

## THE EXHAUSTIVE LIST OF ORDINANCE NO. 439/MJSP OF AUGUST 04, 2023 AND THE AUTONOMY OF THE STATES



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### ABSTRACT

Brazilian federalism, characterized by the division of power between different levels of government, aims to ensure the autonomy and decentralization of public administration. In this context, public security emerges as a crucial issue, requiring joint articulation and financing between the Union, states and municipalities. Law 13.756/2018, sanctioned on December 12, 2018, represented an important milestone in the promotion of federative cooperation in public security. By creating the National Public Security Fund (FNSP), the law established financing and management mechanisms that aimed to strengthen the performance of federative entities in preventing and combating crime. This decentralization sought to ensure greater effectiveness in the application of resources, allowing each federative entity to adapt actions to its specific needs and realities. However, MJSP Ordinance 439/2023, published on August 4, 2023, raised questions about its compatibility with the principles of federalism. By establishing an exhaustive list of axes and assets that can be financed with FNSP resources, Ordinance 439/2023 limited the autonomy of states in choosing priorities for their public security actions. The central question then arises: does Ordinance 439/2023, by establishing strict guidelines for the application of FNSP resources, violate the principles of Brazilian federalism? This is the question that this bibliographic and documentary study seeks to answer. Through an in-depth analysis of Law 13,756/2018, MJSP Ordinance 439/2023, it is concluded that the exhaustive list violates the autonomy of the States regarding the decision of what to invest in public security in the State or Federal District.

**Keywords:** Federalism, Law 13.756/2018, MJSP Ordinance 439/2023.

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## INTRODUCTION

Federalism is a form of political organization that is based on the division and sharing of power between different levels of government within the same territory. This distribution of competences aims to ensure the autonomy and decentralization of power, allowing each federative entity to act more closely to local needs and realities.

In this context, the creation of the National Public Security Fund – FNSP, by Law 13,756 of December 12, 2018, represents an important milestone in the promotion of federative cooperation in the area of public security in Brazil, by establishing financing and management mechanisms that consider the specificities of each federative entity. On the other hand, the Federal Government issued Ordinance 439, August 4, 2023, going against the FNSP Law by establishing bankable axes.

As for the specific objectives, three were outlined, namely: to identify and analyze the forms of state adopted by Brazil throughout its Constitutions; analyze Law 13,756/2018; analyze whether the exhaustive list listed by MJSP Ordinance 439/2023 interferes with the ideals of Brazilian federalism by listing the axes and assets that can be financed with resources from the National Public Security Fund - FNSP. This is a bibliographic and documentary research, carried out in the theoretical and empirical fields, from the databases of the Brazilian digital library of theses and dissertations (BDTD), Capes, Ebsco, Google Scholar, Redalyc, RT online, Scielo, Scopus and Vlex, based on the keywords "Federalism", "Law 13.756/2018" and "MJSP Ordinance 439/2023", using the Boolean "and".

As for the approach, the research is qualitative, since it proposes to analyze the phenomenon of federalism and its implication in Law 13.756/2018 and as well as in the Brazilian MJSP Ordinance 439/2023. Finally, the need to change the exhaustive list of MJSP Ordinance No. 439, of August 4, 2023 to an exhaustive list, will be demonstrated.

## FEDERALISM AND THE AUTONOMY OF THE STATES

Federalism is one of the forms of organization of the States, this configuration is characterized by political-administrative, tax and financial decentralization, where "the governmental entities have unique and competing powers to govern over the same territory and people, and the Union governs the national territory and its citizens, while the subnational units govern a delimited part of the national territory and its inhabitants".<sup>4</sup>

The creation of the Federal State dates back to the "promulgation of the (Federal) Constitution of the United States of America in 1787<sup>5</sup>" its legal-political creation

<sup>4</sup>SOARES. Marcia Miranda. Forms of state: Federalism. Available at: [https://www.academia.edu/36962909/FORMAS\\_DE\\_ESTADO\\_FEDERALISMO\\_1](https://www.academia.edu/36962909/FORMAS_DE_ESTADO_FEDERALISMO_1). Accessed on: 18 Apr. 2024.

<sup>5</sup> SARLET, Ingo; MARINONI, Luiz G.; MITIDIERO, Daniel. Constitutional law course: Editora Saraiva, 2024. Electronic book. ISBN 9788553621163. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9788553621163/>. Accessed on: 21 Apr. 2024.

"presupposes in its origin the existence of the Federal Constitution, to institute it".<sup>6</sup> In Brazil, the idea of the Federal State occurred in 1889 with the Proclamation of the Republic, but its effectiveness only occurred with the promulgation of the Constitution of 1891<sup>7</sup>.

