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Preliminary injunction: brief considerations regarding the positions on conduct sufficient to negate the stabilizing effect.

Antecedent Anticipatory Relief: Brief Reflections on the Positions Regarding Conduct Sufficient to Prevent the Stabilizing Effect

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Summary

The innovation represented by the stabilization of the provisional decision faces, among other debates, that concerning whether or not appeals are mandatory for the purpose of challenging the stabilizing effect.
The scenario calls for reflection on the normative ethics of paying attention to the semantic limits of the law, as opposed to teleological interpretations that gradually transform the judge into a legislator with the right to rewrite the law.

Keywords: Preliminary injunction. Stabilization of the injunction.

Abstract

The innovation represented by stabilization of the provisional decision faces, among others, the discussion of the appeal exactivity to struggle against the judicial decision stabilize effect. The scenario approach points out, in one hand, the normative ethics to be concerned with semantic limits of legal text, and in the other hand, the teleological style of interpretation which slowly converts the judge into legislator to rewrite the law.

Keywords: Preliminary injunction. The stabilization of the provisional decision.

1. Introduction

This approach aims to highlight peculiarities regarding the legal concept of urgent relief.
anticipated, but not before locating it within the 2015 CPC, so that the analysis is limited to the period to
starting from the latest codification with the inclusion of the modality in an antecedent character.

Having distinguished the institute as a subspecies of the subspecies of provisional remedies for
To focus the analysis on preliminary injunctions in an anticipatory manner, the first reflective step is necessary.
regarding the need *for "judicial services to gain adherence to the conflict of interests that*
"It arises from life and its complexities and from substantive law1". That is, as responsible for
In the regulation of legal relations and situations, the contrast between definitiveness and provisionality is commonplace,
resulting, for the interpreter, in a Sophie's Choice[2] and within the limits of the judicial process.
democratic.

At this crossroads, the problematic scenario of the risk of harm is also visualized and
The need for a lengthy process is unnecessary.

Specifically, the intention is to address the stabilization of urgent protective measures.
precedent, with the originality of dispensing with adversarial proceedings, endowed with effectiveness after the passage of *time.*
albis of the time limit foreseen for the exhaustion of cognition, without achieving the authority of res judicata, eis

1MACEDO, Elaine Harzheim. *Judicial provision in the context of preliminary injunctions: procedure, stabilization of the decision and the lapse of the 2 (two) year period: a new case of preclusion?* Revista de Processo, São Paulo, year 40, no. 250, 2015, p. 192.
[2]*Ibidem,* p. 192.

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which is not exhaustive3 .

Preliminary injunctions, as outlined in articles 303 and 304 of the CPC,

This represents a novelty that could not escape the temptations of doctrinal and judicial voluntarism.

Especially at the beginning of the jurisprudential reading of article 304 of the CPC, the disregard is evident.

through careful observance of the contours of the law in the context of its use by the human intellect. The

The interpreter, even in the case of the solitary articles of preliminary injunctions, does not...

He felt oppressed by legality. *In this case,* the doctrinal interpreter, wielding the powers of a medium...

to provide beneficial extension to the stabilization through any manifestation by the defendant that would overcome

his inaction.4 The courts, therefore, adopted the endemic recourse to teleological interpretation as a subterfuge to

transform themselves into legislators and thus rewrite the law. It is the

which the Superior Court of Justice (STJ) established in Special Appeal No. 1760966/SP of December 7, 2018. The boundaries of the rule established by

Due to the legislative process, they were only reinstated by the same Superior Court of Justice in the Special Appeal.

1797365/RS of 10/22/2019.

The legislative option of article 304 of the CPC, resulting from a democratic deliberation process.

Politics should be immune to the whims of disgruntled interpreters who lacked license.

creative in the case at hand.

2. Theoretical Framework/Results

2.1 Preliminary injunction

There is talk of locating this modality within the 2015 CPC (Brazilian Code of Civil Procedure) because the previous code did not have it.

prediction regarding the possibility of filing for an anticipatory measure even before

filing of the lawsuit. Focused on articles 303 and 304 under the CPC, the granting of preliminary injunction in

The antecedent character comes in the wake of ensuring the effectiveness and timeliness of the service.

jurisdictional, under a constitutional and democratic vector5 . Timeliness, one might say, resides

in the opening for entry prior to the action, whereas the effectiveness emerging from the stabilization of

preliminary injunction under the guise of summary cognition, capable of concluding the process with a satisfactory measure.

in advance.

