

Brazil's Supreme Court guarantees the rights of adolescents in conflict with the law

STAY OF PRELIMINARY ORDER 235-0 TOCANTINS
RELATER: THE PRESIDENT MINISTER
PETITIONER(S): THE STATE OF TOCANTINS
LAWYER(S): PGE TO LUIS GONZAGA ASSUNÇÃO

DEFENDANT: THE SUPREME COURT OF THE STATE OF TOCANTINS (APPEAL AS TO STAY OF PRELIMINARY ORDER Nr. 1848/07 AT PUBLIC CIVIL SUIT Nr. 72658-0/06)

CONCERNED TO: DEPARTMENT OF JUSTICE OF THE STATE OF TOCANTINS

JUDICIAL DECISION: The request concerns the stay of preliminary order (pages 02-22) drawn up by the State of Tocantins against the decision issued by the Supreme Court of the State of Tocantins, which has dismissed the motion for stay of preliminary order filed at the above-mentioned Supreme Court.

The judicial decision herein objected did affirm the preliminary order granted under public civil suit Nr. 2007.0000.2658-0/0, in progress before the Youth Court of Araguaína/TO, which did state as follows:

"[...]"

I hereby do grant the preliminary order and determine that the State of Tocantins shall install at the city of Araguaína/TO, within 12 months, a specialized unit for accomplishing both confinement and semi-confinement socio-educational procedures applied to transgressor adolescents, so as to provide attendance as stated in articles 94, 120, §2 and §124 of the Child and Youth Statute (*Estatuto da Criança e do Adolescente – ECA*).

I hereby further determine that the defendant refrain from keeping adolescents apprehended after the lapse of 12 months in any facility other than the above-mentioned one.

I hereby establish a R\$3,000.00 (three thousand reais) daily penalty to be paid by the defendant should the execution of the present decision be disregarded or delayed. The present decision must be reverted in favor of the Municipal Fund for Youth Rights, under the terms of articles 213 and 214 of law Nr. 8069/90." (page 94).

By means of the public civil suit, the petitioners argued that the local Executive, in the absence of a specialized unit at that Circuit Court, would transfer the transgressor adolescents to the city of Ananás/TO, 160 km away from the original locality, thus making much more difficult for their family to keep contact (page 62).

Besides, transgressor adolescents would have been kept in local prison facilities, in jails adjacent to those occupied by imprisoned adults, thus enabling both visual and verbal contact between them, in inhospitable ambience. Such conditions would have been attested by the Tutelary Board of Araguaína and by the Director of the prison-house (page 65).

It was argued furthermore that the commitment agreed between the Government of Tocantins and the Department of Justice of the State, under the Record of Conduct Adjustment (*Termo de Ajustamento de Conduta – TAC*), was disregarded. Under that TAC, the Government of Tocantins should have allocated resources, until January 15, 2007, for the creation of semi-confinement regime in that Circuit Court, in Palmas and in Gurupi (page 62).

The Public Civil Suit did consider unacceptable the allegation of impediment of reserve for contingencies in the present case, considering the need for assuring the minimum conditions necessary for the condign existence of the transgressor adolescents, as would have informed precedents from the Supreme Court of the States of São Paulo and Rio Grande do Sul (pages 68-71).

At last, did the Department of Justice of the State consign that the preliminary restraining order should be granted, considering the clauses of the Child and Youth Statute (art. 123, art. 185, art. 94, art. 120 and art. 124), along with as provided in the Federal Constitution (art. 1, III; art. 5, III, XXXIX, XLIX; art. 37, caput; art. 227, caput and §3, all included in the CF/88, the Federal Constitution/88) and in International Covenants (pages 71-88).

The Trial Court did grant the preliminary restraining order, as quoted above, remarking that the rules included in art. 227, caput and §3 of the Constitution and transcribed into the ECA are fully valid (pages 90-95).

Although the adolescents were no longer confined in the public prison-house of Ananás/TO at the moment the present decision was taken, the preliminary restraining order did furthermore consign that the inexistence of any specialized unit in Araguaína/TO would oblige for the transgressor adolescents to be conducted to the CASE of Palmas/TO, 375 km away from that circuit court, thus making the family contact impossible, as well as any successful socio-educational process.

