



Legal culture and image in the Brazilian courts

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VICENTE RICCIO*

CLARISSA DINIZ GUEDES*

Abstract

This article discusses the interpretation of images by Brazilian courts and how the legal culture is part of this process. The use of the image as a means of proof differs qualitatively from the evidence traditionally applied in the judiciary, such as documents or witnesses. The image is characterized by instantaneity, emotionality, and immediacy. In addition, the media allow the construction of different meanings, implicit or explicit. The analysis varies according to the nature of the legal systems. In the adversarial legal system (Anglo-Saxon) the images are submitted to cross-examination and debated orally. In the civil law system, the role of the magistrate is preponderant, being responsible for the images' validity. The research found that magistrates incorporate the content of their videos into their decisions based on experts' opinions or witnesses' testimonials who have viewed the images. This highlights a legal culture that is based on formalism and is ill-prepared to deal with the particularities of the image.

Key words

Legal culture; image; court decision; Brazil

Resumen

Este artículo debate la interpretación de imágenes en los tribunales de Brasil y cómo la cultura jurídica es parte de ese proceso. El uso de la imagen como medio de prueba difiere cualitativamente de las pruebas que tradicionalmente se han aplicado en el poder judicial, como documentos o testigos. La imagen se caracteriza por la instantaneidad, la emocionalidad y la inmediatez. Por añadidura, los medios permiten

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* Associate Professor at Law School of Federal University of Juiz de Fora - Brazil. Email: vicente.riccio@gmail.com

* Law School, Federal University of Juiz de Fora, Brazil. Email: clarissadinizguedes@gmail.com

la construcción de diferentes significados, implícitos o explícitos. El análisis varía dependiendo de la naturaleza de los sistemas de derecho. En el sistema jurídico adversarial (anglosajón), las imágenes se someten a contraanálisis y se debaten oralmente. En el sistema jurídico civil, el rol del magistrado es preponderante, ya que es responsable de la validez de las imágenes. La investigación halló que los magistrados incorporan el contenido de sus videos en sus decisiones, basándose en opiniones de expertos o declaraciones de testigos que han visto las imágenes. Ello pone de manifiesto una cultura jurídica que se basa en el formalismo y que está mal preparada para lidiar con las particularidades de la imagen.

Palabras clave

Cultura jurídica; imagen; decisión judicial; Brasil

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1. Introduction

The concept of legal culture has been the subject of debate in different fields of socio-legal studies. Its use is wide and covers several themes, such as the legal culture of legal professionals (lawyers, prosecutors, and judges), how the judicial system and laws are perceived in different countries, or the daily perception of the idea of legality by part of the general population. This flexibility in the use of the idea of legal culture led to the questioning of the concept itself and the applicability of the term in the field of socio-legal studies.

Despite this, the theme of culture is present in all fields of study in the social sciences and for this reason it is a topic relevant to the sociology of law. The different and often irreconcilable approaches on the subject can lead to questions about its use at the same time. However, the idea of legal culture is relevant for the study of the relationship between law and society, as well as for understanding of the different contexts of operation of judicial institutions and the construction of the idea of justice in different social groups.

This article discusses the use of the concept of legal culture to understand the use of images as evidence. More specifically, the article discusses the use of video in Brazilian courts and the cultural elements present in this use. The characteristics of mediated communication and visual argumentation are discussed in the text. The image is a new problem faced by contemporary courts, as its nature is distinct from the textual-verbal model, being characterized by immediacy, fluidity, and ubiquity. Additionally, it acts in the immediate perception of individuals and incorporates several rhetorical elements mediated by technological instruments. It promotes the mobilization of immediate moral judgments, distinct from classical procedural time.

The article is subdivided into four sections. The first discusses the concept of legal culture, its characteristics, uses and limitations. The following section analyzes the application of the concept in view of the different legal systems and respective modes of legal reasoning. The third section addresses the characteristics of visual argumentation and the use of this argumentation in the judicial sphere. The subsequent section describes the methodology for analyzing the judicial decisions selected in this research. Finally, the conclusion summarizes the arguments developed, and how the concept of legal culture can be applied to the study of mediated image in judicial contexts.

2. Legal culture: characteristics, uses and limitations

In a broad perspective, the concept of legal culture can be understood as the “set of exhibition and interpretation techniques employed by law operators – both technically and theoretically – and the set of ideologies corresponding to the function of law that is expressed by their techniques” (Rebuffa and Blankenburg 1993, 139). The idea of legal culture is not to be confused with legal thinking, dogmatics, or legal doctrine. The first discusses the intrinsic characteristics of law and its function. The second refers to the organization of law around conceptual categories such as person, contract, autonomy, among others. Finally, the doctrine is responsible for systematizing the interpretation of legal concepts. In this traditional perspective, the idea of legal culture is linked to the formal legal system.

