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STATE OF EXCEPTION
Jurisdiction: Brazil
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1. Regulatory timeline

January 30	The President promulgates the revised text of the WHO International Health Regulations, agreed at the 58th General Assembly of the World Health Organization on May 23, 2005, approved by the National Congress. In turn, the WHO regulation identifies and defines health emergencies, making it possible for the provision to enter the national internal legislative scenario.
February 4	Brazilian Health Minister Mandetta declares public health emergency due to Covid-19.
February 4	Introduction of the bill 23/2020 in the House of Representatives to address the Covid-19 Emergency.
February 6	Conversion of the Bill 23/2020 into law n. 13.979/2020. Among the relevant aspects of the law are the exceptional and temporary restriction of entry into and exit from the country, as recommended by the National Health Surveillance Agency (Anvisa), by highways, ports or airports. The law allows for quarantine and isolation, as well as vaccination and compulsory testing.
February 26	First case of Covid-19 infection diagnosed.

March 11	The Federal District of Brazil is the first federative entity to address the Covid-19 crisis, ordering schools closures and prohibition of public events, followed by the other units of Brazilian Federation.
March 16	Bolsonaro issues Decree 10.277, establishing the Crisis Committee for Supervision and Monitoring of Covid-19 Impacts.
March 18	President Bolsonaro addresses message 93 to Congress urging a decree of a state of calamity.
March 20	The Congress enacts decree 06/2020 declaring state of calamity, allowing under the law of fiscal responsibility the overcoming of fiscal limits and budgetary expansion.
March 20	Bolsonaro enacts Executive Order (<i>Medida Provisória</i>) 926/2020, altering provisions from Law 13.979/2020, aiming to restrict state power to address the Covid-19 emergency.
March 22-23	Enactment of Executive Order (<i>Medida Provisória</i>) 927, authorizing the employer to provide remote working, accumulating time of and qualification by allowing suppression of wages and benefits. Public accountability restriction of governmental decisions.
March 23	Bolsonaro issues Executive Order 928, releasing public officials from making information available to citizens, in violation of the provisions of the general law on access to information,
March 23	Bolsonaro's executive order against states regulation on Covid-19's measures is challenged before the Brazilian Supreme Court.

March 24	The Brazilian Supreme Court grants injunction allowing the states to regulate the right of circulation, shelter in place, lockdown and quarantine.
April 02	The Federal Government passes Law 13.982/2020 authorizing low income people and small entrepreneurs to receive a pay check of 600,00 BRL for three months.
April 17	Bolsonaro issues Provisional Measure 954, that sets forth: “The telecommunication providers shall make available to the Brazilian Institute of Geography and Statistics (IBGE), in electronic format, a list of the names, telephone numbers and addresses of their consumers, individuals or companies”. The provision compels telecommunication companies to make available personal data of all costumers to the government, with any further guarantee of privacy protection.
May 13	Bolsonaro edits Provisional Measure 966, exempting public agents from civil liability, making them liable only for severe errors concerning acts committed in the pandemic.
May 14	Presentation of Bill no. 2633/2020, Representative Zé Silva (Solidariedade/MG), providing land regularization of occupations on lands located in the Amazon rainforest and other preserved lands.

May 20	Provisional Measure 910, allowing land grabbing, lost its efficacy. However, congress members accelerate the bill's progress by allowing land to be squatted in preserved areas, even requiring an emergency regime for the bill.
May 21	The Supreme Court grants injunction to suspend the criteria of severe error arising from Provisional Measure 966.
May 27	Enactment of LC 173/2020 regarding federal program to combat coronavirus among the Union and the States
June 10	Enactment of Law 14.010/20, providing an Emergency and Transitional Legal Regime of Private Law Relations (RJET) in the period of the Coronavirus pandemic (Covid-19).
July 7	Promulgation of law 14.021/20 with vetoes (concerning access to water, hygiene and intensive care beds), providing for social protection measures to prevent contagion and dissemination of Covid-19 in indigenous territories.
July 7	Promulgation of the Constitutional War Reform, instituting an extraordinary fiscal and financial regime to face national public calamity due to the pandemic, through which the Central Bank is allowed to purchase assets from companies without counterpart, Article 7, II.
July 25	New York Times covering “The Coronavirus Unleashed Along the Amazon River”

At the time this report is written (July 25), Brazil leads the world in the number of Covid-19 infections and deaths¹, only behind the United States. Despite the non-stabilization of infected and the continuing progression of the contagion curve, states have begun to reopen the country, following the President's signs of the country recovery. The lack of sufficient testing and screening of those infected makes the return policy risky and it is not possible at this time to establish the dangers of continuing the reopening.

