

**PRELIMINARY INJUNCTION IN THE CLAIM OF NON-COMPLIANCE WITH A FUNDAMENTAL
PRECEPT (ADPF) NO. 403 SERGIPE**

Rapporteur: Justice Edson Fachin

Plaintiff: Partido Popular Socialista – PPS

Counsel: Afonso Códolo Belice

Defendant: Judge from the Criminal Division of Lagarto, Sergipe

Counsel: not appointed

Here is claim of non-compliance with a fundamental precept (ADPF) filed by the Partido Popular Socialista – PPS, challenging "[the] decision of the Judge Marcel Maia Montalvão from the Criminal Division of Lagarto (SE), in the process No. 201655000183, which ordered the blocking of the communications application WhatsApp".

The plaintiff argues, in short, that:

"It is clear violation of the right to communication. After all, the WhatsApp messaging app accomplished something seen as unthinkable until the last decade: it reunited several generations in one information exchange platform, providing unrestricted communication for its users" (page 4, electronic document No. 1)

The plaintiff argues, in this regard, that

"According to recent data, eight in ten Brazilian mobile phones connected to the application. In a country of continental dimensions like ours, the fact that a single mobile app embraces a number of consumers that represents nearly half the Brazilian population, which is 205.8 million people, is something to be praised" (page 4, electronic document No. 1)

Furthermore

"We seek, therefore, in this narrow allusion, to assert that the WhatsApp app is a truly democratic medium for the Brazilian citizens to communicate. Perhaps the most democratic, thanks to its free, simple and interactive platform" (page 4, electronic document No. 1)

The plaintiff argues, in this sense, that the "the suspension of WhatsApp activities, based on controversial grounds, violates the right to communication, constitutionally guaranteed to the Brazilian people".

The plaintiff states, in this line, that

"A fundamental precept can be injured based on plain judicial interpretation of the Constitution. In such cases the dispute is not based on the legitimacy or not of a law, a normative act, but is based simply on the legitimacy or not of certain

interpretation. Therefore, we seek the Supreme Court to declare the unconstitutionality of the interpretation of a judge who restricts the right to communication of thousands of citizens " (page 5, electronic document No. 1)

For these reasons, the plaintiff requires,

"in accordance with art. 5, § 1, of Law 9882/1999, given the serious violation of the right to free and unrestricted communication, the acceptance of the injunction by the rapporteur, *ad referendum* of the Full Court, to suspend the effects of the decision of the Judge of the Criminal Division of Lagarto, Marcel Maia Montalvão, [that] in the process No. 201655000183 blocked the communications application Whatsapp for 72 hours, so that it is back into operation immediately;

b) A FINAL AND DEFINITIVE PROVISION, in which the current request is to be judged in order to recognize the existence of a violation to the fundamental precept of communication, according to the article 5, item XI of the Brazilian Constitution, thus preventing further suspension of the message app WhatsApp that is requested by any judicial decision" (page 9, electronic document No. 1)

The Preliminary Injunction n. 39344/2016-STF, brought before the Court by the PPS party, informs the occurrence of a "*new court order commanded the blockage of WhatsApp service*".

The plaintiff states that,

"As widely disseminated by the press (news are annexed), the Judge Daniela Barbosa Assumpção de Souza, of the Criminal Division of Duque de Caxias (RJ) determined today a new suspension of the service provided by the app WhatsApp to by complied all the mobile operators in the country" (page 1, electronic document 35)

It highlights that,

"Although the filing of the original claim of non-compliance with a fundamental precept is motivated by other judicial decision [by the Criminal Division of Lagarto (SE)] on the similar matter, the original opening brief covers 'the finality of preventing further suspension of the message app WhatsApp by any judicial decision" (page 1, electronic document 35).

It demands "*the immediate suspension of the decision by the judge Daniela Barbosa Assumpção de Souza, of the Criminal Division of Duque de Caxias (RJ), in the process IP 062-00164/2016, fundamented on the original claim"* (page 1, electronic document 35).

This is the report.

I hereby decide.

According to art. 102, § 1, of the Constitution, "the claim of non-compliance with a fundamental precept deriving from this Constitution shall be examined by the Supreme Court, pursuant to the law".

In order to give concreteness to this constitutional command, Law 9882/1999 was enacted, which provides in its art. 1, *caput*, that "*the claim provided for in § 1 of art. 102 of the Federal Constitution will be brought before the Supreme Court, and will **aim to prevent or remedy injury to a fundamental precept, resulting from an act of the Public Power** "* (emphasis added).

The act of the Public Power in this case was the decision of the *Criminal Division of Duque de Caxias (RJ)*, in the process No. IP 062- 00164/2016, which determined "the suspension of the services of Whatsapp in all telephone operators until a court order is effectively complied with by the company Facebook, under penalty of law".