The Constitution of 1891 enshrined federalism as a fundamental principle of the political organization of the country, establishing a federative republic, with autonomous states and a centralized Union, ensuring the member states their own constitution<sup>8</sup>, and the possibility of incorporating among themselves, subdividing or dismembering themselves, to be annexed to others, or to form new states, with the acquiescence of the Legislative Assemblies and approval of the National<sup>9</sup> Congress, possibility of instituting taxes.<sup>10</sup>

However, the autonomy of the states was limited, and the central power exercised significant control over the finances and policies of the states, as Miranda asserts:

"This condition was ratified in the Constitution of the Republic of the United States of Brazil, in 1891. However, an effective Federative Republic was somewhat distant from the political model that prevailed in the First Republic (1891 to 1930). The rural oligarchies located in the richest states of the country, São Paulo and Minas Gerais, expanded their power and dominated the central government, conducting it according to their interests, keeping the great mass of the population excluded from the decision-making process and marginalizing the other provinces."<sup>11</sup>

With the end of the "old republic", and the events that culminated in the Revolution of 1930 and the beginning of the Vargas Era, the Brazilian state underwent a new reformulation "marked by the oscillation between periods of unitary authoritarianism and

<sup>6</sup> GARDEN. Raul Machado. The Member State in the Brazilian Federal Constitution. Brazilian Journal of Political Studies 69/70. p. 186

<sup>7</sup> Article 1 - The Brazilian Nation adopts as a form of Government, under the representative regime, the Federative Republic, proclaimed on November 15, 1889, and is constituted, by perpetual and indissoluble union of its former Provinces, in the United States of Brazil. BRAZIL. Constitution of 1891.

[https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao91.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm). Available at: [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao91.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm). Accessed on: 18 Apr. 2024.

<sup>8</sup> Article 63 - Each State shall be governed by the Constitution and by the laws it adopts, respecting the constitutional principles of the Union. BRAZIL. Constitution of 1891. Available at: [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao91.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm). Accessed on 18 Apr. 2024.

<sup>9</sup> Article 4 - States may be incorporated among themselves, subdivided or dismembered, in order to be annexed to others, or form new States, upon acquiescence of the respective Legislative Assemblies, in two successive annual sessions, and approval by the National Congress. BRAZIL. Constitution of 1891. Available at: [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao91.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm). Accessed 18 Apr. 2024.

<sup>10</sup> Article 9 - It is the exclusive competence of the States to decree taxes: 1) on the export of goods of their own production; 2) on rural and urban properties; 3) on the transfer of property; 4 ) on industries and professions. Paragraph 1 - It is also exclusively incumbent upon the States to decree: 1) stamp duties for acts emanating from their respective Governments and businesses of their economy; 2) contributions concerning his telegraphs and post offices. BRAZIL. Constitution of 1891. Available at: [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao91.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm). Accessed on 18. Apr. 2024.

<sup>11</sup>SOARES. Marcia Miranda. Forms of state: Federalism. Available at: [https://www.academia.edu/36962909/FORMAS\\_DE\\_ESTADO\\_FEDERALISMO\\_1](https://www.academia.edu/36962909/FORMAS_DE_ESTADO_FEDERALISMO_1). Accessed on: 18 Apr. 2024.

federative democracy".<sup>12</sup> The Charter of 1934 confirms the federative character of the<sup>13</sup> Brazilian State, but is soon revoked by the Constitution of 1937, returning "Brazil to the unitary form".<sup>14</sup> The Estado Novo (1937-1945) was marked by the centralization of power, weakening the autonomy of the states and strengthening the central government. The landmark of the unitarianism of the Vargas Era was the incineration of state flags:

"The then Minister of Justice, Francisco Campos, made a speech after the burning, stating that: *Flag of Brazil, you are the only one today. Hoisted at this hour throughout the national territory, single and only, there is no place in the hearts of Brazilians for other banners, other flags, other symbols. The Brazilians gathered around Brazil and decreed this time with determination not to allow discord to divide it again, that Brazil is a single homeland and that there is no place for any other thought of Brazil, nor space and devotion for any other flag than this one, hoisted today among the blessings of the Church and the salute of the swords and the veneration of the people and the songs of the youth. You are the only one, because there is only one Brazil – around you the unity of Brazil is remade again, the unity of thought and action, the unity that is conquered by will and heart, the unity that can only reign when it is established by historical decisions, amid discords and public enmities, a single moral and political order, the sovereign order, made of strength and ideal, the order of a single thought and a single authority, the thought and authority of Brazil*"<sup>15</sup>

Only with the end of the Estado Novo and the redemocratization of the country was the Brazilian federative system restored in its entirety with the 1946 Constitution<sup>16</sup>. During this period, "at the same time that the National Congress regained its importance, the States also regained the autonomy lost during the dictatorial regime, but without recovering all the field of action they had in the First Republic."<sup>17</sup>

<sup>12</sup> Ditto.

<sup>13</sup> Article 1 - The Brazilian Nation, constituted by the perpetual and indissoluble union of the States, the Federal District and the Territories in the United States of Brazil, maintains as a form of government, under the representative regime, the federative Republic proclaimed on November 15, 1889. BRAZIL. Constitution of 1934. Available at: [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao34.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm). Accessed on 18 Apr. 2024.

<sup>14</sup> BASTOS. Celso Ribeiro. Curso de Direito Constitucional 20ª ed. São Paulo: Saraiva. 1999. p.232.

