# Federal Supreme Court, Covid-19 and public finances*

# *Supremo Tribunal Federal, Covid-19 e as finanças públicas*

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## ABSTRACT

The devastating impact of Covid-19 on public health and the economy has also affected the public budget. This article analyses the decisions made during the pandemic by the Brazilian Federal Supreme Court (STF) in cases related to the public finance rules in Brazil. With the support of data science, we carried out a systematic and exhaustive collection of the STF´s decisions on the following issues: debts of local governments with the Federal government, court-ordered public debts (*precatórios*), budget discipline and fiscal rules, allocation of public funds to respond to the

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pandemic, state legislation on parliamentary amendments to the public budget. The qualitative analysis of the relevant material shows that: (a) the exceptionality of the pandemic context was the basis for several decisions on these issues; (b) many legislative changes in this area addressed issues that were already being decided by the STF and its rulings may have motivated some of these legislative changes; and (c) the STF has tended to alleviate the budgetary pressure on subnational governments, even if at the expense of the Federal government.

KEYWORDS

Brazilian Federal Supreme Court — Covid-19 — public finance — public budget — public spending — public debt

RESUMO

A Covid-19, com seu devastador impacto sobre a saúde e a economia, também afetou as finanças públicas. Este artigo trata sobre a jurisprudên cia do STF durante a pandemia em casos relativos às normas que discipli nam as finanças públicas. Com o auxílio computacional, foi realizada a coleta sistemática e exaustiva das decisões da Corte sobre: dívidas de entes subnacionais com a União, precatórios, regras orçamentárias e de responsabilidade fiscal, uso de verbas para o combate à pandemia, gastos com funcionalismo público e normas estaduais sobre emendas parla mentares. A análise qualitativa desse material trouxe como principais achados que (a) a excepcionalidade do contexto da pandemia foi funda mento para diversas decisões em matéria orçamentária; (b) muitas mu danças legislativas nessa área regulamentavam situações que já estavam sendo discutidas pelo STF e a sua atuação pode ter motivado algumas dessas mudanças; e (c) o STF tendeu a atender demandas de desoneração financeira por parte de entes subnacionais, ainda que às custas da União.

PALAVRAS-CHAVE

Supremo Tribunal Federal (STF) — Covid-19 — finanças públicas — precatórios — dívidas de entes federativos

## Introduction

The Covid-19 pandemic caused a devastating health crisis that has cost the lives of more than 600,000 people in Brazil,[1] and a serious social crisis with the downturn of the economy and the increase in unemployment and poverty. The concurrence of these different crises demands incisive action by the State, due to a significant increase in spending on the health system, social security and measures to sustain economic activity, employment and income levels.[2]

At the federal level, the executed budget of the Ministry of Health jumped from BRL 114 billion in 2019 to BRL 150 and BRL 152 billion, respectively, in 2020 and 2021.[3] Total federal government spending on the pandemic in 2020 and 2021 is estimated at more than R$641 billion, approximately half for Emergency Aid, a program to help workers without formal employment.[4]

This increase in public spending was concomitant with an abrupt fall in revenue due to the economic downturn (Brazilian GDP in 2020 retracted 4.1% compared to 2019)[5] and government support in the form of tax incentives. The combination of higher spending and a drop in revenue led to an alarming increase in the federal government primary deficit from BRL 95 billion in 2019 to BRL 743 billion in 2020.[6]

This shock to public finances, as expected, forced changes in law, and in budgetary rules in particular. It is worth remembering that Legislative Decree no. 6, of 20/3/20, which recognizes the state of public emergency in Brazil resulting from the coronavirus (and relevant regulations relating to the pandemic, such as Law no. 13.979/2020 — the "Covid-19 Law"), was established specifically to relax budget tax limits in Supplementary Law (LC) No. 101/2000 (the *Lei de Responsabilidade Fiscal* (LRF)).

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1 OUR WORLD IN DATA. Covid-19 data explorer, Coronavirus (Covid-19) deaths. Available at: www.ourworldindata.org/covid-deaths. Accessed on: 6 Feb. 2022.

2 TONETO, Rodrigo; CARDOMINGO, Matias; CARVALHO, Laura. *Salvando vidas e a economia: a importância dos gastos públicos na crise causada pela Covid-19* (Nota de Política Econômica n. 009). Made/USP, 2021.

3 Dados do Portal da Transparência. Available at: https://www.portaltransparencia.gov.br/funcoes/10-saude?ano=2019. Accessed on: 10 Mar. 2022.

4 Dados do Portal Siga Brasil. Available at: https://www9.senado.gov.br/QvAJAXZfc/opendoc.htm?document=senado%2Fsigabrasilpainelcidadao.qvw&host=QVS%40www9&an onymous=true&Sheet=shOrcamentoVisaoGeral. Accessed on: 10 Mar. 2022.

5 FUNDO MONETÁRIO INTERNACIONAL (FMI). *World economic outlook*. Available at: https://www.imf.org/en/Publications/WEO/Issues/2021/03/23/world-economic-outlook april-2021. Accessed on: 10 Mar. 2022.

6 INSTITUTO DE POLÍTICAS ECONÔMICAS APLICADAS (IPEA). *Carta de conjuntura*. Available at: https://www.ipea.gov.br/cartadeconjuntura/index.php/2021/02/impactos-dapandemia-sobre-os-resultados-recentes-das-contas-publicas/. Accessed on: 20 Mar. 2022.

Thus, alterations to the public budget in the face of the pandemic recognized the gravity of the health crisis. Other legislative measures were taken to adapt the public budget to the new reality. Among them were Supplementary Law nº 173/2020 and Constitutional Amendments (EC) Nos. 109, 113 and 114 of 2021. The first, on 05/27/2020, established *Programa Federativo de Enfrentamento ao Coronavírus no Brasil.* It amended, among other norms, the Supplementary Law no. 101/2000 (the LRF) and established tax relief measures for federal entities federal. These regulate and establish deadlines for payment of court-ordered debt payments, freeing up resources for entities in moments of crisis.

Issues related to the public budget during the pandemic were also the object of judicial dispute, many settled by the Supreme Court (STF). However, the jurisprudence of the Court on these issues is little developed, as regards decisions on measures to prevent contagion and social protection during a pandemic.[7] There is an important gap in the literature on the performance of the STF during the COVID pandemic, which this article intends to fill.

To this end, we will first seek to identify in detail STF decisions regarding the budget and public finances in which there was any mention of the Covid-19 pandemic until 6/23/2021, when the budget closed. This was carried out with the support of data science and artificial intelligence. Although several decisions about the duty to carry out public policies during the pandemic raise budget discussions (for example, the cost of intensive care units[8] or creation of social assistance programs),[9] they are not covered in the present text. The focus here is limited to decisions that discuss norms that regulate such public

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[7] On this topic, see, for example: BIEHL, João; PRATES, Lucas; AMON, Joseph. Supreme Court v. necropolitics: the chaotic judicialization of Covid-19 in Brazil. *Health and Human Rights Journal* (HHR), v. 23, n. 1, p. 151-162, jun. 2021. Available at: https://www.hhrjournal.org/2021/06/supreme-court-v-necropolitics-the-chaotic-judicialization-of covid-19-in-brazil/. Accessed on: 4 abr. 2022; BOTTINI FILHO, Luciano. Covid-19 Through Brazilian courts: the deserving and the undeserving vulnerable. *German Law Journal*, v. 22, n. 6, 2021. Available at: https://www.cambridge.org/core/journals/german-law-journal/article/covid19-through-brazilian-courts-the-deserving-and-the-undeserving-vulnerable/D7D4F5BD619BC47B47B9586704FD2040. Accessed on: 4 Apr. 2022; ALVES, Rafael Assis; CARVALHO, Laura Bastos; RIOS, Marcos Camilo da Silva Souza. Fique em casa? Remoções forçadas e Covid-19. *Rev. Direito Práx.*, v. 12, n. 3, jul./set. 2021. DOI: https://doi.org/10.1590/2179 8966/2021/61888; GODOY, Miguel Gualano; SANTANA, Carolina Ribeiro; OLIVEIRA, Lucas Cravo. STF, povos indígenas e Sala de Situação: diálogo ilusório. *Rev. Direito Práx.*, v. 12, n. 3, jul./set. 2021. Available at: https://www.e-publicacoes.uerj.br/index.php/revistaceaju/ article/view/61730. Accessed on: 28 Sep. 2022; DIAS, Roberto; TEDESCO, Thomaz Fiterman. Covid-19, direitos sociais trabalhistas e jurisprudência da crise. *Revista Direito Público*, v. 17, n. 96, 2021. DOI: https://doi.org/10.11117/rdp.v17i96.4444.

[8] ACO 3.473, ACO 3.474, ACO 3.475, ACO 3.478 e ACO 3.483.

[9] Ação Direta de Inconstitucionalidade por Omissão (ADO) 56, ADPF 672.

finance. These decisions were divided into the following topics: debts of subnational entities with the Union, court-ordered debt payments, budgetary rules and fiscal responsibility, transfer of funds to combat the pandemic and state norms on congressional amendments.

