THE SYMBOLIC DEAFNESS OF COURTS AND THE PROCEDURAL STATE OF EXCEPTION

A CRITIQUE OF DECISIONISM IN THE SYSTEMATIC DISMISSAL OF *EMBARGOS DECLARATÓRIOS*

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§ 1º | FOREWORD FOR THE FOREIGN READER: WHAT ARE *EMBARGOS DECLARATÓRIOS* IN BRAZILIAN PROCEDURAL LAW?

1. Placement within the system of appeals

In Brazilian civil procedural law, *embargos declaratórios* - rendered here as **motion for clarification** or **declaratory motion** - constitute a *sui generis* remedy governed by Article 1.022 of the Brazilian Code of Civil Procedure of 2015 (*Código de Processo Civil*, *brasCPC*). They differ structurally from the appellate remedies known in common-law systems, such as appeal proper, writ of certiorari, or motion for reconsideration. While ordinary appeals transfer the matter to a higher court for *de novo* review (the devolutive effect), the declaratory motion is filed before the very same body that issued the challenged decision - whether a trial judge, a panel, or the *en banc* plenary of a higher court.

It is therefore not an appeal in the classical sense of merits review, but rather an **integrative, self-critical remedy**: the author of the decision is invited to review their own work in order to correct formal defects and refine it. Functionally - though not identically - it bears affinities with the U.S. *motion to alter or amend the judgment* (Federal Rule of Civil Procedure 59(e)), the *motion for clarification* familiar in some state practice, and the English *slip rule* under CPR 40.12, as well as with the German *Anhörungsrüge* (§ 321a ZPO) and the Italian *ricorso per correzione di errori materiali* (Article 287 c.p.c.). It does not match any of these instruments exactly: it is broader in scope than mere clerical correction, yet narrower than substantive reconsideration.

2. Purpose and function

The purpose of the declaratory motion is precisely circumscribed: it aims at **perfecting** the judicial decision before it becomes final. Article 1.022 of the *brasCPC* sets forth four grounds of admissibility, designated as *vícios* (defects):

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(a) **obscurity** (*obscuridade*) - when the wording of the decision does not allow its meaning and scope to be understood;

(b) **contradiction** (*contradição*) - when there is logical incompatibility between the reasoning and the operative part, or among the reasons themselves;

(c) **omission** (*omissão*) - when the court has overlooked a relevant question raised by the parties or to be examined *ex officio*, including cases in which it fails to observe the holding of a binding precedent (Article 489, § 1, IV, *brasCPC*);

(d) **material error** (*erro material*) - when there is a manifest slip of expression that distorts the meaning of the decision.

The underlying constitutional logic is demanding: under Article 93, IX, of the Brazilian Federal Constitution of 1988, all judicial decisions must be reasoned, on pain of nullity. The *brasCPC* of 2015 elaborated this principle in Article 489, § 1, by creating a catalogue of hypotheses in which a decision is deemed **unreasoned** - particularly when it fails to address all arguments capable, in theory, of invalidating the conclusion adopted (item IV). The declaratory motion thus functions as **the procedural device for enforcing the duty of reasoning** - it compels the judge to review their own decision against constitutional and statutory standards.

3. Specific functions

The declaratory motion fulfils, within the Brazilian system, two further central functions:

Issue preservation (*prequestionamento*): extraordinary appeals to the Federal Supreme Court (STF) and to the Superior Court of Justice (STJ) - functionally analogous to a writ of certiorari before the U.S. Supreme Court and to appeals on points of federal law - require that the constitutional or federal-law question have been expressly addressed in the challenged decision. When the question has been overlooked, it falls to the declaratory motion to introduce it into the decision, thus enabling access to the higher courts. Article 1.025 of the *brasCPC* goes so far as to provide for **fictitious issue preservation**: the elements raised in the declaratory motion are deemed included in the judgment, even if the motion is denied, provided the higher court recognises the existence of the defect.

Tolling of the appeal period: under Article 1.026 of the *brasCPC*, the filing of a declaratory motion **interrupts** the period for other appeals - thereby considerably enhancing its strategic significance.

4. Procedural and constitutional significance

From a rule-of-law perspective, the institution carries considerable weight: it embodies the **right to influence** (*direito de influência*), which contemporary Brazilian doctrine recognises as a central element of the adversarial principle (*contraditório*) safeguarded by Article 5, LV, of the 1988 Constitution. The citizen has not merely the right to be heard before the court, but also the right that their arguments effectively shape the formation of the judicial conviction. The declaratory motion is the procedural instrument that secures this dimension of the adversarial principle.

From the standpoint of procedural economy, it functions as an **internal filter**: defects in the decision are meant to be cured before transmission to higher instances, which lightens the burden on the judiciary and promotes legal certainty. Precisely because it is brought before the very body that issued the decision, it demands from the judge a rare virtue: the intellectual humility to revisit and improve their own work before it becomes final.

5. The present conflict

The present work undertakes a critical examination of an institutional pathology: in Brazilian practice, courts frequently dismiss declaratory motions through standardised, generic formulas, without examining the concrete content of the motion. This practice - shaped by what is known as **defensive case law** (*jurisprudência defensiva*) - empties the institution of its constitutional function and opens a gap between the formal law and the actual judicial practice. It is precisely this conflict that is examined below through the theoretical lenses of **symbolic violence** (Žižek), the **state of exception** (Agamben), and **decisionism** (Schmitt).

§ 2º | SYMBOLIC DEAFNESS AND PROCEDURAL EXCEPTION: A CRITIQUE OF THE STANDARDIZED DISMISSAL OF *EMBARGOS DE DECLARAÇÃO* IN BRAZIL

1. Introduction: the invisible wall between jurisdiction and justice

Imagine a race in which, with every metre run, new obstacles are erected by the organisers themselves, fearful that too many athletes might reach the finish line. The Brazilian litigant finds themselves in this *Kafkaesque* situation: as they progress through the proceeding, instead of drawing closer to judicial relief, they witness the multiplication of a system of institutional obstacles that prevent the effective examination of their arguments (Cf. Marinoni, 2024).

