

The Judicial Review of Legislative and Administrative Acts in Brazil

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Abstract. The purpose of this report is to analyze the judicial review of legislative and administrative acts in Brazil during the Covid-19 pandemic. Departing from the empirical evidence collected, it focuses on three main aspects: 1. The general characteristics of the judicial review of legislative and administrative acts during the pandemic; 2. The intensity of the judicial review, compared to before the pandemic; 3. Whether the pandemic has redesigned the role of the courts compared to before the pandemic. The framework is the Brazilian constitutional court, Supremo Tribunal Federal, and its rulings regarding the competencies of the three levels of the Brazilian federation, federal, state and municipal. The sources are legislative and administrative acts published in the official gazettes of the federal, state, and local governments and the official website of the Supremo Tribunal Federal. Regarding the political declarations and events related to the coronavirus outbreak, the source is the newspaper Folha de S. Paulo. Through an applied research methodology, using qualitative and quantitative analysis, this report will present conclusions regarding the role played by the Constitutional Court in the redesign of Brazilian federative system during the Covid-19 pandemic.

Keywords: *Covid-19, litigation, federation, competency, Brazil*

1. Introduction

This section will introduce the subject of the judicial review of legislative and administrative acts in Brazil during the Covid-19 pandemic.

Moreover, departing from the empirical evidence collected, it will draw conclusions on the following focus points:

- The general characteristics of the judicial review of legislative and administrative acts during the pandemic.
- The intensity of the judicial review, compared to the period previous to the pandemic.
- Whether or not the pandemic has redesigned the role of the courts compared to the period previous to the pandemic.

The framework for this research will be the Brazilian constitutional court, Supremo Tribunal Federal, and its rulings regarding the competences of the three levels of the Brazilian federation.

The reason why this framework is established is that the competence to legislate and promote

policies in response to the Covid-19 pandemic is at the core of the federative conflict that arose in Brazil during the year 2020.

The sources researched are legislative and administrative acts published in the official gazettes of the federal, regional, and local governments¹ and the official website of the Supremo Tribunal Federal. Regarding the political declarations and events related to the coronavirus outbreak, the source is the newspaper Folha de S. Paulo, which is not only the largest and oldest newspaper in Brazil, but also complies with the highest information literacy standards.²

2. The General Characteristics of the Judicial Review of Legislative and Administrative Acts by the Constitutional Court in Brazil

Brazil is a federation composed of the indissoluble union of three levels of government: the Union (federal or national), the federal states (regional), and the municipalities (local), as predicted by Article 1 of the Constitution of the Federative Republic of Brazil. The Federal District is

¹ Tito Maíra, 'The Effects of the Pandemic in Regional and Local Governance: The federal system in Brazil as a case study', (1 June 2021) Working Paper CEDIS VARIA, ISSN 2184-5549 <https://cedis.fd.unl.pt/wp-content/uploads/2021/06/WP-VARIA_2021_JUN-01.pdf> accessed 5 October 2021.

² ALA-ACRL. Information literacy competency standards for higher education. Chicago, Illinois: The Association of College and Research Libraries. The American Library Association; 2000.

considered a *suis generis* unit, and it can perform the functions of federal state and municipality. The competences to legislate and to adopt public policies at each level are described in Articles 21 to 32 of the Constitution.

This federal system is supported by the principles of political autonomy and division of powers, where power slots are allocated to political entities and allows them to make decisions under the terms of the Constitution and seeking to maintain the federative pact.³ The division of competences is provided by the Constitution, and it is divided into administrative competence (executive power) and legislative competence (legislative power), since the presidential system allocates a significant amount of power to the executive.

The administrative competence concerns the decision-making process of political-administrative acts, the implementation of public policies and the general management of public administration at all levels.⁴ It is classified as exclusive or common. In the case of exclusive competence, the Constitution establishes precisely what governmental level has jurisdiction over the policy (Articles 21 and 30), which cannot be transferred to another level. For instance, the collection of income tax is an exclusive responsibility of the federal government. In common competence, the jurisdiction over the decision-making process is simultaneously assigned to the Union, the federal states, the Federal District and the municipalities. For instance, the administration of public health services is a common competence (art. 23, II, of the Constitution).

