PER RELATIONEM REASONS IN PRECAUTIONARY EVIDENTIARY MEASURES IN BRAZIL

A FUNDAMENTAÇÃO *PER RELATIONEM* NAS MEDIDAS CAUTELARES PROBATÓRIAS NO BRASIL

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Antonio Eduardo Ramires Santoro[1/2] *– https://orcid.org/0000-0003-4485-844X*

Abstract: *The primary objective of this article is to investigate the appropriate legal and theorical treatment of precautionary evidentiary measures, the nature of judicial decisions rendered in this context, as well as the scope of the requirements for providing reasons. The research problem to be addressed is: Can the use of the "per relationem" reasoning technique in judicial decisions rendered in the context of evidentiary precautionary measures in Brazil be considered valid in light of criminal procedural guarantees? The original hypothesis is that "per relationem" reasoning does not meet the constitutional requirement for the reasoning of any and all judicial decisions. An exploratory literature review was conducted regarding the approach to evidentiary precautionary measures and the requirement for reasoning in decisions, as well as a qualitative documentary study involving an analysis of judgments from Brazil's higher courts. It was concluded that, for reasoning per relationem not to violate the constitutional guarantee, specific requirements must be met for decisions rendered in the context of evidentiary precautionary measures.*

Keywords: *precautionary evidentiary measures; precautionary evidence; judicial decisions; reasoning in decisions; reasoning per relationem*

Resumo: *Este artigo tem por objetivo central investigar o adequado tratamento legal e dogmático dispensado às medidas cautelares probatórias, à natureza das decisões judiciais proferidas nesse âmbito, assim como a extensão das exigências de fundamentação. O problema de pesquisa a ser enfrentado é: a utilização da técnica de fundamentação per relationem das decisões judiciais proferidas no âmbito das medidas cautelares probatórias no Brasil pode ser considerada válida diante das garantias processuais penais? A hipótese original é que a fundamentação per relationem não atende à exigência constitucional de fundamentação de toda e qualquer decisão judicial. Realizou-se uma pesquisa bibliográfica de natureza exploratória quanto à abordagem das medidas cautelares probatórias e da exigência de fundamentação das decisões, bem como pesquisa documental, de natureza qualitativa, por análise de julgados dos tribunais superiores brasileiros. Concluiu-se que para que a fundamentação per relationem não viole a garantia constitucional é*

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[1] Postdoctoral fellow at the University of Coimbra; Postdoctoral fellow at the University of La Matanza; Ph.D. and M.A. from UFRJ; M.A. from the University of Granada; Associate Professor at UFRJ (PPGD); Full Professor at IBMEC/RJ; Professor at PPGD/UCP; Criminal Defense Attorney (UFRJ, Rio de Janeiro, Brazil, ZIP Code 20.211-340,antoniosantoro@antoniosantoro.com.br , https://orcid.org/0000-0003-4485-844X).

[2] Tradução realizada pelo autor, assistida por IA (Plataforma DeepL).

necessária a observância de requisitos específicos para as decisões proferidas no âmbito das medidas cautelares probatórias.

Palavras chaves: *medidas cautelares probatórias; provas cautelares; decisões judiciais; fundamentação das decisões; fundamentação per relationem*

Summary: *Introduction; 1. Precautionary evidentiary measures in the Brazilian legal system; 2. The requirement to provide reasons for decisions as a second-degree guarantee; 3. Requirements for a precautionary evidentiary decision to be sufficiently reasoned; 3.1. Justification of the facts; 3.2. Justification of the law; 3.3. The requirement for enhanced reasoning in decisions regarding precautionary evidentiary measures: legal aspects and standards established by the Inter-American Court of Human Rights; 4. The subversion of precautionary review through per relationem reasoning; Concluding remarks; References*

INTRODUCTION

A topic rarely addressed in Brazilian legal theory and research is the constitutional adequacy of *per relationem* reasoning in evidentiary precautionary measures.

In fact, despite their widespread use, precautionary evidentiary measures have given rise to little scholarly discussion regarding the proper regulation of so-called precautionary evidence.

As a result, the issue regarding the requirement for reasoning in judicial decisions rendered in the context of evidentiary injunctions ends up being addressed on a case-by-case basis, not only according to the type of evidentiary injunction but also according to the specific case itself.

It is high time to examine the appropriate legal and doctrinal treatment of evidentiary interim measures, their characteristics, their requirements, the nature of the judicial decisions rendered in this context, as well as the scope of the requirements for providing a rationale. This is the central objective of this article.

Consequently, the following specific issue will be addressed: Can the use of the *"per relationem"* reasoning technique in judicial decisions rendered in the context of evidentiary precautionary measures in Brazil be considered valid in light of criminal procedural guarantees?

The original hypothesis is that reasoning *per relationem* does not meet the constitutional requirement for a statement of reasons for any and all judicial decisions—a guarantee that must be reinforced in the case of decisions that restrict fundamental rights and/or enable the exercise of punitive power.

To answer this research question, an exploratory literature review will be conducted regarding the approach to evidentiary precautionary measures and the requirement for " " reasoning in decisions. Various Brazilian and international references will be used, with the central frameworks being the thought of Michele Taruffo, Antonio Magalhães Gomes Filho, and Stephen Toulmin, whose works will be cited as they are discussed in the text.

Regarding the procedure to be adopted concerning the conventional validity of the reasoning behind decisions rendered in evidentiary precautionary measures, a

documentary study will be conducted, consisting of an examination of the standards defined by the Inter-American Court of Human Rights in its ruling on the case of Escher v. Brazil, and, with regard to the validity of reasoning *per relationem*, a qualitative documentary study will be conducted by analyzing selected judgments from the higher courts (Supreme Federal Court and Superior Court of Justice) on the specific topics of the reasoning behind decisions and evidentiary interim measures, in comparison with the theoretical framework used in the bibliographic research.

1 EVIDENTIARY PRECAUTIONARY MEASURES IN THE BRAZILIAN LEGAL SYSTEM

The Brazilian legal system, particularly the Code of Criminal Procedure, does not grant special treatment to precautionary evidence. However, it classifies such evidence, along with non-repeatable and anticipatory evidence, as exceptional types of evidence[3] , at the end of Article 155.

This not only means that there is express authorization to consider certain information-gathering procedures during the investigative phase as evidence, but it is even possible to assert that this has become a common strategy for shifting the informational focus of the proceedings to the pre-trial phase[4] .

There is, however, no conceptual uniformity in the treatment of this topic; some view precautionary evidence as synonymous with means of obtaining evidence[5] , while others identify them as Special Investigation Techniques and classify these as means of evidence[6] or means of obtaining evidence[7] .

