

## Lockdown by court order: an (un)necessary measure?

Decretação de *lockdown* pela via judicial:  
medida (des)necessária?

Decreto de cierre por medios judiciales:  
¿medida (no) necesaria?

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doi: 10.1590/0102-311X00116020

The Brazilian Constitutional definition of health as a social right makes the State the guarantor of this legally protected interest. The federalist system adopted in the *1988 Brazilian Federal Constitution* determines that the Federal Government, states, and municipalities share the authority to care for health and the concurrent authority to legislate on health matters. This shared authority is based especially on the model of decentralization of public actions and services in health and the regional disparities across Brazil's territory.

As Brazil has confronted the COVID-19 pandemic, this heterogeneity has intensified, allowing the Federative Units to adopt different measures that limit rights and public freedoms, depending on the pandemic's progression in the respective geographic area.

The range of autonomy for these government entities was recently reaffirmed by the Brazilian Supreme Court (STF) with its ruling on Direct Unconstitutionality Suit n. 6,341/2020 <sup>1</sup>. The Supreme Court's ruling reinforced the role of local health authorities and public administrators in the adoption of legislative and administrative measures against COVID-19.

Each branch of government in Brazil performs its respective role. Since the COVID-19 public health emergency of national concern was declared by the Ministry of Health <sup>2</sup>, extensive legislation has been produced by the Federal Executive and Legislative Branches (Portal da Legislação. Legislação COVID-19. <http://www4.planalto.gov.br/legislacao/portal-legis/legislacao-covid-19>, accessed on 16/May/2020), not only in health, but also including economic and tax issues, social security, services provision, and individual rights and guarantees, among others. States and municipalities have also contributed to the creation of a new legal framework.

The clash between fundamental rights, the exercise of public freedoms, and respect for restrictive rules and confinement, with the aim of drawing limits between the development of administrative rules, jurisprudence on the protection of (and guaranteed access to) health, and the possibility of exercising individual autonomy have been the object of analysis by the Brazilian academic community <sup>3</sup>.

This scenario provides the backdrop for the first declaration of a lockdown in Brazil, in the cities of São Luís, São José de Ribamar, Paço do Lumiar, and Raposa, all located in the state of Maranhão, under a court order issued on April 30, 2020. The order responded to a claim filed by the local Public Prosecutor, based on the following factors <sup>4</sup>: total occupation of ICU beds dedicated exclusively to COVID-19 in the state public healthcare network; lack of transparency of this same information in the public networks in the above-mentioned cities; provision for lockdown in the Ministry of Health's

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*Epidemiological Bulletin* as a non-pharmacological measure; and the need to ensure the collective health through legal measures.

Lockdown is an extreme measure of social isolation to be applied when other measures cannot be implemented or have proven insufficient to contain the disease, and when the health system may collapse as a result <sup>5</sup>.

The ruling was unprecedented in Brazil and ordered the Maranhão State Government to enforce the lockdown, via a decree with the following measures: (i) suspension of activities that are not essential to maintain life and health; (ii) curtailment of meetings in public spaces; (iii) ban on free circulation of private vehicles, specifying the exceptions; (iv) regulated functioning of essential public services and activities; (v) adoption of guidelines and administrative sanctions, effective inspection, and administrative, criminal, and civil liability, when applicable; and (vi) demonstration of adequate structuring of healthcare services for treating COVID-19 <sup>4</sup>. The above-mentioned municipalities in Maranhão were ordered to abstain from legislating against the lockdown ordered by the state government <sup>4</sup>.

While acknowledging the health emergency caused by the COVID-19 pandemic, it is important to recall that health policies are the responsibility of the Executive Branch, since health actions depend on a bundle of information involving different areas of knowledge and the sociocultural reality of the region to be affected by such decisions.

Therefore, the Executive Branch, as a source of popular legitimacy and subject to political and administrative accountability for its actions, is the most adequate locus for health policy action, since its choices are subject to constant surveillance by the opposition, Legislative Branch, Accounts Court, Office of the Public Prosecutor, citizenry at large, and ultimately the Judiciary Branch.

In the case of the Maranhão State Government, the establishment of the State Committee for the Prevention and Fight Against COVID-19 <sup>6</sup> was the first measure, stemming from others aimed at fighting the epidemic <sup>7</sup>.

The lockdown measure taken by the Judiciary Branch in Maranhão opened the way for the discussion on the active role played by this branch in the last decade in Brazil's institutional life. The situation has been no different in the current response to the pandemic. The Judiciary Branch has played a central role through the Supreme Court and its different agencies and bodies at different levels and in various specialties.

However, this phenomenon is not exclusive to the Brazilian State. Following World War II, most Western countries experienced an expansion of the Judiciary Branch into the majority political sphere occupied by the Legislative and Executive Branches, fueled by the popular vote <sup>8</sup>.

The leading cases in this trend occurred in countries like Canada (missile tests), United States (2000 Presidential elections), Israel (construction of a wall on the border with the Palestinian territory), Turkey (preservation of a lay State), Hungary and Argentina (economic plans), and South Korea (reinstatement of an impeached president) <sup>9</sup>.