The legislative competence concerns the possibility of issuing mandatory, general and abstract norms, and it is divided into private, concurrent, and complementary or supplementary. The private competence (Article 22) belongs to the Union through the bicameral Congress, which can legislate on civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labour law, among others. Unlike exclusive administrative competence, it admits delegation; federal law may

delegate to a certain federal state the possibility of enacting law on specific topics. As regards to concurrent competence, the Union, the federal states, and the Federal District may legislate on health and social assistance (Article 24, XII), on protection and guarantee of the rights of people with disabilities, on cultural, artistic and historical heritage, among others.⁵ From this competence, derives the complementary or supplementary competence, in which the Union issues general norms, and the states are responsible for the complementary legislative activity (when there is a general law) or supplementary (when in the absence of a general law, the states can fully legislate on the matter). In the case conflict between federal law and state law, the first will suspend the effectiveness of the state legislation⁶.

Therefore, the jurisdiction over public health policies and legislation is common and concurrent, meaning that all three levels of the Brazilian government share the prerogative to adopt public policies but only the federal and state levels can legislate over the matter. When analysing the competence of the municipalities (Article 30), one will find the possibility to legislate over local matters within their territory, a general classification that encompasses, for instance, the opening hours of the commerce, the zoning plan, and the waste management.

3. The Management of the COVID-19 Emergency by the Public Powers

The notoriously negationist discourse regarding the Covid-19 outbreak at the Brazilian federal government was not affected by the major events that took place in March 2020, when the World Health Organization declared the pandemic and issued recommendations of actions to contain the spread of coronavirus.⁷ President Bolsonaro himself disregarded the Covid-19 disease as a "minor case of flu"⁸ and appeared in public without a face mask on several occasions, generating gatherings around him.⁹ He also dismissed the

³ Bulos, Uadi Lammego. *Curso de Direito Constitucional*. São Paulo: SaraivaJur, 2020.

⁴ Scarlet, Ingo Wolfgang. *Curso de Direito Constitucional*. 9^a ed. São Paulo: Saraiva, 2020.

⁵ Silva, José Afonso da. *Curso de Direito Constitucional Positivo*. 37^a ed. São Paulo: Malheiros, 2013.

⁶ Martins, Flavio. *Curso de Direito Constitucional*. 5^a ed. São Paulo: SaraivaJur, 2021.

⁷ World Health Organization, 'Timeline: WHO's COVID-19 response' <<https://www.who.int/emergencies/diseases/ncvs/diseases/novel-coronavirus-2019/interactive-timeline>> (accessed 5 October 2021).

⁸ Folha De S. Paulo, 'Não vai ser uma gripezinha que vai me derrubar, diz Bolsonaro sobre coronavírus' *Folha de S. Paulo* (20 March 2020) <<https://www1.folha.uol.com.br/poder/2020/03/nao-vai-ser-uma-gripezinha-que-vai-me-derrubar-diz-bolsonaro-sobre-coronavirus.shtml>> accessed 5 October 2021.

⁹ Folha De S. Paulo, 'Em dia com 965 mortos pela Covid, Bolsonaro ouve panelaço, come cachorro-quente e provoca aglomeração' (*Folha de S. Paulo*, 23 May 2020) <<https://www1.folha.uol.com.br/poder/2020/05/em-dia-com-965-mortos-pela-covid-bolsonaro-ouve-panelaco-com-e-cachorro-quente-e-provoca-aglomeracao.shtml>> accessed 5 October 2021.

Minister of Health Luiz Henrique Mandetta¹⁰ and pressured the following Minister of Health Nelson Teich to adopt hydroxychloroquine as the standard protocol treatment on Covid-19 cases, which lead to the resigning of Teich¹¹, leaving the federal health authority headless for four months.¹² The following Minister was Eduardo Pazuello¹³, also quickly dismissed by the President. Finally, the current Health Minister Marcelo Queiroga, appointed one year after the outbreak emergency was declared by the World Health Organization, is supporting the vaccination campaign and social distancing measures.¹⁴

Recently, a parliamentary committee of inquiry, known as “CPI da Covid”, has been approved and launched by the Brazilian congress. The parliament members are currently focusing on the responsibility of the federal government in the alleged mismanagement of the Covid-19 outbreak, resulting on the death of almost five hundred thousand Brazilian citizens.¹⁵ There are records of about two hundred speeches of the President disregarding the pandemic, the vaccine and the need for social distancing.¹⁶ A “shadow cabinet” was allegedly formed by the President to advise the

management of the outbreak, disregarding the role of the Ministry of Health.¹⁷ In the course of the statements, former members of the government argued that this cabinet circulated, though unsuccessfully, a proposal of decree to include Covid-19 in the recommendations of the package leaflet of the hydroxychloroquine.¹⁸

