

THE JUDGE AS AN INDIRECT VICTIM IN CRIMINAL PROCEEDINGS AND THEIR POSSIBLE IMPEDIMENT TO ADJUDICATE: AN ANALYSIS OF IMPEDIMENT CLAIM NO. 165 OF THE FEDERAL SUPREME COURT OF BRAZIL

EL JUEZ COMO VÍCTIMA INDIRECTA EN LOS PROCEDIMIENTOS PENALES Y SU POSIBLE IMPEDIMENTO PARA DICTAR SENTENCIA: ANÁLISIS DE LA SOLICITUD DE IMPEDIMENTO N.º 165 DEL TRIBUNAL SUPREMO FEDERAL DE BRASIL

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Abstract: Recently, in Brazil, there has been constant questioning as to whether Justice Alexandre de Moraes, as a judge, could act in Petition No. 12 100, which is being processed before the Supreme Federal Court (STF). This case involves the possible crimes committed by former President Jair Bolsonaro and his colleagues in relation to an attempted coup d'état in 2022. In this context, the question covered in the article is the following: is it possible for the judge, as an indirect victim of a crime, to judge the case, or would he be prevented from doing so according to article 252, paragraph IV, of the Code of Criminal Procedure (CCP)? The objective of the article is to examine whether the judge, as an indirect victim, becomes directly interested in the resolution of the case

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or becomes a party to it, which would prevent him from judging it. To prepare the article, the deductive method and qualitative research were used, as well as some references from the main scholars who address the topic, such as Nucci (2014), Ferrajoli (2002) and Campos (2024).

Keywords: Impediment Action No. 165, “Green and Yellow Dagger” Plan, Coup d’état, Judge, Indirect victim.

Resumen: Recientemente, en Brasil, ha habido un constante cuestionamiento sobre si el ministro Alexandre de Moraes, en su calidad de juez, podría actuar en la Petición N° 12 100, que se tramita ante el Supremo Tribunal Federal. Este caso involucra los posibles delitos cometidos por el expresidente Jair Bolsonaro y sus colegas en relación con un intento de golpe de Estado en 2022. En este contexto, la pregunta que se cubre en el artículo es la siguiente: ¿es posible que el juez, como víctima indirecta de un delito, juzgue el caso, o estaría impedido de hacerlo según el artículo 252, párrafo IV, del Código de Procedimiento Penal? El objetivo del artículo es examinar si el juez, como víctima indirecta, tiene un interés directo en resolver el caso o se convierte en parte de este, lo que le impediría juzgarlo. Para la elaboración del artículo se utilizaron el método deductivo y la investigación cualitativa, así como algunas referencias de los principales estudiosos que abordan el tema, como Nucci (2014), Ferrajoli (2002) y Campos (2024).

Palabras clave: Acción de Impedimento No. 165, Plan “Daga Verde y Amarilla”, Golpe de Estado, Juez, Víctima indirecta.

Summary. I. Introduction. II. Due process of criminal law: initial considerations. III. The right to be judged by an impartial court: impediments and cases of suspicion. IV. Analysis of the regimental appeal in Impediment Claim No. 165 of the Federal District: the judge as an indirect victim of the criminal act. V. Conclusions. References

I. INTRODUCTION

According to article 252, section IV, of the Brazilian CCP, a judge is considered unable to adjudicate a case if there is an impediment to jurisdiction. Specifically, the provision establishes that a judge is impeded if he is a party to the case or has a direct interest in its resolution. Thus, both the rules on impediment (article 252) and suspicion (article 254) in the same Code aim to protect judicial impartiality, ensuring that possible subjective biases (personal convictions) do not interfere with the adjudication process. In addition to impartiality, the Code also seeks to safeguard fundamental procedural rights for all parties, such as adversarial proceedings and full defense, in accordance with the principle of due process in criminal law.

In the years following the COVID-19 pandemic in 2019, Brazil experienced significant political, social, and legal instability. One of the most striking events, both nationally and internationally, was the January 8, 2023, attacks at Praça dos Três Poderes in Brasília, when protesters vandalized public property. In response, the STF, in coordination with the Federal Police, adopted measures to prosecute those responsible. A central figure in this legal and political context was Minister Alexandre de Moraes.

In 2024, new allegations emerged regarding an alleged plan orchestrated by former President Jair Bolsonaro and his close associates to seize power, which reportedly included intentions to assassinate both Minister Moraes and President Lula. Following these revelations, an investigation was initiated, with Minister Moraes presiding over the testimony of Bolsonaro's confidant, Mauro

Cid. Cid confirmed the existence of the plan, known as “Green and Yellow Dagger”, and attributed roles to the individuals involved. After these developments, Bolsonaro’s defense team filed Impediment Claim No. 165, seeking to remove Minister Moraes from adjudicating the case.

Against this background, this article examines the following research question: can a judge, as an indirect victim of a crime, adjudicate the case, or would he be legally impeded under article 252, item IV, of the CCP? The central objective of this work is to determine whether a magistrate, by being an indirect victim, acquires a direct interest in the case’s resolution or becomes a party to it, thereby justifying disqualification from adjudication.

Alongside this main objective, the article also pursues specific objectives: first, to explain how the principle of due process of law can be understood from both an international perspective (as in debates surrounding the Nuremberg Tribunal) and a national (Brazilian) one; second, to analyze how the Brazilian CCP regulates judicial impediment in criminal proceedings; and, finally, to evaluate the main arguments raised in the judgment of the Impediment Claim that did not recognize Minister Alexandre de Moraes as impeded from ruling on the possible coup d’état case connected to the “Green and Yellow Dagger” Plan.

To achieve these objectives, the study adopts a deductive methodology, beginning with a general discussion of due process and judicial impartiality, followed by an in-depth analysis of the Impediment Claim and prevailing legal perspectives. A qualitative research approach is also applied, supported by the works of scholars such as Nucci (2014), Ferrajoli (2002), and Campos (2024).

