Dossiê Especial

Revista Juris Poiesis, Rio de Janeiro. v. 24, n. 35, 2021.
ISSN 2448-0517

NEW CHALLENGES FOR TRANSNATIONAL CIVIL AND COMMERCIAL LAW IN THE WAKE OF THE COVID-19 PANDEMIC.
RETHINKING THE ROLE OF LAW AND LEGAL INSTITUTIONS IN TIMES OF CRISIS

Emilie Ghio[1]
Edinburgh Napier University, United Kingdom

Ricardo Perlingeiro [2]
Estácio de Sá University, Brazil

This issue of the *Juris Poesis Journal* features extended abstracts of papers which have been presented at the roundtable entitled 'New Challenges for Transnational Civil and Commercial Law in the Wake of the COVID-19 Pandemic', hosted by the Law and Society Association (LSA) in Chicago from 26 to 30 May 2021. The roundtable was organized by Dr Emilie Ghio from Edinburgh Napier University (Scotland, UK) and Professor Ricardo Perlingeiro from Estacio de Sa University (Brazil). It gathered experts from different jurisdictions across the world and different academic fields who discussed the challenges caused by the COVID-19 crisis to their area of study and practice.

The roundtable is the fruit of an ongoing project which was granted the status of International Research Collaborative by the LSA in 2020 in partnership with the Fluminense Federal University Centre on Judiciary Sciences (Núcleo de Pesquisa e Extensão sobre Ciências do Poder Judiciário (NUPEJ) and the Research Center for Administrative Justice in Context at Estácio de Sá University (NUPEJAC). The project has an international inter-disciplinary, as well as comparative dimension, as it brings together social sciences experts from different jurisdictions around the world.

The objectives of the International Research Collaborative are to: (i) create a network of universities; (ii) deepen the law and social science scholarship on transnational civil and commercial law in the wake of pandemic; and (iii) inform policy and industry discussions taking place among law and social science researchers world-wide around the effects of Covid-19. The roundtable was its first deliverable.

The project was born from common concerns in the academic and industry community of the devastating impact of the COVID-19 crisis on their field of study and/or practice, which

[1] Lecturer in Law, Edinburgh Napier University. E.ghio@napier.ac.uk
[2] Professor at Estácio de Sá University/ MA and PhD Programs in Law (Rio de Janeiro). ricardo.perlingeiro@estacio.br

came at a time where the world was grappling with an unprecedented number of other challenges. Indeed, the word 'crisis' is not merely common anymore; it is everywhere, and crises are increasingly global. This is not surprising in an increasingly integrated, international economy, which confronts most countries with similar social, economic, political and environmental issues. As we navigate these connected set of crises – health crisis, economic crisis, ecological crisis, human crisis – it is clear that we are at an unprecedented moment of reckoning. Over the years, these crises have highlighted two opposing tendencies: (i) increased cooperation and a natural phenomenon of legal convergence as States find common solutions to common problems; or (ii) a preference for state-centric solutions, which prioritise domestic interests, a rejection of supranational standards and harmonisation efforts and a protection of domestic sovereignty.

Generally, the roundtable tackled several challenges concerning transnational civil and commercial law in the wake of the COVID-19 pandemic, which have brought to the fore the need to rethink the role of law and legal institutions in times of crisis. Discussions investigated how law has at times contributed to these crises, and at other times, helped in solving them. Specifically and within the lens of global crises, Dr Laura Cordes (Arizona State University, United States) spoke about how United States courts address standalone litigation in cross-border insolvency cases; Dr Emilie Ghio (Edinburgh Napier University, United Kingdom) focused on the role of legal harmonisation in times of crisis; Professor Rafael Mario Iorio Filho (Estacio de Sa University, Brazil) reflected on federalism in Brazil during the pandemic, Professor Ricardo Perlingeiro (Fluminense Federal University, Brazil) discussed international cooperation between judicial and administrative authorities; finally, Luisa Silva Schmidt (Estacio de Sa University, Brazil) questioned the economic recovery versus environmental cooperation divide. Ultimately, participants at the roundtable determined whether globalisation and legal integration have come to a halt and whether the world is witnessing a phenomenon of disintegration.

The uniqueness of the discussion came from the fact that the discussants hold different views on a same principle, depending on their area of expertise as well as their jurisdiction. This diversity is welcomed as it illustrates the richness, yet complexity, of the debate on global crises, including the COVID-19 pandemic. The diversity of views revealed that common problems are at times, provided with common solutions and at times, dealt with within the realm of national sovereignty. The extended abstracts featuring in this issue are the preliminary results of the research conducted by the LSA roundtable participants on the abovementioned topics.

Edinburgh/Niterói, 3-4 September 2021

HARMONISATION IN TIMES OF CRISIS

Emilie Ghio[3]
Edinburgh Napier University, United Kingdom

1. INTRODUCTION

Globalisation generally, and European integration more specifically, have led to the minimisation of legal diversity, which can result in transaction costs and the lack of level-playing field for cross-border actors. One of the prevailing methods to achieve such level-playing field is legal harmonisation.

In the European Union (EU) in particular, harmonisation serves as a key tool for the integration of the internal market. The rationale behind harmonisation is that disparities between national legal systems create obstacles to the proper functioning of the internal market by producing competitive advantages for some actors with cross-border activities and by deterring foreign investment. Further, the EU is more appealing to external economic actors and investors if they only need to tackle one unified regime, instead of twenty-eight (one supranational and twenty-seven national). It is thus not surprising that the harmonisation of several fields of law has been a priority of the European institutions since the creation of the EU.

A discussion of legal harmonisation is particularly relevant during a time when, in addition to the current health crisis brought about by the COVID-19 pandemic, European integration seems to have lost some of its shine and the EU is experiencing some integrational panic.[4] The last decade or so has unfolded in a rather dramatic way for the European Union, its market and citizens. In the words of Antonios Platsas:

> the word 'crisis' is not merely common; it is everywhere … Nationalisms and populisms are on the rise … The naivety of the late 1990s and the early 2000s has given its place to considerable scepticism … In 2015, the EU has been hit by the worst immigration crisis it has encountered in its history [whilst] in 2016, the United Kingdom's electorate voted … to withdraw from the EU, otherwise the leading example of harmonisation efforts in the world to date. And the question is: what has the legal harmonisation thesis done to thwart certain or all

[3] Lecturer in Law, Edinburgh Napier University, United Kingdom.
[4] Mai'a Davis Cross & Xinru Ma, *EU Crises and Integrational Panic: the Role of the Media,* 22 JOURNAL OF EUROPEAN PUBLIC POLICY 1053, 1056 (2015).

> of the above? Or, even more provocatively, is this the right time for one to engage oneself with another legal harmonisation discussion?[5]

To answer Platsas' question, it is exactly the right time to revisit the question of harmonisation. Underlying the various crises confronting the EU lies a problem very much intertwined with the matter of harmonisation, since European issues such as the legitimacy and validity of the EU, particularly salient in times of crises, 'can probably be best identified by analysing the objections against private law harmonisation.'[6]

2. HARMONISATION AND CRISES

Legal harmonisation has been confronted with several obstacles over the years, increasingly so in times of crisis where the protection of national sovereignty and legal cultures, as well as an overall rise in Euroscepticism, prioritising state-centric solutions to common issues have become more present than ever before. Eurosceptic tensions, which culminated with 'Brexit', provide clear evidence that the 'seductive appeal of harmonisation is today tarnished [and its] role is increasingly contested.'[71] Legal harmonisation, therefore, has inherent challenges, and EU institutions are under great pressure to adapt and overcome these challenges.

Firstly, even in an era of accelerated globalisation, legal systems remain deeply rooted within the structure of the nation-state. The laws and regulations that individuals and undertakings deal with, including those inspired or promoted by supranational institutions, are usually drafted by domestic legislatures. Distinctive national legal cultures are at the heart of law schools' curricula and popular culture, as well as domestic legislatures and government bodies. They are therefore entrenched within domestic legal systems and exhibited in domestic legal texts.

Secondly, harmonisation is increasingly contested in the EU. During peaceful times, legal harmonisation is easier to develop. During these periods, not only are European policies established under lesser time constraints, but domestic political timelines – such as electoral cycles – are known at European level too. This allows the European institutions to strategically plan the development of harmonisation policies in advance, through white or green papers or

[5] ANTONIOS PLATSAS, THE HARMONISATION OF NATIONAL LEGAL SYSTEMS. STRATEGIC MODELS AND FACTORS vii-viii (2017).
[6] Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, 3 EUROPEAN LAW JOURNAL 378, 385 (1997).
[7] Stephen Weatherill, *Why Harmonise, in* 2 EU LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER 31 (Takis Tridimas & Paola Nebbia eds, 2004).

the Commission's work programmes. The implementation of these policies is also foreseeable and veto points can be anticipated. In times of crisis, these timelines change because domestic uncertainty increases and standard operating procedures can rarely be applied.

A publicly perceived threat – in the case of harmonisation, a threat to national sovereignty and legal culture for example – increases the salience of an issue and leads to an increased likelihood of domestic actors opposing the harmonisation measure. In other words, harmonisation policies and debates become more resistance-prone during times of high politicisation.

