# BETWEEN EMANCIPATION AND PROTECTION: THE LIMITS OF AUTONOMY FOR VULNERABLE GROUPS FROM A TRANSFORMATIVE CONSTITUTIONAL PERSPECTIVE

# ENTRE A EMANCIPAÇÃO E A PROTEÇÃO, OS LIMITES DA AUTONOMIA DOS VULNERÁVEIS NA PERSPECTIVA CONSTITUCIONAL TRANSFORMADORA

# ENTRE LA EMANCIPACIÓN Y LA PROTECCIÓN: LOS LÍMITES DE LA AUTONOMÍA PARA LOS GRUPOS VULNERABLES DESDE UNA PERSPECTIVA CONSTITUCIONAL TRANSFORMADORA

https://doi.org/10.56238/sevened2026.019-055

**José Carlos Ferreira Magalhães[1], Raquel Fabiana Lopes Sparemberger[2]**


## ABSTRACT

This article analyzes the tensions between autonomy and the protection of vulnerable subjects, especially children, adolescents, young people, the elderly, and people with disabilities, in light of transformative constitutionalism. Starting from human dignity and Fineman's theory of vulnerability, it examines the normative shaping of civil capacity after the Convention on the Rights of Persons with Disabilities, the Statute of Persons with Disabilities, and the 2015 Code of Civil Procedure. Empirical data from the National Council of Justice (CNJ) and decisions of the Superior Court of Justice (STJ) reveal the gap between the normative promise and the reality. It argues for the need for structural criteria to effectively balance autonomy, guardianship, and supported decision-making, avoiding both paternalism and abandonment.


**Keywords:** Constitutional Vulnerability. Autonomy. Transformative Constitutionalism. Legal Framework.


## RESUMO

O artigo analisa as tensões entre autonomia e proteção de sujeitos vulneráveis, especialmente de crianças, adolescentes, jovens, idosos e pessoas com deficiência, à luz do constitucionalismo transformador. Partindo da dignidade humana e da teoria da vulnerabilidade de Fineman, examina-se a conformação normativa da capacidade civil após a Convenção da Pessoa com Deficiência, o Estatuto da Pessoa com Deficiência e o Código de Processo Civil de 2015. Dados empíricos do CNJ e decisões do STJ revelam a distância entre a promessa normativa e a sala de máquinas. Defende-se a necessidade de critérios estruturais para equilibrar efetivamente autonomia, curatela e tomada de decisão apoiada, evitando tanto o paternalismo quanto o abandono.


[1] Master's Student in Law. Fundação Escola Superior do Ministério Público (FMP).
E-mail: josecferreiras@gmail.com
[2] Postdoctoral Researcher in Law. Universidade Federal de Santa Catarina (UFSC).
E-mail: fabiana7778@hotmail.com

**Palavras-chave:** Vulnerabilidade Constitucional. Autonomia. Constitucionalismo Transformador. Sala de Máquinas.

**RESUMEN**
Este artículo analiza las tensiones entre la autonomía y la protección de los sujetos vulnerables, especialmente niños, adolescentes, jóvenes, ancianos y personas con discapacidad, a la luz del constitucionalismo transformador. Partiendo de la dignidad humana y la teoría de la vulnerabilidad de Fineman, examina la configuración normativa de la capacidad civil tras la Convención sobre los Derechos de las Personas con Discapacidad, el Estatuto de las Personas con Discapacidad y el Código de Procedimiento Civil de 2015. Datos empíricos del Consejo Nacional de Justicia (CNJ) y decisiones del Tribunal Superior de Justicia (TSJ) revelan la brecha entre la promesa normativa y la realidad. Se argumenta a favor de la necesidad de criterios estructurales para equilibrar eficazmente la autonomía, la tutela y la toma de decisiones con apoyo, evitando tanto el paternalismo como el abandono.

**Palabras clave:** Vulnerabilidad Constitucional. Autonomía. Constitucionalismo Transformador. Marco Jurídico.

## 1 INTRODUCTION

The protection of vulnerable groups in Brazil was indelibly marked by the Federal Constitution of 1988, which established guidelines for the protection of fundamental rights in relation to all subjects and, in particular, for those who demand special constitutional protection.

Within the scope of Title VIII of the Constitution, which deals with the Social Order, the constitutional text distinguished a specific Chapter, VII, to deal with "the Family, the Child, the Adolescent, the Youth and the Elderly". This will be exactly the group in a situation of vulnerability considered in this article, adding people with "physical, sensory or mental disabilities", under the terms of article 227, II, without disregarding the perspective that vulnerability is an inherent element of humanity itself.