The article will explore how the STF positioned itself regarding these disputes. We will present, for each of these spheres, a panorama of the decisions made evaluating context, characteristics, patterns and decision variations. We will address the following questions: (i) Does the pandemic appear as an exceptional circumstance that justifies certain jurisprudential positions? (ii) Was the STF deferential to the reforms in the rules of the Legislature? (iii) Did federal conflicts, which marked the response policies to Covid-19 in Brazil,[10] manifest themselves in budget-related disputes in the STF and how were they resolved by the court?

These questions are important for a broader understanding of how the pandemic affects the decisions and arguments of the STF, the relationship between the governing powers during a crisis and the federative organization of the Brazilian state. Others analyses of the performance of the STF during the pandemic has approached these questions, but as mentioned, were not focused on decisions about budget rules.

Some results of this research are worth highlighting. First, the exceptional context of the pandemic was frequently mentioned in decisions of the STF. It was often the main, or even only, argument. This indicates elements of "crisis jurisprudence" in which the context has a great weight in the decision and the court think pragmatically about the consequences of their choices.[11] Second, not only legislative changes concerning the public budget motivated by the pandemic were questioned in the STF, but many situations that were already being discussed and decided by the court itself. On some matters, there are indications that the STF was not only the instance of legislative control, but the prime motivator, which points to the role of the court in this issue. Third, the STF tended to meet demands for financial relief by subnational entities due to pressures prompted by Covid-19. This finding complements the analyses which, looking at policy decisions for prevention and treatment of Covid-19,

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[10] ABRUCIO, Fernando et al. Combate à Covid-19 sob o federalismo bolsonarista: um caso de descoordenação intergovernamental. Revista de Administração Pública, Rio de Janeiro, v. 54, n. 4, p. 663-677, 2020.

[11] LEAL, Fernando. O Supremo e a pandemia: é preciso uma jurisprudência da crise? Jota, São Paulo, 1º abr. 2020. Available at: https://www.jota.info/stf/supra/stf-pandemia-crisejurisprudencia-01042020. Accessed on: 28 Sep. 2022.

concluded that the STF acted in a way to guarantee legal competence and material conditions for the performance of these entities during the crisis.[12]

In short, the data reveal a dimension of STF performance that, although little noted and discussed in the literature, played a central role in the response of the Brazilian State to the health, economic and social crisis caused by the pandemic.

## 1. Methodology

This article is part of a larger project to analyze all the case law of the STF related to Covid-19. Digital technology was used to identify decisions, classified initially by topic. A database was built of all decisions taken by the STF between 1/15/2020, with the first decision related to Covid-19, and 6/23/2021, when the identification process was closed and material analyzes began. Time allowance is needed to enable research, but also limits. The period covered in this study covers the beginning of the pandemic and the two waves when the number of deaths and hospitalizations reached the highest levels and, therefore, litigation was probably more frequent and dramatic. It also encompasses the period of increased access to vaccines, which led to a lowering of the health crisis.

The first stage for the construction of this data bank was the elaboration of a program (written in *python*) to perform automated queries on the STF decision research tool.[13] Consultations were carried out using the terms "corona", "covid" and "pandemic". The program also combines search results with the terms on a worksheet, eliminating duplicates.

The data collection resulted in 5,841 entries, analyzed in an exploratory way with unsupervised machine learning algorithms. The objective of this algorithm was to create groups of documents (clusters) according to patterns found in the set of words that make up the decisions. The first finding was that about 80% of

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[12] GLEZER, Rubens; BARBOSA, Ana Paula; CADEDO, Matheus. O mito da jurisprudência federalista concentradora do STF: uma nova proposta de análise dos conflitos federativos. Revista Brasileira de Estudos Constitucionais, v. 115, n. 47, 2021; LEONI, Fernanda. O papel do Supremo Tribunal Federal na intermediação dos conflitos federativos no contexto da Covid-19. Cadernos de Gestão Pública, v. 27, n. 87, 2022. Available at: https://bibliotecadigital.fgv.br/ojs/index.php/cgpc/article/view/83851/80618. Accessed on: 28 Sep. 2022; WANG, Daniel et al. O STF e as medidas para prevenção e tratamento da Covid-19. Revista DireitoGV (no prelo).

[13] SUPREMO TRIBUNAL FEDERAL. Pesquisa de jurisprudência — STF. Available at: https://jurisprudencia.stf.jus.br/pages/search. Accessed on: 13 Oct. 2021.

the decisions dealt with criminal matters, to be dealt with in another text. The remaining 1,139 decisions went through further rounds of "clustering". Based on the new clusters and the interest of the research, the decisions were grouped around themes. Posteriorly, each cluster was analyzed by the research team to check its accuracy and reclassify decisions if necessary. False positives were excluded (cases that have nothing to do with the pandemic) and cases subject to judicial secrecy, resulting in 1,125 cases for analysis.

Among all the decisions collected and classified, this text will analyze those related to the norms that regulate public finances. As seen below, these decisions were divided into five themes for analysis. In all, the article covers 150 decisions, concentrated on 104 actions.

Computing and artificial intelligence enabled the systematic collection and speedy processing of a large amount of data. They also allowed an automated classification of the mapped decisions, grouping them according to their thematic similarities (clusters), which streamlined the work carried out by the research team to check classifications and group or divide clusters according to research interests. Therefore, they reduced risk of error and bias in the collection, making it more systematic, and brought gains in scale and time that the research team to work on the total at the same time, rather than samples.

Finally, we should note another methodological choice adopted in this text: each time a decision was taken by a single minister, we chose to individualize the position, specifying the person. As made clear in the subsequent items, the court decisions analyzed were largely monocratic. In addition, some issues pertain to one or a few ministers. When it comes to recent decisions, which do not always have a consolidated understanding, we understand that this information is relevant to clarify within the STF a particular position about a determined subject.

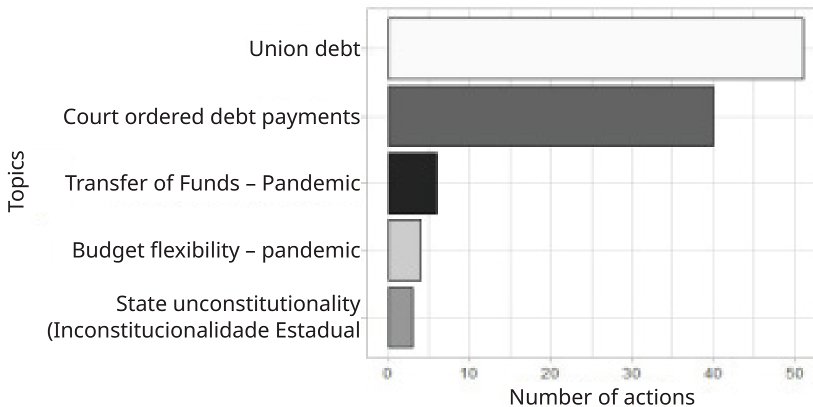
## 2. Aggregate analysis of decisions

The elements within the scope of this text were divided into six major themes:[14] (a) debts of subnational entities with the Union ("Union Debts"); (b) payment of court-ordered debt payments ("*Court-ordered debt payments*"); (c) flexibility of budget and fiscal responsibility rules ("Budget flexibility — pandemic"); (d) transfer of funds for the pandemic ("Use of funds — pandemic"); and (e) unconstitutionality of state laws related to budget issues:

[14] To present the sample, it was decided to group the decisions according to the legal action, since different decisions in the same legal process could unbalance the comparison of procedural classes, authorship and identified themes in favor of actions in which there were more decisions.

requests for suspension of payment of parliamentary amendments due to their unconstitutionality ("State Unconstitutionality"). The following table presents the number of lawsuits filed in each of the scenarios (See key below).

**Table 1**
**Legal actions in the STF related to budget, by topic**

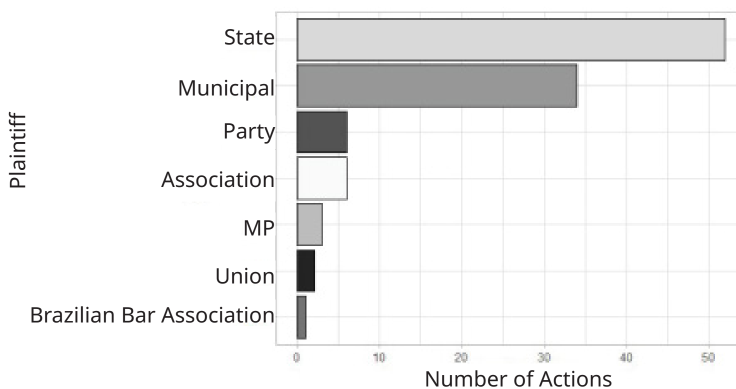



Source: Own elaboration.

Legal actions related to debts of subnational entities with the Union (51, in which there were 81 decisions) and the payment of court-ordered debt payments (40 processess and 42 decisions) together account for 87.5% of the processes and 82% of the analyzed decisions. This indicates the centrality of discussions regarding the possibility of financial exemption from federative entities.