The **declaratory motion** (*embargos declaratórios*) - conceived as a tool for refining the judicial decision - has paradoxically become the most visible symbol of this architecture of exclusion. Each precedent that generalises the dismissal formula joins the previous one like a brick, raising the wall that separates the citizen from the real possibility of having their arguments read, their reasons weighed, and their grounds engaged by the court (Cf. Didier; Cunha, 2023).

The present critique articulates this phenomenon through three complementary theoretical registers: Slavoj Žižek's **symbolic violence**, which allows the identification of an *institutional deafness* prior to any visible aggression; Giorgio Agamben's **state of exception**, which describes the suspension of the procedural norm without its formal revocation; and Carl Schmitt's **decisionism**, which illuminates the posture of the judge who decides *a priori*, without bearing the argumentative burden of the norm (Cf. Žižek, 2008; Agamben, 2005; Schmitt, 2005).

2. The qualitative degradation of judicial decisions

2.1. Diagnosis of a structural crisis

Long-term observation of forensic practice reveals a sharp decline in the quality of judicial decisions. This is not romantic nostalgia, but an empirical finding accessible to anyone who

compares judgments from different periods: contemporary judgments and rulings present, with worrying frequency, defects that compromise their *intelligibility*, internal coherence and, above all, the demonstration that the parties' arguments were actually weighed (Cf. Streck, 2017; Marinoni, 2024).

2.2. Mass litigation and the decisional *copy-and-paste*

The distribution of tens of thousands of cases per magistrate has made materially impossible the **time for reflection** required for a considered and individualised decision. Overloaded, the contemporary judge systematically resorts to prefabricated templates and to precedents from supposedly analogous cases, inserted through the well-known practice of *copy-and-paste* - which generates omissions, contradictions, and inaccuracies that render the decision unintelligible to its addressee (Cf. Nunes; Bahia, 2018).

Practical example: judgments that mention parties not involved in the litigation, mismatched case numbers, or legal theses entirely foreign to the controversy show that the text was produced without real cognition of the specific case - confirming the diagnosis of decisional depersonalisation.

3. Declaratory motions as quality control of jurisdiction

3.1. The cleansing function of the institution

Amid this qualitative degradation, declaratory motions should perform a strategic role of **internal control** over judicial activity. Unlike other appeals, which transfer review to a higher body, they submit the decision to the self-critical scrutiny of its own author, allowing them to correct formal defects before transmission to the next instance. They therefore operate as a genuine mechanism of decisional quality (Cf. Didier; Cunha, 2023; Medina, 2024).

3.2. The typology of admissible defects

The morphology of curable defects reveals the cleansing function of the institution: **omission** denounces that a relevant question, raised by the parties or cognisable *ex officio*, was overlooked; **contradiction** evidences irreconcilable propositions in judicial reasoning; **obscurity** (or ambiguity) shows that the wording does not allow the addressee to grasp the scope of the ruling; and **material error** discloses expression slips capable of inverting the meaning of the decision (Article 1.022, I, II and III, *brasCPC*) (Cf. Marinoni; Arenhart; Mitidiero, 2024).

4. Cognitive asymmetry: who truly knows the case?

4.1. The lawyer as holder of in-depth knowledge

Here lies one of the most disturbing paradoxes of the system. Effective mastery of the case - its detailed understanding in all factual, evidentiary, and legal aspects - belongs to the lawyer, not to the judge. It is counsel who devotes days, weeks, and months to studying the controversy, examining documents, interviewing witnesses, researching precedents, and developing the argumentative strategy, *meditating* upon the case in the etymological sense of the verb (Cf. Calamandrei, 2013; Streck, 2017).

4.2. The magistrate and the necessarily superficial examination

The judge, conversely, approaches the case in a fragmentary and hurried manner, conditioned by material overload. They consult reports prepared by clerks, identify recurring legal patterns, and apply preelaborated texts, without immersing themselves in the particularities that individualise the controversy. This **cognitive asymmetry** inverts the intuitive logic according to which the judge should be the person who best knows the case being decided (Cf. Marinoni, 2024).

4.3. The corrective function of declaratory motions

Faced with this inversion, the procedural system must provide effective mechanisms by which the lawyer - the holder of in-depth knowledge - can alert the judge to overlooked aspects. Declaratory motions perform precisely this function: they allow the lawyer's cognitive mastery to **correct** the imperfections of the magistrate's necessarily hurried review, restoring epistemic parity between the petitioner and the decider.

5. The sophism of the dispensability of exhaustive examination

5.1. The *contradictio in adiecto* of contemporary case law

Decisions proliferate that assert, with unsettling naturalness, the thesis that "the adjudicating body is not bound to analyse all arguments raised by the parties, provided the reasoning adopted suffices to support the conclusion". This is an authentic **contradiction in terms**, which subverts the constitutional foundations of judicial activity and disfigures the very institution of reasoning (Cf. Nunes; Bahia, 2018; Streck, 2017).

5.2. The violated normative block

Article **489, § 1, IV, of the *brasCPC*** provides that a decision is not considered reasoned when it "fails to address all arguments raised in the proceeding capable, in theory, of invalidating the conclusion". Article **93, IX, of the 1988 Constitution** requires all judicial decisions to be reasoned, on pain of nullity. And Article **5, LV, of the Constitution** enshrines the adversarial principle (*contraditório*), which comprises not only the *right to be heard*, but also the *right to influence* - that is, the right that the arguments actually be considered in the formation of judicial conviction (Cf. Marinoni; Arenhart; Mitidiero, 2024).

