



The effectiveness of provisory measures (MPs) in Brazil

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Abstract

On October 5, 1988, the National Constituent Assembly promulgated the Constitution of the Federative Republic of Brazil, instituting 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, for a period not superior to 60 days, with an immediate force of law. However, in September 2001, Constitutional Amendment 32 (CA 32), removed the MP's termination clause over time from Art. 62. In other words, MPs, instead of provisory, should become permanent. This article investigated the effectiveness of MPs - through comprehensive archival research and context analysis. Key findings pointed a significant reduction of MPs reeditions with the adoption of CA 32 (from 9,588 to zero, in 18 years), a decreasing tax of converted Laws (from 78 before and 76 percent after CA 32), resulting in 1,512 MPs issued from 1988 until 2019, with 1,160 MPs converted into Laws (77 percent). Ultimately, this investigation pointed out the existence of 67 MPs in process, most of which in force for 18 years (N=51), a potential source for juridical insecurity. Case analysis and discussion complete the present work.

Keywords: provisory measure, federal constitution, constitutional amendment, Brazilian legislation

1. Introduction

This article investigated the Brazilian Provisory Measures (Medidas Provisórias – MPs, in Brazilian Portuguese) as the unit of analysis ^[1]. MPs are acts of the Brazilian president, 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]. However, evidence was found that provisory measures, in some cases, became permanent ones.

This study was primarily motivated by one of my previous research on Brazilian credit cooperatives legislation ^[3]. Surprisingly, I found the Provisory Measure (MP) 2.168-40 from 2001 ^[1], therefore, issued 18 years ago - still in force ^[4]. Also, further investigation revealed a total of 65 MPs in process, from which 51 are in force since 2001. This finding is inconsistent with Art. 62 from Federal Constitution 1988, by which MPs are limited to 60 days expiration date.

Moreover, MP 2.168-40 was re-issued 40 times from 1998 to 2001, with the last version issued on August 24, 2001. What prevented MP 2.168-40 to be re-issued for the 41st time? Why so many MPs were not converted into Laws, but instead are still in force? Therefore, in this article, I decided to investigate all the 1,512 MPs issued from 1988 to 2019, why some provisory measures became permanent ones, the overall MP legislation, and ultimately the effectiveness of the overall MP's Executive/Legislative process in Brazil.

The answers to these inconsistencies lie within the Constitutional Amendment 32 (CA32), issued on September 11, 2001 ^[5], which modified Art. 62 from Federal Constitution 1988 ^[2], to be discussed in the following sections.

First, the current Brazilian Federal Constitution (the eighth in Brazilian history), was promulgated by the National Constituent Assembly on October 5, 1988, with 117 articles.

It became known as the "Citizen Constitution", because it was conceived after the end of the military regime in Brazil (1964-1985), in the democratization period.

Nevertheless, from October 5, 1988, to September 27, 2019, the Brazilian constitution has undergone 102 amendments. In the same period, 1,512 MPs were issued by eight presidents. One particular amendment is essential to be investigated in the present study: The Constitutional Amendment 32 (CA32) ^[5], issued on September 11, 2001 (on the very same day of the 9-11 infamous terrorist attacks in the United States).

Then, the next sections present methods and limitations of the present study, as well as results, case analysis, and discussion, which compile the present work.

2. Methods and limitations

This study is a qualitative, interpretive, inductive reasoning, multi-method approach. It combined extensive archive research with a single descriptive case study, which unit of analysis is the Brazilian MPs issued from 1988 to September 2019 ^[1].

This research is limited to the Brazilian legislation, especially Federal Constitution 1988, especially Art. 62 ^[2], and Constitutional Amendment 32 ^[5], regarding Art. 62 modification. Secondary data were gathered from the Brazilian Congress database ^[6].

Then, this research is limited to the Brazilian system of government: Brazil is a federal presidential constitutional republic, which is based on representative democracy.

Finally, this research is limited to the following Brazilian government branches: (i) executive, and (ii) legislative. The judicial branch is not investigated in the present study. The next section presents the results of this research.