Against such decision, the State of Tocantins filed a suit at the Presidency of the Supreme Court of Tocantins (pages 33-54), pleading for stay of preliminary order. The Presidency dismissed the motion, considering that no serious injury to the public order and economy did occur, and that the decision would carry no multiplying effect (pages 97-100). Against such decision the State of Tocantins did lodge an appeal.

The Full Court of the Supreme Court of the State of Tocantins did affirm the judgement to the appeal of stay of preliminary order (pages 127-130), considering the inexistence of any multiplying effect and the absence of reasons to annul the decision brought upon the State.

The pleading for stay of preliminary order against the decision by the Supreme Court of the State of Tocantins is grounded on arguments of injury to the public order and economy of the State of Tocantins. The petitioner stresses that the preliminary order awarded determining the construction of a specialized unit within specific term would imply act of interfering by the Judiciary on Executive prerogatives. Such interference would affront the principle of independence of Powers, as provided in art. 2 of the Constitution (pages 08-09).

Furthermore, the petitioner alleges injury to the public economy of the State, based on absence of budgetary prevision, scantiness of time for the arrangements, offense to the principle of reserve for contingencies, besides explicit legal and constitutional interdiction concerning expenses commanding without legal authorization (pages 08-19).

Concluding, the State of Tocantins asseverates that the preliminary order awarded has totally drained the object of the public civil suit, thus transgressing art. 1, §3 of Law Nr. 8437/92, which forbids preliminary orders to be awarded against acts performed by public authorities that drain, either in full or in part, the object of the action (pages 19-21).

I hereby decide.

The rules grounding the institute of suspension (Laws 4348/64, 8437/92, 9494/97 and art. 297 of the RI/STF) allows the Presidency of the Federal Supreme Court, aiming at avoiding serious injury to public order, health, security and economy, to determine the stay of execution of decisions awarding

security, preliminary order or preliminary injunction, issued in either single or last resort by local or federal courts, provided the discussion, at the origin, is constitutional on its nature.

Therefore, the competence of the Federal Supreme Court to judge the pleading for the revocation of provisional remedies is justified by the constitutional nature of the controversy, according to the law of the case issued by this Court, remarking the following judicial precedents: Rcl 497-AgR/RS, rel. Min. Carlos Velloso, Full Court, DJ 06.4.2001; SS 2.187-AgR/SC, rel. Min. Maurício Corrêa, DJ 21.10.2003; and SS 2.465/SC, rel. Min. Nelson Jobim, DJ 20.10.2004.

The public civil suit claims for condemning the State of Tocantins in obligation to do, in order to install a confinement and semi-confinement program for transgressor adolescents in a specialized unit in the Circuit Court of Araguaína/TO, within 12 months. Thereby, it points to: transgression of adolescents' rights and of the policy based on attendance to adolescents, as provided in art. 227, caput and §3 of the Constitution, and reaffirmed in the ECA (art. 94, art. 120, §2, and art. 124).

On the other hand, the stay of preliminary order points to: transgression of art. 2, CF/88, consistent with direct interference with the Executive activities; absence of budgetary provision (art. 163, I; art. 165; art. 166, §3 and §4; art. 167, III, all included in CF/88); offense of the principle of reserve for contingencies, scantiness of time for the arrangements and possible multiplying effect of the present case. There is no doubt, therefore, that the subject under discussion from the origin is one of constitutional nature.

Once stated these preliminary considerations, I come now to the analysis of the motion, taking for exclusive basis the prescriptive guidelines which rule the stay of preliminary orders. Nevertheless, it must be remarked that, as the motion for stay of judicial decision is analyzed, the President of the Supreme Federal Court is not hindered from pronouncing some minimum judgement as to the deliberation regarding judicial matters appertaining to the principal action, according to what is usually acknowledged in the case law by this Court, from which can be remarked the following judgements: SS 846-AgR/DF, rel. Minister Sepúlveda Pertence, DJ 29.5.96; SS 1272-AgR/RJ, rel. Minister Carlos Velloso, DJ 18.5.2001.