The development of the concept of legal culture sought to go beyond this exclusively formal dimension of law and to analyze the perception and understanding of law in society. In general, the initial studies on legal culture sought to analyze the values and attitudes that link people to the legal system and the culture of society in a generic way. This definition introduces the distinction between values and attitudes towards the law on the part of the public and on the part of the legal operators. The Anglo-Saxon tradition and its reference to the entrenchment of law in culture is an example. In this perspective, cultural unity is a characteristic of Common Law thinking (Cotterrell 2004).

The concept of legal culture defined by Friedman (1975) as an analytical term sought to work on the explicit and tacit elements of the interaction of the legal system and its external environment. In its descriptive aspect, it identified a group of situations such as knowledge, attitudes and behaviors related to the legal system. In short, it analyzed measurable elements of great diversity in a broad category (Silbey 2010).

This diversity can be observed in the multiple contexts and situations of use of the concept of legal culture. More specifically, “whoever uses the term understands culture as something that the law already expresses and reflects and something that the law needs to achieve” (Nelken 2016, 2). Thus, the concept of legal culture serves to deal with the rules and practices shared by specific groups or even by an entire society. Another recurring use is in the comparison of different legal systems (Legrand 2006) or in the concrete performance of the courts (Blankenburg 1998). Despite this, the imprecision of the concept and the respective scope of applicability is the subject of debate, since the relationship between culture and law is contradictory and marked by different modes of interaction (Cotterrell 2004). Moreover, the legal culture concept allows the understanding of how law is “embedded in larger frameworks of social structure and culture that constitute and reveal the place of law in society” (Nelken 2012, 17).

The idea of legal culture, in turn, remains relevant to the study of the relationship between law and society, as the cultural dimension is present in the process of applying institutionalized law. The high complexity of contemporary society affects the cultural lives of law. Thus, the concept of legal culture allows the description of the processes that define the conditions of the action and its continuous process of reproduction (Penisi 2006).

The prospects for using the concept of legal culture based on overly generalized models are insufficient for a deep understanding of normative phenomena dissociated from state legality, such as, for example, the expressions of legality worked in the media, especially in popular culture (Asimow 2009, Rafter and Brown 2011), the processes of transnational regulation (Faria 1997, Arnaud 1998), or even the construction of the trust process around cryptocurrencies (Cunha and Silbey 2020). In this sense, the cultural dimension of law in society is a relevant object of analysis, which is why the “different definitions of the facts of legal culture will reflect the contrasting understandings of what is meant as culture” (Nelken 2016, 11). Furthermore, a point common to all the different models of analysis is the presence of the image of law built from the experiences of individuals (Hertogh and Kurkchian 2016).

Thus, the legal culture can be understood because of the institutions of the justice system, the context, and the interpretative process of situations that mobilize judgments. Its use must consider facts, perspectives, and values properly articulated in different objects of

analysis. In a broad perspective, the concept of legal culture is characterized by legal forms, distinctive modes of using the law, or different repertoires of languages. Moreover, the concept of legal culture is constituted as an amalgam of different modes of speech such as popular, administrative, or institutional ones (Nelken 2016).

The perspective of analysis regarding culture has also undergone changes. The generalist view of a coherent whole capable of incorporating the dimensions of values, beliefs, knowledge, and customs is not supported. Studies in the field of culture have come to recognize its contextual and local dimension (Geertz 1973, Swidler 1986, Shearing and Ericson 1991). This change in perspective can be applied to the study of the cultural dimension of law, since its institutional structure is now observed from its contexts of action and its symbolic dimension (Sarat and Kearns 1998).

Silbey (2010) reinforces this perspective by including the concept of legal culture in the debate on the concept of culture itself. First, the debate was about the analytical character of the concept of culture or about its concreteness and measurability. From the turn of cultural studies in the 1980s, the focus was on social action. Thus, the search for articulating structure and action starts to guide the understanding of culture and its expression in legal contexts.

Another point to be considered in the discussion of legal culture is the issue of values. Culture expressed in different contexts, macro or microsocial, is permeated by the dimension of values. They are present in the process of reproducing social and legal norms. Moreover, the culture is in constant movement and incorporates beliefs, traditions, projects, being fundamental for the organization of the plurality existing in a society (Cotterrell 2017). In this way, the law is an instrument to provide meaning to a cultural context while being influenced by it.