Over the years, crises facing the EU have revealed two opposite tendencies, which are not necessarily mutually exclusive. Firstly, a preference for state-centric solutions which prioritise domestic interests, a rejection of supranational standards and overall harmonisation efforts with a view to protecting domestic sovereignty (such as in the global economic crisis); and secondly, increased cooperation and a natural phenomenon of legal convergence as States find common solutions to common problems (such as in the COVID-19 crisis). These phenomena are particularly visible within the field of European insolvency law.

3. CASE STUDY: HARMONISATION AND CRISES IN EUROPEAN INSOLVENCY LAW

Insolvency systems in the EU have been closely linked to nation-building processes and have been perceived as a sensitive area of national diversity, with the responsibility at the European level being mainly focused on cross-border procedural 388coordination. However, since the global economic and financial crisis of the late 2000s, the harmonisation agenda in this field has intensified and in the last ten years alone, the EU has been particularly prolific. Harmonisation measures of note include:

(i) the European Commission Recommendation on a New Approach to Business Failure and insolvency 2014;[8]
(ii) the European Insolvency Regulation Recast 2015;[9]
(iii) the Directive on Preventive Restructuring Frameworks 2019.[10]

Most of these harmonisation instruments were passed as a reaction to a crisis.

[8] Commission Recommendation on a new approach to business failure and insolvency, COM(2014) 1500 final.
[9] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
[10] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

3.1 Example n. 1: the global economic and financial crisis of 2007-2008

In the midst of the global economic crisis of the late 2000s, the EU saw an average of 200,000 firms going insolvent per year in the EU.[11] As early as 2012, the Commission published a Communication stating the urgent need to harmonise insolvency laws across the Union in order to promote a more business-friendly environment for debtors in financial distress. Specifically, it introduced the idea of harmonising specific elements of insolvency law, including rules on second chance for honest entrepreneurs and rules on preventive restructuring.[12] The Communication was expanded on and in 2014, the Commission published its Recommendation on a New Approach to Business Failure and Insolvency (ECR 2014). The Recommendation's aim was to (i) promote a rescue and recovery culture across the EU[13] and (ii) create a level playing field of national insolvency laws, which would, in turn, lead to improved access to credit and foreign investment.[14]

The ECR 2014 is an interesting instrument to study and its nature is of particular relevance for the current discussion. Indeed, despite championing further harmonisation, not only did the Commission opt for a soft law instrument, it also opted for a minimum harmonisation approach.[15] As a result of the soft law nature of the instrument, Member States were merely *invited* to implement the ECR 2014 in their national regimes. Their inclination to do so, however, 'has not been strong (to put it mildly)'[16] and an evaluation conducted by the Commission regarding compliance with the Recommendation revealed that only two Member States – Slovenia and Hungary – introduced reforms that resulted in legislation complying with the Recommendation.[17] Interestingly however, during that same period, while this top-down harmonisation initiative was rejected, States such as Belgium, Denmark, France, Germany, Greece, Italy, Poland, Portugal and Spain, to name just a few, substantially modernised their business failure policies to tackle the rising number of insolvency cases due to the economic and financial crisis.

---

[11] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A new European approach to business failure and insolvency, COM(2012) 742 final, p.2.
[12] *Id*. at pp. 2-4.
[13] Commission Recommendation on a new approach to business failure and insolvency, COM(2014) 1500 final, Recital 1.
[14] *Id*., at Recitals 4, 8 and 11.
[15] *Id*., at Article 1(3).
[16] Horst Eidenmuller & Kirstin Van Zwieten, *Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency* 35 (European Corporate Governance Institute, Law Working Paper No. 301/2015, 2015), https://ssrn.com/abstract=2662213 .
[17] Directorate-General of Justice and Consumers of the European Commission, *Evaluation of the implementation of the Recommendation of 12 March 2014 on a New Approach to Business Failure and Insolvency* (Sept. 30, 2015).

The result of these reforms is striking. Although national insolvency regimes in the EU continue to show differences in substance, the aforementioned revisions have introduced greater legal similarity among the Member States' legislation, with an increasing number of domestic systems exhibiting common features such as cram-down mechanisms, debtor-in-possession regimes, preventive restructuring options and protection for new financing.

3.2. Example n. 2: the health crisis due to COVID-19

The COVID-19 crisis, which hit the world with full force in 2020 paralysed the world economy, forcing many countries around the globe to take emergency measures. Differing emergency responses across countries to the crisis uncovered tensions between global economic interdependence and the tendency for nation-state governance during the crisis. National governments adopted strategies and laws to control or mitigate the economically and financially destructive effects of the pandemic at a national level, with no preliminary co-ordination at the European or international level. This was mostly due to the fact that existing instruments did not provide the European institutions with the adequate powers to issue delegated or implementing acts[18] in the context of a pandemic.[19] In fact, adoption of new legal acts by the EU legislator – treaties, regulations, directives and decisions – is. Recommendations and opinions may be adopted more quickly, but they are not be binding on the Member States. As a consequence, the EU legislator had to leave the immediate mitigation of the crisis effects to national governments.[20] In the case of insolvency law, the EU instruments which existed at the

[18] For instance, the Directive on Preventive Restructuring 2019 provides for implementing powers and adoption of implementing acts for the Commission only regarding a data communication form (Recital 97 and Articles 29(7) and 30).

[19] Criticisms about governments' responses to the COVID-19 crisis in the area of insolvency law are not limited to the EU. See for example in the US context: Anthony J. Casey, *Bankruptcy & Bailouts; Subsidies & Stimulus: The Government Toolset for Responding to Market Distress* (European Corporate Governance Institute, Law Working Paper No. 578/2021, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783422. The choice of tools in the current crisis has been suboptimal. The government has yet to fully address the systemic economic challenges posed by COVID-19. The appropriate response requires further economic stimulus for small businesses rather than bankruptcy reform. The economic hardship is real and growing, and while the day of reckoning likely won't arrive as a wave of Chapter 11 bankruptcy filings, it will materialize in some form in the absence of appropriate systemic economic relief.' See also Diane Dick, *Bankruptcy, Bailout, or Bust: Early Corporate Responses to the Business and Financial Challenges of COVID-19*, 40 BANKRUPTCY LAW LETTER 1 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765553.

[20] While Article 107(1) TFEU prohibits aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, such aid is, however, compatible with the internal market if it helps to make good the damage caused by natural disasters or exceptional occurrences, or if it is to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

time COVID-19 hit were of little use for companies, and individual countries had to act swiftly and independently to support business and limit the damages caused by the economic crisis.

At the onset of the COVID-19 crisis, Member States' preferred national solutions over common multilateral ones to control the spread of the virus. Although not prompted by the EU institutions to do so, Member States ended up resorting to similar strategies when it came to their insolvency regimes. They either tweaked existing insolvency measures (e.g. Denmark, France, Germany, Italy, UK), introduced new instruments in their restructuring toolkit (e.g. Germany (StaRUG), the Netherlands (WHOA), UK (CIGA)) and/or adopted non-insolvency relief packages (e.g. Denmark, France, Germany, Italy, the Netherlands, UK).[21]

This so-called phenomenon of 'copycat coronavirus policies'[22] was the result of regulatory emulation, which occurred spontaneously, with limited direct impetus from the EU.

4. LESSONS FOR HARMONISATION

Crises provide useful impetuses to rethink old debates and concepts. The global economic and financial crisis of the late 2000s as well as the COVID-19 pandemic have called into question the foundational and theoretical basis on which the EU institution have built their harmonisation efforts. These crises are thus an opportunity to rethink the concept of legal harmonisation and the role of the EU institutions in this process.

Following several studies conducted on harmonisation in the EU, I argue that there is a need to rethink the EU's harmonisation language and process. I support Reinhard Bork's statement that:

> [h]armonisation is declared to be a necessary and meaningful instrument for improving the common market and this cannot be doubted. However, if harmonisation is part of the day-to-day work of the European Union, shouldn't there be an administrative department within the European Commission which supports harmonisation efforts on a more general level? None of this is apparent. The impression is that there is no theoretical framework for harmonisation at all […]. A comprehensive theory of legal harmonisation has not yet been developed and it is still something to strive for […] This is a lacuna which must be addressed before harmonisation of insolvency laws can be pursued in earnest.[23]

[21] Emilie Ghio et al., *Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic, in* INTERNATIONAL INSOLVENCY REVIEW (forthcoming, Oct. 2021).
[22] Ivan Krastev, *Copycat Coronavirus Policies Will Soon Come To An End*, FINANCIAL TIMES, Apr. 7, 2020, https://www.ft.com/content/bd12b3ca-77e9-11ea-bd25-7fd923850377.
[23] Reinhard Bork, *Preventive Restructuring Frameworks: A 'Comedy of Errors' or 'All's Well That Ends Well'?* 14 INTERNATIONAL CORPORATE RESCUE 417, 425 (2017).

What the above discussion of harmonisation and crises has revealed is that crises create similar problems for EU Member States and that governmental reactions tend to share common patterns, strategies and legal solutions. Therefore, what the study of harmonisation during crises ultimately reveals is that harmonisation can occur even without the involvement of the EU. During the global financial and economic crisis of the late 2000s, while the ECR 2014 was poorly implemented by Member States, they nonetheless mirrored one another's rescue regime; during the COVID-19 pandemic, while the EU was absent from the regulatory governance of insolvency law, Member States have nonetheless adopted similar strategies.

