

Brazilian Legislation on Executive Power: Provisory or Permanent Measures?

Dr. Murillo de Oliveira Dias*

Coordinator and Professor, Fundação Getulio Vargas, Brazil

DOI: [10.36348/SIJLCLJ.2019.v02i10.007](https://doi.org/10.36348/SIJLCLJ.2019.v02i10.007)

| Received: 21.10.2019 | Accepted: 28.10.2019 | Published: 30.10.2019

*Corresponding author: Dr. Murillo de Oliveira Dias

Abstract

In 1988, the National Constituent Assembly promulgated the Brazilian Constitution, creating the Provisional Measure (MP) through Art. 62, which is a single act of the President of the Republic, due to urgency and relevance of the subject, with an immediate force of law, for a period not superior to 60 days. In this article, N=1,512 MPs, issued from 1988 to 2019, were analyzed. Key findings pointed out 1,160 MPs converted into Laws (77 percent conversion tax), 67 MPs in process, from which N=51 MPs are still in force for 18 years. This inconsistency is given by the Constitutional Amendment 32, issued on September 11, 2001, which altered the termination clause over time from Art. 62, paragraph 1st, under investigation. The implications are potential legal uncertainty arising from disparities, regarding provisional measures that became permanent, until appreciated by the Brazilian Congress. Case analysis and discussion complete the present work.

Keywords: Provisory Measure, Federal Constitution, Constitutional Amendment, Brazilian Legislation.

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INTRODUCTION

This study presents an extensive investigation of the Brazilian Provisory Measures (*Medidas Provisórias*, or MPs, in Brazilian Portuguese), as the unit of analysis [1].

Provisory Measures are exclusive acts of the Brazilian chief of the executive power, created by the Constitution 1988, Art. 62, "with an immediate force of law, without the participation of the Legislative Power, due to urgency and relevance of the subject, for a period not superior to 60 days" [2]. Nevertheless, evidence was found that approximately five percent of the overall N=1,512 MPs are still in force after the termination period. In other words, provisory became, became long-life, permanent ones. N=51 MPs are still in force for eighteen years. Such MPs are investigated in this case study.

MP 2.162-72, for instance, from August 23, 2001, ruling the issuance of National Treasury Notes - NTN for the capital increase of the Banco do Brasil S.A., was re-issued 72 times, on a monthly basis, from March 14, 1996 (initially MP 1.367 – MPs sometimes changed their identification number, for distinct classification purposes), since then in process, with full legal force for 18 years.

The answer to the discrepancies studied here lies in the Constitutional Amendment 32 (CA32), issued on September 11, 2001 [5].

The "Citizen Constitution", as became known Constitution 1988, was issued on October 5, 1988, with 117 articles, and Amended 102 times, from 1988 to 2019. In this research, only Art. 62 is under investigation, in which MPs are ruled [2], together with CA32, regarding Art. 62 [5].

In the next sections, methods and limitations are presented. Case analysis, discussion, implications and future research complete the current study.

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METHODS AND LIMITATIONS

This study is qualitative, inductive reasoning, multi-method approach interpretive. It compiled a single descriptive case study with extensive archival research. The unit of analysis is the Brazilian Provisional Measures [1].

This research is limited to Federal Constitution 1988, Art. 62 [2], and Constitutional Amendment 32 [5], regarding Art. 62 modification. Archival research was conducted solely upon the Brazilian Congress database [6].

Moreover, this study is limited also by the Brazilian Federative Republic government system. Other government systems are not part of this study and should be investigated in separate.

Finally, this research is limited to the MPs issued from 1988 to October 2, 2019. Other legal instruments or different periods are not investigated here.

FEDERAL CONSTITUTION 1988

Provisory Measure (MP), is a legal dispositive, exclusive to the executive power. According to the Brazilian Constitution 1988, Art. 62, Title IV, Chapter I (Legislative Power), Section VIII (Legislative Process), subsection III, "In case of relevance and urgency, the President of the Republic may adopt provisional measures, with force of law, and shall submit them immediately to the National Congress" [2].

