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# The terrain a decision leaves behind: sedimentation, synthesis, and recombination in the case law of the Brazilian Supreme Federal Court

*O terreno que a decisão deixa: sedimentação, síntese e recombinação na jurisprudência do STF*

*El terreno que deja la decisión: sedimentación, síntesis y recombinación en la jurisprudencia del STF*

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**Abstract:**
This article examines how particular decisions of the Brazilian Supreme Federal Court can, over time, become stable jurisprudential propositions and subsequently be combined with materials from other lines of case law to produce a reusable legal formulation. It distinguishes three operations in the development of jurisprudence: sedimentation, understood as the diachronic process through which a proposition arising in a particular case gains stability through reuse; synthesis, which consists of abstracting decisions that address the same legal question into a more general formulation; and recombination, in which propositions addressing distinct questions perform complementary argumentative functions in constructing a formulation that none of them contained independently at the same level of articulation. The first two operations have recognised antecedents in the theory of legal reasoning, whereas the third is presented as an analytical distinction examined in relation to neighbouring concepts. The empirical material comprises the jurisprudential development from the single-justice decision in ADPF 45 (2004) to the judgment in RE 684.612, corresponding to General-Repercussion Theme 698 (2023). The documentary and analytical reconstruction supports the conclusion that, by 2023, the central proposition advanced in 2004 — the exceptional legitimacy of judicial intervention in the face of an omission that compromises rights — constituted an express or reconstructible premise in the opinions examined from all three positions in dispute. It also indicates that the leading opinion synthesises sector-specific precedents into settled case law concerning the legitimacy of judicial intervention and that the holding on the mode of intervention, taking that authorisation as an accepted premise, combines the structural form of intervention — supported by scholarship that had already linked action plans to administrative participation in determining the form, timeframe, and means of implementation — with specific administrative mechanisms, such as staff reallocation and the contracting of social organisations, whose lawfulness is supported by a precedent from a different line of case law. This articulation presupposes the decomposition of sector-specific precedents, from which the opinion retains the answer concerning the legitimacy of intervention while setting aside the answer concerning the remedy. The classification of the case as recombination is therefore limited to the specific articulation between the structural framework of the action plan and those administrative mechanisms, and is presented as plausible within the stated documentary limitations. The argument does not presuppose a deliberate project of judicial expansion, nor does it reduce the outcome to an opposition between judicial activism and restraint.

**Keywords:**
precedents; jurisprudential development; judicial review of public policies; Brazilian Supreme Federal Court; Theme 698.

**Resumo:**
Pergunta-se como decisões particulares do Supremo Tribunal Federal podem transformar-se, ao longo do tempo, em proposições jurisprudenciais estáveis e, posteriormente, ser combinadas com materiais de outras linhagens para produzir uma formulação jurídica reutilizável. Propõe-se distinguir três operações do desenvolvimento jurisprudencial: a sedimentação, entendida como o processo diacrônico pelo qual uma proposição situada em um caso adquire estabilidade por meio de sua reutilização; a síntese, que consiste na abstração de decisões que respondem a uma mesma questão jurídica em uma formulação mais geral; e a recombinação, na qual proposições que respondem a questões distintas desempenham funções argumentativas complementares na construção de uma formulação que nenhuma delas continha isoladamente, no mesmo nível de articulação. As duas primeiras operações possuem antecedentes reconhecidos na teoria do raciocínio jurídico, enquanto a terceira é apresentada como uma distinção analítica, confrontada com noções próximas. O material empírico compreende o desenvolvimento jurisprudencial entre a decisão monocrática proferida na ADPF 45, em 2004, e o julgamento do RE 684.612, correspondente ao Tema 698 da repercussão geral, em 2023. A reconstrução documental e analítica sustenta que a proposição central de 2004 — a legitimidade excepcional da intervenção judicial diante de omissão que comprometa direitos — constituía, em 2023, uma premissa expressa ou reconstruível nos votos examinados das três posições em disputa. Sustenta, ainda, que o voto condutor sintetiza precedentes setoriais como jurisprudência assente quanto à legitimidade da intervenção e que a tese relativa ao modo de intervenção, tomando essa autorização como premissa recebida, articula a forma estrutural da intervenção — apoiada em doutrina que já associava o plano de ação à participação da Administração na definição da forma, do prazo e dos meios de implementação — com meios administrativos específicos, como o remanejamento e a contratação de organizações sociais, cuja licitude encontra respaldo em precedente de outra linhagem jurisprudencial. Essa articulação pressupõe a decomposição de precedentes setoriais, dos quais o voto aproveita a resposta relativa à legitimidade da intervenção e afasta aquela referente ao remédio. A classificação do caso como recombinação restringe-se, por isso, à articulação concreta entre a estrutura do plano e esses meios administrativos específicos, sendo apresentada como plausível, dentro dos limites documentais explicitados. O argumento não pressupõe a existência de um projeto consciente de expansão judicial, tampouco reduz o resultado à oposição entre ativismo e autocontenção.

**Palavras-chave:**
precedentes; desenvolvimento jurisprudencial; controle judicial de políticas públicas; Supremo Tribunal Federal; Tema 698.

**Resumen:**
Se pregunta cómo decisiones particulares del Supremo Tribunal Federal pueden transformarse, a lo largo del tiempo, en proposiciones jurisprudenciales estables y, posteriormente, ser combinadas con materiales de otras líneas para producir una formulación jurídica reutilizable. Se propone distinguir tres operaciones del desarrollo jurisprudencial: la sedimentación, entendida como el proceso diacrónico por el cual una proposición situada en un caso adquiere estabilidad por medio de su reutilización; la síntesis, que consiste en la abstracción de decisiones que responden a una misma cuestión jurídica en una formulación más general; y la recombinación, en la cual proposiciones que responden a preguntas distintas desempeñan

funciones argumentativas complementarias en la construcción de una formulación que ninguna de ellas contenía aisladamente, en el mismo nivel de articulación. Las dos primeras operaciones poseen antecedentes reconocidos en la teoría del razonamiento jurídico, mientras que la tercera es presentada como una distinción analítica, confrontada con nociones próximas. El material empírico comprende el desarrollo jurisprudencial entre la decisión monocrática dictada en la ADPF 45, en 2004, y el juicio del RE 684.612, correspondiente al Tema 698 de la repercusión general, en 2023. La reconstrucción documental y analítica sostiene que la proposición central de 2004 —la legitimidad excepcional de la intervención judicial frente a omisión que comprometa derechos— constituía, en 2023, una premisa expresa o reconstruible en los votos examinados de las tres posiciones en disputa. Sostiene, también, que el voto conductor sintetiza precedentes sectoriales como jurisprudencia consolidada en la legitimidad de la intervención y que la tesis relativa al modo de intervención, tomando esa autorización como premisa recibida, articula la forma estructural de la intervención — apoyada en doctrina que ya asociaba el plan de acción a la participación de la Administración en la definición de la forma, del plazo y de los medios de implementación— con medios administrativos específicos, como la reasignación y la contratación de organizaciones sociales, cuya licitud encuentra respaldo en precedente de otra línea jurisprudencial. Esa articulación presupone la descomposición de precedentes sectoriales, de los cuales el voto aprovecha la respuesta relativa a la legitimidad de la intervención y aleja aquella referente al remedio. La clasificación del caso como recombinación se restringe, por eso, a la articulación concreta entre la estructura del plan y esos medios administrativos específicos, siendo presentada como plausible, dentro de los límites documentales explicitados. El argumento no presupone la existencia de un proyecto consciente de expansión judicial, tampoco reduce el resultado a la oposición entre activismo y autocontención.

**Palabras clave:**
precedentes; desarrollo jurisprudencial; control judicial de políticas públicas; Supremo Tribunal Federal; Tema 698.

**The mountain**

Imagine a mountain without a road. The first group that needs to cross it does not have a map. In front of a rock, it deviates; in front of a hillside, it seeks passage; in front of a river, it improvises a crossing. Each decision solves a local problem, and none of those who walk need to know the final outline.

The second group no longer meets the same mountain. It finds a trail. It may abandon it, and nothing obliges it to follow it; but following the trail and abandoning it are no longer equivalent alternatives. Where the first group found only the mountain, the second finds the mountain and the trail of those who passed.