What this shows is that legal harmonisation across the EU should not merely be understood as top-down measures initiated by the EU institutions. Importantly, the crises discussed above have revealed the inadequacy of top-down harmonisation mechanisms as the *only* way to promote integration between Member States.

The reality of the legal harmonisation process reflects a dual approach to increasing legal similarity across the EU. This increased legal similarity can happen via EU-driven initiatives, *i.e.* top-down harmonisation, but also, via Member States-driven initiatives, *i.e.* bottom-up harmonisation. In the latter case, the coming together of legal systems can occur through different mechanisms, specifically convergence, exhibited by the similarity in the state-centric solutions adopted by countries in the wake of the COVID-19 pandemic. Convergence of laws has been defined as an 'affiliated idea to harmonisation of laws [,] a process as well as a result to be achieved[;] the process of the coming together of different systems, albeit in certain areas of law.'[24] Convergence is ultimately a process akin to policy diffusion, where policies are adopted at State level due to processes of competition, cooperation or learning between different countries.

This is important as, uncovering the role of Member States as drivers of European harmonisation, contributes to the demystification that EU laws are not merely passed in Brussels, behind closed doors, but that rather, the EU is an arena of dialectic harmonisation.[25]

[24] PLATSAS, *supra* note 3, at 7.
[25] For an in-depth discussion of these issues, see Ghio et al, *supra* note 19.

INTERNATIONAL JUDICIAL COOPERATION IN RESPONSE TO TRANSNATIONAL CRISES[26]

Ricardo Perlingeiro[27]
Estácio de Sá University, Brazil

1. INTRODUCTION

This essay mainly focuses on global crises that give rise to conflicts that cross borders and therefore call on States to perfect their administrative and judicial tools of international cooperation to ensure that the law is applied and rights are protected in cross-border areas.

I intend to discuss this topic in three sections: 1. What contemporary international judicial cooperation is like; 2. The extent to which international judicial cooperation depends on harmonization and uniformity among jurisdictions; 3. Examples of how the 2007-2009 financial crisis and multifaceted crisis caused by the Covid-19 pandemic increased international judicial cooperation and how they managed to stimulate convergence among jurisdictions.

2. WHAT IS CONTEMPORARY INTERNATIONAL JUDICIAL COOPERATION LIKE?

This paper discusses international cooperation as a practice between courts and administrative bodies of different States, with the objective of facilitating the effectiveness of public powers that, due to the transnational nature of the interests involved, need to go beyond the borders of a single State.

To understand the scope of the expression "international judicial cooperation", we shall use the term "public powers" to mean the dispute-resolution authorities powers intended to protect rights typical of the Judiciary and also assigned to certain administrative authorities, as well as executive administrative powers of law enforcement, including powers of criminal prosecution.

Examples of international judicial cooperation in civil, commercial, administrative and criminal matters: communications and service of process; exchange of information about

[26] A special thank you to Emilie Ghio, Lecturer in Law at Edinburgh Napier University, for her helpful comments and feedback.
[27] Professor at Estácio de Sá University/ MA and PhD Programs in Law (Rio de Janeiro). ricardo.perlingeiro@estacio.br

documents and proceedings; evidence-taking; joint criminal investigation between States; recognition and implementation of foreign decisions; cross-border insolvency of companies and financial institutions; judicial measures of interim relief; and extradition.

3. TO WHAT EXTENT IS INTERNATIONAL JUDICIAL COOPERATION FACILITATED BY HARMONIZATION OR UNIFORMITY AMONG JURISDICTIONS?

For Ghio, harmonization is an umbrella term encompassing a variety of different regulatory mechanisms, including approximation (top-down, i.e. it starts at the supranational level and progresses down, to the level of States) and convergence (bottom-up). The latter is a spontaneous phenomenon in which States borrow standards, principles and rules from other jurisdictions, without abandoning their national concepts. Importantly, neither convergence nor approximation necessarily result in legal uniformity but rather, aim at achieving increased legal similarity.[28]

In this context, harmonization among national jurisdictions in matters of international judicial cooperation will be analyzed from two different perspectives. Firstly, the topic will be examined from the point of view of substantive aspects of cooperation, that is to say, the content of the measures of cooperation, and then it will be examined from standpoint of the procedural aspects of the measures of cooperation.

International judicial cooperation makes it possible for powers, duties, rights and obligations instituted under the norms of one jurisdiction to be effective in another national jurisdiction.

Thus, the recognition by one State of foreign judicial decisions and claims related to the rights that are provided for only in another State may serve as a premise for future convergence, because it leads States to become familiar with the laws, rights, obligations and duties of other States.

[28] This understanding is based on the etymological and literal meanings of the words. See Martin Boodman, *The Myth of Harmonization of Laws*, 39 AM. J. COMP. L. 699 (1991). See also the definition of "harmonization" in the Cambridge dictionary ("the act of making different people, plans, situations, etc. suitable for each other" and "the act of making systems or laws similar in different companies, countries, etc. so that they can work together more easily"); see the definition of "approximation" in the Merriam-Webster dictionary ("a process of drawing together" which results in "a thing that is similar to something else, but is not exactly the same"); see the definition of convergence in the Cambridge dictionary ("[the] fact that two or more things, ideas, etc. become similar or come together") (emphases added). See generally, EMILIE GHIO, RETHINKING HARMONISATION. LESSONS FROM EUROPEAN INSOLVENCY LAW (forthcoming 2022).

Regarding international judicial cooperation procedures, however, it is possible to identify convergence, uniformity or approximation among national jurisdictions, according to the national, international or supranational nature of the normative sources of the cooperation procedures.

It should be pointed out that procedures of international judicial cooperation enshrined in national norms are guided by legal values and principles that form part of fundamental human duties. One State, by cooperating with another, will be promoting the fundamental rights of its own Constitution, although the foreign rights and decisions do not fully coincide with its own laws.

This being the case, international judicial cooperation is a *prima facie* duty to be honored by States, and refusing to cooperate must be an exceptional, proportional measure based on the need to respect certain limits imposed by the international public policy (*ordre public*) of the State asked to cooperate.

What motivates or limits international judicial cooperation, however, are fundamental legal values and principles that depend on a *convergent interpretation* between cooperating States. Convergence is essential in international judicial cooperation when based on norms of national origin.

Indeed, unless States apply the common principles that guide international judicial cooperation in a convergent manner, such cooperation will have little chance of being realized if based solely on national norms. Model laws on this topic, such as the UNCITRAL Model Law on Cross-Border Insolvency and the Model Code of Interjurisdictional Cooperation for Ibero-America, strengthen the mission of convergence among national legal systems of international judicial cooperation.

Without such convergence, the alternative is to go back to the origins of international judicial cooperation and promote express reciprocity, in other words, international judicial cooperation conditional on a specific pre-existing treaty among States who intend to collaborate with one another. These days, there are countless bilateral and even multilateral treaties in this subject area, as shown by the conventions of Mercosul, Interamerican Specialized Conferences on Private International Law, the Hague Conference on Private International Law (HCCH) and the United Nations Organization (UN).

In this particular scenario, where the cooperation procedures are based on a treaty, the objective is not convergence or approximation but rather uniformization entre among the jurisdictions of the cooperating States.

Finally, within the European Union, Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and Regulation 848/2015 on Insolvency Proceedings are examples of supranational rules concerning procedures for international judicial cooperation.

As States commit to such regulations, they will tend to incorporate European procedural rules of international judicial cooperation into their jurisdictions. This is typically a phenomenon of approximation among jurisdictions.

4. EXAMPLES OF HOW CRISES INTENSIFY INTERNATIONAL JUDICIAL COOPERATION

4.1. The 2007-2009 financial crisis

The 2007-2009 financial crisis revealed the lack of legal instruments necessary for States to promote a coordinated action on the transnational insolvency of financial institutions. Applying the rules of transnational insolvency to financial institutions is not always a good choice, although such procedures may be a feasible alternative these days.

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, clearly resulted from the 2007-2009 financial crisis.

With the advent of the 2007-2009 financial crisis, international organizations carried out studies on the convergence of national jurisdictions with respect to the insolvency of financial institutions, including the Basel Committee on Banking Supervision,[29] the Financial Stability Council,[30] the United Nations Commission on International Trade Law[31] and the International Monetary Fund.[32]

In a nutshell, it may be said that the 2007-2009 crisis promoted a consensus in the international legal community that it is necessary to adopt common principles on the

29 Basel Committee on Banking Supervision [BCBS], *Report and Recommendations of the Cross-border Bank Resolution Group*, https://www.bis.org/publ/bcbs169.pdf.
30 Financial Stability Board [FSB], *Key attributes of effective resolution regimes for financial institutions* (Oct. 2011), https://www.fsb.org/wp-content/uploads/r_111104cc.pdf.
31 Recent developments concerning the global and regional initiatives regarding the insolvency of large and complex financial institutions.
32 INTERNATIONAL MONETARY FUND [IMF], RESOLUTION OF CROSS-BORDER BANKS — A PROPOSED FRAMEWORK FOR ENHANCED COORDINATION, 2010 POLICY PAPERS, no. 63, at. 1 (2010), https://www.elibrary.imf.org/view/journals/007/2010/063/article-A001-en.xml.

transnational insolvency of financial institutions and the regulation thereof through convergent national norms.