Below, we present the distribution of processes according to the author of the demand.

**Table 2**
**Distribution of legal actions according to the plaintiff**

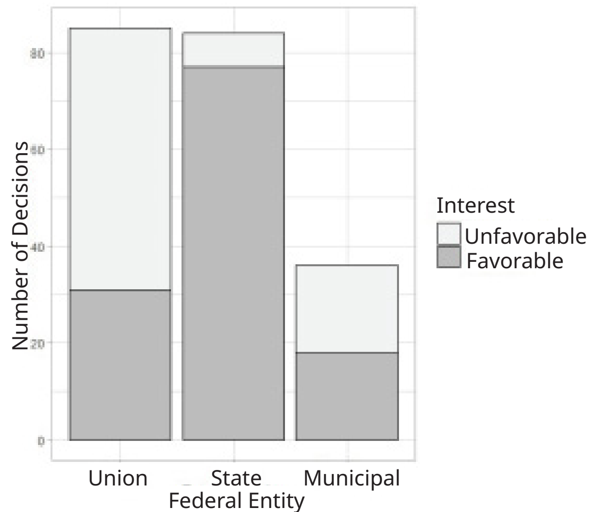



Source: Own elaboration.

From Graph 2, it is possible to verify that the litigants who most sought the STF to resolve budget and public finance demands during the pandemic were states and municipalities: 51 and 34 lawsuits filed, respectively. These legal actions generated 89 decisions in lawsuits filed by states and 37 in lawsuits brought by municipalities, totalling 84% of the 150 decisions analyzed.

Graph 3 shows to what extent the decisions favored, or not, the main litigants: municipalities, states and the Union. The states were the entities with more interests served: there was a decision favorable to the state in 77 decisions. In only seven decisions were states possibly disadvantaged, indicating the tendency of the STF to favor the interests of state agencies in budgetary matters. Regarding the municipalities, 18 decisions were favorable and another 18 were unfavorable. The Union, in turn, was the sphere of government whose interests were most disadvantaged by STF decisions: of the 85 decisions in which Union interests were at stake, 54 were unfavorable. These variations can be better understood in the thematic analysis in the following sections.

**Graph 3**
**STF and interests of federal entities**[15]




Source: own elaboration

[15] The total number of decisions in each column of Graph 3 corresponds to the sum of decisions in which there was interest from advantaged and disadvantaged spheres of government. When we believe that it is inapplicable to assess whether there was a direct interest of the federative entity, the processes are not part of the entity column. For this reason, the column related to municipal interests has n = 36, the column related to state interests has n = 84 and the column related to Union interests has n = 85. In the same case, there may be interests of two or more federative spheres, in which they are part of more than one column of the graph.

## 3. Subnational entities debts with the Union

In the 1990s, the Union assumed and refinanced state and municipalities debts, acting as creditor. It also approved reforms such as the *Programa de Reestruturação e de Ajuste Fiscal* (PAF) in 1997 and the *Lei de Responsabilidade Fiscal* (LRF) in 2000 to reduce fiscal indiscipline and indebtedness.[16] However, recently, several states have shown serious lack of control over their accounts,[17] claiming difficulty in paying their debts to the Union.

At least since 2015, states began to seek injunctions through the STF to renegotiate debts, to ease fiscal adjustment measures or penalties provided for in contracts with the Union. In 2016, the STF had become so bound up in the controversy that the Minister of Finance himself appealed to the court to defend the positions of the Federal Executive, and agreements between the parties mediated by ministers of the court.[18]

A survey by the Tribunal de Contas da União (TCU), covering the 2009-19 period, identified 25 processes in the STF referring to the debts of entities to the Union, in the region of almost R$15 billion in total, and pointed to a tendency for decisions to be in favor of the Union.[19] In a text dedicated to the study of federative conflicts between states and the Union, Dantas analyzed the original civil suits (ACO) judged by the court between 1988 and 2019. In the 615 ACOs in which the STF recognized the federative conflict, at least 546 concerned financial aspects of the relationship between the federal entities. Most of the actions were authored by the states (92.7%), and with these states there were favorable decisions in 76.6% of cases.[20]

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[16] LOUREIRO, Maria Rita. Instituições, política e ajuste fiscal: o Brasil em perspectiva comparada. *Revista Brasileira de Ciências Sociais*, v. 16, n. 47, p. 89-90, out. 2011.

[17] BASTOS, Fernando Bertoletti. Estados federativos, cortes supremas e dívidas estaduais: um estudo do efeito de decisões recentes do STF sobre a credibilidade das medidas de ajuste fiscal implementadas ao longo da década de 1990. *Revista da Faculdade de Direito da UFRGS*, Porto Alegre, n. 44, p. 50-84, dez. 2020. DOI: https://doi.org/10.22456/0104-6594.95288.

[18] Ibid.; BRASIL. Ministro Fachin reúne governadores e ministro da Fazenda para debater repactuação de dívidas. *Notícias STF*, Brasília, 19 abr. 2016.

[19] Tribunal de Contas da União. Acórdão 2591/2021 (2021).

[20] DANTAS, Andrea de Quadros. O STF como árbitro da federação: uma análise empírica dos conflitos federativos em sede de ADO. *Revista Direito GV*, v. 16, n. 2, 2020. DOI: http://dx.doi. org/10.1590/2317-6172201964. It is important to emphasize that, although related to the author's text, which also investigates federative conflicts in ACO, the classifications adopted by the author in her work are different from those used here. In our study, we classify decisions as favorable or unfavorable to federal entities, without considering the merits of the case. For example, if a case was filed by the state against the Union, and the STF dismissed it without deciding on the merits, considering, for example, that the party was not legitimate, we consider the decision contrary to the interests of the state.

The data summarized above allow us to observe at least three dimensions of the presence of the Judiciary in federal disputes related to public finances. First, litigation on the subject predates the pandemic. Second, the STF has been a relevant factor in the subject of renegotiation of the debts of subnational entities. Third, data indicate a trend in the STF to favor states in disputes with the Union on public finance issues.[21]

This is an interesting backdrop to analyzing the issue of state debt to the Union in the context of the pandemic. Responses to the pandemic in Brazil were marked by an intense and frequent federative conflict over responsibility for measures related to combating the health crisis, such as vaccinations and social distancing.[22] Many of these conflicts were taken to the STF and its decisions tended to guarantee decision-making power to the subnational entities, often limiting the Union power. We may highlight, for example, the decision *Ação Direta de Inconstitucionalidade* (ADI) no. 6.341, in which the Supreme Court affirmed the competence and autonomy of states and municipalities to act jointly and concurrently with the Union in the fight against the pandemic.

However, as stated by Fernanda Dias Menezes de Almeida, "[…] assigning competences means conferring powers, but also duties, with which compliance is essential for the existence of sufficient financial resources".[23] With regard to this observation, a relevant question is whether attribution to states and municipalities the power to legislate and execute measures in the fight against the pandemic was accompanied by decisions of the STF that recognized the financial needs of entities to carry out such measures, even to the detriment of the interests of the Union. A relevant consideration

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[21] This decentralizing tendency does not seem to be the trend in other fields. Analyzing results of actions judged in a concentrated way by the STF during the pandemic, Leoni concludes that even during this period, the court showed a centralizing tendency. LEONI, Fernanda. O papel do Supremo Tribunal Federal na intermediação dos conflitos federativos no contexto da Covid-19. Cadernos de Gestão Pública, v. 27, n. 87, 2022. The author's conclusion differs from other works which investigated the decision-making behavior of the STF in other periods of Covid-19 and which pointed to a decentralizing trend, such as OLIVEIRA, Vanessa Elias; MADEIRA, Lígia Mori. Judicialização da política no enfrentamento à Covid-19: um novo padrão decisório do STF? *Revista Brasileira de Ciência Política*, n. 35, p. 1-44, 2021. DOI: https://doi.org/10.1590/0103-3352.2021.35.247055; DANTAS, Andréa de Quadros, PEDROSA, Maria Helena Martins Rocha; PEREIRA, Alessandra Lopes da Silva. A pandemia de COVID-19 e os precedentes do STF sobre as competências constitucionais dos entes federativos: uma guinada jurisprudencial ou mera continuidade da função integrativa da Corte? Dossiê Especial Covid-19. *RDP*, v. 17, n. 96, p. 37-64, nov./dez. 2020. DOI: https://doi. org/10.11117rdp. v17i96.4511.

[22] Daniel Wang et al., *O STF e as medidas para prevenção e tratamento da Covid-19*, op. cit.

[23] ALMEIDA, Fernanda Dias Menezes de. *Competências na Constituição de 1988*. 5. ed. São Paulo: Atlas, 2010. p. 15.

when answering this question concerns processes relating to the payment of subnational entity debts to the Union, in which financial exemption of those at the expense of the latter is requested.

Analysis of these actions will be divided into two parts, allowing us (a) to visualize more clearly that the legislative response came after (and, perhaps, in reaction to) STF decisions on the matter and (b) analyze how the STF responds to the legislative change in judgments on the subject.