This shift toward a contextual view of legal culture refers to the classic dilemma between structure and action. According to Nelken, "the idea of legal culture thus points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society" (Nelken 2001, 25). State law is a classic form of social structure, observed in the institutionalization of the judiciary, bar associations and law schools. The interactional dimension comprises the operation of the law by its professionals and laypeople in their daily lives (Liu 2015). In other words, the dimension of state law establishes standards, norms, and legal limitations for the consolidated judicial decision in the sentence or in other stages of the process (Giura 2015). This structuring character is not absolute, since the process of individuals' interaction with the system can be characterized by acceptance, negotiation and contestation (Ewick and Silbey 1998). Besides, the social space does not limit people by their roles and functions, but by their location and temporality (Liu 2015).

Among these new research contexts, the relationship between law and the media is a relevant element, as it manifests itself in a phenomenon that involves a strong symbolic dimension and mobilizes lay conceptions of justice as well as its institutional counterpart of the justice system and the professionals inserted in it. The fluid, immediate and emotional character of the media mobilize values and moral judgments that are immediately constructed, as opposed to the formalized decision model of judicial courts (Garapon 1997). Moreover, the mediated image can broaden the judicial space and weaken

its ritual. The use of videoconferences in legal settings is one example of the desacralization of judicial space promoted by the mediated image (Perrocheau and Cottin 2018).

This work seeks to understand how video images are worked in a specific institutional context, in this case the higher court of justice of the State of Minas Gerais in Brazil, the second largest populated in the country. In the case of Brazil, a country with a Roman-German legal tradition, that is characterized by its attachment to formalism and the judge's prevalent role in the process. It is based on the premise that, especially in Brazil, despite the mutual influence between the systems of common law and civil law, the bureaucratic and book-entry aspects of the process still prevail in judicial practice (Denti 1974, Cavallone 2006, Nunes 2008).

In this arrangement, the institutional dimension defines the elements and spaces for action by legal professionals and the actors involved in the justice system, with the expected result being a judicial sentence (Giura 2015). The object treated in this context – the image recorded on video to prove a fact underlying the cause – is highly complex, as it is capable of recording, storing and sharing specific interactions regardless of time and space (Thompson 1995).

The analysis of the interpretation of video images by Brazilian courts takes into account macro-structural elements established by the civil law system, responsible for establishing the mode of debate and the decision-making process. However, the concrete action of legal professionals refers to contextual and subjective elements, providing meaning to the participants in the interaction in a legal context. The subjectivity in these contexts is amplified in the decision-making processes involving the use of the image. This fact stems from its immediate, fluid and subjective character. The research seeks to understand how the images recorded on video are analyzed in a legal context influenced by the system of law and by the concrete action of its magistrates. For this reason, judicial decisions (judgments) are the object of study. Therefore, the perspective of legal culture as an instrument for analyzing a dynamic context, marked by subjectivities, but also influenced by the institutional characteristics of the Brazilian judicial system, characterizes this research.

3. Legal culture and legal systems

The systems of law historically developed in the Western World show relevant distinctions and were considered expressions of specific legal cultures. The common law system characterizes itself by the role of courts in defining law, predominantly oral argument, the relevance of testimonial evidence and the role of the parties in the production of evidence (Riccio *et al.* 2018). Experience is valued as the basis for the process of interpreting the law. The continental or civil law system was originally based on the model of the legal code systematized by a specific legislative will. It is based on the conduct of the process by the judge (Bohlander 2011), on extremely bureaucratic and formal character of the evidential law and on the predominance of writing in the process. This distinction establishes different models of interpretation, as judges in common law traditionally make use of it in cases of legislative gaps. The civil law system has, for centuries, stuck to the task of interpreting the law resulting from legislative will. The

interpretive process itself in both traditions consider the particularity of the legislation, its creation and the competent institution to interpret it (Carney 2015).

In spite of this, the distinction between the legal systems of the Western World is not dichotomous as it may seem at first sight, as at the moment they do not present themselves purely (Varano and Barsotti 2014), but demonstrate historical and cultural variations, also observed in the way the evidence is dealt with. The evolution of the right to proof is an example for understanding the *modus operandi* of legal systems. In the adversarial model, the evolution occurred from the rhetorical conception of the typical proof of the pre-classical Roman period (Kaser 1968) and has developed throughout history (Giuliani 1962, Nobili 1974).

This experience results in the central presence of the jury in the production of evidence under the common law. The jury is a space of orality. In this arrangement, the rhetorical dimension of the judicial decision-making process is highlighted. In the Romano-Germanic tradition, the doctrine expressed in the legal code establishes the standards to be followed substantially, that is, by reducing the spaces of rhetoric. The common law perspective works differently, as the main concern is with the functioning of the judicial system and the resolution of conflicts based on the previously exposed decisions (Brouwer 2018).