In contrast to the initial request and the incidental request, the subspecies is timeless, to the extent that

in which, in a journey through procedural time, it goes back to a moment prior to the main request and creates a

phenomenon of autonomization of summary cognition without precedent in our legal system .

3MITIDIERO, Daniel. *Autonomization and stabilization of preliminary injunctions in the new Code of Civil Procedure.* Electronic Journal of the Regional Labor Court of the 9th Region, Curitiba, PR, v. 4, n. 39, p. 16-17.

4MARINONI, Luiz Guilherme. ARENHART, Sérgio Cruz. MITIDIERO, Daniel.New *course of civil procedure: protection of rights through common procedure.* Volume II. São Paulo: Revista dos Tribunais, 2015, p. 216.

5MACEDO, Elaine Harzheim. *Op. cit.,* p. 191.

6. The inspiration comes from the French measures for the autonomization of cognition known as *référéprovisione référéinjunction,* as well as from the instrumentality of precautionary measures in Italian law, which allows for the stabilization and autonomization of urgent measures. Regarding the

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The resolution of disputes through ordinary means, by means of full and exhaustive examination, This tends to require an extended timeframe, which is incompatible with the constitutional guarantee of access to justice and the efficiency of the justice system. It is questionable whether... stabilization of the effects of preliminary injunction, which has the immediate consequence of... The termination of the process, with the delivery of the jurisdictional service, is a factor of convergence with instrumentalist dictates and those of procedural guarantees.7 If the process without effectiveness is even more The ideological accusation that the instrumentalist judge acts ideologically, along with the autonomization... The stabilization of preliminary injunctions is the point of contact between the doctrines, deserving careful analysis.

2.2. From suitability to its stabilization

The summarization, at the same time, of cognition and procedure8 , by the literal interpretation of the law, is inadmissible to provisional evidence-based relief, which means that only anticipatory relief allows for the prerogative of making definitive what was granted under the guise of provisionality .

Having fulfilled the requirements of article 319 of the CPC, proceeding to the demonstration of Given the elements that demonstrate urgency in obtaining provisional relief, as well as the indication of final relief, the claim to avail itself of the benefit provided for in the *heading* of article 303 of the CPC10 must be pursued. that It consists of the option to file an incomplete petition, which can be amended after the request has been reviewed.

On this subject, see SICA, Heitor Vitor Mendonça. *Twelve problems and eleven solutions regarding the so-called "stabilization of preliminary injunctions,"* in Revista do Ministério Público do Rio de Janeiro, no. 55, Jan/Mar 2015, footnote on p. 87.

[7] It seems pertinent to contrast schools of thought that converge, at least initially, on the issue of preliminary injunctions. On one hand, there are the instrumentalists, arguing that jurisdiction has objectives related to the ends of the State itself; that is, the purposes of jurisdiction (and therefore of the procedural system) are indefinable, their ultimate goal being the common good, allowing procedural maneuvers that ensure effectiveness in the pursuit of a fair process. On the other hand, there are the procedural guarantors, who always focus on the constitutional substance of the process as a counter-jurisdictional guarantee for the citizen; that is, a guarantee institution that can only be managed through legislative means. On instrumentality, see DINAMARCO, Cândido Rangel. *A Instrumentalidade do Processo.* São Paulo: Revista dos Tribunais, 1987. p. 447. On procedural guarantors, see COSTA, Eduardo José Fonseca. *An ideological spectroscopy of the debate between legal guarantees and activism. Judicial Activism and Procedural Guarantees.* Salvador: Editora JusPodivm, 2013.

[8] SICA, Heitor Vitor Mendonça. *Op. cit.,* p. 87.

