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Evictions during the Pandemic

An Empirical Discussion from the Brazilian Law Perspective

Bianca Tavolari and Saylon A. Pereira

6.1 INTRODUCTION

On the morning of July 31, 2021, a demonstration in front of the US Capitol drew the attention of those passing through the city center. Unlike the events of January 6th of the same year, which further exposed the social divide of an already divided country, the August protest was small in number, peaceful, and silent. Faced with the impending congressional recess, Democratic Representative Cori Bush from Missouri, serving in her first term, decided she would not leave the demonstration until lawmakers voted to extend the eviction moratorium adopted in response to the COVID-19 pandemic. The decision to sleep in front of the building for five days in a folding chair, with her orange sleeping bag, was extreme.[1] But for Bush, the Congressional decision to go on a seven-week summer recess without discussing the suspension of evictions that was about to expire, and would therefore allow the immediate eviction of thousands of families who could not afford to pay their rent, was even more serious.[2] The *sit-in*, an activist tactic widely employed by the civil rights movement in the United States throughout the 1960s, gained supporters: at the beginning of August protesters joined the congresswoman in solidarity with the cause of preventing evictions. Congress left on recess without extending its moratorium. In response, on August 3rd, the Biden administration's Centers for Disease Control and Prevention (CDC) announced a 60-day extension of the eviction moratorium in light of the escalation of infections associated with the Delta variant.[3]

[1] N. Fandos, With Capitol Sit-In, Cori Bush Galvanized a Progressive Revolt over Evictions, *The New York Times*, August 4, 2021.

[2] V. Stracqualursi, House Democrat Sleeps on Capitol Steps as She Blasts Lawmakers over Expiring Eviction Moratorium, *CNN*, August 2, 2021.

[3] J. Eballos-Roig, Biden Administration Rolls Out 60-Day Targeted Eviction Ban Aimed at Protecting Millions of Renters from Losing Their Homes, *Insider*, August 3, 2021.

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The executive measure would soon be challenged by the US Supreme Court, putting an end to the federal eviction moratorium.[4]

In the United States, the eviction moratorium was created as an emergency measure in response to the pandemic. It was part of the CARES Act, a federal law passed by the US Congress on March 27, 2020.[5] Section 4024, titled *Temporary moratorium on eviction filings*, prevented landlords both from filing eviction actions to regain possession of rented properties and from collecting rent or even fines from tenants.[6] The measure was initially established for 120 days, with successive extensions by Congress, and was in effect until July 31, 2021. The initial response from the legislature was very different from the position expressed by then-President Donald Trump, who declared that landlords would "take it easy," suggesting that rental relationships did not need any course correction in the midst of the pandemic.[7]

Among the many impacts of the COVID-19 pandemic, the impact on housing was a central concern. While vaccines were not yet available, social isolation was a fundamental measure to prevent and reduce virus contamination. Staying at home became a matter of life or death. The necessary condition was, of course, to have a place to live. But not only that: it was necessary to ensure some security of permanence, that is, that housing would be a point of security and not instability while the health risks persisted. As a result, governments in several countries adopted emergency policies to prevent the worsening of the housing crisis, which meant, in many cases, changing the rules governing rental contracts, especially residential ones. The solutions found to avoid evictions and mitigate the housing impacts of the health crisis involved different legal and institutional arrangements, including suspension of landlords' ability to enforce their rights, creation of public funds to pay the rent of vulnerable people, adoption of rules permitting installment payments or requiring negotiation, and even combined measures.[8]

[4] The main basis of the decision by the US Supreme Court was the CDC's lack of authority to declare a nationwide eviction moratorium. See *Alabama Association of Realtors et al. v. Department of Health and Human Services et al.*, 141 S. Ct. 2485 (2021). Cori Bush, Alexandria Ocasio-Cortez, and ninety-two other lawmakers signed a manifesto against the Supreme Court's decision the following day, addressed to Nancy Pelosi, Speaker of the House, and Charles Schumer, then Majority Leader in Congress: A. Pressley et al., Eviction Moratorium Extension Letter, Congress of the United States, August 27, 2021. Local eviction moratoriums were not affected by the decision.

[5] For the processing of the Coronavirus Aid, Relief, and Economic Security Act, see Congress.Gov, S.3548 – CARES Act, www.congress.gov/bill/116th-congress/senate-bill/3548.

[6] For the specific text of section 4024, see Digital Library – National Consumer Law Center, Sec. 4024. Temporary Moratorium on Eviction Filings, https://library.nclc.org/sec-4024-temporary-moratorium-eviction-filings.

[7] For an analysis, see B. Tavolari, O Aluguel no Centro da Crise, *Novos Estudos*, May 13, 2020.

[8] For a comparison of policies adopted by OECD member countries during the pandemic, see The Organization for Economic Cooperation and Development, HC3.3. Evictions, OECD Affordable Housing Database, May 27, 2021.

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The United States was one of the first countries to approve legislative measures regarding rent. In a country where over 44 million households rented in 2020 – with historically underreported numbers for rental housing, as stated by the Census Bureau[9] – movements under the banner of "*cancel the rent*" began to form during the pandemic, demanding the incorporation of redistributive justice criteria and state intermediation in contracts between landlords and tenants.[10]

If in the United States the response from Congress was immediate and the Supreme Court only ruled against extension of the eviction moratorium in the middle of its second year and after Congress had allowed the moratorium to expire, the Brazilian case followed a similar script, but with completely inverted signs. In Brazil, even though the initial attempt to establish transition rules for rent came from the federal legislature, the first enforceable protective regulation would only be established on June 3, 2021, in the middle of the second year of the pandemic, through the interim decision of Justice Luís Roberto Barroso in the Action for Noncompliance with a Fundamental Precept (*Ação de Descumprimento de Preceito Fundamental*) 828 (or simply ADPF 828).