The development of the Romano-Germanic system resulted in a more formalistic perspective of the evidence (Cappelletti 2010). From the middle age onward, the Roman system adopted the following characteristics: a) the increasing interference of the judicial authority in the admission of evidence, b) the limitation of the judge's powers in relation to his ability to freely form his conviction (Tozzi 1974). In spite of this, the judge takes the lead in the production of evidence, in search of the truth, and has greater freedom to determine probative steps, to question parties and witnesses.

In the criminal sphere, the civil law process has a history of an inquisitive nature, (Lombardo 1999), whose reflexes in the evidential field established, until recently, central participation of the judge in the questioning of witnesses and the interrogation of the defendant. The recent legislative reform of the Brazilian criminal process has adopted the possibility of direct inquiry by the defender and accuser. It is an approximation with the adversarial model. The centrality of the judge's role in the Roman-Germanic system can also be observed in the case of civil proceedings. The judge conducts the probatory activity from the moment of admissibility, passing through the production, until the moment of valuation of the evidence.

In summary, the space for orality is still restricted in civil law, despite the approximation observed between the two systems of law. In general, the judge is still primarily responsible for conducting the case within the continental system. The institutional form helps to define the operation of the system. This practical action, in turn, is characterized by a way of acting and the cultural logic of the operators of the judicial system. Thus, legislative initiatives to incorporate legal transplants are not appropriate for their daily practice. In the Brazilian case, the recent legislative innovations in the scope of the judicial process (civil and criminal) have not been incorporated into daily life and the procedure continues to be written (Cavallone 2006). Thus, the context of practical action by legal professionals is characterized by the reinforcement of the bureaucratic perspective, despite recent legislative innovations.

This stance is criticized, for example, when analyzing the jury court in Brazil, as oral evidence is poorly analyzed in the case of crimes against life. Oral evidence is usually produced at the pre-trial stage and reading of these records is done at the trial stage. This cultural dimension, rooted in the way Brazilian professionals act, is criticized, as it reduces the possibility of discussing the circumstances related to a crime and the juridical understanding of the facts by the jurors (Badaró 2009, Nardelli 2019).

This practice observed in the Brazilian courts opens space for questioning how the image is treated by Brazilian procedural law in the civil and criminal spheres. In addition to the express provision of the audiovisual document in the Civil Procedure Code of 2015, technological innovations are made possible, in the evidential field, by the authorization to use evidence not provided for in the legislation. The 2002 Civil Code also makes it possible to use various means of proof, including video. The same is true concerning criminal proceedings. The video is documentary evidence whose production can be authorized by the judge as long as fundamental rights and due process are respected. The current Code of Criminal Procedure does not directly discipline the use of video, but by subsidiary application of the Code of Civil Procedure, the use in the criminal field falls within the concept of documentary evidence. In summary, the admissibility of video evidence is accepted in both civil and criminal proceedings, and its value is established by the judge.

The prediction of the use of the image in a legal context does not depend exclusively on a determination of the law, but on how it is incorporated into judicial practice. In this sense, it is possible to speak about the legal culture of legal professionals in practical legal contexts. This is relevant in a context of doctrinal emptiness concerning the image but marked by a moment of increasing its use in the courts.

In the context of common law, the image is subjected to orality in greater intensity. Brion (2014) states that there is a correlation between image and verdict due to the adversarial model. This situation stems from the presence of visual elements that are part of the court space, but not incorporated into the formal process. In turn, the presentation of information endowed with legal meaning (evidence, testimony, and argumentation) that are part of the formal structure of the judicial process presented to the jurors also participates in the decision-making process. Therefore, these two spheres defined by the institutional structure of the adversarial system enable the existence of a causal relationship between the use of image and verdict.

Silbey (2008) points out the need to develop a critical reading of the image in the context of the adversarial process through an informed orality. This practice avoids the reproduction of myths about the image. And what are the myths about the image? In summary: 1) the film does not present any type of bias, 2) its content is unambiguous and marked by obviousness, 3) the observer is transformed into a witness. The overcoming of the myths of the image is possible from its submission to the correct way of cross-examination. To deal with the complexity of its use in court, the lawyer must work on the context and content of the images, the relevant aspects of the video evidence, its fragments, and the contrast with the testimony of the witnesses. In this sense, a significant portion of the literature addresses the issue of the image in the adversarial system, but how to understand its use in the context of civil law?

