Translated from Portuguese to English - www.onlinedoctranslator.com

RCMOS –Multidisciplinary Scientific Journal O Saber -*Multidisciplinary Scientific Journal Know*
ISSN: 2675-9128. Sao Paulo-SP.

The unconstitutionality of the provisional execution of the sentence for conviction in the first instance held by the jury court

The unconstitutionality of the provisional execution of the penalty for conviction in the first instance executed by the jury court

Tiago Alves Teixeira[1]
Rita Carneiro[two]

Submitted on: 11/18/2022
Approved on: 11/19/2022
Published on: 11/19/2022 DOI
10.51473/rcmos.v2i2.417

SUMMARY
This article aims to demonstrate the unconstitutionality of the rule contained in the second part of art. 492, I, “e”, of Law No. 13,964/2019, which establishes provisional execution of the sentence after the sentencing decision in the Jury Court for sentences equal to or greater than 15 (fifteen) years of imprisonment. The problem revolves around the violation of fundamental rights and guarantees established in the Magna Carta and the international treaties to which Brazil is a signatory, as well as the legal uncertainty promoted by the change in understanding on the subject by the Supreme Court. The research was developed in an exploratory modality, with bibliographic and jurisprudential research. In the end, we seek to verify which measures can be adopted to solve the problem of unconstitutionality in the norm in question.
Key words: Provisional execution of the sentence. Jury court. Unconstitutionality. Principle of Presumption of Innocence. Art. 492, I, “e”, of the Anti-Crime Package.

ABSTRACT
This article aims to demonstrate the unconstitutionality of the rule contained in the second part of art. 492, I, “e”, of Law No. 13,964/2019, in which the provisional execution of the sentence is signed after the conviction in the Jury Court for sentences equal to or greater than 15 (fifteen) years of imprisonment. The problem revolves around the violation of fundamental rights and guarantees established in the Magna Carta and the international treaties to which Brazil is a signatory, as well as the legal uncertainty promoted by the change in the understanding on the subject by the Supreme Court. The research was developed in an exploratory mode, with a bibliographic and jurisprudential survey. In the end, we seek to verify what measures can be adopted to solve the problem of unconstitutionality in the norm in question.
Keywords: Provisional execution of sentence. Jury court. Unconstitutionality. Principle of the presumption of innocence. Art. 492, I, “e”, of the Anti-Crime Package.

1. INTRODUCTION

With the entry into force of Law No. 13,964/2019, better known as the “Anti-Crime Package”, many debates arose around some provisions contained in the infra-constitutional rule. One of these provisions, which sparked debates among legal professionals, scholars and academia, concerns the unconstitutionality of the provisional execution of the sentence by the Jury Court, provided for in the second part of art. 492, item I, paragraph “e”, of the aforementioned law, according to which the accused sentenced to a sentence equal to or greater than 15 (fifteen) years of imprisonment by the Plenary Jury, must be sent to prison.

For this reason, the objective of the present study is to demonstrate that the device contravenes the principle of presumption of innocence adopted by the Magna Carta, since the provisional execution of the sentence automatically by the Jury Court, in the first instance, due to sentence handed down will deprive the accused of his right to freedom even before the sentence becomes final.

Once the proposed hypothesis of the rule's unconstitutionality is confirmed, the aim is to verify which measures can be adopted to remedy the problem.

To achieve the proposed objective, this theoretical foray will be guided by the exploratory method, with a bibliographical survey that will direct a critical-reflexive approach. A search and analysis of current judgments on the topic will also be undertaken.

1 Postgraduate student in Criminal Law and Applied Criminal Procedure at the Brazilian Law School (EBRADI). Graduated in Legal and Notary Services from Unopar. Graduating in Law from FASAVIC. Email: ttiagoadv@gmail.com two
Master's student in Education at the State University of Southwest Bahia (UESB). Specialization in Contemporary Public Law from the Faculty of Technology and Sciences of Vitória da Conquista. Specialization in Criminal Sciences from the University of Amazônia. Graduated in Law from UESB. Professor at Faculdade Santo Agostinho de Vitória da Conquista (FASAVIC). Professor at Faculdade Independente do Nordeste (FAINOR). Professor at the Faculty of Technology and Sciences of Vitória da Conquista (FTC).

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.

