

Challenges of the democratic rule of law in Brazil: between institutional crises and the pandemic of COVID-19¹

Desafios do estado democrático de direito no Brasil: entre crises institucionais e a pandemia da COVID-19

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Abstract:

Brazil has faced a severe economic and political-democratic crisis, which affected over the constitutional text, provoking constant normative alterations and interpretations sometimes intriguing occasioned by the Federal Supreme Court. The interference of the economic system in the political and legal systems has generated problems that even included the loss of functional differentiation among these sectors, associated to this, the country is facing a health crisis generated by the COVID-19 pandemic. It is intended, on this paper, to approach these questions' impacts on the context of Brazilian Government's confrontation of the new coronavirus pandemic, focusing on conflicts among the federal entities (Union, States and Counties) that reached the Supreme Federal Court. From the analysis, it is concluded that the interference inflicted by the economic system on the political and legal systems has provoked a type of functional intromission, named "dedifferentiation", with loss of the autonomy of the latter, also generating expressive social damage, alike changes on the constitutional protective structure, dismantling the welfare state and weakening the democracy. The federal government's behavior in addressing the health crisis has led to a belligerent unconstitutional centralism, despite cooperation federalism, resulting in the absence of national coordination of health policies and creating managerial conflicts which, in turn, translate into more social and politics instability, as well as avoidable deaths. To proceed this critical analysis, doctrinal and documentary studies will be used, including reading news reports and examination of Supreme Court's decisions that deal with measures to combat Covid -19.

Keywords: Constitutional crisis. Democratic crisis. Sanitary Crisis. Covid-19 Pandemic. STF.

Resumo:

O Brasil tem enfrentado graves crises de natureza econômica e político-democrática, que repercutem sobre o texto constitucional, provocando constantes alterações normativas e/ou interpretações por vezes intrigantes por parte do Supremo Tribunal Federal. A interferência do sistema econômico nos sistemas político e jurídico gera problemas que incluem até mesmo a perda de diferenciação funcional entre esses setores, associada a

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isso, o país enfrenta a crise sanitária causada pela pandemia da COVID-19. Pretende-se, neste ensaio, abordar os impactos dessas questões no contexto do enfrentamento da pandemia do novo Coronavírus pelo governo brasileiro, com foco em conflitos entre os entes federativos (União, Estados e Municípios) que aportaram ao Supremo Tribunal Federal. Da análise, conclui-se que a interferência do sistema econômico nos sistemas político e jurídico tem provocado um tipo de intromissão funcional, aqui chamada “desdiferenciação”, com perda da autonomia desses últimos, além de ocasionar danos sociais expressivos, como alterações na estrutura protetiva constitucional, desmonte do Estado de bem-estar social e enfraquecimento da democracia. A conduta do governo federal no enfrentamento da crise sanitária tem levado a um tipo de centralismo inconstitucional beligerante, à revelia do federalismo de cooperação, resultando na ausência de coordenação nacional das políticas de saúde e contendas gerenciais que, por sua vez, se traduzem em mais instabilidade social e política e aumento exponencial de mortes evitáveis. Para proceder a essa análise crítica, serão utilizados estudos doutrinários e documentais, incluindo leituras de notícias jornalísticas e exame das decisões do STF que versam sobre as medidas de combate à Covid-19.

Palavras-chave: Crise constitucional. Crise Democrática. Crise Sanitária. Pandemia de Covid-19. STF.

1 Introduction

Constitutionalism and the democratic rule of law represent great stakes of Western modernity. In the twentieth century, several Latin American countries experienced periods of exception, with military dictatorships, authoritarianism and repression of human, civil and political rights. In Brazil, after twenty-one years of dictatorial rule, it was possible to migrate to a political coalition that ended up generating the Federal Constitution of 1988, known as the Citizenship Charter, which, although disfigured in a significant part of the social demands initially proposed, instituted and/or reinstituted rights of freedom aiming at the reconstruction of democracy. with respect for fundamental rights, guided by the objective of eradicating poverty and marginalization, as well as reducing social and regional inequalities.

Throughout the twenty-first century, the banners of the rule of law and democratic constitutionalism have faced great challenges. The interference of economic interests in the political and legal systems ends up distorting constitutional dictates and seriously damaging the social protection framework of the State. In this scenario of instability, we have seen, all over the world, the return of authoritarian governments, although "democratically" elected, that preach moral conservatism as a priority agenda, an apolitical agenda, based on ethical and customs controls, a real smokescreen for the advances of political-economic retroliberalism, especially docile to the large financial market.

In the context of these tensions, in Brazil, in 2016, the *Accusation* without any real legal reason of the then president, Dilma Rousseff, with a progressive and social profile, followed by the election, in 2018, of President Jair Bolsonaro, with a reactionary and neoliberal profile, who controls customs while freeing the state from predatory capital. This conservative agenda was trapped in March 2020, at the peak of its implementation, by the health crisis derived from

Covid-19, whose effects directly affected the country's population, demanding action from governments, in the three spheres of the federation, and straining the already weakened Brazilian Unified Health System (SUS).

This text aims to present the factors of political and democratic instability, confronting, at first, the situation of constitutionalism in Brazil, focusing on the role of the Supreme Federal Court (STF). Next, we will address some reasons that challenge the stability of Brazilian democracy, from facing the health crisis derived from the Covid-19 pandemic, to reaching partial conclusions on cases referred to the STF, convened, all the time, to decide on matters that involve confrontations between the entities of the federation – and that must be exhausted in the administrative sphere, It was enough that the so-called "Federative Pact" was respected.

The methodological path chosen encompasses the critical analysis of the current context, in the face of the democratic constitutionalism represented by the Constitutional Charter of 1988, its developments and inconsistencies, tempering the theoretical positions of authors such as Luhmann, Marcelo Neves, Di Giorgi and Callejón, in fragments that bring them together. The discussion will be instrumentalized through the use of research techniques such as bibliographic review, the analysis of legal documents – laws and decisions of the STF – in addition to the use of newspaper articles as secondary sources of information on facts related to the topic addressed.

