HOW THE PANDEMIC MIGHT BOOST REDISCOVERING JUDICIAL DEFERENCE TO ADMINISTRATIVE CHOICES AS A POSSIBILITY

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ABSTRACT

This paper presents initial signs of a new sensibility in the Brazilian Constitutional Court in reassessing the deferential approach when it comes to judicial review over public choices held by the administrative state. Precedents can be presented before the pandemics, and event after, in provisional injunctions held by the Court, considering a normative framework edited to address the health crisis that expanded the deliberative powers of federative entities and administrative agencies. Even though the limited number of rulings prevent classifying those events as a new trend in the Brazilian Constitutional Court, peremptory refusal on the deferential approach is certainly overcome.

Keywords: Judicial deference, public choices, judicial control over the administrative state, pandemics.

Contents: 1. Preliminary considerations. 2. Reassessing the deferential approach: initial signs before the pandemic. 3. Pandemics and the reaffirmation of the judicial deferential approach. 4 Can we proclaim a new trend in the Court's usage of the deferential approach?

1. PRELIMINARY CONSIDERATIONS

A strong and independent Judiciary, leaded by the Brazilian Supreme Federal Court, is an undisputed and celebrated feature of the Brazilian 1988 Constitution.[2] History explains how progressive forces in the National Constituent Assembly sponsored the idea that the institutional design should provide independent instances in which people could seek due protection for a wide range of human rights granted in the constitution.

Judicial independence associated with another constitutional clause granting "access to justice" lead to intense judicialization in almost every aspect of life. Aside from the worldwide

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[2] Luís Roberto Barroso et al., *Developments in Brazilian constitutional law: The year 2016 in review*, 15 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 496-497 (2017).

phenomena known as judicialization of politics,[3] according to the "Justice in Numbers Report", issued by the National Council of Justice,[4] in 2019 there were 78,7 million pending lawsuits in Brazil. That huge number was celebrated as a decrease considering 2018, when there were 80 million pending cases.

A significant part of those lawsuits involves the Public Administration in two distinct types of dispute: tax law and human rights protection.[5] Historically, in both subjects, the deferential approach has not been very prestigious, usually understood by judges as an undesired limitation to judicial scrutiny. According to that view, judicial control over public policies related to human rights promotion should not depart from a deferential approach. Extremists even proclaim that resource limitations, strategical prioritization defined by distributive concerns and similar issues should not be considered as limitation to judicial control over administrative choices.

Despite the seductiveness of such a proclamation, it enables the issuing of rulings that deeply affect executive planning and regulation. Such rulings, well-intended as they might be, can bring about inequality among plaintiffs (different judges interpreting the same executive choice in different ways); they can also suffer from ineffectiveness, when built on a misunderstanding of a certain issue or departing from a misunderstanding about the resources actually available to face it. A final risk relates to undetected correlations between the administrative strategy under scrutiny, and other public policies. In that scenery, striking the former can negatively affect the latter, causing an unpredictable ripple effect.

These side effects, and the distortions they can bring to the whole public health system in Brazil should not be minimized. Designed by the Brazilian constitution as a national e unified system, the "SUS" (abbreviation for 'unified health system') encompasses all the federative level in a single structure providing services to 80% of the population, with more than 150 million citizens insured. Redesigning any strategy in such a huge structure can easily affect hundreds of thousands of Brazilians[6] – and even foreigners in the national territory, who are also insured by this same public health system.

[3] Rogério B. Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 231-62 (Rachel Sieder; Line Schjolden & Alan Angell eds, 2005).
[4] CONSELHO NACIONAL DE JUSTIÇA, JUSTIÇA EM NÚMEROS 2019 (2019).
[5] Estefania Maria de Queiroz Barboza & Katya Kozicki, *Judicalization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court*, 13 DIRITTO & QUESTIONI PUBBLICHE 407-44 (2013).
[6] Daniel Wl Wang, *Courts and health care rationing: the case of the Brazilian Federal Supreme Court*, 8 HEALTH ECONOMICS, POLICY AND LAW 75-93 (2013).

The upgoing curve in lawsuits related to the national health system was the trigger to initial rulings by the Federal Supreme Court ("Supremo Tribunal Federal", referred to as STF), that took into account the institutional capacity reasoning, reopening the debate on the deferential judicial approach to Executive choices.

2. REASSESSING THE DEFERENTIAL APPROACH: INITIAL SIGNS BEFORE THE PANDEMIC

Over the past two years, initial signs were seen in STF on reassessing a deferential judicial approach, especially in administrative regulation related to the right to health, and public services related to that same right.

Three decisions might be highlighted in that new trend.

