

FEDERALISM AND JUDICIALIZATION OF PUBLIC HEALTH: HOW THE BRAZILIAN SUPREME COURT SOLVED A FEDERATIVE CONFLICT UNDER COVID-19'S EMERGENCY

FEDERALISMO E JUDICIALIZAÇÃO DA SAÚDE
PÚBLICA: COMO O SUPREMO TRIBUNAL FEDERAL
RESOLVEU UM CONFLITO FEDERATIVO NA
EMERGÊNCIA DA COVID-19

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PÚBLICA: CÓMO LA SUPREMA CORTE FEDERAL
RESOLVIÓ UN CONFLICTO FEDERATIVO EN LA
EMERGENCIA DE LA COVID-19

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ABSTRACT:

Do federalist political categories matter in judicial decision-making during the pandemic? Under the health crisis, Brazilian federated entities (Union, States, Federal District, and Municipalities) had the challenge of working together. In March 2020, faced with the failure of the Union to exercise its natural leadership in defining the necessary social distancing measures (e.g., lockdown), a political party called the Brazilian Supreme Court to declare the constitutionality of the restriction measures unilaterally taken

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by States and Municipalities (ADI 6341). Concerning the resolution of federative litigation, a decision in favor of subnational entities denotes, at least temporarily, disruption with the tradition of the Brazilian Supreme Court. This research took a qualitative empirical approach (case study) to verify the influence of federative political categories (leadership, cooperation, and coordination) on the opinion of each Justice of the Brazilian Supreme Court when judging ADI 6341, regarding social distancing measures edited by subnational entities and therefore contrary to the interests of the federal government.

RESUMO:

As categorias políticas federalistas importam nas decisões judiciais durante a pandemia? Diante da crise sanitária, os entes federados brasileiros (União, Estados, Distrito Federal e Municípios) tiveram o desafio de trabalhar em conjunto. Em março de 2020, diante do fracasso da União em exercer sua liderança natural na definição das necessárias medidas de distanciamento social (por exemplo, lockdown), um partido político acionou o Supremo Tribunal Federal para declarar a constitucionalidade das medidas de restrição tomadas unilateralmente pelos Estados e Municípios (ADI 6341). No que diz respeito à resolução do contencioso federativo, a decisão favorável aos entes subnacionais denota, ao menos temporariamente, ruptura com a tradição do Supremo Tribunal Federal. Esta pesquisa teve uma abordagem empírica qualitativa (estudo de caso) para verificar a influência das categorias políticas federativas (liderança, cooperação e coordenação) na opinião de cada Ministro do Supremo Tribunal Federal ao julgar a ADI 6341, sobre medidas de distanciamento social editadas por governos subnacionais entidades e, portanto, contrários aos interesses do governo federal.

RESUMEN:

¿Las categorías políticas federales influyen en las decisiones judiciales durante la pandemia? Antes de la crisis sanitaria, los entes federativos brasileños (la Unión, los Estados, el Distrito Federal y los Municipios) enfrentaron el desafío de trabajar de manera conjunta. En marzo de 2020, debido al fracaso de la Unión en ejercer su liderazgo natural en la definición de las necesarias medidas de distanciamento social (por ejemplo, el

confinamiento), un partido político recurrió al Supremo Tribunal Federal para declarar la constitucionalidad de las medidas restrictivas tomadas unilateralmente por los Estados y los Municipios (ADI 6341). En cuanto a la resolución del conflicto federativo, la decisión favorable a los entes subnacionales indica, al menos temporalmente, una ruptura con la tradición del Supremo Tribunal Federal. Esta investigación adoptó un enfoque empírico cualitativo (estudio de caso) para analizar la influencia de las categorías políticas federativas (liderazgo, cooperación y coordinación) en la opinión de cada Ministro del Supremo Tribunal Federal al juzgar la ADI 6341, sobre las medidas de distanciamiento social adoptadas por los gobiernos subnacionales, las cuales, en consecuencia, contradecían los intereses del gobierno federal.

KEYWORDS:

Federalism; Brazilian Supreme Court; Covid-19; case study.

PALAVRAS-CHAVES:

Federalismo; Supremo Tribunal Federal; COVID-19; estudo de caso.

PALABRAS-CLAVE:

Federalismo; Supremo Tribunal Federal; COVID-19; estudio de caso.

1. INTRODUCTION

Do federalist political categories matter in judicial decision-making during the pandemic? Under the health crisis, Brazilian federated entities (Union, States, Federal District, and Municipalities) had the challenge of working in harmony. In March 2020, faced with the failure of the Union to exercise its natural leadership in defining the necessary social distancing measures (e.g., lockdown), a political party called the Brazilian Supreme Court to declare the constitutionality of the restriction measures unilaterally taken by States and Municipalities (ADI 6341). Concerning the resolution of federative litigation, a decision in favor of subnational entities denotes, at least temporarily, a disruption with the tradition of the Brazilian Supreme Court.

This research took a qualitative empirical approach (case study) to

verify the influence of some federative political categories (leadership, cooperation, and coordination) on the opinion of each Justice of the Brazilian Supreme Court (STF) when judging ADI 6341, regarding social distancing measures edited by subnational entities and therefore contrary to the interests of the Federal Government at the time.

In this way, the paper investigates whether leadership, cooperation, and coordination (as federative categories) were relevant as a basis for the judgment in favor of subnational entities in ADI 6341. According to the literature (ARABI, 2019; BARBOSA, 2009; GOMES et al., 2020; OLIVEIRA; MADEIRA, 2021), the judgment of Brazilian federative conflicts traditionally leads to a position of the Brazilian Supreme Court in favor of the Union.

