus, although the institutional design is innovative, its operationalization remains below the constitutional expectations of full protection and non-revictimization.

From the point of view of procedural dogmatics, the hybrid jurisdiction enshrined in the Maria da Penha Law represents an exception to the principle of jurisdictional specialization, enshrining a model of integration jurisdiction. Such a model aims to ensure that the same court hears the multiple dimensions of the same social fact, in line with the principle of procedural economy and unity of jurisdictional provision (Azevedo; Soares, 2022; Santos, 2022).

Azevedo and Soares (2022) comment on the panorama that, by attributing cumulative competence to EVs, the legislator recognized the need for a systemic and interdisciplinary approach to domestic violence, which transcends the formal boundaries of criminal law and civil law. This integration is, therefore, an expression of a public policy of gender justice, which seeks to articulate the legal, social, and human dimensions of violence

However, it is crystal clear that the ideal of comprehensiveness comes up against institutional resistance, as many courts still maintain rigid divisions between civil and criminal jurisdictions, denying the full application of article 14 of the Maria da Penha Law. This reality is observed in several Brazilian states, in which the Judiciary, for budgetary and administrative reasons, restricts the performance of domestic violence courts to the criminal sphere (Campos; Severi, 2024).

Therefore, the creation of specialized courts, therefore, is not only an administrative measure, but a constitutional duty to implement women's fundamental rights. As Azevedo and Soares (2022) observe, the unification of competences allows for the adoption of faster and more effective protective measures, preventing procedural time from serving as an instrument for perpetuating violence, and the magistrate should also play a central role not only as a judge, but as an agent of social transformation.

In light of the contributions of Azevedo and Soares (2022), Jesus, Pacheco and Nunes (2024) and Cortez Campos and Severi (2024), it is verified that the hybrid structure of EVs represents more than a jurisdictional reorganization, as it configures a civilizational advance, guided by the gender perspective and the search for a truly emancipatory justice, capable of combining technique, sensitivity and equity. Next, other essential elements for understanding practical and legal elements that involve the protection of women and combating violence will be discussed, such as the evidential value of the victim's word and possible challenges of criminal prosecution.

2.1 THE PROBATIVE VALUE OF THE VICTIM'S WORD AND THE CHALLENGES OF CRIMINAL PROSECUTION

The theoretical-practical examination and discussion of the evidential value of the victim's word in the context of domestic violence crimes demands an approach that goes beyond the technical-procedural field, entering the sociological, psychological and legal sphere that permeates gender relations, since it is a theme that tensions structuring principles of the criminal process, such as the presumption of innocence and the *in dubio pro reo*, in the face of the need to give credibility to the narrative of historically silenced women.

As Santos (2024) observes, the problem lies not only in the evaluation of evidence, but in the way the justice system interprets the female voice, still marked by stereotypes and asymmetries of power, where the author warns that, in many cases, the victim's testimony constitutes the main or only source of conviction, given the private nature of the crimes, requiring the judge to be legally sensitive to balance the protection of the victim and the guarantees of the accused.

In this light, Martins (2022) argues that the victim's word should be considered a legitimate and relevant means of evidence, especially in crimes committed in the domestic and family sphere, where the absence of witnesses is the rule and not the exception, arguing that the testimony of the offended party, when coherent, firm and harmonious with the other elements of the process, can serve as a sufficient basis for a conviction, as long as it is submitted to the scrutiny of the adversary and the ample defense.

This understanding is compatible with the system of motivated free conviction of the judge, enshrined in article 155 of the Code of Criminal Procedure, which assigns to the magistrate the task of evaluating evidence based on logic and experience, without prior hierarchy between the means of proof (Brasil, 1940). However, Martins (2022) points out that the victim's word cannot be absolutized, as the excessive use of this resource can convert the testimony into an instrument of injustice, reversing the burden of proof and violating due process.

There is, therefore, recognition of the centrality of the victim's word, as well as divergences to the extent of their evidentiary autonomy, with the proposal of a prudent and balanced stance, emphasizing the risk of condemning without corroborative evidence, but a more incisive valuation is also advocated, as long as the narrative presents verisimilitude and coherence with the context of gender violence, reflecting the contemporary challenge of the Brazilian criminal process, which would be how to avoid revictimization without hurting the presumption of innocence (Martins, 2022; Santos, 2024).

In a complementary vein, Zambon (2023) warns that the legal treatment given to the victim's word must take into account the context of structural inequality and the emotional dynamics that permeate the aggressor-victim relationship, while the woman's account is often discredited not by factual inconsistency, but by deep-rooted prejudices about female behavior, which compromises access to justice and perpetuates impunity. Therefore, it is essential that the evidential evaluation of the victim's word be guided by the principles of human dignity and full protection, so that testimonial evidence is not analyzed in isolation, but contextualized in its social and psychological dimension.

At the same time that it is necessary to safeguard the vulnerability of the victim, it cannot be admitted that the prosecution does not need minimum corroborating evidence, under penalty of establishing a regime of presumption of guilt incompatible with the rule of law. It is important to remember that article 5, LVII, of the Federal Constitution ensures that "no one shall be considered guilty until a final and unappealable criminal conviction has been handed down", which imposes on the judge a rigorous argumentative burden in the grounds of conviction decisions based exclusively on the report of the offended party (Brasil, 1988; Oliveira, 2022).

Santos (2024) presents a jurisprudential analysis of the Court of Justice of Sergipe, for example, in which there is a growing tendency to attribute relevant evidential weight to the victim's word, as long as it is corroborated by minimal evidence of materiality or authorship, identifying that, in the most recent decisions, judges have recognized that, in crimes committed in the domestic environment, the absence of witnesses should not imply the disregard of the offended party's account, under penalty of making criminal prosecution unfeasible.

3 THE VICTIM'S WITHDRAWAL AND THE PROCEDURAL REFLEXES: BETWEEN THE RIGHT TO SILENCE AND IMPUNITY

Having already addressed relevant issues about the probative value of the word of the victim of violence against women, it is crucial to take a more delimited look, especially about the possibility of the victim's withdrawal and the procedural reflexes from the exercise of the right to silence, in spite of the fact that, after changes made by Law No. 14,321/2022 which, although it deals with the typification of the crime of institutional violence, ends up leading, depending on the attitude of the complainant, to adverse results to justice, despite when there is a withdrawal from reporting what happened, which can serve as a defensive apparatus for the alleged aggressor.

First, as some of the psychological, social, economic, and institutional factors that lead women who are victims of domestic violence to give up the complaint or to exercise the right to silence, according to Santos (2024), it is the manifestation of the persistent patriarchal structure that, even in the face of normative advances such as Law No. 11,340/2006, keeps them in a position of vulnerability and dependence. The silence and withdrawal of the victim represent not only autonomous choices, but also conditioned responses to a context of fear, shame, and structural dependence, and such factors are intertwined in order to limit female protagonism and the effectiveness of public policies, reproducing a cycle of oppression that perpetuates domestic violence.

The correlation between the advent of Law No. 14,321/2022, which typified institutional violence, and the progressive increase in acquittals in cases of domestic and family violence against women finds empirical support in the data provided by the Court of Justice of Maranhão, which reveal a significant statistical inflection from 2022 onwards. As shown below, the percentage of acquittals, which represented 7.13% of the total number of judgments in 2020, climbed to 15.26% in 2021 and reached 33.97% in the first full year of the new normative framework, reaching a peak of 44.63% in 2023.

Table 1

Percentage of acquittals and convictions in domestic violence cases (TJMA 2020-2025)

Years	Acquittal	Conviction	Grand Total
2020	7,13%	92,87%	100%
2021	15,26%	84,74%	100%
2022	33,97%	66,03%	100%
2023	44,63%	55,37%	100%
2024	37,38%	62,62%	100%
2025	20,69%	79,31%	100%
Grand Total:	25,49%	74,51%	100%

Source: Authors.

Although the subsequent years show a reduction (37.38% in 2024 and 20.69% in 2025), possibly indicating the development of compensatory judicial practices, the grand total of 25.49% of acquittals in the period denotes that the system has not yet recovered the level of previous rates, which reveals a significant inflection in local jurisprudence, suggesting a correlation between the affirmation of the right to silence and the increase in acquittals due to insufficient evidence.

This scenario highlights the central paradox denounced by Deiab Júnior and Carvalho (2024), a norm created to protect women from institutional violence ended up offering the defensive system a new way of instrumentalizing female silence, emptying the evidentiary body and favoring acquittals due to insufficient evidence. The victim's silence cannot and should not be legally sanctioned, but its effects on criminal prosecution are devastatingly concrete.

From a psychological point of view, according to Fontes, Pizzani and Andrade (2024), fear is the primary and most visceral element of giving up, given that this fear is not restricted to the possibility of new aggressions, but extends to the loss of family ties, social stigmatization and distrust of state protection, manifesting itself as an internalized defense mechanism, structured by the asymmetry of power between victim and aggressor, which makes the process of reporting and continuing criminal prosecution an unbearable emotional burden. On the other hand, Macarini and Miranda 2018), this dynamic is aggravated by feelings of guilt and shame, often imposed on women by patriarchal culture, which attributes to them the responsibility for family breakdown and the public exposure of violence.

In the same sense, Santos (2024) highlights that silence and giving up are intrinsically linked to emotional dependence, a psychological phenomenon that feeds on abusive dynamics and a distorted affective bond, since the victim often associates the aggressor with the figure of provider and companion, believing in the possibility of reconciliation and behavior change. This hope, which is renewed after cycles of aggression and regret, is one of the most perverse expressions of psychological violence, as it perpetuates submission and neutralizes the capacity for resistance.

In addition to fear and emotional dependence, social factors play a decisive role in the perpetuation of giving up. Moral judgment and blaming the victim continue to be recurrent practices in communities, institutions, and even in the justice system, and the woman who breaks the silence faces not only the aggressor, but an entire symbolic network of social coercion that delegitimizes her pain and puts her credibility in check (Santos, 2024; Souza et al., 2025).

No less important to report, the institutional dimension of desistance, in turn, exposes the weaknesses of the justice system itself, since, as Santos (2024) and Souza et al. (2025) also point out, bureaucratic practices and procedural slowness intensify the woman's sense of powerlessness in the face of state inefficiency, where the victim is often subjected to long interrogations, reliving the trauma in successive hearings, without proper psychological support, as a type of institutional revictimization that generates discredit in formal instances of protection and leads to desistance as a strategy of emotional self-preservation.

It is essential to recognize that the victim's withdrawal does not represent individual weakness, but a symptom of collective failures, from the perspective that female silence is socially induced by a culture that still naturalizes violence and delegitimizes women's pain. In this context, the challenge is not limited to the application of criminal sanctions, but to the reconstruction of the social imaginary about gender, power and justice, which requires state action that goes beyond punishment, reaching welcoming, empowerment and social re-education.

The enactment of Law No. 14,321/2022, which inserted article 15-A into the Abuse of Authority Law (Law No. 13,869/2019), represented an advance in terms of the protection of the rights of victims and witnesses of violent crimes, especially women victims of domestic violence, typifying the crime of institutional violence, defined as the conduct of subjecting the victim to unnecessary, repetitive, or invasive procedures that lead her to relive the situation of violence or unnecessary suffering, arising in response to the growing awareness of the revictimization produced by the justice system itself, a phenomenon widely denounced by feminist movements and human rights organizations (Brasil, 2022; Deiab Júnior; Carvalho, 2024).

From the perspective of criminal policy, Deiab Junior and Carvalho (2024) point out that institutional violence is a manifestation of an androcentric penal system, which still reproduces patriarchal logics in the management of justice. The revictimization of women, especially in cases of sexual or domestic crimes, reflects a pattern of discredit and blame, in which female testimony is constantly questioned, and its morality submitted to public scrutiny, as the legal discourse becomes an instrument of power, legitimizing a form of symbolic state violence, whose effect is twofold: the retraction of complaints and the perpetuation of impunity.

On the other hand, Sanches and Batista (2024) highlight that the effectiveness of Law No. 14,321/2022 depends on a profound cultural and institutional change, especially in the training of legal operators, from the view that article 15-A of Law No. 13,869/2019 is not limited to punishing public agents who practice acts of revictimization, but also intends to prevent the naturalization of these conducts through the incorporation of restorative and humanized practices of care for victims. The authors continue to contribute to the present debate by the conception that the figure of the Judge of Guarantees, introduced by Law No. 13,964/2019, emerges, in this context, as a mechanism to contain institutional violence, by ensuring independent and impartial control over investigative and procedural acts, avoiding excesses and abuses resulting from early judgments.

Law No. 14,321/2022 should be understood as a legal and ethical response to a structural problem of the Brazilian justice system, which would be the reproduction of violence through the very institutions responsible for combating it. As summarized by Deiab Junior and Carvalho (2024), the contemporary challenge lies in transforming punitive legislation into an instrument to guarantee rights, overcoming the logic of Emergency Criminal Law and replacing it with empathetic, inclusive, and restorative justice, so that the alleged aggressors, in the figure of defendants, do not use the exercise of the victim's right to silence as a clear and disrespectful strategy to acquire the *in dubio pro reo*, which would benefit him.

In a judgment of Criminal Writ of Mandamus No. 0000280-06.2022.8.08.0000, by the Court of Justice of Espírito Santo, in a situation in which the Public Prosecutor's Office had questions rejected by the titular magistrate of the 6th Criminal Court of Serra, based on the right to silence, in Statement No. 50 of FONAVID and in Law No. 14,245/2021, it was found that the victim of violence against women, based on the attainment of her dignity in the face of possible revictimization and discomfort in reliving what happened, thus, the ministerial claim of alleged judicial illegality inquired was not accepted, as can be seen in the following summary:

> JUDGMENT WRIT OF MANDAMUS NO. 0000280-06.2022.8.08 .0000 PETITIONER: STATE PUBLIC PROSECUTOR'S OFFICE COOPERATING AUTHORITY: JUDGE OF THE 6TH CRIMINAL COURT OF SERRA RAPPORTEUR: JUDGE MARIANNE JÚDICE DE MATTOS SUMMARY: WRIT OF MANDAMUS JUDICIAL ACT GRANTING RIGHT TO SILENCE - VICTIM CRIME DOMESTIC VIOLENCE - MARIA DA PENHA LAW - ARTICLE 474- A OF THE CPP STATEMENT 50 FONAVID - DIGNITY OF THE VICTIM - SECURITY DENIED 1. The doctrine requires the cumulative demonstration of three requirements, namely: i) the absence of a suitable appeal instrument; ii) the non-formation of res judicata and iii) the occurrence of manifest illegality or teratology in the decision attacked, capable, therefore, of being qualified as manifestly illegal or abusive of power. 2. The illustrious representative of the Public Prosecutor's Office filed the present writ against the act of the judge of the 6th Criminal Court of Serra who, in an instruction and trial hearing related to the records of Criminal Action No. 0014042-13 .2020.8.08.0048, rejected the questions posed by the Public Prosecutor's Office to the victim Lorena Moreira Pinheiro, granting her the right to remain silent during the hearing, based on Statement No. 50 of FONAVID and Law 14.245/2021 (Mariana Ferrer Law), on the grounds that the victim's hearing revictimized her, causing her suffering, as well as affecting her dignity. 3. Although the magistrate has the power to order the coercive conduct of the victim so that she appears at the hearing, he does not have the power to make her speak, when she expresses her intention to remain silent, especially because there is no legal sanction to do so. 4 . With the enactment of Law No. 14,650/2021, which punishes acts against the dignity of victims and witnesses, article 474-A was added to the Code of Criminal Procedure, which expressly provides for the need for the parties, during the hearing, to respect the dignity of the victim, and it is up to the judge to ensure the observance of such right. 5. I do not see the demonstration of manifest illegality in the judicial act now questioned, especially because the Magistrate did not act by encouraging the victim's

silence, but only, in view of the concrete situation, and sensitive to the embarrassment expressed, questioned her if the questioning bothered her or offended her dignity, to which after obtaining a positive manifestation from the offended party, he guaranteed her the right to silence. 6. Security denied. HAVING SEEN, reported and discussed these records, the Justices who are part of the First Criminal Chamber of the Distinguished Court of Justice of the State of Espírito Santo, in accordance with the minutes and shorthand notes, UNANIMOUSLY, UNANIMOUSLY DENY THE SECURITY, under the terms of the vote cast by the Eminent Rapporteur. Vitória, ES, June 15, 2022 . RAPPORTEUR PRESIDENT
(TJ-ES - MS: 00002800620228080000, Rapporteur.: MARIANNE JUDICE DE MATTOS, Judgment Date: 06/15/2022, FIRST CRIMINAL CHAMBER, Publication Date: 06/24/2022).

The Court's position in question reveals concern for the victim, especially in the psychological sense, with clear grounds for the decision, taking into account the need for specific questions also for MS, which did not occur, highlighting the lack of sanction for the victim when she decides and reaffirms her will to remain silent.

However, such exercise of right or even the lack of production of cohesive and truthful evidence must also be observed from the perspective that it opens the way for a possible acquittal of the alleged aggressor, as already mentioned, due to the character of *in dubio pro reo*, existing in our Democratic State of Law, as seen in the following case, judged by the TJ-DF, in 2022:

CRIMINAL APPEAL. FACTS. THREAT. PRIVATE ARPRISONMENT. SEXUAL HARASSMENT. CONTEXT OF DOMESTIC VIOLENCE. EVIDENTIARY INSUFFICIENCY. ACQUITTAL BASED ON THE PRINCIPLE IN DUBIO PRO REO. APPEAL BY THE PUBLIC PROSECUTOR. ACQUITTAL UPHELD. 1. It is clear that in crimes committed in situations of domestic violence against women, the victim's word has special importance, especially when corroborated by other elements that make up the body of evidence. However, in the case of the record, the testimonies were not cohesive and harmonious. In the presence of doubt, acquittal is an enforceable measure. 2. APPEAL KNOWN AND DISMISSED. ACQUITTAL SENTENCE UPHELD.

(TJ-DF 07010252220208070006 - Secrecy of Justice 0701025-22.2020.8 .07.0006, Rapporteur.: HUMBERTO ULHÔA, Judgment Date: 02/10/2022, 1st Criminal Panel, Publication Date: Published in DJE: 02/21/2022. Page: No Registered Page).

It is observed that the absence of testimony, above all, cohesive and harmonious, in the context of violence against women, even if the victim's word has deep importance and presumption of veracity, can lead to the acquittal of the defendant in the face of doubts about the facts narrated, which clarifies the indispensability of greater mechanisms and protocols of care and other support for the victims, aiming that there is no type of gap at the time of the production of evidence.

Another clear case in which the right to silence exercised by the woman in testimony, where the defendant benefited from acquittal in the face of "lack of evidence" is the following:

> CRIMINAL APPEAL. BODILY INJURY. DOMESTIC VIOLENCE. CRIMINAL PROCEDURE. MINISTERIAL RESIGNATION. ACTION OF AN UNCONDITIONAL PUBLIC NATURE. VICTIM EXEMPTED FROM THE OBLIGATION TO TESTIFY. NULLITY. NON-OCCURRENCE. EXCEPTION TO THE OBLIGATION OF THE OFFENDED PARTY'S TESTIMONY. DISCRETION OF THE JUDGE. OFFENSE TO THE ADVERSARIAL PROCEDURE. NON-OCCURRENCE. ABSENCE OF THE PUBLIC PROSECUTOR'S OFFICE AT THE HEARING OF INSTRUCTION AND TRIAL. NULLITY. In the crime of bodily injury committed in the context of domestic violence, the victim's desire not to incriminate the accused and to withdraw from the action is irrelevant for the purposes of determining the criminal responsibility of the aggressor, in view of the unconditional public nature of the action. Precedent No. 542/STJ. Judgment of ADI 4424 by the Federal Supreme Court. In crimes that occur in the domestic environment, without the presence of witnesses, the victim's word is of fundamental importance for the investigation of the facts. In these circumstances, the obligation to testify, even against the will of the offended party, appears to be an important instrument for the judge. The solution cannot be so simplistic, forcing each and every victim of domestic violence to testify, against their will, without observing the risks of secondary victimization. The circumstances of the specific case must be considered,... given the controversy about the victim's autonomy in not wanting to testify. The judge must be aware of the fact that the refusal to testify, in some cases, is motivated by the interest in preserving relationships that have already been pacified, however, in others, by exposure to violence, threats or any type of internal suffering of the deponent. Article 201 of the Code of Criminal Procedure provides that the offended party will be asked about the circumstances of the offense whenever possible. And paragraph 1 of the same article provides that the judge may determine the coercive conduct of the offended party when he, summoned, fails to appear without just cause. The obligation of the victim's testimony is not absolute, with exceptions to be verified in the specific case. If there is a justified reason, the victim may be exempted from the obligation to testify. The decision will be up to the magistrate who conducts the criminal action within the scope of his discretionary action. The option for the testimony of the offended party, which must be evaluated on a case-by-case basis, cannot be confused with the right to refuse to testify, which, by law, is guaranteed only to the witness who is the spouse, ascendant, descendant or brother of the defendant, under the terms of article 206 of the Code of Criminal Procedure. It can be inferred from article 201 and its paragraph 1 of the CPC that the judge may dispense with the hearing... of the offended party, for a justified reason, such as in cases in which secondary victimization is sought to be avoided. It is worth noting that the lack of testimony by the offended party does not prevent the conviction supported by other evidence. In domestic violence, in the face of a change in the victim's version in court, or the refusal to testify, the use of the statements that the offended party made spontaneously in the police phase shortly after suffering the aggression must be admitted, together with the other evidence produced in the judicial phase. In the case of the record, the victim refused to answer any type of question, expressing the desire to withdraw from the process, due to the fact that she has a friendly relationship with the defendant, because they have children in common. The sentencing court understood that the victim's autonomy not to testify against the defendant should be respected, given her interest in preserving the family relationship that had already been pacified. The court of origin, which presided over the instruction, was close to the subjects of the case, and the

decision to dispense with the victim's testimony should be honored. There is no news in the records of a history of domestic violence, nor subsequent occurrences, or any indication of taint in the will of the offended party not to testify. In view of the circumstances of the case, in respect to the autonomy of the ... offended party, who expressed the desire not to testify against the defendant, the victim's exemption from the obligation to testify does not constitute illegality. Although duly summoned for the hearing of instruction and trial, the ministerial representative did not attend the ceremony. Thus, there is no affront to the principle of adversarial proceedings if the body of the Public Prosecutor's Office, regularly summoned for the act, failed to appear at its discretion. Hence, there is no talk of nullity, given that the absence of a statement by the Public Prosecutor's Office was due to its own cause. Under the terms of article 565 of the CPP, none of the parties may argue nullity to which they have given cause, or to which they have concurred. If there is no offense to the adversarial procedure, there is no talk of nullity. Acquittal sentence upheld, on other grounds. MINISTERIAL APPEAL DISMISSED. (Criminal Appeal No. 70079977492, Third Criminal Chamber, Court of Justice of RS, Rapporteur: Rinez da Trindade, Judged on 05/23/2019).
(TJ-RS - ACR: 70079977492 RS, Rapporteur: Rinez da Trindade, Judgment Date: 05/23/2019, Third Criminal Chamber, Publication Date: Diário da Justiça on 06/13/2019)

The respective judgment is dated 2019, prior to Law No. 14,321/2022, however, it still fits the intended analysis, since it evidences a situation of benefit to the defendant when the victim chooses to remain silent, even more so in the specific case, in which she alleged, upon examination of the record, that she still had a friendly relationship with the accused, in addition to children in common and there was no desire to continue with the action, even if unconditional. As a result, based on article 386, item VII, of the CP/1940, there was a judgment dismissing the complaint for lack of evidence, in order to acquit him, due to the fact that the victim was silent about the occurrence of the fact.

This issue needs to be investigated in more depth, as well as multiple scientific biases and, at the same time, connected, such as structural, institutional, psychological, economic, family and social elements, since many women choose, in a way, not to assist in criminal prosecution, which can contribute, albeit indirectly, to the perpetuation of domestic violence.

It is essential to highlight that the right to silence extracted from the interpretation of the prohibition on revictimization is exercised in the context of a continuous and systematic cycle of violence against women, having patriarchal, historical, social, cultural and economic roots, causing fear of testifying due to the possible consequences to the victim's life after the defendant's eventual conviction. It should also be noted that the eventual emotional or financial dependence may make it difficult to consolidate the encouragement to ratify the testimony collected in the police phase. The victim may end up choosing to act in such a way as to provide the acquittal of the accused, using a right that should protect her from the so-called revictimization.

3.1 PROTOCOL FOR ASSISTANCE AND STRENGTHENING OF VICTIM PARTICIPATION AS A COPING TOOL

In view of the theoretical and legal points raised in the course of this Article, the objective is to propose certain actions aimed at mitigating the use of the right to silence of women who are victims of domestic violence, especially in favor of the defendant for possible acquittal. To this end, interdisciplinary elements will be considered, that is, those that originate from different intentions, knowledge and areas, in Protocol to be shown in Table 2, onwards:

Table 2

Protocol for assistance and strengthening of the victim's participation

Step	Central Objective	Proposed Interinstitutional Actions
1. Immediate Psychosocial Screening and Reception	Ensure humanized initial listening and risk assessment.	Initial care by a multiprofessional team (psychologist, social worker and lawyer); Active listening, without re-victimization; Confidential registration and immediate referral to the necessary services;
2. Integrated Interdisciplinary Care	Articulate legal, psychological and social services.	Intersectoral meeting between agencies (Brazilian Women's House, Public Prosecutor's Office, OAB, CRASVI Defender's Office); Joint and continuous referral of the victim; Sharing of information between agencies, preserving confidentiality;
3. Prevention of Institutional Revictimization	Avoid procedural practices that reproduce suffering and stigmatization.	Audiovisual recording of the testimonies to avoid repetitions; Welcoming environment for interrogation, without contact with the aggressor; Unique interviews, with trained professionals;
4. Legal Support and Procedural Monitoring	Strengthen the victim's role in the judicial process.	Legal follow-up by the Victim Support Center within the scope of the Public Prosecutor's Office or by a lawyer accredited by the Women's House, Women's Secretariat or similar body that has lawyers or attorneys on its staff;
5. Ongoing Psychological and Therapeutic Support	Promote emotional rebalancing and prevent relapses in the cycle of violence.	Continuous and individualized psychological care. Therapeutic groups and resilience workshops; Pre-reporting psychosocial follow-up;
6. Economic and Social Empowerment	Break ties of economic and affective dependence.	Referral to income generation and professional training programs; Inclusion in housing policies and assistance programs; Support for educational reintegration;

7. Permanent Training of Public Agents	To train professionals sensitive to the gender perspective and human rights.	Periodic courses and workshops on gender, trauma and humanized listening; Insertion of public ethics and institutional violence content in legal training;
8. Protocol Monitoring and Evaluation	Ensure effectiveness and continuous improvement of service.	Performance indicators and periodic execution reports; Inter-institutional auditing and social control by rights councils; Annual evaluation with review of targets.

Source: Prepared by the authors, based on Andrade (2024), Borin (2023), Fontes, Pizzani, Andrade (2024), Sanches, Batista (2024), Jordão (2025), Oliveira (2022).

The proposal for a Protocol for Assistance and Strengthening of Victim Participation (PAFPV) should, therefore, operate under the principle of comprehensiveness, articulating the legal, psychological, social and economic dimensions of care. The objective is to ensure that the State acts not only in punishing the aggressor, but in the reconstruction of dignity and female emancipation, based on the understanding that institutional fragmentation constitutes one of the greatest barriers to gender justice, and it is essential to create normative and operational mechanisms that prevent revictimization and promote the protagonism of women in all stages of the criminal process.

In its structure, the protocol should start with immediate psychosocial screening and welcoming, ensuring that the first approach is made by a trained multiprofessional team. This initial phase aims to break the victim's emotional isolation and create an environment of trust, which is essential for the production of a report free of coercion. As Deiab Junior and Carvalho (2023) argue, welcoming is the turning point in the coping process, as it is at this moment that the State is present in a concrete way, breaking the cycle of institutional invisibility and offering the victim the first sign of recognition and legitimacy.

Subsequently, the protocol proposes the mandatory integration of legal, health and social assistance services, with articulated referrals and communications between the institutions involved. This integration is the practical expression of interdisciplinarity provided for in article 9 of the Maria da Penha Law, which imposes on the public power the duty to provide assistance on several fronts.

The suggested integration model aims to articulate psychologists, social workers, prosecutors, lawyers and public defenders to ensure the protection of the victim, as well as the coherence between protective measures, psychological monitoring and social reintegration policies. This inter-institutional convergence reduces the response time of the system and confers legitimacy to the criminal process, transforming it into an instrument of justice and reparation.

Another essential axis of the protocol is the prevention of institutional revictimization, in line with the provisions of article 15-A of Law No. 13,869/2019, introduced by Law No. 14,321/2022, which typified institutional violence as a crime. According to Sanches and Batista (2024), this typification is innovative, as it recognizes that the justice system itself can be an agent of violence when it imposes repetitive and invasive procedures on the victim.

The protocol, therefore, should establish guidelines for single interviews, in a welcoming environment and with accessible language, as well as for the use of audiovisual recordings that avoid unnecessary repetition of the testimony. Compliance with these guidelines reinforces the centrality of the victim in the process and the ethics of care, removing the instrumentalization of female pain as a means of evidence.

The continuous training of public agents is another fundamental pillar of the protocol, because, as Jordão (2025) points out, institutional violence is the result not only of abusive practices, but also of the lack of technical preparation and social sensitivity on the part of legal operators. Thus, permanent training should include content on gender, human rights, trauma psychology, and active listening techniques, being an indispensable qualification element for state action to stop reproducing patriarchal authoritarianism and start incorporating a humanistic and inclusive ethic.

Nevertheless, the protocol must provide for mechanisms for economic and social empowerment, recognizing that financial dependence is one of the main causes of giving up the complaint, even more so in view of the need for public policies that ensure temporary housing, professional qualification, and minimum income programs for women in situations of violence (Meira, 2022; Jordão, 2025).

These actions not only guarantee material protection, but also function as instruments for rebuilding autonomy and preventing relapses into abusive cycles. The inclusion of victims in education and training programs strengthens their role as subjects of rights, allowing them to redefine their identity outside the condition of vulnerability.

The effectiveness of coping policies depends on the institutionalization of democratic control and transparency mechanisms, capable of ensuring that the protection discourse translates into concrete results in women's lives. Thus, the protocol should not be a static document, but a dynamic instrument for managing and improving public policy to combat domestic violence (Rocha, 2021; Jordão, 2025).

Thus, the PAFPV is a proposal that synthesizes institutional learning and recent normative evolution, intending to reinforce the idea that the fight against domestic violence is only fully realized when women cease to be mere recipients of public policies to become agents of social transformation and reduction of the use of the right to silence as a way to alleviate the situation and consequently benefit the defendant with acquittal, encouraging the victim to participate in the process and produce evidence. Such a paradigm shift requires a sensitive State, which recognizes in active listening, interdisciplinarity and the empowerment of the victim the bases for a truly emancipatory justice.

4 FINAL CONSIDERATIONS

Confronting domestic violence in Brazil reveals itself as a historical, legal and social process in constant reconstruction, which demands more than the simple positivization of rights, requiring the consolidation of an institutional culture capable of understanding the complexity of gender relations and the multiple factors that sustain the perpetuation of violence.

Although the country has made significant progress with the enactment of Law No. 11,340/2006, the creation of the Specialized Courts, and the typification of institutional violence by Law No. 14,321/2022, there are still deep structural, cultural, and operational gaps that compromise the effectiveness of these norms and the full scope of justice.

Data from the Maranhão Court of Justice reveal a critical paradox: after Law No. 14,321/2022 came into force, the rate of acquittals in cases of domestic violence jumped from 7.13% (in 2020) to a peak of 44.63% (in 2023). This reality demonstrates that the protective norm, by seeking to shield women against institutional violence and revictimization, ended up producing a deleterious side effect on criminal prosecution. The analysis shows that the justice system failed to develop parallel support mechanisms, allowing the right to silence conceived as an instrument of protection to become a vector of impunity due to lack of cohesive evidence.

The trajectory of public policies aimed at the protection of women shows that the Brazilian State has evolved from a welfare approach to a human rights perspective, centered on the dignity of the person and on substantial equality between genders. However, contemporary challenges go beyond the normative dimension: they are located in the field of effectiveness, requiring inter-institutional articulation, the continuous training of public agents and the integration between the justice, health, security and social assistance systems.

In this context, the protocol for strengthening victim participation, presented in this study, represents an essential step in this direction, as it translates the State's commitment to active listening, humanization, and the prevention of revictimization.

The recognition of the evidential value of the victim's word is also presented as a structuring element of the coping policy. However, its effectiveness depends on overcoming androcentric paradigms and historical stigmas that delegitimize the female voice in judicial spaces. The search for a balance between the protection of the victim and the guarantees of the defendant is one of the most sensitive dilemmas of contemporary criminal procedure, requiring from magistrates and other legal operators a prudent, ethical and empathetic posture, since jurisprudence demonstrates that the right to silence, although legitimate, cannot become an instrument of impunity, but must be interpreted within a logic of protection and not of exclusion of women from the process.

Fear, shame, and disbelief in institutions form a cycle of silencing that needs to be broken through consistent public policies that combine protection, autonomy, and empowerment. In this context, institutional violence, typified in 2022, emerges as a new frontier of state accountability, revealing that the justice system itself must be the object of surveillance and ethical improvement, under penalty of reproducing the violence it intends to combat.

The combination of psychological, social and legal aspects that permeate domestic violence reinforces the need for a model of restorative justice, which sees the victim as a subject of rights and not as a mere evidentiary object. The construction of local and national service networks, the integration between gender and public security policies are essential ways to achieve the rights already recognized in the legislation. Women's empowerment, in turn, should be understood as an essential dimension of prevention, as economic and emotional autonomy is the most effective antidote to the recurrence of violence.

The effectiveness of confronting domestic violence is not achieved only by penal rigidity, but by the combination of educational, preventive and social measures, which allow women to rebuild their trajectory with safety, dignity and freedom. The State must act proactively, promoting justice that is simultaneously punitive and reparative, legal and humanistic, formal and transformative. It is in this convergence between law, psychology and public policy that lies the possibility of breaking with the paradigm of invisibility and establishing a culture of substantive equality.

Combating this problem requires systemic, interdisciplinary, and intersectoral action, in which the Judiciary, the Executive, and civil society act in an articulated manner. The strengthening of victim participation, the prevention of revictimization, and the creation of effective welcoming protocols are the foundations of a new model of gender justice, a model that recognizes women not as spectators of the process, but as protagonists of social transformation.

It should be noted that, although the present study has contributed to the understanding of the legal and institutional dimensions of combating domestic violence, there is still a vast field for future research. Empirical and interdisciplinary investigations are essential to assess the concrete application of care protocols, the impact of Law No. 14,321/2022 on judicial practices, and the relationship between the right to silence and the production of evidence in cases of domestic violence, because only with scientific deepening and continuous dialogue between theory and practice will it be possible to consolidate a truly protective, emancipatory, and equitable justice for all women.

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THE CONSTITUTIONALITY OF THE RULES GOVERNING INTERMITTENT WORK: ADI 6154, ADI 5826, AND ADI 5829

A CONSTITUCIONALIDADE DAS REGRAS ATINENTES AO TRABALHO INTERMITENTE: ADI 6154, ADI 5826 e ADI 5829

LA CONSTITUCIONALIDAD DE LAS REGLAS RELATIVAS AL TRABAJO INTERMITENTE: ADI 6154, ADI 5826 Y ADI 5829

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ABSTRACT

Law No. 13.467/2017 (Labor Reform) introduced the intermittent employment contract in Brazil, a modality characterized by non-continuous service provision and lack of a minimum work schedule. This article examines the constitutional controversy surrounding this contract before the Brazilian Supreme Federal Court (ADIs 6154, 5826, and 5829), focusing on the legal and hermeneutical grounds of the Justices' opinions. Based on a theoretical-dogmatic methodology and documentary-bibliographic research, the ruling that upheld the constitutionality of the norm is analyzed as a paradigmatic shift that favors a liberal-economic model over traditional social protection. The study highlights the potential risks of structural labor precarization and the transfer of economic risks to workers, despite the formal preservation of rights. It concludes that the Supreme Court's decision poses significant challenges to ensuring social protection and balancing labor flexibilization with the core values of Brazilian social constitutionalism.

Keywords: Intermittent Work. Constitutionality. Labor Reform. Supreme Federal Court. Fundamental Rights. Labor Flexibilization. Social Constitutionalism.

RESUMO

A Lei nº 13.467/2017 (Reforma Trabalhista) instituiu o contrato de trabalho intermitente, modalidade marcada pela prestação descontínua de serviços e ausência de jornada mínima. O artigo analisa a controvérsia constitucional dessa figura perante o Supremo Tribunal Federal (ADIs 6154, 5826 e 5829), investigando os fundamentos jurídicos e hermenêuticos dos votos ministeriais. Com base em pesquisa teórico-dogmática, de cunho bibliográfico e documental, a decisão que declarou a constitucionalidade da norma é examinada como marco hermenêutico que evidencia a primazia do paradigma liberal-econômico sobre o

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tradicional modelo protetivo. Apontam-se os riscos de precarização estrutural das relações de trabalho e a transferência de riscos ao trabalhador, mesmo com a manutenção formal de direitos. Conclui-se que a decisão do STF suscita relevantes desafios à efetividade da proteção social e à conciliação entre flexibilização das relações laborais e os fundamentos do constitucionalismo social brasileiro.

Palavras-chave: Trabalho Intermitente. Constitucionalidade. Reforma Trabalhista. Supremo Tribunal Federal. Direitos Fundamentais. Flexibilização Trabalhista. Constitucionalismo Social.

RESUMEN

La Ley n.º 13.467/2017 (Reforma Laboral) instituyó el contrato de trabajo intermitente, modalidad caracterizada por la prestación discontinua de servicios y la ausencia de jornada mínima. El artículo analiza la controversia constitucional de esta figura ante el Supremo Tribunal Federal (ADI 6154, ADI 5826 y ADI 5829), investigando los fundamentos jurídicos y hermenéuticos de los votos de los ministros. Con base en una investigación teórico-dogmática, de carácter bibliográfico y documental, la decisión que declaró la constitucionalidad de la norma es examinada como un hito hermenéutico que pone de manifiesto la primacía del paradigma liberal-económico sobre el tradicional modelo protectorio. Se señalan los riesgos de precarización estructural de las relaciones laborales y la transferencia de riesgos al trabajador, aun con el mantenimiento formal de derechos. Se concluye que la decisión del STF suscita importantes desafíos para la efectividad de la protección social y para la conciliación entre la flexibilización de las relaciones laborales y los fundamentos del constitucionalismo social brasileño.

Palabras clave: Trabajo Intermitente. Constitucionalidad. Reforma Laboral. Supremo Tribunal Federal. Derechos Fundamentales. Flexibilización Laboral. Constitucionalismo Social.

1 INTRODUCTION

Law No. 13,467/2017, which instituted the Labor Reform in Brazil, promoted significant changes in the Consolidation of Labor Laws, highlighting, among them, the creation of the intermittent employment contract (Articles 443, §3 and 452-A of the CLT). This contractual modality, which allows the provision of services with subordination on a non-continuous basis, with alternation between periods of activity and inactivity and without guarantee of minimum working hours or fixed monthly remuneration, emerged as one of the most controversial points of the reform. While defenders presented it as an essential tool for making the labor market more flexible and formalizing informal relations, critics directly associated it with precariousness, income instability, and potential violation of fundamental rights.

In view of the relevance and dissent, the constitutionality of the rules related to intermittent work was submitted to the analysis of the Federal Supreme Court (STF) through Direct Unconstitutionality Actions (ADIs) 6154, 5826 and 5829. The joint judgment of these actions by the Supreme Court, concluded in December 2024, resulted in the declaration of dismissal of the requests made and the affirmation, by majority, of the constitutionality of the contested provisions. This decision then consolidated the judicial understanding of the modality. He also explained the tension that exists in the highest Court of the country between different views on the interpretation of the constitutional principles that govern labor relations and the economic order.

The main object of research in this article is to study how the Federal Supreme Court in ADIs 6154, 5826 and 5829 dealt with the constitutionality of the intermittent employment contract, evaluating how the divergence between the justices occurred.

The central hypothesis that guides this study argues that the decision of the STF, by declaring the constitutionality of the modality by majority, built a paradigmatic inflection in the constitutional interpretation of fundamental labor rights in Brazil. It is argued that this decision, which recognized the compatibility of the rule, reflects a weighing of principles that privileges free enterprise and economic efficiency to the detriment of an alleged material effectiveness of social rights and the classical protective principle.

The research is justified, among other factors, in the potential of the theme to generate a deep social impact regarding the protection of the vulnerability of the intermittent worker, appearing to be a debate of a concrete, practical nature and placed as an agenda not only for the understanding of the decision, but, above all, to create a scenario for monitoring how the market and reality will behave from now on: The coming years will be in charge of saying the correctness (or not) of the elected political-legislative option.

As a general objective, the present study seeks to analyze in a detailed and critical way the foundations of what was decided by the STF within the horizon of Brazilian social constitutionalism linked to labor rights in the context of flexibilization.

As specific objectives, it is proposed: (a) to describe the normative structure of the intermittent employment contract; (b) analyze the arguments of the parties and the votes of the Ministers of the STF in the ADIs; (c) to identify the hermeneutical tension between the constitutional principles in conflict; (d) to evaluate the dogmatic and socio-legal implications of the decision; and (e) point out regulatory challenges and future perspectives for the modality.

The research is justified by the notorious legal, social and economic relevance of the theme, its direct impact on the lives of workers and on business dynamics, and by the importance of the decision as a precedent that is aligned with a framework of normative foundations that can be added to a new panorama of redefinition of the constitutional limits of flexibilization in the country. A critical analysis is essential to understand how the legal system seeks to reconcile the adaptability of the market with the protection of human dignity.

The methodology used is qualitative, of a theoretical-dogmatic nature and an analytical-critical approach, using a documentary-bibliographic procedure based on the legislation, judgments and votes of the ADIs and specialized doctrine.

The structure of the article comprises a sequence of topics that begin with the conceptual and normative analysis of the intermittent contract, after the study of the ADIs and the ministerial votes, followed by the discussion of the hermeneutic tension and its implications, and a referral to the study of the socioeconomic impacts and regulatory challenges, and the future proposals/perspectives, culminating in the conclusions that synthesize the contribution to the understanding of the evolution of Labor Law Brazilian post-Labor Reform and STF decisions.

2 OF INTERMITTENT WORK

The intermittent employment contract modality was incorporated into the Consolidation of Labor Laws (CLT) and is one of the fruits resulting from the Labor Reform, sanctioned by Law No. 13,467 of 2017. It is important to note that, roughly speaking, it was a reform (like this new type of contract), taxed as having allowed undue flexibility. To a certain extent, it may have unfairly readjusted employee rights, under the pretext of enabling a more adaptable contractual model between the parties (Leite, 2023)[4].

[4] In fact, it is a contractual format already used in several countries, although in Brazil, the intermittent contract is still relatively unknown and used – which could be justified by a pure and simple lack of knowledge or even by some perception of legal uncertainty that such contracting would generate. Since the time of the legislative

The very name "intermittent" signals that the fundamental characteristic of this modality is exactly the alternation between periods of activity and inactivity.

That is, the work will be provided in a discontinuous manner. The employee is summoned by the employer at specific times or when there is a specific need. Thus, during the intervals of inactivity, the worker does not receive a salary and is not at the disposal of the employer - and this gives him the freedom to perform other activities or provide services to other companies.

The intermittent worker is not to be confused with the *freelancer*. The latter has substantial autonomy in the execution of activities, while in the intermittent employment contract, **subordination** persists as a present and indisputable element – and the employee must follow the guidelines established by the employer. In addition, another striking feature is the **unpredictability** of the call: the employee is aware that he does not have a fixed date for the performance of his duties, which, from another point of view, means that the employer does not hire a workforce on an exclusive basis (Romar, 2018).

The legal bases of the intermittent contract in the CLT are articles 443, *caput* and third paragraph, and article 452-A. Ordinance No. 671 of 2021 regulates the provisions. Thus, the normative feasibility for the employee to provide services in a non-continuous manner is defined, which may be for days, hours or weeks, with interspersed periods of inactivity.

However, formality emerges as an indispensable pillar for the validity of the intermittent employment contract, and must always occur in **writing**, with annotations in the Work and Social Security Card (CTPS) and clear contractual clauses that prevent distortions[5].

2.1 REMUNERATION, PURPOSE AND CALL PROCESS

The remuneration of the intermittent worker must be proportional to the time actually worked. If the organization adopts the minimum wage as a basis, the intermittent worker will

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discussions, it was argued that the intermittent contract would have the purpose of regularizing the well-known "bico", ensuring, as a consequence, more rights to workers on the one hand. Still, on the other hand, from the employer's perspective, offering him ways to optimize labor costs compared to fixed-term or indefinite hiring (Delgado, 2021).

[5] The intermittent employment contract provided for in article 452-A of the CLT must be entered into in writing, even if provided for in a collective bargaining agreement or collective bargaining agreement, and will contain
- the identification, signature and domicile or registered office of the parties;
- the value of the hour or day of work, which shall not be lower than the hourly or daily value of the minimum wage, nor lower than that due to other employees of the establishment who perform the same function, ensuring that night work is remunerated higher than that of day work; e
- the place and deadline for payment of remuneration.

The intermittent employee, by prior agreement with the employer, may enjoy his vacation in up to 03 (three) periods.
The hourly or daily remuneration of the intermittent worker may be higher than that paid to other workers of the company hired for an indefinite period, given the special characteristics of the intermittent employment contract.
The confirmation of the summons continues to be as determined by article 452-A, § 1 and § 2, that is, through any effective means of communication.

be entitled to the corresponding hourly or daily rate. If the other employees perceive remuneration higher than the legal minimum, the intermittent worker must also have the proportionality of this remuneration guaranteed.

What is certain is that, in order to avoid discrimination in relation to the fixed contract, the payment of the intermittent worker is equivalent to his, that is, that the same hour of the permanent worker determines the value of the intermittent worker's hour. In addition, the contract must unequivocally establish that the intermittent worker is entitled to all **legal bonuses**, which includes, for example: night bonus (higher than daytime pay), unhealthy pay, hazard pay, etc.

The CLT allows the hiring of intermittent work to extend to **any activity**, except **aeronauts**.

The mechanics of the call, with its intricacies of acceptance or refusal, is configured as one of the most particular and critical elements of the intermittent contract. The call can be made by any means of communication that is effective, such as phone calls, text messages (including the use of applications such as WhatsApp)

However, it must be carried out at least three calendar days in advance of the date scheduled for the start of the provision of services. Failure to comply with this deadline (for example, calling today to work tomorrow) may mischaracterize the intermittent contract, resulting in its conversion to an employment contract for an indefinite period.

The employee has one working day to communicate his acceptance or refusal to the call. Unlike the popular phrase "he who is silent consents", in the context of the intermittent contract, the worker's silence is interpreted as refusal. If the worker does not manifest himself, there will be no obligation to provide the services in that period, and this inaction will not be configured as insubordination or serious misconduct.

The refusal does not require justification. The employee has the prerogative to decide whether or not to accept the summons, without this implying the termination of the contractual

The parties may agree through the intermittent employment contract:
- The places where services are provided;
- The shifts for which the employee will be called to provide services; e
- The forms and instruments of summoning and responding to the provision of services.

In the intermittent employment contract, the period of inactivity will not be considered time at the employer's disposal and will not be remunerated, in which case the intermittent employment contract will be mischaracterized if there is remuneration for time available during the period of inactivity.

Severance pay and prior notice must be calculated based on the average of the amounts received by the employee during the course of the intermittent employment contract.

Therefore, the calculation of the amounts of severance pay and prior notice is different from the calculation of an employment contract under the continuous regime.

In the intermittent employment contract, the employer must pay its own and the employee's social security contributions, and deposit the FGTS based on the amounts paid in the monthly period, and will provide the employee with proof of compliance with these obligations (Ordinance No. 671 of 2021) (BRASIL, 2021).

relationship. This particularity reinforces the non-exclusivity of labor, since the employee can work for other employers during their periods of inactivity.

If the offer to attend work is accepted, the party who fails to comply, without just cause, will pay the other party, within thirty days, a fine of 50% (fifty percent) of the remuneration that would be due, with compensation allowed within the same period[6] (CLT, 2025).

> " ... It should also be noted that MP No. 808/2017, despite having suffered the oft-mentioned loss of validity, brought to light a set of solutions (from article 452-B to article 452-H of the CLT) with the objective of further regulating the controversial and criticized intermittent employment contract. Article 452-B provided for optional clauses that may or may not be included in the intermittent employment contract, among which the one that provides — if the parties so wish — for a reciprocal compensation format in the event of cancellation of services previously scheduled under the terms of paragraphs 1 and 2 of article 452-A ..." (Martinez, 2019)

The payment regime in the intermittent contract has distinctive nuances, designed to ensure the payment of labor funds immediately after the effective provision of services.

2.2 FUNDS

The intermittent employee will receive the following amounts soon after the end of the provision of services (either at the end of a week, 20 days, or the period that lasted the call): 1) the remuneration is calculated according to the hourly wage practiced for the company's fixed worker. 2) proportional vacation: plus one constitutional third, with immediate payment. 3) 13th proportional salary: measured based on the days actually worked. 4) paid weekly rest (DSR). 5) additional: including night, unhealthy, dangerous bonuses, among others, if applicable to the activity performed. In addition, other amounts provided for in Collective Bargaining Agreements or Collective Bargaining Agreements may be incorporated and must be itemized in the payment receipt.

You are also entitled to: FGTS, INSS/Social Security Payment based on the monthly payment made to the worker, unemployment insurance (provided that it meets the other criteria established in the specific legislation).

The employer must always provide proof to the employee regarding the payment of these contributions - detailed payment receipt.

[6] If the employee accepts the summons, but later refuses to provide the service on the agreed day, he must pay a fine equivalent to 50% of the amount of remuneration that would be due to him, to be paid within 30 days. In turn, if the employer summons the worker and the worker appears, but the employer, for any reason (such as "no longer needs" or "forgot"), dismisses the need for the service, the employer must pay the same fine of 50% of the amount of remuneration that would be due to the employee, due to non-compliance with what was agreed.

With regard to vacations, the intermittent contract adopts, in essence, the same terms applicable to the fixed worker, but with notable particularities[7].