The inverted signals are both temporal and institutional. The protection against evictions in Brazil effectively begins when the eviction moratorium *ends* in the United States, which means that the Brazilian government did not adopt any transitional measure during the most critical period of the pandemic, when vaccines were not yet available. The timing of the decision-making process was also reversed: the urgent approval of the protective measure as a federal law in the United States contrasts with the inaction from the Brazilian legislature. In addition, the supreme courts of both countries had opposite roles: The US Supreme Court decided to end the moratorium while the Brazilian Supreme Court decided to initiate protective rules.

6.2 LEGAL HETERODOXY AND ORTHODOXY BETWEEN NORTH AND SOUTH

Heterodoxy is a relational concept. As Kevin Davis and Mariana Pargendler describe in Chapter 1, legal heterodoxy is employed to address a deviation from what has been conventionally adopted by countries of the Global North, in a very specific sense: deviations that incorporate distinct public policy objectives beyond economic efficiency into law, demonstrating a greater concern with distributive goals, taken

[9] For data from the 2020 US Census, see United States Census Bureau, 2020 Census Results,: www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-results.html. For systematized data on housing and rental, see National Multifamily Housing Council, Quick Facts: Resident Demographics, www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/.

[10] K. Y. Taylor, Cancel the Rent, *The New Yorker*, May 12, 2020; M. Brady et al., Why We (Still) Need to Cancel the Rent, Movement Policy Brief Series, *NYU Urban Democracy Lab*, June 24, 2020.

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forward not only in the legislative arena, but especially by courts. There is, therefore, a twofold dimension. First, the recognition by law of concern with inequalities – a *content* dimension – and, second, the fact that courts play a decisive role in this recognition – a *procedural* or *institutional* dimension. Due to its relational nature, determining legal heterodoxy implies an opposition to an established legal orthodoxy. The conceptual opposition is useful if understood not in purely descriptive or normative terms, but as an analytical tool.

When it comes specifically to contract law, legal orthodoxy may be characterized by a formal notion of equality between parties and by the argument that contracts should not be designed to address any kind of distributive goals.[11] The orthodox paradigm admits some leeway for the inclusion of social aims other than efficiency: if contract law is to have any role in combating economic inequalities, it should be explicitly designed by elected lawmakers rather than courts.[12] Thus, contract law orthodoxy has a two-dimensional character: formal equality and *pacta sunt servanda* as the main *content*, and a rejection of courts as the legitimate site for changing the rules that govern the contract as the main *institutional* claim. Conversely, heterodoxy is characterized by contract interpretation and adjudication guided by external public and collective values determined by courts.

Given these initial definitions, we interpret Brazil as a case of legal heterodoxy and the United States as a case of legal orthodoxy regarding protection from evictions during the pandemic. Both contract law and property law are at the center of the discussion on lease or rental contracts, as private agreements that govern the rules of use, access, and distribution to a bundle of rights linked to private property, specifically to ownership of real estate.[13]

In the case of Brazil, this legal heterodoxy may be explained by a set of decisive legal and political features. The Brazilian 1988 Constitution is characterized by its dirigisme, with a constitutional text deeply influenced by the constitutional movements of the nineteenth century – the extensive list of social rights and transformative objectives that bind the state, such as poverty eradication and reducing social and regional inequalities, are evocative of this point. The 1988 Constitution has also granted a central role to the Brazilian judiciary in the structure of the state apparatus, with an especially prominent role assigned to the Brazilian Supreme Court (*Supremo Tribunal Federal*). The Brazilian Supreme Court is, at the same time, a constitutional court, and a court of appeal. The comparative ease of access to courts

[11] See K. E. Davis and M. Pargendler, Contract Law and Inequality (2022) 107 *Iowa Law Review* 1485–41.

[12] See K. E. Davis and M. Pargendler, Contract Law Heterodoxy (2022) 4 *Revue Européenne du Droit* 92–97.

[13] For one of the main accounts of the bundle of property rights, see J. Waldron, What Is Private Property? (1985) 5 *Oxford Journal of Legal Studies* 313–49. For an analysis of how property and contract are decisive legal instruments to create and distribute wealth, see K. Pistor, *The Code of Capital: How Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2020).

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of law in general has transformed the Brazilian judiciary into a privileged arena for several legal political disputes.