[9] Therefore, its application to exclusively conservative (precautionary) measures, even in a preliminary stage, is excluded, and Also, as mentioned, there are the provisions regarding the protection of evidence, which have their own specific regulations, the first with a particular chapter (articles 305 to 310) and the second with an exclusive title (article 311). Cf. LAMY, Eduardo de Avelar. *Stabilization of preliminary injunctions in the new Code of Civil Procedure.* Revista do Processo / Instituto Brasileiro de Direito Processual (IBDP). São Paulo: Revista dos Tribunais, v. 41, n. 260, Oct., 2016, p. 107. It should also be noted that *"Only the preliminary injunction granted before the date of the decision can be stabilized. Never the preliminary injunction granted after the decision."* Cf. MACEDO, Elaine Harzheim. *op. cit.,* p. 200.

10Art. 303. In cases where the urgency is contemporaneous with the filing of the action, the initial petition may be limited to the request for preliminary relief and the indication of the request for final relief, with an explanation of the dispute, the right sought to be enforced, and the danger of harm or the risk to the useful outcome of the proceedings.

§ 1. Once the preliminary injunction referred to in the heading *of this article has been granted:*
I - the plaintiff must amend the initial petition, supplementing their arguments, attaching new documents, and confirming the request for final relief, within 15 (fifteen) days or within another longer period that the judge may set;
II - the defendant will be summoned and notified for the conciliation or mediation hearing in accordance with article 334;
III - If no settlement is reached, the time limit for filing a response will be calculated as per article 335.
§ 2. If the amendment referred to in item I of § 1 of this article is not carried out, the process will be terminated without resolution of the merits.
§ 3 The amendment referred to in item I of § 1 of this article shall be made in the same proceedings, without incurring new court costs.
§ 4 In the initial petition referred to in the heading of this article, the plaintiff must indicate the value of the case, which must take into account the request for final relief.

§ 5 The plaintiff shall also indicate in the initial petition that he or she intends to avail himself or herself of the benefit provided for in the heading *of this article.*
§ 6. If the court finds that there are no grounds for granting preliminary relief, it shall order the amendment of the initial petition within 5 (five) days, under penalty of dismissal and termination of the proceedings without resolution of the merits.

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of preliminary injunction and, what is essential, the stabilization of any injunction that may be granted.

Thus, if the plaintiff, in the initial pleading, indicates their intention to avail themselves of the benefits

From the *main clause* of the article (as authorized by paragraph 5), it can be said that it agrees with the extinction of

process after the granting of the injunction. Hence the novel aspect of the possibility of stabilizing the injunction.

even without amending the initial pleading within the 15-day period indicated in §1, which occurs if the appeal process provided for

in the *heading* of article 304 of the CPC11 is not exercised. Note that the decision

The provisional decision will remain in effect until a subsequent decision reviews, amends, or invalidates it (Article 304, § 3), and not

constitutes res judicata (§6).

It can therefore be stated that stabilization is a result of the relationship between article 303 and article 304.

304 of the CPC, while a vacuum of manifestation from the defendant, and, aiming at cognition

In the event of exhaustive discussion, the parties may address the issue of stability through the independent legal action provided for in Article 304, §

2nd, CPC, within the two-year statute of limitations (art. 304, § 5, of the CPC).

Full cognition, now dependent on the will of the parties12, can be postponed by simple

inertia of the defendant who opts for a quick and effective solution to the problem, even if, to do so, there remains no certainty

regarding what has been provisionally decided13. Even if

For the time being, the parties may find themselves satisfied due to procedural economy, as well as

due to the defendant's procedural strategy, given that the plaintiff appeared to have a stronger claim,

prefers to succumb with the safeguard of being able to do so *later* under better conditions, allowing time for factual and evidentiary

changes to occur that favor him14 .

Despite its apparent simplicity, the summary protection of rights and the process aimed at...

Stabilization, however, leads to turbulent waters.

11Art. 304. The preliminary injunction, granted under the terms of art. 303, becomes stable if no appeal is filed against the decision granting it.

§ 1 In the case provided for in the heading, the process will be terminated.
§ 2. Either party may sue the other in order to review, amend or invalidate the preliminary injunction established under the terms of the main clause.

§ 3 The preliminary injunction shall retain its effects until reviewed, amended, or invalidated by a decision on the merits rendered in the action referred to in § 2.