However, when judging ADI 6341, the STF decided that the measures adopted by the Federal Government would not remove the power of subnational entities to take administrative and normative measures with regard to the new coronavirus.

This research is justified because the result of this judgment coincided with a break in the history of results of the judicialization of federal conflicts in Brazil. In order to verify its relevance for the studies of Brazilian federalism, the paper aims to identify whether such a change was a consequence of federalist basis (leadership, cooperation, and coordination) or whether those federative categories were of no importance considering the opinions expressed by the Justices in ADI 6341.

2. BRAZILIAN FEDERALISM AND PUBLIC HEALTH POLICIES

It is instructive to understand the meaning of federalism from the very concept of the federal State, whose core is based on the “regional distribution of autonomous powers” (SILVA, 2012, p. 99). It is a composite form of State, situated in opposition to the unitary form. The form of State, in turn, is defined by how political power is exercised in the territory.

Despite the fact that federalism suits the demands of plural and unequal societies, such as Latin American countries, especially due to the economic disparities of each entity of the federation, only Brazil and Argentina are federal states amongst those countries (FERNANDEZ, 2011, p. 79).

Besides the existence of a central government that does not nullify the power of self-government of subnational entities, political decentrali-

zation does not deprive the important role of the central government. On one hand, the subnational entities cede a portion of power to the Union – as is the case of Brazilian federalism – and maintain their autonomy. On the other hand, the Union is sovereign so that it can accommodate the interests of decentralized governments without jeopardizing the legal and political unity of the Federative Republic of Brazil.

Because of the political and legal unity of the federation, as a practical consequence of the characteristics of sovereignty and autonomy, it is possible that the same territory suffers the incidence of “a double sphere of normative power”, which means that both the legal order of the Union and that of the Member State (MENDES; BRANCO, 2012, p.856).

For instance, article 23 of Brazilian Constitution establishes certain powers which are common to the Union, the States, the Federal District, and the Municipalities, such as the provision of item II: “taking care of health and public assistance, the protection and guarantee of people with disabilities; [...]” (BRASIL, 1988, *online*). In addition, article 24 attributes to the Union, the States, and the Federal District a shared power to legislate on some issues, such as the provision of item XII: “social security, protection and defense of health; [...]” (BRASIL, 1988, *online*).

Most importantly, for the conciliation of sovereignty and autonomy, federalism requires balance. In order to prevent being inefficient, a federalist State must respect two main conditions: decentralization and multi-lateral cooperation, (COLOMER, 1999, p. 42).

In other words, the efficiency of federalism requires that the central government does not abuse its power. On the contrary, the exercise of autonomy by subnational governments would be affected. The desired balance of “decentralization” (COLOMER, 1999, p. 50) requires political and strategic harmony in the exercise of power “[...] according to a not only horizontal distribution of functions - executive, legislative and judicial -, but also vertical, between States and the Union, for the benefit of public freedoms [...]” (MENDES; BRANCO, 2012, p. 860-861).

With regard to cooperation, it is intertwined with the constitutional division of powers between the federative entities. Since there are not only prerogatives attributed separately to a given entity but also those conferred together, the levels of government may reach agreements on these matters. Otherwise, intergovernmental harmony would be hindered.

In Brazil, although federalism was enshrined in 1889, it was only in the 1891 Constitution that such form of State was detailed. Unlike many federations, the Brazilian one is peculiar for being based on the principle of individualism without reflecting the manifestation of collective institutions. In other words, the federative system did not result from a response to separatist aspirations, which only occurred during the period in colonial Brazil and at the beginning of the 19th century, so the unity of the country was not – and is not – under any separatist threat (SOUZA, 2005, p. 106).

The current Brazilian Constitution (1988) has adopted the democratic regime, the respect for harmony between the three branches of government, as well as for fundamental rights and guarantees. Taking into consideration such a constitutional valuation, it is possible to infer that despite the centralization verified in 1967/1969, the States and Municipalities were allowed to recover their autonomy. However, whether such development of autonomy has - or has not - resulted in the dispersion of political authority centered on the Union is an issue that deserves investigation (ARRETCHE, 2012, p. 13).

One aspect that demands attention with regard to centralization of political authority in Brazil - in spite of being a federalist country - is the high financial and tax collection of the Union, which increases “[...] the dependence of smaller entities in relation to federal transfers of financial resources and subvert[s], once more, the essential premises of federalism” (ARABI, 2019, p.75).

By the way, in order to verify whether the autonomy of subnational entities coincides with the sharing of political authority, Arretche (2012) launched one of the basis of her investigative interest towards Brazilian federalism. Such research is of core relevance to the present study, especially due to the impact of centralization in limiting autonomy for the formulation of public policies.

The interaction between the Brazilian federalism model and public policies is of utmost importance for this paper. Since subnational entities are autonomous, there is a presumption that, necessarily, the federal states produce a “dispersion of political authority,” which would matter in the effective authority for the formulation of public policies. However, in reality, the variety of models of federalism demonstrates that such a view is

mistaken (ARRETCHE, 2012, p. 13).

Despite the fact that multilateral cooperation and decentralization are a crucial combination for the efficiency of federalism (COLOMER, 1999, p. 50), Marta Arretche (2012, p. 13) points out that such decentralization is not inherent to all federal states, if one considers it in the sense of the distribution of political decision-making power. Such verification is extremely important for this paper since the federal conflict in question (ADI 6341) concerns the formulation and execution of public policies in the health area during the pandemic.