Furthermore, the testimonials suggest that President Bolsonaro supported, along with the state government of Amazonas, the testing of a “herd immunity without vaccination”, which lead to the collapse of the public health system in the state capital Manaus.¹⁹ The summoned civil servants also presented proof that the federal government refused to buy vaccine for months during 2020, leaving dozens of emails and offers from the pharmaceutical company Pfizer unanswered.²⁰

The legislative and administrative measures established at the federal level are consistent with the scenario unveiled by the parliamentary commission of inquiry. The Act 13.979/2020, approved by congress in February, contained measures concerning exclusively the management of the public health system, namely the isolation and quarantine of suspect or confirmed Covid-19

¹⁰ Folha De S. Paulo, ‘Bolsonaro demite Mandetta e convida Nelson Teich para o Ministério da Saúde’ *Folha de S. Paulo* (16 April 2020) <<https://www1.folha.uol.com.br/poder/2020/04/bolsonaro-demite-mandetta-e-convida-nelson-teich-para-o-ministerio-da-saude.shtml>> accessed 5 October 2021.

¹¹ Folha De S. Paulo, ‘Após ultimato sobre cloroquina, Teich pede demissão do Ministério da Saúde’ *Folha de S. Paulo* (15 May 2020) <<https://www1.folha.uol.com.br/equilibriosaude/2020/05/apos-ultimato-sobre-cloroquina-teich- pede-demissao-do-ministerio-da-saude.shtml>> accessed 5 October 2021.

¹² Folha De S. Paulo, ‘Após quatro meses como provisório-eterno, General toma posse como Ministro efetivo da saúde’ (*Folha de S. Paulo*, 16 September 2020) <<https://www1.folha.uol.com.br/equilibriosaude/2020/09/apos-quatro-meses-como-provisorio-eterno-general-tom-a-posse-como-ministro-efetivo-da-saude.shtml>> accessed 5 October 2021.

¹³ Folha De S. Paulo, ‘Bolsonaro adota Plano Vacina para tentar estancar perda de popularidade’ *Folha de S. Paulo* (9 March 2020) <<https://www1.folha.uol.com.br/poder/2021/03/bolsonaro-adota-plano-vacina-para-tentar-estancar-perda-de-popularidade.shtml>> accessed 5 October 2021.

¹⁴ Folha De S. Paulo, ‘Saiba quem é Marcelo Queiroga, o novo ministro da Saúde de Bolsonaro’ *Folha de S. Paulo* (14 March 2020) <<https://www1.folha.uol.com.br/equilibriosaude/2021/03/saiba-quem-e-marcelo-queiroga-o-novo-ministro-da-saude-de-bolsonaro.shtml>> accessed 5 October 2021.

¹⁵ Folha De S. Paulo, ‘Brasil registra 2.344 mortes por Covid em 24 h e total passa de 482 mil’ *Folha de S. Paulo*, (10 June 2020) <<https://www1.folha.uol.com.br/equilibriosaude/2021/06/brasil-registra-2344-mortes-por-covid-em-24-h-e-total-passa-de-482-mil.shtml>> accessed 5 October 2021.

¹⁶ Folha De S. Paulo, ‘CPI mira discursos do governo e levanta 200 falas negacionistas de Bolsonaro’ *Folha de S. Paulo* (30 April 2021) <<https://www1.folha.uol.com.br/poder/2021/04/cpi-mira-discursos-do-governo-e-levanta-200-falas-negacionistas-de-bolsonaro.shtml>> accessed 5 October 2021.

¹⁷ Folha De S. Paulo, ‘Documentos do Planalto entregues à CPI mostram 24 reuniões com atuação de ‘ministério paralelo’ na gestão da pandemia’ *Folha de S. Paulo* (27 May 2021) <<https://www1.folha.uol.com.br/poder/2021/05/documentos-do-planalto-entregues-a-cpi-mostram-24-reunioes-com-atuacao-de-ministerio-paralelo-na-gestao-da-pandemia.shtml>> accessed 5 October 2021.

¹⁸ Folha De S. Paulo, ‘Mandetta reafirma proposta de alterar bula da cloroquina e diz que Nise agia como urubu na carniça’ *Folha de S. Paulo* (1 June 2021) <<https://www1.folha.uol.com.br/colunas/monicabergamo/2021/06/mandetta-reafirma-proposta-de-alterar-bula-da-cloroquina-e-diz-que-nise-agia-como-urubu-na-carnica.shtml>> accessed 5 October 2021.

