

## Legislative vulnerability of minority groups

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**Abstract** *Minorities are in an inferior position in society and therefore vulnerable in many aspects. This study analyzes legislative vulnerability and aims to categorize as “weak” or “strong” the protection conferred by law to the following minorities: elderly, disabled, LGBT, Indians, women, children/ adolescents and black people. In order to do so, it was developed a documental research in 30 federal laws in which legal provisions were searched to protect minorities. Next, the articles were organized in the following categories: civil, criminal, administrative, labor and procedural, to be analyzed afterwards. Legal protection was considered “strong” when there were legal provisions that observed the five categories and “weak” when it did not meet this criterion. It was noted that six groups have “strong” legislative protection, which elides the assertion that minorities are outside the law. The exception is the LGBT group, whose legislative protection is weak. In addition, consecrating rights through laws strengthens the institutional channels for minorities to demand their rights. Finally, it was observed that the legislative protection granted to minorities is not homogeneous but rather discriminatory, and there is an interference by the majority group in the rights regulation of vulnerable groups.*

**Key words** *Vulnerability analysis, Legislation as topic*

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## Introduction

For the purposes of this study, minority refers to a human or social group that is in a situation of inferiority or subordination in relation to another, considered major or dominant. This position of inferiority can be based on several factors, such as socioeconomic, legislative, psychic, age, physical, linguistic, gender, ethnic or religious. In other words, minorities are “a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics, different from the characteristics of the majority of the population”<sup>1</sup>. Or, they are “all social groups that are considered inferior and against which discrimination exists”<sup>2</sup>.

It should be noted that minorities are not always inferior in number. Séguin<sup>2</sup> shows that women and the poor are minority groups, although they are the majority in society. The elderly correspond to a significant part of the world population (8%), but it is a minority. Therefore, the numerical factor is not capable of characterizing a minority, but the position of subordination and inferiority that it occupies in a given society.

The fact that they are in a deprived position in the social sphere makes the minorities also in a condition of vulnerability. As a general notion, vulnerability consists of a degree of susceptibility of people to acquiring health problems<sup>3</sup>. Vulnerability is distinguished from risk, as it refers to probabilities or chances of someone becoming ill or dying as a result of a health problem. “Vulnerability expresses the potentialities of illness, non-illness and confrontation, related to each and every individual”<sup>3</sup>. Understanding vulnerability does not mean quantitatively observing statistical and probabilistic aspects, but rather analyzing in a broad and universal way which social or individual issues affect health and how to address them<sup>4</sup>.

According to Nichiata et al.<sup>4</sup>, vulnerable groups are people who are exposed to injuries or disabilities that make them susceptible to health shocks. People have “a threshold of vulnerability that, when overcome, results in illness”<sup>4</sup>. Nichiata et al.<sup>4</sup> exemplify as vulnerable groups “young and old, women, racial minorities, people with little social support, little or no access to education, low income and unemployed. It is possible to observe that vulnerability in health is related to elements such as age, race, ethnicity, poverty, schooling and social support.

These minority groups are in line with the research developed by the Institute of Applied

Economic Research - Ipea<sup>5</sup>. This consisted of a study on national minority conferences and their impact on both Executive and Legislative actions. The study concluded an existence of 9 (nine) minority groups, such as the elderly, people with disabilities, LGBT (lesbian, gay, bisexual, transvestite, transsexual and transgender), women, children and adolescents, black people and other minority ethnic and religious groups, young people and Brazilians abroad.

Therefore, the minority groups described by Ipea<sup>5</sup> resemble the vulnerable groups described by Nichiata et al.<sup>4</sup> and, among those mentioned, the following were adopted in this study, namely: the elderly, people with disabilities, LGBT, Indians, women, children and adolescents.

The analysis of vulnerability is very broad, as it may occur in several spheres, including labor relations, public policies, access to health and education. According to Bertolozzi et al.<sup>3</sup>, the concept of vulnerability is multidisciplinary, since health is something complex that requires different points of view to be analyzed and addressed. Thus, punctual actions and tasks are insufficient to solve the problem.