Moreover, it is important to point out that the conclusions expressed on this topic by international organizations are leading to new guidelines for contemporary international judicial cooperation in general, and not just for the transnational insolvency of financial institutions.

For example, Recommendation 4 of the Basel Committee on Banking Supervision reads as follows: "Cross-border effects on national decisions: To promote better coordination among national authorities in cross-border resolutions, national authorities should consider the development of procedures to facilitate the mutual recognition of crisis management and resolution proceedings and/or measures."

In fact, it is an extraordinary advance for contemporary international judicial cooperation to admit that techniques involving the mutual recognition of foreign administrative and judicial decisions around the world are essential instead of the current view that mutual recognition is a privilege of States that have previously signed treaties with each other or that belong to certain communities such as the European Union.

4.2 The multifaceted crisis caused by the Covid-19 pandemic

The multifaceted crisis caused by the Covid-19 pandemic is a fine example of the important role to be performed by international administrative and judicial cooperation in the various spheres of public and private law.

International organizations promoting the harmonization of international systems of judicial cooperation, such as the HCCH, the UN and the European Union, are developing studies, principles and guidelines intended to uniformize the interpretation and application of new measures of international judicial cooperation in the context of the Covid-19 Pandemic.

In the words of the Permanent Bureau of the HCCH, [33]

> With international borders closed and containment measures in place, cross-border movement of people and goods is subject to unprecedented restrictions. In many jurisdictions, children and families remain stranded. Access to government services remains limited. Legal procedures have been delayed or suspended. Flows of goods have been reduced or restricted and businesses left

33 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], HCCH COVID-19 TOOLKIT 1 (2020), https://assets.hcch.net/docs/538fa32a-3fc8-4aba-8871-7a1175c0868d.pdf.

> unable to fulfil contractual obligations. However, even as we witness a surge in the use of technology to assist in these uncertain times, the fact remains that questions of private international law abound.
>
> Various HCCH Conventions and their supporting documentation provide valuable assistance as we navigate this crisis together and adjust to the new reality in which we find ourselves – a reality which will undoubtedly continue to have an impact on our everyday lives long after COVID-19.

In this context, the HCCH has developed a COVID-19 Pandemic Toolkit, covering the following topics.:[34]

> International Child Protection and Family Matters:
> Child Abduction and Child Protection;
> Child Support and Family Maintenance;
> Intercountry Adoption.
>
> International Legal Cooperation, Litigation and Dispute Resolution:
> Apostilles (authentication of public documents);
> Service of Documents and Taking of Evidence;
> International Commercial Contracts.

Here is one of the conclusions of the "Report on the meeting of the Working Group on International Cooperation on the Impact of the Corona Virus (COVID-19) on International cooperation in criminal matters: a one-year overview" held in Vienna on 25 and 26 March 2021 by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime.

> The report referred to the impact of the COVID-19 pandemic on the transformation of the *modus operandi* of organized criminal groups. It stressed that the pandemic resulted in a significant increase in crimes such as trafficking in fake and counterfeit medical products, corruption, drug trafficking and cybercrime. In addition, the report observed that one sector of judicial cooperation that had been affected by the pandemic, in particular by flight cancellations and other limitations resulting from it, was that of the surrender of persons sought in extradition proceedings, as well as proceedings relating to the execution of European arrest warrants. It highlighted that, in general, the feasibility of any transfer by air needed to be assessed on a case-by-case basis and often depended on ad hoc flights and the practical arrangements in place.[35]

34 HCCH, *supra* note 8, at 2.
35 Conference of the Parties to the United Nations Convention against Transnational Organized Crime. *Report on the meeting of the Working Group on International Cooperation*, U.N. Doc. CTOC/COP/WG.3/2021/3 (Apr. 8, 2021) at 6, https://www.unodc.org/documents/treaties/International_Cooperation_2021/Report/V2102254.pdf.

Within the European Union, regarding digital technologies, the European Commission has initiated the process of creating a norm that will boost the efficiency of international judicial cooperation in cross-border processes in the EU and make it more resistant to crises such as the COVID-19 pandemic. The public consulting phase of this legislative phase ended on May 11, 2021.[36]

In fact, self-isolation and travel restrictions have undermined conventional face-to-face legal services in court and accelerated the implementation of remote audiovisual communication processes worldwide, which has increased the frequency of access to [virtual] courts. As a result, digital electronic international judicial cooperation proceedings are no longer the exception but have become the rule.

5 LESSONS TO BE DRAWN FROM THE GLOBAL CRISES FOR INTERNATIONAL JUDICIAL COOPERATION

The 2007-2009 financial crisis and the multifaceted crisis caused by the Covid-19 Pandemic made it urgently necessary for international entities to publish studies and recommendations capable of promoting convergence among national jurisdictions of regarding cooperation measures imposed by the new situations of cross-border conflict.

In fact, the international community's efforts to reach a consensus on new measures of international judicial cooperation attest to the importance of its role in dealing with crises.

Yet not only has international judicial cooperation displayed leadership in resolving conflicts triggered by global crises but incredible developments have been achieved in the general principles of international judicial cooperation, such as the mutual recognition of decisions, increasing its effectiveness.

In times of crisis, urgent solutions are indispensable. International judicial cooperation could be made more effective by overcoming the old dogma that such cooperation is only possible between States who have established pre-existing treaties to that purpose.

36 Proposal for a regulation: Modernising judicial cooperation between EU countries – use of digital technology, Ref. Ares(2021)172677 (Jan. 8, 2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12685-Modernising-judicial-cooperation-between-EU-countries-use-of-digital-technology_en.

List of Abreviations

EU - European Union
HCCH - Hague Conference on Private International Law
UN - United Nations Organization
UNCITRAL - United Nations Commission on International Trade Law

ALONE OR TOGETHER?
HOW U.S. COURTS ADDRESS STANDALONE LITIGATION IN CROSS-BORDER CASES

Laura N. Coordes
Arizona State University, United States

The world has long understood that a company's financial crisis can cross borders. This short essay explores how U.S. bankruptcy law presents opportunities for both convergence and divergence in a time of financial crisis.

To address the problem of what to do when a company with assets in multiple countries files for bankruptcy in one of those countries, the United Nations Commission on International Trade Law (UNCITRAL) in 1997 announced the Model Law on Cross-Border Insolvency.[37] UNCITRAL created the Model Law with the goal of harmonizing the administration of insolvency cases involving parties from two or more countries.[38] Thus, the Model Law's overarching purpose is to authorize and encourage cooperation and coordination among different jurisdictions dealing with a company's insolvency.[39] It does not seek to make insolvency law uniform across jurisdictions.[40] The Model Law is thus a law of cooperation rather than a law of substantive harmonization.

The United States implemented the Model Law through Chapter 15 of the United States Bankruptcy Code. Chapter 15 provides a process through which a foreign representative may file a case in the U.S. that is ancillary to another, primary proceeding, brought in the debtor's home country or another foreign jurisdiction.[41] Broadly speaking, the debtor first commences a proceeding in another jurisdiction.[42] The debtor's foreign representative then commences an ancillary, Chapter 15 case in the U.S.[43] Using the processes outlined in Chapter 15, the U.S.

---

[37] *Chapter 15 of the U.S. Bankruptcy Code: Ancillary and Cross-Border Cases*, CONG. RES. SERV. at 8 (July 14, 2006), https://www.everycrsreport.com/files/20060714_RL33562_52b8a63bfefc3c2fb422f4feb750c04a9d072bca.pdf ("UNCITRAL approved and adopted the Model Law on May 30, 1997.").
[38] *Id*. (noting UNCITRAL's objective of "providing a prototype for procedural cooperation between national governments").
[39] *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, U.N. COMMISSION ON INT'L TRADE L. (May 30, 1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.
[40] *Id.*
[41] *Chapter 15 – Bankruptcy Basics*, U.S. COURTS (n.d), https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics.
[42] *Id*.
[43] *Id*.

bankruptcy court may "recognize" the primary, foreign proceeding, thereby granting the foreign representative access to U.S. courts.[44]

Consistent with the goals of the Model Law, Chapter 15 contains several provisions promoting cooperation between U.S. and foreign courts and parties. For example, §1525 requires U.S. courts to cooperate with foreign courts and foreign representatives "to the maximum extent possible," either directly or through a trustee.[45] A debtor or trustee must similarly cooperate "to the maximum extent possible"[46] with foreign courts and foreign representatives; such cooperation may be implemented "by any appropriate means."[47] In this way, Chapter 15 both mandates and encourages cooperation among cross-border parties and courts, using multiple mechanisms, thereby fulfilling the Model Law's broader purpose of promoting cross-border cooperation and comity.[48]

