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The provisional bridge: legislative omission and stabilization of the judicial regime governing public servants' strikes (1994–2026)

A ponte provisória: omissão legislativa e estabilização do regime judicial da greve dos servidores públicos (1994–2026)

El puente provisional: omisión legislativa y estabilización del régimen judicial de la huelga de los servidores públicos (1994–2026)

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Abstract:
This article examines what happens when the Brazilian Supreme Federal Court fills a legislative omission with an avowedly provisional rule and the legislation meant to replace it never arrives. The case is the right to strike of civil public servants (article 37, VII, of the Constitution), whose specific statute was not enacted between 1988 and 2026. The documentary reconstruction distinguishes three moments: the declaration of legislative default (MI 20, 1994), preceded by intermediate techniques combining deadlines and consequences (1991); the filling of the gap by analogical application of Laws 7,783/1989 and 7,701/1988, together with a sixty-day deadline for Congress (MIs 670, 708 and 712, 2007); and a sequence of decisions settling further questions of the regime — jurisdiction, pay deductions for strike days, the ban on strikes in public security, mandatory mediation (Rcl 6,568, 2009; Themes 531, 541 and 544, 2016–2017) — up to the 2020 reading of the 2007 ruling in light of those later decisions (MI 708-ED). Each post-2007 rule is classified according to the source from which it can be reconstructed, drawing on the Italian criterion of additive judgments "a rime obbligate". Judicial creation without an identifiable source turns out to be marginal, and at least one rule — the jurisdiction of the ordinary courts over strikes by public employees hired under labour law (Theme 544) — expressly derives its authority from the rule created by the 2007 ruling itself. Two claims are distinguished. The minimal claim, which the case supports securely, is that the decisive step lies not in the initial act of gap-filling but in its duration: a rule adopted to apply while the omission persisted became, through the persistence of the omission, the normative infrastructure on which the Court went on to decide, both to secure and to restrict the right. Law 13,300/2016 regulated this provisional status without setting any term to it. The strong claim, which the case supports only in part, is that this infrastructure became partly self-referential. The article does not claim that judicial gap-filling caused legislative inertia.

Keywords:
unconstitutional omission; writ of injunction; public servants' right to strike; additive judgments; Brazilian Supreme Federal Court.

Resumo:
Examina-se o que acontece quando o Supremo Tribunal Federal supre uma omissão legislativa por uma disciplina declaradamente provisória e a legislação que deveria substituí-la não chega. O caso é o direito de greve dos servidores públicos civis (art. 37, VII, da Constituição), cuja lei específica não foi editada entre 1988 e 2026. A reconstrução documental distingue três momentos: a declaração da mora (MI 20, 1994), precedida de técnicas intermediárias de prazo

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e consequência (1991); o suprimento por aplicação analógica das Leis 7.783/1989 e 7.701/1988, acompanhado de prazo de sessenta dias ao Congresso Nacional (MIs 670, 708 e 712, 2007); e a sucessão de decisões que resolveram questões seguintes do regime — competência, desconto dos dias parados, vedação da greve na segurança pública, mediação obrigatória (Rcl 6.568, 2009; Temas 531, 541 e 544, 2016– 2017) —, até a releitura do suprimento de 2007, em 2020, à luz dessas decisões posteriores (MI 708-ED). Cada regra posterior a 2007 é classificada pela fonte de que se pode reconstruí-la, com apoio no critério italiano das sentenças aditivas "a rime obbligate". O resultado é que a criação judicial sem fonte identificável é pontual, e que ao menos uma regra — a competência da Justiça comum para a greve dos servidores celetistas (Tema 544) — tem sua autoridade declarada na própria regra criada pelo suprimento de 2007. Distinguem-se duas teses. A tese mínima, que o caso sustenta com segurança, é que a passagem decisiva não está no ato inicial de suprimento, mas em sua duração: uma disciplina adotada para vigorar enquanto persistisse a omissão tornou-se, pela permanência da omissão, a infraestrutura normativa sobre a qual o Tribunal passou a decidir, tanto para garantir quanto para restringir o direito. A tese forte, que o caso sustenta de modo parcial, é que essa infraestrutura adquiriu capacidade parcialmente autorreferencial. A Lei 13.300/2016 disciplinou essa provisoriedade sem lhe fixar termo. Não se afirma que o suprimento tenha causado a inércia legislativa.

Palavras-chave:
omissão inconstitucional; mandado de injunção; greve dos servidores públicos; sentenças aditivas; Supremo Tribunal Federal.

Resumen:
Se examina qué ocurre cuando el Supremo Tribunal Federal suple una omisión legislativa mediante una regulación declaradamente provisional y no llega la legislación que debería sustituirla. El caso es el derecho de huelga de los servidores públicos civiles (art. 37, VII, de la Constitución), cuya ley específica no se promulgó entre 1988 y 2026. La reconstrucción documental distingue tres momentos: la declaración de la mora legislativa (MI 20, 1994), precedida por técnicas intermedias de plazo y consecuencia (1991); la suplencia mediante la aplicación analógica de las Leyes 7.783/1989 y 7.701/1988, acompañada de un plazo de sesenta días para que el Congreso Nacional legislara (MIs 670, 708 y 712, 2007); y la sucesión de decisiones que resolvieron cuestiones posteriores del régimen —competencia, descuento de los días de huelga, prohibición de la huelga en la seguridad pública y mediación obligatoria (Rcl 6.568, 2009; Temas 531, 541 y 544, 2016–2017)—, hasta la relectura de la suplencia de 2007, en 2020, a la luz de esas decisiones posteriores (MI 708-ED). Cada regla posterior a 2007 se clasifica según la fuente a partir de la cual puede reconstruirse, con apoyo en el criterio italiano de las sentencias aditivas "a rime obbligate". El resultado es que la creación judicial sin una fuente identificable es puntual y que al menos una regla —la competencia de la justicia ordinaria para la huelga de los servidores públicos contratados bajo el régimen laboral (Tema 544)— tiene su autoridad declarada en la propia regla creada por la suplencia de 2007. Se distinguen dos tesis. La tesis mínima, que el caso sustenta con seguridad, es que el paso decisivo no está en el acto inicial de suplencia, sino en su duración: una regulación adoptada para regir mientras persistiera la omisión se convirtió, por la permanencia de esa omisión, en la infraestructura normativa sobre la cual el Tribunal pasó a decidir, tanto para garantizar como para restringir el derecho. La tesis fuerte, que el caso sustenta parcialmente, es que esa infraestructura adquirió una capacidad parcialmente autorreferencial. La Ley 13.300/2016 reguló esa provisionalidad sin fijarle un término. No se afirma que la suplencia haya causado la inercia legislativa.

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Palabras clave:
omisión inconstitucional; mandado de injunção; huelga de los servidores públicos; sentencias aditivas; Supremo Tribunal Federal.