The present study is limited to analyzing vulnerability from the legislative point of view, that is, the laws that regulate, ensure and protect the rights of these minorities, and verifying if this legal protection can be considered “strong” or “weak”. “Strong” legal protection means the one that broadly covers the following five legal areas: civil, procedural, criminal, administrative and labor. And it is “weak” when there are no norms in all the mentioned categories.

It is also intended to categorize and establish degrees of legislative protection to these groups, seeking to recognize some of their idiosyncrasies.

## Methodology

It is a qualitative research in which a documentary analysis of thirty (30) federal laws was carried out. These laws were identified after consultation with *Vade Mecum*<sup>6</sup> in order to know the main federal laws that protect and regulate the rights of these minority groups. It should be clarified that the *Vade Mecum* is a collection of major federal laws, periodically updated, developed and recognized by law scholars and published by various editors.

The laws were then organized and grouped into five categories: civil, criminal, administrative, procedural and labor. These categories of

laws were chosen because they are the basic laws in the national legal system and used as the basis for other more specific laws. Therefore, other areas of law, such as environmental, financial, tax, social security and others were not considered in this study.

The first category, civil, included the set of devices that are present in the Civil Code (CC<sup>7</sup>) and the Public Registers Law (Law 6,015/73<sup>8</sup>). In criminal law, we have: Criminal Code (CP), Criminal Enforcement Law (Law 7,210/1984<sup>9</sup>) and Criminal Offenses Act (Decree-Law 3,688/1941<sup>10</sup>). In the administrative area, the laws: Federal Administrative Law (Law 9,784/99<sup>11</sup>), Public Servant Statute (Law 8,112/90<sup>12</sup>) and Law of Priority to service (Law 10,048/00<sup>13</sup>). In the procedural: the Civil Procedure Code (CPC<sup>14</sup>), the Code of Criminal Procedure (CPP), the Laws of the Special Courts (Law 9,099/95<sup>15</sup>, 10,259/01<sup>16</sup> and Law 12,153/2009<sup>17</sup>), Public Law Action (Law 7,347/1985<sup>18</sup>), Law of Popular Action (Law 4,717/65<sup>19</sup>) and Law of Constitutional Writ (Law 12,016/2009<sup>20</sup>). Lastly, the Labor Law consists of the Consolidation of Labor Laws (CLT) and the Law on Discrimination in Employment (Law 9,029/95<sup>21</sup>).

In addition to the laws mentioned in Chart 1, those of popular action<sup>19</sup>, injunction<sup>20</sup> and the special courts of both state courts<sup>10</sup> and federal courts<sup>16</sup> and the tax courts<sup>17</sup> were analyzed, but no legal provisions were found that protected the minorities under study.

Then, each of the laws was accessed on the official Union website (*planalto.gov*). Direct access to the internet site was performed in order to obtain the updated version of the legislation. Next, the law was read while search for standards referred to the seven minority groups were conducted. Only those norms and provisions that gave specific protection to the seven minority groups were considered. Specific protection includes a norm that assures legal prerogatives for certain people because they belong to a minority.

Although the present organization of the laws in the five areas was adopted for the purposes of the present study, it is emphasized that the Federal Constitution has other legal provisions of different areas. It should be noted that there are specific laws such as the Maria da Penha Law (Law 11,340/06<sup>22</sup>), Law of compulsory notification of violence against women (Law 10,778/03<sup>23</sup>), Law of Gestacional alimony (Law 11,804/08<sup>24</sup>), Statute of the Elderly (Law 10,741/03<sup>25</sup>), the Statute of the Children and Adolescents (Law 8,069/90<sup>26</sup>), the Statute of the Disabled (Law 13,146/2015<sup>27</sup>),

the International Convention on the Rights of Persons with Disabilities (Decree 6.949<sup>28</sup>/Law 6,001/73<sup>29</sup>), Law of the Indian Foundation (FUNAI) (Law 5,371/67<sup>30</sup>), Racial Equality Statute (Law 12,228/2010<sup>31</sup>), Crimes Against Prejudice of Race or Color Law (Law 7,716/89<sup>32</sup>) and Law 9,029/95<sup>21</sup> on the prohibition of discrimination in workplace that are not presented in Chart 1, since these legislative documents held the specific protection mentioned in this study, except for LGBT. From this previously constituted organization, it was possible to classify the legislative protection that these minority groups are subject to, as “weak” or “strong”, according to previously established criteria, with the adoption of the hermeneutical method for analysis and interpretation.

