

INCIDENT OF COMPETENCE DISPLACEMENT: LINEAMENTS OF A GUARANTEE AGAINST SERIOUS VIOLATIONS OF HUMAN RIGHTS

Wilson Antônio Steinmetz¹

The Constitution of the Federative Republic of Brazil is emphatic in affirming the primacy of human rights. It prescribes the dignity of the human being as the foundation of the Republic and obliges the Republic, in international relations, to be guided by the prevalence of the human rights. In the original text, there is not reference to the concept of serious violation of the human rights. However, the Constitution expressly repudiates racism and terrorism, which are the two forms of serious human rights violations, and authorizes the legislature to qualify for certain heinous crimes.

It is with the constitutional amendment 45/2004 which introduces the concept of serious violation of human rights and a new specific instrument for addressing them. The instrument is called the Incident of Competence Displacement (IDC).

According to the paragraph 5 in the art. 109, added by the amendment/45, “In cases of serious violation of the human rights, the General-Prosecutor of the Republic, with the purpose of ensuring the compliance of the obligations under international human rights treaties of which Brazil is a member, will be able to raise any Incident of Competence Displacement to the Federal Court, before the Superior Court of Justice, at any stage of the investigation or process.”

Since then, the Superior Court of Justice (STJ) judged four competence shift incidents raised by the General-Prosecutor of the Republic (IDC No. 1, n. 2, n. 3 and n. 5). In those judgments, the Superior Court defined the most important features of the Incident of Competence Displacement.

Under the principle of natural judge and the federative principle, the Incident of Competence Displacement must have exceptional character. The massive use of Incident of Competence Displacement would relativize the fundamental guarantee of the natural judge (CF, art. 5, XXXVII) and constitute undue interference of the Union (by Federal Justice) on the autonomy of the states of the Federation, responsible for the common justice. According to the Superior Court of Justice, at this point, we should also note the principles of proportionality and reasonableness. Here, the Superior Court of Justice’s argumentation has not been detailed. It is unclear whether the court identifies a collision of principles and proposes a weighting according to the relevant circumstances of the case. Without explaining and justifying, the Superior Court of Justice has only stated that reasonableness and proportionality must be observed. This argument has been repeated in all judgments.

Incident of Competence Displacement can be raised at any time during the investigation, prosecution and trial. This is a correct interpretation because the inefficiency of state action may occur at any phase of the criminal prosecution of the offenses with serious human rights violations. In other words, failure or inefficiency is not only possible at the stage of police investigations, but also of denunciation by the prosecution and trial by the Judiciary.

There are three requirements which support the Incident of Competence Displacement: the existence of serious violation of human rights; the risk of international liability arising from

¹ wilson.steinmetz@gmail.com

non-compliance of legal obligations under international treaties; and the inability of authorities and local authorities to provide effective responses. The first two requirements are expressly provided in the Constitution.

Since the judgment of the first Incident of Competence Displacement (n. 1), the Superior Court of Justice adopted the interpretation that “Given the scope and magnitude of the expression ‘human rights’, it is likely that the derived constituent power has chosen not to define the list of crimes that would go to the Jurisdiction of the Federal Court, without restricting the cases of Incident of Competence Displacement.”

Moreover, such definitions are not typical of a constitutional text.” Therefore, the Superior Court of Justice gave a broad sense the term ‘human rights’, understanding that the Incident of Competence Displacement is not limited to serious violations against some human rights (e.g., right to life or right to physical integrity), but it is limited to any human rights for which Brazil has assumed international obligations under treaties.

In none of the Incident of Competence Displacement judged, the Superior Court of Justice has produced or adopted a definition of “serious violation”. However, there is something in common in all Incident of Competence Displacement: homicide crime. This indicates a trend: the Incident of Competence Displacement will be raised especially in cases of crimes against life (murder) and physical (e.g., torture). For the risk of international liability arising from non-compliance with legal obligations under international treaties, it is certain the American Convention on Human Rights (Pact of San José, Costa Rica) is particularly relevant. This is mentioned in the Supreme Court’s judgments.

The third and final requirement - which is not expressly provided in the Constitution - is more complex and thus more difficult to check, to analyze and to evaluate in each case submitted to the court. In the Incident of Competence Displacement no. 1, the court refers to the requirement this way: “inertia, neglect, lack of political will or real conditions of the State-Member, by its institutions, to undertake the appropriate criminal prosecution” (p. 2). In the Incident of Competence Displacement no. 2: “[...] *the inability of authorities and local authorities to provide effective responses*, recognize the limitations and precariousness of resources [...]” (SUPERIOR COURT OF JUSTICE, 2010, p. 2). We can observe that in both judgments the Superior Court of Justice refers to the subjective aspects (will of the state and local authorities) and to the objective aspects (availability of means) of the ineffectiveness in fighting serious violation.

