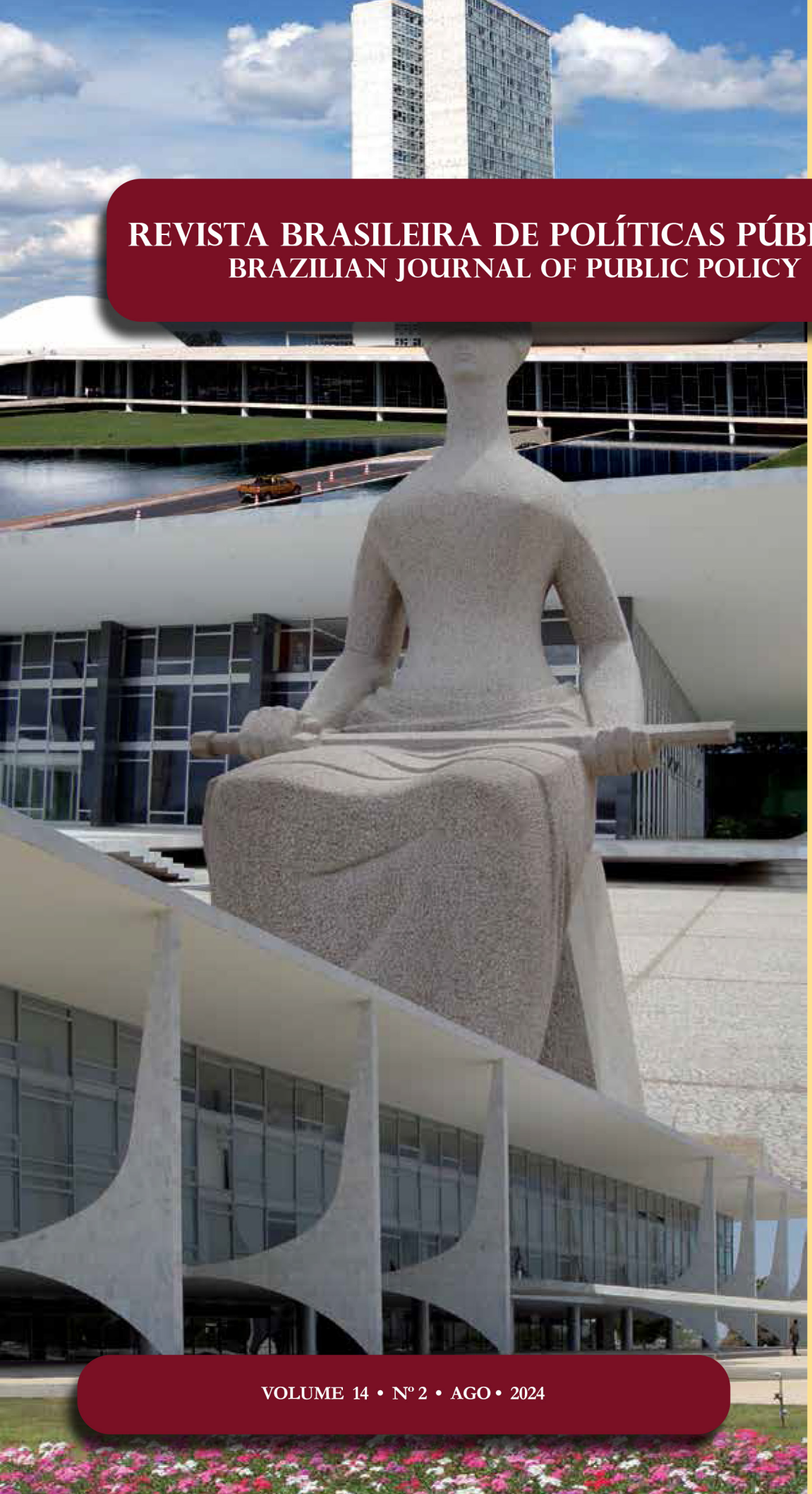

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Constitutional adjudication, non-legal expertise and humility

Jurisdição constitucional, conhecimentos não-jurídicos e humildade

Ana Paula de Barcellos

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Sumário

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Constitutional adjudication, non-legal expertise and humility*

Jurisdição constitucional, conhecimentos não-jurídicos e humildade

Ana Paula de Barcellos **

Resumo

Decisões no âmbito da jurisdição constitucional muitas vezes requerem o estabelecimento de fatos que envolvem a expertise de áreas não jurídicas, mas nem sempre os tribunais reconhecem a necessidade desse diálogo interdisciplinar. Quando os tribunais tomam decisões fora de seus limites epistêmicos, fazendo declarações sobre expertise não jurídica, sua legitimidade e os resultados pretendidos de suas decisões acabam sendo prejudicados. Esta questão é particularmente urgente considerando a expansão das pretensões transformadoras da jurisdição constitucional sobre realidades cada vez mais complexas, como acontece no Brasil. Apesar da importância do tema, há pouca discussão jurídica sobre ele. Este artigo visa a demonstrar que a atual relação entre a jurisdição constitucional e a expertise não jurídica é problemática e demanda atenção da pesquisa jurídica. O artigo pretende ainda contribuir para o entendimento das múltiplas dimensões da questão e propor um diálogo com debates sobre humildade intelectual e humildade no direito. Ao promover a humildade intelectual dentro da comunidade jurídica, podemos melhor reconhecer os limites epistêmicos dos tribunais e acadêmicos jurídicos e aprimorar nossa compreensão das dinâmicas e limites do conhecimento científico.

Palavras-chave: jurisdição constitucional e conhecimentos não jurídicos; jurisdição constitucional e humildade; humildade e constitucionalismo transformador; decisão estrutural e conhecimentos não jurídicos; decisão estrutural e humildade.

Abstract

Constitutional adjudication often requires the establishment of facts involving expertise from various non-legal fields. However, courts may not always recognize the need for such interdisciplinary input. When courts render decisions outside their epistemic limits and make statements on non-legal expertise without organized interdisciplinary dialogue, their legitimacy and the intended outcomes of their rulings are compromised. This issue is particularly pressing as constitutional adjudication increasingly addresses a broad array of topics in an ever more complex reality, especially in countries like Brazil engaged in transformative constitutionalism. Despite its importance, there is limited legal discussion on this subject. This paper aims to hi-

* Artigo comvidado

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ghlight the problematic relationship between constitutional adjudication and non-legal expertise, calling for greater attention from legal scholars. It also seeks to contribute to the understanding of the issue's multiple dimensions and proposes engaging with debates on intellectual humility and humility in law. By fostering intellectual humility within the legal community, we can better recognize the epistemic limits of courts and legal scholars and enhance our comprehension of the dynamics and boundaries of scientific knowledge.

Key-words: constitutional adjudication and non-legal expertise; constitutional adjudication and humility; courts as policy makers, non-legal expertise and humility; balancing, non-legal expertise and humility.

1 Introduction

During the 2022 national election campaign in Brazil, the Superior Electoral Court (TSE) engaged in an open fight against electoral disinformation. After granting several requests from candidates and public prosecutors to remove content from social media platforms, the TSE issued a general regulation (Resolução 23.714, October 20, 2022). This regulation allowed the TSE's President, without specific requests, to ban content similar to that previously banned by the court, to ban social media profiles and channels spreading false information (fake news), attacks on democracy, and hate speech, to prevent the people involved from opening new ones, and even to suspend public access to the social media platform for up to 24 hours[1].

The Brazilian Federal Electoral Code gives TSE the power to issue regulations for its "faithful execution", but Resolução TSE 23.714/2022 was not enforcing any specific legal provision[2]. TSE issued the regulation to protect and promote constitutional values and rights: to neutralize populist threats to democracy and protect voters from false information, ensuring their freedom of choice; the Brazilian Supreme Court (STF) dismissed a challenge against it, confirming its constitutionality, for the same reasons. Both Courts considered the intervention necessary to protect rights and promote constitutional objectives, therefore, valid[3].