With the intention to analyze the existence or not of a relationship between federalism and the decentralizing effect in the formulation of public policies, as well as if, if so, how such a relationship would take place, Arretche (2012, p. 13) has built an empirical model method to study the Brazilian case, which has two dimensions.

The first dimension is focused on verifying what is the opportunity that subnational entities have to refrain the Union from making a political-normative decision. In other words, the decentralizing effect in the formulation of public policies cannot be rigorously measured without taking into account the veto power of the national government's proposals. In the decision-making space, it is possible to investigate the real impact of the position adopted by subnational entities on central legislative proposals. This veto power is analyzed through the legislative process, from the initiative to the approval of legislative acts in the Chamber of Deputies and the Federal Senate (ARRETCHE, 2012, p. 13).

It is observed that whereas the first dimension is dedicated to the scope of the shared normative decision (*shared rule*), the second dimension is concerned with the power of subnational entities regarding the formulation of their own policies (*self-rule*). The last dimension is studied through the political tools adopted by the Union in order to impact public policies of subnational governments (ARRETCHE, 2012, p. 13).

The creation of the two dimensions allows an investigation regarding the effective dispersion of political authority. Besides, the study of the connection between the Brazilian federalist model and the formulation of public policies requires a detachment of the mistaken idea that federalism necessarily implies the dispersion of political authority.

In the case of Brazilian federalism, there is a combination of "broad

legislative authority for the Union with limited institutional opportunities for vetoing subnational governments” (ARRETCHE, 2012, p. 17). Therefore, regarding the first dimension formulated by the author, in the shared decision-making space (*shared rule*), it is observed that the central government has a wide spectrum of legislative power of creation. In addition to it, the Union practically does not find any obstacle to make its power prevail, since the subnational entities have very limited veto power.

The Brazilian Constitution, therefore, has been created in such a way that a considerable portion of political authority was attributed to the Union, even though the autonomy of subnational entities is inherent to the definition of federalism. In this sense, it reflects on the extent to which political power is decentralized in the Brazilian Federalist model. The point is that the autonomy to formulate public policies differs from the power to execute policies created by the Union. Likewise, having financial autonomy differs from mere participation in the amount of revenue and expenses of the Union without the possibility of defining the allocation of public funds. This is why

[t]he variety of federalism adopted in Brazil brings it closer to centralized European federations, which tend to operate based on institutional mechanisms that centralize the policy-making process and confer great regulatory power to the Union. It means, therefore, that the Union has institutional resources to coordinate the actions of subnational governments around common national objectives (ARRETCHE, 2012, p. 22).

It is true to say that policies can never be formulated and implemented if they are not in tune with the institutional political organization of a country. Its success or failure may depend heavily on both political institutions and the processes of their formulation (“policymaking process”), the latter even to a certain extent shaped by those. In favor of the development of political and institutional reform projects consistent with the reality of a country, knowledge about the aforementioned processes is essential, as well as the political arrangement in the respective historical trajectory (STEIN et al., 2006).

The most evident aspect of distortion in Brazilian federalism is located in the fiscal and financial areas. In these areas, the pendular movement of the supposed distribution of political authority gives deference to the

central entity, causing a substantial dependence on the States and Municipalities concerning the Union. It is so privileged that the centralization of authority in the Union reduces in a “[...] concrete and practical way [the] autonomy of subnational federative entities” (ARABI, 2019, p. 81).

Hence the need to know the nuances of the federative model in question to understand the variable mechanisms, as well as how they operate in the precise reality of the country. In the case of the Brazilian health system:

[...] the institutional mechanisms of checks and balances – typical of the main federative arrangements in the world and with variations, in which different cases stand out, such as the North American and the German – and the dynamics between cooperation and competition – expressed in the regulations of the Unified Health System [Sistema Único de Saúde - SUS] [...] – represent, together with public sector funding, the main political issues related to the crisis of cooperative federalism in the Brazilian health system (RIBEIRO; MOREIRA, 2016, p. 15).

Like other spheres of the Brazilian public system, the Unified Health System works throughout the positive cooperation of the federated entities under the coordination of the sovereign entity. With regard to the autonomy of subnational entities, it denotes the possibility of meeting regional and local peculiarities as well as fiscal and financial dependence on the central power.

Such dependence inevitably implies competition between subnational governments in the race for resources from the national government. Therefore, in reality, the dialogue between cooperation and competition has not presented the desired harmony. After all, even with inductive policies of regional cooperation, the fact that subnational entities are permeated with socioeconomic inequalities aggravates the competition between those with lower tax collections in the expectation of obtaining resources from the national entity. Furthermore, the mentioned multipartite institutions, despite having been designed in line with the guideline and the principle of “decentralization” (BRASIL, 1988, online; BRASIL, 1990, online), hinder the implementation of coordinated public policies of the Unified Health System, taking into account view its veto power.

The association between Brazilian federalism and public policies

gains a more sophisticated dimension in the face of the search for reconciling the coordination of the Union with the positive cooperation of even more spheres of power, such as multiparty institutions, capable of vetoing coordinated policies of the Unified Health System.

For Brazilian federalism to work regularly on public policy issues, the literature (ARRETCHE, 2012; COLOMER, 1999; JENNINGS, 1994; JENNINGS and KRANE, 1994; GREER; JACOBSON, 2010; RIBEIRO and MOREIRA, 2016; SANTOS, 2021) expects the Union to play the following roles: leadership, coordination, and cooperation, which will be analysed in this paper.