2 The constitutional paradox and the role of the Superior Court in Brazil

For a long time, under the aegis of legal positivism, the norm played a central role in theories of the legal phenomenon. In this work, we use the epistemological approach of Luhmann's (2019) sociological theory, for the general concept of functionality of the social system, which, although controversial, is interdisciplinary (through collaborations with sciences such as biology, physics, psychology, economics, communication theory, among others), applied to the study of social phenomena. In the theoretical set of the so-called functional systems, considered the constitutional text, it is observed that, in addition to the norm, the judicial decision, especially that issued by the Supreme Court, has gained relevance, as it operates, as Luhmann (2021), the introduction of an "asymmetry in the relationship between two different types of text, the Constitution and the other law". Consequently, the Constitution and the court in charge of interpreting it began to instrumentalize the binary code

of what is right/wrong, to the extent that the Constitutional Court began to categorize the norms that conform and those that do not conform to the law, and these must be invalidated.

The Constitution, as the *Supreme Law*, replaced the protections of natural law and positive rationality, with the power to define the validity of other norms based on the duality of the licit/illicit relationship. Luhmann warns of the audacity of this postulate: "all other laws can now be observed in view of their conformity or not with the law. Any law [...] can be non-conforming to the law" (2021, cit.), all under the Kelsenian justification that the legal order would be "a construction of different layers or levels of legal norms" (Kelsen, 2019, p. 247).

Taking as valid the proposition that this binary code represents the basis of the legal system and that the High Court will be the *guardian of the Constitution*, it is easy to see the increase in importance that the leadership of the Judiciary has come to play. In Brazil, the Constitution that had been established, throughout the twentieth century, as a promise of legal-political organization capable of granting stability to the Democratic Rule of Law, was consolidated in the aforementioned "Citizens' Constitution". After the dictatorial period, the original constituent legislator assured that the page of oppression and the rejection of human rights should be part of the past.

According to Luhmann (2019, p. 113), modern society is characterized by its overcomplexity and social systems are presented in the face of the systemic-functional differentiation of autopoiesis, in this way, each social system is self-referential, to the extent that it is justified through its own foundations. Neves (2016, p. 17; 2018, p. 106) explains that in today's modern society, the question of development and underdevelopment concerns the split of modernity into center and periphery², according to which in countries of peripheral modernity, such as Brazil, the autopoiesis of legal and political systems would be blocked by other subsystems, especially the economic, and regional legal-political systems of the center. In these terms, the insufficiency of complex couplings between the system and the environment leads to the degeneration of the corresponding security of expectations.

The Federal Constitution of 1988, at least formally, intended to implement the Democratic Rule of Law, with a profile of social welfare, expanding fundamental individual and social rights and their guarantees. However, the Brazilian reality revealed that we only inaugurated a

² It should be noted that the notion of center/periphery can also occur between peripheral countries and within countries, whether peripheral or central (Neves, 2018, p. 103)

new constitutional nominalism³ (Neves, 2018, p. 208), since the rights guaranteed in the Magna Carta were not, in fact, enjoyed by the Brazilian population. This is because in peripheral countries such as Brazil, characterized by social stratification, economic inequality and the marginalization of the masses, there is a division of society into underintegrated and overintegrated, a fact that makes it impossible for the entire population to fully exercise fundamental rights. Over-integration uses the constitutional text whenever it is favorable to its interests, however, the same norm is quickly rejected when it imposes limits on its political and economic possibilities of action. In turn, the underintegrated (the majority of the Brazilian population) do not have access to the rights guaranteed by the legal system, however, this is not an exclusion, since they are not freed from the duties and responsibilities of the state apparatus, especially with regard to punitive structures. (Neves, 1994, p. 261). Thus, the generalized lack in the legal system, in terms of the absence of reciprocally shared rights and duties, gives rise to the non-existence of citizenship (Neves, 2016, p. 248).

In the context of the contradictions of a country like Brazil, the legal system has suffered undue interference from the economic system and the 1988 Constitution has been repeatedly disfigured by the large number of constitutional amendments. On the other hand, the STF, in recent years, has adopted decisions guided by interest groups, revealing itself, in general, to be co-opted by the opinion of the mainstream media and alien to the explicit constitutional text, as will be mentioned below. In a scenario like this, who guarantees the stability of the principles of the democratic regime and human rights? In the current Brazilian context, would the STF be a strong and stable enough institution to carry out its much-needed mission? According to the general theory of constitutionalism, the High Court would be responsible for fulfilling the function of safeguarding the text and spirit of the constitutional norm, filtering the interference of the political and economic systems in the structure of justice and strengthening the functional differentiation of the entire social system. It happens that, in the Brazilian reality, there is a great difficulty for the Law to maintain its autonomy and self-reference, thus, according to Neves, Brazil has a constitutional history represented by a vicious circle between nominalism and constitutional instrumentalism, and in recent years it has migrated from nominalism to a true "constitutional degradation" (2018, p. 414).

³ According to Marcelo Neves (2018, p. 128), constitutional nominalism refers to the copying of constitutional models by peripheral countries without implying an effective change in the reality of the population, with a real structural discrepancy between the established constitutional norm and the one experienced by society.

The Brazilian constitutional text has been modified by 117 amendments: in the last five years alone, there have been 22 changes to the Magna Carta, a trend that does not seem to stop, quite the opposite. In fact, the 1988 Constitution has undergone so many changes that several doctrinaires metaphorically associate it with a "mosaic", without unity and increasingly distant from the initial ideals of inclusive and balanced socio-economic development, with reduced inequalities, social well-being and dignity of the human person. As stated above, the STF, instead of containing the decomposition, played an important role in this degenerative process, since the interpretation of the constitutional text is fundamental for the effectiveness of the norm. As Giorgi (2015, pp. 117-118) reminds us, with each interpretation, the judge "transforms the text itself [...] Only the interpretation of the Constitution is increasingly distinguished between constitutional interpretation and unconstitutional interpretation: autology repeats itself and reflects on itself."