The provisional bridge

A river cuts across a road, and the permanent bridge depends on construction that has not yet begun. To keep the crossing open, someone builds a provisional bridge with a sign stating exactly that: provisional, until the permanent construction is complete. The sign also specifies a deadline for construction to begin.

The deadline passes, and construction does not begin. The provisional bridge remains standing, because removing it would interrupt the crossing. Over time, it is reinforced. Questions arise that no one had anticipated — who can cross it at peak times, who is liable for an accident, whether heavy vehicles can use it — and its builder begins to answer them. Some answers follow traffic rules that already existed for other bridges; others follow the rules the builder established for this bridge; still others come from manuals that had nothing to do with bridges. Years later, the sign remains. The bridge is still formally provisional.

None of this requires that someone has wanted to manage the bridge forever, or that the final work has not begun because of the provisional bridge. The image doesn't prove anything. It serves to fix the properties that are sought, then, in a specific case: a solution expressly adopted to last until another one existed; a deadline for the definitive solution, which was not fulfilled; the permanence of the provisional solution; and the formation, on it, of a set of rules on issues that the initial solution did not solve.

§ 1 — The problem

Article 37, VII, of the 1988 Constitution guarantees public servants the right to strike, to be exercised “under the terms and within the limits defined by a specific statute”. That statute has not been enacted. In 1994, the Supreme Federal Court declared the National Congress to be in legislative default. In 2007, it ordered that, until the statute was enacted, the laws governing strikes in the private sector should apply to public servants insofar as appropriate, and gave Congress sixty days to legislate. Between 2009 and 2017, it decided which courts have jurisdiction over public servants’ strikes, whether pay should be deducted for days on strike,

which public servants may not strike, and when public authorities must participate in mediation. In September 2026, the specific statute still does not exist.

The case is usually read in two ways. In the doctrinal narrative, it is the history of the writ of injunction moving from a "non-concretist" phase to a "concretist" phase, with the 2007 judgment as the turning point. In institutional criticism, it is an example of activism: the Court is said to have legislated in Congress's place. Both readings focus on the same moment —the gap-filling act of 2007— and the same question —whether the Court could do what it did.

What happened after that moment receives less attention, and gives rise to the question: when the Supreme Federal Court fills a legislative gap through an expressly provisional regulatory framework, and the legislation that should replace it does not arrive, what happens to that framework —and to the Court's role in the field it regulates?

The question excludes others, which the theme usually calls. It is not discussed whether the gap-filling measure of 2007 was constitutionally correct, nor whether the right of public servants to strike should have more or less limits. You don't investigate why Congress didn't legislate. And the broader question of the institutional expansion of the Supreme Court, which the literature associates with the normative ambition of the 1988 Constitution and the concentration of competences in the Court, is not taken up.[1] The examination is a documented sequence of decisions on a single right over three decades and the relationship between those decisions and the provisional nature that the Court itself attributed to the regulatory framework it created.

The hypothesis is that the decisive passage is not necessarily in the act of 2007, but in the temporal transformation of the gap-filling measure: a regulatory framework expressly adopted to remain in force as long as the omission persisted became, by the permanence of the omission itself, the normative infrastructure on which the Court began to resolve successive issues of the strike regime of the public servants. Two propositions must be separated because they are tested in different ways.

The minimum thesis is that the provisional became infrastructure because it persisted, and because the Court continued to administer the field in the absence of law. It does not depend on whether the Court has created rules without support from a legislative or constitutional source. It depends that provisional regulatory framework has lasted and that subsequent decisions have been taken within the field that it opened.

[1] VIEIRA, Supremocracia (2008), among the extensive literature on the subject.

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The strong thesis is that this infrastructure has acquired partially self-referential capacity: some later rules have come to derive from the judicial regime itself, rather than from the law that the Court borrowed. The strong thesis can be confirmed or refuted by the classification of the sources of the rules (§ 6). The minimum thesis does not depend on this classification.

§ 2 — Theoretical framework

2.1 Additive judgments and "constrained rhymes"

The filling of a legislative gap by judicial decision has, in comparative law, a name and a theory. The Italian constitutional court developed, from the 1960s onwards, the so-called additive judgments: decisions declaring unconstitutional a law in the part where it does not provide for something that should be foreseen and, with this, add the missing norm to the legal order. Justice Gilmar Mendes' vote in the 2007 trial expressly invoked this tradition by qualifying the decision as additive or manipulative.[2]

Italian theory also supplied the best-known criterion for limiting this type of decision. Vezio Crisafulli argued that, if one wished to speak of the creation of new law in connection with additive judgments, one would have to add that this was legislation "a rime obbligate" — through constrained rhymes: the Court would invent nothing, but would extend, make explicit, or specify something that, even if latent, was already contained in the existing normative system.[3] The additive decision would be legitimate when the added norm was the only one compatible with the Constitution; when several solutions were possible, the choice would belong to the legislature.

The criterion is of interest here for two reasons. The first is that it offers a test to classify judicial rules by the source of which they can be reconstructed: a rule is a "constrained rhyme" when it necessarily stems from pre-existing normative material; it is not when it results from choice between alternatives. The second is that the Italian Court itself, from 2016 onwards,

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[2] BELCHIOR, Direito de greve do servidor público civil estatutário (2007), records the characterization of the decision, in Justice Gilmar Mendes's opinion, as a judgment with a "manipulative or additive" profile; MENDES, Mandado de injunção e seus respectivos limites constitucionais (2021), describes the phase inaugurated in 2007 as admitting "judgments with an additive profile".

[3] CRISAFULLI, La Corte costituzionale ha vent'anni (1976), p. 1707 e ss.: "se di creazione di nuovo diritto vuole parlarsi (ma non è), dovrà almeno aggiungersi, dunque, che si tratterebbe di una legislazione a rime obbligate". The passage is cited as reproduced in MARTIRE, Giurisprudenza costituzionale e rime obbligate (2020).

abandoned the strict requirement and began to admit solutions "constitutionally adequate, even if not mandatory", justifying this flexibility, among other reasons, by the persistence of legislative inertia.[4] Italian evolution shows that the criterion of compulsory rhyme, although demanding, is not arbitrary: it is precisely the limit that a court tends to relax when the legislator does not react.

The criterion here serves as a classification instrument, and not as a correction parameter. It is not asked whether Brazilian decisions should have been limited to mandatory rhymes, but from what material each rule can be reconstructed.