<sup>15</sup> OLIVEN. Ruben George. The National and the Regional in the construction of the Brazilian identity. Available at: <https://jornalggn.com.br/blog/luisnassif/a-cremacao-das-bandeiras-estaduais-no-estado-novo>. Accessed on 18 Apr. 2024.

<sup>16</sup> Article 1 - The United States of Brazil maintains, under the representative regime, the Federation and the Republic. Paragraph 1 - The Union comprises, in addition to the States, the Federal District and the Territories. Paragraph 2 - The Federal District is the Capital of the Union. Article 2 - States may be incorporated among themselves, subdivided or dismembered in order to be annexed to others or to form new States, by means of a vote of the respective Legislative Assemblies, a plebiscite of the populations directly concerned and the approval of the National Congress. Article 3 - The Territories may, by means of a special law, be constituted into States, subdivided into new Territories or reparticipate in the States from which they have been dismembered. BRAZIL. Constitution of 1946. Available at: [https://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao46.htm](https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao46.htm). Accessed on Apr. 18, 2024.

<sup>17</sup> SOARES. Marcia Miranda. Forms of state: Federalism. Available at: [https://www.academia.edu/36962909/FORMAS\\_DE\\_ESTADO\\_FEDERALISMO\\_1](https://www.academia.edu/36962909/FORMAS_DE_ESTADO_FEDERALISMO_1). Accessed on: 18 Apr. 2024.

During the military government (1964-1985) the 1967 Constitution<sup>18</sup> ensured the federative form of the state, however the reality of the military regime in practice was different. Federalism in this period was marked by deep contradictions, on the one hand, the centralization of power in the hands of the federal government intensified with the use of institutional acts, the appointment of intervenors<sup>19</sup> and also "expansion of fiscal control, especially with regard to finances", <sup>20</sup>significantly limiting the autonomy of states and municipalities. On the other, discourses defended the preservation of federalism by masking the centralizing reality:

"From 1964 onwards, the armed movement, which then broke out, giving rise to a despotic and authoritarian regime, brought violent shocks at all times and produced an enormous weakening of the federative principle. Moreover, the very advance of the technical-bureaucratic State, assuming increasingly broad functions in the economic field, has made many authors doubt the federative character of the Brazilian State."<sup>21</sup>

In 1985, the military government came to an end and the Brazilian state went through a new process of redemocratization that consolidated and strengthened the country's democratic and federative principles. After years of authoritarianism, the 1988 Constitution represented a return to the rule of law and an affirmation of democratic values and the decentralization of power:

"Given the trauma of the military dictatorship, marked by authoritarian centralism, territorial decentralization gained prominence in political changes and began to be confused with the democratization of the country. To decentralize was to federalize and also to democratize the country. The result was a broad process of territorial decentralization. States and municipalities have resumed political autonomy, that is, the ability to establish their own powers, executive and legislative, independently of the central power. The municipalities were elevated to the condition of third federative entity, something unprecedented in Brazilian history and rare in world federative experiences. Combined with political decentralization, there was a broad

<sup>18</sup> Article 1 - Brazil is a Federative Republic, constituted under the representative regime, by the indissoluble union of the States, the Federal District and the Territories. Paragraph 1 - All power emanates from the people and is exercised in their name. Paragraph 2 - The national symbols are the flag and the anthem in force on the date of the promulgation of this Constitution and others established by law. Paragraph 3 - The States, the Federal District and the Municipalities may have their own symbols. BRAZIL. Constitution of 1967. Available at: [https://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao67.htm](https://www.planalto.gov.br/ccivil_03/constituicao/constituicao67.htm). Accessed on: 18 Apr. 2024.

<sup>19</sup> BRAZIL. **INSTITUTIONAL ACT No. 5, OF DECEMBER 13, 1968**. The President of the Republic may decree intervention in the states and municipalities, without the limitations provided for in the Constitution, suspend the political rights of any citizen for a period of 10 years and revoke federal, state and municipal elective mandates, and takes other measures. Available at: [https://www.planalto.gov.br/ccivil\\_03/ait/ait-05-68.htm](https://www.planalto.gov.br/ccivil_03/ait/ait-05-68.htm). Accessed on 18.Apr. 2024.

<sup>20</sup> SOARES. Marcia Miranda. Forms of state: Federalism. Available at: [https://www.academia.edu/36962909/FORMAS\\_DE\\_ESTADO\\_FEDERALISMO\\_1](https://www.academia.edu/36962909/FORMAS_DE_ESTADO_FEDERALISMO_1). Accessed on: 18 Apr. 2024.