However, MPs are limited in scope, as originally worded by Art. 62, § 1:

- Nationality, citizenship, political rights, political parties and electoral law;
- Criminal law, criminal and civil procedural law;
- Organization of the judiciary and the public prosecutor, the career and guarantee of its members;
- Multiannual plans, budget guidelines, budget and additional and supplementary credits, except as provided in art. 167, §3 [2]

The tax increase is prevented by §2 — finally, § 12, Art. Sixty-two issued "the provisional measure shall be fully effective until the draft is sanctioned or vetoed" [2] CA 32 has altered the Art. 62, as demonstrated in the next section.

CONSTITUTION AMENDMENT 32

Constitution Amendment 32 (CA32) was issued on September 11, 2001. CA32 altered the following articles from Federal Constitution: (a) 1º, (b) 48, (c) 57, (d) 61, (e) 62, (f) 64, (g) 66, (h) 84, (i) 88, and finally (j) 246. In this research, only art. 62 is studied. Article 62 has been altered on its caput and in § 1:

CA 32, Art. 62. Caput, the following sentence was eliminated (in red)

Em caso de relevância e urgência, o Presidente da República poderá adotar medidas provisórias, com força de lei, devendo submetê-las de imediato ao Congresso Nacional., que, estando em recesso, será convocado extraordinariamente para se reunir no prazo de cinco dias [2, 5]

Directly translated, Art. 62 from CA 32 remained as follows: "In case of relevance and urgency, the president of the Republic should adopt provisory measures, with the full force of law, submitting them to the National Congress."

The sentence in red was suppressed: "(...) even being in recess, should be extraordinarily summoned, in five days. Therefore, CA32 removed the possibility for congress extraordinary convocation within the recess.

CA 32, sole paragraph became § 1:

§ 1 Parágrafo único. ÉAs vedada a edição de medidas provisórias sobreperderão matéria:eficácia, desde a edição, se não forem convertidas em lei no prazo de trinta dias, a partir de sua publicação, devendo o Congresso Nacional disciplinar as relações jurídicas delas decorrentes.

In sum, the expiration period of 30 days, counting after the MP publication, was, by CA 32, suppressed from the original Art. 62, from Federal Constitution 1988. In the following sections, the consequences of such an Amendment will be analyzed.

PROVISORY MEASURES (1988 – 2019)

For the purposes of this research, N=1,512 MPs has been investigated, from November 4, 1988 (MP 10) October 2, 2019 (MP 897). Out of these, 1,160 MPs were converted in laws (77 percent), 312 were rejected, terminated (33 percent), or are in the process – 67 (approximately 4.5 percent).

First, Figure 1 illustrates the MPs issued before and after CA 32:

Constitutional Ammendment 32		MPs	MPs Re- editions	Total
MPs	Period	(a)	(b)	(c = a + b)
Before	1988 - 2001	615	9.588	10.203
After	2001 - 2019	897	0	897
Total		1.512	9.588	11.100

Fig-1: MPs issued before and after CA 32. Source: Brasil, 2019 [6]

Observe in Figure-1 that before the Constitutional Amendment 32 (CA 32), from 1988 to

2001, the number of MP re-issuance or re-editions reached 9,588 MPs, and after CA 32, dropped to zero.

Figure-2 depicts the number of MPs converted into Laws, before and after the CA 32:

Constitutional Amendment 32		MPs	MPs converted into Laws	Conversion rate (%)
MPs	Period	(a)	(d)	(c = d/a)
Before CA 32	1988 - 2001	615	479	78%
After CA 32	2001 - 2019	897	681	76%
Total		1.512	1.160	77%

Fig-2: MPs converted into Laws. Source: Brasil, 2019 [6]

Note in Figure-2 that the conversion tax decreased slightly after the CA 32 (2 percent) in comparison to both periods (before and after CA 32). Nevertheless, the number of Congress sessions for MP appreciations decreased dramatically; thus, optimizing National Congress performance on MPs. Once MPs are initially, acts of the executive power, not the legislative branch, they might be seen as interference from the executive on congressional matters.