The constitutional prolixity in relation to the establishment of fundamental rights and guarantees in relation to these vulnerable groups, in a different way from the previous historical paradigm, related to the military dictatorship and tainted by several confrontations with the principle of human dignity, is in line with the historical development of Transformative Constitutionalism, especially from the 1990s onwards. This transformative perspective is based on the allocation of all branches of law by the prescriptions of the Constitution, in addition to evaluating the elements of private relationships, including family relationships, based on constitutional principles and guarantees.

However, constitutional transformation does not take place automatically, since it depends on institutional and structural arrangements capable of operationalizing constitutional norms. Thus, even though the Brazilian Constitution has expanded rights and guarantees, practices and structures persist that limit the autonomy of the subjects it seeks to protect, reproducing tutelary and paternalistic logics incompatible with the 1988 constitutional project.

From these bases, this article intends, through the hypothetical-deductive method, of a qualitative nature, based on the analysis of normative, jurisprudential and empirical evidence, to answer the following research question: how to delimit the autonomy of constitutionally protected subjects, so as not to compromise the reinforced protection that is ensured by the Constitution, from the transformative perspective?

In this sense, the general objective is to analyze the limits of the autonomy established by the Constitution for vulnerable groups, considering the imperfections existing in the engine room and its essentiality for the constitutionally instituted rights and programs to be achieved. The constitutional bases for the protection of these groups, the normative conformation of civil capacity in the current legislation, and the evaluation of empirical data and jurisprudence, which reveal the distance between the normative promise and the engine room, must be examined.

The article is structured in two development sections, in addition to this introduction and conclusion: section 2 examines the constitutional foundations of human dignity and vulnerability; Section 3 looks at transformative constitutionalism and the concept of the engine room applied to the protection of the vulnerable.

## 2 DIGNITY OF THE HUMAN PERSON AND VULNERABILITY: THE BASES OF THE FEDERAL CONSTITUTION OF 1988

Human dignity and fundamental rights and guarantees have gone through a long historical process so that the perspectives that exist today were achieved.

While the eighteenth and nineteenth centuries were marked by the advance of individual rights, directed by liberalism, the advance of social rights together with the maturation of the recognition of individual rights advanced especially in the twentieth century. based on Locke's philosophy (Fineman, 2008).

The Second World War, characterized by the massive violation of human rights in the Nazi-fascist regimes, was a turning point in the recognition and prioritization of human rights and inviolable fundamental rights, encompassing life and human dignity (Tamanaha, 2004, p. 109).

After this period, there was a transformation in constitutional texts around the world, which began to recognize the centrality of human dignity (Grimm, 2016, p. 161), although they depended on effective measures for the materialization of constitutional texts. In this context, the conjunction of socioeconomic, political and legal factors inherent to the post-war II period, marked in several Western countries by the transition from authoritarian and exclusionary regimes to democracies, served as a catalyst for the incorporation of various human and social rights inherent to the ongoing social transformations, generating a transition, empirically perceptible, to more verbose constitutions, especially in the field of fundamental rights (Freire, 2021).

Thus, the second half of the twentieth century saw formal structural changes in the constitutions, with evidence in the constitutions of Italy, 1947, Germany, 1949, which influenced the Charters of late democracies, such as the Constitution of Greece, 1975, Portugal, 1976, and Spain, 1978, including, in this field, states marked by dictatorships, the Latin American constitutions of the end of the century (Assumpção, 2022), which began to include a broad list of rights, understood as elements of social transformation.

Fundamental human rights have undergone this long trajectory of change, initially gaining constitutional stature and, consequently, sheltering positive law (Bobbio, 2004, p. 19),

enabling the action of constitutional courts established throughout the twentieth century, with the exception of the United States (which has a different trajectory in relation to its Constitutional Court), for the protection of these rights.

In line with this historical transition, the Constitution of the Federative Republic of Brazil, of 1988, is the culmination of the transition process from a dictatorial and military regime, which began in the 1960s, to a democratic federative model, based on the dignity of the human person. The Brazilian Constitution represents, in this sense, the materialization of the aspirations for changes existing in the Nation, bringing a model of democratic interactions that prioritized the dignity of the human person (Teixeira, 2018), with a broad list of fundamental rights that began to direct the political and social relations of the State (Piovesan; Hernandes, 2024), definitively breaking with the dictatorial model in force until then.

In line with the prioritization of the dignity of the human person and fundamental rights, the Federal Constitution has among its foundations, provided for in the first article of the Charter, pluralism (item V), which is added to the dignity of the human person (III) and allows different conceptions of what is "good" to be structured, according to individual convictions (Teixeira, 2018), allowing the recognition of individuals as subjects of rights in their *individualities*, not as a mere agglomeration of people.

