Pandemic, democratic risk, freedom of religion, and *crisis jurisprudence*: A Brazilian Chronicle

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Introduction

We have been living hard times, with a deadly virus spreading around the world, bringing suffering and despair. Our country is in a bad place concerning the number of deaths, almost half a million victims.

Going back from Asia, at the beginning of last year, through Thailand and Singapore, I noticed in those countries the preparation of pandemic outbreak measures of control; starting from the placement of sanitary barriers. Having arrived in Brazil it was unusual the normality of the airports. I was not even asked if I had been to China, the epicenter of the pandemic outbreak at that time. Between you and I, the watch started, officially, at the end of March 2020.

The fact is that we have suffered from a faulty president, and even negationist. A person who does not believe in the achievements of science, keeping himself attached to miraculous medication to cure what he himself referred to as a small flu. What is curious is that even against all the evidence which overcame every doubt that existed in the first months of last year, the president stands firm, sabotaging sanitary measures, promoting crowding, refusing to wear a mask, and adopt other safety initiatives; instigating people to leave their homes. Recently, a CPI (Parliamentary Investigation Committee) was organized by the National Congress to investigate the facts reported herein. We hope it revels to everyone the chain of actions and defaults which have led the way to the extension of this tragedy.

II - Pandemic crisis, democracy, and the defense of the Constitution.

Initiated the pandemic, urgent measures needed to be undertaken, and they, certainly, would result in restrictions of freedom, citizenship, rights of gathering and association, freedom of movement; indeed, some of the most important fundamental rights. In these cases, constitutional history adverts, the normative instance must regulate reality as it is, the situation of necessity, under the penalty of real factors of power taking over the conduction of the country and unfairly replacing its sovereignty; triggering an authoritarian regime and the state of exception. The moment was perfect for this, and in light of previous illiberal experiences throughout the world, every precaution is necessary.

We have been living the centralized power necessity myth, in accordance to which, under a unified command, it is improved the answer to the pandemic crisis. China might confirm the thesis, however, New Zealand, democratic and plural, proves it wrong. In the case of Brazil, although, the fight for centralization of command was not to unify and rationalize sanitary measures, but on the contrary, to avoid them.

The authoritarian attempt from the government was blocked, fortunately, before the resistance of Brazilian society, the press, and the counter-power exercised by constitutional entities of horizontal control and judicial review. The polemic, but efficacious, Fake News Investigation, and the one steered by the Supreme Federal Court to investigate antidemocratic manifestations (extremists demanding military intervention, Congress and Supreme Court shut down) have resulted in some success. The Chief of Executive seems to have, ultimately, adopted a path apart from a frontal attack against the other branches of government. I said it seems, because the path the president has taken is not clear, it is full of different tracks, moving forward and turning back. Nevertheless, democracy slow erosion and the political control over the State, its branches and agencies, may constitute a momentary strategy to, after its formation, at the price of gold, form an unstable support foundation inside the National Congress.

Research performed by Tom Ginsburg and Mila Versteeg, published in the Harvard Law Review Blog, in April last year, has shown that, within comparative law, there are three types of experience of pandemic confrontation.

A. In the first group we have the countries which have appealed to a type of state of emergency, when foreseen under their Constitutions, hence, suspending rights and granting extraordinary powers to the government to handle the issue by way of the issuance of decrees and other administrative measures. Such is the case of Spain and France, for instance, but always with definite deadlines and parliamentary and jurisdictional review upon the measures taken.

B. In the second group, we have countries that have made use of current legislation in which, from time to time, in cases such as the outbreak, allowing the delegation of the normative authority and, to fight against the pandemic and for the protection of fundamental rights, authorizes the restriction. It is not exercised powers from a state of exception, however, it is taken an extraordinary action in light of the circumstances and the acknowledgment of a state of necessity, in which rules must be interpreted according to its context and the understanding that fundamental rights must not be considered as absolute, becoming subject to restrictions when weighed against other rights and constitutionally protected rights of persons, groups, or the community. As examples, we may list the United States, Japan, Italy, and Belgium.

C. Finally, there is a group that needed to urgently approve new legislation, in their constitution or statutory provisions, to allow extraordinary measures which should not seem as derived from a state of exception. We may classify those measures as extraordinary, as Pedro Serrano states, as not as rules presented by a state of exception. It is the case of Hungary, Norway, and Ghana. In Hungary, as everyone knows, with terrible consequences, due to Victor Orbán deceitful initiatives, unsuccessfully, fortunately, to make permanent the approved measures for the period of pandemic confrontation.