In Brazil, the judge has great power to deal with the image, as he acts remarkably in the conduct of the evidential activity, especially at the time of the production of the evidence. In a different way from the adversarial system, the greater intensity of the judge's evidential powers allows him to give greater or lesser use of orality in the production of evidence, especially audiovisual evidence. Thus, it is possible to question how the image is used in the context of the prevalence of the written word in judicial practice. The law defines the space and the mode of a judicial decision; however, the concrete action of the legal professional is permeated by cultural practices and meanings built daily.

Finally, there is still the dimension of legal professionals. Understanding the characteristics of the image and its rhetorical content is a skill to be developed. The complexity, fluidity, and originality of the video impose new conceptual and practical skills on those who apply the law in their daily lives. But how to develop them? This is the subject of the following section.

4. Image and visual argumentation in the judicial sphere

The relationship between law and image is complex and characterized by several facets. These plural and differentiated spaces can be observed in paintings, in the architecture of the courts (Garapon 1997, Carlsson and Baier 2002), in the representation of the State through official documents, such as the French commemorative stamps (Wagner and Bozzo-Rey 2014), in photographs about situations that mobilize the sense of justice (Flusser 1985, Carrabine 2012), in reality shows about crime (Cavender and Fishman 1998), in film production representative of the judicial process (Silbey 2017), in the use of surveillance cameras on the police uniform (Fan 2018). The image recording of situations related to justice can be observed throughout history; however, contemporary technological development has enhanced this capacity (Boltanski 1993).

In the context of hypermedia, the images are immediate and available in the most diverse spaces. In this context, images in everyday life are endless and inaccurate. This hinders the ability to orient yourself in a visual tangle. Sherwin (2011) defines this new context as digital baroque: a situation of the immense presence of the image in everyday life that can confuse and overwhelm the senses. Hence there is the need to develop the ability to select, understand, and interpret images. This ability is especially relevant in the judicial context, which is why the idea of visual literacy must be considered by legal professionals.

Due to this new reality, Feigenson (2014) warns of the fact that images need words for their interpretation. Through them, they gain meaning for social practice and construction of the legal argumentation process. This situation reveals a paradox, as the courts are continuously fed with photographs, videos recorded by cell phones, images from security cameras, computer simulations, records made by drones, etc. All these information apparatuses are at risk of being tampered with and manipulated (Feigenson and Speisel 2009). In this sense, the challenges for the incorporation of the image in the judicial sphere must take into consideration: 1) the incorporation of the image in the process of legal argument based on words, 2) the tension brought by the visual with the access promoted to the real, 3) the risk of basing the decision-making process on images as inspired by popular culture.

This new reality imposes new challenges for the law since the growth of the presence of the image in the courts in all legal systems is constant. The images recorded by security

cameras, smartphones, virtual environments, among others, must go through an argumentative process. But was the image an argument? What would distinguish the visual from the written argument? This aspect is relevant due to the argumentative nature of the judicial practice.

The concept of visual argument has been discussed in specialized literature since the 1990s. Studies on this problem seek to identify the elements of the visual argument and its distinction concerning the traditional literal argument. The discussion about this problem can be seen in a text of great impact: *Rhétorique de l'image*, by Roland Barthes (1964). There, Barthes seeks to analyze the meaning attributed to the image and understand its representation. To this end, he analyzes an advertising piece, chosen because of the intentionality that exists in this type of message. In this case, advertising for a pasta factory featuring packages of spaghetti, sauce, parmesan cheese, onions, tomatoes, and a walnut. Barthes identifies three messages in the ad: 1) linguistic, 2) iconic coded message, 3) an iconic non-coded message.

Two elements are found in the image: the denotative and the connotative. In this case, the literal aspect has a denotative nature, while the symbolic image is connotative. The images are polysemic, have different meanings; therefore, the receiver can select what interests him. The denotative aspect is related to the literary character of the message, and the connotative aspect, to the symbolic elements related to it. Thus, rhetoric is related to the connotative meaning of the signifiers of the image.

Barthes' perspective works on image analysis based on verbal language. Therefore, the analysis of the image based on its linguistic elements does not consider the intrinsic characteristics of the visual language (Roque 2016). In other words, the analysis of the image proposed by Barthes is centered on concepts typical of verbal rhetoric. The idea of visual argumentation seeks to supplant this exclusively literal perspective.

The dichotomy established between text and image is not capable of dealing with the complexity of the image, as there is a "gray area" between the literal and the visual. An innovative approach must understand how communication is established and perceived, without disregarding the specific elements of the image. Roque (2016) criticizes the existence of a hierarchy between image and text, in which the ability to define meaning would be exclusively up to the latter. In many situations, the reversal of this situation is observed.