¹⁹ Folha De S. Paulo, ‘Vice do Amazonas diz que política de imunidade de rebanho apoiada por Bolsonaro levou Manaus ao colapso’ *Folha de S. Paulo* (5 May 2021) <<https://istoe.com.br/vice-do-amazonas-diz-que-imunidade-de-rebanho-apoiada-por-bolsonaro-levou-manaus-a-colapso/>> accessed 5 October 2021.

²⁰ Folha De S. Paulo, ‘Senador fala em 81 emails da Pfizer enviados ao governo, e coronel responde que eram repetidos’ *Folha de S. Paulo* (9 June 2021) <<https://aovivo.folha.uol.com.br/poder/2021/06/09/5998-braco-direito-de-pazuello-no-ministerio-da-saude-fala-agora-a-cpi-da-covid-acompanhe.shtml>> accessed 5 October 2021.

cases, the testing plan, and the protocol of treatment. From the negationist discourse and lack of effective action of the federal government concerning the pandemic, a gap in the power balance emerged and made it possible for the states and municipalities to take control of the decision-making process. This conclusion will be further explored in the next sections.

4. The Intensity of the Judicial Review Previously to and During the pandemic

From the brief description of the Brazilian federative system in section I, a reasonable number of questions arise, as it happened when the time came to adopt policies and legislate about the measures to fight the Covid-19 pandemic. The conflicts between the legislation issued by the federal government and the measures adopted by the states and municipalities were then posed to the constitutional court on a paramount case – ADI 6341 – that will be analysed in this section. But firstly, an introductory approach to the Brazilian constitutional court activity is required.

A general overview of two decades of activity of the Supremo Tribunal Federal, from 1988 – the year the Constitution was granted – to 2018, shows that 1.957.206 claims have been filed. From those, 626.223 are related to Public Law and Administration, 417.014 to Taxation Law, 347.668 to Procedural Law, 296.252 to Social Security Law, and 270.049 to Labour Law.²¹ Most of those proceedings are appeals from state courts and from the superior court Superior Tribunal de Justiça. From the claims filed directly at the Supremo Tribunal Federal, in the same period, 5.421 are Ações Diretas de Inconstitucionalidade, like the one that will be thoroughly examined in this report. The other types of constitutional procedures submitted

to the court are Mandados de Injunção (6.649), Arguições de Descumprimento de Preceito Fundamental (444), Ações Declaratórias de Constitucionalidade (49) and Ações Diretas de Inconstitucionalidade por Omissão (33).²²

The Covid-19 pandemic raised judicial conflicts of a great range, generating 8.517 claims at the constitutional court, from which 38 approach constitutional individual rights and guarantees. From those 38 proceedings, the claims for suspension of decrees – a formal act issued by the executive power to establish public policy – that imposed restrictions of citizens' mobility and closure of non-essential businesses were mostly ruled in favour of the state or municipality (Rcl 41890; Rcl 39976; Rcl46178; Rcl 45721; SS 5456; SL 1432; Rcl 46442; HC 199449 e Rcl 45201), thus acknowledging their concurrent and common competence to combat the Covid-19 pandemic.²³

However, the cases not only addressed the federative division of competences but also the merit of decrees that required social isolation and lockdown. In those cases, the Supremo Tribunal Federal has been in favour of the isolation measures proposed by federal states and municipalities, as the right to collective health overlaps with the individual right to mobility or commerce, for instance.²⁴

From the 38 claims, many addressed the matter of services provided by public schools, such as the functioning of the canteens during the pandemic²⁵ and the availability of computers for students to attend online classes.²⁶ The court rulings were in favour of the maintenance of canteens services but acknowledged the lack of obligation of schools to provide computers, tablets or other devices to all students.

Under the scope of criminal law, the court was questioned about the obligation to hold the in-

²¹ Pereira, Thomaz; Arguelhes, Diego Werneck; Almeida, Guilherme da Franca Couto, 'VIII Relatório Supremo em Números: Quem decide no Supremo?: tipos de decisão colegiada no tribunal' (Rio de Janeiro: FGV Direito Rio, 2020, p. 144).

²² Pereira, Thomaz; Arguelhes, Diego Werneck; Almeida, Guilherme da Franca Couto, 'VIII Relatório Supremo em Números: Quem decide no Supremo?: tipos de decisão colegiada no tribunal' (Rio de Janeiro: FGV Direito Rio, 2020)

²³ Supremo Tribunal Federal 'Painel de Ações Covid-19' <<https://transparencia.stf.jus.br/single/?appid=615fc495-804d-409f-9b08fb436a455451&sheet=260e1cae-f9aa-44bb-bbc4-9d8b9f2244d5&opt=nointeraction&select=clearall>> accessed 5 October 2021.

