Special jurisdiction: judicial oscillations

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Abstract: The article addresses the oscillation in the rulings of the Federal Supreme Court regarding the special jurisdiction enjoyed by certain authorities in light of the evolution of said institute throughout the Brazilian constitutional history, as a natural result of enforcing two commands: to guarantee the protection of certain fundamental functions of the Republic and at the same time prevent the abuse of such prerogatives by their occupants.

Keywords: special jurisdiction; prerogative powers; functional crimes; STF: AP 937-QO, HC 232.627, Inq 4.787.

1. Introduction

In a forceful article entitled “The STF and the Chaos of the Forum by Prerogative of Function”, criminal lawyer Alberto Zacharias Toron criticized the oscillation of the Supreme Court's understanding of the special criminal forum of parliamentarians over the almost sixty years that separate 1962 and 2018, two important milestones in the matter (Toron, 2020, p. 111-112).

Such a move would also be an additional step taken by the Court in September 2024, in cases under my report: HC 232,627 and Inq 4,787 - Ag R-QO. In these cases, the Court decided in a way that sought a balanced position. While recognizing the practical difficulties encountered by previous compositions of the Court, it shared Toron's criticism and sought to calibrate social expectations, establishing a clear and henceforth stable rule.

In this article, in support of the laudable initiative of launching the Plenário Magazine, we seek to reconstruct the interpretative problem created by the forum as a prerogative of function, considering parliamentary activity.

This reconstruction will combine temporal and analytical aspects: in a first step, separating the different cores of meaning of the text contained in art. 53, § 1, of the 1988 Constitution, and then associating them with their practical repercussions in a periodic reading of the Constitutional Court's case law.

Regarding the special forum institute, it will be demonstrated how the latest interpretation given by the STF meets the expectations of the 1988 Constitution. and resolves the problems of previous interpretations, contextualizing what was, in truth, an institutional evolution of the guarantee of jurisdiction by prerogative of function.

2. Institutional evolution of the forum by prerogative of function

In his hearing at the Federal Senate in 2017, Minister Alexandre de Moraes pointed out, when responding to a question from Senator Lasier Martins, that the 1988 Constitution is the one with the

greatest number of jurisdictional prerogatives, and that, therefore, it was comparable to European constitutions in terms of level of protection (Anjos, 2017).

The contrast between the ways in which the institute is regulated by Brazilian constitutions denotes an unequivocal evolution of the guarantee.

In a 2015 study, updated in 2021, entitled Forum by prerogative of function in comparative law, the Consultancy of the Chamber of Deputies, in a detailed analysis, illuminated this path (Tavares Filho, 2021), which is reproduced here only in general terms.

The Constitution of 1824, while reserving the emperor's irresponsibility, divided the special jurisdiction into two groups. The first, under the jurisdiction of the Senate, covered individual crimes committed by members of the imperial family, ministers and state counselors, as well as senators and deputies during the legislative period (art. 47). The second, under the jurisdiction of the Supreme Court of Justice, covered crimes and errors of office committed by its ministers, those of relations, employees in the diplomatic corps and presidents of provinces (art. 164, II).

The 1891 Charter, the first republican Constitution, reduced the special jurisdiction to the figure of the president, who answered to the Supreme Federal Court, after the approval of the Chamber of Deputies, for common crimes, and to the Senate, for crimes of responsibility (art. 53).

In the 1934 Constitution, the jurisdiction of the Supreme Court was expanded to prosecute and judge originally in common crimes the President of the Republic and the ministers of the Court; in common crimes and crimes of responsibility, the ministers of State, the Attorney General of the Republic, the judges of the federal courts and of the courts of appeal of the states, the Federal District and the territories, the ministers of the Court of Auditors and the ambassadors and diplomatic ministers; and, only in crimes of responsibility, the federal judges (art. 76, I).