Thus, the following question is posed to the study of visual argumentation: "can images be arguments?" (Groarke *et al.* 2016, 217). As a landmark of this debate is the special edition of the *Argumentation and Advocacy* journal of 1996, organized by David Birdsell and Leo Groarke (Groarke *et al.* 2016). The traditional perspective did not consider the image an argument, as it was not an intentional act between one or more human beings characterized in its formal elements: reason, evidence, evidence, argumentation, and refutation (Fleming 1996).

The criticism of the traditional perspective was based on the fact that communication in daily life is not structured exclusively on the "statement-support" model, but the context is the main element of provision of meaning. Therefore, the visual rhetoric is enthymeme, as it involves: "1 – probable premises and conclusions, 2 – accommodation of the ethical and emotional dimensions of the arguments, 3 – dependence on an

agreement between messenger and audience” (Kjeldsen 2015). The active audience is central, as it is able to receive, understand and interpret the content received (Kjeldsen 2016).

Briefly, the debate around visual argumentation has been established in these terms over the past twenty years, although a general theory on the subject has not been established. The consensual points recognize the ability to argue and evidence the image, as well as its functionality in the development of specific reasoning. In addition, the image has demonstrative, evidential, or explanatory functions (Groarke *et al.* 2016). Contemporary reality is eminently visual. Screens, drawings, printed matter, films, surveillance cameras are present in everyday life. For this reason, the dichotomous perspective around the visual and verbal is not sufficient for the effective understanding of its manifestation in different social spheres. Besides, the perception of visual representations depends on verbal concepts (Kjeldsen 2016).

The presence of the image of everyday life affects the world of law, as its presence in the practical debates of legal professionals is a reality, regardless of the legal system. However, the fluid nature of the image poses challenges to the theory of law as to its professionals. It requires analytical sophistication for its proper interpretation and incorporation into the process. However, the practical operation of using the image does not occur optimally, as it is constituted from the pre-existing cultural repertoire of its operators.

In the case of legal culture, it is important to highlight that the macro-structural framework defined by law outlines the decision-making space of the legal profession. The resulting action reflects already established practices and values that are faced with a complex and uncertain context. In this sense, the concept of legal culture can be used as an instrument for analyzing the use of the image in the Brazilian judicial context – founded on the logic of civil law. The relationship between the structure established by the law and the interpretation of a fluid, ubiquitous, and emotional object such as the image can be operated from this perspective of legal culture.

The civil law model centered on legislative sovereignty and the written expression of its acts is characteristic of judicial practice in Brazil. Thus, the more specific research question on the incorporation of the image in Brazilian courts can be expressed as follows: how can the judicial sentence reveal the cultural repertoire of legal professionals in the treatment of the image in a judicial context? The next section will describe the methodology and present the analysis of the data collected from the digital database of sentences of the Justice Court of Minas Gerais.

5. Methodology

This paper adopts a qualitative approach to answer the research question exposed above. Qualitative research aims to understand a phenomenon and make sense of it. Thus, it is possible to understand how a specific problem is socially constructed (Denzin and Lincoln 1998). For this reason, the interpretation of the data gathered in the research allows making sense of a certain phenomenon (Alasuutari 1996). Therefore, this paper analyses judicial decisions based on the video to understand how the cultural repertoire of Brazilian second-degree judges deals with the image in a legal context.

This research is based on a database gathered in the first semester of 2019 from the Justice Tribunal of Minas Gerais' website by using the search terms "evidence" and "video". A sample of 413 decisions was selected. The data has been filtered to maintain only those decisions in which the video as evidence of the crime or its circumstances have been evaluated. After the first filtering process, 160 court decisions remained. All decisions were read in full by the research team. In only 21 cases it was found that the footages may have been watched by the appellate judges. In none of these 21 court decisions is possible to find a reference of the video being shown at the trial session. All of them are second-degree decisions.¹

Two decisions have been selected from these 21 cases. These are decisions in which the judges refer directly to the scenes of the video. To ensure the representativeness of the sample, the following criteria have been set: a) presence of judge's descriptions of the footage with the people shown in the recordings; b) mention of evidence – other than the video – relating to the criminal fact; c) record of the crime or its circumstances by video evidence; d) mention of physical characteristics of the suspect's being captured by video. The decisions' analysis will focus specifically on: a) detecting considerations about the authenticity and integrity of the video; b) finding observations about the quality of image and sound; c) seeking considerations on the inherent limits of video evidence in representing the truth; d) detecting which means of proof (other than video) supports the decision on facts.

The central aim of the analysis is to verify the depth of the debates about the authenticity, integrity, quality, and, also, about the footage's content itself. Furthermore, the authors intend to verify whether what prevails in the reasoning is the judge's valuation of the video or the report of its scenes by other sources, such as witnesses, victims, and experts. This process reveals how cultural repertoires are mobilized in legal contexts and in the particular cases with a focus on the images' interpretation.

