BRAZILIAN
FEDERAL SUPREME COURT

MAY 2021

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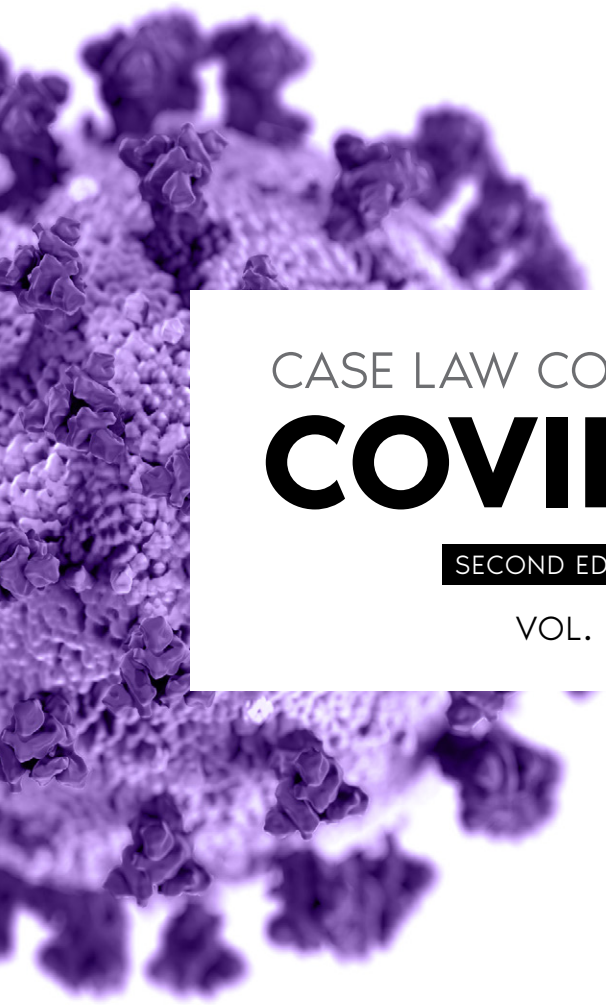

CASE LAW COMPILATION

COVID-19

SECOND EDITION

VOL. 1

SUSTAINABLE DEVELOPMENT GOALS

BRAZILIAN FEDERAL SUPREME COURT

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COVID-19

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FOREWORD

The new Coronavirus pandemic took everyone by surprise. People and public institutions were forced to readapt their routines and expectations. The Judiciary, faithful to its mission to pacify conflicts, as mandated by the Constitution, was no exception, as there has been an actual productivity increase by courts in the country during this period.

In the turmoil of the crisis, the Federal Supreme Court fulfilled its constitutional duties and worked, once again, as a focal point in terms of judicial and democratic security. Invested in this role, the Court was able to produce decisions of the utmost importance to the institutions of the country. Some of those decisions are described in the following pages, dedicated to guaranteeing disclosure of the Court's activities during this unique period.

It is imperative to realize that, in order to produce satisfying decisions – both in terms of quantity and quality –, the Court promoted administrative efforts with impressive speed.

One of the first measures was the establishment of a procedural preference mark for cases related to Covid-19. A classifying mechanism that alerts the Justices' offices of such cases, which improved the working system as the issues were granted priority to proceed.

In consequence of this subtle change, the "Panel of Covid-19 Cases" was created, an interactive board available on the Court's website, which

shows the exact number of cases submitted to trial and their respective decisions and is refreshed automatically every five minutes. The system supports search by designated Justice and procedural class, among the many that exist in the vast competence of the Court.

In practical terms, by the end of September 2020 (six months after the beginning of the pandemic in Brazil), there were more than 6,000 cataloged decisions. Concerning concentrated constitutional control cases alone, there were 138 regarding Covid-19 related themes. Also, there were 4,030 *habeas corpora* regarding people's right to freedom, and 717 constitutional complaints, a type of demand designed to overrule an administrative or judicial legal act that does not heed to a Supreme Court precedent.

The decision mechanisms were also significantly remodeled so that social distancing set by the ''new normal'' would not represent an impediment to the Court's judicial activities. Therefore, there are two trial environments available now: the virtual and the physical one.

Regarding the virtual environment, the case classes increased. In the past, very few classes were decided remotely. Now, due to an internal rule change, any class may be subject to a virtual trial. In such trials, after the designated Justice submits a vote, the others are given a predetermined time to agree, disagree, or request an extended period to examine the matter more deeply.

In addition, the virtual sitting, created in 2007, underwent many improvements in order to guarantee the right to adversary proceeding: submission of oral arguments electronically, the possibility to offer factual clarifications by both parties during the trial and the publication, via the internet, of the Justices' complete opinions, which increases the disclosure and transparency of the trials. Furthermore, the ''Virtual Trial Panel''

was created, containing the most relevant statistical info and graphs to society, which is fed automatically by the Court's database.

Regarding the physical environment, trials were adapted to work via videoconference. Therefore, decisions that would have happened inside the Court, if conditions were normal, were able to take place similarly with the participation of all Justices, Prosecution Office, and Counsels so that the Court's activities were uncompromised, given their insurmountable importance to society.

Fully prepared to exercise its constitutional duties, the Court was able to give exemplary decisions, fully detailed in terms of the analysis of delicate matters concerning the pandemic. As such, this publication contains decisions regarding, for example, the competence of federate units (Union, states, Federal District, and municipalities) to take action in order to contain the spread of the virus; the determination of scientifically and technical procedures as parameters to decide whether a public agent is responsible for a certain outcome during these uncertain times; the constitutionality of reducing work hours and salaries throughout the crisis; and the overrule of certain initiatives enforced by public authorities that eventually collided with fundamental rights.

As a result, the outcome was undoubtedly positive: in this atypical and otherwise unthinkable landscape, the Federal Supreme Court rose to the challenge, increasing its productivity significantly. This was also achieved through the home-office regime of the Court's staff, which has been in force for the past four years. Consequently, social distancing measures were taken with haste and transparency, as well as the possibility for any person to electronically access the activities developed by the Court.

There are times in which difficulties arise and seem overwhelming. The Judiciary must always be prudent, responsible, and have a sense of innovation in order to fulfill its constitutional and social roles. During the Covid-19 pandemic, the Supreme Court overcame itself.

The Case Law Compilation on Covid-19 represents a landmark in terms of implementing the "2030 Agenda." Administrative measures were adopted so that the Court could grant priority to cases aligned with the "Sustainable Development Goals" (SDGs) of the "2030 Agenda." In this compendium, the proceedings related to the SDGs received a visual highlight, which means that this classification is indexed in the judicial database.

I am certain that this publication is a relevant contribution to the constructive dialogue regarding the experience of constitutional jurisdiction in many nations.

Justice Luiz Fux
Chief Justice of the Federal Supreme Court

PREFACE TO THE SECOND EDITION

In October 2020, the first edition of the Case Law Compilation – Covid-19 was launched. Comprised of relevant decisions proclaimed by the Court in the year of 2020, concerning a multitude of demands related to the pandemic, the compilation revealed that the Court's response to the crisis has been swift and effective.

Due to the emergency and dynamic nature of the pandemic, many of these decisions needed to be addressed as soon as possible, and were given a provisional remedy, either by a single Justice or by the Full Court.

Since then, the Court has not stopped being urged to issue decisions for either new or on-going cases[1]. Many of these actions, related in the first volume of this work, have undergone the Constitutional mechanisms of control that turn provisional remedies into final decisions (which may or may not confirm the provisional ones). Also, many acts or legal norms that were presented to the Court's evaluation have ceased to produce effects, been revoked, or the situation that they were designed to regulate is no more.

1 See also BRAZILIAN SUPREME COURT: the judicialization of the crisis. Brasília: Ayres Britto Law Firm and Legal Counsel, 2020. Available at: https://ayresbritto.com.br/boletim/. Accessed on: 7 April 2021.

This edition aims to show these updates while the second Volume of the Case Law Compilation – Covid-19 is on its way to be published.

UPDATES

The Court has worked through the unpredictable nature of the pandemic, and this second edition reflects those changes. The cases that were part of the first edition have been updated with relevant information: decisions that have been officially published; single-Justice decisions that were affirmed by the Full Court; provisional remedies that have been converted into final decisions; cases that were eventually dismissed, and why.

Besides the developments shown in each of these cases, the work has been updated with the description of the 1988 Federal Constitutional Articles that granted reasons to the cases, which will help the reader to better understand the controversies, as well as the decision-making process of the Court.

To facilitate the analysis, this edition groups the cases according to seven different categories: i) Competence of the Federal Entities; ii) Economic and Financial Order; iii) Fundamental Rights and Guarantees; iv) Human Rights; v) Labor Rights; vi) Legislative Branch; vii) Political Rights.

This edition underwent a linguistic revision to improve the text. The content updates can be visually identified either by all the footnotes or on item **III** on the case briefs description, which are displayed as follows.

CATEGORY

CATEGORY COLOR

COMPETENCE OF THE FEDERAL ENTITIES

SDG

DOCKET NUMBER

ADPF 672 MC-Ref

HEADNOTES

The states and the Federal District enjoy concurrent power, while municipalities enjoy supplementary power within their respective territories to adopt restrictive measures during the pandemic. Therefore, complying with federalism and its constitutional rules on the distribution of powers implies respecting the decisions of governors and mayors regarding social distancing and quarantine, suspension of school and cultural activities, and trade restrictions.

Decision rendered during a virtual sitting: October 9, 2020
Official Journal: October 29, 2020

FACTS

I. The Federal Council of the Brazilian Bar Association filed this claim concerning the actions and omissions that the federal government had been taking to manage the emergency public health and economy policies due to the outbreak of Covid-19.

HOLDING

II. Justice Rapporteur Alexandre de Moraes found that notorious divergences of opinions among authorities of different levels have caused insecurity and justified fear throughout society.

UPDATES

III. On October 13, 2020, the Full Court unanimously affirmed the provisional remedy to recognise that the states, the Federal District and the municipalities exercise concurrent powers, within the limits of their

VIRTUAL TRIAL PANEL

Additionally, it is important to highlight that the Federal Supreme Court took advantage of modern technology to avoid face-to-face contact and maintain the Court's work after the pandemic was declared. Therefore, the Court issued Resolution 672/2020 to regulate remote trial sessions and broaden the staff's home-office. The first edition addressed this information and when this work shows the decision date, it is implied that the Full Court sat *en banc* remotely.

But this second edition reports also on decisions issued during **Virtual Trial Sittings**. During remote trial sessions the Court meets at the same time remotely, which is different from virtual sessions since they are mainly asynchronous gatherings.

This type of session was created in 2007 following the Judiciary Reform[2] that, among several innovations, established a new requirement for the Supreme Court to hear Extraordinary Appeals, the so-called General Repercussion effect. Since then, it has undergone several improvements to better meet the parties' needs and comply with the Court's institutional role.

As of 2010, by means of the Internal Rule Amendment 42/2010, the Court started to judge not only whether the case had general repercussion but the merits of General Repercussion Themes itself within virtual sittings.

In 2016, the jurisdiction of those sittings was extended to include two types of appeals: internal motion and motion for clarification. In 2019, Resolution 642/2019 established that the virtual sittings would be held weekly on Fridays, as a rule, starting by the Rapporteur's filing of the

2 Constitutional Amendment 45/2004.

syllabus, report, and opinion into the system. As from the beginning of the trial, other Justices have up to five working days to present one of the four options: a) join the Rapporteur's opinion; b) join the Rapporteur's opinion, dissenting from the grounds; c) dissent from the Rapporteur's opinion; or d) join the dissenting Justices' opinion. In case the Justices do not present their holding, the system considers they have joined the Rapporteur's opinion.

From this moment in 2019, the Court could handle provisional remedies, referrals of provisional remedies, and provisional reliefs on original actions of constitutional assessment, besides other types of procedures which discussed matters that had been decided on prior precedents by the Court. The goal of expanding the types of legal actions that could be ruled in the virtual environment was to ease the overcrowded trial docket and ensure the trials were held within a reasonable time.

Last year, the electronic system was improved to disclose the report and the opinion of the Justices on the official site of the Supreme Court during the trial period. The entire content of the decision (as well as the partial score) becomes available to the public as soon as it is included in the system. Moreover, during the trial period, the parties can present a petition to clarify matters of fact by means of the STF's electronic system of petitioning. The sitting started to have a six-day period and all cases under the jurisdiction of the Court can be now ruled under the virtual trial panel.

Secretariat of Major Studies, Research, and Information Management

PREFACE TO THE FIRST EDITION

This publication selects, summarizes, and translates into English important decisions that the Court has recently rendered. The purpose is to disclose the Court's case-law as an endeavor to build institutional dialogues among Supreme Courts and Constitutional Courts. Notwithstanding cultural particularities, national high courts around the world face increasingly complex cases on fundamental rights. Having an easy access to courts' reasoning enables the comparative investigation through the analysis of already adopted approaches by other courts and may contribute to dealing with and solving complicated cases. Ultimately, it strengthens the guarantee of fundamental rights itself.