3 ANALYSIS OF THE DECISIONS OF THE FEDERAL SUPREME COURT

3.1 ADI 6154

ADI 6154 was proposed by the National Confederation of Industrial Workers (CNTI), questioning the constitutionality of articles 443, *caput* and §3; 452-A, §§1 to 9; and 611-A, VIII, of the CLT. The central issue under discussion was to verify whether the rules that regulate intermittent work are compatible with the principles and rights provided for in the Federal Constitution of 1988, especially with regard to the protection of workers and the guarantee of decent working conditions.

The rapporteur of the action was Justice Edson Fachin (rapporteur of this and of the joined actions ADI 5,829 and ADI 6,154), who voted for the merits, being defeated by the majority of the Court – but having reasoned that there was incompatibility between intermittent work and the essential core of fundamental labor rights. According to his argument, the contractual modality violates the dignity of the human person (art. 1, III, CF88) and the social value of work (art. 1, IV, CF88) by institutionalizing the precariousness of labor relations.

He noted that the intermittent contract breaks with the principle of contractual synagma, allowing an employment relationship without a minimum obligation to convene or remunerate. This characteristic, according to Fachin, transforms the worker into a "mere instrument of economic activity", violating his dignity and autonomy. The Minister was in tune with the theory of the prohibition of insufficient protection (*untermassverbot*), originating in the German constitutional doctrine and adopted by the jurisprudence of the STF in other contexts. According to this postulate, the State cannot establish a level of protection of fundamental rights below the minimum necessary to preserve the effectiveness and meaning of these rights[8].

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[7] *" ... And the vacation system? Was there any regulation made by law, in particular, in favor of intermittent employees? Yes. Every 12 months, the intermittent employee acquires the right to enjoy, in the following 12 months, one month of vacation, a period during which he may not be called to provide services by the same employer, nor will he receive anything, given the anticipation of the perception of the proportional vacation fragments with an increase of one third, as provided for in paragraph 6, II, of the provisions of article 452-A of the CLT. Despite the loss of validity of paragraph 10 of the aforementioned article 452-A of the CLT, its reference was maintained in the legal universe. To dispel doubts about analogous application, the aforementioned provision provided — and still seems required — that the employee hired for intermittent work, by prior agreement with the employer, may enjoy his vacation in up to three periods, under the terms of paragraphs 1 and 2 of article 134 of the CLT ..."*(Martinez, 2019).

[8] Main Arguments of the Rapporteur: Violation of Constitutional Principles: The plaintiff points out violation of the principles of human dignity, the social value of work, the prohibition of social regression and legal certainty. They allege that intermittent work was designed to make the means of hiring workers more precarious.

Justice Nunes Marques, who drafted the ruling, pointed out the full constitutionality of intermittent work, arguing that the contractual modality represents a legitimate instrument for making labor relations more flexible. His vote was based on three main axes:

a) Constitutional compatibility: he argued that the Constitution does not prohibit different contractual modalities, as long as essential rights are guaranteed. Intermittent work, according to his argument, preserves the fundamental rights of the worker, ensuring proportional vacations, 13th proportional salary, FGTS and social security protection.
b) Social and economic function: he highlighted that intermittent work contributes to the formalization of labor relations that would otherwise remain informal. The modality would respond to real economic needs, especially in sectors characterized by seasonal or fluctuating demand.
c) Private Autonomy: emphasized the importance of private autonomy as a constitutional principle, arguing that contractual freedom is a corollary of free economic enterprise. The intermittent worker, according to this perspective, can refuse summons and maintain multiple bonds, expanding his work options[9].

Justice Cristiano Zanin adopted an intermediate position, recognizing the constitutionality of intermittent work, but establishing interpretative limits. According to his vote, the contract should be automatically terminated if the worker is not summoned for a

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Transformation of the Worker into an object: The intermittent contract places the worker in a condition of mere object, as a tool, equipment, machinery, at the disposal of the business economic activity, whenever, where and as the employer sees fit. Uncertainty and Unpredictability of Remuneration: The zero-hour contract modality does not guarantee service provision or remuneration. The worker continues without the real conditions to enjoy the fundamental social rights that depend on the provision of services and resulting remuneration, without which there are no essential conditions for a dignified life. Insufficient Protection: The provisions are insufficient to guarantee minimum respect for constitutionally protected rights. There is no setting of minimum working hours and minimum incomes, even if estimated. The Minister invoked a postulate of protection or prohibition of insufficient protection. Suspension of Fundamental Social Rights: The rights guaranteed in arts. 6 and 7 of the Federal Constitution are suspended for the entire period in which the worker, despite being formally hired, is not providing services to the entrepreneur (STF, ADI 6154).

[9] Main Arguments of Justice Nunes Marques: Non-Suppression of Labor Rights: The intermittent contract ensures the payment of traditionally provided amounts, such as paid weekly rest, vacation and thirteenth salary proportional, and social security payments. In addition, the value of the hour of work cannot be lower than the hourly value of the minimum wage or that salary due to the other employees of the establishment who perform the same function. Increase in Social Protection: The modality increases social protection in relation to informal workers, who perform services without any type of contract. It constitutes a middle term between informality and the common employment relationship, offering minimum guarantees. Flexibility and Inclusion in the Labor Market: The new model aims to provide flexibility, regularize and bring workers back to the market, with guaranteed constitutional social rights. It cites case law of the TST stating that *"In this sense, the Fourth Panel of the Superior Labor Court (TST), when examining, on August 9, 2019, AIRR 1045406.2018.5.03.0097, considered to regulate the hiring of an employee under the intermittent regime modality, once all the dictates of the law were met. On the occasion, he stated: "The introduction of rules for intermittent work in our legal system was due to the need to grant basic rights to a multitude of workers who were in informality (almost 50% of the country's workforce), living on odd jobs, without a formal contract and without guarantee of fundamental labor rights. This is one of the new contractual modalities existing in the world, making the form of hiring and remuneration more flexible, in order to combat unemployment. It does not generate precariousness, but legal certainty for workers and employers, with clear rules, which stimulate the creation of new jobs".* (STF, ADI 6154).

period of more than 12 months, avoiding situations of perpetual availability without labor compensation. It also recognized the possibility of civil liability of the employer for non-compliance with objective good faith in cases of unjustified absence of summons or discriminatory use of the institute[10].

3.2 ADI 5826

ADI 5826, now proposed by FENEPOSPETRO, followed substantially the same fundamentals and results as ADI 6154[11]. In the initial complaint, he alleged the violation of the principles of human dignity, the social value of work, the prohibition of social regression and legal certainty.

Justice Edson Fachin, as Rapporteur, voted for partial knowledge of the actions and, in the known part, for the merits of the requests, declaring the unconstitutionality of the following provisions of the CLT, as amended by Law No. 13,467/2017: Article 443, *caput*, final part, and paragraph 3; Article 452-A, paragraphs 1 to paragraph 9; and Article 611-A, VIII, final part. It pointed out that the provisions inserted by Provisional Measure No. 808/2017 would not be analyzed, since the MP was not converted into law and had its validity ended on 04/23/2018.

Justice Nunes Marques, the winning vote, rapporteur for the judgment, voted for partial knowledge of the actions and, on the merits, for the dismissal of the requests, declaring the constitutionality of the contested legal provisions. His vote was the prevailing one, making him the Draftsman of the Judgment. Justice Alexandre de Moraes emphasized the importance of legal certainty provided by the legal regulation of intermittent work. According

[10] Zanin voted for the partial upholding of the direct actions, to give an interpretation in accordance with the Federal Constitution to article 443, paragraph 3, of the CLT. His judgment thesis is that the intermittent contract is constitutional, but the intermittent employment contract will be considered terminated by operation of law if one year has elapsed without any summons of the employee by the employer. It also provides for civil liability of the employer for lack of justification. Arguments: Agreement with General Constitutionality: It aligns with the position of constitutionality of the intermittent contract, but highlights the concerns with uncertainty. Frustration of Expectation and Dignity: The absence of an indefinite call frustrates the worker's expectation of receiving remuneration that meets his vital needs (Article 7, IV, FC), violating the dignity of the human person. Offense to the Principle of Alterity: Understands that the possibility of not calling without the employer's responsibility transfers the risks of economic activity to the worker, in violation of article 2 of the CLT and the principle of alterity. It cites jurisprudence of the Superior Labor Court (TST) that considers an unlawful act the employer who does not summon the intermittent worker. Need for Maximum Period of Inactivity: Proposes a period of one year for the automatic termination of the contract due to inactivity, based on other labor rights (13th salary, vacation) that are consolidated annually. It mentions that Provisional Measure 808/2017 (which has lost its validity) already provided for this deadline, demonstrating the intention of legal certainty (STF, ADI 6154).

[11] The lawsuit was dismissed by a majority, with votes defeated, albeit in part, by Justices Fachin, Rosa Weber, Luiz Fux, Cristiano Zanin and Cármen Lúcia. Likewise, the constitutionality of provisions of the Consolidation of Labor Laws (CLT) that deal with the intermittent employment contract was also questioned, specifically the amendments to Provisional Measure No. 808/2017 in arts. Article 443, caput and § 3, Article 452-A and Article 611-A, VIII (STF, ADI 5826).

to his argument, the legal formalization of the modality offers greater protection than informal labor relations ("bicos"), guaranteeing basic rights and enabling state control.

Justice Rosa Weber produced a dissenting opinion of particular legal density, arguing that intermittent work compromises the *minimum contractual sign* necessary to characterize a genuine employment relationship. According to Weber, the modality structurally favors the employer, creating a contractual imbalance incompatible with the principle of worker protection. Although she requested to see the records, Justice Rosa Weber cast a dissenting vote, following Justice Edson Fachin with reservations, for the merits of the action (unconstitutionality).[12]

Justice Zanin voted for the partial upholding of the direct actions, to give an interpretation in accordance with the Federal Constitution to article 443, paragraph 3, of the CLT. His thesis, as in the previous ADI, is that the intermittent contract is constitutional, but the intermittent employment contract will be considered terminated by operation of law if a year has elapsed without any call of the employee by the employer, with possible civil liability of the employer for lack of justification[13].

3.3 ADI 5829

ADI 5829, filed by FENATELL, was also dismissed, consolidating the jurisprudential understanding of the constitutionality of intermittent work. The judgment reaffirmed the grounds of the previous decisions, demonstrating the stabilization of the majority position of the Court.

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[12] In the final minutes extract, it is listed as partially overdue. It declared the active illegitimacy of the federations (5,826 and 5,829) and the loss of purpose of MP 808/2017, focusing on ADI 6,154. Main Arguments: Precariousness and Deterioration of Rights: The labor reform aimed to make the social rights of workers more flexible in favor of the economic interests of the private sector, promoting the deterioration of the legal regime for the protection of social rights. Offense to Decent Work and Human Dignity: The modality transfers the economic risk from the company to the employee, fosters the generation of underemployment and occupational uncertainties. Unemployment is replaced by precariousness. It argues that the uncertainty regarding the object of the employment contract leads to the insecurity and infeasibility of the working citizen to receive remuneration essential to his maintenance and to the construction of a life project. Distortion of Labor Law: The intermittent contract breaks with the basic principle of continuity of the employment contract, to which the certainty of the provision of services and the scheduling of the workday, essential for the dignity of the worker, are linked. Negative Impact on Collective Bargaining
Work is Not a Commodity: Reaffirms the ILO principle, criticizing the instrumental view of work. Dilution of the 13th and Vacations: The fragmented payment of these funds corrupts its purpose (STF, ADI 58260

[13] In summary, the Minister reported that there would be a constitutionality with reservations: he agrees with the general constitutionality, but shares the concerns about the uncertainty of the provision of service. It also argues the frustration of expectation and the principle of alterity: it argues that the possibility of not calling indefinitely frustrates the worker's legitimate expectation of receiving a salary for his vital needs (Art. 7, IV, FC). This also transfers the risks of the enterprise to the employee, violating the principle of alterity (Article 2 of the CLT). It cites a decision of the TST that considers the employer who never summons the intermittent worker to be unlawful. Need for a maximum period of inactivity: proposes the establishment of a maximum period of one year of inactivity for the automatic termination of the contract, based on other annual labor rights and the provision of Article 452-D of MP 808/2017 (which lost its validity, but demonstrated the intention of protection) (STF, ADI 5826).

Despite the divergences and robust arguments presented by Justices Edson Fachin, Rosa Weber and Luiz Fux, the majority of the Federal Supreme Court (STF) decided for the constitutionality of the contested legal provisions that regulate the intermittent employment contract.

Therefore, the prevailing thesis was that the intermittent employment contract, as outlined by Law No. 13,467/2017, is compatible with the Federal Constitution, being seen as an instrument to make labor relations more flexible and combat informality, offering a level of protection to workers who previously did not have a formal relationship.

4 REFLECTIVE NOTES: DID THE SUPREME COURT GET IT RIGHT?

The intermittent employment contract marks a significant change in the labor dynamics of Brazil. The promise is that it represents a balance between the flexibility of hiring and the safeguarding of minimum rights for workers.

However, its correct application will require accurate vigilance to the formal details and deadlines established by employers and employees, in order to avoid the mischaracterization of the relationship or the application of penalties.

Trade union movements and workers' organizations have maintained mobilization for the revision of the legislation, while business entities defend its maintenance and eventual expansion. This political tension will continue to influence the normative development of the matter

The decisions of the STF in the ADIs under analysis express a fundamental tension between two interpretative paradigms of the 1988 Constitution: the protective-social paradigm and the liberal-economic paradigm. This tension is not merely academic, but reflects concrete disputes about the Brazilian socioeconomic development model.

It is demonstrated that the decision of the STF, by dismissing the lawsuits by majority vote and declaring the constitutionality of intermittent work, represents a paradigmatic milestone in the Brazilian labor constitutional interpretation. A significant hermeneutic inflection is revealed that privileges the liberal-economic paradigm over the traditional social-protective one.

This latent articulation between constitutional principles points to substantial concerns regarding the effectiveness of minimum social protection and the risk of structural precariousness of labor relations, despite the formal maintenance of rights and the potential for formalization for some.

Notwithstanding being formally legalized, the intermittent modality, as interpreted by the majority of the STF, promotes a significant transfer of economic risks to the worker and can compromise the material effectiveness of fundamental rights, reflecting the prevalence of private autonomy and economic efficiency to the detriment of the protection of the underprivileged in the current context of Brazilian social constitutionalism.

In this sense, such concerns are tangential to the authoritative part of the doctrine, which makes severe criticisms in the opposite direction, estimating that, in fact, this new intermittent employment contract is a clear trend in the understanding of the entrepreneurs who fostered (and sponsored) the so-called Labor Reform who, through it, intend to transfer the risks of their economic activity to the employee and, with this, increase their profits (LEITE, 2023).

See:

> In addition, the new article 425-A of the CLT (and articles 29 to 39 of MTP Ordinance 671/2021, which "regulate" intermittent work) is, in our opinion, manifestly unconstitutional, because the worker will only receive remuneration when summoned by the company, which uses his service and then discards it as if it were a commodity, thus violating the principles of the dignity of the human person of the working citizen, of the social value of their work, the search for full employment, the correction of social inequalities and the social function of the company (CF, articles 1, III and IV, 170, caput, III, VII and VIII), and it is also certain that this "intermittent worker" may receive nothing for a month or months or receive remuneration below the minimum wage, which violates the provisions of article 7, IV, of the FC. (LEITE, 2023).

In summary , *"... This contractual modality is certainly one of the clearest manifestations of the overexploitation of human labor, as it equates the worker to a disposable machine ..."*. It puts in check the Brazilian constitutional project of building citizenship, improving the social conditions of workers, and a freer, fairer, and more solidary society (LEITE, 2023).

In the same sense, it is recommended to read Statements 40, 73, 74, 84, 85, 86, 87, 88, 89, 90 and 91 approved in the Conference on Material and Procedural Labor Law. Statement 73 has the following diction:

> INTERMITTENT EMPLOYMENT CONTRACT: UNCONSTITUTIONALITY: The intermittent work regime provided for in article 443, paragraph 3, and article 452-A of the CLT is unconstitutional, for violation of article 7, I and VII of the Constitution of the Republic and for violating the fundamental right of the worker to the limits of working hours, to the thirteenth salary and to paid vacations[14].

[14] Still the statements. Statement 74. Intermittent employment contract: minimum wage The legal protection of the minimum wage, enshrined in article 7, VII, of the Constitution of the Republic, reaches workers in an intermittent work regime, provided for in arts. 443, § 3, and 452-A of the CLT, which are also guaranteed the right to the minimum monthly wage, regardless of the number of days in which they are called to work, respecting the professional minimum wage, the normative wage, the conventional wage or the regional floor. Statement 84. Intermittent employment contract: workload: as the intermittent employment contract must be entered into

This points out that the STF's decision is not unanimously followed. The setbacks urge a critical understanding of this transformation in the understandings of Brazilian labor law and the persistent challenges to reconcile the flexibilization of labor relations with the preservation of human dignity and social protection in the contemporary context.

5 FINAL CRITICAL CONTRIBUTIONS

The intermittent employment contract marks a significant change in Brazil's labor dynamics under the mantle of seeking a balance between the flexibility of hiring and the safeguarding of minimum rights for workers. Its correct application, however, requires accurate vigilance to the formal details and established deadlines, on the part of employers and employees, in order to avoid the mischaracterization of the bond or the application of penalties.

The decisions of the STF in the ADIs under analysis express the relationship of fundamental contradiction between two interpretative guidelines of the 1988 Constitution: the protective-social paradigm and the liberal-economic paradigm. The divergences between the

in writing, the contractual instrument must contain the periods of service provision or the estimate of services to be performed, in respect of which the employer is obligated. Statement 85. The intermittent employment contract in Brazil does not correspond to the British zero-hours contract In intermittent employment contracts, it is mandatory to indicate the minimum number of hours of effective provision of services, as an employment contract with an undetermined object or subject to a purely potestative condition is not admitted, according to articles 104, II, 166 II and 122 of the civil code, applicable in the alternative to the matter, pursuant to article 8, sole paragraph, of the CLT. Statement 86: Vacation and intermittent work. Vacation. intermittent work. in view of the existence of a legal antinomy between the provisions of paragraph 6 of article 452-A of the CLT and the provisions of paragraph 9 of the same article 452-A of the CLT, the legal system must be interpreted in a systematic way and the hierarchical criterion must be used to resolve the conflict of rules. Thus, in view of article 7, XVII, of the CF/88, which provides for the right to paid annual vacation, that is, paid at the time of the rest period (as also provided for in article 452-A, paragraph 9, CLT), the payment of proportional vacation after the provision of services (article 452-A, paragraph 6, II, CLT) is not applicable. Thus, in intermittent work, vacation must be paid when it is enjoyed. Statement 87. Intermittent employment contract. minimum wage and professional floor. fine. Unconstitutionality The fine provided for in article 452-A, paragraph 4, of the CLT, imposed on the worker who does not comply with a summons previously answered, is not compatible with the constitutional principles of human dignity, the social value of work, isonomy, the protection of the worker and the social function of the company. Statement 88. Intermittent work and risk to third parties intermittent work may not be carried out in activities that may endanger the life, health and safety of the workers themselves and/or third parties. Statement 89. Intermittent employment contract. permanence of the worker inside or outside the employer's establishment for the convenience of the latter. calculation as length of service intermittent employment contract. Permanence of the worker inside or outside the employer's establishment for the convenience of the latter. Calculation as length of service. in the intermittent employment contract, pursuant to article 452-A, paragraph 5, of the CLT, the periods in which the worker remains inside or outside the employer's establishment to meet interests, conveniences or awaiting instructions from the latter will be computed as hours or fractions actually worked. Statement 90. Intermittent employment contract and permanent demands 1. It is illegal to hire in the form of intermittent work to meet permanent, continuous or regular work demand, within the normal volume of activity of the company. 2. It is illegal to replace a regular or permanent job by hiring in the form of intermittent work. 3. The employer cannot opt for the intermittent employment contract to, under this legal regime, adopt the sliding and variable scale of the working day. 4. In view of the need for intermittent work, the employee hired under the terms of article 443, paragraph 3, of the CLT has a subjective right to the call, and his or the employer's omission is unlawful. Statement 91. Uncertain day and time for labor and risk exclusive to the employer. time at disposal is of effective service in the intermittent employment contract, the period without call by the employer is time at his disposal and must be remunerated as effective service. The burden of variations in demand in the enterprise is exclusive to the employer.

justices themselves, the doctrinal uprising in the opposite direction, and the very initiative of the parties who authored the ADIs to raise a trench to fight the legislative modification show that the problem is not merely academic, but reflects concrete disputes about the Brazilian socioeconomic development model.

It is demonstrated that the decision of the STF as a paradigmatic landmark in the Brazilian labor constitutional interpretation reveals itself as a significant hermeneutic inflection that makes a political-normative option that chose to privilege the liberal-economic paradigm over the traditional social protection.

It is pointed out that these substantial concerns regarding the effectiveness of minimum social protection and the risk of structural precariousness of labor relations (despite the formal maintenance of rights and the potential for formalization for some) end up leading to the criticism of the transfer of economic risks to the worker and may compromise the material effectiveness of fundamental rights.

Under the guise of giving the prevalence of private autonomy and economic efficiency, it is secondary to the protection of the underprivileged in the current context of Brazilian social constitutionalism.

What is certain is that the STF's decision does not solve all the challenges related to the sport. It will be essential to monitor, from now on, its practical effects on the living conditions of workers, the levels of employment and formalization, and the collection of social security.

Statistical studies will be key to assessing whether the modality fulfills the promises of its advocates (formalization, reduction of unemployment, beneficial flexibility) or confirms the fears of its critics (precariousness, reduction of income, weakening of social protection).

This entire panorama must be tempered with other issues such as: time limits of intermittency, criteria for termination due to inactivity and liability for abuse in the call (factors that will need a more precise jurisprudential definition).

This practical experimentation may require new measures in both directions. It is worth saying: the practical experience of intermittent work can generate pressures for legislative reforms, both in the sense of greater flexibility and greater protection. The public debate on the effects of the modality will influence future political decisions about its regulation.

The prioritization of economic efficiency in the face of a theoretical ideal of traditional social protection also signals deference to legislative choices of flexibility, due to the crucial role of the economy in the full development of a nation, which makes the decision of the majority of the STF defensible, rekindling the well-known margin of constitutional interpretation available to the Courts that, sometimes they also decide on political criteria.

It is identified, however, that one of the main weaknesses of the Praetorian majority argument in the STF lies in the insufficient consideration of the practical effects of the modality on the concrete lives of workers. It is necessary to think about whether the formal maintenance of rights is sufficient to ensure that rights do not lose material effectiveness due to the intermittence of the provision of work.

On the other hand, the minority argument, represented by the unsuccessful votes, although more sensitive to social rights, may have underestimated the legitimate needs for flexibility in the modern economy and the possibilities of future and adequate regulation of the modality – which may well be modified to meet a scenario that only the entrails of a new reality can prove necessary and require normative symbioses that accommodate such coming vicissitudes.

It seems that several decisions of the STF in recent years have been pointing, in a very massive and repeated way, a very clear direction of giving constitutional validity to norms that make traditional CLT rights more flexible, - a general framework from which a certain relativization of that historical-constructive primacy in the protection of the worker is extracted, revealing a reinterpretation of these rights, previously magnetized by a certain absoluteness, now in the light of the most recent economic considerations.

The main danger that can be glimpsed in this trajectory is the possible and progressive erosion of social protection, with a special impact on workers in situations of greater vulnerability. It is undeniable that intermittent work can be a functional alternative for professional categories that already have a more consolidated bargaining power. However, for those who depend on a single employment relationship, this modality can indeed bring undesirable precariousness.

Hence the demand for meticulous regulation, a point of balance, capable of preserving the core of fundamental labor rights in the constitutional sphere and, before that, entering the field of legislative policy and practical application by jurisprudence.

The very democratic and social vitality of our legal system will depend, to a large extent, on the way we manage to regulate, in an adequate and genuinely responsible way, tested in the laboratory of daily life, outside a watertight normative paralysis, this and many other forms of labor flexibilization in the legal field, but shaped by a joint and coordinated effort of all public authorities and civil society as a contribution to development economic, without, however, putting in check the pillars of social justice marked by the irreducible demands of human dignity.

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THE RIGHT TO HUMAN DEVELOPMENT AS AN INTERNATIONAL COMMITMENT: FRATERNITY, SDG 16 OF THE 2030 AGENDA, AND THE PROTECTION OF VICTIMS IN THE BRAZILIAN JUSTICE SYSTEM

O DIREITO AO DESENVOLVIMENTO HUMANO COMO COMPROMISSO INTERNACIONAL: FRATERNIDADE, ODS 16 DA AGENDA 2030 E A TUTELA DAS VÍTIMAS NO SISTEMA DE JUSTIÇA BRASILEIRO

EL DERECHO AL DESARROLLO HUMANO COMO COMPROMISO INTERNACIONAL: LA FRATERNIDAD, EL ODS 16 DE LA AGENDA 2030 Y LA PROTECCIÓN DE LAS VÍCTIMAS EN EL SISTEMA DE JUSTICIA BRASILEÑO

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ABSTRACT

This article analyzes human development as a legal commitment assumed by the Brazilian State in the context of the internationalization of human rights, focusing on the United Nations 2030 Agenda as a global normative framework for promoting sustainable development, considering fraternity as a guiding legal category for social relations and the realization of human rights. It starts from the hypothesis that the incorporation of international normative instruments, even if not fully binding, imposes state duties to promote public policies aimed at overcoming poverty, reducing social inequalities, and providing comprehensive protection for victims of human rights violations, in accordance with international parameters of justice and human dignity. The objective is to verify whether the right to human development has a binding nature in the Brazilian legal system and to what extent the Justice System contributes to its realization, especially in light of SDG 16 of the 2030 Agenda, highlighting access to justice, institutional strengthening, and the protection of victims, from a fraternal perspective. This study adopts a qualitative methodology, of a bibliographic and documentary nature, based on the analysis of international treaties, domestic norms, and national and foreign doctrinal production, using the deductive method. It concludes that the right to human development has a legally binding nature, being progressively realized in Brazil through institutional action and the internalization of international parameters, requiring the consolidation of fraternity as the foundation of a more inclusive justice.

Keywords: Human Development. 2030 Agenda. Human Rights. Victims' Rights. SDG 16. Fraternity.

RESUMO

O presente artigo analisa o desenvolvimento humano como compromisso jurídico assumido pelo Estado brasileiro no contexto da internacionalização dos direitos humanos, com

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enfoque na Agenda 2030 das Nações Unidas como marco normativo global de promoção do desenvolvimento sustentável, considerando a fraternidade como categoria jurídica orientadora das relações sociais e da efetivação dos direitos humanos. Parte-se da hipótese de que a incorporação de instrumentos normativos internacionais, ainda que não plenamente vinculantes, impõe deveres estatais de promoção de políticas públicas voltadas à superação da pobreza, à redução das desigualdades sociais e à proteção integral das vítimas de violações de direitos, em consonância com parâmetros internacionais de justiça e dignidade humana. O objetivo é verificar se o direito ao desenvolvimento humano possui natureza vinculante no ordenamento jurídico brasileiro e em que medida o Sistema de Justiça contribui para sua efetivação, especialmente à luz do ODS 16 da Agenda 2030, com destaque para o acesso à justiça, o fortalecimento institucional e a tutela das vítimas, sob uma perspectiva fraterna. Adota-se metodologia qualitativa, de natureza bibliográfica e documental, com base na análise de tratados internacionais, normas internas e produção doutrinária nacional e estrangeira, mediante utilização do método dedutivo. Conclui-se que o direito ao desenvolvimento humano possui natureza juridicamente vinculante, sendo progressivamente concretizado no Brasil por meio da atuação institucional e da internalização de parâmetros internacionais, exigindo a consolidação da fraternidade como fundamento de uma justiça mais inclusiva.

Palavras-chave: Desenvolvimento Humano. Agenda 2030. Direitos Humanos. Direito das Vítimas. ODS 16. Fraternidade.

RESUMEN
Este artículo analiza el desarrollo humano como un compromiso jurídico asumido por el Estado brasileño en el contexto de la internacionalización de los derechos humanos, centrándose en la Agenda 2030 de las Naciones Unidas como marco normativo global para promover el desarrollo sostenible, considerando la fraternidad como categoría jurídica rectora de las relaciones sociales y la realización de los derechos humanos. Parte de la hipótesis de que la incorporación de instrumentos normativos internacionales, aun cuando no sean plenamente vinculantes, impone al Estado el deber de promover políticas públicas dirigidas a superar la pobreza, reducir las desigualdades sociales y brindar protección integral a las víctimas de violaciones de derechos humanos, de conformidad con los parámetros internacionales de justicia y dignidad humana. El objetivo es verificar si el derecho al desarrollo humano tiene carácter vinculante en el ordenamiento jurídico brasileño y en qué medida el Sistema de Justicia contribuye a su realización, especialmente a la luz del ODS 16 de la Agenda 2030, destacando el acceso a la justicia, el fortalecimiento institucional y la protección de las víctimas, desde una perspectiva fraterna. Este estudio adopta una metodología cualitativa, de carácter bibliográfico y documental, basada en el análisis de tratados internacionales, normas internas y producción doctrinal nacional y extranjera, utilizando el método deductivo. Concluye que el derecho al desarrollo humano tiene carácter jurídicamente vinculante, realizándose progresivamente en Brasil mediante la acción institucional y la internalización de parámetros internacionales, lo que requiere la consolidación de la fraternidad como fundamento de una justicia más inclusiva.

Palabras clave: Desarrollo Humano. Agenda 2030. Derechos Humanos. Derechos de las Víctimas. ODS 16. Fraternidad.

1 INTRODUCTION

In the present work it is intended to demonstrate that there is a commitment on the part of the Brazilian Justice System to promote human development, either through the positions of its members, or through the manifestations and judicial decisions issued by the system, or due to the existence of several international treaties and the recognition of the internationalization of human rights.

The United Nations (UN) has worked insistently in search of international consensus for universal cooperation, in order to promote and consolidate respect for Human Rights and fundamental freedoms for all, without distinction of race, sex, language or religion. The UN also recognizes that development is a comprehensive economic, social, cultural and political process, and should be within the reach of all individuals on the planet.

Based on the Universal Declaration of Human Rights, which guarantees everyone the realization of the rights and freedoms enshrined in this provision, and also with a strong appeal to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, in addition to other instruments of the United Nations, it is confirmed that the right to development is an inalienable human right and that equal opportunity for development is an inalienable human right. prerogative of both nations and individuals who make up nations.

The discussion of the theme intends to lead us to understand whether the Brazilian State is legally bound by the principle of human development, even though there is no express regulatory norm in this sense, but as a result of the internationalization of human rights.

Despite the growing normative consolidation of the right to development at the international level, the definition of its binding force and its institutional implementation within the Brazilian justice system still remains controversial in the Brazilian legal doctrine, evidencing a true doctrinal gap.

As a complementary theoretical framework, fraternity is adopted as a relational legal category capable of densifying the effectiveness of human rights in the context of sustainable development.

In view of this scenario, the following research problem arises: to what extent does the right to human development, in the light of the 2030 Agenda and SDG 16, have a legally binding nature in the Brazilian legal system and how has the Justice System incorporated the protection of victims from a perspective guided by fraternity?

The aim is to seek foundations to ensure responses in the sense of affirming Brazil's obligation to implement public policies, at all levels and by all sectors of the State, to ensure the full development of people is one of the objectives of the work, evidencing the legal and institutional relevance of the theme for the effectiveness of human rights.

The second objective is to assess the level of commitment of the Justice System to the Sustainable Development Goals from the context of United Nations Resolution No. 40/34 and the 2030 Agenda that was approved in 2015 by the UN General Assembly, especially under the terms of Sustainable Development Goal (SDG) 16. Therefore,

The article aims to: (i) analyze the link of the Brazilian State to the principle of human development; and (ii) assess the commitment of the Justice System to SDG 16 of the 2030 Agenda.

The present academic discussion aims, based on bibliographic research, using books, articles, doctrine and national and international normative protocols, with the application of the deductive method, to examine the hypothesis of state linkage to sustainable human development, as a presupposition for the guarantee of Human Rights. The research is inserted in the field of public law, with a legal-dogmatic approach and critical-normative analysis.

The article is structured in four sections: initially the concept of development as freedom is discussed; then its legal nature is analyzed; then the performance of the Justice System in relation to SDG 16 is examined; and, finally, the binding nature of human development in the Brazilian context is evaluated from the perspective of fraternity.

2 DEVELOPMENT AND HUMAN RIGHTS

In the contemporary world, how is it possible to think about the concept of development? The expression can lead to reflection on the paths to be taken that will allow the passage from a current state to another future state, this one more developed, more perfect than the previous one. Development can be thought of in terms of evolution or progress, which can be achieved through the expansion of the physical and intellectual capacities of a person, a community, a people, reflecting a higher level of productivity, a better and higher standard of living, whether through the use and enjoyment of new technologies, expansion of energy consumption, greater need for natural resources, all this in the name of progress that feeds back on the new demands that will arise. However, a more in-depth and broader approach will allow other conclusions to be reached, especially from the conception of development as an expansion of human freedoms.

By adding the term "sustainable" to the definition of development, it is possible to think of a more balanced and harmonized form of economic development, so as not to allow the depletion of natural resources or cause environmental damage. For Jeffrey Sachs (2017), sustainable development is a fundamental concept for our time. It is, at the same time, a way of understanding the world and a method to solve global problems. It highlights that, as an intellectual exercise, sustainable development attempts to understand the interactions of three complex systems: the world economy, global society, and the Earth's physical environment, which reinforces the need to integrate economic growth and the expansion of human freedoms.

From this perspective, the theoretical contribution of Amartya Sen stands out, for whom development should be understood as a process of expansion of people's real freedoms, and not just as economic growth or income increase. The author proposes a break with traditional approaches focused exclusively on economic indicators, arguing that development consists of the expansion of human capacities — that is, the concrete possibilities for individuals to live the life they value. Highlighted:

> Development can be seen as a process of expanding the real freedoms that people enjoy. The focus on human freedoms contrasts with narrower visions of development, such as those that identify development with growth in the Gross National Product (GNP), increase in personal incomes, industrialization, technological advancement, or social modernization. The growth of GNP or individual incomes can obviously be very important as a means of expanding the freedoms enjoyed by members of society. But freedoms also depend on other determinants, such as social and economic provisions (e.g., education and health services) and civil rights (e.g., the freedom to participate in public discussions and investigations) (SEN, 2010, p. 10).

Thus, the deprivation of substantive freedoms, such as access to education, health, political participation and justice, is not only a social problem, but a denial of development itself. In this line, development comes to be understood as an instrument and purpose of human rights, establishing an intrinsic relationship between the promotion of freedoms and the performance of state institutions, especially in the context of the justice system.

The realization of processes that seek this form of development, placing the human being at the center of the development process, will allow the world to provide current and future generations with the means of material, intellectual and social subsistence, reaching the global population in a more equal way.

In this way, it will seek to create minimum conditions for a global human coexistence, based on the reduction of poverty, misery and deprivation, considered as the great contemporary challenges, especially when understood as restrictions on fundamental freedoms. Any discontent with such a state has the potential to generate ruptures with universal peace and harmony, as highlighted in the Declaration of Philadelphia[3].

Within this context, development cannot and should not be received as a simple economic, material and technological evolution of small groups of people or of certain countries, with the prevalence of the logic of quantity. On the contrary, it should be thought of broadly, focusing on improving the quality of life of socially excluded populations. This exclusion can be manifested by the absence of access to minimum and dignified daily food for the survival of a human being, by the precariousness of health and basic sanitation services, by the limitation of access to quality education, as well as by restrictions on access to justice, configuring structural deprivations of freedom. Jeffrey Sachs explains, in this point, that:

> The world economy is growing rapidly (3-4 per cent per year) and is extremely unequal in the distribution of income within and between countries. We live in a world of fabulous wealth and extreme poverty. In this way, it can be seen that the look at development is no longer strictly linked only to the economy, but also reaches the legal bias, which will appropriate the concept, aligning it with human rights, thus valuing, above all, the search for the dignity of the human being (SACHS, 2017, p. 12).

In this context, the concept of development is no longer restricted to the economic dimension, but incorporates social, legal and institutional dimensions, with a focus on the dignity of the human person. The author goes on to state that "a good society is not only an economically prosperous society, but also a socially inclusive, environmentally sustainable and well-governed society" (SACHS, 2017, p. 23).

Economic progress can no longer be detached from social progress. With this new look, a new perspective is opened for the work of the United Nations (UN), international organizations that act in defense of human rights, States and justice systems. The growing awareness of environmental issues and their global impacts has driven institutional and regulatory changes, with the aim of reorganizing development policies and promoting a social order more oriented to human dignity.

Still in this expanded perspective, the international community began to overcome strictly economic conceptions of development, adopting the paradigm of sustainable development. This concept shifts the central axis of reference, from the economy to the human being. With this approach, guided by an intergenerational commitment, the UN has

[3] The Declaration of Philadelphia, referring to the aims and objectives of the International Labor Organization, was approved at the 26th meeting of the Conference (Philadelphia – 1944).

structured a set of guidelines aimed at promoting global sustainable development. This proposal became known as Agenda 21, approved at ECO-92 or Rio-92 by 178 countries[4].

The United Nations Conference on Environment and Development represented a watershed that definitively placed the environmental and ecological agenda on the international agenda. This mobilization highlighted the need to adopt more sustainable production and consumption patterns, consolidating global commitments aimed at environmental protection.

One of the central approaches of this study is to analyze how the Sustainable Development Goals (SDGs) have been implemented in Brazil. The 2030 Agenda establishes 17 interdependent and ambitious goals aimed at overcoming global challenges. Considering the breadth of the theme, it would not be possible to take a critical look at all the proposed goals, so the analysis will be limited to SDG 16 – Peace, Justice and Effective Institutions –, which aims to promote peaceful and inclusive societies, ensure access to justice and strengthen effective institutions at all levels, which is directly related to the expansion of institutional and legal freedoms (UN, 2015).

3 ON THE RIGHT TO DEVELOPMENT AND THE SUSTAINABLE DEVELOPMENT GOALS

Agenda 21, presented on the basis of UN General Assembly Resolution No. 44/228 of December 22, 1989, establishes a balanced and integrated approach to issues related to the environment and development. This work agenda sought to create objectives and commitments aimed at the twenty-first century, mapping priority problems, resources and means to face them. The achievement of all the goals, which are not restricted only to environmental problems, but also act to eradicate poverty and consolidate human rights, does not depend exclusively on governments, but requires the involvement of civil society, in a true cultural revolution, which reveals the progressive link between sustainable development and human rights.

In the midst of the implementation of the measures proposed by Agenda 21, the UN General Assembly was held in September 2015 in New York, with the presence of world leaders and representatives of civil society, where a new action plan was adopted to eradicate poverty, protect the planet and ensure that people achieve peace and prosperity. This plan is

[4] ECO-92, also called the Earth Summit, took place in Rio de Janeiro in 1992. Important results and commitments were obtained from this conference, considered one of the most important ever held, represented a milestone in the discussions on environmental preservation and sustainable development. Agenda 21 is one of the most important instruments to have resulted from ECO-92. It is an action plan developed so that countries could, based on it, elaborate and implement measures aimed at sustainable development, which, in order to be achieved, must jointly cover the following fronts: environmental conservation; social justice; economic growth. Available at: https://brasilescola.uol.com.br/geografia/eco-92.htm. Accessed on: 03 May 2026.

called the 2030 Agenda for Sustainable Development and resulted in the creation of 17 Sustainable Development Goals (SDGs), which include 169 targets, based on the old Millennium Development Goals (MDGs).[5] The 2030 Agenda, endowed with a genuinely humanist essence, reaffirmed the objectives of Agenda 21 and broadens its scope, becoming one of the main international normative instruments with greater scope.

Sustainable Development Goal 16 – Peace, Justice and Strong Institutions – aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels (UN, 2015). Sustainable development, which places the human person as a central subject, is seen as the appropriate path to world peace, especially when associated with the effectiveness of fundamental rights.

SDG 16 is quite broad and encompasses several different themes. For this reason, and specifically, it is appropriate to direct the discussion to sub-items 16.1, 16.2 and 16.3, namely: reduction of all forms of violence and related mortality rates everywhere; combating abuse, exploitation, trafficking and all forms of violence and torture against children; promotion of the rule of law, at the national and international levels, and ensuring equal access to justice for all. These themes deal, in short, with the reduction or elimination of all forms of violence, broad access to justice and unrestricted protection of fundamental freedoms.

Inthe field of the development of peoples, the Catholic Church had already expressed its Christian vision on the subject, through Pope Paul VI, in the following terms:

> Development is not reduced to simple economic growth. To be authentic, it must be integral, that is, it must promote all men and the whole man, as an eminent expert rightly and forcefully emphasized: "We do not accept that the economic is separated from the human; nor the development of the civilizations in which he was included. What counts for us is man, each man, each group of men, until we reach the whole of humanity" (PAUL VI, 1967).

In the same sense, Pope Francis expressed himself in the terms of the Encyclical Letter *Laudato Si*: "Technological and economic development, which does not leave a better world and an integrally superior quality of life, cannot be considered progress" (FRANCISCO, 2015, p. 148).

So far, the way in which a global commitment to a better and fairer distribution of income has been built, with a focus on eliminating poverty and preserving the environment.

[5] For more information, see the document available at https://brasil.un.org/pt-br/91863-agenda-2030-para-o-desenvolvimento-sustentável. Accessed on: 03 May 26.

The sustainability of development is already a consensus, however, it is necessary to discuss the scope of this development and whether it can be considered as a right, especially at the international legal level.

The Declaration on the Right to Development, proclaimed by the UN in 1986 and accepted by 146 States, confirms that the right to development is an inalienable human right (Article 1), recognizesthat the human person is the central subject of the development process (Article 2) and declares that all human rights and fundamental freedoms are indivisible and interdependent (Article 6). Therefore, the right to development must be seen as a global process of maximizing economic, social and cultural freedoms.

It should be added that in the same sense, the Vienna Declaration of 1993 ratifies its universal and inalienable character, and must be implemented and carried out. Thus, "the recognition of the Right to Development as a universal right gives it protection in the international sphere, thus allowing them to be postulated as true rights and not as mere charity, generosity or compassion" (PIOVESAN, 2002, p. 5), distancing its understanding as a mere programmatic guideline.

According to Flávio Pansieri (2016), when addressing some concepts of Amartya Sen's work Development as Freedom, he will highlight that the guarantee of development must go through the expansion of freedoms. He emphasizes that freedom is the central point of this process and is indispensable for the achievement of the condition of agent of individuals. This condition will confer on individuals the status of being agents of transformation of their own realities and protagonists of their own destinies. Regarding the definition of the term agent condition, it is worth highlighting Amartya Sen's definition:

> I am using the term agent not in this sense[6], but in its older—and "greater"—sense of someone who acts and brings about change and whose achievements can be judged according to his own values and goals, regardless of whether or not we evaluate them according to an external criterion. This study is particularly concerned with the role of the individual's condition as an agent as a member of the public and as a participant in economic, social and political actions (interacting in the market and even getting involved, directly or indirectly, in individual or joint activities in the political sphere or in other spheres) (SEN, 2000, p. 24).

An inhibiting factor to achieve this condition of agent thought by Amartya Sen is the incidence of extreme poverty, which makes the individual vulnerable to the violation of his freedoms. Poverty generates deprivations of all kinds: physical, material, structural and

[6] The meaning to which the author refers is the use of the term agent made in the literature of economics and game theory in reference to a person who acts on behalf of another and whose objectives must be evaluated in the light of the objectives of his principal. Amartya wants to indicate with this term a republican aspect in the sense that people act on their own in search of progressive social development.

psychological, such as hunger, malnutrition, diseases, housing deficit, lack of water, lack of basic sanitation, among others. Without the possibility of access to adequate opportunities, it is not possible to exercise individual protagonism. In this context, it is essential to prioritize actions aimed at reducing inequalities, allowing the expansion of freedoms and, therefore, the formation of agents of social transformation.

The journey towards development requires the commitment of different social actors, such as governments, companies, civil society, and public authorities. Everyone must assume responsibilities in the construction of a model oriented to human dignity in the economic, social and cultural spheres, as a way of materializing the proposal of intergenerational solidarity. According to Wagner Balera (2016, p. 46) "only that development that incorporates intergenerational commitment as a guideline for the common future of humanity will meet the requirement of sustainability".

At this rate, it is clear that the Sustainable Development Goals show a reaction of the international community to the individualistic and selfish posture of those who have historically benefited from progress to the detriment of significant portions of the population. It is a model marked by the concentration of wealth, environmental degradation and the centrality of economic growth, in contrast to the contemporary proposal of development guided by human rights and the expansion of freedoms.

4 THE INTERNALIZATION OF SDG 16 OF THE 2030 AGENDA IN BRAZIL: THE ROLE OF THE JUSTICE SYSTEM AND THE CENTRALITY OF VICTIMS IN THE REALIZATION OF HUMAN RIGHTS

The United Nations 2030 Agenda, by establishing Sustainable Development Goal 16, introduces a new normative rationality in the field of human rights, by directly linking sustainable development to the promotion of access to justice, the strengthening of institutions and the construction of peaceful and inclusive societies. In this context, the victims' rights emerge as a central element of this normative architecture, to the extent that the effectiveness of access to justice cannot be dissociated from the guarantee of full protection for those who suffer rights violations. Thus, the Brazilian Justice System starts to play a strategic role in the implementation of these guidelines, requiring institutional action guided not only by the repression of illicit acts, but essentially by the promotion of rights, the reparation of damages, access to information and the centrality of the victim in the justice process.

In the current conjuncture of the contemporary Brazilian criminal procedural system, the right of victims to access justice is recognized. The participation of individuals directly in the proceedings initiated by the State, and, exceptionally, by the victims themselves, against the alleged perpetrators of the violations suffered and generating damage, is admitted, aiming at individual accountability. This process of expanding the participation of victims in the justice system is supported by the international guidelines consolidated by the 2030 Agenda, especially within the scope of SDG 16, which reinforces the need to build and consolidate solid institutional mechanisms that are more inclusive and accessible, even as a way to overcome evident legislative deficiencies.

With the incidence of the 2030 Agenda and the goals established by SDG 16, the role of victims within the Law grows in relevance. The victim has always been seen, especially in criminal proceedings, as a subject of production of evidence, the one who presents himself and seeks to establish a link between the alleged perpetrator of the crime and the fact investigated. Under this new approach, a progressive expansion of the role of victims in the penal system is expected. When analyzing public policies aimed at victims in the face of the incidence of the 2030 Agenda, Antonio Suxberger and Henrique de Castro highlighted:

> The victim was relegated for a long time to a secondary position within the Law: either due to the lack of interest in the victim as an object of study, or by the victim as the subject who suffers the crime, reflected in the lack of legal norms that dealt with how the victim should be treated after the crime occurred (SUXBERGER; CASTRO, 2020, p. 187).

Such a position ends up reflecting the precariousness of legal norms that establish a clear rule about the treatment given to victims and their rights in criminal proceedings. In this traditional model, the State is the holder of the criminal action and the focus falls on the accused. The traditional structure of the criminal process was not designed and conceived with the objective of welcoming the victims, which is why it is necessary to adapt it to allow the realization of rights, avoid re-victimization and prevent human rights violations. This need for institutional reconfiguration dialogues directly with the commitments assumed by Brazil at the international level, especially with regard to the promotion of broad and effective access to justice, as recommended by SDG 16 of the 2030 Agenda.

This phase of expansion and increase in the procedural prerogatives of victims is not unanimous in the legal world, as there are those who maintain that this expansion can generate restrictions on the rights of the accused. One of the foundations of this expansion lies in the possibility of promoting the restoration of the victim in the physical, psychic and material aspects, contributing to the humanization of procedural procedures. It is also an instrument of empowerment, insofar as the victim is moved to the center of the criminal procedural dynamics. According to Osmo and Martin-Chenut, the expansion of the participation of victims in the criminal process reveals structural tensions between guarantees of the accused and demands for recognition and reparation. The reassessment of the role of the victim in the criminal process is highlighted:

> The actors in the process - the Public Prosecutor's Office, the accused and the victim - would participate in the collective elaboration of a judicial truth. The criminal process, instead of being dominated by the confrontation between two antagonistic parties, would become a privileged place of communication (OSMO; MARTIN-CHENUT, 2017, p. 1469).

In the international dimension of human rights, UN Resolution No. 40/34 of 1985 stands out, which established the Declaration of Basic Principles of Justice Relating to Victims of Crime and Abuse of Power, adopted by the General Assembly on November 29, 1985. These are the first chords that sheltered the victim in the context of the criminal process and represent the initial milestone in the protection of victims in the criminal process. The resolution falls within the scope of international law as a *soft law* instrument, characterized by its non-binding nature and without the force of law.

Despite their non-binding nature, such instruments exert a relevant influence on the shaping of public policies and institutional practices, especially when articulated with global agendas such as the 2030 Agenda. Carlos Ayres Britto, when analyzing the influence of these instruments on the domestic legal system, points out that:

> Thus, *soft law* can be seen as a legal advantage by allowing the transformation of the internal order through international non-binding discussions and guidelines. In such cases, even if it is not exactly a positive and binding norm, based on the international experience observed, it emerges as an instrument for the law to evolve more quickly, especially due to the delay of the law in the face of social transformations (BRITTO, 2020).

Only 23 years after these first international advances, the Brazilian legislator promoted changes in criminal procedural legislation[7]. Through Federal Law No. 11,690/2008, specific victims' rights were incorporated into the Code of Criminal Procedure[8], with emphasis on

[7] Other initiatives can be checked by consulting Federal Law No. 11,340, of August 7, 2006 – Maria da Penha Law.

[8] Article 201. Whenever possible, the aggrieved party will be qualified and asked about the circumstances of the infraction, who is or presumes to be the perpetrator, the evidence he can indicate, and his statements will be concluded.

§ 1 If, summoned for this purpose, he fails to appear without just cause, the aggrieved party may be taken to the presence of the authority.

§ 2 The aggrieved party shall be informed of the procedural acts relating to the entry and exit of the accused from prison, the designation of a date for the hearing and the sentence and respective judgments that maintain or modify it.

access to information, communication of procedural acts, protection against contact with the accused, multidisciplinary care and data protection. Such advances, although relevant, are still insufficient in the face of the contemporary requirements imposed by the 2030 Agenda, which demands a broader and more structured approach to protecting victims.

