THE CONCURRENT LEGISLATIVE CONSTITUTIONAL COMPETENCE IN THE CRISIS CAUSED BY COVID-19 AND THE INTERPRETATION GIVEN BY THE STF IN THE JUDGMENT OF THE PRECAUTIONARY MEASURE AT ADI 6341

A COMPETÊNCIA CONSTITUCIONAL LEGISLATIVA CONCORRENTE EM MEIO ÀS CRISES CAUSADAS PELA COVID-19 E A INTERPRETAÇÃO DADA PELO STF NO JULGAMENTO DA MEDIDA CAUTELAR NA ADI 6341

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ABSTRACT

The paper analyzes the concurrent competence to legislate defined on the art. 24, XII, of the Brazilian Federal Constitution of 1988 (CF / 1988), comparing decisions of the Supreme Federal Court (STF) in times of normality and in times of crisis, as is the moment experienced, in the face of the COVID-19 pandemic. The

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judgments mentioned refer to the precautionary measure in Direct Unconstitutionality Action (ADI) 6341 and in the ADI 3937, both referring to the defense and protection of health. Methodologically, the study is qualitative, having as sources the bibliographic and documentary survey, especially the jurisprudential research. It is concluded that the court's position on the concurrent competence to legislate defined on the art. 24, XII, of the CF/1988, remained the same in the analyzed judgments.

KEYWORDS: Concurrent competence to legislate. ADI. Pandemic. Federalism. Health.

RESUMO

O artigo analisa a competência legislativa concorrente delimitada no art. 24, XII, da Constituição Federal de 1988 (CF/1988), comparando decisões do Supremo Tribunal Federal (STF) em tempos de normalidade e em tempos de crise, como é o momento vivenciado, diante da pandemia de COVID-19. Os julgamentos em foco são referentes à medida cautelar na Ação Direta de Inconstitucionalidade (ADI) 6341 e na ADI 3937, ambas referentes à defesa e proteção à saúde. Metodologicamente, o estudo é qualitativo, tendo como fontes o levantamento bibliográfico e documental, especialmente a pesquisa jurisprudencial. Conclui-se que o posicionamento da corte sobre a competência legislativa concorrente delimitada no art. 24, XII, da CF/1988, se manteve no caso nos julgamentos analisados.

PALAVRAS-CHAVE: *Competência legislativa concorrente. ADI. Pandemia. Federalismo. Saúde.*

1 INTRODUCTION

This article aims to analyze the concurrent legislative competence (*competência legislativa concorrente*) defined in art. 24, XII, of the Brazilian Federal Constitution of 1988 (*CF/1988*), comparing decisions of the Supreme Federal Court (*Supremo Tribunal Federal – STF*) in times of normality and in times of crisis, as is the moment experienced, in the face of the COVID-19 pandemic.

It's based on the interpretation given by this Court in the judgment of the precautionary measure in Direct Action of Unconstitutionality 6341(*medida cautelar na Ação Direta de Inconstitucionalidade – ADI*) (BRASIL, 2020d), reported by Minister Marco Aurélio Mello, seeking to verify whether there is, at least in terms of defense and health protection, a tendency to reinforce the division of vertical competence in the concurrent modality, taking into account the autonomy among the federated entities, the reaffirmation of the absence of hierarchy among them, as well as the notion of the prevalence of interest for the purpose of validating the idea of cooperative and solidary federalism that guides BC/1988 (BRASIL, 1988).

In ADI 6341 (BRASIL, 2020d) the Democratic Labor Party (*Partido Democrático Trabalhista – PDT*) called for the suspension of the effectiveness of several provisions of Provisional Measure 926/2020 (*Medida Provisória – MP 926/2020*) (BRASIL, 2020c) in dealing with the new coronavirus, in order to limit the taking of normative and administrative measures by the states, the Federal District and the municipalities.

The debate takes place at a time when it is necessary for Brazil to adopt measures to prevent and contain COVID-19, a disease caused by a new virus, SARS-CoV-2, also known as a new coronavirus. Initially registered in China, at the end of 2019, cases rapidly increased and gained worldwide proportion, with the World Health Organization (*Organização Mundial*

de Saúde – OMS), in late January, declaring an international public health emergency and, on March 11, 2020, evolved into the declaration of a pandemic.

In fact, the figures reveal a worrying picture, since the total number of confirmed cases in the world is already close to 6 million, with more than 350 thousand deaths, on May 28, 2020. The United States (USA), with almost 1,7 million cases, have far exceeded China (82.995), the initial epicenter of the pandemic. The same is true in Brazil (438.812), Russia (379.051) and the United Kingdom (269.127), Italy (231.732), among the examples of countries with more than 200 thousand cases, as shown by official data released by the respective governments and systematized by Stephanou (2020).

The situation caused a serious crisis and the need to adopt emergency measures in several dimensions, such as health, economic, behavioral and legal. It represents a brutal challenge for the State in terms of managing its health systems, which are strongly threatened with collapse in the face of the exponential number of people in need of care. There is still no scientifically approved drug to fight the new coronavirus, nor is there a vaccine, which, according to the most optimistic forecasts, will be available in a year.

It brings challenges in economic terms, as a result of a recession that perhaps surpasses that of the Great Depression of the beginning of the 20th century, when the fall in the countries' gross domestic product (GDP) and the increase in unemployment terrified the world. Between 1929 and 1932-1933, GDP fell 30% in the United States, 15% in Latin America, 9% in Europe, 5% in Italy (CIOCCA, 2009). According to the weekly Focus survey, carried out by the Central Bank, there will be a 3,45% drop in Brazilian GDP in 2020, after a 3,8% drop in the previous year. In addition to reducing product and income in two straight years, several other analysts already bring more negative forecasts to the country.

