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The impact of judiciary decisions on public security policies in Brazil

Abstract

The principle of separation of powers is present in the Federal Constitution of Brazil, and states that the powers must be independent and harmonious with each other. When cases of judicialization of public policies occur, the Judiciary has its power expanded in matters that would be of primary competence of the Legislative and Executive powers. The purpose of this article is to carry out an analysis of two specific cases that occurred in Brazil in which a judicial decision has a direct impact on public security policies. The first case is a decision by the Superior Court of Justice - STJ that changed the understanding of police pat down and suspicious attitude. The second case is a decision by the highest court in the country, the Federal Supreme Court - STF, which prohibited police operations in favelas in the city of Rio de Janeiro/RJ during the Covid-19 pandemic. The analytical lens used in these case studies was through the discretion of street-level bureaucrats, specifically looking at police officers, who are professionals who deal with the public on the street, regardless of external decisions similar to Top-Down policies. As a result, it was found that even a monocratic decision by a judge or minister can have a strong impact and change in practice the implementation of previously designed public security policies, but that street-level professionals are essential parts in this process through its discretionary power to act.

Keywords: separation of powers, judicialization, public safety policies, street-level bureaucrats, police officers, discretion

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Introduction

Public decision makers have an important role in the functioning of societies. In a democracy, citizens elect politicians and, thus, transfer responsibility for the conduct of public acts and policies to legitimately elected rulers. The constituted powers have different roles when it comes to public policies. The planning, creation and execution of these policies are carried out jointly by the three Powers that form the State: Legislative, Executive and Judiciary. The Legislative and Executive branches can propose public policies. The Legislature, in addition to proposing, creates laws relating to a given public policy, and the Executive is responsible for planning action and applying the measure. The Judiciary controls the law created and confirms whether it is adequate to fulfill the objective.[1]

The public policy cycle consists of the following stages: agenda definition, identification of alternatives, evaluation of options, selection of options, implementation and evaluation.[2] It appears that the Judiciary does not have a primary role in the public policy cycle, with this responsibility falling to elected officials, whether from the Legislative or Executive branches. However, actors in the justice system operate, directly or indirectly, in policy making through their decisions, whether judicial or extra-judicial, and, as a rule, judicial decisions are analyzed based on work on institutions and actors. of the justice system, as well as the process of institutional consolidation of its bodies.[3]

Brazil is a country with high crime rates and one of the indices used to measure violence is the homicide rate. According to the Ministry of Health's Mortality Information System (SIM/MS), in 2019, there were 45,503 homicides in Brazil, which corresponds to a rate of 21.7 deaths per 100 thousand inhabitants.[4] For this reason, in electoral disputes, an issue that appears and enters the discussion and formulation of the agenda is public security policies, such as, for example, the arms/disarmament issue and the reduction of the age of criminal responsibility. Even in the face of this complex scenario, to this day, in Brazil, the right to Security has not been understood in the same sense as the right to health, education or sanitation, and efforts have been made to identify some elements necessary for the formulation of public security policies and to overcome the pattern of reactive and fragmentary interventions to date. predominant in the country.[5]

At the tip of the spear, there are the people, servants and employees who implement the policies designed by the authorities. One of these execution fronts are street-level bureaucrats. According to Lipsky M[6] there are two ways to understand the term "street-level bureaucrat." One is by equating it with the public services that citizens generally interact with. In this sense, all teachers, police officers and social workers in public agencies are street-level bureaucrats without any other conceptualization. This is how the term has commonly been used. Often portrayed as policy makers rather than policy makers, street-level bureaucrats play a key role in implementing policies.[7] Street-level bureaucrats not only respond to the incentive instruments of New Public Management, but they use their discretion to adjust to them, developing informal practices not foreseen by the formulators.[8]

In this sense, the objective of this article is to analyze the impact that judicial decisions have on public security policies in Brazil, carrying out this research through the analytical lens of the discretion existing in street-level bureaucracy. To achieve this objective, two case studies were carried out referring to specific cases that occurred in the Brazilian Justice System that had an impact in some way on the implementation of public security policies.

This article is structured with this brief introduction to the topic covered, a theoretical framework that will address federalism and the separation of powers; public safety and the role of the police; and discretion in street-level bureaucracy and the implementation of public security policies. Next, the two cases studied are presented, accompanied by their discussions and, finally, the conclusion of the study.

Theoretical reference

Federalism and the separation of powers

Right at the beginning of the Constitution of the Federative Republic of Brazil,[9] in its art. 2nd, the concept of separation of powers is present, which states: the Legislative, Executive and Judiciary are Powers of the Union, independent and harmonious with each other. In the Brazilian federative system, state competencies are divided between different spheres of government, Union, States and Municipalities, differentiated from each other with regard to their institutions, their financial, human and political resources, and their relationship with civil society. This makes the issue of public security even more complex. The distribution of power between the levels of government and the type of relationship established between them are decisive in defining the actions that will be adopted in the area of public security, determining everything from their content to the appropriate way and time to execute them.[10]

The judicialization of public security demands, depending on how the Judiciary decides, may affect the political situation in contemporary democracies. The immediate consequence of this intervention is the expansion of judicial power in matters that would be reserved for the powers of the Executive and Legislative Powers, inspired by the theory of checks and balances.[11] When this intervention occurs, the judiciary cannot usurp the typical competence of the Legislature, under penalty of violating the principle of separation of powers. Traditionally, the implications of the federalist structure for the characterization of national public policies were analyzed, in addition to social policies, and fiscal policies. On very rare occasions, the analyzes of this content were extended to public security policies.[12] The separation of powers, like the other structuring principles of the Rule of Law, presents itself as an essential mechanism for guaranteeing the moderate exercise of power and the consequent containment of totalitarianism. In a similar way to the multiple aspects it can assume, all of undeniable importance in the organization of the State, there are also multiple classifications it can receive.[13]