Aiming to embody this consideration of rights from plural perspectives of individuality, the Federal Constitution of 1988 makes specific considerations about individuals in situations of vulnerability, based on the principle that in these conditions intersubjectivity becomes a necessity for the enjoyment of constitutionally provided rights (Teixeira, 2018), due to physical or psychological fragility.

The Constitution ends up reconciling the elements of freedom and solidarity, inherent to human dignity, with the characteristics related to vulnerability, directing, in the family environment, special protection for children, adolescents, the elderly and people with disabilities (Teixeira, 2018). The current Charter of the Republic, in its article 226, reaches the family as the base of society, establishing a series of protections by the State, including in relation to the family entity, establishing a multivariate form of family.

In this sense, the Federal Constitution included in the scope of the concept of family the community formed by any of the parents and their descendants which, added to the judgment, by the Federal Supreme Court, of the Direct Action of Unconstitutionality No. 4277 and the Action for Non-Compliance with a Fundamental Precept No. 132, expanded the concept of family, including changes in the social sphere, anchored in fundamental principles and, in particular, in the dignity of the human person.

In the same title in which it deals with families, especially in article 227, the Federal Constitution establishes a series of rules aimed at the protection of children, adolescents and people with disabilities, expressly defining such groups as special protection groups.

Os Arts. 229 and 230, in turn, focus on the protection of the elderly, clarifying rights and establishing obligations aimed at the effectiveness of this protection, once again considering elements of human dignity and the guarantee of the right to life. It is noted, therefore, that the Citizen Constitution established a series of fundamental rights and guarantees directed to these groups, breaking with the previous constitutional tradition, still demarcated by the influence of the dictatorship, while establishing obligations for state action, even in the field of family entities, for the protection of groups in situations of vulnerability.

In 2009, the International Convention on the Rights of Persons with Disabilities was added to the 1988 constitutional text, which inaugurated the incorporation of human rights norms with constitutional stature into the Brazilian legal system, and structured a series of requirements and safeguards for the exercise of legal capacity by persons with disabilities (Rosenvald, 2018). One of the central elements of the manifestation of the will and preferences of persons with disabilities becomes, within the scope of the Convention, the exemption from conflict of interest and undue influence, mentioning the principle of proportionality for the provision of these guidelines.

In this field, it is necessary to establish a terminological distinction that is essential for understanding the limits of this study. Although the Supreme Court itself is not theoretically precise when it uses terms related to vulnerability (Vargas; Leal, 2023), the focus of this work is on the limits of Title VIII of the Constitution, specifically in relation to the constitutionally protected groups of Children, Adolescents, Youth, Elderly, and Persons with Disabilities, in line with Teixeira's (2018) perspective of family protection.

This cut is necessary especially due to the restrictions on the private autonomy of these individuals, resulting from both normative and factual bases, considering the conditions that individuals can achieve throughout their lives. Given the relational character of vulnerability, which manifests itself from the interaction between different subjects, one stronger and the other less resistant, which subordinates the latter to a condition susceptible to harm (Machado, 2023), the theme of protection gains even more relevance, considering that the conditions that characterize the situation of vulnerability are manifested precisely in relationships dependent on the manifestation of will in an autonomous and conscious way.

In view of this theoretical field, although the discussion on the concept of autonomy is the subject of extensive debates, which are beyond the scope of this article, the term will be

used in reference to a free will, intrinsically related to the self-determination of subjects, self-governed by their own will and not by the will of others, in line with the perspective used by Barroso (2012).

Based on these delimitations, vulnerability becomes a concrete form, which must be considered for the materialization of human dignity both in the public and private spheres (Gama; Bridges; Teixeira, 2014), which must consider the limitations of each subject in their relationships. In the same sense, it must be considered with regard to the availability of first-generation fundamental rights, especially freedom and private autonomy, which can be attenuated due to material conditions of vulnerability (Teixeira, 2018).

Although the dignity of the human person can be presented as the axiological foundation of the Brazilian constitutional order, it is necessary to recognize that, in relation to the subjects of special constitutional protection, dignity operates not only as a limit to the State's discretion, but above all as a structural condition for the exercise of autonomy. In this sense, dignity, as mentioned, assumes a relational character and is based on the individual's capacities, requiring the State and the family to create material, affective and institutional conditions that allow children, adolescents, the elderly and people with disabilities to develop their own life projects. It is a conception that moves away from the classical liberal notion of autonomy as a mere negative freedom and adheres to a substantial understanding, according to which autonomy is only possible when the subject has adequate means to exercise it, especially in contexts of age, ontological or functional vulnerability.

