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## LEGAL AID AND THE STATE OF EXCEPTION: A STUDY ON GOIÁS AND THE INSTITUTIONAL BARRIERS TO ACCESS TO JUSTICE<sup>1</sup>

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1. Reflections based on Giorgio Agamben's theories on the arbitrary use of legislation.

**Abstract:** This work addresses the problem of the state of exception in the Brazilian judicial context, focusing on the arbitrary denial of legal aid as a barrier to access to justice. Based on the theories of Giorgio Agamben, especially in his works *State of Exception* and *Homo Sacer*, it analyzes how judicial practices distort legal interpretation, creating obstacles that limit the fundamental right to access the judiciary. Despite the fact that Brazilian legislation establishes that the granting of free aid should be presumed upon a simple declaration of need, there is a trend towards arbitrary rejections based on subjective criteria and disproportionate requirements, such as the request for non-existent documents. Using a methodology of bibliographical review, analysis of case law and empirical research into perceptions of the judiciary, this study identified judicial practices which, by excluding the most vulnerable, constitute an informal state of exception. The relationship between the denial of legal aid and the concept of *Homo Sacer* showed how such practices create “zones of exclusion”, depriving individuals of their basic rights. The conclusion is that these barriers compromise the principles of equality and dignity, reinforcing the need for institutional reforms to guarantee the effective application of the right to free legal aid and the strengthening of the rule of law.

**Keywords:** State of Exception. Legal aid. Access to Justice. *Homo Sacer*. Abuse of Power

## INTRODUCTION

The fundamental right of access to justice is one of the structuring bases of the principle of equality in modern democracies, and is indispensable for the concretization of constitutional rights and guarantees. In Brazil, however, structural and institutional barriers persist that limit the exercise of this right, especially in the context of free legal aid. The post-pandemic situation has exacerbated

these difficulties, as the increase in litigation and the overload of the judicial system have exposed gaps in judicial practices and public policies aimed at promoting equal access.

This article addresses the problem of the systematic and arbitrary denial of free legal aid, a practice that not only violates rights guaranteed by the Constitution, but also deepens structural inequalities. Based on the theories of Giorgio Agamben, especially the concepts of “State of Exception” and “*Homo Sacer*”, the work examines how judicial decisions, based on subjective and disproportionate criteria, have created a regime of informal exclusion that limits the access of vulnerable individuals to the judiciary.

The analysis is based on Agamben’s theoretical framework, which discusses the suspension of rights under emergency pretexts, showing how such practices can become permanent mechanisms of control and exclusion. In the case of the Goiás State Court, we show how the distorted interpretation of the legislation on free legal aid compromises fundamental rights, putting into practice a state of exception that marginalizes those who depend on the system to protect their rights.

In addition, the aim is to highlight the relevance of the issue in the contemporary Brazilian context, emphasizing the relationship between legal exclusion and social inequalities aggravated by the lack of effective public policies. The implications of these practices are not restricted to the individual level, but jeopardize the legitimacy of the legal system and the principles of the rule of law.

The central objective of this study is therefore to critically examine how judicial practices that subvert current legislation contribute to the perpetuation of structural exclusions, proposing concrete alternatives for the effective democratization of access to justice. The introduction of the *Homo Sacer* concept in this context offers an innovative theoretical

lens for understanding the dynamics of exclusion and the contradictions of a system which, instead of protecting, marginalizes the most vulnerable.

## **THEORETICAL FRAMEWORK**

### **STATE OF EXCEPTION**

The concept of the state of exception, as elaborated by Giorgio Agamben, is central to the analysis in this study. Agamben (2004) defines the state of exception as a situation in which normal laws are suspended, allowing sovereign power to act outside legal limits in name of protecting the state. Originally conceived as a temporary measure to deal with crises, the state of exception has become normalized in contemporary democracies, extending indefinitely and becoming an instrument of permanent control: “The exception, by becoming the norm, creates a space where legal guarantees are systematically suspended” (Agamben, 2004, p. 45).

In the Brazilian context, we observe a similar practice in the Goiás State Courts, where the rejection of free legal aid is often based on subjective and arbitrary interpretations of the legislation, characterizing a form of informal state of exception (Alves, 2024).

### **HOMO SACER AND LEGAL EXCLUSION**

The concept of *homo sacer*, developed by Agamben, exemplifies how the law can exclude certain individuals from its most basic protections. “The Homo Sacer is the person whose life is not protected by the legal system, but who, paradoxically, cannot be sacrificed according to the formal rites of punishment” (Martins, 2016, p. 198). This figure is used as a metaphor for those who, despite having the right to free legal aid, are excluded from the judicial system.

This exclusion manifests itself when magistrates reject requests for free legal aid based on criteria not provided for in the legislation, disregarding the presumption of veracity of the declaration of hyposufficiency: “The judiciary, by adopting a stance of systematic distrust, ends up subverting the very purpose of the legal benefit” (Alves, 2024, p. 32).

### **LEGAL AID AND THE FUNDAMENTAL RIGHT ACCESS TO JUSTICE**

The Federal Constitution and the Code of Civil Procedure (CPC) guarantee the right to free legal aid, and a simple declaration of need is sufficient for it to be granted. However, several court decisions point to a growing trend of rejection, requiring additional proof of hyposufficiency.

A relevant case law is the case judged by Judge Sandra Regina Teodoro Reis, of the Goiás Court of Justice, in Interlocutory Appeal No. 56314087720228090000. The decision highlighted the absence of documentary evidence as grounds for dismissal: “The mere assertion of financial incapacity is not enough; real need must be demonstrated with robust documents” (TJ-GO, 2022).

Another example is the Interlocutory Appeal judged by Judge Gerson Santana Cintra (AI no. 57741881720228090137), where the denial of legal aid was upheld on the grounds that the request did not present new facts that would justify modifying the decision: “The presumption of veracity of the statement is relative and can be overturned by evidence to the contrary” (TJ-GO, 2022).

### **ETHICAL AND MORAL IMPLICATIONS**

Morality and ethics are essential foundations for the formation of legal norms. “Legal ethics should guide the application of the law, ensuring that decisions are based on principles of justice and not on arbitrary discretion” (Martins, 2016, p. 203). However, the state of

exception observed in judicial practice, by suspending the equitable application of laws, compromises not only justice, but also the legitimacy of the legal system.

