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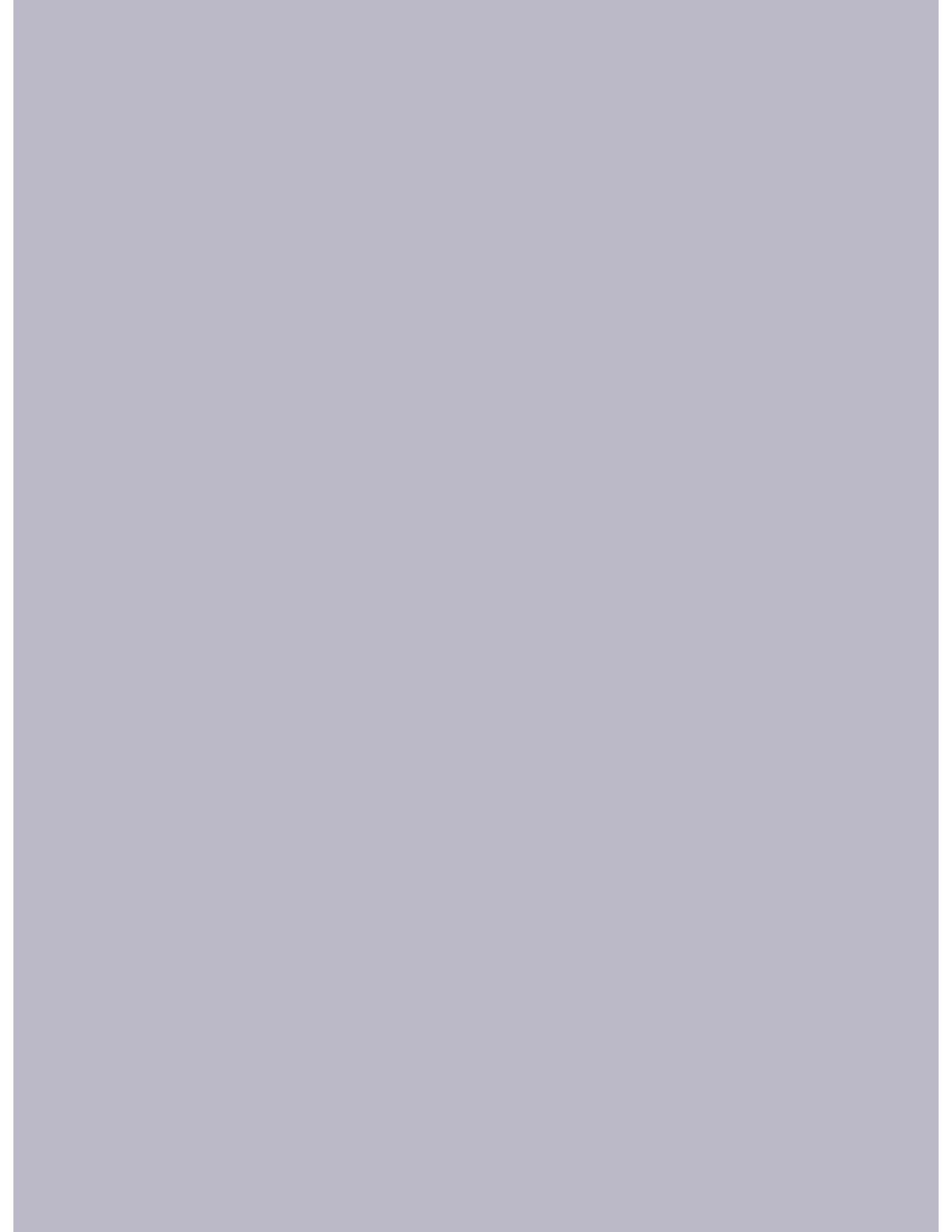
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FACULDADE DE DIREITO
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Digital Transformation and Governance in the Judiciary

COORDENAÇÃO:

Fabício Castagna Lunardi
Pedro Miguel Alves Ribeiro Correia
Lorenzo-Mateo Bujosa Vadell





Ficha Técnica

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Fabrício Castagna Lunardi
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Editors

**Digital Transformation and Governance
in the Judiciary**

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INSTITUTO JURÍDICO
FACULDADE DE DIREITO
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University Of Coimbra
National School For Training And Improvement Of Judges (Enfam)

**ACADEMIC AND SCIENTIFIC COOPERATION BETWEEN THE FACULTY OF LAW OF
THE UNIVERSITY OF COIMBRA (FDUC) AND THE BRAZILIAN NATIONAL SCHOOL
FOR TRAINING AND IMPROVEMENT OF JUDGES (ENFAM)**

On August 31, 2022, FDUC (Portugal) and ENFAM (Brazil) signed, through their top representatives, an Academic and Scientific Cooperation Agreement aimed at implementing joint and effective actions that would ensure the performance of academic activities related to teaching and research, by of their Research Centers and Institutes. The cooperation has involved the implementation of projects, research groups, international seminars, scientific publications, data sharing and exchange of experiences, among other products.

This book is another important product of the Scientific and Academic Cooperation Agreement between the two renowned higher education institutions, of the partnership between research groups, as well as of the collaboration of professors and researchers from the University of Salamanca.

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Have a great read!

Brasília/Coimbra/Salamanca, March 2025.