The study concludes that there is no consensus on whether a judge, as an indirect victim, should be considered legally impeded from adjudicating under the CCP. While the STF, in its decision on the Impediment Claim, upheld Minister Moraes' impartiality to preside over the case, part of the legal doctrine –such as Campos (2024)– argued that Moraes' involvement, particularly as a target of surveillance and an assassination attempt, raised legitimate concerns about his impartiality.

II. DUE PROCESS OF CRIMINAL LAW: INITIAL CONSIDERATIONS

It was through article 5, item LIV, of the 1988 Federal Constitution that due process of law was established in Brazil. This guarantee is also supported by item LV of the same article¹. A careful reading of the Constitution shows that the ordinary legislator determined that due process of law, also regarded as a principle, functions as a procedural safeguard whenever an individual is deprived of liberty or property within Brazilian territory. In the same sense, the Constitution guarantees litigants, in judicial or administrative proceedings, as well as defendants in general, the observance of adversarial proceedings and full defense, in addition to access to appeals and measures necessary for the proper course of the process (Nucci, 2014).

On the importance of preserving this principle, Ferrajoli (2002) stated that “each of the deontic implications – or principles – that make up every model

¹ LIV. No one shall be deprived of their liberty or property without due process of law.

of criminal law therefore states [...] a legal guarantee for the affirmation of criminal liability and for the application of punishment” (p. 74).

The principle of due process ensures that the entire legal procedure operates as a guarantee for individuals who may be deprived of their liberty (in cases of criminal offenses) or property (as in compensation to the public treasury for administrative misconduct²). This demonstrates that due process is a fundamental right enshrined in the Constitution, serving as a safeguard for all individuals subject to restrictions on liberty by the state (Silva & Almeida, 2023). Importantly, the scope of due process extends beyond the judicial sphere to administrative cases, as highlighted in item LV of article 5.

In connection with due process, the legislator also incorporated the principles of adversarial proceedings and full defense. However, while guaranteeing these principles, the law limited their application to litigants in judicial or administrative proceedings and to defendants in general. Consequently, the legislator did not make their application mandatory in procedures that do not involve litigants or defendants. An example is the police investigation, a procedure for gathering evidence of authorship and materiality, concluded with the indictment by the police chief. This procedure does not involve litigants or defendants, since it is limited to the relationship between the state (investigator) and the investigated, who is only formally designated as such after the indictment by the police chief (Araujo, 2013). Additionally, Araujo (2013) emphasizes that:

² Process established in Law No. 8429/1992, which provides for the sanctions applicable due to the practice of acts of administrative impropriety, as referred to in §4 of article 37 of the Federal Constitution; and provides other measures.

In a police investigation, the technical defense is limited. Although the right to defense is expressly provided for in the Constitution, as I explained earlier, in practice, the way in which the police investigation is conducted leaves almost no room for the technical defense to act within it. Therefore, it is said that the technical defense in the pre-trial phase has an essentially exogenous role, through the exercise of habeas corpus and the writ of mandamus, which, ultimately, embody the exercise of the right to defense outside the police investigation. Within the investigation, there is basically only the possibility of requesting diligences, within the narrow limits of art. 14 of the CCP [...]. (p. 43)

Apart from this type of exception, the principles of adversarial proceedings and full defense are the rule in the current Brazilian system. Regarding the first, the law guarantees that there is equal production of evidence and counter-evidence by the parties during the proceedings. This is easy to see in criminal proceedings, where the prosecution (normally represented by the Public Prosecutor's Office and the Assistant Prosecutor) has the burden of proof to produce evidence that seeks the conviction of the defendant, that is, they have the responsibility to produce evidence and, in return, the defendant's defense has the purpose of producing counter-evidence, that is, evidence that disproves the evidence that was prepared by the Public Prosecutor's Office (Távora & Alencar, 2015). Given this scenario, Lopes Jr. (2019) teaches that:

[...] To establish the accusatory procedural system in line with the Constitution, keeping the initiative and management of evidence in the hands of the parties and avoiding judicial activism. The maximum

effectiveness of the *ne procedat iudex ex officio* is required to guarantee the impartiality of the judge and the adversarial system. (p. 123)

This can be seen in systems considered to be guarantors, which precisely delimit the functions of each party in the criminal process (prosecution and defense), leaving the judge (magistrate) in a position of spectator and appraiser of the evidence and counter-evidence to produce their conviction and subsequent judgment of the case (Távora & Alencar, 2015). Regarding this, Dos Santos (2023) goes so far as to defend the application of the so-called principle of fraternity in the criminal field (within this scenario of producing evidence and counter-evidence):

The application of the principle of fraternity is based on the assumption that, even in the face of differences in society, all individuals must act in mutual cooperation, aiming at community integration and through a duty of responsibility towards others, aiming at an inclusive agenda that encourages tolerance and eliminates discriminatory treatment. Ultimately, fraternity, as a legal category, aims to combat the selectivity that prevails in the criminal sphere. (p. 68)

In this area, in addition to the adversarial system, due process of law also includes a full defense. Also considered a principle, a full defense is the core that includes two central aspects within a due criminal legal process: self-defense, which is exercised by the individual during the process, its maximum expression being, for example, the interrogation of the defendant (where he defends himself directly against the facts that are being imputed by the state or the victim against him) and the technical defense that is carried out by the defendant's lawyer, the latter

being inalienable (that is, it is the defendant's right to defend himself within the process, however, the presence of the lawyer in the procedural acts is mandatory). That is why, currently, the defendant is not required to appear in court to provide his explanations or his version of the facts that are being imputed to him (and if he does not appear, there will be no legal penalty in this regard) (Lopes Jr, 2019).

However, due process is not only regarded as a fundamental guarantee within the domestic legal order but is also expressly recognized at the international level, being included in the main international instruments that constitute the global and regional human rights protection system. In this regard, Dos Santos (2023) stated: “The human rights protection system has evolved to such an extent that its effects have spread to domestic legal systems, which now include fundamental rights and guarantees to regulate life in society” (p. 111).