5.3. The inescapable question

If the legal order requires the judge to address all grounds capable of invalidating their conclusion, who holds the prerogative to decide, **a priori**, which arguments deserve examination and which may be ignored? Certainly not the judge, whose superficial cognition of the case does not allow them to distinguish, with certainty, the essential from the peripheral in the strategy crafted by the lawyer who truly *meditated* upon the controversy.

Practical example: the moving party points out an omission concerning a statute-of-limitations defence raised in the answer; the court dismisses the motion invoking the generic formula that it is "not bound to address all arguments". The vicious circle closes: the first-order omission

(lack of examination in the original decision) is shielded by a second-order omission (refusal to verify whether the omission existed).

6. The adversarial principle as a triple guarantee and its negation

6.1. Overcoming the liberal-individualist conception

The modern constitutional theory of process, overcoming the liberal reading that reduced the adversarial principle to mere bilaterality of audience, recognises it as having a **threefold nature**: (a) *right to be heard*, by which the party must be able to express themselves on relevant elements; (b) *right to influence*, by which the arguments must effectively enter the formation of judicial conviction; and (c) *prohibition of surprise decisions*, forbidding rulings grounded on questions on which the parties were not given the opportunity to speak (Cf. Marinoni; Arenhart; Mitidiero, 2024; Theodoro Jr. et al., 2023).

6.2. The threefold violation by generic dismissal

The standardised dismissal of declaratory motions frontally violates all three dimensions. The first (being heard) is only *formally* preserved, since the motion is filed but not examined. The second (influence) is frontally struck: the petitioner demonstrates that a specific argument was omitted, and the court responds that it is "not bound to consider all of them". The third (prohibition of surprise) is breached when a decision is maintained which omitted the examination of a relevant question, without giving the parties an opportunity to address it.

7. Symbolic deafness: a Žižekian reading of the dismissal of declaratory motions

7.1. The three faces of violence according to Žižek

Slavoj Žižek proposes a topology of violence in three registers: **subjective violence** (visible, exercised by an identifiable agent); **systemic violence** (anonymous, arising from the normal functioning of economic and political institutions); and **symbolic violence**, inscribed in language and its structures, which operates through the imposition of universes of meaning and the mortification of the real by means of prior categories (Cf. Žižek, 2008).

7.2. The symbolic deafness of the judiciary

The generic and standardised dismissal of declaratory motions constitutes an exemplary modality of symbolic violence: there is no visible aggression, no humiliated party at the hearing, no spectacular act of brutality. There is, however, something deeper and more devastating - the **structural refusal to listen**, the *symbolic deafness* manifested in the archived standard formula, in the phantom decision that mentions neither the parties nor the specific arguments, in the cliché that could have been written for any other case (Cf. Žižek, 2008; Streck, 2017).

7.3. The violence of language that does not listen

Žižek warns that symbolic violence is all the more dangerous the less visible it is: it structures the very field of the sayable, defining what deserves to be heard and what can be silenced without institutional cost. When the court writes that it is "not bound to refute all arguments", it produces a **performative utterance** that pre-classifies as dispensable reasons that were not even read - exercising symbolic violence in its most accomplished form (Cf. Žižek, 2008).

7.4. The cynical reason of the legal *establishment*

The reiterated practice of generic dismissal embodies what Peter Sloterdijk, taken up by Žižek, called *cynical reason*: "they know very well what they are doing, but they do it anyway". The courts know the contemporary doctrine of the adversarial principle, they have read Article 489, § 1, IV, of the *brasCPC* and Article 93, IX, of the Constitution; nevertheless, they continue reproducing the dismissal formula because the institutional structure - overloaded and shielded by defensive case law - so authorises (Cf. Sloterdijk, 1987; Žižek, 2008b).

Practical example: a lawyer devotes twenty pages to demonstrating an omission on a central thesis and receives a three-line ruling stating "mere dissatisfaction". The text does not engage; it refuses to listen. This is symbolic violence in its pure state: the absence of reply functions as annulment of the other's speech.

8. The procedural state of exception: an Agambenian reading

8.1. The category of *iustitium* applied to the process

Giorgio Agamben retrieves the Roman institute of the *iustitium* - "interruption, suspension of law" - to describe the state of exception as a **zone of anomie** in which the norm is suspended without being revoked. The *iustitium* does not operate as a full dictatorship (pleromatic state), but as a **kenomatic state**, an empty space in which the legal norm formally remains in force, although it ceases to produce effects (Cf. Agamben, 2005).

8.2. The silent suspension of Article 1.022 of the *brasCPC*

Applied to the proceeding, the category reveals something disturbing: Article 1.022 of the *brasCPC* has not been revoked nor declared unconstitutional; it remains formally in force, integrated into the legal order, invoked in pleadings, and cited in decisions. Its normative effectiveness, however, has been **suspended** by defensive case-law construction, which empties it through the thesis that "the judge is not bound to analyse all arguments". Here lies the *procedural iustitium* in its most subtle form: the law remains, but it does not govern (Cf. Agamben, 2005; Streck, 2017).

8.3. The exception turned into the rule

Walter Benjamin, taken up by Agamben, warned that the tradition of the oppressed teaches that the state of exception is the rule, not the exception. Transposed to Brazilian civil procedure, the lesson is crystalline: the generic dismissal of declaratory motions ought to be an exception duly justified; it has become banal routine. What was meant to be extraordinary treatment has become the ordinary rule, producing the paradox of a system that lives in a permanent state of suspension of its own guarantees (Cf. Benjamin, 1968; Agamben, 2005).