Fabrício Castagna Lunardi
Pedro Miguel Alves Ribeiro Correia
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Editors

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CHAPTER 1 – TELEWORKING AND THE RIGHT TO DISCONNECT: THE BRAZILIAN EXPERIENCE

(DOI: 10.47907/DigitalTransformationAndGovernance/06)

Audrey Kramy Araruna Gonçalves¹

Summary: 1. Introduction. 2. Remote Work. 2.1. Regulation and Expansion. 2.2. Teleworking in the Brazilian Judiciary. 2.3. Impact of Digital Transformations on Management Models. 3. Right to Disconnect. 4. Case Study of a Brazilian State Court of Justice. Conclusions. References

Abstract: This article aims to investigate how teleworking and Digital Justice can potentially transform Judiciary Administration, with the purpose of assessing the adequacy of current management models adopted and the need for training personnel to work with remote or hybrid teams, particularly concerning team communication and the right to disconnect. To achieve its objective, the research is based on a normative study of teleworking and digital justice in Brazil and an analysis of empirical research conducted with judges and employees of a Brazilian State Court of Justice. In conclusion, it was found that digital transformations and teleworking have brought significant improvements to the judicial service, including increased effectiveness in judicial proceedings and an improved quality of life for judicial agents. However, current team and process management models need enhancement to strike a proper balance between improving the judicial service provided and ensuring the right to disconnect for judicial agents. For this reason, it is proposed that all personnel of the Judiciary, who are bound by the Constitution to serve the public effectively, be required to participate in periodic training courses in remote team management as a strategic measure.

Keywords: Teleworking; Digital Justice; Judiciary Administration; Right to Disconnect; Remote Team Management.

1. Introduction

The adoption of teleworking is regarded as a strategy that can offer judicial professionals increased flexibility in carrying out their work responsibilities while also accommodating their personal lives.

This enhanced flexibility carries the advantage of reducing expenses for public administration while simultaneously improving the quality of life for teleworkers. In turn, this improved work-life balance enables teleworkers to better manage their schedules, returning to their duties with heightened energy and contributing to the public entity through improved service quality and heightened productivity.

However, effectively managing a teleworking team that operates asynchronously presents a formidable challenge. It requires proper training to prevent it from becoming a 24-hour on-call duty, thus infringing upon teleworkers' right to disconnect.

¹ Master of Legal and Judicial Studies at ENFAM – National Judicial School for Formation and Development. Judge of Law at State Court of Justice of Paraíba – TJPB. <https://wwws.cnpq.br/cvlatessweb/PKG_MENU.menu?>.

In light of these considerations, the primary objective of this article is to investigate the impact of teleworking on judicial administration. This investigation aims to equip managers with the skills required to lead teleworking or hybrid teams effectively. Additionally, it seeks to gauge the perception of teleworkers themselves concerning asynchronous communication within current judicial management models.

To accomplish this objective, the research relies on the analysis of quantitative data sourced from the annual Research in Numbers reports, which are compiled by the National Council of Justice (CNJ). These reports facilitate the analysis of teleworking's influence on the judicial system. To delve into the qualitative effects of teleworking on judicial management and the right to disconnect, a case study methodology will be employed. This methodology will involve conducting semi-structured interviews and organizing focus groups with magistrates and civil servants from a state court in Brazil.

2. Teleworking

2.1. Regulation and expansion

The advancement of technological tools and their extensive integration into the labor market has transformed labour dynamics, resulting in the establishment of mechanisms primarily oriented towards accomplishing productivity targets rather than adhering to conventional work schedules². Therefore, the location where the activity is carried out, whether inside or outside the organisational environment, has become irrelevant.

The concept of teleworking is not unanimous. However, in order to be considered as such, there is consensus in the literature regarding the presence of two characteristics: distance and the use of information and communication technologies (ICTs)³. For an activity to be considered teleworking, it is essential that it takes place in a different location from the employer⁴, utilising

² Brazilian Judiciary currently adopts the managerial management model, in which the focus is on strategic planning and the establishment of performance goals. Throughout history, the Brazilian Judiciary has previously adopted, subsequently, the patrimonialist model (where the State was considered the property of the king) and the bureaucratic model (administration carried out by career professionals with formal and bureaucratic procedures) (Alex Pizzio SILVA; José Eudacy Feijó PAIVA, «Gestão do judiciário e gestão da qualidade: uma questão de princípios», *Revista de Direito da Administração Pública*, 3/1 (2018) 63-80, [consult. 4 Ago. 2022]. Disponível em: <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/redap2018&div=19&start_page=63&collection=journals&set_as_cursor=5&men_tab=srchresults>).

³ Cháris Telles Martins da ROCHA; Fernanda Spanier AMADOR, «O teletrabalho: conceituação e questões para análise», *Cad. EBAPE.BR*, 16/1 (2018) 1-20, [consult. 30 Jun. 2022]. Disponível em: <<https://www.scielo.br/j/cebape/a/xdbDYsyFztnLT5CVwpXGm3g/?lang=pt&format=pdf>>.

⁴ Tatiane PASCHOAL; Priscila Maria da SILVA; Gisela DEMO; Natasha FOGAÇA; Mário César FERREIRA, «Qualidade de vida no teletrabalho, redesenho do trabalho e bem-estar no trabalho de professores de ensino público no Distrito Federal», *Contextus – Revista Contemporânea de Economia e Gestão* 20 (2022) 1-12, [consult. 5 Ago. 2022]. Disponível em: <<http://periodicos.ufc.br/contextus/article/view/71500>>.

technological resources. Additionally, Coneglian⁵ highlights flexibility, productivity, and convenience in work organisation as elements of teleworking.