There are authors who argue that it is always desirable to have a separation of powers as a way of guaranteeing freedom and, to this end, it should be avoided that members of each of the three Powers are appointed by members of the other Powers. However, the case of the Judiciary would be an exception, given the need to guarantee the excellence of the professional, and because the guarantee of permanence in the position would "destroy" any dependence on authority that there might be.[14]

Public security and the role of the police

Public security plays a preponderant role in achieving national security, because it is a basic need for any person to feel safe and well-being. Safe, man can work better, implying order, in the progress of the State.[15] Public security policies in Brazil have, as a rule, been designed and implemented in a fragmented and poorly planned manner. In the resumption of the democratic order, at the end of the 1980s, unlike what happened with other rights supported and reformulated by the Constitution, the right to security and order, as well as the organizational structure that should guarantee them, was restricted to the listing of some police organizations linked to the chapter of "defense of the State and democratic institutions", bypassing the citizen characteristic attributed to other spheres of Brazilian social life that were beginning to reconfigure themselves.[10]

According to data published in the Yearbook of the Brazilian Public Security Forum of 2022, based on data provided by the Public Security Secretariats (or state correspondents), there are currently 208 police institutions in Brazil and active (reference March 2022) for approximately 764,419 active members of public security (including non-police officers) and specifically 682,279 police officers (including Military Police, Fire Departments, Civil Police, Technical Forensics, Criminal Police, Federal Police, Federal Highway Police and Federal Criminal Police).[16]

According to the preamble and art. 5th and 6th of the Federal Constitution, public security is considered a fundamental right, it is an essential requirement for the full exercise of citizenship, with racial and gender equality, with freedom, peace and appreciation of the environment and life. Security, being a right, needs to be translated into public policies guided by several constitutional principles. And to understand the division of competences and responsibilities of police institutions, below we will demonstrate the institutional architecture according to the federative pact that produces the modeling of public security and police activity in the country. It is worth noting that Brazil is a Federative Republic organized into three administrative and government plans: Union, States and Federal District and Municipalities. At the subnational level, it is made up of 26 states and the Federal District, where Brasília, the country's capital, is located and at the third level there are 5,570 municipalities.[16]

Public security cannot be confused with just police organizations (despite these having a central role) nor can it be confused with the criminal justice system. From this perspective, as stated above, there are 208 police organizations in Brazil, however, according to the Brazilian Public Security Forum, there are other bodies and agencies that hold a portion of the Police Power, as provided in art. 78, of Law No. 5,172, of October 25, 1966[17] and whose duties generate impacts on the maintenance of public order, prevention and repression of violence and crime. The Police power is a prerogative of the Public Administration based on the supremacy of the public interest over the private, in the name of the community and social well-being, being able to restrict, discipline, limit, control, intervene, monitor rights, freedoms and interests. Therefore, we can reach the number of 1,559 agencies that apply the Police Power and that directly or indirectly impact public safety.[16]

With regard to the police activity specifically mentioned in art. 144 of the Federal Constitution,[9] at the Union level there are three police forces under its responsibility (Federal Penal Police, Federal Highway Police and Federal Police). Within the Federation Units (States and Federal District) there are three police institutions each (Military Police, state or district Criminal Police and Civil Police). It is worth mentioning that there is the Legislative Police Department of the Federal Senate and the Chamber of Deputies with responsibility for areas considered to be dependencies of the National Congress. And finally, there is the Federal Railway Police with responsibility for ostensible patrolling in the regions of federal railways, which is almost extinct and with retired police officers and no new competitions. That said, Brazil has 86 police institutions in full operation.[16] That said, didactically, it can be observed that the police missions in Brazil are based on territorial or legal competence, and can be classified as Administrative Police (when more directed towards the maintenance, prevention of public order or public safety or, criminal prevention) or understood as the Judiciary Police (when charged, after the crime has occurred, to investigate crimes and provide support with a body of evidence to identify the authorship and materiality of the crime and direct the investigation to initiate criminal action within the scope of the system criminal justice) Table 1.

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Table 1 Summary table - Police institutions in Brazil with the division of responsibilities and their respective police personnel

Esfera de Governo	Agências Policiais	Competências Legais	Número	Efetivo
Federal	Polícia Federal	ARTIGO 144 CF - I - Apurar infrações penais contra a ordem política e social ou em detrimento de bens, serviços e interesses da União ou de suas entidades autárquicas e empresas públicas, assim como outras infrações cuja prática tenha repercussão interestadual ou internacional e exija repressão uniforme, segundo se dispuser em lei; II - prevenir e reprimir o tráfico ilícito de entorpecentes e drogas afins, o contrabando e o descaminho, sem prejuízo da ação fazendária e de outros órgãos públicos nas respectivas áreas de competência; III - exercer as funções de polícia marítima, aérea e de fronteiras; IV - exercer, com exclusividade, as funções de polícia judiciária da União.	1	11.615
	Polícia Rodoviária Federal	Patrulhamento ostensivo das rodovias federais.	1	12.324
	Polícia Penal Federal	Segurança dos estabelecimentos penais federais.	1	919
	Polícia Ferroviária Federal	Patrulhamento ostensivo das ferrovias federais.	1	189
	Departamento de Polícia Legislativa	Preservação da ordem e do patrimônio, bem como pela prevenção e apuração de infrações penais, nos edifícios e dependências externas do Congresso Nacional	1	459
Estados e Distrito Federal	Polícia Militar	Polícia ostensiva e a preservação da ordem pública; polícia judiciária militar.	27	406.384
	Polícia Civil	Polícia judiciária e a apuração de infrações penais, exceto as militares.	27	91.926
	Polícia Penal	Segurança dos estabelecimentos penais estaduais e distritais.	27	92.216
Total de Forças Policiais			86	682.927

Source: Yearbook of the Brazilian public security forum (2022).