8.4. The inexecution of law

Agamben observes that "whoever acts during the *iustitium* neither executes nor transgresses, but **inexecutes** the law". The image precisely describes the magistrate who dismisses motions through a generic formula: they do not formally violate Article 1.022 of the *brasCPC* (they even

cite it), nor do they comply with it; they simply *inexecute* it, keeping it as dead letter while preserving the appearance of procedural legality (Cf. Agamben, 2005).

9. Schmittian decisionism and the procedural sovereignty of the judge

9.1. Schmitt and the sovereign who decides the exception

Carl Schmitt sums up sovereignty in the famous formula: "**sovereign is he who decides on the exception**". For the German jurist, normality proves nothing; the exception proves everything. The sovereign is not bound to the norm as other subjects are, for it is they who decide *whether* the norm applies, *when* it applies, and *to what extent* it applies - operating, therefore, at the border between order and anomie (Cf. Schmitt, 2005).

9.2. The magistrate as procedural sovereign

The contemporary practice of Brazilian courts confers upon the judge, within the microcosm of each proceeding, a functionally analogous position to that of the Schmittian sovereign: it is they who decide, *a priori*, whether to examine the arguments, which they will consider relevant, and which they will qualify as dilatory - without subjecting these choices to objective criteria known in advance. The judge does not apply the norm; they decide *on* its application (Cf. Schmitt, 2005; Streck, 2017).

9.3. The decision that precedes examination

The sharpest feature of this decisionism is the **temporal and logical inversion** between examination and qualification. The procedural norm provides that the appeal is first examined and only thereafter, possibly, the conduct is qualified as dilatory (Article 1.026, § 2, *brasCPC*). The inverted practice starts from the qualification ("this is mere dissatisfaction") and dispenses with examination. The legal qualification precedes and replaces the analysis of the content, just as, in Schmitt, the sovereign's decision precedes the norm (Cf. Schmitt, 2005).

9.4. *Auctoritas, non veritas facit legem*

The Hobbesian maxim that Schmitt retrieves - "authority, not truth, makes the law" - finds its echo in the standardised dismissal of declaratory motions. The ruling that dismisses the appeal need not demonstrate that the arguments are unfounded; it suffices that the court *authoritatively* qualifies them as such. Institutional force replaces argumentative reason, and decisionism fulfils its programme: the decision is valid because it was rendered, not because it was reasoned (Cf. Schmitt, 2005; Branco, 2007).

Practical example: two declaratory motions with identical grounds may receive opposite treatment in different panels, without it being possible to identify any normative criterion that explains the difference. What decides is not the norm, but the act of deciding - confirming, in the recursive microcosm, the decisionist structure described by Schmitt.

10. Defensive case law and institutional *non liquet*

10.1. Genealogy of defensive case law

The expression **defensive case law**, coined by procedural doctrine, designates the set of artificially restrictive jurisprudential constructions that hinder access to higher courts. Applied to declaratory motions, it describes the subterfuge created by the judiciary - under pressure from procedural overload - to justify the summary dismissal of appeals without effective examination of their merits (Cf. Marinoni; Mitidiero, 2024; Theodoro Jr. et al., 2023).

10.2. The veiled refusal to adjudicate

Generic dismissal essentially constitutes a **violation of the *non liquet* principle**: the judicial body cannot exempt itself from assessing the claim. When the court limits itself to responding that it is "not bound to refute all arguments", without verifying whether the specific question deserved a pronouncement, an **omission of the second degree** arises: the judge not only omits examination in the original decision (curable omission), but also refuses to verify whether the omission existed (incurable omission within the ordinary appellate system) (Cf. Streck, 2017).

11. The ignored legitimate safety valve: the fine as adequate legislative response

11.1. The implicit argument of preventive shielding

Generic dismissal is justified, in courthouse corridors, by the fear that individualised examination would encourage abusive use of the appeal. According to this defensive logic, examining each motion would incentivise bad-faith litigants to delay the moment of *res judicata*. The reasoning, however, ignores that the legislator has already provided a proportionate response to abuse (Cf. Medina, 2024).

11.2. The sanctioning architecture of Article 1.026 of the *brasCPC*

Article 1.026, § 2, of the *brasCPC* provides that "when declaratory motions are manifestly dilatory, the judge or court, by reasoned decision, shall condemn the moving party to pay the opposing party a fine not exceeding two per cent of the updated value of the claim". **§ 3** provides for aggravation in case of repetition, raising the fine up to ten per cent and conditioning subsequent appeals upon prior deposit - with exceptions for the Public Treasury and beneficiaries of legal aid.

11.3. The features of the legitimate sanction

The legislative sanction presents five virtues: (a) **graduability** (from 2% to 10%, depending on gravity); (b) **mandatory reasoning** (requires specific demonstration of dilatory character); (c) **appealability** (the qualification can be challenged); (d) **pedagogical effect** (it educates the litigant); and (e) **progressive aggravation** (rendering abuse economically unviable). The instrument exists and suffices - only its application according to its *ratio legis* is lacking (Cf. Marinoni; Arenhart; Mitidiero, 2024).

12. The perverse inversion: neither examination nor fine

12.1. Sanction without process

Judicial practice combines the worst of both worlds: it does not examine the motions (dismissing them through generic formulas) nor does it apply the fine (which would require reasoning demonstrating the dilatory character). A legal category nonexistent in the legal order

is thus created - the **unsanctioned dilatory motions** -, treated as abusive but not formally qualified as such, escaping appellate control (Cf. Streck, 2017).

12.2. The inverted presumption of bad faith

The legislative system presupposes the **presumption of good faith** of the litigant. It falls upon whoever alleges bad faith to prove it, not upon the moving party to prove their uprightness. Defensive case law inverts this premise: the motion is treated as dilatory prior to any examination, and the burden of proving the legitimacy of the challenge falls, in practice, upon the moving party - violating the constitutional presumption (Cf. Theodoro Jr., 2023).