It's important to emphasise that the terms “teleworking” and “remote work” are not synonymous, with the latter being the genus of which the first is a specific type. Teleworking can be defined as work performed remotely, away from the employer's premises, involving the use of technological tools by the teleworker. Remote work, on the other hand, can be defined as the activity carried out outside the employer's establishment or institution, with a focus on producing results and the subordination of the relationship being present.

One of the methods for classifying remote work revolves around the territorial criterion, which enables the distinction between “work carried out at home” (home-office) and “work conducted at a location other than one's domicile”, such as telecottages, telecentres, and mobile workspaces. In both scenarios, the key factor is the aspect of distance, and whether or not technology is involved can determine whether it qualifies as telework.

Mello⁶ advocates that other factors must be taken into consideration in teleworking, such as the profile of those authorised to engage in this modality, which includes having a suitable physical infrastructure at their domicile, meeting established performance targets, and maintaining ongoing interaction with the remainder of the team that is working in the in-person mode.

To summarise, teleworking is a type of distance work and may or may not be classified as home-office, depending on the use of technology. Home-office and teleworking are types of distance work that have points of intersection, but they are not to be confused. If technology is used, it is teleworking. If technology is not used, teleworking is not.

In the private sector, telework has long been practised, initially under the guise of various forms of remote work, including home-based work. The flexibilization of labor relations aimed primarily at preserving jobs in the post-industrial era, facilitated the informal development of decentralised work arrangements, despite the absence of regulatory legislation.

The International Labor Organization (ILO) defines “home-based work” as the situation in which an individual, referred to as a home-based worker, carries out their work in their own residence or another location of their choosing, distinct from the employer's workplace. This work is compensated and produces a product or service according to specific characteristics determined by the employer. It is irrelevant whether the materials and tools for the work are provided by the employer or the worker.⁷

⁵ Tamara Natácia Mulari CONEGLIAN, *Teletrabalho Home office: identidade, subjetividade e saúde mental dos trabalhadores*, Curitiba: CRV, 2020, 31.

⁶ Alvaro Augusto Araújo MELLO, *O uso do teletrabalho nas empresas de call center e contact center multiclientes atuantes no Brasil: estudo para identificar as forças propulsoras, restritivas e contribuições reconhecidas*, 2011, 278 f., Tese (Doutorado em Administração), Universidade de São Paulo, São Paulo, [consult. 24 Mai. 2022]. Disponível em: <<https://www.teses.usp.br/teses/disponiveis/12/12139/tde16082011-154156/pt-br.php>>.

⁷ INTERNATIONAL LABOUR ORGANISATION, *Domestic Labour Convention No. 177*, 1996, [consult. 20 Mar. 2022]. Disponível em: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312322>.

According to Rodrigues⁸, the origin of the term “teleworking” can be attributed to Jack Nilles. In 1971, while serving as the Secretary of the Research Committee at the Aerospace Corporation in Southern California, where he was involved in designing spacecraft for the Department of Defense and NASA, Nilles was asked during a research trip why they hadn’t been able to find a solution to prevent people from facing immense commutes to get to work, even though they had successfully sent a man to the Moon.

Motivated by this inquiry, Nilles began formulating the initial concepts of teleworking. In the subsequent year, 1972, after his departure from Aerospace, he established the *Telecommunications-Transportation Tradeoff* program at the University of Southern California. In 1973, he authored a project along these lines with financial backing from the National Science Foundation. This project was put into practice within an insurance company located in Los Angeles, and its favourable outcomes were documented in 1974 in the publication titled “The Telecommunications-Transportation Tradeoff.” According to Rodrigues⁹, from that point forward, the teleworking concept gained widespread acceptance and was embraced by numerous American corporations, subsequently spreading globally. Jack Nilles is widely acknowledged as the father of teleworking.

There are also references to earlier practices that can be regarded as antecedents to teleworking, even though the term had not yet been coined. One illustrative example is the railway owned by J. Edgard Thompson¹⁰, which as early as 1857, was employing the company’s telegraph system to oversee remote divisions situated at a considerable distance¹¹. Additionally, in England, in 1962, German Stephane Shirley founded Freelance Programmers with the aim of offering employment opportunities to women, allowing them to create computer programs from the comfort of their own homes¹².

The advent and growth of teleworking in Brazil primarily originated within the private sector. In contrast, its adoption in the public sector, and particularly in the judiciary, is a relatively recent development. Consequently, it is imperative to comprehend the successful initiatives and

⁸ Ana Cristina Barcellos RODRIGUES, *Teletrabalho: A tecnologia transformando as relações de trabalho*, 2011, 142 f., Dissertação (Mestrado em Direito do Trabalho e da Seguridade Social), Universidade de São Paulo, São Paulo, [consult. 27 Jan. 2021]. Disponível em: <https://www.teses.usp.br/teses/disponiveis/2/2138/tde14062012-112439/publico/TELETRABALHO_A_tecnologia_transformando_as_relacoes_de_trabalho_Integral.pdf>, 27.