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1 BRASIL. Tribunal Superior Eleitoral. *Resolução nº 23.714, de 20 de outubro de 2022*. DJE-TSE, nº 213, de 24.10.2022, p. 1-3. Available at: https://www.tse.jus.br/legislacao/compilada/res/2022/resolucao-no-23-714-de-20-de-outubro-de-2022. Articles 3º, 4º and 5º:

"Article 3. The Presidency of the Superior Electoral Court may extend a collegial decision made by the Court's Plenary on misinformation to other situations with identical content, under penalty of the fine provided for in Article 2, including in cases of successive replications by the content provider or applications. § 1 In the case described in the main clause, the Presidency of the Superior Electoral Court shall specify, in an order, the URLs, URIs, or URNs with identical content that must be removed. § 2 The fine imposed in a supplementary decision issued under this article does not replace the fine applied in the original decision.

Article 4. The systematic production of misinformation, characterized by the habitual publication of false or decontextualized information about the electoral process, authorizes the temporary suspension of profiles, accounts, or channels maintained on social media, in accordance with the requirements, deadlines, and consequences provided for in Article 2. Sole Paragraph The order referred to in the main clause includes the suspension of the registration of new profiles, accounts, or channels by those responsible or under their control, as well as the use of previously registered contingency profiles, accounts, or channels, under penalty of committing the crime provided for in Article 347 of Statute No. 4,737, of July 15, 1965 - Electoral Code.

Article 5. In the case of repeated non-compliance with orders based on this Resolution, the President of the Superior Electoral Court may order the suspension of access to the services of the implicated platform for a period proportional to the severity of the infraction, up to a maximum of twenty-four hours".

2 Brazil (1965), Federal Law 4.735/65 (Federal Electoral Code), article 1º, sole paragraph, and article 23, IX. According to the 1988 Brazilian Federal Constitution, electoral law is within Congress exclusive legislative power.

3 BRASIL. Supremo Tribunal Federal. *ADI 7261/MC, Justice Rapporteur Edson Fachin, j. October 26, 2022*. Published on November 23, 2022. The STF issued a preliminary injunction on October 26, 2022, to uphold the TSE regulation, and the final decision was published on March 6, 2024. STF (preliminary injunction): "1. The allegation that the Superior Electoral Court (TSE), in exercising its normative elaboration authority and police power regarding electoral propaganda, usurped the legislative competence of the Union does not hold, as the Specialized Court has been addressing the issue of combating disinformation through reiterated jurisprudential precedents and normative acts issued over recent years. 2. Resolution TSE No. 23.714/2022 does not constitute prior censorship. 3. The dissemination of false news during the short period of the electoral process can dominate the public space, restricting the circulation of ideas and the free exercise of the right to information. 4. The phenomenon of disinformation spread via the internet, if not monitored by the electoral authority, has the potential to restrict the free and conscious formation of the voter's will. 5. In the absence of elements leading to the declaration of unconstitutionality of the contested norm, a deferential attitude must be adopted regarding the competence of the Superior Electoral Court in organizing and conducting general elections.

Two years before that, in 2020, in a very different case, by a majority vote STF struck down Federal Law 13.269/2016 that authorized the production and exceptional use of an experimental drug for cancer not cleared by the Brazilian drug agency (ANVISA) while clinical studies were ongoing (the "cancer pill" case)[4]. Most Justices considered the federal law harmed the constitutional right to health because it was "reckless and potentially harmful to generically release treatment without conducting the corresponding clinical studies, due to the absence of assertive technical elements of the substance's viability for well-being."[5].

The minority opinion mentioned some respectable experts heard by Congress supporting the bill, weighted that the law authorized the drug only for terminal patients without other therapeutic options, and highlighted that ANVISA regulations allow for "promising" medication still without clearance to be used by this kind of patient. There was no dialogue between Justices about the different expert sources each of them evaluated as more important and for which reasons.

Although the cases mentioned are very different, in both of them Brazilian superior courts needed to assess non-legal expertise before deciding. In the first case, the Courts involved didn't realize they were stepping out of their epistemic limits and never asked the question of whether the factual premise assumed – that blocking social media accounts would help neutralize the populist threat and protect voters from accessing false information and making decisions based on it – was actual or at least probable. They just supposed it was true, even though political science, political, and social psychology are probably the fields able to answer that question, not the law.

In the second case, the Justices realized they were dealing with non-legal expertise, but there was no clear framework to guide this interdisciplinary dialogue. Among various "expert sources," Justices picked the one they pleased without standards that could be publicly debated and scrutinized. Most Justices considered the ANVISA decision on drug clearance the ultimate expert authority; experts heard by Congress and the ANVISA regulation to terminal patients and "promising" uncleared drugs could not overcome it; the minority vote evaluated otherwise, and no common standard was in place.

Indeed, it would not be correct to say that the STF adopts ANVISA's clearance of drugs as the decisive criterion as a permanent standard. In a ruling from 2019, STF authorized lower courts to issue orders against the SUS (Brazilian Unified Public Health System) to provide or fund medication without ANVISA clearance to plaintiffs if exceptional conditions are met, including "the existence of the drug's registration with renowned regulatory agencies abroad." [6]. The STF adopted similar reasoning during the COVID-19 pandemic, allowing states and municipalities to take action to preserve public health based on technical

6. Preliminary injunction confirmed. 7. Direct Action of Unconstitutionality judged unfounded".

4 The press named it as "cancer pill". The substance involved in the drug is synthetic phosphoethanolamine.

5 BRASIL. Supremo Tribunal Federal. *ADI 5501, Justice Rapporteur Marco Aurélio, j. October 26, 2020*. Published on December 1, 2020: "It is unconstitutional to enact regulations that authorize the provision of substances without registration with the competent authority, considering the principle of separation of powers and the fundamental right to health – articles 2 and 196 of the Federal Constitution."

6 BRASIL. Superior Tribunal Federal. *Tema RG 500 (Leading case RE 657.718)*. Justice Rapporteur Marco Aurélio, j. May 22, 2019. Available at https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=4143144&numeroProcesso=657718&classeProcesso=RE&numeroTema=500: "1. The State cannot be compelled to provide experimental drugs. 2. The absence of registration with ANVISA generally prevents the provision of medication by court decision. 3. Exceptionally, judicial provision of medication without sanitary registration is possible in cases of unreasonable delay by ANVISA in reviewing the request (exceeding the deadline set by Law No. 13,411/2016), provided three requirements are met: (i) the existence of a registration request for the drug in Brazil (except for orphan drugs for rare and ultra-rare diseases); (ii) the drug's registration with renowned regulatory agencies abroad; and (iii) the absence of a registered therapeutic substitute in Brazil. 4. Lawsuits demanding the provision of medications without ANVISA registration must necessarily be filed against the Union".

statements from international organizations[7], including the importation of vaccines cleared by at least one reputable foreign drug agency if ANVISA did not clear the vaccine in 72 hours[8].

The two cases illustrate how courts engaging in constitutional adjudication may need to establish facts involving non-legal expertise from a variety of fields, from political science and political and social psychology to the safety of new drugs. Constitutional cases may involve scientific (encompassing the full range of knowledge that can be assessed using this methodology), technical, and cultural issues about which judges lack the necessary background to make fully informed decisions.

Fact-finding is not strange to adjudication. Courts, at least lower courts, are used to determine which facts are relevant to the case, who should bear the burden to prove what, and to assess the evidence presented on who did what, when, how, and which are the consequences; procedural law provides for that extensively. However, fact-finding in constitutional adjudication may be more complex within superior and constitutional courts for several reasons. These courts may assume their reasoning is exclusively legal and not even realize their ruling depends on facts. Eventually, these higher courts simply move forward, making statements about non-legal expertise without evidence to support it, as the TSE and the STF made in the social media banning decisions in 2022. Courts may otherwise realize non-legal expertise is involved in the case. Still, as there is no legal framework to guide this interdisciplinary dialogue, the decision on the non-legal issue ends up being made but without clear criteria or justification, as happened in the "cancer pill" case.