<sup>21</sup> BASTOS. Celso Ribeiro. BASTOS. Celso Ribeiro. Curso de Direito Constitucional 20<sup>a</sup> ed. São Paulo: Saraiva. 1999. p. 232



fiscal decentralization that increased the participation of the states, but especially the municipalities, in the distribution of public revenues."<sup>22</sup>

The 1988 Constitution reestablished the balance between the authority of the Union and the autonomy of the federative entities, recognizing the regional diversities and the specific needs of each state, representing an evolution with regard to federalism and the autonomy of the states and municipalities "which began to receive funds related to the Participation Fund, directly, without intermediation. Municipal autonomy allowed the weakening of the so-called "state oligarchies" in which the governors maintained control.<sup>23</sup>

As can be seen since the formal institution of the federal state in 1891, Brazilian federalism was marked by periods of centralization of powers in the Union, such as during the Vargas Era and the Military Government, and moments of greater decentralization, such as the one being experienced during the more than 30 years of the 1988 Constitution:

In the same vein, the literature positioned the advent of the Constitution as the milestone of a new turn towards decentralization, within the same dynamic between centralization/decentralization. Whether in the metaphor of a pendulum movement, in the dynamics of systoles and diastoles, or in the idea of a continuum, the debate on centralization versus decentralization continued to dominate the analyses of federalism and public policies in the post-1988 Constitution period<sup>24</sup>.

However, Brazilian federalism still faces challenges due to the extreme dependence of states and municipalities on transfers from the Union, which concentrates most of the resources. This dependence is the result of the concentration of power at the federal level, which collects about 70% of all taxes paid by Brazilian society<sup>25</sup>. With limited own revenue, states and municipalities become more dependent on transfers from the Union, compromising autonomy and investment capacity in essential areas such as health, education and security.

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<sup>22</sup> SOARES, Marcia Miranda. Forms of state: Federalism. Available at: [https://www.academia.edu/36962909/FORMAS\\_DE\\_ESTADO\\_FEDERALISMO\\_1](https://www.academia.edu/36962909/FORMAS_DE_ESTADO_FEDERALISMO_1). Accessed on: 18 Apr. 2024.

<sup>23</sup> PONTE, Marcelo Dias ; ANDRADE, M. D. . Conditional cash transfer as a public policy: the Bolsa Família program as a mechanism for the reduction of social inequalities in Brazil. In: Aires José Rover; José Querino Tavares Neto; Luiz Gustavo Gonçalves Ribeiro; Sébastien Kiwonghi Bizawu. (Org.). Social Rights, public policies and security and agrarian and environmental law. 1ed. Zaragoza: Prensas de la Universidad de Zaragoza, 2019, v. 26, p. 238-258.

<sup>24</sup> FRANZESE, Cibele. Cooperative federalism in Brazil: from the 1988 Constitution to public policy systems. Thesis (doctorate). School of Business Administration of São Paulo. Available at: <https://hdl.handle.net/10438/8219>. Accessed on: 14 Apr. 2024.

<sup>25</sup> RABELLO, G.G; OLIVEIRA, J. M. Taxation on Companies in Brazil: International Comparison. Radar: technology, production and foreign trade/Institute of Applied Economic Research, Brasília, v. 41, p. 33-43, Oct/2015.

In this context, we will analyze Law 13.756, of December 12, 2018, which established the National Public Security Fund, which aims to balance the distribution of resources for public security.

### **LAW 13,756, OF DECEMBER 12, 2018**

Federalism is a political system in which power is shared among the different federated entities. Federalism, according to Almeida, "constitutes a peculiar compromise between diffusion and concentration of political power, as a function of the political struggle and the predominant conceptions about the contours of the national state and about the desirable degrees of political integration and social equity".<sup>26</sup>

In Almeida's view, Brazilian Political Science should treat federalism under four approaches: "1) the genesis of Brazilian federalism; 2) federalism, political representation and democracy; 3) federalism and governability; and 4) federalism, intergovernmental relations and public policies".<sup>27</sup> In this vein, we will analyze Law 13.756/2018 under the fourth approach proposed by Almeida, which deals with federalism, such as intergovernmental relations and public policies.

In this context, Law 13.756/2018 of December 12, 2018, known as the National Public Security Fund (FNSP) Law, strengthens federative cooperation in the area of public security with the objective of supporting projects, activities and actions framed in the guidelines of the National Plan for Public Security and Social Defense (PNSPDS) of the Federal Government stipulated by Law 13675/2018.

In 2018, Law No. 13,756 brought the provision on the allocation of lottery resources for public security<sup>28</sup>. This rule also provided for commercial promotion (CHAPTER IV OF

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<sup>26</sup> ALMEIDA, M. H. T. de. Federalism, democracy and government in Brazil: ideas, hypotheses and evidence. **BIB - Brazilian Journal of Bibliographic Information in Social Sciences**, [S. l.], n. 51, p. 13–34, 2001. Available at: <https://bibanpocs.emnuvens.com.br/revista/article/view/232>. Accessed on: 8 out. 2024.

<sup>27</sup> Ditto.

<sup>28</sup> Art. 1 This Law provides for the National Public Security Fund (FNSP) and for the destination of the proceeds from lottery collections, with the objective of promoting:  
I – the necessary changes to the functioning of the FNSP, to give effect to the actions of the Ministry of Public Security regarding the execution of its competence to coordinate and promote the integration of public security in cooperation with the federative entities; and II – the consolidation of the legal provisions related to the destination of the proceeds of lottery collections, to provide clarity and transparency to the apportionment system and, through specific changes, to guarantee resources for public security actions. BRAZIL. Law No. 13,756, of December 12, 2018. Brasília, DF: Diário Oficial da União, 2018. Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13756.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13756.htm). Accessed on: 18 Apr. 2024.