⁹ Ana Cristina Barcellos RODRIGUES, *Teletrabalho: A tecnologia transformando as relações de trabalho*, 2011, 142 f., Dissertação (Mestrado em Direito do Trabalho e da Seguridade Social), Universidade de São Paulo, São Paulo, [consult. 27 Jan. 2021]. Disponível em: <https://www.teses.usp.br/teses/disponiveis/2/2138/tde14062012-112439/publico/TELETRABALHO_A_tecnologia_transformando_as_relacoes_de_trabalho_Integral.pdf>, 28.

¹⁰ José Arnaldo de OLIVEIRA, *O teletrabalho e as novas tecnologias na relação laboral*, Rio de Janeiro: Lumen Juris, 2020, 13.

¹¹ Daniele PARMEGIANE. *Dano Existencial: Análise da jornada excessiva de trabalho e o teletrabalho sob a ótica da dignidade da pessoa humana*, Curitiba: CRV, 2020, 131.

¹² Roberta SCALZILLI, «O direito à desconexão: uma análise crítica do instituto do teletrabalho brasileiro frente ao dano existencial como consequência da jornada excessiva de trabalho em tempos de pandemia», *Revista do Tribunal Regional do Trabalho da 3ª Região, edição especial*, t. II (2020) 643-664, [consult. 27 Mai. 2021]. Disponível em: <<https://sistemas.trt3.jus.br/bd-trt3/handle/11103/56362>>, 649.

advancements achieved in the private sector. This understanding can serve as a foundation for identifying practices that may be transferable to the public sector, while also tailoring them to align with the unique responsibilities entrusted to the judiciary in safeguarding rights, both within and beyond its institutional boundaries.

In Brazil, private labour legislation, outlined in 1943 through the Consolidation of Labor Laws (Consolidação das Leis Trabalhistas – CLT), initially focused solely on the concept of home-based work. Article 6 was applied by analogy to address other forms of remote work when specific regulations were lacking¹³. It wasn't until 2011, with the amendment of this article by Act N 12,551¹⁴, that more defining elements were introduced, encompassing various forms of remote services, including teleworking and home-office arrangements.

Subsequently, the so-called Labor Reform of 2017, enacted by Act No. 13,467, and effective from November 11, 2017, incorporated Chapter II-A into the Consolidation of Labor Laws (CLT)¹⁵. This chapter introduced specific regulations primarily centred around the terms and conditions stipulated within employment contracts.

2.2. Teleworking in the Brazilian Judiciary

For the Brazilian Judiciary, teleworking is defined as the type of work carried out remotely, using technological resources, covering activities that, due to the nature of the position or the duties of the unit, can be carried out outside the body's premises (CNJ, Resolution no. 227/16, art. 1)¹⁶. The same resolution also defines a manager as a magistrate or civil servant occupying a commissioned position responsible for managing the unit.¹⁷

¹³ According to the previous wording of article 6th of the CLT, “No distinction is made between work carried out in the employer's establishment and work carried out in the employee's home, provided that the employment relationship is characterized” – (BRASIL. Decreto-lei nº 5.452, de 1º de maio de 1943. Approves the Consolidation of Labour Laws. Federal Official Gazette: section 1, Rio de Janeiro, RJ, 1 May 1943. Available at: <http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm>. Accessed on: 15 July 2022). trans.

¹⁴ Law no. 12.551/2011 amended art. 6º of the CLT to read as follows: “Art. 6th There is no distinction between work carried out at the employer's establishment, work carried out at the employee's home and work carried out at a distance, provided that the preconditions of the employment relationship are characterized. Sole Paragraph. The telematic and computerized means of command, control and supervision are equivalent, for the purposes of legal subordination, to the personal and direct means of command, control and supervision of the work of others” (BRASIL. Lei nº 12.551, de 15 de dezembro de 2011. Amends art. 6 of the Consolidation of Labour Laws (CLT), approved by Decree-Law no. 5,452, of 1 May 1943, to equate the legal effects of subordination exercised by telematic and computerized means to that exercised by personal and direct means. Diário Oficial da União: seção 1, Brasília, DF, 15 Dec. 2011. Available at: <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12551.htm>. Accessed on: 15 Jul. 2022.)trans>.

¹⁵ Arts.75-A a 75-E da CLT (BRASIL. Decreto-lei nº 5.452, de 1º de maio de 1943. Aprova a Consolidação das Leis do Trabalho. Diário Oficial da União: seção 1, Rio de Janeiro, RJ, 1 maio 1943. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm. Accessed on: 15 jul. 2022.).

¹⁶ Arts.75-A a 75-E da CLT (BRASIL. Decreto-lei nº 5.452, de 1º de maio de 1943.

¹⁷ Arts.75-A a 75-E da CLT (BRASIL. Decreto-lei nº 5.452, de 1º de maio de 1943.

Teleworkers will have their performance evaluated based on performance targets, which must be set at a higher level compared to employees who perform the same job in a traditional office setting¹⁸. Generally, teleworking can be authorised for all civil servants, provided that they meet certain criteria, including not being in the first year of their probationary period; not having contraindications for health reasons, as determined by a medical expert; not having received a disciplinary penalty within the two years prior to their application for remote work (as per CNJ, Resolution No. 227/16, Article 5).

Employees wishing to engage in teleworking should submit their request to their respective manager. The manager will then assess whether the eligibility criteria have been satisfied and may decide to grant teleworking, taking into consideration the administration's best interests.

As per the regulations, it is expressly prohibited to compensate for achieving predetermined targets with overtime payments and transport allowances. Additionally, the accumulation of any form of time-off or a "bank of hours" is also prohibited (Art. 7).