Concerning the global framework, the Universal Declaration of Human Rights (UDHR) of 1948 establishes in article 10³ that every individual has the right to be heard by an independent and impartial tribunal, which will decide on their rights and obligations in relation to the criminal charge brought against them.

In that sense, Streck (2014) described this scenario as a consequence of constitutionalism, which underpins the jurisdiction of magistrates and has

³ Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations and of any criminal charge against them.

gained significant relevance in recent times. According to the author, constitutionalism consolidates legal instruments (such as constitutions) to impose limits on state power.

Regarding the UDHR, Bonavides (2019) observed that it represented a “[...] convergence of desires and hopes, since it has been, since its promulgation, a kind of letter of manumission for the people who signed it, after the war of extermination of the 1930s and 1940s [...]” (pp. 588-589). In other words, it symbolized the determination of states to guarantee a minimum standard of human existence in order to prevent the recurrence of past atrocities, such as those committed during the Second World War.

From this perspective, the UDHR linked due process to the guarantee of a judge (magistrate) appointed to office prior to the criminal act (independent court) and who acts with impartiality. Habermas (1997) explained that this notion is connected to legal rationality, meaning that judicial impartiality derives from it. According to him, the judge’s decision must be directly based on law and justice, with rationality being legitimized by the latter. This reasoning aligns with the UDHR’s rejection of exceptional courts, which are established after the occurrence of the punishable act and may be formed by authorities regarded as biased under the law:

Furthermore, the impartial judge derives from the principle of the natural judge, despite being among the parties, he is not committed to any of them, while in neutrality he would be completely oblivious. With impartiality, one does not expect a judge who borders on perfection, a Herculean one, created by Dworkin. Therefore, as he himself points out,

one can only imitate Hercules to a certain extent. (Pelicho & Carvalho, 2022, p. 23133)

As an important legal note, considering the interaction between national and international legal systems, the 1988 Federal Constitution explicitly prohibits the establishment of such exceptional courts, as stated in article 5, item XXXVII⁴. Also in this section, one of the discussions that gained prominence on this topic of exceptional courts was the event called the “Nuremberg Tribunal”, which took place between 1945 and 1946, a court formed after the end of the Second World War (1939-1945) and aimed to punish the Germans (Nazis) responsible for the crimes committed during the war. Thus, looking at it from this perspective, one can question whether the Nuremberg Tribunal would be an exceptional court, since it was formed after the occurrence of the criminal events of the post-Second World War period (Reis & Hernandez, 2024):

Given these facts, it is clear that “victors’ justice” was established in Nuremberg, after all, other crimes against humanity committed by the victorious countries were left out of the agenda, under the justification that it was the exercise of self-defense. (p. 62)

⁴ XXXVII. There will be no exceptional court or tribunal.

Well, in addition to the provisions of article 10 of the UDHR, the Declaration also brings, throughout its article 11 (items 1⁵ and 2⁶), other issues that revolve around the core of the principle of due process of law: the presumption of innocence of the defendant until a final court decision is handed down (item 1), and that the individual subject to trial may only be punished for acts considered criminal at the time of their action (item 2). Therefore, it is noted that the international legislator was concerned with protecting due process of law, in its international conception, within these main points (guarantees): the existence of a court that existed prior to the criminal act, the existence of an impartial authority, the presumption of innocence until the final judgment by this authority, and the punishment only for acts considered criminal at the time of their practice by the individual (Gomes & Rêgo, 2022). Hereby:

The procedural dimension of due process can reasonably be conceptualized as the constitutional requirement that any deprivation of a person's life, liberty, or property by the state must be preceded by minimum guarantees. These guarantees comprise, in essence, the right to be notified (adversarial), the right to defend oneself (in the Anglo-American tradition, the “right to be heard”), and the right to an impartial adjudicator [...]. (Lordelo & Teixeira, 2022, p. 5)

⁵ 1. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which they have had all the guarantees necessary for their defence.

⁶ 2. No one shall be held guilty of any offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

On the other hand, when examining regional systems for the protection of human rights, it is notable how due process is addressed in the 1979 American Convention on Human Rights (ACHR). This international instrument contains extensive legal provisions establishing the requirements that state authorities must respect regarding due process when restricting the freedom of a person accused of a criminal act.

Article 7 of the Convention, for instance, prohibits the restriction of individual freedom outside the legally defined hypotheses (item 2⁷). It also establishes that, in the event of arrest, the person must be brought without delay before a competent state authority with jurisdictional powers (a magistrate), so that they may be tried within a reasonable period of time or released immediately (item 5⁸). On this point, Greco (2015) explained that concern for the formulation of the process and respect for its form reflects the legislator's intention to safeguard, through the national legal system, the most valuable assets of society. However, once criminal state protection is no longer necessary, and since criminal law only applies when other branches of law "fail", the state must step aside in favor of the individual.

In Brazil, this last provision became known for introducing the custody hearing as a mandatory stage of criminal prosecution. In such hearings, the

⁷ No one may be deprived of their physical liberty except for the reasons and under the conditions previously determined by the political constitutions of the state parties or by the laws enacted in accordance with them.

⁸ Everyone who is detained or arrested shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall have the right to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. Their release may be subject to guarantees ensuring their appearance for trial.

judge verifies the circumstances of the arrest and may either uphold imprisonment (after confirming the arrest in flagrante delicto) or grant release with or without precautionary measures, such as bail (Côrrea et al., 2023).

Furthermore, the ACHR guarantees the defendant's right to appeal decisions issued by a competent authority that may negatively affect them (item 6⁹); and, in addition to article 7, article 8 of the Convention ended up providing for the judicial guarantees inherent to due process. In this sense, item 1¹⁰ of article 8 determines that every person has the right to be heard in court, and to be tried by a competent, independent, impartial judge or tribunal previously constituted by law (once again, prohibiting the existence of exceptional courts).