2. Introduction

This report aims to investigate the occurrences of the state of exception during the pandemic. Although formally declared a state of calamity, thus avoiding constitutional prohibitions arising from the state of defense or siege, many of the measures adopted tangibly cross the line between the rule and the exception. The most diverse pieces of legislation were analyzed to provide the most comprehensive scenario of the crisis.

3. Body

3.1. DIVISION OF POWER

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Bolsonaro addressed message No. 93, March 2020, to the Congress to declare a state of calamity². According to the provisions of article 21, item X and XVIII, of the 1988's Brazilian Constitution, setting forth that the Federal Union is empowered to plan and promote permanent defense against public calamities, the Brazilian Congress enacts legislative decree 06/2020 aiming to address the Covid-19 emergency. The main effect of the legislative decree by proclaiming the state of calamity is to release the limits of spending placed by budgetary commands according to the fiscal responsibility law. Budgetary responsibility law establishes limits on public expenditures addressed to the Union and municipalities and states that compose the Brazilian federation. It is worth noting that the state of emergency precedes the state of calamity. While the Health Minister's ordinance decreed the emergency, the state of calamity required the participation of the President of the Republic and Congress, due to the fiscal effects arising from the state of public calamity. Another aspect of being considered is the stage of crisis states provided in the Brazilian Constitution of 1988. Beyond the state of calamity, when conditions worsen, it is also possible to decree the state of defense, state

¹ WHO Coronavirus Disease (COVID-19) Dashboard. WHO Coronavirus Disease (COVID-19). Retrieved 26 July 2020, from <https://covid19.who.int/>

² Gouveia, J. B. (2020). *O Estado de exceção no Direito Constitucional*. Leya, p. 78.

of siege, or federal intervention (art. 49, IV, Brazilian Constitution). However, the consequences arising from the decree of the state of defense and siege are even more limiting to fundamental freedoms, such as freedom of movement and assembly. There are also other legal consequences, such as the prohibition of amendments to the Constitution. Thus, it is unlikely that other crisis states will be approved in Brazil, as they make it impossible to adopt reforms and measures to contain the COVID-19 crisis's effects.

[2]

The Minister of Health was the first to inaugurate the state of emergency through Ordinance 188. However, the pandemic's unfolding required the adoption of other measures at the request of the President of the Republic, with authorization from the National Congress. Checks and balances among powers are in full activity, encompassing though, a vast array of caveats from the uncontrolled edition of provisional measures, disputes involving federative states, and the Republic's powers.

[3]

March 18, 2020, President Bolsonaro made the following statement requesting Congress to take action:

“Therefore, in view of the permissive contained in article 65 of the Fiscal Responsibility Law, it is important to use, exceptionally, the measure provided therein, in the sense that, once the public calamity is recognized by the National Congress and as long as it lasts, the Union is exempted from reaching the fiscal results and from the limitation of commitment provided for in article 9 of the aforementioned Supplementary Law.”³

In the draft legislative decree 88/2020, which became Legislative Decree 06/2020, congress members debated the relevance of voting on the state of public calamity in which Brazil finds itself, in response to the March 18, 2020 message 93 from the President of the Republic. The Chamber of Deputies and the Federal Senate report was for the approval of the draft legislative decree. The justification for approving the state of public calamity is due to unleash the fiscal effects of public spending.

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Article 167, paragraph third, Brazilian Constitution, provides that the primary purpose of approving the state of calamity is to release additional credit, liberating resources to cover unforeseeable expenses. Recognized the calamity, the state is released to spend beyond the annual budget provided, to be released from the forecast of revenues from taxes paid, also allowing a debt that exceeds the limits provided.