The 1937 Constitution changed part of the previous system, submitting the ministers of the STF, in crimes of responsibility, to the Federal Council (art. 100). Furthermore, it created a special forum also in the federated units for state judges, then tried, in common crimes and crimes of responsibility, by the courts of appeal in the states, Federal District and territories (art. 103, e).

Subsequently, the 1946 text extended special jurisdiction to judges of the Superior Courts and Regional Labor Courts (art. 101, I, c), which, in the 1967 Constitution, included labor judges and ministers of the Courts of Auditors of the Union, states and the Federal District (art. 114, I, b).

As pointed out by Minister Alexandre de Moraes, the 1988 Citizen Charter increased the list of special jurisdictions to include authorities such as the Vice President of the Republic, commanders of the Armed Forces, governors, mayors, members of the Public Prosecutor's Office (arts. 52, I; 96, III; 102; 105, b and c) and, for the first time in republican history, members of the National Congress (art. 53, § 1º).

Given the principle of symmetry, state constitutions are authorized to grant special jurisdiction to state deputies and vice-governors. However, according to the Supreme Court's case law, they cannot extend the jurisdiction to the vice-mayor and city councilors, given what would have been an eloquent silence on the part of the constituent when determining, in art. 29, X, that the mayor (without reference to other regional authorities) be tried by the Court of Justice.[1]

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[1] ADI 558 and ADI 6,842, reported by Justice Cármen Lúcia, tried on April 19, 2021, and June 21, 2021, respectively. See also ADI 2,553, as amended for the judgment by Justice Alexandre de Moraes, E-DJ August 17, 2020. It is true that this is a complex debate, to be taken from the open wording of art. 125, § 1, of the same Constitution, by which "the

2.1 What do so many changes mean?

It seems clear that Brazilian constitutional history is the history of the progressive increase in special jurisdictions granted to certain authorities. Has Brazilian law been doing well? The answer seems to me to be unequivocally affirmative. To clarify it, some observations about the institution are necessary.

As is known, when we talk about forums, we are referring to the criminal judicial forum, because it is basically to this that the constitutions refer to (cf. arts. 53, § 1º, and 102, I, b), with reservations for the Legislative Houses when they operate in an atypical, adjudicating function.

In Brazilian law, judicial jurisdiction is generally determined by the subject matter. The special forum, or privileged jurisdiction, determined ratione personae, is an exception. The rule is justified by the already intuitive notion that everyone should be prosecuted by the same jurisdictional bodies, in compliance with the constitutional mandates of the republican principles (art. 1), the natural judge (art. 5, LIII) and equality (art. 5, caput). The exception, in turn, is based on the need to balance the administration of justice with the functional protection of high-ranking public officials.

In simpler terms: some authorities – due to the position held, not the person in charge – given the position they occupy in the legal system, notably because their decisions can have a broader impact on society and the State, demand different jurisdictional treatment to ensure the impartiality and independence necessary for the proper performance of their role.

The jurisdiction by prerogative of office guarantees impartiality and independence in a bilateral manner. The premise, quite reasonable, is that a Superior Court is better equipped, on the one hand, against forces that could make the defendant vulnerable in court (such as political enemies) and equally against forces that, on the other hand, could empower him.

This is an old understanding of the Federal Supreme Court, set out by Minister Victor Nunes Leal, in the judgment of Rcl 473, back in 1962:

> Special jurisdiction, as a prerogative of certain public functions, is, in fact, instituted not in the personal interest of the person holding the position, but in the public interest of its proper exercise, that is, of its exercise with a high degree of independence, which results from the certainty that its acts will be judged with full guarantees and complete impartiality. The legislator assumes that the highest-ranking courts have greater impartiality to judge the holders of certain public functions, due to their capacity to resist, either the possible influence of the accused himself, or the influences that acted against him. The presumed independence of the higher-ranking court is, therefore, a bilateral guarantee, a guarantee against and in favor of the accused. (Brazil, 1962, emphasis added)

It can be concluded that the current translation of the institute as a forum privilege, in addition to being untechnical, misses something fundamental: the special forum may be unfavorable to the defendant, at least from the perspective of his personal, selfish interests, whenever they are malicious.