3. Federal Constitution 1988: Art. 62

MPs are ruled by the Federal Constitution, Title IV, Chapter I (Legislative Power), Section VIII (Legislative Process),

¹ MP 2.168-40 issued in 2001 is still in force, and is observed at http://www.planalto.gov.br/ccivil_03/MPV/2168-40.htm

subsection III, Article 62 [2], stating that “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].

Paragraph 1 limited the scope of the MPs, prohibiting the following issues from being the object of provisory measures

1. nationality, citizenship, political rights, political parties and electoral law;
2. criminal law, criminal and civil procedural law;
3. organization of the judiciary and the public prosecutor, the career and guarantee of its members;
4. multiannual plans, budget guidelines, budget and additional and supplementary credits, except as provided in art. 167, § 3. [2]

Paragraph 2 also prevents the Brazilian president regarding the imposition or increase of taxes. On Paragraph 4, if the matters urged, the National Congress should stop its recess (later, with the CA 32, this item was removed, for instance). [2] Paragraph 7 issued that the MP could be extended only

once for the same period, which, within sixty days of its publication, does not have its voting closed in the two Houses of the National Congress. [2].

In Paragraph 8, the connection between the Executive and the Legislative branches are disclosed: "Provisional measures shall have their voting commenced in the Chamber of Deputies" [2]. Finally, § 12, Art. Sixty-two Issued "the provisional measure shall be fully effective until the draft is sanctioned or vetoed" [2] in sum, Art. Sixty-two had 12 items. Constitutional Amendment has changed the article caput and the first paragraph, as presented in the next section.

4. Constitution Amendment 32, Art. 62

Federal Constitution Amendment 32 (CA32) was issued on September 11, 2001. CA32 has modified the following articles from Federal Constitution 1988: (i) 1º, (ii) 48, (iii) 57, (iv) 61, (v) 62, (vi) 64, (vii) 66, (viii) 84, (ix) 88, and finally (x) 246. In this research, only art. 62 is studied. Article 62 suffered the following modifications, according to the comparative table 1, as follows:

Table 1: Comparison between original ART. 62 from Federal Constitution 1988 versus the Constitutional Amendment 32 from 2001 (original in Portuguese – see notes within the text)

Constitution 1988	Constitutional Amendment 32
Art. 62. 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.	Art. 62. 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.
Parágrafo único. As medidas provisórias perderão 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.	§Parágrafo 1ºúnico. 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.

Source: Federal Constitution 1988 [2] and Constitutional Amendment 32 [5]

Notes: directly translated, on the new Article 62 [5], two sentences were removed: (i) the necessity for extraordinary convocation of the congress, during recess (upper cell right), and (ii) the MP's termination clause over time (lower cell right), which became simply: “The issuance of provisional measures on the matter is prohibited.” [5]

The original paragraph [2] stated that MPs would lose efficacy, since its edition, if they are not converted into law in the following 30 days from its publication [2]. In other words, the deadlines for MP overdue were removed, and provisory could become permanent, while § 11 and § 12 remained intact:

§ 11. If the legislative decree referred to in § three is not edited until sixty days after the rejection or loss of

effectiveness of a provisional measure, the legal relations constituted and resulting from acts practiced during its term shall be governed by it.

§ 12. A conversion bill, amending the original text of the provisional measure, shall be fully capable until the draft is sanctioned or vetoed. [5].

In other words, if an MP is not vetoed or voted within 30 days by the congress, it will remain fully effective, including the legal relations constituted, which allows the MP to be in effect until the congress appreciation.

In the next section, the overall MPs are presented, as well as the N= 51MPs waiting for 18 years to be appreciate within the Congress.

5. Results

5.1. Portrait of the Brazilian MPs

In total, 1,512 MPs were investigated: MP 10, from

November 4, 1988 until MP 897, from October 2, 2019. Within the period, eight presidents issued MPs, as depicted in the following Figure 1:

President Successor	President	Term	Period	MPs (a)	MPs Re- editions (b)	Total MPs (c = a + b)
30 ^o	Tancredo Neves	Deceased before mandate	none	0	0	0
31 ^o	José Sarney †	15.03.1985 - 15.03.1990	5 years	121	0	121
32 ^o	Fernando Collor ††	15.03.1990 - 29.12.1992	2 years and 289 days	96	43	139
33 ^o	Itamar Franco	29.12.1992 - 01.01.1995	2 years and 3 days	78	107	185
34 ^o	Fernando Henrique Cardoso	01.01.1995 - 01.01.2003	8 years	422	9.438	9.860
35 ^o	Luis Inacio Lula da Silva	01.01.2003 - 01.01.2011	8 years	419	0 ^{†††}	419
36 ^o	Dilma Rousseff	01.01.2011 - 31.08.2016	5 years and 243 days	222	0	222
37 ^o	Michel Temer	31.08.2016 - 01.01.2019	2 years and 123 days	126	0	126
38 ^o	Jair Messias Bolsonaro ^{††††}	01.01.2019 - to date	300 days so far	28	0	28
Total				1.512	9.588	11.100

Fig 1: Brazilian presidents from 1988 to 2019 and their MPs. Source: Brasil, 2019

Observe that the 30th president, Tancredo Neves, died before his inauguration on April 21, 1985, substituted by José Sarney†, who issued 121 MPs in five years. Fernando Collor††, 31st president, and Dilma Rousseff, 36th president, were impeached and did not complete their terms. Itamar Franco (33rd) and Michel Temer (37th) presidents, completed the respective mandates.

The 34th president, Fernando Henrique Cardoso, who has been re-elected president for a second term, had 422 MPs issued, with the number of 9,438 MPs reeditions, with a total of 9,860 MPs, followed by Lula da Silva, with 419

MPs in two terms.

Observe that from the 35th president until current president Jair Bolsonaro, the MPs were not re-issued anymore. This is one of the consequences of the CA 32 changes.

Finally, note that president Jair Bolsonaro, who initiated his term on January 1st, 2019 has only partial results, and his performance cannot be evaluated this far. ††††

5.2. MPs before and after CA 32

Figure 2 illustrates the number of MPs before and after the 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 2: MPs issued before and after CA 32. Source: Brasil, 2019

Observe in Figure 2 that after the CA 32 has been issued until the current date, there is no MP reeditions. They simply could be waiting for congress appreciation. Note that before the CA 32, there was a total of 10,203 MPs, after CA 32, only 897 MPs.

The number of MPs increased from 615 to 897 (approximately 45 percent), totaling 1,512 MPs. The overall

MPs before CA 32 decreased from 10,203 to 897 (almost 92 percent).

5.3. MPs converted into Laws, before and after CA 32

Figure 3 illustrates the number of MPs converted into Laws, before and after the CA 32:

Constitutional Ammendment 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 3: Conversion rates before and after CA 32. Source: Brasil, 2019

Observe that before the CA 32, 78 percent of the MPs were converted into Laws. That number became very close to the performance after the CA32 approval (2 percent difference). In total, 77 percent of the overall MPs were converted into Laws.

5.4 MPs rejected and in process

Figure 4 illustrates the number of MPs rejected, not accepted or overdue MPs, before and after the CA 32, as well as In Process MPs:

Constitutional Ammendment 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 4: Rejected, overdue, and in process MPs. Source: Brasil, 2019

Comparing Table 1, and Figures 2 and 4, observe that CA 32 had a direct impact on the number of reeditions, reducing them to zero (Figure 2). However, the collateral effect of CA 32 seems to be represented in the 51 MPs issued in 2001 (Figure 4), still in force (Table 1).

In other words, N=51 provisory measures are “fully effective until the draft is sanctioned or vetoed.” [5], which means that provisory measures, at the end of the day, became permanent. They are literally frozen for the last 18 years.

Finally, the number of rejected/overdue MPs increased in two percent (from 22 to 24 percent), and the number of MPs in process is 16. From these, only one remained from

Michel Temer administration (2016-2018). The other 15 were issued on Jair Bolsonaro administration, fulfilling the regular time for appreciation, at the moment this article was being written.