## Results

At first, the articles of law related to the rights of minorities in the five legal areas (civil, criminal, administrative, procedural and labor) adopted for analysis in this study are presented below, in Chart 1.

It was initially observed that the elderly have their own legislation, the Statute of the Elderly, which already includes standards that meet the five categories listed. In addition to having its own law, this category has full priority in the progress of judicial and administrative proceedings<sup>25</sup>. It is possible to order the criminal custody of the accused, in order to guarantee the right of those who are sixty years old or over (article 313, section III, CPP<sup>33</sup>). Besides, many institutions have legitimacy to act in the defense of the rights of the said minority group in collective, diffuse, and other lawsuits (article 81 and 82<sup>25</sup>). Besides, the Public Prosecution Service (MP) can intervene. Regarding the MP's performance, the 87 art. of the Statute of the Elderly<sup>25</sup> establishes that, if there is a judicial sentence imposing a conviction on the Public Power and the elderly person does not promote the execution, the Public Prosecutor must do so in 60 (sixty) days.

In the criminal aspect, it also highlights the existence of more severe penalties when a crime is committed against the elderly. In the Criminal Code, we highlight the larceny (article 171, § 4), the frustration of labor law (article 207) and the crime of enticing people for different purposes (article 149-A)<sup>34</sup>. In the labor sphere, arts. 26 to 28 of the Statute of the Elderly<sup>25</sup> prohibit discrimination against the elderly at the workplace,

Chart 1. Legal devices organized in the five legal areas.