§ 4. Either party may request the unarchiving of the case file in which the measure was granted, to support the initial petition of the action referred to in § 2, with jurisdiction belonging to the court that granted the preliminary injunction.
§ 5 The right to review, amend or invalidate the preliminary injunction, provided for in § 2 of this article, expires after 2 (two) years, counted from the date of notification of the decision that terminated the proceedings, pursuant to § 1.
§ 6 The decision granting the injunction will not constitute res judicata, but the stability of its effects will only be removed by a decision that reverses, amends, or invalidates it, issued in an action brought by one of the parties, in accordance with § 2 of this article.

12. The parties are mentioned because nothing prevents the applicant from wanting to take advantage of the stabilization procedure from the outset and proceed with the case until the matter is exhausted, by amending the initial pleading so that the proceedings continue until res judicata is formed.

[13] DOTTI, Rogéria. Fagundes. *The stabilization of preliminary injunctions in the 2015 CPC: The autonomy of summary injunctions and the dispensable res judicata.* In: LUCON, Paulo Henrique dos Santos; APRIGLIANO, Ricardo de Carvalho; SILVA, João Paulo Hecker da; VASCONCELOS, Ronaldo; ORTHMANN, André. (org.). Process in Conferences - XI Brazilian Conferences on Procedural Law / XXV Ibero-American Conferences on Procedural Law. 1st ed. Salvador: JusPodivm, v.1, 2016, p. 906.

[14] Or perhaps they wish to avoid the costly procedural process. In the context of consumer law, it can be envisioned that defendants who are suppliers of services or products, aware that the issue will not constitute res judicata, thus excluding it from the formation of binding precedents under Article 927 of the CPC (Brazilian Code of Civil Procedure), might reflect more carefully on the need to resist certain consumer claims, being satisfied with the stabilization, especially if the Judiciary has the sensitivity and consistency to grant them a reduction in the costs of the proceedings. On this subject, see RANGEL, Rafael Calmon. The stabilization of preliminary injunctions in consumer lawsuits. Revista de Direito do Consumidor. vol. 107. year 25. São Paulo: Ed. RT, Sept.-Oct. 2016, p. 526.

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3. Materials and Methods

This is qualitative research, developed through a literature review.
and case law analysis. Doctrinal positions regarding the taxative nature of the handling were examined.
the appeal procedure provided for in article 304 of the CPC, as well as the precedents of the Superior Court of Justice that
They initially relaxed and later reinstated the requirement to file an appeal.
instrument.

4. Results and Discussion

4.1 Whether or not the appeal process against stabilization is exhaustive.

It is no coincidence that questions have been raised elsewhere regarding the initial convergence or lack thereof of views.
instrumentalist and guarantor with regard to *"super-anticipatory protection"15* as a tool for access to
Justice and efficiency. Depending on the perspective adopted, autonomy and stabilization are at stake.
of the preliminary injunction.

The antagonistic context lies specifically in the *opening paragraph* of Article 304 of the CPC, in its part...
final: *"if the respective appeal is not filed".* The wording, being clear, points to the *"remedy".*
a suitable volunteer to bring about, within the same process, the reform, invalidation, clarification or integration of a judicial decision that is being challenged16". However, even though the letter of the law does not allow
Leaving room for interpretation, there is a school of thought that argues that any act of challenging the defendant's decision
is sufficient to prevent the stabilization.17 This is because the doctrinal sentiment often aligns with this view.
redemptive duties that confer upon the scholar and the judge an enlightened role as interpreter of a
A diffuse collective reason that cannot be measured by democratic criteria.

By exceeding the limits of the legal text, there is an undeniable desire to engage in judicial policy18. The
criticisms of the model in the *heading* of article 304 of the CPC seem, in truth, to have no concern about acknowledging
the attempt to invade and colonize the legislative space19 .

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15 Olavo de Oliveira Neto coined the term *"super-anticipated injunction"* to designate an injunction of an antecedent nature. See OLIVEIRA NETO, Olavo de, OLIVEIRA, Patrícia Elias Cozzolino de. *From anticipatory injunction to super-anticipated injunction: brief considerations about the simplified initial petition.* In OLIVEIRA NETO, Olavo de, OLIVEIRA, Patrícia Elias Cozzolino de, BUENO, Cassio Scarpinella, LUCON, Paulo Henrique dos Santos, MEDEIROS NETO, Elias Marques de (Coord.). Provisional injunction in the new CPC.
São Paulo: Saraiva, 2016. p. 343.