6. Analysis and Discussion

President Michel Temer was the president to issue the higher number of MPs per month, in his short administration (after president Dilma's impeachment): approximately 4.5 MPs issued in a month, near one per week, as depicted in the following Figure 5:

President	Period	MPs (a)	Term in months	MP/month
Tancredo Neves	none	0	0	0,0
José Sarney	5 years	121	70	1,7
Fernando Collor	2 years and 289 days	96	31	3,1
Itamar Franco	2 years and 3 days	78	24	3,3
Fernando Henrique Cardoso	8 years	422	96	4,4
Luis Inacio Lula da Silva	8 years	419	96	4,4
Dilma Rousseff	5 years and 243 days	222	69	3,2
Michel Temer	2 years and 123 days	126	28	4,5
Jair Messias Bolsonaro	300 days so far	28	9	3,1

Fig 5: Number of MPs per president per month. Source: Brasil, 2019

Observe that the replication of MPs was prevented due to the CA 32. However, 51 out of 67 in-process MPs are in force since 2001, 18 years, which is confusing at the minimum. Further analysis indicated those MPs might represent juridical insecurity over the years; once it is not a Law itself, rather than the Provisory Measure, it has become

over the years, a permanent one.

Regarding the conversion rates per president, the analysis indicated that former president Luis Inacio da Silva, the 35th Brazilian president has the higher Law conversion rate (87 percent), according to Figure 6, as follows:

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

Fig 6: MPs to Laws conversion rates. Source: Brasil, 2019

Observe the number of MPs from the 35th Brazilian president: out of 419 MPs, with zero replications, 366 were converted into Laws, the highest conversion rate from 1988 to 2019. President Jair Bolsonaro, the 38th Brazilian term, cannot be evaluated because his term barely has been imitated on January 1st, 2019.

On the one hand, CA 32 reduced the number of MP replications to zero, decreasing substantially congress work hours on ordinary sessions regarding this particular subject, even revoking the extraordinary congress meetings, if subjects were urgent or demanded extraordinary sessions (See Table 1). It did not implicate, however, in a faster MPs conversion process. On the other hand, CA 32 removed the possibility of the automatic extinction of overdue MPs. In practice, it has created one anomaly that affected N=51 MPs, in force since 2001.

The analysis also indicated that these in-process MPs should be once for all vetoed or voted, to be accepted and become Law, of definitively rejected. While other subjects seem to be more critical in the government's political agenda, these MPs are left in a situation of juridical insecurity: they are not Laws but keep the effects of Law, while waiting for the congress appreciation on such matters.

Then, the excessive number of MPs are seen as interference from the Executive on the Legislative agenda, as stated by the president of the Brazilian Congress, Rodrigo Maia:

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].

Once the Congress should appreciate MPs in due time, other relevant matters are kept aside temporarily, therefore, interfering in the Congress agenda. However, in this regard, CA 32 decreased the number of MPs tremendously to be appreciated by Congress, extinguishing the re-editions. For instance, MP 2.086-89 was replicated 89 times, finally converted into Law 10.179 in 2001, meaning 89 times revisiting the same issue, until final its appreciation by the Congress, a far time-consuming task than after CA 32, not to mention the N=51 MPs that have been hovering over the congress for 18 years.

A recommendation for this case is to summon the Congress for extraordinary sessions, in a task force to vote or veto the N=51 MPs in process for such extended time, and convert them into Laws or not.

Finally, another solution is to reduce the congress recess, given the amount of work to be appreciated. Currently, 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. It is too much time for recess, given the fact that the overall Brazilian workers merely have 30 days' vacation. If the Brazilian Congress had more working days - reducing in days congress recess in 26 days, certainly there would be more time to appreciate all legislative matters at hand.

7. Implications and future research

This study implied that changing the structure of MPs processing, through revisiting Art.62 from Federal Constitution, through a new Amendment, to prevent provisory measures become permanent ones. Other scenarios might be affected by this study [8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 19, 20, 21, 22] for instance.

Another implication regards the originality of this study: after the general elections 2018, two-thirds of the Congressmen were elected and took office ten months ago. With the current agenda be focused on political issues of the moment, it is easy to set aside forgotten MPs, In this sense, this study represents a warning sign to the activities of the Brazilian legislative and executive powers, regarding their performance on such crucial issues for the Brazilian Nation. Future study is recommended to investigate the content of each of the N=51 MPs in force since 2001, to study how the juridical insecurity has impacted many Laws, and in how extent it affects the public administration.

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