3. THE JUDICIALIZATION OF FEDERATIVE CONFLICTS

[...] there is a condominium, made up of the Union, States, Federal District and Municipalities, aimed at taking care of health and public assistance [...]. From the democratic atmosphere experienced, the totalitarian vision is inappropriate in all respects. It is up to the President of the Republic to exercise superior leadership, coordinating efforts aimed at the well-being of Brazilians.

Justice Marco Aurélio Mello, ADI 6764 (BRASIL, 2021).

Considering the centralization of political authority in the Union (ARRETCHE, 2012), advocated by the dynamics of the legislative process in the National Congress, it is common that the national government fails to give due relevance to subnational peculiarities. This deficitary balance is normally a matter of judicial review since, in theory, there is no hierarchy between the entities of the federation. In this sense, “[...] the Judiciary must act to neutralize any normative excesses of centralization”, a concern that is indispensable “[...] for an adequate protection of fundamental rights [...]” (DE ARAUJO, 2019, p. 17).

Regarding the respect for subnational interests, it is noted that the Union is, in theory, responsible for coordinating subjects which correspond to a shared power amongst other federative entities. As for those ones, they are responsible for cooperating with the Union, so that the national policy is not frustrated, despite the existence of respect for local and regional peculiarities.

Besides coordination and cooperation, leadership is an attribute

inherent to administrative activity, such as that of the Executive, in any branch of government. The equilibrium amongst those categories (ARRETCHE, 2012; COLOMER, 1999; JENNINGS, 1994; JENNINGS and KRANE, 1994; GREER; JACOBSON, 2010; RIBEIRO and MOREIRA, 2016; SANTOS, 2021) would express coherence to decentralization, as well as to federalism itself. However, it occurs that centralization has been taking shape. With the permission of the readers for presenting a metaphor, it is suggested that the *body* and *soul* of the Brazilian State are not in tune (SANTOS, 2021). It means that, although it is officially a federation, the distribution of political authority favors the Union in an exacerbated way, which denotes strong remnants of a unitary state.

When there is room for interpretation regarding the exercise of certain powers to legislate, such as the lack of definition of the expressions in articles 22 and 24 of the Brazilian Constitution, “[...] there has been a predominance of favoring to centralization, to the detriment of the [...] idea of subsidiarity, which advocates the search for local or regionalized solutions” (ARABI, 2019, p. 42). At the Brazilian Supreme Court, judgments concerning federative conflicts prevail in favor of the Union, not restrictively regarding legislative powers but also public policies. This is “[...] the majority behavioral pattern, in which the [Brazilian Supreme Court] has [...] successively affirmed and reinforced the predominance of the Union in federal matters, to the detriment of the interests of other federal entities [...]” (GOMES et al., 2020, p. 195).

In addition to the literature revealing a predominance in favor of the Union in judgments involving federal conflicts, it is also worth mentioning the findings regarding the signs of “[...] negative judicial activism, in the sense of not acting [...]” in cases in which the Union appears as a defendant, that is, in vertical conflicts. While in horizontal conflicts the Federal Supreme Court fails to rule in a percentage of 36.4%, the percentage increases to 54.5% in vertical conflicts (BARBOSA, 2009, p. 113).

It is suggestive that “[...] when the interests of the Union [are at stake], the Supreme interferes even less”, preferring “[...] to maintain the *status quo* of Brazilian federalism, not acting [on in either a harmful nor a beneficial way], seeking to assume a neutral position, [which reveals the] signs of a negative judicial activism [...]” (BARBOSA, 2009, p. 113). Although such research interest arises from the very recent movement of the

Brazilian Supreme Court, the study of the existence or not of a new decision-making standard after the judicialization of federalism in the pandemic is not a matter of pioneering. Already in 2021, Oliveira and Madeira raised the hypothesis of verifying

[...] currently the same pattern previously registered, in terms of who mobilizes the Judiciary, but with different results: now, the president loses more than he gains in the Federal Supreme Court [...], in cases of control of constitutionality of acts related to coping with the pandemic. As the data show, this hypothesis is confirmed, but with regard to the federative issue in a broader sense, it is still not possible to affirm the existence of a new decision-making standard (OLIVEIRA; MADEIRA, 2021, p. 1).

Faced with such a behavioral pattern of the Federal Supreme Court, pointed out by the literature, a content analysis will be carried out in one case of judicialization of federal conflict that concerns public health policies in the context of confronting the COVID-19 pandemic (ADI 6341).

4. THE ADEQUACY OF THE CASE STUDY METHOD TO THE RESEARCH PROBLEM SOLUTION

Before effectively starting the study of ADI 6341, it is pertinent to present the methodological meaning of the qualitative tool of case study. Even though not infrequently, “[...] case study teaching is confused with case study research” (YIN, 2001, p. 29). Whilst, in teaching, it is possible to deliberately change the “raw material” with the didactic purpose of demonstrating a certain issue, in case study research, such manipulation of evidence is prohibited since it must be fully exposed in a true act of transparency (YIN, 2001, p. 29).

In other words, it is correct to say that, as a teaching strategy, the case study can illustrate the application of a presented concept. Given the purpose of learning, it is perfectly acceptable that only the relevant facet for addressing the question that is intended to be elucidated is exposed. For instance, addressing the issue of judicial review and presenting a judgment which the Brazilian Supreme Court has carried out. The case, therefore, is one of the facilitating means of understanding the subject that one aims to teach.