Discretionary in street level bureaucracy and the implementation of public security policies

In the field of Administrative Law, discretionary power can be conceptualized as the power of choice that, within the legally established limits, has the State agent between two or more alternatives, in carrying out state action.[18] The police power vested in public agents and especially police officers is intrinsically linked to discretionary power. The Police Power must be discretionary and not arbitrary.[19] When we enter the area of science that studies Public Policies, we come across the concept of Street Level Bureaucrats, who are employees who work directly in interaction with users and are responsible for the state's daily interactions with users and, in fact, carry out , the delivery of services. It is through these professionals that the population can access public administration. At the same time, and because they are the most visible interface of the State, these bureaucrats materialize the image that citizens have of the government – whether positively or negatively.[20]

Michael Lipsky was the creator of the term Street Level Bureaucrat, which first appeared in literature in the 1980s. The author calls them policymakers (public policy makers) as opposed to public policy executors, as street level bureaucrats street workers' role is to transform comprehensive policies (often ambiguous and contradictory) into practical actions within contexts with unpredictable situations and scarce resources, and they do this by exercising discretionary power, which is the margin of freedom for decision-making that bureaucrats street level have. Taking a similar view, authors argue that street-level bureaucrats define themselves as citizen-agents whose decision-making is affected by the normative interests of serving their clients rather than adhering to overarching rules, guidelines, or political intentions.[21] This discretion to act inherent to street-level bureaucrats is a point that should be paid attention to by public policy makers. Lavee and Cohen (2019)argue that the combination of perceptions of an acute crisis situation, lack of effective knowledge in the area, and the demand for innovation and activism leads street-level bureaucrats to adopt innovative strategies aimed at influencing policy.

Police corporations tend to try to diminish the discretion of their officers by emphasizing either faithful implementation of laws and rules, rigid top-down control, and traditional views of discretion that provide little or no space or context for confronting the social. In empirical research conducted with street-level workers, the dominant narrative of implementation-control-discretion was questioned and it was observed that these workers are often conservative of institutional norms and practices, but their work reveals tensions between the practice and the objectives of the social equity, and as one of the results an interesting fact was found:

Street-level workers in agencies that strictly adhere to the implementation-control-discretion tripod told countless stories that revealed the expression of their human agency through normative judgment and pragmatic improvisation. But these stories were rarely told in the presence of supervisors and rarely shared openly with other workers in organizational settings. The choices and actions reflected in these stories were essential to street-level work, but they were hidden and subversive.[22]

Police officers, especially those who work in environments with very high crime rates, act in crises every day. A study of the role of street-level bureaucrats in crises suggested shifting attention to these professionals as an essential source of information for policy design during emergencies and emphasizes that current street-level literature, in general, tends to employ a top-down approach, that is, focusing on what influences the attitudes, decisions, and actions of street-level bureaucrats, as well as the ways in which they exercise their discretion during direct delivery interactions.[23] This understanding emphasizes the importance that these professionals have in the process of implementing public policies, since their discretionary action makes a difference in this process.

The COVID-19 pandemic has generated an unprecedented crisis and several studies have been carried out on the actions of street-level bureaucrats during the crisis. One of the factors observed, at the time of the crisis, is the increased discretion of these workers, who can

respond with vocation and heroism or with a focus on their safety and inaction.[24] Public security policies serve the purpose of providing citizens with the protection and guarantee of the fundamental rights provided for in the Constitution and the debate on the implementation of these policies must be guided by the discretion of the professionals who apply them on the streets.

Case presentation

Case 1

The moment in which a crime occurs is of relevant importance and marks and directs the actions of public security bodies. Corroborating the teachings ofLazzarini (1994), we have the moment before the crime occurs, where there is preventive action by the police forces to prevent that crime from happening. When the fact occurs, we have the moment of immediate repression by the state apparatus, and later, a third moment in which criminal investigation through the judicial police enters the picture.

The preventive role of the police has a significant value for society, as it involves actions aimed at preventing and preventing crimes and offenses from happening. This matter is present on Brazil's government agenda and in the most recent public security policy, it appears several times. This is the National Public Security Policy for Social Defense - PNSPDS and the Unified Public Security System, established by Law No. 13,675, of June 11, 2018.[25] Some of the principles and guidelines present in the PNSPDS are efficiency in the prevention and control of criminal offenses, encouragement and support for carrying out actions to prevent violence and crime, priority of preventive and supervisory actions for internal security, among others.

One of the ways that police forces can enhance the prevention of crimes and offenses is through overt policing, which prevents disorder, maintaining public order in its multiple facets and seeking to prevent criminal practices in the broadest sense. The personal search, personal search or police approach is an operationalization of this measure, where the police officer, through his overt presence, makes approaches based on well-founded suspicion to verify criminal practices of any nature. This power granted to the police officer is supported by the Brazilian Criminal Procedure Code, Decree-Law No. 3,689, of October 3, 1941, which states:

Art. 244. The personal search will not depend on a warrant, in the case of arrest or when there is a well-founded suspicion that the person is in possession of a prohibited weapon or objects or papers that constitute a crime, or when the measure is determined in the course of home search.[26] The first case brought to light in this article is the analysis of the decision of the Superior Court of Justice – STJ that was handed down in a habeas corpus appeal. It should be noted that it was not a decision by a single judge in the first instance, but rather a deliberation by one of the groups, the 6th Panel, composed of 5 third-instance ministers in the Judiciary, which brings more relevance to the feat.