## METHODOLOGY

This study adopts a qualitative and exploratory approach, with the aim of analyzing how public perception of the Judiciary reflects and influences judicial exclusion and unequal access to justice. The research combines a theoretical framework based on the concepts of Giorgio Agamben, especially “Homo Sacer” and the “State of Exception”, with empirical data collected through a questionnaire applied to the Brazilian population.

## DATA COLLECTION PROCEDURES

The empirical data was obtained from a structured survey conducted in August 2024. A digital questionnaire was distributed to a diverse audience of citizens, jurists and law students, with a total of 600 invitations sent out. Of the responses collected, 65 were considered valid for analysis, respecting the ethical principles of anonymity and confidentiality.

The questionnaire included objective and subjective questions about the perception of the Judiciary, focusing on issues related to:

- Differential treatment by judges for rich people;
- Use of the judiciary as an instrument of oppression in situations of abuse of power;
- General trust in the justice system.

## DATA ANALYSIS

The data was processed using descriptive analysis, highlighting the frequencies and patterns of responses to the questions most relevant to the subject of the study. The central questions, among others, were:

- “Do you believe that judges can give better treatment to rich people?”

- “If it acts with abuse of power, can the judiciary be an instrument of oppression?”

The answers obtained were organized into binary categories (“Yes” and “No”) for simplification and visualization. The qualitative analysis focused on interpreting the data in the light of the theoretical framework, identifying how perceptions reflect dynamics of legal exclusion and structural inequality.

## LIMITATIONS

It is important to recognize that the survey has limitations in terms of the representativeness of the sample, since the number of respondents (65) represents only a fraction of the potential target audience. However, the data provides relevant information on public perception and its implications for the legitimacy of the judicial system, and is considered a high number for random voluntary respondents.

## HOMO SACER: THE CONCEPT AND ITS IMPLICATIONS

The concept of *Homo Sacer* was introduced by Giorgio Agamben in his work *Homo Sacer: Sovereign Power and Naked Life* (1995), and has become a milestone in contemporary political and legal philosophy. Agamben uses the Latin term “Homo Sacer”, which can be translated as “sacred man” or “cursed man”, to describe a paradoxical figure in Roman law, an individual who, although part of the community, is excluded from its most basic legal protections. The *homo sacer* is the person whose life has no legal value and is at the same time “unsacri- ficable” (Agamben, 1995).

In Roman law, he was a criminal whose actions were considered so serious that they did not fit into the traditional categories of punishment. He could not be sacrificed in religious rituals, but anyone could kill him without it being considered murder. This figure shows the suspension of legal and moral

norms, placing *Homo Sacer* outside the reach of both law and religion, in a state of complete exclusion (Martins, 2016). Thus, Agamben sees *homo sacer* as a metaphor for the individuals who, in contexts of exception, are deprived of their fundamental rights.

Agamben relates the concept to the notion of bare life, life stripped of any legal protection or political value. According to the author, naked life is the condition of those who live outside the sphere of law, subject to the sovereign power that decides who is or is not entitled to legal protection. Therefore, it is the embodiment of bare life, an existence that is not recognized as worthy of protection by the legal system, but which also cannot be integrated into the political order (Agamben, 2004).

The relevance of the concept of *homo sacer* extends beyond Roman antiquity, offering a critical lens for analysing contemporary practices of exclusion and marginalization. Agamben argues that the state of exception, by temporarily suspending the application of laws, creates the conditions for certain individuals or social groups to be treated as such, excluded from legal and political protections. For Agamben, the Nazi concentration camp exemplifies the maximum expression of *homo sacer*, where human life is reduced to a state of complete vulnerability (Agamben, 2004).

This figure is relevant to understanding social and legal exclusion in the modern world, especially in contexts of crisis or state of exception. In situations where sovereign power decides who belongs to the legal order and who can be excluded from it, marginalized groups - such as refugees, stateless people and detainees in arbitrary prisons - can be considered *homo sacer*. They exist outside the protection of the law and are treated as worthless lives, at the mercy of a power that does not submit to legal rules (Martins, 2016).

In the Brazilian context, the concept can be applied to the analysis of judicial practices that exclude individuals from their basic rights, such as the arbitrary denial of legal aid. By denying access to justice to citizens who do not need it, the judiciary effectively deprives individuals of access to justice, stripping them of their legal protections and leaving them on the margins of the legal system. This exclusion reflects the temporary suspension of rights, typical of the state of exception, which is normalized in institutional practices (Alves, 2024).

As a figure of exclusion, it reveals the fragility of legal guarantees in contexts of exception. It forces us to confront the contradiction between the promise of equality before the law and the reality of discriminatory and arbitrary practices. Agamben (2004) points out that naked life is the product of a sovereignty affirmed by exclusion, creating a paradox where the law exists to protect, but also to define who will be excluded from this protection.

Therefore, the study of *homo sacer* leads us to question the function of law in contexts where the exception becomes the rule. It alerts us to the dangers of normalizing the state of exception and creating zones of indistinction, where the suspension of laws allows the perpetuation of practices of exclusion and marginalization. It is thus an invitation to rethink the role of legal institutions in guaranteeing true justice for all members of society, without exceptions.

Agamben challenges us to reflect on the limits of sovereign power and the ethical implications of a legal system that allows for the exclusion of certain people. The figure of *Homo Sacer* is a reminder of the need for a constant commitment to protecting fundamental rights and building a society where the right to have rights is an effective reality, and not just a formal promise.

## CONTEMPORARY *HOMO SACER*

The concept of *homo sacer*, developed by Giorgio Agamben, transcends its original historical context to offer a powerful lens for analyzing social and legal exclusion in modern societies. The *homo sacer*, as described by Agamben (1995), is the person whose life is stripped of legal and political value. This figure, inserted in a state of exception, symbolizes individuals whose existence is marginalized by power structures, often under the pretext of emergency or security. In contemporary times, it is easily recognized in populations that suffer from the exclusion of fundamental rights, such as refugees, stateless people, minorities and economically vulnerable groups.

A striking example is the situation of Syrian and Afghan refugees, particularly in Europe, where hundreds of thousands of people have sought shelter as a result of armed conflicts and political instability. Despite the protections established by international law, such as the 1951 Geneva Convention, many refugees find themselves in makeshift concentration camps or in border containment areas, without access to basic rights such as health, education or employment. Agamben (2004) argues that, in situations like this, the state of exception becomes a permanent practice, transforming refugees into modern *Homines Sacri*, whose lives remain outside the protection of national and international laws.