It is estimated that Brazil's unemployment rate will rise from the current 11,6% to 16,1% in the second quarter of 2020, worsening the labor market, which was already going through a bad phase in the country. In absolute numbers, it represents 5 million more unemployed people in just three months, increasing the number of people without work from 12,3 million to 17 million, according to the Brazilian Institute of Economics of the Getúlio Vargas Foundation (*Instituto Brasileiro de Economia da Fundação Getúlio Vargas – FGV IBRE*).

The challenges in social terms are enormous, such as the importance of structuring public policies to alleviate the cost of the dramatic situation of insufficient income of millions of brazilian, not least because there was already a situation of unemployment and reduction of social and labor rights that are quite complicated.

Behavioral disruptions, especially those stemming from social isolation (or, ultimately, lockdown), have profoundly altered the way people interact around the world. The high contagion of the virus requires changes in habits such as washing hands, wearing masks, canceling trips and social gatherings. In many cases, teleworking is necessary, this without mention changes such as the impediment of family members and friends to watch over the bodies and give a dignified burial to their loved ones, fatal victims of the disease.

Finally, the legal challenges stand out, since there are many uncertainties at the present time. Economy problems affect organizations as to the possibility of fulfilling (partial or total) the contracts already concluded. Although there are several legal mechanisms to mitigate risks and penalties that business organizations would be subject to, depending on the mag-

nitude of the impacts of the pandemic on their operations, the moment causes great concern. The impacts on health plan consumption relationships, for example, raise several questions in terms of the responsibilities of the parties.

The need for action by all the members of the Brazilian federation can, of course, raise potential conflicts of competence, insofar as, according to art. 24, XII, of BC/88, it is up to the Union, the States and the Federal District to legislate concurrently on social security, protection and defense of health.

In this article, as already explained, the concern is regarding the Supreme Federal Court (*Supremo Tribunal Federal – STF*) position on the issue of standards by States, the Federal District and Municipalities in facing the new coronavirus vis-à-vis other periods, which we will call normal.

To this end, a comparative analysis is carried out between the judgment of ADI 3937, in 2017 (BRASIL, 2017), filed by the National Confederation of Industrial Workers (*Confederação Nacional dos Trabalhadores na Indústria – CNTI*) against Law nº 12.687/2007 (SÃO PAULO, 2007), edited by State of São Paulo, prohibiting the use of products, materials or artifacts that contained any types of asbestos in the state territory and that adopted in 2020, in the judgment of ADI 6341 (BRASIL, 2020d).

As a research problem, it is asked: "does the constitutional division of concurrent legislative competence, in the interpretation of the STF on the subject of health protection and defense, maintain the idea of cooperative and solidary federalism determined by the BC/1988?".

Methodologically, the research has a qualitative approach, seeking to interpret the phenomenon and assign meanings to decisions. As for the objectives, the research is exploratory, having as a procedure, a bibliographic and documentary survey is adopted, notably the jurisprudential research regarding the position of the *STF* in both decisions under analysis.

The text is structured in three parts, in addition to this introduction. Section 2 discusses federalism and concurrent competence in brazilian constitutionalism in times of normality. In section 3, the concurrent competence to legislate in times of constitutional abnormality is addressed, analyzing the decision that endorsed the precautionary measure in ADI 6341 (*medida cautelar na ADI 6341*) (BRASIL, 2020). The study's conclusions are presented at the end.

2. FEDERALISM AND CONCURRENT COMPETENCE IN BRAZILIAN CONSTITUTIONALISM IN TIMES OF NORMALITY

Brazilian federalism, consolidated by the Brazilian Constitution of 1891 (BRASIL, 1891), was formed by segregation, that is, it was the result of a political decentralization of a unitary state as a result of a centrifugal movement established by Decree nº 1 of 15/11/1889, which

transformed the old provinces into united member states in an indissoluble way (HORBACH, 2013, p. 9).

In the following Constitutions, 1934 and 1937 (BRASIL, 1934 and 1937), a centralizing tendency prevailed, with the increase of the competences of the Union and the presence of the Federal Government in the solution of economic problems of the Member States, which was considered a setback because states and municipalities became less autonomous in this period than in the period of imperial centralism (SILVA, 2009).

This attempt to neutralize regional interests was changed in the Brazilian Constitution of 1946 (BRASIL, 1946), which inaugurated a period of cooperative federalism. One of the main characteristics of this cooperative federalism was the greater transfer of federal resources to Member States and municipalities, but the concentration, within the Union, of the great national decision-making powers and legislative discipline (ABRÚCIO; SAMUELS, 1997).

With the Brazilian Constitution of 1967 (BRASIL, 1967) and its amendments, the centralizing trend was resumed: increasing the reduction of the normative autonomy of the States, prevailing what Horta (1980/1982) called purely apparent federalism.

The democratic reopening and the promulgation of the Federal Constitution of 1988 (BRASIL, 1988) gave a new configuration to national federalism, which again had a cooperative profile, a model that can be inferred from the analysis of the provisions of its art. 24, which deals with concurrent/competitor competence (*competência concorrente*), having established institutional designs on a large scale to structure a State oriented to be democratic and of law (RANGEL, 2016, p. 218).

Discussing the notion of competence and its relationship with the power structures delimited by the constitutional rule, highlights Canotilho (1993, p. 175-176):

> Constitutional norms of competence are those in which certain attributions to certain constitutional bodies are recognized or spheres of competence are established between the various constitutional bodies. (...) It should be noted, according to the previous references on the "material contamination" of the organizational rules, that the rules of competence often contain a material content that concerns not only the duty to guarantee the constitutionally established competence, also to the very reason for the delimitation of competence. (*Normas constitucionais de competência são aquelas nas quais se reconhecem certas atribuições a determinados órgãos constitucionais ou são estabelecidas esferas de competência entre os vários órgãos constitucionais. (...) Saliente-se, de acordo com as referências anteriores sobre a «contaminação material» das normas organizatórias, que as normas de competência comportam muitas vezes, um conteúdo material respeitante não só ao dever de garantir a competência constitucionalmente fixada, mas também à própria razão de ser da delimitação de competência.*)

This new configuration of the delimitation of state powers was based on the principle of predominance of interest with regard to the division of powers among the federated entities, that is: the Union was responsible for what was of predominantly national interest, for States, regionally, and for Municipalities, local, as well as the idea of cooperative federalism which starts from the basic notion of the inability of federative entities to plan and implement, in an isolated way, public policies necessary to fulfill the competences attributed to them by the Constitution (SCHIER *et al,* 2018, p. 221).