From this perspective, this article proposes to identify and analyze the constitutional principles that are relevant to the topic. Afterwards, the jurisprudence established by the Federal Supreme Court regarding the provisional execution of the sentence will be presented. Finally, Extraordinary Appeal no.**1,235,340/SC**and Direct Unconstitutionality Actions that deal with the unconstitutionality of the provisional execution of the sentence when the accused is sentenced to a sentence equal to or greater than 15 years of imprisonment by the Jury Court.

2. METHODOLOGY

According to Antônio Carlos Gil (2017, p.27), exploratory research "aims to provide greater familiarity with the problem" and seeks to analyze facts or phenomena studied.

In this type of methodology, data collection can occur mainly through bibliographical research. In this way, the present study was based on doctrine, which provided the expansion of knowledge

2.1 Type of search

This research was approached qualitatively, considering that the primary objective was to understand the social and legal impact caused by the unconstitutional norm, considering that the matter is of great importance both for the social order and for legal security.

3. RELATED CONSTITUTIONAL PRINCIPLES

The Federal Constitution (CF) of 1988 was drawn up on principles that govern the entire society, whether in the public or private sphere, in civil or criminal relations, in common acts carried out by civilians or in procedural acts carried out by people invested with powers. by the State.

Within CF/88 there are principles that are set out explicitly or implicitly. The proposal is to analyze the constitutional principles that are most relevant to the object of this study, such as the principle of presumption of innocence and the principle of supremacy of verdicts, both present in CF/88 explicitly, in Title II, which deals with fundamental rights and guarantees.

3.1 Principle of Presumption of Innocence

The principle of presumption of innocence or non-guilt is guaranteed in art. 5th, LVII, of CRFB/88: "*no one will be considered guilty until the final criminal sentence is reached*", which arises from a greater principle, namely the Dignity of the Human Person.

The principle of presumption of innocence is enshrined in the Declaration of Human Rights, of the United Nations (UN), of 1948, with Brazilian vote, in its art. 11, §1º, according to which "every person accused of a crime has the right to be presumed innocent, until their guilt is proven, in accordance with the law and in a public process in which all necessary guarantees for their defense are ensured." "

The presumption of innocence is also provided for in the text of the American Convention on Human Rights (Pact of São José da Costa Rica) of 1969, of which Brazil is a signatory, which provides, in its article 8, on Judicial Guarantees, topic 2 , what*"Every person accused of a crime has the right to be presumed innocent until their guilt is legally proven."*

According to art. 1st, III, of CF/88, the Democratic Rule of Law is based on the Dignity of the Human Person. Therefore, the suppression of individual freedom before all resources have been exhausted directly offends the Constitution.

In §1 and 2 of art. 5th, of the Brazilian Constitution, it is established that the norms defining fundamental rights and guarantees have immediate application and that the rights and guarantees provided for in the Constitution do not exclude others arising from the regime and principles of international treaties to which it is part, that is, the CF/ 88 gave strength to the international principles to which it is a signatory.

Note that the supreme norm expressly adopted principles and also established that, in addition to the principles adopted in the constitutional text, it will not exclude other principles present in international treaties such as the American Convention on Human Rights, as it is a signatory.

Therefore, it appears that the Brazilian State is doubly committed to the principle of presumption of innocence, which gives the defendant the right to appeal up to the last degree of jurisdiction while free, as already demonstrated.

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.

It is worth noting that art. 60, § 4º, IV, of CF/88, the proposed amendment aimed at abolish individual rights and guarantees. Therefore, this is a permanent clause. It cannot be modified to reduce the fundamental rights and guarantees of citizens, only to expand them.

According to lectureMoraes (2021, p. 351), based on the principle of presumption of innocence, no one should be arrested before appeals have been exhausted and the sentence becomes final, allowing them to respond freely.

Still according to Moraes (2021, p. 265),It isIt is necessary for the State to prove the individual's guilt and, in doing so, the defendant will be able to pursue his acquittal until the appeals are exhausted. It can be inferred, therefore, that until the sentence becomes final, the execution of the conviction should not begin.

Based on the vote of Minister Gilmar Mendes in Extraordinary Appeal No. 1,235,340/SC, the principle of innocence is embodied in a constitutional barrier against state violence. It can be said, therefore, that the presumption of innocence is an instrument of defense for citizens against the arbitrary acts of representatives of power.

The constitutional norm expressly adopted the principle of presumption of innocence. Thus, the accused who has a conviction handed down against him may appeal to the higher court, until the appeals are exhausted.