Brazil has adopted its own model, although similar to the last one which was mentioned, making use of current legislation (articles 131 and 268 of the Criminal Code), of interpretation according to the Fiscal Liability Law provisions supported by an injunction issued by the Supreme Federal Court from a judicial review case (which, soon after, lost its force because of the Legislative), making official a public calamity state to authorize special spending to fight against the pandemic, following the fiscal liability law, and the enactment of laws, including statutory provisions, and constitutional amendments to target the actual combat.

The State of Emergency Decree or the State of Siege, outlined in the Federal Constitution (articles 136, 137 to 139), or of federal intervention (art. 84, X) would not be considered necessary or even required for a fight against the pandemic.

The President of the Republic, taking advantage of the delicate situation, intended to, as aforementioned, to undertake unilateral governance, by way of the issuance of decrees, of actions against the pandemic, which were restricted by an accurate holding, awarded by the Supreme Federal Court, upholding the concurrent jurisdiction upon the subject. The sequence of events has proven the fairness of the decision. For good or bad, the extreme caution and excessive actions, in the beginning, the States and Cities are the ones that have taken the necessary measures and have put themselves on the front line of the fight, granting some strength to public health. In the scope of the federal government, from omission to chloroquine, amid the exchange of ministers and the incentive given to the population to violate protective rules, we have seen an unstable country, hurt by the numbers of people dying because of the outbreak.

Yes, we have failed a lot. We could have done much more. The issue of the vaccine, dependent on the performance of the Minister of Health, may be the most severe of the problems. Our country, because of SUS - Universal Health Care System of Brazil, displaying a rare capacity for mass vaccination campaigns, could have provided for about 2 million people per day. We could have been, now, in a much more comfortable position. Curiously, in terms of judicial standing, the criticism must be lighter. We have managed, for now, to overcome a fatal attempt to take advantage of a crisis to strengthen the centralized authority of the president. Yes, maybe we could think about, in a distant future, when the summons of a constituent power does not compromise the democratic achievements, a constitutional amendment to regulate under the Fundamental Law, together with the state of defense and siege, the regulation of another type of extraordinary legality, a type of state of sanitary emergency to discipline the way the people react against abnormal circumstances of a pandemic outbreak. The initiative, however, because of its risk, should not be tried for the moment.

III - The National Congress and the pandemic.

It is true that, nowadays, the National Congress and the Supreme Federal Court have been evaluated by the Brazilian people in the course of severe criticism. It is

important to acknowledge, however, that the works of the Court and Congress have been fundamental for the constitutional supremacy defense during this particularly critical period. Firstly, let's notice the functional role of the Legislative. The houses enacted: (i) the Law 13.979/2020 prescribes pandemic confrontation, authorizing sanitary measures for the protection of health pursuant to the article 196 of the CF (Federal Constitution); (ii) the Law 14.010, derived from a bill drafted by a committee in which the chairman was the Supreme Court Justice (Minister) Toffoli and following the example set forth by the USA, Germany, and the United Kingdom, to lay down rules upon private affairs during the pandemic outbreak; (iii) the Constitutional Amendment 106/2020 making stipulations for the war budget; (iv) the Constitutional Amendment 107/2020, authorizing the delay of the municipal elections (to the days between 15 and 29 of November), initiative negotiated with the Electoral Superior Tribunal, political parties, and the people and (v) the Complementary Law 173 (Brazilian Federal Statute), of May 27th 2020, created the federative program of combat against the new corona virus, altering the Complementary Law 101/2000 and granted resources to the States, the Federal District, and the Cities, apart from other measures.

In Brazil, the Legislative Branch is complicated, not sufficiently transparent, moving with enormous difficulty and high political cost, which compromises its credibility, but nobody can deny, within the actual landscape, it has displayed the responsibility needed upon the gravity of the situation. The National Congress, besides that, introduced into the justice system other provisions and represented an answer to the interests of society in favor of democracy, safety, and public health.

IV - The Supreme Court and Crisis Jurisprudence

The Supreme Federal Court, in its turn, has been aware of the ongoing dangerous situation the country is under. It has been observed, inclusively, that in the most sensitive periods, the well-known division of the Court gave birth, at this point, to a more adjusted practice of the ministers. Concerning the subject, a new Supreme Federal Court, more united and effective, has shown itself during the pandemic.