12.3. The uncontrolled grey zone

The moving party remains in a legally undefined situation: their motion was treated as abusive, but the qualification was not formalised; therefore, they cannot challenge that qualification. They did not suffer the pecuniary sanction, but bore a worse implicit sanction - the denial of examination. Defensive case law throws out both the wheat and the chaff, indistinctly treating all motions as a procedural nuisance.

13. Phantom decisions and generic reasoning as shielding

13.1. Decisions without individualisation

Revelatory of the functional emptying of declaratory motions is the phenomenon of **phantom decisions**: generic rulings devoid of individualisation, which do not cite the specific argument raised, contenting themselves with formulas applicable to any case. The text does not prove it was produced for *that* specific case - it could migrate to any other file by simply altering the variable fields (Cf. Nunes; Bahia, 2018; Streck, 2017).

13.2. The absence of real cognition

When the motion points out the omission of a specific argument and the decision limits itself to stating generically that "the judge is not bound to analyse all grounds", it becomes evident that there was not even **real cognition** of the motion's content. The judge did not read the reasons, did not identify the alleged omission, did not assess its relevance - they merely applied the standard formula. The motion becomes an appeal of **symbolic effectiveness**: it exists in the law but does not produce the substantive effect for which it was conceived.

14. Systemic effects of the disqualification of declaratory motions

14.1. Deterioration of original reasoning

If the judge knows that possible omissions and contradictions will be raised and effectively cured through declaratory motions, they tend to devote greater care to the original decision. Conversely, if they know that motions will be dismissed through generic formulas, they feel exempted from improving reasoning - since failings will neither be corrected nor entail consequences. The disqualification of motions feeds back into the degradation of original decisions (Cf. Marinoni, 2024).

14.2. Impossibility of issue preservation

Extraordinary and special appeals require the **issue preservation** (*prequestionamento*) of the constitutional or federal question. If the court omits the examination of a ground and the declaratory motion is dismissed under generic allegation, access to the higher courts is rendered impossible: the question has not been decided (absence of issue preservation) and there is no way to remedy the omission - except by invoking **Article 1.025 of the *brasCPC***, which mitigates but does not solve the problem (Cf. Didier; Cunha, 2023).

14.3. Multiplication of rescissory actions and institutional delegitimisation

Decisions affected by omissions, which should have been corrected by declaratory motion, become final with their defects, generating rescissory actions for denial of jurisdictional relief (**Article 966, V, *brasCPC***) and further overloading the system. To this is added the erosion of institutional trust: the citizen who realises the futility of argumentation develops the perception that the judiciary does not listen - compromising the democratic legitimacy of the judicial function (Cf. Marinoni; Arenhart; Mitidiero, 2024).

15. Proposals for the requalification of declaratory motions

15.1. Prohibition of generic reasoning

The decision that dismisses declaratory motions cannot rest content with standardised formulas. It must identify which specific argument was alleged to have been omitted, demonstrate why it does not deserve examination (if so it deems), or actually examine it (if it acknowledges the omission). Generic reasoning in the dismissal of motions must be equated with absence of reasoning, entailing nullity in accordance with Article 489, § 1, of the *brasCPC*.

15.2. Effective application of the fine when warranted

When the judge holds that the motions are manifestly dilatory, they must **formally** so qualify them, with specific reasoning and application of the fine of Article 1.026, § 2. They cannot treat motions as dilatory without formally qualifying them as such - a practice that deprives the moving party of the right to challenge the qualification.

15.3. Control by higher courts and accountability

The higher courts must overturn rulings that dismiss declaratory motions through generic reasoning, ordering effective examination. Magistrates who systematically dismiss motions without individualisation must be the object of disciplinary representation, since such behaviour characterises a failure to fulfil the functional duties of providing adequate jurisdiction and reasoning decisions.

15.4. Judicial education and transparent statistics

To invest in the continuous training of the judiciary regarding the contemporary theory of the adversarial principle (right to influence) and to create a statistical system identifying the percentages of declaratory motions granted, dismissed, and dismissed with fine application by magistrate - allowing the identification of anomalous patterns suggestive of systematic dismissal without real examination.

16. Conclusion: bringing down the wall, restoring listening

The wall that separates the citizen from effective jurisdiction, raised brick by brick through procedural subterfuges, finds in disqualified declaratory motions one of its most solid segments. The joint reading of Žižek, Agamben, and Schmitt reveals that this is not a mere technical problem: there is **symbolic violence** in the refusal to listen; there is a **procedural state of exception** in the silent suspension of Article 1.022 of the *brasCPC*; there is **decisionism** in the *a priori* qualification that dispenses with examination (Cf. Žižek, 2008; Agamben, 2005; Schmitt, 2005).

The reversal of this picture does not require legislative reforms - the normative arsenal already exists, inscribed in Articles 489, § 1, IV, and 1.026 of the *brasCPC*, and in Article 93, IX, of the Constitution. It depends on a **cultural conversion** of the judiciary: regaining the intellectual humility to acknowledge that cognitive mastery of the case belongs to the lawyer; understanding that declaratory motions do not represent an affront, but an opportunity for refinement; internalising that the specific legal sanction for dilatory motions renders any preventive shielding unnecessary.

So long as the present treatment persists - motions dismissed through generic formulas, phantom decisions devoid of individualisation, omissions endorsed under the sophism of "the dispensability of refuting all arguments", legal fine not applied because its prerequisite is the very examination one wishes to avoid -, declaratory motions will remain an unfulfilled constitutional promise. And the wall will keep growing, brick upon brick, precedent upon precedent, until the distance between jurisdiction and justice itself becomes the rule that has replaced the Constitution.