Moreover, housing is a constitutional right in Brazil, as one of the social rights enshrined in Article 6. However, it was not a guaranteed social right in the constitution's original text of 1988. It was incorporated twelve years later, in 2000, by a constitutional amendment.[14] Nonetheless, the original constitutional text established the "social function" of property as a fundamental right with the same status as the right to private property and, even before that, since at least 1916 housing had been recognized on an infra-constitutional level by the Brazilian Civil Code. We have, therefore, the grounds for what we are calling legal heterodoxy: The Constitution recognizes housing as a social right and guarantees broad access to courts authorized to apply and enforce the right. The constitutional recognition is also a reference in cases that involve the enforcement of private agreements.[15]

This does not mean, however, that the right to housing is fully enforced in all private legal relations or that courts consistently and regularly apply the right to housing to compensate for or correct inequalities in housing.[16] As we will discuss further in Section 6.3, the Brazilian bill on the Emergency and Transitional Legal Regime for private law relations during the pandemic period was not at all protective of the right to housing in private agreements, indicating a mismatch between enshrined constitutional rights and specific protections discussed and established by the legislative chambers. But the fact that the right to housing is a constitutional social right changes the *legal grammar* of the discussion: it can be claimed as a legal argument in specific lawsuits, and its lack of recognition by the state may be legitimately criticized as a violation of a fundamental right. The right to housing is, therefore, a yardstick for immanent critique of legal reasoning, judicial decisions, legislative decision-making and measures adopted by the executive, in all three levels of the Brazilian federation, encompassing the Union, States, and municipalities.

This legal and institutional scenario deviates quite drastically from the one in the United States, where the right to housing is not guaranteed by the federal constitution, the country has not signed the International Covenant on Economic, Social, and Cultural Rights, and, as a consequence, there is relatively little scope for using

[14] Constitutional Amendment No. 26/2000. The amendment was originally proposed in 1998 (*Proposta de Emenda à Constituição* No. 601/1998). For an analysis of the changes in the legal protection of the right to housing in Brazil from 1992, when Brazil signed the International Covenant on Economic, Social and Cultural Rights, which includes the right to housing in an international human rights perspective, until 2004, after the constitutional amendment, see M. P. Morais et al., Monitorando o Direito à Moradia no Brasil (1992–2004) (2006) 12 *IPEA Políticas Sociais – Acompanhamento e Análise* 230–41.

[15] See V. A. Silva, *A Constitucionalização do Direito: Os Direitos Fundamentais nas Relações entre Particulares* (São Paulo: Malheiros, 2005).

[16] For a discussion of the Brazilian Housing Financial System and how courts systematically deny the right to housing in mortgage contracts, see M. Schapiro and S. Alves, Developmental State with Neoliberal Tools: A Portrait of the Brazilian Housing Financial System (2019) 12 *Law and Development Review* 457–93.

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the courts to protect shelter needs in private agreements.[17] As we will see, the United States is, in relation to Brazil, characterized as a case of legal orthodoxy since the protection against evictions during the pandemic was enacted by Congress. But, even if the legal and institutional conditions are so different as to establish the deviation, there are several similar aspects that bring both countries together when it comes to the pandemic. The United States and Brazil are on the top tier of the most populated countries and among the most severely hit by COVID-19 when it comes to death tolls.[18] Politically, both countries had presidents with autocratic tendencies who downplayed the impact of the virus, the importance of science and vaccines, and tried to delegitimize the recommendations of the World Health Organization. We have, therefore, legal, and institutional deviation, which makes the case for a legal heterodoxy/orthodoxy relational analysis.

By establishing an even stronger link between the right to housing and the right to life, the COVID-19 pandemic placed pressure on countries that previously did not incorporate rental housing into redistributive public policies to do so. Prior to the pandemic, both the United States and Brazil lacked substantive public policy arrangements that addressed rental relations in view of distributive objectives – with perhaps the exception of some municipal initiatives that establish housing units with rent control, such as in New York, or still-timid social rental housing policies for specific vulnerable groups, such as in São Paulo.

We aim to show that, unlike the United States, which prevented the filing of eviction actions through legislative means and, therefore, followed a path close to legal orthodoxy, the Brazilian case is a clear example of heterodoxy in establishing distributive and protective objectives for rental contracts through the judiciary after failing to adopt safeguarding conditions via legislation. In addition, although there is a tradition in Brazil of enforcing social rights through the Supreme Court,[19] cases related to the right to housing were still very concentrated on specific issues – such as the possibility of seizing a guarantor's family property in residential and

[17] C. Hartman, The Case for a Right to Housing (1998) 9 *Housing Policy Debate* 223–46; M. Foscarinis, The Growth of a Movement for a Human Right to Housing in the United States (2007) 20 *Harvard Human Rights Journal* 35–40; C. Lamb, Congress, the Courts, and Civil Rights: The Fair Housing Act of 1968 Revisited (1982) 27 *Villanova Law Review* 1115–62.

[18] According to the World Health Organization Database, the death tolls for the United States and Brazil were the most acute in absolute numbers: there have been 1,127,152 deaths by COVID-19 in the United States and 704,659 in Brazil. See World Health Organization, WHO COVID-19 Dashboard, https://covid19.who.int/. In terms of COVID-19 daily confirmed cases, the comparison of both countries shows a very similar timeline, with coinciding peaks. See Our World in Data, Daily New Confirmed COVID-19 Cases per Million People, https://encurtador.com.br/ehozF.

[19] This is especially the case for the social right to health. See D. W. L. Wang, Courts and Health Care Rationing: The Case of the Brazilian Federal Supreme Court (2013) 8 *Health Economics, Policy and Law* 75–93; O. L. M. Ferraz, The Right to Health in the Courts of Brazil: Worsening Health Inequities? (2009) 11 *Health and Human Rights Journal* 33–45. For a specific case of enforcement of the social right to health regarding intellectual property rights, see Chapter 8, by Carlos Portugal Gouvêa.