The aforementioned decision was about the analysis of an appeal in habeas corpus No. 158580 - BA (2021/0403609-0), referring to a crime of drug trafficking, in which the summary of the judgment states in summary: PERSONAL SEARCH. ABSENCE OF SUSPECT. VAGUE ALLEGATION OF "SUSPICIOUS ATTITUDE". FAILURE. ILLEGALITY OF THE EVIDENCE OBTAINED. PROCESS LOCKING. RESOURCE PROVIDED.

In this way, the STJ brought a different understanding to the topic of police approach, which, as depicted above, is an important tool for public policies regarding crime prevention. The judicial decision discussed here has 50 (fifty) pages and on the Egrégio Tribunal website, an extract of the decision was published, in which we will highlight the most relevant points:

Personal search based on "suspicious attitude" is illegal, decides sixth panel

The Sixth Panel of the Superior Court of Justice (STJ) considered a personal or vehicle search to be illegal, without a judicial warrant, motivated only by the police's subjective impression of the individual's suspicious appearance or attitude. At the trial, the collegiate granted habeas corpus to halt the criminal action against a defendant accused of drug trafficking. The police officers who approached him, and who said they had found drugs in the personal search, stated that he was in a "suspicious attitude", without offering any other justification for the procedure. Unanimously, the ministers considered that, in order to carry out a personal search – popularly known as "baculejo", "framing" or "general" – it is necessary that the well-founded suspicion referred to in the**article 244 of the Criminal Procedure Code**is described objectively and justified by evidence that the individual is in possession of drugs, weapons or other illicit objects, highlighting the urgency for diligence.

Finding drugs does not validate the illegality of the search

The minister stated that it is not possible to accept the justification for police conduct – which has a direct impact on the validity of the evidence. For him, the fact that drugs were found during the search does not validate prior illegality, as the "founded suspicion" that would justify the search must be assessed "based on what was known before the investigation". The violation of the legal rules for personal searches, concluded the rapporteur, "results in the illegality of the evidence obtained as a result of the measure", also giving rise to the possible criminal liability of the police officers involved.[27]

Given the impact of the decision, there was a national repercussion among security bodies, mainly with regard to the military police, as, in theory, the measure changes an entire organizational culture and operational way of acting, restricting police officers from doing their work. legally supported from carrying out searches on people in a suspicious attitude and directly impacting public security policies with a focus on prevention. Police officers are street-level bureaucrats, meaning they work directly with citizens and have substantial discretion in their activities.[28] Such discretion is often treated with suspicion by control structures and instances.[29] The discretionary space refers to organizational perspectives, as well as the relationship between superiors and subordinates; the discretionary action occurs through the way bureaucrats understand the normative contents.[30] Given this scenario, it is essential that the governing body of police organizations map and, when possible, outline the space for discretion in order to guarantee administrative and legal security for decision-making at the local level.[31] Based on the discretion invested in public agents, there was a debate to make a counterpoint to the measure decided at the judicial level, and here we highlight two of them: the high level, in a meeting of the National Secretaries of Public Security and the middle level, through the Association of Officers of the Military Police of the Federal District.

Regarding the meeting of the National Council of Secretaries of State for Public Security, a note was prepared and published,[32] which here we bring the main excerpts:

In consideration of the judgment of the Appeal in Habeas Corpus - RHC nº 158,580, by the Sixth Panel of the STJ, which considered illegal the personal or home search, without a judicial warrant,

motivated only by the subjective impression of the police about the suspicious appearance or attitude of the individual, the CONSESP is hereby publicly expressing its position and the concern of State Secretaries of Public Security across the country regarding the issue.

In the case of the precedent of the Sixth Panel, with respect to the collective Court, the decision given is not binding, producing effects exclusively in the specific case, not preventing police bodies from continuing to carry out approaches when there is a well-founded suspicion, in the exercise of their duties and attributions. cool.

Therefore, there is no abuse or illegality when there is a well-founded suspicion that the person targeted by personal searches is carrying an illegal object or is in a flagrant situation justifying a preventive approach by the police. Strongly based on the foregoing, the National Council of Public Security Secretaries registers its respect for the STJ's decision, but firmly positions itself for the legitimacy and legality of the actions of the Public Security Forces throughout the country in carrying out personal searches, assuming the strict limits of the law.[32]

The Association of Military Police Officers of the Federal District – ASOF, issued a Note of Clarification(ASOF, 2022)on July 7, 2022, corroborating CONSESP's understanding and guidance. Let's look at the main points:

The Board of Directors of the Association of Military Police Officers of the Federal District (ASOF/PMDF), due to a decision by the Sixth Panel of the Superior Court of Justice (STJ), which, in April this year, considered personal or vehicle searches to be illegal, without a judicial warrant, motivated solely by the military police officer's subjective impression of the individual's suspicious appearance or attitude, the following must be declared:

I. The decision of the aforementioned Court has no binding effect. Furthermore, it is important to highlight that the public approaches made by the DF military police officers are always based on well-founded and concrete suspicion. The work of the PMDF is considered one of the most effective in the country precisely because it prevents crime before it happens. We know that many illegal acts are prevented precisely by the effective action of the military police before they occur. If the PM only acted in cases where the crime had actually already occurred, the Corporation's action would no longer have the character of anticipating illegality, a characteristic that is the reason for the military police's actions in favor of the defenseless citizen, in the face of crime and insecurity.