Furthermore, the defendant may appeal freely, considering that, according to the principle of innocence, the accused can only be considered guilty after the conviction has become final and unappealable.

Therefore, when it comes to the application of art. 492, I, "e", of the Anti-Crime Package, there is an offense against rights enshrined both at the national level, by the Magna Carta, and in international relations, through Treaties to which Brazil is a signatory, since it does not have the principle of presumption of innocence was respected, with a view to establishing the provisional beginning of the execution of the sentence, applying its immediate effects.

The consequence of this is the irreparability of the consequences to which the State subjects the accused. According to Vinícius Gomes Vasconcellos (2019, p. 142),

> It remains clear that the review of the conviction must be carried out at a time prior to the release of its effects and the action of state punitive power. As it is a deeply serious and irreparable measure, the imposition of a criminal sanction must be verified through the appeal court before its execution begins. This is an essential measure for the effective realization of the right to defense and the protection of the presumption of innocence. (VASCONCELLOS, 2019, p. 142).

Considering this, the unconstitutionality of the infra-constitutional device in question is evident and its application is the consummation of the setback, and must be removed from the legal system.

3.2 Principle of Sovereignty of Verdicts

For some scholars, the principle of sovereignty of verdicts is absolute and that the principle of presumption of innocence, when it comes to provisional execution of the sentence by the Jury Court, must be relativized. But it is necessary to understand this principle first.

The principle of sovereignty of verdicts is established in art. 5th, item XXXVIII, item 'c', of CF/88: "the institution of the jury is recognized, with the organization that gives it the law, ensuring: [...] c) the sovereignty of the verdicts". It would be the prevalence of the decisions made by the Jury.

According to Cezar Roberto Bitencourt (2021, p. 405), "The sovereignty of the Jury Court's verdicts does not make them immune to submission to the principle of double degree of jurisdiction, including regarding the examination of merit [...]" .

According to Walfredo Cunha Campos (2015, p. 10),

> Sovereignty of verdicts, in turn, is the prohibition of the presiding judge from issuing a sentence that contrary to what the jurors decided. In other words [...] the sovereignty of the verdicts is addressed to the presiding judge, who is prohibited from contradicting the decision of the jurors, sentencing in a different way to that decided by them. (CUNHA, 2015, p.10).

In this vein, José Frederico Marques*apud*Walfredo Cunha Campos (2015, p.10), states that:

> the term sovereignty should not have its meaning sought in vague dictionaries or philosophical clarifications of Constitutional Law, but rather in its technical-procedural meaning, that is, the impossibility of a court being ruled to replace or alter a popular verdict on the merits. (MARKS*apud* CAMPOS, 2015, p.10).

It is in this sense that the Minister Ricardo Lewandowski, stated in HC 163.814/MG that the term sovereignty must be better defined, considering that it has no relation to the term sovereignty present in

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.

art. 1st of CF/88. It is understandable, as it would make no sense to not re-examine a sentence handed down by a Court.

In the terms established by Minister Celso de Mello in HC 174.759:

> It is not appropriate to invoke the sovereignty of the verdict of the Sentencing Council, to justify the possibility of early (or provisional) execution of an unappealable criminal conviction issued by the Jury Court, as the meaning of the constitutional clause inherent in the sovereign pronouncement of the jurors (CF, art. .5 **th**, XXXVIII, "c") does not transform it into an intangible decision-making manifestation, even though it is permissible, in such a case, to file an appeal, as is clear from the rule inscribed in art. 593, III, "d", of the CPP. (STF. HC 174759

Therefore, the allegation of the Public Ministry of Santa Catarina in the RE does not deserve to be prospered. 1,235,340/SC that the sovereignty of the verdicts legitimizes the immediate execution of the conviction by the Jury Court. In fact, the principle of sovereignty of verdicts is contained in the title that deals with fundamental rights and guarantees, and must be interpreted for the benefit of the citizen and not against him.

As the indoctrinator Lênio Luiz Streck (2020) states,

> the aforementioned sovereignty of verdicts is a guarantee of the defendant and not something that can be invoked against him. After all, the Jury Court itself exists to provide greater protection to the accused, so much so that it is provided for in article 5, which lists the individual rights and guarantees of every citizen. If the sovereignty of the Jury is a fundamental right (yes, the Jury is provided as a guarantee), how can this constitutional guarantee be turned (or used) against the defendant? Sovereignty, at most, can mean what was stated in the very recent vote of Minister Celso de Mello, who decided, in RHC 117.076/PR, that there is no appeal to the Public Prosecutor's Office, based on an alleged conflict between the acquittal deliberation and the evidence in the case. . Sovereignty is in this sense. And not in the sense that the Jury's decision exhausts the evidentiary discussion against the defendant. (STRECK, 2020).