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commercial rental agreements, for example[20] – and not on a broad discussion of evictions and displacement. Thus, as in other fundamental areas, such as criminal justice, the pandemic can be seen as a "critical juncture" for the constitutional right to housing, a moment which partially alters the functioning of institutions, with important reinterpretations.[21] The Supreme Court's decision on ADPF 828 may be regarded simultaneously as an innovative rupture with its previous jurisprudence on social rights, which did not comprehensively cover the right to housing,[22] and a continuation of the Court's general tradition of enforcing social rights.

This chapter is part of a broader and ongoing research project on protections for the right to housing during the pandemic in Brazil. The project covers (i) legislative discussions surrounding transition rules for rent, which were weakened during the passage of Law No. 14,010 of June 10, 2020, creating the Emergency and Transitional Legal Regime for private law relations during the pandemic period;[23] (ii) legislative discussions that led to the proposal of several bills, initiated by lawmakers from different positions in the Brazilian political spectrum, aimed at creating protective rules to prevent evictions and repossessions, which ultimately culminated in the approval of Law No. 14,216, promulgated only on October 7, 2021, months after the Supreme Court's decision;[24] (iii) an analysis of Minister Luís Roberto Barroso's decision in ADPF No. 828 of June 3, 2021, as well as constitutional complaints filed from them,[25] the deference of lower courts to the decision, and the legal arguments

[20] See T. Acca, Uma Análise da Doutrina Brasileira dos Direitos Sociais: Saúde, Educação e Moradia entre os Anos de 1964 e 2006, Master's Thesis, University of São Paulo Law School (2009); N. C. Campos, A Efetividade do Direito à Moradia no Judiciário Brasileiro: Uma Análise Comparativa da Jurisprudência, Thesis, Escola de Formação da Sociedade Brasileira de Direito Público – SBDP (2010); M. Silva, Colisão de Direitos Fundamentais: Como o STF faz a Ponderação entre o Direito à Propriedade e o Direito Social à Moradia em Contratos de Locação na Área Urbana?, Thesis, Escola de Formação da Sociedade Brasileira de Direito Público – SBDP (2020).

[21] For this diagnosis, see M. R. Machado, and N. P. Vasconcelos, Uma Conjuntura Crítica Perdida: a COVID-19 nas Prisões Brasileiras (2021) 12 *Revista Direito e Práxis* 2015–43.

[22] The scenario is composed of a few cases collectively decided by the Supreme Court's plenary on the right to housing, with another scenario not yet systematically mapped regarding monocratic decisions at the appellate level. In the case concerning the protection of the guarantor's family property in lease contracts, the Supreme Court held that the inclusion of the right to housing in 2000 did not alter the interpretation of Federal Law No. 8,009 of 1990, which had determined the possibility of seizure of the family property in this circumstance, whether in residential or commercial contracts. No other case has been decided by the plenary on rental agreements, which leads to understanding ADPF 828 as a landmark: it is the first protective decision on rent for more vulnerable individuals interpreted from the perspective of the fundamental right to housing.

[23] Lei No. 14.010, de 10 de junho de 2020. D.O.U. de 12.6.2020 (Brazil).

[24] Lei No. 14.216, de 7 de outubro de 2021. D.O.U de 8.10.2021 (Brazil).

[25] We have published two empirical studies on constitutional complaints based on ADPF No. 828 in the form of Technical Notes: B. Tavolari, S. Alves, and V. Nisida, Nota Técnica: Ação de Descumprimento de Preceito Fundamental n. 828 (2021) *Núcleo de Questões Urbanas – Insper*; B. Tavolari, V. Nisida, and S. Alves, Nota Técnica: Ação de Descumprimento de Preceito Fundamental n. 828 – Atualização 31/01/22: período de Dezembro de 2021 a Janeiro de 2022 (2022) *Núcleo de Questões Urbanas – Insper*.

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mobilized by those courts; and (iv) finally, an analysis of a "transition regime" for ADPF No. 828, in a decision of October 31, 2022, which established procedural and institutional conditions for collective removals but immediately ended protective measures for rental agreements.[26]

Thus, this chapter is the first systematic formulation of different research findings on protective measures for rent in Brazil during the pandemic. Additionally, it points to some research paths that are still being developed. At this moment, our aim is to discuss the main arguments, in the initial legislative debate, in favor and against the inclusion of criteria of redistributive justice in the interpretation of rental contracts in Brazil. The comparative perspective is mainly analytical – it provides a conceptual tool to investigate the Brazilian case but will not lead us to a detailed comparative analysis of Brazil and the United States in this chapter. The remainder of this chapter will examine (i) the first Brazilian legislative attempt to establish eviction and rental protection as part of a legal transitional regime for private relations in response to the pandemic, in March 2020; (ii) the empirical assumptions made by members of Congress in refusing to accept the vulnerability of tenants vis-à-vis landlords, and how data may help us to shed light on the actual distributive implications, and (iii) the justifications presented by former president Jair Bolsonaro for blocking even very mild protective legislation.

6.3 FIRST ATTEMPT AT CREATING PROTECTION AGAINST EVICTIONS: THE EMERGENCY AND TRANSITIONAL LEGAL REGIME FOR PRIVATE LEGAL RELATIONS

In Brazil, the first initiative to create distinct parameters for rental contracts in view of the pandemic originated in the federal legislature. On March 30th, Senator Antonio Anastasia filed Bill No. 1179/2020, which established the emergency and transitional legal regime for private law relationships during the pandemic. The original text contained two specific articles regarding rent.[27] The proposed changes relate to the structural elements of eviction actions (*ações de despejo*) in Brazil.[28]

[26] Since ADPF No. 828 has suspended forced evictions, ending its validity abruptly had a high potential to trigger concentrated effects of evictions nationwide. Therefore, a "transition regime" was established to put an end to the protection. The regime included, for instance, changing courts' institutional architecture, as Justice Barroso determined the obligation to create specific bodies, internal to the courts, for mediating collective conflicts arising from the end of the protection period. See B. Tavolari, A Volta dos Despejos e Remoções, *Folha de São Paulo*, November 9, 2022.

