



*Permanent Mission of Brazil to the United Nations Office and other International
Organizations in Geneva
Chemin Louis Dunant 15 - 1202
Geneva -, Switzerland*

Geneva, 9 August, 2018

Dear Mr. Diego García-Sayan,

I refer to the joint communication AL BRA 6/2018, dated 7 June 2018, regarding the alleged persecution against Judge Hugo Cavalcanti Melo Filho by Brazilian judicial authorities. On behalf of the Brazilian Government, I attach the following comments.

Please accept the assurances of its highest consideration.


João Lucas Quental N. de Almeida
Minister-Counsellor

Permanent Mission of Brazil to the United Nations Office in Geneva

Diego García-Sayan

Special Rapporteur on the independence of judges and lawyers



FEDERATIVE REPUBLIC OF BRAZIL

RESPONSE TO COMMUNICATION

AL BRA 6/2018

With regard to the allegation letter sent by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayan, regarding the alleged persecution against Judge Hugo Cavalcanti Melo Filho by Brazilian judicial authorities (AL BRAS 6 2018), the Brazilian Government presents the following comments:

According to the letter, Melo Filho, judge of the 12th Labor Court in Recife and President of the Latin American Association of Labor Judges (ALJT, in Portuguese), has been subjected, since April 2018, to six disciplinary proceedings brought before the Regional Labor Court of Pernambuco, allegedly in connection to decisions and statements made by him regarding the reform of the Brazilian labor law and the proposal for pension reform in Brazil.

At the outset, it is important to clarify that according to the information of the Comptroller's Office of the Regional Labor Court of the 6th Region (Recife, Pernambuco) there are five disciplinary proceedings regarding the aforementioned judge - not six, as mentioned in the allegation letter. It is also important to highlight that these proceedings do not relate to the constitutional right of individuals to freely express his views on political or economic issues regarding the national scenario, including with regards to the reform in the Brazilian labor law. The procedures did not stem from persecution, but from the legal obligation of the Comptroller's Office to investigate facts which may constitute a breach of the duties of judges (Article 27, subsection V of the Rules of Procedures of the Labor Court and Resolution 135/2011 of the National Council of Justice). Not doing so could be deemed prevarication from the part of the Comptroller's Office's institutional duties.

Contrary to the allegations, the administrative proceedings adopted do not relate to the content of judicial decisions, nor deal exclusively with manifestations of the judge on the reform of the labor law and the proposal for pension reform in Brazil.

Summary of the disciplinary procedures:

- Request to start a disciplinary proceeding: originating from the facts ascertained in Disciplinary Complaint No. 1000005-85.2018.5.06.0000, filed on 14/03/2018. Formalization of the proposal: 14/05/2018. Conduct that led to measure: comments in a virtual environment for members of the Association of Labor Justice Judges of the 6th Region (AMATRA6), members of the Comptroller's Office and members of the Regional Labor Court, which may constitute noncompliance with the obligations of politeness and urbanity (use of offensive or inappropriate language). Allegedly violated article(s): articles 35, IV, and 36, III, of the Organic Law of the National Judiciary (Supplementary Law no. 35, of 14 March 1979); and Articles 1 and 22 of the Code of Ethics of Judges. Procedural stage: decision of the plenary of the Regional Labor Court

of the 6th Region, on 22/05/2018, to establish an administrative disciplinary proceeding to ascertain the alleged violation of the aforementioned articles. The procedure is awaiting a decision on the review requested by the judge on 12/06/2018.

- Request to start a disciplinary proceeding: originating from the facts ascertained in the Request nº 1000080-61.2017.5.06.0000, filed 05/05/2017. Formalization of the proposal: 22/06/2017. Conduct that led to the measure: Decision of 27/04/2017, which may contain offensive and disrespectful language related to the President of the Superior Council of the Labor Justice (CSJT, in its Portuguese acronym), as well as recommendation to the staff of the unit contrary to guidelines of the Presidency of the Court and the President of the CSJT. Allegedly violated article(s): articles 35, IV and VII, and 36, III Organic Law of the National Judiciary (LOMAN, in its Portuguese acronym), and 1st, 7th and 22nd (caput and paragraph) of the Code of Ethics of the Judges. Procedural stage: awaiting return of the case-file, after the granting of time for the judge to examine documents attached to the case after the formalization of the request to the plenary of the Court (Regional Labor Court of the 6th Region). The investigation was filed in May 2017. The continuation of the proceeding has been made possible after the return of the case-file to the Comptroller's Office on 26/04/2018 (the President of the 6th Regional Labor Court had sent it on 15/08/2017 to the National Council of Justice).