In the present case, it is under discussion the possible conflict between (1) the principle of separation of Powers, accomplished by the right of the State of Tocantins to discretionarily define the terms of public policies aimed at transgressor adolescents and a basic policy for their assistance and (2) the constitutional protection of the rights assisting transgressor adolescents and of a basic policy aimed at their attendance. This is what provides art 227 of the Constitution:

“Art. 227. It is the duty of the family, the society and the State to ensure to the child and the adolescent, with number one priority, the right to life, health, feeding, education, leisure, professionalization, culture, dignity, respect, freedom, and both familiar and communitarian companionship, besides keeping them safe from all kinds of negligence, discrimination, exploitation, violence, cruelty and oppression.

§1: The State shall promote programs aimed at the full assistance to the health of both the child and the adolescent, being herein admitted the participation of non-governmental organizations and fulfilling the following precepts:

[...]

V – obedience to the principles of brevity, exceptionality and respect to the peculiar condition of the individual undergoing his/her development process as any remedy is applied that shall deprive him/her from freedom; [...]

It is not to be doubted that the theme of juvenile protection, and specifically as transgressor adolescents are involved, deserves special attention under the Constitution. As one may observe,

both the caput of art. 277 and its first paragraph and the subsections therein include prescriptive provisions aimed at the State, as remarked above.

Thereby, one should remark the constitutional determination for number one priority as to the accomplishment of such prescriptive provisions, due to the paramount protection significance regarding juvenile rights. Concerning the case herein, there is relevance as to the objective dimension of the fundamental right to protection assisting both the child and the adolescent.

Regarding this objective aspect, the State is obliged to create the phatic presumptions required for granting the effective accomplishment of such right.

As I have been analyzing in doctrinal studies, the fundamental rights include more than just some intervention prohibition (Eingriffsverbote), they do also express a protection postulate (Schutzgebote). Thus, using an expression by Canaris, there would be not only a prohibition of excess (Übermassverbot), but also a prohibition of insufficient protection (Untermassverbot) (Claus-Wilhelm Canaris, Grundrechtswirkungen um Verhältnismässigkeitprinzip in der richterlichen Anwendung und Fortbildung des Privatsrechts, JuS, 1989, p. 161).

In this objective dimension, it should also be assigned relevance to the perspective of the rights for both the organization and the procedure (Recht auf Organization und auf Verfahren), those fundamental rights whose accomplishment depends on state arrangements aiming at the creation and the adequacy of departments and procedures essential for them to be fulfilled.

It seems logical, therefore, that the effectiveness of such fundamental right to protection assisting the child and the adolescent is not detached from the positive state action aimed at creating certain phatic conditions, always dependent on the financial resources available to the State and on systems involving departments and procedures aimed at this ultimate object.

Otherwise, one would be armoring, through a wide space for discretionary actions by the state, some phatic situation undoubtedly rejected by the society, thus characterizing a typical hypothesis of insufficient protection by the State, under a wider point of view, and by the Judiciary, under a more restricted point of view.

On the other hand, it is alleged in the present stay of preliminary order that some injury to the public order and economy might occur in face of the judicial determination for a confinement program and semi-confinement regime to be implemented using specialized facilities (yet to be built), within a 12 month delay.

In this sense, the core argument by the State of Tocantins resides on the transgression of the principle of separation of Powers (art. 2, CF/88), herein strictly expressed, which hinders the interference of the Judicial Power with the discretionary prerogatives assisting the State Executive Power.

Nevertheless, in our days, for it to be properly understood under the constitutional point of view, such principle requires attitude of mind and adjustments taking into account the constitutional Brazilian reality, forming a circle where the Constitution theory and the constitutional experience do mutually complement each other.

Therein, it is my understanding that no serious injury to the public order could take place due to transgression of art. 2 of the Constitution. The allegation of transgression of the separation of Powers shall not vindicate the inertness of the Executive Power of the State of Tocantins concerning the constitutional duty of assuring number one priority to the accomplishment of juvenile rights as claimed for in the constitutional text (art. 227).

Similarly, I see no evidence of serious injury to the public economy. It must be remarked that the Child and Youth Statute, due to the number one priority granted by the Constitution, clearly expresses the duty assigned to the Executive Power to assure precedence in accomplishing those public policies, as stated in its art. 4.