Adding to the debate on the limits of freedom and its relationship with human dignity, the discussion about the submission of civil relations to fundamental rights is not recent, dating back to the Lüth-Urteil case (centered on freedom of expression), in which the German Constitutional Court ruled on the horizontal application of constitutional norms, in all branches of law (Leal, 2007, p. 64-67).

In Brazil, this discussion was impacted by the Federal Constitution of 1988, with decisions within the scope of the Federal Supreme Court that mark the position of Brazilian jurisprudence in the sense of affecting private relations by fundamental rights, with milestones in Extraordinary Appeal 201.819-8/RJ, which dealt with the application of fundamental rights in the context of private associative relations, and in Direct Action of Unconstitutionality 4815, which was also based on the discussion about freedom of expression, specifically about the need for prior authorization for the publication of biographical documents.

In the infra-constitutional sphere, relevant changes occurred with the advent of the Statute of Persons with Disabilities and the Code of Civil Procedure, both in 2015, which inflicted

robust changes in the relational field of people subject to vulnerabilities, with strong criticism in the scope of Civil Law for enabling curatorship related to legally capable people (Lago Júnior; Barbosa, 2016), considering that the parameters of civil capacity structured in the Civil Code of 2002 were changed.

To give effect to the new civil parameters, the normative changes included mechanisms to support autonomy, especially through Supported Decision Making, structured in article 1,783-A, of the Civil Code, which would be framed as a distinct element of assistance in the case of limitations to the definition and manifestation of the elements of will (Rosenvald, 2018). In the same sense, curatorship began to be framed in an exceptional way, subject to specific planning and based on the individual therapeutic elements of each subject (Rosenvald, 2018), observing the constitutional guidelines, including the established principles, increased by the Convention on Persons with Disabilities.

Ten years after the legal changes, it is possible to see that despite the good normative intentions, the practical effects of the new regulations are paradoxical, considering that the institutes to support the vulnerable have not been fully applied and that the curatorship has been applied indistinctly, covering several cases of specific limitations, due to the difficulty of individualized monitoring of the capacities of the subjects.

In the end, as mentioned, capable people (based on the text of the Civil Code in force) are being submitted to the institute of curatorship without the proper restrictions and, at the other extreme, subjects in need of support are susceptible to decisions and businesses that are not aligned with their real interests, due to the lack of support for decision-making.

It is precisely in this extreme situation in relation to the vulnerable that the transformative constitutional perspective becomes a relevant theoretical tool, given that it analyzes the effectiveness of the norm and the role of judges and legal culture from a broad view, considering the institutional elements inherent to the realization of rights.

In this context, dignity fulfills the function of a normative axis capable of balancing protection and autonomy, functioning both as a foundation for state intervention and as a limit to excessive protection. Dignity prevents protection from becoming an annulment of personality, at the same time that it prevents an abstract defense of autonomy from putting at risk subjects that the Constitution has assumed as priorities.

The legal system must therefore recognize that dignity requires a complex balance, in which state or family intervention is proportional to the degree of vulnerability and always oriented to strengthening the subject's capacity for self-determination. If dignity is the foundation of reinforced protection, it is also in it that the foundation of the autonomy of the constitutionally

protected subjects is located. The theoretical and practical challenge, however, lies in reconciling protection and autonomy without incurring either paternalism or abandonment, a tension that is especially relevant in the light of the transformative constitutional perspective.

## 3 TRANSFORMATIVE CONSTITUTIONALISM AND RECOGNITION OF THE "ENGINE ROOM" IN THE PROTECTION OF THE VULNERABLE

Transformative Constitutionalism is a doctrinal perspective that starts from the premise that the norm does not have material effects in itself, especially the fundamental rights and guarantees established in the Constitution, although it recognizes that the effectiveness of fundamental rights is full, using the classification of José Afonso da Silva (1998) as a reference.

With the debate marked especially from the article *Legal Culture and Transformative Constitutionalism*, by Karl E. Klare (1998), Transformative Constitutionalism can be defined as a perspective of effective judicial action aimed at the transformation of society, based on the interpretation and application of constitutional norms in a way that brings changes in political and social institutions.  in the context of a favorable historical and political context (Klare, 1998).

In this line, the transformative theoretical perspective studies and considers the movements of all agents who work in the judicial field, not just judges. Thus, the role of lawyers and doctrine in the transformation of legal culture is highlighted, considering that the recognition of the existing procedural limitations depends, at first, on recognition from doctrine and the harmonization of discussion methods, especially legal argumentation, based on the performance of lawyers (Klare, 1998).

The focus on the implications in the social field of norms and judicial decisions is a central element, which is analyzed, in Transformative Constitutionalism, together with the constitutional body itself, so that this theoretical prism analyzes the Constitution and the Laws not only as norms, but as a constitutional project (Arguelhes; Süssekind, 2022) that must be achieved from both regulations and court decisions. For this reason, in the transformative logic, the political and moral values of the judge should be used as beacons for his decisions (Langa, 2006), even if they are committed to impartial processes.