Other groups arrive. Stones are removed, the trail is extended, and signs begin to indicate the route. What began as a circumstantial solution acquires the appearance of a path. Since the crossing is not carried out by a single group or by a single route, other trails are formed, each one open to overcome a different obstacle — rivers, slopes, and changes in

elevation. At some point, someone realizes that three of them pass close to each other and connects them through a new stretch, open, in part, with stones brought from outside the mountain. For this part, it is reached a point that others may have already reached by other routes.

Coming back is still possible. But those who arrive later no longer decide on the mountain as it existed before: they decide on a land where there are trails, marks and passages left by others and in which to abandon a path means also to renounce parts built on the previous ones. None of this requires anyone to have designed the entire layout. Each group may have reasonably solved the problem before them.

The image doesn't prove anything. It only serves to fix the properties that will be sought, then, in a specific case: each decision partially alters the land received by the following; the future does not become inevitable; it is possible to return — and it is important to know if the return was practiced or even proposed; and subsequent decisions can work with materials that were not available to the previous ones, including materials formed on distinct tracks and materials brought from outside them.

## § 1 — The problem

The mountain corresponds to a set of related constitutional issues: if, when, how and by what means the judiciary may determine that the administration implements a public policy that it has ceased to implement. The groups represent the panels and justices of the Supreme Court who answered these questions between 2004 and 2023.

The first milestone is the monocratic decision made in 2004 at ADPF 45, in which the rapporteur, after recognizing the supervenient loss of the object, stated that the Judiciary may, “on exceptional grounds”, be called to ensure the implementation of public policies when the omission of the competent bodies compromise constitutional rights. The second milestone is the judgment of RE 684.612, concluded in 2023, in which the thesis of Theme 698 of the general repercussion was fixed: judicial intervention in public policies aimed at the realization of fundamental rights, given the absence or severe deficiency of the service, does not violate the separation of powers; as a rule, the judicial decision should point out the purposes to be achieved and require the administration to submit a plan, rather than determining specific measures.

The Court in 2023 was not obliged to follow the path opened in 2004. He could decide otherwise — and four ministers, defeated in different directions, proposed divergent solutions.

The question examined here is not whether the Court has decided correctly, nor whether judicial intervention in public policies is legitimate. This is a previous and more delimited question:

How can particular decisions of the STF become, over time, sedimented jurisprudential propositions and subsequently be combined with materials from other lineages to produce a reusable legal formulation?

The question deliberately excludes other issues that the theme usually raises: why the Supreme Court currently occupies the institutional position it occupies, what is the role of the 1988 Constitution in this process and whether the Brazilian constitutional jurisdiction should be more or less deferential to the decisions of the other powers. These issues are relevant, but require other tools of analysis. The object of this investigation is an operation internal to legal argumentation: what subsequent decisions do with the material left by the previous ones.

The literature on path dependence offers a natural framework for the mountain image, but its use in this study is deliberately limited. Paul Pierson defined path dependence, in a strict sense, as a process of increasing returns, in which each step increases the probability of the following and makes it more difficult to abandon the established course. Oona Hathaway transposed this idea into common law, noting that the rule of precedent makes the development of law explicitly dependent on previous decisions.[1] It is not argued that the case examined meets this more demanding definition, nor is it sought to measure whether the return becomes progressively more difficult at every reuse. It retains only the aspect that the image of the mountain also seeks to represent: the terrain on which it decides is historically modified, and to continue along a path or return to an earlier one may not be argumentatively equivalent. The intended contribution does not depend on this literature, but on the analytical distinction between three operations of jurisprudential development.

## § 2 — Precedent, history, and legal material

### 2.1 Dworkin and the constraining past

Ronald Dworkin's theory is the main interlocutor, for having made the institutional past a constraint on interpretation.

For Dworkin, the precedent is not only for the rule he has enunciated. In addition to this force, which is exhausted within the limits of what has been decided, exerts a gravitational force over decisions that are outside its strict orbit, and this force derives from the requirement to

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treat similar cases in a similar way.[1] In Law's Empire, intuition becomes the theory of integrity: law must be read as the work of a single author, the personified community; the judge who decides a difficult case resembles the novelist who receives the chapters written by others and needs to write the following. It is not free to write anything, because the new chapter needs to adjust to what came before; it is not mere copyist, because among the continuations that fit, it must choose the one that shows the set in its best light.[2]

Three traits prevent this theory from being read as a license. The adjustment acts as a threshold, albeit approximate: an interpretation that leaves unexplained substantial part of the material is disqualified before any value judgment. Integrity requires consistency of principle, not local coherence: the judge cannot justify each decision by a different principle, as desired result. And the judge can treat past decisions as errors, but he must justify this treatment by the same theory that justifies the rest. Integrity, therefore, does not authorize the selection of fragments of jurisprudence according to convenience; adjustment and justification exist precisely to filter this type of selection.

It is not a question of refuting this theory, nor of attributing to it the assumption of a static story: the chain novel already assumes that each chapter becomes material for the following. What the theory does not intend to offer — because it is normative — is a vocabulary to describe what kind of transformation each chapter operates on the material it receives. Later decisions can abstract what the previous ones have decided in more general formulations; they can articulate materials that respond to different questions in new formulations, and these formulations begin to integrate the history received by the next interpreter. The question added is descriptive: what operations transform the historical material that constrains, and how can they be observed in a concrete case?

The question is not entirely new, and it should be put. Karl Llewellyn has already described the doctrine of the precedent as two-faced — one technique to restrict inconvenient precedents, another to use the useful ones —, and Duncan Kennedy compared the legal material to a means that resists the work of those who use it and at the same time is what they work with.[3] The issue of the margin of judicial freedom is left out, and it is not maintained that the

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[1] DWORKIN, Hard cases (1975), republished as chapter 4 of Taking rights seriously (2002).

[2] DWORKIN, Law's Empire (1999), Chapters 6 and 7. The reconstruction is deliberately summary; what matters is that adjustment and justification are different dimensions, with the adjustment operating as an approximate threshold, and that both interact in the interpretive judgment.

[3] LLEWELLYN, The bramble bush (1930); KENNEDY, Freedom and constraint in adjudication: a critical phenomenology (1986).

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accumulation or diversity of precedents enlarges or reduces it.[4] It is another matter: describe, in one case, the operations by which the material received is transformed.

### 2.2 Precedent, analogy, and generalization

A distinction of Frederick Schauer prevents this description from being dissolved in general. To follow a precedent is to attribute present value to an earlier decision even when it is believed to be wrong; the precedent constrains precisely because it does not depend on the agreement of the one who follows it. Arguing by analogy is another thing: the decision maker chooses, among previous cases, those whose similarity he considers persuasive, and the choice is his.[5] In both cases, what separates the relevant from the irrelevant are rules of relevance that are not given by the material itself.

To these two forms of use of the past is added a third: generalization, by which a set of decisions is described as an expression of a broader rule than any of them enunciated. Let rules themselves be generalizations — which select some traces of a situation and disregard others — be it Schauer's thesis developed in another work.[6] The operations proposed in the following section can be read as specifications of these forms of use — with the difference that they do not ask only if the interpreter is bound, but what he does with the material to which he binds or chooses.

### 2.3 Historicity

One last theoretical element is enough. The judicial decision is also a text that is detached from those who wrote it and read it by interpreters whose horizons the first did not have. Gadamer treated this condition as a trait of all understanding and took legal hermeneutics as his model; Ricoeur described the action that leaves a "mark" in time and whose meaning, by a "sedimentation in social time", ceases to coincide with the intention of those who practiced

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[4] Whether the accumulation of precedents expands or reduces the judicial margin is an empirical issue not examined here; see LINDQUIST; CROSS, Empirically testing Dworkin's chain novel theory: studying the path of preceding (2005), p. 1157-1158.

[5] SCHAUER, Precedent (1987), p. 576-577; SCHAUER, Thinking like a lawyer (2009), p. 37 and 87: in analogue use, the previous decision "is selected in order to support an argument now"; in the preceding one, "a previous decision imposes itself to preclude an otherwise preferred outcome".

[6] SCHAUER, Playing by the rules: a philosophical examination of rule-based decision-making in law and in life (1991).