In the same line, item 2¹¹ of this article also states that every person must be considered innocent until proven guilty by law. Through such negotiations, it can be seen that the legislator of the ACHR also linked the notion of due process to the concepts of a competent court or judge, previously invested in the role, independent and, of course, impartial. However, if the judge benefits from the law to reach the desired decision in the procedural progress, that is, if they decide first and then verify whether there is any legal article that supports

⁹ Everyone deprived of their liberty has the right to have recourse to a competent court or tribunal for a ruling without delay on the lawfulness of their arrest or detention and for their release if the arrest or detention is unlawful. In state parties whose laws provide that every person who is threatened with deprivation of their liberty has the right to have recourse to a competent court or tribunal for a ruling on the lawfulness of such threat, this recourse may not be restricted or abolished. The recourse may be lodged by the person himself or by another person.

¹⁰ Everyone has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or tribunal, previously established by law, in the investigation of any criminal charge made against them, or for the determination of their rights or obligations of a civil, labor, tax or any other nature.

¹¹ Everyone accused of a crime has the right to be presumed innocent until proven guilty according to law. During the trial, everyone has the right, in full equality, to the following minimum guarantees: [...].

their decision, this judge should not be considered impartial and bound by constitutional rules (Woiciechowski & Vidal, 2022).

According to this, it is evident that international legal frameworks, such as the UDHR and ACHR, have emphasized the importance of associating due process in criminal law with the presence of an impartial judicial authority:

The principle of the natural judge is a fundamental guarantee of procedural law, provided for in the Federal Constitution of Brazil and in several international human rights treaties. It ensures that no one will be prosecuted or sentenced except by the competent authority, previously established by law. This principle is crucial to guarantee impartiality, independence and legal certainty in judicial proceeding. (Xavier & Oliveira, 2024, p. 6)

In addition to the laws already mentioned, the Brazilian Federal Constitution itself adopts this line of reasoning, as stated in article 5, item XXXVII, which prohibits the creation of exceptional courts in national territory. However, it is the CCP that takes on the detailed legal responsibility of regulating the principle of impartiality. The CCP provides clear guidelines for determining whether a judicial authority is impartial or biased when issuing rulings in criminal proceedings, an essential element of due process. Without procedural form, there is no legal guarantee, and without legal guarantee, there is no due process in Brazil.

It is important to note, however, that although the guarantee of an impartial judgment is generally understood as protecting the judge's decision

from external pressures favoring one outcome over another in a specific case, Dworkin (2002) emphasized that judges often must deal not only with legal techniques and statutory requirements in rendering their decisions, but also with other factors, such as ethical considerations, that may influence their final judgment. This underscores the importance of the judge maintaining impartiality not only from a strictly legal perspective but also in relation to external factors that may affect the litigation process.

It is widely recognized that a judge must remain neutral, keeping an equal distance from the parties involved, and ensuring that impartiality is not compromised by external interests. Judicial decisions must be based exclusively on the evidence and counter-evidence presented by the prosecution and the defense, in accordance with the principle of adversarial proceedings. Since impartiality is a central element in understanding the issues addressed in this article, it is necessary to analyze it in detail and assess its legal significance within the Brazilian CCP.

III. THE RIGHT TO BE JUDGED BY AN IMPARTIAL COURT: IMPEDIMENTS AND CASES OF SUSPICION

At this stage, it becomes clear that impartiality constitutes a true cornerstone of both the national and international legal systems. The purpose of the law is to ensure that individuals are judged by a magistrate who is not influenced by his own subjective values to the extent that they “spill over” into his decisions during the judicial process.

In that sense, Dworkin (1999) further noted that judicial impartiality also functions as a safeguard in legal interpretation. The judge must interpret the law

in accordance with normative commands, treating the legal system as a coherent whole developed and issued by a single authority; in this case, the ordinary legislator.

In Brazil, impartiality is defined in article 5, item LII¹², of the 1988 Federal Constitution, a concept intrinsically linked to the principle of the natural judge (Bravim, 2023). Provisions guaranteeing that an individual is prosecuted and tried before an impartial and independent judicial authority, previously established by law, represent the fullest expression of this principle. The individual must be judged by the authority who already held jurisdiction to do so at the time of the alleged criminal offense (whether crime or misdemeanor).

According to Alexy (2008), the guarantee of judicial impartiality constitutes a negative norm within the state's jurisdiction, requiring the magistrate to refrain from acting in cases where partiality could violate a citizen's fundamental rights, a matter regulated by a positive norm. In this context, the two norms act as counterpoints, while simultaneously complementing each other in their respective applications.

This reasoning reflects the accusatory criminal system in Brazil, which, unlike the inquisitorial model and the doctrines of Criminal Law of the Enemy, establishes that individuals are punished only for what they do or fail to do (a criminally relevant act or omission), that is, for the fact itself (Neves, 2010):

Enemy criminal law is an expression that always sounds incoherent. In a war, the enemy is assured of almost nothing. Talking about law and

¹² LIII. No one shall be prosecuted or sentenced except by the competent authority.

adding the word enemy, therefore, sounds contradictory and should be a theoretical impossibility. And that is precisely how the expression was born. In a 1985 work by Günther Jakobs [...]. (Fabretti, 2020, p. 14)

Therefore, the principle of the natural judge is related to the practices of the accusatory system, which currently prevails in Brazil¹³. At first glance, it may seem simple to determine when a judge's impartiality is being questioned. However, this is not the case, since national courts have already ruled on complex issues that apparently raised doubts about whether a judge's impartiality was "contaminated" in deciding a case.

One such case concerned whether a judge associated with Freemasonry would be biased in his decision. According to article 36, paragraph II¹⁴ of Complementary Law No. 35/1979¹⁵, the Organic Law of the Judiciary (LOMAN), magistrates cannot hold a management or technical position in a civil society, foundation, or association, even if unpaid; a provision also found in article 95, sole paragraph, item II¹⁶ of the Federal Constitution of 1988.