- Request to start a disciplinary proceeding: originating from the facts ascertained in Disciplinary Complaint No. 1000094-45.2017.5.06.0000, filed on 27/06/2017. Conduct that led to measure: alleged lack of politeness and urbanity (use of offensive or inappropriate language) towards the regional Comptroller and the Labor Court in a statement sent by the judge by email, on 22/06/2017, after learning of the refusal of his request for a leave to appear before the Parliamentary Commission of Inquiry (CPI) in Brasília, on 29/06/2017. Allegedly violated article(s): Article 35, IV, and 36, III, of LOMAN, and 1st and 22nd of the Code of Ethics of the Judiciary. Procedural stage: decision of the Comptroller's Office, on 22/05/ 2018, requesting the plenary of the Regional Labor Court to start an administrative disciplinary procedure. Awaiting the assessment of the petition of the defense, sent by e-mail on 26/07/2018, before formally submitting the request. The investigation was initiated in June 2017. The continuation of the proceeding was only made possible after the return of the case-file to the Comptroller's Office on 26/04/2018 (the President of the 6th Regional Labor Court had sent it on 15/08/2017 to the National Council of Justice).

- Request to start a disciplinary proceeding: originating from the facts ascertained in Disciplinary Complaint No. 1000098-82.2017.5.06.0000, assessed on 19/07/2017. Filing of the request: 19/06/2018. Conduct that led to

measure: representation filed by Court judge Maria do Socorro Silva Emerenciano on comments made by judge Hugo Cavalcanti, by e-mail at 17/07/2017, which may amount to derogatory and disrespectful treatment of the Court judge, as well as lack of politeness and of courtesy (use of offensive or inappropriate language) to the members of the Court. Allegedly violated article(s): articles 35, IV, 36, III, of LOMAN, and 1 and 22 of the Code of Ethics of the Judiciary. Procedural phase: awaiting decision of the plenary of the Regional Labor Court on the request to start a disciplinary proceeding. The investigation of the facts was filed in July 2017. The continuation of the procedure was made possible after the return of the case-file to the Comptroller's Office on 26/04/2018 (the President of the 6th Regional Labor Court had sent it on 15/08/2017 to the National Council of Justice).

- Disciplinary Complaint nº 10000013-62.2018.5.06.0000. Date of the filing: 23/05/2018. Conduct that led to measure: decision of 06/29/2017, which could amount to the "exercise of political party activity" in the views of the Court's Comptroller and of the Nacional Comptroller of Justice. Allegedly violated article(s): article 95 single paragraph, III, of the Federal Constitution and article 7 of the Code of Ethics of the Judiciary. Procedural phase: decision on 25/07/2018, to request to the plenary of the Regional Labor Court the start of an administrative disciplinary procedure. Proceeding is waiting the summons of the judge to present his defense.

As listed above, up to this date there are five proceedings in place to assess the conduct of Judge Hugo Cavalcanti Melo Filho, not six as informed in the letter of allegation. The document related to overdue judicial decisions has not been filed as a disciplinary complaint until this moment.

The Regional Comptroller's Office of the Regional Labor Court of the 6th region highlights that the due process of law was upheld in all the administrative proceedings, including the right to full defense and due process of law. It also informs that the National Council of Justice, after requesting and analyzing information about the proceedings against the judge, concluded that "there being no negligence, omission or any other irregularity, the local Comptroller's Office should prepare and adopt the measures it deems fit in relation to its organs". Therefore the National Council of Justice decided to send the case-file back to the Regional Comptroller's Office at the Regional Labor Court for the assessment of the conduct of the judge.