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it.[7] Neither formulated a theory of the precedent, and nothing that follows is attributed to them beyond this: the proposition that the 2004 judge wrote to solve the 2004 case is read, in 2011, in 2012 and in 2023, by those who face other cases and have other materials.

## § 3 — Three operations

### 3.1 Sedimentation

It is called sedimentation the process by which a legal proposition formulated initially in a particular case is reused over time and progressively acquires jurisprudential stability or status — so that subsequent decisions begin to treat it as something the court has already stated, and not as something that needs to be justified again. Unlike the following two operations, sedimentation is not practiced by any isolated decision: it is the diachronic result of reiterations — including reiterations in the form of synthesis. Calling it an operation is therefore a simplification, and not an equalization to the other two.

The operation has a prior record. Edward Levi described the cycle of legal concepts in stages: a first, in which the concept is constructed as cases are compared and the court "gropes for an expression"; a second, in which the concept becomes more or less fixed; a third, of dissolution.[8] The sedimentation corresponds to the passage from the first to the second stage. Only one set of observation indicators, different from those of the synthesis, is added: the attribution to the proposition of a status that its origin did not give it; its use, expressed or reconstructable, by opposing positions in the same judgment; and its support for subsequent decisions without returning to the source.

Accuracy is necessary. Sedimentation does not imply forgetting the origin. A proposition may be sedimented and continue to be attributed to those who formulated it; what sedimentation makes possible is that a subsequent foundation does not need to return to the source to support it.

Toulmin's vocabulary helps to pinpoint the point. In an argument, the data support the conclusion by means of a guarantee, and the guarantee can be challenged; whoever defends it then resorts to its support, the "backing without which the warrants themselves would have

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[7] GADAMER, Truth and Method (1997); RICOEUR, The model of the text: meaningful action considered as a text (1971). The translation of Ricoeur's expressions is free.

[8] LEVI, An introduction to legal reasoning (1948), p. 501-507. Levi describes the first stage as the one in which "the court gropes in search of an expression" and the second as the one in which the concept is "more or less fixed."

neither authority nor force".[9] A sedimented proposition is a guarantee whose support is no longer required: the rule is invoked, and no one asks where it comes from. MacCormick describes the corresponding risk in the doctrine of precedent, when it is suspected that the ratio is "only a legal proposition of a previous decision which a later court considers appropriate to highlight to justify its own decision".[10] The sedimentation does not confirm or deny this suspicion; it describes the process by which a proposition begins to dispense with the question.

### 3.2 Synthesis

It is called synthesis the operation by which particular decisions belonging to the same trajectory are abstracted from part of their particularities and presented as support of a more general proposition — typically in the form "the jurisprudence of this Court has admitted that..".

The operation is not new and is not claimed here as such. The literature on reasoning and legal writing has been describing it for decades under the name of rule synthesis: the process of examining authorities who applied the relevant law, extracting from them the guiding principles and enunciating them as a single rule.[11] The technique is used in two ways: to gather decisions that answer the same legal question in different situations of fact, and to reconstruct a rule of several elements from decisions that clarify each one of them. The term is reserved here for the first sense; the difference between element synthesis and recombination is treated in § 3.3. Precedents who answer the same question in different sectors — for example, whether the Judiciary can order the administration to provide services where it has failed to act in prison, educational or health matters — are, in this sense, material synthesis. Their observation indicator is the presentation of an identified set of particular decisions as instances of a general rule extracted from them.

### 3.3 Recombination

It is called recombination the operation by which a decision mobilizes legal propositions that respond to different issues, assigns them complementary argumentative functions and

[9] TOULMIN, Os usos do argumento (2001), p. 140-141 and 148.

[10] MACCORMICK (2008), p. 194. MacCormick resumes the expression of Julius Stone, for whom the ratio would be a "illusory reference category", and refuses the extreme version of the suspicion.

[11] FIGLEY, Teaching rule synthesis with real cases (2011), p. 245-247; MURRAY, Explanatory synthesis and rule synthesis: a comparative civil law and common law analysis (2011). The classical formulation, reproduced in this literature, attributes to Richard Neumann the definition of synthesis as the meeting of several decisions in a whole that represents a rule or an expression of politics.

integrates them into a formulation that was not contained, at the same level of generality and articulation, in any of the materials mobilized alone. The decisive point is the criterion of distinction between trajectories. Two propositions belong to different trajectories, in the sense adopted here, when they respond to distinct legal issues — for example, whether the Judiciary can intervene, when it should do so, how it should do so and with what means the Administration can fulfill order —, and not only when they have developed in different factual sectors. In order for the criterion not to be defined by the use that the subsequent decision makes of the materials, the question is identified at the origin: it is the one that the material decided or faced, and not the function it receives in the destination. A single precedent can answer more than one question, and the subsequent decision can take advantage of one of its answers and push away another. MacCormick expressly admits this plurality: if the ratio is the justification "sufficient to decide a legal question raised by the arguments of the parties", the same judgment may contain "multiple rationes", one for each issue that he had to resolve.[12] Precedents that answer the same question in different sectors are synthesis material (§ 3.2). Recombination begins when materials that answer different questions are put to work together.

The definition is deliberately demanding. In order to speak of recombination, it is necessary to demonstrate: (i) plurality of materials; (ii) that these materials respond, at source, to distinct legal issues; (iii) complementary argumentative functions — what is verified by a suppression test: suppressed each material, remains without support, in the decision, a determined step of the justification that no other material covers; (iv) integration, understood not as mere co-occurrence in the same text, but as inferential dependence: the decision makes the application of one material depend on that of another; and (v) a resulting formulation that includes identifiable components in the text of the decision, whose articulation is not present in any of the materials mobilized. Two limits of the requirement (v) must be stated from the outset: it is related to the repertoire that the decision mobilized, rather than to the practice of the court as a whole, so that it does not itself support affirmation of novelty of this practice; and materials may be jurisprudential or external to jurisprudence, such as doctrine — in which case recombination is, as it were, mixed. If any of these requirements cannot be demonstrated, the case should not be described as recombination; and if any material mobilized already contained the resulting articulation, the case would be synthesis or import, rather than recombination.

Requirements (iii) and (iv) can be read in Toulmin's vocabulary. Each material fulfils, in justification, the supporting function of a given guarantee; the suppression test asks which

[12] MACCORMICK (2008), p. 203.

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guarantee loses its support when the material is removed; and there is integration when the application of one guarantee depends on another. What Toulmin calls the field-dependence of support — the guarantee of a biological classification is based on a taxonomy, that of a nationality in a statute — reappears here as the origin of the materials: different warrants in the same decision may rely on different jurisprudential lineages, or outside the case law.[13]

The operation differs from the analogy. The analogy transfers the solution from one similar case to another; in recombination, the materials are not similar to each other or to the case, and perform different functions in the same justification.

The operation has, moreover, close neighbors, and only holds if they distinguish themselves. The first is the most common. Every decision whose justification is structured on several premises supports each of them in its own sources, connects them by inference and comes to a conclusion that no isolated source contained.[14] The requirements (i), (iii), (iv) and (v) also describe this ordinary justification. What recombination requires more is the requirement (ii), and the trait that best shows it is decomposition: the decision takes advantage of a precedent the answer to one question and removes the answer he gave to another, supplying it with material of different origin. For the same reason, recombination is distinguished from synthesis by elements (§ 3.2), in which each decision is used for what it has decided.

Structurally similar is Bruce Ackerman's intergenerational synthesis: as the American Constitution is the work of several generations, it would be up to the courts to synthesize partial constitutional transformations in a coherent doctrinal whole.[15] The units, however, are constitutional regimes, in temporal-hierarchical relation to each other, and the theory is normative. Next is also the notion of a constitutional loan from Nelson Tebbe and Robert Tsai — the use of one domain of constitutional knowledge to interpret, reinforce or illuminate another — which is directional and crosses domains.[16] In the case examined below, the use of a

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[13] TOULMIN (2001), p. 148-149.

[14] The distinction between internal justification, which links the premises to the conclusion, and external justification, which underlies each premise, is WRÓBLEWSKI, Legal syllogism and rationality of judicial decision (1974), and was developed by ALEXY, Theory of Legal Argumentation (2001).