2.2 Responsive jurisdiction and the problem of time

The main theoretical interlocutor is the theory of responsive constitutional adjudication, formulated by Rosalind Dixon. In general terms, the theory maintains that constitutional courts can legitimately intervene to counterbalance dysfunctions of the democratic process — among them, the legislator's "blind spots" and the "costs of inertia", that is, situations in which the legislator does not act even in the face of issues he himself recognizes as relevant. In such situations, a judicial decision can unlock the political process by returning the matter to it with an incentive to act.[5] Emilio Peluso Neder Meyer recently applied this framework to the Supreme Court, and registered cases in which the intervention of the Court did not produce legislation or produced a counter-reaction.[6]

The case of the public servants' strike is, at first glance, an example of the situation that the theory describes: a constitutionally foreseen right, a law that the text itself requires, an inertia of decades. It is also a test of one of its implicit expectations: that judicial intervention is a stage, not a point of arrival. It is not a question of refuting the theory, which is normative, nor of measuring its predictive capacity, which would require many cases, but of showing that a remedy conceived as provisional raises a question that the theory needs to face: what happens with the remedy when the next step does not occur.

The Brazilian literature on institutional dialogues formulates the same concern in other terms, by refusing that the judicial decision be treated as a last word and by examining the

[4] MARTIRE, Giurisprudenza costituzionale e rime obbligate (2020), p. 244-259, with reference to sentences n. 236/2016 and n. 40/2019 of the Italian constitutional court.

[5] DIXON, Responsive judicial review: democracy and dysfunction in the modern age (2023).

[6] MEYER, Responsive Constitutional Jurisdiction in the Supreme Court: an ongoing trend? (2025). Among the examples of the author are the creation of municipalities, in which Congress responded with Constitutional Amendment No. 57/2008, and the criminalization of homotransphobia, after which, according to the author, no law was passed.

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legislative reactions to the decisions of the Court.[7] The case examined is, in this vocabulary, a dialogue in which one of the interlocutors did not respond. What matters is what the other one did after.

§ 3 — Method and limits

The study is qualitative and documentary. The corpus is formed by the decisions of the Supreme Court on the strike of civil public servants and on the technique of the writ of injunction that made them possible, from 1989 to 2017, by Law 13.300/2016 and by the legislative situation in September 2026. The decisions were read in their judgment summaries, theses and, when available, in votes and transcripts; the degree of verification of each is indicated in a note.

Three levels of affirmation are kept separate: the documentary fact ("the thesis of Theme 531 states X"), analytical reconstruction ("Rule X can be reconstructed from source Y") and the hypothesis ("provisional regulatory framework has stabilized as an infrastructure of the regime"). No inference from the author is presented as a statement by the Court. The analysis focuses on the motivation of decisions, which Taruffo distinguishes from the reasoning that led to them: between the choices made to decide and those expressed to justify "there is not necessarily any coincidence".[8] Therefore, the justification offered is classified, not the route that produced it.

The central test is the classification of each rule of the judicial regime of the strike, from 2007, according to the source from which it can be reconstructed. The categories are five:

• (a) Loaned law. The rule is based on Laws 7.783/1989 or 7.701/1988,

applied by analogy, even with adaptation.

• (b) Constitution. The rule is extracted directly from the constitutional text.

It is recorded separately whether the derivation was a "constrained rhyme" or if it resulted from choice

among alternatives, what is seen, among other indications, by the existence of

the divergence based on the judgment itself.

• (c) Judicial regime. The rule is based on rules laid down by the Court itself.

in previous decisions of the same regime, and not directly from the borrowed law.

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[7] BRANDÃO, Supremacia judicial versus diálogos constitucionais (2012).

[8] TARUFFO, The motivation of the civil sentence (2015), p. 196 and 201. The distinction is that of the context of discovery and the context of justification, which the author transposes into the reasoning of the judge.

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• (d) External material. The rule is built on legal material other than both the borrowed law and the regime — for example, another law.

• (e) Not rebuilt. The source of the rule could not be reconstructed with the material examined.

The category (c) is the one that tests the strong thesis. A rule classified in (c) is not, by itself, creation without source: it is a rule whose immediate authority already comes from the previous judicial system. If the strong thesis is correct, rules in (c) must appear after 2007, regardless of how many rules fall in (d) or (e). When a rule has a composite justification — for example, a constitutional source reinforced by the regime — the classification registers the two rather than forcing one. The criterion is parallel in the analysis of the argument. Under Toulmin, the question for the source is not addressed to the case data, but rather to the support of the guarantee linking the data to the conclusion: "the backing without which the warrants themselves would have neither authority nor force".[9] Categories (a), (b) and (d) indicate support outside the scheme; category (c), internal support for it. It is also the difference Schauer draws between learning from a previous decision and following it because it was made: whoever learns decides for what he knows now; who follows decides because the past has decided.[10] The rule classified in (c) works, for the decision that applies it, as what MacCormick calls ratio decidendi: "the rule or principle of decision for which a given precedent lends authority".[11]

There are two limits. The first is causal: it is not argued that the 2007 gap-filling measure caused the subsequent legislative inertia, or the other way around. Inertia can have causes that have nothing to do with the Court — the political cost of regulating public servants' strikes, the divergence between governments and union entities, the priority of other agendas — and nothing in the material examined allows these causes to be separated. The second is of range: a case does not set standard. What can be shown is that the phenomenon described occurred, and how.

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[9] TOULMIN, The uses of the argument (2001), p. 140-141 and 148. Toulmin calls data the facts invoked in favour of the claim, warrant the rule authorising the transition from data to conclusion, and support what gives authority to the guarantee.

[10] SCHAUER, Thinking like a lawyer (2009), p. 37 and 87: in the use of the analogy, the previous decision "is selected in order to support an argument now"; in the previous one, "a previous decision imposes itself to preclude an otherwise preferred outcome".

[11] MACCORMICK, Retórica and o Estado de Direito (2008), p. 193.

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§ 4 — Declaring the omission (1989–1994)

The Court's first response to legislative omission was its most restrained. In MI 107, whose procedural question was decided on 23 November 1989, the full Court held that the writ of injunction allowed it to declare the competent body's legislative default and notify that body, but did not authorize it to enact the missing norm or directly secure the exercise of the right.[12] This approach reflected a strict reading of the separation of powers: recognizing the omission was a judicial task; filling it was not.

The orientation began to yield almost immediately, not by rupture, but by the introduction of intermediate techniques that combined time and consequence. In MI 283, judged on March 20, 1991, under the report of Justice Sepúlveda Pertence, the Court declared the legislative default as to the economic repair law provided for in article 8 § 3 of the Transitional Constitutional Provisions Act, fixed deadline for Congress and assured the plaintiff, if the deadline was exhausted without the law, the possibility of obtaining judicial compensation.[13] In MI 232, judged on August 2, 1991 under the rapporteurship of Justice Moreira Alves — the same as leading the 1989 orientation —, the Court set a six-month deadline for Congress to regulate the immunity of Art. 195, § 7o, and determined that, while the omission persisted, the plaintiff would enjoy the required immunity.[14]

These decisions introduced the time structure that will reappear in 2007: a deadline for the legislator and a judicial solution in case the deadline fails. The difference is scope. In 1991, the conditional solution concerned the plaintiff and a relatively determined right of content — reparation, immunity. It was not yet a matter of disciplining the exercise of a collective right throughout a category.