The determination of the number of civil servants and the scope of activities eligible for teleworking must be established through a proposal put forth by the Teleworking Management Commission within each organisation. This proposal should be adequately justified and subsequently approved by an official decree issued by the respective Presidency of the organisation. Importantly, the number of teleworking civil servants may not surpass 30 % of the total permanent staff within the Court, Office, or Administrative Unit (Art. 5, III)¹⁹.

The administration retains the right to inspect the teleworker's workspace, which must remain suitable for conducting job duties throughout the entire teleworking period (Art. 9, § 6).²⁰

While there is no compulsory requirement for teleworkers to physically attend the administrative site, the regulations recommend establishing a minimum number of days per year for such attendance. This suggestion is aimed at enhancing the organisational environment and fostering a sense of connection.

¹⁸ The increase in productivity may be waived in the case of magistrates or civil servants with disabilities, special needs or serious illness, or who are parents or guardians of dependents in the same condition (BRASIL. CONSELHO NACIONAL DE JUSTIÇA. *Resolution no. 343, of 9 September 2020*. Establishes special working conditions for magistrates and civil servants with disabilities, special needs or serious illness or who are parents or guardians of dependents in the same condition and makes other provisions. Brasília, DF: CNJ, 2020. Available at: <<https://atos.cnj.jus.br/atos/detalhar/3459>>. Accessed on: 24 May 2022).

¹⁹ BRASIL. CONSELHO NACIONAL DE JUSTIÇA. *Resolution no. 343, of 9 September 2020*.

²⁰ The organisation's power of inspection must respect the rights to privacy and human dignity, so that inspections must be notified in advance and limited to the room in the teleworker's home where the work activity is carried out. (Denise Pire FINCATO, «Health, hygiene and safety in teleworking: reflections and dilemmas in the context of the dignity of the working human person», *Revista Brasileira de Direitos Fundamentais & Justiça* 3/9 (2022) 101, [consult. 3 Mar. 2022]. Disponível em: <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/direfnj9&div=9&start_page=101&collection=journals&set_as_cursor=12&men_tab=srchresults>, 21.

Furthermore, teleworkers are permitted to attend and perform their work at the organisation's physical premises whenever they consider it beneficial or necessary, always with the best interests of the administration in mind.

The regulations also recommend establishing a maximum duration for teleworking, which can be subject to reevaluation at the discretion of the administration.

In all judicial institutions where teleworking is implemented, it is mandatory to establish a Teleworking Management Committee and conduct at least one annual training workshop for teleworkers. Additionally, unit managers must provide the Committee with a report every six months, including a list of teleworkers, any encountered challenges, and the outcomes achieved.

For each staff member working remotely, a work plan must be developed, outlining performance targets aligned with the institution's Strategic Plan. These targets should be set at a higher level than those established for in-office employees.

Regarding magistrates, teleworking is not currently permitted by law, and this matter is under discussion within the National Council of Justice (CNJ), as per Case No. 0006711-84.2019.2.00.0000, initiated in 2019.²¹ Nonetheless, special working conditions can be authorised for judges or civil servants with disabilities, special needs, serious illnesses, or those who are parents or guardians of dependents with such conditions, in accordance with Resolution 343/20, CNJ.

The courts are not authorised to cover the expenses related to procuring goods or services for teleworking employees. Instead, it is the responsibility of the teleworking employees themselves to bear these necessary costs.

The authority to regulate teleworking is shared in a complementary manner between the National Council of Justice and the individual Courts. Courts are allowed to issue regulations that can adapt the rules to their specific needs as long as they are compatible with the overarching regulations.

Additionally, it is mandatory to submit a technical assessment to the National Council of Justice every two years. This assessment should outline the benefits of implementing teleworking and the desirability of its continuation.

2.3. Impact of Digital Transformations on Management Models

The computerization of judicial proceedings in Brazil was formalised through Act 11.419/06, which introduced amendments to the Code of Civil Procedure. This law regulated the procedures and validated procedural actions conducted electronically. Subsequently, in 2013, the National

²¹ The administrative process number 0006711-84.2019.2.00.0000/CNJ began on September 5, 2019, before the onset of the pandemic. On October 5, 2022, the entry of the Brazilian Magistrates Association (Associação dos Magistrados Brasileiros – AMB) as a third party with interest in the matter was granted. The most recent decision, dated May 30, 2022, determined the suspension of the proceedings until a report requested from the Working Group supporting the activities of the Operational Efficiency, Infrastructure, and Personnel Management Commission is submitted to the case. You can access this information at: <<https://www.cnj.jus.br/pjecnj/ConsultaPublica/listView.seam>. Accessed on: 30 August 2023>. Accessed on August 30, 2023.

Council of Justice (Conselho Nacional de Justiça – CNJ) established the Electronic Judicial Process (PJE) as a computerised system within the Brazilian Judiciary.

Additional regulations were also enacted to establish and govern the practice and services of the judicial system. These include Resolution 345 CNJ, which addresses the concept of a fully digital court, Resolution 354 CNJ, which pertains to the digital execution of procedural actions, Resolution 372 CNJ, which establishes the Virtual Counter, and Resolution 385 CNJ, which focuses on the Justice 4.0 Centers.

The significant increase in the virtualization of legal processes and the expansion of teleworking has highlighted the necessity of training managers to effectively lead hybrid teams, comprising both on-site and remote members. One crucial aspect that requires attention is the asynchrony in carrying out activities. In a team where work occurs at different times, determining the methods and schedules for communication is essential for sustaining productivity and enhancing the quality of life for employees.