The fact is that Special Investigation Techniques (TEI) are not evidence[8] ; however, since there is an express provision for them to be admitted into the

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3 SANTORO, Antonio Eduardo Ramires and MACHADO, Rodrigo, "Dogmatic Reflections on the Use of Information Obtained During the Investigative Phase: the conceptual problem of exceptional evidence," *in* SANTORO, Antonio Eduardo Ramires Santoro, MALAN, Diogo Rudge, and MIRZA, Flavio (eds.), *Challenging 80 Years of Authoritarian Criminal Procedure*, 1st ed., Belo Horizonte, D'Plácido, 2021, pp. 91–92.

4 SANTORO, Antonio Eduardo Ramires, "The Interplay Between Maxi-Trials and Plea Bargaining: The Shift of the Focus of Evidence to the Investigative Phase in Operation Car Wash," *Brazilian Journal of Criminal Procedural Law*, vol. 6, no. 1, Jan.–Apr. 2020, pp. 81–116.

5 GOMES FILHO, Antonio Magalhães, BADARÓ, Gustavo Henrique Righi Ivahy, "Evidence and Substitutes for Evidence in Brazilian Criminal Proceedings," *Brazilian Journal of Criminal Sciences*, São Paulo, vol. 15, no. 65, Mar.–Apr. 2007, pp. 180 and NICOLITTI, André, *Manual of Criminal Procedure*, 10th ed., Belo Horizonte, D'Plácido, 2020, pp. 1022.

6 LEMOS, Bruno Espiñeira, and QUINTIERE, Víctor Minervino, *Special Investigation Techniques in Criminal Proceedings*, Belo Horizonte, D'Plácido, 2017, p. 26.

7 GOMES, Luiz Flávio and SILVA, Marcelo Rodrigues da, *Criminal Organizations and Special Investigation Techniques: Controversial Issues, Theoretical and Practical Aspects, and an Analysis of Law No. 12,850/2013*, Salvador, Juspodivm, 2015, pp. 193; BORGES FILHO, Adalberto Lima, "Special Investigative Techniques in the Law on Criminal Organizations," *Revista Direito Diário*, 4th ed., Fortaleza, vol. 1, no. 1, Apr.–Jun. 2019, pp. 15.

8 According to SANTORO and GONÇALVES, "there is an intrinsic relationship, stemming from the power of Special Investigative Techniques (TIE), that enables them to become means of obtaining evidence"

proceedings as evidence, they may be considered as such. TEI are techniques covered by the Palermo and Mérida Conventions and encompass "covert police activity, of a confidential or even secret nature, carried out for the purpose of obtaining intelligence regarding the activities of suspects and/or collecting evidence"[9] .

On the other hand, the means or measures for obtaining evidence are extra-procedural evidentiary activities, based on surprise[10] , also called covert methods[11] , without the participation of the defense and without direct cross-examination, which may serve to obtain sources or elements of evidence.

Preliminary evidence must be understood within the scope of preliminary measures. In criminal proceedings, there is no "preliminary proceeding," but rather preliminary measures, which can be classified as personal, evidentiary, or property-related[12] . Preliminary measures may be ordered during the investigation or during the trial. In the first case, they are called preparatory measures, and in the second, incidental measures. In all cases, precautionary measures must have their own specific characteristics and requirements.

The requirements for precautionary measures are generally presented in traditional legal doctrine as *fumus boni juris* and *periculum in mora*[13] . It is common in criminal procedure to question the appropriateness of these terms, substituting them with *fumus commissi delicti* and *periculum libertatis*. However, while it is admissible that, with regard to personal precautionary measures—particularly pretrial detention—the term *periculum libertatis* is more appropriate than *periculum in mora*, the same cannot be said for evidentiary precautionary measures.

It would be better, as Santoro and Gonçalves propose[14] , to understand that the requirements for any evidentiary precautionary measure are the "need for an

(SANTORO, Antonio Eduardo Ramires and MACHADO, Rodrigo, "Dogmatic Reflections on the Use of Information Obtained During the Investigative Phase: the conceptual problem of exceptional evidence," *in* SANTORO, Antonio Eduardo Ramires Santoro, MALAN, Diogo Rudge, and MIRZA, Flavio, eds., *Challenging 80 Years of Authoritarian Criminal Procedure*, 1st ed., Belo Horizonte, D'Plácido, 2021, vol. 1, pp. 96.)

9 SINTRA, António, "Special Techniques of Criminal Investigation: A Security Factor," *Política Internacional e Segurança*, no. 4, 2010, pp. 176.

10 TONINI, Paolo, *Evidence in Italian Criminal Proceedings*, Translated by Alexandra Martins and Daniela Mróz, São Paulo, Revista dos Tribunais, 2002, pp. 242. For Badaró, surprise is not essential (BADARÓ, Gustavo, "Circumstances Authorizing the Use of Exceptional Means of Obtaining Evidence," *in* AMBOS, Kai and ROMERO, Eneas, eds., *Organized Crime: Analysis of Law 12.850/2013*, São Paulo, Marcial Pons, 2017, pp. 19).

11 PRADO, Geraldo, *Criminal Evidence and Epistemic Control Systems: The Breach of the Chain of Custody of Evidence Obtained by Covert Methods*, São Paulo, Marcial Pons, 2014, pp. 62.

12 ROSA, Alexandre Morais da, *Guide to Criminal Procedure According to Game Theory*, 6th ed., Florianópolis, EMais, 2020, p. 421.

13 GOMES FILHO, Antonio Magalhães, *The Motivation Behind Criminal Decisions*, 2nd ed., São Paulo, RT, 2013, p. 182.

14 SANTORO, Antonio Eduardo Ramires and MACHADO, Rodrigo, "Dogmatic Reflections on the Use of Information Obtained During the Investigative Phase: the conceptual problem of exceptional evidence," *in*

evidentiary measure" (rather than *fumus boni juris* or *fumus commissi delicti*) and "risk of loss of evidence" (rather than *periculum in mora* or *periculum libertatis*).

The "necessity of an evidentiary measure" would consist of (1) certainty of the crime (which we will refer to here as materiality), (2) probability (which we will refer to as circumstantial evidence) of perpetration or participation, and (3) the relevance of the measure to the intended purpose. The "risk of loss of evidence," on the other hand, would consist alternatively of (1) the risk of losing the source of evidence due to the passage of time or (2) the risk of losing the source of evidence because the person under investigation has prior knowledge of the investigation.

Among the basic characteristics of precautionary measures are jurisdictionality, exceptionality, instrumentality, provisionality, legality, specificity, and adversarial nature.

Since not every Special Investigative Technique has a legal basis—a characteristic of legality—and not every means of obtaining evidence requires a judicial decision—a characteristic of jurisdictionality (for example, the controlled operation provided for in Article 8 of Law No. 12,850/2013, which requires only notification to the judge)—it is not appropriate to assert that both are precautionary evidence.