[15] ACKERMAN, We the people: foundations (1991); ACKERMAN, De-schooling constitutional law (2014), where the author summarizes the problem: as the Constitution is the work of many generations, it is up to the courts to synthesize partial transformations in a coherent doctrinal whole. Michael McConnell objected that, in this model, everything depends on which elements of each regime the judge decides to expand or emphasize (MCCONNELL, The Forgotten Constitutional Moment, 1994) — objection that is also valid in terms of recombination.

[16] TEBBE; TSAI, Constitutional borrowing (2010). The authors exclude from the concept reasoning from precedents within the same domain, and describe, among other examples, a decision whose principles would be "product of synthesis" between two constitutional domains; proximity to recombination is real and must be registered.

precedent on administrative organization to answer a remedial question has precisely these traits, and can be described as a loan; the recombination is not this isolated use, but the composition, in a single formulation, of materials of different origins, some of them decomposed. The notion of hybrid rights, which emerge from the interaction of constitutional clauses, has as units textual provisions, not jurisprudential propositions.[17]

The literature that treats jurisprudence as a network should also be recognized. The reconstruction of citation networks of the Supreme Court, with analysis of the connections between decisions and patterns of use of precedents, was made by Adriana Vojvodic, whose thesis reconstructs previous networks in cases of fundamental rights and concludes, for the universe examined, that the use of precedents by the Court was characterized by "reiteration of solutions, rather than by argumentative construction of standards".[18] Internationally, genealogical models of doctrine represent each decision as derived from a single previous decision — a choice that by construction does not register an operation dependent on more than one origin.[19] The idea of jurisprudence as a network is not claimed, nor that of lineages of precedents. The question here is semantic and argumentative: what a decision does with propositions that answer different questions.

In the literature consulted — the theory of precedent and legal reasoning in Portuguese and English, the literature of rule synthesis, constitutional loan and hybrid rights, and studies on citation networks in the Supreme Court — there was no systematic distinction between sedimentation, synthesis and recombination as different operations of jurisprudential development, nor the characterization of recombination by the requirements above. The contribution lies in this distinction and its documentary application to a case.

## § 4 — Method and limits

The study is qualitative and documentary. It reconstructs, from the text of the decisions, that propositions were formulated, reused and articulated, and with what argumentative function. Three levels of affirmation are kept separate throughout the text: documental fact

[17] COENEN, Reconceptualizing hybrid rights (2020).

[18] VOJVODIC, Precedents and Arguments in the Supreme Court: between the link to the past and the signage for the future (2012), summary (p. 4). The thesis also records (p. 12), regarding the relationship between two judgments, a statement by a minister according to which one of them had "planned the ground" for the other — an image that precedes, in Brazilian literature, that of the mountain.

[19] CLARK; LAUDERDALE, The genealogy of law (2012), p. 334. The authors also tested models with two parents and recorded that the adjustment of the single-parent model is almost equivalent, which is why they adopt it; the body observation concerns representation, not the statistical quality of the model.

("vote cites X"), analytical reconstruction ("X performs function Y in argumentation") and theoretical hypothesis ("this standard can be described as recombination"). No inference from the author is presented as a statement by the Court. The object is the motivation, not the reasoning that led to it: Taruffo shows that, between the choices made to decide and those expressed to justify, "there is no necessary coincidence."[20] What is rebuilt is the way the votes justify, not the way the ministers have come to what they have decided. The sources are as follows. The decision in ADPF 45 was read in its full text, reproduced from the Informational STF n. 345. From the trial of Tema 698, the vote of Justice Luís Roberto Barroso, editor for the judgment, was read in full; the minutes of the votes of Justices Ricardo Lewandowski and Alexandre de Moraes, made public after the trial; and the judgment, judgment summary and statement reproduced in institutional publication.[21] The votes of Justices Edson Fachin and André Mendonça are not part of the corpus. Of the precedents invoked in the driving vote, theses and judgment summaries are considered, what the vote of 2023 of them says and, in the case of the three interlocutory appeals in § 22, the object and the central proposition. For the requirement (v), we used the chapter on the implementation of the Structural Process Course, by Arenhart, Osna and Jobim, and the reproduction of Porfiro (2018) in França (2021). The intermediate decisions were consulted in their judgment summaries and transcripts.

There are two limits. The first is causal: the study shows how a formulation was constructed, not that it could not have been constructed otherwise, nor that the mechanisms described are the sufficient cause of the result. Competing explanations — the import of foreign models, the strategic behaviour of ministers, the institutional force of the general repercussion — remain open and are resumed in Paragraph 8. The second is of range: a case does not establish frequency. What can be shown is that the three operations are distinguishable and observable; how common they are questions for another research.

[20] TARUFFO, A motivação da sentença civil (2015), p. 196 and 201.

[21] The vote of Justice Barroso is quoted by the version published on his institutional website; the minutes of the votes of Justices Lewandowski (April 2020) and Moraes (June 2023), by the versions released after the trial; the judgment, the judgment summary and the statement, by the reproduction of the Journal Carioca de Direito. The votes shall be quoted by paragraph or by excerpt.

## § 5 — ADPF 45: the initial proposition

### 5.1 The case and the status of the decision

The Brazilian Social Democracy Party filed a claim alleging noncompliance with a fundamental precept (ADPF) against the presidential veto of § 2 of Article 55 (later renumbered as Article 59) of the bill that became Law 10.707/2003, the Budget Guidelines Law for 2004. The vetoed provision defined what would count as "public health actions and services" for purposes of Constitutional Amendment 29/2000. Before judgment, the President submitted to Congress a bill that became Law 10.777/2003 and restored the vetoed content. On 29 April 2004, the rapporteur, Justice Celso de Mello, decided individually: "I dismiss the present claim alleging noncompliance with a fundamental precept as moot, owing to the supervening disappearance of its subject matter".[22] The decision's status must be established before its content, because that status is what will change. It was a single-justice decision that did not decide the merits —which, in an ADPF, would have effects against everyone and binding force —, ordered no one to do anything, was not ratified by the full Court, and preceded the creation of general repercussion by Constitutional Amendment 45 in December 2004. All the relevant observations were made after mootness was recognized, as obiter dictum —in MacCormick's sense of obiter dicta: opinions "that go beyond the points necessary to decide the particular case".[23] ADPF 45 is treated here as the starting point because it is the most cited formulation of the proposition relevant to the study, rather than its origin. Earlier and later decisions by the same rapporteur, on health and education, contain analogous statements; the proposition is not claimed to descend exclusively from it.

### 5.2 What the decision said

Recognizing the loss of the object, the rapporteur added that constitutional action "qualifies itself as an appropriate instrument and able to enable the implementation of public policies, when, provided for in the text of the Political Charter, as in the case (EC 29/2000), they are wholly or partly left unfulfilled by the governmental bodies designated by the

[22] BRAZIL, Supreme Court, ADPF 45-MC/DF, rel. Min. Celso de Mello, Monocratic decision of 29 Apr 2004, STF Information No. 345. The identification of the author and the vetoed device is contained in the text of the decision.

[23] MACCORMICK, Retórica and o Estado de Direito (2008), p. 193.

command entered in the Constitution of the Republic itself". There are four propositions. The first, which is the central proposition, is that of exceptionality: "It is certain that it does not include, ordinarily, within the institutional functions of the Judiciary Power — and in those of this Supreme Court, in particular — the attribution of formulating and implementing public policies [..]. This task, however, although on exceptional grounds, may be attributed to the Judiciary if and when the competent state bodies, for failing to comply with the political-legal burdens that affect them, will compromise, with such behavior, the effectiveness and integrity of individual and/or collective rights impregnated with constitutional stature, even if derived from clauses coated with programmatic content." The second states that "the freedom of conformation of the legislator is not absolute in this area, nor that of the Executive Power". The third limit, without refusing, the resource-availability limitation: the clause, "except where there is an objectively ascertainable justifying reason", cannot be invoked by the State to exonerate itself from its constitutional obligations, and its conditioning is translated into a binomial of "reasonability of individual/social claim" and "existence of financial availability of the State". The fourth invokes the existential minimum, especially through the transcribed doctrine.[24]

### 5.3 What the decision did not say

To avoid anachronism, it also matters what the decision does not contain. It does not speak in plan, schedule, monitoring, structural process or distinction between ends and means. It does not distinguish individual judicial protection from collective protection, except in the expression "individual/social pretension". It does not formulate the separation of powers as a thesis to be removed; it works with the notion of freedom of conformation, which declares not to be absolute. And its central proposition is, textually, an exception proposition: the Judiciary does not formulate public policies "ordinarily"; it can do so "on exceptional grounds", "if and when" there is impairment of rights.

