

PROVISIONAL MEASURE: an urgent and relevant subject

Helena Zani Morgado¹

Hugo Anciães²

ABSTRACT

This work craves to analyze not only the importance of the Provisional Measure in the national legal system, but also the legal discussions underlying this institute nowadays. Initially, we will focus on historical aspects that led to its creation. Then, the study will look into the legal aspects of this normative act, and in addition, a detailed analysis of urgency and relevance requisites for the issuing of Provisional Measures will be made. The possibility of the use of this legal instrument by other federal entities, namely, states and municipalities will be also verified. Finally, the advantages and disadvantages concerning the institute will be explored, in order to assess its current importance and compatibility with the principle of separation of powers.

KEY WORDS: Provisional Measure. Relevance and urgency. Separation of powers.

MEDIDA PROVISÓRIA: um tema urgente e relevante

RESUMO

O presente trabalho almeja analisar não apenas a importância da Medida Provisória no ordenamento jurídico pátrio, mas também as discussões jurídicas que cercam tal instituto na atualidade. Inicialmente, serão abordados os aspectos históricos que acarretaram seu surgimento. Em seguida, o estudo debruçar-se-á sobre aspectos legais desse ato normativo e, além disso, será realizada uma minuciosa análise acerca dos pressupostos constitucionais de urgência e relevância, requisitos indispensáveis para a edição de Medidas Provisórias. Verificar-se-á, ainda, a possibilidade jurídica de utilização do instrumento pelos demais entes federativos, quais sejam, Estados e Municípios. Por fim, será realizado um exame envolvendo as vantagens e desvantagens do instituto, a fim de avaliar sua atual dimensão e compatibilidade com o princípio da separação de poderes.

PALAVRAS-CHAVE: Medida Provisória. Relevância e urgência. Separação de poderes.

1. Introduction

¹ Undergraduate Law student at Rio de Janeiro State University

² Undergraduate Law student at Fundação Getulio Vargas – FGV .

This article was translated by Adriana Taranto and authorized for publication by the author in 14/11/2012.

Version in portuguese received in 31/10/2011 , accepted in 06/12/2011.

Natural disasters, calamities, conflicts – any society can face extraordinary situations, which require immediate efforts from the governors. And how can a State act according to the law in a fast and efficient way in these circumstances? Based on this questioning that instruments analogous to the Provisional Measure as we know today were developed along the time, created to escape the usual slowness of the legislative course and as an expression of the system of checks and balances – while a non typical function³ of the Executive Power.

The first example of institute in this sense certainly dates back to the Weimar Republic. After Germany's loss in the 1st World War, the Constitution institutionalized in the country, despite the positive aspects – such as abolition of social classes and equalization of rights between men and women – delegated to the Reich's President excessive powers. Besides dissolving the Parliament and commanding the Armed Forces, the chief of the Executive Power had the prerogative of issuing the so called “emergency decrees” in cases of considerable threat or disturbance to security and public order. Initially, this mechanism was used against political dangers and violent attempts of subversion, but with the years the interpretation of its prerequisites was expanded, leading to its use during economic difficulties, for instance.

A jurist of great relevance at that time, Carl Schmitt defended ideas that aggravated even more the indiscriminated use of the emergency decrees. According to him, they could violate every and any article of the Constitution destined to the guarantee of individual rights, which was justified by the purpose of the dictatorial regime. In his words: “*La constitución es intangible, mientras que las leyes constitucionales pueden ser suspendidas durante el estado de excepción, y violadas por las medidas del estado de excepción.*”⁴

Thereby, it's not hard to conclude that the destination given to these normative acts was determinant to spark the process which led to the end of the Weimar Republic and culminated in the rise of Nazism⁵. However, the disastrous consequences⁵ of the use of this type of measure were not limited to Germany. Using articles 12 and 13 of the Constitution of 1937⁶, Brazil imported the

³ José dos Santos Carvalho Filho clarifies that “there is no exclusivity in the exercise of the functions by the powers. There is a preponderance. [...]For that reason that the State Powers, although having their normal functions (typical functions), also have functions that materially should belong to a diverse Power (non typical functions), whenever, of course, the Constitution authorizes.” (CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. 25th ed. Rio de Janeiro: Lumen Juris, 2010).

⁴ To Carl Schmitt, the Constitution is, therefore, intangible, whereas the constitution laws can not only be put aside during the state of exception but also violated by measures of the state of exception. Available at <<http://www.abdconst.com.br/revista3/portouniao.pdf>>. Accessed on Oct. 10th, 2011.

⁵ ZIMMERMANN, Augusto. *Curso de Direito Constitucional*. 4 ed. Rio de Janeiro: Lumen Juris, 2006. p. 489.

⁶ The Constitution of 1937 established:

Art. 12: The Republican President can be authorized to issue decrees-law under the conditions and within the limits set by the authorization act.

emergency decrees under the figure of decree-law, which remained in the national legal system until the promulgation of the Constitution of 1988, having served as a tool for many abuses during the authoritarian governments.

The Brazilian Constitutions of 1967⁷ and 1969⁸ were influenced by the “*decreti-legge*” from the Italian Constitution of 1947, whose article 77 allows its application “*in casi straordinari di necessità e d’urgenza*”⁹. An example of this influence is the article 55 of the Constitutional amendment 01/69, which contemplated the expedition of decrees-law regarding the area of public finances, creation of public positions, national security and establishment of salaries, providing that there was urgency or relevant public interest and that the act did not imply increased expenses. The usurpation of the legislative function by the military was still corroborated by two factors: validation by lapse of time, given that, if the Congress did not pronounce itself, the decree-law was validated; and the necessity of only one formal prerequisite, namely, relevance or urgency, for its expedition. Thereby, the foundation that allowed for so many years the military rulers to make use of the tool in question to dictate the normative direction of the country was perpetuated.

It should be noted, however, that, despite the similarities, the legal treatment given to the subject differs fundamentally in Italy and in Brazil – what might explain many of the problems identified in relation to the topic being discussed. That's because in the European country the Government that adopts the "provisional instrument with force of law" does so under his own political responsibility – thus, the rejection of the act by the Parliament means the fall of the Cabinet, since, to govern, the Prime Minister needs the support of the legislative power. Indeed, until July

Art. 13: The President of the Republic, during periods of recess of Parliament or of dissolution of Chamber of Deputies, may, if necessary to the needs of the State, issue decrees on matters of legislative powers of the Union, except for the following: a) modifications to the Constitution; b) electoral legislation; c) budget; d) taxes; e) Institutionalization of monopolies; f) currency; g) Government loans; h) conveyance and encumbrance of real estate of the Union. Sole Paragraph - Decrees-law to be issued depends on the National Economy Council opinion, in matters of its consultative powers.

⁷ The Constitution of 1967 provided:

Art. 49: The legislative process comprises the development of: [...] V – decrees-law;

Art. 58: The President of the Republic, in cases of urgency or relevant public interest, and provided that the act did not imply increased expenses, can issue decrees with force of Law regarding the following subjects: I – national security; II – public finances. Sole Paragraph - Published, the text, which takes immediate effect, the National Congress will approve or reject it, within sixty days not being possible to amend it; If, within that period, there is no deliberation the text will be regarded as approved.