In the case of study research, in turn, the researcher must, in this

order: identify the categories of analysis available in the relevant literature and assess the case without manipulating its characteristics, verifying therefore whether the categories are present or not, to explain the reasons below.

Intending to clarify the methodological tool used in this paper, it is also pertinent to mention that the case study research should not be confused with the mere presentation of a case to support the discussion held in mere legal research based on the literature review on a certain topic. Such differentiation is crucial to clarify the work that is now being developed, non legal research but empirical and qualitative, which carries out the case study by identifying the categories of analysis in the chosen case (ADI 6341).

It should be noted that, as a methodological research strategy, the case study enables understanding of “[...] individual, organizational, social and political phenomena [...]”. It thus allows real-life events to be investigated without manipulating their essential characteristics. Examples of real-life events would be “[...] individual life cycles, organizational and administrative processes, changes in urban regions, international relations and the maturation of some sectors” (YIN, 2001, p. 21).

This methodological path is dedicated to investigating the following empirical topic: whether the chosen case used federative categories (leadership, cooperation, and coordination) expressly in their opinions’ foundations. A research effort is undertaken to qualitatively analyze whether federalism was relevant to support the decisions of the Brazilian Supreme Court in the proposed federative conflict (ADI 6341).

As for the evidence available in the researched object, the content of the opinions cast in the collegiate appreciation of the case: such evidence will be analyzed in full, without being hidden or manipulated in any way. The access to the “raw material” (YIN, 2001, p. 29) is public, since it is made available through consultation on the Brazilian Supreme Court’s website.

Regarding the choice of the case to be studied, “[...] [it] is often linked to what we want to infer from it” (MACHADO, 2017, p. 371). After all, even if the case study still occurs, the respective choice is guided by the context already available in reality, even before the research is carried out. Still, based on the intended objective, the researcher must make an effort

to jointly define what will belong to the context evidenced in the research and to identify the “units of analysis” (MACHADO, 2017, p. 375).

In this paper, it is pointed out as a context already available in reality the fact that, historically, the Brazilian Supreme Court adopted a centralizing posture in the judgments of federal conflicts, together with the new fact that, in the context of the pandemic, the same Court was favorable to decentralization.

The case to be studied in this empirical and qualitative research has been chosen according to the question to be answered (MACHADO, 2017, p. 371). As already clarified, we seek to understand whether such a change in course - from centralization to decentralization - would correspond to evidence of the effectiveness of the precepts of federalism or if it would consist of a punctual effect of the judgment under analysis.

As previously presented, if the case study methodology verifies the presence of pre-established federative categories defined in this work (leadership, cooperation, and coordination), we will be faced with consistent indications of the exercise of political authority by the Brazilian Supreme Court in favor of decentralization. However, if such categories are absent or not significantly expressed in the analyzed opinions, the decentralizing effect will not have been a reflection of a decision-making cause based on federalism.

The research carried out a careful reading of the entire file referring to the entire content of the judgment made available on the Supreme Court website. It is clarified that no digital tools were used to locate words or expressions in the files since the existence of categories was analyzed either explicitly or implicitly, which demanded effort in interpretive reading, including non-literally reading.

It is recalled that the functioning of Brazilian federalism depends on cooperation, coordination, and leadership (ARRETCHE, 2012; COLOMER, 1999; JENNINGS, 1994; JENNINGS and KRANE, 1994; GREER; JACOBSON, 2010; RIBEIRO and MOREIRA, 2016; SANTOS, 2021). Such categories were chosen to guide the analysis of the opinions - available in the full content file of the judgment corresponding to the case under study - precisely because they characterize the essence of the proposed constitutional design for the Brazilian federalist model.

In short, the exercise of autonomy by subnational entities must be

based on cooperation with the general norms created by the Union, as well as with federal public policies. These are observed as a limit to the exercise of autonomy in valuing regional and local peculiarities, as well as a requirement for the financing of federative entities, which are not hierarchically subordinated to the Union at least in theory. Cooperation ends up becoming a condition for the survival of States and Municipalities, even if this may imply the very loss of a portion of autonomy when the Union issues general norms so full of details that they excessively limit the political creation of subnational legislation.

This point raises the double bias of cooperation; that is, not only is it up to decentralized entities to cooperate with the central entity, but the Union also has a similar burden. In this way of cooperation (Union vis-à-vis federative entities), it means that the subnational autonomy ought to be respected by the absence of the publication of general norms or public policies at the federal level that ignores the conformation of regional and local peculiarities. In the financial aspect, the feasibility of exercising such autonomy consists of the transfer of federal funds to the federated entities.

Cooperation is a federal category intrinsically related to coordination. For there to be effective cooperation, there needs to be coordination. After all, the latter is defined as the connection between resources and processes to obtain the desired results (JENNINGS, 1994, p. 53).

What was presented above about the cooperation of decentralized entities towards the central one was nothing more than the result of directing financial and fiscal resources and political processes in favor of federative balance. In this way, if cooperation were a product of the direction in focus, it would be correct to say that coordination would be a necessary factor for the connection between resources and processes, having as a guide the achievement of federative balance.

Regarding the dynamism of the federative balance, it is important to say that the elements under coordination are mutable - “resources” and “processes” (JENNINGS, 1994, p. 53) - so that it would not make sense for the product to be static of that connection. Incidentally, it can be said that the judicialization of federal conflicts is routine before the Brazilian Supreme Court.