A cross-border financial crisis thus creates opportunities for cooperation. But it may also create opportunities for manipulation. Specifically, parties may attempt to use a Chapter 15 case as a way to bootstrap U.S. court jurisdiction to address their own litigation objectives. One way to do this is to try to get a case heard in the U.S. rather than in a foreign jurisdiction. For example, in *In re Sibaham Ltd.*, a group of plaintiffs attempted to commence a class action adversary proceeding against a U.K. debtor in U.S. court, using the U.S. bankruptcy court's Chapter 15 recognition order (which granted recognition of the U.K. foreign proceeding) as the basis for U.S. jurisdiction.[49] The Bankruptcy Court for the Western District of North Carolina quickly caught on and dismissed this bootstrapping attempt, holding that the U.K. debtor and its creditors would be prejudiced if the plaintiffs proceeded with a class action in the U.S. rather than the U.K., where the debtor's main insolvency proceeding was pending.[50]

Similarly, in a case predating Chapter 15, the District Court for the Southern District of New York held in *In re Marconi PLC* that former §304, a predecessor of sorts to Chapter 15, does not permit domestic creditors to file an adversary proceeding in an ancillary proceeding in order to establish claims against a foreign debtor.[51] The court reasoned that the whole purpose of the statute was to centralize proceedings in one court.[52] In addition, in *JP Morgan Chase*

[44] *Id.*
[45] 11 U.S.C. §1525(a) (2005).
[46] 11 U.S.C. §1526(a) (2005).
[47] 11 U.S.C. §1527 (2005).
[48] *Chapter 15 – Bankruptcy Basics*, *supra* note 5.
[49] *In re* Sibaham Limited, Case No. 19-31537, 2020 WL 2731870 (Bankr. W.D.N.C. May 4, 2020).
[50] *Id.* at *2.
[51] *In re* Marconi PLC, 363 B.R. 361 (S.D.N.Y. 2007).
[52] *Id.* at 365.

Bank v. Altos Hornos de Mexico, S.A. de C.V., the Second Circuit articulated a general policy that "U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding."[53]

Not all attempts to centralize litigation in the U.S. receive the same treatment, however. In *In re British American Ins. Co. Ltd.*, the Bankruptcy Court for the Southern District of Florida held that a foreign debtor with a pending insolvency proceeding in Saint Vincent and the Grenadines had standing to bring a claim against its former directors for breach of fiduciary duty in U.S. court.[54] The court further held that it need not authorize the debtor or its representatives to file the action in the U.S., as the Bankruptcy Code already provided the debtor with this power.[55]

Other cases involve parties using Chapter 15 to transfer litigation from one U.S. court to another. In particular, a party may be trying to get its case heard in U.S. federal court, rather than U.S. state court. In *Firefighters' Retirement System v. Citgo Group Ltd.*, the Fifth Circuit held that a state court action by a group of pension funds was sufficiently related to the Cayman Islands debtor's Chapter 15 case, such that a U.S. district court, rather than a U.S. state court, had to hear the case.[56] The court reached this decision even though the debtor did not file for Chapter 15 until after the pension funds had attempted to remove the litigation to district court.[57]

Thus, the answer to the question of whether non-debtor parties are permitted to use Chapter 15 cases, which are generally ancillary to a primary proceeding in a different country, to pursue their own litigation strategies in the U.S. is, "it depends." Specifically, the question of whether ancillary proceedings should be allowed may hinge on both the plaintiff's identity and the type of action at issue.[58] Debtors, or their foreign representatives, seem to have better luck at pursuing U.S.-based litigation than creditors or others seeking to assert claims against the debtor.[59] This pattern seems to illustrate a deference to debtors, or at least a deference to the perception that the goal of the foreign main proceeding is to assist the debtor. Likewise, proceedings dealing with claims determinations and allowance are more likely to be directed to

[53] JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 424 (2d Cir. 2005).
[54] *In re* British American Ins. Co. Ltd., 488 B.R. 205 (Bankr. S.D. Fla. 2013).
[55] *Id.* at 235 (holding that plaintiffs could pursue the claim under §1509(f)).
[56] Firefighters' Retirement System v. Citco Group Ltd., 796 F.3d 520 (5th Cir. 2015).
[57] *Id.* at 523.
[58] George W. Shuster, Jr. & Benjamin W. Loveland, *Keeping Chapter 15 Ancillary*, 40-MAR AM. BANKR. INST. J. 32 (Mar. 2021).
[59] *Id.* at 50 ("U.S. courts are more likely to allow standalone actions filed by the foreign representatives for a chapter 15 foreign debtor than to allow stand-alone actions filed *against* a chapter 15 foreign debtor.") (emphasis in original).

the foreign main proceeding rather than being allowed to go forward as a standalone action in the U.S.[60] This trend seems to reflect the policy that claims determination is a central part of the bankruptcy process.

Taken as a whole, the decisions show that although U.S. courts do sometimes allow standalone litigation to proceed, the judges deciding these cases are generally taking both bankruptcy policy and Chapter 15's broader, cooperative purpose into account when doing so. The spirit of cooperation appears strongest—and a Chapter 15 case consequently appears most successful—when a foreign representative uses it as a tool in furtherance of the foreign main proceeding's goals.[61] By contrast, when a non-debtor uses Chapter 15 to pursue its own litigation advantage, Chapter 15's purposes may be thwarted.[62] Thus, a concern remains that if standalone cases are permitted, the procedural harmonization provided by Chapter 15 and the Model Law may be threatened.

Two additional points are worth making. First, even if Chapter 15 provides the necessary tools for cooperation, those tools are only available if debtors choose to use Chapter 15. Many of the Chapter 15 cases decided to date show courts carefully and diplomatically working through the issues at hand while keeping cooperative principles in mind.[63] However, the Bankruptcy Code's generous eligibility provisions could throw a wrench into the frequency of ancillary cases in the U.S.[64] Because it is very easy for a foreign company to be eligible for Chapters 7 or 11, foreign debtors may—and often do—choose to file a main (Chapter 7 or 11) proceeding in the U.S. instead of a Chapter 15 ancillary proceeding.[65] When a foreign debtor chooses to file for Chapter 7 or Chapter 11, it is necessarily choosing U.S. law and potentially lessening the likelihood of cooperation and comity. Of course, it is possible for judges in Chapter 7 and 11 cases to work across borders;[66] however, these chapters of the Bankruptcy

[60] *Id*.
[61] *Id.* ("Chapter 15 remains an ancillary tool most successfully used by foreign representatives in furtherance of a foreign main proceeding.").
[62] *Id*.
[63] *See, e.g.*, Bill Rochelle, *New York Judge Declines (for Now) to Enforce an Indonesian Plan in the U.S.*, ABI.ORG (Apr. 22, 2021), https://www.abi.org/newsroom/daily-wire/new-york-judge-declines-for-now-to-enforce-an-indonesian-plan-in-the-us (describing the judge's opinion in a Chapter 15 case as "highly diplomatic").
[64] Teadra Pugh, *Analysis: Whopping Ch. 15 Bankruptcy Filings May Be Misleading*, BLOOMBERG L. (Nov. 16, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-whopping-ch-15-bankruptcy-filings-may-be-misleading ("Any foreign company meeting...two simple requirements could simply file a petition seeking Chapter 7 or Chapter 11 relief with the applicable U.S. Bankruptcy Court.").
[65] *Id.* ("[A] number of foreign companies prefer to file their main bankruptcy proceeding in the United States.").
[66] *See, e.g.*, Michael McKiernan, *Focus: What can be learned from Nortel case?*, LAW TIMES (Mar. 27, 2017), https://www.lawtimesnews.com/news/legal-analysis/focus-what-can-be-learned-from-nortel-case/262474

Code do not provide a ready toolkit for cooperation and comity. By contrast, those principles are enshrined in the statutory text of Chapter 15, as discussed above.

A second issue relates to the scope and purpose of Chapter 15 itself and whether Chapter 15 is primarily about the administration of cross-border assets, or something more. If Chapter 15 is increasingly used by parties in the U.S. to pursue their own, ancillary litigation strategies, it is possible that over time, the Chapter 15 proceeding—and maybe even Chapter 15 itself--may become more U.S.-centric rather than cooperative.

In conclusion, Chapter 15 and the Model Law on which it is based provide a ready toolkit for cooperation, even though these laws do not require or expect substantive legal uniformity. However, ancillary litigation within a Chapter 15 case presents the threat of divergence in cases where more aspects of a cross-border case are decided in the ancillary jurisdiction, rather than in the jurisdiction of the main proceeding. As the world sees more cross-border cases, particularly in times of crisis, it will be important to be vigilant to ensure that the principles of cooperation and comity remain supreme in cross-border cases and are not eclipsed by parties seeking to capitalize on a pathway to U.S. court access.

(describing the *Nortel* Chapter 11 bankruptcy and noting that the "working relationship has become very good between Canadian and U.S. courts").

ECONOMIC RECOVERY VS. ENVIRONMENTAL COOPERATION: A MADE-UP CONTRADICTION?

Luísa Silva Schmidt[67]
Estácio de Sá University, Brazil

1. INTRODUCTION

The health crisis caused by Covid-19 pandemic can be investigated in parallel with the environmental crisis.