5.1. Court decisions

The first case² analysis concerns an appeal verdict that confirms the defendant's conviction for the crime of armed robbery in two commercial establishments. In this case, modest amounts of money were subtracted (in total R\$ 875.00 – Brazilian currency, equivalent to approximately \$155.00 – US currency, at the time of writing this paper). The defendant, Rodrigo, was sentenced in both instances to 7 years and 8 months in prison, in an initially closed regime without parole, and a further 92 day fine.

The two robberies occurred in sequence, and the prosecution alleged that the defendant was assisted by a minor. The main evidence mentioned in the decision's summary is the victims (owners or employees of the establishments) and the police officer testimonies. As mentioned before, it is possible to observe a presence of different probatory means in the decision. The video evidence is mentioned in the judge's rapporteur report and in the arguments used to sustain the decision.

¹ Only 3 of these 21 court decisions refer to the video exhibition at the hearing in the first degree of jurisdiction.

² TJMG, Appeal number 1.0120.17.001189-0/001; Judge Rapporteur Catta Preta; date of judgment 11/04/2019; published at *DJ* 22/04/2019.

From the written report and the reasoning of the decision, it is possible to extract that the fact – or its circumstances – was captured by surveillance cameras. However, it is not clear whether the footage is internal to the shops in which the crimes have occurred or whether the cameras captured the suspect from the outside. The image appears on the report, but it is not deeply analyzed.

A closer look at the decision demonstrates how images are dealt with in Brazilian courts. As observed before, the image comes with another means of evidence. On page 3 of the decision, the appellate judge states that “the element of materiality is confirmed by the police report (page 3/7), by the deposition term (page 8/23) and content analysis of audiovisual records (page 27/29)”. The criminal’s identification was based on the victims’ testimonies and by the police officer responsible for the arrest. He stressed the defendant’s walking manner and clothes color.

The victims’ identification of the suspect did not rely on visual memories but hearsays. These second-hand testimonies are reproduced as stated in the decision: a) Victim “R.M.S.V.”: “ through third-party conversations, it was said that the perpetrators were the defendant and the minor “; b) Victim “M.A.C.”: “that the boy who entered the bakery was wearing a helmet; that by the hand I could see that he was white-colored and of medium height; that his stature was similar to Rodrigo’s; that I saw Rodrigo a few times on the street; that the rumor that came later was that the boy who entered the store was Rodrigo and the underaged R.; that the minor remained on top of the connected motorcycle outside and it was impossible to see his features since in the bakery there are two doors and a wall in the middle and the motorcycle was in the direction of the wall”.

On page 5 of the decision is transcribed the testimony of the police officer who recognized the defendant from the video footage. The police officer affirms: “the walking manner of the person who was filmed is unmistakable, being the same gait as Rodrigo [defendant]; [I] could identify it in the footage; he walks waving his arm.”

The court decision is transcribed by the first-degree judge’s impressions on the footage. Right after, the court directly analyses the video content:

“However, the accused did not provide evidence to support his version of the facts and as presented in the statements already transcribed, the police officer RBF, as well as the victim MAC, spotted the appellant near the crime scene on the day of the incident wearing the same clothes as one of the assailants, which destroys the veracity of his alibi.

In addition, it was pointed out by several witnesses, as well as by the judge *a quo*, that the accused has a peculiar gait that facilitates his identification. As pointed out in the sentence (p. 182): “Finally, it should be noted that, despite the quality and limitation of the video collected in the records, it is possible to recognize the accused by his peculiar way of walking, and this Judge had contact with him during the instruction hearing and judgment, realizing that as said by the police, he has a unique gait”. When analyzing the images from the local security cameras (CD attached to the records on page 232), it is noted that the assailant who left the establishment has a different way of walking and that can be recognized by individuals who have already had contact with him, such is the case with the police officer, who apprehended him in other cases for property crimes, including. The quality of the images is in this sense.

The above excerpt demonstrates that both second and first-degree judges watched the video. The latter compares the gait of the person in the video with the defendant's way of walking. Despite admitting the poor quality of the video, and considering the contact held with the defendant at the hearing, the judge of first degree deemed the "possibility" of suspect's recognition from the video. Likewise, after watching the video, the appellate judge deems it possible to recognize the defendant just by his manner of walking. Furthermore, the credibility of the victims' and policeman's testimonies was justified by the fact that "crimes against property are generally carried out on the sly, without the presence of witnesses, therefore the victim's word is of extreme probative value" (Appeal 1.0120.17.001189-0/001 p. 3).