It is worth noting that the easy accessibility of teleworkers through constant connectivity, regardless of location or time, has the potential to intrude upon their right to privacy and leisure. This constant connection could also disrupt their right to disconnect from work, which is essential for maintaining a healthy work-life balance.

The widespread adoption of teleworking was made feasible largely due to the substantial increase in virtual litigation processes. In various courts throughout the country, the processing of cases virtually reached nearly 100% during the pandemic.²²

According to the “Pesquisa em Números” report conducted by the National Council of Justice (CNJ), the total number of new lawsuits filed in 2022 reached 21.3 million. This represents a 7.5% increase compared to the previous year.²³

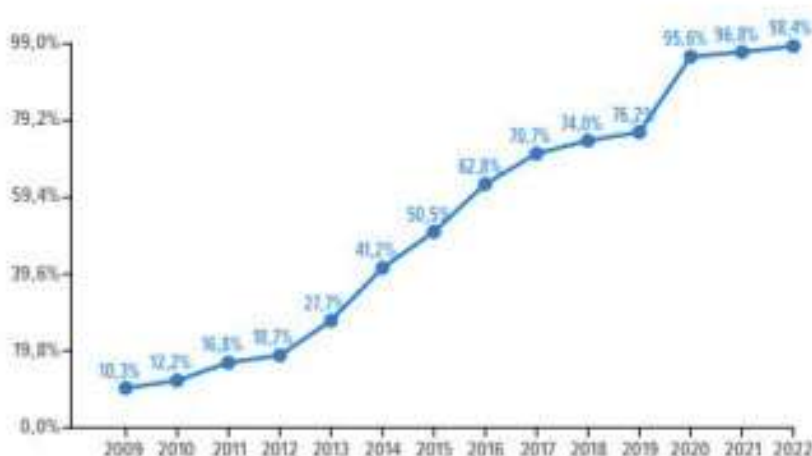
Regarding the virtualization of the justice system, the report revealed that the percentage of new electronic cases reached an impressive 98.4%. In the span of just one year, a remarkable 31 million new electronic cases were filed.²⁴

²² Elayne CANTUÁRIA; Audrey GONÇALVES, «A gestão de crise pelo Poder Judiciário Brasileiro: Medidas e normativos adotados para garantia da continuidade das atividades durante a pandemia pela covid-19», 2022, [consult. 3 Set. 2023]. Disponível em: <<http://site.conpedi.org.br/publicacoes/465g8u3r/sh181d20/ZZRKOB8pB9mD459c.pdf>>.

²³ CONSELHO NACIONAL DE JUSTIÇA, *Justiça em Números 2023 (Dados 2022). Sumário Executivo*, Brasília: CNJ, 2023, [consult. 3 Set. 2023]. Disponível em: <<https://www.cnj.jus.br/wp-content/uploads/2023/08/sumario-executivo-justica-em-numeros-v-2023-08-29.pdf>>.

²⁴ CONSELHO NACIONAL DE JUSTIÇA, *Justiça em Números 2023*.

SÉRIE HISTÓRICA DOS CASOS NOVOS ELETRÔNICOS:



Historical Series of New Electronic Cases (trans)

Source: CNJ Justice in Numbers

3. Right to disconnect

The right to disconnect can be defined as the period of genuine rest and personal enjoyment for employees, during which they are entirely exempt from any communication or engagement with their employer. This time allows individuals to pursue activities of their choice without any obligations related to work.

In Harff's perspective, the right to disconnect entails that employees have the freedom to disconnect from electronic devices and communication channels that link them to their employer during non-working hours, holidays, and weekends. It embodies the right "[...] not to work beyond their designated working hours and to be free from the concern of having their breaks and holidays interrupted."²⁵

According to Ponzilacqua e Silva, "[...] the integration of technology into production processes alters the way work is structured and organised, giving rise to flexible work patterns and blurring the boundaries between work and personal life [...]"²⁶

Similarly, Scalzilli contends that "[...] the breakdown of the distinction between the work environment, facilitated by teleworking and telematic communication, goes beyond the traditional workday and hinders disengagement." (trans)²⁷

²⁵ Rafael Neves HARFF, «Direito à desconexão: estudo comparado do direito brasileiro com o direito francês», *Revista Eletrônica do Tribunal Regional do Trabalho da 4ª Região*, 13/205 (2017) 4-5, [consult. 14 Jul. 2022]. Disponível em: <https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/110510/2017_harff_rafael_direito_desconexao.pdf?sequence=1&isAllowed=y>.

²⁶ Márcio Henrique Pereira PONZILACQUA; Luana Graciana SILVA, «O direito à desconexão do trabalho francês: perspectivas de implementação no Direito brasileiro», *Revista Direito e Práxis*, 13/1 (2022) 199, [consult. 10 Mai. 2022]. Disponível em: <<https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/53832/36306>>.