In Brazil, a similar situation can be observed in the exclusion of indigenous populations. Despite the constitutional guarantees that ensure the right to land, culture and self-determination, indigenous communities face systematic violations of their rights. The advance of deforestation, the expansion of illegal mining and the state's failure to protect them create a context of extreme vulnerability, where these populations are treated as disposable lives. The figure of *homo sacer* is manifested in the lack of effective legal protection and the

growing violence against indigenous leaders, who often face threats without the aggressors being punished.

Another contemporary example is related to the criminal justice and prison system. Inmates in overcrowded prisons are often deprived of basic conditions such as adequate food, medical care and access to justice. Many pre-trial detainees spend years awaiting trial in inhumane conditions, without the guarantee of their due process rights.

In this context, they become modern *Homines Sacri*, living on the margins of the legal system, in a state of total vulnerability. According to Agamben (1995), these conditions exemplify the state of exception, where sovereign power suspends fundamental rights, leaving individuals in a legal and existential limbo.

The homelessness crisis in the United States is another case in point. Despite living in one of the world's most advanced economies, millions of homeless people are excluded from social protection networks. The criminalization of poverty, through laws that penalize acts such as sleeping in public spaces, reflects a denial of basic rights and places these people in a position of "bare life". As Agamben (2004) states, these practices constitute an institutionalized exception, where the laws that should protect are used to exclude.

Furthermore, the denial of access to justice in countries like Brazil, when fundamental rights such as free legal aid are arbitrarily denied, can also be analyzed from the perspective of *homo sacer*. Judicial decisions that require proof of financial insufficiency in addition to a declaration of need practices that exclude economically vulnerable people from the judicial system. These people, deprived of access to justice, become *Homines Sacri* of the legal system, exposed to arbitrariness without any guarantee of protection or redress.

These examples illustrate how the concept of *homo sacer* remains relevant to understanding contemporary exclusion. The figures of refugees, indigenous people, prisoners, the homeless and the economically marginalized share a fundamental characteristic: their lives are reduced to the condition of “bare life”, without effective legal protection. For Agamben (1995), this exclusion is not accidental, but a symptom of the functioning of sovereign power in contexts of a normalized state of exception.

In light of this, it is important to reflect on how institutions and society can combat the normalization of exclusion. The concept of *homo sacer* serves as a warning of the dangers of a legal and political system that allows certain groups to be marginalized, violating principles of equality and dignity. Only by strengthening legal guarantees and an ethical commitment to inclusion will it be possible to prevent more lives being reduced to the condition of bare life.

### **INTERDISCIPLINARY ANALYSIS AND IMPACTS LEGAL EXCLUSION**

Legal exclusion, as a social phenomenon, transcends the limits of the law, requiring an analysis that incorporates sociological and economic perspectives in order to understand its broader impacts. This study adopts an interdisciplinary approach, contextualizing legal exclusion as a factor that deepens structural inequalities and directly affects cohesion social and economic.

### **SOCIOLOGICAL AND ECONOMIC PERSPECTIVES**

From a sociological point of view, legal exclusion can be interpreted as a mechanism for maintaining social hierarchies, where access to the judicial system is affected by socio-economic conditions. Pierre Bourdieu, in his theory of symbolic capital, offers an insight into how the law can operate as a field of power,

where judicial practices reinforce privileges and marginalize vulnerable groups. In this sense, the public perception that “judges favor rich people” as evidenced in the research, reflects unequal social structures that find expression in judicial practices.

In the economic field, legal exclusion has direct and indirect impacts. Individuals and companies that do not have effective access to justice face additional obstacles to resolving conflicts, protecting property rights or seeking compensation for damages suffered. This not only deepens poverty and inequality, but also weakens confidence in the system as a driver of sustainable development. Amartya Sen, in his approach to capabilities, emphasizes that accessible justice is fundamental for the empowerment of individuals and for social equity.

### **THEORETICAL COUNTERPOINTS TO LEGAL EXCLUSION**

Giorgio Agamben’s theory, particularly with regard to “*homo Sacer*” and the “State of Exception”, is central to this study. However, it is equally important to consider criticisms and additions to this perspective. Carl Schmitt, in defining the sovereign as the one who decides the state of exception, offers a vision that highlights the role of concentrated power and political decision in practices of legal exclusion. Michel Foucault, with his concept of biopolitics, shifts the focus to the management of life and how practices of judicial exclusion can be seen as part of a broader control over bodies and populations.

While Agamben emphasizes the suspension of law as an exceptional condition, Foucault suggests that exclusion can be a continuous mechanism of normalization and control. This perspective points out that judicial practices of exclusion are not only arbitrary, but structured within a logic of power that perpetuates social and economic inequalities.

## **SOCIAL IMPACTS AND THE PERPETUATION OF INEQUALITIES**

Judicial practices that deny equal access to justice contribute to the reproduction of socio-economic inequalities on multiple levels. In the Brazilian context, legal exclusion disproportionately affects vulnerable populations, such as low-income people, women in situations of violence and racial minorities. These exclusions not only deprive individuals of their fundamental rights, but also undermine the legitimacy of the rule of law, weakening social cohesion.

In addition, legal exclusion has a retro-mentary effect: individuals who don't trust the judicial system tend to seek extra-legal solutions to conflicts, contributing to the informalization of justice and increasing legal insecurity. This deepens inequalities by limiting opportunities for the protection and redress of rights among different segments of the population.

### **ACCESS TO JUSTICE**

Access to justice is a fundamental right that guarantees individuals the possibility of claiming and protecting their rights through the judicial system. In Brazil, this principle is enshrined in article 5, item XXXV, of the 1988 Federal Constitution, which states: "the law shall not exclude any injury or threat to the right from the appreciation of the Judiciary". This guarantee aims to ensure that everyone, regardless of their social or economic status, can seek judicial protection to defend their interests.

However, various obstacles still hinder the full exercise of this right. As Cappelletti (1988) points out, "economic, social and procedural obstacles are significant barriers preventing effective access to justice". These obstacles include high procedural costs, the complexity of legal procedures and the lack legal information on the part of the population.

To mitigate these difficulties, the Brazilian legal system provides for mechanisms such as free legal aid, regulated by Law No. 1,060/1950, which establishes rules for granting legal aid to the needy. In addition, the New Code of Civil Procedure (Law No. 13.105/2015) reinforces the importance of free legal aid, as set out in articles 98 to 102, with the aim of ensuring that people with low incomes can access the courts without having to pay procedural costs.