“Art. 4. It is the duty of the family, the community as a whole and the State to ensure, with number one priority, the accomplishment of rights concerning life, health, feeding, education, sports, leisure, professionalization, culture, dignity, respect, freedom, and both familiar and communitarian companionship.

Sole paragraph: The precedence assurance includes:

- a) precedence in receiving protection and help under whatever the circumstances;
- b) precedence in receiving public services or services of public relevance;
- c) preference in both the formulation and the accomplishment of social public policies;
- d) privileged allocation of public resources in the areas related to juvenile protection.”

One shall not think of serious injury to the economy of the State of Tocantins in face of the precedence constitutional determination clearly expressed concerning the formulation of social policies in this area, as well as the high priority as to the respective budgetary allocation, unambiguously outlined in the ECA.

The Constitution clearly points out to the values to be prioritized, yet strengthened by the ECA's provisions. The above-mentioned determinations must be seriously taken into account as the state budget is produced, once those are binding provisions.

It must be remarked that on July 13 forthcoming the promulgation of the Child and Youth Statute will celebrate its 18th anniversary. This Statute is now assumed to be an important step toward the delimitation of public actions aimed at both the child and the adolescent.

Furthermore, the decision herein objected is in accordance with the law of the case issued by this Court, which has ratified the understanding, in cases such as the present one, that the State is imputed the constitutional obligation to create objective conditions for actually enabling the effective protection of rights assured under the Constitution, with number one priority, such as: the right to pre-primary education and the rights of both the child and the adolescent. Therein, the following judgements must be remarked: RE-AgR 410.715/SP, 2^a. T. rel. Celso de Mello, DJ 03.02.2006; RE 431.773/SP, rel. Marco Aurélio, DJ 22.10.2004. From the judgement RE-AgR 410.715/SP, 2^a. T. rel. Celso de Mello, DJ 03.02.2006, the following extract shall be remarked:

“[...]”

Pre-primary education, for being qualified as a fundamental right assisting every child, shall not be submitted, while being accomplished, to merely discretionary evaluations by the Public Administration, nor shall it subordinate to reasons based on pure governmental pragmatism. The municipalities – which shall prioritize acts aimed at pre-primary, primary and lower secondary education (CV, art. 211, §2) – shall not be allowed to resign from the constitutional mandate, judicially binding, awarded by art. 208, IV, of the Republic Fundamental Law, and that represents a restrictive condition for the political-administrative discretionary conduct of local entities, whose options, when it comes to the attendance of children in day-care facilities (CF, art. 208, IV), shall not be practiced so as to jeopardize, based on the evaluation of simple convenience or mere opportunity, the efficacy of this basic right of social nature. Although the prerogative of formulating and accomplishing public policies primarily resides in the Legislative and Executive Powers, it proves possible for the Judicial Power to determine – although under exceptional conditions, particularly when public policies are defined by the Constitution itself – that they be accomplished by defaulter state departments, whose omission – for revealing failure in performing political-judicial duties they

are mandatorily in charge of – proves able to jeopardize both the efficacy and the integrity of social rights and cultures imbued of constitutional stature.

[...]"

There is no doubt as to the juridical possibility of judicial determination for the Executive Power to accomplish public policies defined under the Constitution, as in the present case, where the constitutional rule demands, with number one priority, the protection of juvenile rights, clearly defined in the Child and Youth Statute. The same has been decided by the Federal Court of Appeals (STJ-Resp 630.765/SP, 1^a. T, rel. Luiz Fux, DJ 12.09.2005).

In the case herein, there is evidence of possible insufficient protection of the juvenile rights by the State, which shall be prohibited, as already remarked. The Judicial Power is not creating public policies, nor is this Power arrogating initiatives of the Executive Power.