The decision was soon recognized for what it was. Daniel Wang noted that she could have limited herself to judging the impaired action and that the rapporteur's argument, "despite indifferent to the outcome of this trial", represented an innovation in relation to the then consolidated case law.[25] Fernando Leal took it as an example par excellence of a problematic

[24] The decision transcribes BARCELLOS, The legal effectiveness of constitutional principles (2002), p. 245-246; KRELL, Social rights and judicial control in Brazil and Germany (2002), p. 22-23; and VIEIRA DE ANDRADE, The fundamental rights in the Portuguese Constitution of 1976 (1987), p. 207; and refers to HOLMES; SUNSTEIN, The cost of rights (1999). The pages are the ones that the decision itself indicates.

[25] WANG, Escassez de recursos, custos dos direitos and reserva do possível na jurisprudência do STF (2008).

use of the concept of precedent: according to the report, ADPF 45 was evoked in 241 decisions of the Court itself; but, as the action was never judged on merit, "without decision, there is no precedent".[26]

## § 6 — Sedimentation and synthesis

### 6.1 The 2004 proposition in Theme 698

The most direct test of sedimentation is at the very trial of Theme 698. ADPF 45 appears in it, but not in the vote that formulated the prevailing thesis.

The driving vote, by Justice Barroso, does not directly mention ADPF 45. The decision is present in two other votes. The rapporteur, Justice Lewandowski, directly invokes it, at the point where he deals with health financing and the resource-availability limitation: he states that this "was the sense of the analysis undertaken by the Justice Celso de Mello in the examination of ADPF- MC 45/DF, in which he asserted that the manipulation of the financial activity of the State is not the responsibility", and transcribes the passages on the graduality of social rights, the sealing of "artificial obstacles" and the resource-availability limitation. Justice Alexandre de Moraes mentions it in a mediated way: he notes that the rapporteur quoted and transcribed the previous vote of Justice Ellen Gracie, in AI 734.487-AgR, according to which "the Plenary of this Court recognized in ADPF 45/DF" the political dimension of the right to health; he adds a decision by Justice Ayres Britto, in RE 590.664, who claims to have been "also anchored" in ADPF 45.[27]

We need to distinguish what these data show. As a fact of citation, ADPF 45 is invoked in opposing positions: directly by Lewandowski, who denied the appeal, regarding the resource-availability limitation; indirectly by Moraes, who provided it, by transcription of other votes. The proposition of exceptionality, in turn, appears without mentioning the source in the thesis proposed by Moraes, which would allow the appeal to reinstate the judgment dismissing the claim: "It is legitimate and valid the exceptional action of the Judiciary in matters of public policies when the administrator's neglect in complying with fundamental rights is well

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[26] LEAL, Authoritative Force, persuasive influence or anything: what is a precedent for the Supreme Court? (2020). The number is from the author, from the platform "Supreme in Numbers". Leal's thesis — that ADPF 45 should not count as a precedent — is compatible with the description proposed here: sedimentation can be, at the same time, an observable mechanism and a defect in practice.

[27] BRASIL, Supreme Court, RE 684.612/RJ, votes of the Justices Ricardo Lewandowski and Alexandre de Moraes. In the vote of Justice Moraes, the reference to ADPF 45 appears in previous voting transcript, which Moraes also reports having transcribed in ARE 947.270-AgR.

evidenced”.[28] It also appears, without mentioning the source, in the driving vote (§ 6.2). That the three positions converge in this proposition is reconstruction of the author, based on the similarity of the statements in the votes examined, and not fact of citation; with this exception, none of the votes examined proposed to deny the exceptional authorization enunciated, among other decisions, in ADPF 45.

Two other sedimentation indicators are observable. The first is the status that the proposition acquired. In the vote transcribed by Moraes, Justice Ellen Gracie states that “the Plenary of this Court recognized” in ADPF 45 which, in 2004, was side argumentation of a monocratic decision in impaired action; Leal recorded similar affirmation of the same minister in another trial.[29] The assignment is inaccurate, and this inaccuracy is, in the reconstruction proposed here, an indication of sedimentation: the proposition began to circulate with an authority that its origin did not give it. The second is that the reasoning which prevailed could dispense with returning to the source. The origin is named, in the same trial, by Lewandowski and Moraes; the driving vote did not need to return to it.

The ADPF 45 reaches the driving vote, however, by an indirect route. Paragraph 25 transcribes the judgment summary of RE 1.008.166 (Theme 548), which lists among its precedents the ARE 639.337-AgR, judged by the Second Panel in 2011 under the rapporteurial of Justice Celso de Mello. This judgment reproduces, in collegiate decision, the structure of the 2004 proposition — the judgment summary states that it is possible for the Judiciary, “although on exceptional grounds”, to determine the implementation of public policies defined in the Constitution — and, according to transcription in secondary literature, invokes ADPF 45 nominally.[30] The chain is indirect citation: the 2004 decision is in the 2023 text within a transcribed judgment summary, two links away. From it, a linear genealogy is not supported; it is only held that the 2004 material remained present, through various paths, in the repertoire that the 2023 judgment had.

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[28] BRAZIL, Supreme Court, RE 684.612/RJ, Min. Alexandre de Moraes, proposed thesis, item II. Item I of the same thesis stated that it is not up to the Judiciary to replace the Executive's judgment of opportunity and convenience by determining public tender and other administrative measures.

[29] LEAL (2020) transcribes, from RE 559.646-AgR, the same minister's statement that “the plenary of the Supreme Court had recognized, in ADPF 45, the possibility of judicial control of public policies”.

[30] BRAZIL, Supreme Court, ARE 639.337-AgR/SP, rel. Min. Celso de Mello, Second Panel, j. 23 Aug. 2011, DJe 15 Sep. 2011. Menu available on LexML. The nominal invocation of ADPF 45 in the body of the judgment is contained in the transcript in CRUVINEL, The judicialization of public policies in early childhood education: ARE 639.337 Agr SP.

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### 6.2 Synthesis

§ 22 of the driving vote is an example of a synthesis in the sense of § 3.2. It states that the Court "has admitted the intervention of the Judiciary for the implementation of public policies, in exceptional situations, when proven the inertia or delay of the public entity, as an measure safeguarding fundamental rights", and presents as support an identified set of decisions — ARE 1.230.668 AgR-EDv-AgR, ARE 1.408.531 Agr and ARE 1.289.323 Agr — referred only by number, body and date. §§ 23 to 27 add precedents that answer the same question in different sectors: prisons (Tema 220), early childhood education (Tema 548), ICU beds (ACO 3.473). The set is presented as an expression of the same rule: intervention is legitimate in the face of omission that compromises rights. The two elements that characterize the synthesis are present — identified particular decisions and a general rule extracted from them.

The three interlocutory appeals in § 22 could be identified as to the object. ARE 1.230.668-AgR-EDv-AgR/AM dealt with the construction of new schools and expressly formulated the possibility of judicial implementation of public policies in emergency cases, due to inertia or administrative delay. The ARE 1.289.323-AgR/RJ dealt with the National School Feeding Program and stated that the Judiciary can, in exceptional situations, determine measures safeguarding essential rights. The ARE 1.408.531-AgR/RJ dealt with the restoration of protected heritage in the face of municipal omission. The three are, therefore, heterogeneous material regarding the sector, but convergent on the same legal question: the exceptional admissibility of judicial intervention in the face of state omission. This reinforces, instead of weakening, the classification of § 22 as a synthesis. The correspondence between the synthesized formula and the 2004 proposition — exceptionality, omission and protection of rights — remains analytical reconstruction of the author, not explanation of vote.

The same formula for attributing to jurisprudence appears before 2023. In the decisions transcribed in Justice Moraes' vote, Justice Ellen Gracie wrote that "the jurisprudence has evolved and admitted, in exceptional cases, the performance of the Judiciary in the theme of public policies", and Justice Ayres Britto, in a decision published in 2012, that "the jurisprudence of our House of Justice has admitted, in certain cases, the judicial control of the omission of the State in the implementation of public policies", adding that "this intervention, however, occurs in an exceptional character".[31] It has not been found in which decisions each of these passages is based. What is recorded is the recurrence, by different ministers and at

[31] The two passages are quoted as transcribed in Min's vote. Alexandre de Moraes in RE 684.612.

different times, of the same formula that attributes to jurisprudence the proposition — which, without the identification of the synthesized decisions, is an indication of sedimentation, not proof of synthesis.