[27] Senado Federal, Projeto de Lei n. 1179, de 2020 (2020).

[28] Eviction (*despejo*) is a term widely used in public debate to designate individual and collective forced removals of all kinds. However, from a technical legal point of view, evictions refer to a specific type of judicial action derived from a rent agreement, as distinct. Other removals may occur in other types of legal proceedings, such as repossession actions, actions resulting from expropriation or reclamation, public civil actions, and other types of actions to defend possession and property.

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Eviction actions are regulated by Law 8,245/1991 (Law of Tenancy). Article 59 paragraph 1 provides a *fast track* for eviction in certain circumstances, authorizing the judge to issue an injunction for eviction of the tenant within fifteen days, without the tenant being heard in the process, so long as the landlord provides a deposit in the amount equivalent to three months' rent. This fast-track eviction action applies in case of nonpayment of rent or other amounts due when the contract is not subject to guarantees. In other words, if the tenant does not pay the rent on time and the agreement is not subject to any formal guarantee – features that are common in contracts with low-income tenants – they can be evicted from the property in fifteen days without even being heard. In these cases, the decision is provisional, meaning it can be reversed by a decision on the merits. The landlord's deposit of a security in the amount of three months' rent serves as potential compensation if the eviction proves to be improper.

The first article of the bill on the Emergency and Transitional Legal Regime suspended the possibility of fast-tracking evictions during the pandemic, which did not mean, in any way, that evictions would be suspended *tout court*. Nothing in the bill prevented eviction actions from proceeding using the regular procedure, with eviction by means of a final judicial decision. The second article of the bill provided a specific transition rule for tenants who had suffered economic and financial changes resulting from dismissal or reductions in workload or remuneration, allowing negotiation between landlords and tenants to pay the amounts due in installments.

When we compare the proposed bill with the legislation enacted in the United States, the former is much more modest. While in the United States landlords were prohibited from filing eviction actions and collecting past due rent payments from the outset, the Brazilian proposal allowed for evictions and required the payment of unpaid amounts, even if deferred over time. The Brazilian proposal only prevented fast-track eviction.

The Senate justified the initial proposal as follows:

> In general terms, the project establishes that: . . .
>
> (iv) Evictions of residential properties are suspended until December 31, 2020, but tenants are not exempt from paying rent, although payment can be deferred in case of loss of income due to unemployment. The landlord may repossess the property either for their own use or for that of their family. . . .
>
> Today, both the Civil Code and the Consumer Protection Code have adequate rules for resolving or revising contracts due to unforeseeable events and excessive burden, respectively. It is now necessary to contain excesses in the name of the occurrence of fortuitous events and force majeure, but also to allow vulnerable segments such as urban tenants not to suffer restrictions on their right to housing.[29]

The public justification is structured as a two-fold argument. First, the official justification is mistaken in stating that evictions are suspended. As explained, only

[29] Senado Federal, Projeto de Lei n. 1179, p. 12–14.

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the fast-track form of eviction through a preliminary injunction would have been affected if the bill had been approved. Second, there is explicit mention of general provisions of Brazilian law that supposedly address situations that cause excessive imbalance between parties. However, the bill recognizes that existing rules allowing courts to rewrite agreements in view of changed circumstances for contractual revision were insufficient – if they were, it would not be necessary to approve specific measures. The justification revolves around the constitutional right to housing, whose protection should be ensured ("It is now necessary to contain excesses in the name of the occurrence of fortuitous events and force majeure, but also to allow vulnerable segments such as urban tenants not to suffer restrictions on their right to housing").

Nevertheless, the wording of the bill was disputed and contested during the legislative process. On April 3, 2020, a new text was presented and approved by the Senate's Constitution and Justice Committee. The points regarding rent were removed from the approved text. The rapporteur Simone Tebet made amendments to the provision on suspension of injunctions in evictions and, moreover, removed the entire article that dealt with installment payments of rent (see Table 6.1). The justification used is that the text assumed that tenants would not be able to pay rents and disregarded the situation of landlords who live on these incomes:[30]

> The ideal approach would be to leave this matter to private negotiations, with the reminder that the legal system already has tools to authorize, depending on the specific case, contractual revision, as exemplified by articles 317 and 478 of the Civil Code.[31]

There are two justifications for the Committee's amendments. First, there is an empirical claim. According to Senator Simone Tebet's report, one may not assume that tenants are the weaker side of the rental contract and, therefore, should be protected by specific rules. It challenges the idea of including distributive objectives in the transition rule on the grounds that cases of owners who rely solely on rental income would need to be considered in the equation, which would indicate that vulnerability could also be located on the landlord's side. The second point builds on the first one: if there are no elements to presuppose vulnerability of only one side, there would be insufficient reasons for the state to provide rules seeking to protect tenants. Any imbalances could be resolved through the general rules of contractual interpretation already provided for in the Brazilian Civil Code – an assumption that had been expressly rejected in the original formulation of the proposal.

