

CASE LAW COMPILATION
FUNDAMENTAL RIGHTS
VOL. 3

SECRETARY GENERAL OF THE PRESIDENCY
PEDRO FELIPE DE OLIVEIRA SANTOS

SECRETARY OF COMMUNICATION
MARIANA ARAÚJO DE OLIVEIRA
FÁBIO JOSÉ CARACIOLO TELES

CHIEF OF STAFF OF THE PRESIDENCY
PATRÍCIA ANDRADE NEVES PERTENCE

COPYEDITING
ANA VALÉRIA DE OLIVEIRA TEIXEIRA
FERNANDO CARNEIRO ROSA FORTES
FLÁVIA TRIGUEIRO MENDES PATRIOTA

GENERAL DIRECTOR
EDMUNDO VERAS DOS SANTOS FILHO

SECRETARY OF MAJOR STUDIES, RESEARCH, AND INFORMATION MANAGEMENT
ALEXANDRE REIS SIQUEIRA FREIRE

PROOFREADING

DIRECTOR OF INFORMATION DIFFUSION
THIAGO GONTIJO VIEIRA

EDITORIAL PRODUCTION

PROJECT MANAGER
FLÁVIA TRIGUEIRO MENDES PATRIOTA

GRAFIC DESIGN AND DIAGRAMMING

WRITERS STAFF
ANA VALÉRIA DE OLIVEIRA TEIXEIRA
FERNANDO CARNEIRO ROSA FORTES
FLÁVIA TRIGUEIRO MENDES PATRIOTA

PHOTOGRAPH

EDITORIAL STAFF
ALEXANDRE REIS SIQUEIRA FREIRE
ANA VALÉRIA DE OLIVEIRA TEIXEIRA
FERNANDO CARNEIRO ROSA FORTES
FLÁVIA TRIGUEIRO MENDES PATRIOTA
JEAN FRANCISCO CORRÊA MINUZZI
PEDRO FELIPE DE OLIVEIRA SANTOS
THIAGO GONTIJO VIEIRA

INTERNATIONAL AFFAIRS OFFICE
RICARDO NEIVA TAVARES
ANDRÉ NOGUEIRA RANGEL V. WOLLMAN

Dados Internacionais de Catalogação na Publicação (CIP)
(Supremo Tribunal Federal – Biblioteca Ministro Victor Nunes Leal)

Brasil. Supremo Tribunal Federal (STF).
Case law compilation: fundamental rights / Brazilian Federal Supreme Court. – Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2022.
Traz decisões proferidas pelo STF sobre direitos fundamentais após a publicação da Constituição Federal de 1988.
ISBN:

SUPREME COURT BOOKSTORE
Supremo Tribunal Federal – Anexo I – Térreo
Praça dos Três Poderes – 70175-900
Brasília/Distrito Federal
livraria.codi@stf.jus.br
+ 55 (61) 3217.4493

FOREWORD

PREFACE OF THE THIRD EDITION

Case Law Compilation

This publication selects, summarizes and translates into English important decisions the Court has rendered recently. 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 approaches already adopted by other courts and may contribute to dealing and solving complicated cases. Ultimately, it strengthens the guarantee of fundamental rights itself.

Theme

This third volume concerns the **Fundamental Rights**. These are usually described as the ones inherent to the human person which are universal, in the sense that everyone is entitled to them, and that are acknowledged implicitly or expressly by a constitutional order¹.

For the purposes of this publication, a formal aspect was adopted to set which fundamental rights were to be dealt with, that is, they were those considered as so by the Constitution itself². The 1988 Federal Constitution sets forth the "Fundamental Rights and Guarantees" under Title II, divided into 5 chapters as follows I) Individual and Collective rights and duties; II) Social rights; III) Nationality; IV) Political Rights; V) Political Parties.

¹ Vieira, Oscar Vilhena. *Direitos fundamentais: uma leitura da jurisprudência do STF*. Malheiros Editores Ltda., 2006.

² We followed the didactic approach adopted by Virgílio Afonso da Silva on his book "Brazilian Constitutional Law" (*Direito Constitucional Brasileiro*, ed. da Universidade de São Paulo, 2021).

This compilation targets the rights of chapter I) Individual and Collective rights and duties, which are listed by **Article 5** and its extensive 79 items and 4 paragraphs. They can be translated into the rights to **I) life; II) Freedom; III) Equality; IV) Privacy; V) Property; VI) Safety**. Accordingly, *social* and *political rights* and *nationality* were left to be dealt with further in future publications.

To recognize a right as a fundamental one implies placing it on the highest hierarchy of public choices. They represent society's most regarded values. Interestingly, almost all countries have adopted formal constitutions and rights set therein are becoming increasingly similar³. This global constitutionalism⁴, while indicating a common ground of values, drives the attention to the performance of courts and their roles. After all, if fundamental rights are similarly established in positive statutes, the court's reasoning becomes a productive ground to better understand the effectiveness of fundamental rights.

Indeed, for centuries scholars have attempted to define their meaning, scope, and to whom they are directed. The 1776 United States Declaration of Independence, for example, just like the French 1789 Declaration of the Rights of Man and of the Citizen, set forth similar provisions on how all men are born equal, notwithstanding the lawfulness of slavery at that time. In other words, equality's core concept differs along with history and according to its viewer⁵.

In addition, equally leveled and high regarded values may clash. Although it is for statutory law to serve as a means by which the democratic political system sets primarily the balance between the rights representing those values, it is for the Courts to assess if the choice made by legislators preserves the core of the colliding rights by means of a weighting process.

In this sense, this publication aims to display landmark cases of fundamental rights handed down by the Supreme Court since the enactment of the 1988 Federal Constitution.

³ Law, David S. and Versteeg, Mila. *The Evolution and Ideology of Global Constitutionalism* (June 13, 2011). California Law Review, Vol. 99, p. 1163, 2011, APSA 2010 Annual Meeting Paper, 5th Annual Conference on Empirical Legal Studies Paper, Washington University in St. Louis Legal Studies Research Paper No. 10-10-01, Available at SSRN: <https://ssrn.com/abstract=1643628>

⁴ Peters, Anne (2009). *The Merits of Global Constitutionalism*. Indiana Journal of Global Legal Studies: Vol. 16: Iss. 2, Article 2. Available at: <https://www.repository.law.indiana.edu/ijgls/vol16/iss2/>

⁵ Vieira, Oscar Vilhena. *Direitos fundamentais: uma leitura da jurisprudência do STF*. Malheiros Editores Ltda., 2006.

Method

In relation to the selection of the cases presented, a search was carried out on the Supreme Court's main database using the keywords: "fundamental rights (or human rights or fundamental guarantee) and Article 5 (or art. 5) and international treaty (or pact or agreement or protocol or declaration)"⁶. A search was also taken on the Court's database "A Constituição e o Supremo" (The Constitution and the Supreme Court)⁷ under Article 5's tab. The database is a service provided by the Court that makes the research of its case law a straightforward task. STF's legal analysts assess the judgments rendered on a daily basis to select relevant parts of notable cases and display them under a specific constitutional provision. This second search worked as a double inference on the importance of the cases chosen.

After both searches, the group of decisions collected was examined and mapped into the categories:

- I. General principles and procedural issues;
- II. Right to life and to physical integrity;
- III. Right to equal protection;
- IV. Freedoms of movement, religion, and association;
- V. Right to privacy and to be safe;
- VI. Right to access justice and to due process.

In the process of selecting decisions, the fundamental right to free speech was excluded considering this was the theme of the second volume of this editorial line published in November 2021⁸. Other cuts concerned the single-justice decisions, the cases rendered before the 1988 Constitution, or those that quashed the legal question on formal grounds.

The landmark cases were chosen considering both their impact and reasoning. Considering the current stage of global constitutionalism, expressed by the rise

⁶ Available at: <https://jurisprudencia.stf.jus.br/pages/search>. In the Brazilian Portuguese idiom, the key-words used for the search carried out on February 10, 2022, are the following: ("direito fundamenta\$" ou "direito\$ humano\$" ou "garantia\$ fundamenta\$") e (pacto ou acordo ou convenção ou tratado ou protocolo ou declaração) e ("art 5" ou "artigo 5").

⁷ Available at: <https://portal.stf.jus.br/constituicao-supremo/constituicao.asp>.

⁸ Important decisions left aside in this work may be found on that prior volume, including, for instance, the *Ellwanger Case*, when the Court discussed whether an anti-Semitic publication was protected under the free speech right. The 2nd Volume of the Case Law Compilation: Freedom of Speech is available here: http://www.stf.jus.br/arquivo/cms/jurisprudencialInternacional/anexo/Case_lawFreedom_of_Speech.pdf. The 1st Volume of the Case Law Compilation: Covid-19 is available here: http://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf.

of international organs and courts and the internationalization of the discourse of fundamental rights, among other phenomena, special attention was driven to the international agreements mentioned in the opinions.

After setting the main decision to be included in one of the categories and identifying its specific themes (for example, under the equal protection category, the theme related to the LGBTQIA+ community), other searches were carried out specifically on that topic and eventually reported on the additional information field to provide an ample landscape of the Court's case law.

Finally, the case brief of each landmark decision was displayed following, *mutatis mutandis*, the format adopted by the Venice Commission to its database on constitutional jurisdiction (CODICES). It segments the decision into headnotes, facts, holdings, and additional information. The headnotes are a summary of STF's holding on the legal question brought before it. Considering the Court's *seriatim* decision-making process⁹, the facts and holdings are a précis of the justice rapporteur's opinion or of the opinion of the justice who wrote the prevailing vote. Given the differences among constitutional orders, a format already adopted by a relevant international body may facilitate the understanding of STF's holdings and contribute to the dialogue this publication intends to foster.

⁹ See more about this matter on the chapter "About the Federal Supreme Court".

ACRONYMS

ACO	Original Civil Action (<i>Ação Cível Originária</i>)
ADI	Direct Action of Unconstitutionality (<i>Ação Direta de Inconstitucionalidade</i>)
ADO	Direct Action of Unconstitutionality by Omission (<i>Ação Direta de Inconstitucionalidade por Omissão</i>)
ADPF	Claim of Non-Compliance with a Fundamental Precept (<i>Ação de Descumprimento de Preceito Fundamental</i>)
ARE	Extraordinary Appeal with internal motion (<i>Recurso Extraordinário com agravo</i>)
IACHR	Inter-American Court of Human Rights (<i>Corte Interamericana de Derechos Humanos</i>)
MC	Provisional Measure (<i>Medida Cautelar</i>)
RE	Extraordinary Appeal (<i>Recurso Extraordinário</i>)
REF	Referral of the Full Court (<i>Ad Referendum</i>)
RG	General Repercussion (<i>Repercussão Geral</i>)
STF	Federal Supreme Court (Supremo Tribunal Federal)

CONTENTS

ABOUT THE FEDERAL SUPREME COURT

GENERAL PRINCIPLES AND PROCEDURAL ISSUES

The legal status of human rights treaties

Human rights treaties shall have supra-legal status, that is, above all ordinary statutes although below the Federal Constitution.

The arrest of an unfaithful bailee is unlawful, whatever the type of bailment is, considering international treaties on human rights that Brazil incorporated.

The Amnesty Act

1988 Federal Constitution received the Amnesty Act.

Res judicata flexibility in face of the fundamental right to paternity recognition

No procedural obstacles, including the *res judicata* principle, should be imposed on the exercise of one's fundamental right to search for his genetic identity.

Jurisdictional immunity of foreign states' acts in violation of human rights

Unlawful acts committed by foreign States in violation of human rights do not enjoy jurisdictional immunity.

RIGHT TO LIFE AND TO PHYSICAL INTEGRITY

The use of human embryonic stem cells for research

Scientific research using embryonic stem cells violates neither the right to life nor the dignity of the human person.

Early delivery in case of anencephaly fetuses

A woman has the right to either keep or terminate her pregnancy in case the fetus is diagnosed with anencephaly.

The state of unconstitutional affairs of the Brazilian prison system

The Brazilian prison system falls under the concept of an "unconstitutional state of affairs", considering the widespread violation of detainees' fundamental rights resulting from persistent acts and omissions of the public authorities.

RIGHT TO EQUAL PROTECTION

Recognition of same-sex unions as families

Same-sex unions are family units. The rules applied to steady unions between a man and a woman shall apply to them until the National Congress enacts a specific law to regulate the matter.

Racial and indigenous quotas for admission to a public university do not violate the constitutional principle of equal protection.

Inclusion of people with disabilities in private schools

Private educational institutions must promote the inclusion of people with disabilities in regular education and provide the necessary adaptation measures without transferring any financial burden to tuition, annuities, enrollment, and monthly fees.

Principle of the best interest of the child in case of a request for the father's expulsion

The expulsion of a foreigner whose Brazilian child was recognized or adopted after the fact that led to the expulsion is forbidden, once it is proven that the child is under the foreigner's guardianship and economically dependent on him.

Venezuelan migratory crisis

The temporary closure of the border between Brazil and Venezuela or limitation of Venezuelan entry into Brazil violates fundamental rights.

Migratory regularization and fee immunity

A foreigner who has permanent residency in Brazil and is not economically self-sufficient is entitled to immunity from the fees related to the migratory regularization.

FREEDOM OF MOVEMENT, RELIGION, AND ASSOCIATION

Freedom of religion and animal sacrifices during rituals

The Animal Protection Act which allows the ritual of animal sacrifice in cults of African origin to protect religious freedom is constitutional.

Freedom of association and the syndical contribution

The compulsory nature of union fees has no Constitutional grounds.

Freedom of movement

The detention of children and adolescents for investigative purposes is not in line with the right to freedom of movement, dignity, and respect.

Freedom to gather in public spaces

The constitutional requirement to provide prior notice regarding the right to assemble is satisfied with the dissemination of information that allows the Public Administration to ensure that it's peacefully carried out or that it does not frustrate another meeting in the same place.

RIGHT TO PRIVACY AND TO BE SAFE

The inviolability of the home

The forced entry into a home without a court order, even at night, is only permissible if grounded on well-founded reasons, duly justified *a posteriori*, indicating that a situation of *flagrante delicto* was occurring within the house. In this case, the evidence collected in the searched home will also be lawful.

The absence of a statement of reason entails the disciplinary, civil, and criminal liability of the agent or authority, and nullifies the acts performed.

The prohibition to strike of the police officer

The right to strike is forbidden to civilian police officers and all civil servants who are directly involved in the area of public security.

The participation of the Public Power is mandatory in mediation established in the relevant legislation for those involved in this sector, so that their interests may be vocalized.

The state plan to downgrade police lethality

Considering the persistent violation of human rights by the security forces of the State of Rio de Janeiro, it shall elaborate and present to the Supreme Court a plan aiming to reduce police lethality.

Access of intelligence agencies to personal data

The bodies that make up the Brazilian Intelligence System can only provide data and specific knowledge to the intelligence agency when the public interest in the measure is proven.

Any decision to provide this data must be duly and formally reasoned so Courts may control its legality.

RIGHT TO ACCESS JUSTICE AND TO DUE PROCESS

Maria da Penha Act

The Act that establishes measures to inhibit domestic and family violence against women is constitutional.

Presentation hearing (custody hearing)

A court's internal rule that regulates custody hearings within its organ by detailing existing provisions under the American Convention on Human Rights and the Code of Criminal Procedure does not violate the Federal Constitution.

Coercive conduction for interrogation

The coercive conduction for interrogation of the investigated or defendant does not comply with the Federal Constitution.

Principle of non-culpability and the initial term to service the conviction sentence

The constitutional principle of non-culpability requires a final and unappealable judgment of conviction to start the execution of the sentence.

CONCLUDING REMARKS

REFERENCES

ABOUT THE FEDERAL SUPREME COURT

JURISDICTION

The Federal Supreme Court has several constitutionally defined legal powers, both in terms of original and appellate jurisdiction. Regarding original jurisdiction, the Supreme Court will decide on the following: a) direct action of unconstitutionality against federal or state law; b) declaratory action of constitutionality against federal law; c) criminal prosecution against the President, Vice-President, member of the National Congress, its own Justices, and the Federal Prosecutor General; d) criminal prosecution for common or responsibility crimes against Ministers of the State and high Commanders of the Army, Navy, and Air Force, members of high courts and ambassadors; e) *habeas corpus*; f) *habeas data*; g) *writ of mandamus*; h) litigation between a national and an international entity; i) extradition; j) constitutional complaint; k) execution of a sentence carried out by the Supreme Court; l) litigation that involves all judges or litigation that involves more than half of the judges from one court; m) a conflict of powers between high courts; n) writ of injunction; o) litigation against the National Council of Justice¹⁰ and the National Council of the Prosecution Office¹¹.

Concerning appellate jurisdiction, the Court can examine two types of appeals: a) the ordinary constitutional appeal, directed to reforming decisions by high courts in *habeas corpus*, *habeas data*, writ of *mandamus* and writ of injunction; b) the extraordinary constitutional appeal, in which the matter discussed must have been litigated previously, there must be a direct offense to the Constitution, and the matter must have general repercussion. In sum¹², the Court's jurisdiction can be identified as follows:

SUPREME COURT'S JURISDICTION	
Original Jurisdiction	• Constitutional review • Criminal prosecution¹³ • Constitutional complaint • High Courts' conflict of powers • <i>Habeas Corpus</i>

¹⁰ CNJ, in the Brazilian Portuguese acronym.

¹¹ CNMP, in the Brazilian Portuguese acronym.

¹² The Supreme Court's detailed jurisdiction can be read under Article 102 of the Federal Constitution. An English version is available at Court's website on the address: http://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf.

¹³ Of the ones specified under the Constitution and the respective sentence execution.

	• <i>Habeas Data</i> • <i>Writ of Injunction</i> • National vs international entity • Extradiction • Litigation involving all the country's judges or more than half of the judges from one court • Litigation against the National Council of Justice and the National Council of the Prosecution Office	
Judicial Review	Ordinary Appeal	High Court's decisions in: <i>habeas corpus</i> , <i>habeas data</i> , <i>writ of mandamus</i> , and <i>writ of injunction</i>
	Extraordinary Appeal	• Previously litigated matter • Direct offense to the Constitution • General Repercussion

INTERNAL RULES

Other than that, the Court is internally divided into the Full Court, the panels and the Chief Justice. Having particular duties, the Chief Justice is not part of any of the two panels.

Each panel is formed by five Justices. The President of each panel is the oldest among the Justices (the Justice who has been a member of the Court the longest), for a period of one year, alternating between them, until all of them have presided the panel at least once. The panel members hold a regular meeting once a week, every Tuesday, with at least three of its members. They only examine cases that are not addressed by the Full Court. Both are identical in terms of judicial powers. Also, cases are distributed to the Justices regardless of which panel they belong to at the time.

The Court sits *en banc* twice a week, on Wednesdays and Thursdays, to approach decisions that require examination by each of the eleven Justices. An *en banc* session may occur with at least six members. The Justices sit on a bench, in the form of a semi-rectangle. The central chair is occupied by the Chief Justice. To the left, sits the Federal Prosecutor General, to the right, the plenary secretary. The other Justices sit on both sides of the bench, starting with the oldest Justice, who sits closest to the Chief Justice. The attorneys stand in front of the Chief Justice, in order to perform their oral arguments. Every *en banc* session is largely publicized by television, radio, and the internet. Also, there are 170 seats available to

those willing to attend the sessions (Article 93, item IX, of the Federal Constitution).

Once a case is received by the Court, it is distributed to a Justice or to the Chief Justice, according to the case's class. This distribution of cases is established by an electronic draw system among the ten Justices, excluding the Chief Justice, unless there is a legal reason connecting a specific Justice to a case.

After the distribution of a case, it is received immediately by a Justice, who is responsible for conducting the case and, in order to do so, has the power to decide on emergency requests, admit *amici curiae*, call for public hearings and experts, and so forth. The Justice also must submit orderly demands to the panel or the Full Court, request a day for the deliberation, summarize the case and submit the first opinion. After concluding the case, the Justice writes a summary and submits it to the other Justices, requesting for the case to go to deliberation.