For public servants' strikes, the response during this period was a declaration. In MI 20, decided on 19 May 1994, with Justice Celso de Mello as rapporteur, the full Court recognized Congress's legislative default in regulating Article 37, VII, and notified it of the need for legislative action.[15] The Court set no deadline and specified no consequence. The decision is the

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[12] BRAZIL, Supreme Court, MI 107-QO/DF, rel. Min. Moreira Alves, j. 23 Nov. 1989. The characterization follows MENDES (2021) and the judgment summary registered in LexML.

[13] BRAZIL, Supreme Court, MI 283/DF, rel. Min. Sepúlveda Pertence, j. 20 Mar. 1991. The Court's institutional publication on relevant cases records a period of forty-five days.

[14] BRAZIL, Supreme Court, MI 232/RJ, rel. Min. Moreira Alves, j. 2 Aug. 1991, as recorded on the institutional page of the Court on article 59 of ADCT and in excerpt from the judgment summary reproduced in the literature.

[15] BRASIL, Supremo Tribunal Federal, MI 20/DF, rel. Min. Celso de Mello, j. 19 maio 1994.

documentary starting point: from that point onward, the omission ceases to be merely a fact and becomes a judicially declared legislative default.

The 1989–1994 sequence allows us to record a premise, which is not original, because the literature describes it as a succession of phases: each stronger technique was introduced after the weaker one proved incapable of producing the law.[16] What matters to what follows is something else. As early as 1991, the Court had developed a two-part decision-making procedure — a timeframe for the legislator and a solution in case the horizon fails. In 2007, this form would be applied to a collective right, and the second part would have no fixed endpoint.

§ 5 — Filling the gap (2007)

5.1 The judgment

On October 25, 2007, the Plenary concluded the trial of three writs of injunction on the strike of civil public servants. The MI 670 had been filed by the Civil Police Servants Union of Espírito Santo (original rapporteur Justice Maurício Corrêa, author of the Court's judgment Justice Gilmar Mendes); the MI 708, by the Workers' Union in Education of the Municipality of João Pessoa (rapporteur Justice Gilmar Mendes); the MI 712, by the Workers' Union of the Judicial Power of the State of Pará (rapporteur Justice Eros Grau).[17] By majority, the Court determined the application to public servants, as appropriate, of Laws 7.783/1989, which disciplined the strike in the private sector, and 7.701/1988, which organizes the jurisdiction of labor courts in collective proceedings, and conferred on the decision general effectiveness. Justices Ricardo Lewandowski, Joaquim Barbosa, and Marco Aurélio dissented in part: they would have limited the decision's effects to the categories that had petitioned the Court.[18]

5.2 The justification

Two types of reason sustained the decision, and it's useful to separate them.

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[16] MENDES (2021) organizes the case-law in stages (MI 107; MI 283; MI 232 and 284; MI 670, 708 and 712; MI 758); ARAUJO (2021) reconstructs the evolution up to ADO 26.

[17] The identification of the petitioners follows BELCHIOR (2007). The report of MI 670 and the wording of the judgment by Justice Gilmar Mendes appear in the institutional publication of the Court on relevant cases.

[18] BELCHIOR (2007), which also records the dissenting opinion by Justice Maurício Corrêa, rapporteur from MI 670, on the non-concretist line.

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The first is the ineffectiveness of the previous response. In the vote of 19 September 2007, Justice Celso de Mello — rapporteur for MI 20 — recalled that the Court had recognised the Congress's legislative default "almost 13 years ago", and qualified the omission as "continued, unacceptable, unreasonable and abusive inertia of the Federal Union", setting up "abusive omission in fulfilling the legislative obligation".[19] The justification is the same as the literature identifies in each phase passage: the strongest technique comes after the failure of the weakest.

The second type of reason appears less prominent in the literature, but is decisive for what follows. The absence of law did not prevent the strikes of public servants; it prevented them from being legally disciplined. In the vote that led the MI 708, Justice Gilmar Mendes recorded that, in the lack of law, strikes in the public service had been taking place "without any legal control, giving rise to heterodox negotiations".[20] The year 2007 was marked by strikes with great impact on the federal public service. A reading of the trial attributes the change of orientation, in part, precisely to the need to subject these strikes to rules.[21]

The two reasons are not excluded, and there is no need to decide between them. But the second prevents the gap-filling measure from being described only as an expansion of a right. By applying Law 7.783/1989, the Court ensured the exercise of the strike and, at the same time, subjected it to a regime of requirements, limits and judicial control that previously did not exist for public servants. What the Court acquired in 2007 was the power to lay down the rule of the field, and that power can be exercised in both directions.

5.3 What was supplied

The decision has three normative components, and each can be classified by the criterion of § 3.

The first is the application of Law 7.783/1989, "insofar as applicable". This is the typical instance of category (a): the rule comes from the borrowed statute, applied by analogy.

The second is the power, recognized to the competent court, to fix, "in the face of the case and upon request of a legitimate entity or body", a strike regime more severe than that of

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[19] Vote of Justice Celso de Mello in the writs of injunction on the strike of public servants, 19 Sep. 2007, released in Consultor Jurídico on 19 Sep. 2007.

[20] Vote by Justice Gilmar Mendes no MI 708/DF, according to extensive reproduction published in the Observatory of Constitutional Jurisdiction (IDP), which indicates the pagination of the Court; the passage is also cited by SÁ (2008).

[21] SÁ (2008) attributes the change to the principle of supremacy of public interest; FIGUEIREDO, Supreme gave effectiveness to the writ of injunction (2008), mentions the strikes 2007 at INSS, Revenue and air traffic control.

Law 7.783/1989.[22] The borrowed law already distinguishes essential services and activities and requires, in these cases, the guarantee of the services indispensable to meeting the community's needs that cannot be postponed. The ability to aggravate this regime for public servants is an adaptation of the borrowed law, not its simple application: (a), with adaptation.

The third is the regulatory framework of competence. Law 7.701/1988 organises the jurisdiction of labour courts. The 2007 decision did not apply it as it is, but transposed its structure — a court for national or regional conflicts, another for local conflicts — to the common, federal and state courts, distributing the civil servant strikes between the Superior Court of Justice, the Federal Regional Courts and the Courts of Justice.[23] The adaptation here is greater. The borrowed law provides the form of the rule, but not its content: by strict analogy, it would point to labor courts. Nevertheless, the rule is reconstructed from the borrowed law, plus a choice by the Court as to the relevant branch: (a), with substantial adaptation.