In Incident of Competence Displacement n. 3, the Superior Court of Justice pronounces more details about this third requirement: “The incident requires a clear demonstration of the utter inability of the local authorities to provide answers to the serious violation of human rights.” (SUPERIOR COURT OF JUSTICE, 2014, p. 2). That is, the inability has to be clear and complete. The court also makes a distinction between incapacity or ineffectiveness and inefficiency:

You can not confuse failure or ineffectiveness of the authorities and local authorities with inefficiency. While the inability or ineffectiveness derived from complete ignorance in the exercise of state activities, aimed at the responsibility of the authors of the indicated offenses, inefficiency is the absence of obtaining useful results and capable of generating legal consequences, regardless of the set of measures adopted. (SUPERIOR COURT OF JUSTICE, 2014, p. 2).

It is not inefficiency, but the ineffectiveness authorizing the granting of powers of displacement: “[...] is the ineffectiveness of the state, revealed by the total lack of ability to move and thus to fulfill structuring role of their own organizational existence, the triggering factor of federalization.” (SUPERIOR COURT OF JUSTICE, 2014, p. 2).

No doubt, this third requirement is necessary and should be evaluated carefully, otherwise it can run the risk to trivialize the Incident of Competence Displacement and relativize the principle of natural judge and the federative principle. However, it seems to be too strict condition the granting to the total ineffectiveness. Police authorities of the Public Ministry and the Judiciary can always claim that some action has been taken or is being taking.

It is also debatable the Superior Court of Justice’s argument that judicial slowness is not a reason to accept the Incident of Competence Displacement (n. 3, p. 3 and 36-37). The inefficiency can not be restricted to the police and public prosecutors. It is clear that one of the causes of the ineffectiveness of fundamental rights in Brazil are the delays, it is the judicial assistance in unreasonable time.

As settled by the Superior Court of Justice, these three conditions are cumulative. The absence of one of the requirements is sufficient to justify the rejection of the Incident of Competence Displacement.

Based on the four cases judged by the Superior Court of Justice, it can be concluded: (a) it is correct the interpretation of not restricting the concept of “serious violation of human rights” to only a few human rights, because there is a wide range of human rights in relation to which Brazil has assumed international obligations through treaties; (b) despite this, the tendency is that the Incident of Competence Displacement has as object a serious violation of the right to life and physical integrity, because, in these cases, given the failure and inefficiency of state authorities, there is no way to end the serious violation unless through the use of federalization; (c) it is correct the interpretation that the criteria should be cumulative, because the serious violation of human rights by itself is not sufficient for the removal of the principle of natural justice and the federal principle; the demonstration of the ineffectiveness of the state authorities (police, prosecution and judiciary) is required; (d) however, the graduation of inefficiency is still necessary; perhaps it is too much to condition the granting of powers to the total ineffectiveness displacement, because it will always be possible to the authorities of the State-Members to show that something has been or is being done.

REFERENCES

SUPERIOR TRIBUNAL DE JUSTIÇA. *Incidente de Deslocamento de Competência nº 1 PA (2005/0029378-4)*. Relator Ministro Arnaldo Esteves Lima. Julgamento em 08 jun. 2005 Publicação em 10 out. 2005. Available from: <https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=556348&num_registro=200500293784&data=20051010&formato=PDF>. Access on: Aug. 15 2016.

SUPERIOR TRIBUNAL DE JUSTIÇA. *Incidente de Deslocamento de Competência n. 2 - DF (2009/0121262-6)*. Relatora Ministra Laurita Vaz. Julgamento em 27 out. 2010. Publicação em 22 nov. 2010. Available from: <https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=985923&num_registro=200901212626&data=20101122&formato=PDF>. Access on: 15 ago. 2016.

SUPERIOR TRIBUNAL DE JUSTIÇA. *Incidente de Deslocamento de Competência n. 3 - GO (2013/0138069-0)*. Relator Ministro Jorge Mussi. Julgamento em 10 dez. 2014. Publicação em 02 fev. 2015. Available from: <https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1374933&num_registro=201301380690&data=20150202&formato=PDF>. Access on: 15 ago. 2016.

SUPERIOR TRIBUNAL DE JUSTIÇA. *Incidente de Deslocamento de Competência n. 5 - PE (2014/0101401-7)*. Relator Ministro Rogerio Schietti Cruz. Julgamento em 13 ago. 2014. Publicação em 01 set. 2014. Available from: <https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1338428&num_registro=201401014017&data=20140901&formato=PDF>. Access on: 15 ago. 2016.