On the previous 48h, the Federal Supreme Court posts on its website the list of cases that will go to deliberation the following week. The power to submit a case to deliberation is divided between the Chief Justice and the designated Justice for that case. The designated Justice analyzes the case, writes the summary, and releases the case to deliberation, but the Chief Justice (or the panel's President) is responsible for choosing, from all the cases that have been released, which one will go to deliberation first.

The deliberation sessions can be ordinary or extraordinary. Normally, the ordinary sessions are held from 2 p.m. to 6 p.m. However, if necessary, they may last longer. The extraordinary sessions end when its objective has been fulfilled. Prior to the beginning of a session, there are steps that must be verified: a) number of Justices present; b) approval of the prior session's minutes; c) immediate proposals; d) deliberation of the designated cases. Some cases can be submitted to deliberation concurrently, if the matter is similar between them, even if there are some differences. During the session, the cases presented by the senior Justices are normally submitted to deliberation first. However, it is up to the Chief Justice, or the panel's President, to ultimately decide which cases will be decided first.

Moreover, the designated Justice, during the deliberation, can ask for the submission of the case to be postponed, due to a new fact that has occurred and that demands a more convenient date for the decision.

DECISION-MAKING PROCESS: SERIATIM OPINION

The Court's sitting starts with the presentation of the case summary by the designated Justice, the Rapporteur. Next, the parties present their oral arguments for 15 minutes at most (except in penal deliberations in which this period can reach 1 hour or more). After the parties have spoken, the Justices issue their opinions, starting with the Rapporteur. Each Justice is allowed to speak twice, and once more, if they change their opinion. No Justice shall speak unless given authorization by the Chief Justice or the panel's President. They are allowed to interrupt an oral argument with the Chief Justice's approval. These interruptions are transcribed along with the final decision, unless the Justice decides to withdraw them.

During the deliberation, a Justice can call for an overview of the case. The overview interrupts the deliberation, and it is an opportunity for this Justice to undergo a deeper study of the case, having a period of nearly 2 weeks to submit the case to the Full Court or the panel again, so the deliberation can be resumed. The opinions are submitted in order. First, the designated Justice, followed by the Justice responsible for reviewing the case, depending on the case's class. If the case does not require a reviewer, the newer Justice submits his/her opinion, and so forth, until the senior Justice, and finally the Chief Justice submits the final opinion. After counting of votes, the Chief Justice proclaims the Court's final decision on the case.

Once the Chief Justice has proclaimed the final decision, one of the Justices, usually the one who authors the majority opinion, is responsible for summarizing the opinion from the bench. It consists of the summary of the case, the opinions (even the ones that do not follow the majority), which have been written by each Justice or have been cast orally during the deliberation, the oral discussions, the questions made to and by the parties, and the summary of the ruling. There will also be a minute that contains the summary of the deliberation (which Justice was present and voted, whether there were oral arguments, and so forth).

The Court's decision is proclaimed according to the seriatim model, which means that the ruling does not consist of a single and common sentence, but of a series of different opinions (including those that do not follow the majority), which are casted by each Justice, with their unique decision and reasoning. Together, all these votes become the ruling.

GENERAL PRINCIPLES AND PROCEDURAL ISSUES

The legal status of human rights treaties

Human rights treaties shall have supra-legal status, that is, above all ordinary statutes although below the Federal Constitution.

The arrest of an unfaithful bailee is unlawful, whatever the type of bailment is, considering international treaties on human rights that Brazil incorporated.

Extraordinary Appeal nº: 466343¹⁴

Facts

This case discussed whether a debtor in a secured fiduciary sale can be sentenced to jail.

The Federal Constitution¹⁵ bans civil imprisonment but exempts the debtor of an alimony obligation and the unfaithful bailee when he unjustifiably refuses to return the property to the owner.

The challenged decision considered imprisonment unconstitutional. A financial institution appealed before the Supreme Court claiming that a decree had amounted the fiduciary debtor to the unfaithful bailee, which would allow the imprisonment order.

Holdings

The Full Court unanimously denied the extraordinary appeal. The Court overruled its prior understanding that the treaties on human rights had the legal status of an ordinary statute and decided that human rights treaties have a supra-legal status, that is, above all ordinary statutes although below the Federal

¹⁴ Jointly ruled with cases: RE 349703; HC 87585; HC 92566.

¹⁵ Federal Constitution.

Article 5. (...)

LXVII - there shall be no civil imprisonment for debt, except for a person who is voluntarily and inexcusably in default on alimony obligation or for the unjustifiably unfaithful bailee.

Constitution. Due to this new interpretation, the Court ruled that civil imprisonment applies only to cases of voluntary non-payment of alimony.

Justice Rapporteur Cezar Peluso initially highlighted that a secured fiduciary sale and the contracts of deposit did not share an affinity that would allow them to be equated.

Indeed, the Constitution had established two exceptions to the civil imprisonment ban and the legislator may regulate the cases when establishing the concepts of alimony or unfaithful bailment. Notwithstanding, the legislator cannot enlarge the constitutional text by creating fictions or equivalents beyond what the constitution had previously stated. Therefore, the decree associating the fiduciary debtor with the unfaithful bailee was found unconstitutional.

In addition, in 1992 Brazil incorporated, without any reservations, the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS and the AMERICAN CONVENTION ON HUMAN RIGHTS - PACT OF SAN JOSE, COSTA RICA. The treaties banned imprisonment for debt and allowed the debtor of alimony to be sentenced to prison as the only exception (Article 11¹⁶ and Article 7.7¹⁷, respectively). Accordingly, interpreting the challenged decree considering the treaties entailed the unlawful nature of imprisonments arising from any kind of bailment.

Justice Gilmar Mendes added that since the 1988 Federal Constitutional enactment several interpretations arose to define the legal hierarchy of the international treaties on human rights due to Article 5, paragraph 2. The provision foresaw that the rights and guarantees established by the Constitution did not exclude others set forth on international treaties that Brazil was a part of.

According to the Justice, it seemed that the discussion over the constitutional status of human rights treaties was, in a way, emptied by the enactment of the Constitutional Amendment 45/2004 (known as the Judiciary Reform). It included paragraph 3 to Article 5 establishing that: "The international treaties and conventions on human rights that are approved, in each House of the National Congress, in two rounds, by three-fifths of the votes of the respective members, will be equivalent to constitutional amendments".

¹⁶ International Covenant on Civil and Political Rights.

Article 11. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

¹⁷ American Convention on Human Rights.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

In practical terms, the Justice found it an eloquent statement that the treaties that Brazil had already ratified, prior to the constitutional change, and not submitted to the special legislative process of approval in the National Congress, could not be compared to the constitutional norms. On the other hand, it could not be denied that the Reform granted a special character to human rights treaties when compared to other reciprocity treaties between contracting States. The Constitution had addressed them a privileged spot in the legal system.

As so, the Justice highlighted that these special treaties and conventions should have *supra-legal status*, that is, above the infra-constitutional legislation but below the Constitution. Following these grounds, since 1992, when Brazil accessed the international treaties on human rights banning imprisonment for debt there were no legal bases to enforce the constitutional rule that allowed the prison sentence of the unfaithful bailee.

The constitutional legislator may submit the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS and the AMERICAN CONVENTION ON HUMAN RIGHTS, in addition to other human rights treaties, to the special approval procedure foreseen under Article 5, paragraph 3, of the Constitution, giving those international treaties a constitutional amendment status.

Notwithstanding, even before 1992 it was possible to foresee that the rule violated the Constitution based on the principle of proportionality. The legal system provides other procedural-executive means to guarantee credit. Individual rights guarantees should be interpreted to expand the benefit of freedom.

Additional Information

This is a landmark decision for having overruled the understanding that international treaties on human rights amounted to an ordinary statute. Especially, it represented a turning point for the legal status of the international treaties signed by Brazil either before or after the Constitutional Amendment 45/2004 that had not passed through the 3/5 special quorum that allows it to have constitutional status¹⁸. They were now granted supra-legal status. This is the case of the: INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE; INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS; CONVENTION AGAINST TORTURE AND

¹⁸ SILVA, Virgílio Afonso de. *Direito Constitucional Brasileiro*. 1 ed., 1 reimpr. – São Paulo: Editora da Universidade de São Paulo, 2021.

OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD.

Two international treaties on human rights were approved under the mentioned quorum and are equivalent to a constitutional amendment: a) MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED¹⁹; and b) CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS OPTIONAL PROTOCOL²⁰. These documents are part of the constitutional parameter to assess whether ordinary statutes are constitutional. This evaluation is known as the conventionality control²¹.

As a result of this judgment, the Justices repealed *Summula* 619 of the STF, according to which "the arrest of a judicial bailee may be ordered in the very proceeding in which the burden was placed, regardless of the filing of a deposit action". Moreover, the Court enacted the biding *Summula* 25, which states as follows: "The civil imprisonment of an unfaithful bailment is unlawful whatever the type of bailment it may be".

Graphic data

Docket n.º: RE 466343

Full Court, In-Person Deliberation, 10 x 0

Decision date: 3 December 2008

Official Gazette: 5 June 2009

ODS: 16

General Repercussion

Justice Rapporteur Cezar Peluso

Quote: "The Law is always implied in favor of freedom, which does not support the artifice of restrictive conditions by inference".

¹⁹ Legislative Decree 261, of 2015.

²⁰ Legislative Decree 186, of 2008.

²¹ I/A Court, Almonacid Arellano et al. vs. Chile, 2006.

The Amnesty Act

1988 Federal Constitution received the Amnesty Act.

Claim of Non-Compliance with a Fundamental Precept n.º: 153

Facts

The Federal Council of the Brazilian Bar Association²² filed a claim requesting the Court to apply an interpretation according to the Constitution to declare that the amnesty granted by Law 6683 to political or political-related offenses does not extend to common offenses perpetrated by agents of repression against political opponents during the military regime.

The Bar pointed out that Article 1, paragraph 1, of the Amnesty Act,²³ granted amnesty to various public agents responsible for acts of homicide, forced disappearances, abuse of authority, bodily injury, rape, assault, and battery.

It claimed that the human person's dignity could not be negotiated and it was, instead, being used as a bargaining chip to allow the transition from the military regime to the Rule of Law. As so, the amnesty for perpetrators of those offenses served to cover up the granting of impunity to official criminals.

Therefore, it argued that the concession violated constitutional rights and guarantees and that Article 5, item XLIII, of the Federal Constitution²⁴ stipulates torture as an offense not subject to amnesty or grace.

²² OAB, in Brazilian Portuguese acronym.

²³ Law 6683/1979.

Article 1. Amnesty is granted to all those who, in the period between September 02, 1961 and August 15, 1979, committed political crimes or crimes related to political crimes, electoral crimes, to those who had their political rights suspended and to public servants of the Direct and Indirect Administration, of foundations linked to public power, to Servants of the Legislative and Judiciary Branches, to Military personnel and to union leaders and representatives, punished on the basis of Institutional and Complementary Acts.

Paragraph 1 - For the purposes of this article, crimes of any nature related to political crimes or committed with political motives are related.

²⁴ Federal Constitution, Article 5: (...) XLIII – acts of torture, illicit trafficking in narcotics and similar drugs, terrorism, and crimes regarded as heinous shall not be bailable or subject to grace or amnesty by law; those who order, commit or omit themselves while being able to prevent such crimes shall be held liable.

Holdings

The Full Court, by a majority, denied the claim under the terms of the opinion of Justice Rapporteur Eros Grau.

The Court declared the Amnesty Act compatible with the Federal Constitution, which means that the amnesty granted by that Act was broad and general, covering offenses of any nature committed by the agents of repression and the opponents of the military regime who committed electoral, political, or political-related offenses in that referred period.

The Court denied the argument that the Act violated the right of citizens to obtain information related to personal or collective interests from public bodies. The Amnesty Act would not prevent access to information concerning the actions of agents of repression in that specific period. Thus, the right to access information related to the dictatorship period did not rely on the prosecution of those responsible for crimes, because the amnesty was objective, as it comprised facts and offenses of undetermined persons, instead of certain persons.

The Court also rejected the argument that the Act, having been approved and sanctioned by the military personnel, who were not elected by the people, breached the democratic and the republican government principles. The argument would imply denying the legal doctrine of reception of laws approved before the 1988 Constitution. It added that the amnesty granted by the statute was worded in Constitutional Amendment 26/1985, which established the guidelines for the constitutional power of the 1988 Federal Constitution. Therefore, the Court found that it did not make sense to question whether the amnesty was received by the 1988 Constitution.

Therefore, the Amnesty Law, as an act-measure that regulated interests that have immediate and concrete effects, and in particular, the concept of "political-related offenses" must be construed according to the historical context of the Act. During the transitional period from dictatorship to the new democratic order, there was a lengthy debate that led eventually to the approval of a political agreement. One outcome of this agreement was the Amnesty Law. In that context, the amnesty was bilateral, broad, and comprehensive, but it was not unrestricted because it did not cover those who had already been sentenced.

In addition, breaching the good faith and the wishes of the various classes and political institutions of the late 1970s, which fought for a broad, general, and unrestricted Amnesty Law would imply to undermining access to the historical truth.

The Court considered that the amnesty battle was perhaps the most important moment in the struggle for the re-democratization of the country.

The Court mentioned that Law 6683/1979 precedes the UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT. In turn, Law 9455/1997, which defines the crime of torture and the precept of Article 5, item XLIII, of the Constitution (which declares the practice of torture, among other crimes, to be exempt from grace and amnesty), does not reach amnesties consummated before its effectiveness.

Graphic data

Docket n.º: ADPF 153

Full Court, In-Person Deliberation, 7x2

Decision date: 29 April 2010

Official Gazette: 6 August 2010

ODS: 16

Amici Curiae

Justice Rapporteur Eros Grau

Quote: "Things have a price, people have dignity. Dignity is priceless, it is valid for all those who are part of humanity. We are, however, in danger when someone claims the right to take what belongs to the dignity of the human person as his or her value (the value of the person who claims this). Human value takes shape in the substance and measure of the person who claims it and intends to impose it in the quality and quantity in which he measures it. The value of the dignity of the human person will no longer then be the value of the human, of all those who belong to humanity, but of those who proclaim it according to their own criteria. At this point, we are in danger, subject to the tyranny of values."

Res judicata flexibility in face of the fundamental right to paternity recognition

No procedural obstacles, including the *res judicata* principle, should be imposed on the exercise of one's fundamental right to search for his genetic identity.

Extraordinary Appeal n. °: 363889

Facts

A young person and his mother filed a paternity action combined with a request for alimony. They could not afford a DNA test. Therefore, the first instance dismissed the case due to insufficient evidence to appoint the child's father.

After a time, Congress enacted a law establishing a free DNA test for those who could not provide it. Those petitioners request the government benefit and once more requested the paternity search.

The Court of the first instance reestablished the investigation notwithstanding the *res judicata* nature of the prior decision. The Court of Appeal overruled and terminated the lawsuit, as requested by the alleged father.

They appealed before the Supreme Court claiming to consider relative the theory of intangibility of a *res judicata* decision. That is, one's right to know his or her real father, to search for the "real truth", and the human dignity principle should prevail over the unchangeable nature of *res judicata*.

Holdings

The Supreme Court, unanimously, granted the appeal according to the opinion of Justice Rapporteur Dias Toffoli.

The Court compared the provisions of Article 5, item XXXVI, of the Federal Constitution, which states that the law cannot harm the *res judicata* nature, with the right to the real truth, that is, the right of children to know who their father is.

According to the Court, the decision based on a lack of evidence already signaled that *res judicata* cannot be considered unchangeable. Besides, the Pact of San Jose, Costa Rica, foresees one's right to know his history and origins. The Court should grant priority to the principle of human dignity over legal safety in

the case, considering one's right to personality and to access his genetic information.

Moreover, the State had not fulfilled its duty to provide full and free legal assistance to an underage, when he was represented by his mother in the first suit. Therefore, it was now necessary to fill this gap.

Additional Information

On similar grounds, in case **AR 1244 EI** the Full Court ruled that given the importance of the fundamental right to search for genetic identity as an aspect of the right of personality and consistently with the principle of human dignity, every individual is entitled to have their paternity recognized at any time.

The case concerned an appeal against a decision of STF to dismiss a paternity suit along with an inheritance claim. The First Panel, adopting a literal reading of Articles 340 to 347 of the repealed 1916 Civil Code, held that it was impossible as a matter of law to determine the paternity that resulted from adultery. The Panel stated that, according to civil law, it was the husband's exclusive right to question a child's paternity when the child was born during the marriage. It further stated that the wife's adultery and her confession concerning who was the child's biological father would not be sufficient evidence to rebut the legal presumption of paternity i.e., the presumption that a child's father is the man who is married to the child's mother when the boy was conceived or born. As the couple's separation had not been proven and the husband did not contest his paternity, the Court decided that it was not possible to set aside the paternity of the person that had registered the baby. Consequently, the presumption that the child was the husband's son prevailed.

STF accepted the appeal and decided to vacate the First Panel's decision. In reviewing the case, the Full Court found an error in the legal assessment of the evidence produced in the case.

The Full Court considered that although the First Panel's decision accepted the assumption of paternity, that finding was contrary to the documentary and testimonial evidence in the records. It did so because the decision was based on a literal interpretation of an archaic and eminently sexist provision of the then-current civil law. In this way, the Panel placed too great of weight on the judicial procedure instead of on personal rights, thus preventing the child from having his true father recognized. Additionally, the decision breached the principles of reasonableness and human dignity, including the individual's right to formalize his filial relationship with his true parent, even if it stemmed from an adulterous

relationship. For the Full Court the goal of all judicial proceedings should be to achieve justice, they should not only be legal but also fair.

Graphic data

Docket n.º: RE 363889

Full Court, In-Person Deliberation, 7x2

Decision date: 2 June 2011

Official Gazette: 16 December 2011

ODS: 16

General Repercussion

Justice Rapporteur Dias Tofoli

Quote: "The appealed decision based on the prevalence of the *res judicata* principle, overshadowed the plaintiff's fundamental right to try to have his genetic origin recognized, prevailing, in this case, what the doctrine called material unconstitutionality, because as it contradicted the normative content of our current Federal Constitution. For this reason, it must be set aside to allow, in the present case, a flexible *res judicata* (...)".

Jurisdictional immunity of foreign states' acts in violation of human rights

Unlawful acts committed by foreign States in violation of human rights do not enjoy jurisdictional immunity.

Extraordinary Appeal with interlocutory motion n°: 954858

Facts

D.P.C., a civilian, was working on a fishing boat in the Brazilian territorial sea when he died because of an attack by a German submarine, during the Second World War.

Although the events took place in 1943, the causes of the sinking were only defined in 2001, in a judgment by the Maritime Court.

His grandchildren and the widows of his grandchildren requested compensation for pecuniary loss and emotional distress against the Federal Republic of Germany.

The subsequent ruling closed the case, based on the understanding that Germany enjoyed immunity from jurisdiction.

The petitioners mentioned the MOSCOW CONFERENCE (1943); the LONDON AGREEMENT (1945) and the DECLARATION OF THE GERMAN REPUBLIC TO THE ALLIED FORCES (1945) which established the Nuremberg Tribunal. They defended that the Federal Republic of Germany should be summoned to appear in Court and be submitted to the jurisdiction of the places where war crimes were committed during the Nazi regime. They requested an exception to the immunity from jurisdiction because of international human rights violations.

Holdings

The Full Court, by a majority, granted the extraordinary appeal to reform the contested decision and unprecedentedly remove the jurisdictional immunity of a foreign State.

The Court decided that immunity in such cases is rooted in customary law. Customary law, despite its elevated status in international law, should not always

prevail. This is because acts that result in the death of non-combatant Brazilian citizen, even if carried out in the context of war, are unlawful acts, either because they offend the rules that regulate armed conflicts, or because they ignore the principles that govern human rights.

Justice Rapporteur Edson Fachin emphasized that article 6, 'b' of the CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL²⁵ set forth as "*war crimes*" the killing of civilians, including those on the high seas.

Also, the event was an act that violated the human right to life, guaranteed by the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS²⁶.

Furthermore, in cases like this, human rights must prevail, as determined by Article 4, item II, of the Federal Constitution, which made the explicit normative option for a new paradigm in international relations, with the preponderance of human beings over the sovereignty of States.