Preliminary evidence, therefore, requires judicial oversight through a decision issued by the competent judge[15] , which may be (1) authorizing, when a prior decision is required before executing the preliminary evidentiary measure (e.g., search and seizure), or (2) ratifying, when the measure may be executed, but depends on judicial ratification to be valid (e.g., plea bargaining[16]) or (3) renewal orders, in cases where a decision is required for the evidentiary measure to be renewed periodically (e.g., telephone wiretapping beginning with the second interception period).

Whether the decision is authorizing, ratifying, or renewing, adequate reasoning is a fundamental requirement.

SANTORO, Antonio Eduardo Ramires Santoro, MALAN, Diogo Rudge, and MIRZA, Flavio, eds., *Challenging 80 Years of Authoritarian Criminal Procedure*, 1st ed., Belo Horizonte, D'Plácido, 2021, vol. 1, p. 100.

[15] In this case, that role is fulfilled by the judge overseeing procedural safeguards during the investigation (preliminary evidentiary measures), as provided for in Article 3-B of the Code of Criminal Procedure, which was deemed constitutional in the rulings on ADIs 6298, 6299, 6300, and 6305, and must be implemented within the deadline set by the STF (12 months, extendable for an additional 12 months) or by the judge competent to hear the case in accordance with the rules governing jurisdiction in the case of incidental evidentiary precautionary measures.

[16] Although they do not assert that this constitutes precautionary evidence, Coutinho and Santos view it as a Special Investigative Technique, a legal transaction, and a means of obtaining evidence (COUTINHO, Luiz Augusto Reis de Azevedo, and SANTOS, Rafael Oliveira, "Plea Bargaining as an Instrument for Facilitating Access to Justice." *Consinter International Law Review*, Paraná, Brazil, vol. 8, no. 14, 2022, pp. 231–249)

2 THE REQUIREMENT TO PROVIDE REASONS FOR DECISIONS AS A GUARANTEE OF THE RIGHT TO AN APPEAL

The first Brazilian Constitution to expressly and broadly impose the duty to provide reasons for decisions was that of 1988. Previous constitutions, although they occasionally provided for the duty to state reasons, did not extend it generally to all decisions[17].

The need to provide reasons for judicial decisions is, more than a requirement inherent to the democratic rule of law, a fundamental right of citizens[18] . The requirement to provide reasons constitutes a choice made by the framers of the Constitution aimed at preventing arbitrary judgments and, thus, safeguarding the democratic rule of law.

In their commentary on Article 93, IX of the Federal Constitution, Lenio Luiz Streck and Gilmar Ferreira Mendes argue that this constitutional provision is more than a requirement inherent to the democratic rule of law; it constitutes a true fundamental right of citizens.

They emphasize that providing a rationale does not merely mean explaining the basis of the decision, but rather consists of justification through legal reasons and arguments. Once this requirement is met, according to the authors, we are "protected" from arbitrary judgments.

The constitutional requirement that all judicial and administrative decisions be supported by reasoning becomes a fundamental right, since by stating that the judge must explain the reasons for rendering a particular decision, the Constitution guarantees the right to *accountability*, as opposed to *the* corresponding *duty* to render an account[19]. In short, the reasoning is the justification for deciding one way or another. It is a prerequisite for the legitimacy of the decision[20].

For Gomes Filho, the political function of the requirement to provide reasoning for judicial decisions is to serve as a guarantee[21]. The reviewability of judicial decisions is, for the jurist, a specific value of the law, insofar as "the law is certain if decisions are reviewable" and "it is precisely this reviewability that is made possible by the reasoning"[22] .

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17 Art. 179, VIII, Constitution of 1824; art. 72, §16, Constitution of 1891; art. 113, §35, Constitution of 1934; Art. 122, 11), 1937 Constitution; Art. 141, §25, 1946 Constitution; Art. 150, §15, 1967 Constitution.

18 STRECK, Lenio Luiz, "Commentary on Article 93, IX." *In* CANOTILHO, José Joaquim Gomes; MENDES, Gilmar Ferreira; SARLET, Ingo W. Wolfgang, *Commentaries on the Constitution of Brazil*, São Paulo, Saraiva/Almedina, 2013, p. 1071.

19 STRECK, Lenio Luiz, "Commentary on Article 93, IX." *In* CANOTILHO, José Joaquim Gomes; MENDES, Gilmar Ferreira; SARLET, Ingo W. Wolfgang, *Commentaries on the Brazilian Constitution*, São Paulo, Saraiva/Almedina, 2013, p. 1,324.

20 STRECK, Lenio Luiz, "Commentary on Article 93, IX." *In* CANOTILHO, José Joaquim Gomes; MENDES, Gilmar Ferreira; SARLET, Ingo W. Wolfgang, *Commentaries on the Brazilian Constitution*, São Paulo, Saraiva/Almedina, 2013, p. 1,325.

21 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 70.

22 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 74–75.

Badaró argues that a judge may act differently when aware that he or she must justify the assessment of evidence, which is why "without the need to justify his or her choices, the act of adjudication becomes unaccountable"[23] .

When referring to the duty to provide reasoning as a procedural guarantee, Gomes Filho emphasizes that this requirement, with regard to decisions of a criminal nature, forms an integral part of and completes an entire system of guarantees, the strict observance of which is a condition for the legitimacy of any punitive measure under the rule of law[24] .

The reasoning serves a dual function—intra-procedural and extra-procedural—and is not limited to the parties to the proceedings but extends to society as a whole. The extra-procedural function ensures oversight of how the judiciary operates, guaranteeing that "confidence in judicial protection is strengthened—an invaluable factor in the rule of law, social cohesion, and the strength of institutions"[25] .

According to Ferrajoli, in order to enable the oversight of these guarantees, a second set of instrumental or secondary guarantees—referred to as second-degree guarantees or "guarantees of the guarantees"—is necessary[26] . The reasoning behind judicial decisions is the ultimate second-degree procedural guarantee, "which serves as a safeguard for the integrity of the system"[27] .

Therefore, the guarantees afforded to citizens before the adjudicating State—such as impartiality and the right to adversarial proceedings—which are related to evidentiary precautionary measures and also directly pertain to judicial action and the individual's participation, are safeguarded by the ultimate guarantee of guarantees: the reasoning behind judicial decisions.

As Barbosa Moreira rightly points out, the requirement for reasoning is justified because it provides "elements for *a concrete* assessment of the judge's impartiality"[28] and ensures respect for the adversarial process, since it verifies compliance with "the right of the parties to be heard and to have the issues they have raised examined by the adjudicating body."[29]

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23 BADARÓ, Gustavo, *Judicial Epistemology and Evidentiary Contexts*, São Paulo, Thomson Reuters, 2019, p. 265.

24 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, p. 82.

25 MOREIRA, José Carlos Barbosa, "The Reasoning Behind Judicial Decisions as a Guarantee Inherent to the Rule of Law," in MOREIRA, José Carlos Barbosa, ed., *Topics in Procedural Law*, Vol. 2, 2nd ed., São Paulo, Saraiva, 1988, p. 90.