The result is that the gap-filling measure of 2007, examined by the criterion of forced rhyme, is less creative than the criticism of activism usually assumes. None of its components is a no-source rule. They all rebuild from the borrowed law, with adaptations of increasing intensity. None of them, however, could be demonstrated, with the material available, as rhymes strictly obligated: the choice of Law 7.783/1989, the ability to aggravate and the transposition of competence into ordinary courts appear as appropriate solutions, not as the only possible ones. The divergence of the three dissenting justices, who would have limited the effects to the parties, shows that the scope of the decision was also the object of choice.

5.4 The temporal structure

The 2007 decision also contains a fourth element, which is not a rule within the regime but defines it: the setting of a sixty-day deadline for the National Congress to legislate on the

[22] BRAZIL, Supreme Court, MI 708/DF, rel. Min. Gilmar Mendes, j. 25 Oct. 2007, issue, as reproduced in GOULART, Da (in)constitutionality of the exercise of the right of strike by public servants active in the area of public safety (2019), p. 68, footnote 12.

[23] MI 708/DF, adds: application of Law 7.701/1988 “with regard to the competence to assess and judge any judicial conflicts related to the strike of public servants”, according to GOULART (2019), p. 68, footnote 12; the distribution between Superior Court of Justice, Regional Courts Federal and Courts of Justice is included in the judgment summary of the MI 670, reproduced in ROCHA, Competence for judgment of conflicts arising from the exercise of the right to strike of public servants (2015).

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matter.[24] The judicial regulatory framework would remain in force until the specific statute was enacted.

It is tempting to describe what followed as non-compliance with a court order: the Court gave sixty days, and Congress did not legislate in nineteen years. The description would be inaccurate. The decision did not foresee that, after the deadline, something would happen to Congress or provisional regulatory framework. On the contrary: it fixed the deadline and, at the same time, created the applicable regulatory framework until the law came. The deadline had no sanction, and regulatory framework had no end.

That's the combination that matters. The same judgment contains a very short timeframe for legislative action and a judicial solution with no fixed endpoint to the hypothesis that this horizon will fail. The structure already existed in 1991; what changes in 2007 is that the second part is not exhausted in the satisfaction of a petitioner, but regulates, with general effectiveness, the exercise of a right by all civil public servants in the country. If the deadline failed — and it failed — the provisional solution would become, for an indefinite period, the only regulatory framework in the field.

The divergence on the subjective scope of the decision, which in 2007 seemed secondary, gains its weight here. The three justices who dissented in part would have limited the decision's effects to the petitioning categories. A decision with that scope is exhausted in each case in the satisfaction of those who requested it, and each new category would have to obtain its own. The general effectiveness did something else: it created, at once, a regulatory framework for all civil public servants in the country. It is the general effectiveness that transforms the gap-filling measure into something that can last as a regime, because there is now a single body of rules to which the following questions can be referred.

The provisional characterization persisted in the Court's own discourse. In the motions for clarification decided in 2020 (§ 6.4), the judgment again described the regime as the application of the two statutes "until the specific statute is enacted" and reproduced the summary of the 2007 judgment, including the sixty-day deadline.[25] Thirteen years later, the bridge still bore the sign.

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[24] The deadline is set out in the MI 708 judgment summary and on the institutional page of the Supreme Court on article 102 of the Constitution; the institutional publication on relevant cases records, as for MI 670, the setting of "60 days to the National Congress to legislate on the matter".

[25] MI 708-ED/DF, rel. Min. Rosa Weber, judgment of 6 March 2020 (see § 6.4).

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§ 6 — Administering the regime (2009–2017)

6.1 Subsequent questions

A temporary bridge that lasts raises questions that its construction did not solve. The regulatory framework of 2007 said that Law 7.783/1989 was applicable, insofar as applicable. It did not say which public servants could strike, if the days stopped should be paid, who would judge the strike of the public servants contracted by the CLT labor regime, nor how the public authorities should behave before categories prevented from stopping. These issues reached the Court over the next decade, and were decided without specific law.

Rcl 6.568 (2009). On 21 May 2009, the full Court decided a constitutional complaint, with Justice Eros Grau as rapporteur, concerning a collective strike dispute involving civil police officers in São Paulo that had been filed in the labor courts. The complaint alleged a violation of the authority of the decision in ADI 3.395, which had excluded labor-court jurisdiction over cases between public authorities and statutory public servants; the argument was accepted, and the Court also relied on MIs 708 and 712. It held that the labor courts lack jurisdiction to resolve disputes between public servants and the administrative entities to which they are attached, and stated that civil-police activities are analogous to military activities, for which the Constitution expressly prohibits strikes. Certain categories of public servants responsible for maintaining order and public security may therefore be denied the exercise of that right. The proposal concerning police strikes was presented by the rapporteur.[26]

Theme 531 (2016). On 27 October 2016, in RE 693.456, with Justice Dias Toffoli as rapporteur, the Court established, by six votes to four, the following holding: “The public administration must deduct pay for days of work stoppage resulting from public servants’ exercise of the right to strike, because of the resulting suspension of the employment relationship; making up those days is permitted by agreement. Such deductions are, however, impermissible if it is shown that the strike was caused by unlawful conduct by public authorities.” In his dissent, Justice Ricardo Lewandowski questioned the application of Article 7 of Law 7.783/1989 to public servants in the absence of a specific statute.[27]

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[26] BRAZIL, Supreme Court, Rcl 6.568/SP, rel. Min. Eros Grau, Plenário, j. 21 May 2009, issue as recorded in LexML. The rapporteur is on the official agenda of 20 May 2009; the invocation of ADI 3.395, in the injunction and merit, and support in MIs 708 and 712 are on the Court's institutional news about granting the injunction and on the trial.

[27] BRASIL, Supreme Court, RE 693.456/RJ (Tema 531), rel. Min. Dias Toffoli, j. 27 Oct. 2016. The scoreboard and positions are on the institutional news of the trial, reproduced by third parties: mostly, in addition to the

Theme 541 (2017). On 5 April 2017, in ARE 654.432, the Court fixed the thesis by seven votes to three: “1. The exercise of the right to strike, in any form or modality, is forbidden to civil police officers and all public servants who act directly in the area of public safety. 2. The participation of the public authorities in mediation established by the representative professional bodies of public security careers, in accordance with article 165 of the CPC, is mandatory for giving voice to the interests of the category.” The rapporteur, Justice Edson Fachin, was defeated with Justices Rosa Weber and Marco Aurélio; the editor of the judgment was Justice Alexandre de Moraes. The driving vote, released by the Court, supports the prohibition on the constitutional nature of public security functions, on the need for continuity of security, order and social peace and on the functional analogy with military activities.[28]

Theme 544 (2017). On 1 August 2017, in RE 846.854, the Court established the following holding: “The ordinary federal or state courts have jurisdiction to determine whether strikes by public servants employed under the CLT labor regime in the direct public administration, autonomous public entities, and public foundations are abusive.” The judgment summary states the basis: “The essential nature of the activities performed by public servants leads to the application of the jurisdictional rule established by the Supreme Federal Court in MI 670, even when the servants are employed by the State under the CLT labor regime.” The original rapporteur was Justice Luiz Fux; the author of the Court’s judgment was Justice Alexandre de Moraes.[29]

6.2 The source of each rule

The table classifies the rules set out in those decisions by the criterion of § 3. The first column is documentary fact; the classification is analytical reconstruction of the author, made from theses, judgment summaries and known reasons.