The second court decision³ concerns an appeal verdict confirming the defendant's conviction for the crime of armed robbery. In this case, the defendant was recognized by the victims and the defense requested the forensic analysis of the video. The aim was to demonstrate that the accused was not the perpetrator of the crime. In this case, the victims' testimony is central to repeal the defendant's argument. The judges at first and second degrees relied on that evidence. The victims recognized the defendant by his red chokes as well as by the presence of tattoos on both arms. For his part, the defendant denied that the tattoos of the man appearing in the images were similar to his.

The court found the victim's testimonies to be "solid and efficient evidence" that the defendant had committed the crime. The defense asked for an expert opinion about the video. The aim was to prove that another person committed the crime. Considering this topic, the appellate judges decided as follows:

In the case at hand, there is no doubt that Daniel was recognized by the victims as one of the perpetrators of the crime of theft, and it is unnecessary to know whether he is the person who appears in the footage reproduced on the DVD attached to page 208.

It can be seen, on the other hand, that as it is extracted from the aforementioned images, although the assailants were wearing a helmet, the visor was raised, with part of the features of the face on display, thus enabling Daniel's identification by the victims. (Appeal 1.0433.18.004814-5/001, p. 5)

The above excerpt demonstrates that the appellate judges watched the video and analyzed its content. However, the analysis is superficially done, insofar as it justifies the dismissal of expert evidence and further debate on the video. The judge rapporteur explicitly affirms that the video does not need to be analyzed because the testimonies confirmed the guilty.

As a result of the qualitative research, it is possible to conclude that even in the few cases in which the court directly analyzes the video, there is no further debate about the specifics of the video evidence. In the first case analyzed, questions about the authenticity and integrity of the video did not arise. As for the content of the video, the analysis seems to have been made superficially, considering that the police officer who recognized the defendant in the video did not see the author's face, using only his way of walking as a parameter of similarity. The same applies to the judges' analysis.

³ TJMG, Appellation number 1.0433.18.004814-5/001; Judge Rapporteur Denise Pinho da Costa Val; Date of judgement 28/05/2019; published at DJ03/06/2019.

The grounds of the first decision focus more on the police officer's report about the video content than on the valuation of the footage by the judges. The first analysis points to two contradictory conclusions: first, the video was essential to prove authorship and, second, there was little debate about the opposition between the physical characteristics of the criminal agent shown in the film and those of the defendant. The last issue was solved simply by the prevalence of police analysis over the content of the video.

In the second case, the court valued the content of the video merely to dismiss forensic evidence on the footage. It appears that, although the defense has raised the relevance of forensic evidence to prove the defendant's innocence, technical arguments were not opposed to the rejection of it. There has been no consideration over the quality or the sharpness of the images to justify the dismissal. Overall, the court did not explore the question of whether the expert evidence would be able to demonstrate the similarity between the tattoos shown in the video and those of the defendant.

Finally, in both cases, the criminal fact or its circumstances were captured by surveillance cameras, and even so, the court attributed probative value to other types of evidence to the argument that the crime had been committed "on the sly". Much of this other evidence has been extracted from indirect or doubtful sources, such as hearsay, police officer's reports of video content, and recognition by the victim based on very few characteristics of the defendant.

6. Conclusion

The use of video evidence is a reality throughout the world in all legal systems. Considering the Brazilian context, the research discussed through a qualitative perspective how judges interpret the image. Using second-degree decisions as objects of study, the paper has shown how image-based evidence is evaluated in this context. As a civil law country, Brazil presents the main features of this tradition such as the prevalence of the judge in the process, the written procedures, and its inquisitive nature.

After analyzing the two selected cases is possible to depict how cultural repertoires are mobilized to interpret a complex kind of evidence such as the image. As observed through the decisions, the image is accompanied by other kinds of evidence such as testimonies from victims or police officers. The indirect analysis of video evidence is well suited in a context centered on written procedures. The debate over the image does not go deeper into its main features. In both cases, it is possible to observe a superficial analysis of video contents. These facts are in part related to the main features of the Brazilian legal system. Additionally, the lack of ability to apprehend the characteristics of the image as evidence is also part of the problem.

Further research is required to understand the impact of video evidence in civil law countries. The great bulk of studies come from common law countries. This gap can be fulfilled through research with legal professionals, forensic experts, and police officers. Moreover, the study of judicial decisions can broaden its scope to different branches of judicial power such as administrative, labor courts, or civil courts with distinct approaches. Finally, the concept of legal culture is adequate to understand how legal structures shape the space in which judicial decisions are built as also the mobilization of cultural repertoires faced with the challenge of the images as evidence.

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