Due to its rapid spread, Covid-19 was declared a global pandemic by the World Health Organization on March 11, 2020. In his statement at that occasion, WHO's Director-General stressed that Covid-19 was not just a public health crisis, but one that could impact various sectors.[68]

Although there is still no scientific consensus regarding the origins of the new coronavirus, the most widely accepted hypothesis so far is that Covid-19 is a zoonotic disease that first passed to people from a still unidentified animal.[69] A laboratory origin of Sars-Cov-2 was found to be extremely unlikely.[70]

On the other hand, the environmental crisis also manifests in various ways, such as depletion of natural resources, extinction of species and climate change. It started to be perceived as a global problem from the 1970s, when discussions that were restricted to academic and social circles were elevated to the international political agenda through the United Nations.

Considering the likely zoonotic origins of the Covid-19 pandemic, it has been argued that the current health crisis may be potentially related to the environmental crisis, as the ecological imbalance, deforestation, the loss of biodiversity and of natural habitats are potential sources for new zoonotic diseases.

[67] PhD candidate in Law at Estácio de Sá University
[68] *Timeline: WHO's COVID-19 response*, WORLD HEALTH ORGANIZATION (n.d.).
[69] WORLD HEALTH ORGANIZATION [WHO], WHO-CONVENED GLOBAL STUDY OF ORIGINS OF SARS-COV-2: CHINA PART. Joint report 119-120 (Mar. 30, 2021a); Smriti Mallapaty, Amy Maxmen & Ewen Callaway, *Mysteries Persist After World Health Organization Reports on Covid-Origin Search*, 590 NATURE, Feb. 18, 2021 at 371, 371-72.
[70] WHO, *supra* note 2, at 119-120.

In fact, most pandemic-causing viruses – including HIV/AIDS and Ebola – come directly or indirectly from wildlife, with more than 30% of new diseases reported since 1960 being linked to deforestation[71], a practice that disturbs natural habitats and favors spillovers.[72]

Both the sanitary and the ecological crises, although disproportionately affecting some segments of society, project their effects globally; therefore, they must be addressed at the international level. Though domestic measures are important, effective solutions can only be achieved through international cooperation.

2. COOPERATIVE MEASURES TO TACKLE THE ENVIRONMENTAL CRISIS

One of the main negative outcomes of the environmental issue is global warming, which is seen as a global problem that demands a cooperative solution at least since 1992, when the United Nations Framework Convention on Climate Change – UNFCCC was negotiated. In its text, the participating countries acknowledged "*the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities*".[73]

Likewise, the Paris Agreement, adopted in 2015 under the UNFCCC, established a common goal[74], to be achieved through Nationally Determined Contributions – NDC's, which consist of ambitious and progressive efforts to reduce greenhouse gas emissions, defined by each participating country according to the main goal set out in the Agreement.

In this sense, the Paris Agreement can be considered an instrument of harmonisation, as it determines a common goal and a common mechanism to achieve it. The recognition of common but differentiated responsibilities enforces the idea of harmonisation, instead of uniformity, as local efforts are tailored according to the characteristics of the proponent.[75]

---

[71] Mariana M. Vale et al., *Could a Future Pandemic Come From the Amazon? The Science and Policy of Pandemic Prevention in the Amazon*, ZENODO, Mar. 15, 2021a, at 2.

[72] One single study carried out in the Amazon isolated more than 180 different species of viruses in Amazonian vertebrates, two-thirds of which have been confirmed to be pathogenic to humans (Vale et. al., *supra* note 4, at 3).

[73] United Nations Framework Convention on Climate Change [UNFCCC] FCC/INFORMAL/84/Rev.1 GE.14-20481 (E) (1992).

[74] Consisting in "*[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels*" (Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015[hereinafter Paris Agreement], art. 2).

[75] Article 4.4 of the Paris Agreement states: "*Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue*

In addition, the Paris Agreement functions as in instrument of legal harmonisation, as it furthers the enactment of national legislations to comply with it. Indeed, all Parties to the Agreement passed at least one law or policy concerning climate change.[76]

3. IMPACTS CAUSED BY THE HEALTH CRISIS

The need for cooperative solutions is also present in the health crisis. Concerted actions are necessary to contain viral proliferation, and immunization efforts can be rendered useless if restrained to a single or a few countries, as the spread of the coronavirus in other countries gives rise to the emergence of new variants that may spread more quickly and may even be, at some level, immune to existing vaccines.[77]

However, instead of the experience in tackling climate change inspire cooperative solutions to the current health problem the contrary occurred: the pandemic context negatively affected the international cooperation efforts to reduce emissions of greenhouse gases as many countries turned to state-centric solutions to protect themselves.

On one hand, many natural protected areas faced the suspension or reduction of activities, including surveillance and monitoring, due to cuts in funding and lack of personnel because of social distancing. This made way to the increase of illegal activities like logging, poaching and fires, and affected the livelihood of traditional populations, especially in less developed regions, such as Africa, South Asia and Latin America.[78]

On the other hand, even though economic activities and air travel were scaled down because of the pandemic, causing 2020 emissions to be lower than in 2019, "*GHG [greenhouse gas] concentrations in the atmosphere continue to rise, with the immediate reduction in emissions expected to have a negligible long-term impact on climate change*".[79] The measures adopted to foster economic recovery from the pandemic will be crucial to determine if the gap

enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances" (Paris Agreement, *supra* note 7).

[76] LITIGÂNCIA CLIMÁTICA: NOVAS FRONTEIRAS PARA O DIREITO AMBIENTAL NO BRASIL 23 (Joana Setzer, Kamyla Cunha & Amália S. Botter Fabri eds., 2019) (Braz.).

[77] WHO, *The effects of virus variants on COVID-19 vaccines*, WORLD HEALTH ORGANIZATION, Mar. 1, 2021b.

[78] John Waithaka et al., *Impacts of COVID-19 on protected and conserved areas: a global overview and regional perspectives*, 27 PARKS, THE INTERNATIONAL JOURNAL OF PROTECTED AREAS AND CONSERVATION (SPECIAL ISSUE) 41, 41-56 (Adrian Phillips & Brent A. Mitchell eds., 2021).

[79] UNITED NATIONS ENVIRONMENT PROGRAMME [UNEP]. *Emissions Gap Report 2020 - Executive summary* IV (2020).

between current greenhouse gas emissions and the reductions needed to meet the Paris Agreement's goals will increase or decrease.

If recovery measures are based in fossil fuel intensive activities, GHG emissions should rise when compared to pre-Covid-19 scenarios. Conversely, if the opportunity to start a low-carbon transition is seized, emissions are expected to decrease significantly[80], meeting both goals of achieving zero net-emissions of GHGs and promoting development, as set in the United Nation's Sustainable Development Goals.

Despite this, in many cases environmental policies were set aside as economic recovery measures were prioritised. Considering the data available in October 2020, "*COVID-19 fiscal spending has primarily supported the global* status quo *of high-carbon economic production or had neutral effects on GHG emissions*".[81]

4. THE BRAZILIAN CASE

The situation in Brazil provides a clear example of this. Several measures and omissions raise doubts concerning the directions that will be taken towards post-pandemic economic recovery.

At the beginning of the pandemic, in April 2020, the country's former Minister of Environment[82] claimed in an official meeting that the government should "profit" from the "public distraction" caused by the pandemic to pass bills weakening environmental protection.[83] Unfortunately, this intent seems to be succeeding, as environmental regulations were weakened, public bodies dedicated to the subject were extinguished and inspection forces of federal environmental agencies were dismantled.[84] As result, in June 2019 (first year of President Jair Bolsonaro in office), deforestation rates were 57% higher compared to the previous year[85] and, in July 2020, this rate was 9.5% higher.[86]

Besides, federal government has stopped demarcating indigenous lands, has transferred this task from the National Indigenous Foundation to the Agriculture Ministry, despite its

[80] *Id.*
[81] UNEP, *supra* note 12, at XI.
[82] In June 2021, the Minister left office, amid accusations of involvement in favoring illegal logging.
[83] Jake Spring, *Brazil minister calls for environmental deregulation while public distracted by COVID*, REUTERS, May 22, 2020.
[84] Mariana M. Vale et al., *The COVID-19 pandemic as an opportunity to weaken environmental protection in Brazil*, *in* 255 BIOLOGICAL CONSERVATION 1, 1-5 (Amanda Bates et al. eds., 2021b).
[85] RICARDO ABRAMOVAY, AMAZÔNIA: POR UMA ECONOMIA DO CONHECIMENTO DA NATUREZA (2019) (Braz.).
[86] Carolina Dantas, *Desmatamento na Amazônia cresce 9,5% em um ano e passa de 11 mil km², aponta Inpe,* G1 (30 nov. 2020) (Braz.).

potentially conflicting interest, and considers permitting economic activities such as mining in these areas.[87]

This set of measures that sacrificed environmental protection and, therefore, international commitments assumed by Brazil on this subject, were challenged before the Supreme Court in several lawsuits. Even though there are no decisions on merits yet, the preliminary decisions indicate the Brazilian Supreme Court considers that the international commitments undertaken by the country to contain climate change can guide the interpretation of the constitutional duty to protect the environment.