In the Brazilian case, it is verified that the Judiciary, acting as a protagonist of legislative policy, frequently disrespects the boundaries between the legal and political systems. The process in which the judge stops applying the law to construct the law (Silva, 2018) is called "Government of the Judges", and it is not a mere interpretative exercise to observe, sometimes, in the decisions of the Supreme Court, different meanings of the constitutional text and even the construction of its own rules. The reality of the Constitution is social differentiation and the function of the constitutional judge is to continuously reactivate this process of construction of reality (Giorgi, 2015, p. 117). When one observes, in Brazil, the process of judicialization of politics and the politicization of the judiciary, especially in the sphere of the STF, one observes that the constitutional judge ceases to exercise his function of constructing reality, to the extent that the boundaries between the political and legal systems are mixed, in a true phenomenon of "dedifferentiation".

In addition, one cannot fail to observe the "legal inconsistency of the participation of the STF as an interested party in issues of political conflicts" (Neves, 2018, p. 407). If the "guardian of the Constitution" promotes constitutional instability, constantly changing its decisions based on political criteria and excessively expanding the interpretation of the constitutional text, it means that the situation in Brazil is serious: the normative text itself is modified by the excessive and unreasonable use of principles inapplicable to the case⁴, which can lead to a

⁴ Review the following STF judgments and the use of the principle of presumption of innocence to justify diametrically opposed conclusions: Declaratory Actions of Constitutionality Nos. 43, 44 and 54; Habeas Corpus No. 126.292/SP and Habeas Corpus No. 152.752/PR.

symbolic judicialization, or to the displacement of the symbolic character of the Constitution to the Judiciary which, far from promoting the effectiveness of fundamental rights, ends up revealing a broad discretion and bringing constitutional jurisdiction closer to an "irresponsible commitment" and anti-democracy (Carneiro, 2015, pp. 162-163). This lack of congruence between decisions, which could occur even within the political system, is, as a general rule, incompatible with the legal system (Giorgi, 2015, p. 114).

From this perspective, the use in Brazil of the doctrine of "neo-constitutionalism" gave rise to the exaggerated use of principles under the justification of constitutional concreteness and this ended up overestimating the role of the Judiciary, to the detriment of the Legislative and Executive Branches. This fact would have led to the distortion represented by the insertion of the Judiciary in party politics, media stardom and symbolic judicialization, to the detriment of the legal implementation of the Constitution (Neves, 2018, p. 409-410; Carneiro, 2015, p. 163). This description confirms the fragility and instability of the Brazilian legal system, revealing that CF/88 could not act as a structural coupling of the justice system, nor exercise its function of filtering the interference of the political system in the law.

Therefore, in Brazilian judicial practice it is understood that "democracy is not realized in politics, but in law" (Silva, 2018), a reading that causes serious failures in the justice system. Although it is not desirable to go beyond the Judiciary, to the point of entering a kind of "judicial democracy" or "dictatorship of the judges", it is true that the Judiciary cannot remain silent, on the contrary, the ideal would be "a Judicial Power, at the same time autonomous in relation to political power, but strongly active, capable of monitoring the coherence requirements of a highly complex law" (Santoro, 2005, p. 114), in his field of analysis.

In addition to this challenging circumstance experienced by Brazilian constitutionalism, the following points will mention two other faces of the crisis facing Brazil: the political-democratic and the health.

3 The challenges of the Democratic Rule of Law: constitutional and democratic crisis

After the impeachment of former President Dilma Rousseff, Brazil is experiencing a kind of "new era" in the political and legal context. The growing tension of the population led to the election of a ruler with an authoritarian profile, without real proposals for the country's problems, a fact that is aggravated in relation to the goals of development, increasingly

evidenced by the crisis imposed by the Covid-19 pandemic. It can be observed that in several regions of the world there have been elections of extreme right-wing candidates; the manipulation of the State by financial power, generally coming from speculative capital; the realization of "reforms" that alter social protection; the extreme democratic fragility.

In Brazil, this degenerative process, as announced by social scientists, is strengthened. Some explain "how democracies die" (Levitsky; Ziblatt, 2018, p. 19); others speak of "processes of democratic involution" (Balaguer Callejón, 2018, p. 682); while there are those who analyze the paradoxes of constitutionalization due to the passage from "democratic capitalism to capitalist democracy" (Brunkhorst, 2014, p. 94). The common questions are: are we facing a new paradigm? Is the democratic regime doomed to failure? Is there another form of government more appropriate in this "postmodern" era? What institution can protect the Democratic Rule of Law?

It is not possible to answer such complex questions with simple solutions, but it is worth trying to draw, in the Brazilian case, a general overview of the reasons that generated the democratic and constitutional weakening and that seem to be similar in other parts of the globe. In the first place, it is important to highlight the process of political polarization of the population as a factor of great relevance, an episode verified in Brazil and in other countries, as occurred in the last two presidential elections in the United States. This phenomenon has been enhanced by technological advances and the expansion of the use of social networks, new forms of communication that should serve to promote the expansion of dialogue, but reality has shown the opposite: absence of debate, fragmentation of public space and gregarious mentality.

For Empoli (2019), in his book *The Engineers of Chaos*, he explains how new media were used, in several countries, to channel the anger of part of the population, directing it to commercial and electoral purposes. In this new form of communication, engagement predominates and not the veracity or content of the information, which is why the spread of conspiracy theories and prejudiced, racist or gender controversies prevails. The objective, in general, is to retain followers around a supposedly apolitical electoral candidate, who would be contrary to the interests of the elites and traditional politicians and who, in defense of the people, would promote true justice, however, in general, these candidates are not capable of proposing concrete solutions to the problems they helped to proclaim and end up forming authoritarian administrations. anti-democratic, sowers of anger, fear and segregation.

The use of social media through the spread of *fake news* associated with the manipulation of election propaganda has also had a significant impact on electoral processes and, so far, the legal system has not found effective ways to stop this destruction. In Brazil, despite the efforts

made, the Electoral Tribunal failed to contain disinformation or maintain the integrity of the 2018 electoral process (Santos, 2020, p. 441). Balaguer Callejón shows how the internalization of the power of global agents through social networks also intervened in the *British Brexit referendum* and in the US presidential elections, generating a new constitutional crisis, more destructible than the previous ones because it affects "the very core of democratic and constitutional processes by internalizing the power of large global agents through social networks" (2018, p. 692).