Graphic data

Docket n.º: ARE 954858

Full Court, Virtual Deliberation, 6 x 5

Decision date: 23 August 2021

Official Gazette: 24 September 2021

ODS: 16

Amici Curiae I General Repercussion

Justice Rapporteur Edson Fachin

Quote: "The events reported, as seen, remained unanswered for almost 60 years (...). When then the truth comes out, revealing that the fishermen – civilian workers unrelated to the war – were victims of a random act, can they do anything

²⁵ Charter of the International Military Tribunal.

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (...)

b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

²⁶ International Covenant on Civil and Political Rights

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

to make the aggressor accountable? To deny this right or to demand that the victim seek foreign jurisdiction is to reserve for him anomie, the non-right, the 'state of exception' (...)."

RIGHT TO LIFE AND TO PHYSICAL INTEGRITY

The use of human embryonic stem cells for research

Scientific research using embryonic stem cells violates neither the right to life nor the dignity of the human person.

Direct Action of Unconstitutionality n. °: 3510

Facts

In 2005, the Biosecurity Act²⁷ was enacted establishing standards for procedures involving genetically modified organisms. The Act allowed the deployment of unused human embryonic stem cells obtained from *in vitro* fertilization for research and therapy, provided these cells came from viable embryos and have been frozen for more than three years from the date the Act became in force. The consent of parents was required in any event and research institutions had to submit their programs to a Research Ethics Committee. Moreover, merchandising of embryos or embryonic stem cells was not permitted.

The Federal Prosecutor General filed this claim alleging the procedure violated the right to life and the principle of human dignity. For the claimant, human life begins with fertilization. A one-cell zygote (embryo in the beginning stage) is an embryonic human being, and it is at the exact moment of fertilization that the mother welcomes the zygote allowing it to have a proper environment for its development. Also, the claimant argued that the research with adult stem cells was more promising than those with embryonic stem cells.

Holdings

The Supreme Court, by a majority, denied the claim under the terms of the Rapporteur's opinion, Justice Ayres Britto.

The Court found that human life is only possible after the embryo is implanted in the womb and the consequent birth of a living being occurs. The Court understood that the ordinary law protects each stage of the gestational development of the human being with diverse regimes. The pre-implantation embryo is

²⁷ Law 11105/2005.

under the protection of the law, although it is not a person in the biographical sense referred to in the Constitution.

The Constitution, in the chapter that provides about individual rights and safeguards, refers to the individual, as a natural person. Hence, the inviolability of the right to life is an exclusive prerogative of a personalized being, born alive. Furthermore, the Court stated that the Organs Transplantation Act²⁸ establishes that there is no life after the brain death. Thus, if brain activity is a requirement of life, the embryo, which does not have a complete brain, cannot be considered human life.

The Court explained that the couple's decision to have children, as well as the option to do an *in vitro* fertilization, is a constitutional right. Such an option does not oblige the couple to use all embryos because, besides the lack of a legal norm setting this obligation, it would violate the free will and the autonomy of family planning, which is a right that stems from the principle of human dignity and the responsible parenthood (Article 226, paragraph 7, of the Federal Constitution²⁹).

Additional Information

This case challenged the Full Court to a broad discussion on the right to life for the first time and it stands out also for being the first case the Court called a public hearing. It took place on April 20, 2007. Several *amici curiae* filed briefs and arguments before the Court.

Although STF did not set an initial term as to the concept of human life, all the Justices stressed the strong connection between the principle of human dignity and the right to life.

Concerning the right to life, the Full Court had entered an opinion on **HC 84025**³⁰ but could not properly address the matter since it became moot. In this case, the party requested permission for an anticipated birth considering the fetus was anencephalic. A Rio de Janeiro Court granted the request, but the Superior Court of Justice overruled it, issuing a writ of *habeas corpus* on behalf

²⁸ Law 9434/1997.

²⁹ Article 226. Paragraph 7. Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide educational and scientific resources for the exercise of this right, any coercion by official or private institutions being forbidden.

³⁰ Full Court, Justice Rapporteur Joaquim Barbosa, decided on March 4, 2004.

of the unborn child. The woman gave birth soon after appealing before the Supreme Court.

Graphic data

Docket n.º: ADI 3510

Full Court, In-Person Deliberation, 6 x 5

Decision date: 29 May 2008

Official Gazette: 28 May 2010

ODS: 3, 17

Amici Curiae I Public Hearing

Justice Rapporteur Ayres Britto

Quote: "The Biosafety Act is characterized as a legal regulation that protects against arbitrariness in such a religious, philosophical, and ethically sensitive as biotechnology, medicine, and human genetics. It is a set of norms based on the assumption of the intrinsic dignity of every form of human life, or that has the potential to do so".

Early delivery in case of anencephaly fetuses

A woman has the right to either keep or terminate her pregnancy in case the fetus is diagnosed with anencephaly.

Claim of Non-Compliance with a Fundamental Precept n. °: 54

Facts

The National Confederation of Health Workers filed this claim challenging the interpretation that considered an abortion the anticipation of the birth of an anencephalic fetus. The Penal Code establishes the crime of abortion under Articles 124, 126, 128, I, and 128, II³¹.

The claimant argued that an abortion required a potential life outside the womb. Accordingly, banning anticipating the birth, in this case, breached the woman's freedom, under the legality principle; her right to health; and the principle of human dignity.

³¹ **Abortion caused by the pregnant woman or with her consent**

Article 124 - Provoking an abortion in oneself or allowing someone else to do so:

Penalty - detention, from one to three years.

Third-party abortion

Article 125 - To cause abortion without the consent of the pregnant woman:

Penalty - imprisonment, from three to ten years.

Article 126 - To perform an abortion with the consent of the pregnant woman:

Penalty - imprisonment, from one to four years.

Sole paragraph. The penalty of the previous Article applies if the pregnant woman is not over fourteen years of age, or mentally ill or mentally deficient, or if the consent is obtained through fraud, serious threat or violence.

Qualified form

Article 127 - The penalties imposed in the two previous Articles are increased by one-third if, as a result of the abortion or the means used to provoke it, the pregnant woman suffers a serious bodily injury; and they are doubled, if, by any of these causes, death befalls her.

Article 128 - Abortion performed by a physician is not punished:

Necessary abortion

I - if there is no other way to save the pregnant woman's life;

Abortion in the case of pregnancy resulting from rape

II - if the pregnancy has been the result of rape and the pregnant woman, or her legal representative if she is incapacitated, consents to the procedure.

Holdings

The Supreme Court, by a majority, granted the claim under the terms of the Rapporteur's opinion, Justice Marco Aurélio.

First, the Court stressed the need to set aside any religious moral bias considering the fundamental precepts that guarantee the Brazilian secular state. During Brazil's imperial period, the State was Catholic, and the worship or practice of other religions was only allowed in the domestic sphere or in private houses intended for this use but without the form of a Temple. Since 1891, when the first Republican Constitution was enacted, secularism was established as a principle and it was reaffirmed in the subsequent constitutional texts, including the 1988 Federal Constitution currently in force.

The Court distinguished the discussion about the therapeutic anticipated delivery from the abortion's decriminalization and from prejudice against the deficiency of the fetus (eugenic abortion). An abortion requires a healthy fetus, while anencephaly, according to the experts heard in the public hearing called by this case Rapporteur, is a condition consisting of the absence of the brain and skull. Anencephaly is equivalent to brain death and, therefore, is lethal in all cases.

Accordingly, the case presented a false conflict of fundamental rights because opposing the rights of the woman, there was a being who, though biologically alive, was legally dead under the Organs Transplantation Act, which established brain death as the criterion to declare one's death. Thus, pregnancy termination was not a crime due to the absence of the subject of the criminal act.

The Penal Code allows pregnancy termination in two cases: under necessity (when there is a risk to the woman's life) and for humanitarian reasons (when the pregnancy results from rape). Since the law itself allowed the abortion in a case the fetus was perfectly healthy, the Court found it disproportional to consider an anticipated delivery illegal in a situation where the fetus has an incurable lethal anomaly. Humanitarian abortion and the anticipated delivery of an anencephaly fetus aim to safeguard the woman's physical and mental health. Thus, the Court considered that the legislator did not foresee such possibility of "abortion", because the Penal Code dates to 1940 when no exam could provide an anencephaly diagnosis.

Additional Information

Just as the decision entered on **ADI 3510** in 2008, this ruling is considered a landmark case that dealt with the right to life and the principle of human dignity.

As of this decision, one other case presented before the Court regarding the interpretation of the crime of abortion received high public attention. On the writ of habeas corpus 124603 (**HC 124306**³²), the First Panel of the Court, by a majority, granted the order to release the arrested parties, two owners of an abortion clinic, and the co-defendants. The Panel established an interpretation of Articles 124 and 126 of the Penal Code (which establishes the crime of abortion) according to the Constitution, to withdraw the anticipated delivery in the first trimester of pregnancy from its scope. The First Panel considered that the criminalization, in this case, violates various fundamental rights of women, as well as the principle of proportionality. It also ruled that in this specific case, to consider abortion a crime is not compatible with the following fundamental rights: a) the woman's sexual and reproductive rights, since she cannot be forced by the State to maintain an unwanted pregnancy; b) her autonomy, considering she must be entitled to make her own existential choices; c) the woman's physical and psychological integrity, as she suffers the effects of pregnancy on her body and her psyche; and d) the equal protection principle, since men do not become pregnant and, therefore, full gender equality depends on respecting the woman's will in this matter.

Graphic data

Docket n. °: ADPF 54

Full Court, In-Person Deliberation, 8x2

Decision date: 12 April 2012

Official Gazette: 30 April 2013

ODS: 3, 5, 16

Amici Curiae I Public Hearing

Justice Rapporteur Marco Aurélio

Quote: "That is to say: religious moral conceptions, whether unanimous, majority or minority, cannot guide state decisions, and must be limited to the private sphere. Religious and spiritual belief – or the absence of it, atheism – serves primarily to dictate one's conduct and private life. Religious passions of all kinds must be set aside in the State's performance. Faith and moral guidelines resulting from it cannot be imposed on anyone and by anyone. Otherwise, there will be no secular democracy with religious freedom, given the lack of respect for those who do not profess the faith that inspired the official decision or for those whom one day wish to review the position taken until then."

³² First Panel, Justice Rapporteur Roberto Barroso, decided on November 29, 2016.

The state of unconstitutional affairs of the Brazilian prison system

The Brazilian prison system falls under the concept of an "unconstitutional state of affairs", considering the widespread violation of detainees' fundamental rights resulting from persistent acts and omissions of the public authorities.

Provisional Measure on a Claim of Non-Compliance with a Fundamental Precept
n. °: 347

Facts

The Socialism and Freedom Party filed this claim to acknowledge the "state of unconstitutional affairs" of the prison system and to impose broad normative, administrative, and budgetary measures to remedy the violation of prisoners' fundamental rights.

The claimant based his request on a report about the prison system of the Clinic of Fundamental Rights of the Law School of the University of the state of Rio de Janeiro. According to the applicant, the data demonstrated that prisons' conditions were incompatible with several constitutional provisions. It argued that such a situation results from acts and omissions of the three branches of government, involving the three levels of government (federal, state, and municipal).

Therefore, it requested the release of resources from the National Penitentiary Fund, the implementation of custody hearings, and other measures related to Courts' orders, especially the adoption of alternatives to pre-trial detention. In addition, the claimant required an order to enjoin governments to draw up a national, state, and district plan to overcome the unconstitutional situation.

Holdings

The Supreme Court partially granted the provisional measure, by a majority, according to the Rapporteur's opinion, Justice Marco Aurélio.

Unprecedentedly, the Court acknowledged the concept of an "unconstitutional state of affairs", a doctrine initially formulated by the Constitutional Court of Colombia. For the Full Court, although it was difficult to conceptualize such terminology, it could be identified from the opposite direction, i.e., acknowledging what doesn't fall under that concept.

From this premise and considering the requirements stipulated by the Colombian Court – namely, widespread violation of fundamental rights, the inertia of public authorities and the need for joint action to overcome the problem – the prison system in Brazil fits into the frame of an "unconstitutional state of affairs".

According to the Court, the data on the lack of capacity, the overcrowded cells, and the poor condition in prison facilities (hydraulic and electrical) demonstrated this scenario. The prisoners' situation implied a violation of several constitutional provisions, especially those related to human person dignity, the prohibition of inhuman or degrading treatment, and cruel penalties. It also breached national statutory and international law.

In addition, the penalty did not achieve the purpose of rehabilitation. On the contrary, the data showed high recidivism rates (around 70%), reflecting an increase in crime and social insecurity.

The Court pointed out that the responsibility for the widespread and permanent violation of prisoners' fundamental rights could not be accounted to a single public authority. In fact, it is a historical malfunction in the framework of the State, including the Federal Government, the states, and the Federal District, which encompasses the three branches, including the Judiciary, given the high number of pre-trial detentions ordered. Therefore, the solution to the problem involved a coordinated action of all these entities.

In this context, the role of the Supreme Court is precisely to coordinate the actions of the bodies involved and to monitor the results. The Court stressed, however, that the competent bodies would choose the content of the actions to be monitored. Therefore, there was no offense to the principle of separation of powers.

It is possible to declare that the State's failure to ensure minimum conditions for a dignified existence for prisoners legitimized the Court's intervention. STF highlighted that this group has no direct political representation – as the convicts have their political rights suspended while the criminal sentence is effective – nor does it is part of the political program of the candidates. This reinforced the need for the Court's intervention.

On these grounds, the Court ordered the release of the accumulated budget of the National Penitentiary Fund, which was established to promote improvements in the prison system. The Court also enjoined all Courts to carry custody hearings in up to ninety days, enabling the presentation before a judge of those who were arrested in *flagrante delicto* within 24 hours from the time of arrest,

as established by Articles 9, item 3, of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS and 7, item 5, of the AMERICAN CONVENTION ON HUMAN RIGHTS signed by Brazil and thus incorporated into domestic law. The Court considered that the measure would diminish the overcrowding problem and decrease pre-trial detentions.

On the other hand, the Court denied, by a majority, the request for the judges to present a statement of reasons whenever they order pre-trial detention instead of an alternative measure foresaw under Article 319 of the Code of Penal Procedure. The majority considered that such a requirement is already included in the mentioned provision and the Court's pronouncement in this regard would give rise to constitutional claims for noncompliance with this ruling.

Finally, the Court, by a majority and by its own initiative, ordered the federal and the state governments to provide information about each prison's situation.

Additional Information

This is an outstanding case mostly for the Court's unprecedented declaration of the "unconstitutional state of affairs" of the prison system. Notwithstanding, the Court denied affirming the provisional measure on March 18, 2020.

Regarding the physical integrity of the persons detained, STF entered a decision on case **RE 580252**³³ establishing that the State is constitutional liable for damage (including moral damage) suffered by prison inmates once it is established that such harm was caused by a failure to secure minimum humane standards. In this sense, on **RE 841526**³⁴ the Court established that the State is legally liable for the death of a detainee in the event of it fails to comply with its duty pursuant to Article 5, item XLIX, of the Constitution³⁵, to protect prisoners' physical and mental integrity.

Prior to the decisions above, STF had settled that Courts may impose on the Public Administration an order to promote measures or reforms in prison facilities to ensure the principle of dignity of the human persons and guarantee respect for their physical and moral integrity (**RE 592581**³⁶). The Public Administration could not allege a lack of resources to avoid complying with the order.

³³ Full Court, Justice Gilmar Mendes, decided on February 16, 2017.

³⁴ Full Court, Justice Rapporteur Luiz Fux, decided on March 30, 2016.

³⁵ Federal Constitution: Article 5, XLIX – prisoners are ensured respect for their physical and moral integrity.

³⁶ Full Court, Justice Rapporteur Ricardo Lewandowski, decided on August 13, 2015.

As to the prison system, the Court faced a broad discussion on case **RE 641320**³⁷, when Justice Gilmar Mendes, the Rapporteur, called a public hearing to collect information from various experts, including members of Congress and the Judiciary.

The lawsuit discussed whether a convict could start serving his prison time on a less onerous regime due to the lack of vacancy in the prison unit he was originally sentenced to. The appellant alleged a public safety interest and requested the defendant, who was convicted of theft in conspiracy, to begin his time in a burdensome regime (closed system), while waiting for a vacancy.

The Full Court found it unacceptable that the flaws of the prison system could frustrate the convicts' basic right to receive fair and proper treatment. Justice Gilmar Mendes pointed out that ordering a more severe regime was an over-execution since it violated the defendants' right to have a prison time under the compatible scheme originally ordered and the right to advance to a more favorable regime after showing good behavior (Law 7210/1984).

Therefore, STF set that in case of lack of vacancies, courts shall order alternative measures, such as i. early release of the convict closer to make progress in the regime schemes; ii. electronic monitor of the persons in semi-open conditions released; iii. substitution of the closed regime with penalties of rights restricting (for example provision of services to the community or study while in the open regime). These were not to be considered exhausting measures.

In addition, given the complexity of the constitutional issue in the trial, the Rapporteur enjoined the National Council of Justice³⁸ to present a project and several measures to assure better conditions in the prison system.

Another landmark decision facing the overcrowding problem and yet granting special protection both to children and women was entered on **HC 143641**³⁹. The writ was filed on behalf of all women submitted to pre-trial detention in the National Penitentiary System who were pregnant, or in the postpartum period, or who had children up to 12 years of age under their responsibility. The Court held that the women in this group who had been accused of non-violent crimes should be permitted to await trial under house arrest rather than in detention. In addition, Justice Ricardo Lewandowski granted the order by his own initiative

³⁷ Full Court, Justice Rapporteur Gilmar Mendes, decided on May 11, 2016.

³⁸ CNJ, in the Brazilian Portuguese acronym.

³⁹ Second Panel, Justice Rapporteur Ricardo Lewandowski, decided on February 20, 2018.

allowing that women with children who had been arrested prior to this ruling and have not yet been placed under house arrest were entitled to the benefit.

Graphic data

Docket n.º: ADPF 347 MC

Full Court, In-Person Deliberation, 9 x 2⁴⁰

Decision date: 9 September 2015

Official Gazette: 19 February 2016

ODS: 3, 16

Amici Curiae

Justice Rapporteur Marco Aurélio

Quote: "The Supreme Court Justices' life-tenure ensures them to act 'according to their science and conscience' with sufficient political and social isolation to distinguish legitimate social desires from the oppressive public opinion against the principles and fundamentals of the constitutional order (...) (...). Both from the liberal point of view of the inherent dignity of all human beings and from the utilitarian point of view of maximizing the well-being of the members of society, the right attitude is to seek solutions to the daily tragedy of Brazilian prisons, regardless of the majority contrary opinion".

⁴⁰ Refers to the order for judges and courts to hold custody hearings within ninety days to make possible for the detainee to appear before the judicial authority within up to 24 hours from the time of arrest, in compliance with Articles 9, item III, of the COVENANT ON CIVIL AND POLITICAL RIGHTS and 7, item 5, of the INTER-AMERICAN CONVENTION ON HUMAN RIGHTS.

RIGHT TO EQUAL PROTECTION

Recognition of same-sex unions as families

Same-sex unions are family units. The rules applied to steady unions between a man and a woman shall apply to them until the National Congress enacts a specific law to regulate the matter.

Direct Action of Unconstitutionality n. °: 4277⁴¹

Facts

This claim raised the question of whether same-sex unions could be given the rights granted to heterosexual ones.

According to the Brazilian Federal Constitution, “the family, which is the foundation of society, shall enjoy special protection from the State” (Article 226, head paragraph). Its third paragraph states that “For purposes of protection by the State, the stable union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage”.

In addition, the Brazilian Civil Code sets the family entity concept under its Article 1723 (Law 10406/2002) by the wording: “It is recognized as a family entity the stable union between man and woman, set in public coexistence, continuous and enduring and established with the goal of the family constitution”.

The Federal Prosecutor General filed this action arguing that the lack of regulation of same-sex marriage violated the principles of human dignity and of equal protection. The claimant stressed that the Civil Code’s rule is only a definition, not a limitation. Moreover, the Federal Constitution does not forbid a civil union between persons of the same sex, but rather any form of discrimination and prejudice. Consequently, for the purposes of protection under the law, the definition of a family entity should not depend on one’s sexual orientation.

⁴¹ Jointly ruled with case ADI 4277.