One of these lawsuits discusses the lack of implementation of projects funded by the Amazonian Fund, an initiative designed in Brazil to support actions destined to reduce GHG emissions caused by deforestation, in compliance with the REDD+ mechanism.[88] At the end of March 2020, over R$ 1 billion[89] awaited destination, and changes in governance structures, extinguishing a council formed by government and civil society representatives, created a diplomatic incident with donor countries that can impact their donations. According to Justice Rosa Weber, this created "*a scenario of insufficient protection of the Amazon biome*".[90]

In a similar way the Court, in a preliminary decision concerning the paralyzation of a fund created to implement measures of mitigation and adaptation to climate change, acknowledged the existence of "*a continuous, progressive and worrying trajectory destined to empty Brazilian public policies in environmental issues*"[91], leading to an "*unconstitutional state of affairs*" capable of compromising international credibility and funding capacities of Brazil.

[87] Lucas Ferrante & Philip M. Fearnside, *Brazil threatens indigeous lands*, 368 SCIENCE, May 1, 2020, at 481, 481-482.
[88] REDD+ (Reducing Emissions from Deforestation and Forest Degradation) is a cooperative mechanism provided for in Article 5 of Paris Agreement (Paris Agreement, *supra* note 7), which reads:
"1. Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1 (d), of the Convention, including forests.
2. Parties are encouraged to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches."
[89] From a sum of approximately R$ 3.5 billion, formed by donations from Norway (R$ 3.186.719.318,40 = 91%), Germany (R$ 192.690.396,00 = 5,7%) and Brazilian company PETROBRAS (R$ 17.285.079,13 = 0,5%).
[90] STF [Supremo Tribunal Federal], ADO 59, Relatora: Min. Rosa Weber, 31.08.2020 (Braz.).
[91] STF, ADPF 708/DF (previously ADO 60/DF), Relator: Min. Luís Roberto Barroso, 28.06.2020 (Braz.).

Regarding the lack of adequate measures to protect indigenous people from Covid-19, the Supreme Court issued a provisional measure determining the confection of a "*Plan for Coping with COVID-19 for Brazilian Indigenous Peoples*", which is currently ongoing.[92]

5. CHALLENGES TO HARMONISATION IN A POST-PANDEMIC FUTURE

Both sanitary and environmental crises project their effects globally and, therefore, require shared solutions. In a globalized society, state-centric solutions do not seem to be effective to tackle these problems.

Change is inevitable; the choice is whether it will occur as a chaotic response to a disruption or as carefully planned transition towards a system that does not overlap the physical limits imposed by the environment and the moral limits expressed in our ethical values.[93]

Covid-19 showed us how dramatic abrupt change can be, and how inefficient state-centric solutions in a globalized world can be. This should encourage us to plan a collaborative transition to a more cooperative, inclusive and green future, which will equally have the effect to avoid or reduce the risks and/or impacts of a future new pandemic, as well as the loss of lives and of social advances that this entails.

Furthermore, the only way to meet the goals set in the Paris Agreement is to promote a post-Covid-19 economic recovery based on decarbonizing and decoupling the economy.[94] If we keep business as usual, we will face an average increase in global temperature of 3º C compared to pre-industrial levels, with potentially catastrophic consequences to human existence.[95]

Although indisputably necessary, the transition is not expected to be easy, as it requires a reformulation of traditional concepts such as national sovereignty, as collaborative solutions challenge the idea of unconditional national self-determination on behalf of attaining internationally elected goals.

At some level, though, this prioritisation of common goals can already be seen in climate change litigation, as national courts are being called upon to enforce international

[92] STF, ADPF 709 MC/DF, Relator: Min. Luís Roberto Barroso, 08.07.2020 (Braz.).
[93] HERMAN E. DALY & JOSHUA FARLEY, ECOLOGICAL ECONOMICS: PRINCIPLES AND APPLICATIONS 11 (2d ed. 2010).
[94] UNEP, *supra* note 12.
[95] IPCC, *Summary for Policymakers*, *in* GLOBAL WARMING OF 1.5°C at 3, 18 (Valérie Masson-Delmotte et al. eds., 2018).

commitments.[96] Legal instruments can work as fundamental tools to promote change, as they can institutionalize shared values and enforce collaborative solutions that prioritise common good in detriment of individual interests.

Relying on this framework, the next steps of the research aim to analyze whether post-pandemic economic recovery measures promote cooperation towards common goals or prioritise national interests, and in which extent these measures harmonise with the goals set out in the Paris Agreement.

REFERENCE LIST

Carolina Dantas, *Desmatamento na Amazônia cresce 9,5% em um ano e passa de 11 mil km², aponta Inpe*, G1 (30 nov. 2020), https://g1.globo.com/natureza/noticia/2020/11/30/amazonia-teve-11-mil-km-de-desmatamento-entre-agosto-de-2019-e-julho-de-2020-aponta-inpe.ghtml (Braz.).

HERMAN E. DALY & JOSHUA FARLEY, ECOLOGICAL ECONOMICS: PRINCIPLES AND APPLICATIONS (2d ed. 2010).

IPCC, *Summary for Policymakers*, *in* GLOBAL WARMING OF 1.5°C 3 (Valérie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/sr15/chapter/spm/.

Jake Spring, *Brazil minister calls for environmental deregulation while public distracted by COVID*, REUTERS, May 22, 2020, https://www.reuters.com/article/us-brazil-politics-environment/brazil-minister-calls-for-environmental-deregulation-while-public-distracted-by-covid-idUSKBN22Y30Y.

John Waithaka et al., *Impacts of COVID-19 on protected and conserved areas: a global overview and regional perspectives*, 27 PARKS, THE INTERNATIONAL JOURNAL OF PROTECTED AREAS AND CONSERVATION (SPECIAL ISSUE) 41 (Adrian Phillips & Brent A. Mitchell eds., 2021), DOI 10.2305/IUCN.CH.2021PARKS-27.en.

LITIGÂNCIA CLIMÁTICA: NOVAS FRONTEIRAS PARA O DIREITO AMBIENTAL NO BRASIL (Joana Setzer, Kamyla Cunha & Amália S. Botter Fabri eds., 2019) (Braz.).

Lucas Ferrante & Philip M. Fearnside, *Brazil threatens indigeous lands*, 368 SCIENCE, May 1, 2020, at 481, https://doi.org/10.1126/science.abb6327.

Mariana M. Vale et al., *Could a Future Pandemic Come From the Amazon? The Science and Policy of Pandemic Prevention in the Amazon*, ZENODO, Mar. 15, 2021a, DOI: 10.5281/zenodo.4606591.

[96] One of the most famous examples of this is the Urgenda Case, from the Netherlands, described in LITIGÂNCIA CLIMÁTICA, *supra* note 9, at 71-73.

Mariana M. Vale et al., *The COVID-19 pandemic as an opportunity to weaken environmental protection in Brazil, in* 255 BIOLOGICAL CONSERVATION 1 (Amanda Bates et al. eds., 2021b), DOI https://doi.org/10.1016/j.biocon.2021.108994.

Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015 [hereinafter Paris Agreement], https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

RICARDO ABRAMOVAY, AMAZÔNIA: POR UMA ECONOMIA DO CONHECIMENTO DA NATUREZA (2019) (Braz.).

Smriti Mallapaty, Amy Maxmen & Ewen Callaway, *Mysteries Persist After World Health Organization Reports on Covid-Origin Search*, 590 NATURE, Feb. 18, 2021 at 371.

Timeline: WHO's COVID-19 response, WORLD HEALTH ORGANIZATION (n.d.), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#!

UNITED NATIONS ENVIRONMENT PROGRAMME [UNEP]. *Emissions Gap Report 2020 - Executive summary* (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34438/EGR20ESE.pdf?sequence=25.

United Nations Framework Convention on Climate Change [UNFCCC] FCC/INFORMAL/84/Rev.1 GE.14-20481 (E) (1992), https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf .

World Health Organization [WHO], *The effects of virus variants on COVID-19 vaccines*, WORLD HEALTH ORGANIZATION, Mar. 1, 2021b, https://www.who.int/news-room/feature-stories/detail/the-effects-of-virus-variants-on-covid-19-vaccines.

WHO, WHO-CONVENED GLOBAL STUDY OF ORIGINS OF SARS-COV-2: CHINA PART. Joint report (Mar. 30, 2021a), https://www.who.int/publications/i/item/who-convened-global-study-of-origins-of-sars-cov-2-china-part.

CASES

STF [Supremo Tribunal Federal], ADO 59, Relatora: Min. Rosa Weber, 31.08.2020, http://portal.stf.jus.br/processos/downloadPeca.asp?id=15344261377&ext=.pdf (Braz.).

STF, ADPF 708/DF (previously ADO 60/DF), Relator: Min. Luís Roberto Barroso, 28.06.2020, http://portal.stf.jus.br/processos/downloadPeca.asp?id=15343625717&ext=.pdf (Braz.).

STF, ADPF 709 MC/DF, Relator: Min. Luís Roberto Barroso, 08.07.2020, http://portal.stf.jus.br/processos/downloadPeca.asp?id=15343710124&ext=.pdf (Braz.).