This first edition concerns the Covid-19 pandemic. Brazil's National Congress acknowledged the state of public calamity on March 20, 2020. Rather than limiting and reducing its operations, the Supreme Court moved rapidly to manage the growing number of cases being filed, while still carrying out measures to follow the World Health Organization guidance on social distance. Accordingly, the Court issued Resolution 672/2020, which regulated remote trial sessions. On April 15, the Court sat *en banc* remotely for the first time in its history.

The decisions were selected from the list of main rulings concerning the pandemic, prepared by the Court's Presidency. They were issued during the Court's first semester trial period, from April 15 to June 30, and the first month of the second semester trial period, August. The work focuses on providing case briefs starting with a short account of facts, followed by the decision's outcome and the main points of the prevailing

opinion. Concurring or dissenting opinions are not part of the précis[3]. The summaries of the decisions to be published were based on the Court's Newsletter (*Informativo*), on the Court's News (*Notícia STF*), and on the live broadcast of the Court's sittings.

Concerning the translation, the process used the term's "foreignization" (Lawrence Venutti) as a rule, leaving the "domestication" as an exception. That is bearing in mind the target audience – the international legal community –, while still keeping Brazil's legal system and cultural aspects under perspective. Nevertheless, translation is a technique of transposing a text from a source language to a target one, which implies on making options that, most of the time; do not fall within a dichotomy. The used method based its translation options on knowledge of comparative law, linguistics, terminology, and the translation study itself. That approach allows choosing an appropriate term within a determining context for a specific audience.

Additionally, it is important to highlight that each case presents the logo of the Sustainable Development Goals of the United Nations 2030 Agenda it is related to. According to Justice Luiz Fux's speech when taking office as Chief Justice, the Agenda will guide his administration. In an unprecedented way, this work adopts the labels not only to identify the Court's attempt on achieving its part in this global endeavor but also to disseminate the goals and to contribute in calling everyone for action.

Finally, for other news on the Court and on its case law, you may access the Court's international website. Feel free to contact us if you need further information or have any suggestions at the following e-mail: SAE@stf.jus.br.

3 In the second edition of this publication, concurring or dissenting opinions were included.

ACRONYMS

ACO	Original Civil Action *(Ação Cível Originária)*
ADI	Direct Action of Unconstitutionality *(Ação Direta de Inconstitucionalidade)*
ADPF	Claim of Non-Compliance with a Fundamental Precept *(Ação de Descumprimento de Preceito Fundamental)*
BPC	Benefit Paid on a Continuous Basis *(Benefício de Prestação Continuada)*
CA	Constitutional Amendment *(Emenda Constitucional)*
FUNAI	National Indigenous Foundation *(Fundação Nacional do Índio)*
Fiocruz	Oswaldo Cruz Foundation *(Fundação Oswaldo Cruz)*
HC	*Habeas Corpus*
IBGE	Brazilian Institute of Geography and Statistics Foundation *(Instituto Brasileiro de Geografia e Estatística)*
LDO	Budget Directives Law *(Lei de Diretrizes Orçamentárias)*

LRF	Act on Fiscal Responsibility *(Lei de Responsabilidade Fiscal)*
MC	Provisional Remedy *(Medida Cautelar)*
MP	Presidential Provisional Decree *(Medida Provisória)*
MPF	Federal Prosecution Office *(Ministério Público Federal)*
NCHSS	National Continuous Household Sample Survey *(Pesquisa Nacional por Amostra de Domicílios)*
PGR	Federal Attorney General *(Procurador Geral da República)*
PR	State of Paraná *(Estado do Paraná)*
Rcl	Constitutional Claim *(Reclamação)*
Ref	Referral of the Full Court *(Ad Referendum)*
SDR	Remote Deliberation System *(Sistema de Deliberação Remota)*
TP	Provisional Relief *(Tutela Provisória)*
STF	Federal Supreme Court *(Supremo Tribunal Federal)*

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COMPETENCE OF THE FEDERAL ENTITIES

FUNDAMENTAL RIGHTS AND GUARANTEES

HUMAN RIGHTS

LABOR RIGHTS

COMPETENCE OF THE FEDERAL ENTITIES

ADI 6341 MC-Ref

The head of the federal executive branch has competence to issue decrees establishing which public services and activities are considered essential, and such act does not violate the competence that the federal entities share to legislate on health matters, as long as the decree safeguards the autonomy of the states, the municipalities, and the Federal District.

Decision: April 15, 2020
Official Journal: November 13, 2020

I. The Democratic Labor Party filed this action contending that the redistribution of police powers on health matters introduced by the Presidential Provisional Decree 926/2020 (MP 926/2020) in Federal Law 13979/2020 had interfered in the cooperation regime between federal entities.

Essentially, the decree conferred on the authorities, within the scope of their competences, the possibility of adopting measures of isolation, quarantine, movement restrictions, whether entering or leaving the country, or interstate and inter-municipal locomotion. It also provided that such measures should ensure the functioning of essential activities and that the President of the Republic would establish, by decree, what such essential services would be.

II. The Supreme Court, by a majority, upheld the provisional remedy previously granted by Justice Rapporteur, Marco Aurelio. Therefore, it gave interpretation according to the Constitution to § 9 of Article 3 of Law 13979, to make it clear that, according to Article 198 of the Constitution[4],

4 Article 198. Health actions and public services integrate a regionalized and hierarchical network and constitute a single system, organized according to the following directives: (CA 29, 2000; CA 51, 2006; CA 63, 2010; CA 86, 2015) I – decentralization, with a single management in each sphere of government; II – full service, priority being given to preventive activities, without prejudice to assistance services; III – participation of the community. Paragraph 1. The unified health system shall be financed, as set forth in article 195, with funds from the social welfare budget of the Union, the states, the Federal District and the municipalities, as well as from other sources. Paragraph 2. The Union, the states, the Federal District, and the municipalities shall apply each year, to health actions and public services, a minimum amount of funds de rived from the application of percentages calculated upon the following: I – in the case of the Union, the net current revenue of the respective fiscal year, and it may not be lower than fifteen percent (15%); II – in the case of the states and of the Federal District, the proceeds from the collection of the taxes mentioned in article 155 and of the funds mentioned in articles 157 and 159, items I, subitem a, and II, after deducting the portions remitted to the respective municipalities; III – in the case of the municipalities and of the Federal District, the proceeds from the collection of the taxes mentioned in article 156 and of the funds mentioned in articles 158 and 159, item I, subitem b, and paragraph 3. Paragraph 3. A supplementary law to be revised at least every five years shall establish: I – the percentages referred to in items II and III of paragraph 2; II – the criteria for the sharing of funds of the Union earmarked for health and as signed to the states, the Federal District, and the municipalities, and of funds of the states assigned to their respective municipalities, with a view to a progressive reduction of regional disparities; III – the rules for supervision, assessment, and control of expenditures on health at the level of the Union, the states, the Federal District, and the municipalities; IV – (Revoked). Paragraph 4. The local managers of the unified health system may hire community health workers and endemic disease control agents by means of a public selection process, taking into account the nature and complexity of their duties and the specific requirements of their activity. Paragraph 5. Federal legislation shall provide for the legal regime, a nationwide professional minimum salary, the guidelines for Career Schemes, and the regulation of activities of community health workers and endemic disease control agents, and it shall be incumbent upon the Federal Government, under the terms of the law, to provide supplementary financial support to the states, the Federal District, and municipalities, to achieve compliance with said minimum

the President of the Republic may provide, by decree, essential public services and activities if the federal entities preserve their powers.

As foreseen in Article 23, item II of the Federal Constitution[5], the Union, the states, the Federal District, and the municipalities have common power to legislate on public health. In this sense, the Court found that the measures adopted by the Federal Government in MP 926/2020 to confront the new coronavirus did not exclude the competence or withdrew normative and administrative measures by the federated entities. The head of the federal executive branch can legislate on the subject and define essential public services by decree but must necessarily safeguard the autonomy of other entities to take care of health, direct the Unified Health System, and carry out health and epidemiological surveillance actions.

salary. Paragraph 6. In addition to the cases set forth in paragraph 1 of article 41 and in paragraph 4 of article 169 of the Federal Constitution, an employee whose activities are equivalent to those of a community health worker or an endemic disease control agent may be dismissed if he does not comply with the specific requirements stipulated by law for such activities.

5 Article 23. The Union, the states, the Federal District and the municipalities, in common, have the power: (CA 53, 2006; CA 85, 2015) (...) II – to provide for health and public assistance, for the protection and safeguard of handicapped persons; [...]

ACO 3385 TP

According to the Constitution, unless the state of defense or of siege is declared and comes into force, the Union shall only take private properties. Thus, the federal government has no power to request ventilators bought by a state-member.

Decision: April 20, 2020
Official Journal: April 24, 2020

I. The state of Maranhão reports that it acquired more than sixty-eight ventilators from the company *Intermed Equipamento Hospitalar Ltda*. to equip intensive care units. Without these ventilators, in cases of medium and high severity, the treatment for Covid-19 becomes insufficient.

Subsequently, the Union requested from *Intermed*, on a compulsory basis, all pulmonary ventilators already acquired by the State of Maranhão. In addition, the Union also requested all ventilators that would be produced in the next 180 days.

The plaintiff claims that the Federal Constitution forbids a federal entity from taking assets, administrative personnel and services from another entity (Articles 1, 18, 25 and 30).

He highlights that, in addition to the damage caused to citizens and the effects on their integrity and health, the Union's action wastes the resources spent on the construction of intensive care units, which would be underused in case of lack of ventilators.

II. At the beginning of his decision, Justice Rapporteur Celso de Mello addressed the jurisdiction of the Supreme Court to preside over and

try this case. He pointed out that the Federal Supreme Court has the duty of acting in cases of federative conflict. In this case, the litigation undermines the exercise of the powers of the federal entities.

According to the Justice Rapporteur, the numerous intensive care units destined for Covid-19 treatment in that state will not have the main necessary equipment to cope with the severe cases of the disease, which will increase the risks of evolving to death, thus demonstrating the presence of *fumus boni iuris* and *periculum in mora*. Therefore, he granted the provisional relief.

As per the Justice Rapporteur, the relationship between the Union, the states, the Federal District and the municipalities is based on the Federal Constitution, and their actions cannot transgress the provisions established thereof, otherwise the institutional autonomy of the federal entities is nullified.

Justice Celso de Mello emphasized that, under the Federal Constitution, unless a state of defense or of siege is declared and comes into force, the Union shall only take private properties (Article 5, item XXV).

This means, therefore, that it is unacceptable for the Union to request goods, services, administrative personnel and resources from municipalities under an ordinary situation, without the enactment of any of the constitutional crisis systems (state of defense and/or state of siege).

Justice Celso de Mello stressed the need to enforce the fundamental rights of the person, among which, by the precedence and supremacy, the right to life and the right to health. Therefore, the Rapporteur granted the provisional relief of urgency to ensure to the state of Maranhão, at an early stage, adequate protection to the health of its residents.

He reinforced the Union's need to fully respect and guarantee the right to life and health. Therefore, he determined that, within 48 hours, the company *Intermed Equipamento Médico Hospitalar Ltda.* had to deliver to the State of Maranhão 68 ventilators acquired by the referred state through Contract 67/2020.

ADI 6343 MC-Ref

The federal entities do not need to abide by a technical authorization provided by the central government in order to enforce every local policy designed to contain the effects of the pandemic but every local measure must be grounded by a technical or scientific justification.

The Union, the states, and the municipalities may each restrict the right to movement within the country in order to contain the spread of the pandemic according to their respective constitutional powers; but they shall not refrain the essential goods and services from circulating freely.

Decision: May 6, 2020
Official Journal: November 17, 2020

I. A political party filed this action against legal alterations promoted by a Provisional Presidential Decree, which concerns various measures in order to contain the public health issue caused by the Covid-19 pandemic in the country. The party also requested a provisional remedy, given the urgent character of the matter.

According to the plaintiff, the modifications that mostly impose restrictions on the right to travel between states and cities could not take place, since they were not substantiated by technical recommendations from

health-related agencies, neither by authorization from the Justice, Public Safety, Infrastructure and Health Departments of the country.

Moreover, the plaintiff sustains that these measures, imposed in the entire country, offend the autonomy of the federated entities, since transportation policies affect each state and municipality in a different manner. Therefore, each entity should be able to enforce its own regulations, in accordance with their particularities.

The party also claims that the local measures authorized by the provisional decree depend on a previous scientific study promoted by the central government, which, in the long run, means that the urgent and ever-changing demands caused by the pandemic would never receive a proper and timely response.

II. The Supreme Court partially acquitted the request for a provisional remedy in order to overrule the need for each state and municipality to heed to a previous authorization by the central government, substantiated by technical and scientific studies, to enforce urgent local measures designed to mitigate the effects of the pandemic. Nevertheless, every local measure must be preceded by a technical and scientific justification, even if not provided by the central government. Also, the restrictions on the right to travel must not refrain from the distribution of essential goods and services throughout the country.