In fact, the Supreme Court accepts the appeal of court decisions through ADPF, as shown, for example, in the judgment of ADPF 249-AgR/DF, by rapporteur Justice Celso de Mello, whose decision judgment was summarized in the following terms:

"CLAIM OF NON-COMPLIANCE WITH A FUNDAMENTAL PRECEPT - THEORY OF SUBSIDIARITY - INVALIDITY OF SUCH CONSTITUTIONAL ACTION - DOCTRINE - PRECEDENT – **POSSIBILITY OF CHALLENGING COURT DECISIONS BY ADPF, AS LONG AS NOT RENDERED FINAL – CONSEQUENT ENFORCEABILITY OF THE FINAL DECISION TO THE ADPF – PRECEDENT – THE POLITICAL-JUDICIAL MEANING OF THE 'RES JUDICATA' – RELATIONSHIP BETWEEN RES JUDICIATA WITH PREJUDICE AND THE CONSTITUTION – RESPECT FOR THE AUTHORITY OF THE RES JUDICATA WITH PREJUDICE, EVEN WHEN THE DECISION WAS CONFRONTING CASE LAW OF THE SUPREME COURT – ADPF: CONSTITUTIONAL ACTION THAT HAS NO TERMINATION FUNCTION – RELEVANT CONTROVERSY CHARACTERIZED BY CONFLICTING DECISIONS FROM DIFFERENT JUDICIAL BODIES: NECESSARY AND ESSENTIAL PRECONDITION TO THE VALID FILING OF THE ADPF – ABSENCE, IN THE CASE, OF ANY STATE OF UNCERTAINTY OR INSECURITY IN THE LEGAL LEVEL, NOTABLY BECAUSE THE INTERPRETATIVE DISSENT WAS ALREADY SETTLED BY THE SUPREME COURT - FORMULATION OF PRECEDENT 652 / STF - DOCTRINE - APPEAL DISMISSED"** (emphasis added).

This court now examines the fundamental precept that was allegedly infringed.

According to art. 5, IX, of the Constitution:

"Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

(...)

IX – the expression of intellectual, artistic, scientific, and communications activities is free, independently of censorship or license”.

As it turns out, the right to free expression and communication was highlighted by the original constituent power with status of entrenchment clause, which means that it cannot be abolished, even by the means of a constitutional amendment.

In modern society, the Internet is undoubtedly the most popular and comprehensive media, the subject of several academic studies because of its importance as a democratic instrument for access to information and dissemination of data of all kinds.

On the other hand, the internet is also a source of concern for some academics because of its possible need for regulation, since at first glance it could be considered a "lawless territory."

In Brazil, however, the matter was given legal outlines. Law 12965/2014 arose exactly for the purpose of establishing "principles, guarantees, rights and obligations for the use of Internet in Brazil".

In art. 3, I, the law provides that one of the principles of Internet use in the country is the "*guarantee of freedom of speech, communication and expression of thought, in accordance to the Federal Constitution*" Furthermore, there was explicit concern about "*preservation of stability, security and functionality of the network, via technical measures consistent with international standards and by encouraging the use of best practices*" (art. 3, V).

The extensive aspect of the suspension of WhatsApp application service, which allows instant messaging in the global computer network, seems to violate the fundamental precept of freedom of expression indicated here, as well as the current law on the subject. Moreover, the extent of the blocking throughout the whole national territory is at least disproportionate in relation to the reason that gave cause to it.

The judge herself recognized in its decision that:

“WhatsApp works perfectly fine in BRAZIL with a **large number of users**, and, that, obviously, it is used in Portuguese, and includes even a spell checker in Portuguese.

(...)

WhatsApp has more than 1 (one) billion users worldwide and "BRAZIL is the second country with the highest number of users, only behind South Africa. According to a report published by the company, 76% of mobile subscribers in Brazil make regular use of WhatsApp, which is the most popular instant messaging service in the country" (emphasis added).

Without going into the merits of the use of the application for illicit purposes, it is

necessary to to highlight the importance of this type of communication even to subpoena orders or judicial decisions, as reported the electronic site <http://www.conjur.com.br/2016-fev-27/klaus-koplin-urgente-Intimação-feita-whatsapp>.

Since the discussion regarding the company's obligation to reveal the message content is a matter of high technical complexity, to be resolved during the definitive judgment session, this court would like to emphasize that said debate as determined by the Criminal Division of Duque de Caxias (RJ) when it stated that WhatsApp allegedly did not comply with this obligation is not at stake here at this court in this moment.

Thus, in this perfunctory analysis inherent to the nature of the preliminary injunction, this court understands that it is not reasonable to allow the continuation of the contested act, since it creates legal uncertainty among users of said service, leaving millions of Brazilians without communication.

There is a similar decision issued by Justice Marco Aurélio in the ADPF 309/DF, which states that:

"POWER OF THE JUDGE TO GRANT PRELIMINARY INJUNCTIONS - JUDICIARY. The judiciary has the legitimacy and the power to accept the requests from preliminary injunctions in order to avoid violation of a right - final part of the item XXXV of Article 5 of the Federal Constitution.

PUBLIC POLICY ACCESSIBILITY - REGULATION - MINISTRY OF COMMUNICATIONS - ALIENATION FOR REGIONAL COURT DECISION FEDERAL - CLAIM MADE IN THE SUPREME COURT - PENDING JUDGMENT - SEPARATION OF POWERS - LEGAL INSECURITY. If a matter of high technical complexity is involved and another settlement in other complaint is pending, the court shall suspend the judicial decision and wait to future pronouncement of the Supreme Court" (emphasis added).

That said, based on the general power of the judge to grant preliminary injunctions by preliminary injunction, this court grants the suspension of the decision of the judge of the Criminal Division of Duque de Caxias (RJ) in the process IP 062-0016 /2016, reestablishing immediately the messaging service application WhatsApp, without prejudice to further examination of the matter by raffled Rapporteur.

This decision is to be publicized urgently,

Brasilia, July 19th, 2016.

Justice RICARDO LEWANDOWSKI

Head of the Supreme Court