### *3.1 First phase: from the beginning of 2020 until the approval of the Federal Plan to Combat the Pandemic (Supplementary Law No. 173/2020)*

The first phase involving the STF occurred shortly after the beginning of the pandemic. Anticipating a health crisis that would have repercussions on their finances, the states applied to the STF requesting the suspension of payment of debts to the Union or to federal financial institutions, such as Banco do Brasil (BB), Caixa Econômica Federal (CEF) and Banco Nacional de Desenvolvimento Econômico e Social (BNDES).

The first process that reached the STF with was *Ação Civil Originária* (ACO) *no. 3.363*, on 22/4/20. The state of São Paulo asked the STF to authorize the suspension of installment payments of a debt, including one expiring the day following, owing to the pandemic. The state argued that the crisis caused by the new coronavirus would impose an increase in health spending and restrictions imposed to prevent the spread of the virus would affect state economic activities. Minister Alexandre de Moraes, in an injunction issued on the same day, granted the suspension of the debt payment by the state for 180 days, requiring proof that the amounts saved would be used to combat the pandemic. The decision highlighted the seriousness of the pandemic and the need to protect the right to life.

Thereafter, other states appealed to the STF on the same grounds. In these cases, Minister Alexandre de Moraes decided in a similar way, with same the legal basis and response time. The civil action numbers were 3.365 (Bahia), 3.366 (Maranhão), 3.367 (Paraná), 3.368 (Paraíba), 3.369 (Pernambuco), 3.370 (Santa Catarina), 3.371 (Mato Grosso), 3.372 (Acre), 3.373 (Pará), 3.374 (Alagoas), 3.375 (Espírito Santo), 3.376 (Amapá), 3.377 (Rondônia), 3.378 (Rio Grande do Norte), 3.379 (Mato Grosso), 3.380 (Sergipe), 3.381 (Bahia), 3.382 (Mato Grosso), 3.384 (Santa Catarina) and 3.390 (Federal District).

In this first moment, other decisions were taken by Minister Alexandre de Moraes in the same cases already granted a preliminary injunction. In some cases, the states asked for the extension of the injunction for other contracts or for a longer term. In others, the Union tried to circumvent the decision taken by the STF by imposing sanctions on the states for non-payment of debts, complicating their finances, so that they appealed to the court again. In general, the requests were granted by the rapporteur.

These actions led to a federative conflict, confused with the competence of the STF. The ACOs aimed at resolution of conflicts between the Union and the states and the Federal District (DF). However, these did not exactly involve an issue competence, but a financial dispute over the payment of debts and their deadlines.

As seen below, these ACOs were extinguished in the second phase, when the underlying legal issue was addressed by the Plan Federation for Combating the Pandemic (Supplementary Law No. 173/2020), which led the states to renounce the right on which the actions were based.

### *3.2 Second phase: the Federative Confrontation Plan for the pandemic*

Supplementary Law No. 173, enacted on 27/5/2020, established the Federal Program to Combat the Sars-CoV-2 Coronavirus (Covid-19), amending, among other rules, Supplementary Law No. 101/2000 (the "Fiscal Responsibility Law"). The program consists of three elements: i) the suspension of payments of debts contracted between the Union and states, Federal District or municipalities; ii) the restructuring of operations of internal and external credit with the financial system and multilateral institutions credit; iii) the delivery of resources from the Union, by way of financial aid for the adoption of actions to combat Covid-19, states, municipalities and the Federal District during the 2020 financial year.

In addition to the three elements, the Law also promoted, in articles 7 and 8, alterations and additions to the Fiscal Responsibility Law (Supplementary Law no. 101/2000). It established nullity of acts that increased expenses related to personnel who did not meet certain requirements and prohibited, until 12/31/21, among other measures, readjustments or benefits to public officials or increases in civil service staff.

As for the first element, related to the suspension of debts, the program provides for a series of related measures, such as preventing execution by

the Union of guarantees arising from debt refinancing agreements entered into with the other federative entities and the "preferential" application of the resources resulting from the suspension of debts in the face of the pandemic. In addition, the program provides that unpaid amounts prior to March 2020 due to the granting of an injunction could receive the same treatment at the values for the 2020 financial year, provided the entity benefited renounced the legal action, pursuant to art. 2, §6. This measure was justified in the opinion of the rapporteur Senator Davi Alcolumbre as necessary to ensure "isonomy among all entities, whether or not injunction was obtained, giving them more favorable treatment than they would obtain from the Judiciary".[24]

As a result, dozens of federal entities joined with waiver requests, vis-a-vis the ACOs mentioned in the previous section, which discussed the payment of debts to the Union whose unpaid amounts related to periods prior to the 2020 fiscal year.[25] In all these processes, there was an injunction granting the request.

In this respect, it is worth highlighting the interaction between the STF and the legislation produced by Congress. Among the alternatives brought by law to adapt public finances to the context of the pandemic, is suspension of debt payments, a situation achieved by subnational entities via the STF in the first months of the pandemic. In addition, LC no. 173/2020 provided for the option of more beneficial treatment for entities to waive those lawsuits, suggesting the prompt response by the STF to this claim may have contributed to the benefit established in law. Although it cannot be said that the injunctions of the STF led to the approval of LC no. 173/2020, certainly the court action was among the concerns of the Legislature.

The cases in this second phase can be divided into two groups, analyzed separately: the decisions concerning the constitutionality of LC no. 173/2020 and those dealing with debts of subnational entities with the Union outside the scope of LC no. 173/2020.

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[24] SENADO FEDERAL. *Parecer sobre o Projeto de Lei Complementar nº 149, de 2019*. p. 10. Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=8102276&ts=1640120722537&disposition=inline. Accessed on: 12 Feb. 2022.

[25] In addition to the ACOs mentioned in the previous section, there was also approval of a request for waiver in ACO 3387, filed by the state of Tocantins. In this action, the parties were negotiating an agreement and, until the moment of the resignation request, there was no injunction granted for the suspension of debts. After the enactment of LC nº 173/2020, the plaintiff asked for the waiver, which, as in the other cases, was ratified.

### *3.2.1 Constitutionality of LC No. 173/2020*

LC No. 173/2020 was the subject of 11 ADI decisions in 2020.[26] There was a decision on the merits of only four lawsuits, which were judged jointly on 3/15/2021, with a unanimous decision in the virtual plenary as to the inadmissibility of all.

The first, ADI No. 6.442, questioned the requirement that the entity was entitled to the suspension of payment, which would violate the federal pact, due process of law and the principles of supremacy and public interest. The Supreme Court, however, considered that there was no offense to the rights or threat to federative stability, since the acceptance of the benefit conditioned by the waiver was optional for each entity. Furthermore, the STF understood that it did not intervene in the matter, as it had competence only to act in conflicts between entities that represent a risk to the federative balance, and not in strictly procedural and property matters.

ADI Nos. 6447, 6450 and 6525, in turn, questioned the expenditure limitations on the civil service. The ADIs maintained that there were violations of the principle of separation of powers, federative autonomy, efficiency, proportionality and the prohibition of retrogression. There were also conflicts in terms of irreducibility of salaries, maintenance of purchase power, and with the rules of art. 169 and art. 39, § 1, of the Constitution. The STF, however, understood that there was no reduction in the remuneration of the official and that containment of expenses with mandatory expenses in federal legislation was compatible with the Constitution, especially in a pandemic situation.[27]

There are also two other cases related to public officials, relating to amendments to LC no. 173/2020. The Extraordinary Resource (RE) no. 1.311,742 was filed by the state of São Paulo against the decision of an appeal group that ruled out the application of LC no. 173/2020, which prevented civil servants from adding to their remuneration on a temporal basis, for example, with trienniums. the STF, in a unanimous judgment in the virtual plenary, recognized the general repercussion and judged that the limitation was

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[26] The decisions took place in nine different actions. In ADIs nos. 6.444 and 6.485 there were two different decisions due to resources

[27] ADIs Nos. 6444, 6542, 6485, 6456 and 6465, filed by Associações Federais de Servidores Públicos, were also directed to the restrictions provided for in articles 7 and 8 of the LC. All of them, however, were subject to extinction decisions without judgment on merit by active illegitimacy of the party.

constitutional, reaffirming the established position in the judgment of ADIs nos. 6.442, 6.447, 6.450 and 6.525.[28]

In the RE decision, Minister Luiz Fux mentions that, only in the court that issued the contested decision, there were over 100 similar cases awaiting judgment, which signals the relevance of the issue for the public. This led to recognition of the general repercussions of the controversy by the STF. On its merits, the STF understood that the rule in question deals with financial law, under the competence of the Union under the terms of art. 24, § 1 of the Constitution, and not the legal regime of civil servants, which would require a proposal by the President of the Republic (art. 61, § 1, II, c of the Constitution). Therefore, there would be no violation of the federative pact or separation of powers, nor abuse of the competence of the Union to set, by means of a Supplementary law, limits for expenses for personnel of all federated entities.