The Court decided that the central government cannot have a monopoly in terms of all actions that must be taken in the country concerning the containment of the pandemic. The Union does have a primordial role in terms of coordinating every federal entity but its autonomy must be preserved since it is not possible for the central government to understand every regional idiosyncrasy. Ergo, the Union's exclusivity in terms of deciding about the right to travel throughout the country is harmful.

The central government should be able to enforce legislation about transportation but only if there is a general interest involved, concerning the pandemic. However, states and cities must also be able to promote their own rules in accordance with their local needs, always limited by their legislative competence. This means that states and cities cannot close their borders, for instance.

Furthermore, the Union, the states, and the municipalities must coordinate their efforts in order to achieve a common goal: mitigate the nefarious effects of the pandemic.

Each federate entity should not need to act in accordance with a previously approved technical study issued by the central government, as that would be counterproductive. However, it does not mean that no technical support is needed. On the contrary, each urgent and restrictive measure taken locally must be backed by scientific evidence.

These urgent and restrictive measures, which can be enforced by each federate entity are authorized by the Constitution but only if justified by technical and scientific reasons, and not merely political.

ADI 6421 MC

Authorities must observe technical and scientific criteria of medical and sanitary entities when carrying out their actions during the Covid-19 pandemic. Their actions are subject to the principle of prevention and of precaution, that is, if there is any doubt as to the effects of any measure, authorities should not apply it, as self-restraint must guide the Administration.

Decision: May 21, 2020
Official Journal: November 12, 2020

I. The Brazilian Press Association and six political parties filed this action against the Provisional Presidential Decree 966/2020 that limits the liability of public officials during the Covid-19 pandemic.

Article 1 of the decree foresees that public agents can only be held liable, in civil and administrative areas, if they intentionally act or omit themselves or in a gross error in the performance of acts directly or indirectly related to: a) public health emergency due to the Covid-19 pandemic; and b) striving against the economic and social effects resulting from the Covid-19 pandemic.

Its first paragraph also foresees that liability for technical opinion will not automatically extend to the person who has adopted it as a basis for decision-making.

In turn, Article 2 identifies as gross error the "manifest, evident and inexcusable error performed with serious fault, characterized by an action or omission with high degree of negligence, imprudence or malpractice."

The plaintiffs claim that when dealing with liability for damages caused by authorities, the Federal Constitution does not differ the types of error – whether serious or simple – that give rise to the possibility of filing a claim for compensation to the Union for the damage caused.

The plaintiffs also maintain that the definition of ''gross error,'' in the decree, is vague and creates obstacles to the inspection and control of administrative acts, in addition to providing a permissive environment during and after the pandemic.

According to them, the decree subverts the principle of civil liability by foreseeing that the causal link between the performance of an act and its harmful result does not entail in an authorities' liability. They emphasize that this violates the right to compensation for material, moral and reputation damage.

Finally, the plaintiffs point out that the interpretative parameters placed in the decree makes the existence of gross error appear extremely open and fluid, and hinders the civil and administrative liability of public authorities.

II. The Supreme Court found that the subject addressed in the decree, which identifies provisional remedies, is relevant and urgent.

The Court clarified that the purpose of this decree was to provide safety to public officials, who have decision-making powers, by minimizing their responsibilities in treating the disease and combating its economic effects. Thus, the Court, by majority, partially granted the provisional remedy to confer interpretation according to the Constitution and Articles 1 and 2 of Decree 966/2020.

In relation to Article 1, the Court decided that the authority responsible for the decision must demand that the technical opinion deals expressly with:

(i) the scientific and technical standards and criteria applicable to the matter, as established by nationally and internationally acknowledged organizations and entities; (ii) the constitutional principles of precaution and prevention.

Regarding Article 2, the Court asserted that when outlining gross error, one must consider the observance, by the authorities: (i) of scientific and technical standards, norms and criteria, as established by internationally and nationally known organizations and entities; as well as (ii) the constitutional principles of precaution and prevention.

The Court pointed out that one of the problems, in Brazil, is that the control of Public Administration acts comes many years after the relevant facts, when, many times, there is no longer any record, in memory, of the emergency, uncertainties and vagueness that led the administrator to the decision.

Situations that involve acts such as corruption, overpricing or undue favor are an illegitimate conduct regardless of the situation caused by the pandemic. The decree does not deal with crime or illegal act. Thus, any interpretation of the contested text that gives immunity to public officials in relation to an unlawful act or improbity must be excluded.

The Justices highlighted the need to consider that there are incorrect public authorities who take advantage of the situation to benefit from it despite the deaths that have been occurring; and that there are certain managers who may fear harsh retaliation for their actions.

In this sense, the contested text correctly limits the agent's liability for the strictly gross error, which the Court interpreted in accordance with the Constitution, as previously mentioned.

Finally, the Supreme Court upheld the following legal theses: "1. The administrative act that gives rise to a violation of the right to life, health, the balanced environment or adverse impacts on the economy constitutes as gross error, for failure to observe: (i) scientific and technical standards and criteria; or (ii) the constitutional principles of precaution and prevention. 2. Authorities should demand that the technical opinions on which they will base their decision deal expressly with: (i) the scientific and technical standards and criteria applicable to the matter, as established by internationally and nationally recognized organizations and entities; and (ii) the constitutional principles of precaution and prevention, under penalty of becoming co-responsible for possible violations of rights."

ADPF 672 MC-Ref

The states and the Federal District enjoy concurrent power, while municipalities enjoy supplementary power within their respective territories to adopt restrictive measures during the pandemic. Therefore, complying with federalism and its constitutional rules on the distribution of powers implies respecting the decisions of governors and mayors regarding social distancing and quarantine, suspension of school and cultural activities, and trade restrictions.

Decision rendered during a virtual sitting: October 9, 2020
Official Journal: October 29, 2020

I. The Federal Council of the Brazilian Bar Association filed this claim concerning the actions and omissions that the federal government had been taking to manage the emergency public health and economy policies due to the outbreak of Covid-19.

The plaintiff reports that Law 13979/2020 foresees a series of sanitary measures such as the enforcement of isolation, quarantine and restrictions on some outdoor gatherings. The law also authorizes simplified and streamlined procedures for contracting goods, inputs and services to support and strengthen the functioning of the health system.

In its petition, the plaintiff states that the National Congress has also approved the Union's request and acknowledged the state of public calamity resulting from the pandemic. The Congress allowed budget spending notwithstanding the limits and fiscal targets set by the Fiscal Responsibility Law. Therefore, although the Union has these instruments to react to the crisis, most of the federal government's decisions do not address the health emergency. According to the plaintiff, the actions taken so far have affected the country's governance and endangered the life of Brazilians.

The plaintiff emphasizes that several states and municipalities have implemented measures to contain social agglomerations and reduce the number of infected persons. The plaintiff states that the cooperative federalism model adopted by the 1988 Federal Constitution is the ground of the constitutional, administrative and political agreement stablished in the states and municipal governments. According to Articles 23, item II, and 24, item XII, of the Constitution, the Union, the states and the municipalities have the power to legislate concurrently on public health matters. Amid public calamity, the actions of the states and municipalities become even more crucial because local and regional authorities are the ones able to make a diagnosis around the evolution of indicators and service capacity for health care, including intensive care unit and ventilator equipment availability in each region.

The plaintiff adds that the President of the Republic acts in such a way as to escalate conflicts with governors and mayors who, in turn, rely on

federal support to implement the necessary health policies. In fact, the states and municipalities rely on federal resources remittance and other measures taken by the federal government to grant economic relief, as it has a greater financial and technical capacity to coordinate efforts to overcome the crisis.

According to the plaintiff, the Ministry of Economy has minimized the economic effects of the crisis and took a long time to adopt measures which, when taken, were proven to be insufficient. The Council points out that the following fundamental precepts had been violated: the right to health, the right to life and the federative principle, as the President of the Republic acts to undermine and discredit measures adopted by other federative entities based on their respective constitutional powers, which are independent and harmonious with each other.

Upon these matters, the plaintiff requests a provisional remedy to enjoin the President of the Republic from performing acts contrary to social isolation policies adopted by the states and municipalities, and to order the immediate implementation of economic measures to support the most affected sectors.

II. Justice Rapporteur Alexandre de Moraes found that notorious divergences of opinions among authorities of different levels have caused insecurity and justified fear throughout society. Thus, the Rapporteur partially granted the provisional remedy to acknowledge and ensure the concurrent power of the states and the Federal District. The Rapporteur also recognized, within their territories, the municipalities' supplementary competence to adopt and maintain the restrictive measures allowed in quarantine, regardless of an overcoming federal act on the contrary. According to the Rapporteur, this decision does not eliminate the power of the Union to establish restrictive measures throughout the country if it deems to be necessary.

Obviously, the Court may assess, on a case-by-case basis, the formal and material validity of each normative act issued by states and municipalities.

According to Justice Alexandre de Moraes, it is legally possible to file this specific type of Claim before the Court, aiming to avoid public authorities' actions that could jeopardize the fundamental precepts of the Republic, including the protection of health and the respect for federalism and its rules on the distribution of powers, enshrined as an unamendable clause by the Federal Constitution. The Constitution guarantees health as a right for all and a duty of the State, what entails in an universal and equal access to health and services.

Therefore, the Rapporteur decided that it was not possible to grant the plaintiff's request to replace the discretionary judgment of the Executive Branch.

On the other hand, the severe outbreak of the new coronavirus pandemic requires Brazilian authorities, in all levels of government, to implement concrete public health protections and to adopt all possible and technically sustainable measures to support the activities of the Unified Health System.

The Justice Rapporteur emphasized that the Judiciary is not supposed to replace the President's judgment of convenience and opportunity when exercising his constitutional powers. However, the Judiciary has a constitutional duty to verify, with logical coherence, the facts and the decision's taken on each case. Thus, if there is no consistency, the measures are flawed due to the violation of the constitutional order and the principle of prohibition of the public authorities' arbitrariness.

After these considerations and in respect of the federalism and its constitutional rules on the distribution of competences, the Justice stated that governors and mayors must be respected in their decisions regarding the imposition of social distancing, quarantine, suspension of school and cultural activities, and trade restrictions.

Federal entities enjoy autonomy, which implies on the distribution of legislative, administrative and tax powers. In relation to health and public assistance, including organization of food supplies, the Rapporteur pointed out that the Constitution foresees common administrative competence among the Union, the states, the Federal District and municipalities.

Likewise, the Federal Constitution foresees concurrent power among the Union, the states and the Federal District to legislate on health protection and on defence. Concerning the municipalities, the Constitution also allows supplementing federal and state legislation if there is local interest. Justice Alexandre de Moraes highlighted that the political-administrative decentralization of the Health System, pursuant to which services are performed in outlying regions and the financial charge that is distributed among the federative entities, including sanitary and epidemiological surveillance activities.

In conclusion, the Union must not cancel decisions that the local governments has adopted or will adopt within their territories that aim to fight the pandemic.

III. On October 13, 2020, the Full Court unanimously affirmed the provisional remedy to recognise that the states, the Federal District and the municipalities exercise concurrent powers, within the limits of their territories and duties, to adopt legally approved restrictive measures during the pandemic, such as imposition of social distancing/isolation;

quarantine; suspension of school activities; commercial, cultural and circulation restriction; among others. The Union still retains power to impose restrictive measures within the national territory, if deemed necessary. Nevertheless, the validity of each specific legal act on the matter, from every federate entity, could be analysed separately.

ECONOMIC AND FINANCIAL ORDER

ADPF 662 MC

The law that has increased the number of people to receive the social assistance benefit produced a budget and financial impact. The national emergency period concerning the new Coronavirus is not sufficient reason for the rule to not indicate the source of full funding to increase beneficiaries, especially since it is a proposal for a permanent increase on pay on a continuous basis.

Decision: April 3, 2020
Official Journal: April 7, 2020

I. The President of the Republic, through the Office of the General Counsel to the Federal Government, filed the present claim against the Senate Bill 55/1996, in the amended part of Article 20, paragraph 3, of Law 8742/1993 (Organic Law of Social Assistance).

The aforementioned Article guarantees a monthly benefit of one minimum wage to handicapped people and to the elderly who prove that they do not have the means to provide for their own support or to have it provided by their families, as set forth by law (benefits paid on a continuous basis, BPC in the Brazilian Portuguese acronym).

The Senate Bill 55/1996 raised the limit of family income to access the BPC from one quarter to half a minimum wage, which was fully vetoed by the President of the Republic.

According to information provided by the National Congress, the economic crisis triggered by the Covid-19 pandemic would make the approval of Senate Bill 55/1996 even more opportune on its amendments in the part where it alters Article 20, paragraph 3 of Law 8742/1993.

The plaintiff claims that Senate Bill 55/1996 does not comply with the principles of the Republic; of democracy; of the due process of law and sustainable indebtedness. In addition, it contradicts the fundamental right of good governance. According to the plaintiff, the legislative process finished without final deliberations and an estimate of its budgetary and financial effects.