Thus, within the conceptual framework employed so far, the original Senate bill could be read as an orthodox variant of contract law, insofar as it provided for the need to weigh economic inequalities, but expressly through legal provision, that is, via approval of the Emergency and Transitional Legal Regime of Private Legal Relations. The proposal reformulated in the Constitution and Justice Committee is

[30] "Article 10 deserves to be suppressed as it provides an absolute presumption that tenants will not be able to pay rents and disregards that there are cases of landlords who survive only on these incomes." Senado Federal, Parecer n.18 de 2020 (2020), p. 18.

[31] Ibid.

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TABLE 6.1 *Comparison of proposed text*

Bill No. 1179/2020, authored by Antonio Anastasia	Report n.18/2020, which approves the substitute in the Commission of Constitution and Justice, by the rapporteur Simone Tebet
CHAPTER VI On Urban Property Rentals Article 9. An injunction for eviction from urban property in eviction actions referred to in Article 59, § 1, I, II, V, VII, VIII, and IX, of Law No. 8,245, of October 18, 1991, shall not be granted until December 31, 2020. Paragraph 1. The provisions of this Article shall only apply to actions filed from March 20, 2020. Paragraph 2. The right of repossession of the property is guaranteed in the cases provided for in Article 47, items I, II, III, and IV of Law No. 8,245, of October 18, 1991, and the restrictions of the caput shall not apply to such cases. Article 10. Residential tenants who undergo economic and financial changes resulting from dismissal, reduction of work hours, or decrease in remuneration, may fully or partially suspend the payment of due rents from March 20, 2020, until October 30, 2020. §1. In the event of exercising the rent payment suspension as referred to in the caput, overdue rents must be paid in installments starting from October 30, 2020, on the due date, adding to the payment of future rents, the monthly percentage of 20% of overdue rents. §2. Tenants must notify the lessor of the suspension exercise provided in the caput. §3. The communication provided for in §2 may be carried out by any act that can be legally proven.	CHAPTER VI On Urban Property Rentals Article 9. No preliminary injunction for eviction from urban property shall be granted in eviction proceedings referred to in Article 59, § 1, I, II, V, VII, VIII, and IX, of Law No. 8,245, of October 18, 1991, until October 30, 2020. Sole Paragraph. The provisions of this article apply only to actions filed from March 20, 2020, onward.

orthodox both from an institutional and a functional perspective,[32] insofar as it denies the distributive role of contract law in this specific case by refuting the claim that there would be a more vulnerable side. If there is no side that is evidently more vulnerable, protections by means of law would not be justifiable – and would therefore need to be altered, as they were.[33]

Table 6.1 compares both formulations.

[32] For this distinction, see Davis and Pargendler, Contract Law and Inequality.

[33] From a comparative perspective, the Senate's response could even be understood as ultra-orthodox, in the sense that it even goes against any minimum social protection and distributive goal that has been adopted by countries that have not enshrined the right to housing as a constitutional guarantee. For the notion of legal "ultra-orthodoxy", see Chapter 4 by Weitseng Chen and Chapter 8 Carlos Portugal Gouvêa.

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TABLE 6.2 *Income distribution by class: All families, rent-paying families, and rent-receiving families*

Income classes	All families (A)	Rent-paying families (B)	Rent-receiving families (C)
Up to 2 min wages	24.3%	29.0%	5.8%
More than 2 up to 3 min wages	19.0%	19.2%	9.3%
More than 3 up to 6 min wages	30.6%	28.9%	26.1%
More than 6 up to 10 min wages	13.8%	12.7%	19.4%
More than 10 up to 15 min wages	6.2%	5.0%	14.9%
More than 15 up to 25 min wages	3.8%	3.6%	12.4%
More than 25 min wages	2.5%	1.6%	12.1%
Total	100%	100%	100%

Source: Household Budget Survey (*POF*) (2018).

6.4 ARE THE RELATIONS BETWEEN LANDLORDS AND TENANTS MARKED BY STRUCTURAL ECONOMIC INEQUALITIES IN BRAZIL?

The empirical argument about the lack of clear asymmetry between landlord and tenant in a rent contract lacked data and evidence that could support the diagnosis. In view of this absence, we gathered data on who pays and who receives rent in Brazil, based on the 2018 Household Budget Survey, the most up-to-date at the time. The data shows that, out of the 69 million Brazilian families, 11.7 million, or 17 percent, had some monetary expenditure on rent. In aggregate, the families spent just over R$6.5 billion on rent, in 2018 values. This amount, distributed among the 11.7 million families that had expenditures on rent, equals a monthly average expenditure of R$555, or 58 percent of the minimum wage at the time. For these families, this represented 20 percent of their monthly income.[34] For the purposes of the Household Budget Survey, rent does not necessarily need to be formal, established by a duly agreed contract between the parties – it is sufficient that there is some declared expenditure on rental housing, even if in an informal manner. Accordingly, the data allows us to visualize the situation of extremely vulnerable and informal renters.

Table 6.2 shows the proportion of Brazilian families in each income bracket, as well as how families who pay and receive rent are distributed across income brackets. The distribution of rent-paying families across income brackets is highly heterogeneous, reflecting to a large extent the country's unequal income distribution. Among the 11.7 million families who had any expenditure on rent, 77 percent have a monthly income of less than six times the minimum wage, and 29 percent have a total monthly income of less than two times the minimum wage. Only 10 percent of families who pay rent have an income greater than ten times the minimum wage.