²⁷ Roberta SCALZILLI, «O direito à desconexão: uma análise crítica do instituto do teletrabalho brasileiro frente ao dano existencial como consequência da jornada excessiva de trabalho em tempos de pandemia», *Revista do*

In the 1980s and 1990s, Richard Susskind had already highlighted that technology would usher in significant transformations across various facets of life, encompassing both social and professional spheres. He foresaw a shift where courts and judges would conduct their operations in digital realms rather than within the physical confines of traditional courthouse settings. Susskind emphasised that the court should be perceived as a service rather than a physical location.²⁸

Undoubtedly, technology has paved the way for enhancements in labour processes. Nevertheless, it is crucial to recognize that it is human talent that possesses the capacity to implement and advance these technologies.²⁹ Hence, it is imperative to place special emphasis on the well-being and health of teleworkers.

In order to safeguard this right, it is imperative that workers have their designated rest periods effectively ensured. Employees who are consistently on call, with no clear boundaries regarding when they might be summoned for work-related matters, are unable to genuinely enjoy their time off.

The right to disconnect does not imply working fewer hours but rather working more efficiently during the designated work hours. It signifies the ability to utilise non-working hours for family, leisure, or other personal pursuits, which can rejuvenate the mind and body.

When it comes to work conducted *in person*, detecting violations of the right to disconnect typically poses minimal challenges. This is because, in most cases, work, including within the Judiciary, adheres to defined office hours. Communications with civil servants and judges outside of these hours are exceptions and are typically justified by emergency situations.

Nonetheless, implementing the right to disconnect becomes intricate in the context of teleworking, which is inherently defined by flexible working hours. At this juncture, there exist divergent viewpoints on how to monitor remote work, with the approach of setting and achieving targets being the prevailing method.

According to Scalzilli, teleworking, owing to its flexible nature, can potentially give rise to various societal problems. He argues that teleworking employees are susceptible to developing workaholic tendencies, a psychological ailment that significantly impacts an individual's well-being. This condition is characterised by an 'addiction' to work.³⁰

Tribunal Regional do Trabalho da 3ª Região, edição especial, t. II (2020) 643-664, [consult. 27 Mai. 2021]. Disponível em: <<https://sistemas.trt3.jus.br/bd-trt3/handle/11103/56362>>, 65.

²⁸ Richard SUSSKIND, *Online Courts and the Future of Justice*, Oxford: Oxford University Press, 2019, 95.

²⁹ Idalberto CHIAVENATO, «Prefácio», in IDEM, *Gestão de pessoas: o novo papel da gestão do talento humano*, 5.ª ed., São Paulo: Atlas, 2020, IX.

³⁰ Roberta SCALZILLI, «O direito à desconexão: uma análise crítica do instituto do teletrabalho brasileiro frente ao dano existencial como consequência da jornada excessiva de trabalho em tempos de pandemia», *Revista do Tribunal Regional do Trabalho da 3ª Região, edição especial*, t. II (2020) 643-664, [consult. 27 Mai. 2021]. Disponível em: <<https://sistemas.trt3.jus.br/bd-trt3/handle/11103/56362>>, 65.

In the private sector, which has provided valuable insights for the public sector, various approaches have been taken by employers to monitor the hours worked remotely. However, certain methods, viewed as encroachments on employees' rights to privacy and personal space, have resulted in legal disputes and compensation claims. Examples include the use of software that captures screenshots of computer screens and generates reports on websites visited.

While digital media's immediacy offers a sense of empowerment and flexibility, it can also give rise to a sense of detachment and a loss of control stemming from this very freedom.³¹

The Brazilian Federal Constitution, in establishing the maximum duration of the workday and the entitlement to paid rest, explicitly emphasises that this is not merely an individual entitlement but a collective right that serves the interests of society at large.

Safeguarding the well-being of workers holds significance for the entire community. As Maior suggests, "[...] restricting working hours is a matter of public health for society, rather than solely an economic concern that pertains solely to the individual worker." (trans)³² This perspective underscores the broader societal importance of ensuring reasonable working hours and rest periods for all. The author further posits that the objective of legal regulation is not to create additional compensation for overtime work but rather to prevent the need for such excessive work hours in the first place.³³

In the context of teleworking, monitoring the potential surplus of available time becomes even more crucial because there is no direct oversight of the time devoted to tasks or the total number of working hours.

4. Case Study of a Brazilian State Court of Justice

This article draws upon a portion of the research conducted as part of a Master's dissertation in Law and the Judiciary. The research was conducted through a case study involving civil servants and magistrates from a state court in Brazil.

The case study unfolded during three distinct periods (May 2021, October 2021, and May 2022) and employed two research methodologies: *structured interviews* (questionnaires) and *focus groups*.

The primary focus of this research was the Court of Justice of the State of Paraíba (TJPB), which is categorised by the CNJ as a smaller court. This court comprises 259 magistrates, including

³¹ Márcio Henrique Pereira PONZILACQUA; Luana Graciana SILVA, «O direito à desconexão do trabalho francês: perspectivas de implementação no Direito brasileiro», *Revista Direito e Práxis*, 13/1 (2022) 199, [consult. 10 Mai. 2022]. Disponível em: <<https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/53832/36306>>.

³² Jorge Souto MAIOR, *Do direito à desconexão do trabalho*, 2003, [consult. 10 Dez. 2021]. Disponível em: <https://www.jorgesoutomaior.com/uploads/5/3/9/1/53916439/do_direito_%C3%A0_desconex%C3%A3o_do_trabalho..pdf>, 9.

³³ Jorge Souto MAIOR, *Do direito à desconexão do trabalho*, 9.

judges and justices³⁴, along with 3,102 civil servants³⁵ who could potentially engage in teleworking arrangements. In addition, the TJPB operates across 55 districts³⁶.