That said, it is possible to state that the principle of sovereignty of verdicts is also a tool for limiting state punitive power, with the accused being guaranteed the right to be judged by their peers, and must be interpreted in favor of the accused and in accordance with the Constitution and not to its detriment.

4. JURISPRUDENCE ON THE (IM)POSSIBILITY OF PROVISIONAL EXECUTION OF THE PENALTY

Based on the teachings of Teresa Arruda Alvim Wambier and Bruno Dantas (2016 p. 279), the stability of judicial decisions is essential for the good performance of judicial activity, that is, a healthy system needs legal security, as can be seen in the passage transcribed below:

> **It is desirable that the same judge does not change his opinion; that the lower courts maintain firm and stable jurisprudence; but it is, above all, not only desirable, but also essential for the proper functioning of the system, that the Superior Courts do not frequently change their positions. After all, the law cannot be confused with the succession of different 'opinions' from different Superior Court judges. The jurisprudence established must be that of the court, and not of each minister, individually considered. (**WAMBIER; DANTAS, 2016, p. 279)

It turns out that the question about provisional execution made the jurisdiction take the painful route several times when it was submitted to the Federal Supreme Court (STF) with regard to imprisonment in the second instance. This is because, contrary to the constitutional text or any international treaty to which Brazil is a signatory, the STF sometimes decided on the provisional execution of the sentence, sometimes deciding on the impossibility of arrest in the second instance.

In this vein, Minister Marco Aurélio states, in the judgment of HC 126.292, which took place on February 17, 2016: "Yesterday, the Supreme Court said that there could be no provisional execution, at stake, the freedom to come and go. Considered the same constitutional text, today it concludes in a diametrically opposite way." Corroborating the words of the learned Minister, table 1 clearly demonstrates the STF's change in understanding regarding the provisional execution of the sentence.

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.

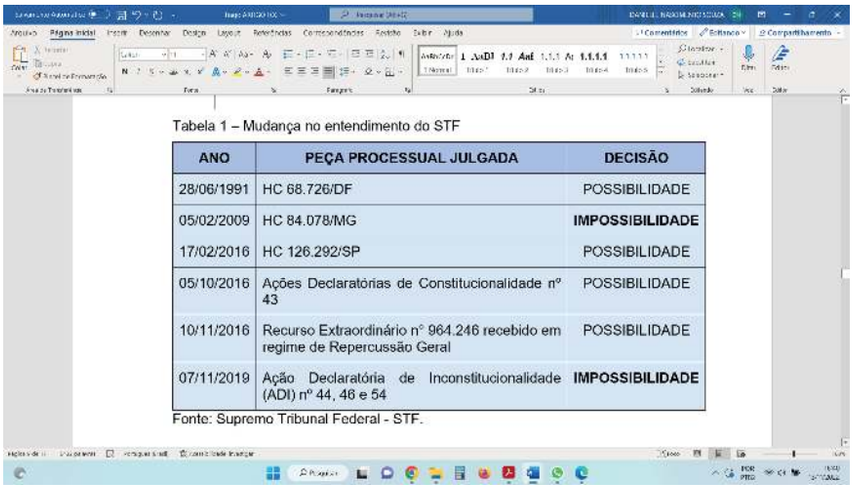

Tabela 1 – Mudança no entendimento do STF

ANO	PEÇA PROCESSUAL JULGADA	DECISÃO
28/06/1991	HC 68.726/DF	POSSIBILIDADE
05/02/2009	HC 84.078/MG	**IMPOSSIBILIDADE**
17/02/2016	HC 126.292/SP	POSSIBILIDADE
05/10/2016	Ações Declaratórias de Constitucionalidade nº 43	POSSIBILIDADE
10/11/2016	Recurso Extraordinário nº 964.246 recebido em regime de Repercussão Geral	POSSIBILIDADE
07/11/2019	Ação Declaratória de Inconstitucionalidade (ADI) nº 44, 46 e 54	**IMPOSSIBILIDADE**

Fonte: Supremo Tribunal Federal - STF.