All this is associated with the feeling of absence of representation and legitimacy, which, due to various factors, further reduces confidence in the democratic regime. The result has been the election of far-right presidents, who often issue opinions that discredit the electoral process, against the democratic regime, in favor of authoritarianism and institutional instability. Unfortunately, in Brazil, for several years now, the current President of the Republic, since he served as a consecutive federal deputy, has praised the military dictatorship, participated in demonstrations against democracy and insinuated the closure of the National Congress and the STF, declaring that the Brazilian electoral process, especially electronic voting, is permeated by fraud. However, no effective attitude has been adopted by the political and judicial institutions to contain these pronouncements.

During the period of the Covid-19 pandemic, several demonstrations against democracy, in favor of the closure of the National Congress and the Supreme Federal Court and in defense of the military dictatorship, were attended by the President of the Republic and ministers of State, among other politicians linked to this group (G1, 2020; Moura; Sampaio, 2020). Similar attitudes were adopted by former US President Donald Trump, which ended up culminating, in January 2021, with the invasion of the Capitol, the seat of the central legislative branch, by extremists who did not accept the result of the presidential election, under the same argument of electoral fraud.

Another point that confirms the fragility of the Democratic Rule of Law is the growth of the interference of economic interests, with a neoliberal bias, in democracy. The constitutional (institutional) crisis is exacerbated as a result of a policy of 'economic colonization' that subordinates the social state to the positive results of the trade balance or to the actions of hegemonic economic agents" (Morais, 2011, p. 47). In this context, the State ceases to be concerned with the well-being of the population and the guarantee of its rights, in order to preserve the interests of capitalism, thus, also in Brazil, "during the last thirty years of global neoliberal hegemony, the fragile balance of power between democracy and capitalism has tilted dramatically in favor of capitalism" (Brunkhorst, 2014, p. 105).

The fundamental concern of neoliberal governments is the so-called "fiscal austerity", implemented through reforms aimed at "modernizing public administration", through legislative changes that reduce "business costs". In fact, reforms serve to amortize or extinguish social rights⁵. In the last five years, Brazil has made several legislative changes for these purposes, some of them in the constitutional text itself, such as Constitutional Amendment No. 103/2019, which modified social security rights, without forgetting Law No. 13,467/2019, which carried out the so-called "labor reform".⁶

The Constitutional Amendment that most affected the developmental and social profile of the Brazilian State came immediately after the inauguration of Michel Temer. This is EC No. 95, of December 2016, which froze public spending for a period of 20 years, ignoring the economic and demographic growth rates of the next two decades, with direct effects on social rights, such as health and education, which depend on state compensation. The foreseeable consequence will be the scrapping of social policies, a fact verified in the Covid-19 pandemic, as explained below. Associated with this, the new wording of the constitutional text, in the end, takes away the right of the Brazilian citizen to choose, in each election, the government program and public policies that he or she considers necessary for economic development (Mariano, 2017, p. 261), considering that future rulers will be tied to the agenda of fiscal adjustment of the public accounts.

Another relevant issue in the relationship between the economic and political system is that the process of globalization has changed the dynamics of companies with countries. By not having a territorial link, they can migrate to states with lower labor costs – it should be noted that in neoliberal language, sometimes called retroliberal here, rights become costs and investments become expenses – and more tax incentives. The result of this is that "jobs come and go as soon as they appear, fragmented and eliminated without warning, as changes in the rules of the game of hiring and firing" (Bauman, 1999, p. 113).

Capital has no borders, but states and their sovereignty do, and human beings, linked to territories, suffer the consequences of this mobility. Even more serious, in the new wave of liberalization, is the growth of the power of speculative financial capital, which does not generate employment and has very little connection with the real life of the population. This

⁵ Either through laws that reduce labor and social security rights, or through the reduction of funds for education and social assistance.

⁶ In addition to these other legislative changes, they are also planned for the near future, such as administrative and tax reforms and the "Mais Brasil Plan" composed of several Constitutional Amendment Proposals (No. 186/2019, 187/2019 and 188/2019).

money is fluid and can be in several places (companies or countries) in the same day, paradoxically, despite not having a territorial link, it determines public policies, since governments are controlled by those who hold economic power, knowing that this "select group" determines the fate of a huge part of the planet's population.

Thus, the separation between economic, political, and legal systems as heteronomous, normatively closed, and cognitively open, can be corrupted. In practice, there is a conjuncture in which "the transformation of an order of markets rooted *and* controlled *by* states into an order of states rooted *in* and controlled *by* markets" (Brunkhorst, 2014, p. 102). The operating system that is normatively closed satisfies the interests of the market when it issues its *output*. In Brazil, to make matters worse, this dichotomy remains even more problematic, due to the so-called functional dedifferentiation, proposed by Luhmann himself (2021), for whom the constitutional model requires "that the separation and operational closure of the legal and political systems be preliminarily guaranteed".

As noted above, the Brazilian legal system, either due to the intense judicialization of politics (increasing interference of the judiciary in political issues and decisions, in addition to the appreciation of illegal transgressions), or due to the politicization of the *stricto sensu* jurídico (use of resources and methods typical of the political sphere by jurists, such as the invasion of the legal field by the political) faces difficulties in maintaining the Constitution as a structural coupling strong enough to contain undue interference in the Law. To make matters worse, in the whole of authoritarian neoliberalism and little commitment to social developmentalism, the legal system suffers an acute interference from the economic, since it is subordinated to it, a scenario in which the Law adapts to economic and political interests, with the predominance of the codes of money/power over the licit/illicit. to the detriment of fundamental rights and the strengthening of the democratic State.

Brazilian institutions would need structures capable of strengthening them in order to resist these two pressures, the economic and the political, manipulated by undue economic interventions, which cause the risk of total dedifferentiation, that is, of the fusion of unequivocal interests, to the detriment of social rights. The country is living in a time of challenges, in which the economic interpretation of the Constitution, associated with the crisis generated by the visible democratic fragility, requires redoubled attention, if the Constitutional and Democratic Rule of Law is still to be presented as a fair and viable option.

As if the simultaneous crises affecting the country were not enough, the appearance of the new Coronavirus, which has hit health systems around the world, produces particular impacts in Brazil, given the aforementioned institutional fragility.