26 FERRAJOLI, Luigi, *Law and Reason: Theory of Criminal Guarantees*, 4th ed., São Paulo, RT, 2014. Trans. Ana Paula Zomer Sica, Fauzi Hassan Choukr, Juarez Tavares, and Luiz Flávio Gomes, pp. 567.

27 FERRAJOLI, Luigi, *Law and Reason: Theory of Criminal Guarantees*, 4th ed., São Paulo, RT, 2014. Trans. Ana Paula Zomer Sica, Fauzi Hassan Choukr, Juarez Tavares, and Luiz Flávio Gomes, pp. 573.

28 MOREIRA, José Carlos Barbosa, "The Rationale Behind Judicial Decisions as a Guarantee Inherent to the Rule of Law," in MOREIRA, José Carlos Barbosa, ed., *Topics in Procedural Law*, Series 2, 2nd ed., São Paulo, Saraiva, 1988, p. 87.

29 MOREIRA, José Carlos Barbosa, "The Reasoning Behind Judicial Decisions as an Inherent Guarantee of the Rule of Law," in MOREIRA, José Carlos Barbosa, ed., *Topics in Procedural Law*, Series 2, 2nd ed., São Paulo, Saraiva, 1988, p. 88.

More specifically, according to Gomes Filho[30] , the absence of reasoning constitutes a violation of the adversarial process, the effectiveness of which can only be assessed if decisions are duly reasoned; after all, "it would serve no purpose to grant the parties that broad and complex set of prerogatives, powers, and rights (...) if the actions actually taken could be disregarded by the judge at the time of the decision."[31]

3 REQUIREMENTS FOR A PROVISIONAL EVIDENTIARY DECISION TO BE SUFFICIENTLY REASONED

The discussion of the requirements for a decision rendered in the context of a provisional evidentiary measure (authorizing, ratifying, or renewing) to be sufficiently reasoned must address theoretical, legal, and jurisprudential aspects alike.

We will begin with the theoretical approach.

"To provide grounds" is an ambiguous expression that can mean either expressing the reasons or justifying them—that is, presenting reasons that justify the decision. According to Ferrer Beltrán[32] , the former relates to psychological conceptions of motivation, while the latter relates to rationalist conceptions.

In this sense, it is essential to highlight the distinction that Gomes Filho makes between the context of discovery and the context of justification, with the true motivation lying in the latter. To this end, he explains:

> *(...) the distinction made by logical and scientific methodology between the context of discovery and the context of justification has often been invoked: the former refers to the procedure that leads to presenting the solution to a problem, while the latter aims to demonstrate the validity of that same solution.*[33]

With regard to judicial activity, the legal scholar clarifies that the judge's reasoning, in a first stage, focuses on choosing among alternatives to find the best solution to the case—which he calls the "decision"—and then turns to "selecting and articulating the best reasons that can be used to justify the decision made (motivation)"[34] .

Taruffo makes it clear that "speaking of the justificatory structure of the reasoning means referring not to the logical-psychological process through which

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30 GOMES FILHO, Antonio Magalhães, *The Reasoning Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 85.

31 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 84.

32 FERRER BELTRÁN, Jordi, **Motivation and Rationality of Evidence**, Lima, Grijley, 2016, p. 25.

33 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 93.

34 GOMES FILHO, Antonio Magalhães, *The Reasoning Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 93.

the reasons for the decision are identified and formulated"[35] . For the Italian jurist, the contexts of decision-making and justification differ not only in terms of their structure but also from a phenomenological standpoint: "the former is an activity and the latter a discourse"[36] .

The justification must exhibit both internal and external coherence. Internal coherence refers to the logical relationship among the constituent elements of the justification, such that the conclusions are derived from the premises, but it does not require that the premises themselves be correct. It is with regard to external coherence that the justification of the premises themselves will be verified, not least because it is known that "an argument can be logically valid even if some or all of its premises are false"[37] .

As for the structure of the reasoning, it is common to speak of factual grounds and legal grounds to designate the requirements for the reasoning behind a decision[38] . Taruffo, however, proposes a structure of reasoning at a first level, relating to the logical structure of the decision, and at a second level, relating to the justification of each statement individually.

Thus, for Taruffo, in very general terms, the first level consists of stating: (1) the facts of the case (H) imply the applicability of a certain rule (N); (2) the rules identified as applicable (N) imply the existence of certain facts (H). If both links exist, there will be a coincidence between the abstract situation and the concrete situation. This implies the legal characterization (C1) of the verified facts in accordance with the norms declared to be applicable. The legal characterization of the concrete factual situation implies the effects of the qualifying norm and, therefore, leads to the conclusion (C2).

This can be summarized as follows:

$$\rightleftarrows \quad H \longrightarrow N \longrightarrow C1 \qquad C2$$

There can be a high degree of complexity when several issues are linked by a relationship of prior judgment—logical dependence—in which the resolution of one issue is capable of determining the resolution of another that follows it logically. Therefore, there can be logically dependent issues and logically autonomous issues.

On a second level, for the system of logical relationships among the propositions to be considered justified, each proposition—H, N, C1, and C2—must be justified based on rational premises. This means that it is up to the judge to justify the choices made to arrive at the premises from which the decision is derived.

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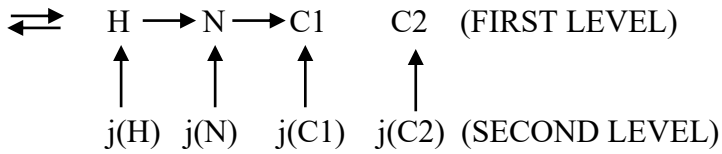
35 TARUFFO, Michelle, *The Reasoning Behind Civil Judgments*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, pp. 203.

36 TARUFFO, Michelle, *The Rationale Behind Civil Judgments*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, pp. 204.

37 FERRER BELTRÁN, Jordi, **Motivation and Rationality of Evidence**, Lima, Grijley, 2016, pp. 33.

38 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 108 et seq.

Thus, the argument must be structured on two levels, where the first level concerns the logical structure and the second level concerns the individualized justification for the choice of premises, which can be represented by the following diagram:



Taruffo explains the meaning of each element of the second level of justification as follows:

> *j(H) indicates the justification for the verification of the facts; j(N) indicates the justification for the choice of the applicable rule and its interpretation; j(C1) indicates the justification for the legal characterization of H according to N, and has independent significance insofar as, as we have seen previously, subsumption also involves independent choices; j(C2), finally, indicates the justification for the decision regarding the legal effect inherent in the specific factual situation.*[39]

To determine whether a justification will be considered rational, two distinct meanings must be considered: first, it will be considered rationally justified when its argumentation meets the requirements of coherence and logic, thus relating to the structural and formal aspect of the discourse[40] ; on the other hand, material rationality exists when the choices align with the values accepted in the sociopolitical environment in which it operates[41] .

Here, it is important to distinguish rationality from the justification of facts and law.