The limited awareness of superior and constitutional courts about the role of non-legal expertise in their rulings and the lack of a legal framework to deal with the interdisciplinary interaction is problematic. When a superior or constitutional court decides outside its epistemic limits, making statements about non-legal expertise without an organized interdisciplinary dialogue, this harms the court's legitimacy. It also may damage the intended outcome associated with the court order, failing to promote the constitutional value or protect the right the court was trying to foster, leading to frustration with constitutional adjudication. As constitutional adjudication deals with a growing variety of topics in an increasingly complex reality, the pro-

[7] BRASIL. Superior Tribunal Federal. *ADI 6421/MC, Justice Rapporteur Luís Roberto Barroso, j. May 21, 2020*. Published on Nov 12, 2020 (preliminary injunction): "2. Administrative decisions related to the protection of life, health, and the environment must adhere to standards, norms, and scientific and technical criteria as established by internationally and nationally recognized organizations and entities. Precedents: ADI 4066, Rel. Min. Rosa Weber, judged on 08/24/2017; and RE 627189, Rel. Min. Dias Toffoli, judged on 06/08/2016. Similarly, Law No. 13,979/2020 (Art. 3, § 1), which outlined measures to address the COVID-19 pandemic and was approved by the National Congress, stipulated that pandemic response measures must be determined "based on scientific evidence and analyses of strategic health information." [...] 4. A preliminary injunction was partially granted to interpret Article 2 of MP 966/2020 in accordance with the Constitution, specifying that in the assessment of gross error, the authorities' adherence to (i) standards, norms, and scientific and technical criteria established by internationally and nationally recognized organizations and entities, as well as (ii) the constitutional principles of precaution and prevention, must be considered."

[8] BRASIL. Superior Tribunal Federal. *ADI 770/MC, Justice Rapporteur Ricardo Lewandowski, j. February 24, 2021*. Published on March 10, 2021 (preliminary injunction): "VI – A preliminary injunction endorsed by the Plenary of the Supreme Federal Court establishes that States, the Federal District, and Municipalities (i) in the event of non-compliance with the National Plan for the Operationalization of Vaccination against COVID-19, recently made public by the Union, or if this plan fails to provide timely and sufficient immunological coverage against the disease, may administer to their respective populations the vaccines they have available, provided these vaccines have been previously approved by Anvisa, or (ii) if this government agency does not issue the necessary authorization within 72 hours, may import and distribute vaccines that have been registered by at least one foreign health authority and approved for commercial distribution in their respective countries, in accordance with Art. 3, VIII, a, and § 7-A of Law 13.979/2020, or any other vaccines that may be approved on an emergency basis, pursuant to Anvisa Resolution DC/ANVISA 444, dated 12/10/2020".

blem multiplies, and it is particularly true in countries engaged in a transformative constitutionalism project, as is the case in Brazil[9]. Nonetheless, there is hardly any legal discussion on the topic[10].

This paper aims (i) to contribute to the understanding of the issue's multiple dimensions, including why the use of non-legal expertise by constitutional adjudication is a problematic reality that needs attention from legal scholars, and (ii) to propose a dialogue with debates on intellectual humility and humility and law as an approach to help raise awareness about this problem. By fostering intellectual humility within the legal community, we can better identify the epistemic limits of courts and legal scholars while enhancing our understanding of the dynamics and boundaries of scientific knowledge. After this introduction, the paper develops into two sections, each discussing topics (i) and (ii), and a conclusion.

2 Constitutional adjudication and non-legal expertise: a problem in need of attention

2.1 Constitutional adjudication and non-legal expertise

This topic aims to understand the phenomenon – the use of non-legal expertise by constitutional adjudication by superior or constitutional courts – and establish why the lack of awareness about it is problematic. First, some terminology qualification is necessary. In several jurisdictions, a broad understanding of constitutional adjudication would encompass all adjudication, and that is the case in Brazil, as judges may need to construe constitutional provisions when interpreting and applying the law equaling constitutional adjudication to adjudication in general. However, this use of the expression would lack any specificity. Constitutional adjudication, at least in the context of this article, describes a more limited reality: cases where courts issue orders to protect rights, promote constitutional goals, and control government initiatives (actions and inaction, including laws) grounded directly in constitutional reasoning. The fields may overlap as lawsuits aiming to interfere with state behavior may do so to protect and promote rights or other constitutional objectives.

The two cases mentioned above display kinds of reasonings frequently associated with contemporary constitutional adjudication. In the 2022 social media banning case, TSE and STF decided on an intervention not provided by law under the premise, not made explicit but inevitably present, that the initiative will produce or at least significantly contribute to a specific outcome: in other words, a policy making reasoning.

[9] About transformative constitutionalism, see MUKHERJEE, G. Transformative Constitutionalism. *In*: WOLFRUM, R.; LACHENMANN, F.; GROTE, R. (ed.). *Max Planck Encyclopedia of Comparative Constitutional Law*. Oxford University Press, 2023. But the use of non-legal expertise by courts without awareness or sound criteria is not exclusive of Brazilian courts. According to LARSEN, A. O. Confronting Supreme Court Fact Finding. *Virginia Law Review*, p. 1255-1312, 2012; research on the US Supreme Court, "Supreme Court justices routinely answer factual questions about the world – such as whether violent video games have a harmful effect on child brain development or whether a partial birth abortion is ever medically necessary. The traditional view is that these findings are informed through the adversary system: by reviewing evidence on the record and briefs on appeal. Routinely, however, the justices also engage in what I call "in house" fact-finding. [...] almost 60% of the most important Court opinions in the last ten years rely on in house research at least once".

[10] Brazilian legal writing focus in the last decades has been on court's institutional capabilities and limitations and judicial deference toward technical expertise. As the paper will discuss judicial deference is one possible model to structure the interdisciplinary dialogue. For a critic evaluation of the discussion on institutional capabilities in Brazil, see ARGUELHES, D. W.; LEAL, F. O argumento das" capacidades institucionais" entre a banalidade, a redundância e o absurdo. *Revista Direito, Estado e Sociedade*, v. 38, 2011. For interesting research suggesting that the STF is highly deferent to agencies decisions, see JORDÃO, E. F.; REIS, V. C.; C. JÚNIOR, R. T. O controle das agências reguladoras federais no STF como instância recursal: um estudo empírico. *Revista de Direito Econômico e Socioambiental*, v. 11, n. 1, p. 122-155, 2020. Scholars from other countries highlight the limited scholarly work on constitutional adjudication and fact-finding as well. See LARSEN, A. O. Confronting Supreme Court Fact Finding. *Virginia Law Review*, p. 1255-1312, 2012.

In this reasoning, court orders usually aim to promote rights provided by the Constitution and other constitutional goals after considering Congress and the Administration have failed to act according to what the Constitution requires.

This policy making reasoning has a forecast dimension to it as it assumes a causal relationship between the intervention ordered and the intended outcome – so that the latter is at least a probable result of the former –, the same way legislatures and agencies are expected to do before enacting a bill or issuing regulation[11]. When courts engage in policy making, they should apply the legal framework compatible with this state function, the same way an agency or Congress needs to abide by the due process rules if they are going to adjudicate the legal status of an individual. Policy making involves forecasting factual relationships and the expected outcomes to decide among alternative interventions; this sort of decision making requires the evaluation of the assumed factual premises of the considered interventions[12].

In Brazil, as in many places, agencies are required to perform an ex-ante and ex-post impact analysis of proposed and issued regulations to assess positive and negative aspects before norms are issued and to evaluate them over time to enhance the quality of the forecasting and to determine if it was accurate[13]. Ex-ante and ex-post legislative impact analysis tools are used by Legislatures as well[14]. Courts have yet to be included in this debate, as the causal or probable relationship between intervention and outcome assumed by court orders may depend on non-legal expertise[15].

As already mentioned, in the 2022 social media banning case, STF assessed the banning of social media accounts as valid because the intervention, according to the court, was necessary to protect and promote constitutional values and fundamental rights: to neutralize populist threats to democracy and protect voters from false information, ensuring their freedom of choice. The question of whether banning the accounts would help neutralize the populist threat and protect voters from accessing false information and making decisions based on it was never asked or discussed. The courts didn't realize that their policy making required a different legal framework and reasoning and that they were stepping outside their epistemic limits.

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[11] EDWARDS, L. H. The Convergence of Analogical and Dialectic Imaginations in Legal Discourse. *Legal Stud. F.*, v. 20, p. 7, 1996. Available at: https://ssrn.com/abstract=2496483. The author identifies five forms of reasoning judges use: rule-based reasoning, analogical reasoning, policy making reasoning, consensual normative reasoning, and narrative reasoning. RUBIN, E. L.; FEELEY, M. M. Judicial policy making and litigation against the government. *U. Pa. J. Const. L.*, v. *5*, p. 617, 2002; focus on judicial policy making.