4 Brazil's performance in the health crisis derived from the Covid-19 pandemic

The world continues to face the effects of the pandemic caused by Covid-19. According to the WHO (2022), as of April 25, 2022, there are more than 507 million confirmed cases of Covid-19, totaling more than 6 million deaths worldwide. In Brazil, the number of deaths exceeds 662 thousand, with more than 30 million cases registered. These alarming data reveal the mismanagement of the Brazilian central government in the face of the health crisis, a fact that placed Brazil in second position in the number of deaths in the world, only surpassed by the United States. As Balaguer Callejón (2020, p. 25) points out, it is not surprising that this scenario of destruction affects the US and Brazil, as a result of the action of populist leaders (Trump and Bolsonaro), who boycotted the policies of their own technical team and local governors.

To make matters worse, *denialist fake news*, spread on social networks based on publications by the President of the Republic himself, cause perplexity and make it difficult to articulate the direction of science. In the pandemic, the President advised against social isolation and confronted state and municipal leaders, and the Ministry of Health itself advised the use of chloroquine and hydroxychloroquine in the treatment of Covid-19, in disagreement with the regulation that requires analysis by the National Commission for the Incorporation of Health Technologies (Vieira; Servo, 2020, p. 11). As a result, the political system, in these acts represented by the head of the Federal Executive, moved even further away from constitutional principles to get closer to the logic of maintaining the profits imposed by the economic system.

In the context of the pandemic, even those agents with a neoliberal bias recognized that the crisis required a rapid and harmonious state response to effectively and quickly confront the economic and social problems generated. However, what happened was a great and deliberate disorder around the federative powers: the states and municipalities were lost in the attempt to contain the proliferation of the virus and guarantee the health of their population. Given the situation, this last section of the article will show the disastrous measures adopted by the federal government, especially those that generated conflicts of interest typified in lawsuits before the Federal Supreme Court.

As a result of the enactment of Law No. 13,979/2020 and Provisional Measure No. 926/2020, in the face of the threat of the President of the Republic to suspend isolation measures

by decree (Pereira; Arantes, 2020), States and Municipalities began to fear that the federal government would hinder the adoption of restrictive measures to contain the advance of the disease. Thus, through ADI No. 6,341, proposed by the Democratic Labor Party (PDT), these normative acts were questioned before the STF, at which time the Constitutional Court sent a direct message to the Federal Executive establishing the concurrent competence between the states to act, normatively and administratively, in the field of public health. without any hierarchy. The Supreme Court also determined that guidelines in the fight against the pandemic must comply with WHO guidelines, on a scientific basis, as an important excerpt from the summary explains:

3. The worst mistake in the formulation of public policies is the omission, above all, of the essential actions required by Article 23 of the Federal Constitution. It is serious that, under the cloak of exclusive or private competence, the inactions of the federal government are rewarded, preventing the States and Municipalities, within the scope of their respective competences, from implementing essential public policies. (...). It is necessary to read the rules that make up Law 13,979, of 2020, as derived from the Union's own competence to legislate on epidemiological surveillance, in the terms of the General Law of the SUS, Law 8,080, of 1990. The exercise of the Union's competence at no time diminished the competence of the other entities of the federation in the provision of health services, nor could, after all, the constitutional guideline be to municipalize these services. (...) 7. Given that the object of action of the states is common, the resolution of conflicts over the exercise of competence must be guided by the better realization of the right to health, supported by scientific evidence and the recommendations of the World Health Organization. (emphasis added). (STF. ADI No. 6.341/DF. Evaluation body: Plenary. Rapporteur of the judgment: Judge Edson Fachin).

The STF's decision was correct, considering that the Constitution establishes the common competence of all the federated entities to take care of health (art. 23, II), so the action of one of the federated entities does not exclude the competence of the other, since their powers are cumulative. This decision of the STF, adopted at the beginning of the pandemic, is directly related to the type of federalism adopted in Brazil and serves to guide the states. Traditionally, in our legal system, the powers and competences of the Union are extended, with the scope of action of the Member States being limited. It means that, in general, the centripetal model of Brazilian federalism "exerts a potential influence on States and Municipalities, through budgetary, financial, and tax rules and policies that are commonly unfavorable to the permanence of wealth with the aforementioned federated entities" (Bonizzato, 2019, p. 103), while implying the strengthening of the Union.

However, Brazilian constitutionalism has historically migrated to the model of cooperative federalism, from the 1946 Constitution to the 1988 Federal Constitution (Horta,

2002). This tendency was ratified when concurrent (art. 24) and common (art. 23, I to XII) competencies were inserted in the 1988 Constitution, which require the cooperative nature of the Union, the States, the Federal District and the Municipalities (Horta, 1999, p. 17). The basic characteristic of cooperation federalism is solidarity, since the central entity has the duty to act jointly with the partial entities, directing regional and local actions. However, this cooperation, through the development of national guidelines, is not perceived in the fight against the pandemic in Brazil.

The mutual collaboration required in the field of public health was carried out in the daily practice of the Unified Health System (SUS). In addition to the provisions of Article 23 of the Constitution, the municipalist decentralization of health, with a focus on primary care, revealed the main role of the Union and the Municipalities (Vieira; Servo, 2020, p. 7), with the States occupying a second plan. However, there was a real weakening of the federative coordination mechanisms of the SUS, a fact that began with the aforementioned EC 95/2016, with the limitation of the Union's mandatory minimum expenditure on health and, recently, was enhanced by the negligence of the federal government in the fight against the pandemic.

This fact was evidenced by the difficulty in acquiring the necessary ventilators for the treatment of severe acute respiratory syndrome at the beginning of the pandemic. In January 2021, the collapse of the public health system began, with a lack of oxygen in ICUs in several Brazilian states, starting with Amazonas.

The sequence of events reveals that the Union has lost its leading role in health coordination. As a general rule, state and municipal governments sought to unite in the fight against the Coronavirus, even in situations where there were political-electoral disputes, breaking, at least momentarily, the historical competition of inability to produce cooperative governance (Pereira; Arantes, 2020). However, there are not enough resources for the States, together with the Municipalities, to resolve all the demands, regular or derived from the pandemic.