Democratizing access to justice also involves implementing alternative methods of conflict resolution, such as mediation and conciliation. These practices seek faster and less costly solutions for the parties involved, promoting a culture of dialog and social pacification. In this sense, the National Council Justice (CNJ) encourages the adoption of public policies that increase access to justice, especially for vulnerable populations.

Despite the progress made, it is necessary to recognize that there are still challenges to be overcome order to make access to justice fully effective in Brazil. Social inequality, procedural slowness and insufficient resources allocated to the judicial system are factors that compromise the realization of this fundamental right. Therefore, it is necessary for the state and civil society to work together promote measures that ensure that all citizens can fully exercise their rights through effective access to justice.

### **FREE LEGAL AID: GUARANTEEING ACCESS TO JUSTICE FOR THOSE IN NEED**

Free legal aid is a fundamental legal mechanism that aims to guarantee access to justice for people in situations of economic vulnerability. This right is enshrined in Federal Constitution of 1988, in article 5, item LXXIV, which states that "the State shall provide full and free legal assistance to those who prove that they are unable to afford it". This is an essential tool to ensure that no person is prevented from seeking judicial protection of their rights due to financial limitations.



This benefit is regulated by Law No. 1,060/1950, which was later supplemented by the New Code of Civil Procedure (Law No. 13,105/2015). According to these rules, free legal aid can be granted to any citizen who demonstrates that they are unable to pay court costs, attorney's fees and other legal expenses without harming their livelihood or that of their family. The request can be made by means of a declaration of hyposufficiency, which, according to article 99, paragraph 3, of the CPC, is presumed to be true unless proven otherwise.

The scope of free legal aid covers not only the payment of procedural costs and expenses, but also the waiving of expert fees and the appointment of lawyers by the Public Defender's Office, when necessary. This allows people in situations of financial vulnerability the opportunity to participate in legal actions, whether as plaintiffs, defendants or in any other procedural position.

Despite its importance, the granting of free legal aid faces practical challenges, such as the restrictive interpretation adopted by some magistrates. In several court decisions, there is a requirement for strict documentary proof of financial hardship, contrary to the spirit of the legislation, which seeks to facilitate access to justice. This stance has been criticized by scholars such as Mauro Cappelletti, who argues that justice should be "open to all, regardless of their economic condition".

In addition, free legal aid plays a crucial role in democratizing the justice system, promoting equality between the parties to proceedings. Without this instrument, low-income individuals could be deprived of their right to a defense, exacerbating social inequalities and compromising the principles of justice and fairness.

Therefore, free legal aid is more than a mere exemption from costs; it is a concrete manifestation of the fundamental right to access to justice. To be fully It must be inter-

preted in a broad and inclusive way, ensuring that economic barriers do not prevent citizens from exercising their rights and seeking judicial solutions to their conflicts.

## REQUIREMENTS FOR GRANTING GRATUITY

Free legal aid is a fundamental guarantee provided for in Brazilian law to ensure that people in situations of economic vulnerability can access justice without facing financial barriers. The main requirement for it to be granted is proof of lack of resources, as set out in article 99, paragraph 3, of the Code of Civil Procedure (Law No. 13.105/2015), which states: "An allegation of insufficiency made exclusively by a natural person is presumed to be true."

This provision introduces the rule of the relative presumption of veracity of the declaration of financial hardship. In other words, it is enough for the natural person to declare, by means of an initial petition or statement in the case file, that they are unable to afford the costs of the proceedings without harming their livelihood or that of their family. This rule was created to simplify and democratize access to justice, preventing citizens in precarious financial situations from having to prove their condition through extensive documentation or excessive bureaucracy.

However, the presumption provided for in §3 is relative (*juris tantum*) and can be overturned by proof to the contrary. This means that if there are indications that the claim of hypo-sufficiency does not match reality, it is up to the opposing party or the judge to demand additional elements to prove the veracity of the statement. This possibility is a safeguard against fraud, but it cannot be abused to make the benefit unfeasible.

In addition, the benefit can be requested at any time during the course of the proceedings, as long as the party demonstrates that their financial condition has changed. Thus, Article

99 of the Civil Code states that § Paragraph 5 complements the rule by ensuring the possibility of reviewing the initial rejection, guaranteeing that justice is accessible even in the face of subsequent economic changes.

Although the rule in paragraph 3 has simplified access to the benefit, some courts have adopted more restrictive interpretations, requiring additional documentary evidence. This attitude goes against the spirit of the rule and compromises procedural speed and efficiency, as well as imposing unnecessary obstacles to access to justice.

Therefore, the presumption of veracity of the declaration of hyposufficiency, as established by article 99, paragraph 3, is a milestone in the Brazilian legal system, as it favors the good faith of the applicant and reduces the economic barriers to entry into the courts. However, its application must be balanced, respecting the right of defense and the principles of reasonableness, so that free legal aid fully fulfills its function of ensuring justice for all, regardless of their socioeconomic status.

## THE CONCEPT OF PRESUMPTION IN LAW

In the legal field, presumption is an inference established by law or logic that allows certain fact to be considered true until the opposite is proven. It is a mechanism widely used to facilitate the application of rules and ensure the protection of rights in situations where direct proof may be unfeasible or unnecessarily costly for the party concerned.

Presumptions fall into two main categories: *juris tantum* (relative) and *juris et de jure* (absolute). The presumption *juris tantum* admits proof to the contrary, i.e. it can be challenged by elements that demonstrate its incorrectness. The presumption *juris et de jure*, on the other hand, is irrefutable and cannot be overturned by any type of evidence.

A classic example of a presumption *juris tantum* in Brazilian law can be found in article 99, paragraph 3 of the Code of Civil Procedure, which states that “an allegation of insufficiency made exclusively by a natural person is presumed to be true”. In this case, the declaration of financial hypo-sufficiency enjoys an initial presumption of veracity, and it is up to the opposing party or the judge to demonstrate, with concrete evidence, that the alleged situation does not correspond to reality. This presumption aims to simplify access to justice for people in vulnerable economic conditions, while protecting the system from abuse.

Presumption also plays an important role in various areas of law. In criminal law, for example, the principle of the presumption of innocence applies, whereby the accused is considered innocent until proven guilty. In civil law, presumptions are used to regulate legal relations, such as the presumption of paternity in the case of children born during marriage, provided for in Article 1.597 of the Civil Code.