COMMERCIAL PROMOTION, articles 26 and 27) and the lottery modality called fixed-odds betting<sup>29</sup> (CHAPTER V OF FIXED-ODDS BETTING, articles 29 to 33).

FNSP resources should be allocated to re-equipment, training and qualification of civil and military police, military fire brigades and municipal guards; information, intelligence and investigation systems, as well as police statistics; structuring and modernization of the technical and scientific police; community policing programs; actions to combat violence against women and programs to improve the quality of life of public security professionals, among others.

Pursuant to article 3 of Law No. 13,756/2018 of December 12, 2018<sup>30</sup>, it establishes several sources of funds for the FNSP, which include donations and aid from individuals or legal entities, revenues from the exploitation of lotteries, agreements and agreements with public or private entities, resources from the confiscation of assets in favor of the Federal Government, and broken or lost bail according to criminal procedural legislation, are examples of stipulated sources.

The legal text, it must be recognized, presented an important advance by providing as a new source of the FNSP the amounts collected with the forfeiture of assets in the criminal sphere. Similarly, it also seems reasonable to understand that legislative innovations are aligned with the public interest based on a democratic model, in relation to its objectives and resources. This is because public security policies, which must undergo a

29 The so-called "fixed-odds bets", which are based on the "betting system related to real sports-themed events", establish a gain resulting from the success of the prediction on online betting sites. Although the matter is controversial, it is an activity recognized as a public service in the formal sense, since such activity is considered an exclusive public service of the Union (art. 29). In the understanding of the STF: "Based on the so-called formalistic or legalistic perspective, what defines public service is not the subjective evaluation of the social relevance of the activity, but rather the legal regime of public or private law that is correlated to it" (p. 9; vote of Justice Gilmar Mendes, in ADPF 492/RJ).

<sup>30</sup> "I - donations and assistance from natural or legal persons, public or private, national or foreign; II - the revenues arising from: a) the exploitation of lotteries, under the terms of the legislation; and b) the application of FNSP budgetary resources, in compliance with the applicable legislation; c) the decree of forfeiture of movable and immovable property, when seized or sequestered as a result of criminal activities perpetrated by militiamen, extended to the successors and executed against them, up to the limit of the value of the transferred assets<sup>30</sup>; (Included by Law No. 13,886, of 2019) III – the appropriations set forth in the annual budget law and in the additional credits; and IV - other revenues destined to the FNSP. V – resources arising from agreements, contracts or agreements signed with public or private, national, international or foreign entities; (Included by Law No. 13,964, of 2019) VI – the resources confiscated or arising from the disposal of assets lost in favor of the Federal Government, under the terms of criminal legislation or criminal procedure; (Included by Law No. 13,964, of 2019); VII – broken or lost bail bonds, in accordance with the provisions of the criminal procedural law; (Included by Law No. 13,964, of 2019) VIII – income of any nature, earned as remuneration, resulting from the application of the FNSP's assets. (Included by Law No. 13,964, of 2019)". Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13756.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13756.htm). Accessed on: 18 Apr. 2024.



democratic definition in relation to their scope and reach, affect not only the citizens who enjoy the public service, but also the public agents allocated to carry out this same policy.

Law No. 13,756/2018, when disciplining the National Security Fund, determined that the transfers of FNSP resources destined to the States, the Federal District and the Municipalities will be transferred to the federative entities, under the terms of the legislation in force. Also according to the Law, it is mandatory to transfer at least 50% of the amount to the states and the Federal District, in the fund-to-fund modality<sup>31</sup>. The other resources will be executed directly by the Union or transferred through agreements or transfer contracts.

In this sense, the content of article 8 of Law No. 13,756/2018 establishes legal conditions for the transfer of FNSP resources:

1) The establishment and operation of: a) State or District Council for Public Security and Social Defense; and b) State or District Public Security Fund, 2) The existence of: a) a security plan and the application of resources within the scope of the States and the Federal District, in compliance with the guidelines of the National Plan for Public Security and Social Defense; and b) set of criteria for the promotion and functional progression, by seniority and merit, of experts, civil and military police officers and members of the military fire brigades; 3) Integration with national systems and the provision and updating of public security data and information to the Ministry of Public Security, under the terms established in an act of the Minister of State for Public Security; and 4) Compliance with a maximum percentage of security professionals who work outside public security corporations, under the terms established in an act of the Minister of State for Public Security. 5) The development and implementation of a state or district plan to combat violence against women.

The funds arising from mandatory transfer (fund-to-fund modality) will be transferred to the receiving agencies in a single installment each year, observing the apportionment criteria, and must be moved exclusively by electronic means, in the specific accounts that were opened by the Ministry of Justice and Public Security in an authorized financial institution<sup>32</sup>.