3.1 The Justification of Facts

First, it should be emphasized that in the context of precautionary measures—especially preparatory ones—which occur during the investigative phase, "invariably (...) the decision will be based solely on a theory of the case

[39] TARUFFO, Michelle, *The Rationale of Civil Judgments*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, p. 245.

[40] According to Taruffo, this reasoning can take three forms: logical (based on a structure of inferences), quasi-logical (based on a hermeneutic canon, which in turn may be theoretical-scientific, teleological, or value-based), or rhetorical-persuasive (which relates to the choice of the value that determines the assessment), all of which are interchangeable. TARUFFO, Michelle, *La motivación de la sentencia civil*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, pp. 249–256.

[41] TARUFFO, Michelle, *La motivación de la sentencia civil*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, p. 249.

constructed during the investigation"[42] , which requires a heightened standard of reasoning to ensure that the judge did not previously and uncritically accept the prosecution's version of events.

To address the justification of the facts, it is essential to acknowledge that the judge must have developed a line of evidentiary reasoning that involves the facts to be proven, the available information, and a connection between the fact to be proven and the evidence. This reasoning is what González Lagier calls evidentiary inference[43].

For this purpose, we will adopt Toulmin's *layout*, which provides us with a complex framework involving an important context of argumentation that is very useful for considering inferences in judicial proceedings.

Toulmin, in asking what is involved in the process of drawing conclusions through the construction of an argument, presents the following framework (*layout*): when presenting the *claim* or conclusion (C), one presents the data (D), understood as facts that support the claim.

This conclusion can be challenged with the question "What do you have to go on?", which suggests a need to provide new data, or the challenge may be of the type "How did you get there?", which suggests the need for a justification to make the leap from the data (D) to the conclusion (C). In this case, Toulmin continues[44] , we do not need to present new data, but rather propositions—such as rules, principles, and rules of inference—that demonstrate it is appropriate and legitimate to move from the data (D) to the conclusion (C).

At this point, what is needed are general, hypothetical statements that serve as a bridge and authorize the leap. Toulmin calls these propositions warrants (W), which are, therefore, distinct from the data (D). Some warrants may be self-authenticating (if a strand of hair is red, then it is not black) or not (anyone who is Swedish is not Roman Catholic). In the first case, presenting the data that João's hair is red allows us to conclude that João's hair is not black, since the warrant that if a strand of hair is red, then it is not black, is self-authenticating. In the second case, presenting the fact that Petersen is Swedish does not allow us to conclude that he is not Roman Catholic, because the warrant that anyone who is Swedish is not Roman Catholic is not self-authenticating[45] .

For Toulmin, as is clear, data (D) and warrants (W) are distinct. Furthermore, he explains: "Data are invoked explicitly; warrants, implicitly"[46].

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42 AZEVEDO, Paulo Bueno de, "Case Theory as a Method for Justifying Criminal Judicial Decisions," *Revista Internacional Consinter de Direito*, Paraná, Brazil, vol. 8, no. 15, 2022, p. 408.

43 GONZÁLEZ LAGIER, Daniel, "Facts and Concepts: On the Relevance of Concepts to the Proof of Facts," *in* GONZÁLEZ LAGIER, Daniel, ed., *Quaestio facti: Essays on Evidence, Causality, and Action*, Mexico, Fontamara, 2013, pp. 75–85.

44 TOULMIN, Stephen, *The Uses of Arguments*, São Paulo, Martins Fontes, 2001. Trans. Ronaldo Guarany, p. 141.

45 TOULMIN, Stephen, **The Uses of Arguments**, São Paulo, Martins Fontes, 2001. Trans. Ronaldo Guarany, p. 142.

46 TOULMIN, Stephen, *The Uses of Arguments*, São Paulo, Martins Fontes, 2001. Trans. Ronaldo Guarany, p. 143.

Toulmin goes on to explain that there are various types of warrants that "can confer different degrees of strength on the conclusions they justify"[47] . Some warrants compel one to accept the conclusion unequivocally; others do so in such a way that the step between the data (D) and the conclusion (C) can be represented by the expression "necessarily." Depending on the lesser strength of the warrant, it may be necessary to introduce a modal qualifier (Q) in addition to the data (D), the conclusion (C), and the warrant (W), such that the adverb connecting the data (D) to the conclusion (C) can be expressed as "presumably," "probably," or "possibly."

In this line of reasoning discussed by Toulmin, another element can be added: the condition of exception or refutation (R) of the warrant (W)[48] .

Toulmin's example is as follows[49] : it is claimed that "Harry is a British subject" (C), and the fact that "Harry was born in Bermuda" (D) is presented as a warrant for the general claim that "a man born in Bermuda will, in general, be British" (W), as provided by the British Nationality Acts. However, the argument is not conclusive unless information is added regarding his ancestry and the possibility that he may have changed his nationality. Therefore, the modal qualifier in this case is "presumably" (Q), provided that Harry's parents are not foreign nationals (R1) and he has not adopted U.S. citizenship (R2).

It is not difficult to see that, alongside the claim, something has been introduced that Toulmin calls "backing"[50] . In other words, it is possible that the claim presented could be challenged. In this case, behind this claim there will be other supporting elements without which the claims would lack authority or validity. In the example above, when the warrant "a man born in Bermuda will, in general, be British" (W) was presented, it was immediately backed by the support "as provided by the British Nationality Acts" (B), which served as the basis for the warrant.

The determination of the facts as proven must be based on the presentation of the various pieces of evidence (Ds) available, which lead to the conclusion (C) based on the warrant (W) and the support (B), in accordance with Toulmin's framework for evidentiary reasoning. It is the judge's responsibility to present each of the elements (D, C, W, and B) in a logical and coherent manner (formal aspect), as well as to justify their choices (substantive aspect).

From a substantive perspective, it is the judge's task to justify each and every choice, but especially the warrant (W) and the backing (B) that allow one to move from the data (D) to the conclusion (C).

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47 TOULMIN, Stephen, *The Uses of Arguments*, São Paulo, Martins Fontes, 2001. Trans. Ronaldo Guarany, p. 144.

48 TOULMIN, Stephen, *The Uses of Arguments*, São Paulo, Martins Fontes, 2001. Trans. Ronaldo Guarany, p. 145.

49 TOULMIN, Stephen, *The Uses of Arguments*, São Paulo, Martins Fontes, 2001. Trans. Ronaldo Guarany, pp. 145–146.

50 TOULMIN, Stephen, *The Uses of Arguments*, São Paulo, Martins Fontes, 2001. Trans. Ronaldo Guarany, p. 148.

Referring to the situations that Taruffo calls *"backing* of *the* warranty" (present in Toulmin's model, which Taruffo also uses), it is possible to understand that if the warranty is scientific in nature, its verifiability is linked to its validation within the relevant scientific field[51] .

If the warrant is one of high statistical probability, although it does not present itself as a deductive certainty, there is a practical certainty that can be statistically verified and is therefore also subject to verification.