Logic of the theme (symbolic deafness and the procedural state of exception in declaratory motions)

The logic of the system, read in a constitutional key, is limpid: Article 1.022 of the *brasCPC* enshrines a remedy of bound reasoning aimed at curing omission, contradiction, obscurity, and material error in the judicial decision; Article 489, § 1, IV, imposes upon the judge the duty to address all arguments capable of invalidating the conclusion; and Article 1.026, § 2, provides for a graduated fine as a proportionate response to abusive use of the institution. The system thus balances the right of the good-faith petitioner (to have their omission cured) with the deterrence of the bad-faith litigant (reasoned and graduable fine).

The pathology diagnosed arises when defensive case law inverts this architecture: the bad faith of the petitioner is presumed, specific examination is dispensed with, dismissal is rendered by generic formula and - paradoxically - the fine is not applied, because its application would require the specific reasoning one wishes to avoid. Žižek allows us to see in this practice a **symbolic violence** (the structural deafness inscribed in the very language of the rulings); Agamben offers the category of the ***iustitium*** (the silent suspension of the norm, which remains in force but does not govern); Schmitt unveils **decisionism** (the *a priori* qualification that precedes and replaces examination, conferring upon the magistrate a functionally sovereign position).

To comply with the system is simple: examine first, qualify afterwards; recognise legitimate omissions and sanction manifest abuses; reason specifically in both scenarios. To subvert it is what is done today: dismiss generically, do not formally sanction, and shield decisional omission under the sophism of dispensability of full examination. The solution lies not in the law, which already exists and suffices - it lies in the institutional will to apply it according to its *ratio*.

§ 3º | SYNOPTIC CHART

Topic/Institution	Explanation
Declaratory motions (Article 1.022, *brasCPC*)	Remedy of bound reasoning, admissible against any judicial decision, intended to clarify obscurity, eliminate contradiction, cure omission (including the hypotheses of Article 489, § 1) and correct material error. Integrative in nature, it serves as **internal control** of decisional quality, submitting the decision to the self-critical scrutiny of its own author.
Duty of reasoning (Article 93, IX, Constitution, and Article 489, § 1, IV, *brasCPC*)	Constitutional guarantee under which all judicial decisions must be reasoned, on pain of nullity. A decision is not considered reasoned if it fails to address all arguments capable, in theory, of invalidating the adopted conclusion. Pillar of the democratic legitimacy of jurisdiction.
Adversarial principle as triple guarantee (Article 5, LV, Constitution)	Comprises three dimensions. **Right to be heard**: the party must be able to express themselves on relevant elements; **right to influence**: the arguments must effectively integrate the judicial conviction; **prohibition of surprise decisions**: the court cannot ground its decision on a question on which there was no prior expression.
Fine for dilatory declaratory motions (Article 1.026, §§ 2 and 3, *brasCPC*)	Pecuniary sanction graduable from 2% to 10% of the updated value of the claim, with aggravation and prior deposit requirement upon repetition. Requires a reasoned decision demonstrating manifestly dilatory character. Constitutes the legitimate and sufficient safety valve of the system against abuse.
Symbolic violence (Žižek)	Modality of violence inscribed in language and institutional structures, operating through the imposition of universes of meaning and the mortification of the real. Manifests itself, in the case of motions, as **symbolic deafness**: a structural refusal to listen institutionalised in standardised dismissal formulas.
State of exception / *iustitium* (Agamben)	Suspension of the norm without its formal revocation, generating a zone of anomie in which the law is inexecuted -

	neither complied with nor transgressed. Applied to the proceeding, describes the silent suspension of Article 1.022 of the *brasCPC* by defensive case law, which keeps it in force but empties it of normative effectiveness.
Decisionism (Schmitt)	Thesis according to which "sovereign is he who decides on the exception". The decision precedes and replaces the norm. In the procedural microcosm, describes the judge who qualifies motions *a priori* as dilatory, without subjecting that choice to objective normative criteria known in advance.
Defensive case law	Set of artificially restrictive jurisprudential constructions, created to hinder access to courts and justify the summary dismissal of appeals without effective examination of merits. Constitutes a veiled refusal to adjudicate and violation of the *non liquet* principle.
Second-degree omission	Pathology in which the judge omits the examination of an argument in the original decision (curable omission) and, upon ruling on the motion, refuses to verify whether that omission existed (incurable omission within the ordinary appellate system). Constitutes a compound denial of jurisdictional relief.
Phantom decisions	Generic rulings without individualisation, which neither identify specific arguments nor engage with the concrete content of the appeal. They could apply to any case by merely altering variable fields. Reveal the absence of real cognition of the contested content.
Fictitious issue preservation (Article 1.025, *brasCPC*)	Mechanism that considers as included in the judgment the elements raised in declaratory motions for purposes of issue preservation, even if the motion is dismissed, provided the higher court recognises the existence of the defect. Mitigates - but does not solve - the obstruction of access to higher courts.
Cognitive asymmetry	Paradox according to which deep mastery of the case belongs to the lawyer, who *meditates* upon it, while the magistrate approaches it in a fragmentary and hurried manner. Functionally justifies the existence of declaratory motions as a correction tool by the holder of in-depth knowledge.