Since the first transfer in 2019 until 2024, the FNSP has already transferred to the federation entities R\$ 4,714,998,848.00 (four billion seven hundred and fourteen million

<sup>31</sup> Article 7 - The transfers of FNSP resources destined to the States, the Federal District and the Municipalities shall be transferred to the federative entities, under the terms of the legislation in force, observing the following proportions and conditions:

I - as a mandatory transfer, at least 50% (fifty percent) of the resources referred to in subparagraph a of item II of the caput of article 3 of this Law to the state or district fund, regardless of the execution of an agreement, transfer agreement or similar instrument; and (...). Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13756.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13756.htm). Accessed on: 18 Apr. 2024. BRAZIL. Law No. 13,756, of December 12, 2018. Brasília, DF: Diário Oficial da União, 2018. Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13756.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13756.htm). Accessed on: 18 Apr. 2024.

<sup>32</sup> Article 24, MJSP ORDINANCE NO. 480, OF NOVEMBER 9, 2021. Provides for the procedures for the mandatory transfer of resources from the National Public Security Fund (FNSP) to the Public Security Funds of the States and the Federal District, as provided for in item I of article 7 of Law No. 13,756, of December 12, 2018, and defines a model for the monitoring and accountability of these resources, as well as for the possible determination of responsibility.

nine hundred and ninety-eight thousand eight hundred and forty-eight reais)<sup>33</sup> of this amount R\$ 214,030,986.08 (two hundred and fourteen million thirty thousand nine hundred and eighty-six million reais and eight cents)<sup>34</sup> were transferred to the State of Amazonas.

The monitoring of the application of resources will take place through a computerized system, monitoring of bank accounts, on-site visits, among other monitoring mechanisms, in accordance with article 24 of MJSP Ordinance No. 440, of 2023. The projects qualified through the Action Plans to receive resources from the FNSP may not have a term exceeding two years<sup>35</sup> and the federated entities benefiting from these resources will provide the Management Council and the National Secretariat of Public Security with information on the performance of their actions in the area of public security<sup>36</sup>.

The criteria for apportionment of resources, in the fund-to-fund modality, are established in MJSP Ordinance No. 275, of July 5, 2021, which are readjusted annually based on the update of the data. In addition, MJSP Ordinance No. 322, of March 9, 2023<sup>37</sup>, included new criteria to provide fluidity and effectiveness in the execution of resources transferred to federative entities, seeking to ensure the equitable distribution of resources, prioritizing regions with higher crime rates and promoting cooperation between the different federative entities in the execution of public security policies.

Each transfer must be faithfully executed in accordance with the guidelines stipulated by ordinances that until 2022 provided for an exemplifying list of what could be the object of

<sup>33</sup> BRAZIL. Ministry of Justice and Public Security. Available at: <https://www.gov.br/mj/pt-br/assuntos/sua-seguranca/seguranca-publica/transferencia-fundo-a-fundo/repasses>. Accessed on: 10 out. 2024.

<sup>34</sup> BRAZIL. Ministry of Justice and Public Security. Available at: <https://www.gov.br/mj/pt-br/assuntos/sua-seguranca/seguranca-publica/transferencia-fundo-a-fundo/repasses>. Accessed on: 10 out. 2024.

<sup>35</sup> Article 10. BRAZIL. Law No. 13,756, of December 12, 2018. Brasília, DF: Diário Oficial da União, 2018. Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13756.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13756.htm). Accessed on: 18 Apr. 2024.

<sup>36</sup> Article 11. BRAZIL. Law No. 13,756, of December 12, 2018. Brasília, DF: Diário Oficial da União, 2018. Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13756.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13756.htm). Accessed on: 18 Apr. 2024.

<sup>37</sup> Art. 3 "I - Territorial Extension; II - Ports and Airports; III - Frontier; IV - Population; V - Effective; VI - Social Vulnerability Index - IVS; VII - Human Development Index - HDI; VIII - Highest Violent Crime Rates - IVC; IX - Greater Reduction of the Violent Crime Index - ICV; X - Reduction of Death of Women; XI - Execution of Arrest Warrant; XII - Forensic Data Integration; XIII - SINESP Integration; XIV - Vehicle Theft; XV - Vehicle Theft; XVI - Production of Expert Reports; XVII - Seizure of Weapons; XVIII - Drug Seizures; XIX - Elucidation of Homicides; XX - Combating Corruption and Destination of Assets Arising from Crime; XXI - Assistance Provided by Military Firefighters; XXII - Fire and Panic Prevention; XXIII - Drug Trafficking; and XXIV - Achievement of Goals of the National Public Security Plan. XXV - development and implementation of a state or district plan to combat violence against women; and (Included by MJSP Ordinance No. 322, of March 9, 2023) XXVI - creation of Maria da Penha patrols. (Included by MJSP Ordinance No. 322, of March 9, 2023)" Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13756.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13756.htm). Accessed on: 18 Apr. 2024.

investments with resources from the Fund, however, the Federal Government reversed the federalist advances by instituting the Ministry of Justice and Public Security Ordinance 439, of August 4, 2023, which regulates the thematic areas and the list of financeable items, entering the sphere of States by stipulating what must be acquired.

Law 13.756/2018 represents an advance in the promotion of federative cooperation in the area of public security, strengthening Brazilian federalism by establishing financing and management mechanisms that consider the specificities and needs of each federative entity. However, the imposition of detailed guidelines by the Federal Government on how these resources should be used by the federative entities limits state autonomy, setting back part of the advances achieved with political and financial decentralization, reflecting the complexity of Brazilian federalism, in which the states need financial support, but face restrictions on how to apply the resources.