The cases presented in this section reflect the STF observance of the regulations introduced by LC no. 173/2020, since in all actions decided on merits the court confirmed the solutions found by the Federal legislature.

### *3.2.2 Situations not covered by LC 173*

With the enactment of LC no. 173, there were legal actions in the STF related to the scope of legislation. In ACOs no. 3373 and 3381, the states requested that, despite the waiver, the previously granted injunctions should continue in effect for another 10 days, in order to provide better conditions to meet the requests of LC no. 173. The rapporteur granted the request in both cases. In ACO no. 3.373, the Union filed an appeal against the concession, resulting in another decision, which maintained the merits of the previous one.

There are also cases whose conflicts were not explicitly covered in the new legislation, although LC no. 173 was often mentioned. They were requests related to stay of execution according to the entity and the Union, with fiscal recovery regimes and with the reversal of sanctions imposed by the Union for non-payment of debts.

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[28] The second case mentioned in the text is SL nº 1.423, judged by Minister Fux on 2/21/2021 in an opposite way. In it, the Public Prosecutors Office of São Paulo sought suspension of the injunction issued by the TJ/SP, determining continuity in counting the time for acquisition of benefits and suspending only their payment. Minister Fux understood that the injunction suspension is a procedural mechanism of restricted orbit, not susceptible to the detailed arguments of the São Paulo court and that the adequate space to discuss this issue would be in the above-mentioned ADIs, then pending judgment.

In ACOs No. 3.431 and 3.433, the state of Amapá asked the STF to suspend the execution of the guarantee in an agreement between the Union and the state. Although the Union argued that these agreements were not part of the scope of LC no, 173, Justice Alexandre de Moraes understood the opposite, granting the suspension of the enforceability of the guarantees required by the Union in both cases. In both actions there was already an injunction granted before the LC 173 and, therefore, the rapporteur considered that the state acted in good faith in waiving the action to benefit from the law. In ACO nº 3.416, the state of Paraíba made a similar request to suspend the performance of the guarantee contract signed with the Union and CEF, which was also granted outright by the Minister Alexandre de Moraes.

ACO no. 3.457, in turn, saw three decisions after the enactment of LC no. 173. The state of Rio de Janeiro requested provisional emergency relief to guarantee its maintenance in the Tax Recovery Regime. It argued that it was under threat of being excluded by the Union, which would provoke financial shock in the state, aggravated by the context of Covid-19. In this action, LC no. 173 is mentioned by the plaintiff to corroborate the origin of the request on the grounds that, if its effects had not been limited to December 2020, it would be applicable to the claim.

Guardianship was granted by Minister Dias Toffoli in December 2020. The Union's embargoes were rejected in March 2021. In April 2021, a new decision extended the provisional guardianship until the analysis of the request for extension of the regime by the Union. The main grounds for granting an extension of the injunction were the risk of collapse in the state economy and the guarantee of administrative continuity, especially in the context of a pandemic.

On a similar topic, the decisions handed down in ACOs nos. 3.449, 3.460 and 3.493 dealt with sanctions imposed by the Union, respectively, on the states of Rio Grande do Norte, Rondônia and Rio de Janeiro resulting from non-compliance with financial obligations, with access to Union resources and guarantees made unfeasible in new contracts. In all three cases, the pandemic is mentioned by the authors as a context that accentuates the issue of commitment to provision of public services caused by sanctions imposed by the Union.

In all cases, the rapporteurs cautiously suspended the default registration of the state. The reason for this, however, is not directly related to LC no. 173. These are situations in which the measure adopted by the Union is considered wrong, but the basis is not legislative novelty but danger of delay — related

to impact sanctions, compounded by Covid-19 — and the likelihood of entitlement — based on the jurisprudence of the court and due process of law.

Finally, in SL no. 1.327, the municipality of Rio de Janeiro (RJ) requested that, due to Covid-19, decisions issued by the Federal Regional Court of the 2nd Region be suspended, which obliged the municipality to pay the debt contracted with the Union. The suspension of the injunction was granted and confirmed by then president of the court, Minister Dias Toffoli, removing decisions which had determined the imposition of sanctions arising from any default by the municipality. The decisions considered that the payment of the debt by the municipality could jeopardize the functioning of the public health system. In the decision confirming the injunction, the minister highlights the importance of the pandemic in his decision:

> One cannot dissociate, from the analysis of the issue at hand, the public health emergency, resulting from the Covid-19 pandemic; so, although the legality of the obligations assumed by the applicant is not discussed, what is certain is that the current economic situation is significantly different from the time of execution of the contracts that generated such obligations [...] the imposition, on the applicant, of resumption of payment of the large sums in dispute, will certainly entail serious risks of to the economy and public health, within the scope of that city.[29]

In conclusion, despite the variety of situations that gave rise to decisions on debts subsequent to LC nº 173, the logic through which ministers grant measures beneficial to subnational entities is quite similar to decisions prior to this legislation. That is, payments are made more flexible and exempted subnational entities at the expense of the Union, based on the pandemic context. We should note, also, that the legal actions in which the constitutionality of LC no. 173 was questioned were not revindicated in the STF. The court endorsed the measures adopted by the Legislature in this area, which also sought to benefit subnational entities, while imposing conditions and establishing restrictions related to functional expenses.

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[29] SUPREMO TRIBUNAL FEDERAL. *Decisão liminar na SL 1.327*. Ministro Dias Toffoli. p. 2-3. Available at: https://portal.stf.jus.br/processos/downloadPeca.asp?id=15343997989&ext=. pdf. Accessed on: 26 Mar. 2022.

## 4. Court-ordered debt payments

It seems clear that the payment of court-ordered debt payments is a problem that affects all Federative entities. In order that the financial obligations of public entities are met safely, the Constitution established its own regime, in which payments are made in order and within a predetermined maximum period.

The amounts intended for the payment of such debts, however, have grown progressively, and, not infrequently, the entities of the Federation do not have the resources to undertake the settlement within the specified period. Martins points out that, in 2017, the states spent 64.5 billion on court-ordered debt payments, reaching 84 billion in 2020. The alteration is more striking in spending carried out by the Union, which tripled from 2016 to 2022, from 29 to 90 billion. The author also observes that in 10 states the debts with court-ordered debt payments increased by more than 100% between 2014 and 2021; and in 11 of the 22 governments (including the Federal District), debts with court-ordered debt payments represented more than 10% of the consolidated debt.[30]

Given the impact on public finances, court-ordered debt payments are a frequent object of litigation in the STF. Addressing the judicialization of constitutional amendments, Oliveira and Arguelhes point out that of the 115 ADIs proposed against constitutional amendments, 7% questioned the court-ordered debt payments regime. This number was inferior only to reforms that impacted civil servants and reforms that altered the jurisdiction of the industrial tribunal.[31]

Court-ordered debt payments have also frequently been the object of Constitutional Amendments (CE). The latest EC on the subject — 109, 113 and 114 — were all approved in 2021, in the middle of the pandemic, changing the form or deadline of payment of such debts.[32] Faced with budget needs imposed by the pandemic, a number of federative entities sought the STF to suspend charges for arrears or payment plans for court-ordered debt payments established by the courts of law that represented an increase in the entity's

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30 MARTINS, Clara Paredes. Análise da evolução do histórico dos precatórios na dívida consolidada dos estados brasileiros e a relação com o risco de crédito. Dissertação (mestrado profissional MPFE) — Escola de Economia de São Paulo, Fundação Getulio Vargas, São Paulo, 2022.

31 OLIVEIRA, Fabiana Luci de; ARGUELHES, Diego Werneck. O Supremo Tribunal Federal e a mudança constitucional. Revista Brasileira de Ciências Sociais, v. 36, n. 105, p. 1-20, 2021

32 EC nºs 113 and 114 were approved only in December 2021, that is, a later period than established for the collection of research data. Thus, they were not analysed.

expenses. Analsyis of the decisions was divided into two moments, with the establishment of EC no. 109, on 3/16/2021, which extended for another five years the term for payment of court-ordered debt payments.

### 4.1 First moment: from the beginning of 2020 to Constitutional Amendment no. 109/2021

When the pandemic began, municipalities presented legal petitions to the STF, addressing mainly two points related to the regime of court-ordered debt payments: the creation of a special line of credit for federal assistance in the payment of court-ordered debt payments and decisions related to the payment issued by courts of law.

Firstly, based on the then provisions of art. 101, paragraph 4 of ADCT, included in EC no. 99/2017, the municipality of Araraquara (SP) in Writ of Mandamus (MS) no. 37.035 requested that the Union create a special credit facility to assist other federative entities in the payment of court-ordered debt payments. In the wording of the amendment, this line of credit needed to be created in six months, but by 2021 this had not happened. The request mentioned the financial difficulty of the entity and the complications that the payment of court-ordered debt payments would cause in confronting the pandemic. In March 2020, Minister Barroso rejected the preliminary injunction on the same day of distribution, indicating that the municipality had not presented proof that all possible remedies for payment of the precatory had been exhausted, and that, despite pointing out the Union omission since 2018, had not questioned or requested release of the credit.[33] MS no. 37.605 was proposed with the same objective and on the same grounds, but also rejected by the minister Rosa Weber.