In the words of the indoctrinator, Cezar Roberto Bitencourt (2021, p. 36), "This stance [...] creates enormous legal insecurity, attacks common sense, hurts democratic and republican feelings and generates unsustainable legal insecurity in the Brazilian community."

For Bitencourt (2022, p.34), the decision in HC 84,078, by seven votes to four, that an accused can only be arrested after a final and unappealable conviction, converges with the Democratic Rule of Law by guaranteeing the exercise of the right to the presumption of innocence present in art. 5th, LVII, of the Federal Constitution.

5. AMENDMENT OF THE CPP BY ART. 492, I, "E", OF THE ANTI-CRIME PACKAGE

In contradiction to ADI judgment No. 54, the following month, Law No. 13,964/2019 came into force, which authorizes the provisional execution of the sentencing sentence, only this time, by the Jury Court, that is, in the 1st instance , contradicting not only CF/88, but also Supreme Court precedent, as can be seen below:

> Art. 492. The president will then issue a sentence that: I –
> In the case of conviction:
> [...]
> e) [...] in the case of conviction to a sentence equal to or greater than 15 (fifteen) years of imprisonment, it will determine the provisional execution of the sentences, with the issuance of the arrest warrant, if applicable, without prejudice to the knowledge of appeals that may be filed. (BRAZIL, 2019, Art. 492, I, E).

The scholar Paulo Bonavides (2004, p. 297) maintains that:

> The legislative body, when deriving its competence from the Constitution, cannot obviously introduce into the legal system laws that are contrary to constitutional provisions: these laws would be considered null, inapplicable, without validity, inconsistent with the established legal order. (BONAVIDES, 2004, p. 297).

In this episode, Aury Lopes Jr.*et al*(2021, p. 33), paragraph "e" of art. 492 of the Anti-Crime Package was a mistake by the legislator, thus contributing to the idea defended in this research. For him, this is a problematic point as it violates the constitutionally guaranteed presumption of innocence.

The scholar in question also points to the judicial precedent existing in ADC nº 54, since "if the STF has already recognized that early execution after a second degree decision is unconstitutional, with much more reason it is unconstitutional that early execution after a first degree decision ". (LOPES JR. *et al*, 2021, p. 33).

In this vein, the learned Cezar Roberto Bitencourt (2021, p. 35) refers to the text of art. 492, I, e, of the Anti-Crime Package as unfortunate and records his annoyance citing the teachings of one of the greatest specialists in Brazilian procedural law, Frederico Marques, "who recognized the need to "Sovereignty" should not be confused with "omnipotence" of the Jury Court's "verdicts". Following the same understanding of the learned Aury Lopes Jr., Bitencourt (2021, p.36), mentions the judgment of ADCs 43, 44 and 54 that denied the arrest after confirmation of the conviction in the second instance.

For José Roberto Machado,*apud***Cézar Roberto Bitencourt (2021, p. 406):**

> Issues relating to human rights must be analyzed from the perspective of recognition and consolidation of rights, so that once a certain right is recognized as fundamental in the internal order, or, in its global dimension in international society, the consolidation phase begins. From then on, there is no longer any way for the State to regress or retreat in the face of recognized fundamental rights, the process is to add new so-called fundamental or human rights. (BITENCORT, 2021, P. 406).

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.

Furthermore, one of the characteristics of fundamental rights is universality, which is why the Charter Policy cannot exclude a group of people from its ownership. In this wake, art. 492, I, "e", second part, excludes from the right to presumption of innocence anyone who is sentenced to a sentence exceeding 15 years of imprisonment.

6. CURRENT JUDGMENT ON THE PROVISIONAL EXECUTION OF THE PENALTY BY THE JURY COURT IN EXTRAORDINARY APPEAL No. 1,235,340/SC

RE No. 1,235,340/SC was filed by the Public Prosecutor's Office of the State of Santa Catarina (MP/SC) against the ruling handed down by the Sixth Panel of the Superior Court of Justice (STJ), which denied the procedural appeal in the Appeal in question.*Habeas Corpus*(RHC) nº 111.960/SC and maintained the freedom of the accused on the grounds that the provisional execution of the conviction handed down by the Jury Court makes the arrest illegal.

The RE was fined on 9/20/2019, with Topic 1068 - Constitutionality of the immediate execution of a sentence applied by the Jury Court. This is an appeal admitted as representing a controversy of general repercussion, since, according to the MP/SC, it is a matter of legal relevance, which would justify "its assessment to standardize the understanding that the principle of sovereignty of verdicts legitimizes the immediate execution of the conviction by the Jury".