By using terms and evaluative questions to stimulate transformative judgments, the transformative perspective is based on the premise that legal texts do not represent, in themselves, a legal norm that must be interpreted based on the textual components. Originating from this point, transformative legal reasoning considers both cultural elements (especially legal culture) and other subjective foundations that define evaluative concepts (Klare, 1998).

As a result of this recognition, transformative theory developed the concept of "machine room", which refers to the organization of political, administrative, and legal power structures, responsible for the provision of constitutional rights and guarantees (Gargarella, 2016), involving social structures and relations, including outside the sphere of procedural action and the Judge State (Arguelhes and Süssekind, 2022).

Based on the contributions of Gargarella (2016), Roa Roa (2023), and Arguelhes and Süssekind (2022), it is possible to delimit the meaning and scope of the term "engine room" in the context of transformative constitutionalism. The engine room refers to the *organization of the power structures that enable the constitutionally provided fundamental rights, including the political, legal and administrative apparatus responsible for the recognition and realization of these rights, in addition to the structural organization of public administration and public policies based on the Constitution*.

The engine room represents, therefore, the entire political, social and institutional framework (in particular) in which the protection of the vulnerable is structured on a daily basis, including both their private relationships and their administrative connections, which require actions by the public authorities to guarantee the autonomy and protection of the subjects.

At this point, a central element in the sphere of the contemporary engine room is the distinction between a paternalistic and patrimonialist conception in relation to the rights of the vulnerable, based exclusively on the criterion of the age or condition of the person with disabilities, which completely removes from these individuals the ability to decide about their lives (Gama; Bridges; Teixeira, 2014), in comparison with a conception of an autonomous life, but with protection, which considers the individuality and needs of each subject.

Also in the case of vulnerable individuals, especially people with disabilities and those undergoing medical treatment, this institutional framework also involves the doctor-patient relationship, which must move from a paternalistic perspective to a relationship based on constitutional elements, which considers the patient's autonomy in this area (Meirelles; Vasconcelos, 2023), without any decision being transferred to a third party.

The balance of these administrative and institutional actions is what enables the autonomy and protection of the vulnerable, without a paternalistic action and, therefore, limiting the constitutional rights of which they are holders. This central aspect must be verified, in the theoretical and practical field, from the perspective of Rosenvald (2018) based on the individuality of each subject, covering possible therapeutic elements, individual needs and capacities of each one.

This need to verify individualities is what overflows the limits of the existing engine room, both in the private and public spheres. The reforms carried out through the Statute of Persons with Disabilities and the Code of Civil Procedure, both in 2015, focused on normative changes, without the institutional mechanism where constitutional rights are realized being achieved or modified.

Without these structural changes in the engine room, the autonomy measures made possible by the normative changes since 2015, although aligned with the constitutional requirements and the Convention for Persons with Disabilities, may have the effect of reducing the protections due to specially protected individuals, given that unprotected autonomy becomes an increase in the vulnerabilities of groups specially protected by the Federal Constitution of 1988. State action in this field, with a focus on the preservation of fundamental rights and guarantees, becomes central, with the purpose of establishing material equality with regard to the rights and guarantees provided for in the Constitution, demanding effective actions for the realization of equality (Fineman, 2008).

Thus, even if the relationships of vulnerable groups occur within the family, the intervention of the State is justified by virtue of the inequalities that can emerge even in this most intimate sphere of private relations, evidenced through violence, abandonment or, at the other extreme, through undue interference in the most elementary self-determination of vulnerable subjects (Fachin, 2011).

It cannot be forgotten, in any legal analysis on the matter, that the groups specially protected by the Constitution of the Republic (which textually evidences their propositions in the epigraphed articles) *are vulnerable*, and this is precisely the core of the need for special attention on the part of society and the law (Gama; Bridges; Teixeira, 2014), without ceasing to be, for this reason, subjects of rights in all spheres of their lives.

Another effect of legal changes without the corresponding change in the engine room is the ineffectiveness of the rules, as occurs in the analysis of curatorship by the Judiciary. From the Statute of Persons with Disabilities, curatorship became a restricted legal institute, focused on people's patrimonial issues, without affecting existential elements, with a focus on valuing the autonomy of the will of the person with disabilities (Meirelles; Vasconcelos, 2023).

Despite being well-intentioned, the changes in the normative frameworks related to curatorship still face difficulties in verifying ordinary legal life. In practice, what we are witnessing is a profusion of decisions related to curatorship without the determination of individualities and covering all aspects of the curator's life, including issues inherent to existential autonomy.

