7 Brazilian federalism

Facing the COVID-19 pandemic¹

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7.1 Introduction

Contrary to several predictions of a prosperous year, 2020 was instead marked by a global fight against a new virus which has killed many across the globe.

In Brazil, the COVID-19 crisis has led to several conflicts among many of the 26 states and the federal capital as well as between the federal central government, the states, and the municipalities. Faced with uncertainty, political actors adopted blame-avoiding strategies, duplicating the most restrictive actions taken elsewhere as a way of seeking legitimacy among the people. As federated units adopted different criteria to intensify or soften restrictive measures, judicial activism was a mark of the period. A wave of lawsuits flooded state and federal courts, and the range of policies was frequently decided by judges.

Nevertheless, the COVID-19 pandemic in Brazil had ambiguous outcomes. Despite the uncoordinated control measures and a huge number of deaths, by the end of January 2021, Brazil seemed to have achieved the goal of flattening the virus transmission curve. Crucially, there was no collapse of the healthcare system (Table 7.1).

7.2 COVID-19 in Brazil

The first confirmed COVID-19 case on Brazilian soil was a Brazilian businessman who returned to the country from Italy on 21 February 2020 (Ministry of Health 2021). His infection was verified as COVID-19 on February 26 at a hospital in São Paulo. At the time, it was assumed that the virus would not spread rapidly in a tropical climate and, therefore, that the situation was under control.

However, the monitoring of several suspected cases was already underway, and the Ministry of Health announced new methods of consolidating information on possible cases across Brazil. At the time, there was still no evidence of the circulation of the

Table 7.1 Key Statistics on COVID-19 in Brazil as of 10 January 2021

<i>Cumulative Cases</i>	<i>Cumulative Cases per 100,000 Population</i>	<i>Cumulative Deaths</i>	<i>Cumulative Deaths per 100,000 Population</i>	<i>Case Fatality Percentage</i>
8,013,708	3,770.1	201,460	94.8	2.5

Source: World Health Organization Weekly epidemiological update – 12 January 2021. Geneva: WHO, 2021. Available from <https://www.who.int/publications/m/item/weekly-epidemiological-update>

virus in the national territory, since all those infected came from countries in which the virus was spreading widely.

On 5 March 2020, the first case of community transmission was recorded. To reduce the spread of the virus, in early March, the government concluded the first major contract for the purchase of N95 protective masks and surgical masks to be used by public health professionals.

On 21 March 2020, the President of the Republic Jair Bolsonaro issued an order designating essential services for the functioning of the country that could not be interrupted even in the midst of the pandemic. These included public security, health assistance, fuel, electricity, and water supply, and telecommunications and internet, among others. In the same month, Bolsonaro also created a “Crisis Committee at the national level” to manage Brazil’s response to the pandemic.

As the pandemic spread to almost all Brazilian municipalities, the states also focused their attention on controlling the virus and, in turn, created their own Crisis Committees. These bodies were created by decrees standardized by the heads of the Brazilian states and the President of the Republic to streamline decision-making between different government sectors.

Furthermore, it was observed that the spread of COVID-19 from large cities to smaller municipalities evolved over time. The climate greatly impacted the rate of the spread of the virus. As winter approached, there was a decrease in the number of patients suffering from respiratory conditions in the tropical North and Northeast regions and an increase in cases in the temperate Midwest and South of the country.

As of 8 September 2020, the virus R number was 0.94 (less than one) (Our World in Data 2021). In terms of deaths per hundred thousand inhabitants, Brazil then ranked tenth, recording lower death rates than European countries such as the United Kingdom and Spain as well as some South American countries such as Peru and Chile (Coronavirus Resource Center 2021).

Between September and the end of 2020, however, Brazil experienced a challenging period as COVID-19 continued to spread throughout the country despite the control measures implemented by governments. Like many other countries that experienced infection spikes in the final third of the year, cases and deaths rose over this period (Table 7.2).