MERITUM MAGAZINE• v.15 • n.2 • p. 285-303 • May/Aug. 2020

In turn, Horta (1991, p. 249-250), thus, points out the importance of the division of competence in the Brazilian Magna Carta for the maturation of federalism in search of balance between the entities:

> The division of powers is a requirement of the federal structure of the State, to ensure the coexistence of the systems that make up the Federal State. The federal form of State corresponds to the composite and plural State, founded on the association of several States, each one having its legal, political and constitutional order, according to the rules established in the Federal Constitution. (...) The division of competence, responsible for the constitutional definition of the specific field of each order, may accentuate centralization, concentrating the largest sum of powers in the Federation or Union, or lead to decentralization, reducing federal powers and expanding state powers, or even moving away from extreme solutions, measuring federal and state competences, in order to establish in the Federal Constitution the balance between the central ordering and partial ordering. In the first case, the centralization of powers configures centripetal federalism; in the second, decentralization leads to centrifugal federalism, and, in the third, the balance in the dosage of the attributions conferred to the orders will implant balanced federalism. (*A repartição de competências é exigência da estrutura federal de Estado, para assegurar o convívio dos ordenamentos que compõem o Estado Federal. A forma federal de Estado corresponde ao Estado composto e plural, fundado na associação de vários Estados, cada um possuindo o seu ordenamento jurídico, político e constitucional, conforme as normas estabelecidas na Constituição Federal. (...) A repartição de competências, responsável pela definição constitucional do campo próprio de cada ordenamento, poderá acentuar a centralização, concentrando na Federação ou União a maior soma de poderes, ou conduzir à descentralização, reduzindo os poderes federais e ampliando os poderes estaduais, ou ainda, afastando-se das soluções extremas, dosar as competências federais e estaduais, de modo a instaurar na Constituição Federal o equilíbrio entre o ordenamento central e os ordenamentos parciais. No primeiro caso, a centralização de poderes configura o federalismo centrípeto; no segundo, a descentralização conduz ao federalismo centrífugo, e, no terceiro, o equilíbrio na dosagem das atribuições conferidas aos ordenamentos implantará o federalismo de equilíbrio.*)

It's important to remember that, externally, only the federal State enjoys international legal personality, with the central government being responsible for conducting the federation's foreign affairs (BURDEAU, 1967). At the domestic level, however, federalism presupposes the division of powers among the different units of the federation.

This distribution can be horizontal or vertical. The first admits three different solutions: a) the exhaustive list of the tasks of the Union and the Member States; b) the enumeration of the Union's competence and the allocation to States of reserved or unlisted powers; and c) listing the competence of the Member States, so that unrelated matters are the responsibility of the central government.

In the vertical distribution, in turn, there is the distribution of identical legislative matter between the Union and the Member States, with federal legislation revealing the essential lines. It will be up to the local legislation "to fill in the clear that was affecting the matter revealed in the general rules legislation to the peculiarities and state requirements" (*"preencher o claro*

que lhe ficou afeiçoando a matéria revelada na legislação de normas gerais às peculiaridades e às exigências estaduais") (HORTA, 1964, p. 53).

This is one of the criteria for the vertical division of competences adopted by the BC/1988 (BRASIL, 1988), the so-called competitor competence that divides legislative political attributions among the federated entities under certain criteria, making it possible for all these entities to exercise the power to legislate , respecting their autonomies, on the same themes in the scope of the prevalence of their interests without hierarchy among the federated entities, demanding a political decentralization, as a way of reformulating the notion of division of competence (HORTA, 1985-1986, p. 21).

In this regard, Almeida (2000, p. 97) emphasizes that the respect for such autonomies of the federated entities in competitor/concurrent competence (*competência concorrente*) implies the absence of hierarchy between them, which reinforces the cooperative model of federation to which Brazil is submitted. It is through it that political power is expressed, at the heart of the autonomy of the federative units.

> In fact, it is in the ability to establish the laws that will govern their own activities, without hierarchical subordination and without the interference of the other spheres of power, that the autonomy of each of these spheres is fundamentally translated. Self-government means nothing other than dictating your own rules. (*De fato, é na capacidade de estabelecer as leis que vão reger as suas próprias atividades, sem subordinação hierárquica e sem a intromissão das demais esferas de poder, que se traduz fundamentalmente a autonomia de cada uma dessas esferas. Autogovernar-se não significa outra coisa senão ditar-se as próprias regras.*)

Accordingly, each autonomous power center in the Federation must be empowered to create the law applicable to its respective orbit. However, in this act of dictating its own rules, one must: keep subordination to sovereign power, in this case the constituent power, manifested in the Constitution:

> And because it is the Constitution that shares, it has the logical consequence that the invasion, no matter by which federated entity, of the field of legislative competence of another will always result in the unconstitutionality of the law issued by the incompetent authority. This is true both in the case of usurpation of private legislative competence, and in the case of non-compliance with the constitutional limits placed on the performance of each entity in the field of concurrent legislative competence. (*E porque é a Constituição que faz a partilha, tem-se como consequência lógica que a invasão não importa por qual das entidades federadas do campo da competência legislativa de outra resultará sempre na inconstitucionalidade da lei editada pela autoridade incompetente. Isto tanto no caso de usurpação de competência legislativa privativa, como no caso de inobservância dos limites constitucionais postos à atuação de cada entidade no campo da competência legislativa concorrente*) (ALMEIDA, 2000, p. 97).