[34] See S. Firpo and B. Tavolari, Políticas de Moradia em Momentos de Crise: a Centralidade do Aluguel, in L. M. Machado (ed.), *Legado de uma Pandemia: 26 Vozes Conversam sobre os Aprendizados para a Política Pública* (Rio de Janeiro: Autografia, 2021), pp. 56–69.

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The number of families who pay rent is proportional to their representation in each of the income brackets that encompass more than two minimum wages and less than twenty-five minimum wages. The biggest discrepancy is in the tails, that is, in the income brackets of less than two minimum wages and more than twenty-five minimum wages. We are talking about more than 3.4 million families in the first case and a little less than 190,000 in the second. Although families tend to spend on rent according to their income, the expenses are relatively high for the poorest. As a fraction of income, these expenses are also quite unequal, both among and within groups. Among families earning up to two minimum wages, rent expenses represent 34 percent of their income. For the richest group, these expenses do not exceed 4 percent of the family's total monthly income. Even though the expenditure in Brazilian real is almost five times higher, as a fraction of income, the rental expenditure of the richest is only 13 percent of what the poorest spend.[35]

To build a complete picture of rental relationships, it is also necessary to look at the other side, that is, the landlords. Table 6.3 shows how families that receive rent are distributed across income brackets. Out of the 69 million Brazilian families, 3.4 million, or 4.9 percent, generate monetary income from rent.[36] In total, these families received a little over R$6.1 billion, in 2018 values. Distributed among the 3.4 million families, this corresponds to an average monthly income of R$1,827, or 1.9 minimum wages at the time, which was equivalent to 17 percent of their income. The distribution of these values is also highly unequal.

The proportion of families receiving rental income varies immensely with income. It ranges from 1.2 percent among the poorest to 23.8 percent among the richest. Additionally, rental income is highly concentrated: 12.1 percent of families with rental income receive 43.8 percent of all rental income received by families in the country. This shows that favoring landlords over tenants may have a regressive effect on income distribution, which is contrary to what was suggested in the Senate Judiciary Committee's justification.

The majority of Brazilian families neither have expenses on rent (83%) nor receive rental income (95%). Expenses on rent represent less than 0.1 percent of GDP. Despite these small numbers, it is worth remembering that 11.7 million families have rental expenses and almost 50 percent of them have a total family income of up to three minimum wages. Moreover, for every two families earning rental income, there are seven that pay rent. The data from the Household Budget Survey is from prior to the pandemic. The poorest families suffered an even greater impact from the pandemic as their sources of income were the most affected – in poorer families, 79 percent of employed adults are informal workers.

[35] Ibid.

[36] It is important to mention that this information does not take into account families who receive rental income indirectly, intermediated by their participation in companies that are landlords. Since data is limited to individuals and families and does not include corporate landlords, this is only a partial view of the broader picture of rental relations.

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TABLE 6.3 *Incidence of monetary rent income by income class*

Income Classes	Number of Consumer Units (Families)	Number of CUs with Positive Rent Income	Frequency of CUs with Positive Rent Income
Up to 2 min wages	16,737,438	197,252	1.2%
More than 2 up to 3 min wages	13,079,821	315,031	2.4%
More than 3 up to 6 min wages	21,099,497	882,031	4.2%
More than 6 up to 10 min wages	9,509,008	653,105	6.9%
More than 10 up to 15 min wages	4,256,727	501,108	11.8%
More than 15 up to 25 min wages	2,629,450	418,530	15.9%
More than 25 min wages	1,705,764	406,818	23.8%
Total	**69.017,704**	**3,373,845**	**4.9%**

Source: Household Budget Survey (*POF*) (2018).

Therefore, it is necessary to contrast both poles – those who pay and those who receive rent – to have a representative picture of the relationships between landlords and tenants. One way to measure such inequalities relates to the number of families who pay rent compared to the number of families who receive it: property-owning families are smaller in number and much more concentrated in higher-income brackets. But inequality also relates to the amounts paid and received, as well as the proportion of these amounts in family income. This picture does not exclude the counterexample raised by Senator Simone Tebet: the argument claimed that the absolute presumption of vulnerability of tenants is not sustained in the face of cases of families whose only source of income would be rental income. It is true that these cases exist. However, public policies should not be based on exceptional cases. The data shows that there is a distributive conflict between the poles of the rental relationship in Brazil. Cases of landlords whose only source of income would cease to exist with eventual legislative protection for tenants should be treated as distortions and also addressed by public policy, as was done, for example, in Spain, where differentiation was made between small and large landlords.[37]

6.5 THE FINAL WORDING OF LAW 14,010 OF 2020 AND THE CONFLICTS BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES

The Emergency and Transitional Regime statute was only approved by Congress on June 10, 2020. On June 15, then-president Jair Bolsonaro decided to veto the entire

[37] For a discussion of the distortion and institutional arrangements aimed at addressing it, see Firpo and Tavolari, Políticas de Moradia em Momentos de Crise: a Centralidade do Aluguel.