He reports that the presidential veto was based on the opinion of the Ministry of Economy and the General Secretariat of the Presidency. The veto pointed out that there was an increase in the limit of the family per capita income for granting BPC, and that there was no indication on the respective source of full funding. Therefore, the Bill had created a benefit that disregarded the new national Fiscal Regime.

The plaintiff points out that the increasing health and economic emergency resulting from the expansion of contamination by the new coronavirus represents a factor that requires control of new expenditures and public finance. The author requires the suspension of the effects of the National Congress act, which could overturn the presidential veto and approve the object of this claim.

Meanwhile, on March 23, 2020, the National Congress rejected the president's veto on Bill 55/1996 and, therefore, the Bill became Law

13981/2020. This law increased the monthly family *per capita* income requirement from one quarter to half a minimum wage.

II. Initially, with the conversion of the Bill into a law, Justice Rapporteur Gilmar Mendes decided that this Claim of Non-Compliance with a Fundamental Precept would become a Direct Action of Unconstitutionality.

The Justice found that the subject addressed in this claim is relevant and urgent, what identifies the provisional remedies. Thus, in a single-judge decision, subject to the Full Court's confirmation, he partially granted the provisional remedy, suspending the effectiveness of the new wording given by Law 13982/2020 to Article 20, paragraph 3 of Law 8742/1992.

According to the Justice Rapporteur, the referred rule increased public expenses without indicating the respective source of full funding and omitted the budgetary and financial impacts of the benefit's extension, what violates the Federal Constitution, the Temporary Constitutional Provisions Act, the Fiscal Responsibility Law and the Budget Directives Law. He highlighted the need to prepare a study on budgetary and fiscal impact in order to enable the implementation of the standard object of the present claim.

Thus, although the questioned norm did not change the value of the constitutional benefit, it increased the number of beneficiaries by changing the criterion for receiving the benefit from a quarter to half of the minimum wage of the family *per capita* income.

The Rapporteur stated that the requirement to indicate the respective source of full funding for social welfare benefits is a commitment to the future and to each citizen, especially those most in need, as it ensures good governance to allow the enjoyment of benefits with security and social justice.

He acknowledged that the public health crisis is worsening, demanding the implementation of the necessary and imperative measures of distancing and social isolation recommended by the World Health Organization. Moreover, the public health crisis is experiencing serious economic effects, especially by the poorest groups of the Brazilian population.

Given the crisis' magnitude, the rules of organization and procedure of financial nature cannot hinder legal solutions that achieve a minimum satisfactory level of social rights. Thus, the Rapporteur considered not only constitutional but also necessary and urgent measures to adopt, which aimed at granting temporary emergency aid to mitigate the adverse effects of the economic recession.

On the other hand, he believes that the increase in the benefit of continued provision does not constitute an emergency and a temporary measure aimed at confronting the calamity of Covid-19. Unlike other emergency benefits, the increase of BPC under the proposed terms has a permanent nature, which is a definitive increase on the amount of benefit, and it is not attached to the present crisis.

The Justice Rapporteur concluded that the emergency period is not a sufficient reason to overrule the constitution, which requires the corresponding source of costing to increase the number of people served by the welfare system. That is especially relevant considering it is a proposal to increase benefits paid on a continuous basis.

ADPF 568

The amount that Petrobras agreed to pay in penalties because of a non-prosecution agreement is extra-budget and the Court may reallocate it to the states to fund actions aimed at combating Covid-19. Such authorization comes from the pressing need that threatens the life and physical integrity of the population and complies with the public interest, as it is indispensable to safeguard the constitutional right to health.

Decision: May 13, 2020
Official Journal: May 18, 2020

I. Petrobras entered into a non-prosecution agreement with the U.S. Department of Justice to pay over US$852 million in penalties to settle criminal investigations of the Operation Car Wash (*Operação Lava-Jato*). However, the U.S. government would credit 80% of the total that Petrobras would pay to Brazilian authorities pursuant to an agreement to be subsequently negotiated between Petrobras and the Federal Prosecution Office.

Such agreement, named "Commitments-making Agreement," was entered between Petrobras and the prosecutor of the Prosecution Office of the state of Paraná, responsible for the Car Wash task force, and was ratified by the Federal Court of Curitiba on January 23, 2019. The agreement foresaw that half of the amount would be invested in "projects, initiatives and institutional development of entities and networks of appropriate entities, educational or not, that reinforce the fight of the Brazilian society against corruption."

The resources would constitute an endowment fund to be administered by a private law foundation, headquartered in Curitiba, in which representatives of the Federal Prosecution Office (MPF), the Federal Prosecution Office of the state of Paraná (MPF-PR), and representatives of the society would have a sit. Even though the resources came from an international agreement entered by Petrobras with the U.S. Department of Justice, the federal court of first instance justified its competence to approve the national agreement because the facts had originated from investigations and criminal proceedings presided over the Federal Court of Curitiba.

The Federal Attorney General (PGR) filed this claim arguing that the agreement assigned responsibilities to the MPF-PR that went beyond the constitutional limits of their competence. The PGR emphasized that the agreement concentrated the powers to investigate and act in legal proceedings as well as execute a billionaire budget (in Brazilian currency), whose revenue comes from an international agreement to which it is neither a party nor a legally interested third person.

The PGR pointed out that the MPF-PR or the Federal Court of that state could not manage a billionare account of resources that would be remitted by Petrobras. The PGR highlighted that members of the Car Wash task force entered into the agreement and settled administrative and financial commitments to be undertaken by the MPF. That is, the authorities had spoken on behalf of the institution without having the power to do so.

The PGR emphasized that the request on this case is to correct the allocation of the amount due by Petrobras to the U.S., but forwarded to Brazil because of this non-prosecution agreement, which resulted in a credit between Petrobras and the United States of America.

In turn, in Constitutional Claim 33667 (Rcl 33667), the president of the Chamber of Deputies argued that Curitiba's Court decision of ratification had violated the Supreme Court's jurisdiction, because part of the investigations and criminal actions related to the Operation Car Wash were pending before the Supreme Court. Moreover, just as the PGR, the president pointed out that the MPF-PR had committed a clear usurpation of powers of other bodies.

The Supreme Court ordered both cases (ADPF 568 and Rcl 33667) to proceed together.

II. On March 15, 2019, Justice Rapporteur Alexandre de Moraes suspended the effects of the decision that ratified the "Commitments-making Agreement" entered by Petrobras and the prosecutors of Paraná (Car Wash task force), as well as the effectiveness of the agreement itself. The Justice also ordered the immediate blocking of the amounts deposited by Petrobras, as well as subsequent deposits, in the current account designated by the Federal Court. According to this decision, the account could only be moved with the express authorization of the Supreme Court.

In his decision, Justice Alexandre de Moraes pointed out that Petrobras chose – in circumstances where constitutional, legal and moral aspects should still be analyzed by the Court – to settle a second agreement to pay a fine in penalties, in which the prosecutors of MPF-PR were chosen as the "Brazilian authorities." According to the Justice, the Supplementary Law 75/1993 foresees the MPF to head the administrative representation of the institution.

The Rapporteur stated that the agreement did not indicate the MPF-PR bodies as the Brazilian authorities to receive the payment of the fine nor the need for the agreement to be ratified by the Federal Court in Curitiba (the capital of the state of Paraná).

Moreover, for Justice Rapporteur Alexandre de Moraes, the second agreement had established provisions not foreseen in the U.S. agreement, which only stipulated the fine to be credited in favor of Brazil, without requiring the formation of a legal entity or specific activities. One of the clauses of the now suspended agreement foresaw that half of the amount would be invested in "projects, initiatives and institutional development of entities and networks of reputable entities, educational or otherwise, that strengthen the fight of Brazilian society against corruption" and would constitute a property fund to be administered by a private law foundation.

In a preliminary analysis, the Justice considered as doubtful the creation and constitution of a private foundation to manage resources derived from the payment of fines to the Brazilian authorities, which upon entering the National Treasury would become public, and whose destination would depend on a budget law issued by the National Congress.

Subsequently, the president of the Chamber of Deputies requested the allocation of the resources recovered to fight fires in the Amazon Rainforest and to the National Education Development Fund. On September 5, 2019, the PGR, the Federal Government and the General Counsel to the National Treasury entered into an agreement and settled that R$ 1.6 billion would be destined for education and R$ 1 billion for environmental protection.

The agreement was approved in the case file of ADPF 568 and became final on October 11, 2019.

Later, represented by their governors and attorneys, the states of Maranhão, Pará, Amazonas, Mato Grosso, Amapá, Acre, Roraima, Rondônia and Tocantins filed a petition to request the financial resources due to Legal Amazon states to be transferred by state funds and/or

specific sources to be created in the public budget, in order to allow rapid remittance and execution of specific actions.

The Justice Rapporteur determined the immediate transfer of the funds settled in the agreement to the states as mandatory transfers, for all budgetary and financial purposes, under the supervision of the Office of the Federal Comptroller-General and the Federal Court of Accounts. He clarified that, although the resources were initially owned by the Union, it undertook the commitment to transfer these amounts to the states directly affected by the fires in Legal Amazon through the agreement itself.

On March 19, 2020, the PGR filed a petition and pointed out the situation of alarm and concern regarding public health in relation to the spread and contagion of the new coronavirus. Therefore, and because these are extra-budget resources that allow reallocation and, considering that the amount assigned to education (R$1.6 billion) had not yet been implemented, the PGR requested such amount to be destined to the Union, managed by the Ministry of Health and applied exclusively to the costs of actions aimed to fight Covid-19.

Previously, the Oswaldo Cruz Foundation (Fiocruz), although not part of the procedural relationship, had also requested part of the resources discussed under this case. Fiocruz pointed out the activities developed by the foundation in view of the public health emergency caused by the Covid-19 pandemic.

The authorities involved in the approval of the original agreement expressed their consent to the proposal to reallocate part of the resources in question.

Thus, on March 22, 2020, Justice Alexandre de Moraes ratified the proposal to adjust the original agreement and determined the immediate allocation of R$1,601,941,554 foreseen in Item 1.1 of the Agreement on

the Allocation of Resources to the Ministry of Health to fund actions to prevent, contain, combat and mitigate the Covid-19 pandemic.

According to the Rapporteur, the right to life and health appears as an immediate consequence of the human dignity as a foundation of the Federative Republic of Brazil. In this sense, the Federal Constitution, under Articles 196 and 197, consecrated health as a right of all and a duty of the State. Such entitlement entails universality and equality in the access to health actions and services.

The severity of the emergency caused by the Covid-19 pandemic required that Brazilian authorities at all levels of government to implemented public health protection and adopted all possible measures to support and maintain the activities of the Unified Health System.

Subsequently, the states of Acre, Maranhão, Tocantins and Mato Grosso requested to redirect the funds they received (in the fight against actions to prevent, inspect and combat deforestation, forest fires and environmental crimes in Legal Amazon) in emergency actions to confront the pandemic. The states emphasized that the not yet implemented funds would be redirected to fight the pandemic. The untying would only be valid in relation to values that had not been committed by the date of the agreement's approval.

Justice Alexandre de Moraes stated that reallocating the money would not abruptly cease any government actions or programs, while at the same time the government would address a pressing need that threatens the life and physical integrity of the population of those states. He emphasized that the proposed amendment is in accordance with the public interest, to the extent that it is indispensable for the protection of the right to health (Federal Constitution, Article 6, head paragraph, and Article 196).

According to the Rapporteur, the states will have to prove the effective use of the authorized amount.

ADI 6357 MC-Ref

The requests to disregard the requirements provided by the Act on Fiscal Responsibility and the Budget Directives Law, due to the need to increase unforeseen and necessary expenditure to combat Covid-19, which is the main issue under this action, became moot by the enactment of a new Constitutional Amendment that provides on the same subject under discussion in this case.

Decision: May 13, 2020
Official Journal: November 20, 2020

I. The President of the Republic filed this action to discharge some requirements of the Fiscal Responsibility Act (Supplementary Law 101/2000 – LRF) and the Budget Directives Law (Law 13898/2020 – LDO). He intended to create and expand prevention programs against Covid-19 and protect the population vulnerable to the pandemic.

To increase indirect tax expenses and obligatory spending of continuous nature, the LFR requires an estimate of the budget and financial effect, compliance with LDO, demonstration of the resources' origin and financial offsetting of their effects in the subsequent fiscal years.

The initial pleading highlighted that the expenditures referred to in these rules "were those aimed at implementing ordinary and regular public policies, which could be subject to adjustment to Budget Laws due to their potential predictability." Despite the provisions of LRF allowing

exceptions for the budget requirements, such exceptions would not be sufficient to guarantee the prompt decision-making process required by the current scenario.

According to the plaintiff, enforcing the rules mentioned amid the current Covid-19 outbreak could violate the dignity of the human person, the guarantee of the right to health, the social values of work and the guarantee of the economic order.

Therefore, the plaintiff requested the Court to interpret the norms according to the Constitution in order to remove the requirement of demonstrating the budgetary adequacy and compensation in relation to the creation and the increase of public programs aimed at confronting the calamity created by Covid-19's dissemination.