Concerning this concurrent competence, BC/1988 (BRASIL, 1988) brings the limit to the Union to establish general norms, not excluding the supplementary competence of States, observing that in the absence of a federal law on general norms, States will exercise full legislative competence, in order to attend to its peculiarities, in all observed the provision of article 24, §§1 °, 2 ° and 3 °, of the BC/1988 (BRASIL, 1988). This concurrent competence is defined by Silva (2013, p. 485):

MERITUM MAGAZINE• v.15 • n.2 • p. 285-303 • May/Aug. 2020

> Competence is the legally assigned capacity to an entity or to an organ or agent of the Public Power to issue decisions. (...) As for the extension, the competence is distinguished in (...) d) competitor, whose concept comprises two elements: d.1) possibility of disposition on the same subject; d.2) primacy of the Union regarding the establishment of general rules. (*Competência é a faculdade atribuída juridicamente a uma entidade ou a um órgão ou agente do Poder Público para emitir decisões. (...) Quanto à extensão, a competência se distingue em (...) d) concorrente, cujo conceito compreende dois elementos: d.1) possibilidade de disposição sobre o mesmo assunto; d.2) primazia da União no que tange à fixação de normas gerais.*)

Novelino (2018, p. 616) also describes concurrent legislative competence among federal entities as one that "can be exercised simultaneously by more than one federative entity. Within the scope of concurrent legislative competence (Brazilian Constitution, art. 24), and the Union being responsible for establishing general rules (Brazilian Constitution, art. 24, §1º)" (*"pode ser exercida, de modo simultâneo por mais de um ente federativo. No âmbito da competência legislativa concorrente (CF, art. 24), estando a União incumbida de estabelecer as normas gerais (CF, art. 24, §1º)"*).

The key to the proper distribution of concurrent legislative competence, as seen in Horbach (2013, p. 10) "is the concept of "general rule", contained in art. 24, § 1º, of the 1988 Constitution. Here again, the question arises in a simple way: The more comprehensive this concept of general rule, the less the state's autonomy" *("é o conceito de "norma geral", constante do art. 24, § 1º, da Constituição de 1988. Mais uma vez aqui a questão se põe de forma simples: quanto mais abrangente esse conceito de norma geral, menor a autonomia estadual"*).

One of the constitutional concurrent legislative powers concerns the protection and defense of health inserted in item XII of art. 24[4] of our 1988 Brazilian Constitution, which states that it is up to all federated entities (Union, States and Federal District) to legislate concurrently on topics such as social security, protection and defense of health.

This concurrent competence was already the subject of a manifestation by the Federal Supreme Court (*Supremo Tribunal Federal – STF*) in 2008 in the judgment of the Direct Action of Unconstitutionality 3937 (*Ação Direta de Inconstitucionalidade (ADI) 3937*) (BRASIL, 2008), filed by the National Confederation of Workers in Industry (*Confederação Nacional dos Trabalhadores na Indústria – CNTI*) against Law nº 12.687/2007 (SÃO PAULO, 2007), from the State of São Paulo, which prohibited the use of products, materials or artifacts that contain any types of asbestos in the state territory.

At that time, by majority, the STF Plenary (*Plenário do STF*) dismissed the request contained in ADI 3937 (BRASIL, 2008), defining that the autonomy of federative entities must be respected, especially in cases involving the protection and defense of health in times of normality, as it turns out:

> (...) federal law makes reference to the ILO Convention 162, art. 3rd, which, as it deals with a theme that in Brazil is considered a fundamental right (health), has the status of supralegal norm. It would, therefore, be above the federal law itself that provides for commercialization, production, transportation,

4 "Art. 24. It's incumbent upon the Union, the States and the Federal District to legislate concurrently on: [...] XII - social security, protection and defense of health; [...]". (*"Art. 24. Compete à União, aos Estados e ao Distrito Federal legislar concorrentemente sobre: [...] XII - previdência social, proteção e defesa da saúde; [...]."*)

> etc. of asbestos. (...) So that, resuming the speech of min. Joaquim Barbosa, the state standard, in this case, complies much more with the FC in terms of health protection or avoiding risks to human health, the health of the population in general, workers in particular and the environment**. State law is much closer to constitutional design, and therefore better accomplishes this supreme principle of maximum effectiveness of the Constitution in terms of fundamental rights, and much closer to the ILO, too, than the federal law. So, it seems to me a very interesting case of opposing the supplementary norm with the general norm, leading us to recognize the superiority of the supplementary norm over the general norm**) ([ADI 3,937 MC, Rapporteur Minister Marco Aurélio, vote by Minister Ayres Britto, j. 4-6-2008, P, DJE from 10-10-2008.] Emphasis added)
>
> ((...) *lei federal faz remissão à Convenção da OIT 162, art. 3º, que, por versar tema que no Brasil é tido como de direito fundamental (saúde), tem o status de norma supralegal. Estaria, portanto, acima da própria lei federal que dispõe sobre a comercialização, produção, transporte etc. do amianto. (...) De maneira que, retomando o discurso do min. Joaquim Barbosa, a norma estadual, no caso, cumpre muito mais a CF nesse plano da proteção à saúde ou de evitar riscos à saúde humana, à saúde da população em geral, dos trabalhadores em particular e do meio ambiente.* A legislação estadual está muito mais próxima dos desígnios constitucionais, e, portanto, realiza melhor esse sumo princípio da eficacidade máxima da Constituição em matéria de direitos fundamentais, e muito mais próxima da OIT, também, do que a legislação federal. Então, parece-me um caso muito interessante de contraposição de norma suplementar com a norma geral, levando-nos a reconhecer a superioridade da norma suplementar sobre a norma geral [ADI 3.937 MC, rel. min. Marco Aurélio, voto do min. Ayres Britto, j. 4-6-2008, P, DJE de 10-10-2008.] Grifo nosso).

In the above vote, the argument that state legislation is much closer to constitutional designs is observed, being pointed out as more effective in terms of fundamental rights and closer to the position defended by the International Labor Organization (ILO).