Based on these provisions, the STF concluded that there would be no breach of impartiality by a judge associated with a Masonic lodge in Brazil (Writ of Mandamus No. 26,683/2021). Nevertheless, the decision was not

¹³ CCP - article 3.A. The criminal process will have an accusatory structure, prohibiting the judge's initiative in the investigation phase and the replacement of the evidentiary role of the prosecution body.

¹⁴ Article 36. The magistrate is prohibited from: [...] II. Holding a management or technical position in a civil society, association or foundation, of any nature or purpose, except for a class association, and without remuneration [...].

¹⁵ Provides for the Organic Law of the National Judiciary.

¹⁶ Article 95. Judges enjoy the following guarantees: [...] Sole paragraph. Judges are prohibited from: [...] II. Receiving, under any title or pretext, costs or participation in proceedings [...].

unanimous. Minister Marco Aurélio dissented, arguing that the magistrate's participation in Freemasonry constituted an express prohibition under LOMAN and the Federal Constitution, since judges are barred from holding any management or technical position in a civil society, foundation, or association, even if unpaid:

Since Freemasonry is an association focused –there is no doubt– on a healthy, philanthropic, progressive objective, its management –I refer to management, not membership– conflicts with the objective of the Charter of the Republic and the Organic Law of the Judiciary, the greater dedication of the judge to the art of proceeding and judging. It is one thing to join Freemasonry, quite another to assume a leadership position in a Masonic lodge. There is no clear and certain right to occupy the position, that is, the first condition of the writ of mandamus does not exist to grant the order. There is an interpretative maxim according to which exceptions must be interpreted strictly, not expansively. The Organic Law of the Judiciary prohibits leadership positions in associations, excepting only those that bring together the judiciary. I deny the order. (Writ of Mandamus No. 26 683/2021, p. 6)

In addition to this, LOMAN brings a series of legal restrictions on the actions of judges, always aiming to protect their impartiality in judging; some of these are: the prohibition of engaging in commercial activity as a majority

shareholder (article 36, item I¹⁷) and express themselves in any means of communication about a process pending judgment; making a derogatory judgment, except in cases of criticism in the records and in technical works or when acting as a teacher (article 36, item III¹⁸).

Still in this sense, another point of discussion involving the impartiality of magistrates –specifically Minister Alexandre de Moraes of the STF–, which gained the Brazilian legal scene, were the events that occurred on January 8, 2023, where supporters of the ideological current of former President Jair Bolsonaro (government between 2019-2022) carried out a series of protests within the Praça dos Três Poderes in Brasília (Mendes et al., 2024):

The attacks that took place on January 8, 2023, in Brasília, raised a series of journalistic questions, but one of the most relevant was the element of surprise given their unprecedented nature in Brazilian history. Despite the protesters' disagreement with the election result and groups across the country having been organizing for some time, no one could have guessed the gravity of what happened in the capital that day, a week after the inauguration of the new government. When the thousands of people began their march towards Praça dos Três Poderes, shortly after lunchtime, no one knew what was to come. (Portari et al., 2024, p. 05)

Such demonstrations ranged from graffiti on the Statue of Justice, with the iconic phrase “You lost, idiot” spoken by Minister Luís Roberto Barroso in

¹⁷ I. Engage in trade or participate in a commercial company, including a mixed economy company, except as a shareholder or quotaholder.

¹⁸ III. Express, by any means of communication, an opinion on a pending trial, whether one's own or someone else's, or a derogatory judgment on rulings, votes or sentences of judicial bodies, except for criticism in the records and in technical works or in the exercise of teaching.

New York in 2022 (Martins & Ribeiro, 2022), and even urinating and defecating in the Supreme Court room (Amado & Barretto, 2023). In that sense, it is clear that these were multiple manifestations of nonconformity from this part of the population with the then President of the Republic Luís Inácio Lula da Silva, who was taking office at the time in Brazilian territory.

Likewise, concerns regarding the potential bias of Minister Alexandre de Moraes arise due to the apparent disproportion in the sentences handed down to those involved in the events of January 8, 2023. For instance, the woman who spray-painted “You lost, idiot” on the Statue of Justice was sentenced to 14 years in a closed regime (Richter, 2025), while one of the protesters who stole a replica of the Federal Constitution that is on display at the STF ended up being sentenced to a 17-year prison term, as well as compensation for collective moral damages in the amount of R\$ 30 million (STF, 2025a):

The majority of those convicted –225– had their actions classified as serious. The sentences for these defendants range from three years to 17 years and six months in prison. They were convicted of five crimes: attempted abolition of the Democratic State of Law, coup d'état, aggravated damage, criminal association and damage to public property. Another 146 people were convicted of incitement and criminal association, considered simple crimes. They were not arrested but must wear an electronic ankle bracelet for one year, pay a fine, perform 225 hours of community service and participate in an in-person course on democracy. In addition, they are prohibited from using social media during this period and from traveling, even within Brazil, without

judicial authorization. Also, according to the report, five people were acquitted of the charges. (STF, 2025b, p. 1)

These examples and legal provisions highlight the ongoing debate over judicial impartiality, a matter of lasting concern for both legal professionals and society at large. In this regard, Bourdieu (1989) argued that jurisdiction represents a form of symbolic violence exercised by the state through an authority figure, namely, the magistrate. He also explained that legal discourses are already preconditioned.

It is through the CCP, in a complementary framework with LOMAN and the Federal Constitution of 1988, that the Brazilian legislator regulates the causes of impediment and suspension of judges in criminal proceedings. Thus, article 252¹⁹ of the CCP establishes situations of impediment, while article 254²⁰ provides the classification of the causes of suspicion of the judge.

