**Case Information**

1. **Case Title:** Federal Council of the Brazilian Bar Association (OAB) vs. President Jair Messias Bolsonaro
2. **Meta Data**

1. **Case Number**: ADI 6387
2. **Corresponding Law Reference**: Brazil, Federal Supreme Court (STF), Direct Unconstitutionality Action (ADIN) nº 6387. Rapporteur: Justice Rosa Weber
3. **Date of Decision**: 07-05-2020
4. **Featured Case**: n/a
5. **Region**: Latin-America and Caribbean
6. **Country**: Brazil
7. **Mode of Expression**: Electronic / Internet-based Communication; Public Documents
8. **Judicial Body**: Supreme Federal Court (Constitutional Court);
9. **Type of Law**: Constitutional Law;
10. **Main Theme**: Privacy, Data Protection and Retention;
11. **Outcome**: Decision - Injunction or Order Granted and Confirmed; Data Protection Granted
12. **Status**: Closed
13. **Tags**: Data Protection and Retention, Right to Privacy
14. **Excerpt**: The Brazilian Supreme Court issued an injunction against the data sharing of information on all subscribers of telephone services, mandated by legislation purporting to aid the national statistics agency (IBGE) in telephone interviews after in-person surveys were interrupted owing to pandemic social distancing measures.

**Case Tracking -** http://portal.stf.jus.br/processos/detalhe.asp?incidente=5895165

**Case Analysis**

1. **Summary and Outcome**
	1. **Summary**: Citing the impacts of the pandemic, President Jair Bolsonaro issued a Provisional Measure mandating telecom companies share personal data on their customers with the Brazilian Institute of Geography and Statistics, for census purposes. The Federal Council of the Brazilian Bar Association (CFOAB) challenged the provisional measure, on the basis of the right to human dignity, the inviolability of intimacy, private life and reputation, confidentiality of communications and data, and informational self-determination.
	2. **Outcome**: Justice Rapporteur Rosa Weber, of the Supreme Court (STF), stayed the provisional measure. She held there was insufficient information on the purposes and limitations of data processing, and on technical and security measures applicable, and as such found a plausible infringement to the right to privacy. Her decision was later confirmed when the case was heard en banc. The case was mooted when the period for review of the provisional measure by Congress elapsed without a vote.

1. **Facts**
	1. **Facts giving rise to cause of action**

In 2020, as social distancing restrictions owing to the Covid-19 pandemic were imposed in Brazil, the in-person surveys conducted by the Brazilian statistics agency, IBGE (Instituto Brasileiro de Geografia e Estatística), for the national census were interrupted. The agency then decided to switch to telephone interviews, to report on statistics as the country faced the pandemic. To obtain subscriber data from telephone carriers, it passed on to the economy minister a request for a provisional measure mandating carriers to do so.

This was relayed to the President, who enacted Provisional Measure no. 954/2020, as requested. Under the Brazilian constitution, provisional measures are a type of legislation adopted by the president which go into force immediately and are later reviewed by Congress.

The provisional measure mandated carriers to share the data on all their subscribers within 7 days after requested by the IBGE. Data were to include names, phone numbers and addresses for all subscribers (individuals and corporations alike). It provided that the data should be used exclusively by the IBGE for official statistics, with the aim of conducting non-face-to-face interviews in the context of household surveys during the pandemic. It additionally established the data were to be kept confidential and should be deleted from the agency databases after pandemic restrictions were lifted. Finally, the IBGE was instructed with publishing a data protection impact assessment (DPIA), as provided by the General Data Protection Law (Law no. 13.709/2018).

* 1. **Cause of action or law at issue**

The federal council of the Brazilian national bar association, Ordem dos Advogados do Brasil (OAB), challenged the provisional measure under two main grounds. It contended the criteria set forth in the Constitution for the enactment of provisional measures (which are reserved for "relevant and urgent cases") were not met. It also argued that the provisional measure violated constitutional provisions on the protection of privacy.

The bar association also claimed the provisional measure violated constitutional provisions on the confidentiality of communications, respect for private life, which it suggested the Court should read under the heading of a new "informational self-determination", which it urged to Court to adopt, drawing liberally from the [German federal census case](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html) (*BVerfGE* 65, 1). It argued subscriber data, even when limited to name, telephone number and address, exposed individuals to serious harm, as data were liable to misuse of all kinds, including in disinformation campaigns and as part of voter manipulation strategies. It emphasised the provisional measure failed to set forth secure measures for handling the data. It also objected to the stated purposes as generic.

Finally, the arguments were also presented as part of a proportionality test, which the bar association claimed the provisional measure failed to meet.

* 1. **Procedural history**

Prior to the case being heard before the full court, an emergency stay was granted by the rapporteur, Justice Rosa Weber.

1. **Decision Overview**
	1. **Deciding judge & type of opinion**

Justice Rosa Weber delivered the judgment for the court.

* 1. **Issue statement**

The main issue before the court was whether the provisional measure was constitutional, either because it failed to meet the criteria for the enactment of provisional measures under art. 62 of the Constitution or because it violated constitutional rights.

Provisional Measure resulting from the pandemic was violating the right of privacy and personality rights related, based on the principle of legit public interest, proportionality and necessity impressed on the Constitution and General Data Protection Law. Although the Brazilian General Data Protection Law was already approved at the time of the decision, it was not yet in force.