The claimant argued that due to the absence of a regulating norm, by analogy, homo-affective stable relationships should be governed by the same rules that regulate stable unions between men and women.

The petitioner requested the Supreme Court: a) to declare same-sex couples as family entities if the requirements to acknowledge a stable union between a man and a woman were met, and b) to extend the same rights and duties of partners in stable unions to partners in same-sex unions.

Holdings

On the merits, the Court unanimously granted the action to provide an interpretation of the Civil Code's Article 1723 pursuant to the Constitution, to acknowledge same-sex partnerships as family units, and to apply to them the rules set forth to steady unions of heterosexual couples.

The Court stated that Article 3, item IV, of the Federal Constitution, forbids any discrimination under sex, race, ethnics. So, under this understanding, no one can be diminished or discriminated against because of their sexual orientation. "The sex of people, unless otherwise specified, does not lend itself to legal inequality," stated the Justice-Rapporteur Ayres Brito, concluding that any depreciation of the homo-affective stable union, therefore, conflicts with the Constitution.

The Court held that neither the sex nor the sexual orientation of a person can provide the basis for legal inequality, pursuant to the constitutional guarantee that forbids prejudice. The expression of one's sexuality falls into a sphere of private autonomy, and it is also a fundamental right, which is the reason why it is considered an unamendable clause.

In addition, the Constitution established the family as the foundation of society and guaranteed special protection of the State to it regardless of distinctions as to its format or composition. The Constitution limited itself to acknowledging the family as a private institution, which is voluntarily composed by adults, establishing a trichotomous relationship with the State and society. Thus, what is not legally forbidden – or mandatory – is legally allowed.

The equality between heterosexual couples and homosexual ones would only gain full meaning if it resulted in an equal subjective right to form an autonomous family, constituted, as a rule, with the same factual characteristics of visibility, continuity, and durability. This understanding fulfills the principles of human dignity, equality, freedom, protection of minorities, and non-discrimination.

Additional Information

In the case **ADPF 132**, jointly ruled with **ADI 4277**, the governor of the state of Rio de Janeiro had challenged lower courts' orders based on the Decree-Law 220/1975 that denied civil servants' rights to leave and pension because they were on same-sex unions. The petitioner claimed the rule violated fundamental rights and requested that same-sex stable unions be ruled by the same law that regulates stable unions between men and women. The decision followed the one on **ADPF 132**.

These two historic cases represented a milestone in STF's case law and opened a series of decisions on multiple aspects regarding the LGBTQI+ community's fundamental rights.

In 2017, the Full Court declared Article 1790⁴² of the Civil Code unconstitutional (**RE 646721**⁴³ and **RE 878694**⁴⁴) as it had granted same-sex unions inferior inheritance rights as opposed to the ones conferred on to a wife or a husband. The Court stated that the rule created a hierarchy between family structures and violated the principle of human dignity. For the Court, the 1988 Constitution protects different formats of family, besides the one that results from marriage, including single-parent families and stable unions, whether conventional or homosexual.

In 2020, the Court held unconstitutional the rules of the Health Ministry and the Brazilian Health Regulatory Agency⁴⁵ that excluded from the qualified blood donors list "men who have had sexual relations with other men and/or their sexual partners in the previous 12 months" (**ADI 5543**⁴⁶). The Court stressed that these guidelines that barred homosexual persons to donate blood were imposed during the 1980s HIV/AIDS crisis. "The decision comes after several nations have relaxed rules on blood donations in recent weeks as supplies face mounting pressure due to the coronavirus pandemic. The United States, Denmark, and Northern Ireland have all changed the rules so men can donate blood three

⁴² Brazilian Civil Code

Article 1790. The companion will participate in the succession of the other as to the property acquired against payment during the stable union, under the following conditions: I - if married to common children, will be entitled to a share equal to the share legally attributed to the child; II - if he competes with descendants of the inheritor only, he will be entitled to half of what is due to each of them; III - if he runs with other succession relatives, he will be entitled to one-third of the inheritance; IV - if there are no relatives who can be inherited, he will be entitled to the entire inheritance.

⁴³ Full Court, Justice Roberto Barroso, decided on May 10, 2017.

⁴⁴ Full Court, Justice Rapporteur Roberto Barroso, decided on May 10, 2017.

⁴⁵ Anvisa, in the Brazilian Portuguese acronym.

⁴⁶ Full Court, Justice Edson Fachin, decided on May 11, 2020.

months after their latest gay sexual encounter rather than wait for one year, a policy LGBT+ campaigners have long decried as discriminatory”⁴⁷.

In 2015, the Supreme Court heard a claim and partially upheld the request to declare that the expressions “pederasty or other lewd acts” and “homosexual or not” in Article 235⁴⁸ of the Brazilian Military Penal Code had not been received by the 1988 Federal Constitution, under the terms of Justice Roberto Barroso’s opinion (**ADPF 291**)⁴⁹. According to the referred Article, a member of the Armed Force who engages in lewd acts, homosexual or not, in environments subject to military administration, commits a crime. The Court found that to define as a crime the sexual acts committed by military personnel in places subject to military administration is consistent with the Federal Constitution and aims at protecting the Armed Forces hierarchy and discipline. However, the law cannot have pejorative and discriminatory expressions; neither can it punish conduct strictly directed at homosexual relations, given that sexual orientation is a right recognized within one’s existential freedom.

Another landmark decision was entered in case **ADI 4275**⁵⁰, when the Court settled that transgender persons could change their given name and their gender marker on official records via an administrative procedure before the Personnel Registry Offices, with no need for prior judicial authorization, nor any surgery to reassign their sex. The change in the public records would depend only on the person’s free expression. Besides the Federal Constitution, the decision was based on international human rights documents, in particular the AMERICAN CONVENTION ON HUMAN RIGHTS (PACT OF SAN JOSE, COSTA RICA).

Affirming that understanding, STF ruled the right of all persons – transgender or not - to change their names in official documents whenever they feel their civil identity does not match their outer gender expression (**RE 670422**)⁵¹⁵².

⁴⁷ See: <https://www.reuters.com/article/us-brazil-lgbt-blood-idUSKBN22M05N>

⁴⁸ Brazilian Militar Penal Code.

Article 235. To practice or allow the military to practice with him libidinous acts, homosexual or otherwise, in a place subject to military administration: Penalty - detention, from six months to one year.

⁴⁹ Full Court, Justice Rapporteur Roberto Barroso, decided on October 28, 2015.

⁵⁰ Full Court, Justice Edson Fachin, decided on March 1, 2018.

⁵¹ Full Court, Justice Rapporteur Dias Toffoli, decided on August 15, 2018.

⁵² On June 28, 2018, the National Council of Justice (CNJ), which is incumbent to control the administrative and financial operation of the Judicial Branch and the proper discharge of official duties by judges, issued the Administrative Act 73/2018, which provides for registering the change of name and gender in the birth and marriage records of a transgender person in the Civil Registry of Natural Persons (Law 6015/1973).

In 2019, the Supreme Court recognized the omission of the National Congress in passing a law that criminalizes acts of homophobia and transphobia. The decision ordered the national law on the crime of racism to apply in cases of homophobia and transphobia until the National Congress approves legislation on the matter (**ADO 26**⁵³ and **MI 4733**⁵⁴)⁵⁵.

In 2020, Brazilian Federal Supreme Court declared unconstitutional four different municipal laws that banned learning papers, materials, educational policies, and activities with information about “gender ideology” or the terms “gender” or “sexual orientation” in local public schools (**ADPF 460**⁵⁶, **ADPF 457**⁵⁷, **ADPF 461**⁵⁸, **ADPF 526**⁵⁹)⁶⁰.

Finally, a case where a shopping center employee embarrassed a transsexual person when she was trying to use the women’s bathroom is pending trial. The Court has granted the general repercussion effect of the case on grounds that the question raises a discussion on the scope of minorities’ fundamental rights - one of the primary missions of contemporary Constitutional Courts (**RE 845779 RG**⁶¹).

Graphic data

Docket n.º: ADI 4277

Full Court, In-Person Deliberation, 11 x 0

Decision date: 5 May 2011

Official Gazette: 14 October 2011

ODS: 3, 5, 10

Amici Curiae

Justice Rapporteur Ayres Britto

Quote: “The equal protection between heterosexual couples and homosexual ones only gains full meaning if it leads to the equal subjective right to form an autonomous family. This is understood, in the context of the two types of legal subjects, as a domestic nucleus independent of any other and constituted, as a rule, with the same factual characteristics of visibility, continuity, and durability.”

⁵³ Full Court, Justice Rapporteur Celso de Mello, decided on June 13, 2019.

⁵⁴ Full Court, Justice Rapporteur Edson Fachin, decided on June 13, 2019.

⁵⁵ These cases were reported in the 2nd Volume of the Case Law Compilation on Freedom of Speech.

⁵⁶ Full Court, Justice Rapporteur Luiz Fux, decided on June 29, 2020.

⁵⁷ Full Court, Justice Rapporteur Alexandre de Moraes, decided on April 27, 2020.

⁵⁸ Full Court, Justice Rapporteur Roberto Barroso, decided on August 24, 2020.

⁵⁹ Full Court, Justice Rapporteur Cármen Lúcia, decided on May 11, 2020.

⁶⁰ These cases were reported in the 2nd Volume of the Case Law Compilation on Freedom of Speech.

⁶¹ Full Court, Justice Rapporteur Roberto Barroso, decided on November 13, 2014.

Racial and indigenous quotas for admission to a public university do not violate the constitutional principle of equal protection.

Claim of Non Compliance with a Fundamental Precept n. °: 186

Facts

The Federal University of Brasilia⁶² published a broad set of administrative and normative acts, which determined that a certain percentage of enrollment in the courses offered by the University should be reserved for black and mulatto candidates and another small amount for indigenous people.

This affirmative action was based on a Social, Ethnic, and Racial Integration Target Plan proposed by the university.

A political party filed a claim against the University to question whether those normative acts were constitutional. According to the claimant, irreparable damage could happen if the enrollments at the university were carried out by candidates who were approved by means of racial quotas, "based on the concealed, unconstitutional and pretentious criteria of the Racial Commission".

Essentially, the petitioner alleged that racial and ethnic quotas violated the principles of human dignity, the repudiation of racism, equal protection, meritocracy, and the universal right to education.

Holdings

The Full Bench unanimously rejected the claim and considered the complaint totally unfounded. On the contrary, the questioned rules implement the principle of material equality, acting to overcome historical social distortions, employing means marked by proportionality and reasonableness.

According to the Justice Rapporteur, Ricardo Lewandowski, the measures and policies adopted by the University of Brasilia (i) aim to establish a plural and diverse academic environment, overcoming historically consolidated social distortions, (ii) reveal proportionality and reasonableness about the means used and the ends pursued; (iii) are transitory and provide for periodic review of their

⁶² UnB, in the Brazilian Portuguese acronym.

results, and (iv) apply effective selective methods that are compatible with the principle of human dignity.

The Supreme Court emphasized that the affirmative action adopted by the University highlighted the democratic content of the principle of legal equality.

Also, affirmative action as a public policy means that equality is no longer simply a legal principle to be respected by all, but a constitutional objective to be achieved by the State and society. The Court stressed that, in the contemporary era, people must not forget that history does not register any example of a nation that has risen from a peripheral condition to become an economic and political power, worthy of respect on the international political scene, while maintaining, at the domestic level, a policy of exclusion in relation to a significant portion of its population.

The Court also asserted that the educational and cultural deficit of black students is an incontrovertible historical fact, due to institutional barriers to access the sources of education. Therefore, the State and society have a duty, not only ethical but also legal, in the face of such inequality, under the fundamental objectives of the Federal Constitution.

Additional Information

By deciding that the quota system adopted by the Federal University of Brasilia was constitutional, the Supreme Court affirmed a policy adopted by many universities since 2012. That year was a landmark in Brazil's policies to increase the number of black, brown, and indigenous students across public higher education.

Following this precedent, the Court unanimously affirmed the constitutionality of Law 12990/2014 that assigned a 20% quota for black candidates from the positions offered in competitive exams for offices in the federal government (**ADC 41**⁶³).

The Rapporteur, Justice Roberto Barroso, stressed that in the contemporary world, equal protection is expressed in three dimensions: a) formal, which prevents the law from establishing discriminatory privileges and treatment; b) material, which corresponds to the need to redistribute power, wealth, and social

⁶³ Full Court, Justice Rapporteur Roberto Barroso, decided on June 8, 2017.

well-being; and, c) equality as recognition, meaning respect for minorities. Accordingly, the law had fulfilled the equal protection principle in these three dimensions.

The Full Court dismissed the alleged infringement of the open competition principle. Reversing positions for black applicants did not exempt them from being approved for an appointment via the public office selection process. Thus, it maintained free competition as the basis for access to public sector appointments, with equal opportunity for all candidates regardless of their personal characteristics in the selection process.

Finally, the Court found the subsidiary criteria of hetero-identification legitimate to combat false i.e., abusive or fraudulent, self-declarations, as long as they respect the human dignity and guarantee both the adversarial proceeding and the effective right to be heard.

The same understanding of these two constitutional review cases (**ADPF 186** and **ADC 41**) was stressed in case **RE 597285**⁶⁴, under the general repercussion doctrine. In the appeal, a non-minority student, whose exam scores were higher than some candidates approved by quotas, claimed that because of affirmative action politics, he was not accepted at the University. In this judgment, the Court denied the appeal and asserted the following thesis: "The use of affirmative action, such as the use of the selected quotas based on ethnic-racial criteria, in the admissions process to public higher education is constitutional".

On the other hand, the Court declared unconstitutional the rule that reserved 40% of the vacancies at the Federal District's public universities for those who prove to have attended elementary and high school in public schools in the Federal District. The Court stated that a spatial criterion is not justified in view of the affirmative action policy that seeks to ensure equal opportunity for public school graduates (**ADI 4868**⁶⁵).

The Supreme Court's case-law also finds constitutional affirmative actions in the electoral context. In 2018, by a majority, the Full Court ensured that 30% of the resources concerned with campaign financing rules (Party Fund and Electoral Fund) should be used to promote female candidates during elections of that year (**ADI 5617**⁶⁶). In addition, it asserted that the electoral financing amount

⁶⁴ Full Court, Justice Rapporteur Ricardo Lewandowski, decided on May 9, 2012.

⁶⁵ Full Court, Justice Rapporteur Gilmar Mendes, decided on March 27, 2020.

⁶⁶ Full Court, Justice Rapporteur Edson Fachin, decided on March 15, 2018.

and advertising time of campaigns on radio and TV allocated to white candidates should be the same as for black candidates. The decision occurred in 2020 and was ordered to apply in the elections of that same year (**ADPF 738 MC-Ref**⁶⁷).

Finally, the Court understands that granting tax exemptions may be understood as an affirmative action if the institution is benefiting a vulnerable group. For instance, in 2005 a law created the “University for All” program, called PROUNI, in the Portuguese acronym. PROUNI was a public policy developed to increase access to private higher education institutions, through scholarships, for people of low-income families. In exchange, these institutions could get tax exemptions. The Court considered the program constitutional (**ADI 3330** and **3314**⁶⁸) reasoning that education is a social right and a duty of the State. Therefore, the program had instituted an objective criterion for compensatory accounting for the scholarships granted by the educational institutions. The Rapporteur, Justice Ayres Brito, stressed that there was “no other way of realizing the constitutional value of equality than by resolutely combating the real factors of inequality”.

Graphic data

Docket n.º: ADPF 186

Full Court, In-Person Deliberation, 10 x 0

Decision date: 26 April 2012

Official Gazette: 20 October 2014

ODS: 1, 10, 16

Amici Curiae I Public Hearing

Justice Rapporteur Ricardo Lewandowski

Quote: “For contemporary societies that have experienced slavery, repression, and prejudice, giving rise to a derogatory perception of race in relation to traditionally subjugated groups, the legal guarantee of mere formal equality underlines the differences between people, contributing to perpetuate the de facto inequalities that exist between them.”

⁶⁷ Full Court, Justice Ricardo Lewandowski, decided on October 5, 2020.

⁶⁸ Full Court, Justice Rapporteur Ayres Britto, decided on May 5, 2012.

Inclusion of people with disabilities in private schools

Private educational institutions must promote the inclusion of people with disabilities in regular education and provide the necessary adaptation measures without transferring any financial burden to tuition, annuities, enrollment, and monthly fees.

Direct Action of Unconstitutionality n. °: 5357

Facts

The National Confederation of Educational Establishments⁶⁹ filed this action against norms of the national statute of persons with disabilities, which demand that private schools offer a proper and inclusive educational environment to students with disabilities.

The law was enacted based on the CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (head paragraph, Article 1 of the Law 13146 of 2015).

The Confederation pointed out that the principles described in the Convention were addressed to the constitutional powers, which must take the appropriate measures so that people with disabilities can develop and be socially included.

According to the claimant, such norms require a lot of investment from private schools throughout the country to meet the legal standards, which would eventually lead to many of them shutting down.

Holdings

The Full Court rejected the claim, according to Justice Rapporteur Edson Fachin's opinion, to affirm the provisions are constitutional and in compliance with the INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES.

The Court decided that responsibility for alterity is a structuring element of the Constitution, which demands, in several provisions, the protection of people with disabilities.

⁶⁹ Confenen, in the Portuguese acronym.

State action presupposes a double path: plurality and equality. In other words, all citizens are entitled to a plural democracy, of people, creeds, ideologies, and other elements.

In view of this, it is understood that equality does not end with the normative provision of equal access to legal assets. It also encompasses the normative provision of measures that allow access and the concrete realization of this right.

In this regard, the INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES was promulgated (Decree 6949 of 2009). This pact recognizes, in Article 24, the right to education without discrimination. It also requires States that signed the Convention to ensure an inclusive education system at all levels, so that persons with disabilities are not excluded from the general education system.

Thus, in the light of the Constitution and the aforementioned INTERNATIONAL CONVENTION, whose status is equivalent to that of a constitutional amendment, inclusive education at all levels is an explicit imperative of this rule.

There are even other provisions of constitutional status that establish the goal of full inclusion and prohibit the exclusion of people with disabilities from the general education system based on their condition.

It is up to the State to facilitate the full and equal participation of people with disabilities in the education system and within community life, as well as to provide free and compulsory primary education. In view of this, it is equally certain that the education of people with disabilities is not limited to public or private establishments that provide public educational services.

From the coexistence with the difference and with its necessary acceptance, there can be the construction of a free, fair, and solidary society, in which the good of all is promoted without prejudice of origin, race, sex, color, age, or any other forms of discrimination.

In this way, Law 13146 of 2015 assumes the ethical commitment of welcoming and democratic plurality adopted by the Constitution. This act requires that not only public schools but also private schools should guide their educational performance from all the facets and potentialities that the fundamental right to education has and that is emphasized in Articles 27 to 30 of the Statute of Persons with Disabilities.

Although the education services can be performed freely in the private sector, this does not mean that the economic agents that provide it can do so unlimitedly or without responsibility. Authorization and quality assessment by the State is required, as well as compliance with the general norms of national education, including those provided for by the Constitution itself.

The schools are not given the opportunity to choose, segregate, or separate. It is their duty to teach, include, and live together. Thus, even if private educational institutions carry out economic activity, they must adapt to welcome all people, providing educational services that not only focus on disability from a medical perspective, but also from an environmental perspective, eliminating any barriers. These duties apply to all economic agents. A different understanding would imply the creation of odious privilege because it would turn into official discrimination.

Additional Information

Direct Action of Unconstitutionality 6590 (**ADI 6590**), which is yet to be decided on the merits, refers to the possible unconstitutionality of Decree 10502 of 2020 that established the National Policy on Special Education. The norm fosters the institution of special classes and schools for people with disabilities, high ability or giftedness, and pervasive developmental disorders. According to the claimant, the decree subverts the logic of inclusive education. The Full Court affirmed the provisional measure granted by Justice Rapporteur Dias Toffoli that suspended the mentioned decree (**ADI 6590 MC-REF**⁷⁰). Subsequently, Justice Dias Toffoli hosted a public virtual hearing that took place on August 23rd and 24th, 2021. In this event, fifty-six technical authorities on the matter were given the chance to speak and provide the Court with their expertise, in order to strengthen the fundamentals of a future decision.