⁸ The Constitutional Amendment 01/69 determined:

Art. 46: The legislative process comprises the development of: [...] V – decrees-law;

Art 55: The President of the Republic, in cases of urgency or relevant public interest, and provided that the act did not imply increased expenses, can issue decrees with force of Law regarding the following subjects: I – national security; II – public finances; III - creation of public positions and establishment of salaries. §1: Published, the text, which takes immediate effect, the National Congress will approve or reject it, within sixty days not being possible to amend it; If, within that period, there is no deliberation the text will be regarded as approved. §2: The rejection of the decree-law does not involve the nullity of the acts performed during its lifetime.

⁹ That is, the Italian Constitution of 1947 allows editing of decrees-law in cases of necessity and urgency.

1988, the inspiration in the Italian model was based on a Constituent's inclination to choose Parliamentarism as the system of Government suitable to the new Brazilian reality. However, in the end, they decided for Presidentialism, in which the Chief Executive is not politically accountable for the issue of emergency measures, considering that it does not require the support of the legislative power to govern.

The Constitution of 1988, on the other hand, linked the emergency legislative acts of the President of the Republic both to requirements similar to those of previous Constitutions, and a new legal regime of procedures and limitations, hoping to end the distortion observed in the dictatorial period. As the first expression of this motivation, a new denomination was given to the institute: Provisional Measure.

2. Legal Aspects

The Constitution of 1988, after the alteration introduced by the Constitutional Amendment No 32/2001¹⁰, went on to give the following treatment to the subject under study:

Art. 62: In case of relevance and urgency, the President of the Republic may use Provisional Measures, with force of law, and must submit them without delay to the National Congress.

From the article in question, first of all, it is possible to elicit the formal premises – simultaneously necessary - for the issuing of Provisional Measures, namely, relevance and urgency. On them we can find several discussions, that will be addressed later. Despite the controversial issues, it is possible to realize the extraordinary character provided by the Constituent Power to this exclusive prerogative of the Chief Executive¹¹, which is in line with the already mentioned evolution that was sought with the extinction of the decrees-law. Moreover, the Transitory Constitutional Provisions Act (TCPA) provides for their conversion into the new normative kind¹².

Furthermore, it is noticed that the Provisional Measure conceives double nature: while it is a norm – because it was promulgated and came into force, innovating the pre-existing legal system – it

¹⁰ Art. 62: *In the case of relevance and urgency, the President of the Republic may use provisional measures, with force of law, and must submit them without delay to the National Congress, which, if in recess, will be convened extraordinarily to meet within five days.*

Sole Paragraph - The provisional measures will lose effectiveness, since their issue, if not converted into law within 30 days from its publication, and the National Congress will discipline legal relations arising from it.

¹¹ *Pedro Lenza emphasizes the fact that the competence on this is not delegable, based on the Federal Constitution, art. 84, XXVI: It is private competence of the President of the Republic: [...] issue Provisional Measures with force of law, in the terms of art. 62. (LENZA, Pedro. Direito Constitucional Esquematizado. 15th ed. São Paulo: Saraiva, 2011).*

¹² *TCPA, art. 25, §2: Decrees-law issued between September 3, 1998 and the promulgation of the Constitution will be converted, on this day, into Provisional Measures, applying to them the rules established in art. 62, Sole paragraph.*

is also a bill to become law – since it sparks the legislative process, having a time limit to be evaluated by the Congress, which will decide on its definite transformation into law¹³. In this sense, José Afonso da Silva classifies it as a measure of law subject to a resolute condition¹⁴, linked to the Chamber of Deputies and Federal Senate's deliberation.

Note that, while law in material sense, the Provisional Measure has the power to suspend the effectiveness of norms that are incompatible with it, ceasing this effect in case of rejection by the Congress. In this scenario, the Legislative power must discipline the legal relations that come from it by means of a Legislative decree¹⁵. On the other hand, if converted to law, it will repeal the legal provisions in contrary, that until then were suspended, based on the chronological criterion of solution of antinomies¹⁶.

The Constitutional Amendment No 32/01 brought to the topic a new rule that establishes that, after being issued by the President of the Republic, the Provisional Measure will take effect for a period of 60 days, extendable only once for an equal period, counted from the publication in the Official Gazette¹⁷. The submission to the Congress will be immediate, in which a Commission comprised of Deputies and Senators will be responsible of evaluating its financial and budget compliance, as well as its constitutional¹⁸ and merit aspects. This assessment will result in an opinion, forwarded to the Chamber of Deputies and the Federal Senate, where they will process separate votes in the plenary of each House.

From the discussion of the commissions three practical results are possible: the approval of the measure without any changes, the approval with amendment and, also, the express rejection of the presidential act. After sixty days of the extension for the appraisal of the measure, if no decision comes up, tacit rejection occurs, in which case the loss of effectiveness is backdated – *ex tunc* – which confirms its ephemeral characteristic¹⁹.

¹³ This process is extensively detailed in the Constitution, art.62, §§3 to 12.

¹⁴ SILVA, José Afonso da. *Curso de Direito Constitucional Positivo*. 27th ed. São Paulo: Malheiros, 2006. p. 531.

¹⁵ Art. 62, §3: *The Provisional Measures, except for what is provided in §§11 and 12, will lose effectiveness, since the edition, if not converted into law within sixty days, extendable once for an equal period, under the terms of §7; the National Congress must discipline, by legislative decree, the legal relations arising therefrom.*

¹⁶ *Civil Code, art. 2, §1: The later law repeals the earlier one when expressly declares it, when inconsistent with it or when regulates entirely the matter of the previous law.*

¹⁷ It should be noted that this time limit may be suspended in case of parliamentary recess, according to art. 62, §4.

¹⁸ The deliberation by each one of the Houses of the National Congress also depends on prior judgment about the urgency and relevance requirements.

¹⁹ As already mentioned, Provisional Measures differ substantially from decrees-law in this aspect. Until the advent of the Constitution of 1988, the expiration of time without resolution by the National Congress led to tacit approval.

With regard to the procedural aspects of the subject, it is essential to highlight the provisions of art. 62, §6²⁰, which provides for the suspension of the agenda of the Legislative House that does not proceed to the appraisal of the Provisional Measure in forty-five days counted from the date of its publication. It is the so called urgency regime, which has the power to suspend all the matters of the House in which it is in²¹. José Afonso da Silva argues that there is incoherence between this provision and the one which states that, if Provisional Measures are not analyzed within sixty days, extendible only once, they lose effectiveness. This is because §6 establishes that all Provisional Measures must go through voting, a process by which they will only be approved or rejected, without legal edge for any loss of effectiveness due to no appraisal²².