The difference between the two operations is thus supported by different indicators. The sedimentation is observed in the status and circulation of the proposition: the attribution to the Plenum, the presence in votes of opposite positions, the support without returning to the source. The synthesis is observed in a determined argumentative act: the presentation of decisions identified as instances of a rule. The two reinforce themselves — each synthesis reiterates the proposition — but they are not confused.

## § 7 — Theme 698: recombination

### 7.1 The case and the judgment

In 2003, the Rio de Janeiro State Public Prosecutor's Office filed a public civil action against the Municipality of Rio de Janeiro concerning conditions at Salgado Filho Municipal Hospital. Based on a Regional Medical Council report identifying a shortage of 283 professionals, it requested a competitive public recruitment process, assignment of successful candidates to that hospital, and correction of the identified irregularities. The trial judgment dismissed the claim; the Court of Justice reversed it and ordered the Municipality to address the shortage "through a competitive public examination based on tests and qualifications" and to correct the irregularities within six months, subject to a daily fine.[32]

The general repercussion was recognized for the theme of "limits of jurisdiction of the Judiciary to determine obligations to make to the State, consistent in competitive public recruitment, hiring of public servants and execution of works that meet the social right of health". The question affected was sectorial — health — and remedial — what kind of order.

The judgment was concluded in a virtual session ending on 30 June 2023. By a majority, the Court allowed the appeal in part, vacated the state-court judgment, and ordered a fresh examination of the case according to the established parameters, following Justice Barroso's opinion. Justices Lewandowski and Fachin dissented in favor of dismissing the appeal, while Justices Moraes and Mendonça dissented in favor of allowing it to reinstate the trial judgment. The following holding was established:

[32] The specific case data are those described in the vote by Justice Barroso, §§ 1 to 4.

"1. The intervention of the Judiciary in public policies aimed at the realization of fundamental rights, in case of absence or severe deficiency of the service, does not violate the principle of separation of powers. 2. The judicial decision, as a rule, instead of determining one-off measures, shall point out the purposes to be achieved and determine to the Public Administration that it submits a plan and/or appropriate means to achieve the result. 3. In the case of health services, the deficit of professionals can be met by a competitive public recruitment process or, for example, by the reassigning of human resources and the hiring of social organizations (OS) and civil society organizations of public interest (OSCIP)."

The literature that examined the judgment has already recorded that the first thesis is part of the continuity of previous jurisprudence and that innovation is in the second, concerning the form of intervention.[33] The question begins after this finding: how were the available jurisprudential and doctrinal materials articulated so that the remedial formulation of the second thesis could appear?

### 7.2 The materials and the questions they address

The driving vote mobilizes as foundation eight judgments by the Supreme Court, all delivered between 2015 and 2023 and identified as to the object and the thesis or judgment summary, and six doctrinal works published between 2008 and 2021.[34] The table groups these materials by the question they decided or faced at origin (§ 3.3). The description of the use is documentary fact; the question at origin is based on theses and judgment summaries; the function is analytical reconstruction of the author.

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[33] SILVA; COSTA, Theme of general repercussion 698: structural process and adopted strategies (2024), p. 342-343, and 358. The authors also maintain that the prevailing thesis may have been influenced by the multiplicity of interests underlying the concrete conflict and identify strategic behavior of ministers, through signs and agenda control — an explanation that is not contested here and which is resumed in § 8.

[34] The doctrinal works cited in the driving vote notes are: SARMENTO (2010); TUSHNET, Weak courts, strong rights (2008), p. 247-258; FONTE (2015); PORFIRO (2018); DIDIER JR.; ZANETI JR. (2020); and ARENHART; OSNA; JOBIM (2021). Chapter 8 of the Structural Process Course already associates action plan with the participation of the defendant himself in defining form, time frame and means. Porfiro (2018) is cited according to FRANÇA (2021, p. 134), which records the different model as a delegation of the restructuring plan to the parties or the institution involved, preserving the decision-making space of the competent bodies. Therefore, the abstract combination between plan and administrative means is not claimed to be new; § 7.3 limits the hypothesis of recombination to the specific articulation between the structural grammar of the plan and concrete means such as reassigning and hiring OS/OSCIP, supported by ADI 1.923.

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| **Material (year)** | **Use in the vote of 2023** | **Issue at source** | **Function in argumentation** |
|---|---|---|---|
| ARE 1.230.668 AgR-EDv- AgR (schools); ARE 1.289.323 AgR (school feeding); ARE 1.408.531 AgR (protected heritage) (2021–2023); RE 592.581, Theme 220 (2015, prisons); RE 1.008.166, Theme 548 (2022, early childhood education); ACO 3.473 MC-Ref (2021, ICU beds) | §§ 22–27: the Court "has admitted" intervention "in exceptional situations, when inertia is proven"; sectoral theses and examples | If the Judiciary can order benefits to the Administration, the Themes 220 and 548 also respond in what way (ad hoc order of works; individual requirement) | Legitimity, in the form of synthesis (§ 6.2); the response on form is removed (§ 7.4) |
| ADPF 347 MC (2015, prison system) | § 30: intervention to "remove public authorities from the state of lethargy" alongside the existential minimum (§ 29) | State of unconstitutional things in the prison system and appropriate precautionary measures | Reinforcement of the trigger (serious omission), already stated in §§ 22 and 29 |
| ADI 1.923 (2015, social organizations) | § 35: Validation of publicprivate collaboration in the provision of services | Validity of the provision of public services by social organisations | Means: lawfulness of alternatives to competitive public recruitment; supports holding 3 |
| Doctrine: Tushnet (2008); structural process literature (2018–2021) | § 34 (Note 2): "weak" model; § 36 (Notes 3 and 4): structural measures, plan and timetable | No decision; models of form of judicial intervention | Form: set the purpose and require a plan |

### 7.3 The five requirements

The case can now be tested against the requirements of § 3.3, with the rigour announced there: the material that does not meet a requirement remains outside the recombination.

(i) Plurality of materials. Satisfied. The vote mobilizes eight judgments and six works; for recombination, however, the relevant units are not the decisions considered one by one, but the sets that fulfill different functions — the synthesized block of legitimacy, ADPF 347, ADI 1.923 and the doctrine of form.

(ii) Different issues. Satisfied with the question identified at source. The synthesized block answers whether the Judiciary can order benefits to the Omissive Administration; ADPF 347, in precautionary, responded to a unconstitutional state of affairs in the prison system; ADI 1.923 decided the validity of the provision of public services by social organizations; the

doctrine does not decide, but proposes a form for judicial intervention. The clearest feature is within the synthesized block: Themes 220 and 548 also answer the question of form — the first authorizing the punctual order of works, the second affirming individual exigibility —, and the vote takes advantage of them only the answer on legitimacy (§ 7.4).

(iii) Complementary functions. By the suppression test, two sets pass and two don't pass. Suppressed the ADI 1.923, thesis 3 — the lawfulness of reassigning and hiring social organizations — remains without the specific support that the vote gives it. Suppressed the doctrine, thesis 2 loses its positive content: the deference as to means authorizes the negative conclusion that the judge should not choose the medium, but not the positive conclusion that he must set purposes and demand a plan, whereas the vote supports the structural doctrine. ADPF 347 does not pass: deleted, the trigger of omission remains supported in §§ 22 and 29. Nor does the synthesized block pass: suppressed, the legitimacy of the intervention loses its presentation as a case law of the Court, but remains supported by the constitutional argument of § 21. According to the criteria adopted, this block is a premise received, not a component of recombination.