On May 14, 2021, the Full Court decided that, in the calculation of personal income tax, a person with a disability who exceeds the age limit and is able to work may be considered a dependent if their earnings do not exceed the deductions authorized by law (**ADI 5583**⁷¹). According to the claimant, the law that determines those who are considered dependent did not include persons with disabilities that are able to work, which would be unconstitutional, since many of them rely on financial support from family members, because their income is not sufficient to cover the costs of disability-related treatments, equipment, and other expenses.

⁷⁰ Full Court, Justice Rapporteur Dias Toffoli, decided on December 21, 2020.

⁷¹ Full Court, Justice Roberto Barroso, decided on May 17, 2021.

Graphic data

Docket n.º: ADI 5357

Full Court, Virtual Deliberation, 8 x 1

Decision date: 9 June 2016

Official Gazette: 11 November 2016

ODS: 4, 10, 16

Amici Curiae

Justice Rapporteur Edson Fachin

Quote: "The enclosure in the face of the different steals the color of everyday experience, depriving us of the stupefaction before what is presented as new, as different. It is only with the coexistence with the difference and with its necessary acceptance that there can be the construction of a free, fair, and solidary society, in which the good of all is promoted without prejudice of origin, race, sex, color, age and any other forms of discrimination."

Principle of the best interest of the child in case of a request for the father's expulsion

The expulsion of a foreigner whose Brazilian child was recognized or adopted after the fact that led to the expulsion is forbidden, once it is proven that the child is under the foreigner's guardianship and economically dependent on him.

Extraordinary Appeal n. °: 608898

Facts

The case concerns a citizen of Tanzania who lived in Brazil and was convicted of forgery of a public document and for using a false document. After the sentence was served, a police investigation was opened which resulted in an order from the Brazilian Ministry of Justice requiring him to leave the country.

Law 6815/1980 (Foreigner Statute), paragraph 1 of Article 75, prohibited the expulsion of a foreigner if the Brazilian progeny had preceded the fact that motivated the expulsion.

In the case, the records showed that his daughter was born one year after his decree of deportation.

The Superior Court of Justice prohibited his expulsion, considering the principles of protection of the interest of the child set forth by the Brazilian Federal Constitution and the Statute of the Child and Adolescent⁷².

The Union appealed to STF on the grounds that the child's birth, taking place after the facts that led to the deportation, could not serve as a shield against his removal from the country. The General Counsel for the Federal Government emphasized that the father's expulsion from the country was not synonymous with the removal of his duties of assistance to his Brazilian daughter.

Holdings

The Full Court unanimously denied the appeal to decide that the expulsion of a foreigner with a Brazilian child born after the criminal act that motivated his expulsion is not compatible with the constitutional principles of protection of the childhood and of the family.

⁷² ECA, in the Brazilian Portuguese acronym.

Justice Rapporteur pointed out that in the past, STF decided several times that the existence of children born after the criminal act would not be enforceable against deportation. In those cases, questions concerning the requirements for deportation were repeatedly examined only based on the interpretation of article 75 of Law 6815/1980.

After a while, the Court understood that it was necessary to deepen the evolution on this subject, focusing on the Federal Constitution, which defines the family as the basis of society and establishes the right of the child to family coexistence.

Thus, according to the Justice Rapporteur Marco Aurelio paragraph 1 of Article 75 of Law 6815/1980 was not received by the Federal Constitution of 1988, and it is forbidden to expel a foreigner whose child was recognized or adopted after the occurrence of the fact that led to the expulsion, once it was proven that the child was under the custody of the foreigner and economically dependent on him or her.

The Federal Constitution established that the family is the foundation of society and shall enjoy special protection from the State. Also, ensured it is the duty of the family, society, and the State, to guarantee children, adolescents, and young people, with absolute priority, the right to family life.

Moreover, the previously mentioned Law 6815/1980 affronted the principle of equal protection, by establishing discriminatory treatment between children born before and after the fact that led to the expulsion.

Graphic data

Docket n.º: RE 608898

Full Court, Online Deliberation, 9 x 0

Decision date: 25 June 2020

Official Gazette: 7 October 2020

ODS: 16

Amici Curiae I General Repercussion

Justice Rapporteur Marco Aurélio

Quote: "The damage associated with the expulsion of a foreign parent from the country does not depend on the date of birth or adoption, much less on the random milestone represented by the act that motivated his or her expulsion. If the interests of the child are to be prioritized, the moment of adoption or conception is of lesser importance."

Venezuelan migratory crisis

The temporary closure of the border between Brazil and Venezuela or limitation of Venezuelan entry into Brazil violates fundamental rights.

Original Civil Action n. °: 3121

Facts

The state of Roraima reported that had extraordinary expenses with health, education, public security, and social assistance due to the flow of Venezuelan immigrants who arrived mostly by land, with little or no money, seeking to survive. The immigrants also had no access to minimally dignified living conditions in their country.

Under these circumstances, the governor of Roraima, filed this action before the Supreme Court seeking reimbursement for all those expenses. The Union, in turn, claimed that had acted directly on the issue of Venezuelan immigrants, including with the "Welcoming Operation", commanded by the Brazilian Army in favor of the humanitarian cause.

The petitioner also asked the Supreme Court to order the Union to promote administrative measures in the areas of police control, health, and sanitary surveillance in the border region between Brazil and Venezuela.

Finally, Roraima requested authorization to temporarily close the border with Venezuela or to limit the entry of refugees from that country.

According to the petitioner, the number of Venezuelans precariously settled in the city of Boa Vista (Roraima's capital) had already exceeded 10% of the state's population, causing a significant impact on the increase of crime, overloading health units and public education, besides increasing the risk of epidemics.

The state claimed that the circumstances justified the characterization of the factual-legal framework of the "state of unconstitutional affairs".

Holdings

After arguments of both parties, Justice Rapporteur Rosa Weber called a conciliatory hearing, which was partially successful.

In this agreement, the rapporteur settled that the federal government must continue the redistribution of Venezuelan immigrants and refugees to other states for as long as the humanitarian crisis in the neighboring country remains.

It should also maintain the "Welcoming Operation" and give more attention, in the short term, to the problem of the homeless population. Immigrants and refugees should undergo a medical screening examination as a preventive health barrier and for epidemiological control.

The federal government agreed to offer technical support to train and qualify people to prepare and execute projects and agreements, especially in the areas of social assistance, health, and security. The goal was to facilitate the access to federal resources that, in some cases, were not released due to deficiency or absence of projects.

The parties also agreed to maintain the partnerships between the Union and civil society organizations that provide voluntary services in the shelters in the cities of Pacaraima and Boa Vista, to reduce the suffering of immigrants and refugees.

So, after the parties had reached an agreement on those subjects, Justice Rapporteur Rosa Weber homologated it.

On merits, the Full Court, by a majority, rejected the state's request to temporarily close the country's border with Venezuela or limit the entry of Venezuelan immigrants into Brazil. The Court considered that the request violated the Federal Constitution and the INTERNATIONAL TREATIES that Brazil had ratified.

The Full Court partially granted the request to enjoin the federal government to transfer additional resources to the State of Roraima.

The Federal Constitution protects the principle of solidarity and it must be applied in the relations between the units of the Federation. In addition, the Brazilian federalism has a cooperative basis, according to the Constitution. This cooperation is mandatory, not optional.

The Court asserted the state of Roraima had extraordinary expenses with health, education, public security, and social assistance because of the flow of Venezuelan immigrants and there was sufficient evidence in the case records of these allegations. It pointed out that Roraima state is small in territorial dimension and, currently, also in income, if compared to other Brazilian states. Moreover,

the Union had mechanisms to help the units of the Federation in the event of abnormality.

Besides, the flow of mass immigration was an extraordinary event, unpredictable and exceptional, and its impact on the petitioner-state stemmed from the fact that the geographical position of Roraima was attractive to facilitate the entry of immigrants into Brazil.

The absence of specific normative provision regarding the degree of commitment of each unit of the Federation about matters of common competence within the scope of cooperative federalism, could not imply a disproportionate burden on the state of Roraima.

Thus, the solution, considering the international example and also the reasonable and proportional interpretation of the cooperation clause, was to divide these additional costs in half for each part.

Additional Information

The massive migration flow of refugees, present worldwide, is often translated into legal questions regarding who should bear the cost to integrate refugees among the units of the Federation. As STF has original jurisdiction over the cases of federative conflict, it has been triggered to settle such matters.

In case **ACO 3113**⁷³, the state of Acre intended to declare the Union fully responsible to manage and to bearing the expenses of immigrants who entered the national territory and started living in the border states. The state claimed that, between 2010 and 2016, around 50,000 foreigners, mostly Haitians, immigrated through the state borders, generating expenditure of an amount not completely reimbursed by the Union. It stressed that the reimbursements were necessary to avoid the illicit enrichment of the Union.

The Full Court rejected the request on grounds that the Constitution had shared the cost of public policies between the units of the Federation. They are thus responsible to ensure the rights of immigrants and refugees. In this case, the Court found that the Union had proved that it provided financial, technical, and personnel assistance to Acre through the Ministries of Citizenship, Regional Development, Health, Defense, Foreign Affairs, and Women, Family and Human Rights, a fact that was not duly contested in the lawsuit.

⁷³ Full Court, Justice Alexandre de Moraes, decided on October 13, 2020.

Graphic data

Docket n.º: ACO 3121

Full Court, Virtual Deliberation, 7 x 4

Decision date: 13 October 2020

Official Gazette: 27 October 2020

ODS: 1, 3, 16, 17

Amici Curiae

Justice Rapporteur Rosa Weber

Quote: "Once the refuge phenomenon is contextualized, it is possible to affirm we are not facing a common or occasional displacement of immigrants, but rather an unfortunately epic, historic, extraordinary, and unpredictable situation. People constantly enter Brazil through the 'Roraima's state door', in search of better living conditions. Starting from these premises, especially the exceptionality and magnitude of the event, there is no way to demand, within the logic of the reasonable and proportional, that a federal state, just because it is located on the border, has computed in its limited budget the risk of a massive migratory event."

Migratory regularization and fee immunity

A foreigner who has permanent residency in Brazil and is not economically self-sufficient is entitled to immunity from the fees related to the migratory regularization.

Extraordinary Appeal n. °: 1018911

Facts

In this case, a first instance court declared that a Venezuelan citizen living in Brazil did not have to pay the fees charged for the migration regularization process and, therefore, could obtain his Foreigner's Identity Card.

The decision took account of his contributive capacity and the legal scope of the term "citizenship" used by the Federal Constitution.

Subsequently, the Union appealed to a higher Court in the Amazonas state claiming that the immigrant should pay the fee, as the Judiciary Branch, in a transversal manner, could not extend a tax benefit without a specific legal provision, even under the mask of equal protection.

The foreigner appealed to the Supreme Court requesting the Court to nullify the decision claiming, among many arguments, that the law recognizes the gratuitousness of fees for those who are underprivileged in relation to the practice of acts necessary to exercise their citizenship. The issuance of an identity card to foreigners with permanent residence in the country is among these acts.

Holdings

The Full Court granted the appeal unanimously under the terms of the opinion of Justice Rapporteur Luiz Fux who emphasized that temporary or permanent visa applicants have some payments to make as part of the legalization process, which may not be affordable for all of them.

The main issue, in this case, was to verify whether the foreigner who applies for permanent residency in the country is entitled to tax exemption on the fees charged for the migration regularization process, considering the contributive capacity and the legal scope of the term "citizenship" used by the Federal Constitution.

The Federal Constitution guarantees equality of treatment among native, naturalized, or foreign Brazilian residents in the country, subject to the exceptions it establishes.

In turn, Brazil's Migration Act (Law 13445/2017), issued after the appealed decision, establishes that consular fees and emoluments will not be charged for granting visas or obtaining migration regularization documents for members of vulnerable groups and individuals in economically disadvantaged conditions.

The Court decided that low-income immigrants should be exempt from those government fees even before Law 13445/2017.

According to the Court, the Federal Constitution ensures equal protection for Brazilians and foreigners residing in the country and provides for the admittedly poor, free civil registration, and acts necessary for the exercise of citizenship.

In other words, legal and non-legal norms that do not ensure this condition violate the constitutional text.

In addition, Brazil signed many multilateral agreements of public international law, such as the CONVENTION REGARDING THE STATUS OF ALIENS, at Habana in 1928. Article 5 foresees that "States should extend to foreigners, domiciled or in transit through their territory, all individual guarantees extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guarantees".

Besides, other international treaties determine the States to provide equal protection to foreigners and nationals, such as the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966); the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966); and the AMERICAN CONVENTION ON HUMAN RIGHTS (1969).

Thus, Brazilian legislation has changed the paradigm by which the national legal system views the condition of foreigners. In the past, there was a statute, forged under the bias of national security, that citizens should be protected from immigrants. Now, the Migration Law (Law 13445/2017) has been enacted and it grants legal status to foreigners based on the humanitarian discipline that the 1988 Constitution ensured.

In conclusion, the Court stressed that the rules that exempt people from paying legal fees (Article 5, items LXXVI and LXXVII) are inserted in those that protect the exercise of citizenship itself.

Additional Information

In 2017, the Full Court, unanimously, decided that social assistance benefits shall be granted to those who need them regardless of their nationality. This understanding, according to STF, fulfills the equal protection principle and the need to secure equal treatment between Brazilians and foreigners living in Brazil (**RE 587970**⁷⁴). Therefore, foreigners residing in Brazil are entitled to the cash transfer program called Continuous Cash Benefit⁷⁵, once the constitutional and legal requirements are met.

The Court rejected the argument that the benefit could only be granted to a foreigner from a country with which Brazil had signed an international agreement that foresees social assistance benefit to Brazilians who are in its territory (reciprocity principle). STF found that, although reciprocity permeates the Constitution, it is not an absolute rule for the treatment of foreign persons. For example, the National Health System is governed by the principle of universality of health care, a fundamental right. Thus, when entering the Brazilian territory, foreigners are entitled to medical care, in case they need emergency assistance, without the need for reciprocity to guarantee such support.

Graphic data

Docket n.º: RE 1018911

Full Court, Virtual Deliberation, 10 x 0

Decision date: 11 November 2021

Official Gazette: 2 December 2021

ODS: 1, 8, 10, 16, 17

General Repercussion

Justice Rapporteur Luiz Fux

Quote: "The foundation of immunity rules is the protection of fundamental rights against the levy of taxes".

⁷⁴ Full Court, Justice Rapporteur Marco Aurélio, decided on April 20, 2017.

⁷⁵ BPC, in the Brazilian Portuguese acronym.

FREEDOM OF MOVEMENT, RELIGION, AND ASSOCIATION

Freedom of religion and animal sacrifices during rituals

The Animal Protection Act which allows the ritual of animal sacrifice in cults of African origin to protect religious freedom is constitutional.

Extraordinary Appeal n. °: 494601

Facts

The Prosecution Office of the State of Rio Grande do Sul filed an extraordinary appeal to question whether a state law adding a paragraph to Article 2 of the State Code of Animal Protection was constitutional. The Article deals with the cruel treatment of animals and the added paragraph excluded animal sacrifice in the ritual of African religions from the scope of the forbidden conduct.

The prosecution argued that the law regulated criminal acts and that the federal government has exclusive jurisdiction over the matter. It also claimed that the exception raised by the law treated differently the religions by covering only African ones.

Holdings

The Supreme Court, by a majority, dismissed the extraordinary appeal according to the opinion of Justice Edson Fachin. The Supreme Court unanimously found that the ritual sacrifice was permitted under the principle of religious freedom.

On a formal level, the Supreme Court considered that the norm does not deal with criminal matters, since it establishes rules for the protection of fauna, and that the Article in question foresaw a case that excluded one's administrative liability. The provision did not establish an exclusion for unlawful conduct.

Besides, the Supreme Court considered that the Brazilian federation was incurring in omission regarding its competence to issue general rules on slaughtering. Thus, the Court concluded that the federal states were free to legislate on

this subject observing the jurisdiction set under Article 24, paragraph 3, of the Federal Constitution.

With regard to the material aspect, the Supreme Court found that the state had a duty to protect popular manifestations, the indigenous and Afro-Brazilian cultures, and those of other groups that participate in the national civilizing process (Article 215, paragraph 1, of the Constitution).

In addition, there was no violation of the principles of secularity and equality. Protecting African religions by law would not be a privilege but a means of securing religious freedom. The State could not be associated with any religion, neither by protecting nor by persecuting it. The principle of secularism of the State prohibits the contempt or suppression of rituals, especially regarding minority religions. In addition, the Constitution ensures a society free from prejudice, including religious prejudice. The Afro-Brazilian culture was found to deserve greater attention from the State, due to its historical stigmatization.

Finally, allowing the slaughtering did not mean inhibiting the protection of animals mentioned in Article 225, item 1, subitem VII, of the Constitution. The protection of a relevant constitutional value should not hinder the exercise of a fundamental right. In this sense, it would be disproportionate to prevent any religious sacrifice when people eat various species of meat on a daily basis.

Graphic data

Docket n.º: RE 494601

Full Court, In-Person Deliberation, 7x1⁷⁶

Decision date: 28 March 2019

Official Gazette: 19 November 2019

ODS: 15, 16

Amici Curiae

Justice Edson Fachin

Quote: "It is not proportional to prevent any and all religious sacrifice of animals, annihilating the exercise of the right to freedom of belief of certain groups when the population consumes meat of various species on a daily basis. (...). The slaughter of animals is acceptable if, removing all ill-treatment at slaughter, the meat is intended for human consumption. With this, the level of protection granted to animals by the Federal Constitution is maintained without the total suppression of the exercise of religious freedom."

⁷⁶ Score for the thesis of general repercussion in the case.

The compulsory nature of union fees has no Constitutional grounds.

Direct Action of Unconstitutionality n. °: 5794 ⁷⁷

Facts

A series of union confederations filed several actions before the Court against Article 1 of Law 13467/ 2017, which introduced the need for express and previous authorization by the employee so the union could charge individual fees.

According to the claimants, the compulsory nature of union fees is based on the Constitution, which guarantees union autonomy and the protection of workers.

Holdings

The Full Court, by a majority, rejected the claims under the terms of the opinion of Justice Luiz Fux, the Rapporteur.

The Court decided that the Constitution does not contain any command imposing compulsory union fees. It delegates to ordinary law the task of providing for the referred contributions and grants the Union the power to create social contributions, which, certainly, includes the prerogative to extinguish or modify the nature of existing contributions.

Specifically, the suppression of the compulsory nature of the union contribution does not violate the constitutional principle of the autonomy of the union organization. In this sense, Law 13497, of 2017, aims to combat the excessive proliferation of union organizations in Brazil.

The democratic legislator found that the compulsory contribution was generating an excessive and artificial supply of union organizations, which constitutes a social loss to the detriment of workers. Not only was a portion of employees' salaries transferred to entities over which they had little or no interference, but the stratospheric number of unions did not translate into a corresponding increase in the workers' well-being.

⁷⁷ Jointly ruled with cases: ADI 5912; ADI 5923; ADI 5859; ADI 5865; ADI 5813; ADI 5885; ADI 5887; ADI 5913; ADI 5810; ADC 55; ADI 5811; ADI 5888; ADI 5892; ADI 5806; ADI 5815; ADI 5850; ADI 5900; ADI 5950; ADI 5945.

Furthermore, the guarantee of a source of funding, regardless of results, creates perverse incentives for unions that are uncommitted to the wishes of employees. Evidently, if everyone was obliged to pay union contributions, whether or not they agreed with the management of the union entity, it is to be assumed that the survival of the latter was not linked to the satisfaction of the members of the represented category. In this way, Law 13467, of 2017, had the scope to strengthen and make trade unions entities efficient, which are now guided by the need to pursue the real interests of workers to attract more members.

Also, the suppression of the compulsory nature of union fees protects freedoms of association, unionization, and expression.

This is why the decision of the democratic legislator was in the sense that the union fees, created in the authoritarian period between 1937 and 1946, voided the freedom to join unions, since, in one way or another, the employee would be obliged to finance them.