In turn, on 03/02/2021, Judge Rosa Weber granted provisional measures in three Original Civil Actions filed by the States of São Paulo, Maranhão and Bahia (Nos. 3474, 3473 and 3475, respectively) to condemn the Union to "immediately analyze the requests for qualification of new ICU beds" made by the States before the Ministry of Health (STF, **STEEL NO. 3473**. Rapporteur: Judge Rosa Weber). In the three lawsuits, the aforementioned States alleged "the abandonment of the cost, by the defendant (Union), of maintaining the ICU beds necessary to face the COVID-19 pandemic." (STF, **STEEL NO. 3474**. Rapporteur: Judge Rosa Weber). It turns out that, probably, due to political-partisan differences, the Federal Government reduced

the transfer of funds made by the Ministry of Health for exclusive Covid-19 beds, knowing that, in the State of Maranhão, for example, in January and February 2021, beds were not being financed with federal resources.

The conducts described frontally violate the principles of legality and administrative impersonality. In addition, the abrupt cut in federal public funds when the entire country was suffering from the resurgence of the pandemic directly affects the lives of people who depend on the Unified Health System to treat the severe respiratory syndrome caused by Covid-19. Although the virus affects everyone, the most serious consequences are suffered by those who need the public health system. When their assistance is affected by a lack of resources, the result is preventable deaths.

Unfortunately, as indicated by the various cases of judicialization collected, the federal government has not acted in accordance with the dictates of cooperative federalism (Horta, 2002). Denialism and rejection of scientific research were noted in each presidential pronouncement. So much so that the STF, in the aforementioned judgments, repeatedly mentions the government's obligation to follow the technical-scientific criteria and guidelines drawn up by the WHO.

However, to date, the most effective measure adopted by the Constitutional Court to determine the responsibilities of the lack of control in Brazilian public health was the determination of the Federal Senate to install the Parliamentary Commission of Inquiry (CPI) with the aim of investigating the possible omissions of the federal government in the fight against Covid-19. without any analysis of political expediency by the president of the Legislative Chamber (STF, **MS No. 37760**. Evaluation body: Plenary. Rapporteur: Judge Roberto Barroso).

While it is true that the decisions made by the Supreme Federal Court, in this period of pandemic, affected, in some way, the installation of chaos in Brazilian public health. We cannot say that their actions have eliminated the phase of constitutional degradation mentioned above. The "messages" sent, through the sentences, to the federal government about scientific denialism had no effect, while the lack of action by the Union in promoting concrete and effective public policies to face the pandemic was evidenced in the poor results achieved by the country. As Balaguer Callejón (2020, p. 33) emphasized, Brazil has useful measures to control state action, but they are not so useful to control inaction. In these terms, although the Court has been correct in the content of the decisions issued on the pandemic, it has not positively interfered in the permanent omission of the federal government.

Since the beginning of the pandemic, the President of the Republic has been against preventive health measures under the justification of increasing the economic crisis and that social distancing measures impacted the right to freedom. If, in fact, there was concern about the economic crisis, about people's lives, health, dignity and freedom, the Federal Government should have invested, quickly and efficiently, in the production and purchase of vaccines against Covid-19. On the contrary, it acted by discrediting existing vaccines, promoting negative vaccination publicity, and rejecting proposals from pharmaceutical companies. It is clear that only with the mass immunization of the population will Brazil have a real chance of winning the fight against the disease, with the reduction of serious cases and deaths and, consequently, the unblocking of health systems and the safe return to work⁷. The classic opposition between development and fundamental rights is not sustainable, economic recovery and the care of the life and health of the Brazilian population will only succeed if they occur simultaneously.

In fact, public spending on the purchase of inputs would recover later by reducing spending on the treatment of those infected and the consequent gradual recovery of the economy. The delay in the implementation of policies aimed at immunizing the Brazilian population will not bring back the lives of Brazilians or the much-publicized economic growth, on the contrary, it will probably put Brazil in a long-term economic crisis, with a high recovery cost for the State, making exit strategies from state intervention more complex and costly (Lazzarini; Musacchio, 2020).

What can be said about this new paradox? The federal government, which claimed to value the economy so much, actually ends up being responsible for the worsening of the health and economic crisis, since the population and the private sector will demand more public resources to resume development. However, the federal government took advantage of the health crisis to approve the so-called Emergency PEC, which originally had no correlation with the pandemic, since the approval of a new round of emergency aid to those most in need was conditional, by Minister Paulo Guedes, on the approval of the Constitutional Amendment Proposal. This, in turn, has no new proposals, representing, in fact, the result of the reformulation of the former PEC No. 186/2019, previously foreseen by the federal government through the "More Brazil Plan", as mentioned in topic 2. The Emergency PEC was converted into EC No. 109, of April 15, 2021.

⁷ A fact that was proven with the cooling of the pandemic in mid-April 2022, when, according to the Ministry of Health, more than 80% of the population had been vaccinated with the second dose.

On the other hand, the federal government's omission with the pandemic was not repeated in the current administration's reformist agenda. The economic team is taking advantage of the delicate moment that the Brazilian population is experiencing to approve a new constitutional amendment of fiscal austerity, instead of containing the economic and social effects caused by the pandemic. In other words, even in this situation, the central concerns of the Federal Government revolve solely around the reduction of public spending, so that, in the old dispute between human rights and economic development, neoliberal capitalism manages to impose itself and continues the dismantling of the welfare state.

5 Final Thoughts

Brazilian constitutionalism suffers from the interference of economic factors in the legal system and the growing risk to the stability of the democratic regime. A combination of factors, aggravated by the polarization of the mood of the population and external interference in the national elections, with the victory of candidates with authoritarian profiles, amid the spread of *fake news*, keeps the political temperature high in the country. Brazil is a peripheral country, with a constitutional history of oscillation between nominalism and instrumentalism, which faced the overthrow of two presidents of the republic through *impeachment* processes only in the period after redemocratization. This scenario has intensified the process of degradation of the Federal Constitution in parallel with the dismantling of the welfare state.