Resolution No. 40/34 provides a broad definition for the term victim and recommends that victims be treated with compassion and respect for dignity. It establishes guidelines regarding access to justice, reparation of damages, whether by the perpetrator of the violation or by the State itself, compensation, material, medical, psychological and social assistance. With the signing of the 2030 Agenda document, in 2015, the members of the Brazilian Justice System began to adopt protocols aimed at meeting the goals related to institutional functioning. This normative convergence evidences the progressive incorporation of the paradigm of full protection of victims within the scope of Brazilian institutions.

Initially, the Judiciary, on September 4, 2018, making express reference to Resolution No. 40/34, issued Resolution No. 253, of the National Council of Justice (CNJ), recognizing the absence of specific legislation, and instituting a policy of attention and support for victims. This policy aims to ensure dignified, equitable and respectful treatment by judicial bodies. Its implementation seeks to expand the system of protection for victims, in line with the UN 2030 Agenda. This initiative represents a milestone in the acceptance and internalization of the SDG 16 guidelines within the Brazilian Judiciary.

Subsequently, in 2021, the Public Prosecutor's Office, through the National Council of the Public Prosecutor's Office (CNMP), adapted its institutional performance to meet the goals of SDG 16, of the United Nations. Resolution No. 243, of October 18, 2021, establishes the Institutional Policy for Integral Protection and Promotion of Rights and Support for Victims, based on the constitutional principles of human dignity and the prevalence of human rights, in addition to referring to UN Resolution No. 40/34. Therefore, there is a coordinated action among the organs of the Justice System in the implementation of policies aligned with international guidelines for the protection of victims.

It should be noted that the policy established by the Judiciary focuses on attention and support for victims, while that of the Public Prosecutor's Office adopts a more comprehensive

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§ 3 Communications to the aggrieved party shall be made at the address indicated by him/her, admitting, at the option of the aggrieved party, the use of electronic means.
§ 4 Before the beginning of the hearing and during its realization, a separate space shall be reserved for the aggrieved party.
§ 5 If the judge deems it necessary, he may refer the injured party to multidisciplinary care, especially in the psychosocial, legal assistance and health areas, at the expense of the offender or the State.
§ 6 The judge shall take the necessary measures to preserve the intimacy, private life, honor and image of the offended party, and may even determine the secrecy of justice in relation to the data, testimonies and other information contained in the records about him or her to avoid their exposure to the media." (NR)

approach, aimed at the full protection and promotion of rights. This distinction reveals different levels of internalization of the guidelines of the 2030 Agenda, with the Public Prosecutor's Office taking a more proactive stance in the promotion of rights. Unlike the CNJ resolution, the CNMP regulation expressly emphasizes fundamental rights as the central axis of institutional action, as can be seen by reading its first article, extending its protection even to situations of serious human rights violations, even if not resulting from criminal offenses.

> Art. 1 This Resolution establishes the Institutional Policy for the Integral Protection and Promotion of Rights and Support for Victims, with the objective of ensuring fundamental rights to victims of criminal offenses, infractions, natural disasters, public calamities and serious human rights violations, guaranteeing them access to information, communication, participation, truth, justice, due diligence, security, support, individualized and non-discriminatory professional treatment, physical, property, psychological and personal data protection, participation and reparation of material, moral and symbolic damages, sustained as a result of the victimizing fact (CNMP, 2021).

The ministerial policy, under the terms of Resolution No. 243/2021, broadly defines the concept of victim, including not only the subject directly affected, but also reaching family members and close people who have been affected in some way by a conduct. It establishes priority for victims who are considered to be in a condition of vulnerability due to age, gender, disability, state of health, or the conditions, nature, and duration of the victimization caused by the crime and who have experienced serious physical or psychological consequences, and provides for a set of rights to be ensured. It also assigns the duty to promote public policies, aiming at the effectiveness of the rules for the protection of victims. Finally, it places the victim as the central axis of the institutional action of the Public Prosecutor's Office. Such an institutional design is directly close to the SDG 16 guidelines, especially with regard to the construction of effective, accountable and inclusive institutions.

In view of this scenario, it is possible to verify that the initiatives of the governance and management bodies of the Judiciary and the Public Prosecutor's Office, in the exercise of the powers established in articles 103-B and 130-A of the Federal Constitution of 1988, are harmoniously aligned with UN Resolution No. 40/34 and with Goal 16 brought by the 2030 Agenda, also from the United Nations. Notably, sub-items 16.1, 16.2, and 16.3 are those that have a pertinent relationship with the construction and implementation of public policies aimed at protecting victims of crimes and infractions.

The institutional agendas launched by the CNJ and CNMP, applicable throughout the Brazilian Judiciary and Public Prosecutor's Office, are in line with the objectives proposed by the United Nations and contribute to making institutions more effective in guaranteeing fundamental rights. Such alignment highlights the progressive convergence between domestic law and the international commitments assumed by Brazil within the scope of the 2030 Agenda.

It is also noteworthy that the processing of Bill No. 3890/2020 (Statute of Victims), whose final wording was approved by the Chamber of Deputies on December 11, 2024 and on December 18 of the same year, had its proposal forwarded to the Federal Senate, where it is still awaiting deliberation[9]. The proposal represents progress in the consolidation of a fairer model of treatment for victims, in line with the guidelines of the UN 2030 Agenda and the perspective of a State oriented to the protection of fundamental rights. The project recognizes the importance of the role of society and the welfare state model, in the face of historical, collective and structural victimization experienced nationally and internationally. If approved, the Victims' Statute may represent the normative consolidation, at the domestic level, of the international guidelines for the protection of victims, strengthening the implementation of SDG 16 in Brazil.

The analysis developed from the perspective of human rights allows us to conclude that the Brazilian Justice System not only incorporates international guidelines, but also acts as an active agent of normative internalization, especially through *soft law instruments*, promoting the progressive institutionalization of victim protection, even in the absence of fully consolidated formal legislation, since the bill of the Statute of Victims is still in its pending in the National Congress. Such a movement, however, is not exempt from criticism, especially from the perspective of criminal guaranteeism, which points to risks of normative expansion without formal legislative support.

Such a movement reveals the transition from a procedural model centered on the State-accused conflict to a more inclusive perspective, guided by the centrality of the victim and the effectiveness of human rights.

5 HUMAN DEVELOPMENT AS AN INTERNATIONAL COMMITMENT FROM THE PERSPECTIVE OF FRATERNITY

Recognizing the rights of victims as a fundamental right, it is necessary to analyze the relationship between human rights and victims' rights. Considering that the Declaration on

[9] After approval in the Chamber of Deputies, Bill No. 3890/2020 was filed in the Federal Senate on December 20, 2024. On October 2, 2025, it received in the Commission on Human Rights and Legislative Participation, a Legislative Report, authored by Senator Weverton, with a vote for its approval. It was approved by the Commission on October 8, 2025. On October 16, 2025, the Bill was distributed to the Public Safety Committee of the Federal Senate, but only on November 14, 2025 was it distributed to Senator Wilder Morais, to issue a report. To date, the Project is in this situation. Available at: https://www25.senado.leg.br/web/atividade/materias/-/materia/166908. Accessed on: 03 May 2026.

the Right to Development, proclaimed by the UN in 1986, confirms that the right to development is an inalienable human right, recognizes the human person as a central subject in the development process and affirms the indivisibility and interdependence of human rights. The Vienna Declaration of 1993 ratifies this understanding, by establishing that the right to development is a universal and inalienable right, which is part of fundamental rights. In view of this normative framework, it is necessary to examine the existence of a legal commitment of the Brazilian State to the promotion of human development.

In the historical normative plan of human rights, it is evident that Brazil has adhered to the main international instruments for the protection of Human Rights. Initially, the Charter of the United Nations, signed in San Francisco, on June 26, 1945 and ratified by Brazil, through Decree No. 19,841, of October 22, 1945, stands out. The document enshrines fundamental freedoms, the maintenance of peace as a common goal, the resolution of conflicts in a peaceful and negotiated manner and the principle of equality and self-determination of peoples.

The Universal Declaration of Human Rights of 1948 enunciates fundamental rights and affirms respect for the dignity of the human person as a central value. It recognizes that dignity is inherent to the human condition and has been incorporated into national legal systems. In Brazil, it acquired *constitutional status* under the terms of article 1, III, of the Federal Constitution of 1988[10].

The International Covenant on Civil and Political Rights, signed on December 16, 1966, was ratified by Brazil, through Decree No. 592, of July 6, 1992. The document established a list of rights, which in summary configures a set of obligations imposed on States, with immediate applicability, structuring a system of protection for individuals against violations of their civil and political rights.

The International Covenant on Economic, Social and Cultural Rights, signed on December 16, 1966 and ratified by Brazil, via Decree No. 591, of July 6, 1992, established a broad list of rights, such as: the right to an adequate standard of living, housing, education, health, among others, recognizing the progressive nature of such rights and the need for state measures for their implementation.

The Covenant does not allow for the restriction or neglect of any of the fundamental human rights recognized or in force in a country by virtue of laws, conventions, regulations or customs (art. 5.2). It also imposes an obligation on the signatory States, in order to give

[10] Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, is constituted as a Democratic State of Law and has as its foundations: I - sovereignty; II - citizenship; III - the dignity of the human person; IV – the social values of work and free enterprise; V - political pluralism.

effect to the list of rights established therein, to prepare programs, norms and techniques with the objective of achieving constant economic, social and cultural development and full and productive occupation, in conditions that ensure the fundamental political and economic freedoms of the human person (art. 6.2) and also the duty to account for the measures implemented and results achieved (art. 16.1). Thus, the adoption of public policies aimed at development is not configured as a mere state faculty.

The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights are manifestations of reaffirmation and guarantee of fundamental rights, aimed at promoting the dignity of the human person. Such international normative instruments, by enshrining the indivisibility and interdependence of human rights, establish a model of integral protection that imposes on States not only negative duties of abstention, but also positive obligations to promote and realize rights. In this context, the right to human development emerges as the maximum expression of the requirement to implement public policies capable of ensuring material and institutional conditions for the full exercise of freedoms.

Another normative instrument to be considered is the American Convention on Human Rights (Pact of San José, Costa Rica), dated November 22, 1969, and incorporated into the national legal system, through Decree No. 678, of November 6, 1992. The Convention, in its preamble, reaffirms the commitment to economic, social and cultural rights, as well as to their civil and political rights, imposing on States the duty to adopt domestic measures to ensure their effectiveness.[11] Thus, the existence of a legal-formal commitment is evident. Firm in this sense is the wording of the first article of the decree that promulgated the Convention, when it states categorically that the Convention "shall be complied with as fully as it is contained therein".

The contemporary conception of human rights consolidated in the Universal Declaration of Human Rights and in Resolution No. 32/130 of the United Nations General Assembly establishes: "all human rights, whatever the type to which they belong, are interrelated with each other, and are indivisible and independent", where they all complement each other and interact in a dynamic way.

This understanding drove the creation of a global normative system of protection, based on the elaboration and adoption by member countries of numerous treaties aimed at the protection of fundamental rights. This system, seen as of international interest and not

[11] ARTICLE 2. Duty to Adopt Provisions of Domestic Law. If the exercise of the rights and freedoms referred to in Article 1 is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional requirements and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to such rights and freedoms.

only of interest of the States, will deserve normative treatment in both instances. This new order brings as a consequence the possibility of "forms of international monitoring and accountability, when human rights are violated" (PIOVESAN, 2018, p. 61).

The Declaration on the Right to Development, adopted by UN General Assembly Resolution 41/128 on December 4, 1986, maintains the logic of the systematic interpretation of ratified international treaties and the internal constitutional order that imposes the legal obligation to promote human development. According to Martins and Siqueira, this agenda is a priority and "the legal obligation of the Brazilian State to promote the development of the human person in the national territory is maintained, especially when the country has chosen to be part of the protective systems of internationalization of the protection of human rights". And they conclude:

> This legal obligation is taken from article 3, item II of the Federal Constitution of 1988, which has as a fundamental objective of the Federative Republic of Brazil the guarantee of national development (BRASIL, 1988). The right to human development goes beyond the material provision to the person, in the sense of providing material means of subsistence, but rather represents a coalition of dimensions that involve the very founding basis of a State, its values and central objectives (MARTINS; SIQUEIRA, 2017, p. 300).

The legal model adopted by Brazil to relate and interact with the international normative apparatus for the protection of human rights was clearly evidenced after the enactment of Constitutional Amendment (EC) 45, of 2004, of the Federal Constitution of 1988. International human rights treaties may acquire constitutional *status* when approved under the terms of article 5, paragraph 3, or supra-legal status, as understood by the Federal Supreme Court, reinforcing the protection of human rights in the country. "The International Convention on the Rights of Persons with Disabilities, internalized through Decree 6,949/2009, was the first international treaty approved by the legislative rite provided for in article 5, paragraph 3, of the FC" (LIMA, 2020, p. 176).

The existence of a modern and integrated normative system is essential to curb human rights violations. However, the role of the Judiciary in the effectiveness of this protection must be considered. In this sense, it is up to the Judiciary to ensure effective judicial provision, contributing to the realization of human rights at the domestic level.

The Federal Constitution enshrines an extensive list of fundamental rights, not exhaustive, and enshrines human dignity as a fundamental structuring principle in the constitutional text. In the face of profound social transformations, added to the emergence of new trends and the incorporation of contemporary values, it is up to the Judiciary to interpret domestic and international norms in an evolving, progressive and dynamic way, allowing the incorporation of international standards of protection.

Jurisdictional dialogue with international courts, such as the Inter-American Court of Human Rights, is an important instrument for strengthening this protection and consolidating a culture of Human Rights in Brazil. These dialogues allow the Brazilian Courts to receive the decisions of the international Courts as a hermeneutical criterion, as an interpretative guide or even as a guiding criterion for their decisions.

It can be argued that one way to promote human development is to apply the principle of solidarity. The Federal Constitution enshrines solidarity as a principle of the Federative Republic of Brazil, under the terms of its article 3, I, by establishing as a fundamental objective the construction of "a free, fair and solidary society". Applying solidarity in a preponderant way as a principle of the Republic could allow the construction of a more effective path to achieve the goals of eradicating poverty, social marginalization and reducing social inequalities.

The principle of solidarity[12] imposes on the State the duty to promote human development with a view to achieving the common good, overcoming poverty and social exclusion. Economic development must be understood as a means to the realization of social justice and not as an end in itself. This guideline reinforces the link between development and human rights at the normative level. As Fernando Antônio de Freitas Lima (2020, p. 79) argues, "in view of this intrinsic and essential relationship between human rights and the dignity of the human person, it is inevitable to relate poverty to the violation of human rights", concluding that such a circumstance represents "an affront to human dignity" since "poverty is also indisposing against human rights" (LIMA, 2020, p. 79).

Notwithstanding the express reference to solidarity in the legal-constitutional plan, it is necessary to move towards a broader understanding of social relations, based on the incorporation of the principle of fraternity as a relevant legal category. Unlike solidarity, which is predominantly structured in a vertical logic, guiding the State's action in the promotion of public policies, aiming to reduce inequalities, fraternity has a horizontal dimension, based on the recognition of the other as a subject of rights and on the construction of bonds of community belonging.

In this sense, fraternity is not limited to imposing institutional duties, but projects an ethics of social relations that reinforces co-responsibility between individuals, between social groups and institutions, constituting the foundation for a more inclusive and participatory culture of human rights, in line with the guidelines of the UN 2030 Agenda. From this

[12] In this sense, see the work "Constitutional Principle of Solidarity" by Carmen Lúcia Antunes Rocha (2025).

perspective, human development is no longer understood only as the result of state actions and is now seen as a collective process, which requires social engagement and reciprocal recognition. This ethical-legal principle is consolidated in the preamble of the Federal Constitution of 1988:

> We, representatives of the Brazilian people, gathered in the National Constituent Assembly to establish a Democratic State, destined to ensure the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society, founded on social harmony and committed, in the internal and international order, with the peaceful solution of the controversies, we promulgate, under the protection of God, the following CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL (BRAZIL, 1988).

Although the majority doctrine understands the preamble as non-mandatory, it is argued that it works particularly in the Brazilian case as a prior commitment, and "it was exactly from the preamble that the stage and the preliminary argumentative line were unveiled, aiming at the rescue of the principle of fraternity. Therein lies the genesis of its constitutional guarantee" (MACHADO, 2025, p. 168).

Firm in the recognition of the normative force of the Preamble of the Federal Constitution of 1988 and in the relevant legal consequences that this recognition entails, Carlos Augusto Alcântara Machado sustains his understanding based on the doctrine of José Afonso da Silva, that:

> when the preamble of the 1988 Constitution [...] uses the verb "to ensure" and, moreover, "to ensure the exercise" of rights and values, it presents itself with an outstanding function of dogmatic-constitutional guarantee, in addition to an unequivocal pragmatic function, with the immediate effect of prescribing to the State an action in favor of the effective realization of values, with specific content, towards the addressees of the constitutional norms that give these values specific content. The preamble will therefore have an undeniably clear directive function (MACHADO, 2025, p. 172-173).

The Brazilian Supreme Court, distancing itself from the previous understanding that the preamble has no normative force, does not create rights or duties and does not serve as a parameter for controlling constitutionality, and that it deals only with a text of a political and ideological nature, has moved in the direction of the evolution of constitutionalism to recognize the principle of fraternity. Overcoming past understandings, it was established that the principle of fraternity was incorporated as a guiding vector of the decisions of the Federal Supreme Court. The following stand out:[13]

> Not only will the State be called upon to formulate public policies that can lead to well-being, equality and justice, but society will have to organize itself according to those values, so that it may establish itself as a fraternal, pluralistic and unprejudiced community (...). And, expressly referring to the Preamble of the Brazilian Constitution of 1988, José Afonso da Silva states that "The Democratic State of Law is intended to ensure the exercise of certain supreme values. ' Ensuring', has, in the context, the function of dogmatic-constitutional guarantee; not, however, of guaranteeing the values abstractly considered, but of their 'exercise'. This sign performs, in this case, a pragmatic function, because, with the objective of 'ensuring', it has the immediate effect of prescribing to the State an action in favor of the effective realization of the said values in the direction (directive function) of the addressees of the constitutional norms that give these values specific content" (...). In the wake of these supreme values explained in the Preamble of the Brazilian Constitution of 1988, the legal principle of solidarity is affirmed in the current constitutional norms. [ADI 2.649, vote of rel. min. Cármen Lúcia, j. 8-5-2008, P, DJE of 17-10-2008.]
> The construction and effective achievement of a fraternal, pluralistic and prejudice-free society, as provided for in the preamble of the Federal Constitution, unequivocally involves a rupture with the praxis of a society based on the constant exercise of domination and disrespect for the dignity of the human person. The promotion of the good of all, in fact, without prejudice of origin, race, sex, color, age and any other forms of discrimination is one of the fundamental objectives of the Federative Republic of Brazil, listed in article 3 of the Federal Constitution of 1988. Thus, the delimitation of the material scope for the application of the "decriminalizing" agreement and the inhibition of persecutio criminis requires compliance with the Constitutional text and with the commitments assumed by the Brazilian State internationally, as a necessary limit for the preservation of the fundamental right to non-discrimination and non-submission to torture – whether psychological or physical, to the inhuman or degrading treatment, operated by the set of stereotyped meanings that circulate and that attributes both women and black people an inferior position, in a perverse hierarchy of humanities. [RHC 222.599, min. rel. Edson Fachin, j. 7-2-2023, P, DJE of 23-3-2023.].

Thus, while solidarity guides state action in reducing inequalities, fraternity broadens this horizon by promoting social integration and the strengthening of community ties, becoming an essential element for the realization of human rights and, in particular, for the construction of a model of justice that recognizes the centrality of victims and the need for more humane responses. inclusive and restorative. Only through a true infra and ultra-legal social recognition, in the sense of taking the other into account, effectively disseminated in society, will it be possible to achieve the legal dimension of citizenship and equality guaranteed by law. "In order for the rule of equality to be legally effective, it is necessary that

[13] The Constitution and the Supreme Court. Available at: https://portal.stf.jus.br/constituicao-supremo/artigo.asp?item=2. Accessed on: 04 May 2026.

the perception of equality in the dimension of everyday life is effectively internalized" (SOUZA, 2003, p. 63).

According to Luís Fernando Barzotto, "the attitude against solidarity is indifference. Indifference is the affirmation that the other is not in unity with me, does not belong to my community, that is, his good is not linked to my good" (BARZOTTO, 2018, p. 82). He will also highlight that "solidarity acts, in a fraternal perspective, to make up for the eventual inability of the other to exercise his own freedom, but it must aim at the moment when the other "will walk on his own feet"" (BARZOTTO, 2018, p. 86).

From this formulation, it is possible to identify that solidarity, although essential, cannot be sustained autonomously without the presence of a deeper foundation of a relational nature, that is, fraternity. This is because the overcoming of indifference does not occur only at the normative level and through state benefits or public policies, but requires the recognition of the other as a member of the same moral and legal community.

In this sense, fraternity can be understood as a legal category under construction, which operates as an integrating element of human rights, by establishing bonds of belonging and co-responsibility among individuals. Unlike solidarity, which is predominantly projected in the action of the State, fraternity acts in the horizontal dimension of social relations, promoting an ethics of recognition and inclusion. According to Sandro dos Santos, the dignity of the human person and fraternity are mutually strengthened.

> The dignity of the human person represents the central axis of human rights and presents itself as a substrate capable of structuring fundamental rights. The dignity of the human person and fraternity complement each other: the former serves as the foundation for the latter, which in turn represents the means by which the former manifests and materializes itself (SANTOS, 2023, p. 49).

The reading proposed by Barzotto allows, therefore, to understand solidarity as an institutional expression of fraternity, insofar as it is materialized in legal duties imposed on the State to reduce inequalities, while the latter provides the axiological substrate, supported by a strong community bond, necessary for its effectiveness. Thus, it is not a question of antagonistic categories, but complementary, with fraternity being the element that gives meaning and depth to the very idea of solidarity.

In the context of human development, this distinction is particularly relevant, as it shows that the promotion of rights cannot be limited to state action, but must incorporate social practices guided by the recognition of the dignity of the other. For this reason, this aspect can be recognized as a "dimension of shared "dignity", in the non-legal sense of "taking the other into consideration" (SOUZA, 2003, p. 63). From this perspective, "not only the State must mobilize to provide the enjoyment of rights for all members of society, but also the individuals themselves, in an inclusive and democratic perspective" (SANTOS, 2023, p. 50).

This perspective gains special relevance when analyzing the rights of victims, whose protection requires not only institutional responses, but also a profound cultural change that breaks with indifference and promotes inclusion, empathy and reparation. This process of social maturation strengthens the consolidation of victims' rights in the national system.

In this way, fraternity emerges as a principle capable of grounding a new rationality in the field of human rights, aligned with the guidelines of the 2030 Agenda, especially within the scope of Sustainable Development Goal 16, which advocates the construction of more just, inclusive societies oriented to the promotion of peace and access to justice.

Whether thought of as a principle or as a dimension of fraternity, solidarity has the potential to help combat discrimination and consolidate freedoms. However, the adequate understanding of this potentiality requires the recognition that solidarity is not exhausted in its vertical dimension, linked to state action, but finds in fraternity its deepest relational and axiological foundation. Augusto Cesar Leite de Resende and Carlos Augusto Alcântara Machado, quoting Pizzolato, point out that:

> fraternity is a kind of horizontal solidarity, distinct from vertical solidarity, characterized by being a source of State intervention with the aim of reducing social inequalities and allowing the free development of the human person. Fraternity stands out as a kind of mutual aid between the individuals themselves, with the State being a mere external guarantor. (RESENDE; MACHADO, 2021, p. 12)

From this distinction, it is possible to argue that fraternity not only complements solidarity, but reconfigures it, by shifting the focus from the exclusive action of the State to a dynamic of social co-responsibility. In this sense, the promotion of human development and the realization of fundamental rights depend not exclusively on structuring public policies, but also on the construction of social bonds based on mutual recognition and inclusion.

This perspective is especially relevant in the context of victims' rights, in which the institutional response, although necessary, is insufficient if it is not accompanied by social and legal practices guided by listening, reparation and the preservation of rights. Fraternity, in this context, presents itself as a category capable of supporting a more humanized approach to the justice system, in line with the guidelines of the 2030 Agenda.

Fraternity, in this context, ceases to be just an ethical-political value to assume a normative function, guiding the interpretation and application of fundamental rights and public policies aimed at protecting victims.

The discussion about the incidence of the principle of solidarity or the prevalence of the principle of fraternity, as a legal category, as another resource for the exercise of freedoms and guarantee of fundamental rights is instigating, revealing itself as a promising field for theoretical deepening in the field of contemporary human rights, although it goes beyond the limits of this work, opening space for future investigations.

6 FINAL CONSIDERATIONS

The consecration of an international human rights system, through the convergence of global instruments of the United Nations, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, allied to regional protection systems, and highlighting the inter-American system, to which Brazil is a signatory, led to the formalization of these rights at the level of the States. This incorporation occurs both by express provision in the Constitutions and by the reception of international principles and norms.

Adherence to the international system for the protection of human dignity and fundamental freedoms creates the obligation for signatory states to promote rights aimed at dignity, including those aimed at human development. This obligation can also be extracted from the interpretation of article 3, item II, of the Federal Constitution of 1988, inserted in the list of fundamental principles.

The 2030 Agenda, as a global plan for sustainable development, establishes as a central challenge the eradication of poverty, understood as the main obstacle to the achievement of development in its economic, social and environmental dimensions. In this context, the right to human development, as a way of conferring dignity and equality for all, must be understood as a binding legal obligation for the Brazilian State, resulting from the commitments assumed at the international level and from the constitutional order itself.

The implementation of this agenda requires a global collective effort and international cooperation, involving not only governments, but also public institutions, the justice system, the academic community and the community in general, with a view to building a solidary society. However, as developed throughout the work, this action is more effective when guided, in a broader way, by the principle of fraternity, understood as a relational dimension of human rights, capable of promoting mutual recognition among individuals and strengthening social bonds indispensable to the construction of a truly inclusive society.

In order to contribute to the achievement of the goals established in SDG 16 of the 2030 Agenda, the Brazilian Justice System, through the National Council of Justice and the National Council of the Public Prosecutor's Office, issued resolutions that institute policies aimed at the care and protection of victims of crimes and offenses, based on UN Resolution No. 40/34. These initiatives aim to reduce victimization, prevent crime, and promote harm repair, ensuring treatment based on dignity, equity, and respect. In this scenario, the protection of victims is consolidated as a concrete expression of the articulation between human development, access to justice and human rights, evidencing the centrality of these policies for the implementation of the commitments assumed by the Brazilian State at the international level.

Also noteworthy is the concern with the training of members and civil servants, contributing to institutional improvement and the consolidation of a culture of human rights. Thus, the implementation of such policies can contribute to the strengthening of more effective, accountable and inclusive institutions, in line with the objectives of the 2030 Agenda. It is inferred, therefore, that the promotion of human development in Brazil demands not only the implementation of normative and institutional mechanisms, but also the incorporation of a legal culture guided by fraternity, as a foundation for the consolidation of a model of justice that is more sensitive to victims and committed to the dignity of the human person.

In conclusion, in this scenario, it is possible to see that the consolidation of fraternity as a legal category proves to be an essential element for the construction of a paradigm of justice committed not only to legality, but to the effective realization of human dignity in its broadest dimension.

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REGISTRY QUALIFICATION AND CONTINUITY IN LAND REGISTRATION: LIMITS TO ATTRIBUTING OWNERSHIP EFFECTS TO THE REAL RIGHT OF ACQUISITION

QUALIFICAÇÃO REGISTRAL E CONTINUIDADE NO REGISTRO DE IMÓVEIS: LIMITES À ATRIBUIÇÃO DE EFEITOS DOMINIAIS AO DIREITO REAL DE AQUISIÇÃO

CALIFICACIÓN Y CONTINUIDAD DE LA INSCRIPCIÓN EN EL REGISTRO DE LA PROPIEDAD: LÍMITES A LA ATRIBUCIÓN DE EFECTOS DE DOMINIO AL DERECHO REAL DE ADQUISICIÓN

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ABSTRACT

This article analyzes the limits of registry qualification within the Brazilian real estate registration system, particularly in situations involving the submission of titles that improperly attribute ownership status to rights that, from a legal and registral standpoint, constitute only acquisition rights. The study is based on the observation of a recurring dissociation between consolidated factual reality and the legal reality reflected in the land registry, which generates tension between the effectiveness of substantive law and legal certainty. A doctrinal and analytical approach is adopted, grounded in civil and registry legislation, specialized legal scholarship, and case law from higher courts. The first axis examines the structural principles of the registration system—especially continuity, availability, and legality—highlighting their role in preserving the coherence of the chain of title. The second axis focuses on the structural distinction between the real right to acquisition and the right of ownership, based on Articles 1.227, 1.225, VII, and 1.245 of the Brazilian Civil Code, demonstrating that ownership is only acquired upon registration of the transfer title. The study concludes that it is not legally admissible to register any title that attributes ownership effects without prior registration of the corresponding transfer instrument, even in the presence of consolidated factual situations, as this would violate fundamental registry principles and legal certainty. As a theoretical contribution, the article proposes an interpretative criterion for registry qualification, grounded in the strict correspondence between the submitted title and the legal nature of the right effectively constituted.

Keywords: Land Registry. Registry Qualification. Real Right of Acquisition. Principle of Continuity. Purchase and Sale Agreement.

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RESUMO
O presente artigo analisa os limites da qualificação registral no sistema do Registro de Imóveis brasileiro, especialmente diante da tentativa de ingresso de títulos que atribuem natureza dominial a direitos que, sob o prisma jurídico-registral, possuem apenas caráter aquisitivo. Parte-se da constatação de uma recorrente dissociação entre a realidade fática consolidada e a realidade jurídica formalizada no fólio real, o que suscita tensão entre a efetividade do direito material e a segurança jurídica. A pesquisa adota abordagem teórico-dogmática, com base na análise da legislação civil e registral, da doutrina especializada e da jurisprudência dos tribunais superiores. No primeiro eixo, examinam-se os princípios estruturantes do sistema registral, com destaque para a continuidade, a disponibilidade e a legalidade, evidenciando-se seu papel na preservação da coerência da cadeia dominial. No segundo, investiga-se a distinção estrutural entre direito real de aquisição e direito de propriedade, à luz dos arts. 1.227, 1.225, VII e 1.245 do Código Civil, demonstrando-se que a aquisição do domínio depende necessariamente do registro do título translativo. Conclui-se que não é juridicamente admissível o ingresso, no Registro de Imóveis, de títulos que atribuam efeitos próprios da propriedade sem a prévia inscrição correspondente, ainda que haja consolidação fática da situação jurídica, sob pena de violação aos princípios registrais e à segurança jurídica. Propõe-se, como contribuição teórica, um critério interpretativo estruturante da qualificação registral, orientado pela estrita correspondência entre o título apresentado e a natureza jurídica do direito efetivamente constituído.

Palavras-chave: Registro de Imóveis. Qualificação Registral. Direito Real de Aquisição. Princípio da Continuidade. Promessa de Compra e Venda.

RESUMEN
Este artículo analiza los límites de la calificación registral en el sistema del Registro de la Propiedad Inmobiliaria de Brasil, especialmente a la luz de los intentos de registrar títulos que atribuyen naturaleza de propiedad a derechos que, desde una perspectiva jurídico-registracional, solo tienen carácter adquisitivo. Parte de la observación de una recurrente disociación entre la realidad fáctica consolidada y la realidad jurídica formalizada en el folio inmobiliario, lo que genera tensión entre la efectividad del derecho sustantivo y la seguridad jurídica. La investigación adopta un enfoque teórico-dogmático, basado en el análisis de la legislación civil y registral, la doctrina especializada y la jurisprudencia de los tribunales superiores. En el primer eje, se examinan los principios estructurantes del sistema registral, destacando la continuidad, la disponibilidad y la legalidad, evidenciando su papel en la preservación de la coherencia de la cadena de propiedad. En segundo lugar, se analiza la distinción estructural entre derecho real de adquisición y derecho de propiedad, a la luz de los artículos 1.227, 1.225, VII y 1.245 del Código Civil, demostrando que la adquisición de la propiedad depende necesariamente de la inscripción del título de transmisión. Se concluye que no es legalmente admisible inscribir en el Registro de la Propiedad títulos que atribuyan efectos propios de la propiedad sin la correspondiente inscripción previa, aun cuando exista consolidación fáctica de la situación jurídica, bajo pena de violación de los principios registrales y de seguridad jurídica. Como contribución teórica, se propone un criterio interpretativo que estructura la calificación registral, guiado por la estricta correspondencia entre el título presentado y la naturaleza jurídica del derecho efectivamente constituido.

Palabras clave: Registro de la Propiedad. Calificación Registral. Derecho Real de Adquisición. Principio de Continuidad. Promesa de Compraventa.

1 INTRODUCTION

The Brazilian real estate registry system, structured based on principles such as legality, continuity and specialty, plays a central role in the legal conformation of real rights, not being limited to the mere publicity of acts, but acting as a requirement for the validity and effectiveness of legal situations related to real estate. In this context, the Real Estate Registry assumes a decisive role in the stabilization of patrimonial relations, by conditioning the constitution, transmission and enforceability of real rights to their registration in the real folio, under the terms of arts. 1,227 and 1,245 of the Civil Code.

Despite this normative structure, practice reveals the recurrent dissociation between the consolidated factual reality and its corresponding registration formalization, especially in contexts marked by old contracts, public housing policies and successive transmissions of rights not taken to registration. This dissociation often leads to the attempt to enter, in the real folio, titles that attribute a dominial nature to rights that, from the legal-registry perspective, have only an acquisitive character, generating an evident tension between the effectiveness of the substantive right and formal legal certainty.

The problem, therefore, is not limited to specific cases, but is projected more broadly in the performance of the Real Estate Registry, especially when it seeks to confer ownership effects to situations that are not legally constituted under the terms required by the legal system. In these cases, a central question emerges: is it legally admissible to enter a title that attributes ownership without prior observance of the principle of registration, or should the registration qualification be restricted to the strict correspondence between the title presented and the legal reality contained in the real folio?

The hypothesis that guides the present study is that the attribution of dominial effects to rights not formally constituted through the registration of the translative title is not admitted in the Brazilian registry system, under penalty of violation of the principles of continuity, availability, typicity of real rights and legal certainty.

In view of this scenario, this article aims to analyze the limits of registry qualification in the face of the attempt to enter titles incompatible with the chain of ownership, especially those that promote undue equivalence between real right of acquisition and right of ownership. To this end, the investigation will be developed from two structuring axes: (i) the examination of the real estate registry system and its informing principles; and (ii) the analysis of the civil and constitutional discipline of real rights, with emphasis on the structural distinction between property and acquisition rights and on the legal assumptions of their constitution.

2 THE REAL ESTATE REGISTRY SYSTEM AND THE LIMITS OF REGISTRY QUALIFICATION

Understanding the limits of registration qualification requires, initially, the analysis of the structuring foundations of the Brazilian real estate registration system, whose internal logic is organized based on principles that not only guide the registrar's activity, but condition the validity and effectiveness of the acts submitted for registration. In this context, the tension between the consolidated factual reality and the legal reality formalized in the real folio can only be adequately addressed from the identification of the role of the Real Estate Registry as an instance of legality control and stabilization of legal relations. Thus, it is essential to systematically examine the legitimizing function of the registry, as well as the principles of continuity, availability and legal certainty, in order to delimit the contours within which the registry qualification must operate and, above all, the limits that cannot be crossed without compromising the coherence of the system.

2.1 THE FUNCTION OF THE REAL ESTATE REGISTRY AS A SYSTEM OF LEGAL LEGITIMATION

The Brazilian Real Estate Registry cannot be understood as a mere instrument of formal publicity of legal acts, but, above all, as a system of legal legitimation of rights in rem, whose structuring function is to confer *erga omnes effectiveness* to the legal situations inscribed in it. This nature derives directly from the normative discipline of arts. 1,227 and 1,245 of the Civil Code, which condition not only the enforceability, but the very constitution of the real rights to registration. From this perspective, the real folio does not simply reproduce the legal reality: it conforms it, functioning as an integral element of the law itself.

Law No. 6,015/1973, by establishing, in its article 1, that public records are intended to guarantee the authenticity, security, and effectiveness of legal acts, reinforces this normative dimension of the registration system. It is not, therefore, a passive repository of information, but a legal structure endowed with conforming force. It is in this sense that the classical doctrine of Afrânio de Carvalho (1976) maintains that registration has an integrative nature of real law, while Ricardo Dip (2010) qualifies it as a system of strict legality, in which registration validity depends on the perfect correspondence between the title presented and the legal order.

The jurisprudence of the Superior Court of Justice corroborates this understanding by repeatedly stating that real estate registration is an indispensable requirement for the production of real effects, and it is not possible to recognize the constitution of the domain outside the real folio (REsp 1.141.732/DF, Rel. Min. Luis Felipe Salomão, 4th Panel, j.

02.02.2012). Such guidance shows that any attempt to attribute dominial effects to situations not formalized by registration represents a direct violation of the structure of the system.

2.2 THE PRINCIPLE OF CONTINUITY AND INTEGRITY OF THE CHAIN OF OWNERSHIP

Within this logic, the principle of continuity emerges as one of the fundamental pillars of the registry system, imposing the need for uninterrupted correspondence between the holders included in the registry and those who appear in the titles presented. Affirmed in article 195 of Law No. 6,015/1973, this principle prevents the registration of a right transmitted by someone who is not listed, in the royal folio, as the holder of the previous right, functioning as a mechanism for preserving the internal coherence of the chain of ownership. The authors Cristiano Cassetari and Marcos Salomão (2025) clarify that this principle represents, as a rule, an uninterrupted chain of acts that reflect the legal history of the property.

The relevance of continuity is not limited to its formal dimension. It is, in fact, an instrument for the protection of legal certainty, insofar as it ensures the traceability of the legal changes of the property over time. As Melhim Namem Chalhub (2021) rightly observes, registration continuity ensures the predictability of real estate legal relationships, allowing third parties to trust the accuracy of the information contained in the registration. In the same sense, João Pedro Lamana Paiva (2014) highlights that continuity is an expression of dynamic legal certainty, preventing changes in ownership from occurring arbitrarily or unrelated to the registry reality.

In a comparative perspective, **Antonio Pau Pedrón (2001)** points out that the principle of *the successive tract* in the Spanish system — a relevant theoretical matrix for Brazilian registry law — constitutes a logical requirement of coherence of the registration, preventing the chain of ownership from being broken by acts that are not compatible with the previously registered ownership.

The jurisprudence of the Superior Court of Justice is firm in recognizing that the absence of continuity prevents the entry of the title in the registry, even if it is valid in the obligation plan (REsp 1.201.993/SP, Rel. Min. Nancy Andrighi, 3rd Panel, j. 15.02.2011). In the same direction, the Court of Appeals of São Paulo has repeatedly decided that the breaking of the chain of ownership makes it impossible to register any title that intends to assign domain without prior regularization of ownership, precisely to preserve the coherence of the system.

2.3 THE PRINCIPLE OF AVAILABILITY AND THE PROHIBITION ON THE EXPANSION OF THE TRANSMITTED RIGHT

A logical corollary of continuity, the principle of availability establishes that no one can transmit more rights than he has, functioning as a material limit to the legal circulation of rights in rem. Although it is not expressly provided for in a single provision, this principle stems from the systematic interpretation of article 1,245 of the Civil Code, which conditions the transfer of ownership to the existence of previously registered ownership.

The incidence of this principle is particularly relevant in cases in which it is intended to attribute a dominial nature to rights that, in the royal folio, have a merely acquisitive nature. In these cases, there is an evident extrapolation of the legal sphere of the transferor, who does not hold the domain and, therefore, cannot transmit it. The doctrine of Caio Mário da Silva Pereira (2019) is categorical in stating that the transmission, whether *inter vivos* or *causa mortis*, does not have the power to expand the legal nature of the transmitted right, and must respect the objective limits of the existing ownership.

The Superior Court of Justice has also established that succession or assignment cannot convert an acquisition right into property without the corresponding registration of the transferable title (AgInt no REsp 1.804.913/DF, Rel. Min. Marco Buzzi, 4th Panel, j. 19.08.2019). Such understanding reinforces that the registration qualification must prevent the attribution of legal effects superior to those actually existing in the holder's assets.

2.4 REGISTRATION QUALIFICATION AS A CONTROL OF LEGALITY AND SYSTEMIC COHERENCE

The registration qualification, in this context, is not limited to a formal analysis of the title, but constitutes a true judgment of legality, aimed at verifying its compatibility with the legal system and with the reality contained in the real folio. This duty is based on arts. 1 and 198 of Law No. 6,015/1973, which attribute to the registrar the responsibility of ensuring the legality of the acts submitted for registration.

It is a bound, and not discretionary, activity, guided by the principles of legality, typicality and continuity. The registrar cannot admit the entry of a title that produces effects not provided for in the legal system or that contradicts the structure of rights in rem. As Ricardo Dip (2010) points out, the registration qualification consists of a judgment of normative subsumption, in which the title must be confronted with the current legal order, and it is not possible to relax its requirements in the name of considerations of convenience or equity.

2.5 LEGAL CERTAINTY AND PROHIBITION OF INFORMAL MUTATION OF THE REGISTERED RIGHT

Legal certainty constitutes the axiological foundation of the registration system, finding support in arts. 5, caput, and 170 of the Federal Constitution. The reliability of the real estate registry depends on the correspondence between what is registered in it and the legal reality it represents. Any break in this correspondence compromises the stabilizing function of the system.

Allowing the entry of a title that attributes property where the registration demonstrates only an acquisitive right would imply a true informal mutation of the real right, carried out outside the mechanisms legally provided for the constitution of the domain. Such a practice not only violates the principle of continuity, but also compromises the protection of third parties in good faith, who rely on the information contained in the royal folio.

The Superior Court of Justice has already stated that the registry cannot be used as an instrument to create non-existent legal situations, and must accurately reflect the legal reality (REsp 1.075.781/RS, Rel. Min. Luis Felipe Salomão, 4th Panel, j. 02.12.2010). Thus, the refusal of registration, far from representing excessive formalism, is a necessary measure to preserve the integrity of the system.

3 THE CIVIL AND CONSTITUTIONAL DISCIPLINE OF REAL RIGHTS

The adequate delimitation of the legal effects of the titles presented to the Real Estate Registry cannot dispense with the analysis of the material discipline of real rights, as structured in Civil Law and projected in the constitutional order. This is because the registration qualification does not operate in a normative vacuum, but is directly linked to the legal nature of the rights that are intended to be constituted, transmitted or modified. In this scenario, the distinction between property and real right of acquisition assumes a central role, as it defines the objective limits of the legal circulation of real estate.

3.1 THE CONSTITUTION OF PROPERTY AND THE PRINCIPLE OF REGISTRATION

The civil discipline of real estate property in Brazil is based on the principle of registration, enshrined in article 1,245 of the Civil Code, according to which the transfer of ownership only operates with the registration of the translative title in the Real Estate Registry. Paragraph 1 of the aforementioned provision reinforces this guideline by establishing that, as long as the title is not registered, the seller continues to be considered the owner of the property.

This rule has a constitutive nature, being recognized in a peaceful manner by doctrine and jurisprudence. The Superior Court of Justice reaffirms this understanding by deciding that the acquisition of real estate property necessarily depends on the registration of the title in the competent notary's office (REsp 1.075.781/RS, Rel. Min. Luis Felipe Salomão, 4th Panel, j. 02.12.2010).

3.2 THE REAL RIGHT OF ACQUISITION AND ITS LEGAL LIMITS

The right of the promising buyer, provided for in article 1,225, VII of the Civil Code, constitutes a real right to acquisition, the effectiveness of which depends on the registration of the purchase and sale commitment.

However, this recognition does not imply equivalence to ownership. As Melhim Namem Chalhub (2021) clarifies, the registered purchase and sale commitment does not transfer ownership, but only ensures its future acquisition, subject to the registration of the definitive title.

The jurisprudence of the Superior Court of Justice is categorical in stating that the commitment, even if registered, is not to be confused with the property (REsp 1.141.732/DF, Rel. Min. Luis Felipe Salomão, 4th Panel, j. 02.02.2012).

3.3 THE STRUCTURAL DISTINCTION BETWEEN PROPERTY AND ACQUISITION RIGHTS

The distinction between property and real right of acquisition has a structural character in the system of real rights. Property, under the terms of article 1,228 of the Civil Code, confers on the holder a set of full faculties – to use, enjoy, dispose of and claim – and is characterized as an absolute, exclusive and perpetual right.

On the other hand, the acquisition right has an instrumental nature, aimed at the future acquisition of the domain. Its function is not to replace property, but to make its acquisition viable. Confusing these categories implies violating the typicity of rights in rem, a principle according to which only rights expressly provided for by law can produce real effects.

3.4 THE LEGAL IRRELEVANCE OF UNREGISTERED ACTS FOR REAL PURPOSES

The discipline of rights in rem is clear in establishing that unregistered acts do not produce real effects, even if valid in terms of obligation. Article 1,227 of the Civil Code provides that real rights over real estate constituted, or transmitted by inter vivos acts, are only acquired with registration in the Real Estate Registry.

Thus, the payment of the price, the consent of the seller or the execution of private instruments, although legally relevant, are not able to transfer ownership without the corresponding registration. The classic doctrine of Orlando Gomes (2009) already stated that full payment does not replace the mode of acquisition provided for by law.

The Superior Court of Justice reaffirms this orientation by deciding that unregistered acts do not produce effects before third parties or change the legal situation of the property (AgRg no REsp 1.183.987/SP, Rel. Min. Sidnei Beneti, 3rd Panel, j. 17.08.2010), reinforcing the centrality of registration as a constitutive element.

3.5 LEGAL CERTAINTY IN THE CONSTITUTIONAL ORDER AND THE STABILIZING FUNCTION OF REGISTRATION

The Federal Constitution, by guaranteeing the right to property (article 5, XXII) and structuring the economic order based on legal certainty (article 170), presupposes the existence of a reliable and coherent registration system. The social function of property (article 5, XXIII), in turn, does not remove the need to comply with the formal requirements of its constitution, acting as a limit to the exercise of the right, and not as a mechanism for its acquisition.

In this sense, as Gilberto Bercovici (2013) teaches, the social function does not replace the modes of acquisition of property, but conditions its exercise. The undue relaxation of the criteria for registration qualification would compromise the very constitutional structure of property, by allowing the constitution of rights in rem without observing the legal requirements.

Thus, the preservation of the coherence of the registry system is not only a technical requirement, but a constitutional imperative, indispensable to the stability of legal relations and the protection of the trust of individuals.

On this point, the contribution of **Hernando de Soto (2000)** is particularly relevant, as it demonstrates that the formalization of registration is an indispensable condition for property to become a fully recognized and circulable asset in the economic system, and the mere factual consolidation of possession or of the obligatory relationship is not enough.

From this perspective, the absence of registration does not represent only a formal failure, but the full legal non-existence of property within the system.

In addition, **José Manuel García García (1999)** points out that the registration of property is an essential instrument of preventive legal security, ensuring the reliability of legal relations and the protection of third parties who trust it.

Such understanding is supported by a consolidated guideline of the Superior Court of Justice, which repeatedly affirms the indispensability of registration as a constituent element of real estate property and the impossibility of its acquisition by transverse means.

4 CONCLUSION

The analysis developed throughout this study shows that the Brazilian real estate registry system does not admit solutions that, under the pretext of recognizing consolidated factual situations, imply the attribution of dominial effects without observing the legal requirements for the constitution of the property. The centrality of registration as a constitutive element of the right in rem, enshrined in arts. 1,227 and 1,245 of the Civil Code, is not compatible with interpretations that relax, by way of interpretation, the requirement of registration of the translative title as a condition for the acquisition of the domain.

In this context, it was demonstrated that the distinction between the real right of acquisition and the right of property is not merely terminological, but structural, being indispensable to the preservation of the typicity of real rights and the coherence of the legal system. The attempt to equate such institutes, especially in the context of registration qualification, leads to the undue expansion of the legal sphere of the holder, in direct affront to the principles of continuity and availability, which prohibit the transmission of rights beyond those effectively registered in the real folio.

Registry qualification, in turn, proved to be an essential instrument for controlling legality and preserving the integrity of the registry system, and cannot be reduced to a merely formal examination of the titles presented. On the contrary, it is a linked legal activity, guided by rigid normative parameters, whose purpose is to ensure that only titles capable of producing the effects that are legally proper to them enter the registry. In this sense, the refusal to register titles that intend to attribute property where only the right remains

From the constitutional perspective, the preservation of the coherence of the registry system is an indispensable condition for the effectiveness of the right to property and the stability of the economic order, under the terms of arts. 5 and 170 of the Federal Constitution. Legal certainty, as a structuring value of the Rule of Law, requires that the real folio remain as a reliable source of legal information, and cannot be used as an instrument for creating legal situations dissociated from the legal assumptions of its constitution.

Based on these premises, it is proposed, as a theoretical contribution of the present study, the affirmation of a structuring interpretative criterion of the registration qualification, according to which: *it is legally inadmissible to enter, in the Real Estate Registry, any title that attributes the effects proper to the right of property without the prior registration of the* *translative title, even if there is factual consolidation of the legal situation, and the registration must accurately reflect the nature of the right effectively constituted.*

This criterion not only reaffirms the centrality of registration principles, but also offers an objective parameter for the registrar's performance in concrete cases, contributing to the standardization of registration practice and to the strengthening of legal certainty.

Finally, it should be noted that overcoming the dissociation between factual reality and registry reality should not occur through the undue flexibility of the registration qualification, but rather through the use of legal instruments appropriate to the regularization of the domain situation, such as the formalization and registration of the corresponding translative title. Only in this way will it be possible to reconcile the effectiveness of the substantive law with the integrity of the registry system, while preserving the legal certainty and functionality of the Real Estate Registry.