The request for credit release was not unprecedented. In June 2019 — before the pandemic — Minister Marco Aurélio, in MS no. 36.735, had determined opening of the credit line in a request made by the state from Maranhão. This decision, which did not appear in our database as it was not related to the pandemic, remained in effect until May 2021, when the claim was

[33] As of the closing date of the survey, the merits of the case had not been judged. The case appeared in the database, however, twice more, due to requests made by the municipality. In one of them, the municipality revoked the action, which was rejected by the rapporteur, as the municipal attorney had not attached to the file a document that authorized the commission of the act. In another, the municipality withdrew the waiver, and requested redistribution to Minister Marco Aurélio. The rapporteur determined the continuation, but rejected the distribution.

rejected by the plenary in an online hearing.[34] During the pandemic, Minister Marco Aurélio maintained his line of reasoning in MS nos. 37.480 and 37.601, determining that the Union made available the line of credit within 30 days. In these two cases, the risk of financial collapse due to the pandemic was used by the authors to reinforce the claim. That circumstance highlights that the pandemic may have functioned only as an instance to reinforce demands that precede Covid-19.

The other type of request taken to the STF at the first moment was the suspension of payment of court-ordered debt payments or limitation of the budget threshold to be transferred by federal entities to the courts of law for payments of court-ordered debt payments. Here, clarification is needed on the payment. According to the constitutional device then in force – art. 101 of the *Ato dasDisposições Constitucionais Transitórias* (ADCT) —, states, municipalities and the Federal District should make monthly transfers to a court account designed for this purpose. The value of the transfers was established by a calculation that involved the income received by the entity and the update of certain indices. These transfers should follow a plan of payments filed with the court. In the event of delay, the courts may determine unavailability or attachment of municipal fees, to satisfy transfer amounts or approve precatory payment plans incorporating overdue and unpaid instalments, thus increasing significantly the percentage to be transferred by entities.

The second set of actions related to the payment of court-ordered debt payments involves this relationship. They are federative entities that sought authorization from the STF not to pay a monthly installment close to maturity, the suspension of the plan approved by the court, or the return of amounts and the suspension of payments made in the accounts of the federative entities to satisfy the payment of court-ordered debt payments. The claims that payment of court-ordered debt payments would compromise the provision of public services also arises here, including of services aimed at combating the pandemic. There were 25 such decisions in this regard.

The case that most stood out in this group was ACO no. 3.458, proposed by the state of São Paulo on 12/23/2020. The state argued that the Union had not passed the legislation to help the federative entities in the discharge of court-ordered debt payments, leading to difficulties in making the payment of an instalment about to expire. So, it asked the STF

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[34] SUPREMO TRIBUNAL FEDERAL. MS 36375. Decisões. Available at: http://portal.stf.jus. br/processos/detalhe.asp?incidente=5659961. Accessed on: 8 Oct. 2021.

to maintain the suspension of the payment of court-ordered debt payments and compliance with the payment plan, which had been determined by the state court months before. The state justified that resources would be needed for the scheduled vaccination campaign to start the following month. Minister Luiz Fux decided that it should remain suspended, and the state of São Paulo not be obliged to make the transfers for the corresponding court-ordered debt payments payment plan for the year 2020. The minister, however, determined that the state prove that the amounts would be invested in fighting the pandemic.[35]

In addition, there were 18 lawsuits filed by municipalities[36] claiming that a significant part of the budget would be committed if the alterations caused by unilateral decisions in payment plans drawn up by courts of law were accepted, thus requesting the suspension or reduction of the established percentage. These requests grew in 2021, mainly because the state courts began to establish payment plans which included unpaid instalments in 2020, increasing transfer values substantially.

Twelve of these requests were made in claims (Rcl.) that referenced issues of order raised in ADIs nos. 4.357 and 4,425, wherein the STF established an extension of the payment of *precatório* debts for another five years, starting in 2016. In eight of these 12 complaints, the preliminary decisions of the rapporteurs were favorable to the municipalities.[37] The justices accepted the allegation that there would be damage to efforts to combat the pandemic if collection in the percentage of revenue required by the Court or attachments determined for the payment of court-ordered debt payments were maintained.

In four complaints, the decision was unfavorable to the municipalities.[38] In Rcl. no. 37.631, before the pandemic, the municipality asked for the suspension of the precatory payment plan approved by the Court of Justice for the 2019 financial year and the reimbursement of attendant amounts

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[35] ACO nº 3.437, with a similar request, was filed by the municipality of Mossoró (RN) and rejected by Minister Cármen Lúcia, who understood that it was not the competence of the STF to arbitrate the conflict between the Union and a municipality.

[36] MS nº 37.038, MS nº 37.364, MS nº 37.422, Rcl nº 37.631, Rcl nº 40.898, Rcl nº 44.320, Rcl nº 45.570, Rcl nº 45.573, Rcl nº 45.574, Rcl nº 45.616, Rcl nº 45.629, Rcl nº 45.643, Rcl nº 45.714, Rcl nº 45.811, Rcl nº 46.062, SS nº 5.415, SS nº 5.454 e STP nº 717.

[37] Rcl nº 40.898, Rcl nº 44.320, Rcl nº 45.570, Rcl nº 45.574, Rcl nº 45.643, Rcl nº 45.714, Rcl nº 45.811 e Rcl nº 46.062.

[38] Rcl nº 37.631, Rcl nº 45.573, Rcl nº 45.616 e Rcl nº 45.629.

disbursed. Shortly after the start of the pandemic, the municipality petitioned to the court claiming that, due to the context, the financial situation of the municipality had worsened, requiring reimbursement of the amounts spent to comply with the 2019 plan. Minister Cármen Lúcia, in April 2020, judged that the complaint could not be used for the relocation of public funds — the municipality's immediate request — but only for discussion of whether the plan was compatible with STF precedents. On this point, the minister pointed out that the STF had already rejected an injunction on the same request before the pandemic, making further consideration moot.

The other three complaints also alleged the unconstitutionality of the plans approved by the courts of justice, and asked for a suspension, referring to the situation caused by Covid-19 as a reinforcement of the arguments. However, the rapporteurs saw no relationship between the two ADIs and discussion of limits to the required budget amounts vis-a-vis the plans established by the courts.

The issue of court-ordered debt payments also appeared in ADI no. 6.556 and in *Arguição de Descumprimento de Preceito Fundamental* (ADPF) no. 789, proposed, respectively, by the states of São Paulo and Maranhão. ADI no. 6.556 questioned the constitutionality of Resolution no. 303/2019 of the National Council of Justice (CNJ), which provided for a special regime of precatorio payment by entities that were in default and that, according to the state, would require the payment of amounts greater than those constitutionally established.[39] With ADPF no. 789, the objective was to contest a number of judicial decisions of the Labor Court that determined the blocking of amounts from a state company providing health services. In both cases the states mentioned that the payment of court-ordered debt payments would jeopardize the fight against the pandemic. That argument was complied with in the preliminary injunction by the respective rapporteurs, Minister Rosa Weber and Minister Roberto Barroso, who granted the preliminary injunctions to suspend payments and blocks. In ADPF no. 789 there was even an order to return the amounts blocked before the decision.[40]

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[39] MSs nº 37.038, 37.364, 37.371 and 37.422 also questioned the CNJ rule, but were rejected because the rapporteurs did not understand that there was a clear and certain right in the first two cases and that the procedural route was inadequate in the last two.

[40] SL nº 1322, SS nº 5.380, SS nº 5.415, SS nº 5.454 and STP nº 717 had similar motivations, based on Covid-19, but the claims were rejected because the STF understood that the procedural type was not applicable.

## *4.2 Second phase: Constitutional Amendment no. 109/2021*

The second phase of the STF's decisions on court-ordered debt payments occurs after the establishment of EC no. 109/2021, of 3/16/2021. This amendment changed the system of payment of court-ordered debt payments in two main respects. Firstly, the amendment extinguished part of art. 101 of the ADCT, excluding the possibility opened by EC no. 99/2017 for the creation of a credit line by the Union to assist in the payment of court-ordered debt payments by other federative entities. Another change was the extension of the deadline for payment of court-ordered debt payments. In the previous system, the deadline for completing the discharge of court-ordered debt payments was 2024. With the EC, the deadline was extended to 2029, federal allowing entities the possibility of settling their debts in smaller instalments, without compromising pressing budgets.