As a means of organizing information essential for the management of the crisis in the medical field, the federal Ministry of Health launched an interactive platform on Public Health in Brazil, called “Localiza SUS.” This platform contains data on new COVID-19 cases, the number of deaths, the availability of hospital beds for the treatment of COVID-19 patients as well as information about health professionals, respirators, medicines, Personal Protective Equipment, etc.

Table 7.2 Cases of COVID-19 in Brazil as of 31 December 2020

<i>Brazil</i>	
Total cases	7,675,973
Cases per 100,000 inhabitants	3,611
Total deaths	194,949
Deaths per 100,000 inhabitants	91.76

Source: <https://ourworldindata.org/coronavirus/country/brazil?country=~BRA>

The pandemic had a major impact on the Brazilian economy in 2020. The unemployment rate reached 13.3 percent (8.9 million people lost their jobs) in September 2020. GNP decreased by 9.7 percent in the second quarter, and the federal debt is estimated at more than BRL 700 billion (compared to BRL 95 billion in 2019).

Federalism in Brazil worked as expected in the economic crisis: the federal government enacted social programs to relieve unemployment and helped subnational units with extra financial transfers. Due to the state of public emergency declared by the Congress, the government was not obliged to meet the primary fiscal balance target in 2020 and was thus able to finance a series of economic measures to maintain the fiscal balance of the federation. Some of the measures included the interruption of debt payments between the states and the federal government and debt renegotiation between federal constituent units and the banks. For four months, the federal government also provided financial support to the health system via transfers to the State Participation Fund (FPE) and the Municipality Participation Fund (FPM) in order to ensure that their revenues were equivalent to 2019 levels. Specifically, by federal law number 14,041 of August 18 (2020), BRL 12.124 billion (US\$ 2,824 billion) was allocated as financial support to FPE and FPM due to the loss of their tax collection revenue.

The federal government also instituted the Federative Program to Confront Coronavirus in May 2020. Through special federal law number 173, debt payments were temporarily suspended between the States and the Federal Government (BRL 12.6 billion or US\$ 2.5 billion), and BRL 60 billion (US\$ 12 billion) was transferred to subnational entities. The criteria for the distribution of resources among the federal constituent units were based on population size and the incidence of COVID-19 cases. Program expenses were also linked to health actions to combat the pandemic.

The most distinctive action on the economic front was *Auxílio Emergencial*, a federal program that provided assistance to informal sector workers and unemployed members of low-income families. *Auxílio emergencial* transferred BRL 600 (US\$ 120) per month to each family from April to August and BRL 300 (US\$ 60) from September to December. The aid was provided to more than 67 million people.

The federal government created a Crisis Committee to address strategic issues related to the pandemic. The Committee gave its attention to diverse issues, including the repatriation of Brazilians from abroad; the testing and provision of equipment for public security forces; and the special care provided to indigenous communities. In addition to the Crisis Committee, the COVID-19 Crisis Combat Operations Center (CCOP) was established, whose role was to implement the decisions of the Crisis Committee. Seeking greater articulation with subnational entities, the Special Secretariat for Federative Affairs (SEAF) instituted bi-weekly meetings with the Crisis Committees of the states. SEAF also met with municipal associations to better understand the particularities and needs of municipalities in the context of the crisis.

7.3 Brazilian federal system

Brazil's federal system has three constitutionally recognized levels of government: the federal (central) government; 26 state governments and the federal district; and 5,570 municipalities.

Some studies link federal arrangements to lower social spending, a lack of coordination, and inefficient policies attributed to political fragmentation and subnational government veto powers. Brazil does not fit this analysis. Despite the three-level

federal system with more than 5,000 constituent units, Brazil has a strong federal government, significant social spending and, in some areas, successful intergovernment coordination (Machado 2014). How can this apparent paradox be explained?

It is important to note that federalism was adopted in Brazil to divide power in what was once a unitary state. In cases like this, a tendency toward centralization is not uncommon, even when power is shared among federated units. This is the case in Brazil, where power and legislative authority are shared with subnational units, not delegated to them.