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THE EFFECTIVENESS OF THE FUNDAMENTAL RIGHTS OF CHILDREN AND ADOLESCENTS IN THE FACE OF CHILD LABOUR IN THE STATE OF MARANHÃO: ADVANCES AND SETBACKS IN LIGHT OF THE 1988 CONSTITUTION

A EFETIVIDADE DOS DIREITOS FUNDAMENTAIS DA CRIANÇA E DO ADOLESCENTE FRENTE AO TRABALHO INFANTIL NO ESTADO DO MARANHÃO: AVANÇOS E RETROCESSOS À LUZ DA CONSTITUIÇÃO DE 1988

LA EFECTIVIDAD DE LOS DERECHOS FUNDAMENTALES DEL NIÑO Y DEL ADOLESCENTE FRENTE AL TRABAJO INFANTIL EN EL ESTADO DE MARANHÃO: AVANCES Y RETROCESOS A LA LUZ DE LA CONSTITUCIÓN DE 1988

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ABSTRACT
This article analyses the effectiveness of the constitutional protection of children's and adolescents' fundamental rights in combating child labour in the State of Maranhão, Brazil, in light of the 1988 Federal Constitution. It is based on the hypothesis that the persistence of child labour constitutes a case of unconstitutional omission by the State, due to insufficient public policies. The research adopts a qualitative approach, based on bibliographic review and documentary analysis of statistical data and reports from national and international organisations. The results indicate that, despite the existence of a robust legal framework, the realisation of fundamental rights remains limited by structural, institutional, and socioeconomic factors. It is concluded that overcoming child labour requires the effective implementation of integrated public policies and greater state commitment to ensuring fundamental rights.

Keywords: Child Labour. Fundamental Rights. Unconstitutional Omission. Integral Protection. Public Policies.

RESUMO
O presente artigo analisa a efetividade da proteção constitucional dos direitos fundamentais da criança e do adolescente no enfrentamento do trabalho infantil no Estado do Maranhão, à luz da Constituição Federal de 1988. Parte-se da hipótese de que a persistência do trabalho infantil configura hipótese de inconstitucionalidade por omissão estatal, diante da insuficiência das políticas públicas implementadas. A pesquisa adota abordagem qualitativa, com base em revisão bibliográfica e análise documental de dados estatísticos e relatórios de organismos nacionais e internacionais. Os resultados indicam que, apesar da existência de um arcabouço normativo robusto, a concretização dos direitos fundamentais permanece limitada por fatores estruturais, institucionais e socioeconômicos. Conclui-se que a superação do trabalho infantil exige a implementação efetiva de políticas públicas

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integradas, bem como maior comprometimento estatal na garantia dos direitos fundamentais.

Palavras-chave: Trabalho Infantil. Direitos Fundamentais. Inconstitucionalidade Por Omissão. Proteção Integral. Políticas Públicas.

RESUMEN
El presente artículo analiza la efectividad de la protección constitucional de los derechos fundamentales del niño y del adolescente en el enfrentamiento del trabajo infantil en el Estado de Maranhão, a la luz de la Constitución Federal de 1988. Se parte de la hipótesis de que la persistencia del trabajo infantil configura un caso de inconstitucionalidad por omisión estatal, ante la insuficiencia de las políticas públicas implementadas. La investigación adopta un enfoque cualitativo, basado en revisión bibliográfica y análisis documental de datos estadísticos e informes de organismos nacionales e internacionales. Los resultados indican que, a pesar de la existencia de un marco normativo robusto, la concreción de los derechos fundamentales permanece limitada por factores estructurales, institucionales y socioeconómicos. Se concluye que la superación del trabajo infantil exige la implementación efectiva de políticas públicas integradas, así como un mayor compromiso estatal en la garantía de los derechos fundamentales.

Palabras clave: Trabajo Infantil. Derechos Fundamentales. Inconstitucionalidad Por Omisión. Protección Integral. Políticas Públicas.

1 INTRODUCTION

The persistence of child labour in Brazil reveals a recurrent pattern of violation of fundamental rights, transcending the merely social dimension and exposing structural weaknesses in the realisation of the constitutional guarantees afforded to children and adolescents (IPEA, 2019; UNICEF, 2021). Although the 1988 Constitution of the Republic inaugurated a new legal paradigm, grounded in the principle of integral protection and absolute priority, it is observed that, in practice, such rights remain far from their full realisation, especially in contexts marked by pronounced socioeconomic inequalities, such as the State of Maranhão (Brasil, 1988; IBGE, 2024).

Recent data highlight the concrete dimension of the problem. According to the Instituto Brasileiro de Geografia e Estatística, the State of Maranhão presents child labour rates above the national average, with significant concentration in informal activities, especially in rural areas and domestic work (IBGE, 2024). This scenario reinforces the persistence of regional inequalities and demonstrates the need for more effective and targeted state action. According to data from the PNAD Contínua released by the IBGE, thousands of children and adolescents in Maranhão remain inserted in early labour activities, especially in informal and rural occupations, evidencing the structural persistence of the problem in the state.

In this scenario, the early exploitation of child and youth labour cannot be understood as an isolated or merely cultural phenomenon, but as the result of structural failures and state omissions that compromise the material realisation of constitutional guarantees. Article 227 of the Federal Constitution unequivocally establishes the duty of the family, society, and the State to ensure to children and adolescents, with absolute priority, the right to life, dignity, education, and protection against all forms of exploitation. In addition, Article 7, item XXXIII, of the Federal Constitution prohibits labour by persons under sixteen years of age, except in the condition of apprentice, reinforcing the protection against early exploitation. However, the continuity of child labour practices reveals a mismatch between the normative plane and social reality, indicating the insufficiency of the public policies implemented (IPEA, 2019; OIT, 2020).

In view of this context, the present work departs from the following research problem: to what extent does the persistence of child labour in the State of Maranhão reveal a case of unconstitutional omission by the State in the realisation of the fundamental rights of children and adolescents? On the basis of this question, the central thesis maintained is that the continuity of this phenomenon constitutes a direct and systematic violation of the constitutional text, notably of the principle of integral protection, highlighting the need for more effective, structured, and integrated state action, in consonance with the fundamental objectives of the Republic provided for in Article 3, item III, of the Federal Constitution.

The relevance of the present research is justified not only by the social gravity of the theme, but also by its legal importance, since it involves the analysis of the effectiveness of fundamental rights and the limits of state action in the face of constitutionally imposed duties. Furthermore, the territorial focus adopted, the State of Maranhão, allows for a more in-depth analysis of a reality marked by high rates of social vulnerability, contributing to the understanding of the concrete difficulties in implementing effective public policies (IBGE, 2024; CEPAL, 2020).

For the development of the research, a qualitative approach is adopted, based on bibliographic review and documentary analysis of legal norms, statistical data, and reports from national and international organisations. The development of the research is structured in three chapters: the first is dedicated to the analysis of the situation of child labour, with emphasis on its socioeconomic determinants; the second examines the effectiveness of constitutional protection and institutional limitations; and, finally, the third proposes coping strategies, with emphasis on the need for integrated public policies and more efficient state action.

In this way, the aim is not only to describe the phenomenon, but to offer a critical analysis in light of the 1988 Constitution, signalling that overcoming child labour requires more than normative provisions, demanding the effective realisation of fundamental rights, especially from the perspective of the efficacy and applicability of constitutional norms, through coordinated state actions committed to the dignity of the human person, a foundation of the Republic provided for in Article 1, item III, of the Federal Constitution (Sarlet, 2012).

2 CHAPTER I: THE SITUATION OF CHILD LABOUR

The objective of this chapter is to analyse the situation of child labour in the State of Maranhão, indicating its main characteristics, causes, and forms of manifestation, in light of the 1988 Federal Constitution and the constitutional protection of childhood ensured to children and adolescents.

From this perspective, it is observed that the distribution of child labour in Brazilian territory does not occur homogeneously, being more intense in regions historically marked by structural inequalities. In the case of Maranhão, this reality is aggravated by factors such as low schooling and limited access to effective public policies, which contributes to the early insertion of children into productive activities (IBGE, 2024; IPEA, 2019). Such a scenario emphasises that the problem of child labour cannot be understood in isolation, but as a reflection of a set of social vulnerabilities, in affront to Article 227 of the 1988 Federal Constitution, which establishes the duty of the family, society, and the State to ensure, with absolute priority, the fundamental rights of children and adolescents.

Another relevant aspect concerns the nature of the activities carried out by children and adolescents, which are largely concentrated in the informal sector. These occupations, by not being regulated, hinder the action of inspection bodies and amplify the invisibility of the phenomenon, especially in domestic and rural activities (CEPAL, 2020). Thus, it is perceived that informality not only favours the existence of child labour, but also contributes to its perpetuation over time, in non-conformity with Article 7, item XXXIII, of the Federal Constitution, as well as with Article 60 of the Statute of the Child and Adolescent (Lei nº 8.069/1990).

Furthermore, studies indicate that the permanence of children in labour directly interferes with the educational trajectory, resulting in school dropout or low academic performance. This factor compromises integral development and reduces the possibilities of social ascension, maintaining the cycle of poverty between generations (UNICEF, 2021; MPT, 2021). Thus, child labour ceases to be merely an economic issue and comes to constitute a serious violation of fundamental rights, especially the right to education, provided for in Article 205 of the Federal Constitution, as well as in Article 53 of the Statute of the Child and Adolescent.

It is important to highlight that the relationship between poverty and child labour is widely recognised in the literature, being pointed out as one of the main determining factors for its occurrence. Families in situations of vulnerability tend to resort to the work of their children as a survival strategy, which reinforces the need for public policies aimed at social protection and the reduction of inequalities (World Bank, 2018; IPEA, 2019). In this sense, the absence of adequate state support contributes to the maintenance of this reality, in non-conformity with the fundamental objectives of the Republic provided for in Article 3, item III, of the Federal Constitution, as well as with the principle of integral protection provided for in Article 1 of the Statute of the Child and Adolescent (Brasil, 1990).

In view of the foregoing, this chapter, aligned with the specific objective of analysing the situation of child labour, demonstrates that the phenomenon in the State of Maranhão is profoundly related to structural factors such as poverty, informality, and social inequality, signalling the complexity of the problem and the need for its analysis across multiple dimensions.

2.1 SOCIOECONOMIC DETERMINANTS AND THE CONFIGURATION OF CHILD LABOUR IN MARANHÃO

In analysing the problem of child labour, it becomes necessary to deepen the socioeconomic factors that contribute to its persistence in the State of Maranhão. It is observed that income inequality, associated with the precariousness of living conditions, exerts direct influence on the early insertion of children into the labour market, especially in contexts where there is an absence of effective public policies (IPEA, 2019; World Bank, 2018), which compromises the realisation of the social rights provided for in Article 6 of the Federal Constitution, which lists rights essential to the dignity of the human person.

In addition, the low schooling of those responsible and the limited access to quality education constitute elements that reinforce this dynamic, hindering the breaking of the cycle of social vulnerability. In this context, many families come to naturalise child labour as a survival strategy, which contributes to its reproduction across generations (UNICEF, 2021; MPT, 2021), in affront to the state duty to guarantee compulsory and free basic education, as established by Article 208, item I, of the Federal Constitution.

Another relevant point refers to the strong presence of the informal economy in the state, which amplifies the invisibility of child labour and hinders its measurement and inspection. Activities carried out within the domestic sphere or in small family enterprises frequently escape state control, which exposes weaknesses in the implementation of protection policies (CEPAL, 2020), contravening the provisions of Article 403 of the Consolidation of Labour Laws (Brasil, 1943), which prohibits work by persons under 16 years of age, except in the condition of apprentice, with night-time, dangerous, or unhealthy activities and those that harm school attendance being prohibited.

In this way, this part of the work demonstrates that child labour in Maranhão is not limited to a legal question, but is deeply rooted in socioeconomic determinants, requiring a broader understanding to support subsequent analyses regarding its effectiveness and confrontation. Furthermore, empirical data indicate that the highest incidence of child labour in Maranhão is concentrated in informal and low-paid activities, which reinforces the invisibility of the phenomenon and hinders its eradication. Such a reality demonstrates that the problem is not restricted to a normative absence, but stems from structural failures in the implementation of effective public policies.

2.2 CHILD LABOUR AND ITS CONDITIONS IN THE INDUSTRIAL REVOLUTION

Child labour did not emerge during the Industrial Revolution. Historical records demonstrate the presence of the early insertion of children into labour activities in different periods of history, especially in contexts marked by social and economic inequality. In Ancient Rome, children frequently acted as apprentices, while, in the Middle Ages, they performed functions similar to those exercised by adults. Over time, the use of child labour was associated with structural factors related to poverty and socioeconomic inequality (Neves, 1999; Hobsbawm, 2007), which demonstrates that the problem of child labour has deep historical roots.

With the passage of time and the transformations in the world of work, production intensified and the pace of labour became more demanding. Even so, child labour remained present in various parts of the world, especially in industrial activities (OIT, 2020). This scenario drove the creation of international protection mechanisms, such as Convention No. 138 of the Organização Internacional do Trabalho (OIT), which establishes the minimum age for admission to employment, and Convention No. 182 of the OIT, which deals with the elimination of the worst forms of child labour, both ratified by Brazil and incorporated into the national legal order, in consonance with Article 5, §2, of the 1988 Federal Constitution. In this historical period, the conception prevailed that poor children should work as a way of avoiding marginalisation, as well as contributing to family income, with work being seen as an instrument of practical learning (Alvim, 1994, p.136).

In the context of industrialisation, children were widely inserted into factory and mining environments, subjected to precarious labour conditions incompatible with their physical and psychic development. Between 1780 and 1840, this exploitation intensified significantly, with the massive use of child and youth labour in various productive activities (Thompson, 1987, p.202). Before this period, child labour was already present, especially in the agricultural and artisanal spheres, with greater family supervision and a lesser degree of direct exploitation (Neves, 1999, p.10-11).

However, in the factories, the reality proved to be substantially more severe. Children were subjected to exhausting workdays, which could reach up to 18 hours daily, frequently in unhealthy and degrading conditions, in addition to suffering ill-treatment (Arruda, 1984, p.77). This scenario brings an approach regarding the dignity of the human person, a principle that, although expressly enshrined only in the 1988 Constitution (Article 1, item III), represents a value inherent to the protection of fundamental rights in any historical context.

In view of these conditions, social movements and demands for improvements in working conditions arose, including the reduction of the workday. Committees and organisations came to defend the rights of workers, while the owners of the factories sought to preserve their economic interests (Thompson, 1987, p.202). In many cases, the factories functioned as veritable spaces of confinement for children in situations of poverty, who were subjected to the rigid control of employers.

Furthermore, many children were displaced from religious institutions to work in factories, remaining isolated from social coexistence and subject to situations of violence and exploitation. Work accidents were frequent, resulting in mutilations and even deaths, and it was common for these workers, upon reaching adulthood, to remain in conditions of extreme poverty (Hobsbawm, 2007). Such conditions demonstrate the complete absence of mechanisms for the protection of childhood, in contrast to the contemporary model inaugurated by the 1988 Federal Constitution.

Work accidents stemmed, above all, from prolonged exposure to dangerous machinery and the inadequacy of work structures to the physical limitations of children, who often had to improvise ways of reaching equipment, significantly increasing the risks (Arruda, 1984, p.77). Moreover, the use of child labour was economically advantageous, since it required lower remuneration, with payment restricted to food and housing being common, in addition to the conclusion of prolonged contracts accepted by families in situations of vulnerability (Arruda, 1984, p.77).

Comparatively, domestic work presented a lesser degree of exploitation, allowing a certain adaptation to the physical conditions of the child, unlike the industrial environment, in which there was no space for rest or recreational activities (Thompson, 1987, p.202). In this context, capitalism, although it did not originate child labour, contributed significantly to its intensification and systematic exploitation, by inserting children into labour relations marked by impersonality, excessive workdays, and the absence of protection (Thompson, 1987, p.202).

The exploitation of child and youth labour was decisive for the growth of industries, insofar as it reduced production costs and expanded the profit margin. The workdays were extremely long, often greater than those imposed even on the animals used in economic activities (Martins, 2006, p.14). With the advent of electric energy, there was an expansion of working time, since production ceased to depend on natural light, further intensifying the exploitation of women and children, considered cheaper and easily replaceable labour (Minharro, 2003, p.37).

In view of this historical panorama, it is verified that the problem of child labour has always been associated with contexts of inequality and economic exploitation, which reinforces the need for state intervention. In the contemporary Brazilian legal order, this protection is grounded in Article 227 of the Federal Constitution, which imposes the duty of integral protection, as well as in Article 7, item XXXIII, which prohibits child labour, and in

Article 60 of the Statute of the Child and Adolescent (Brasil, 1990), which prohibits work before the minimum legal age.

Therefore, this section demonstrates that the problem of child labour constitutes a structural phenomenon, historically constructed and still present in the State of Maranhão, being directly related to socioeconomic factors such as poverty, inequality, and informality. It is found that, although there exists a robust normative apparatus of protection, especially from the 1988 Federal Constitution and the Statute of the Child and Adolescent, challenges persist that compromise the effectiveness of these fundamental rights, highlighting the need for critical analysis and concrete measures for their confrontation.

3 CHAPTER II: THE EFFECTIVENESS OF CONSTITUTIONAL PROTECTION AND UNCONSTITUTIONAL OMISSION

The objective of this chapter is to assess the effectiveness of the constitutional protection of the fundamental rights of children and adolescents in confronting child labour, with emphasis on the analysis of the structural and institutional limitations that compromise the realisation of the principle of integral protection.

The 1988 Constitution of the Republic instituted a new paradigm of protection of childhood and adolescence by enshrining, in its Article 227, the principle of integral protection, attributing to the family, society and, with special emphasis, the State, the duty to ensure, with absolute priority, the realisation of the fundamental rights of this vulnerable group (Brasil, 1988). This is a norm of full efficacy and immediate applicability, under the terms of Article 5, §1, of the Federal Constitution, imposing on the public power not only negative duties, but, above all, positive provisions aimed at the material realisation of these rights.

Notwithstanding the robust normative framework instituted from the 1988 Federal Constitution, it is essential to recognise that Brazil presented relevant advances in the protection of the rights of children and adolescents, especially with the consolidation of the principle of integral protection, the enactment of the Statute of the Child and Adolescent, and the incorporation of international treaties aimed at the eradication of child labour. Such instruments conferred greater legal density on the protection of childhood and established institutional mechanisms of protection, evidencing significant evolution on the normative and programmatic plane. However, the persistence of child labour, especially in contexts of social vulnerability, demonstrates that such advances were not sufficient to ensure the full effectiveness of fundamental rights, revealing the existence of structural failures and state omissions in the implementation of these guarantees.

In this context, the persistence of child labour, especially in regions marked by social vulnerability, such as the State of Maranhão, reveals a scenario of insufficiency in state action, evidencing a mismatch between the normative plane and the factual reality (IBGE, 2024; IPEA, 2019). Such a circumstance transcends mere administrative inefficiency, constituting a case of unconstitutional omission, insofar as the State fails to fulfil constitutionally imposed duties, compromising the efficacy of the fundamental rights of children and adolescents. It is worth highlighting that the persistence of child labour is not limited to the sphere of the ineffectiveness of fundamental rights, but may also assume contours of legal illicitness with criminal repercussions. This is because the exploitation of child and youth labour in prohibited activities or inserted in the worst forms of child labour gives rise to the accountability of the agents involved, under the terms of the Statute of the Child and Adolescent and related legislation. In this context, state omission proves even more serious, since, by failing to act effectively in the inspection and repression of these practices, it indirectly contributes to the perpetuation of illicit conduct that violates not only constitutional norms, but also the criminal legal order.

Along these lines, state action in confronting child labour reveals not only insufficiency, but also a structural limitation in the formulation and execution of public policies. There is a predominance of compensatory measures, aimed at the immediate mitigation of poverty, to the detriment of structuring strategies capable of confronting the deep causes of the problem. Such a dynamic contributes to the maintenance of the cycle of social vulnerability, evidencing that state omission manifests itself not only through the absence of action, but also through the adoption of ineffective or insufficient public policies in the face of constitutional demands.

Contemporary constitutional doctrine recognises that fundamental rights possess vertical efficacy and an objective dimension, requiring concrete action from the State for their implementation. In light of this context, as taught by Ingo Wolfgang Sarlet, the dignity of the human person, provided for in Article 1, item III, of the Federal Constitution, constitutes a normative foundation that imposes the realisation of minimum material conditions for the full development of the individual (Sarlet, 2012). The permanence of children in early labour activities evidences a violation of this essential core, insofar as it compromises basic rights such as education, leisure, and integral development. As taught by José Joaquim Gomes Canotilho, the normative force of the Constitution imposes on the State the duty to materially realise fundamental rights, with the permanence of state omissions capable of rendering unfeasible the effectiveness of constitutional guarantees not being admissible (Canotilho, 2003).

The analysis of the effectiveness of constitutional protection requires, moreover, the consideration of the role of public policies as indispensable instruments for the realisation of fundamental rights. Although the Brazilian legal order has relevant mechanisms, such as the Statute of the Child and Adolescent (Lei nº 8.069/1990), especially in its Article 60, which prohibits work before the minimum legal age, it is evident that its implementation occurs in a fragmented and insufficient manner, especially in contexts of high economic informality (CEPAL, 2020). The existence of legal norms, in itself, does not ensure their effectiveness, with coordinated, continuous, and efficient state action being indispensable.

From this perspective, the jurisprudence of the Supremo Tribunal Federal admits judicial control of public policies in cases of state omission that result in the violation of fundamental rights. In this context, the Court established the understanding that administrative discretion cannot be invoked as a justification for state inertia, especially in the face of social rights and the protection of vulnerable groups, as observed in ADPF 45/DF, with Minister Celso de Mello as rapporteur. State action, therefore, finds limits in the constitutional commands, especially with regard to the protection of children and adolescents, holders of absolute priority.

In addition, the Court has also recognised, on several occasions, the possibility of judicial intervention in the face of state omissions that compromise the effectiveness of fundamental rights, especially within the scope of social rights. From this perspective, the consolidated understanding stands out that the reserve of the possible cannot be used as a justification to render unfeasible the realisation of the existential minimum, especially when it comes to the protection of children and adolescents, subjects of rights endowed with absolute priority. Furthermore, the understanding was consolidated that the clause of the reserve of the possible cannot be used as an absolute obstacle to the realisation of fundamental rights, especially when the guarantee of the existential minimum and the protection of vulnerable groups are at stake. In this sense, it is recognised that the realisation of social rights imposes concrete duties on the State, especially in the face of administrative omission capable of compromising the dignity of the human person (RE 592.581/RS, STF).

In the same perspective, the Supremo Tribunal Federal, in the judgement of ARE 639337/SP, reaffirmed the legitimacy of judicial intervention in cases of state omission related to the realisation of fundamental rights, holding that the clause of the reserve of the possible cannot be invoked in a generic manner to render unfeasible the realisation of the existential minimum. The Court also recognised that the protection of vulnerable groups, especially children and adolescents, imposes on the State positive duties of action, compatible with the principle of absolute priority provided for in Article 227 of the Federal Constitution (ARE 639337/SP, STF).

Another relevant aspect refers to the influence of the socioeconomic structure on the limitation of normative effectiveness. The strong presence of the informal economy in the State of Maranhão hinders inspection and favours the invisibility of child labour, evidencing not only operational limitations, but structural failures in state action (CEPAL, 2020; IBGE, 2024). The absence of integrated and continuous public policies contributes to the perpetuation of the problem, reinforcing the need for a broader and more articulated approach.

The insufficiency of preventive programmes evidences that state action still concentrates on isolated measures, incapable of promoting structural transformations. The discontinuity of public policies, allied to the absence of integration among the federative entities, compromises the effectiveness of confrontation actions, revealing a scenario of institutional fragmentation incompatible with the complexity of the problem (IPEA, 2019; UNICEF, 2021).

On the international plane, Brazil assumed relevant commitments in the combat against child labour, especially through Conventions No. 138 and No. 182 of the Organização Internacional do Trabalho, as well as the Sustainable Development Goals (SDGs), notably target 8.7, which provides for the eradication of child labour in all its forms. However, the persistence of early labour practices evidences difficulties in the effective internalisation of these commitments, reinforcing the mismatch between formal normativity and social reality.

Therefore, this section demonstrates that the effectiveness of the constitutional protection of the rights of children and adolescents is limited by structural, institutional, and economic factors that, together, constitute a scenario of unconstitutional omission by the State, evidencing the need for the adoption of more effective measures for the realisation of the fundamental rights provided for in the 1988 Constitution.

3.1 INSTITUTIONAL LIMITATIONS AND CHALLENGES IN THE REALISATION OF FUNDAMENTAL RIGHTS

In continuity with the assessment of the problem of child labour, it becomes necessary to understand that the existence of constitutional and infraconstitutional norms does not, in itself, guarantee the effective protection of children and adolescents. The 1988 Federal Constitution establishes broad guidelines of protection; however, its realisation depends directly on the efficient action of the institutions responsible for the implementation of these guarantees (Brasil, 1988; IPEA, 2019).

The fragility of the inspection mechanisms contributes significantly to the continuity of the exploitation of child labour, especially in contexts marked by informality. The difficulty of monitoring these activities prevents the effective action of the State, allowing illegal practices to persist silently (MPT, 2021; CEPAL, 2020). This scenario evidences that the existing legal protection faces relevant obstacles in its operationalisation.

The limitation of public policies aimed at childhood constitutes another relevant factor. Social programmes, although essential, present restricted scope and, in many cases, discontinuity, which compromises their efficacy in confronting child labour (IPEA, 2019; UNICEF, 2021). The absence of comprehensive and permanent policies contributes directly to the maintenance of the early insertion of children into labour activities.

The lack of integration among the different governmental sectors represents one of the main obstacles to the effectiveness of combat actions. The isolated action of the areas of education, social assistance, and labour inspection reduces the impact of the measures adopted, hindering the construction of consistent and lasting strategies (OIT, 2020; UNICEF, 2021). This institutional fragmentation reveals the need for an intersectoral and coordinated approach.

On the international level, it is observed that Brazil still faces difficulties in fully complying with the commitments assumed in the combat against the worst forms of child labour. Despite the normative advances, the persistence of the problem indicates that the efforts made were not sufficient for its eradication (OIT, 2020; ONU, 2015), which reinforces the need for improvement of public policies and state action.

Therefore, this section demonstrates that, notwithstanding the normative and institutional advances achieved by the Brazilian legal order in the protection of the rights of children and adolescents, the effectiveness of these guarantees is still significantly limited by structural, institutional, and economic factors that compromise their realisation on the factual plane. In scenarios of high vulnerability, the perpetuation of child labour signals the ineffectiveness of current public policies. This is an evident institutional failure in the implementation of fundamental guarantees and in the fulfilment of the constitutional obligations of the State. In this way, it is evident that the advances verified, although relevant, were not sufficient to ensure the full realisation of fundamental rights, reinforcing the need for the adoption of more effective, integrated, and continuous measures.

4 CHAPTER III: COPING STRATEGIES

The objective of this chapter is to propose strategies for confronting child labour, with a focus on the implementation of effective, integrated, and continuous public policies, capable of promoting the realisation of the fundamental rights of children and adolescents, as provided for in the 1988 Federal Constitution.

Initially, it is highlighted that the expansion and strengthening of social protection programmes constitute essential measures for the reduction of the incidence of child labour. The Federal Constitution, in its Article 6, recognises social assistance as a fundamental right, while Article 203 establishes that this policy must be provided to those who need it, with the objective of guaranteeing social minimums. In this context, initiatives such as the Programa de Erradicação do Trabalho Infantil (PETI) play a relevant role in offering financial support to families in situations of vulnerability, reducing the need for the early insertion of children into labour activities (PETI, 2020; IPEA, 2019). Social protection, therefore, acts directly in the prevention of the problem. The reduction or insufficiency of public policies for the protection of childhood must also be analysed in light of the principle of the prohibition of social regression, widely recognised by contemporary constitutional doctrine as a limit to the suppression or weakening of already realised fundamental rights.

Education, in turn, assumes a central role in the coping strategies, being recognised as a fundamental instrument for breaking the intergenerational cycle of poverty. Article 205 of the Federal Constitution establishes that education is a right of all and a duty of the State and the family, aiming at the full development of the person. The expansion of access to integral education, allied to the improvement of the quality of teaching, contributes to the permanence of children and adolescents in the school environment, removing them from early labour (MEC, 2020; UNICEF, 2021). Investing in education, in this context, represents a long-term structuring measure, aimed at the promotion of the dignity of the human person.

Another strategic axis refers to the strengthening of inspection and the action of the bodies responsible for the protection of the rights of children and adolescents. Article 227 of the Federal Constitution imposes absolute priority on the protection of this group, which requires effective action by the State in the prevention and repression of illegal practices. The intensification of inspection actions, especially in informal sectors, proves essential to identify and curb the exploitation of child labour (MPT, 2021; OIT, 2020). The articulated action among the Ministério Público do Trabalho, the Auditoria Fiscal do Trabalho, and the Conselhos Tutelares contributes to the realisation of the existing legal norms.

The articulation among public policies constitutes an indispensable element for the effective confrontation of the problem. The integration among the areas of social assistance, education, and labour enables a broader and more structured approach, considering the multidimensionality of the problem (CEPAL, 2020; ONU, 2015). The intersectoral action allows the construction of more consistent strategies, avoiding institutional fragmentation and expanding the reach of state actions.

On the international plane, Brazil assumed relevant commitments in the combat against child labour, especially through Conventions No. 138 and No. 182 of the Organização Internacional do Trabalho, as well as the 2030 Agenda for Sustainable Development, which establishes, in target 8.7, the eradication of child labour in all its forms. The realisation of these commitments requires the adoption of internal measures compatible with international standards of protection, in consonance with Article 5, §2, of the Federal Constitution.

Therefore, this section evidences that the confrontation of child labour requires the adoption of structural strategies, grounded in the expansion of social protection, the strengthening of education, the intensification of inspection, and the integration of public policies, demonstrating that the realisation of fundamental rights depends on continuous, efficient, and articulated state action.

4.1 INTEGRATED PUBLIC POLICIES AND PATHWAYS FOR THE REALISATION OF RIGHTS

In the context of the proposition of coping strategies, the consolidation of integrated public policies presents itself as one of the main pathways for the reduction of the exploitation of child labour. The joint action among social assistance, education, and labour inspection enables more effective responses in the face of a problem of structural and multifactorial nature (CEPAL, 2020; OIT, 2020). The integration among sectors strengthens the capacity of the State to intervene in a comprehensive and coordinated manner.

The expansion of income transfer programmes constitutes a relevant instrument of social protection. Such policies, by reducing the economic vulnerability of families, contribute to diminishing the dependence on child labour as a survival strategy. This action is grounded in Article 203 of the Federal Constitution, which guides social assistance towards the protection of the family and the promotion of social inclusion (IPEA, 2019; PETI, 2020).

Education must be understood as a structuring axis of the coping strategies, not only with regard to access, but also to permanence and the quality of teaching. The guarantee of compulsory and free basic education, provided for in Article 208, item I, of the Federal Constitution, associated with the expansion of integral teaching, contributes significantly to removing children and adolescents from early labour, promoting their integral development (MEC, 2020; UNICEF, 2021).

Institutional strengthening also proves indispensable, especially with regard to inspection and the accountability of employers who use child labour. The effective application of the norms provided for in Article 7, item XXXIII, of the Federal Constitution, as well as in Article 60 of the Statute of the Child and Adolescent (Brasil, 1990), depends on the rigorous action of the competent bodies. The reduction of impunity contributes directly to the diminution of the labour exploitation of children and adolescents (MPT, 2021; OIT, 2020).

The implementation of continuous and articulated measures among the federative entities constitutes an essential factor in ensuring the effectiveness of the actions to confront child labour. The cooperation among the Union, States, and Municipalities, as provided for in Article 23 of the Federal Constitution, strengthens state action and expands the reach of social protection mechanisms.

It is necessary to recognise, however, that the realisation of fundamental social rights finds material and budgetary limits, especially in states marked by high socioeconomic vulnerability, such as Maranhão. The so-called 'reserve of the possible' constitutes an argument frequently invoked to justify restrictions in the implementation of actions aimed at the protection of childhood. However, such a limitation cannot be used as a foundation to render unfeasible the realisation of the existential minimum, especially when it comes to the protection of children and adolescents, subjects of rights endowed with absolute priority under the terms of Article 227 of the Federal Constitution.

In this scenario, although the financial and administrative difficulties faced by the public power are recognised, the structural permanence of child labour reveals that state insufficiency transcends the limits of administrative discretion, reaching the field of unconstitutional omission. The integral protection of children and adolescents imposes on the State the duty of progressive, continuous, and efficient action, with the perpetuation of systematic violations on an exclusively budgetary foundation not being admissible.

Therefore, this section demonstrates that the combat against child labour requires the adoption of integrated, continuous, and structural strategies, involving the articulation of social policies, institutional strengthening, and the coordinated action of the State, evidencing that only through a systemic approach will it be possible to promote the effectiveness of the fundamental rights of children and adolescents.

5 FINAL CONSIDERATIONS

The present research aimed to analyse the effectiveness of the constitutional protection of the fundamental rights of children and adolescents in confronting child labour in the State of Maranhão, in light of the 1988 Federal Constitution. From the analysis developed, it was verified that, although the Brazilian legal order has a robust normative framework, grounded in the principle of integral protection and absolute priority, social reality demonstrates the permanence of systematic practices of violation of these rights, evidencing a mismatch between the normative provision and its realisation.

With regard to the objective of describing the situation of child labour, it was found that the phenomenon remains directly associated with structural factors, such as poverty, social inequality, and economic informality, especially in regional contexts marked by high vulnerability, such as the State of Maranhão (IBGE, 2024; IPEA, 2019). Such a scenario reveals that the problem of child labour must be understood as an expression of a complex social reality, historically constructed and perpetuated by structural weaknesses.

Regarding the analysis of the effectiveness of constitutional protection, it was evidenced that the existence of legal norms, in itself, does not ensure the realisation of fundamental rights. The fragility in the implementation of public policies, the insufficiency of inspection, and the absence of articulation among the federative entities constitute relevant obstacles to the realisation of these rights (CEPAL, 2020; UNICEF, 2021). In this context, state action proves insufficient in the face of the demands imposed by the Constitution, especially with regard to integral protection.

In view of this, the central thesis of this work is confirmed, in the sense that the persistence of child labour in the State of Maranhão constitutes a case of unconstitutional omission by the State, since the State fails to fulfil constitutionally imposed duties, notably those provided for in Article 227 and in Article 7, item XXXIII, of the Federal Constitution. Such omission compromises the efficacy of the fundamental rights of children and adolescents, violating, moreover, the fundamental objectives of the Republic provided for in Article 3, item III, as well as the principle of the dignity of the human person.

With regard to the coping strategies, it was verified that overcoming child labour requires the adoption of structural and integrated measures, capable of acting directly on the causes of the problem. The expansion of income transfer programmes, the strengthening of education, and the intensification of inspection prove fundamental for the reduction of the incidence of the phenomenon (IPEA, 2019; OIT, 2020). However, such measures must be implemented in a continuous and articulated manner, under penalty of proving insufficient in the long term.

Furthermore, the need for institutional strengthening and greater state commitment in the execution of public policies aimed at the protection of childhood is highlighted, as well as the possibility of action by the Judiciary in the control of state omissions that imply the violation of fundamental rights. The realisation of the principle of integral protection, therefore, demands not only normative provision, but effective, coordinated, and permanent action on the part of the State.

Along these lines, it is concluded that the eradication of child labour in the State of Maranhão depends on a joint effort, involving not only the improvement of legal norms, but, above all, the concrete realisation of public policies and the overcoming of social inequalities. The protection of the rights of children and adolescents cannot remain on the abstract plane, and must be materialised through effective state actions, under penalty of the perpetuation of a scenario of structural violation of fundamental rights.

Finally, the present study contributes to the legal debate by evidencing that the problem of child labour transcends the social dimension, inserting itself within the scope of the constitutional responsibility of the State, whose omission cannot be admitted in the face of the centrality of fundamental rights and the absolute priority conferred on children and adolescents in the Brazilian legal order.

Thus, the persistence of child labour in the State of Maranhão evidences not only the insufficiency of the public policies currently implemented, but also the existence of a structural deficit in the realisation of the fundamental rights ensured by the 1988 Federal Constitution. The integral protection of children and adolescents cannot remain restricted to the formal plane, requiring continuous, efficient, and articulated state action, under penalty of compromising the very normative force of the Constitution and the legitimacy of the Democratic State governed by the Rule of Law.

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REFLECTIONS ON COGNITIVE LIBERTY: BETWEEN LAW, ETHICS AND NEUROTECHNOLOGIES

REFLEXÕES SOBRE A LIBERDADE COGNITIVA: ENTRE O DIREITO, A ÉTICA E AS NEUROTECNOLOGIAS

REFLEXIONES SOBRE LA LIBERTAD COGNITIVA: ENTRE EL DERECHO, LA ÉTICA Y LAS NEUROTECNOLOGÍAS

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ABSTRACT
Considering the advances in Neuroscience, artificial intelligence and the growth of Neurotechnologies, the general aim of this work is to understand the ethical implications of new technologies in Neuroscience, especially those of neuromodulation and brain imaging, with a temporal focus on the last twenty years in order to capture the technological interval of expansion of these technologies. It will be developed through bibliographical research and the method of approach will be the deductive one, departing from the general international context of the growth of Neuroscience in contemporary times, addressing the advances in brain imaging and neuromodulation technologies so as to reach the particular question, namely: can such technologies bring ethical impacts upon consciousness, personal identity, autonomy, privacy and responsibility? Three specific objectives are pursued, namely, first: to present the concept of Neuroscience and some of the new brain technologies, especially imaging and neuromodulation; secondly, the idea is to point out the possible ethical implications of the technologies set out in chapter two. Finally, the third objective intends, on the basis of the ethical implications indicated, to reflect, at least minimally, on the possibility of neurorights and concepts pertaining to the legal sphere such as consciousness, personal identity, autonomy, privacy and criminal responsibility. This study is relevant and justifiable because, on a broad scale, it discusses the ethical and legal limits of the intervention of technology in the human mind. In the end, it is concluded that, according to the authors presented, the technologies set out may impact consciousness, personal identity, autonomy, privacy and responsibility. This is because, for the latter, there may be a risk of neural surveillance and editing influencing individual and collective decisions. Thus, a possible path is to reflect on the new ethical and regulatory frameworks that are emerging concerning neurorights.

Keywords: Law. Neurorights. Neurotechnologies. Ethics. Liberty.

RESUMO
Considerando os avanços da Neurociência, da inteligência artificial e o incremento das Neurotecnologias o objetivo geral deste trabalho é compreender as implicações éticas das novas tecnologias em Neurociência, especialmente, as de neuromodulação e de imagem cerebral com recorte temporal dos últimos vinte anos para garantir o intervalo tecnológico de expansão dessas tecnologias. Será desenvolvido por meio de pesquisa bibliográfica e o método de abordagem utilizado será o dedutivo partindo-se do contexto geral internacional de incremento da Neurociência, na contemporaneidade, abordando os avanços das tecnologias de imagem cerebral e de neuromodulação de modo a se chegar à questão

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particular, qual seja: tais tecnologias podem trazer impactos éticos para consciência, identidade pessoal, autonomia, privacidade e responsabilidade? Tencionam-se três objetivos específicos, quais sejam, primeiro: apresentar o conceito de Neurociência e algumas das novas tecnologias cerebrais, especialmente de imagem e neuromodulação; na sequência, a segunda ideia é: apontar as possíveis implicações éticas das tecnologias explicitadas no capítulo dois. Por fim, no terceiro objetivo pretende-se a partir das implicações éticas indicadas refletir, minimamente, acerca da possibilidade dos neurodireitos e conceitos afetos à esfera jurídica como consciência, identidade pessoal, autonomia, privacidade e responsabilidade penal. Esse estudo é relevante e justificável, pois, em escala ampla, discute os limites éticos e jurídicos da intervenção da tecnologia na mente humana. Ao final, conclui-se que para os autores apresentados as tecnologias explicitadas podem impactar na consciência, identidade pessoal, autonomia, privacidade e responsabilidade. Isto porque para os últimos pode haver risco de vigilância e edição neural influenciando as decisões individuais e coletivas. Assim, um caminho possível é refletir acerca dos novos marcos éticos e regulatórios que estão despontando sobre os neurodireitos.

Palavras-chave: Direito. Neurodireitos. Neurotecnologias. Ética. Liberdade.

RESUMEN

Considerando los avances de la Neurociencia, de la inteligencia artificial y el incremento de las Neurotecnologías, el objetivo general de este trabajo es comprender las implicaciones éticas de las nuevas tecnologías en Neurociencia, especialmente las de neuromodulación y de imagen cerebral, con un recorte temporal de los últimos veinte años para garantizar el intervalo tecnológico de expansión de estas tecnologías. Se desarrollará mediante investigación bibliográfica y el método de abordaje utilizado será el deductivo, partiendo del contexto general internacional de incremento de la Neurociencia en la contemporaneidad, abordando los avances de las tecnologías de imagen cerebral y de neuromodulación de modo de llegar a la cuestión particular, a saber: ¿pueden tales tecnologías traer impactos éticos para la conciencia, la identidad personal, la autonomía, la privacidad y la responsabilidad? Se pretenden tres objetivos específicos, a saber, primero: presentar el concepto de Neurociencia y algunas de las nuevas tecnologías cerebrales, especialmente de imagen y neuromodulación; a continuación, la segunda idea es: señalar las posibles implicaciones éticas de las tecnologías explicitadas en el capítulo dos. Por último, en el tercer objetivo se pretende, a partir de las implicaciones éticas indicadas, reflexionar, mínimamente, acerca de la posibilidad de los neuroderechos y de conceptos afines a la esfera jurídica como conciencia, identidad personal, autonomía, privacidad y responsabilidad penal. Este estudio es relevante y justificable, pues, a gran escala, discute los límites éticos y jurídicos de la intervención de la tecnología en la mente humana. Al final, se concluye que para los autores presentados las tecnologías explicitadas pueden impactar en la conciencia, la identidad personal, la autonomía, la privacidad y la responsabilidad. Esto porque para los últimos puede haber riesgo de vigilancia y edición neural que influya en las decisiones individuales y colectivas. Así, un camino posible es reflexionar acerca de los nuevos marcos éticos y regulatorios que están surgiendo sobre los neuroderechos.

Palabras clave: Derecho. Neuroderechos. Neurotecnologías. Ética. Libertad.

1 INTRODUCTION

Considering the advances in Neuroscience, artificial intelligence and the growth of Neurotechnologies (NTs), the general aim of this work is to understand the ethical implications of neurotechnologies, especially those of neuromodulation and brain imaging, since these two have been more widespread and present satisfactory results for the diagnosis and treatment of neurological and psychiatric diseases. As regards the temporal focus, considering the advances in brain technologies, the technological interval should be the last twenty years in order to ensure scientific currency.

It will be developed through bibliographical research and the method of approach will be the deductive one, departing from the general international context of the growth of Neuroscience in contemporary times, addressing the advances in brain imaging and neuromodulation technologies so as to reach the particular question, namely: can such technologies bring ethical impacts upon consciousness, personal identity, autonomy, privacy and responsibility?

Furthermore, as regards methodology, during the preparation of this work the author declares that she used the Gemini tool (version 2.5 Flash, by Google) in December 2025 to assist with translation, textual fluency and the formatting of the ABNT (Associação Brasileira de Normas Técnicas) standards. All generated content was rigorously reviewed and validated by the author, who assumes responsibility for all published content.

As regards the research sources, the intention is to use academic articles, the Universal Declaration on Bioethics and Human Rights, as well as documents from international bodies such as the Organização das Nações Unidas para a Educação, a Ciência e a Cultura (UNESCO) and the Organização para a Cooperação e Desenvolvimento Econômico (OCDE). In this respect, given the interdisciplinary nature of the question, it is worth noting that the perspective will not be merely ethical or legal; mention is also preserved of the sciences connected to the theme such as Medicine, Psychology, Engineering and Information Technology.

In the development, three specific objectives are intended, namely, first: to present the concept of Neuroscience and some of the new brain technologies, in particular those of imaging and neuromodulation; secondly, the idea is to point out the possible ethical implications of the technologies set out in chapter two. Finally, the third objective intends, on the basis of the ethical implications indicated, to reflect, at least minimally, on the possibility of neurorights and concepts pertaining to the legal sphere such as consciousness, personal identity, autonomy, privacy and criminal responsibility.

In view of the foregoing, the following topics are proposed: introduction; chapter two: Neuroscience and new brain technologies; chapter three: ethical implications of imaging and neuromodulation technologies; and chapter four: new dimensions in the concepts of consciousness, identity, autonomy, privacy and responsibility; and, finally, the concluding remarks.

The proposed hypothesis of this work is that yes, the new technologies addressed in the text may impact the contours of the concepts pertaining to the legal prism, such as: consciousness, personal identity, autonomy, privacy and responsibility, since there is the possibility of mapping neural data which, when combined, are capable of contributing to the identification of patterns of thought, thus allowing certain actions to be individually or collectively stimulated or discouraged depending on the controller's objective. It is in this respect that scholars have addressed mental privacy, cognitive liberty and the protection of neural data as specific rights: neurorights, a concept to be explored in the development of this work.

Above all, studies to be presented in due course in this research indicate that emotions and behaviours may be altered by new technologies, generating a personality distinct from that which the individual possessed before the clinical intervention. This matters, above all, because of the expansion in access to such technologies and the possibility of their use in non-therapeutic or non-clinical contexts. In this sense, an individual who undergoes a change of personality may suffer a de-characterisation of identity affecting self-perception, engendering an estrangement from oneself and impacting personal identity and autonomy.

In view of the foregoing, this study is relevant and justifiable because, in general, it discusses the ethical limits and legal impacts of neurotechnological intervention in the human mind, in addition to projecting a discussion for the coming years which must permeate the idea of neurorights, and of what will be considered cognitive enhancement and what will be therapeutic.

In the end, it is concluded that the technologies set out may impact, in the ethical-legal sphere, consciousness, personal identity, autonomy, privacy and responsibility. This is because there is a risk of neural surveillance and editing influencing individual and collective decisions. In this sphere, the path is to reflect on the new ethical and regulatory frameworks that are emerging concerning the contemporary limits of Neuroscience and brain technologies.

2 NEUROSCIENCE AND NEW BRAIN TECHNOLOGIES

In January 2024, The New York Times announced brain implants: "Neuralink Implanted a Device in a Patient's Brain, Elon Musk Says: The billionaire said his company's first product, called Telepathy, would let a person control a phone or computer 'just by thinking'" (Mac, 2024).

The Neuralink experiment caused social reflections, especially because, according to Waisberg, there was low transparency regarding the manner of carrying out the experiment, regarding the long-term effects of the implant, as well as regarding the surgical risks, since the procedure of implanting or removing a chip from the brain is invasive. The use of this type of device also provoked reflections regarding the control and privacy of neural data which could be extracted from this device, in addition to stimulating discussions concerning the ethical limits of clinical or non-clinical interventions in brain activity (Waisberg, 2024).

Furthermore, the latter author highlights the need for robust informed consent, as well as the possibility that these technologies might deepen social inequalities, since it cannot be ascertained whether they would be available to all or whether they would be marketed at a high price as cognitive enhancement, in addition to engendering debate concerning the consent of users, clarifying that such techniques are invasive and require the migration of wires within the brain tissue (Waisberg, 2024).

In January 2025, The Lancet Neurology announced the most relevant research in Neuroscience of 2024, among them the advances in blood biomarkers and brain omics. This important record made explicit the capacity to detect proteins associated with Alzheimer's early, constituting an advance in the diagnosis of this disease, supplanting imaging examinations and biopsies (Fu; Ip, 2025).

One of the phenomena most studied by Neuroscience is the search to understand consciousness; questions such as where it derives from remain a subject of investigation and disagreement among neuroscientists. Studies suggest that it would result from the integration of distinct parts of the brain; Koch asserted in 2025 that it derives from the posterior cortex. Such a study monitored the brains of 256 participants in real time using brain measurement techniques. Above all, it attempted to demonstrate how information is unified and integrated by the brain, generating new contours for studies of artificial intelligence and biology (Karel, 2025).

The structure and contemporary understanding of the concept of consciousness is a source of debate, especially because of the development of artificial intelligence (AI) systems. This is because the consciousness or non-consciousness of AIs has frequently been questioned. Themes such as "The artificial intelligence robot that became a millionaire with cryptocurrencies and now wants to be recognised as a person" permeate the news (Walker, 2025).

The discussion is latent considering the growing impact of language models capable of simulating human conversations with fluency. That is, may this new form of "dialoguing" (simulating?) be regarded as consciousness, since it results from an artificial process? It is still too early to answer this and other questions raised throughout this text; however, there is a certain urgency in defining markers to detect where consciousness is born. Such identification makes it possible to develop treatments for neurological diseases, to identify vegetative states or coma, in addition to speculating on a central question of contemporary times that considers whether AI machines can develop consciousness and subjectivity.

In this panorama, in May 2025, BBC NEWS asked "Can artificial intelligence already be conscious? What scientists say". The text reflects that recent research investigates consciousness in experiments such as the dream machine. According to Ghosh, specialists believe that some AI systems may soon become conscious as they acquire greater processing capacity and sensory information. On the other hand, there are those who argue that true consciousness would be capable of arising only in living systems characterised by biological life (Ghosh, 2025).

Another study investigated the definition of the moment of death and raised social debates. In 2024, G1 announced "The discoveries of a neuroscientist about what happens in the brain as we die" (Rodriguez, 2024). Through the use of electroencephalogram (EEG), the said research contributed to exploring the idea that perhaps the brain does not stop immediately after cardiac arrest. The authors indicate findings that suggest the brain enters a kind of survival mode when deprived of oxygen, thus closing off communication with the exterior to focus on internal processes of the body itself, synchronising the neural networks intensely.

Although it is an incomplete study, it may give rise to ethical reflections, for example, regarding the moment of switching off apparatus in order to avoid residual suffering, prompting future revisions concerning the criteria of brain death, in addition to impacting the techniques and the appropriate moment for resuscitation of persons (Xu *et al.*, 2023).

The question of consciousness set out above pits neuroscientists against one another, but it was posed to reveal the debate of the Neurosciences and how it is interconnected with new technologies, such as those of brain imaging or artificial intelligence. After presenting these contemporary debates concerning the new technologies that are connected to the multidisciplinary field at hand, the next point is to define what may be understood as Neuroscience and as Neurotechnologies.