The basic Brazilian manuals of constitutional law have mentioned with small difference, the basic functions of constitutional jurisdiction. To simplify the debate, it is

important to point out the following: (i) protect the federative pact, (ii) guarantee the effectiveness of the Constitution and the constituent elements of democracy, and (iii) protect the minorities against the interests of the majority. Indeed, the Supreme Court, answering to the demands of the actual scenario, reasonably, has exercised the three functions.

To confirm the thesis, we must only remind us that the Court, in the scope of the crisis jurisprudence, among other equally important measures, (i) authorized the government, in terms of a completely new interpretation of provisions under the Fiscal Responsibility Law, to make spending not already set forth in the government budget (ADI [judicial review] 6357); (ii) stipulated concurrent jurisdictional powers for the application of necessary measures to fight against the pandemic, refraining, consequently, a centralized federal government control (ADPF [judicial review] 672); (iii) suspended the effectiveness of legal provisions under the scope of access to information against the constitutional demands related to the publicity and transparency of public acts (ADI 6351); (iv) issued an injunction prohibiting military police operations inside the "favelas" of Rio de Janeiro, preserving, during the pandemic, many lives, particularly of young people, poor, and black (ADPF 635); (v) prohibited, issuing injunctive relief, the publicity called "Brazil cannot stop", reasoning that the message could mistake the people about the severity of the pandemic outbreak (ADPF 669) and (vi) determined the construction of barriers against the access to indigenous areas and the creation of a situation control committee to follow the evolution and effectiveness of protection programs for the native population, avoiding the genocide of these people. (ADPF 709).

Besides the decisions mentioned above, the Supreme Federal Court has altered its internal regulations to authorize its work through virtual conference meetings, making room for a speedy trial upon every matter submitted to them.

As we can see, they have been criticized, sometimes correctly, but in others unfairly because of the actions of some extreme right groups committed to a fight against democracy; during this period, the National Congress and the Supreme Court have been responsive, displaying great sensitivity facing the obstacles imposed by the pandemic outbreak tragedy.

V - The abusive use of the National Security Law during the pandemic.

From the middle of the eighties and after the promulgation of the 1988 Constitution, Brazil has been under a slow process of reconstruction of democratic institutions. Despite the obstacles the country has faced challenging the strength of our democracy, e.g. the impeachment of two presidents, the process may be considered so far as a success. The movements of June 2013, the presidential elections of 2014, the "Car Wash Operation", the impeachment of President Dilma, the political polarization, and a hard political party game, have extremely divided society, to the detriment of the population's trust in the capacity of the country to keep an adequate and long-lasting institutional organization. This became more evident under the leadership of president Bolsonaro, elected due to an extreme right populist speech, theoretically, in favor of a change. Nowadays, the rule of law, the fundamental rights, the press, the National Congress, and the Supreme Federal Court have suffered periodic attacks, being tested against its capacity of endurance. In addition to the continuous erosion of the democratic pillars, twice, at least, the president considered a classic coup, sadly known by our history. It is in this context that emerges the concern about authoritarian legalism, together with the defense of the institutions by way of militant democracy and the fight against non-liberal practices or abusive constitutionalism.

The use of social networking for the spreading of fake news, the protofascist digital activities, the threats against disagreeing groups, the opposition, lawyers, and journalists have not, however, been sufficient. We must also manage the cooptation of governmental agencies, the placement of constitutional agencies leaders and the dismantling of public policies safeguarding fundamental rights, the use of legal instruments, particularly the ones derived from the authoritative remaining which survived the re-democratization process, to attack, punish, or intimidate the ones that dare to challenge or to criticize the president or its government. The strategy is well-known. It is about cooling and diminishing the free flow of ideas, about intimidating certain names as an exemplary measure to slow down criticism, eroding, hence, not only civic virtues and the vitality of the market of ideas but one of the pillars of the republic consisting on the principle that no occupant of a public office should be immune to scrutiny, even when it is hard and unfair, of the citizens occupying the public space.