The 1988 Constitution endows the federal government with an extensive array of exclusive powers and legislative authority. The Constitution also assigns the federal government, states, and municipalities concurrent powers and legislative authority over certain policy areas. However, the Constitution does not prescribe a specific decision-making process on federal matters. Constitutional amendments require only a three-fifths majority and two roll-call votes in the national parliament. They do not require national referenda or an approval of a qualified majority of state-level legislatures as is the case in other federal countries. The institutional model of Brazilian federalism endows the federal government with extensive power to initiate legislation. Since there are few veto points, Presidents are likely to be successful in passing legislation, even if it would change federal matters (Arretche 2013).

Conflicts between federal constituent units are resolved by the Brazilian Supreme Court (STF). Historically, STF has struck down state and municipal legislation when it is in conflict with the federal Constitution or national legislation. It is rare, if not impossible, to find an STF decision that invalidates federal legislation for infringing on powers reserved for states or municipalities.

Finally, political circumstances reinforce tendencies toward centralization. By the 1990s, almost all Brazilian states had large public debts and were on the verge of declaring bankruptcy. The federal government assumed states' debts but required them to adopt a series of measures in return, such as limiting personnel costs, restricting state borrowing, and privatizing state banks. Constitutional amendments and national legislation were passed to limit the expenditures of subnational units. With lower fiscal capacity, in practice, these units do not have the political autonomy as formally granted to them by the 1988 Constitution (Rosenn 2005).

These political circumstances explain why the federal government in Brazil is so strong, despite Brazil being a three-level federation and the decentralization tendency introduced by the 1988 Constitution. But can the federal government coordinate policy action among federal constituent units and deliver nationwide services? The answer to this question is complex and varies according to policy area.

Brazil adopted a universal healthcare system in 1988 – a great challenge considering the continental size of the country and a population of more than 200 million inhabitants. Healthcare and other social policies are part of cooperative federalism, meaning that the federal government, states, and municipalities all share power to enact programs in these areas. Mechanisms of coordination among federal constituent units evolved in the 1990s. These mechanisms succeeded in facilitating decentralization of health spending and coordination of efforts among different municipalities, states, and the federal government.

The federal government ensures coordination of efforts in healthcare through the use of conditional transfers to subnational units, requiring recipients to fulfill general guidelines enacted by the Ministry of Health. States and municipalities participate in

the decision-making process on health policy through councils and joint committees. Today, almost all ambulatory (outpatient) expenditures are carried out by municipalities, while the federal government sets the general direction of health care policy by conditional transfer of funding.

7.4 Federalism and COVID-19

Conflicts between federal constituent units, as well as between the executive and the judicial branches of the government, were common during the pandemic. Policy review in the courts was a mark of the pandemic's first wave.

While countries in Europe and Asia were already suffering the damage caused by COVID-19, Brazil remained in apprehensive anticipation, waiting for the first case of the virus to arrive. Federal Law n° 13.979, enacted on 6 February 2020, was one of the first concrete measures adopted by the government. The law stipulated actions that could be taken by authorities to control the spread of the virus such as social isolation, quarantine, and mandatory tests or vaccines. Meanwhile, the federal Ministry of Health held meetings with state Secretaries of Health to align actions and coordinate efforts. The main recommendation was to flatten the virus transmission curve, although there was no consensus on how to achieve this goal.

As the pandemic approached Brazil, authorities at different levels of government began to take action independently and impose disproportionately restrictive measures, thus creating a panic scenario and stimulating conflict between federal constituent units. Trying to avoid blame in such situations could motivate authorities to emulate the most restrictive actions taken elsewhere (Elkins and Simmons 2005). Electoral strategies also may have a role in the conflicts between constituent federal units, which can be seen as conflicts between political actors. Local elections held in November 2020, and the anticipation of political coalitions in the 2022 general election led to public disagreements and accusations between the President, governors, and mayors regarding pandemic control measures and the related economic costs.