II. The STJ's aforementioned decision is already completely aligned with the operational procedures that the PMDF has always carried out. With this, we seek to reinforce that the PMDF does not make any approach without there being concrete suspicion and does not carry out its operations based on the subjectivity of the military police officer. The police technique, the military police officer's contact with street crime and his operational role give the PM a different vision, which allows him to capture suspicious behavior and postures. Likewise, police raids – for the most part – also always occur at pre-determined times and locations, where crime rates are high and embarrass the honest population.

III. Despite being constitutional, the STJ's decision has been used by detractors of the PMDF with the aim of embarrassing the military police with legal actions, preventing the effective fulfillment of their mission and, consequently, favoring the increase in crime. It is worth noting that the DF's military police officers are the most respected and most praised in the country, having acquired the respect of Brazilian society for their valuable services, being considered the institution with the lowest lethality rate in the country.[33]

It is clear that the STJ's judicial decision had a direct impact on the security forces and mainly on police corporations, throughout the national territory. Government agents and professional associations issued public positions opposing the decision, highlighting the risks for society. According to the theory of Lipsky[28] street-level bureaucrats interact with citizens in the exercise of work and have discretion in the exercise of work and discretion in the exercise of authority. The police officer as a street-level agent, a fundamental player in the implementation of public security policies, who has discretion to act within the limits of the law, plays a relevant role in the implementation of public policies, and the judicialization of measures that impact these policies, go through the discretionary action of these workers.

The judiciary's control over public policies is, to a certain extent, correct to avoid excesses and errors in formulation and implementation, but the measures must not be more harmful than the objective they intend to achieve. The personal search and preventive personal search for the security of rights must be accompanied by the perception of the police approach as a practice of affirming full citizenship,[34] and the behavior of the bureaucrat, in this case the police officer, has an interpretative dimension, since it is he who must build his understanding of the rules and make choices about their relevance. Discretionality is, therefore, the space for legal choices formally guaranteed.[29]

Case 2

Preliminarily, it is necessary to understand this topic and the context that motivated this intervention by the Judiciary in a Public Security Policy, through the Allegation of Non-compliance with Fundamental Precept (ADPF) nº 635. Preliminarily, the processing and judgment of the Allegation of Non-compliance with Fundamental Precepts is regulated by Law No. 9,882, of December 3, 1999, which regulates the provisions of §1 of art. 102 of the Federal Constitution that "the allegation of non-compliance with a fundamental precept, arising from this Constitution, will be assessed by the Federal Supreme Court, in accordance with the law."[9]

As a result, the aforementioned Law No. 9,882/1999 provides that the list of persons entitled to propose this Claim of Non-compliance with a Fundamental Precept are the same as those entitled to bring the Direct Action of Unconstitutionality, being the following, according to the Federal Constitution:

Art. 103. The following may file a direct action for unconstitutionality and a declaratory action for constitutionality:

I. The President of the Republic;

II. The Federal Senate Bureau;

III. The Board of the Chamber of Deputies;

IV. The Board of the Legislative Assembly or the Legislative Chamber of the Federal District;

V. The Governor of the State or Federal District;

VI. The Attorney General of the Republic;

VII. The Federal Council of the Brazilian Bar Association;

VIII. Political party with representation in the National Congress;

IX. National trade union confederation or class entity (emphasis added).[9]

In this sense, Law No. 9,882/1999 provides that this argument must be proposed before the highest Court, the Federal Supreme Court, as a guarantee of the supremacy of the Constitution, as a mechanism for concentrated and concrete control of constitutionality, requiring demonstration of the lack of another procedural means that is suitable for remedying the harm highlighted by the arguer, in accordance with 4th, § 1st, of Law No. 9,882 of 1999. This argument serves as a mechanism to control any action or omission of public authorities, concrete or abstract, normative or non-normative, prior or subsequent to the Magna Carta, or the State Constitution or Organic Law of Municipalities, of any entity or body, of the Executive, Legislative and Judiciary Powers, due to the scope given by the wording of article 1 of this law (PGR, 2020). Therefore, the Allegation of Non-compliance with a Fundamental Precept aims preventively to avoid or subsequently repair damage to some fundamental precept by an act of the Public Power, as established:

Art. 1 The argument provided for in § 1 of art. 102 of the Federal Constitution will be proposed before the Federal Supreme Court, and its purpose will be to avoid or repair damage to a fundamental precept, resulting from an act of the Public Power.

Single paragraph. There will also be an allegation of non-compliance with a fundamental precept:

I - when the basis of the constitutional controversy on federal, state or municipal law or normative act is relevant, including those prior to the Constitution.[35]

The Attorney General's Office, through the Attorney, Dr. Augusto Aras, expressed its opinion in Opinion No. SFCONST/Nº 52451/2020 in order to consider the receipt of the initial petition inadmissible due to the subsidiary nature of the Allegation of Non-compliance with Precept Fundamental. It was pointed out that, under the premise of reducing crimes and violence in Rio de Janeiro, the state Governor published the normative act (Decree 46,775/2019 in which he excluded performance indicators from the calculation of bonuses referring to members of police stations and battalions and goals related to reducing homicides resulting from opposition to police operations) and the practice of administrative acts (application of Decree 27,795/2001 which allowed the use of helicopters in incidents of armed confrontation) which, despite their apparent legality, reveal the use of government instruments that resulted in an increase in police lethality.