The decision objected simply determines the accomplishment of the public policy defined under the Constitution (art. 227, caput, and §3), and clearly and fully specified in the ECA, including as how it should be accomplished. This is the sense of the lesson offered by Christian Courtis and Victor Abramovich (ABRAMOVICH, Victor; COURTIS, Christian, Los derechos sociales como derechos exigibles, Trotta, 2004, p. 251):

“Por ello, el Poder Judicial no tiene la tarea de diseñar políticas públicas, sino la de confrontar el diseño de políticas asumidas con los estándares jurídicos aplicables y – en caso de hallar divergencias – reenviar la cuestión a los poderes pertinentes para que ellos reaccionen ajustando su actividad en consecuencia. Cuando las normas constitucionales o legales fijen pautas para el diseño de políticas públicas y los poderes respectivos no hayan adoptado ninguna medida, corresponderá al Poder Judicial reprochar esa omisión y reenviarles la cuestión para que elaboren alguna medida. Esta dimensión de la actuación judicial puede ser conceptualizada como la participación en un <<diálogo>> entre los distintos poderes del Estado para la concreción del programa jurídico-político establecido por la constitución o por los pactos de derechos humanos.” (no underline in the original)

Nevertheless, according to information included in the reasons stated by the State of Tocantins, the Executive was notified on the first instance decision on October 19, 2007 (page 115). Therefore, the 12 month delay shall be extinguished by October 19, 2008.

From that date on, according to the decision objected, should the State of Tocantins have failed to build the specialized unit or should it happen to confine transgressor adolescents somewhere other than a specialized unit, it will be charged a R\$3,000.00 (three thousand reais) daily penalty for undetermined term.

It is my understanding that only at this point the decision objected leads to serious injury to the public economy – that is, solely regarding the penalty for not having built, within 12 months, the specialized unit for sheltering minors in the City Court of Araguaína. Getting to this conclusion requires nothing but observing that the high penalty established, without fixed term, represents excessive onus for both the Public Power and the collectivity, as it demands financial redistribution of State accounts, to the detriment of other high priority public policies of the State. Therefore, the decision is maintained in full as to the possibility of penalty for keeping transgressor adolescents in ordinary jails, to the detriment of sheltering them in other specialized units existing in the State.

I hereby remark, however, that establishing penalties for disregarding judicial decisions is not prohibited. What should be kept in mind is the possibility of huge damage on the collectivity resulting from penalty incurred in preliminary order based on summary cognitive proceeding.

Therefore, the constitutional determination for number one priority regarding the protection of the child and the adolescent (art. 227, CF/88) offers evidence of both the objective protection dimension of those fundamental rights and the forbiddance of insufficient protection by the State of Tocantins, for making impossible the phatic and concrete conditions required for the implantation of a confinement and semi-confinement program in the City Court of Araguaína/TO.

No transgression of the principle of separation of Powers occurs when the Judicial Power orders the State Executive Power to fulfill the specific constitutional duty to provide proper protection to transgressor adolescents in a specialized unit, as the Constitution itself orders such protection, due to the peculiar condition of the individual undergoing his/her development process (art. 227, §1, V, CF/88).

The forbiddance of insufficient protection requires from the State the forbiddance of inertness and omission as to the protection of transgressor adolescents, with precedence, with preference when public policies are formulated and accomplished, as they involve values the Constitution itself defines as number one priorities.

Such priority policy, defined under the Constitution, must be taken into account in budgetary previsions, as a means to bring both administrative and legislative procedures (Annäherungstheorie) closer to the constitutional determinations which turn into reality the fundamental right to protection assisting both children and adolescents.

Thus, I see no evidence of serious injury to the public order and economy, except for the penalty for not building, within 12 months, the specialized unit to shelter transgressor adolescents in the City Court of Araguaína/TO.

Hence, I hereby partially concede the motion for stay, exclusively as to the value of daily penalty for disregarding the judicial order to build a specialized unit, within 12 months, in the City Court of Araguaína/TO.

Thus, considering the provisions in the Constitution and in the Child and Youth Statute, I hereby maintain the effects of the decision objected as to (1) the installation, within 12 months, of a confinement and semi-confinement program for transgressor adolescents in the City Court of Araguaína/TO and (2) the forbiddance, subject to daily penalty, of sheltering transgressor adolescents in units other than a specialized one (under ECA terms).

To be published.

To be urgently notified.

Brasília, July 08, 2008.

Minister GILMAR MENDES
President