In fact, the emergency regime, combined with the high number of provisional measures issued by the President of the Republic, entailed a considerable paralysis to the Brazilian Legislative Power. Faced with this reality, Michel Temer, then President of the Chamber of Deputies, has developed a legal thesis advocating the systematic interpretation, and not a literal one, of the provisions based on the argument that the agenda lockings should be restricted only to the appraisal involving matters that could be dealt with by Provisional Measures²³. This way, resolutions, decrees, bills and propositions of constitutional amendment could continue to be voted on in extraordinary sessions²⁴. This interpretation was subject of intense debate within the academy and was analyzed by the Federal Supreme Court, in an injunction²⁵ filed by the leaders of three political parties, contesting the interpretation given by the current Vice President of the Republic. The matter is still pending final judgment, however, the reporter, Minister Celso de Mello²⁶, dismissed the injunction, choosing to follow the systematic application of the constitutional provision.

²⁰ Art. 62, §6: *If the Provisional Measure is not appreciated in up to forty-five days of its publication, it enters an emergency regime, subsequently, in each of the houses of the National Congress, suspending all other legislative deliberations of the House in which it is being processed, until ultimately the voting.*

²¹ It is worth emphasizing that the time limit of forty-five days is counted together, that is, if the Chamber of Deputies vote on the Provisional Measure on the 44th day after the publication, it will arrive at the Senate already locking its voting agenda – the arrival to the Senate does not usher in a new period of forty-five days. In this way, it is easy to conclude that whenever there is a locking of the agenda in the Chamber of Deputies, there will be a lock of the agenda when sent to the other House.

²² SILVA, José Afonso da. *Curso de Direito Positivo*. 23rd ed. São Paulo: Malheiros, 2003. p. 531.

²³ Available at <<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=105404>>. Accessed on Oct. 15, 2011.

²⁴ Available at <<http://oab-ba.jusbrasil.com.br/noticias/951678/regra-para-trancamento-da-pauta-por-mp-e-contestada>>. Accessed on Oct. 15, 2011.

²⁵ Injunction n. 27.931, DF, Reporter. Min. Celso de Mello.

²⁶ For the reporter Minister, Temer's interpretation reflects, with fidelity, a legal solution fully compatible with the theoretical model of separation of powers, since it reveals an hermeneutical formula able to assure an appropriate balance between the Legislative and Executive governmental branches and, ultimately, the very integrity of the clause relating to the division of power. He has also given an interpretation according to the Constitution, without reducing the text of art. 62, §6, to restrict it the exegesis, understanding that such constitutional regime that enforces the locking of legislative deliberations of the Houses of Congress refers only to those matters that are liable to regulation by Provisional Measure.

After analyzing the process of Provisional Measures, it is necessary to address the material constraints to which they undergo, commonly categorized by the academy²⁷ as explicit and implicit. The first ones refer to expressed prohibitions in literal command, imposed by the Constitutional Amendment n. 32:

Art. 62: [...]

§1 It is prohibited to issue Provisional Measures on matter:

I – relating to:

- a) nationality, citizenship, political rights, political parties and election law;
- b) criminal law, criminal procedure and civil procedure;
- c) organization of the Judiciary Power and of the Public Prosecutor's Office, the career and the guarantee of its members;
- d) multiannual plans, budget guidelines, budget and additional and supplementary credits, except for what is provided in art. 167, §3;

II – that aims the detention or seizing of assets, popular savings or any other financial asset;

III – reserved for complementary law;

IV – already disciplined in a Bill approved by the National Congress and pending sanction or veto of the President of the Republic.

Among the implicit limits, originating from a systematic interpretation of the Constitution, are the fundamental rights, which, despite the legal silence, are subjected to the reserve of law²⁸. Matters of private or exclusive assignment of Congress, Chamber of Deputies, Senate, Judiciary, Public Prosecution and Courts of Auditors; that in the same legislative session have been rejected by Congress; and those proper for encoding are also subjected to the same restrictions.

Another material limit is provided in art 246 of the Constitution of October 1988, which prohibits the issuing of Provisional Measures that rule constitutional norms modified by a constitutional amendment between January 1995 and the Constitutional Amendment n. 31/2001.

Furthermore, art. 73 of the TCPA, included by the Constitutional Amendment Revision number 1 from 1994, prohibits the use of the institute under study in constitutional regulation even more specifically, in the Emergency Social Fund²⁹.

Another important topic is about the possibility of issuing Provisional Measures on tax matters. Look at what §2, of the already referred art. 62 states:

²⁷ MORAES, Guilherme Peña de. *Curso de Direito Constitucional*. 2nd ed. Rio de Janeiro: Impetus, 2008.

²⁸ Fundamental rights are guaranteed by the Constitution to all people so that they can defend themselves against eventual abuses of the state and other people. These guarantees, for logical reasons, are not absolute, for coexistence with other rights entails conflict which solution is only possible with the relativization, by ponderation exam. Moreover, it is not any rule that can restrict fundamental rights: only laws. Accepting the possibility of restriction by Provisional Measure, for example, would subvert the Democratic State of Law, because it would mean leaving minorities subject to the free-will of the sovereign. The restriction to fundamental rights, therefore, is subject to the principle of legal reserve.

²⁹ TCPA, Art. 73: *In regulating the Emergency Social Fund it will not be possible to use the instrument referred to in item V of art. 59 of the Constitution.*

Art. 62, §2: Provisional measure involving imposition or increase of taxes, except those provided for in arts. 153, I, II, IV, V, and 154, II, will only take effect on the following financial year if converted into law until the last day of the year in which it was issued.

The analysis of this provision allows us to conclude that, as a rule, the Provisional Measure will be subject to the principle of anteriority and will only take effect in the following financial year if converted into law until the last day of the year in which it was issued. However, exceptions are made to this general command in the event of imposition or increase of taxes on imports of foreign products (TI), export of national or nationalized products (TE), credit operations, foreign exchange and insurance, or relating to securities (Tax on Financial Transactions - TFT) and extraordinary war taxes (EWT). In these cases, the Provisional Measure will take effect since its issuing.

However, as well warned by Vicente Paulo and Marcelo Alexandrino³⁰, in the case of tax on industrialized products (TIP), laid down in article 153, IV of the Constitution, a time span of 90 days should be observed for the measure to take effect. This on account of sub-item "c" of item III, article 150³¹, which establishes the rule of "noventena" (as called in Brazil) to the extent that it determines a minimum time limit of ninety days for laws establishing or increasing taxes to take effect, further accentuating the citizen taxpayer protection. This became clear with the Supreme Court's³² recent decision, dated October 20, 2011, suspending the increase of TIP for imported cars, raised by the Government in thirty percent points until December, that is, 90 days after the publication of Decree n. 7,567/11³³. It should be noted that the other taxes previously cited fall into the exception provided for in §1 of art. 150³⁴, reason by which they do not undergo the prior 90-day holding.

In regard to other tax categories subject to the principle of anteriority, such as fees and contributions for improvement, the Provisional Measure only takes effect in the year following its publication, even if it has not been converted into law in the same year it was issued. It is, however, required to wait the course of ninety days after its publication.

³⁰ PAULO, Vicente; ALEXANDRINO, Marcelo. *Direito Constitucional Descomplicado*. 7th ed. São Paulo: Método, 2011. p. 546.