(iv) Integration Satisfied for the articulation between the structural form of intervention and specific administrative means. After invoking the ADI 1.923, the vote concludes: “Therefore, the Judiciary cannot replace the public administrator’s will and give priority to a particular form of hiring staff or managing public health services” (§ 35). And then: “In this way, the judging body must give priority to structural measures to resolve the conflict” (§ 36). The connector makes the requirement for structural measures depend on the deference as to the means. The structural doctrine already offered, in abstract, a grammar in which plan, form, term and means can be constructed with the participation of the defendant himself; the specific step of the vote is to link this grammar to the lawfulness, in the health service, of alternatives to competitive public recruitment such as reassigning and hiring social organizations, supported by ADI 1.923. The link between these parameters and the block of legitimacy is of another nature: after the previous sectorial ones, the vote states that “in this scenario, the construction of parameters is important” (§ 28). The expression situates the parameters after authorization, but does not make the application of one material depend on that of another; according to the criterion of § 3.3, it is co-occurrence, rather than integration.

(v) Formulation not contained in the materials mobilized. The thesis contains four identifiable components: (a) the authorisation — intervention does not violate the separation of powers; (b) the condition — absence or serious deficiency of the service; (c) the form — purposes and plan, rather than specific measures; and (d) the means — competitive public

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recruitment, reassignment or hiring of social organisations. The first two arrive already articulated in the synthesized block, whose formula (§ 22) unites the authorization to the condition of inertia or delay. Recombination, if any, must be located more closely in the concrete articulation of (c) with the specific means of (d), and not in the abstract combination between plan and administrative means. The additional verification of the doctrine cited in the vote shows why. The chapter on the implementation of the Structural Process Course already recommends action plan and records that the defendant himself can participate in the design of the solution, including as to form, time frame and means of implementation. Porfiro (2018), in a passage reproduced by França (2021), already described the deferential model as the one in which the restructuring plan is referred to the parties or institutions involved, preserving the decision-making space of the competent bodies. These antecedents remove any claim of novelty from the general formula plan + means. None of the judgments relied upon, however, contains (c): Theme 220 states the opposite, authorizing the punctual order of works; Theme 548 affirms individual exigibility; the interim ruling of ADPF 347 did not order plan; and ADI 1.923 does not deal with structural judicial control. The point that remains distinctive in the vote of 2023 is the combination of structural grammar of purposes and plan with validation, extracted from ADI 1.923, of determined administrative means — especially reassigning and hiring OS/OSCIP — for compliance in the health sector. The classification would be refuted if the aforementioned doctrinal works contained, before the Theme 698, this specific combination, and not only the generic deference to the administrative choice of means.

Three qualifications also reduce the scope of this conclusion. The first: the requirement (v) is satisfied with regard to the materials that the vote has mobilized and the content that could be verified, not in relation to the practice of the Court or to the entire literature of the structural process. By 2023, the Supreme Court had already determined to the Administration the preparation of plans in structural actions — in ADPF 709, in 2020, that the editor of Theme 698 himself was rapporteur, and in ADPF 635, in 2022.[35] The form of the plan was based, in the vote, by reference to scholarship, and not by reference to these decisions; it is not known, and it is not stated, by which way the idea reached the vote. The second: the observed recombination is mixed, because one of its components — the structural grammar of form — comes from a source external to jurisprudence, while the specification of administrative means comes from ADI 1.923. The third: a component of the 2004 proposition did not go to the thesis. The thesis

[35] BRAZIL, Supreme Court, ADPF 709-MC-Ref/DF, rel. Min. Luís Roberto Barroso, j. 5 Aug. 2020 (Covid-19 coping plan for indigenous peoples); ADPF 635/RJ, rel. Min. Edson Fachin (police lethality reduction plan, 2022). Decisions are mentioned only to record that the grammar of the plan was already present in the practice of the Court; they do not integrate the analysis.

1 does not reproduce the "exceptional" qualifier, present in § 22 of the vote: the binding utterance replaces exceptionality by the gravity of omission.

With these qualifications, the classification of Theme 698 as recombination is plausible and restricted. In abstract, "plan" and "means" are not combined, a combination already present in the structural doctrine. What the vote articulates documentally identifiable is structural grammar of purposes and plan with specific administrative means whose lawfulness comes from another jurisprudential lineage — the ADI 1.923 — on an authorization received by synthesis, after decomposed the sectoral precedents that also answered the question of form. It is the author's theoretical hypothesis, supported by documentary facts and analytical reconstruction identified as such.

### 7.4 Decomposition: what the opinion adopts and what it rejects

The requirement (ii) finds its support clearer in a trace of the vote that at first glance seems mere accommodation. The thesis of Theme 220 states that the resource-availability limitation cannot be invoked against the decision that determines works in prisons. The vote transcribes it and, in the following sentence, describes the precedent as an examination in which the Court considered, "on the one hand, the precarious material conditions in which Brazilian prisons are located, and on the other hand, the delicate budgetary situation of the Union and other federal entities" (§ 23). Later, the parameters reintroduce the consideration of resources by another way: the decision should consider the possibility of extending the measure universally, "considered the resources effectively existing" (§§ 32–33).

In RE 592.581, the Plenary Court held that it was lawful for the judiciary to impose emergency measures or works on the Administration in prisons to ensure the dignity and integrity of inmates, declaring inapplicable, in this context, the resource-availability limitation and the separation of powers. The vote of Theme 698 incorporates this thesis without exceeding it expressly, but does not incorporate it whole. It takes advantage of it the answer to the question of legitimacy, which goes to the synthesized block; it removes the answer to the question from the form — the punctual order of works —, which thesis 2 replaces, as a rule, by setting purposes and the requirement of plan; and it reintroduces, by the parameters, the consideration of the resources that the thesis declared inapplicable. The Theme 548, whose thesis states that the offer of early childhood education can be individually required, is treated in the same way: its answer on legitimacy is used, and its response on the remedy does not go to the thesis.

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It is this trait that distinguishes the operation of element synthesis and the ordinary justification of multiple assumptions (§ 3.3). In them, every decision is used for what it decided. Here precedents are broken down by the questions to which they answer, only part of each answer is retained, and what is missing is supplied by materials from another origin. It is not claimed that the vote has re-read Theme 220 or distinguished itself from it. Only what the text of the vote and theses allows is stated: authorization remains, and the intervention technique is recalibrated.

## § 8 — What changed and what did not change

### 8.1 The counterfactual

Suppose that the case of Salgado Filho Hospital had reached the Supreme Court in 2004, and that the Court had only the jurisprudential material then existing. What components of the 2023 formulation could already be supported, and with what support? The question is not whether the result would be impossible in 2004 — it would not be — but what repertoire was available at each time. Three axes allow us to answer it: the formulality of each component, in a logical and broad doctrinal sense; its availability as a jurisprudential material of the Court itself; and its institutional status.

| **2023 thesis component** | **Formulable in 2004?** | **STF jurisprudential material available in 2004** | **Status 2004 → 2023** |
|---|---|---|---|
| (a) Authorisation: intervention does not violate the separation of powers | Yes. | Yes: ADPF 45 obiter and similar decisions by the same rapporteur | Monocratic decision side ratio → general repercussion thesis |
| (b) Condition: absence or serious deficiency of the service | Yes. | Yes, in the form of exceptionality in the face of omission compromising rights | Ditto |
| (c) Form: purposes and plan, instead of specific measures | Yes (the distinction between ends and means and US structural decisions were known) | No | Inexistent → general repercussion thesis |
| (d) Means: lawfulness of the reassigning and hiring of social organizations | Yes. | No: The validation of social organizations is 2015 | Inexistent → general repercussion thesis, restricted to health |

The table suggests three conclusions. The first is that as regards authorisation and its condition, what changed between 2004 and 2023 was mainly the status — and this change was

not only produced by case law. The general repercussion regime, created in December 2004 and required from 2007, and the duty to comply with the theses set out in this regime, explained by the 2015 Civil Procedure Code, are institutional reforms. It also changed the number of decisions of the Court to which authorisation could be granted. The second is that as to the means, the thesis of 2023 depends on a decision that did not exist in 2004. The third is that, as regards form, neither the Court of 2004 nor the Court of 2023 extracted it from its own jurisprudential material — the one of 2023 based it on doctrine, although it had already, in structural actions, practiced the demand for plans.

The counterfactual thus shows a transformation of the repertoire, not a determinism. The Court of 2004 could have said what the Court of 2023 said. As for authorization, it would have fewer decisions to attribute it to and no mechanism that would make it binding; as for form and means, it would have to support them directly in the text and doctrine.