In addition to being a rule of impartiality, the special forum is also a rule of rationalization and efficiency of the public service. Firstly, because without it, in the face of an accusation of a criminal offense committed by the President of the Republic, admitted by the Chamber of Deputies, a single

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jurisdiction of the courts shall be defined in the State Constitution". On the subject, see the Court's prior guidance – ADI 2,587, ADI 541 and HC 70,474.

judge, at the beginning of his career, could suspend the head of the Executive from his duties for up to 180 days (in the example of art. 86 of the Federal Constitution). Secondly, because, otherwise, the most important functions in the Republic would certainly not be occupied by the best personnel, given the risk to which they would be subjected. In this sense, the lesson of Jorge Octávio Lavocat Galvão (2018, p. 1,053) is valuable:

> The exposure inherent to certain positions makes their holders more susceptible to legal action brought about by passions of all kinds. Just to cite as an example, at the time of the privatizations of the FHC government, several legal measures were proposed against members of the government's top brass, notably against the Attorney General of the Union, who, despite being responsible for providing legal framework for the public policy in question, did not have the prerogative of office. Within a short period of time, numerous lawsuits were filed in several Brazilian districts against the AGU, which then led the President of the Republic to issue, in 2001, a provisional measure elevating the aforementioned position to the status of Minister of State.
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> It is clear, therefore, that the main advantage gained by extending the privileged jurisdiction to the Attorney General of the Union was the unification of the jurisdiction for the trial of various lawsuits filed, which became the jurisdiction of the STF. This measure was essential to provide peace of mind to the holder of the position, who would otherwise have to spend more time hiring lawyers and preparing his defense than actually dedicating himself to the important tasks of his public office. Without such a guarantee, it would be difficult for qualified individuals to accept the invitation to assume the position of Attorney General of the Union.

The evolution of the institute in Brazil, as demonstrated by the history summarized here, is a natural phenomenon: the growing attacks on the Judiciary to intimidate authorities with a socially impactful role created the need to protect them and, thus, to guarantee the best institutional conditions for them to exercise their duties independently.

The oscillation in jurisprudence, in these terms, observes a similar learning curve in the difficult task of guaranteeing the protection of certain fundamental functions of the Republic and, at the same time, avoiding the abuse of such prerogatives by its occupants.

Such premises will be crucial for the considerations that follow.

3. The original sin: the dubiousness of art. 53, § 1st, of the Brazilian Constitution

The topic of special jurisdiction, although broad, is generally associated with parliamentary work. There is nothing surprising about this. Whether due to the number of representatives, or due to greater public exposure – notably given the arduous and noble role of amplifying the opinions of those they represent, especially critical and demanding ones – or, finally, due to the very rivalry of the selection process, through popular vote, the parliamentary function is especially subject to actions that aim to criminalize it.

The 1988 Charter, as anticipated, was the first among the republican constitutions to guarantee members of the National Congress special jurisdiction. It did so, however, in an extremely succinct manner, under the terms of art. 53, § 1, according to which "deputies and senators, from the issuance of the diploma, will be subject to trial before the Supreme Federal Court" (Brazil, 1988).

In light of the text, two interpretations emerge, among the most natural. This work will adopt the division proposed by the Italian master Riccardo Guastini (2014, p. 370 et seqs.), the best known and best systematized of which there is any record.

According to the first interpretation, which is literal (or grammatical), the constituent would have submitted any and all criminal proceedings against a federal parliamentarian to the Supreme Federal Court. This would be justified by the emphasis on the moment of diplomacy and the lack of discrimination regarding the crimes considered.

In the literal interpretation, in short, the forum by prerogative of office is linked to the current exercise of the parliamentary function. This conception is broad in terms of the type of crime (it applies to any crime), but restrictive in terms of the period, whether of the commission of the crime or of its trial.