³ Nacional, I. (2020). DESPACHO DO PRESIDENTE DA REPÚBLICA - DESPACHO DO PRESIDENTE DA REPÚBLICA - DOU - Imprensa Nacional. Retrieved 23 July 2020, from <http://www.in.gov.br/en/web/dou/-/despacho-do-presidente-da-republica-248641738>

[5]

Given the exceptional nature of the state of calamity, other effects beyond loosening of public expenditure arise. Unlike other states of crisis, public calamity does not presuppose the intensity of the state of defense, state di siege, or even intervention. However, by its very nature, the state of calamity results in the adoption of various measures that, in other circumstances, would imply the limitation of fundamental rights, were it not for the urgency of public health to demand drastic measures. The use of masks, testing, and compulsory vaccination, the limitation of traffic, the suppression of labor rights, are some of the examples contained in the legislation that regulates the subject. Impositions are justified only if the calamity is temporary, measures are proportional, and the police rely on prevailing public interest. Thus, the calamity ends up functioning as an umbrella covering situations that the state of defense and siege would not reach. If they were approved to replace the decree of the calamity for defense, Congress would not be allowed to adopt constitutional reforms, as was the case with Constitutional Amendment 106/2020.

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According to Legislative Decree 06/2020, the state of calamity lasts until December 31. The maximum limit established by the law 13.979/2002 is not exceeding the pandemic.

[7]

The paradox of Brazilian democracy lies in the resistance of the President of the Republic himself to respect the laws edited by the National Congress. Since the beginning of the pandemic, the President of the Republic urged his supporters to oppose the social isolation measures proposed by his Ministry of Health. Every week, the President of the Republic participated in events gathering hundreds of people demonstrating against social isolation⁴. The President of the Republic issued official statements claiming that Covid-19 is a flu, proposing the prescription of an unproven drug, chloroquine, to treat the infection. He also opposed the governors in their management of the crisis. Provisional Measure 926 modified the discipline edited by Congress about the competence given to the states of the Federation to contain the spread of the disease. The Provisional Measure would require federal authorization for the implementation of measures by the states. The Presidential Provisional Measure was challenged before the Brazilian Supreme Court in ADI 6341, demanding in the lawsuit that the legal provisions be declared unconstitutional. The Supreme Court, in turn, granted preliminary injunctions to suspend the effectiveness of the statutory provisions,

⁴ Brazil's president joins anti-lockdown protests. (2020). Retrieved 26 July 2020, from <https://www.bbc.com/news/world-latin-america-52351636>

on the grounds that all federal entities were empowered to legislate and execute public health policies. The President continued to enlist supporters, including business people and the armed and paramilitary forces, calling for the reopening of commerce, shopping centers, and a return to public activities and events. A sectarian of dissidents continues to disarticulate the adoption of social isolation measures, which leads to low population adherence to WHO recommendations. The President of the Republic publicly presents himself at official events without wearing a face mask, organizes barbecues, jet ski tours, visits to shopping malls and commerce, supporting the total reopening and vertical isolation, the latter already expressly rejected by WHO.

The growing dissonance between the President's assertions, and his insistence upon supporting unfounded policies not based on scientific expertise, led to the fall of two health ministers, who disagreed with the approaches defended by the President of the Republic. Bolsonaro fired one of the health ministers, and the other resigned shortly after his appointment, fearing retaliation because he disagreed with the President's proposals. It is worth noting that both ministers were doctors and were trying to get around the crisis's disastrous presidential management. The last minister of health appointed by the President is a military man with no training in medicine or health management. He is simply ignoring the growing rate of infection and death in Brazil.