Neuroscience is a multidisciplinary field that studies the nervous system; thus, areas such as Medicine, Biology, Psychology, Engineering and Philosophy connect to think about the brain and how it generates thoughts, actions, emotions, memories, languages, chemical reactions, the functioning of organs, among other possibilities. Especially in recent years, the use of computing and AI to attempt to replicate human brain processes is frequent, and for this reason Neuroscience, which is capable of uniting these various forms of knowledge, gains ground because it also seeks to understand brain functioning. Below, some relevant concepts for the present research will be explored, and for this reason some direct citations are necessary.

In summary, considering the importance of Neuroscience for the present work, it is clarified how this field of knowledge may operate

> Neuroscience is the field of knowledge that studies the nervous system, including the structure, function, development, genetics, evolution and pathology of the nervous system and the brain. It combines various disciplines, including biology, psychology, chemistry, physics, mathematics and computer science, to understand how the nervous system functions at the molecular, cellular, systemic and behavioural levels. Neuroscientists employ a variety of techniques, such as neuroimaging (such as functional magnetic resonance imaging and electroencephalography), animal studies (such as rodents and non-human primates), molecular and cellular biology techniques, computational modelling and clinical studies in humans to investigate questions related to the brain and the nervous system. The goals of Neuroscience are vast and include understanding the neural basis of behaviour, emotions, cognition, memory, learning, perception, sleep, movement and much more. In addition, Neuroscience has applications in a wide range of areas, including medicine (to understand and treat neurological and psychiatric disorders), artificial intelligence (to develop intelligent systems inspired by the brain) and even in fields such as economics and law (to understand how the brain influences human behaviour). (Santos e Coutinho, 2024)

Still in the conceptual sphere, Neuroscience, by forming a multidisciplinary trio with artificial intelligence and engineering, may seek to translate biological signals into digital commands and has, in this case, been termed Neurotechnology. Although there is no consensus regarding the concept of neurotechnologies, the extensive paragraph from the Autoridade Nacional de Proteção de Dados (ANPD) on the subject is drawn upon, since it connects various international bodies in a synthetic manner

> The OCDE (2019, p. 6, our translation) defines neurotechnologies as "[...] devices and procedures used to access, monitor, investigate, assess, manipulate and/or emulate the structure and function of the neural systems of natural persons". The same conceptualisation is adopted by the International Bioethics Committee of UNESCO (2022, p. 13), which incorporates into its definition of neurotechnologies the actions of devices and procedures on the neural systems of animals. Neurotechnologies refer to a range of methods and tools for interacting with the brain and the nervous system,

> which interaction may occur passively, to monitor brain activity, or actively, to alter it (Andorno, 2023, p. 12). In turn, the ICO (2023, p. 8, our translation) conceptualises neurotechnologies as the "[...] consumer, business and health devices and procedures, both invasive and non-invasive, that directly record and process neurodata for the purpose of collecting data, controlling interfaces or devices, or modulating neural activity". The ONU (2024, p. 2, our translation), through a report of the Advisory Committee of the Human Rights Council, highlights that "the term 'neurotechnologies' covers a range of devices and systems that interact with the central nervous system by electrical, magnetic, optogenetic and other means". Such devices may assist in understanding the functioning of the brain, or may intervene in the processes of the nervous system aiming to recover functions or enhance capacities (ONU, 2024, p. 2). For Bertoni and Ienca (2024, p. 2), neurotechnology should be understood as a broad concept encompassing devices, tools, systems and algorithms aimed at understanding, influencing, accessing, monitoring, assessing, emulating, simulating or modulating the structure, activity and functioning of the nervous systems of human beings and other animals. This definition, when contrasted with the others above, presents greater specificity and coverage regarding the purpose of the use of neurotechnologies, as well as incorporating algorithms as an integral part of the spectrum of neurotechnologies. Neurotechnologies allow the establishment of a direct connection between the brain and devices external to it, and this attributes to them a singularity that requires attention to the ethical-legal repercussions, since this type of connection may permit interventions in brain activities (ONU, 2024, p. 2) (Brasil, 2025, our emphasis)

In the last decade, the rapid advance of these three forms of knowledge has been able to redefine, reinterpret and manipulate the manner in which the human brain operates. The capacity to observe neural activity in real time has allowed an ever more precise understanding of human brain activity and, therefore, of the individual and collective behaviours of this group.

Simultaneously with this scientific development, other methods of brain analysis have also drawn attention: neuromodulation. The latter allows direct access to, and makes controllable, the dynamics of the brain system, and for this reason it has been applied in clinical and experimental research. Having introduced the concepts and considering the capacity for direct intervention in the brain, added to the growth of external devices (chips, glasses, helmets and headphones) that connect to that organ by means of brain-machine interfaces, in this work it was chosen to focus in particular on the more emerging neurotechnologies of modulation and image monitoring: the so-called neuroimaging and neuromodulation, also touching on brain-machine interfaces, which will be set out in chapter three, below.

2.1 BRAIN IMAGING TECHNOLOGIES (NEUROIMAGING) AND NEUROMODULATION

Neurotechnology, for this work, may be understood as the set of techniques and tools that unites distinct sciences and allows the recording, investigation and alteration of an activity, and may serve distinct applications which will be illustrated in this chapter. The OCDE highlighted neurotechnologies as one of the emerging technologies, together with synthetic biology and artificial intelligence. This is because, according to the same organisation, they "are characterised by rapid development and uncertainty in trajectory and impact" (OCDE, 2025).

In November 2025, UOL ran the headline "Neurotechnology revolution transforms science fiction into reality". According to the text, direct communication with the brain, aiming at the restoration of movements in paralysed individuals and transforming thoughts into words, are abilities of neurotechnologies. The rise of this type of instrument may be alarming, especially because it raises ethical questions regarding the use and social impact of these technologies (Agence France-Presse, 2025).

The growth of neuroimaging modified the way scientists study the human brain; such an observation procedure makes it possible to see the complex functioning of this organ. In what follows, neuroimaging and its associated technique, namely the brain-computer interface (BCI), will be explored.

2.1.2 Brain imaging technologies and brain-computer interfaces

Among the neuroimaging technologies, functional magnetic resonance imaging (fMRI), electroencephalography (EEG) and positron emission tomography (PET) stand out. Each one has its particularities: fMRI may map areas of brain activity that correlate with motor, sensory or cognitive functions; it is a kind of photograph of the structure; PET, in turn, may assist in the visualisation of other processes, for example, neurochemical ones, that is, it assesses cerebral metabolic activity from the emission of positrons, whereas EEG may serve to capture brain electrical activity in synchronous time, by means of electrodes on the scalp, monitoring electrical activity so that the brain rhythms recorded in graphs can be assessed.

The combination of these technologies is capable of serving to understand the cognitive, emotional and behavioural neural bases. In this way, it supports research in important areas, such as psychiatry and neurology, in addition to contributing to clinical diagnosis. Below, these three neuroimaging techniques will be highlighted. Beginning with fMRI, Meneses *et al.* point out that

> Functional magnetic resonance imaging (fMRI) is a new technique capable of detecting small alterations in the blood flow and oxygenation of brain tissues in which neuronal activation occurs. Its use in the pre-surgical evaluation of patients with epilepsy who have temporal mesial sclerosis is currently under assessment in some neurology centres. The main objective is to find the best activation paradigm in the evaluation of language and memory functions, with a view to substituting the Wada test, widely used nowadays. (Meneses *et al.*, 2004)

As regards EEG, in this technique electrodes are placed on the scalp and the captured signals are converted into digital data; it monitors electrical activity so that the brain rhythms recorded in graphs can be assessed. The analysis of such rhythms makes it possible to identify excessive electrical impulses which point to a predisposition to epilepsy or convulsive seizure, for example. According to Zhang *et al.*, it "is a non-invasive measurement method for brain activity. Due to its safety, high resolution, and hypersensitivity to dynamic changes in brain neural signals, EEG has aroused much interest in scientific research and medical fields" (Zhang *et al.*, 2023).

PET, in turn, is able to identify minuscule tumours that the techniques previously presented here would not be able to. It also makes feasible the response of chemotherapy treatment, for example, whether the cells remain diseased, in metastasis, or whether they have ceased to progress. Being a non-invasive technique, capable of analysing the whole body in a single examination, it is widely used for the diagnosis of diseases, especially in oncological, cardiovascular and neurological practice, as Vaquero and Kinahan point out

> Of all the tomographic molecular imaging modalities, positron emission tomography (PET) probably offers more translational possibilities than any other modality, due to its combination of sensitivity and quantitative accuracy. PET is a non-invasive imaging modality that provides physiological information through the injection of radioactive compounds (radiotracers), the detection of the radiation and the reconstruction of the distribution of the radiotracer. PET imaging has evolved from an imaging modality used for research to becoming a standard component of diagnosis and staging in oncology; it is also used for specific neurological and cardiovascular indications. This is due to the clinically useful information it provides about the function and state of tissues and organs, through the use of radiolabelled molecular imaging agents. (Vaquero e Kinaham, 2015)

However, the sophistication of these brain imaging technologies, as well as the capacity for technical intervention in the brain circuits, whether for therapeutic purposes or not, concerns scholars, and it is precisely for this reason that this work is justified by the risks and ethical implications associated with the uncertain and historically unprecedented use of this type of instrument. The integration of these techniques of brain reading and assessment, associated with the possibility of modulating emotions and therefore also of altering behaviours, reveals the relevance of the contemporary debates pertaining to the subject of this subchapter.

The possibility of influencing behavioural dynamics in real time gave rise to research highlighting the implications of the techniques in question. In this sphere, brain-computer interfaces have also become more sophisticated in order to be able to operate simultaneously with these techniques. Below, what these interfaces are is set out, and subsequently some risks associated with the technologies in question are mentioned.

BCIs emerge to make the communication between the brain activity recorded by neuroimaging and translated into external devices. "Brain-computer interfaces (BCIs) use brain signals to collect information about the user's intentions. To do this, BCIs depend on a recording stage that measures brain activity and translates the information into interpretable electrical signals", explain Nicolas-Alonso and Gomez-Gil (Nicolas-Alonso e Gomez-Gil, 2012).

According to Burwell, Sample and Racine, there is no consensus on the definition of the brain-computer interface, but it is an area in abrupt development within Neuroscience. The authors expound that

> (...) there are some elements on which researchers and scholars commonly agree. These crucial elements are the capacity of a BCI to (1) detect brain activity directly, (2) provide real-time or near-real-time feedback, (3) classify brain activity, and (4) provide feedback to the user that reflects whether she/he has successfully achieved an objective [10]. Similar to most authors [9], we consider a BCI to be a device that detects brain signals conveying intention and translates them into output executable by a machine [11]. In other words, it is a direct connection "between living neuronal tissue and artificial devices that establishes a non-muscular communication pathway between a computer and a brain" [12]. BCIs have the potential to be of great significance in the daily lives of patients [13]. For example, BCIs may be used as "spellers" for individuals who have no other way of communicating [12, 14, 15, 16, 17, 18], may give people who are locked-in or paralysed some control over their environment [12, 15, 19, 20, 21, 22, 23, 24], and may be able to assist rehabilitation after spinal cord injury via artificial stimulation of the muscles [11, 24], among other potential applications. (Burwell, Sample e Racine, 2017)

To clarify the function of BCIs, Nicolas-Alonso and Gomez-Gil add

> A brain-computer interface (BCI) is a hardware and software communication system that allows brain activity, by itself, to control computers or external devices. The immediate goal of BCI research is to provide communication capacity to people with severe disabilities, such as total paralysis or those "locked-in" by neuromuscular disorders, such as amyotrophic lateral sclerosis, brainstem stroke or spinal cord injury. (Nicolas-Alonso e Gomez-Gil, 2012)

Still in the same sphere, classic examples of BCIs are: the p300 Speller, although its precision is considered low according to Nicolas-Alonso and Gomez-Gil; it is a communication system based on EEG which was designed to allow severely paralysed patients to select letters on a screen using only the activity of the brain in order to communicate with other people (Nicolas-Alonso e Gomez-Gil, 2012).

Another example is the neuroprostheses, which may control robotic upper limbs via mental activity. There are also specific systems that may control wheelchairs or drones by means of brain activity. Although they do not constitute the object of this work, it is worth highlighting how the motor neuroprostheses function, with a view to understanding their real potential to promote health and well-being in certain individuals

> (...) there exists a method of activating neural structures by means of an FES system that facilitates a specific movement and allows its use in the real context in which people live; these are the so-called Neuroprostheses or Motor Neuroprostheses (MN) (MENDES *et al.*, 2020). A neuroprosthesis for grasping, for example, is an FES system that restores the capacity to grasp objects; and there are neuroprostheses with diverse objectives, for standing, walking, reaching, etc. (MARQUEZ-CHIN; POPOVIC, 2020). MNs are devices developed to assist in the restoration of motor functions and in the execution of a lost function. They have an interface with the nervous system, stimulating muscles, nerves, spinal cord or brain, and are being used daily to increase the activities and participation of people with impairments (COLLINGER *et al.*, 2013). The MN has a typical architecture composed of sensors to capture the user's command intention or automatic control of the stimulation, a control unit (controller), a stimulator and electrodes that distribute the stimulation; making it possible to operate autonomously during the performance of functional activities (...) (GIL-CASTILLO *et al.*, 2020; MARQUEZ-CHIN; POPOVIC, 2020; MENDES *et al.*, 2020). (Lopes, 2021)

The potential of BCIs is promising, especially for use in communication and in paralysis, in addition to use for entertainment. In this sphere, according to the OCDE, they may promote health and well-being for individuals with disabilities or in rehabilitation (García e Winickoff, 2022).

Thus, it does not seem appropriate to halt this type of instrument given its capacity to promote well-being, but neither can the risks associated with the sophistication of some technologies be neglected, as will be explored in the chapter that follows. The point here was to bring forth the functioning of the classic BCIs. Having outlined the panorama, concept and application of BCIs, which may operate together with neuroimaging, attention turns below to the other technology with the capacity for direct brain intervention: neuromodulation.

2.1.3 Neuromodulation

Still in the context of Neuroscience and the technologies pertaining to it with the capacity for human intervention, neuromodulation also stands out, this because it may be key to direct intervention in the neural circuits. According to Pancholi *et al.*, 2025, it is a "medical field focused on the alteration of nervous activity by means of specific stimuli" (Pancholi *et al.*, 2025).

The technology in question is not to be confused with neuroimaging nor with BCIs; the former have the capacity to observe brain activity, whereas the interfaces translate such movement into some external apparatus. On the other hand, neuromodulation acts on the neurodynamics, that is, an electrical, chemical, magnetic or optical stimulus is applied directly to a specific area of the brain aiming to alter the connection between neurons. Such an alteration may be transitory or permanent depending on the stimulation.

Marder explains that neuromodulation may modify intrinsic properties of neurons, that is, it reconfigures neuronal circuits, and this may significantly alter the output of these circuits. This matters because, according to the author, all nervous systems are subject to being neuromodulated, and depending on the intensity and frequency they may build functional circuits that will give rise to a particular behaviour. She reflects on whether the action of the modulator may be robust and predictable considering the variability between animals or between neurons, questioning further whether the procedure is reliable between individuals, since each one may have a nervous system with different patterns (Marder, 2012).

In a study concerning long-term neuromodulation, Palacios-Filardo and Mellor indicated that neuromodulators such as dopamine, serotonin and noradrenaline, upon being released, may facilitate long-term synaptic plasticity, that is, the brain could reprogramme, modify its connections between neurons in response to a particular stimulus. In this way, a connection could be strengthened or weakened (Palacios-Filardo e Mellor, 2018).

By means of long-term potentiation (LTP), in which after repeated and intense stimulation the connection between neurons may be strengthened. Whereas, in long-term depression (LTD), the connection between certain synapses may be little used, discouraged and therefore weakened, since the brain, in order to avoid its saturation, discards what is irrelevant. The authors indicated evidence that each of these neuromodulators may trigger mechanisms that facilitate long-term potentiation or depression (Palacios-Filardo e Mellor, 2018).

Although the complexity of the theme is indisputable, an attempt is made to explain in a simple manner how potentiation functions: upon stimulating a new ability repeatedly, a neuron sends a signal to the others; such repetition strengthens the learning so that subsequently, in the future, even a weak stimulus has a rapid response, and for this reason it is not necessary, for example, to relearn how to ride a bicycle; once learned, the already potentiated connection is recognised.

And it is precisely this capacity to affect behavioural mechanisms by means of repetition, creating memory and learning of behaviours, that is of concern and justifies this chapter of the work; above all, if used in a non-therapeutic context it may have uncertain ethical consequences.

The foundation of this technology is the idea that many psychiatric or neurological disorders derive from some activity, whether electrical or chemical, but which is considered abnormal within a specific neural circuit (Pancholi *et al.*, 2025).

To clarify, Neudorfer *et al.* explain that in an experiment of deep brain stimulation to treat the disease of essential tremor, the focus was on the thalamic targets within a particular nucleus and a particular brain area. Subsequently, they discussed the historical bases for the selection of these targets. The point is that they integrated imaging and electrophysiological techniques to improve the precision of the chosen target and presented indications that such accuracy in targeting presented a superior result in the suppression of tremors of the said disease (Neudorfer *et al.*, 2024).

Pancholi *et al.* also explain that within this medical field there are: the invasive techniques, for example, deep brain stimulation, responsive neurostimulation, vagus nerve stimulation and spinal cord stimulation; and the non-invasive ones, which may be, also by way of example, transcranial magnetic stimulation, focused ultrasound and transcranial direct current stimulation (Pancholi *et al.*, 2025). However, Krishna and Fasano explain that this list of techniques is not exhaustive and is in constant expansion, and mention that "treatments such as deep brain stimulation (DBS) are now adopted in almost every country throughout the world, with a steady growth in the number of patients implanted" (Krishna e Fasano, 2024).

There is no intention to detail how neuromodulation may act on neurological and psychiatric disorders, but the point is that among the non-invasive procedures most cited are transcranial magnetic stimulation and electrical stimulation, techniques which offer precise adjustments in the stimulation and have generated greater safety when compared to the invasive approaches, since they avoid surgery, as Camacho-Conde *et al.* point out:

> Brain stimulation involves the passage of electrical currents to the brain cells of the cortical and subcortical area to modulate brain functions and is carried out by two methods: non-invasive and invasive. Technological advances have contributed to the development of various techniques within both categories (see in Box 1) (S). Non-invasive stimulation is carried out with the use of two distinct techniques: transcranial magnetic stimulation (TMS), which was introduced in 1985 (2), and transcranial electrical stimulation (TES), in clinical use since 1801 (s). However, currently, the most widely used form of TMS is repetitive TMS (rTMS) and of TES is transcranial direct current stimulation (tDCS). The non-invasive techniques of brain stimulation use electrical currents applied directly through magnetic fields or electrodes on the patients' scalp to stimulate cortical brain cells, whereas invasive stimulation, such as deep brain stimulation (DBS), involves the passage of electrical currents to the brain cells of the

> subcortical area through electrodes implanted surgically more deeply in the brain. Unlike the invasive ones, the non-invasive methods do not require anaesthesia and a surgical operation and are therefore preferred over the invasive methods. In the last decade, the use of these brain stimulation methods has not only increased substantially, but has also expanded to a wide variety of brain disorders, including schizophrenia, major depressive disorder, anxiety disorders and cognitive dysfunctions. (Camacho-Conde *et al.*, 2022)

Neuromodulation has been explored in the treatment of psychiatric disorders such as addictions, obsessive-compulsive disorder (OCD) and depression; although, for the most part, they are experimental treatments, there are already neuromodulation options approved by the FDA for the latter two disorders, as Ranjan, Mahoney and Rezai clarify

> With insights from the neurocircuitry of psychiatric disorders and extensive neuromodulation experience with deep brain stimulation (DBS) in movement disorders, DBS is being increasingly considered as a modulator of the neural network in psychiatric disorders. (...). The FDA (United States Food and Drug Administration) has approved the indication of DBS for psychiatric disorders. Medically refractory depression, addiction and other psychiatric disorders are being explored for DBS neuromodulation. Studies evaluating DBS for psychiatric disorders are promising, but lack larger and controlled studies. (...). We also present a brief review of MR-Guided Focused Ultrasound (MRgFUS), a new form of neurosurgical neuromodulation, which can target deep subcortical structures similar to DBS, but in a non-invasive manner. The early experiences of neurosurgical neuromodulatory therapies, including MRgFUS neuromodulation, are encouraging in psychiatric disorders; however, they remain investigational. Currently, DBS and VNS are the only neurosurgical neuromodulation options approved by the FDA in appropriately selected cases of OCD and depression, respectively. (Ranjan, Mahoney e Rezai, 2024)

Further, concerning the possibilities of the use of neurostimulation, Gouveia *et al.* point out its use in the treatment of drug-resistant epilepsy and indicate vagus nerve stimulation and responsive neurostimulation as procedures that have been used. Although the former is the most accessible, including being approved by the FDA for children, the response route and deep brain stimulation have been promising in cases of drug-resistant seizures, since there was a reduction in the frequency of seizures, according to the said authors (Gouveia *et al.*, 2024).

In summary, what was intended to be demonstrated in subtopic 2.1 is that the integration of the neuroimaging neurotechnologies, added to the possibility of neuromodulation practices, has driven clinical and therapeutic practices as well as emerging research. Such a combination of techniques allows researchers to monitor in real time the alterations in brain activity, deepening the understanding of the functioning of the brain system. From such knowledge it is possible to identify markers that guide early diagnosis or the personalisation of medical treatments. For this reason, neurotechnologies are promising in correlating Neuroscience, technologies and clinical practices. However, these experiments come accompanied by many ethical questions, since they act directly on human cognition with the capacity for behavioural modification, whether for its potentiation or for its weakening.

Finally, despite all these benefits in the treatment and diagnosis of the most diverse diseases, the impacts of the use of these technologies are still uncertain, especially considering, for example, that the latest technologies, such as smartphones, became popular in less than two decades. Thus, concerned with this rapid advance, scholars from distinct fields of knowledge are worried about these implications, a theme which is taken up in what follows, especially from the ethical point of view.

3 ETHICAL IMPLICATIONS OF IMAGING AND NEUROMODULATION TECHNOLOGIES

The contribution of Neuroscience to the research, treatment and diagnosis of some diseases is incontestable, as was attempted to be evidenced in chapter two. Specifically, when one thinks of the quantity of people who are affected by psychiatric disorders and who do not respond to treatment, which increases the risk of suicide and death of these individuals. Such an occurrence reveals that techniques such as neuromodulation seem socially desirable.

In the same way, the hypothesis that individuals with movement disorders such as Parkinson's and essential tremor, or even the possibility of paralysed individuals regaining some control over their activities, are ideals quite esteemed, as Whitten argues

> The sophisticated methods of Neuroscience — including molecular genetics, structural and functional neuroimaging, animal models and experimental tasks that simulate real-world behaviours in human research — have provided important insights into typical functioning and neurobehavioural disorders. Translational Neuroscience seeks to use this knowledge to improve the human condition, developing and refining interventions for these disorders. (Whitten, 2012)

Mental disorders, according to Camacho-Conde *et al.*, are prevalent in all communities, and depressive disorders are in third place in the global burden of disease. Even in middle- and high-income countries, suicide being the third cause of death among groups aged 15 to 24 and the fourth among those aged 18 to 65, and according to the authors, since medicines and other treatments are not always effective, there has been in recent years interest in the application of brain stimulation to attempt to circumvent such a question (Camacho-Conde *et al.*, 2022).

The idea of alleviating the suffering of these distinct groups is esteemed; however, such a contemporary context, which aggregates various fields of knowledge, distinct technologies and techniques, added to artificial intelligence, and which seems quite promising in the diagnosis and treatment of diseases, has gained momentum, especially due to the speed with which some methods may advance, giving rise to disquiet both socially and academically. The intriguing social debate may be visited by means of the article in The New York Times, of November 2025, the article "Big Tech Wants Direct Access to Our Brains: As neural implant technology and A.I. advance at breakneck speeds, do we need a new set of rights to protect our most intimate data — our minds?" (Kinstler, 2025).

The title of the said text was highlighted here because it serves to evidence the social outcry over the question, since it also addresses the access that technology companies may have to what happens in the intimacy of human minds and how this could be used by large companies to track emotions, energy levels, and warns of the risk of mind control and behavioural manipulation that could be employed on a large scale. Hypothetically, it reflects on what may occur should an EEG signal be capable of identifying political ideology, lying or sexual orientation (Kinstler, 2025).

> Neural data can offer unparalleled insight into the workings of the human mind. B.C.I.s are already frighteningly powerful: Using artificial intelligence, scientists have used B.C.I.s to decode "imagined speech," constructing words and sentences from neural data; to recreate mental images (a process known as brain-to-image decoding); and to trace emotions and energy levels. B.C.I.s have allowed people with locked-in syndrome, who cannot move or speak, to communicate with their families and caregivers and even play video games. Scientists have experimented with using neural data from fM.R.I. imaging and EEG signals to detect sexual orientation, political ideology and deception, to name just a few examples. (Kinstler, 2025)

The political and scientific community has also reflected on mental privacy, the control of neural data, cognitive liberty and correlated rights, which, on a broad scale, aim to protect mental integrity, and which the doctrine has termed neurorights. In 2024, the European Parliament expressed itself on the subject of the ethical challenges regarding the protection of mental privacy in the area of Neuroscience, whose title also deserves mention for touching part of the reflection intended to be proposed in this chapter: The protection of mental privacy in the area of neuroscience: Societal, legal and ethical challenges (Maia de Oliveira Wood *et al.*, 2024).

The latter text expounds that, as a result of this debate and in order to generate social visibility for the subject, the Neurorights Foundation was created, which aims to discuss and assess the proposal of neurorights. The authors question the bases that underpin such rights and make explicit that caution on the theme is necessary, especially because it centres its theory on the idea that the human self originates in the brain (although this explanation is quite accepted by academia), which may reduce the human to neural data, engendering a certain objectification of the individual (Maia de Oliveira Wood *et al.*, 2024).

This latter perspective is also debated because it touches on the notion of the human dignity of the vulnerable (for example, patients in a coma or with cognitive disabilities), a value that is central in civilised societies. According to the text, although the consequences are unintentional, and the social and collateral effects are not fully known, one of the greatest questions concerns the pressure for the individual to adapt to performance levels which are achievable only through invasive interventions (Maia de Oliveira Wood *et al.*, 2024).

The text concludes with a critical analysis, mentioning that converting moral rights into legal rights merits reflection and that they need not always be positivised. That is, it questions whether more legislation is necessary or whether already existing rights would be sufficient to protect concepts such as freedom of thought, mental integrity and privacy? The authors ponder whether these traditional rights, with a historical basis, could also protect against manipulations in the cognitive sphere (Maia de Oliveira Wood *et al.*, 2024).

The concern with the neural sphere occurs, according to Chneiweiss, because neurotechnologies are not yet manufactured commercially on a broad scale, but this should not take long, and he warns that it may be too late to act (Chneiweiss, 2025).

Below, some ethical risks will be clarified which are also connected to technical risks of these neurotechnologies. Marder explains that it is complicated to answer the question of whether the action of a modulator is predictable as well as robust, and draws a parallel with medicines, which produce distinct responses in a small group of people:

> The answer to this question is complicated. First, even for modulators that have robust actions, there may be significant differences in their responses to threshold concentrations (Weimann *et al.*, 1997) (S). Second, many modulators show state-dependent actions (Nusbaum and Marder, 1989b; Szabo *et al.*, 2011), such that the activity or prior history of activity of the network determines the extent or sign (Spitzer *et al.*, 2008) of modulatory action. Third, the action of the modulator may depend critically on other modulators (Brezina, 2010; Dickinson *et al.*, 1997) (S). That said, many networks with different underlying parameters may respond reliably to the same modulators (Grashow *et al.*, 2009), although in this study a small proportion of networks responded anomalously (Grashow *et al.*, 2009) (S). These data recall what we see in the human population with pharmacological agents that produce anomalous responses in a small subset of people. Thus, although there are significant individual differences in circuit structures between individuals, the particular sets of network parameters found in the healthy population may be enriched for sets of parameters that allow reliable neuromodulatory control under most conditions. (Marder, 2012)

The last citation also clarifies why this procedure must still be viewed with caution, specifically because the individual differences cannot be disregarded when altering the structure of a neural circuit (Marder, 2012).

In the same vein, Waisberg details the technical risks regarding this type of technology; he addresses specifically Neuralink. According to the author, included among these risks are: a) the displacement of the electrodes — there is the possibility that the ultra-thin electrodes are displaced or migrate to other areas of the brain, which could give rise to mechanical damage to the brain tissue or even loss of signal from the chip; b) the retraction of the electrodes — it was reported that in the initial tests parts of the electrodes retracted from the brain tissue, so that the number of electrodes with the capacity to capture the neural signals was reduced (Waisberg, 2024).

Further, there is the risk of c) Biocompatibility and inflammation: with inflammatory reactions, since the device is invasive, which may compromise the efficacy of the chip in the long term, in addition to the health of the user; d) Mechanical instability: as regards this aspect, Waisberg mentions that a piece of hardware needs to maintain stable connections, but the point is that the brain system is dynamic and flexible. Thus, how to ascertain the durability of the polymer electrodes once they would be under continuous stress. In addition to these concerns, the latter author reports the challenges of removal or even of substitution, which is considered extremely risky because it may, additionally, damage the brain cortex during surgery (Waisberg, 2024).

Maia *et al.* address specific cases from distinct points of view — ethical, sociological and legal; given its completeness in addressing the subject, the text will serve as the foundation for much of the argumentation that follows. They separate the ethical use of neurotechnologies into: non-invasive techniques in tetraplegic patients; non-invasive in a healthy population; invasive in a healthy population; and non-invasive in a patient with Alzheimer's (Maia de Oliveira Wood *et al.*, 2024).

In the first case, the use of non-invasive NT in a tetraplegic patient: the pre-implant concern is transparency and informed consent, since contexts such as that of Neuralink would require, according to the authors, the accompaniment and monitoring of specialists in human rights and medical ethics with regard to the results and methods, in addition to the implementation. As regards the post-implant, the concern is that even in the case of success, there is a risk that the patient is pressured, in the case of a potentiated human capacity, such that society itself pressures the individual towards an adaptation to the new "enhanced" being, engendering the ethical question between what is therapy and what is enhancement (Maia de Oliveira Wood *et al.*, 2024).

In the second case, the use of non-invasive NT in a healthy population to increase concentration, for example. The authors debate the functionalisation of persons, that is, reducing the individual to their productivity, which would intensify the pressure, whether individual or social, for high performance in a constant manner. From the corporate point of view this is also alarming, since it may instil in companies a demand for a highly focused and therefore more productive workforce (Maia de Oliveira Wood *et al.*, 2024).

In people with difficulty in concentration or learning, a demand for standardisation could also occur, the authors suggest, in addition to the aspect of dependence in relation to certain devices and the companies responsible for making the use of a certain technology possible. This could result in a high social expectation for elevated and uniform performance, which does not corroborate inclusive practices. Another ethical point is in the educational context, especially the child context, whose idea of applying an electrical current to the brain, in development, for a prolonged period in smaller doses, also lacks visibility (Maia de Oliveira Wood *et al.*, 2024).

In addition, the profitable aspect and the investments in BCI research are also mentioned: the NT industry generates billions in annual profits and double or triple is expected in the next decade (Kinstler, 2025). With the intensification of research and profits, the speed for the application of NTs on a commercial scale is amplified. The accelerated pace of development and investment increases the importance of the ethical discussion.

In the same vein, as regards the use of invasive NT in a healthy population, Maia de Oliveira *et al.* explain that the ethical concern is above all with agency and dependence, that is, technologies require constant connection and are linked to data centres, engendering questions such as the processing of such neural data, whether there is a risk of bias in the very structure of processing, involuntarily, or whether the agency itself could have such an attribution of manipulation. In view of this, they draw a parallel with current technologies already in wide use, such as smartphones, which already have as an implication: addiction to certain applications, negative effects from excessive use and technological dependence on digital platforms. In addition, they ask how it would be possible to guarantee that the greatest number of people could use such products for performance enhancement? Should the dissemination not be possible, economic and social inequality would also be threatened (Maia de Oliveira Wood *et al.*, 2024).

And in the last case, non-invasive NT in Alzheimer's, the authors indicate that the specific targeting of such a disease, whose neurotherapy promises to improve the autonomy of these patients, must not create false expectations of recovery in the family of those, particularly based on advertising or promises without scientific evidence; for this reason, there would be, according to the authors, an ethical demand also for caution as regards the disclosure and the therapeutic and clinical promise made to the public (Maia de Oliveira Wood *et al.*, 2024).

In view of the ethical questions now presented, what have countries done in terms of legislation and ethical guidelines to prevent the implications hitherto contemplated? Kinstler details some measures, such as neural privacy laws

> To prevent this kind of mind-meddling, several nations and states have already passed neural privacy laws. In 2021, Chile amended its constitution to include explicit protections for "neurorights"; Spain adopted a nonbinding list of "digital rights" that protects individual identity, freedom and dignity from neurotechnologies. In 2023, European nations signed the Léon Declaration on neurotechnology, which prioritizes a "rights oriented" approach to the sector. The legislatures of Mexico, Brazil and Argentina have debated similar measures. California, Colorado, Montana and Connecticut have each passed laws to protect neural data. (Kinstler, 2025)

The pertinence of the question is such that, while this work was being produced, UNESCO published a global normative framework concerning the ethics of neurotechnology, aiming to anticipate great scientific advances without compromising human rights. The recommendation came into force on 12 November 2025 and expressed the following concern

> Although its medical use is strictly regulated, neurotechnology remains largely unregulated in other areas. Many consumers use this technology unwittingly, through common devices such as headbands or connected headphones, which use neural data to monitor heart rate, stress or sleep. These highly sensitive data may reveal thoughts, emotions and reactions, and may be shared without consent. (UNESCO, 2025)

Finally, although the observations of this chapter have brought more questions than answers, the discussion aimed to present the current debates and how the limits of application of these technologies are still not clear. The debate is broad, permeating themes such as social pressure for high performance, inequality of access, coercive use (even if implicitly, in order to be socially accepted), false expectation of recovery for some diseases, technological dependence, agency by large technology companies, security, storage, processing and protection of neural data. And, above all, it reveals the possibility of acting directly on the brain with the capacity to influence emotions and shape behaviours.

In this way, what will themes related to the construction of the individual mean, as well as what it will signify to be a human being, thinking, endowed with supposed free will, in the face of the possibility of behavioural interference arising with the new technologies explored here? Such a reflection provokes debates on the understanding of the notions of consciousness, identity, autonomy, privacy and responsibility, which pertain to the legal field, and for this reason will be conceptions explored below.

4 NEW DIMENSIONS IN THE CONCEPTS OF CONSCIOUSNESS, IDENTITY, AUTONOMY, PRIVACY AND RESPONSIBILITY

The advance of neurotechnologies, which may intervene in cognition and in decision-making, creates tensions in classic concepts such as consciousness, identity, autonomy, privacy and responsibility. In this scenario, there is no intention to exhaust the subject, but only to investigate, at least minimally, the new configurations of the concepts in question, this because they are traditional concepts which would demand greater theoretical depth that this article did not propose to undertake. Thus, the proposal of this chapter is to reflect summarily on these new dimensions of the concepts in question which may have impacts in the legal sphere; for this reason, the doctrinal discussions have addressed the subject under the prism of the possibility of neurorights.

Burwell, Sample and Racine carried out a review of the literature, analysing, in addition to the questions raised in biomedical ethics, but seeking sources also in medicine and philosophy, and identified

> that BCI research and its potential translation into therapeutic intervention generate significant ethical, legal and social concerns, notably as regards personhood, stigma, autonomy, privacy, research ethics, safety, responsibility and justice. Our review of the literature determined, moreover, that, although these questions have been enumerated extensively, few concrete recommendations have been expressed. (Burwell, Sample e Racine, 2017)

If on the one hand NTs offer significant medical advances, the convergence of them with AI, added to non-medical, profitable and commercial-scale contexts, points to reflection on what kind of human being we can create from brain manipulation or from neural data. In 1970, Delgado provoked: "The question is what sort of humans would we like, ideally, to construct?" (Scarf, 1970).

Delgado was a pioneer in the experiments of brain stimulation and of the stimoceiver (a radio apparatus with the capacity to stimulate specific brain areas at a distance). He researched the suppression of aggressiveness, the amplification of happiness and of intelligence. In 1963, he carried out an experiment with a bull to demonstrate that behaviours, such as aggressiveness, could be modified. He implanted a stimulator and radio receiver in the bull's brain, and by means of a particular stimulation a signal was sent to the animal's brain, which stopped and calmed down (Marzullo, 2017).

The possibility of the physical control of the mind still interests, and for this reason Delgado's question, above, points to the relationship between programming and autonomy, that is, if it is possible to suppress or reduce anger, sadness by means of an implanted chip or by means of an electrical shock in a brain area of a particular individual, would the latter still be himself? In this case, Glannon explores this question concerning how to identify what the therapeutic limit is, what it is to cure a disease? He reflects on how to delimit what is: manipulation of personality; improvement (normal functions potentiated?); and therapy (Glannon apud Focquaert, 2009).

If the human being can be constructed, emotional states inferred, motor intentions and affective states altered, the technological risk and the social and scientific concern is legitimate, this because, according to Kinstler, without the due protection for the human mind: surveillance techniques could be employed, companies would have the ability to exploit the neural data generated from human thought; in addition, she contemplates the manipulation of decisions made on the basis of cognitive monitoring. The idea of the power to construct a human being, if taken up by corporations or by governments aiming at an idealised human being, without faults, or docile, or hyper-productive, has plagued philosophers, writers and scientists for decades (Kinstler, 2025).

In this respect, one reflects on the formation of opinion, how to determine that this would be autonomous, without coercion, with the due freedom of thought guaranteed constitutionally? In this particular, even deliberative processes could be compromised, since it cannot be asserted that the decision regarding a particular vote would not be vitiated.

Further, if a "self" can be constructed by external manipulation, the continuity of the self, the notion of personal identity, may also be threatened by the uncertain use of neurotechnologies, point out Maia de Oliveira Wood *et al.* (Maia de Oliveira Wood *et al.*, 2024).

The ANPD has already positioned itself in the same sense,

> In addition to the industrial potential and that of promoting the progress of science and human well-being, the technologies that interact with the brain raise very important ethical-legal questions, notably due to the risks created for fundamental (human) rights such as the free development of personality, freedom of thought, privacy, bodily integrity and non-discrimination. According to a report of the Human Rights Council of the Organização das Nações Unidas (ONU), neurotechnologies affect human (and fundamental) rights in a unique way (ONU, 2024, p. 18). For example, neurotechnologies of the brain-computer interface type, such as Functional Magnetic Resonance Imaging (fMRI) devices, and electroencephalography (EEG), rather than being used for medical diagnosis, may be employed by governments and private entities for the surveillance and monitoring of individuals (Ienca; Jotterand; Elger, 2018, p. 270). The theme has been the object of intense academic and interdisciplinary debate and has reached the most relevant international forums such as ONU (2024), Organização das Nações Unidas para a Educação, a Ciência e a Cultura – UNESCO (2023), Organização dos Estados Americanos – OEA (2023) and Organização para a Cooperação e Desenvolvimento Econômico – OCDE (2019). Thinking about the governance and the legal regulation of neurotechnologies is one of the ramifications of this debate of global scale. (Brasil, 2025, our emphasis)

One of the reflections that neurotechnologies awaken is: why, then, protect mental privacy? This question may be addressed in distinct ways. For now, it is chosen to address it under the ethical and legal aspect, and from such a perspective the democratic aspects arising from this discussion cannot be set aside.

Freedom of thought, although it is seen as the basis of the other freedoms, according to Maia de Oliveira Wood *et al.*, the risk of brain reductionism, in which the neural functions would supersede integral human dignity, engenders alarm (Maia de Oliveira Wood *et al.*, 2024).

This is because, from the clinical point of view, neural data may reveal patterns and indicate psychiatric questions even before the individual has detected them, expound the latter authors. In simple terms, Medicine could prematurely identify vulnerabilities which would allow them to be exploited in therapeutic contexts or for purposes of social manipulation (Maia de Oliveira Wood *et al.*, 2024).

Mental privacy is what determines the human capacity to self-individualise, to think as a unique human being, reinforcing personal identity. According to Maia de Oliveira Wood *et al.*, the very evolution of the idea of the right to be left in peace demonstrates the mutation of the concept, in addition to demonstrating its currency, since, according to the authors in question, it could also protect against the decoding of thoughts and emotions (Maia de Oliveira Wood *et al.*, 2024).

In this sphere of neural data, Yuste *et al.* warn that the risk is the invasion of mental privacy and that for this reason neural data should be treated with protection similar to the other organs in order to prevent the commercialisation of thoughts. This is because the advance of AI may decode mental states, and thus new rights would serve to protect human identity (Yuste *et al.*, 2017).

That is, according to the discussion proposed above, the collection and manipulation of those data, without the user's consent and without a pre-determined purpose, whether by means of non-invasive devices, such as headphones, headbands, helmets, glasses, EEG or neuroimaging, or by an invasive means such as brain implants, may be susceptible to commodification with the objective of profit or of manipulation and surveillance for social, governmental or commercial purposes; for this reason, the concern of the authors cited in this chapter.

In the same sense, another question pertaining to the debate is personal identity, motivated especially by the idea that invasive or non-invasive brain stimulation technologies have the capacity to alter the behavioural pattern, mental states, and therefore also have the ability to de-characterise a particular individual personality. And at this point, what is touched upon, above all, is the preservation of a particular identity and of the integrity of an individual.

Jotterand and Giordano set out cases in which neurological interventions produced behavioural and identity alterations, and thus proposed a responsible clinical use for the brain stimulation techniques. They cite, for example, Phineas Gage, whose accident with an iron bar destroyed part of his left frontal lobe, and he who, before, was a calm, intelligent, disciplined man and, after the accident, became impatient, rude and sarcastic. According to the text, the change was so radical that Gage's friends said "he is no longer Gage" (Jotterand e Giordano, 2011).

The same authors also cite the case of Mr Garrison with moderately advanced Parkinson's, who: before the deep brain stimulation, done for the treatment of the disease, possessed a quiet, pragmatic, timid personality and had also been diagnosed with apathy related to the disease. After the procedure, the motor improvement was significant; however, he became extroverted and sociable, had a change in his political orientation (before republican, afterwards democrat), as well as began to defend and make donations to environmental causes. In this sense, the authors point out, the behavioural and monetary pattern of the patient was drastically altered (Jotterand e Giordano, 2011).

The authors also point out other results in which patients came to have a certain joie de vivre after the treatment. But this worries them, specifically in the case of this type of stimulation if done outside of medical use with the specific objective of changing the personality or altering the subjective experience of the self. Jotterand and Giordano believe that this trajectory would be neither impossible nor improbable considering the economic and social forces that influence neurotechnological interventions (Jotterand e Giordano, 2011).

The examples above served to conjecture what personal identity will signify if it can engender an alteration of personality, for example. Levy discusses whether brain intervention by means of chips or drugs for emotional alterations creates a new self and threatens personal authenticity, or whether it merely removes obstacles for a potentiation of the self (extended mind thesis), and that for this reason the question, for him, would be which interventions to permit and under which conditions, thus distancing himself from the discussion of whether or not we should permit mental interventions (Levy, 2007, our emphasis).

The last paragraphs reveal the idea that if mental space can be inferred, monitored and even manipulated by techniques such as the already explained neuromodulation, without consent, autonomy and free will may also be compromised. Under this aspect, Garrafa highlights how autonomy and individual responsibility must be respected in decision-making

> Article 5 – Autonomy and Individual Responsibility. The autonomy of individuals to make decisions must be respected, while they can be responsible for those decisions and respect the autonomy of others. Special measures must be taken to protect the rights and interests of individuals not capable of exercising autonomy. (Garrafa, 2005)

Still exploring the example of Mr Garrison, whose political orientation went from republican to democrat, the debate touches another point of these neurotechnologies: the influence on the power of decision (Jotterand e Giordano, 2011). In this case the free and autonomous thought of the individual may also be affected, this because, if a brain stimulation or a device in interaction with the brain (BCIs) can manipulate a certain desired decision, how to determine that the action or choice was taken by the individual, since there was an influence of the device or of the stimulation? From this question also derives the attribution of legal and moral responsibility for acts committed under such interference.

In the sphere of accountability, under the legal prism, Andorno and Ienca argue that these neurotechnologies may leave the individual unprotected and suggest that traditional human rights (privacy or freedom of thought) would not be sufficient to protect against the risks arising from neurotechnologies. They indicate that risks such as the recording of brain activity, the decoding of mental patterns, behavioural modulation and interference in decisional autonomy require a specific legal category with the creation of neurorights: the right to mental privacy, to mental integrity, to cognitive liberty and to personal continuity (Ienca e Andorno, 2017).

The ramifications of neurotechnologies continue; derived questions such as criminal accountability, the right against self-incrimination, also point to the importance of the discussion proposed here. Munhoz, De Ávila and Pereira have already discussed the (il)legality and (il)licitness or not of the evidence, as well as of the highly personal rights of the investigated party in the production of evidence with the use of neurotechnologies for access to neural data. They attempted to explore whether evidence based on NT touches the right to silence and whether access to mental information violates constitutional rights of the accused (Munhoz, De Ávila e Pereira, 2024).

For example, in the case of the brain reading of an accused person in which a neuroimaging technology is used and he is exposed to the crime scene and the brain recognises the scene, even though the accused has not revealed such information. In this particular, the risk of the mental reading of an accused person adds debates to the scenario of neurotechnologies and their implications.

Finally, Hamburg expounds the central concern with neurotechnologies and why this differs from the others, above all because it may directly access the biological mental substrate, and adds: "Any new technique for understanding how the brain mediates behavior could affect our lives for better or worse" (Hamburg apud Scarf, 1970). And it was this disquiet that the present research attempted to demonstrate.

5 CONCLUDING REMARKS

The advances of Neuroscience and of AI, added to the growth of Neurotechnologies, inaugurate a panorama of reflections concerning the human mind. Considering the access to brain activity and the modulation of mental processes by means of invasive or non-invasive techniques, some ethical implications may arise from access to such mental processes.

The potential of neurotechnologies is promising and desirable, above all in the treatment and diagnosis of psychiatric and neurological diseases such as Alzheimer's, Parkinson's and depression. The sophistication of these instruments may promote health and well-being for unhealthy individuals. However, the experiments and techniques, many still in testing or not accessible to all publics, engender questions concerning the unintentional or intentional consequences that may arise from the development and expansion in the use of these neurotechnologies.

From the records of brain activity, the studies presented suggested that mental patterns may be decoded, and behavioural modulation, in addition to psychic surveillance with commercial or governmental and social objectives, concerns scientists, this because the interference in behaviour, as in the cases analysed by Jotterand and Giordano, brings reflections concerning individual autonomy, free will, human identity, consciousness, in addition to colliding with the protection of mental privacy and of the legal accountability eventually arising from a modulated action. It is still too early to say whether a modulated action will be considered vitiated or not.

In view of the foregoing, the general objective of understanding the ethical implications of new technologies in Neuroscience was explored in contexts with healthy and unhealthy individuals and with invasive and non-invasive methods. As a result, authors such as Maia de Oliveira Wood *et al.* identified that there is a social risk that an individual is pressured to adapt to a new "potentiated self", engendering the ethical question between what is therapy and what is enhancement.

Another risk is that the corporate, educational or governmental demand for a certain behaviour desirable by such spheres is forced collectively by means of the use of the techniques explored in the text. For example, imagine a company that desires a highly focused and productive workforce and aims to modulate such behaviour, or a government that aspires to a particular sexual orientation, for example.

Another ethical point indicated was the profitable aspect as regards the agency and dependence of some neurotechnologies which require constant connection and are linked to data centres. At this point, reflections regarding the processing of the recorded neural data, the risk of bias or not in the very structure of processing, involuntarily or not, are also revealed.

Further, the egalitarian aspect in access to such technologies was inquired into. In the case in which such an equitable perspective is not possible, the theme of social, economic and technological inequality would also be linked here. Aspects such as an ethical demand in the disclosure and promise made to the public about treatment and diagnosis with the use of these technologies were also mentioned.

Further, technical risks such as the possibility of displacement and retraction of the electrodes, biocompatibility, inflammation, instability of connection, also press for the tests and studies in this area to be transparent and with informed consent, since specific cases such as those of Neuralink generated social noise especially as regards the supposed lack of these two components.

In this way, Maia de Oliveira Wood *et al.* argued for the accompaniment and monitoring of specialists in human rights and medical ethics in the implementation and in the results of these studies. In summary, ethical implications such as social pressure, inequality, coercive use, false expectation of recovery for some diseases, technological dependence, agency by large technology companies, security, storage, processing and protection of neural data were presented, fulfilling the general objective of this work.

In addition, the conjunction of the mapping of neural data, the identification of patterns of thought, direct action on the brain and the possibility of stimulating or discouraging a certain behaviour revealed the theory of the possibility of individual and collective behavioural interference. Thus, should the supposition that emotions may eventually be intensified or reduced be realised, self-perception would also be affected, giving rise to an estrangement from oneself and disturbing the idea of personal identity.

In view of this possibility of affecting individual characteristics, with the ability for depersonalisation, the work explored new contours as regards classic themes such as the construction of the individual, consciousness, identity, autonomy, privacy and responsibility, answering the initial question: whether the new technologies in Neuroscience may bring ethical impacts to such concepts.

Finally, as a result, it was concluded that yes, there may be ethical impacts on the classic concepts highlighted. The authors presented indicated that there may be impacts on mental privacy if the neural data are accessed without consent and without the due making explicit of the reason for collecting them.

Further, studies presented such as those of Burwell, Sample and Racine indicated that should thoughts and decisions receive interference, there is the possibility that this manipulation violates autonomy, since the individual will not be certain whether he is the author of a particular decision or behaviour. In addition, some techniques presented in the text, the case of Garrison, for example, in which a behavioural alteration was produced, reveal debates concerning personal identity and moral and legal responsibility.

In view of the foregoing, many questions hitherto presented lack discussion; however, from the ethical and legal point of view, one of the most notable concerns an action altered by a neurotechnology: whether this is considered a violated and induced decision; this matters, because it may indicate a difficulty in determining whether the action that received the interference is autonomous, that is, of the individual himself or not. For now, this work did not intend to exhaust the subject, but only to contribute to the first notions concerning the ethical implications of the new technologies pertaining to the brain sphere.