The first ruling worth noticing was issued in abstract judicial review (ADI 4874)[7] of a regulatory act issued by the National Agency on Sanitary Vigilance, therefore referred to as ANVISA. This agency oversees regulation in a broad range of health-adjecent issues – their role is similar to that of the Food and Drugs Administration, in the United States. The agency enacted a Resolution banning the usage of flavoring substances in cigarettes, considering that it will turn smoking more appealing, especially to the youth, which therefore made this practice a health hazard. The Justice Rapporteur, Rosa Weber, upholding the agency's decision evoked the Chevron precedent to assert that there was a legislative delegation, and that the agency regulated reasonably, among the limits of that same delegation.

This approach in line with the Chevron two-step test was not appealing to the Court at the occasion – at least, not enough to grant a majority. In fact, the result was a tie[8], with the Justices dissenting on the extension of the legislative delegation to the agency, considering specifically the banning of products. The relevance of the precedent, despite the tie, is bringing the express consideration of a deferential approach to an Executive deliberation, considering the expertise of the administrative body to debate after a long time.

A second relevant precedent was issued in May 22nd, 2019, in "Extraordinary Appeal" nº 657.718 (literal translation of the Brazilian denomination "recurso extraordinário"), in which the Court was called to decide whether the State can be compelled to provide medication and medical procedures not yet approved by the aforementioned ANVISA. In a majority ruling, the

[7] Federal Supreme Court, ADI 4874, Justice Rapporteur Min. Rosa Weber, Plenary, February 1st, 2018, DIÁRIO DA JUSTIÇA [D.J.], 01.02.2019.
[8] There are eleven Justices in the Brazilian Constitutional Court, but in that case, Justice Barroso was exempt, due to a previous legal opinion giver in the matter, before his nomination to the Court.

Court decided that the public health system and its components – the agency included – is provided with institutional capacity to evaluate the adequacy on offering new medication or procedures. Such evaluation, according to the majority, should consider not only its real and proven effects over the illness, but also systemic effects, considering the Brazilian constitution asserts universality as a ruling principle applicable to the right to health.

The Court exempted the State from providing non-approved medication, if agency deliberation was in course and the legal established length of such analysis had not expired. Allowing judges all around the country to decide otherwise was considered unconscionable, due to the Judiciary's limited capacity to engage in such analysis.

A second precedent showing the Court's willingness to reassess judicial deference was also related to the right to health – another "Extraordinary Appeal" nº 566.471 (BRASIL, 2020a), in which the central issue was the whether the State can be compelled to offer high-cost medication whenever it was not listed in the "National Program of Exceptional Dispensation of Medication" – a public policy executed by the public health system[9]. Once again, through a majoritarian ruling, in March 11th, 2020, the Court evoked the expertise of the administrative components of the public health system in deciding if a medication, even if already approved by ANVISA, should be offered or not considering its high costs, and the evident trade-of inherent to such a decision. The Court also mentioned its incapacity to anticipate possible effects in the financial balance of the whole system, relying in the Executive adhesion to the constitutional commitment in granting a right to health.

These two last rulings are also based in the legal requirement that Executive decisions in the national health system should be grounded in "medicine based in evidence" (Federal Law 8080 and modified by Federal Law 12.401/11). The technical content of such a concept led the Court to assert that judicial review should not replace the administrative structures invested with such a scientific authority.

The path was open for reassessing the deferential approach debate – and then we found ourselves in the middle of a pandemic.

3. PANDEMICS AND THE REAFFIRMATION OF THE JUDICIAL DEFERENTIAL APPROACH

[9] Medication, exams, and procedures granted by the National Health System are offered by the distinct federative levels according to specific programs and protocols. Medication out of the ordinary – related to rare diseases, experimental substances and other non-orthodox hypothesis are offered by the central government, in the above-mentioned program.

Experiencing the COVID-19 pandemic forces people and institutions to assess things differently. This is also true when it comes to judicial review in legislative and administrative choices. That new perspective is also powered by at least two changes brought by such perilous times.

The first relevant change, at least to the Brazilian understanding about judicial intervention in administrative strategical choices related to granting the right to health, is the absence of scientific certainty. The core concept of "medicine based in evidence" is no longer available, and Federal Law 13.979/20, regulating administrative measures in facing the pandemic refers to "strategical information in health". Ruling under uncertainty, STF shows clear discomfort in disregarding technical decisions designed by public agencies – therefore, the Court is visibly exercising self-constraint in recent rulings.

A second decisive component is that fact that the pandemic itself, due to it extension, demonstrates that public policies are clearly linked by interdependent relations. This is not a specific feature of the pandemic – everyone who deals with public policies can understand that there is a matrix in which various regulations, programs and strategies operate together. The novelty relies in such an understanding by the Judiciary, who usually tends to consider administrative choices in isolation. Internalizing that interdependency revealed to the Judiciary the risk in generating unforeseen or unintended effects whenever striking Executive deliberation.