In 2020, the TJPB suspended in-person office hours beginning in March and transitioned to teleworking. Hearings were conducted in a virtual format, while meetings with parties and lawyers were held through video conferences, often without prior scheduling.

Statistical data extracted from the CNJ's Justice in Numbers reports for 2020 and 2021 demonstrated that during the period of full teleworking, the court achieved positive outcomes in comparison to the previous year. This included a reduction in expenses, case backlog, and congestion rates, coupled with an increase in the IPC-Jus, Magistrates' (IPM), and Servants' (IPS) productivity indices, as well as the demand response index (IAD).

With the availability of this objective data showcasing a statistically significant improvement in productivity due to teleworking, we proceeded to conduct empirical research with the aim of investigating whether teleworking was being implemented in accordance with and respect for the rights of civil servants and judges to disconnect.

The empirical research, in turn, focused on examining the asynchrony in management and revealed the presence of communication issues between managers and teleworkers, highlighting the need for enhancements in leadership within hybrid teams.

The data unveiled a preference among those surveyed for teleworking, primarily in a hybrid mode, involving periodic visits to the workplace, either a few times a week or every fortnight. However, the absence of standardised communication schedules for team interactions created a perception among teleworkers that they were constantly on call, resulting in work overload and information noise.

The primary means of communication for work-related matters was found to be mobile phone messaging apps, with the same apps being utilized for personal use. Other digital platforms for work-related communication, guidance, or task monitoring, such as online calendars or Kanban methods, were used by less than half of the surveyed individuals.

Regarding the timing of work-related communications, it was revealed that some messages were occasionally sent during evenings and weekends for convenience, with no expectation of an immediate response during these periods. Some respondents also mentioned that while they didn't anticipate an immediate response when sending a message, they experienced anxiety upon receiving a request.

³⁴ The TJPB is made up of 19 judges, according to information on the TJPB's official *website*. (COURT OF JUSTICE OF PARAÍBA. Judges. s/d. Available at: <https://www.tjpb.jus.br/institucional/desembargadores>. Accessed on: 12 July 2021). The number of active magistrates (240) was based on the seniority list published in the TJPB's Official Gazette on 01/07/2021. (Diário da Justiça Eletrônico/ DJE).

³⁵ Through a request to the TJPB's personnel department, we were informed of the total number of 3,102 civil servants, of which 2,138 are permanent employees, 387 occupy commissioned positions and 577 have been requisitioned. The bailiffs were not included in this figure because they do not telework.

³⁶ COURT OF JUSTICE OF PARAÍBA. List of Counties. Courts of the 1st, 2nd and 3rd Entrances. undated. Available at: <https://www.tjpb.jus.br/comarcas/lista>. Accessed on: 22 June 2022.

The survey also indicated that most magistrate respondents preferred to remain in work-related messaging groups even during their holiday periods, whereas most civil servants preferred not to participate in such groups during their rest periods.

The demand for higher productivity in teleworking compared to in-person work was deemed unreasonable, with equal treatment identified as the ideal objective. The report emphasised that both modes of work offer advantages for the Administration and the teleworker, and the insistence on higher productivity reflects an outdated perspective that erroneously views teleworking as a 'privilege.'

Regarding training courses, data collected from focus groups revealed that the majority of respondents believed such training should be mandatory. They argued that providing public services necessitates a commitment to ongoing knowledge refreshment. The shift to new work methods necessitates new approaches.

In this context, it was suggested that participation in training courses related to teleworking team management should be compulsory, with the Court of Justice providing the necessary financial and logistical support to facilitate this participation.

5. Conclusions

The expansion of teleworking and digital justice, catalysed by the onset of the pandemic, has reshaped the landscape of judicial administration. The emergence of hybrid teams necessitates adept managers capable of safeguarding the right to disconnect for teleworkers within the Judiciary.

Communication issues among team members, stemming from the performance of tasks at different times, underscore the imperative for enhancing judicial management to facilitate asynchronous communication in teleworking settings.

Findings from a survey conducted in a Brazilian state court underscore that teleworking has yielded favourable quantitative outcomes. This includes a reduction in expenses, case backlog, and congestion rates, accompanied by an uptick in the IPC-Jus, Magistrates' (IPM), and Servants' (IPS) productivity indices, as well as the demand fulfilment index (IAD).

Empirical research involving magistrates and civil servants, aimed at garnering qualitative insights into the teleworking landscape, reveals that teleworking is a desired modality among Judiciary personnel. It necessitates only minor adjustments and enhancements to align with this evolving reality.

The results emphasise that the teleworking framework presents advantages and disadvantages for both the administration and teleworkers. Nonetheless, it is still treated as if it were a privileged modality, subject to more stringent requirements compared to in-person work arrangements.

The quantitative surge in teleworkers, prompted by the closure of judicial units during the Covid-19 pandemic, underscores the importance of heightened attention to asynchronous communication among judicial actors.

The shift to remote work, characterised by communication through phone calls, text messages, videos, and other means, has blurred the boundaries between personal and professional domains. This blurring has the potential to compromise teleworkers' right to disconnect.

The wealth of data collected provides valuable insights into the feasibility of teleworking when harmonised with the right to disconnect. It is a desired modality among judicial actors, representing a significant stride in the technological evolution of the Judiciary. This study highlights the potential for further research into the fulfilment of the right to disconnect within the Judiciary, aiming to dissociate teleworking from perpetual availability.

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