If the warranty is a maxim of experience (*background knowledge*), Taruffo asserts that its selection is hardly justifiable on logical grounds, but is linked to a topical rationale, consisting of a widespread consensus (common sense) regarding what the maxim asserts[52] .

However, if we are dealing with a spurious generalization[53] , although it is up to the judge to present it as *the basis* for *the warranty*, the fact is that the judge is unlikely to do so, as the use of prejudices and stereotypes to move from the facts to the conclusion can only be scrutinized if they are explicitly set forth by the judge in his or her reasoning; it is not even feasible to extract hidden reasons (also called "real reasons") inferred from the reasoning[54] .

While it is true that hidden reasons cannot be extracted, it is also true that the decision can be reviewed based on the requirement to state the reasons justifying the decision; thus, the failure to state reasons or the statement of reasons that do not justify the decision (whether from a formal, logical, or substantive perspective) are subject to review.

3.2 The Justification of Law

With regard to the justification of the law, it is the judge's duty to define the applicable rule and justify that choice, not only in terms of its validity in relation to constitutional and treaty provisions, but also with respect to the rule's suitability for the specific situation. It is the judge's task to exclude norms that conflict with the Constitution or with international conventions and treaties on the protection of human rights, and only then to determine their applicability.

Once the norm's validity and applicability to the specific case have been established, the norm must be interpreted, and meaning must be ascribed to the

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51 TARUFFO, Michelle, *The Rationale for Civil Judgments*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, p. 247.

52 TARUFFO, Michelle, *The Rationale for Civil Judgments*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, pp. 247.

53 Also known as pseudo-rules that have no basis in empirical reality. These are situations that express prejudices (based on race, gender, religion, or any other factor) and stereotypes ("hysterical woman," "corrupt police officer," "Black robber," "Latino drug dealer," "unfaithful husband," etc.), often self-imposed, which lead to a narrative fallacy that will only have persuasive power for an audience that shares the same prejudices.

54 TARUFFO, Michelle, *La motivación de la sentencia civil*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, p. 239.

normative text. Here, various modalities (authentic, doctrinal, and operative or jurisprudential), methods (grammatical, logical, historical, systematic, and teleological), and scopes of interpretation (literal, restrictive, and extensive) apply; however, an in-depth examination of these is beyond the scope of this work. It is important, however, to recognize the need for the judge to interpret the law in accordance with the Constitution and international conventions and treaties on the protection of human rights, since no rule of interpretation that is open to doubt may conflict with the principles and guarantees of the citizen. It is the judge's duty to "offer good reasons to support their choices"[55] .

As for the law, it is still possible to identify another fundamental aspect of proper reasoning, which is the identification of binding precedents (such as judicial precedents and legal theses on matters of general repercussion) and decision-making standards applicable to the case.

Unlike the deductive procedure characteristic of judicial syllogism—which consists of applying the rule to the facts—the establishment of binding precedents and decision-making standards is "fact-driven," not rule-driven, and stems from the legislature's use of open-ended or evaluative expressions (normative elements), to which the judge must assign meaning. In other words, based on undefined legal criteria, their application is assessed in light of the circumstances of the specific case[56] .

However, once the precedent or standard has been defined by the higher courts, it is up to the judge to apply a syllogistic reasoning process in relation to the established decision-making standard.

Therefore, and finally, it is the judge's responsibility to identify and justify the occurrence of the facts, as well as to indicate and justify the application of the precedent or standard to the specific case.

3.3 The Requirement For Enhanced Rationale in Decisions Regarding EVIDENTIARY Precautionary Measures: Legal Aspects and Standards Defined by the Inter-American Court of Human Rights

In a judicial decision regarding an evidentiary precautionary measure, it is the judge's responsibility to indicate the occurrence of the facts that fall under the legal provision establishing the requirements for granting, confirming, or renewing the request for evidentiary precautionary measures.

Keep in mind that in the context of a precautionary evidentiary measure, it is the judge's responsibility to identify the occurrence of proven facts that meet the respective requirements.

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55 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 116.

56 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 116.

The requirements for any precautionary evidence are: (1) the "necessity of the evidentiary measure" (understood as certainty of the crime, probability of perpetration, and the relevance of the evidentiary measure to the intended purpose) and (2) the "risk of loss of evidence" (understood as the risk of losing the source of evidence due to the passage of time or because the person under investigation has prior knowledge, based on factual information that is new or contemporary to the time of the decision).

As for the infra-constitutional legal requirements for the reasoning behind evidentiary precautionary measures, one must consider Article 315 of the Code of Criminal Procedure, as amended by Law No. 13,964/2019, which, although located in the chapter on pretrial detention, is applicable beyond that specific context.

Paragraph 1 of Article 315 of the Code of Criminal Procedure establishes specific requirements for the reasoning behind all decisions rendered in the context of precautionary measures, which consequently includes precautionary measures for the collection of evidence. It is therefore necessary to specifically indicate new or contemporaneous facts that justify the measure. Thus, with regard to the factual grounds, not only must the judge indicate and justify the concrete evidence supporting the established facts, but these facts must also be new or contemporaneous to the decision.

The same Article 315 of the Code of Criminal Procedure establishes in its paragraph 2 the negative requirements for any decision (here including even judgments), namely, what the decision cannot contain, under penalty of being deemed unfounded: (1) limiting itself to citing, reproducing, or paraphrasing a normative act, without explaining its relationship to the case or the issue; (2) employ indeterminate legal concepts without explaining the specific reason for their application to the case; (3) invoking grounds that could serve to justify any decision; (4) failing to address all arguments raised in the proceedings (which need not be by the opposing party, which has not yet intervened in the context of the wiretap) capable, in theory, of refuting the conclusion adopted by the judge; (5) merely citing a precedent or a summary ruling without identifying its decisive grounds or demonstrating that the case under review aligns with those grounds; and (6) failing to follow a summary ruling, case law, or precedent cited by a party without demonstrating the existence of a distinction in the case under review or that the established understanding has been superseded.

Furthermore, the Inter-American Court of Human Rights established important standards in its judgment in *the Case of Escher et al. v. Brazil*. The case concerned the interception of telephone communications—that is, an evidentiary precautionary measure that requires an authorizing decision and renewal orders. Therefore, it is incumbent upon us to set forth what these requirements are.

The Inter-American Court of Human Rights held that in the Escher Case there was a violation of the duty to provide a reasoned decision because the rulings granting the requests for telephone interception "did not set forth what constituted reasonable grounds for authorship or participation," "the means that would be

employed to carry out the requested interception," "the facts under investigation," "nor did they demonstrate that the means employed was the only viable way to obtain the evidence."

It is not difficult to see that the Inter-American Court of Human Rights held that the requirement of the "necessity of the evidentiary measure"[57] had not been justified, both with regard to the likelihood of perpetration and with regard to the relevance of the evidentiary measure in relation to the intended purpose; nor did it adequately justify the evidentiary reasoning regarding the facts.