According to data from the National Council of Justice, the number of new cases related to the Appointment of Curators increased from 49,267 cases in 2020 to 79,057 cases in 2024 (an increase of 60.5% in the number of cases), with a projection of up to 83,000 new cases of this type in 2025 (CNJ Statistical Panel, 2025). In the same sense, the number of Curatorship processes in general increased from 18,168 cases in 2020 to 30,636 cases in 2024 (an increase of 68.5% in the number of new cases in this period. This shows the annual growth of around 12.56% per year, while the elderly population in Brazil grows 3.8% per year, according to data from the 2022 Census (Brazilian Institute of Geography and Statistics); the Brazilian Inclusion Law (LBI) has not been able to slow down, therefore, the increase in cases of curatorship in relation to this vulnerable group, although this was one of the objectives of the rule.

Also according to information from the National Council of Justice (2023, p. 28), the percentage of curatorship processes that use Supported Decision Making, an institute inseparable from curatorship, corresponds to only 7% of the total number of processes related to curatorship, showing, once again, a legal practice dissonant with legal expectations. Such a quantitative discrepancy reinforces the need for a transformative approach that integrates empirical data to monitor institutional effectiveness. Also according to the CNJ itself, confusion between the institute of Supported Decision Making and other legal institutes is common (CNJ, 2023, p. 29).

In fact, in view of this exponential increase in the number of lawsuits, the Superior Court of Justice has made several provisions of the Code of Civil Procedure and the Civil Code more flexible, with the changes made by the Statute of Persons with Disabilities, due to the impossibility of applying the rules in their entirety in the current legal and social scenario. For example, the requirement of the Medical Report established in article 750 of the CPC was relaxed in case of refusal of the curator to perform the examination (REsp 1.933.597/RO) and in other exceptional cases. In the case of the restriction of curatorship to the patrimonial elements of the person with disabilities, the STJ admitted the possibility of broad and absolute curatorship, involving existential elements of the person (REsp 2.013.021/MG). In addition, the STJ recognized that shared curatorship, provided for in article 1,775-A of the Civil Code for the protection of the curatorship and for the mitigation of the risks inherent to this procedure, is not mandatory and cannot be granted ex officio by the judge in the case.

In these decisions, the Superior Court of Justice considered, in addition to the normative provisions, constitutional principles, especially that of human dignity, but considered in a practical way, taking into account the existing limitations for the operation of implementing rights. It is verified, therefore, that the lack of an engine room aligned with the structuring constitutional

principles not only makes the effectiveness of rights unfeasible, but can also convert normative measures favorable to the enjoyment of rights and guarantees by the vulnerable into potentially harmful measures for this group, which, in the case of autonomy without consideration, can culminate in the increase of the vulnerabilities of the subjects.

Studies carried out and discussed within the scope of the federal legislative houses already demonstrate the impact of the dissonance between the rules and the engine room for the care and monitoring of the vulnerable. In this sense, the text of the Center for Studies and Research of the Legislative Consultancy of the Federal Senate (Oliveira, 2025) stands out, which addresses the practical difficulties related to curatorship, especially in relation to all the formal requirements that must be fulfilled, culminating in the perception that "no one wants to take over anyone's guardianship", due to the normative focus on formal elements, not in the material aspects inherent to this institute.

According to current rules, even if the curatorship takes place in family environments and with demonstrations of care and dedication in relation to the curator, the formal elements related to accountability stand out from the material criteria for verifying the curatorship (Oliveira, 2025), impairing the verification of the real interest of the curators.

As a result of this growing perception of a normative framework that is harmful to the vulnerable, beyond the mere ineffectiveness of the norms, proposals have emerged related to the reduction of the autonomy of the vulnerable, especially people with disabilities.

The apex of this issue lies in the recent discussions for the amendment of the Civil Code, consolidated in Bill No. 04/2025. Based on the assumption that the normative changes that have occurred since 2015 have been innocuous in practical terms, even harming the vulnerable in some cases, the normative proposal once again considers people with disabilities as absolutely incapable. In fact, the diagnosis is not wrong in relation to the effects of the changes, but it also does not consider the fact that more general actions were not taken to change the engine room of the constitution, which involves all the political, legal and institutional aspects that must be achieved in the protection of the vulnerable.

The justification of the bill is clarifying in this sense, as it makes clear the reasons for the amendment of articles 3 and 4 of the Civil Code, which reverberate in the other proposed changes. Literally, "*Another issue that required reflection and action concerns the changes in articles 3 and 4, **which recovered the protection** intended for those who are not in a position to express their will*" (Senado Federal, 2025. Italics). As can be read, the legislative discussions seek *to recover the protection* of vulnerable groups; that is, the normative changes under discussion are based on the assumption that the vulnerable were left helpless during the

changes in the Civil Code and the Code of Civil Procedure, showing, to some extent, the return of a paternalistic conception of the vulnerable in the scope of Brazilian civil law.