Just as cooperation depends on coordination, this depends on leadership, which is the last federative category of analysis. Through lea-

dership, common interests are defined, in addition to mobilizing actors and increasing interaction with one other. Such “[...] characteristics make coordination possible even when federal public policy makers are not only unable to consolidate existing programs, but also continue to launch new programs [...]” (JENNINGS, 1994, p. 59).

Those categories are elements that unite the will of different spheres of power to work together. Without them, any change in structures or systems will not occur or will not work (within the Brazilian model of federalism). Additionally, effective coordination requires alignment regarding the functional division of responsibilities concerning the service to be provided, besides a sensitive view of the user service (JENNINGS; KRANE, 1994, p. 341-344).

Furthermore, it is essential that higher authorities set the example in leadership. The President and Governors can play a fundamental role in the integrated provision of public services by encouraging coordination between the Ministries or Secretariats themselves. If there is no leadership and coordination as an example of higher authorities, it is unlikely that lower authorities will devote their already scarce resources to better coordination (JENNINGS; KRANE, 1994, p. 347).

5. RESULT OF THE CASE STUDY AND ITS INTERPRETATION

After the World Health Organization declared the existence of a pandemic, Brazil faced a lack of definition in the balance between health and economy, which was reflected in the interpretative insecurity of the legislative changes introduced by the federal government (Union). A decree issued by the Presidency of the Republic (MP nº 926/2020), dealing with the operation of companies and mobility restriction measures, drew attention for supposedly interfering in the dynamics of cooperation (at the various federative levels) between health managers and the government spheres, possibly causing an unwanted concentration of powers in the person of the President, publicly a denialist (BBC NEWS BRASIL, *online*, 2021).

On this scenery, the Democratic Labor Party (PDT) suited an ADI (*ação direta de inconstitucionalidade*) 6341, alleging the unconstitutionality of said rule, specifically regarding the disrespect for the federalist model established in the Brazilian Constitution, potentially causing a political imbalance between federal entities, since governors and mayors had

anticipated health measures to try to reduce contamination by the virus.

This research aimed precisely at verifying the presence of federal categories (cooperation, coordination, and leadership) in the opinions of each Justice who participated in the judgment of the ADI, in order to assess the relevance attributed to federalism as a basis for judicial decision-making. It is important to clarify that the fundamentals were considered as presented in each opinion separately, either explicitly or implicitly. Even though the clarification seems pleonastic, it is relevant in the sense that some Justices limited themselves to agreeing with the Rapporteurs without presenting any legal grounds of their own.

In situations where the opinion was limited to practically praising and ratifying previously cast opinions, this research did not consider that there was any mention of any federative category. Such clarification is pertinent because the understanding of the implicit reference to a category of analysis was restricted to excerpts from the opinion in which the meaning presented by the Justice coincided with the meaning of cooperation, coordination, or leadership. Next, the systematization of the information collected in the judicial opinions is presented, with emphasis on the presence (or not) of the federative categories in each one.

Table 1: Identification of federative categories in each Opinion - ADI 6341

<i>Justices' Opinions (ADI 6341)</i>	<i>COOPERATION</i>	<i>COORDINATION</i>	<i>LEADERSHIP</i>
Marco Aurélio Mello	NO	NO	NO
Alexandre de Moraes	YES	YES	YES
Luiz Edson Fachin	YES	YES (IMPLIED)	YES (IMPLIED)
Rosa Weber	YES	YES	NO
Luiz Fux	YES (IMPLIED)	YES (IMPLIED)	NO
Carmen Lúcia Rocha	YES	YES	NO
Ricardo Lewandowski	YES	YES (IMPLIED)	YES
Gilmar Mendes	YES	NO	NO
Dias Toffoli (Chief Justice)	NO	NO	NO

Font: Authors' elaboration.

As Rapporteur, Justice Mello cast his opinion without specifying any of the proposed federative categories of analysis. The reasoning was based on public health, emphasizing the concurrent legitimacy and the possibility of exercising the autonomy of subnational entities (BRASIL, 2020, p. 14), although he mentioned “cooperation” only in his report when citing the argument of the PDT, author of ADI 6341 (BRASIL, 2020, p. 7). His opinion was to maintain the federal decree, regardless of its consequences for subnational public policies.

In the opposite direction, Justice Moraes’ opinion (BRASIL, 2020, p. 21) already started making relevant considerations towards federalism, the separation of powers, and fundamental rights as skillful tools to limit power. By portraying federalism with such a function, the Justice linked the Brazilian Constitution as an instrument that should guide “[...] political leaders so that there is cooperation, integration, precisely so that we can reach a good tone at the end of this difficult journey for all: Union, States, Municipalities and all Brazilians” (BRASIL, 2020, p. 22).

Next, Justice Moraes emphasizes the interpretative focus of the rule of autonomy of subnational entities based on the matter of public health. In this sense, it is possible to observe that the autonomy inherent to federalism is interpreted in the light of public health, matter of shared power, under the terms of articles 23 and 24, based on the predominance of interest (BRASIL, 2020, p. 23). It was verified that Justice Moraes explicitly mentioned all federative categories of analysis proposed in this research. Such evidence reveals that the rationale was centered on federalism.

Justice Fachin made direct considerations regarding federalism, valuing public health in the peculiar context of the pandemic and imposing the challenge to the Supreme Court to ensure the security and stability of decisions, despite the transience of the situation. It is important to emphasize that this Justice presented some premises which would explain the conclusion adopted.