[8]

The ongoing tragedy in Brazil differs from the narrative of prioritizing some values and rights over others. What is most regrettable in Brazilian politics is the use of the most sensitive moments in Brazilian society to implement regimes even more authoritarian, and retrenched in rights. Political, federal, and legal clashes are severely compromising the management of the health crisis. Brazil lacks an articulated effort to address the problem, using social demobilization to adopt devastating measures against society, such as the privatization of water and basic sanitation, the release of Amazon rainforest for land grabbing, and the dismantling of labor rights under the excuse of preserving jobs – just to cite a few inopportune measures. The suppression of labor rights came with Provisional Measure 927, which suppressed several labor rights, imposing individual agreements without the presence of unions in the bargaining process to negotiate better employers' working conditions. The first Provisional Measure issued regarding labor rights unleashed wages cuts without any compensation during the period of remote working. In the field of personal data protection, a Provisional Measure postponed the coming into effects of the national data protection law, which has many effects on core issues related to privacy rights. Under the argument of making Brazilian citizens' data available for the census, in the direction of limiting rights regarding privacy, Provisional Measure 954 attacked privacy rights, while compelling the sharing of data from users' telephone bills and accounts with the Brazilian Institute of Geography and Statistics. However, the Brazilian Supreme Court, deciding on the constitutionality of the measure, decided to grant an injunction suspending the execution of the provision.

Moreover, through the unambiguous transfer of public funds from the state to financial institutions, allowed through the Constitutional "War" Reform (*Emenda Constitucional* 106/2020), the Brazilian President and Congress are waiving trillions from federal funds to private parties, explicitly giving away public money in the exclusive benefit of financial institutions. Notwithstanding the gravity, Bolsonaro keeps calling demonstrators to support the closure of the National Congress and the Supreme Court, all amid the pandemic, denying the effects of the infection and inciting the population to rebel against the governors. With contradictory directions coming from the country's highest leader, Brazil finds itself in an escalation of cases and deaths. As a consequence, the handling of the crisis through Executive Orders (art. 59, V Brazilian Constitution) is a clear governmental demonstration of an unprecedented normalization of the state of exception in Public Law, while also providing the instruments to implement a state of perennial exception in Private Law.

In Brazil, the dynamics of the State of Exception instituted as a result of the "war efforts" were reversed. While in the previous state of war, the exception came from a state concentration of power, using the excuse of geopolitical articulation to concentrate authority in the government. The new private state of exception guides itself by a wide-open transfer from the public in the hands of international markets. Shyness in "looting" the people through taxes and compulsory recruitment is replaced by alliances between large corporations and state war efforts. The capture of the public good by private enterprises has always been a reality. However, the present moment requires a reconfiguration of exchanges to serve financial capital and rearranged gravitational forces of power across borders. In the verbalization of urgency, under the argument of precariously maintaining naked life, the Brazilian state appropriates the law as a democratic instrument to reward the financiers of power projects. The relationship established between the suppression of substantive rights for the community while expanding the power of private parties is the utmost evidence of the phenomena implemented during the Covid-19 crisis. What seems a process of denial of the pandemics by the Brazilian President is nothing but a facade to hide backstage happenings, such as Bolsonaro's visit to the U.S South Command to address the Venezuela question or the passing of harmful policies against society. In Brazil, while opponents cannot draw a broader picture of the scenario since they are struggling to understand why Bolsonaro every day makes a different statement, the setback of rights and achievements vanishes before peoples' eyes.

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The list of rights under attack or threat is extensive: (a) Loosening the protection of the preserved rainforest; (b) constitutional Reform aiming to transfer private assets to the Central Bank without further accountability; (c) undermining rights of indigenous populations; (d) exempting large corporations to mine in protected areas; (e) allowing land grabbing; (e) privatizing access to water; (f) deepening of the process of

privatization of national resources – only to bring about some situations in which democratic normality has eroded to favor a small fraction of privileged; (g) insufficient protection of food security; (h) federal lacking policies to mitigate the effects of the killing crisis in the Brazilian cities most affected; (i) exempting public officials for errors committed in the management of Covid-19;