²⁴ 'Rcl 41890' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5950207>>; 'Rcl 39976' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5892019>>; 'HC 184423' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5896673>>; 'Rcl46178' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6126333>>; 'Rcl 45201' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6071641>>; 'Rcl 45721' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6094816>>; 'SS 5456' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6080529>>; 'SS 5456' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6080529>>; 'SL 1432' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=613541>>; 'Rcl 46442' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6138370>>; 'HC 199449' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6138511>> accessed 5 October 2021.

asp?incidente=5896673>; 'Rcl46178' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6126333>>; 'Rcl 45201' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6071641>>; 'Rcl 45721' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6094816>>; 'SS 5456' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6080529>>; 'SS 5456' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6080529>>; 'SL 1432' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=613541>>; 'Rcl 46442' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6138370>>; 'HC 199449' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6138511>> accessed 5 October 2021.

²⁵ '38. STP 652' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5997466>> accessed 5 October 2021.

²⁶ 'Pet 9620' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6164770>> accessed 5 October 2021.

person preliminary hearing of the defendant²⁷ - as predicted in the international agreement Pacto de San José da Costa Rica -, about the possibility of the defendant remaining in freedom during criminal prosecution²⁸, and also about the application of the principles of broad defence and contradictory under the extraordinary circumstances.²⁹ The conclusion of this analysis is that the court rulings were coherent with the grounds adopted in similar cases in pre-pandemic times.³⁰

As regards the power balance between the levels of the Brazilian federation, the research reveals 248 claims at the Supremo Tribunal Federal under the subject “federative conflict”, as described in Article 102, I, f of the Constitution. From those, 113 have been dismissed for representing a conflict not relevant to the foundations of the federal system or not observing the requirements to file action. From the ones taken to trial, 89 refer to Taxation and Financial Law and 42 to subjects as Environmental and Energy Law, indigenous people rights, immigration policies, and conflicts related to public estates and buildings. Only 4 of those claims have as subject the explicit constitutional competences of the federal, state, and local governments.³¹

From those four proceedings, two are related to public health services in circumstances other than the pandemic scenario, and two concern the Covid-19 pandemic.

In Ação Cível Originária 3.055³², Justice Ricardo Levandowski faces a conflict regarding the financial transfers between federal and state levels in the state of Maranhão. The Ministry of Health had destined to the state a budget of twenty million reais, to be used in installation of public health units in remote areas. When the state requested the availability of the budget, the Ministry revoked the previous act. The state filed action against the revoking act and Justice Levandowski reaffirmed the concurrent competency to provide public health services through the universal healthcare system, declaring the invalidity of the Minister of Health act that suspended the transfer of budget to the state of Maranhão. The decision also carries a content related to the merit of the administrative act; it has been registered that no technical evidence was presented to justify the suspension of the financial transfer.

In Recurso Extraordinário 855.178³³, Justice Luiz Fux confirmed judicial precedents concerning the common competency of the states and federal governments to provide public healthcare and determined that the costs of the medication needed by the claimant should be supported in a ratio of 50% each by the state of Sergipe and the Health Ministry.

The research identifies similar characteristics in other decisions of the constitutional court. In

²⁷ ‘ADPF 347’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560>> accessed 5 October 2021.

²⁸ ‘HC 183064’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5881811>> accessed 5 October 2021.

²⁹ ‘Rcl 40737’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5914833>> accessed 5 October 2021.

³⁰ ‘MS 37086’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5896035>>; ‘MS 37090’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5897476>>; ‘ARE 1312081’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6113919>>; ‘HC 200318’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6151155>>; ‘MS 37637’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6084538>>; ‘MS 37637’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6084538>>; ‘MS 37637’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6084538>>; ‘Pet 8753’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5884516>>; ‘HC 187092’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5937106>>; ‘HC 187122’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5937237>>; ‘Rcl 43917’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6021653>>; ‘Rcl 44557’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6044914>>; ‘HC 195186’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6068180>>; ‘ARE 1321563’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6153444>> accessed 5 October 2021.

‘ARE 1321563’ <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=6153444>> accessed 5 October 2021.

³¹ Brasil, Supremo Tribunal Federal <<https://jurisprudencia.stf.jus.br>> accessed 5 October 2021.