According to the second interpretation, which is intentional (or systematic), the constituent intended to only include crimes committed in the exercise of his/her functions, assuming a link between the offense and the duties of the position. Article 130 of the Constitution of the Portuguese Republic, for example, adopted this parameter: "For crimes committed in the exercise of his/her functions, the President of the Republic shall be held accountable before the Supreme Court of Justice" (Portugal, 1976, Article 130).

In the intentionalist interpretation, in short, the forum by prerogative of function is linked to the contemporary exercise of the parliamentary function. This perspective is restrictive regarding the type of crime, but broad regarding the trial period.

As already explained, the case law of the Supreme Federal Court is inconsistent on the subject and has adopted both rules, including their combinations.

Next, each one will be subjected to due analytical scrutiny, limiting the case law history – contrary to what was done in the votes of HC 232,627 and Inq 4,787-AgR-QO – to cases of special jurisdiction for parliamentarians.

3.1 The rule of topicality

The longest-standing interpretation in the Supreme Federal Court, at least since the advent of the 1988 Constitution, endorsed the rule of actuality. From 1999 to 2018, this rule prevailed in its broadest sense: upon taking office, the special court became competent for all investigations and criminal proceedings instituted against the parliamentarian, including crimes committed before taking office and those unrelated to the functions performed. Removal from office, however, meant the immediate referral of the case to the first instance.

From this simple description emerges the Achilles heel of the rule in question: it allows itself to be manipulated by the defendant, who, as in forum shopping, chooses whether he wants to be tried in the common or special forum.

As noted, the special forum is not strictly a privilege; it is, rather, a bilateral guarantee that ensures the impartiality of the trial: on the one hand, protection against the defendant's vulnerability to political enmities and, on the other, inhibition in the use of influence due to his friendships.

In fact, the resignation of the mandate, under the current rule, leads to the decline of special jurisdiction, and, given the consequent referral of the case to the first instance, the judgment of the case is ultimately delayed. Ultimately, this may result in the prescription of the punitive claim.

Faced with this scenario, it did not take long for the Court to react.

The first initiative was in AP 396, reported by Justice Cármen Lúcia (DJe 4/28/2011). The accused, a federal deputy, had resigned from his position on the eve of the trial session and requested that the

case be sent to the local court. Upon finding that the act was an attempt to flee the jurisdiction – in other words, a true abuse of rights, through fraud against the Constitution –, the Plenary considered the resignation ineffective for the purposes of transferring jurisdiction and continued the trial, sentencing former deputy Natan Donadon to thirteen years, four months and ten days of imprisonment.

In AP 536-QO, reported by Justice Roberto Barroso (DJe 12/8/2014), the Plenary, by absolute majority, recognized the need for an objective criterion to serve as a parameter in the examination of possible procedural abuse. At the time, however, there was no majority regarding the time frame suggested by the rapporteur, for whom, once the complaint was received, the fact that the parliamentarian resigned would not have the effect of transferring the jurisdiction of the STF to any other judicial body. There was also no absolute majority regarding other time frames that were the subject of debate. Given the impasse, the Court decided to leave the definition of the criterion for another opportunity.

Finally, in AP 606-QO, also reported by Minister Roberto Barroso (DJe 18/9/2014), the First Panel advanced in the debate on the topic, in order to establish a general criterion for the perpetuation of the original jurisdiction of the courts.

According to the rapporteur's vote, there were three proposals under discussion: the moment of inclusion of the process on the agenda (position of Minister Dias Toffoli); the end of the procedural instruction (position of Minister Rosa Weber); and the receipt of the complaint (position of the rapporteur).

In the end, the intermediate position prevailed, supported by Justice Rosa Weber, that "the resignation of a parliamentarian, after the end of the investigation, does not entail the loss of jurisdiction of the Supreme Federal Court" (Brazil, 2014b). The Panel thus established an instrument to inhibit the manipulation of the current rule.