¹⁹ Article 252. The judge may not exercise jurisdiction in proceedings in which: I. Their spouse or relative, by blood or marriage, in a direct or collateral line up to the third degree, inclusive, has worked as a defender or lawyer, a body of the Public Prosecutor's Office, police authority, judicial assistant or expert; II. They have performed any of these functions or served as a witness; III. They have served as a judge of another instance, ruling, in fact or in law, on the matter; and IV. They or their spouse or relative, by blood or marriage in a direct or collateral line up to the third degree, inclusive, is a party or directly interested in the case.

²⁰ Article 254. The judge shall be deemed suspicious, and if they do not do so, they may be refused by either party: I. If they are a close friend or a mortal enemy of any of them; II. If they, their spouse, ascendant or descendant, is responding to proceedings for a similar fact, the criminal nature of which is controversial; III. If they, their spouse, or relative, by blood or marriage, up to and including the third degree, supports a lawsuit or responds to proceedings that must be judged by either party; IV. If they have advised either party; V. If they are a creditor or debtor, guardian or curator, of either party; and VI. If they are a partner, shareholder or administrator of a company interested in the process.

In this context, it is important to note that the CCP distinguished between impediment and suspicion based on the degree of bias with which the judge is “contaminated” in deciding a case. Impediment refers to situations in which the magistrate cannot act as a judge under any circumstances, since impartiality is entirely compromised. Suspicion, on the other hand, requires the judge to recognize that he cannot adjudicate a specific case because his impartiality may be directly or indirectly affected. Furthermore, impediments must be recognized ex officio by the judge or at the request of the parties, as they concern matters of public order. Suspicion, in contrast, can be raised by the parties or acknowledged by the judge himself, who must then declare his own suspicion and refrain from judging the case (Meireles, 2019).

This distinction illustrates the extent to which a judge’s impartiality may be compromised and the consequences this has for his or her judgment: impediment constitutes a serious condition, while suspicion may also escalate into seriousness. For example, article 252 of the CCP provides as its first hypothesis of impediment a family relationship, whether by blood or affinity, between the judge and any of the parties, defense attorneys, or judicial assistants involved in the proceedings (item I). Another hypothesis, also classified as a cause of impediment, arises when the outcome of the proceedings directly or indirectly affects any of the judge’s relatives, whether in a direct line, collateral, consanguineous, or by affinity (item IV). A careful reading of the second and third hypotheses of suspicion (items II and III) shows that the CCP considered a judge suspect if he or a family member is responding to a criminal proceeding

involving a similar fact, or if any of them is supporting a lawsuit or will be judged by one of the parties in the case (Lajeado, 2017):

[...] The causes of impediment generate the objective incapacity of the judge, insofar as they are alluding to his relationship with the object of the dispute. The Code of Criminal Procedure (CCP), on the other hand, provides for the cases of impediment in art. 252 [...]. It is worth mentioning that such hypotheses are exhaustive, and neither analogy nor extensive interpretation of these circumstances is permitted. Furthermore, it is reiterated that such causes must be recognized *ex officio* by the judge or by the parties, through an exception of suspicion, as provided for in art. 112, of the Criminal Procedure Code. Suspicion, on the other hand, concerns the subjective incapacity of the judge [...]. (Lajeado, 2017, pp.79-80)

These two hypotheses indicate that a judge's impartiality may be compromised by his or her own circumstances. Thus, even if the judge is criminally liable in another case, when there is an analogous fact, they cannot act. The range of prohibitions arising from suspicion is therefore broader in relation to family ties than those arising from impediment. The CCP addressed this concern by emphasizing that family involvement constitutes a situation capable of contaminating a judge's impartiality.

Another hypothesis established in article 252, item II, of the CCP concerns impediment when the judge has performed some function in the case to be judged or has served as a witness to the facts under discussion. Similarly, item III of article 252 prohibits the judge from issuing a decision in a case in which he or she has already ruled at another level (Veiga et al., 2023, pp. 9-10).

A typical example would be a judge who ruled on the case at first instance, was later promoted to an appellate court, and, by distribution, received the same case, now to rule on the appeal of the decision previously issued.

In the same line, suspicion also protects judicial impartiality in cases involving: friendships or enmities (close friend or enemy, item I of article 254), advice given to one of the parties (item IV), financial or legal relationships such as creditor, debtor, guardian, or curator of the parties (item V), and participation as partner, administrator, or shareholder in a company with an interest in the judgment (item VI) (Batich, 2020).

Therefore, if a judge's conduct falls within any of these situations that compromise or raise doubts about impartiality, the judge must refrain from adjudicating. Otherwise, the result will be nullity (in cases of impediment) or voidability (in cases of suspicion) (Alencar, 2016, pp. 91-92).

Criticizing the concept of impartiality as defined in legal codes, Sousa (2022) argued that it is the magistrate who shapes the symbolic form of their judicial conduct. This plurality is conditioned by social reality and by the different interpretive styles that accompany such symbolization (pp. 218-219).

With these considerations, we return to the CCP. It is precisely through its provisions that the central question of this article arises: can a judge adjudicate a criminal case in which they are involved as an indirect victim of the facts under investigation?

IV. ANALYSIS OF THE REGIMENTAL APPEAL IN IMPEDIMENT CLAIM NO. 165 OF THE FEDERAL DISTRICT: THE JUDGE AS AN INDIRECT VICTIM OF THE CRIMINAL ACT

In 2024, the Brazilian population became aware of a possible coup d'état orchestrated by former President Jair Bolsonaro and his associates. This revelation came through an operation called "Counterattack", initiated by the Federal Police in 2022. The operation indicated the existence of a plan, known as "Green and Yellow Dagger", that aimed to seize power. Given the ongoing political and ideological conflicts in Brazil, this scenario appeared conducive to the establishment of a new form of government, as exemplified by the events of January 8, 2023.