[12] RUBIN, E. L.; FEELEY, M. M. Judicial policy making and litigation against the government. *U. Pa. J. Const. L.*, v. *5*, p. 617, 2002: "If an agency or a legislature is going to adjudicate the legal status of an individual, it needs to gather evidence and reach a reasoned decision that applies the prevailing rules to the situation at hand. In addition to these efficiency-based considerations, it needs to ensure fair treatment by satisfying the requirements of due process. If a court is going to engage in policy making, it must develop mechanisms to define the problem, generate alternative solutions and evaluate those alternatives."

[13] The Brazilian Federal Constitution requires agencies and the government to evaluate policies ex-post and publish the results (article 37, paragraph 16o). Federal Law 13.848/2019 requires agencies to perform regulatory impact analyses before issuing regulations.

[14] ATIENZA, M. Reasoning and legislation. *In*: WINTGENS, Luc J. (org.). *The theory and practice of legislation*. Aldershot: Ashgate, 2005. p. 297-317; FLUCKIGER, A. Can Better Regulation Be Achieved by Guiding Parliaments and Governments - How the Definition of the Quality of Legislation Affects Law Improvement Methods. *Legisprudence*, v. 4, p. 213, 2010; FRANCESCO, F.; RADAELLI, C. M.; TROEGER, V. E. Implementing regulatory innovations in Europe: the case of impact assessment. *Journal of European Public Policy*, p. 1-21, 2011; ISSALYS, P. Analyse d'impact et production normative: de l'efficacité à la légitimité. *Revista da Faculdade de Direito da UFMG*, p. 245-274, 2013; MENEGUIN, F. *Avaliação de Impacto Legislativo no Brasil. UC Berkeley:* Berkeley Program in Law and Economics. Available at: https://escholarship.org/uc/item/8ts831r2; SALINAS, N. S. C. Avaliação legislativa no Brasil: apontamentos para uma nova agenda de pesquisa sobre o modo de produção das leis. *Revista Brasileira de Políticas Públicas*, v. 3, n. 2, p. 229-249, 2013; ANDRADE, A. M.; SANTANA, H. V. Avaliação de políticas públicas versus avaliação de impacto legislativo: uma visão dicotômica de um fenômeno singular. *Revista Brasileira de Políticas Públicas*, v. 7, n. 3, p. 781-798, 2017; BARCELLOS, A. P. Políticas públicas e o dever de monitoramento: "levando os direitos a sério". *Revista Brasileira de Políticas Públicas*, v. 8, n. 2, p. 251-265, 2018; BARCELLOS, A. P. *Direitos Fundamentais e Direito à Justificativa*. Devido Procedimento na Elaboração Normativa. Belo Horizonte: Fórum, 2020.

[15] Federal legislation from 2018 (Federal Law 13.655) directs judges to consider the consequences of their orders whenever adjudicating broad principles of law but the statute offers no help on how to evaluate these consequences if non-legal expertise is required.

Indeed, though, evaluations of the premise assumed by the courts in the case, their reality, probability, or plausibility, are part of the scope of study and investigation of other sciences: political science, social psychology, and social communication, for example. And research from these different fields does not confirm the premise assumed by the courts and may even suggest an opposite relationship. These fields have brought to light, for instance, the role of emotions in politics and the public sphere and how populism fosters and feeds on polarization through the "enemy" discourse, activating feelings of belonging (to the group the person identifies with), and of despise and intolerance to those with different political views. These efforts to divide society between "us" and "them," "friends" and "enemies" can erode the essential social trust necessary for democracy, building a logic associated with war and the elimination of those who think differently[16].

In this context, contrary to the intentions of the TSE and STF, banning channels may have contributed to populist rhetoric rather than to its weakening. In the fields of psychology and social communication, it is known that people's relationship with "fake news" is quite complex, and aggressive interventions, such as content prohibition, can cause more harm than benefit, making the forbidden information more attractive and, for specific audiences, reinforcing the belief in false content[17].

The interaction of constitutional adjudication with knowledge from other fields is evident in this case but was not perceived or acknowledged by the TSE or the STF. Therefore, no solution to deal with this interdisciplinarity was considered. The 2022 social media banning case is representative of a reasoning constitutional adjudication uses often: tackling facts related to causal or probabilistic relationships between interventions and policies and their outcomes when assessing which interventions promote a constitutional value or a fundamental right before ordering them.

In reversed reasoning, when reviewing governmental initiatives, Courts need to decide what is unacceptable to accomplish a constitutional goal or what violates a constitutional right. Proportionality balancing analysis reasoning is the usual technique in this kind of setting. When engaging in this kind of reasoning, constitutional adjudication may also need to deal with non-legal expertise.

In the 2020 cancer pill case, the STF applied the proportionality balancing analysis reasoning. Proportionality analysis of government actions, including the judicial review of statutes, has become a trait in global constitutionalism in recent decades and relates to judicial power expansion. Broadly, the proportionality balancing analysis requires state interventions to be reasonable. In the Brazilian formulation, as in most formulations employed by courts globally, the analysis involves a set of evaluations or tests, two of which are the suitability and necessity tests[18].

In the suitability test, courts will identify the right or the constitutional value the statute or the public policy aims to advance and assess whether the means adopted by the political branches are related and can promote the intended outcome. The suitability test evaluates the logical relationship between means and ends and usually requires the assessment of empirical claims. The necessity test weighs whether the means adopted are needed, meaning they are not excessive, restricting other rights and liberties more than indispensable to achieving the intended purpose. A legal provision may be suitable but excessive, passing the suitability test but failing the necessity one. The underlying idea is that legislation and public policy must

16 PRINZ, J. Emotion and Political Polarization. *In*: FALCATO, A.; SILVA, Graça da S. (ed.). *The Politics of Emotional Shockwaves*. Londres: Palgrave Macmillan, 2021. https://doi.org/10.1007/978-3-030-56021-8_1; DE BLASIO, E.; SELVA, D. Emotions in the Public Sphere: Networked Solidarity, Technology and Social Ties. *In*: FOX, B. (ed.). *Emotions and Loneliness in a Networked Society*. Londres: Palgrave Macmillan, 2019. https://doi.org/10.1007/978-3-030-24882-6_2; and WAHL-JORGENSEN, K. Questioning the ideal of the public sphere: The emotional turn. *Social Media+ Society*, v. 5, n. 3, p. 2056305119852175, 2019.

17 GRANT, A. Think again: The power of knowing what you don't know. Londres: Penguin, 2023.

18 SWEET, A. S.; MATHEWS, J. Proportionality balancing and global constitutionalism. *Colum. J. Transnat'l L.*, v. *47*, p. 72, 2008; and BARROSO, L. R. *Curso de direito constitucional contemporâneo*. São Paulo: *Saraiva Educação SA,* 2013. p. 328-329.

choose the least restrictive intervention among the suitable ones to promote constitutional objectives so that other rights and liberties are not uselessly curtailed.

Besides normative considerations, judges may need information on non-legal expertise to assess the suitability and the necessity tests. Laws and policies aim to intervene in the most diverse and complex realities; therefore, considering the suitability and necessity of these interventions by courts depends on knowledge of these realities. Although courts should not use proportionality/reasonableness analysis to replace the decision made by agencies or Congress, focusing instead on preventing excess and abuse, courts need to know the limits within which there is no abusiveness or excess, and these limits will not always be provided by law. In other words, constitutional adjudication may depend on interdisciplinary interaction in this context as well. When that is the case, it should pursue a dialogue with the relevant non-legal expertise to be able to issue a reasonable decision. And to make things even more complicated, the non-legal expertise may be complex, nuanced, and constantly evolving[19].