Figure 3 illustrates the MPs rejected and in process, before and after CA 32:

Constitutional Amendment 32		MPs	MPs Rejected	Rejection rate (%)	In Process
MPs	Period	(a)	(f)	(g = f/a)	
Before CA 32	1988 - 2001	615	136	22%	51
After CA 32	2001 - 2019	897	216	24%	16
Total		1.512	352	23%	67

Fig-3: MPs rejected and in process. Source: Brasil, 2019 [6]

Out of the N=67 total MPs in process, before the CA 32, N=51 MPs remain in force since 2001. After the CA 32, 16 MPs remain in process; however, they are still in due time.

From 1988 to 2019, eight Brazilian presidents took office, as shown in Figure-4, as follows:

Succession line	President	MPs (a)	MPs converted into Laws (d)	Conversion rate (%) (c = d/a)
30 ^o	Tancredo Neves	0	0	0
31 ^o	José Sarney	121	101	83%
32 ^o	Fernando Collor	96	73	76%
33 ^o	Itamar Franco	78	67	86%
34 ^o	Fernando Henrique Cardoso	422	322	76%
35 ^o	Luis Inacio Lula da Silva	419	366	87%
36 ^o	Dilma Rouseff	222	156	70%
37 ^o	Michel Temer	126	70	56%
38 ^o	Jair Messias Bolsonaro	28	5	18%
Total		1.512	1.160	77%

Fig-4: MPs Conversion per president. Source: Brasil, 2019 [6]

Observe in Figure 4, that the 30th President, Tancredo Neves, passed away on April 21, 1985, and never took office, replaced by José Sarney, from 1985 to 1991.

President Michel Temer occupied the office for two years and 213 days, due to the Dilma Rouseff's impeachment process. The same happened to Fernando Collor, impeached and later substituted for Itamar Franco. Lula da Silva was the president who issued the highest number of MPs converted into Laws. However, both left-wing administrations (Lula's and Dilma's, from Labor Party – PT) were the most corrupt within the entire Brazilian history. Lula is also the only former Brazilian president convicted for corruption, and laundry money, currently in prison, for nine years and six months reclusion.

Michel Temer was the president with the highest number of MPs per term: 4.5 MPs per month, almost one MP per week during his short term.

President Fernando Henrique Cardoso administration (1995-2003), issued the highest number of MPs and reeditions: 422 MPs, plus 9,438 re-editions, totaled 9,860 MPs in eight years mandate.

Finally, President Jair Bolsonaro took office on January 1st, 2019, and cannot be full evaluated because his term has not yet completed a year. So far, twenty MPs were issued by Bolsonaro, and five were converted in Laws, and fifteen are in process, in due time.

PERMANENT MEASURES?

N= 51 Provisory Measures issued before CA 32 are still in force, as illustrated in Figure 5 and 6:

#	MPs	# Reeditons	In force since	Subject
1	2.229-43	41	10.09.2001	Federal career organization
2	2.228-1	1	10.09.2001	Cinema National Politics (PRODECINE)
3	2.227	0	05.09.2001	Alters Law 10.192/01
4	2.226	0	04.09.2001	Adds item to CLT
5	2.225-45	44	04.09.2001	Alter Laws 6.368/76, 8.112/90, 8.429/92 , and 9.525/97
6	2.224	0	04.09.2001	Brazilian investments overseas
7	2.220	0	04.09.2001	Creation of CNDU - National Development Council
8	2.217-3	3	01.09.2001	Establishes the National Council for the Integration of Transport Policies, the National Agency of Land Transport, the National Agency of Waterway Transport and the National Department of Transport Infrastructure
9	2.216-37	37	01.09.2001	Alters Law No. 9,649 of May 27, 1998, - the organization of the Presidency
10	2.215-10	10	01.09.2001	Military forces salary - Laws 3.765, and 6.880
11	2.214	0	01.09.2001	Alters o art. 1 o da Lei n o 10.261 - Union budget
12	2.213-1	1	31.08.2001	Creates the Bolsa-Renda program, to assist poor families
13	2.211	0	30.08.2001	Alter Law 9.995,and 10.266. Union budget.
14	2.210	0	30.08.2001	R\$ 50.000.000,00 extra credit for Enegy Ministry
15	2.209	0	30.08.2001	creation of the Brazilian Trader of Emergency Energy - CBEE
16	2.208	0	20.08.2001	Provides for proof of student status and under eighteen
17	2.206-1	1	10.09.2001	Creates the National Health Minimum Income Program: "Bolsa-Alimentação"
18	2.200-2	2	27.08.2001	Institutes the Brazilian Public Key Infrastructure - ICP-Brasil, transforms the National Institute of Information Technology into a local authority
19	2.199-14	14	27.08.2001	IR changes on Tax
20	2.198-5	5	27.08.2001	Creates and installs the Electricity Crisis Management Chamber of the Governing Council, establishes guidelines for programs to deal with the electric power crisis.
21	2.197-43	43	27.08.2001	Provides for the adoption of measures related to the Financial System of Housing - SFH
22	2.196-3	3	25.08.2001	Establishes the Program for Strengthening Federal Financial Institutions and authorizes the creation of the Asset Management Company - EMGEA
23	2.192-70	70	25.08.2001	Establishes mechanisms to encourage the reduction of the state public sector presence in banking financial activity, provides for the privatization of financial institutions
24	2.190-34	34	24.08.2001	alters dispoitives on ANVISA - National Sanitary Surveillance Agency
25	2.189-49	49	24.08.2001	amends income tax legislation with respect to the withholding tax on income from financial investments,
26	2.187-13	13	27.08.2001	Provides for the adjustment of benefits maintained by the Social Security
27	2.185-35	35	27.08.2001	Refanancing public debt on real estate
28	2.184-23	23	25.08.2001	ensures perception of gratification by civil servants Federal Police, Federal District Police Officer, Federal District Civil Police, Federal Highway Police
29	2.183-56	56	27.08.2001	alter decree 3.365/41, and Laws 4.504/64 , 8.177/91, and 8.629/93.
30	2.181-45	45	27.08.2001	Provides for financial transactions between the National Treasury
31	2.180-35	35	27.08.2001	Alter Laws 8.437/1992, 9.028/95, 9.494/97, 7.347/85 , 8.429/92, 9.704/98 ,Decree 5.452/43, Laws 5.869/73, and 4.348/64
32	2.179-36	36	27.08.2001	Provides for financial relations between the Union and the Central Bank of Brazil
33	2.178-36	36	25.08.2001	Provides for the transfer of funds from the National School Meals Program, institutes the Direct Money at School Program, amends Law 9.533/97.

Fig-5: MPs in process. Source: Brasil, 2019 [6]