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rapporteur, the Justices Barroso, Teori Zavascki, Fux, Gilmar Mendes and Cármen Lúcia; the ministers Fachin, Lewandowski, Rosa Weber and Marco Aurélio have been defeated. Justice Fux invoked PL 710/2011, which provided for the suspension of payment of the days not worked.

[28] BRAZIL, Supreme Court, ARE 654.432/GO (Theme 541), rel. Min. Edson Fachin, red. p. Alexandre de Moraes, j. 5 Apr. 2017. The score and dissenting votes are on the trial news (Consultor Jurídico, 5 Apr 2017). According to the same news, the rapporteur admitted the strike with conditionings, including prior judicial authorization and minimum percentage of staff. The full vote of Justice Alexandre de Moraes was released by the Court on 11 Apr 2017.

[29] BRAZIL, Supreme Federal Court, RE 846.854/SP (Theme 544), rapporteur Justice Luiz Fux, author of the Court’s judgment Justice Alexandre de Moraes, decided 1 August 2017.

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Decision	Rule	Reconstructible source	Category
MI 708 (2007)	Application of Law 7.783/1989, insofar as applicable	Law 7.783/1989, by analogy	(a)
MI 708 (2007)	Power to impose a stricter regime in essential services	Law 7.783/1989 (essential services), adapted	(a), with adaptation
MIs 670 and 708 (2007)	Jurisdiction of the STJ, TRFs, and TJs	Structure of Law 7.701/1988, transposed to the ordinary courts	(a), with substantial adaptation
Rcl 6.568 (2009)	Lack of labor-court jurisdiction over public servants' strikes	ADI 3.395 (interpretation of Article 114 regarding statutory public servants), reinforced by the regime of MIs 708 and 712	(b) and (c), composite
Rcl 6.568 (2009)	Possibility of denying the right to categories working in public security	Constitution: analogy with the prohibition of military strikes	(b), not compulsory
Theme 531 (2016)	Pay deductions for days on strike, with days made up by agreement	Law 7.783/1989, Article 7 (challenged in the dissent); constitutional arguments; reference to a bill	(a), with concurrent support in (b) and (d); 6 to 4
Theme 531 (2016)	Deductions impermissible if the strike was caused by unlawful conduct by public authorities	Not identified in the material examined	(e)
Theme 541 (2017)	Prohibition of strikes by civil police officers and public-security servants	Constitution: analogy with military personnel and the public-security function; decision by 7 to 3	(b), not compulsory
Theme 541 (2017)	Mandatory mediation with participation by public authorities	Code of Civil Procedure, Article 165	(d)
Theme 544 (2017)	Ordinary-court jurisdiction over strikes by public servants employed under the CLT	Jurisdictional rule established in MI 670, expressly applied to CLT employees by the judgment summary; essential nature of activities as the basis for extension	(c)

Three results can be read in the table.

The first is that the judicial creation without identifiable source is punctual. Of the ten rules, only one — the exception of Theme 531 for strikes caused by unlawful conduct of the public authorities — could not be reconstructed from the material examined, and this may reflect the limit of the material, rather than the absence of source. The mandatory mediation of Theme 541 does not come from the borrowed law or the Constitution, but has a legislative source: the Code of Civil Procedure. Those who seek in the regime of workers strike a catalogue of rules invented by the Court will find little.

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The second is that none of the rules examined could be demonstrated, with the material available, as a "constrained rhyme" in a strict sense. The constitutional rules — the exclusion of categories of public security — result from analogy with a prohibition that the text reserves for the military, and the divergence of three ministers in 2017, including the rapporteur, shows that there was a legally articulated alternative. The discount of the days stood was decided by six votes to four. Divergence does not alone prove that no rule was necessary; it shows that the need was not evident to the Court itself. The rules of category (a) are appropriate analogies, not necessary. The entire regime is closer to what the Italian Court has called "constitutionally adequate, even if not mandatory" solutions than Crisafulli's criterion.

The third result is what interests the strong thesis. Two rules, both concerning jurisdiction, involve the judicial system itself — one in a compound way, another exclusively. Law 7.701/1988 deals with labor courts; if it were applied literally, the workers' strike conflicts would go to it. The Court, in 2007, transposed the structure of the law into ordinary courts. In 2009, in Rcl 6.568, he affirmed the incompetence of labor courts, but with a composite basis: the main reason was the authority of ADI 3.395, which had already ruled out that competence as to statutory public servants, and the regime of MIs 708 and 712 came as reinforcement.[30] The 2009 rule, therefore, is not a pure example of the category (c), and therefore it is reclassified, even if against the hypothesis itself.

The 2017 rule is something else. The public servants employed under the CLT labor regime maintain employment relationship with the Administration, which art. 114 attributes, as a rule, to the labor courts, and that ADI 3.395, focused on the statutory public servants, does not reach; Law 7.701/1988, applied by analogy, would point in the same direction. The rule of Theme 544 departs from the borrowed law and general rule of jurisdiction. And it is not necessary to reconstruct it by excluding other sources: the very foundation of the judgment brings the solution back to the rule of competence established in MI 670, extending it to the public servants employed under the CLT labor regime because of the essentiality of the activities they perform. The immediate authority of the solution comes from a rule created in the 2007 gap-filling measure. The classification in (c), in this case, is not genealogical inference of the author; it corresponds to the genealogy that the decision itself declares. The category (c) is empty in 2007, it appears in a composite way in 2009 and exclusively in 2017, precisely

[30] BRAZIL, Supreme Court, ADI 3.395-MC/DF, rel. Min. Cezar Peluso, Tribunal Pleno, j. 5 apr. 2006, who turned away the jurisdiction of the Labor Court to the cases between the Government and public servants bound to it by statutory relationship. The reference to the ADI 3.395 in Rcl 6.568 is on the Court's institutional news.

where the regime had to answer a question that the borrowed law, applied by analogy, would otherwise resolve.

6.3 Granting and restricting

The sequence of decisions after 2007 does not point in a single direction. Theme 531 requires deductions from the striking public servant's pay for days not worked. Theme 541 withdraws the right to strike from an entire area of public service. The Themes 531 and 541 also contain rules favorable to public servants — compensation for agreement, the exception of the strike caused by state lawlessness, compulsory mediation — but the result, for the categories affected, is restricted.