The COVID-19 pandemic provided multiple examples of this phenomenon. Interventions that in other contexts would be considered unconstitutional due to excessiveness – such as prohibiting the circulation of vehicles and people, banning worship services, etc. – were deemed reasonable/proportional by Brazilian courts at that moment. The premise underlying the court's assessment of whether the public health policy was proportional at the time did not originate from the law, but from health sciences, according to what was known then about the subject. Courts upheld those pieces of legislation and policy because the scientific evidence indicated that restrictions to rights and liberties were needed to limit the spread of the virus and that the spread of COVID-19 at that moment could have dramatic consequences for many people. Years after the beginning of the COVID-19 pandemic, as immunization changed the public health environment and some science changed, similar state interventions would most certainly be deemed to violate proportionality.

In the 2020 cancer pill case, it is unclear whether the STF majority vote considered the federal law to fail the suitability or the necessity test, considering the protection and promotion of health as the constitutional right at stake. Still, in any case, the order was grounded in the assumption that without the ANVISA clearance, the exceptional use of the drug authorized by law was harmful to people's right to health. The examination of the papers presented, and the Justice's opinions reveals that the scientific issue was much more complex and nuanced than that.

In their submissions defending the federal law, the Chamber of Deputies and the Federal Senate highlighted the extensive debate that occurred before parliament, including public hearings with specialized professionals and favorable research results for the exceptional release of the substance while clinical tests were ongoing, as provided by the law, but most Justices ignored these statements. As mentioned, they didn't ignore these pieces of expert opinion that Congress valued because of a clear deference standard in favor of ANVISA clearance as the ultimate standard in drug decisions. The court even discussed whether there would be a general ban on Congress to provide on this kind of technical matter under an agency regulation, and the court rejected this kind of limitation on the Legislature.

The minority vote from Justices Edson Fachin, Dias Toffoli and Gilmar Mendes argued that there were ANVISA regulations allowing the use of "promising" medication, still under study – i.e., without clearance – "for patients with serious debilitating diseases and life-threatening conditions without satisfactory therapeutic alternatives with registered products in the country." They considered the law valid for terminal patients without other therapeutic options, who would thus have the freedom, within their autonomy, to

[19] Most jurisdictions and legal scholars will agree that legislators and governments have epistemic discretion on empirical claims (mainly if there is epistemic uncertainty about the claims); courts should review their decisions only in exceptional cases KLATT, M.; SCHMIDT, J. Epistemic discretion in constitutional law. *International Journal of Constitutional Law*, v. 10, n. 1, p. 69-105, 2012. However, courts may need to engage with non-legal expertise to decide if the case is exceptional. How to allocate epistemic discretion is helpful, but it does not spare courts from the interdisciplinary dialogue.

"take unknown risks in favor of a minimum quality of life." The majority view of the court did not engage with this idea.

The 2020 cancer pill case showcases how even when acknowledging that non-legal expertise is at stake, courts may struggle to deal with it absent a legal framework to guide this interdisciplinary dialogue. Justices choose their expert of preference depending on the case without a shared set of public and debatable criteria.

The frequency in which courts engage in constitutional reasonings aiming to transform reality through interventions and controlling whatever the government and Congress do (and don't do) is fueled by the legal mindset of transformative constitutionalism, a movement from courts and the legal culture that aims to transform reality through constitutional law and adjudication. India, South Africa, and Brazil are examples of transformative constitutionalism literature mentions[20]. However, intensive on this outcome, courts are usually unaware they are stepping into non-legal fields of knowledge or, when aware, go there without any legal criteria to guide the interdisciplinary dialogue. Whatever one's ends, as well as their merits and the importance of pursuing them, it is vital to know if and how one's decision contributes to achieving them. How can an institution ground its decisions on the relevance of the values it promotes when it is unclear whether the decisions promote them?

When examining the constitutionality of laws and state actions based on the violation of fundamental rights such as life, health, or norms for the protection of consumer rights in specific areas like health and food, and environmental laws, courts need interdisciplinary inputs even if they don't realize that. The interaction with other fields of knowledge is also evident in fundamental rights protection and promoting constitutional values. Ensuring the right to health, housing, education, or a healthy environment involves understanding technical aspects outside the judiciary's typical expertise. Similarly, judges do not have the expertise to decide what kind of intervention can protect democracy and political pluralism.

2.2 Why are courts unaware they are stepping out of their epistemic limits?

Several reasons make it particularly challenging for superior and constitutional courts to realize they are stepping outside their epistemic limits whenever they make statements about non-legal expertise or rank without proper justification for expert opinions to choose one. This paper will highlight four of them.

First, legal proceedings assume matters discussed before these courts will be exclusively legal and do not provide for fact-finding in a structured fashion. Fact-finding is part of adjudication, and lower courts deal with evidence to assess who did what, when, how, and what the consequences are. Ordinary legal proceedings expect courts to decide on which facts are relevant to the case and who needs to prove them, and the parties have a formal opportunity to present evidence in ordinary adjudication. There is a structured procedure that forces the issue to be examined, even if the conclusion is that the case involves primarily legal issues. But that is not necessarily what happens in many proceedings before superior and constitutional courts.

The proceeding used by TSE to issue Resolução 23.714/2022 was simply a meeting among the Justices who discussed, drafted, and approved the regulation. There is no other legal requirement to it. TSE may organize public hearings and consultations about proposed rules, as was done in January 2024 about new regulations proposed to the 2024 Municipal Elections, when eventually those participating can discuss the lack of evidence to back up proposed interventions. Still, the court is not required to do so.

Brazilian legislation providing on the abstract judicial review of statutes – the proceeding involved in the Cancer Pill Case – does not require the STF to issue a specific decision on which facts are relevant to

[20] VILHENA, O.; BAXI, U.; VILJOEN, F. *Transformative constitutionalism:* Comparing the apex courts of Brazil, India and South Africa. Pretoria University Law Press, 2013.

the case to be decided nor to open the opportunity for the parties or participants in the proceeding to present evidence on them[21]. The Justice Rapporteur has the discretionary power to ask for information and evidence on facts if he pleases; he can also call a public hearing to assemble expertise on the matter or to allow interest groups to present their views. But these possibilities are solely at the discretion of the Justice Rapporteur[22].

The lack of procedural rules requiring superior and constitutional courts to evaluate whether the case involves non-legal expertise and giving parties and participants a say on the matter makes it more difficult for Justices to realize the need for this interdisciplinary dialogue themselves. The proceeding does not help raise the issue.

Second, the kind of facts constitutional adjudication deals with may differ from who did what, when, how, and what the consequences are[23]. Evidence of these facts may involve documents, witnesses, and experts, as some may require non-legal expertise, as in medical malpractice lawsuits and criminal cases. Still, they examine events in the past to determine what happened and assess the legal consequences of it.

Constitutional adjudication may need to assess different facts, as in the two examples described above. In the Social Media Ban case, Brazilian courts assessed – without realizing – whether the ban was an intervention useful in promoting the constitutional goals they deemed valuable. In the Cancer Pill case, Justices needed to decide whether the use of the "cancer pill" as provided by the federal law should be judged as harmful to public health or not. These factual assessments are very different from determining the medical cause of the death of someone in a criminal case or whether the collapse of a building was due to an error from the project in a civil case.

Constitutional adjudication may need to determine facts to assert the proper meaning of the Constitution and its provisions, what they require and forbid, and to construe legislation vis a vis the Constitution. Although they may consider past and present contexts and data, these facts are mainly focused on the future through forecasting. Also, the fact-finding here seeks the truth of statements establishing broad causal/probable connections between interventions and outcomes, not the particular cause of an individualized circumstance. However, Brazilian evidence law seems to assume the only facts courts need to determine are who did what, when how and what are the consequences, and has not discussed how to assess these other kinds of facts so far[24].

The third reason limiting the ability of courts to deal with this phenomenon is a blend of courts' good intentions and, in some cases, the urgency to protect and promote rights and constitutional values and the

[21] Interestingly, the Court – especially in earlier cases – has even dismissed actions of abstract review when the issue revolved around factual matters. See STF, ADI 1527, Justice Rapporteur Maurício Corrêa, j. November 5, 1997, published on May 18, 2001; STF, ADI 1286/QO, Justice Rapporteur Ilmar Galvão, j. February 7, 1996, published on September 6, 1996.