Although it facilitates the application of rules and protects rights, the presumption requires a careful balance. In its relative form (*juris tantum*), the burden of proof falls on the party seeking to challenge the presumption. In order to rebut the presumption, it is necessary to present robust and consistent evidence to prove that the presumed fact is unfounded. This requirement of proof to the contrary is essential to avoid arbitrary decisions and guarantee legal certainty.

However, the use of the presumption as a legal tool is not without its critics. Interpreting it restrictively or requiring excessively rigorous proof to challenge it can result in injustices, especially in contexts where the opposing party has greater resources or greater access to information. On the other hand, its broad and unlimited application can open the door to fraud or abuse.

Therefore, the concept of presumption in law reflects an attempt to balance procedural speed, the protection of rights and the need for proof. It operates as a starting point in legal relations, guaranteeing the effectiveness of rules while preserving the possibility of review and challenge, when necessary. The presumption, when used appropriately, is an expression of the principles of the rule of law.

The principles of good faith and reasonableness that underpin the legal order.

### **THE PRINCIPLE OF THE INERTIA OF THE JUDICIARY AND ITS VIOLATIONS IN THE ANALYSIS OF HYPOSUFFICIENCY**

The principle of the inertia of the Judiciary is one of the pillars of the Brazilian procedural system. It establishes that the judiciary should only act when provoked by one of the parties, limiting itself to examining the issues brought before it. This principle is directly related to the guarantee of due process of law, ensuring that the magistrate does not act *ex officio* beyond the limits set by the parties to the dispute. According to Article 2 of the Code of Civil Procedure (CPC), “the process begins at the initiative of the party and develops by official impulse”.

In the context of the analysis of hypo-sufficiency for the granting of free legal aid, the magistrate’s inertia should prevail. Article 99, paragraph 3 of the CPC states that “allegations of insufficiency made exclusively by a natural person are presumed to be true”. Thus, the declaration of poverty submitted by the applicant should be sufficient for the benefit to be granted, unless there is a reasoned challenge from the opposing party or clear elements in the case file that contradict the presumption. However, in practice, there are cases in which magistrates violate the principle of inertia by demanding, *ex officio*, the submission of documents or other additional evidence that

confronts the declaration of hypo-sufficiency, even without any challenge from the opposing party. This behavior subverts the presumption of veracity established by § 3 of article 99 and unduly shifts the burden of proof to the applicant, disregarding good faith which underpins the procedural system.

A classic example of this violation occurs when judges demand that people claiming financial insufficiency submit bank statements, income tax returns or proof of expenses, even though there is no concrete evidence that the declaration of poverty is fraudulent. This practice has been criticized by legal scholars, who consider it an affront to the principle of inertia and an obstacle to the right of access to justice. As Nery Júnior (2016) points out, “the arbitrary requirement of additional evidence not only distorts the legal presumption, but also unnecessarily burdens the court, creating an unfair barrier to the exercise of its rights”. In , the Superior Court of Justice (STJ) has already consolidated the understanding that the presumption of hypo-sufficiency can only be overturned by concrete elements present in the case file. In Special Appeal No. 1.196.941/SP, Justice Benedito Gonçalves stated that “the dismantling of the presumption established by the law of gratuity of justice requires a concrete examination of the applicant’s current financial situation”. Therefore, without objective evidence to question the declaration of insufficiency, any additional requirement of proof constitutes a violation of due process and the principle of inertia.

This judicial conduct also violates the principle of procedural equality, by imposing on the applicant for the benefit a burden attributed to the opposing party. By acting *ex officio* to demand additional evidence, the magistrate ends up taking on an active role that can harm the economically vulnerable party, contradicting the very purpose of free legal aid, which is to guarantee access to justice for all.

It is therefore important that judges respect the limits of the principle of inertia and the legal guidelines that govern the granting of free legal aid. Demanding undue evidence without a basis in the case file or without a challenge from the opposing party compromises the impartiality of the judiciary and creates unfair barriers to access to justice. Strict adherence to procedural rules and constitutional principles is essential to ensure that the judicial system acts fairly and is accessible to all.

### **DENIED ACCESS TO JUSTICE AND THE RELATIONSHIP WITH THE *HOMO SACER***

Access to justice is one of the fundamental pillars of democratic societies, guaranteed by the Federal Constitution of 1988 as a fundamental right in article 5, item XXXV: “the law shall not exclude any injury or threat to the right from the appreciation of the Judiciary”. However, in practice, many individuals face barriers that exclude them from this right, placing them in a condition of legal and social vulnerability. This exclusion has an intrinsic relationship with the concept of *homo sacer*, developed by Giorgio Agamben in his work *Homo Sacer: Sovereign Power and Naked Life*.

Homo Sacer, in Roman law, is someone whose life has been removed from the sphere of legal and political protection, making him “killable, but unkillable” (Agamben, 1995). This individual, although belonging to the community, is placed outside the normative system, at the mercy of sovereign power. In modern times, Agamben uses this figure to illustrate how certain state practices create “zones of exception”, where certain lives are excluded from fundamental guarantees.

The denial of access to justice reflects this exclusion. When the state or the justice system does not ensure that everyone can claim their rights, spaces of exception are created where certain individuals or groups are made

invisible. People living in poverty, for example, often encounter procedural or administrative barriers to accessing justice, even though they have a formal right to free legal aid. By denying the right to free legal aid or imposing subjective and rigid criteria for granting the benefit, the judicial system perpetuates an exclusion similar to the one described by Agamben.

A concrete example of this relationship is the arbitrary rejection of requests for free legal aid. According to article 99, paragraph 3, of the Code of Civil Procedure, “allegations of insufficiency are presumed to be true”, exclusively by a natural person”. Despite this, many magistrates demand additional evidence, even without a challenge from the opposing party. This practice disregards the legal presumption, placing the hyposufficient party in a position of extreme vulnerability, deprived of the means to access the judiciary. These individuals, without the possibility of challenging abusive decisions, become *Homines Sacri* of the legal system: excluded from the normative protection that should guarantee their procedural equality.

Furthermore, the relationship between exclusion from access to justice and *homo sacer* is evident in situations of social and economic inequality. Marginalized populations, such as people, indigenous people and migrants, face not only financial difficulties, but also institutional discrimination and misinformation. By failing to provide the necessary conditions for these groups to have full access to their rights, the state relegates them to a position of “bare life”, an existence without effective legal or political recognition.