### **ORDINANCE OF THE MINISTRY OF JUSTICE AND PUBLIC SECURITY 439, OF AUGUST 4, 2023 AND THE AUTONOMY GRANTED TO THE STATES IN THE FEDERATIVE PACT**

Ordinance No. 439, of August 04, 2023 of the Ministry of Justice and Public Security, is a regulatory act of Law 13,756, of December 12, 2018, duly authorized by the same legal diploma, as it establishes that an act of the Minister of Justice will establish the execution guidelines, among others established in the Law.

The Action Plan, as already mentioned, is the planning instrument of the States for the execution of the resources of the National Public Security Fund, provided for in article 8, II, "a" of Law 13,756 of December 12, 2018. In the same law there is a commandment that the act of the Minister of Justice will establish criteria for the execution of items III, IV and V of the same article, that is, the aforementioned act of the Minister of Justice can only deal with the criteria for the execution of the integration of national systems, the percentage of security professionals who work outside the corporations and the development of a state public security plan to combat violence against the woman.

And also, item II of the sole paragraph of article 9 of the same Law, which deals with the integration of national public security systems and the updating of information to the national database, in which today we have in operation the INFOSEG system, for access to the states, developed by the SERPRO of the Federal Government and made available in the form of Adhesion to the States with all the functionalities.

In view of this scenario, the Law did not authorize the Minister of State to perform any act that is not linked to these hypotheses, as it would constitute a usurpation of power, which is only up to the Legislative Branch to debate the difficulties, the will of the people through their elected representatives.

The exhaustive list, an innovation of this Federal Government Ordinance, brought a restriction not provided for by law, which brought many losses to the States, because, although the list is extensive, it does not cover the needs of the States. The criterion for combating regional inequalities established in the Federal Constitution of 1988 was forgotten by the Minister of State when he established an exhaustive list, considering that the social problems of the southern region of Brazil are different from those of the northern region, and inserting a list of what can be done with the resources reveals a lack of experience, plus a portion of authoritarianism.

Within the scope of Public Administration, the principle of administrative legality determines that the public administrator can only act in accordance with the law. Although this principle requires that any action by the administrator has a legal basis, it is necessary to interpret it more broadly, considering that the authorization can be both explicit and implicit in the legislation.

In the case in question, it can be understood that the Law was expressly authorized to authorize the Minister of Justice to issue an act referring to certain matters, without granting autonomy to issue acts restricting the execution of the resources of the National Public Security Fund, in which it can be concluded that the act that determined the exhaustive list is formally illegal due to the lack of competence to regulate the matter, for if the legislator wished, he would do so in the Law itself.

It is also necessary to refer to the materiality of the exhaustive list created by Ordinance 439 of August 4, 2023, as its essence affronts the autonomy of the States and the federative pact established in the Federal Constitution of 1988, because in the distribution of tax revenues, both the original and the derived constituent legislated understand that the State has autonomy to execute the resources, As can be concluded by reading articles 157 to 162.

In the aspect of federalism, although the Law provides for the form of collection and transfer of the National Public Security Fund, it does not establish the incorporation of resources to the States, so the autonomy conferred by the States must be respected, as not only Law 13,756 of August 4, 2023, but the entire Brazilian legal system with regard to

public security, it refers to a regime of cooperation between the Union, States and Municipalities, which are the foundations of Federalism.

Even if the collection is classified as a federal resource, from the moment the Law determines the mandatory transfer, there must be respect for the federative pact of non-intervention in the autonomy of the federated entity, which as "a result of the principle of political-administrative autonomy of the States, the entity that shares its revenue cannot determine to the benefited entity how it will be used."<sup>38</sup>

Not respecting the autonomy of the Federative Unit in accepting which items of the Action Plan can be executed, and the absence of an item in the exhaustive list results in the non-authorization of whether it wants to be included in the planning phase, it can be understood that the matter also carries material illegality, and the fact that the States are not heard before the change interprets a principle of authoritarianism from the Federal Government to the State Governments.

In similar cases such as transfers to the Unified Health System (SUS), transfers from the Federal Government do not provide exhaustive lists of what types of equipment can be purchased, which medicines or which procedures can be performed. Brazil is a continental country, with a very diverse culture, the criminality that operates in one Federative Unit may not be the same as in another State.

In the case of technological aspects, if in the interim of the creation and validity of the ordinance, a new technology capable of solving several crimes, or capable of inhibiting the commission of crimes, emerges, if it is not written in the exhaustive list it cannot be acquired, there will be a rigidity of the public security structure.

On the other hand, crime, which is increasingly organized, makes several acquisitions of counterintelligence equipment, more sophisticated weapons with greater firepower, technologies and other materials to circumvent police activity, always have an advantage in public security.