[22] Brazilian scholars point out that the STF mainly uses public hearings or amicus curiae briefs to reinforce the court's legitimacy and not to gather information on facts. See SOMBRA, T. L. S. Supremo Tribunal Federal representativo? O impacto das audiências públicas na deliberação. *Revista Direito GV*, v. 13, p. 236-273, 2017. LEAL, F. A. R. *Para que servem as audiências públicas no STF?*. Available at: https://repositorio.fgv.br/server/api/core/bitstreams/fc2d69aa-fa4b-4742-b0f0-0429b68cb745/content.

[23] Described in the United States legal tradition as "adjudicative facts". See GERONIMO, L. J. F. Facing the facts: confronting legislative facts in Supreme Court adjudication. *Phil. LJ*, v. *94*, p. 41, 2021; and LARSEN, A. O. Confronting Supreme Court Fact Finding. *Virginia Law Review*, p. 1255-1312, 2012.

[24] In the United States, legal tradition would probably label these facts as "legislative facts," contrasting with "adjudicate facts." The expression describes broadly the facts beneath the reasons for the constitutional or legal provision, its purpose, what is required to implement it, and what violates it. They are used to assert the proper meaning of the Constitution and its provisions, what they require and forbid, and to construe legislation vis a vis the Constitution. See GERONIMO, L. J. F. Facing the facts: confronting legislative facts in Supreme Court adjudication. *Phil. LJ*, v. *94*, p. 41, 2021; and LARSEN, A. O. Confronting Supreme Court Fact Finding. *Virginia Law Review*, p. 1255-1312, 2012. Discussing proposals to reform US evidence law to accommodate new realities in fact-finding, see PETROSKI, K. Texts versus testimony: Rethinking legal uses of non-legal expertise. *U. Haw. L. Rev.*, v. 35, p. 81, 2013.

absence of the same commitment to follow up on the decisions' enforcement and on what happens after the order is issued[25].

Brazilian courts have been experimenting with transformative constitutionalism and are sometimes eager to issue rulings aiming at transforming reality, promoting equality, and promoting constitutional values more broadly. Unfortunately, monitoring the implementation of the court's orders and their impact on reality has not received the same attention. Without significant concern about what happens after the decision, courts will not be confronted with the implementation problems caused by the decision's faulty assessment, which was assumed without asking questions about non-legal expertise.

The fourth reason is the limited scholarly work raising awareness about the epistemic limits of courts and legal scholars and proposing frameworks to organize the interdisciplinary dialogue whenever needed.

2.3 Why is it problematic?

The final point of this topic is to establish why the poor dealings of constitutional adjudication with non-legal expertise are problematic to constitutional law. First, it undermines the court's credibility. When courts decide outside their epistemic limits by making statements on non-legal expertise without any interdisciplinary dialogue or sound evidence to support it, this undercuts the court's credibility; even if only some realize it immediately, the experts in the field will know. After all, judges do not know everything about everything. This can undermine the judicial system as a whole.

Constitutional adjudication, of all adjudication, develops in a permanently tensioned border between constitutional legal issues and political disputes where its legitimacy and limits vis a vis majoritarian democracy are always at stake. And in a transformative constitutionalism environment, even more so. When courts are unaware of the need to dialogue with non-legal experts, a new and powerful element pushing against their legitimacy is added to the debate, challenging constitutional adjudication on new grounds. The claim against constitutional adjudication will not only be that it is stepping into the political branches' proper sphere in a democracy but also that it is stepping out of its epistemic limits.

A second reason the issue is problematic is that courts will often get the facts wrong because their assessment, lacking any soundly obtained input from experts, is incorrect or because the personal research judges eventually do to be able to back their statements in a kind of in-house fact-finding get them biased sources discrediting the decision. Even if courts get the facts right, what may not happen often, the legitimacy damage referred to above is already present. But when judges interpret laws and make rulings on matters requiring scientific or technical knowledge, their lack of expertise can result in decisions that do not fully grasp the nuances or limitations of the relevant science, leading to outcomes that are not aligned with the best available evidence. And this problem leads to the next.

Finally, the frustration with the intended outcome of a court order is a problem for constitutional law and constitutional adjudication. The lack of expertise can lead to misguided rulings that may not foster the intended outcomes, negatively impacting public policy, individual rights, and societal well-being. If the court

[25] WERNECK, A. D. Transformative Constitutionalism: A view from Brazil. *In*: DANN, P.; RIEGNER, M.; MAXIM, B. (ed.). *The Global South and Comparative Constitutional Law*. Oxford: Oxford University Press, 2020. p. 165: "Judges might choose cases with transformative potential and issue rulings requiring major, structural changes in the way the government deals with certain issues, only to refrain from following up on what happens after these decisions are taken. They reap the benefits of being associated with transformative discourse and move on to the next issue, leaving the status quo largely undisturbed. For these reasons, while the Brazilian experiment with transformative constitutionalism has not necessarily been unsuccessful, it should not be read as a success case of 'court-centric' approach to transformative constitutionalism when it comes to social rights and material inequality". See also BARCELLOS, A. P. Sanitation rights, public law litigation, and inequality: a case study from Brazil. *Health & Hum. Rts. J.*, v. 16, p. 35, 2014. CASIMIRO, M.; MARMELSTEIN, G. O Supremo Tribunal Federal Como Fórum de Protestos: Por que o Simbolismo Importa em Processos Estruturais? *Direito Público*, v. 19*,* p. 102, 2022, acknowledge that structural litigation has limited capability to transform reality but argue that the court orders' symbolic aspect is still relevant.

orders "x" assuming, without having the expertise to do so, that "x" will lead to "y" – the promotion of a fundamental right or a constitutional value – but this factual relationship is untrue, "y" will not become a reality and the protection and promotion of "y" will not happen. The fundamental right and the constitutional value in view will rest unprotected and unpromoted despite the passage of time and the court order's associated costs, including taxpayer money funding the court and the liberties limited by the court order[26].

Forecasting in policy making is complex. Human knowledge of reality is extremely limited in all fields, and the future brings more unknowns. Therefore, a public intervention's intended outcome may not occur as expected, even when laws and policies have the best evidence. Monitoring, post-regulation, and legislation assessments are needed precisely to know what is happening and eventually review and adjust the original intervention because the human capacity to predict is limited. If the intervention ordered by courts starts off assuming wrong facts, the chance of success is probably null[27].

Having established the problem, the next part of the paper focuses on enhancing awareness of it. The paper suggests a dialogue with debates on intellectual humility and humility and law. As discussed below, fostering intellectual humility within the legal community involves acknowledging the limitations of one's knowledge and being open to insights from other fields. In constitutional adjudication, this means recognizing when non-legal expertise is required and seeking such expertise to inform judicial decisions.

3 Interdisciplinarity and Awareness: intellectual humility as a framework

3.1 Humility and law: a brief review

Legal writing examining humility and law is still limited but growing within the emerging field of "virtue jurisprudence". "Virtue jurisprudence" encompasses discussions on the multiple connections between virtue and law and the centrality of virtue (and of vice) to legal issues[28]. However, while legal scholarly work is developing, the role of intellectual humility in broader social and political relationships has been the focus of research with significant results for other fields of knowledge and law[29]. The precise conceptualization of humility is disputed, but for this paper, humility is the operational belief shared by the individual that she shares with all other people the fragility of being human, characterized by limitations and fallibility. The operational part of it means the person acts according to her belief. In other words, we are all equal in our inherent fragility and limitations as humans, and this realization has consequences for how we behave[30].

[26] BARCELLOS, A. P. *Direitos fundamentais e direito à justificativa*. Devido Procedimento na Elaboração Normativa. Belo Horizonte: Fórum, 2020. p. 37-54.

[27] SCOTT, J. C. *Seeing like a state*: How certain schemes to improve the human condition have failed. Yale: Yale university Press, 2020.

[28] FARRELLY, C.; SOLUM, L. *Virtue jurisprudence*. Springer, 2019; AMAYA, A.; HO, H. L. *Law, virtue and justice*. Portland: Hart Publishing, 2012; DUFF, R. A. The virtues and vices of virtue jurisprudence. *Values and Virtues*, v. 90, 2006; SOLUM, L. B. Virtue jurisprudence a virtue–centred theory of judging. *Metaphilosophy*, v. 34, n. 1□ 2, p. 178-213, 2003.