It is certainly early to proclaim a substantive change in STF's view – but at least two recent decisions recall premises that aligned with the deferential approach.

The first one worth mentioning, was held in abstract judicial review of the Federal Law nº 13.979/20. The precept challenged, among other things, intended to concentrate in the central level, the definition of what administrative measures should be adopted in each State, among the list designed by that same law, which includes compulsory medical exams, social isolation, administrative requisition, etc. Justice Marco Aurelio in ADI 6341[10] granted a partial injunction in order to establish that States and Municipalities – and not the central government – should define the proper and proportional measures to be held in each place. That partial injunction was upheld by the bench in a unanimous decision in April 16th, 2020.

One can see that ruling as resolving a federative conflict, solved by the constitutional distribution of power among federation members. Even though that argument was relevant to

[10] Federal Supreme Court, ADI 6341, Justice Rapporteur: Min. Marco Aurélio, April 15, 2020, still not published.

the ruling, the need to maintain adherence between the administrative measures to be taken and the real situation around the spreading of the virus was also repeatedly mentioned in the session. The case is particularly relevant, showing the Court's deference to the choices in both branches: the legislative deliberation to delegate to each member of the federation to decide according to its own situation related to virus contamination; and the administrative choices to be made, considering its proximity and expertise to decide when and what would be effective in their own area.

The second decision that illustrates a new sensibility to the deferential approach has held in ADI 6344[11] relates to Provisional Measurement 927[12] - from now on, identified as MP 927. Here, the Executive branch proposed possible measures to be taken by employers to their employees, related to preserve jobs and business operation. Those measures can include changes in working regime (allowing home office, reducing job hours, etc.); anticipating vacations, salary reduction, and many other possibilities. For some of these, MP 927 required an agreement between employer and employees; others, on the other hand, could be implemented unilaterally by the employer, innovating in a traditionally very protective legal framework in labor relations.

MP 927 was challenged by labor unions who claimed that it expressed regression in protecting workers social rights. In a majority ruling – 6 in favor, 4 dissenting – the Court upheld most part of the Executive order. Two main considerations prevail: 1) the Executive order, according to the legislative procedure, would also have to be submitted to the Legislative branch, which should appreciate the political choice it expressed; and 2) the pandemic involves crafting an intricate balance between multiple institutional arrangements and extensive normative frameworks regulating distinct areas. The combination of the two recommend a self-restraining disposition, and deference, once again, to both other branches: the Executive, who proposed MP 927, and the Legislative, who was entitled to examine freely the proposition.

4. CAN WE PROCLAIM A NEW TREND IN THE COURT'S USAGE OF THE DEFERENTIAL APPROACH?

[11] Federal Supreme Court, ADI 6344, Justice Rapporteur: Min. Marco Aurélio, April 29, 2020, still not published.

[12] The Brazilian Constitution contains a legislative tool, called "Medida Provisória" (in a literal translation, "Provisional Measure") that can be edited by the Executive branch, with force of law. That "Provisional Measure" is supposed to be appreciated by the Legislative branch in 60 days, extendable for more 60 days. Non deliberation in that period is equivalent to rejection, and in both cases – non deliberation or rejection – Congress should regulate the legal effects of during the validity period.

Resistance to the deferential approach, as mentioned in the beginning, has historical roots.[13] It is understandable that such a vision will not change in a single ruling, as long as it involves reassessing the whole balance between the power branches.

The decisions held before the pandemic already expressed initial signs of a Court's new perception according to which complex systems might be better served by honoring each organization institutional design and expertise. Therefore, the turning point was not exactly the pandemic – but living in that scenery of uncertainty highlighted the risks on replacing technical deliberation drafted in the Executive branch, by subjective perceptions from a Court's Justice.

Executive strategies, especially in public policies, frequently involve distributional decisions that can lead to tragic choices.[14] This comes from the very nature of the whole human rights protection project – and it is not enough reason to discard the deferential approach in judicial review. Deference will never mean blockage to judicial control against an Executive choice that deviate from the constitutional commitments traced to the State. But it can provide a dialogical scrutiny of administrative reasoning, enhancing a right to justification which is inherent to a democratic society.

LIST OF ABBREVIATIONS

ADI – Ação Direta de Inconstitucioanlidade [Direct Action of Unconstitutionality]
ANVISA – Agência Nacional de Vigilância Sanitária [National Agency on Sanitary Vigilance]
COVID-19 - *Corona Virus* Disease 2019
MP – Médida Provisória
STF – Supremo Tribunal Federal [Federal Supreme Court]
SUS – Sistema Único de Saúde [Unified Health System]

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