Minister Barroso opened his eyes to the Attorney General's Office (PGR) and in the act requested maximum urgency due to the trials of ADCs 43, 44 and 54 (which have already been judged, according to the chronology available in table 1), having, Deputy Attorney General of the Republic, Dr. José Bonifácio Borges de Andrade, on November 18, 2019, opined in his opinion in favor of granting the appeal, according to which "the constitutionally guaranteed sovereignty of the verdicts gives the decisions of the Jury Court a special and specific character of material intangibility, which allows for differentiated jurisprudential treatment."

Furthermore, according to the Deputy Prosecutor,

> 16. The decisions of the Jury Court do not have the precariousness characteristic of appealable decisions given by a single court at the first level of jurisdiction. They are qualified by the fact that they emanate from a collegiate body and that they are constitutionally guaranteed sovereignty. (RE n. 1.235.340/SC, Rapporteur Minister Roberto Barroso. PGR Opinion. Published on 09/18/2019).

In his words, "the principle of presumption of innocence must yield to the effectiveness of the criminal system, when faced with the delivery of a sentencing decision by a collegiate body". Therefore, the principle of presumption of innocence should be put into perspective and the execution of the conviction issued by the Jury should begin immediately.

Maximum*bow*to those who share the opposite view, even though it is a collegiate body, it still remains the first instance. In this regard, Minister Ricardo Lewandowski, in the ruling of HC 163.814/MG, handed down on November 19, 2019, states that:

> [...] to date, the prevailing idea is that the Jury Court is a court of first instance, improperly called a Court. This expression "sovereignty" is also not the same expression contained in art. 1st of our Constitution as one of the foundations of the Republic. I mean, these are concepts that need to be better worked on, it is not a*summa potestas*, in the even historical sense of the formation of this expression "sovereignty". (HC 163814/MG, Rapporteur Min. Gilmar Mendes. Published on DJE 08/17/2020)

The judgment of RE 1.235.340/SC has not yet been concluded, maintaining the STF's understanding, until the present moment, that the immediate execution of the sentence imposed by the Jury Court at the minimum level of 15 years of imprisonment is incompatible with the Greater Law. Therefore, it is not possible to immediately execute the decision given by the Jury Court that convicts the accused, even if this is equal to or greater than 15 years' imprisonment.

4 votes were cast in favor of the provisional execution of the sentence by the Jury Court and 3 votes against, according to publication of the decision on November 10, 2022 on the STF website.

Voted for the possibility of provisional execution of the sentence by the Jury Court: Ministers Roberto Barroso (Rapporteur), Minister Dias Toffoli, Minister Cármen**Lúcia, Minister Alexandre de Moraes, who dismissed the ordinary appeal in***habeas corpus*, establishing, for this purpose, the following judgment thesis: "The sovereignty of the Jury Court's verdicts authorizes the immediate execution of the conviction imposed by the panel of jurors, regardless of the total penalty imposed".

Minister Alexandre de Moraes (BRASIL, 2022) proposes the following thesis: "The arrest of a defendant convicted by decision of the Jury Court, even if subject to appeal, does not violate the constitutional principle of the presumption of innocence or non-culpability, in view of that the decisions he makes are sovereign."

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.

The dissenting vote belongs to Minister Gilmar Mendes, who maintains the ban on execution immediate penalty imposed by the Jury Court, based on the following thesis:

> The Federal Constitution, taking into account the presumption of innocence (art. 5, item LV), and the American Convention on Human Rights, due to the convicted person's right to appeal (art. 8.2.h), prohibit the immediate execution of convictions issued by a Jury Court, but the pre-trial detention of the convicted person may be decreed on a motivated basis, in accordance with art. 312 of the CPP, by the President Judge based on the facts and grounds established by the Jurors. (RE 1235340/SC. Rapporteur Min. Roberto Barroso. Published on 11/10/2022).

In the end, Minister Gilmar Mendes declares the unconstitutionality of the new wording determined by Law 13,964/2019 to art. 492, I, e, of the Criminal Procedure Code. His vote was accompanied by Minister Ricardo Lewandowski and Minister Rosa Weber. Minister André Mendonça, in turn, asked to see the files.