The National Security Law (Law. 7.170/83), has been used as a powerful weapon therefor the goals previously mentioned. Enacted in 1983, under Figueiredo's rule, in the scope of a "slow, gradual, and safe opening", less tough than the other rules issued by the military dictatorship; but even in this context, it presents a violating philosophy against democracy and the pluralism introduced by the 1988 Constitution. The frequency upon which it has been used, lately, is burdensome. The government, of course, does not like to see its image associated with genocide. There are dozens of Federal Police ongoing investigations jeopardizing important rights, in particular, freedom of expression, essential to a strong democracy. Due to that, several bills are being read by the members of the National Congress as an attempt to replace the National Security Law, too focused upon the defense of a State understood in light of the old standards of the military regime, for an instrument of democratic defense entailing a pluralist society, the one that the Constitution has set forth for the country. It is a valuable work front, hence, to those committed to democracy, it is the fight for the approval of law compatible with the Constitution.

The National Congress must fulfill its role. New legislation is needed to protect democracy from those using the law with the purpose to compromise its virtues, take down its principles and undermine the institutions. I speak herein about the paradox of democracy under Popper's doctrine. We should not be naive and overcome these issues for the survival of civilization and a democratic Constitution. Whereas the legislative process plays its role, it is up to the people to defend themselves from every type of violence trigger by the governmental bodies pleading to the Judiciary.

The tragic pandemic period has resulted in a scary political landscape, fed by negationism, the sabotage of many measures to protect public health, the attack of extremists against democratic institutions, and, equally, the abusive management of the National Security Law aiming to silence the voice of political criticism and the government opposition. It is not necessary to say that an extreme-right government has the support of some religious groups. The request for in-person religious gatherings and cults, consequently, claimed by these groups, under the actual circumstance, becomes a delicate political issue.

VI - Constitutional Jurisdiction, freedom of religious worship, and the pandemic.

When deciding about the freedom of worship during the pandemic, the claim submitted against the Decree n. 65.563/2021, of San Paulo State, which had prohibited religious gatherings and cults, was rejected by the Supreme Federal Court (ADPF 811) in a 9 to 2 holding. The arguments made by the ministers, which followed the rapporteur, Gilmar Mendes, were very incisive. The tragic sanitary situation in which the world has been under and, particularly, Brazil, set the tone of the speech. Nobody is unaware that we have been facing the worst sanitary crises of the last hundred years. Indeed, the health crisis strengthens the political and economic crises together with the government which has caused continuous political instability. It was in the midst of such landscape in which the holding took place.

The Supreme Court has been building, within the pandemic context, as aforesaid, a crisis jurisprudence, defining standards and reasoning which as guided public agents' activities and of political bodies. The decision of the case can be added with the others previously mentioned, strengthening the direction which has displayed a high level of understanding of the moment necessity. This has resulted in the application of constitutional provisions, although interpreted following the actual circumstance, which obviously does not mistake itself with a state of exception. The extraordinary legality, once again, is not equivalent to the state of exception.

Although all of the ministers which formed the majority showed strong arguments, worthy of note, the rapporteur reasoning deserves special consideration. He recognizes, and it could not be otherwise, the importance of freedom of religion, its unmeasurable importance, the fact that it has been summoned by the most important international instruments and by the Federal Constitution, and the principle of separation between State and religion, also contemplated by the Fundamental Law, imposing certain obligations to the Brazilian state and its agents, displaying as a consequence, on the other hand, the emancipation of the republic in the relation to the spiritual sphere and religious authorities. The country is secular, highlight this. We must take the consequences from this statement.

No interpretation or argument, occurs within an emptiness, becoming important to see, in accordance with Muller, a program and a normative scope, the reality upon the program is inserted, it is the key for proper reading of constitutional provisions, regarding

religious freedom within the pandemic. Besides, it important to acknowledge the existence of distinct dimensions of the right at issue. The internal dimension consists in the freedom of religion which is present inside, the spiritual consciousness, while the external dimension provides for the freedom of worship, exercised as a faith publicly lived with possibilities, positive or negative, in which the gatherings and external rituals, within public space, may challenge.

Religious freedom in the internal dimension is an absolute right, while in its external dimension is limited, becoming a principle, like most rights contemplated by the Constitution. It can, therefore, be subject to restrictions, *pro-rata*, when weighted with other rights, principles, or values therein the *Magna Carta* of the Republic. In fact, after pondering about the issue, it is not the freedom of religion right that is subject to restrictions, but the way this right is exercised. And, at this point, we should not allow spaces of immunity capable of refraining the government to issue adequate and necessary restrictive measures to fulfill its duty to act according to art. 196 of the Constitution to promote health, because the fundamental rights do not present themselves as prohibitions to intervention, displaying, as well, protection orders, derived from, excess prohibitions, on one hand, and insufficient protection, on the other.