In any case, the exhaustive list does not bring any benefit to the States, except for the purpose of guiding what can be done in each financing axis. Exactly what the list should serve, for a better understanding of the guidelines of the National Public Security Policy,

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<sup>38</sup> SIQUEIRA, Julio Pinheiro Faro Man of. Brazilian nominal federalism and public policies. 2012 (Master's Dissertation in Fundamental Rights and Guarantees, Faculty of Law of Vitória, Advisor: Daury Cesar Fabriz). Available at: [https://bdtd.ibict.br/vufind/Record/FDV-1\\_e3428f1b7f6d882bd910d8635825c831](https://bdtd.ibict.br/vufind/Record/FDV-1_e3428f1b7f6d882bd910d8635825c831). Accessed on 30 Oct 2024.



guidelines of what the Federal Government wants the States to carry out, such as violence against women and the creation of Maria da Penha patrols.

For it to be indicative, and for the Federal Government to continue with the function that the Law conferred of cooperation, the exhaustive list should become an exemplary list, because in this way it would not enter into illegality due to the defect of the form, it would not hurt the Autonomy of the States, it would bring a better understanding to the Federated Units of the purposes and objectives that the Federal Government wants to achieve and the cooperation regime with dialogue with the States.

Thus, the exhaustive list should cease to exist in the mandatory format, thus leaving it up to the States to decide which items they intend to carry out and which demands in their locality is more effective for combating crime, violence against women, repression of organized crime, among others.

## **CONCLUSION**

The Federal Constitution of 1988 establishes that the Federative Republic of Brazil is formed by the indissoluble union of States, Municipalities, and the Federal District, conferring Federal competences to the Union, State competences to States, Municipal competences to Municipalities and the Federal District a hybrid form of state and municipal competences, in which it confers this union and the distribution of competences as a federative pact.

One of the most sensitive areas of the federative pact are the forms of collection, distribution of resources, competences and Autonomy of the Federated Entities, which is why this work sought to highlight an enormous illegality in the scope of public security and transfer of linked resources.

The creation of Law No. 13,756, of December 12, 2023, was listed, in which it brought the forms of revenue from the National Public Security Fund, as well as the sharing of revenues with States and the Federal District, for objectives and guidelines of the Federal Government in the field of public security and social defense, according to the National Public Security Plan.

When the aforementioned Law was created, the legislator conferred on the Minister of Justice the power to issue regulatory acts for the transfer, which has been done from 2019 to mid-2023, when Ordinance No. 439, of August 4, 2023, was issued, in which it inserted a list of items subject to financing in which it was called an exhaustive list, requires

the States and the Federal District to only acquire or contract these items listed in the Annex to the Ordinance.

The obligation brought by the Ordinance confers on the Minister of Justice an authoritarianism that is not compatible with the existing cooperation regime in the field of public security, in addition to the illegality of the act, considering that Law 13,756, of December 12, 2023, does not authorize the Minister of Justice to issue a regulatory act and that creates restrictions on this matter.

The exhaustive list also hurts the autonomy of the States as to the decision of what to invest in the public security of the State or Federal District, because by creating a general limit for the entire national territory, the Minister of Justice understood that the difficulties faced by a State in one region of the country is the same as that of another State in another region of the country.

The rigidity of this list establishes that public security must be satisfied with the technologies that the Minister understands to be available in the market, if a new equipment was invented after the publication of the ordinance, or even if due to ignorance of the authority it is not part of the exhaustive list, there will be a stifling of public security.

Finally, by the criterion of cooperation and it is understood that the Federal Government must outline general lines of action for public security in Brazil, in order to aggregate efforts in favor of national public security, as was the thought of the legislator when granting the unification of national public security systems and the continuous feeding of data.

In order to fulfill this objective, the exhaustive list must be used as an example, as a guideline to the States of the National Public Security Policy and the guidelines that the Federal Government wants the States to adopt, and thus there can be a general achievement of the national goals of crime reduction, the dialogue in the construction of these guidelines must be observed, since it covers a universe of participants in a country with such cultural diversity and social inequalities.

In 2024, under a new management of the Ministry of Justice, Ordinance No. 685 of May 16, 2024 was issued, in which it revokes Ordinance No. 439 of August 23, 2023, seeking efficiency in public spending of the resources of the National Public Security Fund, removing taxability from the list and innovating with an exemplary list, however, without removing the effects of the Ordinance, that is, the exhaustiveness exercised in the previous ordinance remains in force to the Application Plan mandatorily linked to it.

Even with the change in the regulation to make the financeable items more flexible, there is still the impetus for control by the Union, in the resources transferred linked to Public Security, hurting the form of federalism. Likewise, Ordinance No. 737 of August 23, 2024, by establishing the conditions for enabling the States to receive resources from the National Public Security Fund, requires that the State Plans for Public Security and Social Defense be approved by the Ministry of Justice.

The requirement established here is a clear interference in the autonomy of the States and the Federal District, in view of the competence established by the Federal Constitution to the Union and the Federative Units with regard to the political-administrative organization, removing the competence of the State Executive Branch as to the approval of the strategic planning of state security, as it determines that the State Public Security Plan be approved by the Ministry of Justice.

Despite the progress regarding the replacement of the classification from exhaustive to exemplary list, there is still interference by the Federal Government in the autonomy of the States, being pinned the limits imposed by regulation, in which it was extrapolated within the legal limits authorized by the legislator, creating serious attacks with the federative form.

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