Associated with this, Brazil faces a concrete problem of functional homogenization (dedifferentiation) of the legal system, impacted by the inappropriate intrusion of political and economic systems. The struggle for the strengthening of democracy and for what remains of the Federal Constitution, hit, from the beginning, by the agenda of neoliberal reforms, needs to be reinforced so that the Magna Carta can, in spite of everything, fulfill its function of structural coupling of the justice system and contain the undue interference of other systems. Aware of the history of constitutional instability, it is urgent to ensure that the institutions of the Republic are attentive to their functional responsibilities.

Despite the difficulties common to a peripheral country, dominated by interests alien to the national interest and the defense of the rights of the population, it is necessary for institutions to fulfill their constitutional role to reduce the uncertainty and fear that permeate the current environment. The system of checks and balances provided for in CF/88 makes a positive counterpoint to the maintenance of the functional differentiation of the system, in the division

of powers, therefore, if each branch of the republic exercises its functions and if the Constitutional Court, guardian of the Constitution, remains faithful to its role, a greater effectiveness of the Magna Carta can be guaranteed.

In the face of the armed confusion in Brazil, the STF, criticized for the phenomenon of the judicialization of politics, has played an important role and, in the face of absurdity, has directed its decisions towards greater respect for its status as guardian of the constituent process. The chaotic situation in the country led the STF to try to correct course, amortizing the impacts of the politicization of the judicial process, as in the case of the revocation of the Lava Jato decisions, although it maintains its role in the judicialization of politics at the highest level. It seems that there is nothing more to be done, given the scenario of chaos imposed by the inaction of the federal government in the context of the pandemic.

While it is true that the STF, as interpreter of the Constitution, has played an important role in facing the current challenges, it cannot be forgotten that the political system has also been called upon to act, in an environment of great instability. It is the functioning of the legislative and judicial branches, especially at the federal level, that has contained the outbursts of lack of preparation and authoritarianism of the federal executive, running the risk of becoming, by excess, a new danger due to the absence of differentiation between the powers.

In the context of political and economic tensions, the country, surprised by the health crisis caused by the Covid-19 pandemic, identifies demands for the restoration of the role of the welfare state and the so-called federalism of cooperation. The effects of the pandemic, although it attacks everyone indiscriminately, are especially felt in the vulnerable and poor population, the underintegrated, who need social assistance to cover their basic needs and have the SUS as their only way to cope with it.

The scenario of confrontation of interests, in the midst of the pandemic, hit the health sector hard. The STF was required daily to solve problems in the administrative sphere of the federation, demonstrating that, in the Covid-19 crisis, the Legislature, the Courts, specifically the Supreme Court of Justice, and state and local governments try to circumvent the inaction of the Union, a fact that ends up aggravating the phenomenon of the so-called functional dedifferentiation and reorganizes capacities and jurisdictions. Brazil has not only become the scene of the uncontrolled spread of the virus, but also the scenario of federative changes and disobedience to the legal system that give rise to studies and responsibilities, present and future, with as yet unforeseen impacts on constitutional powers, on the performance, with independence and distribution, of the powers of the Republic and on the profile of the Democratic Rule of Law.

Associated with these various crises, we are facing a possible institutional and democratic rupture, in the face of the repeated attacks suffered by the electoral system, especially by Bolsonaro and his supporters, in an attempt to delegitimize the official results. The upcoming Brazilian elections, to be held in October 2022, will represent one of the biggest challenges since the country's redemocratization. The legal system, in this act represented by the STF and the TSE, will have to be firm enough to guarantee the maintenance of democracy and what remains of constitutionalism.

References

- BALAGUER CALLEJÓN, Francisco. Constitutional rights, pandemic and globalization. **Prim@ Facie**, João Pessoa, v. 19, n. 42, p. 16-36, 2020. Available at: <https://periodicos.ufpb.br/index.php/primafacie/article/view/56459/3208>. Accessed on: 09 June 2022.
- BALAGUER CALLEJÓN, Francisco. The two great crises of constitutionalism in the face of globalization in the twenty-first century. **Revista Espaço Jurídico de Derecho**, Joaçaba, v. 19, n. 3, p. 681-702, 2018. Available at: <https://portalperiodicos.unoesc.edu.br/espacojuridico/article/view/20205/pdf>. Accessed on: 09 June 2022.
- BAUMAN, Zygmunt. **Globalization: the human consequences**. Rio de Janeiro: Zahar, 1999.
- BONIZZATO, Luigi. Anunciações e escolhas teóricas e fática para o estudo e crítica da contemporânea Federação Brasileira. In: BOLOGNA, C.; LIZIERO, L., SEPÚLVEDA, A. (ed.). **Federalism: contemporary challenges**. Porto Alegre: Editora Fi, 2019. pp. 73-111.
- BRUNKHORST, Hauke. The decapitation of the legislator: the European crisis, paradoxes of the constitutionalization of democratic capitalism. **Direito UnB**, Brasília, DF, v.1, n.1, p. 93-118, Jan./Jun. 2014.
- CARNEIRO, Wálber Araújo. Crisis and scarcity in the social state: from constitutionalization to symbolic judicialization. In: MORAIS, José Luis Bolzan de; COPETTI NETO, Alfredo (ed.). **State and Constitution: Social State and Economic Power in the Face of the Global Crisis**. Florianópolis: Empório do Direito, 2015. pp. 147-173.
- EMPOLI, Giuliano da. **The chaos engineers**. Translation: Arnaldo Bloch. São Paulo: Vestigio, 2019. *Kindle eBook*.
- G1. Bolsonaro once again supports an anti-democratic act and says that he will no longer "admit interference." **G1 Distrito Federal**, Brasília, May 03, 2020. Available in: <https://g1.globo.com/df/distrito-federal/noticia/2020/05/03/manifestantes-fazem-carreata-pro-bolsonaro-na-esplanada-dos-ministerios-em-brasilia.ghtml> Access date: 08 Mar. 2021.
- GIORGI, Raffaele de. The challenge of the constitutional judge. Translation: Ricardo Menna Barreto. **Campo Jurídico**, Guarulhos, v. 3, n. 2, p. 107-120, outside. 2015. Available at:

<http://www.fasb.edu.br/revista/index.php/campojuridico/article/view/76/75>. Accessed on: 09 June 2022.