With regard to freedom of expression, it is known that unions frequently engage in political activities, launching, and supporting candidates, calling for protests and maintaining close ties with political parties. It so happens that political discourse is the core of freedom of expression. By requiring individuals to finance political activities with which they do not agree, through compulsory contributions to unions, the previous regime certainly violated the fundamental guarantee of freedom of expression.

Finally, the suppression of mandatory union fees does not compromise the provision of free legal assistance before the Labor Court.

Unions still have multiple forms of funding, including the confederative contribution, the assistance contribution, and others.

It should be noted that Law 13467, of 2017, expanded the forms of financing of legal assistance provided by unions, granting the right of union lawyers to receive loss of attorney fees.

Also, previous rules on the matter, already set forth that, in the absence of a union, the Public Defender's Office is responsible for providing legal assistance in the labor sphere.

Graphic data

Docket n.º: ADI 5794

Full Court, Virtual Deliberation, 6x3

Decision date: 29 June 2018

Official Gazette: 23 April 2019

ODS: 8, 16

Amici Curiae

Justice Luiz Fux

Quote: "It cannot be accepted that the union fee is imposed on all members of the economic and professional categories and, at the same time, that the Constitution determines that no one is obliged to join or remain affiliated to a union entity."

Freedom of movement

The detention of children and adolescents for investigative purposes is not in line with the right to freedom of movement, dignity, and respect.

Direct Action of Unconstitutionality n. °: ADI 3446

Facts

The Liberal Social Party filed this action to challenge several provisions of the Child and Adolescent Statute⁷⁸.

The party questioned the Article that specified as a crime the detention of children and adolescents for investigation purposes, or for loitering unless they were in *flagrante delicto* or in the event on order with a statement of reasons. The party claimed that the State would not be able to pick up poor children from the streets considering that they had acquired the right to “remain in the gutter”. Accordingly, this provision would violate the due process and the principle of full protection toward children.

In addition, the party questioned the provision that established protective measures as penalties for unlawful acts perpetrated by children and the one that set the jurisdiction to enforce these measures to the Guardianship Council. In short, the party questioned the lack of penalties (socio-educational measures) established for the child who commits an infraction and the submission of the issue to an organ that is not part of the Judicial Branch.

Holdings

The Supreme Court unanimously denied the claim according to the opinion of Justice Rapporteur Gilmar Mendes.

Initially, the Rapporteur highlighted the rules of the Child and Adolescent Statute to solve the case. In addition to the Federal Constitution and the mentioned statute, the international treaties that Brazil had signed.

Accordingly, the CONVENTION ON THE RIGHTS OF THE CHILD ensures the principle of freedom, set forth also under the UNITED NATIONS CHARTER, according to which

⁷⁸ ECA, in the Brazilian Portuguese acronym.

no child shall be subject to arbitrary or unlawful interference in his or her private life, and is entitled to the protection of the law against such interference (Article 16.1). The AMERICAN CONVENTION ON HUMAN RIGHTS foresees that every child has the right to the measures of protection that their condition as a minor requires on the part of their family, society, and the State. In addition, the BEIJING RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE are based on several principles and rights discussed in the action, such as the promotion of the well-being of the minor and his family (item 1.1), the right to be notified of the accusations (item 7.1), the use of extrajudicial means for conflict resolution (item 11), and the brevity of measures restricting freedom (item 13), with the application of measures of insertion in institutions as a last resort (item 19).

The Court considered that the Articles of the Child and Adolescent Statute that guarantee the freedom of movement are in accordance with the doctrine of the child's full protection under Article 227 of the Constitution, which further ensures the right to dignity, respect, and prohibits all forms of neglect, discrimination, violence, cruelty, and oppression.

As so, the Full Court found that the requests sought to eliminate the right to freedom of movement of the underage and to restore the extinct "detention for inquiries", which violated Article 5, item LXI, of the Federal Constitution. The right to free movement is an unamendable clause (Article 60, paragraph 4, item IV, of the Constitution) and it could never be suppressed or unduly restricted by a constitutional amendment.

On the other hand, the Court stressed that the underage's freedom of movement was not absolute. It allows restrictions provided that they are compatible with the special conditions applied to persons under the process of development. However, restricting the rule, in this case, would aggravate the situation of extreme deprivation of rights for children and teenagers, especially for those who are homeless. The Supreme Court found that such circumstances could not be solved with new restrictions and the reinstatement of the doctrine that regarded children and adolescents as mere objects of the State's intervention.

Based on these guidelines, the Court dismissed the alleged violation of the principle of non-removability of the jurisdiction of courts regarding the provision that set the Guardianship Council responsible to enforce the measures established by the statute. The Council is composed of the collegiate laypeople, similar to a court jury, established under Article 5, item XXXVIII, of the Constitution. In addition, the Council allows the direct participation of society in the implementation of public policies defined in Article 227 of the Constitution and aimed

at the promotion and protection of children, in line with the most current theories of justice, democracy, and direct popular participation. Furthermore, the performance of the Council would not inhibit the Judiciary to hear further suits.

Regarding the penalties, the Court found that the legislator's decision not to apply more severe measures complies with the perception that children are developing beings who need, above all, protection and education. Also, the legislator has considerable discretion to define the appropriate treatment for children at risk due to their behavior. The protective measures and the use of detention as a last resort were not disproportionate, but rather in line with constitutional and international norms.

Graphic data

Docket n.º: ADI 3446

Full Court, In-Person Deliberation, 9x0

Decision date: 8 August 2019

Official Gazette: 31 July 2020

ODS: 16

Amici Curiae

Justice Rapporteur Gilmar Mendes

Quote: "(...) despite the progress foreseen in the 1988 Constitution, in the Statute of Children and Adolescents and in the norms of International Law, there is still a huge contingent of children and adolescents who are deprived of the most basic rights provided for by national and international norms, a situation that can be aggravated by diminishing completely their freedom of movement."

Freedom to gather in public spaces

The constitutional requirement to provide prior notice regarding the right to assemble is satisfied with the dissemination of information that allows the Public Administration to ensure that it's peacefully carried out or that it does not frustrate another meeting in the same place.

Extraordinary Appeal n. °: 806339

Facts

In this case, a political demonstration entitled "National Day of Struggle against the lies of the Lula Government", was organized in protest against the conduction of the project to transpose the São Francisco River. The participants completely obstructed the flow of highway BR-101, in Propriá, state of Sergipe, precisely on the bridge over the São Francisco River. There was no prior notification to any public authority, but only the disclosure of the act in the media to the general public. The Union became aware of the facts the day before the gathering, not through communication from its organizers, but through the Ministry of Justice, which sent an official letter. The Federal Highway Police was not informed either, and they became aware of the demonstration through a bulletin, distributed by the Oil Workers Union of Sergipe and Alagoas.

The Union filed a prohibitory interdict in which it obtained a provisional and urgent measure that resulted in an order for the immediate release of the route, under penalty of a daily fine to be paid by the movement's organizers.

The regional federal court affirmed the order emphasizing that the demonstration disrupted the free movement of people and that it is necessary to properly and previously notify the competent authorities to legitimize such protests.

The organizers' entities, then, filed an extraordinary appeal to the Supreme Court, claiming that: a) there had been wide disclosure regarding the protests through media, flyers, etc; b) the absence of prior notice to the authorities would not deem the meeting illegal, since the Public Power has no legitimacy to exercise a judgment of the convenience on the meeting or its way of being.

Holdings

The majority of the Court granted the appeal according to the opinion of Justice Edson Fachin. The Court decided that the interpretation according to which an assembly is illegal, if not preceded by notification, violates the Constitution.

In a democratic society, a public space is not just a place that is accessible to the public at any time, but it is also a place for interaction. There is a modest custom in democratic coexistence and it is in relation to it that any restriction to such an important right should be estimated.

Prior notice or notification allows the public to ensure that the exercise of the right to assemble takes place even in a peaceful way and that it is not fruitful of another meeting at the place. A notification that allows the Public Administration to carry out the security of the demonstration or public meeting is sufficient.

The notification does not need to be personal or registered, because it implies recognizing a sense of organization that was not required by the Constitution itself.

In addition, spontaneous demonstrations are not prohibited by the constitutional text, nor are they banned by human rights treaties. On the contrary, the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Article 21) and the INTER-AMERICAN CONVENTION ON HUMAN RIGHTS (Article 15) ensure the right to assemble and the international organs' interpretation on this subject, just as the Supreme Court's, implies recognizing that it is not possible to interpret the constitutional requirement as a condition for the exercise of the right. The constitutional requirement of prior notification cannot be confused with the need for prior authorization.

In this sense, the lack of notification does not *ipso facto* makes the meeting illegal. Peaceful demonstrations enjoy a presumption of legality, which means that if notification is not possible, the organizers should not be punished by criminal or administrative sanctions that result in a fine or imprisonment.

Additional Information

The subject to which this case refers is intrinsically connected to freedom of speech, a theme that was more deeply explored in the work "[Case Law Compilation vol. 2 – Freedom of Speech](#)". A few selected cases that more closely relate to the right to assemble, and can be found in that volume, are: "The marijuana march case", in which the Court decided that freedom of speech protects rallies calling for drug legalization; the "Dossier on members of the 'anti-fascism' movement", in which the Court decided that the State cannot collect or share

information about the personal lives, choices or political party affiliations of citizens, teachers or civil servants, as well as their civil practices, once they are identified as members of antifascism movements. If they act within the boundaries of the law, they are exercising their rights to freedom of expression, assembly, and association; and “The Football World Cup General Act”, in which the Court decided that the law can impose reasonable restrictions on the right to freedom of speech regarding fans who attend matches during the Football World Cup, in order to prevent potential conflicts in these events.

Graphic data

Docket n.º: RE 806339

Full Court, Virtual Deliberation, 6 x 5

Decision date: 15 December 2020

Official Gazette: 19 March 2021

ODS: 11, 16

Amici Curiae I General Repercussion

Justice Edson Fachin

Quote: “In a democratic society, public space is not only a place for circulation, but also for participation. There is a modest cost for democratic coexistence, and it is in relation to this cost that any restriction to such an important right must be estimated.”

RIGHT TO PRIVACY AND TO BE SAFE

The inviolability of the home

The forced entry into a home without a court order, even at night, is only permissible if grounded on well-founded reasons, duly justified *a posteriori*, indicating that a situation of *flagrante delicto* was occurring within the house. In this case, the evidence collected in the searched home will also be lawful.

The absence of a statement of reason entails the disciplinary, civil, and criminal liability of the agent or authority, and nullifies the acts performed.

Extraordinary Appeal n. °: 603616

Facts

This case refers to an extraordinary appeal concerning the legality of evidence obtained through the forced entry of a domicile by police authorities without a court order. The applicant and a third person were being investigated for drug trafficking. The third person was spotted driving a truck with 23 kilograms of cocaine. After the arrest, he stated that the drug belonged to the applicant, which is why police officers went to the applicant's home, where they entered without judicial authorization. There they found 8 kilograms of drugs, and the applicant was arrested in *flagrante delicto*.

The lower court recognized the permanent nature of the crime of drug trafficking and upheld the applicant's criminal conviction based on the evidence gathered in the home search even without a court order. It found that the forced entry into the applicant's house was supported by the prior monitoring of the suspects and the statements of the third party, elements considered sufficient to indicate well-founded reasons that the defendant was committing the crime of drug trafficking.

The appellant argued that the evidence obtained by means of an invasion of his home by police authorities is unlawful since the indispensable search and seizure order had not been presented. He contended that this fact breached the fundamental right of inviolability of the home and the inadmissibility of the evidence obtained by illegal means (Article 5, item XI and 5, item LVI of the Federal Constitution). He also claimed the violation of his rights to an adversary proceeding and to the opportunity to be heard, alleging that the conviction was

based only on the evidence obtained during the police investigation phase (Article 5, item LV, of the Federal Constitution).

Holdings

The Supreme Court, by a majority, denied the extraordinary appeal according to the opinion of the Justice Rapporteur Gilmar Mendes.

The Court stated that the Federal Constitution ensures the inviolability of the home as a fundamental right. The theme was also established by international treaties on human rights (AMERICAN CONVENTION ON HUMAN RIGHTS and INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS) that protect one's home from "abusive and arbitrary interference." The Court, however, asserted that forced entry into a home is tolerated in four exceptional situations: *flagrante delicto*, disaster, to provide assistance, and by a court order.

According to the traditional interpretation of STF, the court order is not necessary when there is *flagrante delicto* of a permanent crime (i.e. an ongoing crime). So, it is possible to carry out the measures without considering the evidence illicit. This is because, in permanent crimes, the consummation continues in time, which allows considering that the perpetrator is constantly in *flagrante delicto* as long as he or she does not cease the criminal act (Article 303 of the Code of Criminal Procedure). In this case, while the defendant kept drugs in his residence, he was committing the crime of drug trafficking under Article 33 of Drugs Law (Law 11343/2006). Thus, he was liable to be arrested in the act of *flagrante delicto*. Therefore, the forced entry by police agents, regardless of a court order, was lawful.

The Rapporteur, however, said that this understanding is insufficient. He suggested an interpretation that would guarantee the inviolability of the house and also protect the public security agents, by offering safer guidance on their performance. He asserted that, considering the current position, if the police officer invades a residence due to the suspicion of a crime in progress and finds no reason for arrest *in flagrante*, he will respond for the crime of violation of domicile, enhanced by his status as a civil servant (Article 150, paragraph 2 of the Penal Code⁷⁹). Thus, forced entry into a home without justification would be an arbitrary act. The statement of a flagrant situation, after the forced entry, would not justify the measure.

⁷⁹ The provision was repealed by Law 13869 in 2009.

In this context, the Court established that judicial control of a criminal investigation is indispensable to make the right of freedom compatible with the interests of public security. The importance of reinforcing posterior control was stressed, in which police officers are required to demonstrate that the measure was adopted on well-founded reasons (justified grounds). The indication of minimum elements that authorize forced entrance into the home is therefore indispensable. The Court held that this subsequent justification is a simple requirement, compatible with the stage of taking evidence. The communication to the judge of the *flagrante delicto* will be immediate, and this authority will be responsible to analyze the legality of the measure.

The police officer may invoke his or her own testimony to justify the measure. Unlawful evidence, anonymous information, statements by informants, and in general, elements that have no evidentiary force in court, however, do not serve to justify invasive measures. In demonstrating the well-founded reasons for the measure, the agent no longer takes the risk of committing the crime of invasion of domicile, even if the diligence does not have the expected result. Eventually, the judge may consider that the measure was not justified on sufficient grounds. This, however, will not generate the accountability of the officer, except in case of inexcusable abuse. Thus, both the right to inviolability of domicile and the legal certainty of State agents will be optimized.

Graphic data

Docket n.º: RE 603616

Full Court, In-Person Deliberation, 8x1

Decision date: 5 November 2015

Official Gazette: 10 May 2016

ODS: 16

Amici Curiae I General Repercussion

General Repercussion

Justice Rapporteur Gilmar Mendes

Quote: "Imagine, for example, that the police selected houses by lot and, in those chosen, carried out a search and seizure, regardless of any information about their residents. Certainly, crimes would be caught in some of them. The positive result of the searches, however, would not justify its accomplishment. The bottom line is that the criterion for the decision to carry out the forced entry was arbitrary. Protection against arbitrary search requires that due diligence be evaluated based on what was known before it was carried out, not afterward."

The prohibition to strike of the police officer

The right to strike is forbidden to civilian police officers and all civil servants who are directly involved in the area of public security.

The participation of the Public Power is mandatory in mediation established in the relevant legislation for those involved in this sector, so that their interests may be vocalized.

Extraordinary Appeal with interlocutory motion n. °: 654432

Facts

This case stems from an extraordinary appeal against a decision that concluded that civilian police officers could go on strike. The State claimed that certain categories of civil servants, due to their role, are not fully entitled to go on strike due to the potential harm it could cause to the community.

Holdings

The Federal Supreme Court, by a majority, granted the appeal according to the opinion of Justice Alexandre de Moraes.

The Court found that civilian police officers and civil servants who are directly involved in public security are not entitled to go on strike. The participation of the Public Power in mediation established by Article 165 of the Code of Civil Procedure is also mandatory, to allow the interests of those who fall within this category to be vocalized.

STF emphasized that police careers are state careers, and are essential to maintaining democratic normality. There is no equivalent activity in the private sphere. Education and health are also essential services provided by the State, but what distinguishes them from police activity is that the private sector may carry them out, under express constitutional authorization.

When it comes to performing services of public security, however, it is impossible to complement or substitute police activity for private activity. The police service is the armed wing of the State. It is responsible for internal public security, public order, and social peace, just as the Armed Forces are responsible for national security. Therefore, it is inadmissible that the armed wing of the State

should decide to paralyze its activities since the State does not go on strike. This would feature an anarchy situation, which is banned by the Federal Constitution.

The Full Bench mentioned during the trial certain rules of international law, such as the PACT OF SAN JOSE, COSTA RICA, which authorizes denying members of the police force the right to association. In the same way, the EUROPEAN CONVENTION ON HUMAN RIGHTS allows certain restrictions on freedom of assembly, association, and unionization for members of the police force, to guarantee the public security, order, and crime prevention. The INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS also expressly establishes the possibility of limiting the exercise of the right to association for members of the police force in order to protect public order and security.

Police activity is a distinguished career, with specific rights and duties. The dispute before the Supreme Court is not limited to the conflict between the right to strike and the principle of continuity of the public service. It also concerns the necessary constructive and conciliatory interpretation between the right to strike and the right of society to security, through a duty on the part of the State to enforce it by the police agencies described in the constitutional text.

The Court established the prevalence of public and social interest in maintaining public security, order, and social peace over the individual interests of a particular category of civil servants – specifically police officers, excluding from this class of workers the possibility of exercising the right to go on strike. The Court also pointed out that the stoppage of the Judiciary Police entails the inactivity of the Criminal Justice itself and of the Prosecution Office.

The Court concluded that the issue did not involve an analogy with the situation pertaining to the military or the Armed Forces, whose ban on strike extends to the military policemen.

Graphic data

Docket n.º: ARE 654432

Full Court, In-Person Deliberation, 7x3

Decision date: 5 April 2017

Official Gazette: 11 June 2018

ODS: 16

Amici Curiae I General Repercussion

Justice Alexandre de Moraes

Quote: “How can the armed wing of the State maintain the necessary discipline and hierarchy with the right to strike, without jeopardizing public security, order,

and social peace? (...) It's not possible. No one is obliged to enter the public service, especially in police careers, no one is obliged to exercise what, in particular, I consider a true priesthood, which is the police career. But those who remain to know that the police career is more than a profession, it is the armed wing of the State, responsible for guaranteeing internal security, public order, and social peace. It is not possible for the armed wing of the State to want to strike. The state does not strike. The state on strike is anarchic. The Constitution does not allow it."

The state plan to downgrade police lethality

Considering the persistent violation of human rights by the security forces of the State of Rio de Janeiro, it shall elaborate and present to the Supreme Court a plan aiming to reduce police lethality.

Motion for clarification on the provisional measure of the Claim of Non-Compliance with a Fundamental Precept n. °: 635

Facts

In this case, a political party and several *amici curiae* filed a motion for clarification in face of a Full Court's prior decision which had halted police raids in Rio de Janeiro's favelas during the Covid-19 pandemic.

According to the petitioners, the decision was: (i) under contradiction, because it did not order the implementation of a plan to reduce police lethality; (ii) under obscurity, as it refers to priority in the processing of inquiries and investigations when the victims are children, and not children and adolescents, as requested since the beginning; and (iii) omission, for not having considered the request for publicity of all the protocols of action of the Rio de Janeiro police.

Holdings

The Full Court partially heard the motion according to the opinion of Justice Rapporteur Edson Fachin. Unanimously, the Court ordered the State of Rio de Janeiro, within a maximum period of ninety days, to prepare and forward to the STF a plan aimed at reducing police lethality and the control of human rights violations by the security forces of Rio de Janeiro, with objective measures, specific timetables, and the forecast of resources necessary for its implementation.

Therefore, the use of lethal force by state agents should only be justified when other means have been exhausted, including non-lethal weapons, and necessary to protect life or prevent serious harm resulting from a concrete and imminent threat. Furthermore, in the terms of Article 227 of the Federal Constitution, it is imperative to give absolute priority to the investigation of incidents that have children or adolescents as victims. In addition, to safeguard the right to life, it is necessary to recognize the obligation of ambulances in previously planned police operations where there is the possibility of confrontations.