### 8.2 One decision, several dimensions

The question “Did Theme 698 expand or contain the judicial intervention?” is poorly formulated, because the decision does different things in different ways. Decomposed, she:

- stabilizes and generalises a permit: intervention in public policies aimed at fundamental rights, in the event of absence or severe service deficiency, does not violate the separation of powers — formulated for all public policies of this type, although the issue affected was sectorial;
- establishes conditions for this intervention: proof of absence or serious service deficiency due to inertia or slowness (§ 29), consideration of the possibility of extending the measure universally (§§ 32–33), support in technical manifestations (§ 38), openness to participation (§ 39);
- restricts the direct judicial choice of means: as a rule, the judge does not determine specific measures, and it is up to the administration to choose how to achieve the purpose (§ 34–35);
- favours the determination of purposes and the requirement of plans, whose implementation can be supervised “directly by the judiciary or by a delegated body” (§ 36).

The first and fourth operations extend what the judicial decision can achieve or demand; the second and third operations restrict it. In the specific case, the order obtained by the prosecutor was annulled and the cause returned for further examination according to the parameters established. The decision, taken as a whole, is not allowed to be classified in any of the poles of opposition between activism and self-containment.

Decomposition also makes it possible to specify, without expanding, the observation of the mountain from which you return is possible. The trial took three positions. The rapporteur's, even in syntax, reproduced the form of the thesis of Theme 220 — "It is lawful for the Judiciary to impose obligation on the Public Administration to do [..]" — and authorized the punctual order.[36] The majority restricted the punctual order without expressly overruling Theme 220 (§7.4). That of the ministers who provided the appeal denied intervention in the case, but maintained, in theory, the exceptional authorization. In the votes examined, therefore, the retreat was practiced in the intensity of the intervention and was not proposed regarding the authorization. That's what the case allows us to say. The argumentative difficulty of the return was not measured, nor was it shown to grow over time, and it is not maintained that the observed asymmetry is a rule.

### 8.3 Formulation as a reusable unit

It remains to be verified whether the formulation produced in 2023 itself has become a jurisprudential unit — to be invoked as such, without the materials that formed it need to be rebuilt.

An example verified in official source suffices to illustrate the phenomenon, without pretense to measure it. In public civil action against the Municipality of Niterói and its municipal company of housing, urbanization and sanitation, concerning the risk of slope collapse in Morro do Preventório, the judge's chamber of the Court of Justice of Rio de Janeiro exercised a judgment of compliance "vis a vis-à-vis the decision of the Supreme Court in Theme No 698" and maintained the judgment, for understanding that, "configured the omission of the public power regarding constitutionally established public policies to ensure residents access to decent and safe housing, it was up to the Judicial Power to determine their adoption". In 2025, the Vice President denied follow-up to the extraordinary resource "in the light of the Supreme Court Theme 698".[37] The matter — housing and environmental risk — differs from

[36] The thesis proposed by the rapporteur, transcribed in Paragraph 8 of Min. Barroso and the Min. Lewandowski, was: "It is lawful for the Judiciary to impose on the Public Administration an obligation to make consistent in conducting a competitive public examination based on tests and qualifications to provide the positions of doctors and technical staff, followed by the appointment and possession of approved professionals, as well as determining the correction of procedures and the sanitation of irregularities pointed out in a report of the Regional Council of Medicine".

[37] RIO DE JANEIRO, Court of Justice, 3rd Vice-President, Case 0077041-18.2012.8.19.0002, decision of 25 June 2025, which reproduces the statement of the judgment in conformity. The example is illustrative and does not integrate any sampling.

the hospital case of origin, and the reproduced judgment summary invokes Theme 698 not to mention the precedents on prisons, daycare or beds, nor does ADPF 45.

The example shows that later decisions started to invoke the Theme 698 directly without necessarily reconstructing the materials mobilized in its formation. It does not show that this is due to recombination. The institutional force of the general repercussion, which obliges the courts to exercise compliance, explains much of this re-use alone.

### 8.4 Competing explanations

None of the operations described excludes explanations of another nature, and three of them need to be registered. Importation: the remedial form of thesis 2 is based, in the vote, on foreign doctrine and on a Brazilian literature of structural process that declares its affiliation to external models. The strategic behavior: Silva and Costa maintain that the prevailing thesis may have been influenced by the interests underlying the concrete conflict and the strategic action of ministers, through signs and agenda control. Institutional reform: the conversion of authorization into binding thesis depended on the general repercussion and precedent system of the Civil Procedure Code. The analysis does not replace these explanations; it describes the argumentative operations through which, whatever their causes, the formulation was constructed.

### 8.5 Back to Dworkin

The question addressed to Dworkin in § 2.1 may now receive a limited answer to the case. In Theme 698, institutional history operated as an constraint, in the sense that Dworkin describes. None of the three votes examined argued from the constitutional text as if it were read for the first time; all presented themselves as continuation of something. The driving vote presents its thesis as adjusted to the case law of the Court.

The material received, however, was worked in distinguishable ways. It has been summarised — particular decisions presented as what the Court has ‘accepted’. Precedents were decomposed, and from them the answer about legitimacy was retained and the answer about the remedy was turned away. And the form and means were articulated from materials of another origin, in a new formulation. The resulting formulation began to integrate the institutional history received by the following interpreters, who invoke it directly.

A Dworkinian would have two answers. The first: the sedimented formulations — an obiter attributed to the Plenum, a synthesis that does not enumerate its sources — do not integrate the material relevant to the adjustment; only the decisions and principles that justify it integrate it. This answer is normative and compatible with the description offered here; it is, in substance, Leal's criticism of the use of ADPF 45 as a precedent. The second: recombination is nothing more than constructive interpretation — the search for a principle that fits and justifies disparate materials. That's a correct answer. What is offered is not an alternative to constructive interpretation, but an observational typology of some of its operations, applicable to documents.

MacCormick's distinction between consistency and coherence allows us to say what this interpretation produced in the case. Consistency is non-contradiction; coherence is the property of a set of propositions that, taken together, "makes sense" in its entirety, and admits degree: a set can be coherent "even though it contains some internal inconsistencies", and it is the sense of the whole that decides which of them treat as anomalies.[38] The thesis of 2023 is not fully consistent with that of Theme 220, which declared the resource-availability limitation inapplicable, and claims to be coherent with it. Decomposition is the way in which this claim is realized: the part of the precedent that fits the whole is retained, and the other one is treated as an anomaly without being declared an error.

## Conclusion

The land has changed. The Court that decided Theme 698 mobilized eight of its decisions, all after 2014, and doctrinal works published after 2004. And he found a proposition — the exceptional legitimacy of judicial intervention in the face of omission that compromises rights — that a minister of the Court had formulated as the side argument of a decision that did not judge merit, and that in 2023 was the premise, expressed or reconstructable, of the votes examined in each of the three positions in dispute.

In this change one process and two operations can be distinguished. By sedimentation, this proposition acquired stability and a status that its origin did not give it, to the extent that the foundation that prevailed could support it without returning to the source. In synthesis, decisions that answered the same question in different sectors were presented as what the Court "has admitted". By recombination — plausible and restricted classification, with the limits stated in § 7.3 — the driving vote, taking this authorization as a premise received and after

[38] MACCORMICK (2008), chap. 10, p. 249.

decomposing precedents that also answered the question of remedy, articulated the structural grammar of purposes and plan, sought in doctrine, with specific administrative means whose lawfulness was supported in precedent on social organizations. What changed between 2004 and 2023, in terms of authorisation, was above all its status — by institutional reform — and the number of decisions it could be awarded. As for the form, the vote introduced as a thesis of general repercussion a remedial grammar that the Court had already employed in structural actions, but which was based on doctrine. In the votes examined, the retreat was practiced in the intensity of the intervention, and it was not proposed as to the authorization.

None of this requires supposing that someone has planned the outcome, and none of it decides whether the result is constitutionally correct. The result is more modest: that the operations by which the jurisprudential past is worked can be distinguished and observed in the documents, and that the requirements proposed for recombination discriminate: in the case examined, they excluded two of the four sets of materials that the vote mobilized and left standing a closer articulation than the initial reading suggested.

The Court of 2023 could decide otherwise; four of its ministers proposed to do so. However, any of the three positions presented itself as a continuation of materials produced in previous years.

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