The legislative discussion, although well-intentioned, focuses on the consequences related to the problems existing in the engine room of the constitution in relation to vulnerable groups, and not on the causes of these problems, which consist of the forms of interaction with these groups in all social spheres. Thus, instead of equating the elements of private autonomy and the protection of the vulnerable, the legislator goes from one extreme to the other, without actually solving the matter.

Especially in the solutions related to vulnerable groups, especially protected by the Federal Constitution of 1988, the solution necessarily involves focusing on the existing performance and actions within the scope of the engine room. Any discussion or action that aims to solve the apparent dilemma between autonomy and protection of vulnerable groups must take into account that society itself still has a paternalistic conception (Gama; Bridges; Teixeira, 2014). For real progress to occur, the elements of equality established in the Constitution must consider all aspects of the individuality of subjects, regardless of their classification into categories, both in the public and private spheres (Fineman, 2008).

For these reasons, effective solutions must consider broader aspects in the relationship with vulnerable groups, recognizing the role of the engine room for the realization of rights, specifically with regard to power structures and the social, political, legal and administrative relations where rights are realized, considering that autonomy is not an inherent characteristic of human beings.  but rather a product, a consequence, of social policies (Fineman, 2008).

In a practical way, material and discernment support must be given to families, who are primarily responsible for the care and emancipation of the vulnerable. In addition, legal culture should be seen as an axial requirement for the recognition and availability of rights, especially from the performance of lawyers, given that they are on the front line of protection (Klare, 1998), especially in cases of curatorship and judicial intervention; The role of judges also becomes central, given that a broader perception of judicial performance must be taken into account, both in structural cases and for decisions in the specific case.

Otherwise, normative changes will be doomed to become ineffective propositions or, in a more critical scenario, may be transfigured into mechanisms of unprotection or undue mitigation of vulnerable groups.

## 4 CONCLUSION

The solutions discussed for the adequacy of the rights of specially protected groups, under the terms of the Federal Constitution of 1988, have advanced in a non-linear manner over the last decades, revealing a gradual transition from a frankly paternalistic model to a format that recognizes, at least at the normative level, the full ownership of rights and the capacity for self-determination of these subjects. However, the analysis of the conformation of civil capacity after the Convention on Persons with Disabilities, the Statute of Persons with Disabilities and the 2015 Code of Civil Procedure, confronted with empirical data from the CNJ and the case law of the STJ, shows a relevant gap between the constitutional promise of autonomy and protection and the effective functioning of the engine room in which such rights should materialize.

From the perspective of transformative constitutionalism, it becomes clear that the non-paternalistic balance between autonomy and protection of vulnerable subjects cannot be achieved by mere punctual adjustments of the normative text, and it is imperative to construct structural criteria that guide the performance of the various actors located in the engine room, especially when bringing curatorship back to its truly exceptional and preferably patrimonial character; institutionalize practices of individualized assessment of capacities and needs; strengthen, in procedural and cultural terms, Supported Decision Making; and to develop jurisprudential parameters that articulate dignity, proportionality and relational autonomy in the definition of the degree of legitimate intervention in the existential sphere of the subject.

In this scenario, the reinforced protection of constitutionally protected groups must be reinterpreted as a duty to provide material, institutional and relational conditions for the exercise of autonomy, and not as a generic authorization to replace the will of the vulnerable with third parties, public or private.

In summary, the constitutionally adequate delimitation of the autonomy of vulnerable subjects, in the key of transformative constitutionalism, requires a shift of focus, leaving the abstract norm for the engine room in which this norm is concretized.

The challenge, therefore, goes beyond the choice between autonomy or protection, focusing on institutionally reconstructing the conditions in which reinforced protection becomes a materialization of rights, and not a denial of the capacity for self-determination of these subjects. Only from this structural reconfiguration, which involves legal culture, institutional arrangements and social policies, will it be possible to attenuate the apparent paradox between emancipation and tutelage, bringing legal practice closer to the constitutional project inaugurated in 1988.

## REFERENCES


Arguelhes, D., & Süssekind, E. (2022). Constitucionalismo transformador: Entre casas de máquinas e “engenharia social judicial”. Revista Direito e Práxis, 13(4), 2557–2594.