#	MPs	# Reeditons	In force since	Subject
34	2.177-44	44	27.08.2001	Amends Law No. 9,656 of June 3, 1998, which provides for private health care plans.
35	2.174-28	28	24.08.2001	constitutes, within the scope of the Executive Branch of the Union, the Voluntary Termination Program - PDV
36	2.173-24	24	24.08.2001	Provides rules for high school tuition fees
37	2.172-32	32	24.08.2001	Establishes the nullity of the contractual provisions
38	2.170-36	36	24.08.2001	Provides for the administration of cash resources of the National Treasury
39	2.169-43	43	25.08.2001	Extends to civil servants of the Federal Executive Branch the advantage of twenty-eight point eighty six per cent, object of the decision of the Federal Supreme Court
40	2.168-40	40	27.08.2001	Provides for the Agricultural Production Cooperatives Revitalization Program - RECOOP, authorizes the creation of the National Cooperative Learning Service - SESCOOP
41	2.167-53	53	24.08.2001	Authorizes the Union to receive in dividends securities and interest on equity to be paid by entities in whose capital the National Treasury participates
42	2.166-67	67	25.08.2001	Forrestal Code
43	2.165-36	36	25.08.2001	It establishes the Transport Allowance, provides for the payment of the military and servants of the Federal Executive Power, including their municipalities, foundations, public companies and companies of mixed economy.
44	2.164-41	41	27.08.2001	Amends the Consolidation of Labor Laws - CLT to provide for part-time work, suspension of employment contract and professional qualification program
45	2.163-41	41	24.08.2001	Provides for criminal and administrative sanctions arising from conduct and activities harmful to the environment
46	2.162-72	72	24.08.2001	Provides for the issuance of National Treasury Notes - NTN for the capital increase of Banco do Brasil S.A
47	2.161-35	35	24.08.2001	amend procedures related to the National Privatization Program
48	2.159-70	70	27.08.2001	Amend income tax legislation
49	2.158-35	35	27.08.2001	Amends the legislation on Social Security Contributions - COFINS, the Social Integration Programs and the Formation of the Civil Servant Patrimony - PIS / PASEP and the Income Tax
50	2.157-5	5	27.08.2001	Creates the Amazon Development Agency - ADA, extinguishes the Amazon Development Superintendence - SUDAM
51	2.156-5	5	27.08.2001	Creates the Northeast Development Agency - ADENE, extinguishes the Northeast Development Superintendence - SUDENE

Fig-6: MPs in process. Source: Brasil, 2019 [6]

Observe in both Figures 5 and 6 the N=51 MPs in process, and currently in force, since 2001. By the original Art. 62 paragraph 1, these MPs should be terminated due to validity extinction. However, CA 32, on the one hand, decreased the number of MP reeditons substantially to zero. For instance, in Fig-6, the MP 2.159-70 (#48), was re-issued 70 times and has never been converted into Law, because National Congress did not veto or voted this MP, so far. In sum, what should be temporary became permanent in 51 cases [6], with no further plans for a close appreciation.

DISCUSSION

Rodrigo Maia, current president of the Chamber of the Deputies, complains the excessive number of MPs, according to him, a clear interference from the Executive in the Legislative branch, locking the Congress agenda:

What I am concerned about is this interference of the Executive Power in the Legislative Power permanently. We have ten provisional measures locking the agenda in the House of Representatives. Too bad you have an agenda that ends up being almost all monopolized by the Executive Power, "said Maia [7].

Given the drastic reduction of Congress activity regarding MPs, due to the CA 32, it seems an exaggerated commentary. One possible solution for his stalemate should be the reduction of Congress recess period, from the current eight weeks to four weeks, like any Brazilian worker. Brazilian Congressmen shall, at discretion, remain on their bases on Mondays and Fridays, in practice working from Tuesdays to Thursdays. In a developing country like Brazil, this recess embarrasses the population and is a waste of public resources. Congress recesses encompass two periods: July 18th -31st (14 days) and from December 22nd to February 1st (42 days) [6]. In total, 56 days of recess, or almost two months. Recess should be decreased to 30 days maximum, like any other regular worker. Therefore, Brazilian Congress would be plenty of time to vote all N=51 MPs in process, as well as hundreds of Projects of Law and other vital reforms current under plodding appreciation pace by the House of Representatives. Congress members should work the same 44 hours workload, as prescribed for entire urban and rural workers, at least to give an example for the overall Brazilian workers, as worded by Article 7, item XIII from the Brazilian Constitution 1988.

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IMPLICATIONS AND FUTURE RESEARCH

This study implied in revealing potential law insecurity given the provisory measures have become permanent, from which N=51 are in force for 18 years. Critical appreciation of such MPs is paramount for the Brazilian House of Representatives. Another implication is an increasing number of Brazilian business scenarios directly affected by the MPs in process [8-22], for instance.

Future study is recommended to the impact of the N=51 MPs in process in lawsuits over the past decades. Congress performance indicators should be applied to appreciate the real impact of MPs to the legislative agenda.

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