The prohibition of religious gatherings inside religious temples or in-person worships constitutes, hence, a measure (i) adequate following the scientific knowledge and shared by medical consensus and (ii) necessary when there are no other less restrictive measures available. Indeed, this path was followed by several countries to avoid the transmission of the virus resultant from crowding. Lastly, the proscription was found approved by the test of (iii) proportionality in a strict sense. The degree of satisfaction or the reached goal (by way of balancing and weighing) cannot be inferior to the greatness of the restriction admitted. The rejection of the claim, besides, has followed the scientific recommendation, including the entire text of the Technical Note of Coronavirus Contingency Center of Sao Paulo. The Noe suggests, in light of the growing number of new cases, the unrestricted prohibition of “the undertaken of any collective activity, such as sportive events, religious activities, gatherings, and of any concentration of persons in public spaces like beaches, squares, and parks”.

It is about, therefore, a temporary measure, non-discriminatory, and generally, more than that, justified by the most advanced scientific knowledge we have at the moment. It is, then, constitutional. A condition which, by the way, gains support when are considered, pursuant to Minister Barroso's vote, constitutional capacities. Certainly, the State Executive, under this hypothesis, is better equipped to face the pandemic and regulate the necessary measures to fight it than the Judiciary. If there is any doubt left, and in the situation, in light of science standards, there isn't, and should prevail the first one decision and not the second.

The prohibition of religious gatherings issued by decree of a State of the Brazilian Federation does not also violate the Constitution from a formal point of view. The Supreme Court, as aforementioned, decided (ADI 6341) that the political bodies, state and municipal, are vested with jurisdictional powers to legislate and adopt sanitary measures to face the pandemic outbreak, pursuant art. 23 of the Constitution and in accordance with the SUS - Brazilian Universal Health Care System (Law 8.080, 1990). Law 13.979/2020 has authorized the adoption, by the authorities, in the scope of their jurisdiction, of measures of lockdown and quarantine (art. 3o). That is the reason why it is legit, because of this reasoning, the rejected claim. Indeed, there are other Supreme Court precedent laws along the same path and giving support to the formation of a crisis jurisprudence.

We should remind ourselves that there is a considerable quantity of cases about the subject in other countries. It is highly recommendable to know them. However, comparative law should be used with some caution. The rules, context, actual situation, facts, space and time, are the best determiners for the best resolution. That is why it became important, above all, to take the crisis jurisprudence seriously; this has been built continuously by the Supreme Federal Court.

VII - Conclusion

The question that remains unanswered is why, despite the actions taken by the States, Cities, National Congress, and Supreme Federal Court, have we reached the alarming numbers of infected and deaths?

The answer is simple. Brazil has been lacking efficient management because of the absence of trustworthy national leadership capable of, governing the country, get together, in a crisis committee, the authorities who govern the Federation States to follow the tragic context and adopt coordinated group efforts (cooperative federalism and not collision) for the fight against the pandemic. The position of the president is extreme. He would like to have a centralized and exclusive command of the crises to steer the country to a negationist political view and towards a go back to work policy. He does not admit criticism, using the repressive tools of the State to, making abusive use of the National Security Law, fight against criticism, the academy, the press, and his adversaries. On the other hand, due to the judicial decision understanding the concurrent jurisdiction among the Federal Government and the States of the Federation, to apply sanitary measures against the pandemic, he has found another excuse not to cooperate with the States, to default on the performance and blame the Judiciary, the States, and the Cities, for the terrible number of victims we have reached.

The irony is that with so much suffering, so many families devastated by their misfortune, in a legal standing point, we have made, every possible effort, to what needed to be done. The necessary rules to fight against the pandemic were passed by the National Congress according to the Constitution; the Supreme Federal Court has taken action to grant, under our legislation, the necessary safety to agents and public bodies, and to review the legitimacy of the administrative programs initiated. The problem, restating it, has been the Chief of the Federal Executive Branch, an authority that abstains from taking action, gives bad examples, creates political instability, and does not fulfill its leadership and coordination duties, necessary for a better-united front against the pandemic. And this has been sufficient to, designing the tragedy, to restrict the full entitlement to health for Brazilians as ruled by the art. 196 of the Constitution.