Minority groups	Civil	Criminal	Administrative	Processual	Labor law
Elderly	<u>CC</u> : Art. 1.736, II. <u>CF</u> : Art. 203, V; 229; 230.	<u>CP</u> : Art. 61, II, h; 121, § 4º; 121, § 7º, II; 133, III; 140, § 3º; 141, IV; 148, § 1º, I; 159, § 1º; 171, § 4º; 183, III; 203, § 2º; 207, § 2º; 244. <u>7.210/1984</u> <sup>9</sup> : Art. 32, § 2º; 82, § 1º. <u>3.688/41</u> <sup>10</sup> : Art. 21, single paragraph.	<u>10.048/00</u> <sup>15</sup> : Art. 1º a 3º	<u>CPC</u> : Art. 53, III, e; 1048, I.	X
Women	<u>CC</u> : Art. 1736, I.	<u>CP</u> : Art. 37; 61, II, f e h; 121, VI; 125; 203, § 2º; 207, § 2º. <u>7.210/1984</u> <sup>9</sup> : Art. 14, § 3º; 19, 77, § 2º; 82, § 1º; 83, § 2º; 89, I, II; 117, IV; 152.	<u>CF</u> : Art. 40, § 1º, II, a, b. <u>8.112/90</u> <sup>14</sup> : Art 69, single paragraph; 102, a; 185, e; 207. <u>10.048/00</u> <sup>15</sup> : Art. 1º a 3º	X	<u>CF</u> : Art. 7º, XX. <u>CLT</u> : Art. 198; 373-A; 389, II, III, § 1º; 390; 390-E; 391, single paragraph; 391-A; 392, § 3º; 392; 393; 394; 394-A; 395; 396; 397.
Children and adolescents	<u>CC</u> : Art. 1.740, III. <u>CF</u> : 227, 228, 229.	<u>CF</u> : 5º, L. <u>CP</u> : Art. 27; 61, II, h; 111, V; 135; 148, § 1º, IV; 149, § 2º, I; 149-A, § 1º, II; 159, § 1º; 203, § 2º; 207, § 2º; 213, § 1º; 217-A; 218; 218-A; 218-B; 225, single paragraph; 227, § 1º; 230, § 1º; 244; 245; 247; 248; 249; 288, single paragraph. <u>7.210/1984</u> <sup>9</sup> : Art. 52, III; 89; 117, IV. <u>3.688/41</u> <sup>10</sup> : Art. 19, b, c; 50, § 1º.	<u>8.112/90</u> <sup>14</sup> : Art. 83; 97, b; 98, § 2º, § 3º; 99, single paragraph; 196; 197, I; 208; 209; 210, single paragraph; 217, IV; 217, § 3º; 241, single paragraph.	<u>CPC</u> : Art. 189, II; 725, III; 1.048, II. <u>CPP</u> : Art. 313, III; 318, V e VI.	<u>CF</u> : Art. 7º, XXV. <u>CLT</u> : Art. 429, § 2º; 389, § 1º; 392-A; 397; 399; 400; 403; 405, § 2º, § 4º; 406; 409; 415; 416; 417, III; 422; 424; 425; 427, single paragraph; 430, II; 434; 440; 544, IX; 792.
Disabled	<u>CC</u> : Art. 1.550, § 2º, 1.779 a 1783-A. <u>CF</u> : 208, III; 227, § 1º, II e § 2º; 244.	<u>CP</u> : Art. 121, § 7º, II; 129, § 11; 140, § 3º; 141, IV; 149-A, § 1º, II; 203, § 2º; 207, § 2º; 217-A, § 1º; 218-B. <u>7.210/1984</u> <sup>9</sup> : Art. 32, § 3º; 117, III.	<u>CF</u> : Art. 40, § 4º, I. <u>9.784/99</u> <sup>13</sup> : Art. 69-A, II. <u>8.112/90</u> <sup>14</sup> : Art. 5º, § 2º; 98, § 2º, § 3º; 217, c, d. <u>10.048/00</u> <sup>15</sup> : Art. 1º a 5º	<u>CF</u> : Art. 100, § 2º. <u>CPC</u> : Art. 199. <u>CPP</u> : Art. 313, III; 318, III.	<u>CF</u> : Art. 7º, XXXI. <u>CLT</u> : Art. 428, § 3º, 6º §, 5º §, 8º §; 433, I; 461, 4º §.
Indians	<u>6.015/73</u> <sup>8</sup> : Art. 50, § 2º; 246, § 2º e § 3º. <u>CF</u> : 209, § 2º; 215, § 1º, 231 e 232.	<u>CP</u> : Art. 203, § 2º; 207, § 2º.	X	<u>CF</u> : 129, V; 232	X
Black people	<u>CF</u> : Art. 215, § 1º.	<u>CP</u> : Art. 140, § 3º; 149, § 2º, II. <u>CF</u> : Art. 5º, XLII.	X	<u>7.347/85</u> <sup>18</sup> : Art. 1º, VII; 5º, b; 13, § 2º.	X
LGBT	X	X	X	X	X

prioritize the age criterion for the tie-breaking in public tenders and promote programs to stimulate elderly people to engage in labor force.

Women have a statute, the “Maria da Penha” Law<sup>22</sup>, which regulates, in the criminal, procedural and administrative sphere, their rights in case of domestic violence. It is also worth mentioning, in the procedural sphere, that a preventive detention order can be issued to ensure women’s rights (article 313, section II of the CPP)<sup>33</sup>. Regarding civil right, the protection of pregnant women is highlighted, especially through gestational alimony<sup>24</sup>. In the criminal sphere, crimes are more severely punished when committed against women, in which femicide stands out (article 121,IV), the frustration of labor law (article 203 of the CP), enticement of workers to work in another locality (article 207 of the CP)<sup>34</sup>. In addition, Law 10.778/03<sup>23</sup> establishes the need for compulsory notification in cases of violence against women who are treated in public and private health services.

Lastly, in the labor sphere, there are legal norms for the protection of women, respecting their physical limits (limits on weight bearing), prohibiting discrimination, protecting pregnancy and also breastfeeding at the workplace (articles 389 et seq. of CLT)<sup>35</sup>.

As for children and adolescents, they have a specific legislation, Law 8.069/90<sup>19</sup><sup>26</sup>, whose legal provisions encompass the five categories of analysis listed in this study.

However, in the procedural sphere, the possibility of decreeing pre-trial detention to ensure the right of the children and adolescents is highlighted (article 313, CPP<sup>33</sup>, item III). In the criminal chamber, notably in the CP, some crimes receive more severe penalties when committed against members of this minority group, such as those typified by arts. 149-A, 203 and 207<sup>34</sup>. In addition, there is a proper regulation at the workplace for the protection of children and adolescents.

