

# **COVID-19 pandemic opportunities for Brazilian federalism: an analysis of the Brazilian Supreme Court's ADI n. 6341<sup>1</sup>**

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This presentation is part of our research, still in development, on the marks of Brazilian legal culture (Iorio Filho, 2014; Iorio Filho & Duarte, 2011), added to the reflections that we have made in lives on YouTube channels about the relationship between Brazilian law and the COVID-19 pandemic scenario. In particular, we reflect on health protection in relation to the role and limits of the federative entities in fighting the pandemic, which is amplified in the judgment of ADI 6341 by the Brazilian Supreme Court.

This thematic discussion is at all important, because it brings in its significant field a whole problematic of circumstances of federative constitutional clashes, and therefore of explicit relations between sovereign power and local autonomies in relation to the guardianship of citizenship.

To work with the characteristics of the federation, we will use a Weberian methodological instrument (Weber, 1964) which is the ideal type. It is the construction of a model that traces a kind of simplified caricature of the social reality studied and does not intend to exhaust the characteristics of the historical experiences of each state. According to Weber (1964) given the diversity of local peculiarities, the ideal type is an essential instrument to avoid falling into extreme relativism, which enables us to compare certain aspects of a social phenomenon.

The main characteristic of the federal state is administrative and political decentralization. What makes this form of organization quite sophisticated is that power in this type of state is divided into different power functions (Legislative, Executive and Judicial), and these are reproduced symmetrically at all levels of the federation.

Another fundamental element that integrates the federative organization is the existence of the free and efficient manifestation of the will of the representatives of each of the federal states in the sense of creating the union of all of them, thus forming the federal state. This phenomenon is called the federative pact and is established in the Federal Constitution.

Finally, it should also be pointed out that the federative entities, regardless of the size of their population, their participation in the gross domestic product of the Federal State, or their territorial extension, have full formal equality among themselves, an equality that is established by the constitutional rules.

A first observation about federalism should be made: the federation, through the decentralization of sovereign and administrative powers in autonomous geographical entities, becomes a prerequisite for the democratic regime, since it would make possible the

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management of the public thing, respecting the regional and local peculiarities, interests and particularities. Citizenship, on the other hand, which can be translated as a legal minimum common to all who are legally bound to a State, embodies a set of rights and duties that govern the relationship between the State and its people.

The contemporary State, after the bourgeois liberal revolutions, based on the idea of universal legal equality - everyone is equal before the law and in the application of the law -, undertakes to attribute to all those who are bound to it a common legal minimum, composed of a set of rights and duties attributed to all due to the political bond of each subject with this same State. Thus, citizenship, which is inherent to the idea of universality and, therefore, of legal equality, is a phenomenon inherent to contemporary capitalist societies, since it is a way for the State to guarantee to all those who are bound to it and, therefore, holders of duties that ultimately finance the State itself, a minimum level of equality, since the market society, by its own logic, generates inequality (Marshall, 1967).

Thus, citizenship can be conceptualized as the legal minimum, composed of rights and duties, common to all those who are politically bound to a given State. In other words, citizenship is a set of rights and duties attributed to all those who are linked to a given State by a criterion of political bond, due to this same bond, which is nationality. The common legal minimum attributed to all nationals by citizenship is composed, according to Marshall (1967) by three groups of rights: civil rights are derived from the right to liberty and must be guaranteed by the courts; political rights that must be guaranteed by universal access to the ballot box; and social rights that must be guaranteed by public policies.

Associating, in this way, a contemporary conception of federation and citizenship, through autonomy in the hands of the regions, makes viable the democratic exercise of power, and as such of citizenship. Beyond the will to limit power, with its distribution among the federative entities, federalism exists, we may say, to protect the rights of the citizen, the citizen's exercise of power.

### **The ADI 6341**

The ADI n. 6341 was filed by the Democratic Labor Party (PDT) questioning Provisional Measure 926/2020 and the redistribution of sanitary police powers introduced, by that measure, in Federal Law 13,979/2020. The changes, in the view of the applicant political party, interfered with the system of cooperation between the federative entities, since they entrusted the Union with the prerogatives to institute measures of isolation, quarantine and interdiction of movement, public services, essential activities and circulation.