³¹ Art. 150: *Notwithstanding other guarantees ensured to the taxpayer, it is forbidden to the Union, the States, the Federal District and Municipalities: [...]III – charge taxes: [...] c) before the expiration of 90 days from the date on which the law that established or increased it was published, subject to the provisions in sub-item b*

³² Decision given on the DAU n. 4661 proposed by the Democrats (DEM). Rapporteur Min. Marco Aurélio

³³ Available at <http://economia.terra.com.br/noticias/noticia.aspx?idNoticia=201110201823_TRR_80369639>. Accessed on Oct. 22nd, 2011.

³⁴ Art. 150: *Notwithstanding other guarantees ensured to the taxpayer, it is forbidden to the Union, the States, the Federal District and Municipalities: [...]§1: the prohibition of section III, b, does not apply to taxes provided in arts. 148, I, 153, I, II, IV and V; and 154, II; and the prohibition of section III, c, does not apply to taxes provided in arts. 148, I, 153, I, II, III and V; and 154, II, nor does it fix the basis for calculating the taxes provided for in arts. 155, III, and 156, I.*

Finally, there is a material prohibition to state Provisional Measures³⁵, provided for in §2 of art. 25 of the Constitution, which relates to the regulation of the exploration of piped gas.

Another issue worth mentioning is the one concerning the legal nature of the Provisional Measure, subject to academic disagreements in the past. The Supreme Court, in the judgment delivered in the Direct Action for Unconstitutionality (DAU) n. 293, settled the understanding signaling that the Provisional Measure would be a primary normative act:

Provisional measures constitute, in the Brazilian Constitutional Law, a special category of primary normative acts issued by the Executive Branch, which involve force, effectiveness and value of law³⁶.

Despite having a transitory characteristic, while a definite and finished normative type, the Provisional Measure is subject to judicial review in relation to both its material content, as a rule, as well as the prerequisites regarding relevance and urgency, on exceptional basis, as it will be explained in an opportune topic³⁷. In this sense, José Afonso da Silva would not be correct in his critique regarding the normative nature of Provisional Measures³⁸ as, if these were not normative types, they could not be object of a Direct Action for Unconstitutionality.

3. Urgency and Relevance: control and hypotheses

As seen previously, art. 62 of the Constitution establishes as a requirement for the issuing of Provisional Measures the presence of the prerequisites of urgency and relevance. The constituent Assembly, by not determining what the relevant and urgent situations would be, provided to these requirements the characteristic of “open clauses”, allowing variable interpretations over time and space. It is not an easy task, therefore, to identify the constitutional contours that involve these prerequisites. There are antagonistic interests at stake: on one side, the separation of powers and the democracy; on the other one, public interest and slowness of the legislative process.

Clève³⁹ properly affirms that relevant is what is prominent, important, crucial, essential or indispensable in relation to a particular society. The concept of relevance is, therefore, tied to the public interest. The constitutional word refers to more serious and important cases, which require the

³⁵ About this matter, see topic 4: “Act private to the President of the Republic? The possibility of issuing Provisional Measures by States and Municipalities.”

³⁶ Decision given on the DAU n. 293, Rapporteur Min. Celso de Mello. J. Jun. 06, 1990, DJU Apr. 16, 1993.

³⁷ About this matter, see next topic: Urgency and Relevance: control and hypotheses.

³⁸ For the referred author, the Provisional Measure would be a “legislative act subject to a resolutive condition”, once it is subject to lose its legal qualification in a period of sixty days. (FERNANDES, Bernardo Gonçalves. *Curso de Direito Constitucional*. 2nd ed. Rio de Janeiro: Lumen Juris, 2010. p. 662 - 663).

³⁹ CLÈVE, Clèmerson Merlin. *Medidas Provisórias*. 2nd ed. São Paulo: Max Limonad, 1999.

State's immediate action⁴⁰. Urgent, on the other hand, is everything that cannot await the course of time, that must be done immediately. The factual context that requires the issuing of the Measure must be imminent and undelayable.

Once the constitutional prerequisites for the use of Provisional Measures are defined by the Chief of the Executive Branch, we must now analyze who is responsible for the gauging of these prerequisites. The already mentioned §5 of art. 62 determines that it is incumbent upon the National Congress, besides supervising the political aspects, fulfill the judicial control of the institute, which involves the verification of the presence of relevance and urgency. Unfortunately, however, the legislative Branch has relegated this prerogative to a second plan, which results in the conversion into Law of many unconstitutional Provisional Measures.

Facing the derisory efficacy of the judicial meticulous exam by the Chamber of Deputies and Federal Senate, practically reduced to political issues, an interesting question arises concerning the possibility of control by the Judiciary Branch. Regarding “material” inspection, there is no doubt that, as a normative act, the Provisional Measures are subject to judicial review by the Supreme Court⁴¹. In regards to the prerequisites of relevance and urgency, a more detailed analysis is needed in this study.

During the military regime, the Supreme Court, for obvious reasons, did not hunch over the prerequisites of the decrees-law, arguing that these were a result of a political decision of the President. With the promulgation of the Constitution of 1988, the ministers nominated during the dictatorship continued as members of the Court. It is not hard to conclude, therefore, that prior jurisprudence regarding Provisional Measures was maintained, characterizing what Professor Luis Roberto Barroso called “retrospective interpretation”:

one of the chronic pathologies of the constitutional hermeneutics is the retrospective interpretation, by which one tries to interpret the new text in such a way that it does not innovate, but instead stays as much as possible alike with the old one⁴².

The Constitution, as an open system, must be interpreted in light of the current socio-political context, as well as keep itself untied from past hermeneutical chains. As mentioned, however, the ministers remained tied to the past, in a wholly uncritical position – despite the democratic context,

⁴⁰ BALERA, Felipe Penteado. *Medida Provisória: o controle dos requisitos constitucionais de relevância e urgência pelo Congresso Nacional e pelo STF*. Available at: <[http://www.esdc.com.br/RBDC/RBDC-14/RBDC-14-025-Artigo_Felipe_Penteado_Balera_\(Medida_Provisoria\).pdf](http://www.esdc.com.br/RBDC/RBDC-14/RBDC-14-025-Artigo_Felipe_Penteado_Balera_(Medida_Provisoria).pdf)> Accessed on: Oct. 21, 2011.

⁴¹ Art. 102: *It is upon the Supreme Court, primarily, to guard the Constitution, and it shall: I - prosecute and adjudicate, originally: a) the direct action of unconstitutionality of federal or state law or normative act and declaratory actions of constitutionality of a federal law or normative act.*

⁴² Available at: <<http://www.sefaz.pe.gov.br/flexpub/versao1/filesdirectory/sessions579.pdf>>. Accessed on: Oct. 27, 2011.

they continued dodging the control of the assumptions of urgency and relevance. There were, therefore, problems in the three spheres of Government: the Executive was issuing Provisional Measure in excess, the Legislative watching apathetically and the Judiciary abstaining itself.

In face of the continuity of such scenario of anti-judicialization of politics for over one decade, in September 11, 2001 the Constitutional Amendment n. 32, responsible for the current words of art. 62, was approved. Being clear the *ratio legis* of the derived constituent to reduce the large number of Provisional Measures, in addition to preclude the possibility of reissuing of the normative act in the same legislative session⁴³ and to institute material limits, the Amendment n. 32 was essential to the change of jurisprudential orientation regarding the control of the prerequisites of urgency and relevance.