These modifications had an impact on requests pending judgment or on those presented after EC no. 109/2021. MS no. 36.645, headed by Minister Cármen Lúcia, ordered the Union to create the special credit line. MS no. 37.035, in relation to the municipality of Araraquara (SP), was decided in a similar way by minister Roberto Barroso, before EC no. 109/2021. The legal action was registered by the municipality of Várzea Alegre (CE) in August 2019 and decided only in March 2021. Although it was proposed before the pandemic, the rapporteur extinguished the case due to the enactment of EC no. 109/2021, which was partly aimed at rebalance public accounts due to the impact generated by Covid. EC no. 109/2021 also affected other lawsuits. In Rcl no. 47.107, the municipality of Pio XI (PI) sought the suspension of charges undertaken by the court of justice, based on the same argument used before EC no. 109/2021, that is, that the required levels were unconstitutional, which could compromise the fight against the pandemic. For the rapporteur, Minister Dias Toffoli, the continuation of the complaint would be harmed, among other factors, by the approval of EC nº 109/2021, which had extended the deadlines, and, with that, contemplated the demand by the municipality for the shares to be reduced. Similar requests – Rcl no. 45.714 and Rcl no. 45.737 — were, respectively, rejected on their merits and extinguished after the passing of EC no. 109/2021.[41] In another similar action, Rcl no. 46.044, minister

[41] In Rcl nº 45.714, an injunction was granted in favor of the municipality before EC no. 109/2021.

Lewandowski understood that there was no relationship between the questioned decision and the decisions indicated as paradigms.

On the other hand, there were complaints with similar requests decided in favor (albeit partially) of the municipality despite the approval of EC no. 109/2021. In Rcl no. 46.066, Minister Cármen Lúcia did not grant the request of the municipality of Santo André (SP) to limit the level charged by the court of justice for payment of court-ordered debt payments, but determined the unblocking of monies sequestered by the court for the aforementioned payment, understanding that this could compromise the city's role in combating the pandemic. In turn, in Rcl no. 46.962, Minister Rosa Weber granted a request for suspension of the court-ordered debt payments payment plan formulated by the court without referring to the new rules for payment, stating that the suspension of payment should occur on account of the risk of compromising public accounts during the pandemic.

Some lawsuits judged after EC no. 109/2021 were not impacted by it as they concerned issues outside its scope: they sought, for different reasons, the suspension of decisions of lower courts. Rcl Nos. 46.062 and 47.307, headed, respectively, by Cármen Lúcia and Gilmar Mendes, addressed industrial tribunal decisions which had determined the payment without observing the court-ordered debt payments regime, where the authors alleged that these convictions could damage the provision of health services during the pandemic. In both cases, the STF suspended the decisions.

The discussion in the Suspension of Provisional Guardianship (STP) no. 770 involved the issue of submitting to the court-ordered debt payments regime payment for an indirect expropriation undertaken by municipality. The Court had ordered the municipality of Maceió (AL) to make payment immediately, without observing the court-ordered debt payments rule. However, minister Luiz Fux understood that this understanding was questionable and, therefore, the decision should be suspended to preserve the municipal budget, constrained in the face of Covid-19.

Finally, on another issue, STP #785 involved a conflict between the state of Maranhão and the Union, in which the former charged transfers not covered by Fundo de Manutenção e Desenvolvimento do Ensino Fundamental (Fundef). The regional court (TRF) determined that the Union issue a writ corresponding to the uncontested portion of the dispute, that is, wherein it was not subject Union funds (about R$ 3.7 billion). The Union sought the suspension of the decision in the STF, claiming that the issuance of a *precatório* of such an amount would compromise the fight against

Covid-19 at a critical moment, that it did not have an a priori uncontroversial aspect. Minister Luiz Fux welcomed both arguments, but his vote gave greater weight to the context of the pandemic, even though the dispute predated it:

> [...] the mere possibility of the irreversible expenditure of amounts of such a high amount in a situation of controversial legality characterizes the serious risk to the social interest sufficient to reveal the need to adopt a measure that can safeguard the treasury, especially considering the current context of a serious global health and economic crisis, resulting from Covid-19, which imposes on the Union the concentration of financial efforts in favor of health measures and economic stimulus, including the expansion of ICU beds, population vaccination and emergency income distribution to support workers hardest hit by the economic recession.

In general terms, the performance of the STF in the cases that involved the transfer of funds for the payment of court-ordered debt payments tended to favor the federal bodies that proposed the actions. The pandemic featured significantly in the rationale, often decisively, with rapporteurs endorsing the argument that the transfer of funds for the payment of court-ordered debt payments above a certain limit could compromise responses to Covid-19. Most of the petitions to suspend payment of writs or limit or suspend payments prepared by the courts of justice were granted. Not even the enactment of ECn no. 109/2021, reducing the percentage of revenues for those committed to the payment, was enough to change the tendency of the STF to suspend debt enforcement.

## 5. Flexibilization of budget rules and fiscal responsibility

During 2020, considering the challenges imposed by the pandemic on management and public finances, federal entities petitioned, to the STF, for more flexible fiscal and budgetary rules. Many of these rules were created in the same period in which the Union started to assume and refinance the

debts of subnational entities. Seeking to prevent lack of control of state and municipal accounts leading to the need for the financial assistance of the Union, reforms were approved, such as the Fiscal Responsibility Law (LRF)

in 2000, to tighten public spending and thus reduce tax indiscipline and the indebtedness of the entities.[42]

ADI Nos. 6.381 and 6.394, both from April 2020, sought to relax the LRF instruments. In ADI no. 6.381, authorization was requested for temporary appointments to reinforce the staff in the health area and other sectors responding directly to Covid-19, as long as the situation lasted. In ADI no. 6.394, in a similar way, the state postulated the removal of limitations on expenses for personnel, new appointments, increased remuneration and granting of advantages to civil servants in the Health sector. In November of that year, the two cases were dismissed by Minister Alexandre de Moraes due to loss of relevance after the enactment of EC no. 106/2020.

EC no. 106/2020, of 5/6/2020, established an extraordinary tax, financial and recruitment regime in the face of the public emergency resulting from the pandemic. Together with LC no. 173/2020, enacted in the same month, analyzed in a previous section of this article, it was part of the arrangement the legislative body established to deal with public finances in the context.

In ACO no. 3.414, the Federal District, in July 2020, requested authorization to use the remaining amount of the Constitutional Fund of the Federal District, going beyond the normal remit established. The TCU will determine the use of the fund resources in compliance with the annual and accrual basis, requiring that defray expenses in the same year were received. According to the author, the fiscal and budgetary impact of adapting to TCU requirements may mean it is impossible to provide services and make payments, aggravated by the pandemic. Minister Gilmar Mendes pointed out that the TCU decision determined that the rule would come into force 90 days after the end of the Covid-19 emergency and that, therefore, there was no urgency in granting the required precautionary measure.

Not only states and municipalities sought flexibility in the rules for budgetary measures to deal with the pandemic. In ADI no. 6.357, judged on 3/29/2020, the Presidency of the Republic asked for an interpretation to be given in accordance with the Constitution and provisions of the LRF and the Law of Guidelines (LDO) of 2020 to remove the requirement that programs and measures created to tackle the pandemic observed regular requirements for expense allocation procedures, such as budget forecasting and planning. More specifically, it requested, among other measures, loosening of the requirement to present an estimate of the financial impact of the increase in expenditure in the year in which they would come into effect and in the

[42] Fernando Bertoletti Bastos, Estados federativos, cortes supremas e dívidas estaduais, op. cit.

two years following, in addition to the declaration that the increase would be compatible with the multi-year plan and with the LDO. Once the planned budget for 2020 was in effect, such flexibility would assist new programs and policies aimed at combating Covid-19.

The request was granted on a precautionary basis by rapporteur Minister Alexandre de Moraes, who also expanded the interpretation to the other state entities that had declared a state of public emergency. The extract below indicates the relevance of the pandemic for the granting of the measure and the consequentialist nature of the decision:

> The emergence of the Covid-19 pandemic represents an absolutely unpredictable supervening condition with very serious consequences, which will dramatically affect the previously planned budget execution, requiring urgent, long-lasting and coordinated action by all federal authorities, at state and municipal levels, in to protect the lives, health and economic subsistence of a large portion of Brazilian society, making it logically and legally impossible to meet certain requirements of laws compatible with times of normality.[43]

## 6. Transfer of funds for measures to combat the pandemic

Nine cases encapsulate the use of funds for measures to combat the pandemic. Among them, ADPF no. 568 stands out, whereby the STF ratified agreements in which the allocation of amounts arising from *Operation Lava Jato* was foreseen for combatting the pandemic. This instance occurred one year before the pandemic, on 3/12/2019, concerning the administration and allocation of amounts vis-a-vis plea bargain agreements and convictions for corruption. With the emergence of the pandemic, the PGR appealed to the STF for funds, initially intended for other programs, to be made available. Subsequently, the states of Acre, Maranhão, Tocantins and Mato Grosso made similar requests, all of which were approved by the rapporteur. In all

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[43] SUPREMO TRIBUNAL FEDERAL. *Medida Cautelar na ADI 6.357*. Decisão. Ministro Alexandre de Moraes. 29 mar. 2020. p. 10-11. Available at: https://portal.stf.jus.br/processos/downloadPeca.asp?id=15342780618&ext=.pdf. Accessed on: 5 Mar. 2022.

requests, the MPF and presiding minister were in favor of ratification. In total, the orders resulted in five clear homologation decisions.