In one of the files, the National Comptroller of Justice mentioned that the behavior of the judge outlined in the file could possibly be considered as political party activism, given the content of the decision issued by him on June 29, 2017, in which he informs that he would join the general strike on June

2017. The decision to investigate his conduct resulted in the disciplinary complaint no. 1000013-62.2018.5.06.0000.

The Regional Comptroller's Office emphasizes that most of the requests filed by the judge at the administrative level, including from 2017, have been granted. The decision to revoke the partial leave of the judge to serve as President of the Latin American Association of Labor Judges cannot be deemed as persecution because it was taken in accordance with Brazilian law, based on the fact that the entity cannot be considered a professional association, as provided for in article 73, item III, of the Organic Law of the Judiciary, because of its international scope. This decision was then ratified by the National Council of Justice on May 3, 2017 (PCA 0004731-10.2016.2.00.0000), in the context of the administrative proceeding filed by the judge, as follows:

[START QUOTE]

ADMINISTRATIVE CONTROL PROCEEDING. ACT OF REGIONAL LABOR COURT OF THE 6th REGION (PE). DENIAL OF PAID LEAVE OF JUDGE. PRESIDENCY OF ENTITY NON-DEFINED AS "PROFESSIONAL ASSOCIATION", AS PROVIDED FOR IN ARTICLE 73, III, OF LOMAN. NEED FOR RESTRICTIVE INTERPRETATION. PREVALENCE OF PUBLIC INTEREST OVER PRIVATE INTERESTS OF THE ENTITY. ABSENCE OF ILLEGALITY IN THE ACT. REQUEST DISMISSED.

1. Rejection by the Regional Labor Court of the 6th Region (Pernambuco) of the request for paid leave of labor judge in order to preside over association because the entity does not fall within the definition of 'professional association', due to its nature. Decision contested by administrative control procedure.
2. The Organic Law of the National Judiciary (Loman) has a restrictive interpretation of the nature of associations that fall under the exception of subsection III of Article 73 for the purpose of granting paid leave to judges - interpretation which does not imply any restriction of constitutional rights of freedom of association.
3. In the administration of Justice, from the perspective of the effectiveness of judicial assistance, public interest must prevail over the private interest of the judge or of associative entities.
4. Administrative control proceeding ruled unfounded.

[END QUOTE]

The aforementioned administrative decision was also confirmed in judicial proceedings. The Federal Supreme Court (STF) rejected the writ of mandamus filed against the decision of the National Council of Justice which upheld the decision to deny paid leave to preside over associations (MS 35160). According to the Court there was no offense to an unquestionable right of the petitioner and it could not take cognizance of a writ of mandamus related to actions of other Courts. (Precedent 624). The Comptroller's Office informed that the Court also did not take cognizance of the habeas corpus filed for the same purpose (HC 145.445), because the case did not involve current damage or potential injury to the freedom of movement of the judge.

The Comptroller's Office states that there was no intervention of that unit or of the Regional Labor Court on the independence of the judges who work under its jurisdiction (6th region), therefore no violation of the Convention on Civil and Political Rights and of the United Nations Basic Principles on Independence of judges and lawyers. The measures taken in the proceedings were in line with international norms and standards of human rights.

The Ministry of Human Rights highlights that the National Comptroller's Office of Justice recently regulated the exercise of freedom of expression by judges ("Provimento" n. 71/2018), which upholds the right to freedom of expression to members of the judiciary, which differs from the political party activism forbidden by the Federal Constitution (Article 95, single paragraph, III, and article 7 of the Code of Ethics of the Judiciary).

The National Council of Justice pointed out that all administrative disciplinary proceedings against Judge Hugo Cavalcanti Melo Filho before the Regional Comptroller's Office of the 6th Region are strictly following the constitutional principles, in particular the due process of law and right of full defense. These proceedings aim at verifying whether the judge committed any disciplinary fault, in violation of the Organic Law of the National Judiciary (LOMAN) and the Code of Ethics of the Judiciary, to which the national judiciary submits itself. These legal instruments ensure the guarantees and the rights of judges in the exercise of their function, including the protection of the dignity and the independence judges.