In addition to establishing the validity of the state rule, at the time, the Ministers also declared the unconstitutionality of article 2º of Federal Law nº 9.055/1995 (BRASIL, 1995), which allowed the extraction, industrialization, commercialization and distribution of the use of asbestos in the chrysotile variety in the country.

Therefore, it's noted that there is a tendency of the STF, at least in terms of defense and health protection, to reinforce the division of vertical competence in the concurrent modality based on the autonomy among the federated entities, in reaffirming the absence of hierarchy between them , as well as in the prevalence of interest for the purpose of validating the idea of cooperative federalism under the aegis of the Brazilian Constitution of 1988 (BRASIL, 1988), all this in times of constitutional normality.

Let us see, in the next section, whether in times of constitutional abnormality this understanding is maintained by the Brazilian Supreme Court (*STF*).

MERITUM MAGAZINE• v.15 • n.2 • p. 285-303 • May/Aug. 2020

3. CONCURRENT COMPETENCE TO LEGISLATE IN TIMES OF CONSTITUTIONAL ABNORMALITY: THE CASE OF PUBLIC HEALTH AND THE DECISION THAT REFERRED TO THE PRECAUTIONARY MEASURE AT ADI 6341 (MEDIDA CAUTELAR NA ADI 6341)

The idea of constitutional abnormality is intrinsically linked to the notions of a Democratic State of Law based on the governance/empire of law, on the division of state powers, on the legality of administration and on fundamental rights and guarantees. In this sense, the constitutional abnormality refers to situations of crisis or emergency, such as public calamity, for example, to the rules provided for in the constitution itself with provision of resources for the exceptional, necessary, adequate and proportional means, to obtain the restoration of normality constitutional.

This recourse to exceptional means, reminds us Canotilho (1993), can also be called "defense of the constitution", "suspension of constitutional guarantees", "defense of security and public order", "state of constitutional exception" or, still, "extraordinary State protection".

Whatever its denomination, it implies necessary measures for the defense of the constitutional order in the face of an abnormal situation that cannot be faced by the normal means provided for in the Constitution, aiming at restoring constitutional normality, according to Canotilho (1993, p. 1145):

> Consequently, it's a matter of submitting crisis and emergency situations (war, riots, public calamities) to the Constitution itself, constitutionalizing the recourse to exceptional means, which are necessary, adequate and proportional, in order to obtain the restoration constitutional normality. (*Trata-se, por consequência de submeter as situações de crise e de emergência (guerra, tumultos, calamidades públicas) à própria Constituição, constitucionalizando o recurso a meios excepcionais, necessários, adequados e proporcionais, para se obter o restabelecimento da normalidade constitucional.*)

Since the beginning of 2020, the world has been facing a crisis and emergency situation, due to the spread of a new virus, SARS-CoV-2, also known as the new coronavirus, which causes COVID-19. The first cases were recorded in December 2019 in China.

The World Health Organization (WHO) declared an international public health emergency on January 30, 2020 and, with the exponential increase in the number of cases, in people from different countries and continents, modified the previous emergency declaration on health for pandemic, on March 11, 2020.

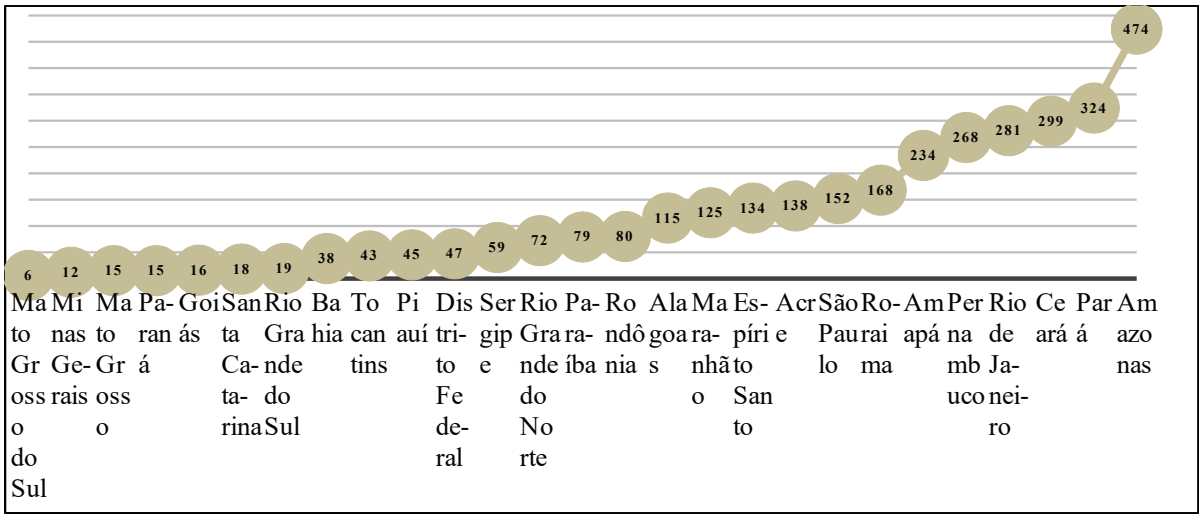
The total number of confirmed cases in the world of people with COVID-19 surpassed one million on April 2, 2020 and by April 15 that number was already over 2 million. As of April 7, more than 80,000 people had died of the disease on the planet, according to WHO.

On April 24, 2020, the total number of confirmed cases worldwide reached 2.716.146 with 190.876 deaths. The United States (USA) had the highest number of cases (879.697), followed by Spain (213.024), Italy (189.973), France (158.183) and Germany (153.129). In number of deaths, Germany (5.575) was well behind, being higher in the USA (49.776), Spain

(22.157), Italy (25.549), France (21.856) and the United Kingdom (18.738), according to official data released by the respective governments and systematized by Stephanou (2020).