The Court set forth conditions to be observed by the security forces of the State of Rio de Janeiro when they get orders to carry out house searches.

The Justices accepted the proposal to create a judicial observatory about the police work defending citizens, not against them, within the National Council of Justice (CNJ), to monitor compliance with this decision. The group will be integrated by researchers and representatives of the Federal Supreme Court, the police, and civil society entities, to be appointed by the president of the Court after its members have been approved by the Plenary of the Court.

Finally, the State of Rio de Janeiro should, within a hundred and eighty days, install GPS equipment and audio and video recording systems in police vehicles and in the uniforms of security agents, with the subsequent digital storage of the respective files.

Additional Information

The provisional measure challenged in this case was reported in the Case Law Compilation: Covid-19, the second edition of the first volume.

Graphic data

Docket n.º: ADPF 635 MC-ED

Full Court, Virtual Deliberation, 10x0⁸⁰

Decision Date: 3 February 2022

Official Gazette: 26 May 2022

ODS: 3, 4, 16

Amicus Curiae / Public Hearing

Justice Edson Fachin

Quote: "We are not here to criticize indiscriminately the performance of the police forces. There is a great majority of dedicated police officers with integrity, who seek the best way to protect society and reduce violence, including by putting their own lives and those of their families at risk. The issue of police lethality is an important one. The theme of police lethality is extremely complex and distressing because it highlights social inequality in an evident way. In many cases, there is a selectivity inherent to the criminal system present on both sides: in those who die because of the police actions, as well as in the deaths of the police themselves during such actions. The structural racism of society reveals itself to be potentiated in the deaths caused by the police forces."

⁸⁰ Concerning the plan, other requests were decided by different scores.

Access of intelligence agencies to personal data

The bodies that make up the Brazilian Intelligence System can only provide data and specific knowledge to the intelligence agency when the public interest in the measure is proven.

Any decision to provide this data must be duly and formally reasoned so Courts may control its legality.

Direct Action of Unconstitutionality n. °: 6529

Facts

Political Parties filed this lawsuit questioning the constitutionality of the procedures set by a statute that established the sharing of personal data between intelligence agencies.

The challenged rule⁸¹ allowed the Brazilian Intelligence Agency (ABIN⁸²) to access specific data related to the defense of institutions and the national interests upon an act of the President of the Republic.

ABIN is a central body of the Brazilian Intelligence System (Sisbin⁸³), composed of other bodies such as the Federal Police, the Office of the Attorney-General to the Union, and the Department of Defense and Foreign Relations.

The petitioners alleged that after the President issued two decrees⁸⁴ changing ABIN's structure, the agency's director-general could have access to classified information by a simple request, and the way the rule had been interpreted compromises fundamental rights.

Holdings

⁸¹ Law 9883 of 1999, sole paragraph of Article 4: "The components of the Brazilian Intelligence System will provide ABIN with specific data and knowledge related to the defense of institutions and the national interests for the purposes of compilation, under the terms and conditions to be approved by a presidential act."

⁸² In the Brazilian Portuguese acronym.

⁸³ In the Brazilian Portuguese acronym

⁸⁴ Decree 9794/2019 and Decree 10445/2020.

The Full Court established that the agencies comprising the Brazilian Intelligence System can only provide data and specific knowledge to the Brazilian Intelligence Agency when the public interest of the measure is proven. The Court removed the access to data based on personal or private interests.

Justice Rapporteur Cármen Lúcia reinforced that the provision of data to ABIN aims to gather and turn them into an efficient defense of institutions and the national interests. She emphasized that only specific data and knowledge related to these purposes are legally admitted and are compatible with the Federal Constitution. Any other interpretation is invalid.

The practice of sharing information based on the agency or an agent's private interest is a misuse of purpose and abuse of rights. The Rapporteur stressed that the practice could not be applied as a subterfuge to serve or benefit private or personal interests, especially those who have access to the data, as it would distort constitutionally defined powers. Therefore, society cannot be a hostage to the voluntarism of rulers or public agents, and the abuse of the State machine to meet personal objectives is a dictatorial attitude, in contrast to the democratic rule of law.

To avoid such a scenario, the Full Court established criteria to allow the information to be shared. First, the component agencies of the Brazilian Intelligence System may only provide data and specific knowledge to ABIN when the public interest of the measure is proven. Second, any request for data must be duly reasoned to allow Courts to promote the legality control. Third, even if the public interest is present, the national legal system provides for cases under the jurisdiction clause of reservation, that is, the need for analysis and prior authorization by the Judiciary. In these cases, according to the Federal Constitution, the prior intervention of the State-judge is essential, without which any action by a State authority will be illegitimate, except for a case of *flagrante delicto*. Finally, in case of legit supply of data to ABIN, a formal proceeding must be established, besides electronic systems and registers of access to enable accountability in the event of omission, deviation, or abuse.

Additional Information

In 2022, the National Congress enacted the Constitutional Amendment 115 which includes the protection of personal data in the Constitution's list of fundamental rights and guarantees⁸⁵. The innovation affirms the need to foster institutional measures that ensure citizens' personal data are not being accessed or gathered for unlawful purposes.

Prior to the Amendment, the Supreme Court's case law interpreted the limits of sharing personal data between public bodies and authorities within the right to privacy, as foreseen under Article 5, item XII⁸⁶, of the Constitution, which includes the right to keep one's communications and correspondence under seal. The general rule is to safeguard one's privacy. The breach of a seal is the exception, and it shall be applied to a criminal investigation or an instruction. In any case, it may be subject to Courts that, as an equidistant body, can assess its compliance with the law on a case-by-case basis.

As so, for example, the Supreme Court considered that a rule should not allow the Secretariat of Brazil's Federal Revenue to have direct access to the banking data of taxpayers as it violates their right to privacy. In addition, the Federal Revenue is a party in the tax-legal relationship (**RE 389808**⁸⁷).

On the other hand, the right to confidentiality cannot be applied to Tax Administration duties, since citizens cannot claim the right to bank secrecy to commit offenses. Therefore, in case **RE 601314**⁸⁸, the Court decided by a majority that a financial institution could provide information to the Treasury without a court order when an administrative or tax procedure has been established and the administrative authority considers the information essential. The Court considered that the statute⁸⁹, besides establishing objective requirements for the request of information by the Tax Administration, also guarantees the duty of confidentiality to carry the transfer from the bank to the tax sphere, which shields the secrecy of taxpayers' financial transactions. Finally, in case of abuse, authorities may face civil, administrative, and criminal liability.

⁸⁵ Federal Constitution, Article 5: "LXXIX. the right to protection of personal data is ensured, including in digital media, under the terms of the law".

⁸⁶ Federal Constitution, Article 5: (...) XII. the secrecy of correspondence and of telegraphic, data and telephone communications is inviolable; except, in the latter case, by a court order, in the cases and as provided by law for the purposes of criminal investigation or finding of evidence in criminal proceedings.

⁸⁷ Full Court, Justice Rapporteur Marco Aurélio, decided on December 15, 2010.

⁸⁸ Full Court, Justice Rapporteur Edson Fachin, decided on February 24, 2016.

⁸⁹ Article 6 of Law 105/2001.

Following these grounds, the Full Court ruled that reports from the Financial Intelligence Unit and tax procedures of Brazil's Federal Revenue, which determines a tax obligation, could be shared with the criminal prosecution bodies for criminal purposes (**RE 1055941**⁹⁰). Although prior judicial authorization is not required, a formal procedure must be established, and the information must be kept confidential in the records. The procedure is indeed subject to subsequent judicial control.

Regarding the secrecy of communications and correspondences, the Court decided that without judicial authorization or legal grounds, the evidence obtained by opening a letter, telegram, package, or similar means is unlawful (**RE 1116949**⁹¹). In this case, a member of the Armed Forces was convicted of drug trafficking. The illegal substance had been found in a package sent through the mail. The appellant claimed the conviction was null under the clause of inviolability of correspondence. The Supreme Court pointed out that the opening of the package had not been judicially authorized. This meant that the conviction itself was not compatible with the Constitution.

The Rapporteur, Justice Edson Fachin, stressed that under the influence of the 1988 Constitution, the secrecy of correspondence must also be read considering the human rights treaties and, consequently, the interpretation given to them by international enforcement bodies. This means that the law must describe the cases in which there can be exceptions to secrecy. Also, these exceptions must be legitimate and a necessity to preserve democracy. In other words, the exceptions must be proportionate to the ends they aim to achieve.

On the other hand, the Court has recently granted an appeal to declare valid the wiretapping and consider the lawfulness of the evidence obtained from it (**RE 625263**⁹²). In this case, the appellant claimed the investigation was complex and the successive extensions of the wiretapping warrant were necessary under the principle of reasonableness. The Supreme Court decided that the wiretap may be successively extended if the initial order and the extensions have legitimate explanation, even if brief, to support the need for the investigation to continue.

Graphic data

Docket n.º: ADI 6529

Full Court, Virtual Deliberation, 10 x 0

⁹⁰ Full Court, Justice Rapporteur Dias Toffoli, decided on December 4, 2019.

⁹¹ Full Court, Justice Edson Fachin, decided on August 18, 2020.

⁹² Full Court, Justice Alexandre de Moraes, decided on March 17, 2022.

Decision date: 11 October 2021

Official Gazette: 22 October 2021

ODS: 16

Amici Curiae

Justice Rapporteur C  rmen L  cia

Quote: "The effectiveness of intelligence activities is usually associated with the confidential nature of the process and the information collected. Nevertheless, the Democratic State of Law requires that this State function, like all others, to be subject to control that allows the analysis of adequacy to the strict public purposes to which it is addressed. Democracy does not admit arbitrariness and requires that everyone be submitted to the Law".

RIGHT TO ACCESS JUSTICE AND TO DUE PROCESS

Maria da Penha Act

The Act that establishes measures to inhibit domestic and family violence against women is constitutional.

Direct Action for the Declaration of Constitutionality n. °: 19

Facts

The President of Brazil filed this case requesting the Supreme Court to interpret provisions of the so-called Maria da Penha Act which had been differently applied nationwide.

The statute established mechanisms to curb domestic and family violence against women. It also assigned civil and criminal courts to hear cases related to the matter, pending the establishment of Special Courts for Domestic and Family Violence against Women, and removed the offenses committed against them from the list of minor offenses (Law 9099/1995).

The petitioner argued that the protection granted to families by the State is a constitutional principle (Article 226, paragraph 8⁹³) and, therefore, there would be a preferential treatment towards women in order to redress the imbalance that exists due to women's physical and moral peculiarities in the Brazilian culture. The petitioner also argued that the statute did not violate the state members' autonomy to set their own organization, pursuant to Articles 96, item II, subitem d⁹⁴.

Holdings

⁹³ Article 226. The family, which is the foundation of society, shall enjoy special protection from the State. (...) Paragraph 8. The State shall ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family.

⁹⁴ Article 96. It is of the exclusive competence of: (...) II – the Federal Supreme Court, the Superior Courts and the Courts of Appeal, to propose to the respective legislative branch, with due regard for the provisions of Article 169: (...) d) alteration of the judicial organization and division;

The Supreme Court, unanimously, granted the declaratory claim on the grounds that the Maria da Penha Act fulfilled the constitutional provision which enjoins the State to establish mechanisms to restrain family relationships from violence (Article 226, paragraph 8 of the Constitution).

The Court held that the Act represents a legislative advance given that it ensured assaulted women effective access to repair, protection, and justice. Accordingly, using gender as a criterion of differentiation is not disproportionate or illegitimate, given that women are vulnerable to physical, moral, and psychological abuse in the private sphere. The Court held that the Act also reduced social and cultural discrimination, which must be fought by compensatory legislation and by the promotion of equality. Thus, the Act complied with the principle of equal protection and with the legal and constitutional order.

In addition, the Court found constitutional the Article that assigned domestic and family violence cases against women to civil and criminal courts pending the establishment of Special Courts for Domestic and Family Violence. The Court held that neither the autonomy of the states to set their own organization, nor their legislative competence to establish courts were violated since there is no enforcement or establishment of these Special Courts by federal law, but only an authorization to create them, considering the need to give uniform and specialized treatment to cases of violence against women in all Brazilian states.

Lastly, the Court held that the removal of offenses committed against women from the list of minor offenses (Law 9099/1995) was a political-normative option chosen by legislators who sought to give special protection to women and distinct treatment for crimes of domestic and family violence against them.

Additional Information

Maria da Penha Act⁹⁵ was named in honor of Maria da Penha Fernandes, who suffered constant aggression from her husband and was left paraplegic after an attempt of murder. She submitted a petition before the INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (IACHR) claiming that Brazil had “condoned the situation”

⁹⁵ Law 11340, enacted on August 7, 2006, created mechanisms to inhibit domestic and family violence against women, pursuant to paragraph 8 of Article 226 of the Federal Constitution, the Convention on the Elimination of All Forms of Discrimination against Women and the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women; provided for the creation of Courts for Domestic and Family Violence against Women; amended the Criminal Procedure Code, the Penal Code and the Penal Execution Law; and took other measures.

for more than 15 years by failing to prosecute her husband. In 2002, the Commission found the State responsible for violating her rights to judicial guarantees and judicial protection, guaranteed by Articles 8 and 25 of the AMERICAN CONVENTION. Thus, the Act is also a result of the country's commitment to review its statutes and policies on account of domestic violence after its conviction⁹⁶.

Therefore, the Supreme Court's ruling affirming the Act is considered a landmark case. It represented a watershed that opened several subsequent rulings in regard to the Maria da Penha Act and the State's measures to protect women from domestic violence.

During the same sitting, the Full Court decided that the Prosecution is entitled to start a criminal act regardless of the victim's formal initiative to do so, and regardless of the severity of the corporal offense (**ADI 4424**⁹⁷). The understanding was affirmed on **ARE 773765**⁹⁸ when the Court set the following legal thesis under the general repercussion doctrine: "Bodily injury offenses committed against women in the domestic and family environment are subject to unconditional public criminal action".

In addition, STF has handed down other important decisions that impact criminal policies on domestic violence such as a) the minimis doctrine shall not be applied to offenses regarding domestic violence against women (**RHC 133043**⁹⁹) and b) convictions to serve sentence in closed-regime due to offenses under Maria da Penha Act shall not be replaced by the punishment of restraint of rights, as per the general rule of the Penal Code (**HC 131219**¹⁰⁰), even if the offense is considered a misdemeanor (**HC 137888**¹⁰¹).

In a recent decision (**ADI 6138**¹⁰²), the Court unanimously found constitutional some alterations to the Maria da Penha Act, which authorized police officers to enforce protective measures in cases of domestic violence.

Finally, the Full Court decided that the theory of self-defense of the honor violated the principle of human dignity, the protection of life, and gender equality.

⁹⁶ IACHR, Maria da Penha Fernandes v. Brazil, Case 12051.

⁹⁷ Full Court, Justice Rapporteur Marco Aurélio, decided on February 9, 2012.

⁹⁸ Full Court, Justice Rapporteur Gilmar Mendes, decided on April 3, 2014.

⁹⁹ Second Panel, Justice Rapporteur Cármen Lúcia, decided on May 10, 2016.

¹⁰⁰ First Panel, Justice Rapporteur Rosa Weber, decided on May 10, 2016.

¹⁰¹ First Panel, Justice Rapporteur Rosa Weber, decided on October 31, 2017.

¹⁰² Full Court, Justice Rapporteur Alexandre de Moraes, decided on March 23, 2022.

The theory is a cultural idea and a rhetorical approach used to justify men's violence against women (**ADPF 779**¹⁰³). The Court banned the theory to be presented before the jury in trials or to be used in any other pre-procedural or criminal procedural phases.

Graphic data

Docket n.º: ADC 19

Full Court, In-Person Deliberation, 11x0

Decision Date: 9 February 2012

Official Gazette: 29 April 2014

ODS: 5, 16

Amicus Curiae

Justice Rapporteur Marco Aurélio

Quote: "The Maria da Penha Act removed from invisibility and silence the victim of hostilities that took place in the privacy of the home and represented a clear legislative movement in the sense of assuring abused women effective access to reparation, protection, and justice. The rule mitigates the reality of social and cultural discrimination that, while existing in the country, legitimizes the adoption of compensatory legislation to promote material equality, without unreasonably restricting the right of people belonging to the male gender".

¹⁰³ Full Court, Justice Rapporteur Dias Toffoli, decided on March 15, 2021.

Presentation hearing (custody hearing)

A court's internal rule that regulates custody hearings within its organ by detailing existing provisions under the American Convention on Human Rights and the Code of Criminal Procedure does not violate the Federal Constitution.

Direct Action of Unconstitutionality n. °: 5240

Facts

The Association of Chief Police Officers of Brazil filed this action questioning whether it was legitimate to regulate custody hearings (prisoner's prompt presentation before a judge for those arrested in *flagrante delicto*) by means of an administrative rule.

In the case, the claimant questioned the Internal Joint Rule 3/2015 of the State Court of São Paulo and the General Internal Affairs of the State of São Paulo, which requires the presentation of the detained person, within 24 hours, before the competent judge, to attend a custody hearing at that Court.

The Association argued that the contested internal rule established an innovation by introducing functional duties to police chiefs, exceeding the regulatory power of the Court. Such rules could not be settled by an administrative act and it depended on a federal law regulation, given the fact that the content concerns a procedural matter (Article 22, items I and V, of the Constitution).

The petitioner emphasized that the AMERICAN CONVENTION ON HUMAN RIGHTS has a "supra-legal" nature and, for this reason, it could not be the legal ground for the issuance of the internal rule. Finally, the claimant requested the internal rule to be declared unconstitutional, based on the principle of proportionality, besides the operational difficulties to implement the hearings.

Holdings

The Supreme Court, by a majority, denied the request according to the opinion of the Justice Rapporteur Luiz Fux.

Initially, the Court stated that Article 7, item 5, of the AMERICAN CONVENTION ON HUMAN RIGHTS, by providing that "every person arrested, detained or detained must be brought, without delay, to the presence of a judge", had suspended the effects of all ordinary legislation in conflict with this provision (**RE 466343**).

Furthermore, the presentation of the detainee before a judge within that period would be closely linked to the idea of the fundamental guarantee of liberty, that is, the "habeas corpus". The essence of this constitutional remedy, therefore, is precisely in the direct contact of the judge with the detainee, so that the judge can know from the detainee himself the reason why he was arrested and under what conditions he is incarcerated.

The Code of Criminal Procedure (CPP) sets under Article 656 that "after receiving the 'habeas corpus' petition, the judge, if he deems it necessary, and the defendant is in prison, will order that he be presented immediately on a day and time to be designated". Therefore, the Court found that the challenged rule was already included in the aforementioned international convention — supralegal order —, and in the CPP itself, in a teleological interpretation of its provisions.

The Court pointed out that Articles 1, 3, 5, 6, and 7 of the challenged joint provision had merely explained scattered provisions of the AMERICAN CONVENTION ON HUMAN RIGHTS and the CPP, thus allowing a clear and systematic understanding of them. Therefore, having not exceeded a regulation of the law, it was not possible to review whether they were constitutional.

However, as for Articles 2, 4, 8, 9, 10, and 11 of the challenged rule, the Court found that the provisions established internal organizational norms of the Appellate Court of the State of São Paulo, which is the competent body to issue its internal organizational rules, under Article 96, item I, subitem a, of the Federal Constitution. In such a case, the rule is grounded on the Constitution itself, and it was possible to assess its constitutionality.

In this regard, the Court decided that there was no violation of the principles of legality (CF, art. 5, II) and the reservation of federal law to procedural matters (CF, art. 22, I).

The Joint Provision 3/2015 did not innovate in the legal order, but had only explained the normative content that already existed in several norms of the CPP — approved by the Federal Constitution of 1988 as a federal statute of procedural content — and the AMERICAN CONVENTION ON HUMAN RIGHTS — recognized by STF as a norm of supralegal legal "status".

Furthermore, there was no violation of the principle of separation of powers (CF, art. 2). In fact, the Court considered that it was not the normative act issued by the court of justice that had created obligations for police chiefs, but the afore-

mentioned convention and the CPP, which, have an immediate and general effect, according to Articles 3 and 6 of the Law of Introduction to the Norms of the Brazilian Law.