³² ‘A revogação de ato administrativo deve ser motivada de modo explícito, claro e congruente (art. 5º, VIII, § 1º, da Lei de Processo Administrativo Federal). A inexistência de motivação acarreta a nulidade do ato’ (Ricardo Lewandowski, *Supremo Tribunal Federal*, 28 September 2020) <<https://jurisprudencia.stf.jus.br/page/s/search/sjur433145/false>> accessed 5 October 2021.

³³ ‘É da jurisprudência do Supremo Tribunal Federal que o tratamento médico adequado aos necessitados se insere no rol dos deveres do Estado, porquanto responsabilidade solidária dos entes federados. O polo passivo pode ser composto por qualquer um deles, isoladamente, ou conjuntamente. A fim de otimizar a compensação entre os entes federados, compete à autoridade judicial, diante dos critérios constitucionais de descentralização e hierarquização, direcionar, caso a caso, o cumprimento conforme as regras de repartição de competências e determinar o ressarcimento a quem suportou o ônus financeiro’ (Justice Luiz Fux, *Supremo Tribunal Federal*, 23 May 2019) <<https://jurisprudencia.stf.jus.br/pages/search/sjur422158/false>> accessed 5 October 2021.

Suspensão de Tutela Provisória 299³⁴, Justice Luiz Fux suspended an act of the Governor of the State of Bahia, which restricted the transit of interstate bus transportation as a measure to contain the coronavirus. Again, the grounds were that, even though the state has such jurisdiction because of the common competency, the Governor did not present technical evidence to support the measure; there weren't mobility data or health indicators showing the effectiveness of the restriction. In Suspensão de Tutela Provisória 173³⁵, Justice Dias Toffoli also acknowledges the common competency of the state of Maranhão to establish sanitary barriers to contain the pandemic but declares de invalidity of the sanitary barrier set at the state airport, again for lack of technical support from the federal agencies responsible for the related policies. Therefore, the administrative measures merits were repelled by the court for lack of sufficient justification, even though the ruling on the competences has remained bound to precedents.

The constitutional court decisions analysed, either previously or during the pandemic, are aligned with the historical background of the Brazilian government in supporting the fundamental rights established by the Constitution; the right to universal and free healthcare is expressly granted by Articles 6, 30, VII, 194 and 196. As described before, promoting the health of the population is the responsibility of the Union, the federal states, the Federal District and the municipalities and that includes providing the necessary financial funds to guarantee the fundamental right.

The Federative Republic of Brazil has historically positioned itself in favour of international agreements aimed at strengthening national health.

There are institutional partnerships in effect with international organizations such as the Pan American Health Organization and the World Health Organization, cooperation projects within

the scope of the Community of Portuguese Language Countries and of the Amazon Cooperation Treaty Organization. Under the Mercosur agreements, the summit of Health Ministers and the work subgroup number 11 (SGT-11) are headed by Brazil. Along with the United Nations agencies, Brazil plays a significant role in the South-South Cooperation Project to strengthen the international actions of the Ministry of Health, under the joint United Nations Program on HIV/AIDS (UNAIDS), based in Brasília. Brazil is also signatory to numerous international treaties aimed at promoting health.³⁶

Bearing in mind this panoramic overview, it is necessary to focus on the milestone events of the federative conflict that arose from the Covid-19 pandemic. The article 102, I, *f*, of the Brazilian constitution establishes the jurisdiction of the Supremo Tribunal Federal to rule in legal actions that represent a conflict between the regional and federal levels of the federation, either if they are at the same level or different levels of government. Therefore, cases that represent conflicts of the nature "state *versus* the Union" or "state *versus* state", should be posed by the constitutional court. The municipalities are not expressly included in this rule, however they were subject of the Presidential Provisional Measure 926/2020 and for that reason they were part of the paramount case ADI 6341, which will be detailed below.

On February 6, 2020, the Brazilian Congress enacted a law proposed by President Jair Bolsonaro, containing the measures that could be adopted in the national territory to fight the outbreak. The later called Act 13.979/2020 measures concerned exclusively the health system activity, namely the isolation and quarantine of suspect or confirmed Covid-19 cases, the testing plan, and the protocol of treatment.