In Brazil, which declared a state of public calamity by Legislative Decree nº 6, of March 18, 2020 (BRASIL, 2020), the first case dates from February 26, 2020 and, a month later, it already reached the total of 2.915 confirmed cases, with 20 deaths. As of March 24, the number had grown to 52.995, with 3.670 deaths. At the end of May, the data showed 438 thousand people, with almost 27 thousand deaths, with some states exceeding 30 thousand on March 29, 2019: São Paulo (89.483), Rio de Janeiro (42.398), Ceará (37.275), Amazonas (33.508) and Pará (31.033) (STEPHANOU, 2020; MS, 2020). When analyzing the number of deaths for each 1 million inhabitants, the high rate of Amazonas, Pará and Ceará is highlighted (Graph 1).

Graph 1- Number of deaths per 1 million inhabitants, according to brazilian states



Source: Own elaboration, based on Stephanou (2020).
Note: Position on 05/28/2020.

The graph shows that the evolution of COVID-19 didn't happen in the same way in the brazilian federated entities, which reinforces the need to respect their constitutional autonomies based on the allocation of concurrent legislative competence to effectively combat the pandemic.

Also in February and March 2020, the pandemic made the adoption of prevention and containment measures for COVID-19 by the various federated entities pressing. In the federal normative field, the following stand out: Ordinance nº 188, of February 3, 2020, of the Minister of State for Health (*Portaria nº 188, de 03 de fevereiro de 2020, do Ministro de Estado da Saúde*), which determined the declaration of Public Health Emergency of National Importance (*Emergência em Saúde Pública de Importância Nacional – ESPI*) and, mainly, Law nº 13.979/2020 (BRASIL, 2020b), published on February 6, 2020 and regulated by Decree nº 10.282, of March 20, 2020 (BRASIL, 2020a), which defined public services and essential activities, for the purpose of safeguarding the survival, health and safety of the population affected by the law's measures.

On March 20, 2020, the federal Executive Power published Provisional Measure nº 926 (*Medida Provisória nº 926*) (BRASIL, 2020c) establishing that the federal government, through

the President of the Republic, would be competent to decide on limitation of locomotion and definition of essential activities, changing part of the aforementioned law, including paragraphs 8 and 9 of art. 3º, as highlighted below:

> Art. 3º. To deal with the public health emergency of international importance resulting from the coronavirus, the authorities may adopt, within the scope of their competences, among others, the following measures: (Wording given by Provisional Measure nº 926, of 2020)
>
> § 8º The measures provided for in this article, when adopted, shall safeguard the exercise and functioning of public services and essential activities. (Included by Provisional Measure nº 926, of 2020)
>
> § 9º The President of the Republic will provide, by decree, on the public services and essential activities referred to in § 8º. (Included by Provisional Measure nº 926, of 2020)
>
> (*"Art. 3º. Para enfrentamento da emergência de saúde pública de importância internacional decorrente do coronavírus, as autoridades poderão adotar, no âmbito de suas competências, dentre outras, as seguintes medidas: (Redação dada pela Medida Provisória nº 926, de 2020)*
>
> *§ 8º. As medidas previstas neste artigo, quando adotadas, deverão resguardar o exercício e o funcionamento de serviços públicos e atividades essenciais. (Incluído pela Medida Provisória nº 926, de 2020)*
>
> *§ 9º. O Presidente da República disporá, mediante decreto, sobre os serviços públicos e atividades essenciais a que se referem o § 8º. (Incluído pela Medida Provisória nº 926, de 2020)"*)

Due to this amendment to Law nº 13.979/2020 by MP nº 926/2020, the Democratic Labor Party (Partido Democrático Trabalhista – PDT) proposed ADI 6341 (BRASIL, 2020e) with a request for a precautionary measure *ad referendum* from the Plenary, and the measure was granted by the rapporteur Minister Marco Aurélio Melo, who set the understanding that States and Municipalities have autonomy to face the pandemic and that the best interpretation of the law would be in the sense that all federated entities, within the limits of their attributions, could take measures to combat COVID-19. Let us see the content of the Minister's report:

> HEALTH; CRISIS; CORONAVIRUS; PROVISIONAL MEASURE; PROVIDENCES; COMPETITIVE LEGITIMATION. The following requirements are met the urgency and necessity, in what provisional measure provides for measures in the field of national public health, without prejudice to the concurrent legitimation of the States, the Federal District and the Municipalities. () 2. Although the request for an urgent measure is aimed at the immediate disallowance of the contested precepts, it's necessary, at the current stage, while the process isn't ready, to assess only the pertinence, or not, of suspending the effectiveness of the devices. The head of article 3º signals, most of all, the experienced court, when referring to the confrontation of the public health emergency, of international importance, resulting from the coronavirus. More than that, it reveals the endorsement of acts by authorities, within the scope of their respective competences, aiming at isolation, quarantine, exceptional and temporary restriction, according to technical and reasoned recommendation of the National Health Surveillance Agency, by roads, ports or airports of entry and exit from the country, as well as interstate and intercity transportation. The contested provisions follow. § 8º deals with the preservation of the exercise and functioning of public services and essential