The plaintiff pointed out that the current sanitary, fiscal and economic crisis context would require planning emergency public policies and that they were unpredictable when formulating the respective budget laws and, especially, the LRF.

In addition, the plaintiff stated that the request was limited to ruling out the application of such preconditions "concerning mainly the expenses needed to face the state of calamity."

II. On March 29, 2020, Justice Rapporteur Alexandre de Moraes granted a provisional remedy to rule out the application of LFR and LDO Articles during the state of public calamity and for the sole purpose of combating the Covid-19 pandemic. The Justice based the decision on a judgment of probability and the fact that the requirements of *fumus boni juris* and *periculum in mora* were present.

According to him, suspending the provisions exceptionally did not conflict with the fiscal prudence and intertemporal budget balance enshrined by the LRF, because no budget spending would be carried out based on

indefinite legislative proposals, characterized by political opportunism, inconsequence, discouragement or improvisation in Public Finance.

The provisional remedy authorized budgetary expenses to protect life, health and the very subsistence of Brazilians affected by such serious situation, which are fundamental rights constitutionally guaranteed and worthy of effective and concrete protection.

Justice Alexandre de Moraes clarified that the provisional remedy applies to all federal entities that have decreed a state of public calamity because of the Covid-19 pandemic, in exceptionally and temporarily means.

On May 13, 2020, the Full Court, by a majority, affirmed the provisional remedy previously granted. However, the Court dismissed the Direct Action of Unconstitutionality due to the later enactment of Constitutional Amendment (CA) 106/2020, which instituted an extraordinary fiscal, financial and contracting regime to deal with the national public calamity resulting from the pandemic. The Court emphasized that the CA 106/2020, also called "War Budget," did not turn the challenged law constitutional in consequence but confirmed the acts previously performed.

Finally, the Court asserted that Article 3 of CA 106/2020 replaces the very understanding of the provisional granted remedy, since it applies to the Union, the states and municipalities. Although the action had become moot, the Court granted interpretation to Article 3 highlighting its application to the three entities of the Federation. In turn, Article 2 of CA 106/2020 provides that not only the Union is responsible to cope with the calamity but also the states and the municipalities.

FUNDAMENTAL RIGHTS AND GUARANTEES

ADI 6351 MC-Ref[6,7]

Free access to information is a fundamental right to the full exercise of the democratic principle.

Decision: April 30, 2020
Official Journal: August 14, 2020

I. The Federal Council of the Brazilian Bar Association filed this action requesting a provisional remedy against Article 1 of the Provisional Presidential Decree 928/2020. The Federal Council stressed that adding Article 6-B to Law 13979/2020 had established new requirements and exceptions to request information from public bodies in the current scenario of public health emergency resulting from the outbreak of the new coronavirus.

The Council argued, among others, that suspending deadlines to render answers (Article 1 of the decree), as well as requiring to iterate the

6 This case was jointly ruled with Direct Actions of Unconstitutionality 6347 and 6353.

7 On September 2, 2020, Justice Rapporteur Alexandre de Moraes held that this action had become moot since the Provisional Presidential Decree discussed in the case ceased to produce legal effects considering it was not converted into law.

request for information, and prohibiting to appeal against a state denial was a disproportionate, arbitrary, and unnecessary restriction of the right to information.

II. The Supreme Court, unanimously affirmed the provisional remedy previously granted by Justice Rapporteur Alexandre de Moraes to suspend the effectiveness of Article 6-B of Law 13979/2020, included by Article 1 of the decree.

The Court highlighted that the Federal Constitution of 1988 provided for expressly the disclosure principle as one of the essential grounds of the Public Administration. Disclosure and transparency correspond to the State's duty to provide requested information, under penalty of political, civil, and criminal liability. Both principles contribute to citizens' political participation in a representative democracy. This participation may only be strengthened when public policies are widely open to different opinions and critics. In this sense, they are necessary to audit government bodies and agencies. In times where public bids are not required due to the pandemic emergency, public administrators must provide even better and wider information.

Accordingly, the disclosure of specific information may only be denied under exceptional circumstances determined by the public interest. Otherwise, the Administration has the responsibility to carry out public affairs under absolute transparency. If it does not do so, it violates Article 5, items XXXIII and LXXII, and Article 37, head paragraph, of the Constitution. The Court considered that the provision discussed in this case had transformed the constitutional rule of disclosure and transparency into an exception, reversing the constitutional protection purpose that all must have free access to information.

ADI 6387 MC-Ref[8]

The practice of sharing data by telecommunications companies with the Brazilian Institute of Geography and Statistics Foundation, for supporting official statistical production during the public health emergency due to the new coronavirus, violates the right to intimacy and private life.

Decision: May 7, 2020
Official Journal: November 12, 2020

I. In five Direct Actions of Unconstitutionality jointly decided, the Federal Council of the Brazilian Bar Association and political parties questioned the constitutionality of the Provisional Presidential Decree 954/2020. Such measure enabled telecommunication companies to share data with the Brazilian Institute of Geography and Statistics Foundation (IBGE), for supporting official statistic production during an emergency public health situation resulting from the new coronavirus.

In short, the decree obliges fixed and mobile telephone companies to disclosure the list of names, telephone numbers and addresses of their consumers, both individuals and legal entities, to IBGE Foundation.

For the plaintiffs, the decree violates the provisions of the Federal Constitution that ensure the dignity of the human person, the inviolability of intimacy, of private life, of honor and of one's reputation, besides the confidentiality of data.

8 On November 19, 2020, Justice Rapporteur Rosa Weber held this action had become moot since the Provisional Presidential Decree discussed in the case ceased to produce legal effects considering it was not converted into a law.

II. Justice Rapporteur Rosa Weber granted the provisional remedy and suspended the effectiveness of Decree 954/2020. The Rapporteur emphasized that the emergency scenario resulting from the health crisis or the need of specific data to formulate public policies to cope with it were not underestimated. However, their fight cannot legitimize the violation of fundamental guarantees enshrined in the Constitution.

According to the Rapporteur, the conditions under which the use of digital personal data takes place, by public or private authorities, is one of the greatest contemporary challenges to the right to privacy.

As per Justice Rosa Weber, paragraph 1 of Article 2 is the only provision of the Decree 954/2020 addressing the purpose and method to use the data. However, the provision only states that the data will be exclusively used by IBGE Foundation to produce official statistic, aiming to conduct non-presential interviews for household surveys. The decree does not delimit the object of the statistics to be produced, nor the specific purpose, nor the amplitude. It also does not clarify the need to make the data available or how it would be used.

The Justice Rapporteur pointed out that the decree did not demonstrate legitimate public interest to share personal data of telephone service users, considering the necessity, adequacy and proportionality of the measure. In addition, the executive branch had the responsibility to do so when issuing it.

Thus, although the decree's wording mentioned that the shared data would be confidential, the decree did not present a technical or administrative mechanism capable of protecting the personal data from unauthorized access, accidental leakage or improper use either in its transmission or in its processing. It merely delegates the procedure to share data as an act of the president of the IBGE Foundation, without offering sufficient protection to the relevant fundamental rights at stake.

These situations would be aggravated by the fact that the General Law on the Protection of Personal Data (Law 13709/2018) was not yet in force. The law defines the criteria for the liability of agents for any damage that may occur due to the processing of personal data.

On May 7, 2020, the Full Court, by majority, affirmed the provisional remedy to suspend the effectiveness of the Provisional Presidential Decree 954/2020. The Court asserted that the right to privacy and its consequent rights to intimacy, honor, and image, emanate from the recognition that the individual personality deserves to be protected in all its manifestations. In order to apply such rights, the Federal Constitution provides, in Article 5, item XII, the inviolability of confidentiality of correspondence and telegraphic communications, data and telephone communications, except, in the last case, by a court order, in the cases and in the manner established by law for the purposes of criminal investigation or criminal prosecution.

For the Court, the Decree 954/2020 does not meet the constitutional requirements regarding the effective protection of Brazilians' fundamental rights.

The Court also pointed out that IBGE website reported a partnership with the Ministry of Health to implement a version of the National Continuous Household Sample Survey (NCHSS) focused on monitoring Covid-19 (NCHSS COVID). The research is focused on quantifying the spread of the Covid-19 pandemic and its impacts on Brazilian labor market.

To define the sample of the new survey, IBGE used a base of 211 thousand domiciles that participated in NCHSS in the first quarter of 2019 and selected those with a registered telephone number. According to the Court, this fact would be sufficient to highlight that the system of data sharing, as regulated by the decree, is needless and excessive.

The Supreme Court concluded that the permission to use the collected data to produce official statistics within thirty days after the pandemic is over was excessive. In addition, Article 4, sole paragraph, of Decree 954/2020 was disproportionate when allowing the conservation of personal data, by a public entity, for a time that clearly exceeds what is strictly necessary to fulfil its stated purpose, which is to support statistical production from Covid-19.

HC 184828 MC

The President of the Republic's act that disaccredits Venezuelan diplomats is valid since it falls within his private and non-delegable competence. However, the 48-hour period established for officials to leave the national territory is not reasonable considering the current stage of the Covid-19 pandemic that puts at risk their life, in addition to their physical and psychological integrity.

Decision: May 16, 2020
Official Journal: May 20, 2020

I. This case refers to a writ of *habeas corpus*, with a request for a provisional remedy, filed against the President of the Republic and the Minister of State for Foreign Affairs, which challenged a letter signed by said minister on April 28, 2020, that determined Venezuelan diplomats and their families to leave the national territory until May 2, 2020.

On May 2, Justice Rapporteur Roberto Barroso granted a provisional remedy to suspend, for a period of 10 days, the effects of the mandatory expulsion order for Venezuelan officials from the Brazilian territory.

The Office of the General Counsel to the Federal Government and the Ministry of Foreign Affairs protested against the plaintiff's claim and the provisional remedy that was granted, alleging, preliminarily, two reasons. First, the Supreme Court's lack of jurisdiction. The writ challenges an act of the Minister of State, which falls under the Superior Court of Justice's jurisdiction. The Federal Attorney General affirmed such argument. Second, the *habeas corpus* is inapt because there is no risk of imprisonment or threat to the freedom of movement.

They stress the order is a mere "political request" for Venezuelan officials to leave Brazil. Regarding the merits, they maintained that the discussion carried out in this *habeas corpus* refers to the maintenance of relations with another country and its diplomatic representatives, which were within the president's exclusive power.

II. Justice Rapporteur Roberto Barroso affirmed the provisional remedy that was previously granted, without interfering in the validity of the president's political-administrative decision, to suspend its effectiveness, ensuring that patients remain in the national territory during the state of public calamity and health emergency acknowledged by the National Congress.

The Justice pointed out that the Office of the General Counsel to the Federal Government and the Ministry of Foreign Affairs alleged that the matter dealt with in this *habeas corpus* is the explicit and unequivocal competence of the President of the Republic, as foreseen in Article 84, item VII, of the Federal Constitution. A private competence that cannot be delegated since "maintaining relations with other countries and accrediting their diplomatic representatives" is not among delegable powers mentioned in the sole paragraph of the same article. Therefore, the Minister of Foreign Affairs is a mere executor of the decision. The President of the Republic himself transmitted this information on a social

network: ''the mandatory withdrawal of the Venezuelan diplomatic corps was determined by an act of the President of the Republic and the Minister of Foreign Affairs.'' Therefore, the Supreme Court has jurisdiction to decide on the case, since Article 102, item I, subitem i, of the Federal Constitution determines the responsibility of this Court to hear and decide on a *habeas corpus* against acts of the President of the Republic.

As to the allegation that the *habeas corpus* is inapt since the letter only formalized negotiations on a political agreement, the Justice stressed that the risk to freedom of movement was clear by the use of the terminology adopted: ''48 hours to abandon the country, process of withdrawal if they do not go alone, employment of specialized troops, reinforcement of personnel and evacuation of the embassy.'' In addition, once again, the President of the Republic himself had spoken to the press and on social media complaining of the interference of the Court in the ''expulsion'' of the Venezuelan diplomats.

Despite the Court's jurisdiction on the case and the undeniable risk of the plaintiffs' locomotion, it is not up to the Supreme Court to review, under a *habeas corpus*, the merits of the political and administrative decision of the Brazilian Head of State. The President has the discretion to accredit or disaccredit the plaintiffs and, therefore, to stop the exercise of their diplomatic and consular functions. Venezuelan officials, therefore, are subject to the rules of the Migration Law like any foreigner.

Article 9 of the Vienna Convention on Diplomatic Relations (Decree 56435/1965) gives the accrediting country a reasonable period to take the necessary measures after the discreditation of diplomatic agents. However, it is necessary to assess whether the health emergency situation recognized by the World Health Organization and the National Congress makes it impossible for the plaintiffs to leave the national territory. In this current scenario, the 48-hour period set by the contested decision

is unreasonable and, therefore, contrary to the commitment made by Brazil when ratifying the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Agents, in addition to violating the Universal Declaration of Human Rights (Article 3) and the American Convention on Human Rights (Articles 4 and 5) as they pose a risk to the lives and personal integrity of the plaintiffs.