According to media reports, two significant political figures were monitored in this context: the newly elected President of the Republic, Luiz Inácio Lula da Silva, and STF Justice Alexandre de Moraes. Beyond mere surveillance, Moraes was allegedly targeted for assassination by the group (Silvestre & Boechat, 2025). The investigation into these events included a statement from then-Lieutenant Colonel Mauro Cid, Bolsonaro's aide-de-camp, in which Moraes was mentioned approximately 12 times as a victim of the group (Silvestre & Boechat, 2025). In response, the Attorney General's Office (PGR) filed charges against former President Bolsonaro for several crimes:

[...] Armed criminal organization (art. 2, caput, §§ 2, 3, and 4, II, of Law No. 12 850/2013), attempted violent abolition of the Democratic Rule of Law (art. 359-L of the Penal Code), coup d'état (art. 359-M of the Penal Code), damage qualified by violence and serious threat against Union property, with considerable harm to the victim (art. 163, sole

paragraph, I, III, and IV, of the Penal Code), and deterioration of listed heritage (art. 62, I, of Law No. 9605/1998), observing the rules of complicity (art. 29, caput, of the Penal Code) and material concurrence (art. 69, caput, of the Penal Code). (Petition No. 12 100, 2024, p. 270)

However, the case was assigned to Justice Alexandre de Moraes, raising the question of whether an indirect victim –in this instance, the judge– could both oversee the investigation –such as in the plea bargain agreement with Mauro Cid– and preside over the criminal proceedings. Former STF Justice Marco Aurélio argued that Moraes should not participate in the case, as a victim cannot direct or judge the accused (Magellan, 2024).

Bolsonaro's defense, as noted by Patriolino (2025), contends that the PGR's complaint relies exclusively on Mauro Cid's testimony, without concrete evidence linking Bolsonaro to the alleged coup plot. The defense further argued that Moraes should be disqualified from the case, as he explicitly identified himself as a victim during the investigations (Impediment Claim No. 165, 2025).

Consequently, Impediment Claim No. 165 was filed with the STF, seeking Moraes' removal from the case. If the claim were granted, his prior actions in the proceedings would be nullified under articles²¹ and 564, item I²², of the CCP. Bolsonaro's defense maintained that Moraes had a direct interest in

²¹ Article 563. No act shall be declared null and void if the nullity does not result in prejudice to the prosecution or the defense.

²² Article 564. Nullity shall occur in the following cases: I. Due to incompetence, suspicion or bribery of the judge [...].

the outcome, given his repeated acknowledgment of his status as a victim during the investigation, placing his involvement under the prohibition in article 252, item IV, of the CCP (Impediment Claim No. 165, 2025). Nevertheless, the STF ruled that Moraes was not disqualified, noting that Bolsonaro's defense had failed to demonstrate specific grounds justifying the impediment (Impediment Claim No. 165, 2025). The Court stated:

In this case, the request should not be accepted. This is because there was no clear demonstration of any of the grounds justifying the impediment, which are expressly provided for in the governing legislation. (Impediment Claim No. 165, 2025, p. 4)

The Supreme Court further emphasized that judicial impediment and suspicion must be clearly and objectively substantiated to be recognized (Impediment Claim No. 165, 2025, p. 3). However, does this case not exemplify the concept of an "indirect victim"? While every crime has a direct victim, legal scholars such as Picoli (2022) suggest that victims can be categorized further:

[...] Which, in turn, is a broad genus encompassing the holder of the protected legal asset (passive subject), those who suffer harm without a right to reparation (injured party), and those who suffer harm with a right to reparation (injured party in the strict sense). (p. 14)

In that sense, there are simple criminal conducts, such as criminal offenses of threats (article 147, caput²³, of the CCP) and insult (article 140, caput²⁴, of the same legal diploma), for example, in which the victim will be the

²³ Article 147. Threatening someone, by word, writing or gesture, or any other symbolic means, with causing them unjust and serious harm: [...].

²⁴ Article 140. Insulting someone, offending their dignity or decorum: [...].

one who suffers the threat (gesture or word) or who has their subjective honor affected by some adjective. This way, these are direct victims of criminal conduct, since the objective is to direct the practice of the core of the type against them, that is, “threaten” and “injure” (Moura, 2024, p. 13).

Some crimes, such as threats (article 147 of the Penal Code) and insult (article 140), have clearly identifiable direct victims. Conversely, other offenses, including drug trafficking (article 33 of Law No. 11 343/06) and drunk driving (article 306 of the Brazilian Traffic Code), affect society as a whole, classifying them as crimes of abstract danger (Barbosa, 2019; Amorim, 2023). Therefore, it is noted that this extravagant legislation indicates that the victim of drug trafficking is society itself (public, collective health). In the same sense, the victim of someone who drives under the influence of alcohol is also society itself:

Abstract danger crimes, in turn, do not require the conduct to result in a situation of real danger, since this is absolutely presumed by the legislator in light of the mere practice of a certain conduct, considered dangerous, that is, the practice of conduct provided for in the criminal type generates a presumption *juris et de jure* (absolute). It does not matter whether damage or even concrete danger to the legal asset has been caused, it is enough that the conduct is dangerous in light of the legislator's discretion. (Campos, 2024, pp. 48-49)

However, the existence of the so-called “indirect victims” in the criminal context is discussed, since they can be understood as those who suffer the consequences of the crime in some way. Resolution No. 243/2021 of the

National Council of the Public Prosecutor's Office (CNMP) defines "indirect victims" as individuals with a de facto or familial relationship to the direct victim (Oliveira, 2022, p. 9). This is widely portrayed in the literature in cases of children who witness cases of domestic violence where the mother ends up suffering within the family or violence in large urban centers (Barboza, 2007).

This concept is often discussed in cases involving children who witness domestic violence. Although they are not the direct victims, they can experience long-term psychological consequences (Patias et al., 2014). Notably, the consequences of a crime are recognized as a relevant factor in the Penal Code itself, considered as a judicial circumstance during the first phase of sentencing (article 59, caput²⁵).

The principle of judicial impartiality is enshrined in the CCP. Article 252, item IV, establishes that a judge must be disqualified if they have a direct interest in the case. In the context of Impediment Claim No. 165, the argument is that Moraes, as a target of surveillance and an alleged assassination plot, could not remain fully impartial in adjudicating the case.