HORTA, Raúl Machado. **Federalism in contemporary constitutional law**. Belo Horizonte: Journal of the Court of Accounts of the State of Minas Gerais, 2002. p.223-249. Available at: www.ablj.org.br/revistas/revista19e20/revista19e20%20%20RAUL%20MACHADO%20HORTA%20-%20O%20Federalismo%20no%20Direito%20Constitucional%20Contemporâneo.pdf. Accessed on: 09 June 2022.

HORTA, Raúl Machado. The new trends of federalism and their reflections in the Brazilian Constitution of 1988. **Revista Legislativo**, Belo Horizonte, n. 25, p. 14-25, Jan./Mar. 1999.

KELSEN, Hans. **Pure theory of law**. Translation: João Baptista Machado. 8. ed. São Paulo: Martins Fontes, 2019.

LAZZARINI, Sergio; MUSACCHIO, Aldo. Leviathan as a partial cure? Opportunities and dangers of using the state apparatus to respond to the COVID-19 crisis. **Journal of Public Administration**, Rio de Janeiro, v. 54, n. 4, 2020. Available in: https://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-76122020000400561 Access date: 08 Mar. 2021.

LEVITSKY, Steven; ZIBLATT, Daniel. **How democracies die**. Translation: Renato Aguiar. Rio de Janeiro: Zahar, 2018.

LUHMANN, Niklas. **Systems theory in practice: functional differentiation and modernity**. Translation: Érica G. de Castro and Patrícia S. Santos. Petrópolis: Voices, 2019. verse 2.

LUHMANN, Niklas. The Constitution as an evolutionary acquisition. **Revista Rechtshistorisches**, [S. l.], v. IX, p. 176-220, 1990. Available at: https://edisciplinas.usp.br/pluginfile.php/5613248/mod_resource/content/1/SEMIN%C3%81RIO%202011.%20LUHMANN.%20A%20constituição%20como%20aquisição%20evolutiva.pdf. Access date: 05 Jan. 2021.

LUHMANN, Niklas. The paradox of human rights and three ways of their deployment. Translation: Ricardo Henrique Arruda de Paula and Paulo Antônio de Menezes Albuquerque. **Themis**, Fortaleza, v. 3, n. 1, p. 153-161, 2000.

MARIANO, Cynara Monteiro. Constitutional Amendment 95/2016 and ceiling on public spending: Brazil returns to the state of economic exception and disaster capitalism. **Journal of Constitutional Research**, Curitiba, v. 4, n. 1, p. 259-281, Jan/Apr 2017.

MORAIS, José Luis Bolzan de. **The crises of the State and the Constitution and the spatial transformation of human rights**. Porto Alegre: Livraria do Advogado, 2011.

MOURA, Rafael Morais; SAMPAIO, Dida. Together with Bolsonaro, the Minister of Defense flies over a pro-government demonstration in Brasília. **Estadão**, São Paulo, May 31, 2020. Available at: <https://politica.estadao.com.br/noticias/geral,ao-lado-de-bolsonaro-ministro-da-defesa-sobrevoa-manifestacao-antidemocratica-em-brasilia,70003320474> Access date: 08 Mar. 2021.

NEVES, Marcelo. Between subintegration and overintegration: non-existent citizenship. **Data: Revista de Ciências Sociais**, Rio de Janeiro, v. 37, n. 2, p. 253-275, 1994.

NEVES, Marcelo. **Between Themis and Leviathan: A Difficult Relationship: The Democratic Rule of Law from and Beyond Luhmann and Habermas**. 3. ed. São Paulo: Martins Fontes, 2016.

NEVES, Marcelo. **Constitution and Law in Peripheral Modernity: A Theoretical Approach and an Interpretation of the Brazilian Case**. Translation: Antônio Luz Costa. São Paulo: WMF Martins Fontes Publisher, 2018.

ON THE CUSP OF CHAOS: note from Rede CoVida on the situation of the pandemic in Brazil. **Rede Covida**, Salvador, Feb 25. 2021. Available in: <https://redecovida.org/relatorios/na-antessala-do-caos-nota-da-rede-covida-sobre-a-situacao-da-pandemia-no-brasil/> Access date: 03 Mar. 2020.

PEREIRA, Carla Galvão; ARANTES, Rafael de Aguiar. Facing Covid-19 in Salvador: Cooperation and Conflict in Intergovernmental Relations. **Environment and Society**, São Paulo, v. 23, p. 1-9, 2020. Available at: <https://www.scielo.br/j/asoc/a/VhxVchb5sqGX39SW4nSVcWv/?format=pdf&lang=en>. Accessed on: 09 June 2022.

SANTORO, Emílio. **Rule of Law and Interpretation: For a Just-Realistic and Anti-Formalist Conception of the Rule of Law**. Porto Alegre: Livraria do Advogado, 2005.

SANTOS, Gustavo Ferreira. Social networks, disinformation and regulation of the electoral process: a study based on the Brazilian electoral experience of 2018. **Revista de Investigaciones Constitucionales**, Curitiba, v.7, n. 2, p. 429-449, May/August. 2020. Available in: <https://www.scielo.br/j/rinc/a/smjstVv5BVxHr5Dy74xN9pR/?format=pdf&lang=en>. Accessed on: 09 June 2022.

SILVA, Luciano Nascimento. "The Observer is the Government of the Judges, between law and politics." In: XXXII JORNADAS DE FILOSOFÍA DEL ORDEN "DERECHO, POLÍTICA Y MORAL", 32, 2018, Buenos Aires. **Annals [...]** Argentine Association of Philosophy of Law: Buenos Aires, 2018.

VIEIRA, Fabiola Sulpino; SERVO, Luciana Mendes Santos. Covid-19 and federative coordination in Brazil: consequences of federal dissonance for the response to the pandemic. **Saúde em Debate**, [S. l.], v. 44, n. esp. 4, p. 100-113, 2020. Available at: <https://preprints.scielo.org/index.php/scielo/preprint/view/1370/2146>. Access date: 09 Mar. 2021.

WORLD HEALTH ORGANIZATION. **WHO dashboard on coronavirus (COVID-19)**. [S. l.]: WHO, 2022. Available at: <https://covid19.who.int> Access date: April 25, 2022.