The disabled, in turn, have a specific law, number 13.146/2015<sup>27</sup> (Disabled Persons Statute) with legal norms of several areas. Furthermore, the International Convention on the Rights of Persons with Disabilities (Decree 6.949, of August 25, 2009<sup>28</sup>) was ratified in Brazil in the form of an amendment to the Constitution. Therefore, it has a superior status when compared to the other norms of the Brazilian legal system. These laws alone already meet the five categories listed in this study.

It should be noted, however, that in the criminal sphere, some crimes receive more severe

penalties if they are committed against disabled persons (Articles 149-A, 203 and 207)<sup>34</sup>. In the procedural sphere, preventive detention can be performed to ensure the right of the disabled (article 313, inc. III, CPP)<sup>33</sup>. In the labor area, protection is guaranteed to avoid discrimination in the workplace and also encourage the employment of this minority group<sup>35</sup>. Finally, in the administrative sphere, the existence of vacancies in public competitions reserved for physically handicapped persons<sup>12</sup> and the priority in the care provided by the public service<sup>13</sup> stand out.

The indigenous population also have their own legislation, the status of the Indian, which includes the five categories analyzed. Some crimes are also more severely punished when committed against Indian people, such as those foreseen in arts. 203 and 207 of the CP<sup>34</sup>. In the administrative sphere, Law No. 5,371, which created the National Indian Foundation (FUNAI)<sup>30</sup>, stands out as an administrative institution that protects indigenous people’s interests.

The black population also have their own specific legislation, the Racial Equality Statute<sup>31</sup>. It contains civil, administrative and labor laws that guarantee the right of this minority.

In the criminal sphere, art. 5, XLIII of CF<sup>36</sup> stands out for establishing that the crime of racism is unenforceable and imprescriptible, subject to imprisonment under the law. In addition, the law 7.716/89<sup>27</sup><sup>32</sup> specifies the crimes resulting from prejudice of race or color.

In the labor sphere, Law 9.029/95 is a relevant tool that prohibits discriminatory practices for both admission and stay at work<sup>21</sup>. It applies not only to race, but to gender, origin, marital status, family situation, disability, professional rehabilitation, age among others (article 1 of the law). Finally, in the procedural sphere, the Law of Public Civil Action (7,347/85)<sup>18</sup> stands out and establishes the possibility of filing this type of action to protect the honor and dignity of racial groups.

Unlike the other categories, at federal level, the LGBT population is outside the scope of the law, in other words, there are no laws specifically ensuring the rights of this group in the five analyzed categories. Despite the existence of norms at the state level that have been observed based on the information obtained from the Ministry of Human Rights<sup>37</sup>, the creation of a protective law for the category falls within the federal jurisdiction that has not yet been published. However, there have been advances in Brazil to ensure the right of stable union and marriage of this population, as well as the right to adoption, due to

judicial decisions, endorsed by regulations of the National Council of Justice. However, crimes committed against the LGBT category are judged in the same way as any other, without criminal procedural prerogatives or aggravated sentences. The absence of laws that regulate this issue often leaves decisions to the discretion of the Judge, in real disputes. This results in legal uncertainty, due to strong interpretative divergences between the magistrates.

## Discussion

Concerning the groups under study, it is possible to conclude that there is a wide range of regulations of law that crosses the civil, criminal, administrative, labor and procedural spheres. Therefore, the legal regulation of these groups can be considered as “strong”, according to the criteria initially adopted. The only exception is the LGBT group, which has few rights regulated by legislation. Thus, legislative regulation for this group is considered weak.

This conclusion is in dissonance with the characteristic of legal-social vulnerability, established by Sodré<sup>38</sup>. According to the author, minorities, understood as “a refusal of consent, a voice of dissent in search of an anti-hegemonic openness in the closed circle of societal determinations”<sup>38</sup>, have four main characteristics, namely: 1) identity *in statunascendi*; 2) the counter-hegemonic struggle; 3) discursive strategies and 4) legal-social vulnerability.