3.2 The rule of contemporaneity

Under the aegis of the 1988 Constitution, the first emblematic case emerged in the trial of Inq 571-QO, reported by the late Minister Sepúlveda Pertence (DJ 5/3/1993), in which the then federal deputy Jabes Pinto Rabelo was listed as the defendant.

At that time, the parameter regarding the special forum was Summary 394, published in the plenary session of April 3, 1964.

The entry stated:

> If a crime is committed during the exercise of a function, special jurisdiction by prerogative of function prevails, even if the investigation or criminal action is initiated after the cessation of that exercise. (Brazil, 1964)

As can be seen, the summary endorsed the so-called rule of contemporaneity.

However, in the aforementioned action, when identifying that "the fact of the process is prior to the diploma", the Court recognized that "with the termination of the mandate, the forum by prerogative of function that it enjoyed ceased and, consequently, the jurisdiction of the Court" (Brazil, 1993).

A rule was thus adopted that combined aspects of topicality and contemporaneity: in crimes committed during the exercise of the function, the special jurisdiction was maintained even after the cessation of that exercise (rule of contemporaneity, according to Summary 394); in crimes committed

before the exercise of the function, the special jurisdiction lost its purpose and the case would be referred to the ordinary jurisdiction, according to the rule ratione materiae (rule of currentness).

This guideline would be reviewed in 1999, with the judgment of Inq 687-QO, reported by Minister Sydney Sanches (DJ 9/11/2001), still on the conduct of Congressman Jabes Rabelo, who was impeached in 1992.

At the time, the Court reviewed its case law and decided that the special jurisdiction would not subsist after the loss of office, including for crimes committed during the exercise of office. The new understanding resulted in the cancellation of Summary 394.

At the time, the position of the rapporteur minister Sidney Sanches prevailed, for whom the Constitution did not explicitly guarantee the prerogative of jurisdiction for authorities who, for whatever reason, left office. Therefore, the loss of office would end the jurisdiction of the Court, since "the prerogatives of jurisdiction, due to the privilege that they, in a certain way, confer, should not be interpreted broadly, in a Constitution that intends to treat ordinary citizens equally, as are also the former holders of such offices or mandates" (Brazil, 2001).

In this precedent, the Court enshrined the current rule in its purest sense, without reservations. The jurisdiction by prerogative of office arose with the investiture in the position; it ceased, however, with the end of the functions, regardless of the nature of the crime.

As anticipated, the contemporaneity rule was only reinserted in 2018. This occurred with the precedent set in AP 937-QO (DJe 12/11/2018), reported by Justice Roberto Barroso. At the time, alluding to the development of case law in recent years, concerned about forum shopping by parliamentarians and the risk of prescription of cases, as well as the need to protect the republican principle (art. 1) and equality (art. 5, caput), the rapporteur understood that the teleology of the forum by prerogative of function, in light of the contemporaneity rule – although without using the term –, reduced the crimes attracting exceptional jurisdiction only to those whose practice would be, in some way, related to the exercise of the function.

This, as is well known, became the winning position, according to which "to ensure that the prerogative of forum serves its constitutional role of guaranteeing the free exercise of functions – and not the illegitimate purpose of ensuring impunity – it is essential that there is a causal relationship between the crime charged and the exercise of the office" (Brazil, 2018). At the time, I considered that, strictly speaking, the teleology of the institute – for the reasons indicated in item 2.1 – does not allow such a reduction of object.

The reasoning is simple: crimes committed by an authority with special jurisdiction without any relation to the office must, in any case, be judged, and in this case the guarantee of impartiality – a bilateral guarantee – is equally imposed.

In addition to this aspect of the winning position, another drew attention: the Plenary, at the time, maintained the understanding that the cessation of the exercise of functions would require the transfer of the case to the first instance court, except for actions in which the procedural investigation had already been concluded.