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NORMATIVE GAPS IN DATA-DRIVEN EDUCATIONAL GOVERNANCE: A LEGAL-NORMATIVE ANALYSIS OF DECREES NO. 6,674/2017 AND NO. 7,223/2017 IN THE PARANÁ STATE EDUCATION PLAN

LACUNAS NORMATIVAS NA GOVERNANÇA EDUCACIONAL POR DADOS: ANÁLISE JURÍDICO-NORMATIVA DOS DECRETOS N. 6.674/2017 E N. 7.223/2017 NO PLANO ESTADUAL DE EDUCAÇÃO DO PARANÁ

LAGUNAS NORMATIVAS EN LA GOBERNANZA EDUCATIVA BASADA EN DATOS: ANÁLISIS JURÍDICO-NORMATIVO DE LOS DECRETOS N. º 6.674/2017 Y N. º 7.223/2017 EN EL PLAN ESTATAL DE EDUCACIÓN DE PARANÁ

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ABSTRACT
This article analyzes, from a legal-normative perspective, the normative gaps in data-driven educational governance established by Paraná State Decrees No. 6,674/2017 and No. 7,223/2017, enacted to organize the monitoring and evaluation of the Paraná State Education Plan, approved by State Law No. 18,492/2015. The research problem consists in examining whether this sub-statutory infrastructure preserves legality, publicity, democratic management, data protection, and social oversight when converting legal goals into technical routines, reports, and indicators. The study aims to assess the compatibility of these decrees with constitutional parameters, the Access to Information Law, the General Personal Data Protection Law, and digital constitutionalism. To this end, it adopts a qualitative, documentary, and interpretive approach, limited to the analysis of state normative acts, official monitoring reports, and their articulation with the applicable legal framework. The findings indicate that the decrees provide a formal basis for monitoring, but leave gaps concerning documented participation, methodological transparency, decision-making justification, data traceability, anonymization, public contestation, and federative coordination. The article concludes that sub-statutory legality is a necessary but insufficient condition when educational indicators are not accompanied by public protocols of purpose limitation, methodological records, social oversight, and democratic review.

Keywords: Data-driven Educational Governance. Paraná State Education Plan. Sub-statutory Legality. Data Protection. Digital Constitutionalism.

RESUMO
Este artigo analisa, em chave jurídico-normativa, as lacunas normativas da governança educacional por dados instituída pelos Decretos estaduais n. 6.674/2017 e n. 7.223/2017, editados para organizar o monitoramento e a avaliação do Plano Estadual de Educação do Paraná, aprovado pela Lei estadual n. 18.492/2015. O problema consiste em compreender

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se essa infraestrutura infralegal preserva legalidade, publicidade, gestão democrática, proteção de dados e controle social ao converter metas legais em rotinas técnicas, relatórios e indicadores. Objetiva-se examinar a compatibilidade dos decretos com parâmetros constitucionais, com a Lei de Acesso à Informação, com a Lei Geral de Proteção de Dados Pessoais e com o constitucionalismo digital. Para tanto, procede-se a uma pesquisa qualitativa, documental e interpretativa, limitada ao exame dos atos normativos estaduais, dos relatórios oficiais de monitoramento e de sua articulação com o regime jurídico aplicável. Observa-se que os decretos conferem base formal ao monitoramento, mas deixam lacunas relativas à participação documentada, à transparência metodológica, à motivação decisória, à rastreabilidade dos dados, à anonimização, à contestação pública e à coordenação federativa. Conclui-se que a legalidade infralegal é condição necessária, porém insuficiente, quando indicadores educacionais não são acompanhados por protocolos públicos de finalidade, memória metodológica, controle social e revisão democrática.

Palavras-chave: Governança Educacional por Dados. Plano Estadual de Educação do Paraná. Legalidade Infralegal. Proteção de Dados. Constitucionalismo Digital.

RESUMEN

Este artículo analiza, desde una perspectiva jurídico-normativa, las lagunas normativas de la gobernanza educativa basada en datos instituida por los Decretos estatales n.º 6.674/2017 y n.º 7.223/2017 de Paraná, promulgados para organizar el seguimiento y la evaluación del Plan Estatal de Educación de Paraná, aprobado por la Ley estatal n.º 18.492/2015. El problema de investigación consiste en examinar si esta infraestructura infralegal preserva la legalidad, la publicidad administrativa, la gestión democrática, la protección de datos y el control social al convertir metas legales en rutinas técnicas, informes e indicadores. El estudio tiene como objetivo evaluar la compatibilidad de dichos decretos con los parámetros constitucionales, la Ley de Acceso a la Información, la Ley General de Protección de Datos Personales y el constitucionalismo digital. Para ello, adopta un enfoque cualitativo, documental e interpretativo, limitado al análisis de los actos normativos estatales, de los informes oficiales de seguimiento y de su articulación con el régimen jurídico aplicable. Los resultados indican que los decretos proporcionan una base formal para el seguimiento, pero dejan lagunas relativas a la participación documentada, la transparencia metodológica, la motivación decisoria, la trazabilidad de los datos, la anonimización, la contestación pública y la coordinación federativa. Se concluye que la legalidad infralegal es una condición necesaria, aunque insuficiente, cuando los indicadores educativos no están acompañados por protocolos públicos de finalidad, memoria metodológica, control social y revisión democrática.

Palabras clave: Gobernanza Educativa Basada en Datos. Plan Estatal de Educación de Paraná. Legalidad Infralegal. Protección de Datos. Constitucionalismo Digital.

1 INTRODUCTION

State Law No. 18,492 of 24 June 2015 approved the Paraná State Education Plan for the 2015–2025 decade, with its validity extended until 31 December 2026 by State Law No. 22,591/2025. Two years later, State Decrees No. 6,674/2017 and No. 7,223/2017 organised the Permanent Monitoring and Evaluation Commission, the Technical Support Group, and the institutional coordination required to follow up on the plan. The PEE-PR thus shifted from a programmatic legal provision to a continuous administrative architecture, dependent on technical bodies, reports, indicators, and evaluation procedures.

The monitoring of educational plans is a condition of effectiveness, but not a neutral procedure. Dourado (2017) demonstrates that plans depend on federative coordination, financing, and participation in order to assert themselves as State policies. Menezes e Souza (2018) indicate that the formal provision of follow-up does not eliminate asymmetries between normative design, institutional capacity, and participation. Scaff (2023), in the Paraná case, points to weaknesses in federative coordination and in the socio-state interface. The creation of technical bodies expands state capacity, but also concentrates methodological power over sources, criteria, series, and modes of publicity.

The central question is how sub-statutory acts convert legal goals into administrative flows of information, reports, and indicators, and to what extent this conversion preserves legality, publicity, democratic management, data protection, and social oversight. The objective is not to reject monitoring, but to subject it to constitutional and legal parameters that prevent the replacement of public deliberation by opaque technical authority.

The starting hypothesis is that the decrees provide a formal basis for the monitoring of the PEE-PR, but retain relevant normative gaps. Some can be addressed through interpretation in conformity with the Constitution, especially regarding qualified publicity, the purpose of processing, and methodological documentation. Others require procedural complementation or a new normative act, since they involve decision-making justification, public contestation, institutional responsibilities, and limits on the administrative use of educational data.

The contribution of this article is to map these gaps and propose a feasible normative reform. The research is qualitative, documentary, and interpretive, in line with the understanding of Bowen (2009) and Cellard (2008) on documentary analysis. It does not carry out a technical audit, interviews, or an educational impact assessment. The delimitation of the empirical corpus – normative acts, monitoring reports, and administrative documents – follows the criteria of pertinence, authenticity, and representativeness indicated by Quivy e Campenhoudt (1992) for the selection of documents in social research. It examines normative acts, official reports, and administrative documents as formal traces of the state organisation of educational follow-up, identifying what the decrees authorise, regulate, omit, and require to be complemented in order to make data-driven governance legally legitimate, publicly controllable, and democratically reviewable.

2 LEGAL-NORMATIVE FRAMEWORK: GOVERNANCE AS A CONSTITUTIONALISED ADMINISTRATIVE EXERCISE

Educational governance refers to the norms, institutions, competences, and procedures through which the State coordinates the implementation of the right to education. It should not be confused with efficient management or with everyday school administration: it concerns the way in which responsibilities are structured, information is produced, priorities are justified, and public oversight is made possible.

The PEE-PR is not realised solely through abstract legal commands, but through institutional arrangements that articulate goals, bodies, procedures, reports, indicators, and decisions. Bucci (2013) understands public policies as arrangements guided by governmental action programmes; Coutinho (2013) shows that law organises implementation capacities, distributes competences, and defines instruments; Freitas (2014) reinforces that administrative choices must be justified, controllable, proportionate, and evidence-based.

The legal-normative consequence is direct: legality is not exhausted by the formal subordination of the decree to the law. It requires traceability of the procedure, participation of those affected, control of purpose, and public review. For Bandeira de Mello (2015), the validity of the administrative act requires not only competence and form, but also sufficient justification and adequacy to the public interest that grounds it – requirements that project onto decrees regulating State policies. A decree may be formally valid and still produce fragile governance if it does not make explicit who defines criteria, how information is consolidated, what responsibilities apply, and how reports ground administrative decisions.

This substantive dimension becomes decisive in goal-based policies. The educational plan is only controllable when the path between goal, information, interpretation, and decision can be reconstructed by oversight bodies, councils, researchers, and school communities. Educational governance is constitutionalised when administrative capacity is accompanied by public responsibility, methodological transparency, and effective contestation.

The theory of public action instruments deepens this reading. Lascoumes e Le Galès (2007) show that instruments are not neutral means: they incorporate representations of public problems, redistribute power, and define who participates, which information matters, which categories organise reality, and which responses appear administratively plausible.

In the educational field, reports, indicators, technical groups, and permanent commissions fulfil this function. They do not merely follow up on goals; they structure how the Administration recognises inequalities and ranks priorities. Desrosières (1998) and Porter (1995) explain how public statistics produce conventions of objectivity, trust, and comparability. Merry (2016) demonstrates that indicators condense values and institutional choices into apparently neutral numbers. The number does not eliminate the normative decision that precedes it.

Applied to the PEE-PR, this reading shows that source, formula, periodicity, and territorial scale interfere with the legal visibility of educational inequalities. An aggregate series may favour state-level comparison and attenuate local asymmetries; a periodic report may disclose results and conceal process; a technical group may qualify information and concentrate methodological power. The critique does not reject technique: it requires that its authority be auditable.

Digital constitutionalism constitutes the third axis. De Gregorio (2022) associates it with the limitation of powers mediated by technology; Celeste (2021) understands it as the projection of constitutional values onto new forms of informational power. Here, "digital" does not necessarily refer to AI, automated decision-making, or predictive algorithms, but to the informational infrastructures of the Administration: databases, consolidation routines, electronic reports, historical series, indicators, and institutional flows.

These infrastructures condition fundamental rights. In the PEE-PR, the way information is recorded, consolidated, and disclosed interferes with how the State identifies supply deficits, territorial inequalities, the need for correction, and conditions for participation. It also mobilises access to public information, personal data protection, and non-discrimination. When data structure priorities, they cease to be technical support and become part of the administrative realisation of the right to education.

Three principles guide this application. The first is constitutional visibility: informational processes must be reconstructible and questionable, not merely published as a final result. The second is structured participation: indicators that affect vulnerable groups, municipalities, schools, or educational priorities require consultation, deliberation, and contestation. The third is democratic non-regression: the digitalisation of monitoring cannot reduce guarantees of transparency, democratic management, and social oversight. This application modifies the standard of control over the decrees. The examination ceases to be limited to the lawfulness of data processing or to official publication. It comes to encompass the democratic quality of the infrastructure: who defines categories, validates methodological changes, is responsible for traceability, can request review, and how affected groups participate before the indicator stabilises as a basis for public action.

The analysis rests on three matrices in tension: legal formalism, which preserves hierarchy, competence, and predictability; the critique of instruments, which reveals the reconfiguration of power even in formally valid acts; and digital constitutionalism, which subordinates informational infrastructures to fundamental rights. Doneda (2011) anticipates this perspective by identifying personal data protection as an autonomous fundamental right, derived from human dignity and privacy, yet endowed with its own content and protection. Mendes (2014) and Bioni (2019), in addressing data protection in connection with informational self-determination and the protection of personality, reinforce that data are not simple technical inputs: they affect autonomy, equality, non-discrimination, and the exercise of rights.

The article maintains this productive tension. Formal legality is necessary, but insufficient when data-driven governance does not allow the reconstruction of sources, criteria, responsibilities, methodological changes, and decision-making uses. Therefore, the analysis of the decrees requires verifying auditability, participation, justification, traceability, data protection, and subordination to fundamental rights.

3 RESULTS AND DISCUSSION: ANALYSIS OF THE DECREES

Decrees No. 6,674/2017 and No. 7,223/2017 organise the transition from the goals of State Law No. 18,492/2015 to monitoring procedures. This transition is not merely operational: it defines the administrative infrastructure through which goals become observable, comparable, and justifiable.

Articles 1 and 2 create the Permanent Commission and stabilise an administrative centre for follow-up. The measure confers institutional continuity, but its composition concentrates power in state bodies, especially SEED, SETI, and CEE-PR. The official reading of the PEE-PR remains conducted within the State, with social participation in a secondary position.

The Commission is necessary to request information, consolidate data, and produce reports. The gap does not lie in its creation, but in the absence of a procedural circuit connecting its activity to the educational community. The decree does not define dedicated seats for forums, representative entities, municipalities, school communities, or rights-protection bodies. Nor does it regulate the publicity of the calendar, minutes, disagreements, decision-making criteria, and the handling of contributions.

Thus, Articles 1 and 2 are a necessary but insufficient institutional basis. To ensure informational legitimacy, they require a public operating protocol, with composition, agenda, minutes, records of statements, deliberation criteria, and a means of handling contributions. Without this layer, the Commission operates as a technical centre, but not as a publicly controllable instance of mediation between data, participation, and educational decision-making.

Article 4 creates the Technical Support Group; Decree No. 7,223/2017 adjusts its composition and reinforces the specialised dimension. The participation of IPARDES qualifies statistical production, data consolidation, and the reading of historical series. Technical expertise is indispensable, but it may shift normative choices onto formulas, categories, and criteria that are little discussed. In light of Lascoumes e Le Galès (2007), the greater the weight of technique, the greater the requirement of auditability, methodological publicity, and contestation.

The gap in Article 4 lies in the absence of substantial duties of methodological documentation. The decree organises the Technical Group, but does not impose methodological notes, calculation records, technical officers, version history, or justification for changes in source, formula, territorial scope, periodicity, or aggregation. The Administration may disclose results without making public the path of production; councils, researchers, and communities know the conclusion, but cannot reconstruct premises, limits, and changes in criteria. The 2019 goal evaluation report, prepared by SEED-PR and IPARDES (2019), illustrates this gap by recording results by goal without fully explaining the source, formula, technical officer, or calculation records, making it difficult for councils, researchers, and communities to reconstruct the path of production of the evidence presented.

The LAI requires active transparency of information of collective interest, and the LGPD requires purpose, adequacy, necessity, security, prevention, and accountability when personal or sensitive data are processed. In educational monitoring, transparency must encompass source, method, periodicity, limitations, technical officer, calculation records, and version preservation. The decree does not translate these duties into the institutional routine of the Technical Group.

Article 3, sole paragraph, allows interaction with entities and bodies related to the PEE-PR. The rule dialogues with the democratic management provided for in Article 14 of the LDB, but differs from a participatory procedure. The decree does not indicate how councils, forums, municipalities, and communities are called upon to express their views; whether they participate before or after methodological consolidation; how contributions are documented;

whether there are public responses; or what deadline applies to relevant changes. This gap is serious because a methodology consolidated without prior debate defines, for years, how the State will recognise deficits, inequalities, and educational priorities. Paro (2002) understands democratic management as effective participation in the conduct of the public school; Luck (2017) associates it with organised participation and co-responsibility. At the state level, participation is not presumed: it is institutionalised through rules, records, deadlines, responses, and review.

Article 6 provides for semi-annual reports and periodic or biennial studies. There is legal value in this provision, since reports reduce administrative forgetting, allow temporal comparison, and create a basis for councils, oversight bodies, researchers, and civil society. The gap lies in the type of transparency: the decree mandates the publication of results, but does not require source, formula, limitations, technical officer, open format, version history, or justification of changes. Publishing results is not enough to fulfil active transparency. In policies monitored by indicators, information of collective interest includes the method that explains how the result was produced, which choices underpin it, and which limits condition its interpretation. Product transparency shows the number or conclusion; process transparency makes it possible to control source, formula, responsible agent, aggregation criteria, treatment of inconsistencies, and methodological changes.

Article 5 articulates state monitoring with the Permanent Federative Negotiation Body of the PNE. The provision converges with the constitutional regime of collaboration, since state plans must dialogue with the PNE, municipal plans, and national parameters. Methodological divergences may be legitimate in cooperative federalism, but they require a compatibility matrix, a technical note, and a public explanation of comparative effects. Without this, state autonomy may turn into methodological opacity. The following tables synthesise the reading. The first relates provisions, legal-democratic risks, and required controls. The second reorganises the findings by domain of regulation, preparing the diagnosis and the reform proposal, unified in the following section. Let us consider:

Table 1

Analytical reading of the central provisions of Decrees No. 6,674/2017 and No. 7,223/2017

Dispositivo analisado	Função jurídico-administrativa	Risco jurídico-democrático	Controle normativo requerido	Prioridade
Arts. 1º e 2º	Instituem a Comissão Permanente, definem sua composição estatal e estabilizam o centro administrativo de	Concentração da leitura oficial do plano em órgãos administrativos, com baixa densidade de permeabilidade social.	Publicidade da composição, calendário, atas, registros de manifestação, divergências e critérios de deliberação.	Alta

Dispositivo analisado	Função jurídico-administrativa	Risco jurídico-democrático	Controle normativo requerido	Prioridade
	acompanhamento do PEE-PR.			
Art. 3º, I a III	Articulam avaliação, proposição de políticas e divulgação de resultados.	Aproximação entre medir, interpretar e decidir sem motivação pública suficiente sobre o uso administrativo dos indicadores.	Justificativa das propostas, indicação do uso decisório atribuído aos dados e transparência ativa das razões administrativas.	Crítica
Art. 3º, parágrafo único	Prevê interação com entes e instâncias relacionados ao plano.	Participação tratada como possibilidade institucional, e não como procedimento verificável de consulta, devolutiva e revisão.	Consulta prévia, ata ou registro público, devolutiva fundamentada, prazo de manifestação e critério de incorporação das contribuições.	Crítica
Art. 4º	Cria o Grupo Técnico de Apoio e estrutura a dimensão especializada do monitoramento.	Deslocamento de escolhas normativas para fórmulas, fontes, recortes e categorias técnicas pouco discutidas publicamente.	Nota metodológica, memória de cálculo, identificação de responsáveis técnicos, histórico de versões e justificativa de alterações.	Crítica
Art. 4º, § 1º	Prevê participação técnica do IPARDES na elaboração de estudos e relatórios.	Rastreabilidade dispersa entre órgãos produtores, consolidadores e validadores da informação educacional.	Cadeia de custódia do dado, fonte primária, responsabilidades institucionais, versões utilizadas e registro de tratamento de inconsistências.	Alta
Art. 5º	Articula o monitoramento estadual à instância federativa relacionada ao PNE.	Divergências metodológicas entre indicadores estaduais e nacionais sem explicação pública sobre compatibilidade ou efeitos comparativos.	Matriz de compatibilidade, nota técnica de divergência, justificativa da opção estadual e indicação dos limites de comparação.	Média
Art. 6º	Prevê relatórios semestrais e estudos periódicos ou bienais.	Publicidade de produto sem transparência de processo, com risco de divulgação do resultado sem auditabilidade da cadeia de produção.	Fonte, fórmula, limitações, responsável técnico, histórico de versões, formato acessível e, quando possível, dados abertos agregados.	Crítica
Arts. 7º e 8º	Vinculam a avaliação às metas e estratégias do PEE-PR.	Uso de dados educacionais sem disciplina expressa de finalidade, minimização, salvaguardas e prevenção de usos desviados ou discriminatórios.	Finalidade educacional documentada, minimização, segurança, agregação ou anonimização suficiente e vedação de usos incompatíveis com o plano.	Alta

Source: prepared by the authors, based on Decrees No. 6,674/2017 and No. 7,223/2017.
Note: the priority indicates the urgency of normative or procedural complementation to ensure informational legitimacy, auditability, and social oversight of monitoring.

Table 2

Domains of regulation and priority of normative intervention

Domínio de regulação	Dispositivos relacionados	Padrão de conformidade	Intervenção normativa prioritária
Arquitetura institucional e governança técnica	Arts. 1º e 2º; art. 4º; art. 4º, § 1º	Compatível, mas lacunar quanto à permeabilidade social, à documentação técnica e à	Publicar protocolo de funcionamento, composição, agenda, atas, notas metodológicas, responsáveis técnicos,

Domínio de regulação	Dispositivos relacionados	Padrão de conformidade	Intervenção normativa prioritária
		rastreabilidade interinstitucional.	memória de cálculo e cadeia de custódia dos dados.
Transparência e auditabilidade	Art. 3º, I a III; art. 6º	Compatível quanto à previsão de divulgação, mas insuficiente quanto à transparência de processo.	Exigir fonte, fórmula, limitações, histórico de versões, formato acessível, dados abertos agregados e motivação do uso decisório dos indicadores.
Participação democrática	Art. 3º, parágrafo único	Omisso quanto ao rito participativo e à forma de contestação pública das escolhas metodológicas.	Definir consulta prévia, prazo de manifestação, registro das contribuições, devolutiva fundamentada e critérios de incorporação ou rejeição.
Proteção de dados e finalidade educacional	Arts. 7º e 8º	Compatível se interpretado restritivamente, mas lacunar quanto às salvaguardas de tratamento de dados pessoais ou sensíveis.	Vincular o tratamento à finalidade educacional do PEE-PR, prever minimização, segurança, agregação ou anonimização e prevenção de usos discriminatórios.
Coordenação federativa e comparabilidade	Art. 5º	Omisso quanto ao procedimento de divergência entre indicadores estaduais, nacionais e municipais.	Publicar matriz de compatibilidade, justificativa de divergências metodológicas, efeitos sobre a comparação e limites de interpretação das séries.
Motivação decisória e controle social	Art. 3º, I a III; arts. 7º e 8º	Compatível com lacuna, pois o decreto permite acompanhamento, mas não exige explicitação de como indicadores fundamentam decisões.	Exigir motivação pública das propostas, indicação de alternativas consideradas, registro de usos administrativos e canal permanente de revisão ou contestação.

Source: prepared by the authors, based on Decrees No. 6,674/2017 and No. 7,223/2017.
Note: the domains synthesise the points of tension identified in the analysis of the decrees and guide the diagnosis of the normative gaps in data-driven educational governance in the PEE-PR.

4 DIAGNOSIS AND PROPOSAL FOR NORMATIVE REFORM

The notion of public compliance, understood by Coelho (2016) as a set of institutional mechanisms of conformity, prevention, and integrity in the Administration, guides the preventive dimension of the proposed reform. Its role, in this article, is not to replace external control or to shift legality towards a merely managerial grammar, but to reinforce the need for protocols, records, and review bodies capable of identifying risks before judicialisation. From this perspective, the gaps identified do not have the same legal nature nor require a uniform institutional response.

To avoid every normative deficit being treated as automatic illegality, four types of remediation are adopted: A, interpretation in conformity with the Constitution; B, procedural complementation through administrative acts, technical notes, or publicised protocols; C, normative amendment through a new decree or amendment; and D, external or review-based institutional control by councils, oversight bodies, the Public Prosecutor's Office, the Public Defender's Office, or the Judiciary. This classification makes it possible to distinguish omissions remediable by interpretation, insufficiencies correctable by administrative procedure, gaps that require normative densification, and situations that call for review-based or external control.

Tables 1 and 2 indicate that the insufficiency is not episodic, but transversal. The same architecture that stabilises monitoring also concentrates methodological definition; the same publicity that discloses results may conceal process; the same participatory openness that allows interaction does not create a verifiable duty of consultation, response, and review. Therefore, diagnosis and reform are treated jointly: each gap is accompanied by the remediation capable of converting it into a controllable procedural obligation.

The proposed reform is incremental. It does not replace the architecture of Decrees No. 6,674/2017 and No. 7,223/2017, since they already stabilise relevant bodies and competences. It corrects critical points without breaking institutional continuity, combining specific amendments, a SEED-PR ordinance, a CEE-PR resolution, and a review body. Precedents from São Paulo and Minas Gerais indicate that protocols, dashboards, and update routines can be instituted through sub-statutory acts and ordinary administrative management (São Paulo, 2025; Minas Gerais, 2023).

4.1 DEMOCRATIC PARTICIPATION

Gap: Articles 1, 2, and 3, sole paragraph, allow interaction, but do not define a public ritual of consultation, deadline, minutes, response, criterion of incorporation, or reasoned reply. Participation appears as a normative possibility, not as a verifiable procedure of deliberation and control. This affects democratic management, administrative publicity, and informational legitimacy.

Remediation: a new Article 3-A should institute a Prior Participatory Procedure. Before relevant methodological changes, especially those involving disability, race, EJA, professional education, children, adolescents, and other vulnerable groups, the Permanent Commission shall submit a reasoned proposal for formal consultation to the CEE-PR, the State Education Forum, and rights-protection bodies. The minimum deadline shall be thirty days; contributions shall be documented, published, and assessed in a report with reasons for incorporation or rejection.

Implementation may occur through a SEED-PR ordinance combined with a CEE-PR resolution. The ordinance regulates the internal ritual; the resolution sets the parameters for participation and educational oversight. The consultation must publish a justifying technical note and a comparative table between the current methodology and the proposal. The final report distinguishes real participation from symbolic openness, preventing a methodology consolidated without debate from defining, for years, the official visibility of deficits and inequalities.

This solution preserves the technical competence of the Commission, but reduces dependence on administrative will in each cycle. Participation ceases to be an occasional invitation and becomes part of the process of forming public evidence, especially when indicator categories affect vulnerable groups or alter educational priorities.

4.2 METHODOLOGICAL TRANSPARENCY AND TRACEABILITY

Gap: Article 4, Article 4, § 1, and Article 6 allow the production and disclosure of results without an express duty of calculation records, technical note, source, formula, technical officer, version history, or chain of custody. The Permanent Commission, Technical Group, IPARDES, and sectoral bodies may produce information, but the decrees do not define responsibilities for source, calculation, review, publication, correction, and version preservation.

Remediation: the creation of the *PEE-PR Indicators Protocol: 2026 version*, a public, dated, editable document instituted by a SEED-PR ordinance. For each indicator, it must contain the legal basis for processing under the LGPD; restrictive educational purpose; minimum territorial unit; periodicity and date of update; primary source; technical officer; formula; methodology; aggregation criteria; known limitations; history of changes; custodian body; rectification procedure; and effects on comparability.

The protocol expands active transparency (LAI), documents purpose and accountability (LGPD), and makes informational power controllable (digital constitutionalism). It must be published on a dedicated SEED-PR page, in an open and accessible format, with the preservation of previous versions. The objective is not merely to open databases, but to explain the legal basis, method, limits of use, and institutional path of administrative evidence.

Traceability also delimits responsibility. When source, version, custodian body, and technical agent are identified, it becomes possible to correct inconsistencies, compare series, and ascertain the effects of methodological changes without turning technical divergence into an opaque dispute. The information remains useful for management, but becomes reconstructible by councils, oversight bodies, and researchers.

4.3 JUSTIFICATION AND DECISION-MAKING CONTROL

Gap: Article 3, I to III, provides for analysis, proposal, and disclosure, but does not require the Commission to explain how reports or indicators ground recommendations, reprogramming of supply, review of priorities, or adjustments of strategy. Without this link, monitoring produces public information without demonstrating decision-making use.

Remediation: an amendment to the decrees should institute an express duty of justification for administrative recommendations derived from indicators. Each proposal for adequacy, reprogramming, or review of strategy shall indicate the data used, the source mobilised, the methodological limitation identified, the alternatives considered, the reason for the administrative choice, and the expected effects. Justification, in this context, connects the publicity of the result to institutional responsibility for the use of the information, preventing the indicator from operating as an implicit, self-sufficient, and uncontrollable basis for public decision-making.

Di Pietro (2024) emphasises that justification constitutes a precondition of validity for relevant administrative decisions, since it enables the control of legality, proportionality, and purpose by the administered party, the councils, and the oversight bodies. This requirement applies fully to the recommendations of the Permanent Commission when educational indicators cease to fulfil a merely descriptive function and come to guide priorities, adjustments, or administrative choices in the monitoring of the PEE-PR.

The legal difference is central: product transparency shows the number; process transparency makes it possible to control how the number was produced and why it sustains a given decision. In data-driven governance, justification is not a subsequent formality, but a requirement of accountability for the administrative use of information.

4.4 DATA PROTECTION AND PUBLIC CONTESTATION

Gap: Articles 7 and 8 link evaluation to the goals and strategies of the PEE-PR, but predate the LGPD and do not distinguish between personal, sensitive, aggregated, and anonymised data. This absence is relevant in indicators of disability, race, school trajectory, children, adolescents, and education professionals. There is also a lack of a channel for councils, researchers, municipalities, schools, and communities to question inconsistencies, omissions, methodological changes, or administrative uses of indicators.

Remediation in data protection: anonymisation and aggregation protocols by sensitive goal. In Goal 1, attendance in early childhood education, minimum aggregation by municipality and stage, with suppression of any cell below 5. In Goal 4, disability, anonymisation when n<10. In Goal 8, race, aggregation by municipality and racial category, with a note on responsible interpretation. Sanctioning, ranking, or discriminatory uses not provided for in the PEE-PR must be prohibited.

Remediation in contestation: the creation of a Chamber of Legal Compliance of Indicators within the CEE-PR, as a consultative and review body in controversies over method, transparency, data protection, indirect discrimination, participation, or federative compatibility. Its composition must include the CEE-PR, SEED-PR, the State Education Forum, data protection specialists, oversight bodies, and civil society.

The Chamber may issue a technical-legal opinion, recommend precautionary administrative suspension, the review of a methodological note, the opening of a public consultation, or the correction of inconsistencies, until a reasoned decision by the competent authority. It does not replace the Permanent Commission or the Technical Group; it adds institutional review and mediation before judicialisation.

4.5 FEDERATIVE COORDINATION AND COMPARABILITY

Gap: Article 5 mentions articulation with the permanent body of the PNE, but does not impose justification for divergences between state and national series, sources, formulas, or parameters. The regime of collaboration allows state adaptation, but requires minimum comparability or public explanation. Without regulation, state autonomy may turn into opacity. INEP (2024), in the 5th cycle of PNE monitoring, documents methodological divergences between state and national series that, without an explanatory technical note, make it difficult to compare the goals of the federal plan with those of the subnational plans – a problem that the proposed compatibility matrix aims precisely to address.

Remediation: a compatibility matrix whenever a state indicator diverges from a relevant national or municipal parameter. Each divergence must present a technical justification, effects on comparability, compatibility with PNE and PEE-PR goals, limits of interpretation, and any break in the series. The divergence must be presumptively possible in cooperative federalism, but conditioned on public explanation.

This solution brings Article 5 closer to the LAI, to good public administration, and to digital constitutionalism, since it subordinates methodological autonomy to traceability, justification, and public review. The matrix also facilitates cooperation between entities, reduces interpretive ambiguities, and allows researchers and oversight bodies to distinguish legitimate adaptation from a change that compromises comparability.

4.6 SYNTHESIS AND IMPLEMENTATION

The gaps are distributed across five axes: participation, transparency, justification, data protection, and federative coordination. They operate at two levels of response: normative amendments to the decrees, for participation, justification, and traceability; and sub-statutory administrative protocols, for indicators, data, compatibility, and compliance. The formal legality of the decrees remains preserved, but gains democratic density through controllable procedures.

Timeline:

- Phase 1 (0–3 months): institute the Indicator Compliance Commission, conduct an LGPD/LAI audit, and publish an initial diagnosis.
- Phase 2 (3–6 months): approve the Indicators Protocol, open consultation with social movements, and sign technical memoranda with IBGE/INEP.
- Phase 3 (6–12 months): implement protocols, train SEED-PR/IPARDES, and publish a Compliance Report.
- Phase 4 (1–2 years): conduct an external audit, adjust procedures, and test a pilot model for other states.

The cost is low to medium, since the reform makes use of existing bodies and adds duties of documentation, publicity, and review. Its feasibility is reinforced by state precedents: São Paulo structured an Open Data Plan 2025–2027; Minas Gerais maintains a PEE monitoring dashboard with goals, indicators, sources, and Secretariat actions.

5 CONCLUSION

Decrees No. 6,674/2017 and No. 7,223/2017 provide a formal basis for the monitoring of the PEE-PR by instituting bodies, distributing competences, and connecting administrative implementation to the goals of State Law No. 18,492/2015. This validity, however, does not eliminate gaps in documented participation, methodological transparency, decision-making justification, traceability, data protection, public contestation, and federative coordination. The analysis demonstrates that sub-statutory legality is necessary, but insufficient, for data-driven educational governance. Full compliance requires public indicator protocols, methodological records, participatory procedures, review chambers, and the subordination of informational infrastructures to fundamental rights.

The proposed reform operates at two levels: normative amendments and sub-statutory protocols. This combination allows implementation without waiting for full legislative approval, preserves the Permanent Commission, the Technical Group, IPARDES, and the CEE-PR, and expands legal certainty without paralysing monitoring. The cost is low; the feasibility is proven by state precedents of open data and monitoring dashboards. The expected gain is institutional: indicators cease to be self-sufficient evidence and become part of a public chain of method, purpose, participation, and responsibility.

The final contribution is to demonstrate that the problem is not solely technological. The digital operates as a form of organisation of the Administration, influencing how the State observes educational policy and legitimises decisions. When the fulfilment of the plan depends on data, indicators, and technical bodies, the constitutional protection of the right to education requires control over the informational infrastructure that makes the policy visible. This is the function of digital constitutionalism: not to paralyse technique, but to subordinate it to public conditions of explanation, traceability, and democratic review.

6 DECLARATION ON THE USE OF ARTIFICIAL INTELLIGENCE

In accordance with CNPq Ordinance No. 2,664 of 6 March 2026, which institutes the Policy on Integrity in Scientific Activity, it is declared that artificial intelligence tools were used only as technical and instrumental support, without replacing the authorship, critical analysis, or intellectual responsibility of the researchers. ChatGPT was used for textual revision, for the initial organisation of the manuscript, for the structuring of data, and for support in formatting references according to the ABNT standard; NotebookLM, for support in the literature review and the organisation of previously selected materials; Gemini, for the systematisation of information and the verification of textual coherence; and the tools LanguageTool and Grammarly, for linguistic checking and support in the translation and revision of the abstract and keywords in a foreign language. For the search and selection of academic texts on the subject, Google Scholar, SciELO, and the CAPES Journal Portal were consulted. The definition of the problem, the objectives, the methodological scope, the analytical categories, the interpretation of the documents, the preparation of the tables, the selection and verification of references, the textual validation, and the final writing remained under the full responsibility of the researchers.

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THE BURDEN OF PROOF IN DATA BREACH LAWSUITS: A DISCUSSION ON THE POSSIBILITY OF REVERSING THE BURDEN OF PROOF IN FAVOUR OF THE DATA SUBJECT, CONSIDERING THEIR TECHNICAL AND INFORMATIONAL VULNERABILITY

O ÔNUS DA PROVA EM AÇÕES DE VAZAMENTO DE DADOS: DISCUSSÃO SOBRE A POSSIBILIDADE DE INVERSÃO DO ÔNUS DA PROVA EM FAVOR DO TITULAR DOS DADOS, CONSIDERANDO SUA HIPOSSUFICIÊNCIA TÉCNICA E INFORMACIONAL

LA CARGA DE LA PRUEBA EN LOS LITIGIOS POR VIOLACIÓN DE DATOS: UN ANÁLISIS SOBRE LA POSIBILIDAD DE INVERTIR LA CARGA DE LA PRUEBA A FAVOR DEL TITULAR DE LOS DATOS, TENIENDO EN CUENTA SU VULNERABILIDAD TÉCNICA E INFORMATIVA

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ABSTRACT

This scientific article discusses the complex issue of the burden of proof in lawsuits arising from personal data breaches. It analyses the inadequacy of the general rule of the Civil Procedure Code—which attributes the burden of proving constitutive facts to the plaintiff—given the notorious technical and informational vulnerability of the data subject. Based on the principles of the General Data Protection Law (LGPD) and by analogy with the Consumer Defence Code (CDC), this study proposes the reversal of the burden of proof as a mechanism for procedural balance. It argues that the data controller's liability, due to their privileged position and duty of security, justifies the reallocation of the evidentiary burden in favour of the victim. The article examines the procedural dilemma resulting from data breaches in modern society, where information is the primary asset. Given the massive centralisation of data by large corporations, security incidents have become an inherent risk, exposing individuals to serious harm. The main obstacle for victims seeking redress is the general rule of the burden of proof, which requires them to demonstrate the controller's fault or negligence. This text argues that such a rule is disproportionate and unjust, as data subjects face technical and informational insufficiency; they lack access to internal records, system logs, or audit reports—the only evidence capable of proving the cause of the incident. To resolve this asymmetry, the article advocates for the reversal of the burden of proof as an essential mechanism to ensure access to justice. This solution is supported by two major pillars of Brazilian law: the analogy with the CDC, comparing the data subject's vulnerability to that of a consumer, and the dynamic distribution of the burden of proof in the Civil Procedure Code (CPC), which allows judges to redistribute the burden when it becomes “excessively difficult” for one party. Requiring the victim to prove a system failure would constitute “diabolical proof” (probatio diabolica). In conclusion, the article maintains that judicial interpretation must recognise the reversal of the burden of proof as the standard in data breach cases. This measure not only balances the procedural relationship but also strengthens the LGPD, incentivising more robust security measures and ensuring that data protection rights are effective in practice.

Keywords: Burden of Proof. Data Breach. Data Protection. LGPD. Reversal of the Burden of Proof.

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RESUMO
O presente artigo científico discute a complexa questão do ônus da prova em ações judiciais decorrentes de vazamentos de dados pessoais. Analisa-se a inadequação da regra geral do Código de Processo Civil, que atribui ao autor a prova dos fatos constitutivos de seu direito, frente à notória hipossuficiência técnica e informacional do titular dos dados. Propõe-se, a partir dos princípios da Lei Geral de Proteção de Dados Pessoais (LGPD) e da analogia com o Código de Defesa do Consumidor (CDC), a inversão do ônus da prova como mecanismo de equilíbrio processual. Argumenta-se que a responsabilidade do controlador de dados, em virtude de sua posição privilegiada e de seu dever de segurança, justifica a readequação da carga probatória em favor da vítima. O artigo analisa o dilema processual decorrente do vazamento de dados na sociedade moderna, que tem a informação como seu principal ativo. Diante da centralização massiva de dados em grandes empresas, os incidentes de segurança se tornaram um risco inerente, expondo indivíduos a sérios prejuízos. O principal obstáculo para a vítima buscar reparação é a regra geral do ônus da prova, que a obriga a demonstrar a culpa ou negligência da empresa controladora. O texto argumenta que essa regra é desproporcional e injusta, pois o titular dos dados se encontra em uma posição de hipossuficiência técnica e informacional. Ele não tem acesso aos registros internos, logs de sistema ou relatórios de auditoria, ou seja, as únicas evidências capazes de provar a causa do incidente. Para resolver essa assimetria, o artigo defende a inversão do ônus da prova como um mecanismo essencial para garantir o acesso à justiça. Em conclusão, o artigo defende que a interpretação judicial deve reconhecer a inversão do ônus da prova como a regra em casos de vazamento de dados. Essa medida não apenas iguala a relação processual, mas também fortalece a Lei Geral de Proteção de Dados (LGPD), incentivando as empresas a adotar medidas de segurança mais robustas e garantindo que o direito à proteção de dados seja efetivo na prática.

Palavras-chave: Ônus da Prova. Vazamento de Dados. Proteção de Dados. LGPD. Inversão do Ônus da Prova.

RESUMEN
Este artículo científico aborda la compleja cuestión de la carga de la prueba en los litigios derivados de filtraciones de datos personales. Analiza la insuficiencia de la regla general del Código de Procedimiento Civil, que asigna la carga de la prueba de los hechos que constituyen un derecho al demandante, dada la notoria desventaja técnica e informativa del titular de los datos. Con base en los principios del Reglamento General de Protección de Datos (RGPD) y por analogía con el Código de Protección del Consumidor (CDC), propone la inversión de la carga de la prueba como mecanismo de equilibrio procesal. Argumenta que la responsabilidad del responsable del tratamiento, debido a su posición privilegiada y su deber de seguridad, justifica el reajuste de la carga de la prueba a favor de la víctima. El artículo analiza el dilema procesal que surge de las filtraciones de datos en la sociedad actual, que considera la información su principal activo. Dada la masiva centralización de datos en las grandes empresas, los incidentes de seguridad se han convertido en un riesgo inherente, exponiendo a las personas a graves daños. El principal obstáculo para una víctima que busca reparación es la regla general de la carga de la prueba, que la obliga a demostrar la culpa o negligencia de la empresa controladora. El texto argumenta que esta regla es desproporcionada e injusta, ya que el titular de los datos se encuentra en una posición de desventaja técnica e informativa. No tiene acceso a registros internos, registros del sistema ni informes de auditoría, es decir, la única evidencia capaz de probar la causa del incidente. Para resolver esta asimetría, el artículo aboga por la inversión de la carga de la prueba como mecanismo esencial para garantizar el acceso a la justicia. En conclusión, el artículo argumenta que la interpretación judicial debería reconocer la inversión de la carga de la prueba como norma en los casos de filtración de datos. Esta medida no solo iguala la relación

procesal, sino que también fortalece la Ley General de Protección de Datos (LGPD), incentivando a las empresas a adoptar medidas de seguridad más robustas y garantizando la efectividad del derecho a la protección de datos en la práctica.

Palabras clave: Carga de la Prueba. Filtración de Datos. Protección de Datos. LGPD. Inversión de la Carga de la Prueba.

1 INTRODUCTION

Contemporary society, deeply immersed in the information economy, has the collection and processing of personal data as one of its pillars. However, technological advancement and the widespread use of digital platforms have brought with them an inherent and growing risk: data breaches. Security incidents, whether caused by technical failures, cyberattacks or human negligence, expose the privacy and security of data subjects to serious material and non-material harm.

Thus, the centrality of data in the modern economy, which was once regarded as secondary information, is today the most valuable asset of many corporations. In the so-called information economy, personal data have ceased to be mere records and have become the raw material of a vast business ecosystem. Technology, retail, finance and even healthcare companies rely on the collection, analysis and monetisation of data to personalise services, target advertising and make strategic decisions. Accordingly, this model, driven by connected devices and ubiquitous digital platforms, has created an unprecedented spiral of data collection, in which every online interaction, every purchase and even every physical movement translates into valuable data points.

Therefore, data vulnerability and security risks are the great concern of the present day, owing to the mass scale of collection and the advent of the inevitable concentration of personal data in large digital repositories. This concentration, however, has turned companies into attractive targets for cyberattacks and security incidents. Vulnerability does not reside solely in the bad faith of digital criminals. Often, a data breach is the result of complex technical failures, inadequate security processes or human error, such as an employee who falls for a phishing scam.

In short, the consequences of these incidents are multiple and far-reaching. For the individual, the exposure of information may lead to material harm, such as: identity theft, financial fraud and the improper use of credit cards. Likewise, it may cause non-material harm, such as the exposure of intimacy, embarrassment, anxiety, loss of control over one's own digital life and, in extreme cases, stalking and violence. Finally, the data subject, entrusting their privacy to a public or private entity, finds themselves in a position of profound vulnerability, without the means to prevent the incident and, often, without the technical knowledge to understand its cause or extent.

In view of the foregoing, the imperative of protection and regulation of the scale and severity of the risks made it peremptory for society to respond by creating robust regulatory frameworks. Laws such as the General Data Protection Law (LGPD) in Brazil and the General Data Protection Regulation (GDPR) in Europe represent an attempt to balance technological advancement with the right to privacy and informational self-determination. Such legislation imposes strict duties of security and transparency on companies, requiring them to protect the data they collect and holding them accountable for incidents. Thus, they seek to reverse the logic of vulnerability, placing the burden of security and of proof upon the entities that hold and profit from the data, rather than upon the individual who provides them. In this way, the challenge of data breaches ceases to be merely a matter of technology and becomes a central theme of law, ethics and governance in the digital age.

In Brazil, the General Personal Data Protection Law (Lei nº 13.709/2018), the LGPD, established a protective legal framework, elevating data protection to a fundamental right and attributing strict duties to processing agents. However, when a security incident materialises and the data subject seeks judicial redress, they face a significant procedural challenge: proof.

In this context, on the one hand, this marks a legal advance, but on the other hand, it reveals a complex procedural barrier that may compromise the effectiveness of the law. To understand this tension, it is essential to detail the role of the LGPD and the practical difficulty of its judicial application.

Prior to the LGPD, the protection of personal data was addressed in a fragmented manner, often on the basis of scattered laws or, by analogy, on the Consumer Defence Code. With its entry into force, the LGPD brought about a paradigm shift: data protection became an autonomous right, closely linked to human dignity and to the fundamental right to privacy.

Indeed, in order to guarantee this protection, the law imposed clear and strict duties on the “processing agents”—that is, on the companies and organisations that collect and process data. They are required to adopt security measures, both technical and administrative, capable of protecting data from unauthorised access and from incidents. Moreover, the LGPD requires these agents to notify the National Data Protection Authority (ANPD) and the affected data subjects of the occurrence of a security incident that may give rise to relevant risk or harm. The law, therefore, created the framework necessary to attribute liability and require compliance.

Nevertheless, despite these advances, the effectiveness of the LGPD in the courts depends on a fundamental principle of procedural law: the burden of proof. The general rule, in accordance with the Civil Procedure Code, provides that the plaintiff in an action must prove the facts that constitute their right. Consequently, for a possible data breach, this rule becomes an almost insurmountable obstacle for the data subject. Information about what caused the incident—whether it was a technical failure, an inadequate configuration, the absence of a defence system or the omission of a software update—is under the exclusive custody of the defendant, the company controlling the data. The victim, in turn, is a vulnerable link in the chain. Accordingly, there is no access to system logs, internal audit reports or any other technical evidence demonstrating the company's negligence. This asymmetry of information and technical knowledge is known in legal circles as technical and informational vulnerability. The victim has access only to the outcome of the incident—the exposure of their data—but not to its cause.

With the aim of resolving this situation of profound imbalance, the legal solution for ensuring justice lies in the reversal of the burden of proof. This procedural mechanism, already enshrined in consumer law, allows the judge to attribute to the defendant the duty to prove that they were not negligent. The reversal of the burden of proof may be applied in data breach actions by two routes, as set out: an analogy with the Consumer Defence Code (CDC), whereby the relationship between the data subject and the controller resembles the consumer relationship, in which the consumer is the more vulnerable party; and also the dynamism of the Civil Procedure Code, which allows the judge to redistribute the burden of proof when it becomes "excessively difficult" for one of the parties to bear the burden. By transferring the obligation to prove the absence of fault to the company, which holds all the means and the legal duty of security, the Judiciary ensures that the protective purpose of the LGPD is not frustrated. The reversal of the burden of proof is the essential tool for the right to data protection to move beyond mere words and become an effective reality for Brazilian citizens.

For this reason, the general rule of the burden of proof, under the Civil Procedure Code (CPC), imposes on the plaintiff the obligation to prove the facts constituting their right (Brasil, 2015). In data breach cases, this rule proves disproportionate. Information about what caused the incident—whether it was a security failure, an intrusion or a failure to adopt preventive measures—is under the exclusive custody of the data controller, who holds all the technical and informational knowledge about their systems. The data subject, in turn, is a vulnerable link in the chain, lacking access to the evidence necessary to demonstrate the controller's fault or negligence.

In truth, the premise of "the Data Subject's Vulnerability and the Evidentiary Imbalance" outlines the main obstacle that an individual faces when seeking redress for a data breach: the notorious imbalance between the parties. Accordingly, the Brazilian procedural rule, enshrined in Article 373 of the CPC, establishes that "the burden of proof falls: I - on the plaintiff, as to the constitutive fact of their right..." (BRASIL, 2015). Although this is a fundamental rule, its literal application in data protection actions disregards the technical and informational vulnerability of the data subject.

For this reason, the data subject is not an information security expert, nor do they have access to system logs, vulnerability reports, access records or any other internal document of the controlling company. To require them to prove the security failure or the company's negligence would be to impose a “diabolical proof”—a proof virtually impossible to produce. The information crucial to elucidating the case is withheld by the defendant party, which is the only one with access to it.

In view of this situation of profound asymmetry, doctrine and case law have inclined towards the reversal of the burden of proof as the fairest and most effective solution. Such a measure finds support in two important pillars of the Brazilian legal order: an analogy with consumer law: the relationship between the data subject and the controller resembles, in many respects, the consumer relationship. The data subject is the vulnerable party, who entrusts their data to a supplier that holds them and profits from them. The Consumer Defence Code (CDC), in its Article 6, item VIII, already provides for this reversal:

> “The following are basic consumer rights: (...) the facilitation of the defence of their rights, including the reversal of the burden of proof, in their favour, in civil proceedings, when, at the judge's discretion, the allegation is plausible or when the consumer is vulnerable, according to the ordinary rules of experience” (BRASIL, 1990).

As Doneda (2019) argues, the data subject finds themselves in a position of vulnerability analogous to that of the consumer, which fully justifies the application of this protective principle.

Furthermore, the modern version of the CPC, in its Article 373, § 1, introduced an important advance by allowing the judge to reallocate the evidentiary burden “when, owing to the particularities of the case, the distribution of the burden of proof becomes excessively difficult for one of the parties”. For jurists such as Pinheiro (2020), this legal provision fits perfectly with data breach cases, in which the difficulty of proof for the victim is not merely a particularity but an intrinsic characteristic of the incident itself. The judge, therefore, may and should reverse the burden, requiring the controller to demonstrate that they adopted all the security measures required by the General Data Protection Law (LGPD).

In sum, the reversal of the burden of proof is the essential tool for the right to data protection to move beyond the theoretical realm and become an effective reality in the courts. It ensures the equality of procedural arms and guarantees that liability for security incidents falls upon those who hold the means and the legal duty of prevention.