[29] ELIZABETH J. K.; NEWMAN B. Intellectual humility in the sociopolitical domain. *Self and Identity*, v. 19, n. 8, p. 989-1016, 2020. DOI: 10.1080/15298868.2020.1714711. p. 990: "Research that has previously been conducted on general IH suggests that IH plays a role in people's general orientations toward the sociopolitical domain. For example, IH relates to more benevolent views of politicians who change their minds, greater openness to learning about opposing political views PORTER, T.; SCHUMANN, K. Intellectual humility and openness to the opposing view. *Self and Identity*, v. 17, n. 2, p. 139-162, 2018, more political tolerance and less social dominance orientation KRUMREI-MANCUSO, E. J. Intellectual humility and prosocial values: Direct and mediated effects. Pepperdine University, Faculty Open Access Publications. *Paper 170*. Available at: https://digitalcommons.pepperdine.edu/faculty_pubs/170.

[30] TANGNEY, J. P. Humility. *In*: SNYDER, C. R.; LOPEZ, S. J. (ed.). *Handbook of positive psychology*. Oxford: Oxford University Press, 2002; TANGNEY, J. P. Humility: Theoretical perspectives, empirical findings and directions for future research. *Journal of Social and Clinical Psychology,* v. 19, *n.* 1, p. 70–82, 2000. Disponível em: https://doi.org/10.1521/jscp.2000.19.1.70; and BYERLY, T. R. The Values and Varieties of Humility. *Philosophia* v. 42, p. 889–910, 2014. https://doi.org/10.1007/s11406-014-9550-x.

It is possible to identify two aspects of humility in human interactions that are especially relevant to the law: an epistemic/intellectual and a relational one. Intellectual humility describes the individual's recognition of her fallibility and epistemic limitations: it relates to what we know or think we know. Epistemic limitation may concern topics outside the person's expertise – the specific theme of this article – where this recognition will be more evident. However, it is also seen in relationships with peers in the individual's field of knowledge. This occurs, for example, when judges in a panel disagree on a legal issue or when professionals on a committee or technical panel cannot reach a consensus[31]. Intellectual humility is associated with certain attitudes: seeking to inform oneself and learn, listening non-defensively to those who think differently (considering the possibility of reevaluating one's own opinions), and respecting diverse views (even if, after reevaluation, the person maintains her original position)[32].

Relational humility emphasizes treating others as equals – the shared human condition with its fragilities and limitations – who deserve respect regardless of social positions or functions performed. This dimension is crucial for the legal realm because of the multiple relationships of subordination law application and enforcement established with the risk that those exercising authority – such as police officers and judges – imagine themselves as superior to others[33].

Research in political science and political and social psychology shows intellectual humility is associated with values and behaviors necessary for social relations and the functioning of democracy. These studies indicate that intellectual humility plays a significant role in fostering trust among citizens (including those with diverse political views), empathy, respect, and tolerance, making this feature precious in an environment of extreme polarization. Research in these fields aims to develop and test more precise parameters to measure intellectual humility and interventions to stimulate it intentionally[34].

Literature from various fields discusses the relationships between humility and law and adjudication[35]. In criminal law, authors reflect on the risks of judges lacking humility and the consequences of adjudication. One highlighted danger is the judge feeling ontologically superior to the defendant – failing to recognize the shared human fragility that could lead anyone, under the same circumstances, to behave as the accused did – and thus deciding based on a judgment of the defendant's supposed character rather than their conduct. There is also the risk of cruelty and excessive punishment as manifestations of arrogance and a perception of oneself as inherently correct and just, different from the defendant[36].

Further, in the criminal justice system, one of the aspects concerning its (il)legitimacy – by society and within its minorities, and victims and their families – involves models of procedural Justice, such as those

[31] PRITCHARD, D. Intellectual humility and the epistemology of disagreement. *Synthese,* v. 198 (Suppl 7), p. 1711–1723, 2021. https://doi.org/10.1007/s11229-018-02024-5; and PRITCHARD, D. Disagreement, Intellectual Humility and Reflection. *In*: SILVA FILHO, W.; TATEO, L. (ed.) *Thinking About Oneself.* Philosophical Studies. 2019. https://doi.org/10.1007/978-3-030-18266-3_5.

[32] PORTER, T.; SCHUMANN, K. Intellectual humility and openness to the opposing view. *Self and Identity*, v. 17, n. 2, p. 139-162, 2018.

[33] SCHARFFS, B. The role of humility in exercising practical wisdom. *UC Davis L. Rev.*, v. 32, p. 127, 1998.

[34] KRUMREI-MANCUSO, E. J.; NEWMAN, B. Sociopolitical Intellectual Humility as a Predictor of Political Attitudes and Behavioral Intentions. *Journal of Social and Political Psychology*, v. *9,* n. 1, p. 52-68, 2021. https://doi.org/10.5964/jspp.5553; PORTER, T. *et al.* Predictors and consequences of intellectual humility. *Nature Reviews Psychology*, v. 1, n. 9, p. 524-536, 2022. https://doi.org/10.1038/s44159-022-00081-9; KRUMREI-MANCUSO, E. J. Intellectual humility and prosocial values: Direct and mediated effects. Pepperdine University, Faculty Open Access Publications. *Paper 170*. Available at: https://digitalcommons.pepperdine.edu/faculty_pubs/170; SMITH, G. You Know You're Right: How Intellectual Humility Decreases Political Hostility. *Political Psychology*, v. 44, n. 6, p. 1319-1335, 2023. https://doi.org/10.1111/pops.12903.

[35] BURBANK, S. B. On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility. *U of Penn Law School*. Public Law Research Paper No. 09-11. Available at: https://ssrn.com/abstract=1393362. http://dx.doi.org/10.2139/ssrn.1393362.

[36] DEAN A. S. Humility in Criminal Justice: What it Might Invite us to Reconsider*,* 100. *Marq. L. Rev.* 1433, 2017. Available at: https://scholarship.law.marquette.edu/mulr/vol100/iss4/9; PILLSBURY, S. H. Questioning Retribution, Valuing Humility. *Ohio St. J. Crim. L.*, v. 11, p. 263, 2013, Loyola-LA Legal Studies Paper No. 2014-2, Available at SSRN: https://ssrn.com/abstract=2368510; and MURPHY, J. G. *Punishment and the moral emotions:* Essays in law, morality, and religion. Oxford: Oxford University Press, 2012.

developed by Tom Tyler, which have become popular and tested in empirical research[37]. This model proposes that people's assessment of the criminal system's legitimacy is influenced by four components: (i) the perception that parties were truly heard before any decision; (ii) the perception that the procedure is neutral, impartial, and justified; (iii) the perception that the parties (and also the victims and their families) were treated with respect by the authorities involved throughout the investigation and prosecution process; and (iv) the perception that the general purpose of the authorities is essentially correct. The first and third aspects are manifestations of humility from a relational perspective.

More broadly, the literature highlights the role of relational humility in judges' activities to behave and be perceived as public servants – that is, public agents providing a service to the community, not aristocrats superior to other citizens. Another aspect of relational humility, which may be especially relevant for constitutional adjudication, is the creation of an environment of equality within the judicial process, listening to and respecting different groups involved in the adjudication process, their views and experiences[38]. Here, relational humility connects with intellectual humility, as considering others worthy of respect and listening to them – really listening – is a way to learn about realities judges generally do not know[39].

On the other hand, the notion of humility in its intellectual dimension has been used as an argument to advocate for judicial self-restraint in various contexts and a posture of judicial deference to decisions of the Legislative and Executive branches[40]. The underlying premise is that the judiciary is in a worse position to make decisions than other instances, which have more and better information and greater political legitimacy. Thus, aware of their limitations, judges should be self-restrained and deferential.

Other authors criticize the necessary connection between humility and judicial deference: the premise that the judiciary is always worse positioned to make decisions may not be true, and intellectual humility is not intellectual subservience. Intellectual humility involves recognizing one's epistemic limitation and fallibility and the willingness to listen to others, inform oneself, and reevaluate. Still, it does not require the result of this reevaluation to change one's original opinion. After considering the other's view, one may conclude that they should maintain their initial understanding[41].