The characteristic of “identity *in statunascendi*” implies that minorities are an entity in formation, since, although being around for years, it is in continuous resumption and reformulation. As for the hegemonic struggle, the minority aims to reduce hegemonic power and, as far as discursive strategies are concerned, it implies that minorities do not struggle with weapons, rather with legitimate social means, such as marches, episodic invasions, symbolic gestures, manifestos, magazines, newspapers etc., aiming at social recognition and the consecration of rights.

Finally, with regard to legal and social vulnerability, since they are not institutionalized by the rules of the current juridical-social system, minorities are marginalized from institutional legitimacy and public policies. Therefore, for the author, minorities can be considered as vulnerable groups because they demand the social recognition that they lack.

This is in contrast with the conclusion of this

study, since minorities are not outside the law and because they have several regulated rights, although it can not be said that all the interests of these groups are legally envisaged. This research, therefore, is in accordance with the thinking of Sarlet<sup>39</sup>, who states that the great challenge of our time is not the regulation or recognition of rights, but rather their effective application in the social context.

The rights of minority groups are provided by law (and not in other acts, such as public policy), which only reinforces the conclusion that their legal protection can be characterized as “strong”, in all legal areas considered, except in the specific case of the LGBT population, who lack specific protection of their rights. Couto and Lima<sup>40</sup> observed that, when a public policy presents a low degree of resilience, it should be constitutionalized, that is, it should become a constitutional law, so as to theoretically guarantee its continuity. Hence, legalizing public policies generates stability insofar as changes in government and management cannot change them arbitrarily. For such, it is necessary to create a new law and change the former, which requires a slow and bureaucratic political process involving diverse interests and, maybe, even the interference of the Judicial Power. Therefore, when legalized, the politics tend to be maintained and favor the status *quo*.

Couto and Lima<sup>40</sup> assert that the characteristic of stability cannot be interpreted only positively, since it can be used by economic groups to assert their interests or political preferences, regardless of governmental changes. This conclusion that does not apply to the rights of minorities, whose recognition improves the human dignity of marginalized groups without direct relationship to the interests of the holders of capital.

The fact that rights are provided by law also strengthens the characteristic of “discursive strategies”, as pointed out by Sodré<sup>38</sup>, since the legislative forecast opens a greater range of legitimate means for the minorities to demand their rights, especially through the intervention of the Judicial Power, which has the prerogative to intervene in case of legal noncompliance (article 5, XXXV, CF)<sup>36</sup>.

However, the characteristic of legal-social vulnerability described by Sodré<sup>38</sup> is in line with the LGBT group, since the lack of protective laws for this minority group make it vulnerable under the legislative aspect. Therefore, the exercise of their rights has been submitted by the Judicial Power, whose intervention has peculiarities, mainly be-

cause the decisions often present a large degree of variability. Therefore, what applies to a case does not necessarily apply to another. In addition, judicial decisions, in most occasions, do not bind the public administration as a whole nor guarantee the stability of social relations. Therefore, it is possible to redeem the full application of Sodre's understanding<sup>38</sup> that the LGBT group is outside the law.

Although the analyzed groups are considered vulnerable, which requires special protection from the State, the legislative support given to them is not homogeneous.

Therefore, in the legal sphere, these categories are discriminated, since, theoretically, everyone will be elderly, but not everyone will be, for exam-

ple, members of the LGBT group. This leads us to infer that, even in laws covering minority groups, there is the interference of the position of majority groups that dominate the political field. In this sense, Trevizan and Amaral<sup>41</sup> conclude that "it is intuitively perceived that it is hierarchically more important to serve the vulnerable groups, in the case of the elderly, than the minority that are the Indians". This evidences that research works recognize the existence of discrimination between categories.

Finally, this paper aims to provide guidance to further studies that may be developed at state and city levels, and analyze the degree of mismatch between reality and the legislative forecast of minority rights.

## Collaborations

CEA Paula, AP da Silva, CML Bittar contributed to the design of this study, and the analysis and interpretation of the results. CML Bittar contributed to the critical review of the intellectual content of the manuscript. All authors participated in the writing, approved the final version of the manuscript and declare that they are responsible for all aspects of the manuscript and guarantee its accuracy and integrity.

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