In light of this scenario, the present work aims to analyse the possibility of reversing the burden of proof in actions for redress of damages arising from data breaches, considering the notorious technical and informational vulnerability of the data subject. Starting from the premise that society is built upon the pillar of data, the scenario unfolds to reveal the challenges and vulnerabilities inherent in this new reality. The development of the theme inevitably involves an analysis of the centrality of data in the modern economy, of the risks to which this centrality exposes individuals, and of the regulatory response necessary to mitigate these dangers.

In the meantime, it is observed that personal data are not merely information; they are one of the engines of the modern economy. Companies use our data to personalise advertisements, optimise services and make strategic decisions. This model, driven by technologies such as smartphones and social networks, leads to the massive collection and storage of information about individuals. This concentration of data, however, creates inevitable vulnerabilities. Like any system, those that store data are subject to technical failures, cyberattacks and human errors. When a data breach occurs, the security and privacy of individuals are exposed to serious and concrete risks.

Moreover, the main obstacle that the victim of a breach faces in court, according to the general rule of Brazilian law, requires that whoever brings a lawsuit (the plaintiff) prove the facts that support their claim. In a data breach case, this means that the victim would have to prove the failure or negligence of the company that held their data.

This rule becomes disproportionate because the evidence is all held by the company. The individual has no means of accessing the security records, server logs, audit reports or technical analyses showing what went wrong. This lack of access and knowledge is what the text calls technical and informational vulnerability. The victim is the weaker party and does not have the tools necessary to comply with the legal requirement of proof.

Finally, the analysis of the reversal of the burden of proof imposes upon this legal mechanism the requirement that it does not remove the need for proof, but transfers it to the party that has control over the evidence—that is, the company that suffered the breach. With the reversal of the burden, the company would be obliged to prove that it was not negligent and that it adopted all appropriate security measures to protect the data. Instead of the victim having to prove the company's fault, the company must prove its innocence. This change seeks to create a fairer process and, at the same time, to encourage companies to take data security more seriously, knowing that they will have to prove their diligence in the event of an incident.

2 THE LEGAL CONTEXT OF DATA BREACHES AND THE LGPD

The LGPD, inspired by international legislation such as the European GDPR, establishes a legal ecosystem aimed at guaranteeing the protection of personal data. The law sets out principles such as security, prevention and non-discrimination, and imposes on processing agents, especially the controller, the adoption of technical and administrative measures capable of protecting data from unauthorised access and from accidental or unlawful situations (Brasil, 2018).

Civil liability in the event of harm is addressed in Article 42 of the LGPD, which provides: “The controller or the operator that, in the exercise of the activity of processing personal data, causes to another person material, moral, individual or collective harm, in violation of personal data protection legislation, is obliged to repair it” (Brasil, 2018). Although the wording of the provision is not explicit as to the nature of the liability—whether strict or fault-based—doctrine has considered the application of strict liability in breach cases, given that the LGPD itself establishes a duty of security for the controller, regardless of fault (Pinheiro, 2020).

Furthermore, the LGPD is a legal instrument that must be interpreted in harmony with other branches of law, especially procedural law and consumer law. The protection of the data subject, in this sense, aligns with the protection of the consumer, an equally vulnerable subject in the legal relationship (Doneda, 2019).

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The protection of personal data, elevated by the LGPD to the status of a fundamental right, is realised through the attribution of duties and, consequently, of the civil liability of processing agents. The core of the debate on the nature of liability in data breach cases lies in the interpretation of Article 42 of the LGPD. Although the provision does not use the expression “strict liability”, doctrine has argued that the combination of other articles of the law points in that direction (Pinheiro, 2020).

The LGPD imposes a duty of security, provided for in Article 46, according to which “processing agents must adopt security measures, both technical and administrative, capable of protecting personal data”. By linking the duty to repair harm to the violation of this duty of security, the law dispenses with the need for the data subject to prove the controller's fault. Liability, therefore, is based on the mere existence of harm and on the violation of a legal obligation, which constitutes strict liability. This interpretation strengthens the position of the data subject, who need not delve into the technical complexities of the incident, but merely demonstrate the harm suffered as a result of the breach.

The LGPD is not an isolated legal system, but rather an instrument that dialogues with the Brazilian legal order, the Consumer Defence Code (CDC) being one of its main interlocutors. The analogy between the relationship between controller and data subject and the consumer relationship is widely accepted, given the notorious vulnerability of the data subject.

As Doneda (2019) maintains, the vulnerability of the data subject is not limited to a lack of economic power, but extends to their technical and informational insufficiency. The individual, who possesses neither specialised knowledge of security systems nor access to a company's internal records, cannot be required to prove the failure that led to the breach. This asymmetry of information and knowledge justifies the application of the principles of the CDC. For example, Article 6, item VIII, of the CDC provides for the reversal of the burden of proof in favour of the consumer when they are vulnerable or their allegation is plausible. The application of this principle to data breach actions is a crucial instrument for rebalancing the procedural scales and ensuring that the right to redress is effective.

By interpreting the LGPD in harmony with the CDC, the Brazilian legal system confers greater protection on data subjects, recognising that the accountability of processing agents is an essential pillar for building a safer and more trustworthy digital environment.

3 THE REVERSAL OF THE BURDEN OF PROOF AS A MECHANISM OF BALANCE

The general rule of the burden of proof, enshrined in Article 373 of the CPC, provides that “the burden of proof falls: I - on the plaintiff, as to the constitutive fact of their right; II - on the defendant, as to the existence of a fact that impedes, modifies or extinguishes the plaintiff's right" (Brasil, 2015). The literal application of this rule in data breach actions results in a scenario of profound imbalance.

The data subject, in the capacity of plaintiff, has the task of proving that the controller did not adopt appropriate security measures or that it acted negligently. However, such proof is practically impossible. Security mechanisms, access records, audit logs and the root-cause analysis of the incident are information found exclusively within the domain of the defendant, the controller. The injured party, in turn, has access only to the outcome: the breach of their data.

In this context, the reversal of the burden of proof emerges as an indispensable legal instrument to re-establish procedural balance and guarantee access to justice. Such a possibility finds support in two important strands of the Brazilian legal order: the Consumer Defence Code (CDC) and the Civil Procedure Code itself.

The CDC, in its Article 6, VIII, provides for the reversal of the burden of proof in favour of the consumer "when, at the judge's discretion, the allegation is plausible or when the consumer is vulnerable, according to the ordinary rules of experience" (Brasil, 1990). Doctrine and case law are unanimous in recognising the applicability of this principle in consumer relations. The relationship between the data subject and the controller resembles, in many respects, the consumer relationship, given the vulnerability and informational asymmetry of the weaker party.

In addition, Article 373, § 1, of the CPC allows the judge the dynamic redistribution of the burden of proof "when, owing to the particularities of the case, the distribution of the burden of proof becomes excessively difficult for one of the parties, or when there is liability for proof of the contrary fact". This rule is perfectly applicable to data breach cases, in which the difficulty of proof for the data subject is not merely a "particularity", but an intrinsic characteristic of the legal relationship itself (Tartuce; Neves, 2021) [3]. The demonstration of harm and of the causal link is already a complex task; to require the victim to prove the failure of the defendant's system would be a "diabolical proof", rendering any claim for redress unfeasible.

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The text above outlines the central dilemma of data breach lawsuits. The literal application of the general rule of the burden of proof creates a scenario of profound procedural imbalance. The data subject, although the injured party, finds themselves in a position of notorious technical and informational vulnerability. They possess neither the means, nor the knowledge, nor access to the company's internal records to demonstrate the failure that led to the incident.

This informational asymmetry makes proof of the controller's fault or negligence a virtually impossible task. While the controller holds all the system logs, audit reports and vulnerability analyses, the victim has access only to the outcome of the incident: the harm. To reverse this logic and guarantee the effectiveness of data protection, the Brazilian legal order offers the necessary tools.

The need to reverse the burden of proof is not merely a demand of justice, but a measure with solid legal support, anchored in two central instruments of Brazilian law.

The first pillar for the reversal of the burden of proof in data breach cases lies in the analogy with consumer law. The relationship between the data subject and the controller resembles, in essence, the consumer relationship, in which the data subject is the vulnerable pole. The General Personal Data Protection Law (LGPD) and the CDC complement each other in their purpose of protecting the weaker party in the legal relationship.

According to doctrine, the vulnerability of the consumer, which justifies the reversal of the burden of proof in the CDC, is perfectly analogous to that of the data subject (Doneda, 2019). It is not a matter of merely economic vulnerability, but of a lack of access to information and of technical knowledge that make the production of proof impossible.

The second and most direct basis for the reversal lies in the Civil Procedure Code itself. Article 373, § 1, of the CPC allows the judge, dynamically, to redistribute the evidentiary burden when its original distribution becomes "excessively difficult" for one of the parties.

The difficulty of proving the controller's fault in a data breach is not a mere "particularity", but a characteristic inherent to the very nature of the incident. Proof of diligence or of the security failure is under the exclusive domain of the defendant. To require the victim to produce this proof would be to impose upon them a "diabolical proof", something that modern case law seeks to avoid so as not to render access to justice unfeasible.

In sum, the reversal of the burden of proof is not an exception to the rule, but rather the application of a fundamental principle of procedural balance that seeks to correct an asymmetry inherent in the information economy. It is the essential legal tool for the LGPD to fulfil its protective role, ensuring that liability for security incidents falls upon those who hold the means and the duty to prevent them.

4 CONCLUSION

The protection of personal data, being a fundamental right, requires a re-examination of traditional procedural rules when these prove insufficient to guarantee the effectiveness of judicial protection. The attribution of the burden of proof to the data subject in breach actions disregards their inherent technical and informational vulnerability, creating an insurmountable barrier to the redress of damages.

In a scenario where personal data have become the new engine of the economy, the traditional procedural regime proves anachronistic for resolving conflicts arising from their mismanagement. The technical and informational vulnerability of the data subject is the central principle that justifies the reallocation of the evidentiary burden. The victim of a data breach, deprived of access to system logs, audit reports and forensic analyses, cannot be required to produce a diabolical proof—that is, a proof whose production is beyond their factual and technical capacity. The right to redress, in this context, would be merely illusory (Pinheiro, 2020).

In this sense, the reversal of the burden of proof emerges as the indispensable legal tool for re-establishing procedural balance. As doctrine maintains (Doneda, 2019), the protection of the data subject aligns with the protection of the consumer, an equally vulnerable subject in the legal relationship, which justifies the application of the principle set out in Article 6, VIII, of the Consumer Defence Code. Moreover, the Civil Procedure Code itself, in its Article 373, § 1, grants the magistrate the authority to apply the dynamic distribution of the burden of proof in situations where the difficulty of producing proof is manifest (Tartuce; Neves, 2021).

Judicial recognition of the reversal of the burden of proof, therefore, goes beyond the mere facilitation of access to justice for the victim. It consolidates a new paradigm of liability, transferring the burden of proving diligence and security to the processing agent, who is the one who in fact holds control of the risks and the means to mitigate them. This stance not only enables the redress of damages, but also strengthens the LGPD in its preventive function, incentivising compliance and the adoption of robust security measures. Only with this progressive interpretation, aligned with digital reality, will the protection of personal data fulfil its mission of safeguarding the fundamental rights of the citizen in contemporary society.

The reversal of the burden of proof, provided for in the Consumer Defence Code and in the Civil Procedure Code itself, constitutes the most appropriate solution for equalising the procedural relationship. It transfers the evidentiary burden to the one who holds the information, the means and the legal duty of security, which is the data controller. By requiring the controller to demonstrate that it adopted all the measures necessary to prevent the incident, the Judiciary not only facilitates the redress of harm, but also encourages a culture of security and prevention, in perfect consonance with the objectives of the LGPD.

Therefore, judicial interpretation in data breach cases must move towards recognising the reversal of the burden of proof as the rule, by virtue of the technical impossibility and the inequality between the parties. Only in this way will the LGPD fulfil its role as an effective instrument for the protection of the fundamental rights of citizens in the digital age.

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ELECTRONIC SERVICE OF PROCESS AND NOTIFICATION UNDER THE LGPD: A STUDY ON THE VALIDITY AND LEGAL SECURITY OF ELECTRONIC SERVICE OF PROCESS AND NOTIFICATION FROM THE PERSPECTIVE OF THE GENERAL DATA PROTECTION LAW (LGPD)

A CITAÇÃO E A INTIMAÇÃO ELETRÔNICA NA LGPD: UM ESTUDO SOBRE A VALIDADE E A SEGURANÇA JURÍDICA DA CITAÇÃO E INTIMAÇÃO ELETRÔNICA SOB A ÓTICA DA LEI GERAL DE PROTEÇÃO DE DADOS PESSOAIS (LGPD)

NOTIFICACIÓN Y EMPLAZAMIENTO ELECTRÓNICO CONFORME A LA LGPD: UN ESTUDIO SOBRE LA VALIDEZ Y LA SEGURIDAD JURÍDICA DE LA NOTIFICACIÓN Y EL EMPLAZAMIENTO ELECTRÓNICO DESDE LA PERSPECTIVA DE LA LEY GENERAL DE PROTECCIÓN DE DATOS (LGPD)

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ABSTRACT
This article analyses the dilemma between procedural celerity and data protection in the digital era, focusing on the validity and legal certainty of electronic service of process and summons. This qualitative, exploratory, and descriptive research employed a robust methodology, including the analysis of legal doctrine, legislation, case law, and National Council of Justice (CNJ) regulations. The investigation demonstrated that, despite the advancements of the Electronic Judicial Process and its legal framework (Law No. 11,419/2006 and the 2015 Civil Procedure Code), the Judiciary's communication systems still face significant challenges in fully complying with the General Data Protection Law (LGPD). Non-compliance with the principles of security, purpose, and transparency may compromise the legal validity of acts and expose personal data to risks. The study concludes that the security and validity of electronic communications go beyond mere automation, depending on a robust technical-legal framework capable of guaranteeing the authenticity and irretraceability of procedural acts. Consequently, measures are proposed such as the standardisation of security protocols, greater transparency in data collection, and specialised training for legal practitioners, ensuring that the modernisation of justice does not compromise citizens' fundamental rights.

Keywords: Procedural Celerity. Data Protection (LGPD). Electronic Service of Process. Legal Certainty. Electronic Judicial Process.

RESUMO
Este artigo analisa o dilema entre a celeridade processual e a proteção de dados na era digital, focando na validade e segurança jurídica da citação e intimação eletrônica. A pesquisa, de natureza qualitativa, exploratória e descritiva, utilizou uma metodologia robusta que incluiu a análise de doutrina, legislação, jurisprudência e normativos do CNJ. A investigação demonstrou que, apesar dos avanços do Processo Judicial Eletrônico e do seu marco legal (Lei nº 11.419/2006 e CPC/2015), os sistemas de comunicação do Poder Judiciário ainda enfrentam desafios significativos para se adequarem plenamente à Lei Geral de Proteção de Dados (LGPD). Falhas na conformidade com os princípios de segurança, finalidade e transparência podem comprometer a validade jurídica dos atos e expor dados pessoais a riscos. O estudo conclui que a segurança e a validade das comunicações

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eletrônicas não se resumem à mera automação, mas dependem de um arcabouço técnico-jurídico robusto capaz de garantir a autenticidade e a irretratabilidade dos atos. Nesse sentido, são propostas medidas como a padronização de protocolos de segurança, a maior transparência na coleta de dados e a capacitação dos operadores do Direito, assegurando que a modernização da justiça não comprometa os direitos fundamentais dos cidadãos. A digitalização do Poder Judiciário trouxe um dilema: como equilibrar a celeridade e efetividade do processo eletrônico com os requisitos de privacidade e proteção de dados da LGPD? Este artigo científico analisa a validade e a segurança jurídica de atos processuais essenciais, como a citação e a intimação eletrônica, confrontando-os com as exigências da Lei Geral de Proteção de Dados Pessoais (LGPD). A pesquisa, baseada em uma metodologia bibliográfica e jurisprudencial, investigou a conformidade dos sistemas judiciais brasileiros e concluiu que, embora haja um avanço tecnológico considerável, ainda persistem falhas que podem comprometer a segurança das informações e, consequentemente, a validade jurídica das comunicações. A falta de protocolos de segurança padronizados, a coleta de dados desnecessários e a ausência de transparência são os principais desafios. O estudo reitera a necessidade de um arcabouço técnico e jurídico robusto para garantir a proteção de dados. Por fim, propõe medidas para aprimorar a segurança e a validade das comunicações eletrônicas, destacando a urgência de capacitação dos operadores do Direito e a implementação de protocolos de segurança mais rigorosos nos sistemas judiciais.

Palavras-chave: Celeridade Processual. Proteção de Dados (LGPD). Citação e Intimação Eletrônica. Segurança Jurídica. Processo Judicial Eletrônico (PJe).

RESUMEN

Este artículo analiza el dilema entre la rapidez procesal y la protección de datos en la era digital, centrándose en la validez y la seguridad jurídica de las citaciones y notificaciones electrónicas. La investigación, de carácter cualitativo, exploratorio y descriptivo, empleó una metodología sólida que incluyó el análisis de la doctrina, la legislación, la jurisprudencia y la normativa del Consejo Nacional de Justicia (CNJ). La investigación demostró que, a pesar de los avances en el Proceso Judicial Electrónico y su marco jurídico (Ley n.º 11.419/2006 y CPC/2015), los sistemas de comunicación del Poder Judicial aún enfrentan importantes desafíos para adaptarse plenamente al Reglamento General de Protección de Datos (RGPD). El incumplimiento de los principios de seguridad, finalidad y transparencia puede comprometer la validez jurídica de los actos y exponer los datos personales a riesgos. El estudio concluye que la seguridad y la validez de las comunicaciones electrónicas no se limitan a la mera automatización, sino que dependen de un marco técnico-jurídico sólido capaz de garantizar la autenticidad y la no repudiación de los actos. En este sentido, se proponen medidas como la estandarización de protocolos de seguridad, una mayor transparencia en la recopilación de datos y la capacitación de profesionales del derecho, garantizando que la modernización de la justicia no comprometa los derechos fundamentales de los ciudadanos. La digitalización del Poder Judicial ha planteado un dilema: ¿cómo equilibrar la rapidez y la eficacia del proceso electrónico con los requisitos de privacidad y protección de datos de la LGPD (Ley General de Protección de Datos de Brasil)? Este artículo científico analiza la validez y la seguridad jurídica de actos procesales esenciales, como las citaciones y notificaciones electrónicas, comparándolos con los requisitos de la LGPD. La investigación, basada en una metodología bibliográfica y jurisprudencial, investigó la conformidad de los sistemas judiciales brasileños y concluyó que, si bien existe un avance tecnológico considerable, persisten deficiencias que pueden comprometer la seguridad de la información y, por consiguiente, la validez jurídica de las comunicaciones. La falta de protocolos de seguridad estandarizados, la recopilación de datos innecesarios y la ausencia de transparencia son los principales desafíos. El estudio reitera la necesidad de un marco técnico y jurídico sólido para garantizar la protección de datos. Finalmente, propone medidas para mejorar la seguridad y validez de las comunicaciones electrónicas, destacando la urgente necesidad de capacitar a los profesionales del derecho e implementar protocolos de seguridad más rigurosos en los sistemas judiciales.

Palabras clave: Eficiencia Procesal. Protección de Datos (LGPD). Citación y Notificación Electrónicas. Seguridad Jurídica. Proceso Judicial Electrónico (PJE).

1 INTRODUCTION

1.1 DIGITALISATION AS A TOOL FOR PROCEDURAL CELERITY

Procedural celerity, one of the pillars of the contemporary Judiciary, found in digitalisation an essential tool for its realisation. The Electronic Judicial Process Law (Law No. 11,419/2006) marked the transition from paper to the virtual environment, establishing the foundations for a more agile and accessible legal system (BRASIL, 2006) [3]. In this context, service of process and notification, fundamental procedural acts that guarantee the exercise of adversarial proceedings and full defence, were gradually incorporated into the electronic medium, optimising the flow of information and reducing the processing time of disputes.

However, technological efficiency cannot override legal security. As Marinoni (2015) [4] teaches, the electronic process, although expeditious, cannot violate the constitutional principles of due process of law, under penalty of nullity of the acts. Electronic service of process and notification, by handling sensitive personal data — such as name, address and, in some cases, information on the individual's health or assets —, entered a zone of critical attention with the entry into force of the General Data Protection Law (LGPD).

The LGPD (Law No. 13,709/2018) [5] establishes a set of rules and principles for the processing of personal data, with the aim of protecting the fundamental rights of freedom, privacy and the free development of personality (BRASIL, 2018). Although the law provides legal bases for data processing in the context of a judicial proceeding (Article 7, item VI), it also imposes compliance with principles such as purpose, necessity and, above all, security (Article 6, items I, II and VII).

The relevance of this study, therefore, lies in the central problem established: how to reconcile the celerity and effectiveness of electronic procedural communications with the rigorous data protection requirements imposed by the LGPD? The question is of the utmost importance for academia and legal practice, since the validity and security of essential procedural acts depend on the compliance of judicial systems with the new legislation. Modernisation, in this context, must ensure that the rights and guarantees of citizens are not compromised.

[3] BRASIL. Lei nº 11.419, de 19 de dezembro de 2006. Dispõe sobre a informatização do processo judicial. Diário Oficial da União, Brasília, DF, 20 dez. 2006.

[4] MARINONI, Luiz Guilherme. O Processo Eletrônico: Eficiência sem garantias?. Revista de Processo, v. 240, p. 1-15, 2015

[5] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.

1.2 THE VALIDITY OF ELECTRONIC PROCEDURAL COMMUNICATIONS IN THE LIGHT OF THE LGPD

The questioning of the validity and legal security of electronic procedural communications, such as service of process and notification, in the light of the General Data Protection Law (LGPD), is central to contemporary Procedural Law. The issue goes beyond the mere digitalisation of acts and delves into their compliance with constitutional principles and guarantees, which are now reinforced by the new legal framework for data protection.

In theory, the validity of electronic service of process and notification is ensured by Law No. 11,419/2006 [6], which deals with the computerisation of the judicial process. However, this validity intrinsically depends on the legal security of the act. As Fredie Didier Jr. (2018) [7] warns, "the adoption of the electronic process does not mean the dispensation of procedural guarantees, but their adaptation to the new environment". This implies that electronic service of process is only valid if it is capable of ensuring, in an incontestable manner, the unequivocal awareness of the defendant regarding the proceeding, guaranteeing the adversarial principle. The fragility of a system, the possibility of fraud or the lack of a secure delivery record may, therefore, render the act null.

The LGPD (Law No. 13,709/2018) [8] adds a layer of complexity to this scenario. Although the Judiciary has the prerogative to process personal data for the implementation of public policies or for the execution of a legal competence (Article 7, items III and VI), it is not exempt from following the principles of the law. The LGPD, as Doneda (2019) [9] points out, imposes on the data operator, in this case the Judiciary itself, the responsibility to adopt "security, technical and administrative measures capable of protecting personal data from unauthorised access and from situations of destruction, loss, alteration, undue communication or dissemination". Therefore, the legal security of electronic service of process is not restricted to its technical proof, but also to the protection of the personal data contained therein.

[6] BRASIL. Lei nº 11.419, de 19 de dezembro de 2006. Dispõe sobre a informatização do processo judicial. Diário Oficial da União, Brasília, DF, 20 dez. 2006.
[7] DIDIER JR., Fredie. Curso de direito processual civil: teoria do processo judicial, processo de conhecimento e procedimento comum. v. 1. Salvador: JusPodivm, 2018.
[8] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.
[9] DONEDA, Danilo. Da privacidade à proteção de dados pessoais. São Paulo: Editora Revista dos Tribunais, 2019.

1.3 THE COMPLIANCE OF JUDICIAL SYSTEMS WITH THE LGPD

The question of the compliance of the Judiciary's communication systems is more delicate and has no single answer, as it varies between courts. In general, it can be stated that the Judiciary's systems still face significant challenges in fully complying with the LGPD.

The main problem lies in the lack of a unified security protocol. Most courts use the Electronic Justice Gazette (DJe) or their own notification systems, which, for the most part, were developed before the entry into force of the LGPD. This raises doubts about: purpose and necessity of the systems that collect only the data strictly necessary for procedural communication;

The security and integrity of information are guaranteed through strong encryption applied to all notifications. Access is strictly restricted to authorised users, ensuring that only those who genuinely need the information can access it. The robustness of the system is ensured by an advanced login and password mechanism.

In terms of transparency, the judicial system ensures that the data subject, the citizen, has full knowledge of how their information is processed, handled and stored, in full compliance with the principle of transparency established by the legislation.

Case law is still incipient, but the debate surrounding procedural nullities arising from failures in electronic communications is already observed. Although there is no categorical declaration that judicial systems violate the LGPD [10], the risk exists, and it materialises when a failure in the system compromises the fundamental right of defence, such as a notification that is not delivered, or confidential data that is exposed.

In short, the validity of electronic communications is conditioned on their legal security, which, in turn, must be guaranteed by the protections offered by the LGPD. Judicial systems, therefore, need to be reviewed and improved to ensure that technological innovation does not come at the cost of the security and rights of citizens.

2 ANALYSIS OF THE VALIDITY AND LEGAL SECURITY OF ELECTRONIC SERVICE OF PROCESS AND NOTIFICATION IN THE FACE OF THE GENERAL DATA PROTECTION LAW (LGPD)

The general objective of this study is to analyse the validity and legal security of electronic service of process and notification in the face of the General Data Protection Law (LGPD). To this end, the following specific objectives are set out:

a) to understand the concepts of electronic service of process and notification in the context of the judicial process;

[10] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.

b) to examine the main LGPD requirements applicable to procedural communications, such as purpose, necessity, security and transparency;

c) to assess whether the systems and procedures of the Brazilian Judiciary comply with the requirements of the LGPD; and

d) to propose measures or guidelines to improve the security and legal validity of electronic communications in the judicial sphere.

Service of process and notification are procedural acts that guarantee the citizen the fundamental right to due process of law, to adversarial proceedings and to full defence. Service of process is the act that gives the defendant awareness of the existence of a proceeding, summoning them to join the procedural legal relationship (BRASIL, 2015) [11]. Notification, on the other hand, seeks to give knowledge to any person involved in the proceeding about procedural acts and terms (DIDIER JR., 2018) [12].

With the advent of the electronic judicial process, communication was digitalised, allowing these acts to be carried out automatically and remotely. Law No. 11,419/2006 established the legal validity of electronic communications (BRASIL, 2006) [13], provided that legal formalities are observed. Validity, however, is not restricted to mere computerisation, requiring that the system used guarantee the authenticity, integrity and irrefutability of the delivery of the communication.

The processing of personal data in the judicial sphere, although supported by Article 7, item VI, of the LGPD [14], must comply with the principles of Article 6. The collision of norms between procedural celerity and data protection is inevitable. In this sense, electronic service of process and notification systems must rigorously observe the following requirements: The processing of data must be limited to the purpose of giving awareness of procedural acts. Any collection of data that exceeds this purpose – for example, the request for information not essential to the identification of the party – constitutes a deviation of purpose (DONEDA, 2019) [15]. The LGPD requires the adoption of technical and administrative measures capable of protecting data from unauthorised access and security incidents (BRASIL, 2018) [16]. This implies that electronic communication systems must be robust, using encryption and other

[11] BRASIL. Lei nº 13.105, de 16 de março de 2015. Código de Processo Civil. Diário Oficial da União, Brasília, DF, 17 mar. 2015

[12] DIDIER JR., Fredie. Curso de direito processual civil: teoria do processo judicial, processo de conhecimento e procedimento comum. v. 1. Salvador: JusPodivm, 2018.

[13] BRASIL. Lei nº 11.419, de 19 de dezembro de 2006. Dispõe sobre a informatização do processo judicial. Diário Oficial da União, Brasília, DF, 20 dez. 2006

[14] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.

[15] DONEDA, Danilo. Da privacidade à proteção de dados pessoais. São Paulo: Editora Revista dos Tribunais, 2019.

[16] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018

technologies to ensure that the information of the service of process is not intercepted or tampered with. The data subject must have access to clear information on how their data is processed (BINENBOJM, 2020) [17]. This means that the courts must inform, in an accessible manner, how data is collected, stored and used for service of process or notification.

The assessment of the compliance of the Judiciary's procedural communication systems with the LGPD reveals a complex and, at times, deficient reality. Although many courts have invested in electronic notification platforms, security is not always guaranteed. The use of weak passwords, the lack of multi-factor authentication and the absence of regular audits expose the system to vulnerabilities.

The lack of a national security standard, combined with the absence of a specific authority to oversee data processing in the judiciary, creates an environment of uncertainty. Case law, in turn, has manifested itself in a punctual manner, but there is still no consolidation that definitively resolves the questions of validity in the event of a security failure. In this context, the validity of the act may be questioned and, in the event of a defect, culminate in the annulment of the proceeding.

To resolve the existing failures, it is imperative that the Judiciary adopt proactive measures. It is proposed: Standardisation of Security Protocols: The National Council of Justice (CNJ) must create and implement a data security protocol for all courts, requiring the use of end-to-end encryption and multi-factor authentication for access to notification systems; Improvement of Training: It is essential to train judges, servants and lawyers on the importance of data protection and best practices in information security. Periodic Audits: The systems must be subjected to regular security audits by independent bodies, in order to identify and correct vulnerabilities. Guarantee of Transparency and Access: The Judiciary must create transparency portals that clearly explain the personal data processing policy, allowing the citizen to exercise their rights.

The analysis of the validity and legal security of electronic procedural communications reveals that, despite technological advances, full compliance with the LGPD is still a challenge. The security of the electronic process and, consequently, its validity, depend on the rigorous observance of the principles of purpose, necessity and, above all, security. The implementation of concrete measures and the adoption of a data protection culture are crucial for the electronic judicial process to continue to be an instrument of celerity, without ever compromising the security and fundamental rights of the citizen.

[17] BINENBOJM, Gustavo. O princípio da transparência na Lei Geral de Proteção de Dados. In: SARLET, Ingo Wolfgang; MENEZES, Joyceane Bezerra de; LIMA, Cíntia de Freitas (coords.). LGPD e a Proteção de Dados Pessoais. Rio de Janeiro: Forense, 2020.

3 METHODOLOGY

This research adopts a predominantly qualitative methodological approach, as it focuses on the analysis and interpretation of legal norms, concepts and principles, without the need for the quantification of data. The qualitative method, as advocated by Minayo (2014) [18], is ideal for the study of complex social phenomena, allowing an in-depth understanding of the dynamics between Law and technology in the context of the judicial process.

The research is, at the same time, exploratory and descriptive. The exploratory character is justified by the need to deepen the understanding of the problem of the collision between the Electronic Judicial Process and the principles of the LGPD, a topic still in consolidation in the Brazilian legal scenario. As pointed out by Gil (2002) [19], exploratory research aims to become familiar with the topic, making it clearer and allowing the construction of hypotheses. In contrast, the descriptive bias aims to describe the characteristics of the phenomenon under study, analysing the systems and procedures of electronic service of process and notification currently used by the Judiciary, without the intention of establishing relationships of direct causality.

For data collection, the research will be based on a rigorous survey of secondary sources, which characterises it as bibliographic and documentary research. The research sources include: specialised doctrine: Books and articles by renowned jurists in the areas of Civil Procedural Law and Digital Law will be consulted, with a focus on authors who address the electronic process, service of process and notification, as well as the protection of personal data, such as Fredie Didier Jr., Luiz Guilherme Marinoni and Danilo Doneda; Legislation: The study will be based on the analysis of the General Data Protection Law (LGPD) (Law No. 13,709/2018), the Electronic Judicial Process Law (Law No. 11,419/2006) and the Civil Procedure Code (Law No. 13,105/2015); Case law: Decisions of superior and state courts that discuss the validity of electronic service of process and notification, as well as the application of the LGPD in the judicial sphere, will be examined, in order to identify the Judiciary's understanding of the topic; National Council of Justice (CNJ) regulations: The regulatory framework of the CNJ will be analysed, such as the Resolutions and Recommendations that regulate the Electronic Judicial Process and data management in the courts.

Data analysis will be carried out through the content analysis technique, allowing the identification of patterns and categories in the sources consulted in order to construct the arguments and conclusions of the work.

[18] MINAYO, Maria Cecília de Souza. O desafio do conhecimento: pesquisa qualitativa em saúde. 14. ed. São Paulo: Hucitec, 2014.
[19] GIL, Antônio Carlos. Como elaborar projetos de pesquisa. 4. ed. São Paulo: Atlas, 2002.

4 THEORETICAL FRAMEWORK

4.1 THE ELECTRONIC JUDICIAL PROCESS AND SERVICE OF PROCESS/NOTIFICATION

The evolution of procedural law in Brazil has been marked by the pursuit of celerity, efficiency and accessibility to justice. In this context, the computerisation of the Judiciary emerged as a response to the challenges imposed by the slowness and bureaucracy of the traditional, paper-based system. As Marinoni (2015) [20] points out, the electronic process represents a paradigm shift, aiming to optimise the provision of justice and reduce costs for the citizen and the State. The transition is not only technological, but also cultural, requiring the adaptation of all legal practitioners.

The computerisation of the Brazilian judicial process was formalised with the enactment of Law No. 11,419/2006, which provided for the use of electronic means in the processing of judicial proceedings, in the communication of procedural acts and in the formation and monitoring of case files (BRASIL, 2006) [21]. This legislation was the starting point for the creation of the Electronic Judicial Process (PJe), a unified platform that allows the processing of actions in a 100% digital manner.

Subsequently, the 2015 Civil Procedure Code (CPC) reinforced the validity and mandatory nature of the electronic process, establishing it as a general rule (BRASIL, 2015) [22]. The CPC dedicated an entire chapter to the practice of electronic procedural acts, validating service of process and notification by electronic means, especially for public and private companies that maintain a registration in the courts' systems.

In this scenario, as Didier Jr. (2018) [23] highlights, technology does not replace procedural principles, but instrumentalises them, allowing electronic service of process, for example, to be as effective as or more effective than its paper version.

Service of process and notification, essential acts for the exercise of full defence and adversarial proceedings, gained new contours in the digital environment. Electronic service of process, to be considered valid, must guarantee the unequivocal awareness of the defendant regarding the demand, ensuring that the communication was successfully delivered and

[20] MARINONI, Luiz Guilherme. O Processo Eletrônico: Eficiência sem garantias?. Revista de Processo, v. 240, p. 1-15, 2015.
[21] BRASIL. Lei nº 11.419, de 19 de dezembro de 2006. Dispõe sobre a informatização do processo judicial. Diário Oficial da União, Brasília, DF, 20 dez. 2006.
[22] BRASIL. Lei nº 13.105, de 16 de março de 2015. Código de Processo Civil. Diário Oficial da União, Brasília, DF, 17 mar. 2015
[23] DIDIER JR., Fredie. Curso de direito processual civil: teoria do processo judicial, processo de conhecimento e procedimento comum. v. 1. Salvador: JusPodivm,

received. Likewise, electronic notification, which gives awareness of the acts and terms of the proceeding, depends on a reliable system that proves the date and time of reading.

The main challenges lie in the need for a technical and legal framework that ensures the authenticity, integrity and irrefutability of the communication. The electronic act, unlike the physical one, does not have the materiality of the signature or the receipt stamp. Therefore, the legal validity of these acts is linked to the robustness of the system that manages them. The guarantee that the message was not tampered with and that the recipient is, in fact, the person who should be served or notified is crucial to avoid the nullity of the proceeding, according to Marinoni's teaching (2015) [24].

Despite the advances, implementation still presents obstacles. The lack of standardisation among the systems of the different courts, security failures and the need for training of legal practitioners and litigants are challenges to be overcome.

4.2 THE LGPD AND THE PROCESSING OF PERSONAL DATA IN THE JUDICIARY

The entry into force of the General Data Protection Law (LGPD), Law No. 13,709/2018, marked a watershed in Brazilian law, by establishing a regulatory framework for the processing of personal data (BRASIL, 2018) [25]. The main objective of the law, as Doneda (2019) [26] points out, is to protect the privacy and fundamental rights of freedom and development of the personality of each individual. The LGPD, therefore, is not just a set of technical rules, but a reflection of principles that aim to guarantee greater control by the citizen over their own information.

The LGPD is based on ten principles that must be observed in any data processing operation. Among them, purpose (the processing must have legitimate and specific purposes), necessity (the collection must be limited to the minimum indispensable for the purpose) and security (technical and administrative measures must be adopted to protect the data) stand out. These principles are, in practice, the guide for the compliance of any body or company.

For data processing to be lawful, it must be supported by one of the ten legal bases provided for in Article 7 of the LGPD. The most common include the consent of the data subject, the fulfilment of a legal or regulatory obligation and the execution of a contract. The law also guarantees data subjects a series of rights, such as the right to access, correction,

[24] MARINONI, Luiz Guilherme. O Processo Eletrônico: Eficiência sem garantias?. Revista de Processo, v. 240, p. 1-15, 2015.
[25] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.
[26] DONEDA, Danilo. Da privacidade à proteção de dados pessoais. São Paulo: Editora Revista dos Tribunais, 2019.

anonymisation and portability of their data, as well as the right to revoke consent at any time [27].

Although the LGPD is applicable to all spheres, its application in the context of the Judiciary presents specific challenges and nuances. Judicial activity, by its very nature, involves the collection and processing of a vast amount of personal data, much of it sensitive. The protection of this data must be balanced with the public interest in the transparency and effectiveness of justice. As Binenbojm (2020) [28] emphasises, judicial activity, being essential to the Democratic Rule of Law, demands a processing of data that, at times, overrides some rights of the subject, but without ever violating human dignity.

The great question, therefore, lies in how the Judiciary can fulfil its role of judicial prosecution and social pacification without harming the principles of the LGPD. The challenges are clear: to guarantee the security of the data stored in electronic systems, to avoid the undue exposure of confidential information and to ensure that the processing of data is always guided by the procedural purpose.

The LGPD, quite rightly, provides specific legal bases for the processing of personal data by public bodies, including the Judiciary. The main provisions that legitimise this activity are:

> Article 7, item VI: Establishes that processing may be carried out for "the execution of public policies, by public bodies, under the terms of the law or of regulations". In the case of the judiciary, the activity of providing judicial protection fits perfectly within this item.
>
> Article 7, item IX: Allows processing when "necessary to meet the legitimate interests of the controller or of a third party, except in the case where the fundamental rights and freedoms of the subject that require the protection of personal data prevail". Judicial activity, by seeking justice and legal security, fits within this criterion.
>
> Article 4, item III: This article is crucial, as it removes the application of the LGPD "for the exclusive purposes of public security, national defence, State security, or activities of investigation and repression of criminal offences". Although this does not mean total exemption, the doctrine understands that these activities have their own legal regime, which reinforces the autonomy of judicial action in specific cases.

The LGPD, therefore, does not prohibit the processing of data by the Judiciary, but requires that it be done with responsibility, transparency and security. The validity of electronic procedural communication, in this context, will increasingly depend on the capacity of judicial

[27] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.
[28] BINENBOJM, Gustavo. O princípio da transparência na Lei Geral de Proteção de Dados. In: SARLET, Ingo Wolfgang; MENEZES, Joyceane Bezerra de; LIMA, Cíntia de Freitas (coords.). LGPD e a Proteção de Dados Pessoais. Rio de Janeiro: Forense, 2020.

systems to reconcile technological efficiency with the protection of the fundamental rights guaranteed by the law.

5 CRITICAL ANALYSIS

5.1 THE COLLISION BETWEEN PROCEDURAL CELERITY AND DATA PROTECTION

The modernisation of the Judiciary brought a dilemma: how to reconcile the pursuit of procedural celerity with the guarantee of data protection? Efficiency, a priority goal of the electronic process, may, paradoxically, compromise security and privacy, pillars of the General Data Protection Law (LGPD). This conflict reveals a tension between two equally important principles, requiring a cautious analysis so that innovation does not come at the cost of fundamental rights.

The electronic process, by replacing paper with digital files, optimises the processing of disputes. However, this digitalisation entails a new set of risks. The volume of personal data processed — information about parties, witnesses, addresses, and even sensitive data such as medical histories — increases exponentially. As Doneda (2019) [29] points out, the collection and storage of large databases create an environment conducive to leaks and misuse, if there are no robust security measures.

Electronic service of process and notification are clear examples of this conflict. The pursuit of agility in communication may lead to the adoption of systems that do not guarantee due protection. A notification sent by e-mail or messaging application, for example, may be intercepted, exposed to third parties or accessed by someone who is not the real recipient, compromising the privacy of the information and, potentially, the legal security of the act.

The problem of the collision between celerity and data protection is already reflected in Brazilian case law, especially in cases involving the validity of procedural acts. Although the doctrine and legislation on data protection are recent, the debate on the validity of electronic communication is already old and now gains a new dimension.

A notable example is the case law that discusses the validity of service of process by WhatsApp. The topic has already reached the Superior Court of Justice (STJ), which in some decisions has validated the service of process, provided it is accompanied by unequivocal proof that the defendant received the message, read it and became aware of the content (STJ, 2017) [30]. However, the Court of Justice of Rio Grande do Sul (TJRS, 2020) [31] has

[29] DONEDA, Danilo. Da privacidade à proteção de dados pessoais. São Paulo: Editora Revista dos Tribunais, 2019.

[30] SUPERIOR TRIBUNAL DE JUSTIÇA (STJ). REsp 1646271/MG. Relator: Ministro Luis Felipe Salomão, Quarta Turma, julgado em 06/06/2017, DJe 08/08/2017.

[31] TRIBUNAL DE JUSTIÇA DO RIO GRANDE DO SUL (TJRS). Agravo de Instrumento nº 70083547901. 22ª Câmara Cível, julgado em 29/01/2020

already manifested itself to the contrary in cases of notification for a hearing through the application, declaring them null on the understanding that the tool does not offer the necessary security to prove the effective awareness of the act. These divergences demonstrate the absence of a consensus and the fragility of systems that were not created with the aim of protecting data, reinforcing the need for an official and secure system.

The LGPD adds a layer of complexity to this discussion. Any failure that leads to a data leak during a procedural communication may, in theory, lead to an administrative penalty imposed by the National Data Protection Authority (ANPD), in addition to civil and criminal sanctions. The pursuit of efficiency cannot override the principles of the LGPD, especially that of security (Article 6, item VII), requiring that the Judiciary, as data controller, adopt all necessary technical and administrative measures to protect the information (BRASIL, 2018) [32].

5.2 ASSESSMENT OF THE CURRENT SYSTEMS OF SERVICE OF PROCESS AND NOTIFICATION

The digitalisation of the Brazilian Judiciary, driven by Law No. 11,419/2006 [33], resulted in the creation of systems such as the Electronic Justice Gazette (DJe) and various electronic notification platforms. However, the mere replacement of paper by the screen does not guarantee the compliance of these systems with the rigours of the General Data Protection Law (LGPD). The assessment of their adequacy to the principles of the LGPD, such as security, purpose, necessity and transparency, reveals both advances and gaps that need to be addressed.

The principle of security, provided for in Article 6, item VII of the LGPD, requires that the data controller adopt technical and administrative measures to protect personal data from unauthorised access and from situations of destruction, loss or undue dissemination (BRASIL, 2018) [34]. In this aspect, the Judiciary's systems have evolved, but still present challenges.

Most electronic notification platforms use encryption to protect the communication between the server and the user, and authentication is carried out through login and password or, in more secure cases, through digital certification. However, the effectiveness of these measures varies. The lack of unified protocols and the absence of regular security audits may

[32] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.
[33] BRASIL. Lei nº 11.419, de 19 de dezembro de 2006. Dispõe sobre a informatização do processo judicial. Diário Oficial da União, Brasília, DF, 20 dez. 2006.
[34] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018.

expose the system to vulnerabilities. Case law, although incipient, has already demonstrated concern about the security of platforms, as in the case of notification via messaging applications, in which the Superior Court of Justice (STJ) conditioned the validity of the act on the unequivocal proof of receipt by the recipient, in the face of the insecurity of the tool (STJ, 2017).

The principles of purpose and necessity, set out in Article 6, items I and III of the LGPD, require that the processing of personal data be carried out for legitimate, specific purposes informed to the subject, with collection restricted to the minimum indispensable for its accomplishment.

Electronic notification and service of process systems, by their nature, process personal data for the specific purpose of communicating procedural acts. However, the compliance of these systems may be questioned in relation to necessity. Many party registration platforms request data that is not strictly necessary for procedural communication, such as secondary contact information or details of the individual's private life. As Doneda (2019) [35] warns, the collection of excessive data may characterise a deviation of purpose, violating the LGPD.

The principle of transparency, provided for in Article 6, item VI of the LGPD, guarantees subjects the right to obtain clear, precise and accessible information about the processing of their data. In the judicial sphere, the application of this principle is crucial, but is not always effective.

The citizen, party to a proceeding, often does not have facilitated access to information on how the court stores, protects and uses their personal data for communication purposes. The privacy policies of the courts' websites, when they exist, are not always clear and comprehensible to the lay public. According to Binenbojm (2020) [36], transparency is fundamental to build trust between the State and the citizen. In the case of the Judiciary, the absence of transparency may generate legal uncertainty, causing the litigant not to know whether their data is being protected or whether the procedural communication is really secure.

The analysis demonstrates that, although the Judiciary's electronic communication systems represent an advance in procedural celerity, their full compliance with the LGPD still requires improvements. Security, purpose and transparency need to be reinforced so that

[35] DONEDA, Danilo. Da privacidade à proteção de dados pessoais. São Paulo: Editora Revista dos Tribunais, 2019.
[36] BINENBOJM, Gustavo. O princípio da transparência na Lei Geral de Proteção de Dados. In: SARLET, Ingo Wolfgang; MENEZES, Joyceane Bezerra de; LIMA, Cíntia de Freitas (coords.). LGPD e a Proteção de Dados Pessoais. Rio de Janeiro: Forense, 2020.

digitalisation does not compromise data protection and, consequently, the validity and legal security of essential procedural acts.

5.3 THE CHALLENGE OF AUTHENTICITY AND IRRETRACEABILITY

The transition of the judicial process from paper to the electronic medium brought numerous gains in celerity and efficiency. However, this evolution generated a central dilemma with regard to communication acts: how to guarantee, in a virtual environment, the authenticity and irretraceability of service of process and notification. In other words, the great question is to ensure that the communication was, in fact, delivered and received by the correct recipient, and that the act cannot be denied later.

The authenticity of an electronic document or communication is the guarantee of its origin. In the traditional process, this guarantee is given by elements such as the stamp of the court officer or the signature of the receiver. In the digital medium, this task is carried out through tools such as digital certification. Law No. 11,419/2006, which instituted the Electronic Judicial Process, already recognised the validity of the use of electronic and digital signatures, which have the same evidentiary force as paper documents (BRASIL, 2006) [37].

Digital certification, issued by Certifying Authorities, is one of the main technologies that guarantee authenticity. It creates a virtual identity that links the encryption key to a person or entity. When an act is digitally signed, it is possible to verify the identity of the issuer and prove that the document was not altered. As Marinoni (2015) [38] points out, this technology is crucial to maintain legal security, as it prevents the act from being falsified or its authorship from being contested.

Irretraceability, also known as non-repudiation, is the principle that prevents the sender of a message from denying having sent it or the recipient from denying having received it. This is a crucial point, especially for the validity of the service of process, which requires the unequivocal awareness of the defendant regarding the existence of the proceeding.

To prove delivery and guarantee irretraceability, the Electronic Judicial Process uses electronic proof of delivery. The courts' systems record the exact moment when the service of process or notification is made available in the lawyer's or party's system. The 2015 Civil Procedure Code (CPC) determines that notifications be considered made on the date of their availability, and that the deadline for the practice of the procedural act begins to count from the first business day following its reading (BRASIL, 2015) [39].

[37] BRASIL. Lei nº 11.419, de 19 de dezembro de 2006. Dispõe sobre a informatização do processo judicial. Diário Oficial da União, Brasília, DF, 20 dez. 2006.
[38] MARINONI, Luiz Guilherme. O Processo Eletrônico: Eficiência sem garantias?. Revista de Processo, v. 240, p. 1-15, 2015.

However, the reliability of the proof of delivery is not always absolute, especially when using tools outside the official systems of the Judiciary. The Superior Court of Justice (STJ), in a case involving service of process through a messaging application, validated the act, but conditioned its effectiveness on the existence of elements that confirm the authenticity and awareness of the party, such as the profile photograph and the confirmation of receipt (STJ, 2017) [40]. This cautious stance of the Judiciary demonstrates that the mere delivery of the message is not sufficient: it is necessary to guarantee that the act was practised by whom it should be and that it reached whom it should reach.

The LGPD, in turn, adds a layer of responsibility to this process. The system operator — the court itself — has the duty to adopt “security, technical and administrative measures capable of protecting personal data from unauthorised access and from situations of destruction, loss, alteration, undue communication or dissemination” (BRASIL, 2018) [41]. Thus, the validity and irretraceability of an electronic communication are intrinsically linked to the capacity of the system to guarantee the protection of the data contained therein.

6 CONCLUSIONS

The detailed analysis of the validity and legal security of electronic procedural communications in the light of the LGPD revealed a scenario of technological advance, but also of significant challenges. Celerity and efficiency, driven by the electronic process, cannot compromise the fundamental rights to privacy and data protection.

The study demonstrated that the legal validity of electronic service of process and notification, although supported by the 2015 Civil Procedure Code, is intrinsically linked to the security of the systems that convey them. The Electronic Judicial Process, in its essence, processes a vast amount of personal data and, as such, must submit to the principles of the LGPD.

The research concluded that, despite the great technological leap, there are still failures that may compromise the legal validity of procedural acts. Systems that do not use adequate encryption, that allow access by weak credentials or that do not offer infallible proof of delivery, put the security of the proceeding at risk and, consequently, may lead to the annulment of the acts. The collision between the pursuit of efficiency and data protection is not only theoretical; it is already manifested in judicial decisions that, out of caution, question

[39] BRASIL. Lei nº 13.105, de 16 de março de 2015. Código de Processo Civil. Diário Oficial da União, Brasília, DF, 17 mar. 2015.
[40] SUPERIOR TRIBUNAL DE JUSTIÇA (STJ). REsp 1646271/MG. Relator: Ministro Luis Felipe Salomão, Quarta Turma, julgado em 06/06/2017, DJe 08/08/2017
[41] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018

the validity of communications carried out by unofficial means, as in the case of service of process via WhatsApp (STJ, 2017) [42].