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section of the statute that included rules on rent, even in its diluted version. The justification for the veto was as follows:

> The legislative proposal, by prohibiting the granting of injunctions in eviction actions, goes against the public interest by suspending one of the instruments of coercion for the payment of obligations established in the rental agreement (eviction), for a substantially long period of time, therefore providing excessive protection to the debtor at the expense of the creditor, as well as promoting the incentive for non-payment and disregarding the reality of several landlords who depend on the receipt of rent as a complementary or even exclusive form of income for their own sustenance.[38]

If we were to formulate a kind of scale of contractual orthodoxy, the justification for the veto of the law would certainly be in one of the positions closest to the maximum of orthodoxy. Here, the public interest is not the protection of more vulnerable people in the pandemic, who may lose their homes, impacting their rights to housing and life. The declared public interest is exactly the opposite, in the protection of the owner and creditor – it is even spoken of as "excessive protection to the debtor," a claim with questionable empirical basis. The argument that the rule would favor noncompliance also falls short, as only evictions through injunction would be suspended and evictions through the common procedure would continue to be judged normally by the Brazilian judiciary. Finally, the dimension of "disregarding reality" is, in fact, a caricature that disregards the evidence about who pays and who receives rent in Brazil, based on the creation of a strawman: the poorer landlord who depends solely and exclusively on rental income to survive.

However, the veto was not the final word on the law. In an atypical reaction, Congress partially overturned the presidential vetoes, keeping part of the article that provided protective rules for rent during the pandemic. On August 20, with 64 votes against 2 in the Senate, and 409 votes against 7 in the Chamber of Deputies, Congress overruled the veto on the main provision of the article on rent. The remaining final wording was as follows:

> Article 9. No preliminary injunction shall be granted for eviction from urban real estate in eviction actions referred to in Article 59, paragraph 1, items I, II, V, VII, VIII and IX, of Law No. 8,245, of October 18, 1991, until October 30, 2020.[39]

Therefore, in its first legislative attempt at the federal level, Brazil approved a transitional rule for rental relationships during the pandemic that prevented eviction through a preliminary injunction, within 15 days and without hearing the tenant. The paths were still open for eviction through a final judgment. In addition, the suspension period until October 30th gave the rule a period of validity of only two months.

[38] Congresso Nacional, Estudo do Veto n. 20/2020 (2020), p. 7.
[39] Lei No. 14.010, de 10 de junho de 2020. D.O.U. de 12.6.2020 (Brazil).

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The rocky path in the legislative branch and the executive veto led to a division of efforts. On the one hand, lawmakers chose to present individual bills on evictions and removals, outside the framework of the transitional legal regime developed for the pandemic. On the other hand, a large part of organized civil society turned to the Supreme Court, and in particular through ADPF 828. ADPF 828 was filed on April 15, 2021, by the Socialist and Freedom Party, in the second year of the pandemic, when expectations regarding the legislative branch had already been exhausted. Its scope extended beyond rental relationships to encompass judicial and administrative collective evictions.

The first interim decision by Justice Luís Roberto Barroso on the scope of the ADPF came on June 3, 2021. This judicial decision, which was grounded on the constitutional right to housing and health of vulnerable individuals, granted a six-month valid precautionary measure, suspending, during this period, administrative or judicial actions resulting in evictions, displacements, forced removals, or repossessions of a collective nature in properties used as residences or productive areas for vulnerable populations. This suspension applied to cases of occupations that occurred before the onset of the pandemic, from March 20, 2020, onward.

Furthermore, the measure suspended the granting of summary evictions, without hearing from the opposing party, in cases of residential leases involving tenants considered vulnerable. However, the eviction action due to non-payment remained possible, provided it followed the regular and adversarial procedure. The opinion argued that a "minimalist" form of judicial intervention was warranted, given the concern that "the income resulting from rent is, in many cases, also vital to the sustenance of landlords."

The precautionary measure allowed for some exceptions. These included premises located in areas at risk of landslides, floods, or similar processes, where removal could take place as provided by the law. Other exceptions addressed situations related to combating organized crime, the removal of invaders from indigenous lands, and the application of local laws more favorable to protecting the right to housing, provided they were in accordance with the Constitution. Previous judicial decisions that provided greater protection to specific vulnerable groups were also preserved and would prevail over the ADPF 828 decision.

The effects of this decision were extended until October 31, 2022, when the resumption of eviction and removal actions was authorized due to the easing of the pandemic's effects. However, this resumption was subject to a series of procedures – such as the establishment by the courts of land conflict committees and the conduct of judicial inspections and mediation hearings before any eviction decision – aimed at reducing housing and humanitarian impacts in the face of the serious housing insecurity situation in the country.

This decision, albeit relatively late in the course of the pandemic, was used by several groups and social movements, and became one of the main tools for defending vulnerable populations against evictions and removals during the

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pandemic, placing the Judiciary as the primary actor in ensuring the right to housing in this extremely critical context.

6.6 CONCLUSION

In this chapter, we have characterized the protection against eviction during the pandemic in Brazil as a case of legal heterodoxy, mainly because it was established by the Federal Supreme Court in June 2021, via ADPF No. 828, based directly on the social rights to housing and health in the Brazilian Constitution. The Brazilian legal system as a whole has many characteristics of a heterodox system, including a systematic set of norms that project principles of public law onto private relations, the protection of the right to life and housing as positive social rights enshrined in the Constitution, along with a highly active and accessible judiciary to ensure the enforcement of these rights. Nonetheless, Brazilian institutions do not appear to have responded to a crisis more effectively than US institutions in terms of response time and the scope of protection. In other words, even a heterodox system – at least within the limits of the concept outlined in this chapter – although legally capable of offering institutions a range of resources and tools to implement public policies, may encounter significant difficulties in enforcing social rights, especially in reaction to crises such as the COVID-19 pandemic.

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