³⁴ 'Em tempos de pandemia, os inevitáveis conflitos federativos decorrentes da adoção de providências tendentes a combatê-la devem ser equacionados pela tomada de medidas coordenadas e voltadas ao bem comum, sempre respeitada a competência constitucional de cada ente da Federação para atuar dentro de sua área territorial, com vistas a resguardar sua necessária autonomia para assim proceder. É inviável, assim, que a imposição de restrições à circulação de ônibus interestaduais seja feita sem a prévia análise de informações estratégicas da área de saúde, conforme previsto no art. 3º, § 1º, da Lei No. 13.979/20' (*Justice Luiz Fux, Supremo Tribunal Federal*, 16 September 2020) <<https://jurisprudencia.stf.jus.br/pages/search/sjur434718/false>> accessed 5 October 2021.

³⁵ 'Em tempos de pandemia, os inevitáveis conflitos federativos decorrentes da adoção de providências

tendentes a combatê-la devem ser equacionados pela tomada de medidas coordenadas e voltadas ao bem comum, sempre respeitada a competência constitucional de cada ente da federação para atuar dentro de sua área territorial e com vistas a resguardar sua necessária autonomia para assim proceder. É inviável, assim, que, em aeroportos, sujeitos à administração da Infraero, possa o estado-membro implantar barreiras sanitárias dissociadas de ações coordenadas pela Anvisa' (*Justice Dias Toffoli, Supremo Tribunal Federal*, 08 September 2020) <<https://jurisprudencia.stf.jus.br/pages/search/sjur434127/false>> accessed 5 October 2021.

³⁶ Brazil, Ministry of Health <<https://antigo.saude.gov.br/assessoria-internacional/organizacoes-internacionais#13>> accessed 5 October 2021.

On the same day, President Jair Bolsonaro issued the Provisional Measure 926/2020³⁷, an instrument conceived by Article 62 of the Constitution whose effects are equivalent to Congress-approved legislation. Provisional Measure 926/2020 established that the policies against the outbreak that could restrict the citizens' mobility, or the businesses and services operations would remain under the jurisdiction of the federal authorities, unless those authorities expressly delegate to the states and municipalities.³⁸ This is the second milestone event the research reveals.

Between March 12, and April 6, 2020 – almost in as orchestrated manner – the Brazilian states and the Federal District, as well as their capitals, issued decrees containing response regulations and policies to the Covid-19 pandemic. Moreover, they were not limited to the cases determined by Provisional Measure 926/2020 but adopted restrictions that broadly affected citizens' mobility and non-essential services and business operations in their territories. In the Brazilian civil law presidential system, decrees have the same nature of legislation, except for being issued by the executive power and not the legislative.

Three categories of measures were identified in the decrees: a) measures within the public administration, such as the establishment of the teleworking regime for civil servants and mandatory use of hand sanitizer in public buildings; b) measures under the framework of the Federal Act 13.979/2020, establishing the isolation, quarantine, testing and treatment protocol for Covid-19 cases; and c) measures that broadly affected the citizens' mobility and non-essential services and businesses operations, namely the closure of stores, malls, cinemas and theatres, schools and public spaces and the prohibition of large social events and gatherings.

In the third group of measures, night curfews were established in some places, the freedom of worship was constrained in a few cities by the closure of churches and temples, public and private events and gatherings were banned in most locations, among other personal liberties restrictions.³⁹

On March 23, 2020, the political party Partido Democrático Trabalhista filed the paramount claim Ação Direta de Inconstitucionalidade (ADI) 6341⁴⁰, requesting the ceasing of the effects of Provisional Measure 926/2020. The ADI is an instrument of judicial constitutionality control, and the petition was grounded in arguments related to the conflict between the content of the norm issued by the President and the Constitution itself. The day after the petition was filed, a decision by Justice Marco Aurélio of the supreme court granted provisional effects to the action, acknowledging the common and concurrent competency to implement regulations and policies against the pandemic, therefore allowing regional and local governments to respond to the outbreak, despite what the federal authorities could determine.

With the issuing of that decision, the judicial review of states and municipalities decrees that established policies and restrictions to prevent the spread of Covid-19 became limited by judicial precedent. Unlike the previous cases analysed by the court, this decision had *erga omnes* effect, and the judicial review from that moment on could only be imposed on grossly unlawful cases.

Notwithstanding, President Jair Bolsonaro made a last attempt to overcome the ruling by filing a claim subscribed by himself, another Ação Direta de Inconstitucionalidade (ADI) 6764 against decrees issued in the states of Bahia, Distrito Federal and Rio Grande do Sul which established lockdown measures. The petition was dismissed by the same Justice Marco Aurélio on the grounds of gross error, since the Constitution grants the right to the President to file an ADI, but not in his name, and only representing the Brazilian sovereign State through the competent institution, that would be the Federal Attorney General's Office.⁴¹

Finally, on April 15, 2020, the Supremo Tribunal Federal submitted the ADI 6341 to the panel of Justices that confirmed the initial decision, ruling in favour of states and municipalities to acknowledge their jurisdiction over legislation and policies to guarantee the fundamental right to health and combat the pandemic.