16. Concept of appeal according to BARBOSA MOREIRA, José Carlos. *Comments* on the *Code* of *Civil Procedure,* Volume V. Forense: RJ, 2009, p. 233. Regarding the judgment of the appeal, it is correctly considered that if the appeal is timely, the legal requirement to prevent the stabilization effect will be satisfied, even if the court subsequently rejects the appeal. Cf. SICA, Heitor Vitor Mendonça. *Op. cit.,* p. 91. The author bases his argument on the already established understanding that a timely appeal, even if inadmissible due to some other defect, is capable of preventing the preclusion of the appealed issue, which suggests a merely obstructive appeal effect on the stabilization of the preliminary injunction.

[17] BONNA, AP; SEGATTO, TM *The stabilization of provisional guardianship and the problems surrounding the lack of legislation in the New Code of Civil Procedure.* De Jure, Belo Horizonte, v. 17, n. 17, Dec. 2018, p. 344.

[18] STRECK, Lenio Luiz. *What Is This – I Decide According to My Conscience?* Porto Alegre: Livraria do Advogado, 2010, p. 23.

[19] It should be noted that criticism of judicial discretion is not an inquisition into the interpretative activity of the judiciary, since the act of giving meaning through interpretation is inherent to the judiciary, particularly in the face of the vagueness and breadth of possible meanings of words. The problem seems to lie in the openness to subjectivity that leads to interpretation as a product of the interpreter's will, which, in practice, turns judges into legislators, reducing the creation of the object of knowledge to the concepts of the protagonist (the judge). Cf. STRECK, Lenio Luiz. *Lessons in hermeneutical critique of law.* Porto Alegre: Livraria do Advogado Editora, 2014.

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Therefore, the doctrinal position favoring allowing the defendant to present [the evidence] arises. a simple petition to the court, or even a defense, informing of your opposition to the granted injunction and Disagreement regarding stabilization. Such maneuvering alone would be enough to establish his intention to give. continuation of the process with a future pronouncement of a decision on the merits based on exhaustive cognition, capable of forming res judicata.20 In short, the question centers on the fact that that the strictness of the appeals process would encourage an increase in challenges via interlocutory appeals. (of instrument and internal), in a code that supposedly values the reduction of direct appealability of interlocutory decisions21 .

The position reflects the ambiguous spectrum of viewing the process as an instrument of justice, with the idea of strengthening jurisdiction also coming from doctrine, which proposes scopes which are not relevant to it. Hence, technically unconcerned explanations for mitigating the taxability of appeal management22. It is voluntarism, in this case doctrinal and judicial, being freed. from the shackles of legality with ethereal arguments, as usual, even when appealing to a A so-called constitutional reading. In this vein, the understanding is that the possibilities should be broadened with relies on judicial response to adapt the text of the law to the effective protection of rights, since the right to defense, a fundamental constitutional right, could not be inhibited by sub-constitutional law (the CPC)23 .

It is clear that this is, above all, a position detached from everyday legal practice. This is because both sides already systematically challenge both favorable and unfavorable preliminary decisions through appeals.24 Therefore, there would be no increase in the likelihood of appeals in this environment. with a high litigation load like the Brazilian one. Not to mention that, once the appeal is filed, the rapporteur may to determine the suspension of the appeal until the amendment, summons, and preliminary hearing phases are exhausted25. Therefore, the prerequisites for not

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p. 90. The author further concludes: *"In the era of Contemporary Constitutionalism, upholding the importance of the semantic limits of the Constitution and, consequently, assessing the validity of laws in accordance with the Constitution constitutes, indeed, an effective advance in the hermeneutical field. It is not, obviously, a return to any exegetical stance operating in the past."* STRECK, Lenio Luiz. *Op. cit.,* p. 112.

[20] NEVES, Daniel Amorim Assumpção. *Manual of Civil Procedural Law.* 9th ed. Salvador: JusPodivm, 2016, p. 452. Regarding the removal of stabilization by any form of challenge, whether appealable or not, THEODORO JÚNIOR, Humberto. *Course of Civil Procedural Law – General theory of civil procedural law, knowledge process and common procedure* – Vol. 1. 56th ed. rev., updated and expanded – Rio de Janeiro: Forense, 2015, p. 674.