Other decisions fall under this umbrella. In ADI No. 5.595, it was postulated that there would be budget transfers by the Union to SUS and to other federative entities to tackle the pandemic. ADI no. 6.318, maintained that the electoral fund would represent the indiscriminate allocation of public resources to entities (parties), requesting that resources initially earmarked for the funds were allocated to deal with the pandemic. ADI No. 6.374, in turn, discussed the possibility of using funds for propaganda during the electoral period outside the established limits by law as it would be necessary to raise public awareness of the risks and precautions that should be taken during the pandemic. In these three requests there was no assessment of the merits with regard to procedural reasons.

Finally, in SL no. 1.410, a municipality questioned a court decision that prevented the transfer of amounts related to the collection of the *Imposto sobre Operações relativas à Circulação de Mercadorias e sobre Prestações de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação* (ICMS) from the municipality. Minister Luiz Fux granted the injunction accepting the allegation of risk of compromising efforts to fight the pandemic. STP #748 represented the other side of the coin, that is, the state asked for the suspension of the court's decision that had determined the transfer to the municipality of amounts relating to ICMS. In this case, Minister Luiz Fux rejected the request, with the same argument related to the pandemic used in SL no. 1.410.

## 7. Unconstitutionality of state laws in relation to parliamentary amendments

In two situations, the STF was asked to decide on the violation of constitutional precepts by state norms that established parliamentary amendment payments. In ADI no. 6.308, the state of Roraima postulated, cautiously, that the provisions of the State Constitution were restricted to the limits imposed by the Federal Constitution. The injunction request, as well as its grant by Minister Barroso, was based on the risk that parliamentary amendment payments that extrapolate constitutional limits would have on public management and planning already overstretched due to the pandemic. The injunction was subsequently endorsed by the plenary.

The second case, also related to parliamentary amendments, relates to *Suspensão de Segurança* (SS) no. 5.453. Here, the state of Rio Grande do Norte postulated the suspension of the measure granted by the Court of Justice that determined state legislator amendment payments. In May 2021, Minister Luiz Fux granted the request outright on grounds similar to those of ADI No. 6.308. The STF had previously expressed its opinion on the impossibility of state constitutions setting limits different from the Federal Constitution for payment of taxable parliamentary amendments. So, there would be no budget forecast for expenses resulting from the court decision. Furthermore, considering expenses resulting from the decision pose a risk to the public economy, especially due to the health crisis, it was deemed appropriate. The injunction was confirmed on the same grounds.

These cases here reflect situations in which the state resorted to the Judiciary to avoid encumbering public budgets with expenses arising from demands the legislature. In both instances, the court, motivated by the hierarchy of the Federal Constitution in relation to state constitutions, granted the demands. The emergency character in which the claims were granted was due, above all, to the risk to public management resulting from the pandemic.

## Final considerations

As noted in the introduction, the analysis of case law in this article was guided by the following questions: (i) Is the context of the pandemic (the health, economic, social and budgetary crisis it entailed) an exceptional circumstance that justifies certain case law rulings? (ii) Was the STF deferential to the reforms in budgetary rules arising from the Legislator? (iii) Were federative conflicts manifested in budget disputes in the STF and, if so, how were they resolved by the Court? Let us address each one.

In relation to the first matter, the decisions analyzed show that the pandemic was explicitly and frequently mentioned to justify the relaxation of financial obligations of public entities, especially regarding payment of debts contracted by states and municipalities with the Union and the payment of court-ordered debt payments. In the vast majority of cases, the pandemic and concerns about public finances were used as arguments to authorize the court to alter the dynamics and payment terms. In addition, Covid-19 also justified the relaxation of obligations arising from the LRF and LDO and restrictions related to spending on civil servants. It also played an important

role in decisions on the allocation of amounts arising from Operation *Lava Jato* and on the unconstitutionality of state laws relating to the payment of parliamentary amendments.

The STF was very sensitive to the impact and expected practical outcomes of their decisions about government and public policy. The pandemic was not just a context, but the core of the reasoning for their decisions. It should be remembered that Minister Fux, in an article written at the beginning of the pandemic, openly defended "crisis jurisprudence", which would admit a "flexibilization of the law" by judges in favor of a "consequentialist judicial solution".[44] Thus, the contextualized reasoning of the decisions suggest caution in terms of setting precedents for future cases.[45]

As for question two, three points are worth highlighting, particularly relating to debts and court-ordered debt payments. First, questions related to these issues were addressed and decided by the STF before legislation adapting relevant norms to the context of the pandemic (and even before the pandemic). Second, the decisions of the STF retain considerable force in terms of legislation produced by Congress. There are also indications that the actions of the STF, if not provoking legislative changes, at least became a major focus in Congress. Finally, after the passing of regulations emanating from the Legislature, the court reduced its protagonist role, limiting itself to recognizing the constitutionality of laws and applying new regulations. However, it is worth mentioning that some unforeseen requests for relief from subnational entities, expressly in LC no. 173/2020, continued to be provided. In the same way, after the enactment of EC no. 109/2021, we may note the relevance of various requests relating to the payment of court-ordered debt payments.

These findings shed light on the complex relationship between the STF and the Legislative. They are not always two isolated powers that decide in a sequential manner in which, first the Legislature takes a position, and then the Judiciary. There is often a more complex process of constitutional dialogue in which the Judiciary begins by deciding on a matter, the legislature produces legislation reacting to the actions of the judiciary, and legislation, in turn, may give rise to new legal disputes.[46]

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[44] FUX, Luiz. A lição de Santo Agostinho. *Folha de S.Paulo*, São Paulo, 10 abr. 2020. Available at: https://www1.folha.uol.com.br/opiniao/2020/04/a-licao-de-santo-agostinho.shtml. Accessed o: 28 set. 2022.

[45] Fernando Leal, O Supremo e a pandemia, op. cit.

[46] MENDES, Conrado Hübner. Not the last word, but dialogue — deliberative separation of powers 2. *Legisprudence*, v. 3, n. 2, p. 191-246, 2009. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911835. Accessed on: 28 Sep. 2022.

Regarding question three, we may conclude that the position of the STF of affirming the common and concurrent competence of federative entities in adopting measures to face Covid-19 was accompanied, in the period considered, by decisions that, for the most part, met demands of states and municipalities seeking financial relief. The exemption, based on the pandemic situation, occurred both at the expense of creditors of court-ordered debt payments and the federal government, whose tax burden increased. It should be noted that these decisions, and subsequent legislative measures, resulted in a budgetary impact of tens of billions of reais.[47]

Accordingly, the findings of this article seem to be in line with the conclusions of other studies that, looking at decisions in other areas, which point to the tendency of STF jurisprudence to guarantee resources and power of decision to subnational entities, to the detriment of the federal government, during the pandemic.[48] This article complements this diagnosis by pointing to jurisprudence that guarantees material conditions for subnational efforts to deal with the pandemic and its effects on society.

The findings here also corroborate the thesis developed in relation to pre-pandemic decisions that, in federal disputes regarding public finances, the STF tends to favor subnational entities at the expense of the Union. In summary, this article highlights the primary importance of the STF during the pandemic. The relevance is not only due to the centrality of the subjects and the volume of resources involved, but because Covid-19 was often the central (sometimes sole) basis for various decisions. Thus, we may better understand the responses of the Brazilian State to the pandemic, wherein public finances are crucial, and gain a broader perspective on the behavior of the STF during the period.

The study, we believe, suggests a further research topic. A key aspect is that part of the budget demands brought to court, although using Covid-19 a pretext, seem to reflect themes already present before the pandemic. In this sense, the discussions linked to the payment of court-ordered debt payments, already the subject of decisions in the STF, even before the pandemic, spark debates on consequentialism regarding the impact on the delivery of public services.[49] The

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[47] On fiscal impact estimates, and the difficulties of measuring precise amounts, see Federal Court of Accounts. Judgment 2.591/2021 (2021).

[48] Fernanda Leoni, O papel do Supremo Tribunal Federal na intermediação dos conflitos federativos no contexto da Covid-19, op. cit.; Andrea de Quadros Dantas, Maria Helena Martins Rocha Pedrosa and Alessandra Lopes da Silva Pereira, A pandemia de COVID-19 e os precedentes do STF sobre as competências constitucionais dos entes federativos, op. cit.

[49] See, for example: WANG, Daniel. Escassez de recursos, custos dos direitos e reserva do possível na jurisprudência do STF. *Revista Direito* GV, v. 4, n. 2, dez. 2008. Available at: https://www.scielo.br/j/rdgv/a/5ScHqNs657gS9gsNhYcmFbg/abstract/?lang=en. Accessed on: 12 Apr. 2022

topic has gained new contours in the current period, and future studies that compare pandemic jurisprudence with decisions before and after it can shed light on legal variations and continuities. The same can be said of the compatibility of hiring servers according to the rules of fiscal responsibility and debts between states and municipalities with the Union. If we look beyond the rhetoric employed in decisions, are in fact dealing with exceptional jurisprudence? Another fruitful research focus is investigation of the economic impact of decisions taken by the court — an issue that may be relevant, for example, to contemporary discussion on the financial health of state entities, allocation of resources, and reforms of public office and the organization of the state.

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