7. DIRECT ACTION OF UNCONSTITUTIONALITY (ADI)

The ADI is a constitutional remedy that can be applied to the case under study, whose jurisdiction to prosecute and judge lies with the STF. It is formally contained in the Constitutional text, in its art. 102:

> The Federal Supreme Court is primarily responsible for guarding the Constitution, and is responsible for: I - Processing and judging, originally:
> a) the direct action of unconstitutionality of a federal or state law or normative act and the declaratory action of constitutionality of a federal law or normative act. (BRAZIL, 1988, Art. 102).

In the year after the date of publication of Law No. 13,964, two Direct Unconstitutionality Actions were proposed. Both are meeting and awaiting judgment, namely: ADI no. 6735/DF, proposed by the Brazilian Association of Criminal Lawyers (ABRACRIM); eADI No. 6783/DF, proposed by the Federal Council of the Brazilian Bar Association.

Both ADIs, reported by Minister Luiz Fux, are awaiting judgment. In the opinion of the Attorney General's Office, attached to ADI nº 6783/DF, Dr. Augusto Aras, gave his opinion on the origin part of the request, to declare partial unconstitutionality, “solely to remove the limitation of fifteen years of imprisonment as a prerequisite for the possibility of immediate fulfillment of the custodial sentences imposed by the Jury Court.”

As RE 1,235,340/SC was received through the general repercussion procedure, the decision rendered in the appeal will be applicable to all other actions with an identical issue. Thus, the aforementioned ADIs would lose their purpose.

8. FINAL CONSIDERATIONS

Within the limits proposed by this research, it was confirmed that the legislator, in violation of the Constitution Federal Law of 1988, ended up creating an unconstitutional rule, promoting embarrassment to the exercise of the accused's right to be presumed innocent, treating him as a convicted defendant,**in the first instance**, before the final judgment of the sentence.

The principle of presumption of innocence reflects the Democratic Rule of Law. Denying this right to the accused is directly violating the Magna Carta. This guarantee is both provided for in internal regulations and in international treaties that were accepted by Brazil. It appears, therefore, that Brazil is doubly committed to the principle of presumption of innocence.

With regard to the principle of sovereignty of verdicts assured in the Political Charter,*bow*to those who share the opposite view, the most accurate understanding belongs to the scholars Cezar Roberto Bitencourt, José Frederico Marques,Walfredo Cunha Campos, Lênio Luiz Streck, as well as the juristMinister Celso de Mello, who argue that this principle should not be interpreted in the sense that the sentence handed down by the Jury Court exhausts the evidentiary discussion against the accused for the purpose of justifying the execution of the sentence before the final judgment of the sentence.

It was also observed that the Supreme Court is still divided on the matter, repeatedly changing the jurisprudence, causing unpredictability and, consequently, legal uncertainty for the jurisdiction. **AND**I need to highlight that one of the STF's powers is to guard the Constitution, with a focus on in art. 102, of CF/88. Therefore, if a right is provided for in the constitutional text, the STF has the duty to ensure that the exercise of the right is respected.

Therefore, Direct Unconstitutionality Actions nº 6735/DF and 6783/DF, which deal with the collision between art. 492, I, “e”, of the Anti-Crime Package and the Brazilian Constitution, must be judged to declare the unconstitutionality of the federal law, considering that the infra-constitutional norm does not overcome the scrutiny of the Federal Constitution.

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.

REFERENCES

BITENCOURT, Cezar R.***Criminal Law Treaty 1 - General Part.***São Paulo: Editora Saraiva, 2021, 26th edition. Available at: https://integrada.minhabiblioteca.com.br/#/books/9786555590333/. Accessed on: 13 Nov. 2022.

BITENCOURT, Cezar R.***Penal Reform from the Perspective of the Anti-Crime Law (Law No. 13,964/2019).***São Paulo: Editora Saraiva, 2021. Available at: https://integrada.minhabiblioteca.com.br/#/books/9786555591231/. Accessed on: 06 Jun. 2022.

BONAVIDES, Paulo.***Constitutional law course***. 15th Ed. São Paulo: Saraiva, 2004.

BRAZIL.***Constitution of the Federative Republic of Brazil of 1988.***Available at: http://www.planalto.gov.br/ccivil_03/constituicao/ConstituicaoCompilado.htm. Accessed on: 05 Jun. 2022.

BRAZIL.***Decree-Law No. 3,689, of October 3, 1941***. Code of Criminal Procedure. Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/Del3689Compilado.htm. Accessed on: 05 Jun. 2022.