§ 4º | TABLE OF PRECEDENTS (STF and STJ)

Item	Explanation of the precedent
STF - ARE 748.371/MT (Theme 660), Virtual Plenary, Rapporteur	General repercussion (*repercussão geral*). *Ratio decidendi*: violation of the principles of the adversarial

Justice Gilmar Mendes, judged on 06.06.2013	principle, ample defence, and due process, when dependent upon the examination of infraconstitutional norms, is of merely reflexive nature, not authorising the admission of an extraordinary appeal. The precedent is frequently invoked to bar appeals alleging violation of Article 93, IX, of the Constitution due to insufficient reasoning - reinforcing the need to frame the critique in directly constitutional terms.
STF - AI 791.292 QO-RG, Plenary, Rapporteur Justice Gilmar Mendes, judged on 23.06.2010 (Theme 339)	General repercussion. *Ratio decidendi*: Article 93, IX, of the Constitution requires that any ruling or decision be reasoned, even summarily, without imposing the detailed examination of each allegation or piece of evidence. The precedent is the matrix of the generalising formula today invoked to dismiss declaratory motions, but it must be read together with Article 489, § 1, IV, of the *brasCPC* of 2015, which **overcame** that interpretation by requiring the treatment of all arguments capable of invalidating the conclusion.
STJ - EDcl no MS 21.315/DF, First Section, Rapporteur Justice Diva Malerbi (Judge summoned from the TRF of the 3rd Region), judged on 08.06.2016, DJe 15.06.2016	*Ratio decidendi*: the adjudicating body is not bound to answer every question raised by the parties when it has found a sufficient reason to render the decision. The judge has the duty to address only questions capable of invalidating the conclusion adopted in the challenged decision. A paradigmatic precedent of the thesis of the "dispensability of exhaustive analysis", the very object of the present critique.
STJ - AgInt no AREsp 1.456.452/SP, Fourth Panel, Rapporteur Justice Luis Felipe Salomão, judged on 03.12.2019, DJe 06.12.2019	*Ratio decidendi*: the STJ holds that the magistrate is not bound to refute, one by one, every argument brought by the party, provided that the grounds used were sufficient to support the decision. Reinforces the defensive line that empties, in practice, Article 489, § 1, IV, of the *brasCPC*.
STJ - EAREsp 1.672.966/SP, Special Court, Rapporteur Justice Laurita Vaz, judged on 19.10.2022, DJe 25.10.2022	*Ratio decidendi*: a special appeal grounded on violation of Article 1.022 of the *brasCPC* is admissible even without express indication of the subsection, provided the reasoning unequivocally demonstrates the hypothesis of admissibility. Important precedent because it softens defensive case law and privileges substance over form.
STJ - REsp 1.814.310/SP, First Panel, Rapporteur Justice Regina	*Ratio decidendi*: exceptional admissibility of the special appeal alleging violation of Article 1.022 of the *brasCPC*

Helena Costa, judged on 05.12.2023, DJe 11.12.2023	without indication of the violated subsection, provided that the defect attributed to the challenged decision and its importance for the resolution of the controversy are unequivocally demonstrated. Mitigates defensive case law.
STJ - AgInt no REsp 2.109.509/RS, First Panel, Rapporteur Justice Sérgio Kukina, judged on 05.08.2025, DJEN 21.08.2025	*Ratio decidendi*: the reasoning of a special appeal is deficient when the allegation of offence to Article 1.022 of the *brasCPC* is made generically, without exact demonstration of the points at which the ruling proved omissive, contradictory, or obscure. Application of Summary 284/STF. Illustrates the - paradoxically asymmetric - requirement of specific reasoning in alleging a reasoning defect.
STF - ADI 5.492/RJ ED, Plenary, Rapporteur Justice Dias Toffoli, judged on 16.05.2022	*Ratio decidendi*: the admissibility of declaratory motions presupposes the fulfilment of the statutory authorising hypotheses of Article 1.022 of the *brasCPC*; when the substantive (infringing) character is configured, they are dismissed. Reflects the general tendency of restrictive reading of the institution by higher courts.
STJ - Summary 98	Statement: "Declaratory motions raised with the notorious purpose of issue preservation are not dilatory in nature." Important limit to the application of the fine under Article 1.026, § 2, of the *brasCPC*: still in force under the *brasCPC* of 2015 according to consolidated case law. Protects the issue-preservation function of declaratory motions.
STF - RE 591.054/SC, Plenary, Rapporteur Justice Marco Aurélio, judged on 17.12.2014 (Theme 129)	General repercussion. *Ratio decidendi*: although dealing with criminal matter (inquiries as bad antecedents), the precedent is frequently invoked to reinforce the duty of substantial reasoning, showing that the STF, in different contexts, oscillates between rigour and flexibility in motivational requirement - an oscillation that reproduces itself in the discipline of declaratory motions.

§ 5º | CONCEPTUAL GLOSSARY FOR THE FOREIGN READER

Brazilian procedural law

Acórdão - Collegiate decision; judgment or ruling of a collegial body (panel, plenary, section), as opposed to single-judge decisions (*decisão monocrática*).

Ação rescisória - Rescissory action; action to annul decisions that have acquired *res judicata* status due to serious defects, comparable to common-law motions for relief from judgment (e.g., Rule 60(b) of the U.S. Federal Rules of Civil Procedure), governed by Articles 966 et seq. of the *brasCPC*.

Agravo interno - Internal interlocutory appeal; against decisions issued by a rapporteur within a collegial court, by which review by the panel is obtained (Article 1.021 of the *brasCPC*).

***brasCPC* (CPC)** - Brazilian Code of Civil Procedure of 2015 (Law No. 13.105/2015), which replaced the previous code of 1973. It introduced profound changes, particularly in matters of the duty of reasoning and the binding precedent system.

Decisão monocrática - Single-judge decision within a collegial court; rendered by the rapporteur alone, in cases where the law permits (Article 932 of the *brasCPC*).

Embargos declaratórios (*embargos de declaração*) - Motion for clarification or declaratory motion; remedy aimed at curing omission, contradiction, obscurity or material error in a judicial decision (Article 1.022 of the *brasCPC*). Without direct equivalent in common-law systems; functionally combines elements of the *motion to alter or amend judgment*, the *motion for clarification*, and the *slip rule* (CPR 40.12 in England and Wales).

Improbidade administrativa - Administrative improbity; statutorily regulated violation of public administrative morality (Law No. 8.429/1992).