Furthermore, the Court recognized that in decisions affecting human rights, the reasoning serves as a safeguard against arbitrary decisions, which "must set forth, through rational argumentation, the grounds on which they are based, taking into account the allegations and the body of evidence submitted to the case file." This does not mean that the response to the requests must be detailed; however, in proceedings where, due to their legal nature, the opposing party is not heard, the reasoning must "demonstrate that all legal requirements and other elements justifying the granting or denial of the measure were weighed."

There is, therefore, as Geraldo Prado rightly observes, a heightened duty to provide a rationale for the preliminary injunction decision[58] . This heightened requirement is grounded not only in the requirements set forth above—from a theoretical, legal, jurisprudential, and doctrinal perspective—but also because, in preliminary injunctions involving evidence: (1) there is a direct impact on fundamental rights and (2) the opposing party does not participate due to the nature of the measure; thus, the absence of prior adversarial proceedings in a measure that directly affects fundamental rights requires enhanced oversight, which is achieved through the requirement to provide grounds for decisions.

4 THE UNDERMINING OF PRECAUTIONARY OVERSIGHT BY "*PER RELATIONEM*" RATIONALE

A common practice in evidentiary preliminary injunction decisions in Brazil is the so-called "reasoning *per relationem"*[59] or *"ad relationem"*[60] .

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[57] Which, in the view of Santoro and Gonçalves, replaces the requirement of *fumus commissi delicti* (SANTORO, Antonio Eduardo Ramires, and MACHADO, Rodrigo, "Dogmatic Reflections on the Use of Evidence Obtained During the Investigative Phase: the conceptual problem of exceptional evidence," *in* SANTORO, Antonio Eduardo Ramires Santoro, MALAN, Diogo Rudge, and MIRZA, Flavio, eds., *Challenging 80 Years of Authoritarian Criminal Procedure*, 1st ed., Belo Horizonte, D'Plácido, 2021, vol. 1, pp. 100)

[58] PRADO, Geraldo, "The Duty to Provide Enhanced Rationale for Decisions Regarding Criminal Precautionary Measures," *in* PEREIRA, Flávio Cardoso (ed.), *Truth and Evidence in Criminal Procedure: Studies in Honor of Professor Michele Taruffo*, Brasília, Gazeta Jurídica, 2016, pp. 136.

[59] TARUFFO, Michelle, *The Reasoning Behind Civil Judgments*, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, pp. 365.

[60] GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 163.

Taruffo explains that decisions grounded *per relationem* are characterized by the judge's failure to provide an "autonomous ad hoc justification"[61] , which occurs in two scenarios: (1) when the appellate judge adopts the reasoning of the decision rendered by the trial judge that was challenged before him; (2) when the judge refers to a justification contained in a separate judgment or, more generally, to the case law on the matter.

In Brazil, these scenarios outlined by Taruffo do not exhaust the phenomenon of reasoning *by reference*. Especially in the context of evidentiary interim injunctions—whether authorizing, ratifying, or, even more clearly, renewing— and thus in the context of wiretapping, it is very common for the judge to adopt as grounds for his decision either (1) those presented by the petitioner (typically the Public Prosecutor's Office in its petition, but not infrequently the police authority in its report or submission) or (2) those he himself used to justify a previous decision (a special case involving renewal decisions).

There is a settled understanding among the higher courts to accept reasoning *by reference (per relationem)* in cases involving decisions authorizing precautionary evidentiary measures, when the reasoning merely refers to previous decisions, the opinion of the Public Prosecutor's Office, or the police authority's report.

The Federal Supreme Court even went so far as to acknowledge that decisions to renew wiretaps add nothing new to the original decision, as noted in the ruling on HC 84.869, with Justice Sepúlveda Pertence serving as the reporting judge, in 2005:

> *Decisions that, as in the present case, authorize the extension of a wiretap without adding new grounds demonstrate that such extension was authorized based on the same reasoning set forth in the initial decision granting the wiretap. Since the petitioner does not challenge the reasoning behind the decision that authorized the telephone monitoring, his objection to the decisions that merely extended the wiretaps cannot be upheld. In any event, the challenged decisions relate to the respective requests to extend the telephone wiretaps, which ultimately constitute the reasoning for such decisions, in what is commonly referred to as "reasoning by reference"*

The Superior Court of Justice establishes a single condition for a decision whose reasoning refers to other acts not to be deemed null and void: that the judge also provide his or her own reasoning, even if succinct (see, among others, AgRg nos EDcl no AREsp No. 1.800.259/MS, reporting Justice Laurita Vaz, Sixth Panel, decided on May 24, 2022, DJe of May 31, 2022).

The STJ states that "decisions that extend orders waiving confidentiality do not have the power to validate the original defects" and that in cases where the judge merely "adds the names of the new parties added to the petition, without even stating the reason for their inclusion" (HC No. 535.414/PE, Reporting Justice Rogerio Schietti Cruz, Sixth Panel, decided on February 8, 2022, DJe of February 21, 2022), there is a defect in the reasoning.

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[61] TARUFFO, Michelle, **The Rationale for Civil Judgments**, Mexico, Federal Electoral Tribunal, 2006. Trans. Lorenzo Córdova Vianello, pp. 365.

Although the issue of reasoning *per relationem* was raised during the adjudication of RE 625.263 on March 16 and 17, 2022—which gave rise to Thesis on a Matter of General Repercussion No. 661[62] regarding the specific case of wiretapping—there was no more in-depth examination of the issue[63] .

Three Justices mentioned this phenomenon in their opinions.

The first of them, in chronological order, was Justice Edson Fachin. His opinion identified a point of convergence between the opinion of the reporting Justice, Justice Gilmar Mendes, and the dissenting opinion issued by Justice Alexandre de Moraes: the possibility of extending the telephone wiretap order an indefinite number of times. The disagreement centered on the level of justification required for extension decisions. For Fachin, the legal argument presented by Justice Gilmar Mendes demanded a detailed justification, which would preclude a *per relationem* justification.

And this was precisely why Justice Edson Fachin did not endorse the argument proposed by Justice Gilmar Mendes, going so far as to state that reasoning *"per relationem"* was fully accepted by the Supreme Federal Court's case law, citing HC 170.762—a case he himself presided over as reporting justice and which was decided in 2019— to assert that if the legal grounds that led to the authorization of the wiretap persist, it is legitimate to maintain the measure (and, consequently, the " " reasoning *by reference*), requiring only "that the decision demonstrate that new evidence has been gathered."

Immediately following Justice Fachin, Justice Rosa Weber addressed the same issue in her opinion, making clear her understanding regarding the possibility that "if the initial authorization is adequately substantiated, nothing prevents, in my view, the extensions from being justified succinctly, including through *per relationem* reasoning." The Justice did not even make an express requirement regarding the submission of new evidence.