In March 2020, when the pandemic was in the early stages in Brazil, some states closed airports, ports, and highways, consequently isolating themselves from the rest of the country. These actions could have stopped the delivery of food, drugs, and other essential goods throughout the nation. On March 20, the President enacted an executive decree (MP 926) to centralize actions in this area, requiring technical advice of a federal agency before any restriction on transportation could be enacted. The President also stated that it was up to him to declare the essential activities that should continue even under isolation measures. To resolve this evident conflict between federal constituent units, the Supreme Court was called upon to resolve this deadlock in federalism.²

The STF decided that the actions taken by authorities to control COVID-19 are a common power of all three levels of government. Thereby, the Court endorsed the executive decree enacted by the President and also recognized that states and municipalities could adopt their own measures and policies according to regional or local needs. This decision gave judicial support to measures adopted by governors and mayors, reinforcing the spirit of cooperative federalism. On one hand, the STF's decision granted political autonomy to federal constituent units in tackling the pandemic, but on the other hand, it intensified uncoordinated actions.

Nevertheless, the Supreme Court went further in the analysis, stating that, to achieve coordination, a federal constituent unit could not act against a restrictive guideline enacted by a superior federal constituent unit. Effectively, what this means is that a municipality can adopt more stringent control measures than those adopted by the state, but not less stringent ones. Even if a municipality proves that its health-care situation allows for a relaxation of control measures, such as reopening schools, the mayor of such a municipality cannot enact this if it contravenes the state guideline. In this case, autonomy seems to be a one-way street, given that the units in the federation must comply with the STF's decision.

As would be expected, a wave of lawsuits flooded state and federal courts because each federal constituent unit adopted different criteria for the intensification or relaxation of virus control measures. As conflicts were referred to the justice system, the courts defined a range of policies related to the pandemic. By the end of August 2020, the Supreme Court had issued rulings in over 4,890 lawsuits regarding governmental actions to tackle COVID-19 (STF 2021).

Nevertheless, a number of joint actions were observed and encouraged by the federal government in a system of articulation and cooperation with states and municipalities. States initiated their own plans prepared by multidisciplinary teams of experts designed to mitigate the impacts of the new coronavirus. In an example of horizontal cooperation, the state of Amazonas offered support to the state of Roraima when its hospitals were reaching capacity treating COVID-19 patients. The state of Amazonas had already gone through its worst moment of the crisis and had, at that time, spare capacity in its hospitals to receive patients from Roraima.

7.5 Conclusions and transformation in Brazil

The COVID-19 pandemic resulted in thousands of deaths in Brazil and a huge economic damage. Despite this, the Brazilian health system did not collapse, and the case-fatality rate was low compared to that of a number of other countries around the world (Coronavirus Resource Center 2021). This outcome may suggest that Brazil achieved the goal of flattening the transmission curve. Uncoordinated actions do not necessarily lead to wrong actions.

Monetary and fiscal reforms go hand in hand with the redefinition of powers among federal constituent units. These issues are permanently debated in Brazil. However, the pandemic has brought a sense of urgency to the discussion, and it may affect the speed of approval of reforms by the legislatures. Conflicts between federal constituent units and judicial activism created a climate of uncertainty. This was a scenario in which every mayor, judge, or prosecutor thought that they had the right answer on how to deal with the pandemic. In this context, the model of federalism in Brazil may change in the short term, either by institutionalizing coordination among federal constituent units or providing subnational entities with more defined administrative and financial powers.

It is not clear whether jurisprudence shifted the Brazil's federal model toward decentralization or if the Supreme Court decisions reinforced decentralization only in certain policy areas. Regardless, it is important to strengthen mechanisms of negotiation on federal affairs in Brazilian federation.

Another important point of transformation due to the COVID-19 crisis is the shift toward result-orientation by public institutions. Brazil has a strong bureaucratic

structure, resulting in significant resources being dedicated to verifying and monitoring processes that contribute little to the organization's purpose. The pandemic has shown that institutional processes with flexible, well-planned, and results-oriented structures are better able to serve the public interest, ensuring good public sector governance.

Notes

- 1 The authors would like to thank Deborah Aroxa, Hanna Cruz, Julio Queiroz, and Luciana Lopes for helpful comments.
- 2 Direct Unconstitutionality Action (ADI) 6134 and Claim of Non-compliance with Fundamental Precept (ADPF) 672.

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