The Attorney General's Office also stated that it was not demonstrated that there was no other effective means to avoid harm to a fundamental precept. Because, on the contrary, the Public Ministry of the state of Rio de Janeiro had already adopted the appropriate measures to preserve fundamental rights and guarantees through the use of its own legal instruments and through the exercise of external control over police activity, as shown in the summary from the aforementioned prosecutor's opinion below:

ARGUMENT OF NON-COMPLIANCE WITH FUNDAMENTAL PRECEPT. CONSTITUTIONAL RIGHT. PUBLIC SECURITY POLICY. ACTS OF PUBLIC POWER. MOBILE. ADMINISTRATIVE ACT. HIERARCHY. EXECUTIVE POWER. NORMATIVE ACTS. PURPOSE DEVIATION. GREETING. LAW. COURT ORDER. UNJUSTIFIED OMISSION. STATE PUBLIC PROSECUTION OFFICE. PERFORMANCE. LOCAL AND REGIONAL PERSPECTIVE. DEFERENCE. 1. The ADPF is inadmissible when there is another effective means to neutralize, in a broad, general and immediate way, the situation of harm to the fundamental precept, due to its subsidiarity (Law 9,882/1999, art. 4, § 1). 2. The ADPF is not applicable, also due to its subsidiary nature, when, in relation to the requested measure, the efficient performance of the local Public Prosecutor's Office is verified to preserve fundamental rights and guarantees considered violated, with the use of resolutive and judicial instruments , and for the external control of police activity (CF/1988, art. 129, VII). 3. In the production of an administrative act, zones of conceptual indeterminacy give rise to the exercise of discretion, the content of which must be endowed with functional legality, under penalty of invalidity. 4. State Decree 46,775/2019, together with the wide use of the authorization provided for in Decree 27,795/2001 and with the public statements of the Governor of the State of Rio de Janeiro, demonstrate a deviation from the purpose in the administrative practices adopted in matters of public security in the locality, violating the fundamental precepts of human dignity (art. 1, III) and life (art. 5, caput). Opinion based on partial knowledge of the action and, in the known part, due to partial origin (emphasis added).[36]

Initially, in the preliminary decision, Minister Edson Fachin granted the request of the Brazilian Socialist Party:

In view of the above, I grant the incidental precautionary measure requested, ad referedum of the Court, to determine: (i) that, under penalty of civil and criminal liability, police operations should not be carried out in communities in Rio de Janeiro during the COVID-19 epidemic , except in absolutely exceptional cases, which must be duly justified in writing by the competent authority, with immediate communication to the Public Ministry of the State of Rio de Janeiro – responsible for external control of police activity; and (ii) that, in extraordinary cases where these operations are carried out during the pandemic, exceptional care is adopted, duly identified in writing by the competent authority, so as not to put an even greater population at risk, the provision of public health services and the performance of activities of humanitarian aid.[37]

On January 7, 2020, the governor of the state of Rio de Janeiro forwarded information to Minister Edson Fachin, refuting the allegations of the Brazilian Socialist Party (PSB) in which they questioned an alleged set of acts and omissions by the Government of the State of Rio de Janeiro regarding the Public Security Policy that was being implemented. And the Head of the state Executive Power also considered that the Brazilian Socialist Party used the Judiciary Power for eminently political purposes, without legal foundations and with generic arguments. And that it was not undoubtedly demonstrated by the petitioner in a specific way which acts of that Public Power were in violation of fundamental precepts, being generically alleged by the PSB applicant that the Public Security Policy of that state power encourages police lethality more than prevention to deaths and armed clashes.

The Governor of the state of Rio de Janeiro also argues that the PSB's allegation is generic because it deals with an alleged chronic situation of several widespread violations of fundamental precepts, such as the lack of planning of police operations, the deficiency of external control of the state Public Prosecutor's Office , the governor's public statements and other generic behaviors considered unconstitutional. However, the governor argued that the generic allegations would make it impossible to question the Federal Supreme Court in relation to the state Executive Power through the Allegation of Non-compliance with a Fundamental Precept, as stated in the requirements arising from Law No. 9,882/1999 of subsidiarity and the specific indication of the act questioned through the proposed action. The government argues that the request was not certain and determined, in accordance with the provisions of art. 322 and 330,

item I, §1º, II, of the 2015 Civil Procedure Code in force, thus making the initial petition inept, in accordance with the precedents of the Federal Supreme Court in relation to ADPF nº 580, in a monocratic decision in July 2019 by minister Celso de Mello and also in the decision given in ADPF nº 94 by minister César Peluso.[38]

The government of the state of Rio de Janeiro declares that the arguer did not demonstrate that other procedural means that could combat the Public Security Policy were exhausted in order to put an end to the harm. Because the party did not file a specific action to question the measures of the Public Security Policy before the judiciary of the state of Rio de Janeiro. With this, it states that the subsidiarity requirement for the entry of the Allegation of Non-compliance with a Fundamental Precept would not be met. Because the Public Defender's Office of the State of Rio de Janeiro had already filed a Public Civil Action, according to process no. 0215700-68.2016.8.19.0001, which continued before the 6th Public Finance Court of the District of the Capital, in which the conviction of the Government was requested. of the State of Rio de Janeiro with the duty to reformulate the public security policy practiced in Complexo da Maré. This action was judged unfounded on the grounds of the legality of the Public Security Policy and that it would be up to the Executive Branch to plan and execute this policy.[38]

The ministers of the Federal Supreme Court (STF) subsequently ratified the provisional protection already granted by minister Edson Fachin with the aim of suspending police operations in communities in Rio de Janeiro, for the period that the public calamity resulting from the Covid-19 pandemic lasts. . These police incursions, as determined by the STF, would remain limited to exceptional episodes and exhaustive justifications, and the Public Prosecutor's Office, as external control of police activity, must be informed and monitor these operations. The decision was made by a majority of votes, accompanied by ministers Ricardo Levandowski, Dias Toffoli, Cármen Lúcia, Gilmar Mendes, Luís Roberto Barroso, Marco Aurélio, Rosa Weber and Celso de Mello, in a virtual session, on August 5, 2020, in the trial regarding provisional protection incidentally in the Claim of Non-Compliance with Fundamental Precept No. 635.[37]