activities. The § 9º attributes to the President of the Republic, by means of a decree, the definition of the services and activities that are eligible. § 10 provides that measures may only be adopted in a specific act, in conjunction with the regulatory body or the granting or authorizing power. Finally, § 11 prohibits restrictions on the movement of workers that may affect the functioning of public services and essential activities. It can be seen that the provisional measure, in view of the urgency and need for discipline, was issued with the purpose of mitigating the international crisis that reached Brazil, even though, according to some technicians, it's still embryonic. There must be a vision aimed at the collective, that is, public health, showing interest in all citizens. The article 3º, head, refers to the attributions, of the authorities, regarding the measures to be implemented. You cannot see a violation of the Federal Constitution. The measures do not exclude acts to be performed by the State, the Federal District and the Municipality considered the concurrent competence in the form of article 23, item II, of the Major Law. It also doesn't avenge the pleading regarding the reserve of complementary law. It is not up to the optics without a sense of the theme to be able to be the object of approach and discipline only by means of a larger law. Given the urgency and the need for general discipline of national scope, it must be concluded that, in due time and manner, the President of the Republic, Jair Bolsonaro, **acted in editing a Provisional Measure. What is contained therein, repeat to exhaustion, doesn't remove concurrent competence, in terms of health, from States and Municipalities. What is desired appears, under the cautionary angle, in item a.2 of the initial piece, based on the field, it must be recognized, simply formal, that the discipline resulting from Provisional Measure nº 926/2020, in what it printed new wording to article 3º of Federal Law nº 9.868/1999, doesn't preclude the taking of normative and administrative measures by States, the Federal District and Municipalities. 3. In part, I grant the cautionary measure to make the concurrent competence explicit, in the pedagogical field and in the diction of the Supreme Court.** 4. This cautionary measure is submitted, as soon as the existing critical phase is supplanted and designated Session, to the sieve of the face-to-face Plenary. (Our emphasis. Rapporteur Minister Marco Aurélio Melo [ADI 6341, Rapporteur Minister Marco Aurélio Melo]).

(*SAÚDE CRISE CORONAVÍRUS MEDIDA PROVISÓRIA PROVIDÊNCIAS LEGITIMAÇÃO CONCORRENTE. Surgem atendidos os requisitos de urgência e necessidade, no que medida provisória dispõe sobre providências no campo da saúde pública nacional, sem prejuízo da legitimação concorrente dos Estados, do Distrito Federal e dos Municípios. () 2. Embora o pedido de medida de urgência esteja direcionado à imediata glosa dos preceitos impugnados, cumpre, na fase atual, enquanto não aparelhado o processo, aferir tão somente a pertinência, ou não, de suspensão da eficácia dos dispositivos. A cabeça do artigo 3º sinaliza, a mais não poder, a quadra vivenciada, ao referir-se ao enfrentamento da emergência de saúde pública, de importância internacional, decorrente do coronavírus. Mais do que isso, revela o endosso a atos de autoridades, no âmbito das respectivas competências, visando o isolamento, a quarentena, a restrição excepcional e temporária, conforme recomendação técnica e fundamentada da Agência Nacional de Vigilância Sanitária, por rodovias, portos ou aeroportos de entrada e saída do País, bem como locomoção interestadual e intermunicipal. Seguem-se os dispositivos impugnados. O § 8º versa a preservação do exercício e funcionamento dos serviços públicos e atividades essenciais. O § 9º atribui ao Presidente da República, mediante decreto, a definição dos serviços e atividades*

MERITUM MAGAZINE• v.15 • n.2 • p. 285-303 • May/Aug. 2020

> *enquadráveis. Já o § 10 prevê que somente poderão ser adotadas as medidas em ato específico, em articulação prévia com o órgão regulador ou o poder concedente ou autorizador. Por último, o § 11 veda restrição à circulação de trabalhadores que possa afetar o funcionamento de serviços púbicos e atividades essenciais. Vê-se que a medida provisória, ante quadro revelador de urgência e necessidade de disciplina, foi editada com a finalidade de mitigar-se a crise internacional que chegou ao Brasil, muito embora no território brasileiro ainda esteja, segundo alguns técnicos, embrionária. Há de ter-se a visão voltada ao coletivo, ou seja, à saúde pública, mostrando-se interessados todos os cidadãos. O artigo 3º, cabeça, remete às atribuições, das autoridades, quanto às medidas a serem implementadas. Não se pode ver transgressão a preceito da Constituição Federal. As providências não afastam atos a serem praticados por Estado, o Distrito Federal e Município considerada a competência concorrente na forma do artigo 23, inciso II, da Lei Maior. Também não vinga o articulado quanto à reserva de lei complementar. Descabe a óptica no sentido de o tema somente poder ser objeto de abordagem e disciplina mediante lei de envergadura maior. Presentes urgência e necessidade de ter-se disciplina geral de abrangência nacional, há de concluir-se que, a tempo e modo, atuou o Presidente da República Jair Bolsonaro* ***ao editar a Medida Provisória. O que nela se contém repita-se à exaustão não afasta a competência concorrente, em termos de saúde, dos Estados e Municípios. Surge acolhível o que pretendido, sob o ângulo acautelador, no item a.2 da peça inicial, assentando-se, no campo, há de ser reconhecido, simplesmente formal, que a disciplina decorrente da Medida Provisória nº 926/2020, no que imprimiu nova redação ao artigo 3º da Lei federal nº 9.868/1999, não afasta a tomada de providências normativas e administrativas pelos Estados, Distrito Federal e Municípios. 3. Defiro, em parte, a medida acauteladora, para tornar explícita, no campo pedagógico e na dicção do Supremo, a competência concorrente****. 4. Esta medida acauteladora fica submetida, tão logo seja suplantada a fase crítica ora existente e designada Sessão, ao crivo do Plenário presencial*. (Grifo nosso. Relator Ministro Marco Aurélio Melo [ADI 6341, Relator Ministro Marco Aurélio Melo]).

As noted, the minister deferred, preliminarily, in part the PDT's request for unconstitutionality of *MP 926/2020* (BRASIL, 2020c), which restricted the to federal government to determine what essential services are and to limit circulation interstate and intercity people and goods. In filing the lawsuit, the PDT pointed out the unconstitutionality in several sections, as it centralized in the Union the competence to take care of health, direct the Unified Health System (SUS) and carry out health and epidemiological surveillance actions, trying to empty the responsibility and the competence of states and municipalities.