The current positioning of the Supreme Court is to not accept it for trespassing the discretionary sphere of Executive Branch, unless when there is a flagrant misuse of purpose or abuse of power to legislate. It considers, therefore, that the formal unconstitutionality should be considered only exceptionally. In this sense, that Supreme Court adopted the following understanding in judging DAU n. 2213, *in verbis*:

The issue of Provisional Measure, by the President of the Republic, to legally legitimate itself, depends, among other requirements, on the strict observance of the constitutional requisites of urgency and relevance (Const., art. 62, “caput”). - The requisites of urgency and relevance, although relatively indeterminate and fluid legal concepts, even exposing themselves initially to the discretionary appraisal of the President, are subject, although exceptionally, to the control of the Judiciary, because they comprise the constitutional structure that discipline the Provisional Measures, qualifying themselves as requirements that legitimate and legally constrain the use of such a normative act by the Chief Executive, the primary legislative power granted to him exceptionally by the Constitution. Doctrine. Precedents - The possibility of judicial control, even though exceptional, is based on the need to prevent the President of the Republic, when issuing Provisional Measures, to fall upon excess of power or upon institutional situation of manifest abuse, because the system of limitation of powers does not allow abusive government practices to prevail over the constitutional principles that form the democratic concept of Power and State, especially in those hypotheses affected by anomalous and arbitrary exercise of state functions. ABUSIVE USE OF PROVISIONAL MEASURES – INADMISSIBILITY – PRINCIPLE OF SEPARATION OF POWERS - EXTRAORDINARY POWERS OF THE PRESIDENT OF THE REPUBLIC - The increasing institutional appropriation of the power to legislate, by the successive Presidents of the Republic, has raised serious legal concerns, due to the fact that the excessive use of Provisional Measures cause profound distortions that are projected on the scenario of political relations between the Executive and Legislative Powers. Nothing can justify the abusive use of Provisional Measures, otherwise the Executive – when absent constitutional grounds of urgency, necessity and material relevance – ends up investing itself, illegitimately,

⁴³ Art. 62, §10: *It is prohibited to reissue, in the same legislative session, a Provisional Measure that has been rejected or has lost its effectiveness by lapse of time.*

of the most important institutional function that belongs to the National Congress, becoming, within the state community, hegemonic instance of power, affecting, thus, with serious detriment to the regime of public freedom and serious reflections on the system of checks and balances, the relation of equilibrium that must necessarily exist among the Powers of the Republic. It is up to the Judiciary Branch, by performing its inherent functions, to prevent that the compulsive exercise of the President's extraordinary power to issue Provisional Measure culminate with the introduction, in the Brazilian institutional process, in legislative matters, of a truly governmental Caesarism, thereby causing serious distortions in the political model and generating serious dysfunctions compromising the integrity of the constitutional principle of separation of powers⁴⁴.

In principle, then, the Supreme Court determines that the requirements of urgency and relevance must be analyzed by the Chief Executive himself by the time of the issuing of the Provisional Measure, and by the National Congress which, if it does not agree, may fail to convert it into Law. Exceptionally, however, when assessing deviation of purpose or abuse of power to legislate by striking absence of these constitutional requisites, the Judiciary may interfere in the discretionary sphere of the Executive.

Despite the undoubted improvement in relation to the omission of other times, *data venia* we dare disagree with the position adopted by the Constitutional Court. "Urgency" and "relevance" do not attribute, by themselves, political discretion to the President, but are presented as indeterminate legal concepts. Notice that, although in both cases there is a semantic inaccuracy, the control mode exerted in each case will be different, once it is secure in the jurisprudence the conception that discretionary acts can only be controlled in case of extreme abuse or serious error.

One cannot speak of discretion only by linking the issuing of Provisional Measures to the exclusive initiative of the Chief Executive. That's because this prerogative is limited to the existence of the requisites of urgency and relevance considered worthy of inclusion in the Constitution by the originary Constituent Power. The simple expression of intent to issue the normative act being analyzed is not enough: it is necessary that the requirements of admissibility in the concrete case are present. Thus, based on the principles of separation of powers and of legality, it is correct to argue the indeterminacy of these legal concepts. To support this thesis, there is still the fact that the use of Provisional Measures results in a zone of conflict between the Executive and the Legislative Branch, making it important that the Judiciary acts as an impartial arbiter.

In this sense, Ministers Sepúlveda Pertence and Celso de Mello, who have a diverse understanding from the rapporteur on the DAU discussed just discussed, are right. For this last one:

⁴⁴ Judgment delivered by the Plenary of the Supreme Court in DAU n. 2213/DF in precautionary measure. Rapporteur Min. Celso de Mello. 2002.

the recognition of judicial immunity, pre-excluding from judicial consideration the examination of such requisites – if it were accepted - would imply ratifying, in an unacceptable way, in favor of the President, an unlimited expansion of his power to issue Provisional Measures without any possibility of control, which would prove incompatible with our constitutional system⁴⁵.

In this standard, based on academics studies, Celso Antonio Bandeira de Mello brilliantly adds that:

the Judiciary does not come out of his own field or invades administrative discretion in determining whether prerequisites normatively established to delimit a given jurisdiction exist or do not exist. Since the Constitution only allows for Provisional Measures in light of relevant and urgent circumstances, it follows that both are cumulatively indispensable requirements for outburst of the aforementioned competence. It is the of saying: without them, the power to issue provisional Measures will not exist. If the Constitution tolerated the issuing of emergency measures outside these hypotheses, it would not have conditioned its expedition to the pre-occurrence of these normative assumptions. It follows that these requisites must be judicially controlled, otherwise the constitutional basis delineating the authority to issue Provisional Measures would be being ignored. Indeed, if 'relevance and urgency' were notions specifically gaugeable only by the President, in discretionary unchallengeable judgement, the delineation and extension of power to issue such measures would not arise from the Constitution, but from the will of the President, since they would have the scope that the Chief Executive wanted to give to them. So, rather than being limited by a circle of powers established by Law, he is the one who would decide his own competencial sphere in matter, the antinomic idea to everything that follows from a State of Law⁴⁶.

Furthermore, the principle of non-obliteration of jurisdictional control is still in effect, as provided in article 5, XXXV of the Constitution, according to which "the law will not exclude from consideration of the Judiciary, injury or threat to a right". As guardian of the Constitution, the excuse for the examination concerning the existence of the conditions of urgency and relevance by the judiciary implies violation of constitutional attributions of the Supreme Court itself.

3.1. Provisional Measures related to tax matters and the violation of the urgency requisite

As seen previously, apart from the exceptions provided for in paragraph 2, art. 62 of the Constitution, Provisional Measures entailing the imposition or increase of taxes shall have effect only in the year following the year of its publication, based on the principle of anteriority.

There is no doubt, it should be emphasized, that such a principle has great importance for legal certainty and protection of citizen-taxpayer. Therefore, any law that creates or increases taxes must respect it.

⁴⁵ Vote by Minister Celso de Mello in the DAU n. 162-1/DF judgment.

⁴⁶ MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo*. 20th ed. São Paulo: Malheiros, 2006. p. 120.