3.2 COMPETENCES

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The Brazilian Republic has an intricate system of federative organization, with reserved and overlapping competencies among federative entities⁵. It also has the figure of the municipality as part of the federative organization. Brazilian federalism is relatively recent, as it emerged after the fall of the Empire, with the proclamation of the Republic in 1889. In the current Constitution of 1988, the states have remaining powers, which were not forbidden to them by the Constitution, Article 25, paragraph one. The Legislative composition encompasses the people represented in the Chamber of Deputies and the States by Senators, thus allowing an influx of states within the Federal Legislative. Each state has governors, a legislature composed only of the Chamber of Deputies and the Judiciary. Finally, the municipalities consisting of mayors and council members also exercising federative powers in conducting local politics. The operation of the Brazilian Federation has become key during the Covid-19 crisis, as each federal entity took on managing the crisis in its area of power. Many of the disputes emerged between states, and the Union came from Bolsonaro's provisional measures replacing federative units' autonomy. The Provisional Measures, inspired by Fascist Italy's Decree-Law, are instruments provided for in the Constitution, which, when not used with caution, imply the usurpation of democratic processes, affecting the balance in the Legislative and between the powers of the Republic. The disharmony between the Republic powers when Brazilian Presidentialism does not function properly has the result of disturbing the whole balance that allows the system to work.

[2]

One of the fiercest clashes between the Union and the States during the pandemic was over the States' competence to legislate and implement public health policies, as well as their power to block the transit of cargo, people and vehicles in their territory. While the National Congress enacted law 13.979/2020, which in its original wording did not prevent states from taking action to counter the pandemic, President Bolsonaro edited Provisional Measure 926 in the direction contrary to the intention of Parliament. MP 926 sought to subtract the federative autonomy of states, suppressing the joint competence to deal with public health, articles 23, II, and 198, I of the Constitution of

⁵ Horta, Raul Machado. (1958) *Perspectivas do federalismo brasileiro*. Vol. 2. Universidade de Minas Gerais, p. 129. See also Bonavides, Paulo, and Paes de Andrade. (2003) *História constitucional do Brasil*. Universidade Portucalense, p. 423. Da Silva, J. A. (1984). *Curso de direito constitucional positivo*. Revista dos Tribunais, p. 48-51.

the Republic. Above the disputes involving the Union, States, and Municipalities, the legislative overlapping of the President of the Republic in editing provisional measures disregarding the content of the law already voted lead to the shift of political debates in the Judiciary, through constitutional suits, as was the case with ADI 6341. In the Supreme Court case 6341, the Union's competence to prevent the adoption of public health measures in the conduct of the calamity was questioned. The Supreme Court rejected the Union's possibility of only the Union commanding what are the essential services since the states need to make use of legislative instruments in the management of the pandemics, such as defining activities maintained during the period of social isolation. The only concession favoring the Union was to prohibit States from blocking the movement of goods and persons between States, given the importance of ensuring the supply of products during the pandemic.

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In Resolution 14, from March 17, 2020, the House of Representatives established the organizational criteria for virtual sessions. Despite the compromised functioning of the legislative houses, since the parliamentary composition of 513 deputies and 81 senators makes the face-to-face meetings impossible in times of Covid-19, the availability of technological means has made it possible for the houses to continue functioning using zoom and platforms of this kind. Congress has made use of the lack of transparency and necessary publicity to predate the national h, following the recent approval of law 14.026, of July 15, 2020, privatizing water. Another example of the speed in approving acts that depredate public property was the constitutional amendment 106/2020, allowing the Central Bank to purchase doubtful assets. Congress should pass a law prohibiting discussion of issues not related to Covid-19, avoiding legislative debate behind closed doors and topics involving the broader collective interest.

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The Brazilian Supreme Constitutional Court played an essential role, primarily through action 6343, in which it allowed states to apply pandemic mitigation policies. By suspending the effectiveness of Provisional Measure 926 issued by Bolsonaro, the Constitutional Court prevented the Federal Executive from creating conditions for state action. Not only did this situation deserve mention, but also a decision in which the Provisional Measure that exempted public authorities from providing information to the public was declared incompatible with the Constitution. Provisional Measure 966 led another debate regarding public officials' liability while in charge of Covid-19 matters. Action 6421 filed before the Supreme Court discussed the President's possibility of overcoming a constitutional command concerning the civil responsibility of the public agent. The STF held that the criteria established were not compatible with the provisions of the Constitution of the Republic Federal Supreme Court. It has already rendered more than 4,000 decisions related to the pandemic. However, despite the activism and speed in granting injunctions, other problems are also gaining proportion

in the crisis. Examples are the constant threats that one of the President's sons addressed to the Supreme Court, such as "it is required just a corporal and a soldier in a jeep to close the STF." The Supreme Court's relationship with the military in Bolsonaro's management is also tense. Every time the Supreme Court wavers in matters that are dear to the presidency, written threats arise that decision-making contrary to the President's interests may lead to over-packaging of ministers or even the closure of the Court. Such menaces from authorities in power undermine the importance and harmony of the institutions.