This structural exclusion undermines the legitimacy of the rule of law and perpetuates social inequalities. Agamben (2004) argues that the state of exception, by temporarily suspending legal guarantees, becomes a device for permanent exclusion. In the case of justice, this suspension does not happen expli-

citly, but through institutional practices that restrict the scope of legal protections. Thus, denied access to justice reflects the creation of a state of exception within the legal system itself.

Analyzing *homo sacer* in the context of access to justice leads us to reflect on the contradictions of the modern legal system. While the law proclaims formal equality and universal protection, in practice many individuals are excluded from these guarantees. The figure of *Homo Sacer* alerts us to the dangers of a judiciary that, instead of ensuring rights, contributes to the perpetuation of exclusions, placing certain lives outside the sphere of protection.

Finally, overcoming this relationship between denied access to justice and *homo sacer* requires structural and ethical changes. It is necessary to strengthen legal aid mechanisms, guarantee the effective application of free legal aid laws and promote a judicial interpretation that prioritizes the constitutional principles of equality and dignity. Only in this way will it be possible to turn the promise of justice for all into a concrete and inclusive reality.

### **THE DEMAND FOR NON-EXISTENT DOCUMENTS AND THE VIOLATION OF THE RIGHT OF ACCESS TO JUSTICE**

One of the most damaging practices to the right of access to justice is the demand by some magistrates for documents that do not exist or are no longer issued by official bodies. An emblematic example was the request for the **Individual Income Tax Exemption Declaration (IRPF)**, while the Internal Revenue Service itself informs that this document has not been issued since 2007. This practice reveals a disconnect between institutional reality and procedural requirements, creating unnecessary obstacles for the courts, especially the economically vulnerable.

The requirement for this type of document often occurs in requests for free legal aid, when the applicant seeks to prove his or her lack of financial resources. Even though article 99, paragraph 3, of the Code of Civil Procedure states that the allegation of insufficiency made by a natural person is presumed to be true, many magistrates adopt a stricter stance, requesting the submission of additional documents. In the case of the IRPF Exemption Declaration, the very impossibility of obtaining it makes the requirement arbitrary and unfair, creating an insurmountable obstacle for the applicant.

This practice not only goes against the principle of procedural good faith, but also constitutes a violation of **the principle of reasonableness**, which requires that judicial decisions be proportional and based on objective and feasible criteria. Since 2007, the IRS has stopped issuing the IRPF Exemption Declaration, replacing it with a self-declaration system where the taxpayer himself informs, if necessary, that he is exempt from submitting the Annual Adjustment Declaration. Therefore, requesting a document that has no longer been issued for more than a decade is not only impractical, but also demonstrates ignorance of the regulatory and administrative changes.

Imposing this kind of requirement also violates the principle of efficiency, laid down in Article 37 of the Federal Constitution, which should guide the actions of public officials, including judges. When a judge demands a non-existent document, he not only causes procedural delay, but also imposes an unnecessary burden on the vulnerable party, who often has to justify the absence of something that, by definition, cannot be provided. This scenario is especially problematic in the case of people in a situation of hyposufficiency, who already face significant barriers to accessing the justice system.

Recent case law points to the need to respect paragraph 3 of article 99 of the CPC, avoiding disproportionate impositions. In the judgment of Special Appeal No. 1.237.412/SP, the Superior Court of Justice reaffirmed that “the requirement of proof of hyposufficiency must be made in a reasonable manner, without creating unnecessary procedural obstacles that make it impossible to exercise the right of access to justice”. This guideline should guide all judicial decisions involving the granting of free legal aid.

Furthermore, the practice of demanding non-existent documents is also contrary to the logic of the principle of proportionality, which requires a balance between the means employed and the ends sought. By requesting an IRPF Exemption Declaration that is no longer issued, the Judiciary not only fails to comply with technical standards, but also makes it impossible to fulfill its primary function: guaranteeing equal access to justice.

The solution to these situations is greater

The judges must be aware of the reality of administrative rules and be committed to interpreting procedural laws in a way that is favorable to inclusion. Judges must prioritize compliance with the principle of procedural good faith and respect the legal guidelines that determine the presumption of veracity of statements made by jurisdictions, unless proven otherwise.

It is imperative that judicial practice is adjusted to avoid disproportionate and unenforceable demands, such as requesting non-existent documents. Only by acting in line with constitutional and procedural principles will it be possible to ensure that the judiciary fulfills its role as a guarantor of rights and promoter of equal access to justice.

## **PRESUMPTION OF VERACITY OF THE DECLARATION LACK OF RESOURCES AND THE USE OF PARTNER SYSTEMS**

Article 99, paragraph 3 of the Code of Civil Procedure states that “an allegation of insufficiency made exclusively by a natural person is presumed to be true”, unless proven otherwise. The aim of this rule is to facilitate access to justice, especially for people who are economically vulnerable, by ensuring that a declaration of financial hardship is sufficient to claim benefits such as free legal aid. However, in practice, there is a contradiction in the way this presumption is applied, particularly with regard to the use of agreed systems and technological resources to verify the financial situation of applicants.

The Judiciary has access to integrated tools, such as systems agreed with banks, the Federal Revenue Service and real estate registry offices, which allow it to consult data on financial transactions, tax returns and asset lists. These tools were developed to promote speed, efficiency and greater security in the analysis of procedural information. Despite this, many magistrates deny the use of these tools to validate the hypo-sufficiency of people who are not banked, who are exempt from income tax or who, due to a lack of assets, are not registered in these systems.

This attitude contradicts the very purpose of the agreed systems, to simplify and automate the verification of relevant information for the trial. By refusing to use these tools, the Judiciary shifts the burden of proof onto the court, especially those in situations of extreme poverty or economic informality, who often do not have formal documents to prove their financial condition.

The problem becomes more evident in the case of unbanked individuals, a significant group in Brazil. According to data from the Central Bank, quoted by CNN (2023), almost

36 million Brazilians still don't have a bank account, living on the margins of the formal financial system. Demanding bank statements from people in this situation would be a huge step forward.

To file a lawsuit or require them to submit income tax returns (non-existent in the case of those who are exempt) is to create an insurmountable barrier to access to justice, in violation of the principle of proportionality. These claimants, who should benefit from the presumption of veracity of their declaration, end up being doubly harmed: firstly, by economic exclusion; and secondly, by the lack of recognition of their vulnerability in the judicial system. The refusal of magistrates to use conventional tools to carry out direct searches also goes against the principle of efficiency laid down in Article 37 of the Federal Constitution. The use of these systems is quicker and less costly than requiring the applicant to present documents that they do not have or that would be difficult to obtain. Instead of using the technological means available, the judiciary is imposing additional bureaucracy on poorer citizens, widening the gap between the law and the law and its practical application.