It occurs that, as already seen, the Provisional Measures can only be issued in the presence of the constitutional prerequisites of relevance and urgency. It is not difficult, however, to see that, even if relevant, a matter that allows the waiting for a year to start producing effects simply cannot be something urgent.

The Constitution established a legislative summary procedure for cases in which the President requests urgency in projects of his own initiative. Article 64 stipulates that each legislative House has forty-five days to appraise the project, totaling ninety days. In the case of Senate amendment, the other House has ten additional days to conduct its analysis. In this way, the instrument of Provisional Measures would not be suited to the processing of matters that could wait up to a hundred days without suffering damage or loss.

In this sense, it is noted that if the Federal Constitution itself determined that the subject that can wait a hundred days to have effect does not fulfill the prerequisites inherent to the institute being studied, with much more reason one that could wait for a year would not. Thus, article 150, in prohibiting the collection of taxes in the same year as the financial year of the law that instituted it, constitutes a material limit to the edition of Provisional Measures. So, it would only be possible to edit these normative acts concerning taxes referred to in paragraph 1 of that same article 150, namely, those not subject to the principle of anteriority.

It should be stressed that many tax lawyers⁴⁷ agree with the argument defended above, however starting from another premise: the equalization with the criminal law. It is brought forward that the two branches of law have the same guarantee values and that, based on the principle of strict legality, they cannot be regulated by Provisional Measure. That is because, if in the criminal law scope, the Constitution states that there is no crime without previous law that defines it, nor penalty without prior legal commination⁴⁸, there is in the tax sphere need to respect the constitutional precept that disciplines on the impossibility of existence or increase of tribute with no law that establishes it⁴⁹. In our view, it remains evident that such a reading is misguided. Parallels between assets and freedom can only sustain themselves from a classist and strictly bourgeois concept of the Constitution.

⁴⁷ In the same sense, read: ATALIBA, Geraldo. *Hipótese de incidência tributária*. São Paulo: Malheiros, 2004; DERZI; MACHADO, Misabel de Abreu. *Direito tributário, direito penal e tipo*. São Paulo: RT, 1988; MENDES, Danielle Patrícia Guimarães. *A medida provisória sobre matéria tributária em face da Emenda Constitucional nº 32*. Jus Navigandi, Teresina, year 7, n. 58, Aug. 1, 2002. Available at: <<http://jus.com.br/revista/texto/3084>>. Accessed on: Dec. 3, 2011.

⁴⁸ Art. 5, XXXIX of the Const: *there is no crime without previous law that defines it, nor penalty without prior legal commination*

⁴⁹ Art. 150, I of the Const: *Notwithstanding other guarantees ensured to the taxpayer, it is forbidden for the Union, the States, the Federal District and Municipalities: I - demand or increase tribute with no law that establishes it.*

In contrast to what has been exposed, however, so far, it is peaceful in the jurisprudence the possibility of using the Provisional Measures on tax matters.

4. Act private to the President of the Republic? States and Municipalities can issue Provisional Measures?.

An interesting question can be raised about the possibility of issuing Provisional Measures by states and municipalities. On one side lies the argument contrary to the detriment of the principles of separation of powers and legality in favor of the principle of symmetry. According to this thought, the rules of the legislative process themselves place the institute as exceptional and exclusive to the Union. Moreover, it was noticed that the issuing of the Provisional Measure depends on a legislative *periculum in mora* context. It is notorious that the federal legislative process is slower than those of the state and the city, because in the first one there is the two House Chamber system. There is a fear that, if Mayors, for example, used this normative act, in practice it would be closing the City Council. Finally, the most skeptical argument against the issuing of Provisional Measures by other federal entities is based on a "likely" extension of the trivialization of the use of this institute, considering that, since on the federal level - where the control of the society, the Legislature and the media is higher - this process takes place, imagine it in states and municipalities.

The Supreme Court, on its turn, established the understanding that, if there is a provision on the State Constitution and if it is in accordance with the constitutional parameters - from procedural issues to the material limits, going through the formal prerequisites - states can adopt such normative act. Notice, therefore, the need for symmetric compliance with the federal legislative process. Such precedent is crystallized in DAU n. 425⁵⁰.

DIRECT ACTION OF UNCONSTITUTIONALITY. PRELIMINARY. STATE CONSTITUTION. LEGISLATIVE PROCESS. PROVISIONAL MEASURE. COMPETENCE OF THE GOVERNOR TO ISSUE IT. INCREASE IN FINANCIAL COMPENSATION OF PUBLIC SERVANTS. INITIATIVE. DONATION OF REAL STATE. INCREASE ON THE PERCENTAGE OF PARTICIPATION OF THE MUNICIPALITIES ON THE TAXES ON THE CIRCULATION OF GOODS AND SERVICES (TCGS) REVENUE. LEGAL EFFECTIVENESS LIMITED IN TIME. LOSS.

1. Member states may issue provisional measures based on the principle of symmetry, obeying the basic rules of the legislative process, within the Union. (art. 62 of the Constitution)

2. Constitutes a form of restriction that is not in the current national constitutional system (§1 of art. 25 of the Constitution) any limitation imposed on federal entities to issue Provisional Measures. It is legitimate and facultative to be adopted by member states, taken the federal government as an example.

⁵⁰ DAU n. 425/TO. Rapporteur Min Maurício Corrêa. Verdict: September. 03,2002.

The Constitution, in turn, although does not expressly provide for it, makes clear reference to the state figure of Provisional Measures:

Art. 25: The states are organized and governed by the constitution and laws that they adopt, subject to the principles of this Constitution.

[...]

§2 - It is up for states to operate, directly or through concession, piped gas local services, as provided by law, being forbidden, however, to issue any provisional measure for its regulation.

A *contrario sensu* reading of the article mentioned shows that, the prohibition of state Provisional Measure for the regulation of piped gas, implicitly acknowledged the possibility of its existence in relation to other subjects. In this regard, the Minister Ellen Gracie flagged that:

To conclude differently would lead us to inevitably ask whether it would make sense to address such a restriction to the President of the Republic in a device that treats only the exclusive activity of other participants of the federation, that is not the Union, or, still, why the Federal Constitution would impose a specific ban regarding the use by member states of a legislative instrument that would be to them prohibited to institute⁵¹.

Although the Supreme Court has not faced the issue, a systematic and teleological interpretation, in the light of the principle of symmetry, allows the issuing of Provisional Measures by municipalities if, *mutatis mutandis*, the same requirements to states are met: there should be a provision in the Municipal Organic Law in accordance with the constitutional parameters. Even though there is no constitutional provision similar to that of art. 25, §2 regarding municipalities, the autonomy, specifically the self-organization, allows the issuing of municipal Provisional Measures⁵².

5. Positive and negative Aspects of the Institute of the Provisional Measure Institute

In a first reflection, one could conclude that the Provisional Measure is a potentially authoritarian legal instrument, taking into account the possibility of a vast degree of legislative action on the part of the Chief of the Executive Branch. It is clear that an excessive and unjustified use of this Institute would eventually weaken the popular representation, the political parties and the

⁵¹ Verdict delivered in the DAU n. 2.391/SC. Rapporteur Min. Ellen Gracie, August 16, 2006.