In the discussion of Impediment Claim No. 165, it was argued that the Minister could not participate in the case because he had been potentially monitored by the group, including a plot against his life. Campos (2024) links this issue to the events of January 8, noting that while Moraes' actions in

²⁵ Article 59. The judge, taking into account the guilt, antecedents, social conduct, personality of the agent, motives, circumstances and consequences of the crime, as well as the behavior of the victim, will establish, as necessary and sufficient for the disapproval and prevention of the crime: [...].

Operation Lesa Pátria were not politically motivated, concerns regarding his impartiality persist:

In summary, given the perspective from which this research focused on analyzing, political-partisan motivation was not demonstrated in Alexandre de Moraes' conduct in his role in Operation Lesa Pátria. However, it is essential to emphasize that it is unreasonable to state that Moraes is absolutely impartial. That is, despite the absence of this element that constitutes partiality –that is, political motivation– there may be other circumstances that denote a violation of the principle of impartiality. In other words, the lack of partisan motivation in the Minister's actions does not necessarily rule out, in itself, the possibility of an instrumentalization of the law to achieve a certain objective or the consideration of partial and/or authoritarian conduct, whether in Operation Lesa Pátria or in any other process that is linked to the extreme right, Jair Bolsonaro and his supporters. (pp. 49-50)

This indicates that the judge, despite not having been the direct victim of the crimes that are being discussed in the complaint filed by the PGR (criminal organization, violent attempt to abolish the Democratic Rule of Law and coup d'état), ended up suffering the consequences of these actions:

Minister André Mendonça was defeated. He believes that, although the crimes under investigation affect the whole of society, Minister Alexandre de Moraes would suffer, directly and immediately, serious and tangible consequences (such as imprisonment or even death) if the

plan were successful. This, in his view, makes him “directly interested”, configuring one of the requirements for impeachment. (STF, 2024, p. 1)

Therefore, there is no guarantee –like the son who witnesses the wife suffering domestic violence– that the judge will be completely impartial in their decisions; who does not want to punish those who tried to plan their death or, in some way, invaded their intimacy and privacy through constant monitoring? This is exactly the scenario that the aforementioned article 252, section IV, of the CCP fits into, considering that the judge becomes directly interested in the case, even if they are not a procedural party (or if understood as “party”: victim).

Despite this, there are those who understand that even though the Minister was also a target of the plan, he is completely impartial to judge the criminal action offered by the PGR, as it would not fall within the express prohibition in article 252, item IV of the CCP (Rodrigues, 2024). Nevertheless, others contend that Moraes remains impartial, as the crimes in question have society, not an individual, as their victim:

In his vote, Justice Barroso stated that the mere claim that Minister Alexandre de Moraes was a victim does not automatically disqualify him from serving as rapporteur, as the crimes in question have society as a whole as the passive subject. (STF, 2024, p. 2)

Therefore, the STF's ruling in this case establishes that a judge who suffers the consequences of a crime in cases of abstract danger is not necessarily disqualified from overseeing the proceedings.

V. CONCLUSION

At the end of this article, it is evident that, according to the Brazilian CCP, a judge who is an indirect victim of a criminal offense may be prevented from acting in the proceedings. This measure serves to safeguard the principles of due process, the natural judge, and, crucially, the impartiality of the magistrate when issuing a final judgment.

However, despite this provision in Brazilian law, the STF, in judging the Impediment Claim analyzed here, concluded that Minister Moraes was not an indirect victim of the offenses under discussion. Consequently, the Court determined that there was no impediment preventing him from remaining involved in the investigation or any resulting proceedings.

For the Brazilian Supreme Court, this implies that a magistrate may adjudicate a case even if mentioned as a target –but not a direct victim– of a criminal investigation, particularly when the crimes under investigation do not have specific individual victims, meaning the “victim” is society or the collective itself.

This demonstrates that, although the principle of due process serves as a guiding framework for interpreting criminal procedural rules in Brazil, it is closely tied to ensuring the natural judge and the impartiality of the magistrate. The Federal Constitution of 1988 emphasizes the importance of an impartial trial protected by minimum guarantees, such as adversarial proceedings and full defense, including the removal of a judge in cases of impediment or suspicion.

Accordingly, the CCP distinguishes between these two situations, giving prominence to impediment in cases where the judge is prohibited from acting. Recognition of such impediment may even be made *ex officio* by the judge. This way, the Code aims to protect the criminal process from potential nullities arising when a judge “contaminated” by bias –legally required to remain equidistant from the parties– issues a decision.

Therefore, the practical case analyzed here illustrates that these issues are not straightforward in the Brazilian context. Although the CCP does not explicitly prevent a judge who is an indirect victim of a criminal action from acting in the proceedings, allowing such participation raises doubts about the judge’s impartiality. In that sense, the Code seeks to prevent precisely this scenario, as the impartiality of the judge must not be questioned when issuing a decision. While the STF maintained that Minister Moraes was not a direct victim of the alleged criminal actions –since these crimes do not have specific individual victims, with society itself being the “victim”– he was nevertheless an indirect target of those involved, which calls his impartiality into question.

This approach of the STF has been repeated, as seen in cases related to the January 8 events in Brazil, where Minister Moraes also investigates the conduct of protesters, effectively shifting the protagonism of the criminal process from the parties to the magistrate. The judge, however, should not be the central figure in the criminal process. These examples indicate that the provisions of the CCP regarding judicial impediments are not being fully observed.

Given this scenario, it is essential for the STF to adhere to the law, which clearly stipulates that a judge cannot adjudicate or act in a case in which he is

involved as a direct or indirect victim, regardless of the nature of the crime. Therefore, Justice Alexandre de Moraes should not have acted in the case concerning the alleged attempted coup d'état and its related offenses, as he is an indirect victim of the criminal action, a situation explicitly addressed by the CCP.

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