³⁷ Brasil, Palácio do Planalto, 'Medida Provisória No. 926/2020' <http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/Mpv/mpv926.htm> accessed 5 October 2021.

³⁸ Articles 3, §§ 8º, 9º and 10º of the Provisional Measure 926/2020.

³⁹ Tito, Maíra, 'The Effects of the Pandemic in Regional and Local Governance: The federal system in Brazil as a case study', Working Paper CEDIS VARIA, ISSN 2184-5549, (CEDIS, 1 June 2021) <[https://cedis.fd.unl.pt/blog/project/the-effects-of-the-covid-19-](https://cedis.fd.unl.pt/blog/project/the-effects-of-the-covid-19-pandemic-in-regional-and-local-governance-the-federal-system-in-brazil-as-a-case-study/)

[pandemic-in-regional-and-local-governance-the-federal-system-in-brazil-as-a-case-study/](https://cedis.fd.unl.pt/blog/project/the-effects-of-the-covid-19-pandemic-in-regional-and-local-governance-the-federal-system-in-brazil-as-a-case-study/)> accessed 5 October 2021.

⁴⁰ Brazil, Supremo Tribunal Federal, 'Ação Direta de Inconstitucionalidade No. 6341' <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5880765>> accessed 5 October 2021.

⁴¹ Brazil, Supremo Tribunal Federal, 'Ação Direta de Inconstitucionalidade No. 6764' <<https://portal.stf.jus.br/processos/detalhe.asp?incidente=6136024>> accessed 5 October 2021.

5. Conclusions on Whether or Not the Pandemic Intensified the Judicial Review or Redesigned the Role of the Court

The conclusion extracted from the scenario described is that the intensity of the submission of federative conflicts to the Brazilian constitutional court has not been affected by the Covid-19 pandemic. The Supremo Tribunal Federal has historically been a protagonist in balancing the powers of the federation. However, the effects of the 2020 precedent can be significantly broader than the ones issued previously to the pandemic. The granting of the ADI 6341 in favour of states and municipalities represents a shift in the power balance within the Brazilian federation.

The regional and local governments in Brazil, during the year 2020, filled the power gap left by the federal government based on such strong grounds that the Brazilian supreme court acknowledged their reasoning and ruled in favour of their jurisdiction over the measures to contain the Covid-19 pandemic. This was a bottom-up process based on interpretation of the Constitution, later submitted to the supreme court, which confirmed the concurrent and common competence of the federal, regional, and local governments to prevent the spread of coronavirus. The court has been bound by precedent since then, maintaining the same foundations on subsequent rulings, and has stated through them that this power is not unlimited; the empirical evidence collected proved that the merit of the administrative and legislative acts were also taken in consideration. The decision was innovative and paramount, but any grossly unlawful excess of legislation or policies by the states and municipalities is not treated with condescendence by the constitutional court.

It is not a new scholarly argument that the era of the Nation-state is coming to an end. The power of the Nation-state is shifting to both regional arrangements in a supranational approach (the European Union, the United Nations, the NAFTA) or an intranational approach (northern Italy, Catalonia, Alsace-Lorraine). In either case, the Nation-states that exercise strong central control in the name of safeguarding their integrity and identity begin to decompose.⁴² This scenario also reveals that layers of governance of the Nation-state are not only being transferred to international organizations, but also local governments. That is why some scholars mention a new era for the City-state.⁴³

In this sense, it is fair to conclude that the Covid-19 pandemic did not redesign the role of the Brazilian constitutional court, which has historically played his part on the federative balance and has been ruling according to judicial precedents. However, the Covid-19 pandemic provided the severe circumstances that led to a paramount decision that acknowledged and confirmed a shift in power balance, after which the Brazilian federation has been - to a certain extent - reshaped by the same court.

⁴² Ohmae, Kenichi, 'The rise of the region state in Foreign Affairs', Spring 1993, p. 80-84 <<https://www.foreignaffairs.com/articles/1993-03-01/rise-region-state>> accessed 5 October 2021.

⁴³ Kotkin, Joel, 'A New Era for the City-state?' (Forbes, 23 December 2010) <<https://www.forbes.com/sites/joelkotkin/2010/12/23/a-new-era-for-the-city-state/>> accessed 5 October 2021.