⁵² Nelson Nery Junior and Rosa Maria de Andrade Nery state: “*There is no prohibition in the Constitutional text for Chiefs of Executive Branches on other levels (state and municipal) to issue Provisional Measures. Thus, both the State Constitution and the Organic Law of the Municipality may allow them to issue Provisional Measure, following the federal model*”. (NERY JUNIOR, Nelson; NERY, Rosa Maria de Andrade. *Constituição Federal Comentada*. 2nd ed. São Paulo: Revista dos Tribunais, 2009).

separation of powers, immutable clause⁵³ and fundamental constitutional principle in the existing legal system⁵⁴. This is because the legislating function of the Executive Branch, in thesis non typical, as already mentioned, due to its frequency would become typical. Ultimately, it would end up the core of the Democratic State of Law⁵⁵. As well asserts the eminent jurist Friedrich Muller, the result is tragic, since:

without having to dissolve the National Congress, according to the Constitution, the President can simultaneously make it powerless and exempt it of responsibility – thus creating a vicious circle of disparliamentarization and disdemocratization⁵⁶.

However, the scope of the institute of Provisional Measure is to give the Executive Branch an instrument to legislate when it cannot wait for the processing of common legislative procedure. In theory, therefore, this normative act is not only necessary but also essential to the functioning of contemporary State.

The immediate consequence of the absence of oversight was the abusive use of the Provisional Measures by the Chief of the Executive Branch. As the original wording of article 62⁵⁷ did not establish the matters subject to control by this normative instrument nor forbade its reissue, what was to be an exceptional providence took the form of a routine legislative method.

In this sense, notice what the following graph⁵⁸ depicts:

⁵³ Art. 60, §4 of the Constitution: *it will not be object of deliberation the proposed amendment aimed at abolishing: [...] III – the separation of powers.*

⁵⁴ Art. 2 of the Constitution: *The Legislature, the Executive and the Judiciary, independent and harmonics among each other, are the powers of the Union.*

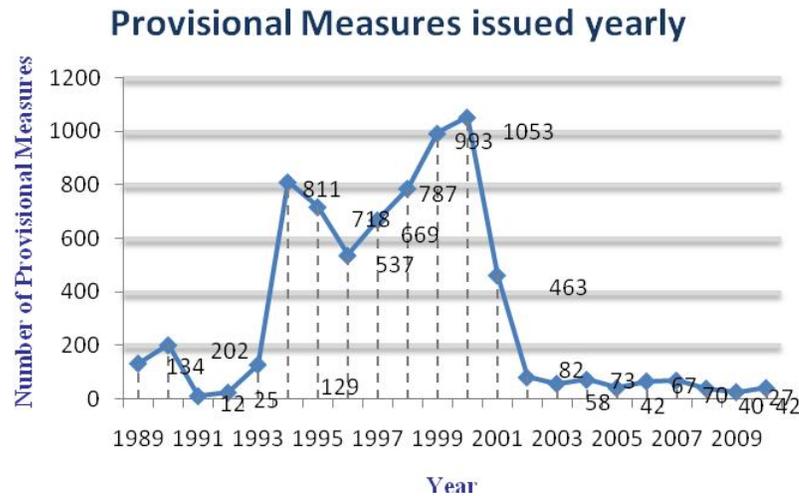
⁵⁵ In a similar approach, read: ZIMMERMANN, Augusto. *Curso de Direito Constitucional*. 4th ed. Rio de Janeiro: Lumen Juris, 2006.

⁵⁶ MULLER, Friederich. In: BONAVIDES, Paulo; MIRANDA, Jorge; AGRA, Walber de Moura (Coord.). *Comentários à Constituição Federal de 1988*. Rio de Janeiro: Forense, 2009.

⁵⁷ Original writing of the article 62: *In case of relevance and urgency, the President of the Republic can use Provisional Measures, with the force of law, and shall submit them without delay to the National Congress, which if in recess, will be convened extraordinarily to meet within five days.*

Sole paragraph: The Provisional Measures will lose effectiveness, since the issuing, if not converted into law within thirty days from its publication, and the National Congress must discipline legal relations arising therefrom.

⁵⁸ Data available at: <http://www.planalto.gov.br/ccivil_03/mpv/quadro/quadro%20geral.htm>. Accessed on: Oct. 25, 2011.



It should be noticed that, as well known, the Provisional Measures were instituted with the promulgation of the Federal Constitution, in October 5, 1988. Seeking an isonomic analysis, the year 1988 was excluded from the statistics, since there is no way to compare the number of measures issued in a certain year with those obtained for just three months. For the same reason, the data go only until 2010, given the possibility of issuing of normative acts still in 2011⁵⁹.

The observation of the data above leads to the conclusion that, in the temporal range in focus, 7034 Provisional Measures were issued by the Presidents of the Republic. It is not difficult to see, especially with the alarming number of 1053 measures only in 2000 - configuring, in that year, an alarming average of 2.88 per day - that the Executive Branch was acting improperly. Certainly there were not more than two exceptional situations per day this year to justify such an application.

Further alarming factor lies in the comparison made between the dictatorial period and the current one: between April 1964 and March 1985, the General Presidents edited 2272 decrees-law. Furthermore, using the instrument of Provisional Measures, the Presidents legislated twice as much as the National Congress since 1988⁶⁰. This fact contributes to the discredit of a measure that should be exceptional and urgent, but turns into ordinary exercise of power to legislate by the Executive Branch, seriously compromising the constitutional postulate of separation of powers.

In this sense, Celso de Mello cites:

This behavior of the various chiefs of the Executive Branch of the Union, in addition to unduly concentrating the focus and the axis of legislative decisions on the

⁵⁹ This because, this article was written in October/2011.

⁶⁰ Data available at: <http://www.egov.ufsc.br/portal/sites/default/files/anexos/14208-14209-1-PB.htm>. Accessed on: Oct. 28, 2011.

Presidency of the Republic, turned unstable the Brazilian State's normative order which begun, in consequence, to live under the sign of the ephemeral⁶¹.

It is worth mentioning, however, the significant positive impact brought about by the constitutional amendment n. 32, responsible, among other things, for imposing limits on the reissuing and for establishing material limits to the adoption of Provisional Measures, giving new wording to article 62 of the Constitution. As an immediate consequence of this amendment, it is easy to see the huge annual decrease in the total number of such normative acts, which thereafter did not exceed 82 per year.

It should be stressed that the last year of Collor's term and Itamar Franco's early months, shortly after the dismissal of the first, represented a non typical period, easily identifiable as jarring point in the series of data.

Despite the reduction, Provisional Measures are still being issued in contradiction to the constitutional boundaries. It was the case of the Provisional Measure 207/04 that, by changing Law n. 10,683/03, granted the status of Minister to the then President of the Central Bank, Henrique Meirelles. It remains clear, of course, that the case is at odds with the constitutional principles of urgency and relevance, with strictly political characteristics. This is why many argue⁶² that such a measure was intended only to stop the investigations carried out by public prosecutors against Meirelles and shift the investigation assessment competence to the Supreme Court⁶³.