Thus, the President's act is valid, but it shall have its effects suspended for as long the state of pandemic is in force.

ADPF 690 MC-Ref[9]

The lack of data transparency referring to the Covid-19 pandemic represents a violation of constitutional fundamental principles, especially the access to information, disclosure, and transparency in Public Administration and of the right to health.

Decision rendered during a virtual sitting: November 23, 2020
Official Journal: March 19, 2021

I. Political parties filed the present claim in view of acts of the federal government that restricted the disclosure of data related to Covid-19.

The plaintiffs report that the Ministry of Health's website delayed the release of data on the new coronavirus pandemic.

In addition, without legitimate justification, the Ministry of Health changed

9 This case was jointly ruled with the Claims of Non-Compliance with a Fundamental Precept no. 691 and 692.

the bulletin format "Covid-19 Daily Report." They omitted relevant data on the evolution of the pandemic in Brazil, such as: total number of confirmed cases, of recovered cases and of deaths; the accumulated numbers in the last three days; how many deaths were under investigation; and how many patients were still under medical supervision.

According to the plaintiffs, concealing this information makes it impossible to monitor the progress of Covid-19 in Brazil and it delays the implementation of public health policies to control and prevent the disease. Moreover, the suspected data manipulation insults the Brazilian population.

The plaintiffs alleged violation of the fundamental precepts of the Federal Constitution, especially the right to life and health, in addition to the public administration' duty of transparency, allied to the principle of supremacy of the public interest.

The plaintiffs required a series of acts to provide greater transparency of the data regarding the Covid-19 pandemic.

II. Justice Rapporteur Alexandre de Moraes partially granted the provisional remedy ordering that the Ministry of Health to maintain full daily disclosure of epidemiological data related to the pandemic, including on their website. The Justice also determined that the data must provide the accumulated numbers of occurrences.

According to the Rapporteur, the Federal Constitution foresees that the democratic state must ensure the well-being of the society. Within the idea of well-being, the provision of all necessary information for planning and combating the pandemic caused by Covid-19 should be highlighted as one of the main purposes of the Union. In addition, the effectiveness of public policies aimed at health, including the

constitutional obligation of the Unified Health System (SUS) to carry out epidemiological surveillance actions.

The Constitution also expressly establishes the principle of disclosure as one of the essential vectors for the public administration, giving it absolute priority in the administrative management and ensuring full access to information for all.

The principles of disclosure and transparency included in the Federal Constitution correspond to the Union's obligation to provide essential information to society. Access to information is a true instrumental guarantee for a full exercise of the democratic principle, which includes "discussing public matters in an unrestricted, robust and open manner" in order to ensure the necessary oversight of government bodies, which only becomes effectively possible with the guarantee of disclosure and transparency.

Thus, except in exceptional situations, the Public Administration has the duty of providing absolute transparency when carrying out public affairs, as foreseen in Article 37, head paragraph and 5, items XXXIII and LXXII, of the Federal Constitution[10].

10 Article 37. The governmental entities and entities owned by the Government in any of the powers of the Union, the states, the Federal District and the municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency, and the following: (CA 18, 1998; CA 19, 1998; CA 20, 1998; CA 34, 2001; CA 41, 2003; CA 42, 2003; CA 47, 2005). Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA 45, 2004). (...) XXXIII – all persons have the right to receive, from the public agencies, information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, subject to liability, except for the information whose secrecy is essential to the security of society and of the State; LXXII – *habeas data* shall be granted: a) to ensure the knowledge of information related to the person of the plaintiff,

This case under decision does not characterize as an exception to the necessary disclosure and transparency. The change made by the Ministry of Health in the ''Daily Report'' bulletin related to the pandemic, with the suppression and omission of epidemiological data, is a well-known fact. The information is necessary to allow the analysis and comparative projections to assist public authorities in making decisions and to allow the population to understand the pandemic situation experienced in the national territory.

The Rapporteur concluded the requirements were present to partially grant the requested provisional remedy due to the serious risk of an abrupt interruption in the collection and dissemination of important epidemiological data, which were essential for maintaining historical evolution analysis of the pandemic in Brazil.

Therefore, the Justice partially granted the provisional remedy to ensure the maintenance of the full disclosure of all epidemiological data that the Ministry of Health had carried out until June 4, 2020.

Failure to comply with this action may result in irreparable damage resulting from non-compliance with the constitutional principles of disclosure and transparency and the constitutional duty to carry out sanitary and epidemiological surveillance actions in the defence of the life and the health of all Brazilians.

contained in records or data banks of government agencies or of agencies of a public character; b) for the correction of data, when the plaintiff does not prefer to do so through a confidential process, either judicial or administrative;

III. On November 23, 2020, the Full Court affirmed the provisional remedy[11] to determine that: a) the Ministry of Health must maintain a daily and complete publication of data regarding the Covid-19 pandemic, including through the Ministry's website, and containing the data collected since the beginning; b) the government cannot change the methodology used to count the number of Covid-19 related cases and deaths, which must be the same that has been used since the start of the data collection.

The Constitution regards the principle of disclosure as one of the main vectors of the Public Administration, which is given priority in order to guarantee the society's full access to information.

Therefore, the Union is obliged to give the necessary information to society, since the access to information is an instrumental guarantee to the full exercise of the democratic principle.

The Public Administration has a duty to display absolute transparency when conducting public affairs, save in exceptional circumstances. According to the Constitution, the political-judicial model rejects the power and that hides itself.

Also, the country has signed international treaties related to the publication of epidemiologic data, such as the International Sanitary Regulation approved by the World Health Organization in 2005.

11 The Full Court, during a virtual session from March 5 to 12, 2021, partially granted the Claim of Non-Compliance with a Fundamental Precept in order to reaffirm the decision of November 23, 2020. It a) enjoins the Ministry of health to daily disclose all epidemiological data related to the pandemic, including on the Ministry of Health's website, ensuring that the cumulative numbers of occurrences, as carried out until June 4, 2020, are presented; b) prohibits the Federal District's Government to adopt new methodology for accounting cases and deaths resulting from the Covid-19 pandemic, in order to maintain the data disclosure as it was transmitted until August 18, 2020, according to the opinion of the Justice Rapporteur. The entire content of the decision was published in the official journal on 19 March 2021.

HUMAN RIGHTS

ADPF 709 MC-Ref

The Constitution grants to professional associations the right to file claims directly before the Supreme Court. The definition of professional associations shall be understood as a group of people who perform the same economic and professional activity, or also, who are members of associations that advocate for the interests of vulnerable and/or minority groups. The latter must be included so the Court may fulfill its institutional mission to protect human rights.

Indigenous peoples have the right to dignity, to life, to health and to live in their own territories, pursuant to Articles 231, paragraphs 1, 5 and 6 of the Constitution[12]. As so, the federal government has the

12 Article 231. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all their property. Paragraph 1. Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their wellbeing and for their physical and cultural reproduction, according to their uses, customs and traditions. (...) Paragraph 5. The removal of Indian groups from their lands is forbidden, except ad referendum of the National Congress, in case of a catastrophe or an epidemic which rep resents a risk to their population, or in the interest of the sovereignty of the country, after decision by the National Congress, it being guaranteed that, under any circumstances, the return shall be immediate as soon as the risk ceases. Paragraph 6. Acts with a view to occupation, domain and possession of the lands referred to in this or to the exploitation of the natural riches of

constitutional duty to provide adequate and sufficient measures to prevent contagion by Covid-19 within their communities.

Decision: August 5, 2020
Official Journal: October 7, 2020

I. The Coalition of the Indigenous Peoples of Brazil, along with six political parties, filed a Claim of Non-Compliance with a Fundamental Precept requiring protective measures against the spread of Covid-19 within their communities.

According to the plaintiffs, the federal government has not adopted adequate and sufficient measures to prevent contagion by the new coronavirus. Such behavior violates the constitutional precepts of the dignity of the human person (Article 1, item III)[13], the rights to life (Article 5, head paragraph)[14] and to health (Articles 6 and 196)[15], as well as the

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the soil, rivers and lakes existing therein, are null and void, producing no legal effects, except in case of relevant public interest of the Union, as provided by a supplementary law and such nullity and voidness shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law.

13 Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: (...) III – the dignity of the human person.

14 Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA 45, 2004)

15 Article 6. Education, health, food, work, housing, transportation, leisure, security, social welfare, protection of motherhood and childhood, and assistance to the destitute, are social rights, as set forth by this Constitution. (CA 26, 2000; CA 64, 2010; CA 90, 2015). Article 196. Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery.

right of indigenous peoples to live in their own territories, according to their cultures and traditions (Article 231)[16].

The plaintiffs sustained that spread of the Covid-19 pandemic is taking place rapidly among those peoples because of their vulnerability, concerning both their historical lower lever of exposure to pathologies and their community shared lifestyle. In addition, they argue that they have a political vulnerability for facing a great deal of difficulty in having their interests contemplated by the majority instances.

They presented two sets of requests, the first one related to the so called Isolated and of Recent Contact Indigenous People. This group is characterized by either limited or no interaction at all with the surrounding society. The second set refers to all Brazilian indigenous peoples.

II. The Supreme Court, sitting *en banc*, affirmed the provisional remedy previously granted by Justice Roberto Barroso. Firstly, and taking an unprecedented step, the Court acknowledged the Coalitions' legal standing to file actions directly before the Court.

According to the Constitution, professional associations enjoy such right but, until this ruling, the Court's case law had interpreted professional associations, for those purposes, as the ones representing peoples who perform the same professional or economic activity. The Rapporteur noted, however, that this understanding was incompatible with the institutional mission of the Court to protect human rights. For this reason, he proposed to interpret the concept as ''a group of people who perform the same economic and professional activity, or also, who are members

16 Article 231. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all their property.

of associations that advocate for the interests of vulnerable and/or minority groups.''

Concerning the request for a provisional remedy, the decision was based on three basic guidelines: i) prevention and precautionary principles; ii) adoption of institutional dialogue between the Judicial and the Executive branches over the measures to be applied to protect indigenous peoples; iii) and establishment of intercultural dialogue among the Judicial and Executive branches and the indigenous peoples.

In this sense, the Court granted the plaintiffs' request for the creation of a situation room to manage the pandemic and guaranteed the participation of the stakeholders they had indicated, which included members of the Federal Prosecution Office, the Federal Public Defender's Office and of the indigenous peoples, as indicated by the Coalition (APIB).

The Court also granted the request for the creation of sanitary barriers according to a plan to be prepared by the situation room, within 10 days. The Rapporteur highlighted that the option of those peoples to remain isolated derives from their right to self-determination and represents their way to preserve their cultural identity. For that reason, the option to isolation is a right, and the Union has the responsibility to guarantee it according to the 169 Convention of the ILO (Article 2, item I; Article 4, items I and II; Article 5 and Article 7).

The Court partially granted the request to extend the assistance of the Indigenous Health Subsystem to all Indigenous Brazilians. It determined the Indigenous Health Subsystem to assist all indigenous persons in tribal villages, regardless of the status of their territories. According to the Rapporteur, being an indigenous person is a matter of identity and it does not require any measure, by the Union, to legalize or recognize their territory, as stressed by the 169 Convention of the ILO (Articles 1, 2 and 3). However, the decision did not grant the same right to indigenous

people who are urban dwellers, because they have access to the Brazilian Public Health System, which grants universal and free assistance but is not available for the tribes. The Rapporteur emphasized the risk for the health system to collapse considering the ongoing pandemic.

The Court partially affirmed the provisional remedy to determine the Union to elaborate a new plan to combat Covid-19 for the indigenous population, with the participation of the National Human Rights Council and of representatives of the indigenous peoples and their experts. The decision also established the creation of a working group to achieve that goal, as well as a 30-day deadline, starting from the notification to the parties, for the plan to be presented to the Court.

As to the request to remove invaders from indigenous lands, the STF noted the existence of information about the presence of over 20,000 illegal miners in just one of the indigenous lands for which the measure was required, not considering the situation of other lands. The Court stressed that the removal of such invaders required the employment of considerable resources involving police and/or military forces, which would lead to an increase the risk of contagion for the communities. Furthermore, the measure could present a risk of armed conflict in the indigenous lands and threaten the physical integrity of indigenous peoples during the pandemic and, as a result, deepen their situation of vulnerability. However, the Court determined the inclusion of a strategy in a plan to be presented by the Union for the removal of invaders. In case no plan was rendered, the Court emphasized the matter would be analyzed once again.[17]

17 On March 16, 2021, Justice Rapporteur Roberto Barroso issued a decision that partially approved the General Plan to Combat Covid-19 for Indigenous Peoples presented by the federal government. According to him, several orders previously issued were only partially fulfilled. This portrayed a serious disarticulation of bodies involved in the document elaboration. In total, four

ADPF 635 MC

Police raids in Rio de Janeiro's favelas are halted as long as the state of public calamity resulting from the Covid-19 pandemic persists. Operations remain restricted to exceptional cases and must be informed and monitored by the Prosecutor's Office of the state of Rio de Janeiro.