Furthermore, rejecting requests based on the absence of formal documents disregards the inclusive spirit of article 99 of the CPC. The Superior Court of Justice, in several decisions, has reaffirmed that the analysis of hyposufficiency must be carried out in a concrete and reasonable manner. In Special Appeal No. 1.196.941/SP, Justice Benedito Gonçalves pointed out that "the removal of the presumption established by the law of gratuity of justice requires an in-depth examination of the applicant's current financial situation". The use of agreed systems could meet this need, eliminating arbitrariness and making the process more accessible.

The insistence on demanding formal evidence from marginalized people goes against the principle of procedural equality. While those who are part of the financial and tax system have their data accessed directly through judicial tools, the poorest, precisely those who need protection the most, are excluded from this benefit. This disparity in treatment compromises the legitimacy of the judicial system and perpetuates structural inequalities.

Therefore, in order for the presumption of veracity of the declaration of hyposufficiency to be effectively respected, magistrates must use the resources available to verify the economic situation of applicants in a proactive and efficient manner. Refusing to access agreed systems to verify financial information not only hinders access to justice, but also imposes a disproportionate burden on people in situations of vulnerability. Ensuring the full use of these tools is an essential step towards promoting equal access to the judiciary and ensuring the concrete application of the fundamental right to free legal aid.

## **SURVEY RESULTS: PERCEPTIONS THE JUDICIARY**

The survey carried out looked at public perceptions of the judiciary in Brazil, focusing on the following issues related to differential treatment and the potential for abuse of power. The questions asked of the participants included:

- 1) **"Do you believe that judges can give better treatment to rich people?"**
- 2) **"If it acts with abuse of power, can the judiciary be an instrument of oppression?"**

The results of the 65 valid responses obtained reveal important patterns that reflect the public's critical view of the judicial system.

## PERCEPTION OF DIFFERENTIAL TREATMENT

Do you believe that judges can give better treatment to rich people?

65 answers

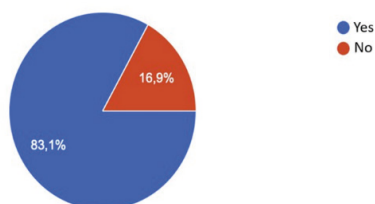


FIG. 1: 83.1% of people believe that the rich get better treatment in court

As for the first question, a significant percentage of respondents believe that judges can treat wealthy people differently. This suggests a widespread perception that economic power influences judicial decisions, undermining the principle of equality before the law.

This result corroborates the idea that the legal system operates in a field of power, as analyzed by Pierre Bourdieu, where the socio-economic position of individuals can mediate access to justice. The public perception of favoritism exposes a critical challenge for the judiciary: overcoming the image of partiality and strengthening social trust in the system.

## THE JUDICIARY AS AN INSTRUMENT OF OPPRESSION

If it acts with abuse of power, can the Judiciary be an instrument of oppression?

65 answers

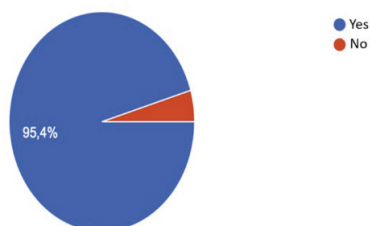


FIG. 2: 95.4% of people believe that abuse of power in the judiciary triggers oppression

The second question revealed that the majority of participants believe that the judiciary can be used as an instrument of oppression in the event of abuse of power. This view highlights the potential of the judicial system to become a mechanism of exclusion, in line with Giorgio Agamben's theory on the *State of Exception*. Arbitrary or authoritarian practices can delegitimize the judiciary and increase the sense of injustice among citizens.

This data also points to the need for policies that prevent institutional abuses, such as greater transparency, *accountability* and social control over the judicial system.

## IMPLICATIONS OF THE RESULTS

The results of the survey reinforce the need to reform judicial practices to meet social expectations of justice and fairness. The presumption of veracity in statements of hypothesis and the use of technologies to verify data objectively are key tools for reducing the negative perceptions raised in the survey.

In addition, training magistrates to understand the social and economic dynamics that affect the judiciary can help mitigate practices that are perceived as biased or oppressive, guaranteeing a more transparent and accessible judiciary.

## CLOSING DEVELOPMENT

Throughout this work, the challenges and contradictions related to access to justice in Brazil were analyzed, especially with regard to the granting of free legal aid and the judicial practices that create barriers to the exercise of this fundamental right. The approach highlighted the relationship between the denial of access to justice and Giorgio Agamben's concept of *Homo Sacer*, revealing how institutional practices can exclude individuals from legal protection and relegate them to a condition of extreme vulnerability.



It has been shown that although article 99, paragraph 3 of the Code of Civil Procedure presumes the declaration of hypo-sufficiency to be true, this guarantee is often disregarded by arbitrary and disproportionate judicial demands. The request for non-existent documents, such as the IRPF Exemption Declaration, or the refusal to use agreed systems to validate financial information reflect practices that, instead of protecting the economically vulnerable, widen inequalities and compromise the right of access to justice.

In addition, it was discussed how the restrictive interpretation rules and the requirement of excessive proof create a state of informal exception in the judiciary, where rights guaranteed by legislation are suspended in practice. These situations exemplify the creation of zones of exclusion within the legal system itself, placing marginalized groups, such as the unbanked and the tax-exempt, in a position analogous to *Homo Sacer*: excluded from the sphere of state protection.

The role of the Judiciary as a guarantor of rights and the need for a more humanized and efficient application of legislation were also highlighted. The use of agreed systems and technological tools, combined with a reasonable interpretation of procedural rules, could mitigate the difficulties faced by those in vulnerable situations, promoting a more accessible and inclusive judiciary.

It can therefore be concluded that full access to justice, as provided for in the Federal Constitution, requires a continuous commitment on the part of magistrates and the judicial system to the practical and fair application of the laws. Only through action committed to the principles of equality, reasonableness and efficiency will it be possible to overcome existing barriers and ensure that all citizens, regardless of their economic status, have effective access to the judiciary. This commitment is essential not only for protection of individual rights, but also for strengthening democracy and the rule of law.