REFLECTIONS ON BRAZILIAN FEDERALISM IN TIMES OF COVID-19 PANDEMIC

Rafael Mario Iorio Filho[97]
Universidade Federal Fluminense/UFF, Brazil

Fernanda Duarte[98]
Universidade Federal Fluminense/UFF, Brazil

1. INTRODUCTION

As part of our ongoing research on the features of Brazilian legal culture, in this article, we seek to explain how Brazilian federalism, in its relations with citizenship, has revealed itself in the current COVID-19 pandemic times. In particular, from the analysis of the judgments already made by the Brazilian Supreme Court (STF) in ADI 6341 we discuss some issues related to health protection and the role and limits of federative entities, in combating the pandemic crisis. This thematic discussion is very relevant, as it brings in its significant field a whole set of circumstances of federal constitutional clashes, and for that reason, it deals with explicit relations between sovereign power and local autonomies in relation to the protection of people´s rights.

2. BRAZILIAN FEDERALISM

The Brazilian Constitution of 1988 established in its article 1 "The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, is constituted as a Democratic State of Law and has as its foundations:" It is noticeable that there was great innovation of the Constitution in establishing that Brazil is a federation consisting of states, municipalities and the federal district, an innovation that is given by raising the municipality to an autonomous entity of the federation. It is widely known that the federation consists only of states, which together with the union presents its dual aspect, hence the great innovation in the new structure presented by Brazilian federalism.

[97] Professor in Law at Fluminense Federal University. E-mail: rafael_iorio@id.uff.br
[98] Professor in Law at Fluminense Federal University. E-mail: fduarte1969@yahoo.com.br

Article 18 of the Brazilian Constitution presents the municipality as an integral part of the administrative political organization of the Federative Republic of Brazil alongside the Union, the States and the Federal District, all of which are endowed with autonomy.

A first observation about federalism should be made: the federation, through the decentralization of sovereign and administrative powers in autonomous geographical entities, becomes a prerequisite for the democratic regime, since it would make possible the management of the public thing, respecting the regional and local peculiarities, interests and particularities. Citizenship, on the other hand, which can be translated as a legal minimum common to all who are legally bound to a State, embodies a set of rights and duties that govern the relationship between the State and its people.

The contemporary State, after the bourgeois liberal revolutions, based on the idea of universal legal equality (equal protection of the laws) - everyone is equal before the law and in the application of the law -, undertakes to attribute to all those who are bound to it a common legal minimum, composed of a set of rights and duties attributed to all due to the political bond of each subject with this same State. Thus, citizenship, which is inherent to the idea of universality and, therefore, of legal equality, is a phenomenon peculiar to contemporary capitalist societies, since it is a way for the State to guarantee to all those who are bound to it and, therefore, holders of duties that ultimately finance the State itself, a minimum level of equality, since the market society, by its own logic, generates inequality[99].

Thus, citizenship can be conceptualized as the legal minimum, composed of rights and duties, common to all those who are politically bound to a given State. In other words, citizenship is a set of rights and duties attributed to all those who are linked to a given State by a criterion of political bond, due to this same bond, which is nationality. The common legal minimum attributed to all nationals by citizenship is composed, according to Marshall[100], of three groups of rights: civil rights are derived from the right to liberty and must be guaranteed by the courts, political rights must be guaranteed by universal access to the ballot box, and social rights must be guaranteed by public policies.

Associating, in this way, a contemporary conception of federation and citizenship, through autonomy in the hands of the regions, makes viable the democratic exercise of power, and as such of citizenship. Beyond the will to limit power, with its distribution among the

[99] T.H MARSHALL, CIDADANIA, CLASSE SOCIAL E *STATUS* (Meton Porto Gadelha trans., 1967) (Braz.).
[100] MARSHALL, *supra* note 3, at 9.

federative entities, federalism exists, we may say, to protect the rights of the citizen, the citizen's exercise of power.

3. THE ADI 6341

The Action n. 6341 was filed by the Democratic Labor Party (PDT) questioning Provisional Measure 926/2020 and the redistribution of sanitary police powers introduced, by said measure, in Federal Law 13.979/2020. The changes, in the view of the applicant political party, interfered with the system of cooperation between the federative entities, since they entrusted the Union with the prerogatives to institute measures of isolation, quarantine and interdiction of movement, public services, essential activities and circulation.

In March 2020, Rapporteur Justice Marco Aurélio granted a partial injunction to make explicit the concurrent competence, in terms of health, of the Union, the States, the Federal District, and the Municipalities, submitting the granted decision to the subsequent scrutiny of the Court's Full Bench.

In his opinion, Justice Marco Aurélio[101] concludes that:

> The provisions do not exclude acts to be performed by the State, the Federal District and the Municipality, considering the concurrent competence in the form of article 23, II, of the Major Law. .... it must be recognized, simply formally, that the discipline resulting from Provisional Measure No. 926/2020, in that it printed a new wording for article 3 of Federal Law No. 9.868/1999, does not rule out the taking of normative and administrative measures by the States, Federal District and Municipalities.

Soon afterwards, in the following month of April, the Full Bench of the Brazilian Supreme Court, in a session by videoconference (under the terms of Resolution 672/2020/STF) appreciated and approved the preliminary order granted, confirming that the actions adopted by the Federal Government, in the provisional measure, to deal with the new Corona virus, do not exclude the concurrent competence, nor the taking of normative and administrative measures by the States, the Federal District, and the municipalities.

See the Full Bench`s opinion:

> The Court, by majority vote, upheld the injunction granted by Justice Marco Aurélio (Rapporteur), with the addition of an interpretation in conformity with the Constitution to paragraph 9 of art. 3 of Law No. 13,979, in order to make it clear that, while preserving the attributions of each sphere of government, pursuant to item I of art. The Rapporteur Justice and Justice Dias

[101] STF, Ação Direta de Inconstitucionalidade 6341 DF, Relator: Ministro Marco Aurélio, 24.03.2020 (Braz.).

> Toffoli (President) won on this point, and Justices Alexandre de Moraes and Luiz Fux won in part, as to the interpretation in conformity with letter b of subsection VI of art. 3.

With the position taken by the Court, the common and concurrent jurisdictions of the federative entities regarding health are reinforced, with emphasis on their autonomy. If it is true that the Supreme Court's decision affirms the position of the Union, it also, on the other hand, provides support and backing for state and municipal actions of social distancing and operation of commercial establishments, as an unfolding of shared jurisdictions.

In fact, such positioning follows to a certain extent the spirit of decentralized protection found in article 198 of the Brazilian Constitution, with the Unified Health System (SUS) - which has been reinforced in almost all actions before the Supreme Court that have health protection and responsibility for treatment or medication as their theme.

4. CONCLUSIONS

Finally, from the perspective of Political Science, Sociology and the Law History, we can affirm that there is nothing new, because we have a great line of historical continuity that characterizes our federalism and is translated into the clashes between centralization and decentralization of power, veiled in the media and juridical-political discourses that have been made explicit due to the urgency and emergency of COVID-19.

The Brazilian Supreme Court in ADI 6341, in resolving the issue by reaffirming the common and concurrent powers of the States and Municipalities, leads us to suggest two reflections: the first is that beyond a Brazilian-style federalism translated into the centralization/decentralization pendulum, such a decision did not help in taking a position of State Policy, since political decisions and normative acts were pulverized among all the federative entities. In other words, there was a fragmentation of the decision-making spheres on how to deal with the pandemic.

The second, arising from the first, leads us to indicate that this fragmentation acclimates to legal insecurity and unequal treatment of citizens. For in some member States and municipalities, for example, there will be limitations on the right to come and go or on the right to economic freedom, and in other regions there will not.

This points to the clear lack of federative harmony in the Brazilian way. The legal framework of civil rights is designed by the Constitution in national terms, that is, as an exercise

of the exclusive and private competences of the Union (v.g. Civil Code and Consumer Code). However, with the Supreme Court's decision, the restrictions on these rights will not be general, because by reinforcing the common and concurrent jurisdiction, in this moment of health crisis, the Court admits the possibility of having local and regional restrictions - which, if contrasted with a national frame, generates and inequalities. Some will be able to trade in one municipality and others will not.

Thus, we would have another example of what can be concluded from the work of Iorio Filho[102] when he analyzes the institute of federal intervention by the Brazilian Supreme Court. Federalism, despite having been idealized by Constitutional Theory as a form of state that would reinforce the protection of citizens by being a mechanism for limiting power, in Brazil, it ends up not protecting them.

List of abbreviations

ADI – Ação Direta de Inconstitucionalidade
PDT – Partido Democrático Trabalhista [Democratic Labor Party]
STF – Supremo Tribunal Federal [Brazilian Supreme Court]
SUS – Sistema Único de Saúde [Unified Health System]

REFERENCE LIST

RAFAEL MARIO IORIO FILHO, UMA QUESTÃO DA CIDADANIA: O PAPEL DO SUPREMO TRIBUNAL FEDERAL NA INTERVENÇÃO FEDERAL (1988-2008) (2014) (Braz.).

STF, Ação Direta de Inconstitucionalidade 6341 DF, Relator: Ministro Marco Aurélio, 24.03.2020 (Braz.), http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6341.pdf.

T.H MARSHALL, CIDADANIA, CLASSE SOCIAL E *STATUS* (Meton Porto Gadelha trans., 1967) (Braz.).

[102] RAFAEL MARIO IORIO FILHO, UMA QUESTÃO DA CIDADANIA: O PAPEL DO SUPREMO TRIBUNAL FEDERAL NA INTERVENÇÃO FEDERAL (1988-2008) (2014) (Braz.).