Assumpção, E. A. de. (2022). The historical construction of social rights. Revista Internacional Consinter de Direito, 8(15), 297–310. https://doi.org/10.19135/revista.consinter.00015.14

Barroso, L. R. (2012). “Aqui, lá e em todo lugar”: A dignidade humana no direito contemporâneo e no discurso transnacional. Revista dos Tribunais, 919.

Bobbio, N. (2004). A era dos direitos (C. N. Coutinho, Trad.). Elsevier.

Conselho Nacional de Justiça. (2023). Estudo empírico das demandas envolvendo pessoas com deficiência. https://www.cnj.jus.br/wp-content/uploads/2023/08/sumario-pessoascomdeficiencia-23-10-08.pdf

Conselho Nacional de Justiça. (2025). Justiça em números 2024. CNJ.

Fachin, L. E. (2011). Famílias – entre o público e o privado. In VIII Congresso Brasileiro de Direito de Família – Família: Entre o público e o privado. https://www.ibdfam.org.br/assets/upload/anais/274.pdf

Vargas, E. F. de, & Leal, M. C. H. (2023). Grupos vulneráveis e minorias: Há uma distinção terminológica na Constituição Federal de 1988 e na jurisprudência do Supremo Tribunal Federal? Revista Estudos Institucionais, 9(3), 877–904. https://doi.org/10.21783/rei.v9i3.732

Fineman, M. A. (2008). The vulnerable subject: Anchoring equality in the human condition. Yale Journal of Law & Feminism, 20(1), 1–23. https://ssrn.com/abstract=1131407

Freire, A. (2021). O perfil das Constituições contemporâneas. Suprema – Revista de Estudos Constitucionais, 1(1), 343–403. https://doi.org/10.53798/suprema.2021.v1.n1.a27

Gama, G. C. N. da, Pontes, J. G. M., & Teixeira, P. H. da C. (2014). O direito civil-constitucional e o livre desenvolvimento da personalidade do idoso: O dilema de Lear. Revista Brasileira de Direito Civil, 2(2). https://rbdcivil.ibdcivil.org.br/rbdc/article/view/120

Gargarella, R. (2016). Recuperar el lugar del “pueblo” en la Constitución. Instituto de Investigaciones Jurídicas, UNAM.

Grimm, D. (2016). Constitutionalism. Oxford University Press.

Klare, K. E. (1998). Legal culture and transformative constitutionalism. South African Journal on Human Rights, 14, 146–188.

Lago Júnior, A., & Barbosa, A. (2016). Primeiras análises sobre o sistema de (in)capacidades, interdição e curatela pós Estatuto da Pessoa com Deficiência e Código de Processo Civil de 2015. Revista de Direito Civil Contemporâneo, 8, 49–89.

Langa, P. (2006). Transformative constitutionalism. Stellenbosch Law Review, 17, 351–360.

Leal, M. C. H. (2007). Jurisdição constitucional aberta: Reflexões sobre a legitimidade e os limites da jurisdição constitucional na ordem democrática – Uma abordagem a partir das teorias constitucionais alemã e norte-americana. Lumen Juris.

Machado, C. L. (2023). Estudo do instituto da vulnerabilidade no direito brasileiro. Revista Foco, 16(11), e3678. https://doi.org/10.54751/revistafoco.v16n11-159

Meirelles, J. M. L. de, & Vasconcelos, A. P. (2023). Os limites da curatela e o consentimento livre e esclarecido da pessoa com deficiência. Estudos Avançados, 37(109), 145–158. https://doi.org/10.1590/s0103-4014.2023.37109.010

Oliveira, C. E. (2025). Curatela de pessoas sem lucidez: Necessidade de uma visão mais humanizada e menos patrimonializada (Texto para Discussão nº 349). Senado Federal. https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/textos-para-discussao/td349

Piovesan, F., & Hernandes, L. E. C. O. (2024). Metodologia de implementação das decisões estruturais e seu impacto transformador. Revista de Processo, 49(353), 293–321.

Roa Roa, J. E. (2023). A cidadania dentro da sala de máquinas do constitucionalismo transformador latino-americano. Revista Direitos Fundamentais & Democracia, 28(2), 91–115.

Rosenvald, N. (2018). A curatela como a terceira margem do rio. Revista Brasileira de Direito Civil, 16, 105–123.

Senado Federal. (2025). Projeto de Lei nº 4, de 2025. https://legis.senado.leg.br/sdleg-getter/documento?dm=9889356&ts=1764869301163&disposition=inline

Silva, J. A. da. (1998). Aplicabilidade das normas constitucionais (3ª ed.). Malheiros.

Tamanaha, B. Z. (2004). On the rule of law: History, politics, theory. Cambridge University Press.

Teixeira, A. C. B. (2018). Autonomia existencial. Revista Brasileira de Direito Civil, 16, 75–104.