Graphic data

Docket n.º: ADI 5240

Full Court, In-Person Deliberation, 8 x 1

Decision date: 20 August 2015

Official Gazette: 1 February 2016

ODS: 16, 17

Amici Curiae

Justice Rapporteur Luiz Fux

Quote: "It is necessary (...) that Brazilian society becomes aware that the calamitous situation of public security in the country is due, in large part, to its perverse system of deprivation of liberty, which, although conceived by the legislator to rehabilitate the person in conflict with the law and reintegrate it into social life (...), in reality, it only tortures and dehumanizes the prisoner, generating a high degree of recidivism. (...)The proposal for custody hearings, led by the National Council of Justice and supported by several courts in the country, is undoubtedly one of the most relevant in this area".

Coercive conduction for interrogation

The coercive conduction for interrogation of the investigated or defendant does not comply with the Federal Constitution.

Claim of Non-Compliance with a Fundamental Precept n. °: 444¹⁰⁴

Facts

Article 260 of the 1941 Criminal Procedure Code¹⁰⁵ (CPP, in the Brazilian Portuguese acronym) sets forth that if a properly summoned accused does not attend the interrogation, the recognition hearing, or other act for which their testimony is needed, the person may be forced to appear against his/her will in the presence of an authority. In turn, the Federal Constitution guarantees the right to silence, freedom of movement, and the right not to produce evidence against oneself.

Due to this conflict of law, the Federal Council of the Brazilian Bar Association filed this claim to question the scope and effect of Article 260 abovementioned, which was used as a basis for decisions determining coercive conductions against people under investigation or defendants for the purpose of interrogation.

Holdings

The Supreme Court, by a majority, granted the request according to the opinion of the Justice Rapporteur Gilmar Mendes. STF declared that the coercive conduction for interrogation of the investigated or defendant does not comply with the Federal Constitution and held the expression “for interrogation”, under Article 260, had not been received by the Federal Constitution.

The Court found that since the act is incompatible with the Constitution, the evidence collected in this event is illegal. In addition, the authorities involved may face civil, criminal, and administrative liability and the State may be held liable in the civil sphere. The decision did not annul the interrogations carried out until the date of this trial.

¹⁰⁴ Jointly ruled with case ADPF 395.

¹⁰⁵ Art. 260. If the accused does not respond to the summons for interrogation, recognition or any other act that, without him, cannot be carried out, the authority may send him to its presence.

The Court understood that the bench warrant for interrogation purposes during criminal prosecution had become obsolete because the Federal Constitution includes the defendant's right to stop answering questions without being harmed (right to silence, right not to produce evidence against itself). Moreover, the warrant was replaced by the simple continuation of the proceeding, in default of the accused (Article 367 of the CPP¹⁰⁶).

Indeed, Article 260 of the CPP, in combination with the judge's power to order provisional measures, was being used to justify the forcible conduction of persons required for interrogation, in the midst of police investigations that were transforming legal procedures into spectacles.

A relevant aspect of the presumption of innocence consists of not treating people without a conviction as if they were guilty. The temporary restriction of one's liberty while driving in custody by police forces on public roads would not constitute a treatment ordinarily applied to innocent people. Thus, the use of coercive means to force people into interrogation violates their fundamental rights.

Persons must be recognized as a member of society endowed with intrinsic value, on equal terms, and with equal rights. Making the human being a mere object in the State, consequently, goes against human dignity. In the coercive conduction, it is evident that the person under investigated is conducted to demonstrate his submission to force, which disrespects the dignity of the human person.

In addition, the Court found a violation of the freedom of movement. Article 5, head paragraph, of the Federal Constitution, ensures such freedom in broad terms. It may only be restricted by respecting due process (Article 5, item LIV, of the Constitution) and in the strict rule of arrest (Article 5, items LXI, LXV, LXVI, LXVII of the Constitution). The freedom of movement is in fact so relevant that the constitution assured everyone the right to request the writ of *habeas corpus* as a remedy against restrictions or illegal threats against their freedom to come and go (Article 5, item LXVIII, of the Constitution).

Graphic data

Docket n.º: ADPF 444

¹⁰⁶ Art. 367. The process will continue without the presence of the accused who, summoned or summoned personally for any act, fails to appear without justifiable reason, or, in the case of a change of residence, does not communicate the new address to the court.

Full Court, In-Person Deliberation, 6x5

Decision Date: 14 June 2018

Official Gazette: 22 May 2019

ODS: 16

Amicus Curiae

Justice Rapporteur Gilmar Mendes

Quote: "Coercive conduction consists of capturing the investigated or accused and taking him into police custody before the authority, to be subjected to interrogation. The temporary restriction of liberty by driving the person in custody by police forces on public roads is not a treatment that can normally be applied to innocent persons. The person taken under custody is clearly treated as the convict."

Principle of non-culpability and the initial term to service the conviction sentence

The constitutional principle of non-culpability requires a final and unappealable judgment of conviction to start the execution of the sentence.

Direct action for the declaration of constitutionality n. ° 43 ¹⁰⁷

Facts

This case refers to direct actions filed requesting the Court to declare constitutional Article 283 of the Code of Criminal Procedure¹⁰⁸ and, therefore, that the Court prohibit the commencement of the execution of the prison sentence while appeals were still pending before the Federal Supreme Court and the Superior Court of Justice.

Holdings

The Supreme Court, by a majority, granted the declaratory claim and held constitutional the Article 283 of the Code of Criminal Procedure according to the opinion of the Justice Rapporteur Marco Aurélio. Thus, no one shall have his or her freedom suppressed until the final decision, pursuant to Article 5, item LVII, of the Constitution, which provides: "no one shall be considered guilty before the issuing of a final and unappealable sentence of conviction".

The Court decided that the presumption of innocence does not prevent a person from being arrested at any stage, be it procedural or pre-procedural, provided the provisional detention requirements are met. However, the effects of the conviction can only start when the sentence becomes final. The requirement of *res judicata* means more protection against the restriction of someone's liberty, since a higher court may overturn or mitigate the conviction.

The Justice Rapporteur highlighted that when the Congress enacted the challenged Article, it simply gave effectiveness, in the procedural field, of an explicit guarantee of the constitutional charter of rights, adapting to the perspective then established by the Supreme Court itself on case **HC 84078**¹⁰⁹, when the

¹⁰⁷ Jointly ruled with cases ADC 44 and ADC 54.

¹⁰⁸ Art. 283. No one may be arrested except in *flagrante delicto* or by written and reasoned order of the competent judicial authority, because of a provisional detention or a criminal conviction that has become final and unappealable.

¹⁰⁹ Full Court, Justice Rapporteur Eros Grau, decided on February 5, 2009.

Court held that “imprisonment before the conviction becomes *res judicata* can on be ordered as a provisional detention”. The rapporteur added that having passed 7 years the Court issued a decision overruling the understanding that was the basis for the alteration of the Code of Criminal Procedure. In other words, the legislator had aligned itself with the Constitution, while STF had departed from it (**HC 126292**¹¹⁰).

The presumption of innocence is a fundamental right, expressly provided for in the Constitution, and does not allow courts to anticipate the formal *res judicata*. In addition, the challenged provision reproduces an unamendable clause whose essential core not even an amendment is authorized to restrict.

The Justice Rapporteur considered that there was no need to distinguish “innocence” from “culpability”. The execution of the sentence of conviction requires the crime to be settled, that is, the certainty of the offense perpetrated. The scope of the principle of non-culpability does not allow grades to form one’s culpability.

There were serious dysfunctions in the criminal procedural system, which led to the expiration of the time limitation and to the non-enforcement of prison-sentenced times. The judicial system needed indeed to be more efficient. However, the Supreme Court should be incisive with a principle so important to the Democratic State of Law, instead of continuing to enable the free operation of a persecutory process by lower instances and dismissing itself from its fundamental role.

Additional Information

The interpretation of the scope of the principle of non-culpability established under Article 5, item LVII, of the Federal Constitution¹¹¹ has undergone different stages since it came into force in 1988 as mentioned by the rapporteur on the case above reported.

Initially, STF’s case law understood that the principle did not hinder someone to start serving his or her sentence time after the conviction was affirmed on the second instance, even if it was still pending trial on the special and extraordinary appeals eventually filed, which do not operate as a supersedeas.

¹¹⁰ Full Court, Justice Rapporteur Teori Zavascki, decided on February 17, 2016.

¹¹¹ Federal Constitution, Article 5: (...) LVII – no one shall be considered guilty before the criminal conviction becomes final and unappealable;

In 2009, the Court overruled this understanding (**HC 84078**¹¹²). It then considered that the presumption of non-culpability implied awaiting for all procedural stages until the criminal conviction becomes final and unappealable. Thus, imprisonment before *res judicata* could be ordered as provisional detention. On this reasoning, the Justice Rapporteur Eros Grau referred to the precedent **RE 482006**¹¹³, when the Full Court unanimously understood that a state constitutional provision that imposed the reduction of salaries of public servants removed from their duties for responding to criminal proceedings implied a flagrant violation of the provisions of item LVII of Article 5 of the Constitution. The Justice then stressed that the “Court that vigorously honors the provisions of the constitutional precept in the name of guaranteeing the property should not deny it when it comes to guaranteeing freedom, even because property has more to do with elites; the threat to liberties effectively reaches the subaltern classes”.

In 2016, on **HC 126292**¹¹⁴, the Supreme Court restated its previous understanding and asserted that the provisory execution of a conviction, rendered or reaffirmed in a court of second degree of jurisdiction, even if subject to a special or extraordinary appeal, did not compromise the principle of presumption of non-culpability. Later on that same year, on November 10, 2016, the Court affirmed that understanding of a case under the general repercussion doctrine (**ARE 964246 RG**¹¹⁵) and on the provisional measure rendered on the direct actions of constitutionality 43 and 44 (**ADC 43 MC**¹¹⁶ and **ADC 44 MC**¹¹⁷).

The decision on the merits of these two direct actions did not affirm the provisional measure, as reported in this case brief.

Graphic data

Docket n.º: ADC 43

Full Court, In-Person Deliberation, 6x5

Decision Date: 7 November 2019

Official Gazette: 12 November 2020

ODS: 16

Amicus Curiae

Justice Rapporteur Marco Aurélio

¹¹² Full Court, Justice Rapporteur Eros Grau, decided on February 5, 2009.

¹¹³ Full Court, Justice Rapporteur Ricardo Lewandowski, decided on November 7, 2007.

¹¹⁴ Full Court, Justice Rapporteur Teori Zavascki, decided on February 17, 2016.

¹¹⁵ Full Court, Justice Rapporteur Teori Zavascki, decided on November 10, 2016.

¹¹⁶ Full Court, Justice Edson Fachin, decided on October 5, 2016.

¹¹⁷ Full Court, Justice Edson Fachin, decided on October 5, 2016.

Quote: "It is urgent to reestablish legal certainty, to declare a simple rule, according to which, in Law, the means justify the end, but not the opposite. Better days require unrestricted compliance with the legal-normative order, especially the constitutional one. This is the price you pay for living in a Democratic State of Law (...)."

CONCLUDING REMARKS

Since the end of World War II, a written charter of fundamental rights and a rigid constitution with a system of constitutional review feature nearly all constitutional democracies¹¹⁸. In Brazil, under the 1988 Federal Constitution, it stands out the charter of fundamental rights of its Article 5.

In addition, Brazil has signed several international treaties on human rights. Some of them are part of the constitutional parameter to assess whether ordinary statutes are constitutional. Others have a special spot in the Brazilian legal system and require STF to promote a permanent dialogue with international organs to fulfill the guarantees set forth therein.

In constitutional democracies, when the democratic political will enforces the rights of majorities and neglects the ones of minorities, the constitutional courts emerge to perform their counter-majoritarian role and assure the effectiveness of persons' basic rights and guarantees. Some landmark cases reported in this volume may help to understand this role and to build the interpretation of the scope, the boundaries, the persons entitled to these rights, and who is responsible to enforce them.

By means of the worldwide migratory crises, for instance, the Court settled who is to bear the costs of public policies to safeguard the rights of migrants and refugees¹¹⁹. The Brazilian constitutional federalism, grounded on the principle of cooperation and solidarity, requires all the units of the Federation to cope with and apply proportional financial resources to accomplish that goal. In addition, considering the equal protection principle, the same fundamental rights and duties set to Brazilian citizens are to be granted to this group once the requirements are met, including benefits of social assistance and exemption of fees¹²⁰.

Also grounded on this principle, same-sex couples are to be recognized as families for the purposes of applying the same civil law rules enforced on heterosexual relationships¹²¹. Racial and economic quotas in universities or offices in

¹¹⁸ BARROSO, Luis Roberto. *Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies* (September 4, 2017). The American Journal of Comparative Law (Forthcoming), Available at SSRN: <https://ssrn.com/abstract=3096203> or <http://dx.doi.org/10.2139/ssrn.3096203>

¹¹⁹ Full Court, **ACO 3121**, Justice Rapporteur Rosa Weber, decided on October 13, 2020.

¹²⁰ Full Court, **RE 1018911**, Justice Rapporteur Luiz Fux, decided on November 11, 2021.

¹²¹ Full Court, ADI 4277, Justice Rapporteur Ayres Britto, decided on May 5, 2011.

Public Administration are ways to ensure material equality¹²². Persons with disabilities' are entitled to inclusive education in private institutions without having to bear the costs for the necessary measures to be included in regular classes¹²³.

Yet, the right to equality, combined with the constitutional principle of full protection towards the children, fostered the Court to overrule its understanding as to whether a father may be expelled from the country when economically responsible for the child. The best interest of the child is to hold a family life, being it now irrelevant if the fact that prompted the expulsion request takes place before or after the child's recognition or adoption¹²⁴.

Equal protection stands out also in the Court's case law by the varying holdings conveying special guarantees to women and mostly represented for institutional mechanism to ease their access to justice and prevent domestic violence, such as the confirmation of special courts to hear these cases¹²⁵.

Access to justice and due process are in fact highly assessed by STF. Amidst the recent social turmoil spread throughout the country steaming from investigations of major corruption schemes, the Court showed great regard to the scope of the non-culpability principle as a fundamental right intimate connected to one's personal dignity, be it in procedural acts for interrogation¹²⁶ or in the beginning term to start one's criminal conviction¹²⁷.

After all, the Brazilian prison system is indeed a concern constantly addressed in recent rulings. Several decisions discussed this subject not only when the Court acknowledged the massive unconstitutional state of affairs of prison facilities¹²⁸, but also by the several orders to compel first instance courts to adopt alternative measures other than pre-trial detentions¹²⁹, or by upholding custody hearings in the state of São Paulo¹³⁰.

¹²² **ADPF 186**, Full Court, Justice Rapporteur Ricardo Lewandowski, decided on April 6, 2012.

¹²³ **ADI 5357**, Full Court, Justice Rapporteur Edson Fachin, decided on June 9, 2016.

¹²⁴ **RE 608898**, Full Court, Justice Rapporteur Marco Aurélio, decided on June 25, 2020.

¹²⁵ **ADC 19**, Full Court, Justice Rapporteur Marco Aurélio, decided on February 9, 2012.

¹²⁶ **ADPF 444**, Full Court, Justice Rapporteur Gilmar Mendes, decided on June 14, 2018.

¹²⁷ **ADC 43**, Full Court, Justice Rapporteur Marco Aurélio, decided on November 7, 2019.

¹²⁸ **ADPF 347 MC**, Full Court, Justice Rapporteur Marco Aurélio, decided on September 9, 2015.

¹²⁹ **RE 641320**, Full Court, Justice Rapporteur Gilmar Mendes, decided on October 21, 2016.

¹³⁰ **ADI 5240**, Full Court, Justice Rapporteur Luiz Fux, decided on August 20, 2015.

Accordingly, it is part of the State's duties to safeguard citizens' physical integrity be it in prison facilities¹³¹, to protect their right to free movement¹³², or even during police raids. It means that when the State forces committed to public security show consistently high standards of human rights violations, the Court must intervene provided instigated¹³³. It also means that this special public servants group enjoys different rights and duties under the constitutional order, including the impossibility to carry out strikes¹³⁴.

Furthermore, regarding one's fundamental right to privacy, the digital era has added a new level of concern, leading to the constitutional protection of persons' personal data and to informational self-determination as autonomous rights. As the Court ruled, even in the name of national security, agencies comprising the Brazilian Intelligence System can only provide data and specific knowledge to the Brazilian Intelligence Agency when the public interest of the measure is proven¹³⁵.

Concerning the right to life, although the Court has not settled a definition as to the beginning of human life in the two most special cases dealing with the subject¹³⁶, the Court strongly stressed the secular nature of the Brazilian state and the overlap between the right to life and the principle of human dignity.

Indeed, in all these multi-dimensional cases, human dignity stands out as a central core in light of which fundamental rights cases ought to be solved. When rendering counter-majoritarian decisions, the Court may fulfill the substantive dimension of democracy, which, beyond the procedural arrangement of being the rule of the majority, includes the fundamental rights to equal protection, freedom, and justice¹³⁷.

¹³¹ **RE 580252**, Full Court, Justice Gilmar Mendes, decided on February 16, 2017.

¹³² **ADI 3446**, Full Court, Justice Rapporteur Gilmar Mendes, decided on August 8, 2019.

¹³³ **ADPF 635 MC-ED**, Full Court, Justice Rapporteur Edson Fachin, decided on February 3, 2022.

¹³⁴ **ARE 654432**, Full Court, Justice Alexandre de Moraes, decided on April 5, 2017.

¹³⁵ **ADI 6529**, Full Court, Justice Rapporteur Cármen Lúcia, decided on October 11, 2021.

¹³⁶ The use of embryonic stem cells for research, **ADI 3510**, Full Court, Justice Rapporteur Ayres Britto, decided on May 29, 2008; and the possibility of early delivery in case of anencephaly fetuses, **ADPF 54**, Full Court, Justice Rapporteur Marco Aurélio, decided on April 12, 2012.

¹³⁷ BARROSO, Luis Roberto. Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies (September 4, 2017). *The American Journal of Comparative Law* (Forthcoming), Available at SSRN: <https://ssrn.com/abstract=3096203> or <http://dx.doi.org/10.2139/ssrn.3096203>

REFERENCES

BARROSO, Luis Roberto. Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies (September 4, 2017). The American Journal of Comparative Law (Forthcoming), Available at SSRN: <https://ssrn.com/abstract=3096203> or <http://dx.doi.org/10.2139/ssrn.3096203>

Constitution of the Federative Republic of Brazil. Brasília: STF, Secretaria de Documentação, 2020. Available at: chrome-extension://efaidnbmnnnibpcajpcgiclfendmkaj/https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf

Filho, Robério Nunes dos Anjos (org.). *STF e Direitos Fundamentais: Diálogos Contemporâneos*. Ed. JusPodium, 2013.

Federal Supreme Court's case law database, available at: <https://jurisprudencia.stf.jus.br/pages/search>.

Federal Supreme Court's case law database "A Constituição e o Supremo", available at: <https://portal.stf.jus.br/constituicao-supremo/>

GARNER, Bryan A. Black's law dictionary. WEST, ninth edition.

LAW, David S. and VESTEEG, Mila. *The Evolution and Ideology of Global Constitutionalism* (June 13, 2011). California Law Review, Vol. 99, p. 1163, 2011, APSA 2010 Annual Meeting Paper, 5th Annual Conference on Empirical Legal Studies Paper. Washington University in St. Louis Legal Studies Research Paper No. 10-10-01, Available at SSRN: <https://ssrn.com/abstract=1643628>

Peters, Anne (2009). *The Merits of Global Constitutionalism*. Indiana Journal of Global Legal Studies: Vol. 16: Iss. 2, Article 2. Available at: <https://www.repository.law.indiana.edu/ijgls/vol16/iss2/>

SILVA, Virgílio Afonso da. *Direito Constitucional Brasileiro*. 1 ed. São Paulo: Editora da Universidade de São Paulo, 2021.

Vieira, Oscar Vilhena. *Direitos fundamentais: uma leitura da jurisprudência do STF*. Malheiros Editores Ltda., 2006.