* 1. **Parties’ arguments**
		1. Claimant's arguments

The bar association claimed the provisional measure violated constitutional provisions on the confidentiality of communications, respect for private life, which it suggested the Court should read under the heading of a new "informational self-determination", which it urged to Court to adopt, drawing liberally from the [German federal census case](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html) (BVerfGE 65, 1). It argued subscriber data, even when limited to name, telephone number and address, exposed individuals to serious harm, as data were liable to misuse of all kinds, including in disinformation campaigns and as part of voter manipulation strategies. It emphasised the provisional measure failed to set forth secure measures for handling the data. It also objected to the stated purposes as generic.

Finally, the arguments were also presented as part of a proportionality test, which the bar association claimed the provisional measure failed to meet.

* + 1. Submissions from the government

The government advanced that the criteria for the enactment of the provisional measure were met, citing the impacts of the pandemic and the need for statistical information to guide its policy for relief, making it a "relevant and urgent case" within the meaning of art. 62 of the Constitution. Citing an earlier decision on the banking information, the government also maintained that confidentiality of subscriber data was not breached by sharing it with the statistics agency, which would likewise be held to confidentiality as to that data. It reasoned the sharing of data from all subscribers was required, even if only a subset would be contacted in the survey, given the need to make sure the sample was statistically valid for the survey.

* + 1. Submission from the prosecutor-general

The prosecutor-general essentially agreed with the government on the criteria for the enactment of provisional measures, as well as on the constitutional protections of privacy. He added the data was not protected under the provision on the confidentiality of communications and data, pointing to earlier decisions where the Court had held only the communication of data fell under that provision, and not stored data. He further argued the provision on the respect for private life was not violated, considering the data were not of an intimate nature but rather "basic identification required for all human interaction in society".

* 1. **Court’s rulings & legal grounds**

***Legal basis***

In a constitutional complaint, the Court must establish whether the act violates the Constitution directly, as opposed to whether it is inconsistent with other legislation. An injunction in a constitutional complaint demands a showing of a probability of the merits of the complaint as well of the urgent need for staying the act.

***The Court's decision and the opinion of the rapporteur***

The Court confirmed the stay of the provisional measure granted by the rapporteur, with a 10–1 vote. As typical in major cases before the Supreme Court, all Justices (except for Celso de Mello J, who joined the rapporteur) entered their opinions seriatim, each endorsing reasoning they favour. While the opinion of the rapporteur is not the opinion of the Court per se, the case is generally cited with reference to the opinion of the rapporteur, who also prepares the headnotes for the decision.

Rosa Weber J held that the provisional measure did not specify the scope, purpose and reach of statistics for which the data would be used. She added it was not clear from the language of the provisional measure why the data was strictly necessary. Weber J emphasised only 200,000 individuals were said to be included in the survey, which she viewed as evidence that the sharing of data on roughly 200,000 million subscribers was excessive.

 She further noted the provisional measure did not include technical and organisational measures designed to prevent unauthorised access to the data, security incidents or abuse.

Other justices entered opinions with similar reasoning, with many emphasising the importance of data protection and some going as far as positing a constitutional right to data protection.

* 1. **Concluding statement**

The Court consequently confirmed the stay granted by the rapporteur, enjoining the provisional measure from entering into effect. The case was mooted when the period for review of the provisional measure by Congress elapsed without a vote.

* 1. 7. **Dissenting or Concurring opinions**

Justice Marco Aurélio seemed to agree with the government's submission that the statistics were essential. He also seemed to agree with the prosecutor-general that the data were too limited to pose any serious risk, or to infringe on the protection of private life. He also noted the provisional measure would still be reviewed by congress, and argued it would not be proper for the Court to decide before congress had assessed it.

**Direction**

1. **Decision Direction**: Expands expression;
2. **Information**: The case has been hailed as a landmark in data protection in Brazil. Earlier cases had refused to consider privacy issues in data sharing between different government actors or agencies, under the notion that shared data were still confidential (i.e., not publicly disclosed). A number of opinions in the case mentioned surveillance and abuse as relevant concerns, underscoring the importance of personal data protection. Given the chilling effect surveillance has on freedom of expression, the ruling expands expression.

**Perspective**

1. **Global Perspective:**
2. **International, Regional, and National Laws or Cases**

Braz., Federal Constitution of 1988, Article 1, III; Article 5, subparagraph X, XII, LIV; Article 62.

Braz., General Data Protection Law no. 13,709/2018, Articles 2, subparagraph I, II.

Braz., Law no. 13,979/2020.

1. **Other National Standards, Law or Jurisprudence**
2. **General Notes**:

**Significance**

1. **Case significance**

The case is a landmark in the national scenario of data protection, and revisits many assumptions on the protection of personal data and particularly stored data that had long been criticised.

1. **Precedential Effect**

The ruling is a pioneer in considering personal data as a right in itself and represents a relevant precedent across the national jurisdiction. Considering it is the highest Brazilian court, lower courts are expected to follow its understanding.

1. Persuasive Effect
2. Related Cases
3. Additional Citations

**Documents**

1. **Official Case Documents**

Judgment:

<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754357629>

1. **Amicus Briefs and Other Legal Authorities**
2. **Reports, Analysis and News Articles**

# A Landmark Ruling from the Brazilian Supreme Court: Data Protection as an Autonomous Fundamental Right and Informational due Process:

<https://edpl.lexxion.eu/article/EDPL/2020/4/21>

# “Please do not share”: Brazilian Supreme Federal Court rules in favor of privacy:

<https://www.accessnow.org/brazilian-supreme-federal-court-rules-in-favor-of-privacy/>

1. **Relevant Materials in Foreign Languages**