This action was filed in 2019, by the Brazilian Socialist Party (PSB) to the detriment of State Decrees nº 27,795/2001 and 46,775/2019, which established the Public Security Policy of the state of Rio de Janeiro. Based on the state of calamity decree and the health protocols that imposed social isolation, the Brazilian Socialist Party requested urgent protection, requesting restrictions on police raids during the pandemic period. According to this requesting party, police actions were not legitimately following protocols for the use of force and presented increasing levels of lethality, violating international treaties and constitutional precepts such as the right to the inviolability of one's home and especially the right to life. According to Minister Fachin, this monitoring is essential so that the population is not put at risk, nor is the public provision of health services and humanitarian aid.[37]

According to Minister Fachin, rapporteur of the Claim of Non-compliance with Fundamental Precept 365, the use of force would only be legitimate if the need to protect protected assets such as the life, bodily integrity or property of third parties is demonstrated, thus requiring consideration by the principle of proportionality. In this context, the reporting minister recalled that Brazil was condemned by the Inter-American Court of Human Rights in 2017, due to a police confrontation in the Nova Brasília community, in Complexo do Alemão (city of Rio de Janeiro), in the years 1994 and 1995. Minister Fachin also stated that the criteria for the legitimate use of force cannot be put into perspective and that a recent police operation in Complexo do Alemão resulted in 13 deaths and the interruption of electricity supply for 24 hours and difficulties in delivery. of food during the quarantine, demonstrating the persistence of police lethality and the unconstitutional state of affairs.[37]

According to Minister Gilmar Mendes, the measure would not result in a complete ban on carrying out police operations, as they could occur as long as there was justification and monitoring of external control of police activity. And this minister stated that there must be procedural precautions inherent to the exceptional situation experienced at this time and that the protocols for the use of force are precarious and the use could become questionable.[37] In relation to Minister Alexandre de Moraes' dissenting vote, it was pointed out that the request was of a generic nature. And the minister also concluded that the absence of police operations for an indefinite period could put the public safety of society in Rio de Janeiro at risk in an unpredictable way in terms of its effects, even if exceptions were foreseen.

For Minister Alexandre de Moraes (and accompanied by Minister Luiz Fux), the Judiciary does not have the competence to formulate and implement public policies. In this minister's understanding, the role of formulating policies relating to public security (or public security policies) is the responsibility of the Executive Branch, although these public policies are subject to judicial control in the event of possible abuse or harm to rights, due to the principle of indefeasibility of jurisdiction, art. 5th, item XXXV, of the Federal Constitution, which states that "the law will not exclude injury or threat to rights from the Judiciary's assessment."[9] According to the Head of the state Executive Branch, it would not be up to the Judiciary to determine which modus operandi the police helicopters will be used, as it is a complex and tactical operation carried out by public security bodies, with thorough verification of the activity of criminals inserted in communities in Rio de Janeiro and the way in which criminal organizations operate, generally related to the crime of drug trafficking.[38]

Regarding the granting of bonuses to state public servants, the governor argued that it is an analysis of the criteria of opportunity and convenience, being the exclusive responsibility of the state public administrator, and it is not up to the Judiciary to enter into the merits regarding the indicators that should be used in the basis for calculating the bonus. And if there were defects, they would be of legality and not constitutionality, and the decision-making is not the responsibility of the Federal Supreme Court.[38] Having said that and based on the theoretical construct already mentioned, interesting discussions on this topic are open to debate. In the wake of Minister Alexandre de Moraes' vote, it is understood that the Judiciary does not have the primary responsibility for the formulation and implementation of Public Policies, that is, over the cycle of public policies, but in the name of the constitutional principle of inertia of the Jurisdiction of the Judiciary is not the responsibility of initiating an action, as the jurisdiction only acts upon provocation from the interested parties and will develop from this through official impulse, that is, the magistrate is prohibited from initiating a process.[37]

However, the Judiciary has the primary competence to judge, upon provocation, the possibility of injury and abuse of rights in Public Policies, due to the constitutional principle of indefeasibility (or also known as the Principle of access to justice) which provides that "the law will not exclude injury or threat to rights from the Judiciary's assessment", under the terms of art. 5th, item XXXV, of the Federal Constitution. In view of this, it appears that, through a transversal approach, these actors in the justice system, especially the highest court of the judiciary, generate direct and indirect impacts on

policymarkers (public policy makers), under a classic doctrinal view.[3] The Judiciary has been the access point for opposition and interest groups to pursue their social demands, due to dissatisfaction with political representation and as a way of seeking benefits that would not be obtained in institutions that decide in a majority manner and impose on the majority , as a dysfunction of democracy.[39]

It is necessary to clarify, from another point of view, that the interference of the Judiciary through the higher courts can cause a certain imbalance in the constitutional principle of the separation of the three powers, based on art. 2nd of the Federal Constitution,[9] not making a concentration of powers healthy for a good harmonious relationship between the powers of the republic, weakening the formula of checks and balances (also called a system of checks and balances between the powers). An accentuated performance by the Judiciary can cause an anomalous phenomenon called judicial activism, politicization of justice or judicialization of Politics, generating confusion between Politics and Law (a common characteristic of the three being the approximation, a common trait between the three, the atypical approximation between jurisdiction and politics). This can create risks for the constitutional order, the Democratic Rule of Law and society itself, if judicial decisions of the Supreme Court are based on political, ideological, social and moral foundations, to the detriment of the foundations of the legal system, as a phenomenon legal.[39]