One fact makes the point clearer. The MI 670, one of the three tried in 2007, was filed by the union of the civil police of Espírito Santo. The category that obtained from the Court the gap-filling measure of omission was, two years later, pointed out by the Court itself as being subject to deprivation of the right, and ten years later, excluded from it by general repercussion thesis.

It is not claimed that the exclusion is incorrect: the analogy with the military and the public safety function are serious constitutional reasons, and most considered them decisive. It's only what the sequence shows. The power acquired in 2007 — that of setting the rule of the field while the law does not come — was exercised in the following years both to ensure the right and to restrict it. In the absence of law, the Court is not only the guarantor of the public servants' strike. It is their regulator.

6.4 The regime reread through itself (2020)

Thirteen years after the gap was filled, the regime returned to its starting point. The National Congress filed motions for clarification of the judgment in MI 708, seeking clarification of the scope of the 2007 regulatory framework in relation to careers involving core State functions. The motions were decided in a virtual session ending on 5 March 2020, with Justice Rosa Weber as rapporteur, and unanimously rejected.[31]

Two traits of the decision matter. The first is that the report describes the 2007 judgment as a determination to apply Laws 7.701/1988 and 7.783/1989 "until the specific law is

[31] BRAZIL, Supreme Court, MI 708-ED/DF, rel. Min. Rosa Weber, virtual session from 28 Feb. to 5 Mar. 2020, judgment of 6 Mar. 2020, according to the whole content reproduced on a jurisprudential basis.

published": the provisionality clause continued to define the scheme. The second is that, to answer the question, the rapporteur noted that the judgment already admitted more severe regime in specific situations and invoked, to show later developments, the thesis of Theme 541. The 2007 gap-filling measure was interpreted in 2020 in the light of a binding rule formed in 2017 within the same field.

The decision does not add new rule to the regime, and therefore does not enter the table. It offers evidence of another kind. The classification of § 6.2 examines the source of each rule; the motions for clarification of 2020 show the integration of the regime in time: provisional regulatory framework not only remained effective, but was read through the decisions that had been made about it. For the strong thesis, it is an independent indication of the classification of Theme 544. For the minimum thesis, it's almost a photograph: the 2007 plate was still on the bridge, and the traffic rules later added were already part of it.

One final feature, from which no conclusion is drawn: the body that requested clarification about the scope of the gap-filling measure was the very body whose omission it remedied.

§ 7 — The legislature regulates provisionality (2016)

The National Congress did not enact the statute governing public servants' strikes. In 2016, it enacted the statute governing the writ of injunction.

Law 13.300 of 23 June 2016 incorporated into the law the technique developed by the Court. Article 8 states that, recognized the legislative default, the injunction will be granted to "determine a reasonable period for the defendant to secure the enactment of the implementing norm" and to "establish the conditions under which the exercise of the rights, freedoms or prerogatives required will take place". Art. 9 states that the decision "will have subjective efficacy limited to the parties and will have effects until the advent of the regulatory standard", and its § 1 admits that it will be given "ultra partes effectiveness or erga omnes" when this is inherent or indispensable to the exercise of the right. Article 10 allows the review of the decision, at the request of any interested party, "when relevant changes to the circumstances of fact or law arise". Article 11 provides that the supervenient regulatory standard shall have ex nunc effects in relation to the beneficiaries of a final judgment, unless it is more favourable to them.[32]

[32] BRASIL, Lei n. 13.300, de 23 de junho de 2016, arts. 8º a 11.

One aspect of the law points in the opposite direction to that of 2007. Article 9 makes the effectiveness limited to the parties the rule, and general effectiveness the exception, admitted only when "inherent or indispensable" to the exercise of the right. The 2016 legislator adopted as a standard the position of the justices who dissented in 2007. The law can be read, at this point, as partial correction of the technique it incorporated. But the correction is valid for the future and does not reach the regime already formed: the regulatory framework of the workers strike has been general effective since 2007 and has not been revised based on the new statute.

At the legislative level, the statute confirms the temporal structure of 1991 and 2007: a deadline for the legislature and conditions for exercising the right while the norm has not been enacted. But it does something more precise that matters to the hypothesis. It regulates provisionality —the decision remains in force "until the implementing norm comes into being"— without fixing a maximum duration. It provides for review when circumstances change, but not periodic reconsideration, expiry, or any consequence when the deadline given to the legislature runs out. If the norm never comes into being, the clause "until the norm comes into being" becomes a clause with no deadline.

It is not argued that the 2016 legislator should have done something else, nor that he intended to institutionalize the permanence of gap-filling measures. The law gives legal form to the provisional solution and leaves what happens when it is no longer in practice provisional.

The legislative situation in September 2026 completes the framework. In 2025, the federal government announced its intention to forward to Congress a proposal for strike regulation and collective bargaining in public service.[33] The project referred, PL 1.893/2026, of the Executive Branch, has as its object the negotiation of labor relations in the public sector and the trade union representation; it does not regulate the right of strike of art. 37, VII, absence that specialized literature has already registered. On September 28, 2026, the draft awaited deliberation of the Plenary of the House of Deputies under urgent procedure.[34] The provisional bridge, erected in 2007 with a period of sixty days for the final work, completes nineteen years without the work having begun.

[33] CONDSEF, Governo Lula quer regulamentar greves no serviço público ainda em 2025 (7 abr. 2025).

[34] BRAZIL, Chamber of Deputies, PL 1.893/2026, process form, consulted on 28 Sep. 2026; original text of the project on the portal of the Presidency of the Republic. About the absence of strike regulation in the project, see the comment published in Consultor Jurídico in 14 Jul. 2026.

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§ 8 — What the case shows and what it does not show

8.1 Where the decisive transition lies

The initial question — at which point the answer to omission ceases to be the protection of a right and becomes something else — now admits a limited answer to the case.

It's not in 1994, when the Court just declared the legislative default. It is not, strictly speaking, in 2007, if the criterion is the creativity of the gap-filling measure act: the 2007 decision is almost entirely rebuilt from the borrowed law, with adaptations, and its temporal structure — a deadline plus a conditional solution — has existed since 1991. Nor is it in the creation of rules without source, that the test of § 6 proved to be punctual.

The passage is in duration. This is the minimum thesis, and the case sustains it safely: a regulatory framework adopted to remain in force as long as the omission persisted became, by the permanence of the omission, the infrastructure on which the Court began to resolve the following issues of the field — competence, discount, exclusion of categories, mediation — and by which it began to read the original decision itself (§ 6.4). The Court extended, adapted and applied this regulatory framework both to guarantee and to restrict the right.