## **SUGGESTIONS AND PERSPECTIVES FOR FUTURE RESEARCHERS**

The issue of access to justice and the barriers faced by people in situations of economic vulnerability require continuous investigation, given their relevance to the realization of fundamental rights and the strengthening of the rule of law. This study looked at the judicial practices that hinder the granting of free legal aid, highlighting the contradictions between the legal system and its practical application. However, the scope of the research can be broadened in various directions, opening up possibilities for future studies.

One suggestion is to deepen the empirical analysis of the performance of magistrates in different states of Brazil, comparing criteria and decision patterns related to the granting of free legal aid. This would allow us to identify recurring judicial practices and possible regional differences, contributing to the debate on standardization of case law and the guarantee of rights.

Another relevant perspective is to investigate the social and economic impacts of denying legal aid. Qualitative studies, based on interviews with people who have had their applications rejected or faced procedural barriers, could reveal the practical consequences of these decisions, such as the worsening of social exclusion and the perpetuation of inequalities.

In addition, there is room for interdisciplinary research that relates the concept of *Homo Sacer* to other areas, such as sociology and political science. Exploring legal exclusion from different perspectives could enrich the academic debate, highlighting how institutional practices reflect power dynamics and social marginalization.

Future researchers could also investigate the potential of technological systems and agreements for validating financial hyposufficiency. A critical analysis of the efficiency and transparency of these systems would be useful

in proposing solutions that reduce the burden of prosecution on applicants, ensuring greater fairness in the process.

Finally, it is recommended that comparative studies be carried out between Brazil and other democratic countries, examining how these systems face the challenges of access to justice for vulnerable populations. This type research could inspire more inclusive reforms and practices in the Brazilian judiciary, in line with international best practices.

The continuation of these investigations is essential if discussions on access to justice are to advance in a consistent and innovative way, contributing to the construction of a fairer legal system that is accessible and aligned with democratic principles.

## RELEVANCE AND INNOVATION

Faced the structural and practical barriers that limit access to justice, it is essential to propose concrete solutions that align judicial action with the constitutional principles of equality and dignity. This topic explores practical measures and technological innovations capable of mitigating the problems identified, reinforcing the democratization of access to justice.

## PRACTICAL PROPOSALS

The correct and consistent application of current legislation is a fundamental element in reducing inequalities in access to the judicial system. In Brazil, the principle of free legal aid is guaranteed in article 5, item LXXIV, of the Federal Constitution, and regulated by the Code of Civil Procedure. In order to ensure that this right is preserved, it is proposed:

- 1) **Respect for the presumption of need:** The need for free legal aid for individuals must be presumed, in accordance with the spirit of the legislator, avoiding arbitrary decisions that harm the economically vulnerable. The burden

of proof, in this context, should fall on the party challenging the declaration, as provided by law.

- 2) **Improving the reasoning behind decisions:** Magistrates should be encouraged to give reasons for their decisions based on objective criteria and in line with consolidated case law. This can be reinforced with normative guidelines and training programs.
- 3) **Analysis protocols for challenges:** In the event of a declaration of need being contested, the use of integrated systems to confirm the applicant's socio-economic data can avoid arbitrariness and speed up processes, preserving the dignity of litigants.
- 4) **Access to partner systems:** Covenants de- can be consulted at the request of the party, to prove their financial condition.

## TECHNOLOGICAL ADVANCES AND INNOVATION

Incorporating technology into the justice system can transform access to justice, making it more efficient and inclusive. Some innovative initiatives include:

- 1) **Integration of Socio-Economic Data Systems:** Develop digital platforms that cross-reference information from government databases (such as the Single Registry, the Federal Revenue Service and the INSS) to automatically verify the veracity of declarations of lack of support. This approach preserves the confidentiality of information and speeds up legal proceedings.
- 2) **Artificial Intelligence (AI) for screening applications:** Implement AI systems for the initial screening of cases involving free legal aid, identifying inconsistencies in a preliminary manner and reducing the analysis time of magistrates.

- 3) **Transparency Portals:** Create user-friendly interfaces for citizens to monitor their legal claims and receive notifications about the progress of their cases. This reinforces trust in the system and improves communication between the parties and the judiciary.
- 4) **Technological Training for Judges and Civil Servants:** Invest in ongoing training programs that prepare legal operators to deal with emerging technologies, such as automated verification systems and artificial intelligence platforms.

## EXPECTED IMPACTS

The proposed measures aim to:

- Reduce the time it takes to and contest cases involving free legal aid.
- Ensuring greater uniformity and objectivity in judicial decisions.
- Promote public confidence in the judicial system, especially among the most vulnerable.
- Increasing the efficiency of the judiciary through the strategic use of technology, freeing up human resources for more complex demands.

By adopting these initiatives, the Brazilian judicial system will not only be able to correct practical inequalities, but also position itself as a model of innovation and efficiency in favor of citizenship.

## CONCLUSION

This study analyzed the problem of access justice in Brazil, highlighting how the arbitrary denial of free legal aid relates to Giorgio Agamben's concept of *Homo Sacer*. It showed that judicial practices, which are often distorted or excessively strict, perpetuate exclusions and create barriers to the full exercise of fundamental rights, compromising equality and dignity in the legal system.

The research revealed that, although article 99, paragraph 3 of the Code of Civil Procedure ensures the presumption of validity of the declaration of hypo-sufficiency for individuals, the requirement of unnecessary documents, such as the IRPF Exemption Declaration, and the refusal of magistrates to use agreed systems to verify financial information have imposed unjustified obstacles on the most vulnerable. These practices, inserted in a context of legal informality, reflect a kind of "state of exception" in the judiciary, where the economically marginalized are excluded from the sphere of state protection, assuming a position similar to that of *Homo Sacer*.

In addition, the work highlighted that the use of advanced technologies, such as integrated systems for verifying socio-economic information and artificial intelligence for screening cases, can contribute to reducing barriers to access to justice. Practical proposals, such as respecting the presumption of need granting free justice and adopting objective criteria for challenges, reinforce the importance of a humanized and inclusive interpretation of procedural rules.

The conclusion is that overcoming exclusionary practices in the judicial system requires not only legislative changes and but also an ethical and institutional commitment to the constitutional principles of equality, efficiency and reasonableness. The awareness of magistrates about the socio-economic realities of their clients and the proper application the rules are essential steps to ensure that the right to free justice is effectively accessible to all. This transformation is not only a legal imperative, but an essential condition for strengthening the rule of law, promoting citizenship and consolidating democracy in Brazil.

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