Between the end of the 20th century and the beginning of the 21st century, the powers and activities of the Federal Supreme Court expanded and underwent substantial institutional changes in a qualitative and quantitative way, according to the political and social scenario. There is a transition and overcoming of the paradigm from Formalist Positivism to Neoconstitutionalism, leaving the judge as a mere applicator of the law to the specific case and begins to act more actively with greater interpretative and argumentative freedom in his decisions, in the face of open norms, abstract principles and values. This phenomenon of Neoconstitutionalism This makes the constitutional content a set of open norms, no longer from a formal and legalistic perspective, allowing the interpreter, in theory, to elaborate a construction resulting from the logic-argumentative nature of the norm in the face of each specific situation, opening There is room for judicial protagonism, as the judge is given greater freedom to resolve, in an interpretative way, what in theory would be the best constitutional will according to each concrete situation faced.[39]

This process at an accentuated level can result in tyranny, oppression, despotism and arbitrariness on the part of the protruding Power, as a result of which it can be harmful to the Democratic Rule of Law and the Fundamental Rights of citizens, as already highlighted by the enlightenment Montesquieu on the separation of the three powers: "everything would be lost if the same man or the same body of principals or nobles, or of the people, exercised these three powers: that of making laws, that of executing public resolutions, and that of judging crimes or divergences of individuals."[40]

Otherwise, as per the decision in Interlocutory Appeal No. 734,487 - AgR, reported by Minister Ellen Gracie, when there is a constitutionally foreseen and non-implemented Public Policy, it is possible for the Judiciary to determine the implementation of Public Policies, without interference. and interference over the discretion of the Executive Branch, but only if it is determined that the Public Policy provided for in the Constitution is implemented, maintaining the discretion of formulation and implementation to the Executive Branch.[41] That said, regardless of the decision of the policymakers (public policy makers), at the forefront the effects of the Judiciary's decisions are mitigated, as at the level of execution these street-level bureaucrats, who in this case are the police, are in close proximity with the population and in contact with communities in areas often experiencing insecurity promoted by criminal organizations and lacking public services that lead to full citizenship. It should be noted that often the only public institutions to reach these communities will be police institutions through street-level bureaucrats or through associations and Non-Governmental Organizations under the authorization of the criminal organization.

These street bureaucrats execute public policies, even in the face of ambiguities and contradictions in policies, in contexts of unpredictability and scarcity of resources, and also exercise, with a certain margin, discretionary power in decision-making,[6] also due to the fact that they are faced with flagrant crimes and that the police officer necessarily has a legal obligation to act in the event of encountering flagrant crimes, by virtue of article 301 of the Code of Criminal Procedure, which states that "any member of the public may and The police authorities and their agents must arrest anyone found in flagrante delicto."[26]

In other words, the police officer (as a street bureaucrat) is constantly between the fine line of prevarication or excess, depending on the interpreter and his convictions (as already said about the judge's broad freedom beyond the legal text, due to the transition from Formalist Positivism to Neoconstitutionalism and judicial activism).[42] As a result, between the prevention or repression of crime, which is sometimes fragmentary,[5] the street police bureaucrat suffers pressure from society and judicial decisions to provide the right to security between malfeasance or excess of execution of Public Policy, often also acting as formulators and playing a fundamental role in the implementation of public policies[7] and, sometimes, developing informal practices not foreseen by the formulators.[8]

Final considerations

Since 1980 when Michael Lipsky introduced the concept of street-level bureaucracy, the diversity of research agendas as well as the volume of academic material produced on the subject has grown exponentially. And it can be said that this growth is because they began to see agents (bureaucrats) such as social workers, nurses and police officers as a fundamental part of implementing the public policy initially designed. Starting from the initial theory, researchers advanced in fields and concepts, developing and specifying themes present in Lipsky's initial work, and as an example, the accountability of these professionals, both in relation to their political-administrative superiors and to the community.[43] Another theme developed was the relational mechanisms of these professionals with users of services and public policies, and the way in which judgments are made by these agents in relation to usurers, as they can determine or not their access to benefits and sanctions, delving into the topic of discretion and the relative autonomy of street-level professionals, as well as the coping mechanisms created by these professionals,[29] the latter chosen as the analytical lens of this article.[44]

The objective of this article was to analyze the impact that judicial decisions have on public security policies in Brazil, carrying out this research through the analytical lens of the discretion existing in street-level bureaucracy. Through two case studies carried out, we verified that the judicialization of public security policies has a direct effect on policy design, with the object being assessed by a panel of magistrates or by a single judge or minister in a monocratic vote. However, the discretion to act within the legal limits inherent to street-level professionals, in this specific case public security agents in the most varied forms, makes a difference in the implementation of public policy.

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Despite the literature on street-level bureaucracy advancing in several countries, this matter is still very incipient in Brazil. This article used data and material available on the internet, and future research could carry out a qualitative study, interviewing these professionals studied here in order to verify their perspective on judicial decisions that directly impact the service they perform daily. Considering all this, we can say that the development of research on street-level bureaucracy and, particularly, the discretion of these agents, has a lot of scope to be explored in Brazil. We saw that facts and processes that occur in the daily lives of these professionals have an impact on policy results. Improving this scientific field can bring benefits to the design and, mainly, the implementation of public security policies for the country, in which the main beneficiary is society itself.

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Conflicts of interest

The author declares there is no conflict of interest.

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