The LGPD, therefore, is not an obstacle to the digitalisation of justice, but a catalyst for this modernisation to occur in a secure and responsible manner. As Doneda (2019) [43] teaches, data protection must be seen as a structuring principle and not as a mere formal rule. Compliance is not restricted to a legal basis for data processing (such as Article 7, item VI of the LGPD), but to the rigorous observance of all principles, especially that of security, necessity and transparency.

To overcome the identified challenges, a series of measures are proposed that aim to strengthen the security and legal validity of electronic communications, guaranteeing the compliance of the Judiciary with the LGPD:

Development of More Rigorous Security Protocols: It is imperative that the National Council of Justice (CNJ) establish and require the adoption of a minimum information security standard for all electronic notification and service of process systems. Such protocols must include the mandatory use of end-to-end encryption, the implementation of multi-factor authentication (MFA) and the conduct of periodic security audits.

Greater Transparency in the Collection and Processing of Data: The Judiciary must create clear and accessible privacy policies that inform data subjects (parties and lawyers) how their information is collected, stored and used. According to the LGPD, transparency is a right of the citizen and a duty of the controller (BRASIL, 2018) [44].

Training of Legal Practitioners and Society: Security is not only a technical issue, but also a human one. It is crucial that judges, servants, lawyers and citizens be trained on the risks and best practices of digital security. An in-depth understanding of the LGPD and cyber threats is fundamental for the secure use of electronic tools and for the construction of a data protection culture in the judicial environment.

The implementation of these proposals is crucial so that electronic service of process and notification continue to be effective instruments of procedural celerity, without compromising the legal security and the protection of the fundamental rights of citizens in the digital ecosystem.

[42] SUPERIOR TRIBUNAL DE JUSTIÇA (STJ). REsp 1646271/MG. Relator: Ministro Luis Felipe Salomão, Quarta Turma, julgado em 06/06/2017, DJe 08/08/2017

[43] DONEDA, Danilo. Da privacidade à proteção de dados pessoais. São Paulo: Editora Revista dos Tribunais, 2019.

[44] BRASIL. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados Pessoais (LGPD). Diário Oficial da União, Brasília, DF, 15 ago. 2018

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FROM DUE PROCESS OF LAW TO THE FUNDAMENTAL RIGHT TO A FAIR PROCESS: A HISTORICAL-PHILOSOPHICAL AND CONSTITUTIONAL RECONSTRUCTION IN THE BRAZILIAN CONSTITUTIONAL STATE

DO DEVIDO PROCESSO LEGAL AO DIREITO FUNDAMENTAL AO PROCESSO JUSTO: RECONSTRUÇÃO HISTÓRICO-FILOSÓFICA E CONSTITUCIONAL NO ESTADO CONSTITUCIONAL BRASILEIRO

DEL DEBIDO PROCESO LEGAL AL DERECHO FUNDAMENTAL A UN PROCESO JUSTO: RECONSTRUCCIÓN HISTÓRICO-FILOSÓFICA Y CONSTITUCIONAL EN EL ESTADO CONSTITUCIONAL BRASILEÑO

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ABSTRACT
This article examines the historical and philosophical development of due process of law and its reinterpretation within the Brazilian Constitutional State, with particular emphasis on the transition from a predominantly formal guarantee against state arbitrariness to a substantive model of fair process. It begins with the philosophical roots of the notions of principle and justice, moving through natural law, the medieval experience, and the Roman-Germanic and Anglo-American trajectories of due process of law. The article then analyses the gradual incorporation of these guarantees into Brazilian constitutionalism, highlighting the central role assumed by the 1988 Constitution. It also investigates the influence of neoconstitutionalism on Civil Procedural Law, especially regarding the normative force of principles, the constitutionalisation of procedure, substantive adversarial participation, adequate judicial reasoning, and the effectiveness of judicial protection. In conclusion, the article argues that due process of law should be understood, in the contemporary context, as a general clause of procedural justice and as an expression of the fundamental right to a fair process, conceived as an open, dynamic, and perfectible model of procedural organisation aimed at producing decisions that are just, rational, participatory, and constitutionally legitimate.

Keywords: Due Process of Law. Fair Process. Neoconstitutionalism. Procedural Guarantees.

RESUMO
O artigo examina a evolução histórico-filosófica do devido processo legal e sua ressignificação no Estado Constitucional brasileiro, com especial atenção à passagem de uma garantia predominantemente formal de contenção do arbítrio estatal para um modelo substancial de processo justo. Parte-se das raízes filosóficas da ideia de princípio e de justiça, passando pela tradição jusnaturalista, pela experiência medieval e pelas trajetórias romano-germânica e anglo-americana do due process of law. Em seguida, analisa-se a incorporação gradual dessas garantias no constitucionalismo brasileiro, destacando-se a centralidade assumida pela Constituição de 1988. O estudo também investiga a influência

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do neoconstitucionalismo sobre o Direito Processual Civil, especialmente quanto à força normativa dos princípios, à constitucionalização do processo, ao contraditório substancial, à fundamentação adequada das decisões e à efetividade da tutela jurisdicional. Ao final, sustenta-se que o devido processo legal deve ser compreendido, no contexto contemporâneo, como cláusula geral de justiça processual e como expressão do direito fundamental ao processo justo, entendido como modelo aberto, dinâmico e perfectibilizável de organização processual, voltado à produção de decisões justas, racionais, participativas e constitucionalmente legítimas.

Palavras-chave: Devido Processo Legal. Processo Justo. Neoconstitucionalismo. Garantias Processuais.

RESUMEN

El artículo examina la evolución histórico-filosófica del debido proceso legal y su resignificación en el Estado Constitucional brasileño, con especial atención al paso de una garantía predominantemente formal de contención del arbitrio estatal hacia un modelo sustancial de proceso justo. Se parte de las raíces filosóficas de las nociones de principio y justicia, pasando por la tradición iusnaturalista, la experiencia medieval y las trayectorias romano-germánica y angloamericana del due process of law. A continuación, se analiza la incorporación gradual de esas garantías en el constitucionalismo brasileño, destacando la centralidad asumida por la Constitución de 1988. El estudio también investiga la influencia del neoconstitucionalismo sobre el Derecho Procesal Civil, especialmente en lo relativo a la fuerza normativa de los principios, la constitucionalización del proceso, el contradictorio sustancial, la fundamentación adecuada de las decisiones y la efectividad de la tutela jurisdiccional. Al final, se sostiene que el debido proceso legal debe comprenderse, en el contexto contemporáneo, como cláusula general de justicia procesal y como expresión del derecho fundamental a un proceso justo, entendido como modelo abierto, dinámico y perfectible de organización procesal, orientado a la producción de decisiones justas, racionales, participativas y constitucionalmente legítimas.

Palabras clave: Debido Proceso Legal. Proceso Justo. Neoconstitucionalismo. Garantías Procesales.

1 FROM THE PHILOSOPHICAL GENESIS TO THE CONSTITUTIONALISATION OF DUE PROCESS OF LAW

The philosophical tradition that serves as the foundation of the notion of principle dates back to Anaximander, a member of the Milesian School and a disciple of Thales of Miletus, to whom the inauguration of Ionian philosophy and the inaugural elaboration of a rational conception of universal foundation are attributed, understood as the originary element of all things. He is recognised not only as a thinker but also as a precursor of a scientific approach to knowledge, having been subsequently interpreted by Aristotle as the one who laid the bases of the concept of principle, to which the Stagirite attributed multiple meanings, always related to the idea of beginning, cause or foundation, so that each field of knowledge would come to be structured on the basis of its own principles, conceived as first propositions that guide reasoning and confer coherence upon systems of knowledge, constituting themselves as originary truths that are not subject to empirical demonstration, since they are self-evident within the sphere of philosophical investigation, whether by the dialectical or the metaphysical path (Fraga, 2012).

In the later development of Hellenic philosophy, Plato elaborated a conception of justice which, although acknowledged by him as difficult to apprehend and situated on an elevated plane of abstraction, was progressively translated into normative propositions, including implications in the procedural field, under the aegis of a natural-law matrix whose foundations had already been outlined in the reflections of Parmenides, Pythagoras and the sophists, composing an intellectual environment in which the idea of justice transcended the positivity of norms and was linked to a superior rational order, prior to and independent of the will of the state (Ramos, 2008; Fraga, 2012).

It is within this same historical and cultural context that the work Antígona, by Sófocles, is situated, in which the conflict between state legality and a conception of justice founded on values prior and superior to positive laws is distinguished in a singular manner, allowing one to glimpse, albeit in an embryonic form, the idea that there are normative limits to the exercise of power, including within the sphere of judgment, which may be interpreted as an anticipation of the notion of due process of law as a guarantee against arbitrariness (Fraga, 2012; Teles, 2021).

The evolution of this thought led to the consolidation of the doctrine of natural law, subsequently appropriated as the ideological foundation of historical movements of rupture, such as the French Revolution, according to Fraga (2012), having been mediated by the Stoic tradition and incorporated by the Roman jurists who, in systematising Law along technical and rational lines, developed their own legal language, in which Cícero was relevant in linking

Law to the laws of nature, maintaining that justice and equity should guide both the content of norms and the procedures through which jurisdiction was carried out.

The relevance of these historical-philosophical contributions to the understanding of due process of law is seen precisely in the fact that they unveil the genesis of a fundamental idea according to which the exercise of jurisdictional power cannot be dissociated from rational, ethical and universal parameters that precede and limit the very positivisation of norms, so that due process of law is not mere procedural technique, being the expression of an intellectual tradition that seeks to ensure that state action, especially in the decision-making sphere, is subject to criteria of justice, rationality and respect for human dignity, thus configuring itself as an essential guarantee for the legitimacy of Law.

The historical evolution of due process of law, above all from its medieval matrices, is projected in a particularly expressive manner in the development of the continental European and Anglo-American legal traditions, evidencing not only a trajectory of conceptual expansion but, above all, a continuous process of functional resignification, in which the principle, initially conceived as an instrument for containing the arbitrariness of the sovereign, comes to occupy a central position in the structuring of the Rule of Law and in the shaping of fundamental guarantees, thus revealing itself as a dynamic historical construction whose normative density expands as the relations between power, society and the individual are transformed (Fraga, 2012).

Turning now to the continental European tradition, the revaluation of classical thought and Roman Law, especially from the eleventh century with the emergence of universities and the renaissance of cities in the context of the Commercial Revolution, played a decisive role in the construction of a systematised legal rationality, in which due process of law comes to be understood as the expression of an order structured by principles, whose primary function consists in limiting state power and ensuring institutional stability, thus being inserted into a scenario of historical transition marked by the formation of the bases of the modern state and by the need to institutionalise mechanisms for the control of power (Costa; Costa; Costa, 2019).

In the Roman-Germanic system it develops under the aegis of a legal-dogmatic logic that privileges codification, the centrality of the law and normative predictability, so that due process of law is progressively incorporated as a structuring principle of procedural legality, linked to the requirement of observing previously established forms, whose purpose consists in ensuring the rationality of the procedure and legal certainty, even though its substantive dimension remains, at this moment, in an embryonic state, being expanded only with the advent of contemporary constitutionalism and the incorporation of fundamental rights as parameters of validity of the order (Teles, 2021).

It is also of interest to discuss that, within the Anglo-American tradition, the development of due process of law assumes significantly distinct contours, being marked by the centrality of case law and by the action of the courts in the progressive construction of the content of the principle, especially in the North American context, where the clause of *due process of law* [3] , incorporated into constitutional law, comes to perform a function that transcends mere procedural guarantee, also assuming a substantive dimension that authorises the control of the content of laws in the light of criteria of reasonableness, proportionality and material justice, which represents a qualitative expansion of its normative scope (Teles, 2021).

Such evolution in United States law appears particularly significant from the nineteenth century onwards, when the Supreme Court begins to use due process of law as an instrument for controlling the legislative power, initially in consonance with the economic logic of classical liberalism, characterised by laissez-faire constitutionalism, and subsequently, especially after the economic crisis of 1929, as a mechanism for protecting fundamental liberties in the face of excessive state interventions, evidencing the adaptive capacity of the principle and its sensitivity to socio-economic transformations (Teles, 2021).

According to Ramos (2007), the distinction between the European and American trajectories, far from configuring an irreconcilable opposition, must be understood as a manifestation of different modes of internalisation of one and the same axiological core, insofar as, while the continental tradition privileges the normative structure and the centrality of the law as an instrument of guarantee, the Anglo-American tradition emphasises the role

3 O *due process of law*, tal como desenvolvido na tradição anglo-americana, serve como cláusula jurídica de elevada densidade normativa e de abrangência complexa e que merece atenção singular, destinada a assegurar que nenhuma restrição aos direitos fundamentais, especialmente à vida, à liberdade e à propriedade, possa ocorrer sem a observância de um conjunto de garantias que conformam não apenas o procedimento, mas também a legitimidade substancial da atuação estatal, sendo possível compreendê-lo, portanto, como um verdadeiro princípio-síntese das garantias processuais, cuja função primordial consiste em condicionar o exercício do poder à racionalidade jurídica e à justiça material, transcendendo a mera exigência de forma para alcançar o controle do próprio conteúdo das decisões e das leis (Fraga, 2012, p. 406-431). Sua evolução histórica demonstra veementemente uma ampliação progressiva de seu alcance, partindo de uma concepção estritamente procedimental, vinculada à necessidade de um rito previamente estabelecido, para alcançar uma dimensão substancial, na qual se admite o exame da razoabilidade e da proporcionalidade das normas estatais, especialmente no contexto da experiência constitucional norte-americana, onde a Suprema Corte passou a utilizá-lo como instrumento de controle da atuação legislativa e de proteção contra arbitrariedades, ainda que, em determinados momentos históricos, tal expansão tenha sido influenciada por interesses econômicos predominantes. À esteira de tal interpretação, o devido processo legal revela-se como categoria jurídica complexa e aberta, cuja abrangência compreende tanto garantias clássicas, como o contraditório, a ampla defesa e a imparcialidade do julgador, quanto dimensões mais amplas de controle da atuação estatal, configurando-se como verdadeiro eixo estruturante do Estado de Direito e como mecanismo de preservação da dignidade da pessoa humana frente às múltiplas formas de exercício do poder (Fraga, 2012; Costa; Costa; Costa, 2019, p. 7-11; Teles, 2021, p. 210-212).

of the Judiciary in the concretisation and expansion of rights, revealing two complementary strands of a common historical process of limiting power and affirming individual liberties.

Meanwhile, Oliveira (2009) unravels that, on the theoretical plane, this evolution accompanies the transformation of the very role of the state which, in moving from the liberal model to the social state and, subsequently, to the contemporary constitutional state, comes to recognise not only the need to contain power but also the requirement to promote material conditions of equality and effectiveness of rights, which Teles (2021) emphasises results in a reconfiguration of due process of law, which ceases to be understood exclusively as a formal procedural guarantee to also assume a substantive dimension aimed at the realisation of justice in the concrete case.

This expansion of the content of the principle finds its foundation in the overcoming of legalistic normativism and in the rise of fundamental rights as the structuring axis of the legal order, a circumstance that imposes the reinterpretation of procedural norms in the light of constitutional values, so that due process of law comes to operate as a general clause of protection against arbitrariness and as an instrument of integration of the system, allowing the adaptation of procedural forms to the requirements of effectiveness and material justice (Oliveira, 2009). Thus, in the contemporary context, due process of law is consolidated as a complex legal category, endowed with a dual dimension, procedural and substantive, to the point that it is projected in the requirement of legally reasoned, proportional decisions compatible with fundamental rights, reaffirming itself as a structuring element of the fair process and as a criterion of legitimation of jurisdictional action in the constitutional state (Fraga, 2012).

The national legal order also underwent various transformations and discussions in this regard, since it is possible to affirm, through Fraga (2012), with relative theoretical certainty, that due process of law found its most sophisticated development within the tradition of *common law*, especially from the North American jurisprudential experience, in which the action of the courts played a decisive role in the expansion of its content and in the densification of its procedural and substantive dimensions, whose expression "due process of law" only came to be formally incorporated into the constitutional text with the promulgation of the 1988 Constitution, even though, in earlier periods, one could already identify, in a fragmentary and unsystematic manner, norms and institutes that, in essence, reflected material developments of this principle, albeit devoid of a more consistent dogmatic systematisation.

It is therefore appropriate to recognise that the Brazilian constitutional trajectory, although relatively brief in historical terms, was marked by a significant succession of constitutional texts, seven or eight, depending on whether or not the 1969 instrument is considered an autonomous constitution, which, to a large extent, did not manage to concretise the substantive ideal of constitutionalism, understood as a technique for limiting power and effectively protecting individual liberties, insofar as several of these normative texts proved incapable of containing authoritarian practices, functioning, not infrequently, as formal instruments for legitimising political structures marked by the concentration of power and the fragility of fundamental guarantees (Fraga, 2012; Teles, 2021).

Notwithstanding this structural limitation of Brazilian constitutionalism in its pre-1988 phase, it is possible to identify relevant manifestations of due process of law on the legislative and doctrinal plane, albeit in an incipient form, evidencing that the construction of this principle in Brazil did not occur abruptly, but rather through a gradual process of incorporating legal guarantees which, subsequently, would be systematised under the aegis of the Constitution called the citizen's Constitution (Fraga, 2012).

Along this historical itinerary, the 1824 Constitution stands out, the first normative document to establish the legal bases of the newly independent Brazilian state, granted by Dom Pedro I after the dissolution of the 1823 Constituent Assembly, being subsequently submitted to the municipal chambers as a strategy for reinforcing its political legitimacy, reflecting, in its ideological matrix, the influence of the French Constitution of 1814, marked by a conservative-leaning liberalism and by elements of political centralisation that preserved traces of absolutism, a circumstance evidenced in the coexistence, in its text, of formally assured individual rights and of a Moderating Power concentrated in the figure of the emperor, which revealed a structural tension between liberty and authority within the adopted constitutional model (Ramos, 2007; Fraga, 2012).

Although lacking an express reference to the clause of *due process of law*, the Imperial Constitution enshrined a set of guarantees which, under substantive analysis, may be understood as embryonic manifestations of due process of law in its classical acceptation, among which the institution of the jury court, the affirmation of the presumption of innocence and the enshrinement of various guarantees related to the principle of legality stand out, especially those provided for in Article 179, which, in establishing limits on state action, indicated a concern, albeit incipient, with the protection of the individual against the exercise of power, anticipating, to a certain extent, the contours of what would later be consolidated as the essential core of due process of law in Brazilian constitutionalism (Ramos, 2007; Fraga, 2012). Following these clarifications, it is important to present a table on the historical-legal evolution of due process of law, above all, from the examination of the constitutional texts already promulgated:

Table 1

Historical-legal evolution of due process of law from the examination of the constitutional texts already promulgated

Period/Constitution	Legal-Political Characterization	Treatment of Due Process of Law	Developments
Constitution of 1891	Strong influence of the U.S. constitutional model, with the adoption of federalism, presidentialism, and judicial review; a concise and liberal text.	Expanded provision of rights in art. 72, with guarantees related to due process (especially §§ 14 and 16).	Represents a relevant advance by bringing the Brazilian legal order closer to liberal rights-based logic, although without explicit systematization of due process as an autonomous clause.
Constitution of 1934	A landmark of social constitutionalism, influenced by the Constitutions of Mexico (1917), Weimar (1919), and Spain (1931); an extensive and interventionist text.	Maintains the right to full defense (art. 113, §24), without conceptual deepening of due process of law.	Expands social rights but does not substantially develop procedural guarantees, remaining at a formal and limited level.
Constitution of 1937	Authoritarian regime of the Estado Novo; a text of an instrumental nature, aimed at the centralization of power.	Suppression of the right to full defense in general terms, with specific provisions in art. 122, §11.	Represents a setback in procedural guarantees, revealing a dissociation between the constitutional text and the effective limitation of power.
Pre-1946 Period (Doctrine)	Consolidation of legal reflections on fundamental guarantees, even in an authoritarian environment.	Implicit recognition of due process of law (Castro Nunes, 1943).	Demonstrates the normative force of the principle beyond the constitutional wording, evidencing its structuring nature.
Constitution of 1946	Redemocratization after World War II; resumption of the Rule of Law and approximation to the social model.	Strengthening of fundamental guarantees and of democratic procedural logic.	Represents a qualitative advance, integrating freedom and social justice, still without full explicit provision of due process.
Constitution of 1988	Democratic Constitutional State; centrality of fundamental rights and human dignity.	Express provision of due process of law (art. 5, LIV and LV); entrenched clause.	Definitive consolidation of the principle as a structuring axis of the process and a limit to state power.
Post-1988 (Development)	Expansion of constitutional hermeneutics and strengthening of constitutional jurisdiction.	Interpretive expansion of due process (formal and substantive dimensions).	The normative provision does not exhaust its content, requiring constant doctrinal and jurisprudential construction.

Source: prepared by the authors.

In view of the aforementioned information, there is a path marked by gradual advances and occasional setbacks, in which the full consolidation of the principle is achieved only with the 1988 Constitution, although its material bases were already dispersed in earlier normative experiences and doctrinal constructions, indicating that its understanding requires a historical reading together with a systematic and evolutionary interpretation of Law (Ramos, 2007; Fraga, 2012; Teles, 2021).

Now, having overcome the historical path pertaining to the formation and development of *due process of law*, as well as its gradual incorporation into the Brazilian legal order, it becomes possible to advance towards a more detailed examination and discussion of what, in the contemporary scenario, is understood by due process of law, transcending the mere notion of a simple historical category and taking its place as a legal institute endowed with normative density and centrality in the constitutional system. The task of conceptualising, however, proves, from a methodological standpoint, intrinsically complex, insofar as any attempt at definition tends, inevitably, to incur reductionisms, incapable of apprehending the totality of the constitutive elements of the analysed phenomenon, which is why, in the specific case of this important principle, it proves more appropriate to adopt a descriptive-structural approach, aimed at identifying its essential characteristics which, taken together, allow its contours within Brazilian law to be delineated.

Among these characteristics, according to Sposato, Cardoso and Sousa Júnior (2022), the prominent position occupied by due process of law in the normative structure of the Constitution stands out in the first place, a circumstance that confers upon it a singular legal force, deriving from the option of the original constituent to elevate it to the condition of an express constitutional principle, which implies recognising it not only with full legal efficacy but also with a structuring function within the system of fundamental guarantees.

In this condition, due process of law presents itself as a norm of superior hierarchy, endowed with supremacy in relation to infra-constitutional provisions, which must conform to it, while at the same time acting as a vector of internal harmonisation of the constitutional text itself, guiding the interpretation and application of the other constitutional norms, which evidences its foundational nature and its capacity to radiate effects over the entire legal order (Teles, 2021; Sposato; Cardoso; Sousa Júnior, 2022).

As it is a constitutional norm of a principled nature, it can be understood that due process of law is characterised by a high degree of abstraction, resulting in the recognition that its concretisation depends on a complex interpretative process, in which the interpreter is called upon to make reasoned choices within an axiological spectrum previously outlined by the legal system, so as to adapt the content of the principle to the specificities of the concrete case.

At this juncture, the application of due process of law must be visualised as a constructive activity, in which the normative content of the principle is progressively delineated from the interaction between text, context and constitutional values, thus demonstrating itself as an open, dynamic category in a permanent process of densification, whose materialisation depends on interpretative action committed to the realisation of justice in the concrete case.

2 NEOCONSTITUTIONALISM AND THE CONSTITUTIONAL RESIGNIFICATION OF PROCEDURE

The evolution of constitutionalism cannot be understood in a manner dissociated from the historical dynamics of social formations themselves, since the set of fundamental rights and guarantees, traditionally associated with the idea of a *Bill of Rights*, stands out as a historical construction profoundly conditioned by political, economic and cultural factors which, in each period, imprinted specific features on the organisation of power and on the definition of the legal status of the individual, so that the prevalence of certain constitutional characteristics over others resulted, to a large extent, from the structural transformations that redefined the socio-political position of communities over time (Ishii, 2013; Bianchini; Borba, 2015).

This finding, however, does not authorise the fragmentation of constitutionalism into absolutely watertight historical compartments, as if each stage were exhausted in itself, insofar as it allows one to identify, from an analytical-evolutionary perspective, successive movements which, as reported by Viana (2024), although interdependent, present their own normative and methodological densities, such as liberal constitutionalism, social constitutionalism, the process of constitutionalisation of rights and, finally, neoconstitutionalism, which, taken together, and now according to Ishii (2013), contributed to the shaping of the contemporary legal paradigm, marked by the centrality of fundamental rights and by the reconfiguration of the classical categories of Law.

The period following the Second World War represents, in this itinerary, a decisive turning point, insofar as the historical experience of the atrocities committed under the aegis of formally valid orders evidenced the insufficiency of the legal models then in force, imposing the need to reconstruct the theoretical bases of Law, with profound repercussions on legal dogmatics, philosophy and sociology, rendering unsustainable the traditional dichotomy between natural law and legal positivism as exclusive paradigms for grounding the legal phenomenon, whereby intense changes are observed in the sphere of laws around the world, since, "[...] fundamental rights and guarantees would only be endowed with efficacy when effectively materialised in the respective legal instruments, from which, since then, the strengthening of constitutional jurisdiction in legal orders derives [...]" (Macêdo; Magalhães; Sanches, 2025, p. 36).

Neoconstitutionalism, then, develops from the mid-twentieth century onwards, although without consensus among the jurists of the movement regarding the term employed, while at the same time there is the strengthening of constitutionalised principles, the distancing from legal positivism and classical formalism, greater proximity between morality and Law, among other changes relevant to present-day Law. This is one more step towards the relativisation of *civil law*, placed under comparison and confirmation of the insufficiency of aspects of classical legal positivism in the process and resolution of social questions and facts, a fact that has greater force from the coming into effect of the 1988 Charter (Viana, 2024; Macêdo; Magalhães; Sanches, 2025).

It is thus understood that the 1988 Constitution is marked as a watershed with regard to the transition from classical legal positivism to greater concerns and legal-social positioning in the face of society's problems, but such a milestone unfortunately cannot be considered an event that resolves all the population's questions, since the Brazilian legal order adhered belatedly to conceptions oriented towards the dignity of the human person, among other elements, "[...] especially with regard to the delegation, to the Judiciary, of the interpretation, application and practical binding of principles now constitutional and endowed with abstraction [...]" (Macêdo; Magalhães; Sanches, 2025, p. 37). Indeed, both absolute confidence in normative codification, typical of classical positivism, and the generic invocation of natural rights devoid of institutional mechanisms of concretisation remain inadequate, given that the complexity of social relations came to require a conception of Law that transcended the limits of normative literality, incorporating substantive values and criteria of material justice, hitherto considered external to the legal field, which involved the revaluation of the axiological dimension of interpretation and the opening of the legal system to the influence of principles endowed with normative force.

The Law of the twenty-first century distances itself from the theoretical matrices that preceded it, rejecting, on the one hand, the strict formalism of positivism, especially with regard to the rigid separation between Law, morality and politics, and, on the other, overcoming the fragilities of traditional natural law, while at the same time being structured upon a practical rationality oriented towards the concretisation of fundamental rights, whose paradigmatic expression is found in the technique of balancing, without disregarding, however, the contributions of legal realism and its sociological dimension, insofar as it seeks to confer effectiveness upon Law in its concrete and socially situated dimension (Lenza, 2022).

As Lenza (2022, p. 186) teaches, neoconstitutionalism is composed of important intrinsic characteristics, above all, relating to material contributions addressed to society, that is, to the creation of a Democratic Social State based on the Rule of Law of post-modernism, surrounded by concerns and preferences regarding the effectuation and concretisation of constitutional rights and guarantees, the reinforcement and expansion of principles, hermeneutic novelties, the increase in the force of laws and the enhancement of distributive justice. The illustrious scholar further clarifies about the constitutional Rule of Law, where "[...] from the moment values are constitutionalised, the great challenge of neoconstitutionalism becomes finding mechanisms for their effective concretisation".

In this context of transformation, a profound alteration is verified in the function attributed to constitutions, all the more so in orders of the Roman-Germanic tradition and its Latin American derivations, in which the Constitution ceases to be conceived as a mere political-programmatic document to assume a position of normative centrality, characterised by the supremacy of its principles and by the direct efficacy of its provisions, which inaugurates a new stage of constitutionalism, marked by the constitutionalisation of Law and by the radiation of constitutional values throughout the entire legal system.

Therefore, it is important to reaffirm that, in comparison with the American Constitution, the other constitutions, notably the Latin American and European ones, "[...] have a broad catalogue of fundamental rights, endowed with an evaluative charge, which enables more efficient legal-constitutional action" (Almeida, 2024, p. 922).

Such a movement, intensified by the incorporation of rights of a social nature and by the expansion of the catalogue of fundamental guarantees, indicates the overcoming of the classical model of Constitution and the consolidation of a paradigm in which fundamental rights assume a structuring function, guiding towards new paths, such as the action of the public powers and the very shaping of procedure, which comes to be understood as an instrument for the realisation of constitutional values, in consonance with the postulates of neoconstitutionalism and with the requirement of effectiveness of rights in the contemporary constitutional state (Macêdo; Magalhães; Sanches, 2025).

In the light of this process of transformation of contemporary constitutionalism, it becomes inevitable to shift the focus of the analysis to the field of Civil Procedural Law, insofar as the phenomenon of neoconstitutionalism, once its historical and social developments have passed, projects direct effects upon the structure, function and purpose of procedure, which ceases to be conceived as a mere technical instrument for applying the law to affirm itself as an institutional space for concretising constitutional values, especially those related to the dignity of the human person, substantive equality and the effectiveness of judicial protection. Such a circumstance determines a reinterpretation of due process of law from the perspective of its understanding as a multi-layered guarantee, oriented by the requirement of just, proportional and rationally reasoned decisions, in consonance with the postulates of the constitutional state and with the demands of a plural society in constant transformation.

The consolidation of neoconstitutionalism in the Brazilian legal scenario cannot be understood as a mere terminological shift or rhetorical updating of constitutional discourse, but rather as a profound epistemological inflection that restructures the foundations of Law from the normative centrality of the Constitution and the binding force of fundamental rights, a circumstance that projects direct effects upon Civil Procedural Law and, in a special way, upon the contemporary understanding of due process of law, which ceases to be conceived as a technical-procedural formula aimed at the formal regularity of acts to assume the condition of a substantive guarantee for containing power and realising the dignity of the human person, thus being inserted into a model of procedure oriented by constitutional values, principles and purposes, whose legitimacy depends on its capacity to concretise rights in real contexts and not merely to observe pre-established formal schemes (Teixeira; Neves, 2014).

In this context, the constitutionalisation of civil procedure emerges as a structuring phenomenon, insofar as it imposes the reading of procedural norms in the light of the 1988 Constitution, transforming procedure into an institutional space for the realisation of fundamental rights, which implies recognising that due process of law is not exhausted in the observance of rites, but requires the conformation of all jurisdictional activity to parameters of justice, rationality and participation, which is why one comes to speak of constitutional due process, an expression that translates the need for the procedure to be structured so as to guarantee not only formal legality but the material effectiveness of procedural guarantees, including substantive adversarial participation, full defence and the adequate reasoning of judicial decisions (Freitas Câmara, 2017; Carvalho Filho, 2021).

The neoconstitutionalist influence is also manifested in the reconfiguration of the adversarial principle, which ceases to be understood as a simple right to bilateral information to assume a three-dimensional dimension, founded on the axes of knowledge, reaction and influence, so that the parties come to occupy an active position in the construction of the jurisdictional decision, requiring of the judge not only the formal consideration of procedural submissions but the effective incorporation of the arguments presented into the decision-making process, which reinforces the democratic legitimacy of the judicial decision and densifies the content of due process of law as a guarantee of effective participation (Bianchini; Borba, 2015; Viana, 2024).

In parallel, it is observed that neoconstitutionalism contributes to the expansion of the role of the Judiciary, especially in contexts marked by the judicialisation of social conflicts and by the need to protect fundamental rights, which leads to an increase in judicial protagonism, whose action comes to be oriented by constitutional principles and by the pursuit of effectiveness, even though such expansion raises relevant tensions with regard to the limits of the jurisdictional function, the separation of powers and the preservation of legal certainty, imposing, in this scenario, the use of due process of law as a parameter for containing and legitimising judicial action (Teixeira; Neves, 2014; Freitas Câmara, 2017).

This transformation also has repercussions on the theory of fundamental rights, insofar as procedure comes to be understood as an autonomous fundamental right and not merely as an instrument of jurisdiction, assuming the function of protecting individual liberty in the face of state power and of promoting material equality between litigants, which reinforces the idea that due process of law constitutes the essential core of the Democratic State based on the Rule of Law, whose observance is a condition of legitimacy of any state intervention in the legal sphere of individuals (Carvalho Filho, 2021; Moreira, 2019).

Notwithstanding the advances provided by this new legal rationality, it is necessary to recognise that the expansion of the content of due process of law, driven by the centrality of principles and by the interpretative openness characteristic of neoconstitutionalism, also brings with it relevant challenges, especially with regard to the risk of normative indeterminacy, the possibility of excessively discretionary decisions and the weakening of legal predictability, thus requiring the construction of rigorous hermeneutic criteria that allow the effectiveness of rights to be reconciled with legal certainty and the coherence of the system (Moreira, 2019; Viana, 2024).

Thus, the influence of neoconstitutionalism on due process of law, in the Brazilian context, reveals itself as a complex and multifaceted phenomenon which, while promoting the humanisation of procedure and the centrality of fundamental rights, imposes the need for constant critical reflection on the limits of jurisdictional action and on the mechanisms for controlling power, so as to ensure that the expansion of the content of the principle does not become a factor of instability, but an instrument for strengthening the Rule of Law and for concretising the dignity of the human person (Bianchini; Borba, 2015). All the findings listed above, for better clarification, will be presented in a synthesised manner in Table 2, below:

Table 2

New guises of due process of law in neoconstitutionalism

Dimension	Traditional Model (Classical/Formal)	Neoconstitutional Model (Contemporary)	Legal-Procedural Impact
Nature of the principle	Formal guarantee of compliance with legal procedures.	Substantive guarantee linked to human dignity.	The process becomes an instrument of substantive justice, not merely of procedural regularity.
Normative basis	Strict legality (subordination to the law).	Constitutional supremacy and the normative force of principles.	The Constitution guides and conditions all procedural action.
Function of the process	Technical means of applying the law.	Space for the realization of fundamental rights.	The process takes on a democratic and axiological character.
Adversarial principle	Right to notice and to be heard.	Substantive adversarial principle (knowledge + reaction + influence).	The parties come to effectively influence the judicial decision.
Role of the judge	Applier of the law (passive position).	Active interpreter bound by the Constitution and fundamental rights.	Expansion of argumentative and decision-making responsibility.
Reasoning of decisions	Formal justification, often generic.	Analytical, rational, and constitutionally adequate reasoning.	Democratic control of decisions and prohibition of arbitrariness.
Procedural equality	Formal equality between the parties.	Substantive equality (equality of arms).	Possibility of differentiated treatment to correct inequalities.
Procedural effectiveness	Secondary in relation to form.	Central as a constitutional value.	Pursuit of fair and concrete results.
Legal interpretation	Logical-formal subsumption.	Balancing of principles and axiological interpretation.	Greater hermeneutic openness, with the need for argumentative rationality.
Relationship with fundamental rights	Indirect or limited.	Direct and structuring.	The process is conceived as an autonomous fundamental right.
Control of jurisdictional activity	Restricted to legality.	Expanded (constitutionality, proportionality, reasonableness).	Greater requirement of legitimacy of decisions.
Associated risk	Excessive formalism	Possible excessive discretion.	Need for balance between effectiveness and legal certainty.

Source: prepared by the authors, based on Turbnay Junior (2012), Teixeira and Neves (2014), Bianchini and Borba (2015), Lenza (2022), Silveira Filho (2024), Viana (2024).

In view of the aforementioned elements, the transformation of due process of law under the aegis of neoconstitutionalism denotes a profound paradigmatic change: from a model centred on form and strict legality to a model oriented by constitutional values, democratic participation and the effectiveness of fundamental rights. This evolution, then, considerably expands the content of the principle and redefines it in the role of procedure and of the Judiciary present in the contemporary state. In contrast, this expansion requires extreme methodological caution, because the strengthening of the substantive dimension of due process of law must proceed in balance with the preservation of legal certainty, avoiding that interpretative openness compromise the predictability and coherence of the system.

But is it not already time to think about or even observe diverse strands that nonetheless deal with the principle of due process of law even more closely linked to the dignity of the human person and other possible dimensions? Here it is that the next topic will address this, seeking to highlight important conjectures and views arising from Schools belonging to the Brazilian milieu, above all, so that it may be possible to enable an introspection and, at the same time, the sharing of disruptive thoughts from certain perspectives and scholars, aiming to enrich the debate on this important constitutional premise in force in our country and, perhaps, to develop a new concept much more grounded in what may be considered as "just" for Brazilian citizens.

In the following topic, important legal scholars and doctrinaires of the Escola Gaúcha de Direito will be considered, such as Carlos Alberto Álvaro de Oliveira, Luiz Guilherme Marinoni, Daniel Mitidiero, Luis Alberto Reichelt, among others, above all to bring a comparison between due process of law and the conception of the fundamental right to a fair process.

3 FROM DUE PROCESS OF LAW TO THE FUNDAMENTAL RIGHT TO A FAIR PROCESS

The discussion concerning due process of law in comparison with the fundamental right to a fair process, above all, calls for an overcoming of the traditional readings that reduced the former to a merely formal guarantee of procedural regularity, something already seen in the traditional/classical model of Law, in order to understand it as a category inserted into a broader and more complex frame, in which procedure comes to be conceived as an instrument for the realisation of justice in the Constitutional State, so that the mere observance of legal forms, although necessary, is insufficient to ensure the legitimacy of jurisdictional action, requiring, beyond that, the conformity of the procedural course with substantive values such as the dignity of the human person, material equality, effectiveness and legal certainty, which, in their interrelation, shape the normative content of what is called a fair process, understood not only as a guarantee but as a true model of procedure oriented towards obtaining just decisions adequate to the reality of the concrete case.

As Oliveira (2009) well clarifies, in his studies concerning the fundamental rights to effectiveness and certainty in a dynamic manner, this important researcher addresses that the distinction between due process of law and fair process is not established in terms of opposition, there being a progressive conceptual expansion, insofar as the former, especially in its classical acceptation, is historically linked to the idea of limiting state power through the imposition of previously established forms. The latter, in turn, emerges as a theoretical construction proper to contemporary constitutionalism, incorporating a more intense axiological dimension, oriented towards the concrete realisation of justice in the process, which requires recognising that procedural correctness, although essential, must be articulated with the pursuit of the truth of the facts, with the adequate application of the law and with the effective protection of material rights, composing a procedural system that is not exhausted in form, thus being projected in the substance of the decision (Cavani, 2014).

Now, it must be considered that Civil Procedure, far from constituting a purely technical and neutral mechanism, must be understood as a cultural phenomenon, structured on the basis of evaluative choices that reflect the interests, ideologies and needs of a given historical-social context, since, there being the right of access to jurisdiction, "[...] from the moment the state took upon itself the monopoly of providing it, as well as the right to a fair process and to the effectiveness of judicial protection" (Oliveira, 2009, p. 64), which means affirming that the very shaping of due process of law cannot be dissociated from the constitutional values that inform the legal order, it being indispensable to recognise that its interpretation and application must be oriented by the realisation of material justice, under penalty of their becoming instruments for the reproduction of inequalities and for the legitimation of formally correct yet substantively unjust decisions, the state having taken upon itself such responsibility.

This perspective leads to the understanding that the fundamental right to a fair process is not limited to the guarantee of access to jurisdiction or to the observance of certain procedural stages, but requires certain changes in the dimension of decisions, which the so-called fundamental right to a fair process, according to Marinoni (2019), would be capable of achieving, since it has as its focus the guarantee of reaching a decision that can be considered truly just for both parties to the process, for civil society and for the unity of Law, simultaneously, being the gateway to the exercise of the claim to justice and to legal protection within the current Constitutional State.

Meanwhile, due process of law encompasses a set of normative requirements that project themselves over the entire structure of the process, including the need to ensure an adequate organisation of the jurisdictional apparatus, the observance of principles such as the adversarial principle, cooperation and procedural good faith, as well as the production of decisions founded on criteria of rationality, proportionality and justice, so that the fair process presents itself as a true super-principle, capable of integrating and guiding the interpretation of the other procedural guarantees, conferring upon them unity and coherence within the legal system (Cavani, 2014; Oliveira, 2021).

The distinction between a static conception and a dynamic conception of procedural guarantees allows one to understand that due process of law, when reduced to its formal dimension, tends to operate as a mere guarantee of defence against state power, limiting itself to ensuring the observance of previously established forms, without, however, effectively interfering in the quality of the judicial decision, whereas the dynamic perspective, proper to the fundamental right to a fair process, establishes a reinterpretation of these guarantees in the light of fundamental rights (Cavani, 2014; Marinoni, 2019). Thereby, "[...] there arises the notion, albeit embryonic, of a dialogical process, formed from the interaction of the procedural subjects, an interaction that has as its frame precisely the fundamental guarantees of the process" (Mariotini, 2021, p. 7), requiring that the process be structured so as to promote just, adequate results compatible with constitutional values, which implies recognising the need to overcome a purely formalist model in favour of a model committed to the effectiveness of judicial protection and to the realisation of justice in the concrete case.

Cavani (2014), in studying the contributions and research of Luiz Guilherme Marinoni and Daniel Mitidiero in this regard, positions himself in favour of the interpretation that the fair process assumes the contours of a true normative model of the Constitutional State, insofar as it articulates, on the same plane, procedural correctness, the pursuit of truth and the adequate application of the law, orienting itself towards obtaining a just decision, understood as that which results from the conjugation of respect for procedural guarantees and the realisation of material rights. This only attests that due process of law, in its contemporary acceptation, cannot be understood in isolation, but must be integrated into a broader conception of procedure, in which justice ceases to be an element external to the procedure to become an intrinsic purpose of jurisdictional activity.

Mitidiero (2011) contributes to these clarifications when he discusses that:

> [...] It is the minimum model of procedural action of the State and even of private individuals in certain substantive situations. Its observance is a necessary and indispensable condition for obtaining just decisions. The Constitution speaks of due process of law (*due process of law*). The expression is criticisable on at least two

fronts. Firstly, because it refers to the cultural context of the Rule of Law (*Rechtsstaat, État Légal*), in which the process was conceived solely as a bulwark against state arbitrariness, whereas today the Constitutional State (*Verfassungsstaat, État de Droit*) has as its mission to collaborate in the realisation of the effective protection of rights through the organisation of a fair process. Secondly, because it gives rise to the pursuit, on account of the United States tradition in which it was gathered, of a substantive dimension to the provision (*substantive due process of law*), when there is no need to think of it beyond its procedural dimension in Brazilian law. On the one hand, it is necessary to perceive that the duties of proportionality and reasonableness do not derive from a supposed substantive dimension of due process [...] (Mitidiero, 2011, p. 2-3).

In view of the points made above, it is of interest to understand that the articulation between due process of law and the fundamental right to a fair process, as proposed by contemporary doctrine, does not necessarily concern the substitution of one concept for another, there having to be their integration into a more sophisticated normative system, in which the former provides the structural basis of procedural guarantees, while the latter expands and densifies its content, incorporating requirements of a substantive nature aimed at ensuring the effectiveness and legitimacy of judicial protection, so that procedure, in the Constitutional State, ceases to be conceived as an end in itself to affirm itself as an instrument for the realisation of justice, committed to the protection of human dignity and to the promotion of a more equitable and inclusive legal order.

It is also emphasised that the so-called due process of law, although expressly inscribed in Article 5, item LIV, of the 1988 Constitution, must not be read as a simple guarantee of rite or as an enunciation satisfied by the mechanical observance of previously established forms, because, in its most adequate understanding, it institutes in Brazilian Law the authentic fundamental right to a fair process.

That is, a minimum model of procedural organisation that proves indispensable to the legitimate action of the Constitutional State, especially when jurisdiction is called upon to interfere in the sphere of the liberty, property and legal positions of persons, requiring, precisely for that reason, more than formal legality, but a procedural conformation apt to produce just, controllable and constitutionally adequate decisions. Mitidiero (2011) further emphasises that this guarantee, although receiving notorious inspiration from North American *due process of law*, is not to be confused with the uncritical importation of substantive *due process*, since Brazilian law has an open catalogue of fundamental rights and its own constitutional matrix, sufficient to ensure the protection of implicit rights without the need to resort to that category, which is why he prefers to speak of a fair process, an expression that preserves the procedural character of the guarantee and inserts it, without ambiguity, into the grammar of the Constitutional State.

Turning to Luis Alberto Reichelt (2018), the right to a fair process is a model in expansion, variable and perfectible, an expression that makes patent the dynamic vocation of the guarantee and prevents it from being treated as a closed formula or as a rigid concept, because the fair process is not born as a ready and finished mould, being a normative structure open to legislative, jurisdictional and doctrinal densification, always in dialogue with the concrete requirements of the protection of rights and with the historical-social transformations that traverse legal life.

A true standard for the conformation of procedure in the Constitutional State is thus assembled, whose normative core is projected over legislative organisation, over administrative action and, above all, over jurisdictional activity, so that procedure comes to be understood as an instrument for the effective protection of rights and not as a mere technique for processing the claim.

Another relevant axis of this indispensable thought is found in the definition of the scope of protection of the right to a fair process, which is conceived as a right of a procedural nature that imposes organisational duties on the State in its legislative, executive and judiciary functions, which means that infra-constitutional legislation does not create the right, but densifies it, providing it with normative concreteness and rendering viable the construction of a process suited to the protection of rights, which is why procedural laws must be read as concretisations of the fundamental right to a fair process itself (Mitidiero, 2011; Reichelt, 2018).

From this understanding, the judge is also legally bound to the content of the principle, being unable to interpret or apply it in isolation from the constitutional system, since the administration of justice must operate as a means for effecting adequate, timely and effective judicial protection, especially when the claim brought before the court depends on the intervention of the State to preserve or realise the threatened material right itself.

Reichelt (2023) confers special relevance upon the affirmation that any and every process, jurisdictional or not, is subject to the control of procedural justice as a condition of legitimacy before the constitutional order, which encompasses civil, criminal, labour, electoral and military processes, as well as administrative, legislative and arbitral procedures, and even, in certain hypotheses, processes between private individuals that culminate in the imposition of relevant private restrictions, so that the clause of the fair process assumes an unequivocal function as an umbrella for procedural guarantees. At this point, the author is emphatic in maintaining that the abstract existence of a process is not enough, because it is necessary that it possess a structure compatible with the Constitution, that it be public, reasoned, with a natural judge, adversarial participation, full defence, the right to evidence, reasonable duration and equality of arms, for only thus does jurisdiction qualify as effective judicial protection and not as a simple institutional formality.

The axis of the discussion is thus shifted from the old *due process of law* to the fundamental right to a fair process, understood as a normative category proper to the Constitutional State, with procedural content, an identifiable minimum structure, an expansive vocation and a strong guarantee-related density, which allows one to affirm that procedure, in the Brazilian constitutional order, is only legitimated when it is organisedly oriented towards the adequate protection of rights, the effective participation of the parties, decisional rationality and the limitation of power, so that procedural justice ceases to be an abstract ideal and comes to constitute a legally and concretely enforceable requirement.

The violation of the right to a fair process may present itself in a direct or indirect manner, it being certain that only direct offence authorises, as a rule, extraordinary control via the constitutional route, whereas the mere interpretation of the infra-constitutional legislation that densifies the guarantee characterises reflex injury, although this does not prevent the Supremo Tribunal Federal from overseeing the sufficiency or insufficiency of the legislative protection conferred upon the fair process, especially when it is discussed whether the legislator adequately concretised the constitutional clause or whether, on the contrary, emptied it by omission or by excessively restrictive protection (Mitidiero, 2011; Cavani, 2014).

Given all that has already been discussed, the distinction is relevant because it reinforces that the fair process may be identified with a true normative parameter for controlling state action, including legislative action, whose densification must be assessed in the light of the Constitution and of the need for effective protection of rights, without prejudice to the diversity of purposes that procedure assumes according to the material right in question, since Civil Procedure aims at the effective protection of rights, whereas other procedural branches, such as the criminal one, have a more intensely protective function against state arbitrariness.

4 TOWARDS A CONTEMPORARY RECONSTRUCTION OF DUE PROCESS OF LAW: DUE PROCESS AS A GENERAL CLAUSE OF PROCEDURAL JUSTICE

Due process of law, in the light of the theoretical reconstruction operated within contemporary constitutionalism and densified by the contributions expounded, must be conceived as a complex, open and structural normative category, whose primary function consists in ensuring the conformation of all jurisdictional activity to a model of fair process, oriented by the realisation of the dignity of the human person, by the effectiveness of fundamental rights and by the rational limitation of state power, so that procedural legality ceases to constitute an end in itself to affirm itself as a means for the construction of just, adequate and constitutionally legitimate decisions, thus being inserted into a legal-philosophical matrix that articulates form and substance in indissociable unity (Fraga, 2012; Mitidiero, 2011).

It is thus redefined as the synthesis-principle of the Constitutional State, endowed with high normative density and an integrating vocation, whose incidence is projected over all dimensions of procedure, imposing the requirement of reasoned, proportional, reasonable decisions committed to material justice, so that procedure is converted into an institutional space for the concretisation of fundamental rights, definitively overcoming the traditional view that reduced it to a technical mechanism for applying the law (Teles, 2021; Teixeira; Neves, 2014).

From this reconfiguration, it can be affirmed that due process of law, in its contemporary acceptation, assumes the nature of a general clause of procedural justice, whose concretisation depends on a dynamic interpretative process, oriented by constitutional values and by the need to adapt the procedure to the specificities of the concrete case, which is why its application is not exhausted in normative subsumption, demanding a hermeneutic activity committed to the realisation of justice, given that it is an open category, in a permanent process of densification, and its materialisation depends on the responsible and argumentatively qualified action of the interpreter.

Due process of law can and must be conceived as a normative model for the organisation of procedure, whose legitimacy derives from its capacity to produce just decisions, whose justice ceases to be an element external to the procedure to become an intrinsic purpose of jurisdictional activity, requiring that the procedure be structured so as to ensure both the formal regularity and the substantive correctness of decisions, in consonance with fundamental rights and with the dignity of the human person.

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