The strong thesis — that the infrastructure has acquired partially self-referential capacity — has narrower but precise support. It rests on a rule whose very reasoning brings it back to the 2007 gap-filling measure (Theme 544), on another rule with a composite justification (Rcl 6.568) and, by another route, on the 2020 re-reading. The thesis is existential, not quantitative: it states that the regime has acquired the ability to produce solutions whose immediate authority goes back to its own previous rules, and not that it has become the predominant source of field decisions. For the first statement, an unequivocal case suffices; for the second one, the material is not enough, and it is not done.

The distinction between the two theses has a consequence. If all the rules after 2007 were reconstructable from the borrowed law or the Constitution, the strong thesis would fall, but the minimum would still stand, because what characterizes it is not the origin of each rule, but the fact that the Court has become the continued administrator of a regulatory framework whose stated termination condition never occurred.

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8.2 The response to Dixon

The theory of responsive jurisdiction justifies judicial intervention against legislative inertia as a way to return the issue to the political process with an incentive to act. The case examined does not refute that justification. It shows, however, that it depends on a temporal premise that the theory does not need to explain when the intervention works: that the judicial solution will be replaced. When it is not, intervention is no longer a stage of dialogue and becomes the regime. The theory can answer that the problem of the case lies in the calibration of the remedy — the general effectiveness of 2007, rather than weaker and dialogical solutions —, and the option of Law 13.300/2016 for the effectiveness between the parties as a rule points in this direction. The answer is plausible, but it does not eliminate the question: also a weak remedy, if the condition of its provisionality does not come true, it will have to last.

Italian evolution offers an instructive parallel. There, the persistence of legislative inertia led the Constitutional Court to relax the criterion of compulsory rhyme and admit only appropriate solutions.[35] Here, the persistence of inertia led the Court to decide subsequent questions of the regime from its previous decisions. In both cases, it is time — and not an isolated decision — that transforms the nature of the intervention. A theory of judicial intervention against legislative inertia needs, therefore, a theory of the term: what should happen to the provisional remedy when the condition on which its provisionality depends is not realized. This theory is not proposed here; the Brazilian case shows that it is necessary.

8.3 Competing explanations

None of the observations above excludes explanations of another nature, and three of them deserve examination.

The first is the change of composition of the Court. Justice Moreira Alves, who led the 1989 orientation, retired on 20 April 2003, and the 2007 composition was substantially different.[36] The explanation is plausible as to the causes of the turn of 2007, but not as to its form: the vote that justified it came from the rapporteur of the MI 20, who had been in the Court since before, and the structure of deadline and conditional solution had been developed in 1991, including by Moreira Alves himself.

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[35] MARTIRE (2020).

[36] The date is contained in the institutional biography of the Justice at the portal of the Supreme Court.

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The second is the context of strikes in 2007. If the decision was motivated, in part, by the need to subject employee strikes to rules, the subsequent restrictive sequence — discount, exclusion from public safety — would not be a deviation from gap-filling measure, but a development of one of its original purposes. The explanation is compatible with the hypothesis, and reinforces it: it shows that the power acquired in 2007 was, from the beginning, to regulate, and not just to guarantee.

The third is the policy of inertia. The Congress may not have legislated for reasons that have nothing to do with the Court — the political cost of regulating public servants' strikes, the resistance of organized categories, the preference of successive governments to negotiate on a case-by-case basis. These reasons are not examined, and it is not claimed that judicial regulatory framework has reduced the incentive to legislate.[37] It merely states that, whatever the cause of inertia, its duration had an effect on judicial regulatory framework: it transformed it from provisional bridge to road.

8.4 What would refute each thesis

The strong thesis would be refuted if no rule after 2007 had its immediate authority in the previous judicial system itself — that is, if each one were to rebuild entirely from the borrowed law, the Constitution or external material. The test did not produce this result, although it could have produced it: it would suffice that the rule of Theme 544 had independent foundation in art. 114 or in ADI 3.395. In Rcl 6.568, the presence of the regimen is only composed, as ADI 3.395 provides the main reason. In Theme 541, the driving vote grounds the prohibition in the Constitution, and mediation has source in the Civil Procedure Code; neither of the two rules passes to the category (c). In Theme 544, however, the dependence is unequivocal: the judgment itself supports the competence of the ordinary courts for the strike of the civil public servants in the application of the rule signed in MI 670.

This supports the existence of self-referentiality, not its extension. An unequivocal case shows that the scheme has acquired the ability to produce solutions whose immediate authority goes back to its own rules; it does not show that this has become the predominant source of subsequent decisions.

[37] The relationship between the form of the judicial remedy — term with costly consequence, or usable supplementary rule — and the subsequent legislative response is an independent comparative question, which would require a sample and its own causal design.

The minimum thesis would otherwise be refuted: if the regulatory framework of 2007 had been replaced — by law, by review of the Court itself or by disuse — or if later questions in the field had been decided outside of it. Nothing in the material examined indicates any such hypothesis, and the motions for clarification of 2020 indicate otherwise.

The study limit is sourced. The classifications are based on published judgment summaries, theses and votes, and the reading of other documents can adjust individual classifications; it cannot undo that of Theme 544, which is based on the self-description of the judgment summary itself.

Conclusion

In 1994, the Supreme Federal Court declared that the National Congress was in legislative default concerning the statute governing public servants' strikes. In 2007, it ordered that, until that statute was enacted, the private-sector strike statutes should apply to public servants, and gave Congress sixty days to legislate. In 2009, 2016, and 2017, it decided which courts have jurisdiction over public servants' strikes, whether pay is deducted for days on strike, which public servants may not strike, and when public authorities must participate in mediation. In 2016, Congress gave statutory form to the technique of provisional gap-filling, without fixing its endpoint. In 2020, the Court reread the 2007 gap-filling measure in light of its own subsequent decisions. In September 2026, the statute governing public servants' strikes still does not exist.

The test applied to the rules of the regime showed that the Court created little without identifiable source support: most of the rules are reconstructed from the borrowed law, the Constitution or other law. None could be demonstrated, with the material available, as a strictly mandatory solution. One of them is re-introduced by the decision itself to a rule which the Court had created in the 2007 gap-filling measure, another one with a reinforcement in previous decisions, and in 2020 the original decision was re-read in the light of the decisions that formed on it. The novelty of the case is less in the absence of sources than in their genealogy.

The decisive transition in the case examined —and this is the thesis that the case firmly supports— lies neither in the initial gap-filling act nor in the creative freedom of subsequent decisions, but in the institutional duration of a solution born with an expiry condition dependent on legislative action that never arrived. The provisional regulatory framework did not become a regime at an identifiable moment. It stabilized, decision after decision, while the condition for its termination remained unfulfilled.

None of this requires supposing that the Court wanted to administer the public servants' strike indefinitely, or that Congress had stopped legislating because of it. The result is more modest: that a judicial remedy conceived as provisional, when the condition of its provisionality does not come true, transforms the role of those who have granted it. The Court which in 2007 filled a legislative gap to guarantee a right became, in time, the regulator of the field — and exercised that role in both directions.

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