[21] BONNA, AP; SEGATTO, TM *Op.cit.,* p. 345.

[22] In a single passage, arguments are presented that *it would be "more interesting," "more appropriate,"* and *"more sensible"* to ignore ethics. normative and to make an unbiased reading of the legal text. Cf. BONNA, AP; SEGATTO, TM *Op.cit.,* pp. 345 and 346.

23On the subject, see LAMY, Eduardo de Avelar. *Op. cit.,* p. 110. Regarding the externalizing signs of resistance to the stabilizing effect, the following are considered: (a) appeal (interlocutory or internal), (b) complaint, (c) writ of mandamus, (d) suspension of preliminary injunction, and (e) request for reconsideration. See COSTA, Eduardo José da Fonseca. *On provisional relief. Art. 300.* In: STRECK, Lenio Luiz. NUNES, Dierle. CUNHA, Leonardo Carneira da. (orgs.) FREIRE, Alexandre (exec. coord.). Comments on the Code of Civil Procedure. São Paulo: Saraiva, 2016, p. 674.

[24] In this regard, see MACEDO, Elaine Harzheim. *Op. cit.,* p. 202.

[25] Again, MACEDO, Elaine Harzheim. *Op. cit.,* p. 202.

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stabilization of guardianship and the right to a second level of jurisdiction.

Above all, there is a political choice on the part of the legislator, who, in imposing the handling of the appeal as a form In order to avoid a stabilizing effect, the intention was to discourage unjustified dissatisfaction, especially since the The defendant may not agree, but, as a procedural strategy, may wait to exercise the right to action foreseen in article 304, §5°, at a time that is most advantageous to him from a factual point of view- evidentiary or else accept *"from the outset the anticipatory measure, not intending to pursue the judicial discussion"26 .*

What seems serious, as mentioned, is not the disregard for logical issues in the overall picture. The practical-forensic handling of appeals is not the same as mistaking one thing for another to make judicial policy. in violation of the legislative option developed in an environment of profound democratic discussions.

In response to the constitutional interpretation, it is understood that the *legislator's intent* underwent a process of deliberation. of the principles of the breadth of the right to action and defense, as well as the principle of celerity, Since the legislator opted for the latter, in consideration of the effectiveness of judicial protection, another right enshrined in the Constitution27. Therefore, the constitutionality test is easily passed.

4.2 The jurisprudential shift of the STJ

In the initial opportunity it had to express its opinion on the matter, the STJ (BRAZIL) concluded due to the dismissal of the stabilization when, without filing an appeal, the defendant contested the claim, questioning the granting of preliminary injunction:

> (...) 4. In the case at hand, although no interlocutory appeal was filed against the decision that granted the request for anticipation of the effects of the requested preliminary injunction, pursuant to Article 303 of the CPC/2015, the defendant anticipated the matter and filed a defense, in which it even requested the revocation of the provisional injunction granted, arguing that its fulfillment was impossible, which is why there is no reason to speak of the stabilization of the preliminary injunction, and therefore the case should proceed normally until the pronouncement of the judgment28. (BRAZIL, REsp: 1760966 DJe 07/12/2018)

It is not surprising that the Superior Court is modifying the meaning of the word "appeal," as if it were possible to split the text and the norm with interpretations that exceed their semantic limits29. In addition to the deleterious effects already explained, it must be noted that, in practice, what happens reserving stabilization for cases of default. It cannot be reasonable that the legislator had

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26Ibidem. Op. cit., p. 202.