3.2. ROLE OF EXPERTISE

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The debate surrounding the chloroquine is evidence of Bolsonaro's carelessness regarding the gravity of the disease, which already took over 80.000 lives. He rejects experts' opinions, attacks those who oppose his views, despite several studies contrary to the use of chloroquine to treat Covid-19. Since the beginning of the pandemics in Brazil, Bolsonaro boasts the medicine as the cure for the infection. Meanwhile, two Health Ministers left office, recognizing that they could not support the prescription of chloroquine as treatment, admitting that the only way to stop the spread would be through social distancing and isolation. While numbers were skyrocketing, and in some cities, there was a lack of beds to receive patients in intensive care, President Bolsonaro continued to insist on the use of chloroquine. Thus, despite some governors' efforts to purchase mechanical ventilators and expand the health network, the effort was severely compromised by negligent and even criminal actions to mitigate the crisis and assemble the technical apparatus of national efforts to combat the disease.

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Bolsonaro enacted Decree 10.277.2020, establishing a committee composed of the Federal Government's highest level, whose main objective is to coordinate the operations and monitoring the actions adopted by public and private actors concerning Covid-19. With Resolution 06, from June 2, issued from the Crisis Committee, for supervision and monitoring of the impacts of Covid-19. The Working Group's purpose is to keep the President of the Republic abreast of the crisis's unfolding. However, besides being a committee composed predominantly of allies, it does not have a binding force capable of compelling the President and adopting specific postures.

The monitoring systems are daily fed with new data, and statistics are designed to forecast public spending. However, several measures to combat the pandemic are no longer applied due to the barrier of spending without prior revenue allocation. In a catastrophic veto, Bolsonaro has backed several vetoes to the law issued to welcome the spread of the pandemic in the indigenous and riverine communities of the Amazon. The President vetoed necessary measures provided for in law no. 14,021, July 7, such as

providing drinking water to communities devoid of the essential good, expanding the capacity of beds and intensive care units, in addition to prohibiting access to primary hygiene products to such remote communities.⁶

4. Conclusion

The President's disastrous handling of the Covid-19 pandemic hid behind the victims and infected a much more powerful and harmful articulation for Brazil's coming decades. Bolsonaro, distracting the media, his followers, and even his opponents, rehearses an impeccable orchestration between the desiderata of the Executive and Legislative to harm democracy and Brazilians. The widespread use of technology to support democratic debate has become the conduit for the disarticulation of social movements and popular pressure to approve unpopular measures. Despite powers and institutions' appearance of functioning, little was done in favor of those most in need. Millions of unemployed and hungry Brazilians aspire to reopen because they cannot survive without exposing themselves and their families to risks. Out in the streets since the explosion of cases, domestic servants were forced to work daily without any protective equipment, besides informal workers, and a growing list of essential workers for whom the pandemic does not exist. The pandemic revealed the most unequal, oppressive, and unfair side of Brazilian society. Brazilian elites at the top of their luxury condominiums and their bulletproof cars called on workers to get on crowded buses to earn \$200 per month. Meanwhile, all kinds of lobbies have paraded through Congress, proposing wage cuts, dismantling labor rights, unlimited tax benefits, and the like. In addition to mourning its dead, Brazil will have a great effort to rescue its living from the abyss they find themselves.

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⁶ In order to understand the seriousness of the problem before the country, in the most precarious and distant communities, it is worth checking the reasons for the veto. Mensagem n. 378 . (2020). Retrieved 26 July 2020, from http://www.planalto.gov.br/CCIVIL_03/_Ato2019-2022/2020/Msg/VEP/VEP-378.htm

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