Decision entered during a virtual sitting: August 17, 2020
Official Journal: October 21, 2020

I. A political party filed this claim against normative acts (State Decrees 27795/2001 and 46775/2019) and non-normative ones issued by the Governor of the state of Rio de Janeiro, related to the increase in police lethality, especially in communities who mostly have poor and black people.

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versions of the plan had been presented before. The Rapporteur noted that he decided to partially approve the proposal, subject to certain conditions, given the pressing need to approve a general plan, so that lives could be saved. He considered unconstitutional Resolution 4/2021 issued by the National Indigenous Foundation (FUNAI). The norm established a hetero identification of indigenous people as opposed to the Court's case law, which provides for that the fundamental criterion for the indigenous recognition is the self-declaration. He overruled the proposal to isolate invaders of indigenous lands and ordered the presentation of a new plan, by the Federal Police, with the support of the Ministry of Justice and Public Security. The Covid-19 vaccination priority was granted to indigenous peoples from unacknowledged lands and urban lands without access to the public health system, under equal conditions with other indigenous peoples. The Rapporteur ordered, within 48 hours, the Ministry of Justice and Public Security to assign a responsible to provide access to clean water and sanitation. He also enjoined the Ministry of Health to disclose important information to competent bodies that provide services concerning indigenous peoples.

The aforementioned acts regulate the public security policy adopted by the Governor of Rio de Janeiro and include several measures, including the use of helicopters as shooting platforms in police operations and collective and generic search and arrest warrants.

The plaintiff points out that the use of helicopters in police operations, despite being legally authorized, was implemented in a "war logic," given the routine use of aerial platforms in direct armed confrontations. He states that helicopters are used as "slaughter tools" and that it violates the right to life and dignity of the residents.

He highlights that, despite the state legislation imposing the installation of GPS and audio and video cameras in police vehicles, concrete measures were not taken to give transparency to police raids. On the contrary, there would be a secret protocol for the operation of aircraft and low rates of administrative-disciplinary investigation of public agents involved in homicides related to police operations.

According to the plaintiff, the use of war material and of police force, associated with the statement by the state Governor in which he suggested launching a missile into a *favela*, dominated by drug dealers, represent a disregard for the democratic state of law, for the due process, for the death penalty ban and for the dignity and integrity of the human person.

The petition reports that in the first nine months of this year alone, civilian deaths recorded in police operations and patrols reached 1,402. It means an average of five deaths per day – a disastrous record for security forces in the state. According to the plaintiff, most of these deaths are of poor and black people, which characterizes the true genocide of the black population in the state of Rio de Janeiro. The petition registers the state's failures to investigate and punish the members of its own civil police involved in these deaths.

On the other hand, the constant participation of police officers in armed conflicts and their insufficient psychological support contribute to the high rates of mental disorders and suicides among security agents in the state of Rio de Janeiro.

After filing the initial petition, the plaintiff and several *amici curiae* requested emergency relief to restrict police operations during the pandemic period. They alleged that police operations were even more lethal and violent, interrupting the operation of health units and the distribution of basic food baskets in the *favelas*.

Justice Rapporteur Edson Fachin granted the provisional remedy to halt police raids in Rio de Janeiro's *favelas* during the Covid-19 pandemic, under penalty of civil and criminal liability. Operations may happen in exceptional cases with written justification by a competent authority, and the Prosecutor's Office of the state of Rio should be subsequently informed, as it is responsible for external control of police activity.

Such exceptional care would be adopted in order to not place the population, the provision of public health services and the performance of humanitarian aid activities at even greater risk.

The Justice Rapporteur recalled that the inappropriate use of force already led Brazil to be condemned in 2017 by the Inter-American Court of Human Rights for the 1994 and 1995 massacres that took place in the *Favela Nova Brasília*, in *Complexo do Alemão* (RJ).

On August 18, 2020, the Supreme Court partially heard the Claim and, by a majority, affirmed the Rapporteur's previous decision to interpret Article 2 of Decree 27795/2001 according to the Constitution in order to restrict the use of helicopters in police operations to strictly necessary cases, which should be confirmed by means of a detailed report, prepared at the end of the operation.

In the provisional decision, the Court ruled that the state of Rio de Janeiro should instruct its security agents and health professionals to preserve all traces of crimes committed in police raids, in order to avoid undue removal of corpses and the disposal of important parts and objects for the investigation under the allegations aid provision.

In relation to the crime scenes, the Court granted the provisional remedy to order the technical and scientific police bodies of the state of Rio de Janeiro to document, through photographs, the expert evidence produced in investigations of crimes against life, notably the crime scene report and necropsy examination, in order to ensure the possibility of independent review. The photographic records, sketches and injury schemes must be attached to the case file, as well as stored in an electronic backup system.

In the case of police operations in perimeters where schools, daycare centers, hospitals or health centers were located, as a provisional remedy, the Court ordered the observation of the following guidelines: (i) the raids are an exceptional measure, especially in the entry and exit period of schools, the respective command must justify, previously or later, the concrete reasons that turn the raid indispensable in these regions in its own file or within the criminal investigation, with the subsequent notification of the state Prosecution's Office within 24 hours; (ii) the prohibition of the usage of any educational or health equipment as an operational base for the civil and military police, even the base of operational resources in the entry and exit areas of these establishments; and (iii) the elaboration of proprietary and confidential communication protocols involving the civil and military police, and the federal, state and municipal authorities in areas with school and health facilities, so that soon after the beginning of police raids, the directors or chiefs units have enough time to reduce the risks to the physical integrity of the people under their responsibility.

The Court pointed out that whenever there is suspicion of the involvement of agents belonging to public security bodies in the practice of criminal offenses, the investigation will be attributed to the competent Public Prosecutor's Office. The investigation, in turn, should meet the requirements of the Minnesota Protocol, especially regarding hearing victims or family members and prioritizing cases where children are victims.

The Court enjoined the Public Prosecution to appoint a member to act on duty on such cases.[18]

18 On December 17, 2020, Justice Rapporteur Edson Fachin issued a decision calling a Public Hearing to discuss strategies to reduce police killing in the state of Rio de Janeiro. The hearing took place on April 16 and 19, 2021. Several organizations were admitted as *amicus curie* and contributed to the debate.

LABOR RIGHTS

ADI 6363 MC-Ref

The rule of the executive branch that authorizes working hour reduction and salary cut, or a time-limited suspension of employment contracts, through individual agreements regardless of the union's consent is constitutional due to the pandemic of the new coronavirus.

Decision: April 17, 2020
Official Journal: November 24, 2020

I. The Federal Government issued the Provisional Presidential Decree (MP) 936/20 that instituted the Emergency Program for the Maintenance of Employment and Income and foresaw complementary labor measures to deal with the state of public calamity and emergency due to the new coronavirus.

Among the measures, Articles 7 and 8 authorized working hour reduction and salary cut, or a time-limited suspension of employment contracts, through individual agreements between employee and employer.

The provisional decree did not apply to the Union, the states, the Federal District and municipalities, to government bodies and associated entities, state-owned companies and mixed-capital companies, including their subsidiaries, and international organizations.

The political party *Rede Sustentabilidade* filed this action against Articles 7 and 8 claiming that wages and working days are irreducible, as they refer to a constitutional social guarantee related to the human dignity and the minimum standard of one's life. Furthermore, wages could only be cut by means of collective bargaining with the correspondent reduction of working hours.

II. The Supreme Court, by a majority, did not endorse the provisional remedy previously granted by Justice Rapporteur Ricardo Lewandowski. Under the terms of Justice Alexandre de Moraes's opinion, the Court upheld the effectiveness of Provisional Decree 936/20.

Accordingly, it reasoned that the decree aimed at balancing social inequalities caused by the pandemic and should be interpreted according to several constitutional vectors: human dignity, labor, free enterprise, and national development, eradication of poverty and marginalization, and reduction of inequalities.

In addition, the guarantee of non-reducibility of wages could only make sense if there is an employment first. The pandemic outbreak brought economic and social effects, such as unemployment and lack of income. Amidst this situation, the purpose of the provisional decree was to maintain employments.

The Court highlighted that several companies have announced mass layoffs because of the pandemic, and the decree intended to offer a proportional option for employee and employer to guarantee jobs. Moreover, the decree was specific about defining its effectiveness during the state of calamity (90 days), a period in which the employees would have their job guaranteed, even with a wage cut amounted to the reduction in working hours.

Besides all these facts, the Union would pay an amount to supplement the workers' wages. The Court also stated that employees have the option to accept this reduction or not, as well as the proportional emergency aid in chash. In this case, if there is a dismissal, they will receive the unemployment insurance.

For these reasons, the Supreme Court decided, as a provisional remedy, that the decree did not aim merely at making salary cut legal but rather establish emergency mechanisms to safeguard jobs and incomes. The issue under this case did not concern a conflict between employee and employer but a convergence so that companies (especially micro and small), employer and employee, with the government's support, could overcome the crisis.

The Court stressed that unions would not be unaware of the labor agreements, as they would be notified to assess if those agreements need to be extended to other workers in the same professional category, or to indicate their annulment, if there is any defect.

According to the Court, if there is no pact between employers and employees, the result of the pandemic could double unemployment in the country, an unacceptable situation that would entail in enormous social conflict.

ADI 6342 MC-Ref[19]

The Federal Government's decree easing labor rights during the coronavirus pandemic is constitutional; including the individual agreements that employers and employees may enter to guarantee the employment contract that would prevail over other rules.

It is not reasonable to require workers proof of a causal link to consider cases of coronavirus as an occupational disease.

The provision that loosens labor tax auditors' work during the pandemic does not contribute in fighting the crisis and therefore shall not be upheld.

Decision: April 29, 2020
Official Journal: November 11, 2020

I. The Democratic Labor Party filed this action requesting a provisional remedy against the Presidential Provisional Decree 927/2020 (MP). The decree provided for labor measures that employers might undertake to face the state of public calamity recognized by Legislative Decree 6/20, and the public health emergency resulting from the new coronavirus, decreed by the Minister of Health.

The rule established, among others, an individual written agreement that employers and employees may enter to guarantee the employment contract, which would prevail over all other rules; a suspension of safety

19 On 7 August 2020, Justice Rapporteur Marco Aurélio held this action had become moot. The Provisional Presidential Decree discussed in the case ceased to produce legal effects because it was not converted into law in due time.

and health requirements at work; and a postponement of deadlines for vacation bonus payments.

II. The Supreme Court, by a majority and under the terms of Justice Alexandre de Moraes's opinion, suspended two Articles of the decree (29 and 31) but affirmed the rule.

The Court considered that the following provisions of the 1988 Federal Constitution would ground the interpretation of this decision: Article 7, item VI (guarantee against salary cut, except as foreseen in collective or individual agreements)[20]; Article 1, item IV (social values of work and free enterprise)[21]; and Article 3, items II and III (eradication of poverty and marginalization, reduction of inequalities, promotion of society's welfare, without discrimination)[22].

Considering the pandemic, the Court considered that the rule aimed at settling work's social values, holding labor bonds, work, and income of workers and their families, with the values of the free initiative, and the preservation of companies, especially the small and micro ones.

20 Article 7. The following are rights of urban and rural workers, among others that aim to improve their social conditions: (CA 20, 1998; CA 28, 2000; CA 53, 2006; CA 72, 2013) (...) IV – nationally unified minimum monthly wage, established by law, capable of satisfying their basic living needs and those of their families with housing, food, education, health, leisure, clothing, hygiene, transportation, and social security, with periodical adjustments to maintain its purchasing power, it being forbidden to use it as an index for any purpose;

21 Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: (...) IV – the social values of labor and of the free enterprise.

22 Article 3. The fundamental objectives of the Federative Republic of Brazil are: (...) II – to guarantee national development; III – to eradicate poverty and substandard living conditions and to reduce social and regional inequalities.

Nevertheless, two provisions were not related to this purpose. First, Article 29, which foresees that cases of contamination by the new coronavirus will not be considered an occupational disease, except upon proving causal link. The Court found the principle of reasonableness to be violated since workers would have great difficulty in demonstrating causal link. In addition, the Article is contrary to what the Court established in RE 828040. In that case, the Court ruled as constitutional the employer's strict liability for damages resulting from accidents at work when specified by law or when the normally performed activity, by its nature, exposes workers to habitual and special risk, with harmful potential and that implies a greater burden to the worker than to the other members of the community.

The second provision was Article 31, which suspended the performance of labor tax auditors for a period of 180 days. For the Court, the measure did not contribute in fighting the pandemic. On the contrary, it reduced the performance of auditors at a time when labor rights were being made more flexible so that jobs and business activities could be preserved.

LEGISLATIVE BRANCH

ADPF 663 MC-Ref

Amid the calamity resulting from Covid-19, it is reasonable for the National Congress to adopt measures to adjust the voting procedure for provisional presidential decrees, such as replacing the work of a commission for an opinion issued directly by a representative in the chambers of the Parliament, as the case may be.