Intimação - Formal notification in proceedings; comparable to *service* in common-law systems, with specific procedural particularities.

Jurisprudência defensiva - Defensive case law; the set of artificially restrictive jurisprudential constructions that hinder access to courts - particularly to the higher courts - and justify the summary dismissal of appeals without effective examination of merits.

Non liquet - Prohibition of denial of justice; in Brazilian law, expressly enshrined in Article 140 of the *brasCPC*, under which the judge cannot exempt themselves from adjudicating the dispute, not even on grounds of statutory gap or obscurity.

Prequestionamento - Issue preservation; admissibility requirement for extraordinary appeals, demanding that the constitutional or federal-law question have been expressly addressed in the challenged decision. Functionally comparable to the U.S. *preservation of error* doctrine.

Prequestionamento ficto - Fictitious issue preservation (Article 1.025 of the *brasCPC*); mechanism that deems the elements raised in declaratory motions as included in the judgment even if the motion is dismissed, provided the higher court recognises the existence of the defect.

Recurso especial - Special appeal to the Superior Court of Justice (STJ); functionally comparable to a federal-law appeal before a court of last resort on points of federal statutory law (Article 105, III, of the Constitution).

Recurso extraordinário - Extraordinary appeal to the Federal Supreme Court (STF); functionally comparable to a writ of certiorari raising constitutional questions before the U.S. Supreme Court (Article 102, III, of the Constitution).

Repercussão geral - General repercussion; admissibility requirement for the extraordinary appeal before the STF, introduced by Constitutional Amendment 45/2004, requiring that the question raised transcend individual interest (Article 102, § 3, of the Constitution). Functionally analogous to the U.S. Supreme Court's *certworthy* requirement.

STF (*Supremo Tribunal Federal*) - Federal Supreme Court; the highest court of Brazil, charged with safeguarding the Constitution. Functionally, it combines competencies that, in the U.S. system, would belong to the Supreme Court, with emphasis on constitutional questions.

STJ (*Superior Tribunal de Justiça*) - Superior Court of Justice; charged with the uniform interpretation of federal law. Functionally closer to a federal court of last resort on points of federal statutory law (in civil and criminal matters).

Súmula - Binding or orientational statement issued by higher courts to unify case law. There exists the *súmula vinculante* (binding, governed by Article 103-A of the Constitution) and non-binding *súmulas*.

Tema - Thematic numbering of precedents with general repercussion (*repercussão geral*) at the STF or with binding effect on repetitive appeals (*recursos repetitivos*) at the STJ.

Tutela provisória - Provisional relief; umbrella term covering both urgent injunctive measures (*tutela de urgência*, comparable to a preliminary injunction) and the *tutela da evidência* (relief based on the evident factual and legal situation).

Brazilian constitutional law

***Constituição Federal de 1988* (CF/88)** - Brazilian Federal Constitution of 1988, also known as the "Citizen Constitution" (*Constituição Cidadã*); it marked the end of military dictatorship and established the democratic rule of law.

Direito de influência - Right to influence; contemporary doctrine of the adversarial principle (Article 5, LV, of the Constitution), under which the party has not only the right to be heard, but also the right that their arguments effectively shape the formation of judicial conviction.

Dever de fundamentação - Duty of reasoning; constitutional duty (Article 93, IX, of the Constitution) requiring all judicial decisions to be reasoned on pain of nullity, elaborated in Article 489, § 1, of the *brasCPC*.

Estado de coisas inconstitucional - Unconstitutional state of affairs; doctrine recognised by the STF in ADPF 347/DF (2015), characterising structural, lasting and massive violations of fundamental rights whose remedy requires the coordinated intervention of several state powers.

Philosophical-legal concepts

State of exception (*estado de exceção*) - In Carl Schmitt: the situation in which the sovereign suspends the law in force in order to preserve the order. In Giorgio Agamben: a paradigm of modern government, transitioning from an extraordinary measure to a permanent technique.

Auctoritas, non veritas facit legem - Latin maxim ("authority, not truth, makes the law") which Schmitt borrows from Hobbes to emphasise the decisionist character of sovereign decision.

Decisionism (*decisionismo*) - Legal and political theoretical position of Carl Schmitt, according to which every legal order ultimately rests upon an act of decision, not entirely determined by any prior norm. Sovereign is the one who decides in the exceptional case.

Iustitium - Roman institute of the "interruption of law" (from *ius* + *stitium*, interruption) which Agamben retrieves from Roman law to describe the state of exception as a **kenomatic state** (empty, anomic), in which the norm is suspended without being revoked.

Kenomatic state (*estado kenomático*) - State of emptiness, of anomie; in Agamben, the mode in which law operates during the *iustitium* - it remains formally in place, yet does not apply.

Pleromatic state (*estado pleromático*) - State of fullness; in Agamben, characteristic of classical dictatorship and full powers, in contrast to the emptiness of the *iustitium*.

Symbolic violence (*violência simbólica*) - In Slavoj Žižek (following Pierre Bourdieu and Jacques Lacan): a form of violence inscribed in language and in institutional structures, operating through the imposition of universes of meaning and the mortification of the real by means of prior categories. It is all the more effective the less it is perceived as violence.

Subjective violence (*violência subjetiva*) - In Žižek: visible violence exercised by an identifiable agent (criminality, terrorism, state repression).

Systemic violence (*violência sistêmica*) - In Žižek: anonymous violence, arising from the normal functioning of economic and political institutions.

Cynical reason (*razão cínica*) - In Peter Sloterdijk (and Žižek): a state of consciousness in which the subject sees through the falsity of their own practice yet persists in it. Formula: "they know very well what they are doing, but they do it anyway" - an inversion of the Marxian diagnosis of ideology.

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