Finally, Justice Carmem Lúcia refers to the observation regarding the core of the divergence pointed out by Justice Fachin as being directly related to the issue of *per relationem* reasoning, which, according to her, "was not previously addressed" and ultimately does not directly address this possibility, although she cites landmark decisions that permit such a technique of justification.

What can be observed, therefore, is that the STF and the STJ have been accepting *per relationem* reasoning as valid.

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62 The Thesis in General Repercussion Topic 661 reads as follows: "Successive renewals of telephone wiretaps are lawful, provided that the requirements of Article 2 of Law No. 9,296/1996 are met and the necessity of the measure is demonstrated based on concrete evidence and the complexity of the investigation, the initial judicial decision and the extensions are duly substantiated, with legitimate justification—even if succinct—to support the continuation of the investigations. Standardized justifications or reproductions of generic templates unrelated to the specific case are unlawful."

63 SANTORO, Antonio Eduardo Ramires, *Telephone Interception in a Democratic Criminal Proceeding*, Deerfield Beach, Pembroke Collins, 2023, pp. 335.

Unfortunately, even though the technique of reasoning *per relationem* is accepted—which ultimately constitutes a violation of the "essential function of ensuring effective and adequate judicial review of the matter decided"[64] —the minimum conditions for deeming it valid have not been established.

Gomes Filho points to the need for four requirements for reasoning *by reference* to be deemed sufficient: (1) there must be a connection regarding the subject matter of the decisions; (2) there must be consistency regarding the depth of the analysis conducted in both decisions; (3) both decisions must originate from a judge or judges who participated in the deliberation, under penalty of illegitimacy; and (4) it is only possible to refer to a prior text, never to a decision that has yet to be rendered[65].

This still does not seem sufficient to us.

It is necessary to require the provision of grounds to justify why the reasoning of a specific prior decision serves as the basis for the new decision that adopts it *per relationem*. This argumentative effort must be new and original to the judge who issues the new decision.

That is not all. With specific regard to decisions renewing evidentiary precautionary measures—particularly those related to wiretapping—two specific requirements must be met: (1) it is *a conditio sine qua non* to cite the evidence obtained in the period immediately preceding the decision that justifies a new period of restriction on fundamental rights; and (2) the decision must explicitly state the reasons why a new period of restriction on those fundamental rights may contribute to the criminal investigation.

Regarding the first of these requirements, it should be noted that the STF, in its ruling on RE 625.263, held that it was not necessary for any results to have been obtained during the previous period; therefore, this requirement was set aside. However, this position conflicts with the STF's own understanding that each decision renewing the period of telephone interception constitutes a "new order" (Inq 2.424, STF). If it is a new order, there must be specific grounds for it.

Furthermore, if we accept the argument that the STF cannot limit the number of extensions where the law has not set a limit—an argument used as the premise for the ruling on RE 625.263 and Thesis 661—we must conclude that an extension of more than fifteen days cannot be permitted either, since the law has set that limit. This constitutes a direct link to the law[66], with even greater justification in the second case, which limits the infringement of citizens' fundamental rights.

Thus, if it were possible for a single decision authorizing telephone interception for fifteen days to serve, *by extension (per relationem*), without any new information, as the basis for other decisions renewing the lifting of telephone

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64 GOMES FILHO, Antonio Magalhães, *The Justification of Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 164.

65 GOMES FILHO, Antonio Magalhães, *The Rationale Behind Criminal Decisions*, 2nd ed., São Paulo, Revista dos Tribunais, 2013, pp. 164–166.

66 Art. 5 of Law No. 9,296/96.

confidentiality, ultimately a single decision would be authorizing the interception of communications for 30, 45, 60, or more days, since what characterizes the oversight of the restriction on a fundamental right is not merely the judge's signature and a new date, but the content of the judge's justification.

If the justification were repeated, *per relationem*, the legal limit of fifteen days for the period of telephone interception would be violated.

It is essential that, to the extent that the STF has placed control over the impact on fundamental rights involved in evidentiary precautionary measures on the reasoning behind each decision, the issue of the admissibility of reasoning *per relationem* be reexamined by establishing precise and consistent validity criteria. These criteria are: (1) reasoning *by reference* to another judicial decision may only be admissible to the extent that allowing the arguments of a non-judicial body (Public Prosecutor's Office, police authority, or defense) to serve as the basis for a decision would imply a violation of jurisdictional authority, a characteristic of decisions rendered in the context of evidentiary precautionary measures; (2) there must be a connection regarding the subject matter of the rulings; (3) there must be consistency regarding the depth of the review conducted in both rulings; (4) both rulings must originate from a judge or judges who participated in the deliberation, under penalty of illegitimacy; (5) it is only possible to refer to a prior text, never to a decision that has yet to be rendered; (6) a judge who adopts reasoning *by reference* must also provide his or her own reasoning, even if succinct; (7) in the case of a renewal decision, it is *a conditio sine qua non* to refer to the information obtained in the period immediately preceding the decision that justifies a new period of restriction on fundamental rights; and (8) also in the case of a renewal decision, to explicitly state the reasons why a new period of restriction on the aforementioned fundamental rights may contribute to the criminal investigation.

If the above requirements are not met, a decision authorizing, ratifying, or renewing a precautionary evidentiary measure must be considered insufficiently substantiated.

CONCLUDING REMARKS

In conclusion, we must directly address the central question posed in the introduction to this paper: Can the use of the *"per relationem"* reasoning technique in judicial decisions rendered in the context of evidentiary precautionary measures in Brazil be considered valid in light of criminal procedural guarantees?

It is not exactly possible to assert that the original hypothesis has been confirmed. This is because to claim that reasoning *per relationem* fails to meet the constitutional requirement for the reasoning of any and all judicial decisions implies, first of all, ignoring the reality observed in Brazil, including with the express endorsement of the Federal Supreme Court. Second, to assert that—even in the context of open criticism of the majority position of our higher courts—any and all decisions grounded *per relationem* are inadmissible would be far too radical.

What has been established—and what is proposed as a well-founded response based on the research presented above—is that the reasoning behind decisions rendered in the context of evidentiary injunctions must be more robust, given the greater risk of compromising fundamental rights.

However, this does not preclude the use of the *per relationem* technique, provided that in any decision regarding evidentiary injunctions (whether authorizing, ratifying, or renewing) (1) it refers to a judicial decision, not to an argument put forward by someone who does not hold the position of a judicial body with decision-making powers; (2) there is a connection between the rulings; (3) there is identity of subject matter between the two rulings; (4) the rulings originate from judges who participated in the deliberation; (5) the decision referred to is not one to be rendered, but one that already exists; (6) the court provides its own reasoning, even if succinct. Furthermore, if the decision is a renewal: (1) it must refer to evidence obtained during the most recent period prior to the renewal, and (2) it must explicitly state the reasons why a new period may contribute to the investigation.

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