The plenary session of the *STF* (*sessão plenária do STF*) to deal with ADI 6341 (BRASIL, 2020e) was held on April 15, 2020, and was marked by having been the first, entirely, by videoconference. In it, the ministers maintained the same basic idea of the precautionary decision of Minister Marco Aurélio Mello and gave an appropriate interpretation to determine that the President of the Republic, in the definition of essential services, safeguarded the regional interest of the state and locality of the municipality, under penalty of being emptied these autonomies, *in verbis*:

> The Court, by majority, endorsed the precautionary measure granted by Minister Marco Aurélio (Rapporteur), **plus interpretation according to the Constitution to § 9º of art. 3º of Law nº 13.979, in order to explain that, preserving the attribution of each sphere of government, under the terms of item I of**

> **art. 198 of the Constitution, the President of the Republic may dispose, by decree, on public services and essential activities**, expired, in this point, the Reporting Minister and the Minister Dias Toffoli (President), and, in part, as to the interpretation according to the letter b of item VI of art. 3º, Ministers Alexandre de Moraes and Luiz Fux. Minister Edson Fachin will write the judgment. Plenary, 15/04/2020 (Session held entirely by videoconference - Resolution 672/2020/STF). (Our emphasis)
>
> (*O Tribunal, por maioria, referendou a medida cautelar deferida pelo Ministro Marco Aurélio (Relator),* ***acrescida de interpretação conforme à Constituição ao § 9º do art. 3º da Lei nº 13.979, a fim de explicitar que, preservada a atribuição de cada esfera de governo, nos termos do inciso I do art. 198 da Constituição, o Presidente da República poderá dispor, mediante decreto, sobre os serviços públicos e atividades essenciais****, vencidos, neste ponto, o Ministro Relator e o Ministro Dias Toffoli (Presidente), e, em parte, quanto à interpretação conforme à letra b do inciso VI do art. 3º, os Ministros Alexandre de Moraes e Luiz Fux. Redigirá o acórdão o Ministro Edson Fachin. Plenário, 15.04.2020 (Sessão realizada inteiramente por videoconferência - Resolução 672/2020/STF). Grifo nosso*)

The unanimous decision endorsed the preliminary injunction, and its interpretation that there is no provision in the rule that in fact directs the exclusive competence to the Union to adopt measures on pandemic issues. It was understood that the measures adopted by the Federal Government don't prevent other entities of the federation from acting normatively and administratively within the scope of their common federative competence, in all observance of the fundamental social right to health, "whose access must be universal, equal and free, configuring the duty of the State and the right of all citizens, it causes the reconfiguration of public health in order to guarantee the provision of goods, utilities and services necessary for its enjoyment" (*"cujo acesso deve ser universal, igualitário e gratuito, configurando dever do Estado e direito de todos os cidadãos, ocasiona a reconfiguração da saúde pública de forma a garantir a prestação de bens, utilidades e serviços necessários à sua fruição"*) (COSTA. 2017, p. 850).

Some practical questions emerge from the decision endorsed by the plenary of the STF, reflections that will be pointed out here only to foster future debates, since the core of this article is to analyze the reflection of this decision for brazilian cooperative federalism. The first is about the limits of autonomy of states and municipalities so that arbitrariness isn't committed; what are these limits? Secondly, would restrictive orders from states and municipalities require a technical guarantee from the federal level, such as from the Ministry of Health (*Ministério da Saúde*) or the National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária – ANVISA*)? Or is the technical analysis of your health organs sufficient? Finally, in case of conflict between state and municipal decrees, which one should prevail?

Despite these questions, it's noted that the decision of the STF plenary that endorsed the precautionary measure of Minister Marco Aurélio, maintained the jurisprudence established by the court in ADI 3937 of 2008 (BRASIL, 2008), although in a generic way, and less in terms of defense and health protection. The decisions reinforced the division of vertical competence in the concurrent modality based on the autonomy among the federated entities, the reaffirmation of the absence of hierarchy between them and the prevalence of interest for the purpose of validating the idea of cooperative federalism, under the aegis of CF/1988 (BRASIL,

1988), and, above all, to ensure the proper functioning of the Democratic State of Law, which carries with it the duty to observe and implement fundamental rights, essential to protect human dignity (GERVASONI; GERVASONI, 2004).

4. FINAL CONSIDERATIONS

The analysis of the positioning of the Supreme Federal Court (*Supremo Tribunal Federal – STF*) in decisions on concurrent legislative competence, defined in art. 24, XII, of the *Brazilian Constitution of 1988* (BRASIL, 1988), showed that the jurisprudence is in the case of the trial of ADI 3937 (BRASIL, 2008), in 2017, and of ADI 6341 (BRASIL, 2020e), in 2020, the which were called periods of normality and periods of crisis, respectively, responding positively to the problem proposed in the present research regarding the Court's interpretation of health protection and defense.

It should be noted, however, that although the decision made by the STF in ADI 6341 (BRASIL, 2020) was generic, it remains clear that the autonomy of states and municipalities doesn't grant them the power to commit arbitrariness, especially when their actions may affect country's interests, such as, for example, in the case of road closures that may cause a crisis in national supply.

An issue that has not yet been decided or analyzed to obtain a dictum in this case by the *STF* is what should prevail in the event of disagreements between a state decree, which, for example, determines quarantine, and a municipal decree that relaxes it locally. However, by the interpretation given in the referendum of the precautionary measure it can be understood that, in these cases, the local interest of the municipalities will prevail.

Therefore, the *STF* reinforces in its decision the vertical division of competence, respecting the autonomy of states and municipalities and safeguarding the Union's competence to legislate only over general rules within the scope of concurrent competence, and it should also be understood that, within the scope of national interests of the Union, regional of the States and local of the municipalities, the notion of cooperative federalism is necessary for the effective confrontation with COVID-19 and other crises of this nature that may come to affect the structures of the brazilian federation.

In summary, the joint action of the federated entities, based on the balanced predominance of their interests, be it in times of normality but, mainly, in times of crisis such as that which occurred in the health system in all spheres of power resulting from the COVID pandemic of 2019, it's a necessary path, according to the *STF*, which reaffirmed its concurrent constitutional competences to legislate on the subject, so that this crisis is overcome with effectiveness and efficiency, maintaining the idea of cooperative and solidary federalism enshrined in the Federal Constitution of 1988.

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