The first of them highlighted that the international emergency declared by the World Health Organization did not grant discretion devoid of control or counterweights inherent to the rule of law. According to the premise presented by Justice Fachin, the constitutional rules work not only for the protection of individual freedom but also for the exercise of collective rationality, that is, the “[...] capacity to coordinate actions ef-

ficiently”. In this sense, albeit tangentially, the Justice addressed the federative category of coordination as a result of the exercise of collective rationality (BRASIL, 2020, p. 33).

In turn, about leadership, the reference was implicitly and vaguely observed since the Justice Fachin referred, as a second premise, the power/duty of the political authority to justify its actions as a requirement to be effectively followed by those people subordinated to his authority (BRASIL, 2020, p. 34). It is understood that there would have been an implicit reference to such a federative category because coherence in actions is encompassed by the idea of leadership. After all, this is also characterized by the example given by the leader to his subordinates, not necessarily in interpersonal relationships.

At this point, one should bear in mind the idea of coherence between the expected actions of the followers and the actions carried out by the supposed leader. In the sequence, it is possible to notice that cooperation is mentioned as part of the reasoning, also implicitly. After all, Justice Fachin portrays that the Union exercises federal powers in a priority position (preemption). Thus, in the absence of federal legislation, the States and Municipalities would have assumed the possibility of acting against such preference under the theory of North American law called “presumption against preemption” (BRASIL, 2020, p. 34- 35).

Therefore, the implicit use of the rationale based on cooperation is explained by the fact that the inaction of the central entity does not impede the action of the subnational ones. In other words, notwithstanding that the Union has to define norms about the organization of federative powers, States and Municipalities are allowed to act if the Union does not fulfill such a duty.

It is also important to note the implicit allusion to the federative category of coordination, although Justice Fachin had explicitly used the terms “coordinate” and “coordination” in the context of the Unified Health System (BRASIL, 2020, p. 49- 50).

Furthermore, according to the structural organization of federalism, Justice Fachin emphasized that it is up to the national management of the Unified Health System to coordinate epidemiological surveillance systems as well as actions in this area. In turn, the States would be responsible for coordinating, in a complementary way, the execution of such actions and

services, while the Municipalities would be responsible for the execution (BRASIL, 2020, p. 49-50). Concerning cooperation, the Justice expressly referred to “cooperative federalism,” clarifying that none of the federative entities could be superior or inferior due to the delegation of powers between them. This part of the opinion even preceded the conclusion of its reasoning (BRASIL, 2020, p. 49-55).

As already anticipated in the discussion about the opinion of Justice Fachin, Justice Mendes made express reference to “cooperative federalism” in defending that this was achieved through the Unified Health System (BRASIL, 2020, p. 58). Finally, Justice Mendes once again alluded to cooperation (BRASIL, 2020, p. 59).

In Justice Weber’s opinion, it is important to observe that she called for “coordinated actions among national States” as a necessity to face a pandemic (BRASIL, 2020, p. 71). Despite the mention of the idea of coordination, this category was not approached in the context of the Federation but of a global society. Cooperation, in turn, was mentioned to endorse the meaning of the federative principle, as well as in a collated precedent about cooperative federalism (BRASIL, 2020, p. 74-75).

In Justice Fux’s opinion, there is an explicit reference to cooperation. Concerning coordination, the Justice has implicitly alluded to it when he highlighted the “[effective] need for national uniformity in the policies to be adopted, and the creation of a management committee for this purpose is salutary” (BRASIL, 2020, p. 90). In this case, the uniformity between the implemented policies corresponds to the link established through the supposed management committee, suggestively created with the purpose to guarantee the homogeneity of the adoption of health policies.

Regarding the implicit reference to federative coordination in the opinion of Justice Fux, there is still a new excerpt of an implicit mention of coordination and also cooperation. After all, the very allusion to the harmonious normative interpretation from the federative point of view to matters subject to general norms reflects cooperation and coordination. Such federal categories are implicitly endorsed through reference to the functioning of the Unified Health System (BRASIL, 2020, p. 95).

Justice Rocha explicitly addressed cooperation and coordination. She historically referred to the constitutional experience of the cooperative federalism model since 1934, having emphasized that, despite the

pandemic crisis, there was more than a lack of cooperation, but a lack of understanding. She highlighted, moreover, that there was no joint organization – and, therefore, coordination – between the federative entities to form a national unit. Corroborating with the reasoning that considered the Federalist precepts as relevant, Justice Rocha portrayed coordination as a task of the Union (BRASIL, 2020, p. 123-124). Finally, she mentioned the need for authorization from the Union for the adoption of restrictive measures for entering and leaving the country, as well as interstate transportation (BRASIL, 2020, p. 131).

Regarding the opinion of Justice Lewandowski, there is an introductory and explicit reference to cooperation, followed by the implicit allusion to coordination, when he explained that there is no hierarchical relationship between federative entities (BRASIL, 2020, p. 132-134). Additionally, Justice Lewandowski stated dialogue and political leadership as requirements imposed by cooperative federalism. By that, it is possible to infer that the federative category of leadership was also expressly addressed (BRASIL, 2020, p. 135).

Justice Mendes referred to the importance of discussing federal powers in the context in which “legislative and administrative disagreements” act as aggravating factors for the crisis faced by the country due to the pandemic (BRASIL, 2020, p. 137). As already mentioned, the Justice stated that the Unified Health System consisted of the materialization of cooperative federalism, which makes it possible to observe the existence of cooperation as an explicit federative category (BRASIL, 2020, p. 137).