27DONIZETTI, Elpídio. *Didactic course of civil procedural law* – 20th ed. rev., updated and expanded – São Paulo: Atlas, 2017, p. 569.
28STJ - REsp: 1760966 SP 2018/0145271-6, Rapporteur: Minister MARCO AURÉLIO BELLIZZE, date of judgment: 04/12/2018, T3 - THIRD PANEL, publication date: Official Gazette 07/12/2018.
29STRECK, Lenio Luiz. *Semantic limits and their importance in and for democracy.* AJURIS Magazine. v. 41, n. 135, September 2014. Porto Alegre: AJURIS, 2014. It is not surprising because it is not uncommon for the Superior Court of Justice (STJ) to do so: although the Code of Civil Procedure (CPC) expressly states that attorney's fees may only be determined equitably when the economic benefit is *"inestimable or negligible"* or the value of the case is *"very* low" (article 85, §8, of the CPC), the possibility of setting fees outside the legal criteria of paragraphs 2 and 3 of article 85 has been discussed again, not only to increase but also to decrease the amount of the fees in cases of *"great value"* or when the economic benefit is *"substantial".* On the subject, see STJ Repetitive Theme 1076.

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The institution of stabilization has been exceptionalized to the point of becoming illogical, insofar as the very...
The applicant, in filing the lawsuit, would no longer adopt the preliminary injunction procedure, since
aware of the improbability of the stabilizing effect.

Now, if the mere possibility of default judgment would be sufficient for the applicant to trigger the...
stabilization, it is evident that it would no longer make sense, after the injunction has been granted and stabilized by the default judgment, for the applicant to fail to amend, since he would have exhaustive cognizance under the mantle of res judicata30. Of
So unusual, it would be something like a lottery to file for preliminary injunction in advance, the
which would ultimately lead to the filing of a lawsuit requesting an urgent preliminary injunction.
Article 294 of the CPC. It was, therefore, a matter of burying the institution based on the rewriting of the law by
legal world.

Fortunately, there was a refreshing shift by the STJ (BRAZIL) in the following direction:

> (...) II - The means of defense have specific purposes: the contestation demonstrates resistance in relation to the exhaustive protection, while the interlocutory appeal allows for the review of the decision rendered in summary proceedings. Unmistakable institutions. III - The absence of challenge to the decision by which the anticipation of the protection was granted in an antecedent manner will undoubtedly preclude the possibility of its review. IV - The presentation of a contestation does not have the power to remove the preclusion resulting from the non-use of the appropriate procedural instrument - the interlocutory appeal.31 *(BRAZIL,* REsp: 1797365, DJe 22/10/2019)

The shift preserved the idea of jurisdiction without an exhaustive purpose, with the prevalence
from summary protection to ordinary protection, an omnipresent theme in the spirit of the CPC32 .

Final considerations

Amidst the debates regarding whether or not the appeal procedure in the *main clause* is taxable.
Article 304 of the CPC provides a robust example of how legal culture distorts the process.
and reduces it to an instrument for achieving the aims of jurisdiction, which is imbued with awareness.
teleological, legitimized by her mediumistic ability.

The urge to alter textual meanings, even when faced with literal interpretations, seems irresistible.
then of legislative options duly approved by the proper legislative process. Although
The short time span between the decision to bury the stabilization (07/12/2018) and the one in which the
resurrected (22/10/2019), it is seen that the progressive paradigm of instrumentality conditions the
respect for legality and criteria for understanding normative texts in the nebulous universe
jurisdictional-procedural, thereby rejecting the view of the process as a guarantee.

30RAATZ, Igor. *Provisional Remedies in Brazilian Civil Procedure.* Livraria do Advogado. 2018, p. 173.

31STJ - REsp: 1797365 RS 2019/0040848-7, Rapporteur: Minister SÉRGIO KUKINA, date of judgment: 03/10/2019, T1 - FIRST PANEL, date of publication: DJe 22/10/2019 RB vol. 662, winning vote written by Minister Regina Helena Costa, which draws attention to the respect for democratic legislative deliberation that resulted in a clear choice by the legislator. To do otherwise, according to the minister, would be to exceed the jurisdictional function.

32RAATZ, Igor. *Op. cit.,* p. 173

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contrajurisdicional33 .

Even the so-called constitutional interpretation immunizes judges from adhering to legality, which it imposes, With the stabilization of the effects of preliminary injunctions, the effectiveness of the judicial process is ensured. in a summary setting. That is, Sophie's choice, at the crossroads between summary and Ordinary, it proves to be democratic and at the same time effective, since the defendant's right is maintained to to establish the best procedural strategy (whether to appeal or accept the stabilization, with the right to review within the timeframe stipulated in §5 of article 304) and deliver the satisfactory relief to the applicant within the established timeframe. adequate.

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