The relationships between humility and adjudication are multiple, some quite complex and fascinating. However, the focus of this study is limited and relatively simple: situations where constitutional adjudica-

[37] TYLER, T. R.; LIND, E. Allan. Procedural Justice. *In*: SANDERS, J.; HAMILTON, V. L. (ed.). *Handbook of Justice Research in Law*. Springer, 2002. https://doi.org/10.1007/0-306-47379-8_3; TYLER, T. R.; LIND, E. Allan. *The Social Psychology of Procedural Justice*. Springer, 1988; and SCHNAUDT, C.; HAHN, C.; HEPPNER, E. Distributive and procedural justice and political trust in Europe. *Frontiers in Political Science*, v. 3, p. 642232, 2021. doi: 10.3389/fpos.2021.642232.

[38] AMAYA, A. The virtue of judicial humility. *Jurisprudence*, v. 9, n. 1, p. 97–107, 2017. https://doi.org/10.1080/20403313.2017.1352315. p. 9-10: "Judges who are humble and compassionate will have a distinct attitude –one of service- towards the exercise of the judicial function. Judicial humility also helps the project of building a fraternal society insofar as it fosters the virtue of service. [...] The judge in a fraternal democracy ought to exert authority, but in a manner of service rather than in a dictatorial way. Hence, the relevance of the virtue of service for the ideal of fraternity leads us to re-conceptualize the judge as the servant of people rather than as the servant of the law – as a 'servant-leader' rather than a 'remote figure of authority'. [...] In this paper, I have argued for an egalitarian approach to judicial humility according to which the humble judge is one who does not take himself to be superior to others on the grounds of his superior knowledge, social or professional status or other respects in which he might excel (and be better than) others (most importantly, the parties and other actors involved in the process). I have also argued that judicial humility is valuable in that it is instrumental to advancing the ideal of fraternity. Humility in judging contributes to fraternity insofar as it helps establish the egalitarian social relations which are, as argued, a constitutive condition of fraternity. In addition, humble judges are likely to possess the virtues of compassion and service, which are also critical to bringing about a fraternal community."

[39] HAMMAN, Evan. Culture, humility and the law: Towards a more transformative teaching framework. *Alternative Law Journal*, v. *42,* n. 2, p. 155-161, 2017: "Cultural competency has proven less effective than its proponents had envisioned. Disciplines outside of the law (social work, health and psychology) have turned to the more powerful theory of 'cultural humility' - a framework for lifelong learning and self-reflection. Cultural humility contends that one can never really 'master' another's culture, but that we ought to remain respectful and reflective in our approach."

[40] Intellectual humility has been associated to respect for precedents as well. See GENTITHES, M. Precedent, Humility, and Justice. *Tex. Wesleyan L. Rev.*, v. 18, p. 835, 2011.

[41] AMAYA, A. The virtue of judicial humility. *Jurisprudence*, v. 9, n. 1, p. 97–107, 2017. https://doi.org/10.1080/20403313.2017.1352315. p. 3: "Views of judicial humility as judicial restraint are, I would argue, very problematic."

tion needs to interact with non-legal knowledge outside the epistemic limits of judges and how intellectual humility can help address this phenomenon.

As mentioned, intellectual humility broadly recognizes our epistemic limitation (I do not know everything) and fallibility (I may be wrong even about what I think I know), including topics we consider ourselves experts. Still, its application is even more explicit regarding topics outside the individual's training. Intellectual humility should, therefore, lead judges to recognize their epistemic limits when confronted with assessments involving non-legal knowledge. However, this is not always the case.

3.2 Intellectual humility and constitutional adjudication

Humility is a sensitive topic for adjudication, as mentioned above, due to the exercise of authority. The statement that judges do not know everything about everything may seem obvious. Yet, constitutional law faces a specific temptation that needs to be identified and resisted. At least in theory, an environmental engineer does not imagine she can have a say on the safety of experimental medications, and a psychologist is clear that nutritional guidance for her patients depends on specialized knowledge from other professionals. Even within the same field of expertise – such as medicine, a familiar example to almost everyone – there are specialized professionals to whom problems are referred when general knowledge is insufficient.

Constitutional provisions, particularly when embedded in a transformative constitutionalism project as in Brazil, may regulate the most varied topics and aim to transform reality on various levels, from environmental issues to health (including medication, mental health, nutrition, sanitation, water, etc.), education, housing, economic development, among many other subjects. Constitutional law provides about these topics and aims to transform the reality surrounding them, but this does not mean that judges making decisions based on constitutional provisions become experts in all these subjects. There are many legal discussions about whether judges should decide based on general constitutional provisions and in what contexts, but these are not the subject of this paper. Assuming courts have decided to issue orders based on those constitutional provisions (rightly or not), they should be aware of the interaction with non-legal expertise these orders may require.

The temptation thus consists of imagining that because constitutional law regulates various topics, they become purely legal issues, ascribing judges in charge of implementing the norms with technical knowledge about these fields (or rendering unnecessary the use of tools and expertise from other areas). Constitutional provisions on the right to health make it a legal issue from many perspectives but the scientific part of it does not disappear, and courts do not attain non-legal expertise by enforcing legislation, nor even the Constitution. Constitutional adjudication, therefore, needs to deal with this inevitable limitation, and hence the importance of intellectual humility.

In sum, intellectual humility in constitutional adjudication involves acknowledging the limitations of courts and legal scholars' knowledge and recognizing when non-legal expertise is required. It means being open to learning from insights from other fields and seeking out such expertise to inform judicial decisions. How to seek out this expertise and organize this interdisciplinary dialogue is another question that needs scholarly work, but one comment can be made now.

3.3 A note on judicial deference and its limitations

As mentioned above, studies exploring the intersection of intellectual humility and law often emphasize judicial deference to decisions made by other political branches and agencies, whether for democratic reasons or due to the technical expertise of the responsible body. While the democratic reasons for deference are a separate discussion, from the perspective of the epistemic limits of courts, deference is one possible

model derived from intellectual humility, but it is not the only one. Intellectual humility offers a comprehensive perspective on the problem, from which various models can be developed, including, but not limited to, the deference one.

Judicial deference based on expertise applies only when courts review previous decisions. It provides little guidance when judges encounter what they consider an unconstitutional omission requiring intervention. Judicial deference does not address how courts should handle non-legal expertise in these situations.

Moreover, technical deference must incorporate intellectual humility when applied to experts in non-legal fields. Science should not be idealized or simplified into a yes-or-no question[42]. For instance, the Cancer Pill case illustrates the complexities involved in developing a new drug and assessing its safety. Additionally, science is a social enterprise with its own limitations and dynamics, rather than a solitary endeavor. From a legal perspective, understanding how expert conclusions are produced in various settings, both governmental and non-governmental, is crucial. Therefore, the legal framework used to incorporate expertise into constitutional adjudication, including but not limited to the deference model, should account for the inherent limitations and fallibility present in all fields.

4 Conclusion

In the realm of constitutional adjudication, the intersection of pursuing rights and constitutional objectives with non-legal expertise presents a significant challenge to the judiciary. Courts often find themselves stepping beyond their epistemic limits, inadvertently making determinations on issues requiring specialized knowledge from fields outside the law without recognizing it. In some cases, courts may be aware of the non-legal issues at stake but lack a legal framework to address them using sound criteria. This issue is especially prevalent in contexts of transformative constitutionalism, such as in Brazil.

The lack of interdisciplinary dialogue in these scenarios not only discredits the judiciary but also undermines the efficacy of its decisions. When courts issue rulings without adequately consulting experts, the intended outcomes of their orders are often frustrated. This disconnect between legal judgments and the complexities of non-legal issues highlights a critical need for the recognition of the epistemic boundaries of courts and legal scholarship.

Intellectual humility can help both courts and legal scholars acknowledge their limitations and seek necessary expertise beyond the legal domain. Embracing intellectual humility and fostering interdisciplinary engagement does not equate to judicial deference; rather, it offers a more comprehensive approach to addressing limitations and fallibility. Recognizing that science and other fields should not be idealized is crucial to this process.

However, intellectual humility alone is not sufficient. Courts need a structured legal framework to facilitate interdisciplinary dialogue, considering the various fields of non-legal expertise, the sources of expertise, and how they are produced. This framework should be a focal point for future legal scholarly research.

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