In March 2020, Reporting Justice Marco Aurélio granted a partial injunction to make explicit the concurrent jurisdiction, in terms of health, of the Union, the States, the Federal District, and the Municipalities, submitting the granted decision to the subsequent scrutiny of the Court's Full Bench.

In his opinion, Justice Marco Aurélio concludes that:

The provisions do not exclude acts to be performed by the State, the Federal District and the Municipality, considering the concurrent jurisdiction in the form of article 23, II, of the Brazilian Constitution". [...] it must be recognized, simply formally, that the discipline resulting from Provisional Measure No. 926/2020, in that it printed a new wording for article 3 of Federal Law No. 9.868/1999, does not rule out the taking of normative and administrative measures by the States, Federal District and Municipalities.

Soon afterwards, in the following month of April, the full bench of the Brazilian Supreme Court, in a session by videoconference (under the terms of Resolution 672/2020/STF) appreciated and approved the preliminary order granted, confirming that the actions adopted by the Federal Government, in the provisional measure, to deal with the new Coronavirus, do not exclude the concurrent competence, nor the taking of normative and administrative measures by the states, the Federal District, and the municipalities.

Here is part of the full bench's decision:

The Court, by majority vote, upheld the injunction granted by Justice Marco Aurélio (Rapporteur), with the addition of an interpretation in conformity with the Constitution to paragraph 9 of art. 3 of Law No. 13,979, in order to make it clear that, while preserving the attributions of each sphere of government, pursuant to item I of art. The Reporting Justice and Justice Dias Toffoli (Chief President) were defeated on this point, and Justices Alexandre de Moraes and Luiz Fux were partially defeated on the interpretation in conformity with letter b of subsection VI of art. 3.

With the position taken by the Court, the common and concurrent jurisdiction of the federative entities regarding health are reinforced, with emphasis on their autonomy. If it is true that the STF's decision affirms the position of the Union, it also, on the other hand, provides support and backing for state and municipal actions of social distancing and operation of commercial establishments, as an unfolding of shared jurisdictions.

In fact, such positioning follows to a certain extent the spirit of decentralized protection found in article 198 of the Brazilian Constitution, with the Unified Health System (SUS) - which has been reinforced in almost all actions before the Supreme Court that have health protection and responsibility for treatment or medication as their theme.

## Conclusions

Finally, from the perspective of Political Science, Sociology, and the History of Law, we can affirm that there is nothing new, because we have a great line of historical continuity that characterizes our federalism and is translated into the clashes between centralization and decentralization of power, veiled in the media and juridical-political discourses that have been made explicit due to the urgency and emergency of COVID-19.

The Brazilian Supreme Court ADI 6341, in resolving the issue by reaffirming the common and concurrent jurisdiction of the States and Municipalities, leads us to suggest two reflections: the first is that beyond a Brazilian-style federalism translated into the centralization/decentralization pendulum, such a decision did not help in taking a position of State Policy, since political decisions and normative acts were pulverized among all the federative entities. In other words, there was a fragmentation of the decision-making spheres on how to deal with the pandemic.

The second, arising from the first, leads us to indicate that this fragmentation acclimates to legal insecurity and unequal treatment of citizens. For in some member states and municipalities, for example, there will be limitations on the right to come and go or on the right to economic freedom, and in other regions there will not.

This points to the clear lack of federative harmony in the Brazilian way. The legal framework of civil rights is designed by the Constitution in national terms, that is, as an exercise of the exclusive and private jurisdictions of the Union (v.g. Civil Code and Consumer Code). However, with the Supreme Court's decision, the restrictions on these rights will not be general, because by reinforcing the common and concurrent jurisdictions, in this moment of health crisis, the Court admits the possibility of having local and regional restrictions - which, if

contrasted with a national frame, generates and inequalities. Some will be able to trade in one municipality and others will not.

Thus, we would have another example of what can be concluded from the work of Iorio Filho (2014) when he analyzes the institute of federal intervention by the Brazilian Supreme Court. Federalism, despite having been idealized by Constitutional Theory as a form of state that would strengthen the protection of citizens by being a mechanism for limiting power, in Brazil, it ends up not protecting them.

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