The Judiciary Branch has thus taken a protagonist role in historical contexts in rulings with wide-reaching political consequences, public policy enforcement, moral choices on controversial issues, and especially tragic choices in the health area. The Brazilian case is special due to the extent and magnitude of such action. Diverse circumstances associated with the *1988 Federal Constitution*, the country's political reality, and in the last few months the fight against the coronavirus pandemic have propelled the Judiciary Branch to mainstream newspaper headlines, radio and TV programs, and social networks.

These cases illustrate the fluidity of the limits between politics and justice in the contemporary world, leading to a shift of political power to judges and courts, with significant changes in the language, arguments, and forms of participation by society. These facts can be interpreted via Niklas Luhmann's social systems theory <sup>10</sup> as an "irritation" between the judicial and political systems, such that these systems operate outside their binary structural logic. From this perspective, it is thus essential to distinguish between judicialization and judicial activism.

According to Barroso <sup>11</sup>, judicialization and judicial activism are close cousins. They belong to the same family and frequent the same places, but do not have the same origins. Strictly speaking, they are not produced by the same immediate causes. In the Brazilian context, judicialization results from the constitutional model that was adopted rather than from a deliberate exercise of political will. It

thus allows a structural coupling between the different systems through the *1988 Federal Constitution* in order to offer responses to the social body when demanded <sup>10</sup>.

Meanwhile, judicial activism is the choice of a specific and proactive way of interpreting the Constitution, expanding both its meaning and scope <sup>12</sup>. Judicial activism usually occurs in situations of relative disengagement by the Legislative and Executive Branches, of a certain disconnect between the political class and civil society, preventing social demands from being met effectively, or in acts that can exempt majority institutions from their responsibility, since the latter depend on constant popular legitimacy, while the Judiciary Branch not only lacks a popular basis but is situated equidistantly in political disputes <sup>13</sup> (even though the Judiciary is often used as a political institution to support or block certain government acts).

In other words, judicial activism is associated with broader and more intense participation by the Judiciary, with greater interference in the space of the other two branches, particularly by requiring or preventing government from acting, especially on public policy matters. Such cases may involve what Luhmann called “system corruption”, given the invasion of the political system’s environment by other codes and communication systems that are not proper to it <sup>10</sup>.

The ruling that granted urgent oversight by declaring a lockdown in Maranhão was issued on grounds of the Constitutional guarantee of health as a fundamental social right that requires the State to take measures to effectively guarantee that right. Lockdown is thus a recommended measure when social distancing has not proven effective and is based on the non-recognition of the absolute nature of individual rights and guarantees <sup>4</sup>.

The lockdown creates a series of obligations for various government levels and agencies. It was not known in advance whether such measures could be organized and supported on such short notice by the respective public administrations. The enforcement of total lockdown requires interaction with other areas of government besides health, such as public security, social protection, and communications in order to plan a set of measures capable of providing adequate backup and economic and social support for the affected population <sup>14</sup>, in addition to the lockdown’s efficacy per se. All this makes the lockdown operation highly complex, and the Judiciary Branch may not be able to adequately assess it in advance.

The opposite of judicial activism is judicial self-constraint, by which the Judiciary seeks to reduce its interference in acts by the other branches of government <sup>11</sup>. Accordingly, among other measures, judges and courts refrain from interfering in public policymaking, as illustrated by the ruling by the Pernambuco State Court on May 7, 2020, which rejected a similar lockdown in that state, also requested by the Office of the Public Prosecutor, which had claimed that previous measures had proven incapable of reducing or flattening the transmission curve <sup>15</sup>.

The judge’s ruling in Pernambuco contended that it was not up to the Judiciary Branch “*to set priorities to be adopted according to presumably technical criteria by the public powers in the performance of such functions; this prevents the judiciary from extrapolating its constitutional authority and making a decision that is based on political content...*” <sup>15</sup>. The ruling cited the *1988 Federal Constitution* itself and its fundamental clause on the separation of powers. The judge thus left the lockdown decision up to the political authorities.

In certain recent situations, Brazil’s Judiciary Branch has displayed a clearly activist stance. This has resulted in unusual and complex situations that transcend the boundaries of the Judiciary’s competencies as set out in the *1988 Federal Constitution*. Even more seriously, the court order for a lockdown exempts the Executive Branch from taking the leading role in public policies to fight the pandemic and allows arbitrary and unreasonable measures to be enforced without review by the proper oversight bodies (since the courts, which would otherwise have only the final say, became the policy’s protagonist).

The issue is not to hermetically seal off the branches of government from each other, avoiding communication between the political and judiciary systems, especially in light of the current public health emergency. Rather, the issue is to preserve the Constitutional autonomy of the branches of the federation and their respect for the division of powers.

## Contributors

All the authors conceived the original idea and wrote and revised the manuscript.

## Additional informations

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Submitted on 07/May/2020

Final version resubmitted on 19/May/2020

Approved on 02/Jun/2020