BRAZIL.***Law No. 13,964, of December 24, 2019***. Improves criminal and criminal procedural legislation. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13964.htm#:~:text=Na%20hip%C3%B3tese%20de%20condena%C3%A7%C3%A3o%20por,com%20o%20your%20yield%20l%C3%ADcito. Accessed on: 05 Jun. 2022.

BRAZIL. Federal Court of Justice.***RE 1235340/SC Topic 1068 - Constitutionality of the immediate execution of a sentence imposed by the Jury Court.***General Repercussion in RE 1235340 in which it is discussed, in light of art. 5th, item XXXVIII, paragraph c, of the Federal Constitution, whether the sovereignty of the Jury Court's verdicts authorizes the immediate execution of the sentence imposed by the Sentencing Council. Appellant: Attorney General of the State of Santa Catarina. Respondent: JFS Rapporteur: Min. Roberto Barroso. Available at: https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso. asp?incident=5776893&numeroProcesso=1235340&classeProcesso=RE&numeroTema=1068. Accessed on 12 Nov. 2022.

BRAZIL. Federal Court of Justice.***Direct Unconstitutionality Action No. 6,783.***Administrative Law and other matters of Public Law. Constitutionality Control. Criminal Procedural Law. Penal execution. Provisional Criminal Execution. Fit. Available at: https://portal.stf.jus.br/processes/detalhe.asp?incidente=6145339. Accessed on: 13 Nov. 2022.

BRAZIL. Federal Court of Justice.***Habeas Corpus 163,814 Minas Gerais***. Petitioner: Flavio Henrique Unes Pereira and others. Defendant: rapporteur of HC nº 452.478 of the Superior Court of Justice. Reporter Min. Gilmar Mendes. Published on DJE 08/17/2020. Available at: https://portal.stf.jus.br/processos/downloadPeca.asp?id=15344022545&ext=.pdf. Accessed on 12 Nov. 2022.

BRAZIL. Federal Court of Justice.***Habeas Corpus 174,759 Ceará.***Petitioner: Oseas de Sousa Rodrigues Filho. Defendant: Rapporteur of HC nº 528.469 of the Superior Court of Justice Rapporteur: Min. Celso de Mello. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=5756267. Accessed on: 11 Nov. 2022.

BRAZIL. Federal Court of Justice.***General Repercussion: origins, innovations and their application to the Federal Supreme Court.***Brasília: DF, 2017. Available at: https://ead.stf.jus.br/. Accessed on 10 Nov. 2022.

CAMPOS, Walfredo Cunha.***Jury Court: Theory and Practice***. São Paulo: Atlas, 2015, 4th edition.

GIL, Antonio C.***How to design research projects.***São Paulo: Grupo GEN, 2022. Available at: https://integra.minhabiblioteca.com.br/#/books/9786559771653/. Accessed on: 05 Jun. 2022.

LOPES JR., Aury; PINHO, Ana Claudia Bastos D.; ROSA, Alexandre Morais.***Anti-Crime Package: one year later***. São Paulo: Editora Saraiva, 2021. Available at: https://integrada.minhabiblioteca.com.br/#/books/9788553618453/. Accessed on: 06 Jun. 2022.

MORAES, Alexandre D.***Fundamental human rights.***São Paulo: Grupo GEN, 2021. Available at: https://integrada.minhabiblioteca.com.br/#/books/9788597026825/. Accessed on: 05 Jun. 2022.

NUCCI, Guilherme de S.***Criminal Procedural Law Course***. São Paulo: Grupo GEN, 2021. Available at: https://integrada.minhabiblioteca.com.br/#/books/9788530993627/. Accessed on: 06 Jun. 2022.

STRECK, Lênio L.***Jury: can a simple "no" lead to the defendant's immediate arrest?***Available at: https://www.conjur.com.br/2020-jan-30/senso-incomum-juri-simples-nao-levar-imediata-prisao-reu. Accessed on: 13 Nov. 2022.

VASCONCELLOS, Vinicius G.***Right to appeal in criminal proceedings***.São Paulo: RT, 2019.

WAMBIER, Teresa Arruda Alvim; DANTAS, Bruno.***Special appeal, extraordinary appeal and the new role of superior courts in Brazilian law.***São Paulo: Revista dos Tribunais, 2016.

This is an article published in Open Access under the CreativeCommons Attribution license, which permits unrestricted use, distribution and reproduction in any medium, as long as the original work is correctly cited.