Additionally, Justice Mendes spoke about the ideal integration or integration, in which “[...] power is vocalized with a single voice [...]”, lamenting that such harmony is not what is seen in the practice. The Justice also stressed the importance of bearing in mind the federative powers, in respect of regional and local asymmetries, without the forgetfulness of the Presidency of the Republic when defining the essential activities (BRASIL, 2020, p. 139).

In a piece of Justice Mendes’ opinion, it is possible to identify the federative category of cooperation, as he emphasizes that the Union could not disregard the autonomy of subnational entities. Along the same reasoning, the Justice presented that cooperative federalism should be interpreted in such a way that the Presidency of the Republic verifies the health

needs of states and municipalities (BRASIL, 2020, p. 140).

Finally, Justice Toffoli (Chief Justice at that time), on the other hand, did not explain any reasons for his opinion, having limited himself to agree with the opinion presented by Justice Mello (BRASIL, 2020, p. 141).

After analyzing the presence of federative categories in the Justices' opinions, there was a substantial mention to cooperation and coordination. It is possible to infer that cooperative federalism guided the constitutional interpretation of the Brazilian Supreme Court when judging ADI 6341.

In addition to the emphasis on constitutional divisions of power, the Justices relied on the evaluative goal centered on the implementation of public policies, taking the federative principle as an interpretative guideline. In this way, the inaction of the central entity regarding the exercise of its attributions would not subtract the possibility of action of the States, Federal District, and Municipalities, especially when the omission of the Union implies insufficient protection of fundamental rights and public social policies.

The outcome of the judgment under study was based essentially on federalism. The exaltation of cooperative federalism rejected any interpretation that, in some way, gave prestige to the inaction of the central entity. In this sense, if the Union fails to exercise the task of coordinating the actions of subnational entities, they have even more autonomy to adopt prophylactic measures or to combat the pandemic.

6. CONCLUSIONS

Parallel to the federative fundamentals verified in the case studied, it is important to point out that this is a judgment that involves the Presidency of the Republic, as a representative of the Union, in the context of facing the pandemic. Additionally, there was a result in favor of decentralization on the contrary of the tradition of the Brazilian Supreme Court (ARABI, 2019; BARBOSA, 2009; GOMES et al., 2020; OLIVEIRA; MADEIRA, 2021).

Such a result denotes the exercise of political authority by the Federal Supreme Court in favor of decentralization. Besides, the upshot was accompanied by a discussion amongst the Justices about federalism. In this way, the appreciation of the actions of the States, Municipalities, and

the Federal District in the face of the omission of the central entity is not a matter of mere chance. It is a federalism issue.

Taking into consideration that the President of the Republic at the time used to lose more than gain in the Federal Supreme Court (OLIVEIRA; MADEIRA, 2021), it is important to observe that the question to be answered in this paper must be faced carefully. In other words, it is necessary to verify whether the result of the judgment was decentralizing due to (I) the new interpretation regarding the federative conflict or (II) the position of the Presidency of the Republic at the time, which reveals the need to face the phenomenon as multifactorial.

Such a concern is pertinent because federative relations have been weakened by the actions of the Presidency of the Republic at the time even before the start of the pandemic, being “[...] marked by the conflicting posture with social groups and certain themes, weakening them in the public policy agenda [. ..]” (ROCHA NETO, 2020, p. 341). Such conflict affects “[...] public management, affecting government bodies and public policies and affecting both the participation of civil society and the relationship with other federal entities” (ROCHA NETO, 2020, p. 341).

Although it is not the object of this research to study the behavior of the Presidency of the Republic, the mention is relevant and necessary in the strict measure of the interconnection between its performance and the federative imbalance. After all, the clashes fought by the Chief of the Federal Executive since he took power have been fierce.

Therefore, on one hand, it is clear that the result of the judgment with a decentralizing effect was markedly based on the federative principle, according to the opinions expressed by the Justices in ADI 6341. On the other hand, it is not possible to conclude that there is a new decision-making standard (OLIVEIRA; MADEIRA, 2021). However, it is possible to state that the posture of the President of the Republic - as representative of the Union - exerted a strong and negative influence on the federative balance, which was aggravated from the beginning of the pandemic (ROCHA NETO, 2020).

The protagonism of the Presidency of the Republic (the central entity), in this case, did not demonstrate respect to any of the analyzed federative categories (coordination, cooperation and leadership). Hereupon, there was a potential degradation of federative relations, either through

speeches or behaviors of the President of the Republic, in an affronting posture before the Judiciary.

The result of the judgment of ADI 6341, along with the federative categories verified in the opinions of the Justices, makes it plausible to observe a possible decentralizing tendency of the Brazilian Supreme Court in the judgment of federative conflicts. However, if the decentralizing effect were not accompanied by reasoning based on federative categories, the search for evidence of a new decision-making standard by the Court would have been weakened. Accordingly, as examined in the opinions of the Justices, federative categories were relevant to the result of ADI 6341. Consequently, federalism itself was significant to such a pro-decentralization position adopted by the Brazilian Supreme Court.

The case study revealed a break with the decision-making pattern in favor of the Union about federal conflicts. Nevertheless, it is not possible yet to extract from the rupture the idea of a trend regarding a new decision-making standard (OLIVEIRA; MADEIRA, 2021).

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