In this case, jurisdiction would be perpetuated until the outcome of the case. The judgment thesis was written as follows:

> (i) The jurisdiction by prerogative of office applies only to crimes committed during the exercise of the office and related to the functions performed; and (ii) after the end of the procedural investigation, with the publication of the summons to present final arguments, the jurisdiction to

> process and judge criminal actions will no longer be affected due to the public agent coming to occupy office or leaving the office he/she occupied, whatever the reason. (Brazil, 2018)

This amalgamation indicates that the overcoming of jurisprudence occurred only halfway.

The Plenary began to define the prerogative of forum by a material criterion, based on the nature of the crime (rule of contemporaneity), but, paradoxically, maintained the main consequence of the current rule – decline in competence with the end of the functional exercise.

With this arrangement, the precedent established in AP 937-QO brings together what is most restrictive in the two rules examined – an interpretation that goes beyond the limits of the constitutional text.

The result of this is the subversion of the purpose of the forum by prerogative of office. It is enough for the parliamentarian not to be reelected or for the public agent to retire for the acts carried out in the exercise of the office to be judged not by the body designated by the constituent legislator, but by another jurisdictional instance.

Take as an example a senator who, at the end of his term, is elected to the position of federal deputy, or vice versa. Or even a vice president who assumes the position of president of the Republic, after the resignation of the incumbent. The application of the thesis established in AP 937-QO would imply the referral of the investigations and actions to the first instance, and the accused would be exposed to the risks that the law sought to contain by establishing the special forum.

The flaw is so glaring that the Court was forced to relativize the general rule to establish that the prerogative of forum subsists when the federal parliamentarian is elected, without interruption of the mandate, to the other Legislative House, according to Inq 4,342-QO, reported by Minister Edson Fachin (DJe 6/13/2022).

To make matters worse, the precedent keeps open the forum shopping loophole: the parliamentarian can, for example, resign before the final arguments stage, forcing the case to be sent to a judge who may seem more sympathetic to the interests of the defense. The flaw did not go unnoticed by Justice Roberto Barroso, who has already defended the anticipation of this milestone to the moment of receipt of the complaint, in the aforementioned precedent, AP 606-QO, reported by His Excellency.

4. Conclusion

It was in view of this set of things – a case law that, it should be noted, I have never endorsed – that I submitted the matter to the scrutiny of my peers, when reporting on HC 232,627 and Inq 4,787. AgR-QO, and I voted to establish the following thesis:

> The prerogative of jurisdiction for the trial of crimes committed in office and by reason of functions subsists even after removal from office, even if the investigation or criminal action is initiated after the exercise of the office has ceased. (Brazil, 2024a)

I proposed, in the wake of long-standing understanding – see the points of order raised in Inq 687, reported by Minister Sydney Sanches, and in AP 937, reported by Minister Roberto Barroso –, the immediate application of the new interpretation to ongoing proceedings, with the exception of all the acts carried out by the STF and other courts based on previous jurisprudence.

With this, I hope that a balanced position will finally be reached on the subject, capable of satisfying the constitutional precept of legal certainty. The evolution of the jurisdiction by prerogative of function, throughout Brazilian history, reveals a continuous effort to reconcile the protection of essential public functions with the need to avoid abuses.

This balance is essential to ensure that authorities can carry out their activities without fear of political persecution, while ensuring that justice prevails, regardless of the position held. Thus, by consolidating a clearer and more stable interpretation of the special forum, confidence in institutions and in democracy itself is reinforced.

Furthermore, strengthening legal certainty should not be seen simply as an objective in itself, but as a means to foster an environment where ethics and public responsibility are prioritized.

The practice of jurisdiction by prerogative function should serve as an instrument that not only protects state functions but also promotes transparency and accountability. With this perspective, it will be possible to envision a future in which justice and institutional integrity go hand in hand, contributing to a more just society.

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