Decision entered during a virtual session: December 18, 2020
Official Journal: April 8, 2021

I. The President of the Republic filed a Claim of Non-Compliance with a Fundamental Precept in view of the Executive Commission Act 7/2020 of the Federal Senate and Draft Resolution 11/2020 of the Chamber of Deputies, which waived the attendance of representatives in situations of vulnerability due to the Covid-19 pandemic.

The normative acts also foresee the Remote Deliberation System (SDR), which enables the Congress to continue operating during this period. SDR is a technological solution that makes it possible to remotely discuss and vote on matters. It must be ''exclusively used in situations of war, social upheaval, public calamity, pandemic, epidemiological emergency, collapse of the transportation system or situations of force majeure that prevent or make it impossible for Senators to meet in person in the National Congress or in another place'' (Article 1, sole paragraph, of Executive Commission Act 7/2020 of the Federal Senate).

The Draft Resolution 11/2020 establishes that deliberations in the SDR environment must be preferably related to public health emergency due to Covid-19 (Article 4, paragraph 2).

The general counsel to the federal government, on behalf of the President of the Republic, argues that the rules compromise the regular legislative process, in particular the procedure to vote on the provisional presidential decrees.

He points out that they intend to replace the constitutional provision of Article 62, paragraph 9, which establishes the initial examination of such decrees by the joint committee of Deputies and Senators.

The plaintiff argues that ''the sixty day period, extendable for an equal period, for the National Congress to assess the decrees is suspended during the parliamentary recess – a period of 30 days of suspension. He claims that, in fact, this situation amounts to a parliamentary recess, until the resumption of the conditions for obtaining the regular quorum for deliberation under Article 47'' of the Constitution (majority vote).

According to the plaintiff, the rules challenged to breach the due legislative process, the power of the National Congress' agenda, popular sovereignty and legal certainty (Federal Constitution, Article 1, item I; Article 5, items XXXVI and LIV; Article 62, paragraphs 3, and 6)[23]. Therefore, the plaintiff

23 Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on I – sovereignty; Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA 45, 2004) (...) XXXVI – the law shall not injure the vested right, the perfect juridical act and the res judicata; (...) LIV – no one shall be deprived of freedom or of his assets without the due process of law; Article 62. In important and urgent cases, the president of the Republic may adopt provisional remedies with the force of law

requests to extend the validity periods for processing the presidential decrees in the National Congress.

The Chamber of Deputies and the Federal Senate reported that the regulation of the provisional presidential decree by the SDR is an exceptional measure, a result of an effort to continue the legislative process in the remote way.

II. Justice Rapporteur Alexandre de Moraes partially granted the provisional remedy. He authorized that, during the Covid-19 pandemic, the decrees can be instructed on the floor of the Chamber of Deputies and the Federal Senate. Only under exceptional situations, the issuance of an opinion in place of the Joint Committee by parliamentarians of both Houses will be authorized.

The Justice highlighted the exceptional possibility for the President of the Republic to adopt provisional decrees with immediate force of law. He stated that the Federal Constitution established a strict procedure to make provisional presidential decrees valid and effective, such as the possibility of being issued for sixty days and their reissue for another sixty days. Thus, if the National Congress does not consider the decrees within the allowed period, this normative act will lose its effectiveness.

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and shall submit them to the National Congress immediately. (CA 32, 2001) (...) Paragraph 3. Apart from the provisions mentioned in paragraphs 11 and 12, provisional remedies shall lose effectiveness from the day of their issuance if they are not converted into law within a period of sixty days, which may be extended once for an identical period of time under the terms of paragraph 7, and the National Congress shall issue a legislative decree to regulate the legal relations arising therefrom. (...) Paragraph 6. If a provisional remedy is not examined within fortyfive days as of its date of publication, it shall subsequently be forwarded to urgent consideration in each House of the National Congress, and the deliberation of all other legislative matters shall be suspended in the House where it is under consideration, until such time as voting is concluded.

The Rapporteur highlighted that the inertia of the Legislative Branch in analysing the norm within the maximum constitutional period of 120 days does not entail in its approval by the deadline, nor its extension, but rather its tacit rejection.

And, even in the most serious constitutional cases to defend the Union and the Democratic Institutions – State of Defence (Federal Constitution, Article 136)[24] and State of Siege (Federal Constitution, Article 137)[25] – there is no rule foreseeing the suspension of the validity period of provisional presidential decrees, because the Federal Constitution determines the continuous and permanent operation of the National Congress.

The Rapporteur pointed out that there were changes in the functioning of the Committees and floor proceedings, which required adjustments in the procedure for the analysis and voting of the provisional presidential decrees, which, exceptionally, replaced their initial examination upon the Joint Committee of Deputies and Senators (Federal Constitution, Article 62, paragraph 9)[26].

24 Article 136. The president of the Republic may, after hearing the Council of the Republic and the National Defense Council, decree a state of defense to preserve or to promptly reestablish, in specific and restricted locations, the public order or the social peace threatened by serious and imminent institutional instability or affected by major natural calamities.

25 Article 137. The president of the Republic may, after hearing the Council of the Republic and the National Defense Council, request authorization from the National Congress to decree the state of siege in the event of I – serious disturbance with nationwide effects or occurrence of facts that evidence the ineffectiveness of a measure taken during the state of defense; II – declaration of state of war or response to foreign armed aggression. Sole paragraph. The president of the Republic shall, on requesting authorization to decree the state of siege or to extend it, submit the reasons that determine such request, and the National Congress shall decide by absolute majority.

26 Article 62. In important and urgent cases, the president of the Republic may adopt provisional remedies with the force of law and shall submit them to the National Congress immediately. (CA 32, 2001) (...) Paragraph 9. It is incumbent

However, in times of state of emergency in public health of national importance and under the circumstances of public calamity resulting from Covid-19, it is reasonable for the National Congress to temporarily establish the presentation of an opinion on the decrees by parliamentarians directly on the floor.

The Rapporteur also admitted the exceptional possibility for the floor proceedings of the Chamber of Deputies and the Federal Senate to work remotely, in the form and timeframe defined for the operation of the Remote Deliberation System in each House. According to the Justice Rapporteur, this exceptional regimental provision will enable, "in its fullness and efficiently," the analysis of provisional presidential decrees.

The Rapporteur pointed out that parliamentary recess is the only period during which the 120-day period is suspended.

III. On December 18, 2020, the Full Court, by majority, affirmed the provisional remedy to authorize, as requested by the Legislative Branch, that during the national public health emergency and the state of public calamity caused by the Covid-19 pandemic, presidential decrees must be presented to both Congressional Houses. However, the presentation of an opinion in place of the Joint Committee by parliamentarians of both Houses will be authorized exceptionally.

Also, both Congressional Houses will be able to deliberate on amendments and other requirements through the SDR system and will be able to present new regulation on the use of the SDR, if necessary.

upon the joint committee of deputies and senators to examine provisional remedies and issue an opinion thereon before they are submitted to floor action in each House of the National Congress in a separate session.

Justices Edson Fachin, Marco Aurélio and Rosa Weber dissented. According to them, it is impossible, according to the Constitution, parliamentarians of both Houses to present an opinion in place of the Joint Committee.

Justices Roberto Barroso and Cármen Lúcia, despite presenting opinions in agreement with the Rapporteur, affirmed that, at the time the claim was filled, there was still no formal legislation regulating the SDR system and the other matters discussed in the case.

This meant that the claim should not yet have been presented to the Court, since there was no law to be analysed. The Court could not function as a consultive body regarding law that was to be formally approved by the Legislative.

However, the new legislation, since it was following the correct legislative process, should be assumed as valid, and should produce its effects until the Court would eventually be able to analyse it properly.

POLITICAL RIGHTS

ADI 6359 MC-Ref[27]

The established deadlines for the municipal elections that will take place on October this year shall remain in force, despite the state of pandemic caused by Covid-19, under penalty of violation of the democratic principle and popular sovereignty.

Decision: May 14, 2020
Official Journal: November 10, 2020

I. For the next elections that will take place in Brazil in October 2020, the legislation foresees that candidates must have their party affiliation approved up to six months before the elections and that they must have electoral domicile in the respective jurisdiction for a period of 6 months. A supplementary law also foresees that people holding public office or positions shall leave their activities within the period established by law.

The Progressives Party (PP) filed this action and requested the suspension for thirty days of the deadline for party filiation, electoral domicile and disengagement from public service for those who were interested in running for the 2020 elections. The deadline would start running on April 4, 2020.

27 On December 4, 2020, Justice Rapporteur Rosa Weber issued a decision holding that the suit had become moot due to the Constitutional Amendment 107/2020, enacted in June 2, 2020, which postponed the municipal elections.

According to the PP, although the contested normative acts are still constitutional, they would be in transition towards an unconstitutionality status due to the circumstances arising from the measures to confront the Covid-19 pandemic, since they make it impossible to fulfil the democratic principle and popular sovereignty in the 2020 elections.

The PP referred to the deadlines foreseen in Article 9, head paragraph, of Law 9504/1997 (Law of Elections); as well as in Article 1, items IV, V and VII, of Supplementary Law 64/1990; and, by extension, Article 10, head paragraph and paragraph 4, of Resolution 23609/2019 of the Superior Electoral Court, which foresees the selection and registration of candidates for the elections; and the related provisions of Resolution 23606/2019 of the Superior Electoral Court, relating to the 2020 Election Calendar.

The plaintiff pointed out that he did not intend to anticipate the 2020 elections nor extend offices of current political agents, whose terms will end next December (mayors, municipal councilors and senators). He argued that, because of measures limiting the locomotion of people and the right to assembly, filling new filiations would be compromised. The political party also mentioned the lack of engagement of women in politics, which would prevent the fulfillment of gender quotas, as required by Elections Law.

For the PP, the pandemic also affects the holder of an office or position in the government bodies who intend to run for elections. The plaintiff cited, as an example, the state and municipal health secretaries who would wish to run for an elective office for the next elections, however, they are under strong pressure to remain in their positions as they are directly involved in the formulation or implementation of public policies to contain Covid-19. In such circumstances, these people would be torn between keeping their positions and functions, which would sacrifice

their candidacy projects; or resigning from office to comply with the rules of disengagement and compete in the 2020 election.

II. Justice Rapporteur Rosa Weber rejected the provisional remedy. The Justice pointed out that, in times of uncertainty, the preservation of established procedures for the expression of popular will, of the institutions that shape democracy, despite their fallibility, may be one of the few safeguards of normality.

The Full Court, on May 14, 2020, by majority, fully affirmed the Rapporteur's decision. According to the Court, the immediate suspension of the deadlines foreseen in the contested rules would weaken the protections against the abuse in the exercise of office, position or job in government bodies or associated entities. Such suspension of deadlines would also disproportionately increase the risk of regular and legitimate elections and, consequently, produce situations with even greater potential risk for the democratic principle and popular sovereignty. Moreover, it would jeopardize the unamendable clause of periodic suffrage (Federal Constitution, Article 60, paragraph 4, item II)[28] and, consequently, popular sovereignty and the Democratic State of Law (Federal Constitution, Article 1, sole paragraph)[29].

The Court stated that the judicial protection of the electoral process is based on the prevalence of the Constitution, which established a Democratic State of Law marked by independence and harmony among the Legislative, Executive and Judicial branches. In this context,

28 Article 60. The Constitution may be amended on the proposal of: (...) Paragraph 4. No proposal of amendment shall be considered which is aimed at abolishing: (...) III – the separation of the Government Branches.

29 Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: (...) Sole paragraph. All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution.

the rules establishing the rites and procedures inherent to democracy should be treated as what they are: guarantees of the perennial existence of the democratic regime. The idea of democracy, particularly representative democracy, cannot be legally treated as a merely abstract concept, a vague ideal or simple rhetoric. Deadlines, such as the one of disengagement, are not mere formalities but aim to ensure the preponderance of isonomy, an expression of the republican principle itself, in the electoral dispute. If they are not complied with, the very legitimacy of the electoral process may be undermined.

According to the Court, in view of the exceptional measures to face the new coronavirus pandemic, the idea of extending electoral deadlines, with the sought postponement, can be tempting. Nevertheless, the constitutional history recommends that, especially in crisis situations, the preservation of the established procedures for the expression of the popular will and of the institutions that shape democracy should be sought to the maximum. Despite their fallibility, they may be one of the few safeguards of normality.

The Court pointed out that, according to a report released by the Superior Electoral Court to monitor the impacts of the Covid-19 pandemic, with a view to the 2020 municipal elections, considering the current electoral calendar; the Electoral Court has, so far, material conditions to implement elections this year.

The Supreme Court concluded that the risk of weakening the democratic system and the rule of law itself related to the disruption of the electoral deadlines, as a result of the acceptance of the provisional claim, appears to be a more serious risk than the claimed damage due to the maintenance of deadlines in the current circumstances. When dealing with controversial issues, one should not forget the inherent importance of the democratic process and the sacred value of suffrage.

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