It is interesting to notice that such a fact is not characteristic of one Government, but of all. Inasmuch that, by the time of the issuing of the so-called "Collor Plan" - via Provisional Measure – the then Senator Fernando Henrique Cardoso went on to say that it "constitutes abuse of the patience and of the intelligence of the country the insistence of Presidents, who, in an insensitive authoritarian recurrence, keep on issuing Provisional Measures"⁶⁴. However, the same Fernando Henrique issued over 5000 measures during his eight-year term⁶⁵. Itamar Franco, in turn, used the same instrument to appoint directors of a State-owned radio.

There is no doubt, however, that, in a democratic State of Law, the Executive Branch requires a swift, agile and efficient means to meet the changing demands of society, which cannot wait the

⁶¹ Statement available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=88830&caixaBusca=N>. Accessed on: Oct. 21, 2011.

⁶² In this sense, see demonstration of the Bar Association of Brazil. Available at: http://direito2.com/oab/2004/nov/9/oab_repudia_mp_que_deu_status_de_ministro_a_presidente_do_bc. Accessed on: Oct. 23, 2011.

⁶³ Art. 102: *It is for the Supreme Court, mainly, to guard the Constitution, and shall: I - to process and adjudicate, originally: [...] c) in common criminal offenses and crimes of responsibility, Ministers of State [...]*

⁶⁴ Statement available at: <http://jusvi.com/artigos/947>. Accessed on: Oct. 22, 2011.

⁶⁵ SILVA, Paulo Napoleão Nogueira. *Breves Comentários à Constituição Federal*. v. I. Rio de Janeiro: Forense, 2007.

time needed for the completion of the long pending federal legislative process. The pathology, certainly, resides in the commonplace use of the instrument of the Provisional Measure. Its everyday use is in clear contradiction with the *ratio legis* of article 62 of the Constitution, which requires the issuing this primary normative act only in exceptional situations, namely, those urgent and relevant.

6. Final Considerations

Some conclusions can be drawn at this point. Firstly, the data previously analyzed demonstrate the clear incompatibility between the ideal conception of Provisional Measure as formulated by the academics and its factual use, which often configures a true usurpation of the typical function of Legislative Branch by the Executive. In this sense, the overuse of this normative act entails the drastic reduction of the political and institutional importance of the National Congress, in view of the legal provision that suspends any other appraisal in cases of non-assessment of the measure after forty-five days.

On the other hand, in our point of view, there is clearly a factual impossibility of governing without an instrument similar to the Provisional Measure, justified by a legislative *periculum in mora*. That is because it turns out that there are many urgent and relevant issues that cannot wait the necessary time pending, characteristic of the regular legislative process, without leading to damage. In an economic crisis scenario, for example, it would be unreasonable and unproductive to have to wait for all the processing of the Bill so that a crucial measure can be adopted – there would be the huge risk of damages arising on account of the delay of the legislative process. The provisional measure is, therefore, vital to the functioning of the contemporary State.

Given the above considerations, it is important to notice that the mere fact that the Executive Branch uses its non typical function to legislate does not put in risk the principle of separation of powers. This postulate is threatened, however, when the President of the Republic, based on art. 62 of the Constitution, uses the institute of Provisional Measures in an improper and exorbitant way, with no respect to the constitutional principles of relevance and urgency. By doing so, the Executive Branch not only assumes a Legislative scope outside its constitutional function, but also undermines legal certainty, which, in turn, is based on the parameters of the Democratic State of Law.

7. References

ATALIBA, Geraldo. *Hipótese de incidência tributária*. São Paulo: Malheiros, 2004;

BALERA, Felipe Penteado. *Medida Provisória: o controle dos requisitos constitucionais de relevância e urgência pelo Congresso Nacional e pelo STF*. Available at:

<[http://www.esdc.com.br/RBDC/RBDC-14/RBDC-14-025-Artigo_Felipe_Penteado_Balera_\(Medida_Provisoria\).pdf](http://www.esdc.com.br/RBDC/RBDC-14/RBDC-14-025-Artigo_Felipe_Penteado_Balera_(Medida_Provisoria).pdf)>. Accessed on: Oct. 20, 2011.

BEZERRA, Paulo Cesar Santos. *Mutação Constitucional: os processos mutacionais como mecanismos de acesso à justiça*. Available at: <<http://www.sefaz.pe.gov.br/flexpub/versao1/filesdirectory/sessions579.pdf>>. Accessed on: Oct. 27, 2011.

BONAVIDES, Paulo; MIRANDA, Jorge; AGRA, Walber de Moura (Coord.). *Comentários à Constituição Federal de 1988*. Rio de Janeiro: Forense, 2009.

CARVALHO FILHO, José dos Santos. *Manual de Direito Administrativo*. 25th ed. Rio de Janeiro: Lumen Juris, 2010.

CLÈVE, Clèmerson Merlin. *Medidas Provisórias*. 2nd ed. São Paulo: Max Limonad, 1999.

DERZI; MACHADO, Misabel de Abreu. *Direito tributário, direito penal e tipo*. São Paulo: RT, 1988;

FERNANDES, Bernardo Gonçalves. *Curso de Direito Constitucional*. Rio de Janeiro: Lumen Juris, 2010.

LENZA, Pedro. *Direito Constitucional Esquematizado*. 15th ed. São Paulo: Saraiva, 2011.

MAIA, Paula Oliveira; LIMA, Eduardo Martins. *As Medidas Provisórias e o Poder Judiciário: o controle jurisdicional dos pressupostos de relevância e urgência*. Available at: <<http://www.conpedi.org.br/manaus/arquivos/anais/Paula%20Oliveira%20Maia%20e%20Eduardo%20Martins%20de%20Lima.pdf>>. Accessed on: Oct. 22, 2011.

MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo*. 20th ed. São Paulo: Malheiros, 2006.

MENDES, Danielle Patrícia Guimarães. *A medida provisória sobre matéria tributária em face da Emenda Constitucional n. 32*. Jus Navigandi, Teresina, year 7, n. 58, Ago. 1, 2002. Available at: <<http://jus.com.br/revista/texto/3084>>. Accessed on: Dec. 3, 2011. MORAES, Alexandre de. *Direito Constitucional*. 20th ed. São Paulo: Atlas, 2006.

MORAES, Guilherme Peña de. *Curso de Direito Constitucional*. 2nd ed. Rio de Janeiro: Impetus, 2008.

NERY JUNIOR, Nelson; NERY, Rosa Maria de Andrade. *Constituição Federal Comentada*. 2nd ed. São Paulo: Revista dos Tribunais, 2009.

PAULO, Vicente; ALEXANDRINO, Marcelo. *Direito Constitucional Descomplicado*. 7th ed. São Paulo: Método, 2011. p. 546.

SILVA, José Afonso da. *Curso de Direito Constitucional Positivo*. 27th ed. São Paulo: Malheiros, 2006.

SILVA, Paulo Napoleão Nogueira. *Breves Comentários à Constituição Federal*. v. I. Rio de Janeiro: Forense, 2007.

ZIMMERMANN, Augusto. *Curso de Direito Constitucional*. 4th ed. Rio de Janeiro: Lumen Juris, 2006.