


DEMOCRACY AND RELATIONS OF THE EXECUTIVE AND JUDICIAL BRANCHES: THE COVID-19 PANDEMIC AND INSTITUTIONAL CHANGES IN THE ROLE OF THE BRAZILIAN FEDERAL SUPREME COURT

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Contextualization: The COVID-19 pandemic, which began in March 2020, caused deaths, uncertainties and socio-economic damage around the world. Governments created public policies to overcome or, at least, mitigate the effects of the crisis. In Brazil, federative conflicts were observed regarding the attributions and roles of political actors and federative entities. At the federal level, there was a clash between the President (and Congress majority) and the Supreme Court.

Objectives: In view of this, the research determines the relationship between the institutional actors, comparing the performance of the Federal Supreme Court before and during the occurrence of the public calamity, and historical and comparative analysis in relation to previous presidential terms.

Method: The method adopted was the study of the decisions in abstract judicial review of the Supreme Court from 1988 to 2022, by cataloging the published decisions, “favorable” or “unfavorable” to the Government preferences.

Results: The results found indicate a change in the Court's attitude towards the last presidential term in public policies oriented to the COVID pandemic, revealing a greater opposition of the Judiciary to the national Executive Branch. The researchers concluded that the space previously occupied by the President in carrying out certain public policies was occupied by the Supreme Court, due to the President's omissions, also attributing decision-making power to Constitutional Court.

Keywords: Democracy; Covid-19; Brazilian Federal Supreme Court.

DEMOCRACIA E AS RELAÇÕES ENTRE OS PODERES EXECUTIVO E JUDICIÁRIO: A PANDEMIA DE COVID-19 E AS MUDANÇAS INSTITUCIONAIS NO PAPEL DO SUPREMO TRIBUNAL FEDERAL BRASILEIRO

Contextualização: A pandemia de COVID-19, iniciada em março de 2020, causou mortes, incertezas e danos socioeconômicos em todo o mundo. Governos criaram políticas públicas para superar ou, ao menos, mitigar os efeitos da crise. No Brasil, foram observados conflitos federativos quanto às atribuições e aos papéis de atores políticos e entidades federativas. No âmbito federal, houve um embate entre o Presidente (e a maioria do Congresso) e o Supremo Tribunal Federal.

Objetivo: Diante disso, a pesquisa determina a relação entre os atores institucionais, comparando o desempenho do Supremo Tribunal Federal antes e durante a ocorrência da calamidade pública, bem como uma análise histórica e comparativa em relação a mandatos presidenciais anteriores.

Método: O método adotado foi o estudo das decisões em controle abstrato de constitucionalidade do Supremo Tribunal Federal de 1988 a 2022, por meio da catalogação das decisões publicadas como “favoráveis” ou “desfavoráveis” às preferências do Governo.

Resultados: Os resultados indicam uma mudança na atitude do Tribunal em relação ao último mandato presidencial nas políticas públicas voltadas para a pandemia de COVID-19, revelando uma maior oposição do Judiciário ao Poder Executivo nacional. Os pesquisadores concluíram que o espaço anteriormente ocupado pelo Presidente na implementação de determinadas políticas públicas foi ocupado pelo Supremo Tribunal Federal, devido às omissões do Presidente, também atribuindo poder decisório ao Tribunal Constitucional.

Palavras-chave: Democracia; Covid-19; Supremo Tribunal Federal.

DEMOCRACIA Y LAS RELACIONES ENTRE LOS PODERES EJECUTIVO Y JUDICIAL: LA PANDEMIA DE COVID-19 Y LOS CAMBIOS INSTITUCIONALES EN EL PAPEL DE LA CORTE SUPREMA FEDERAL DE BRASIL

Contextualización: La pandemia de COVID-19, que comenzó en marzo de 2020, causó muertes, incertidumbres y daños socioeconómicos en todo el mundo. Los gobiernos crearon políticas públicas para superar o, al menos, mitigar los efectos de la crisis. En Brasil, se observaron conflictos federativos respecto a las atribuciones y roles de los actores políticos y las entidades federativas. A nivel federal, hubo un enfrentamiento entre el Presidente (y la mayoría del Congreso) y la Corte Suprema.

Objetivos: Ante esto, la investigación determina la relación entre los actores institucionales, comparando el desempeño de la Corte Suprema antes y durante la ocurrencia de la calamidad pública, además de un análisis histórico y comparativo en relación con mandatos presidenciales anteriores.

Método: El método adoptado fue el estudio de las decisiones en el control abstracto de constitucionalidad de la Corte Suprema desde 1988 hasta 2022, mediante la catalogación de las decisiones publicadas como “favorables” o “desfavorables” a las preferencias del Gobierno.

Resultados: Los resultados encontrados indican un cambio en la actitud de la Corte hacia el último mandato presidencial en las políticas públicas orientadas a la pandemia de COVID-19, revelando una mayor oposición del Poder Judicial al Poder Ejecutivo nacional. Los investigadores concluyeron que el espacio previamente ocupado por el Presidente en la implementación de ciertas políticas públicas fue asumido por la Corte Suprema, debido a las omisiones del Presidente, atribuyendo también poder de decisión al Tribunal Constitucional.

Palabras clave: Democracia; Covid-19; Corte Constitucional de Brasil.

INTRODUCTION

In March 2020, the world stopped. The main concern became a new and little-known respiratory disease that required quick action by governments. In certain cases, governments acted as scientific information indicated. In others, they tried solutions that turned out to be disastrous. The reality was frightening. Tens of millions of people have died because of COVID-19 and the situation has only stabilized since the emergence of vaccines. All these facts are well known to all of us.

In Brazil, the federal government's policy was terrible. The President defended that COVID-19 was just a “small cold” and that it would not cause great damage. He was against lockdowns, because he understood that the risk to the economy justified taking the risk of death from the disease. This measure led to a federative conflict with many States and Municipalities, which intended to implement the measures World Health Organization (WHO) and Brazilian health institutions.

The President also did not intend to implement a vaccination policy at the beginning of the pandemic. In his view, vaccines would not be effective and would cause other diseases. States purchased COVID-19 vaccines directly, without support from the federal government. Only after much pressure from public opinion did the President decide to buy the vaccines.

On various grounds, constitutional actions were filed in the Brazilian Supreme Court (STF, *Supremo Tribunal Federal*) and federal government legal norms (laws, acts, decrees and executive orders) were suspended for violating the Brazilian Constitution. Given this situation, we researched the behavior of the Brazilian Supreme Court to determine changes in the Court's alignment with the federal government.

This paper consists of a descriptive study that uses a database with decisions of the Brazilian Supreme Court (Preliminary/Temporary Injunctions and Final Decisions) in “ADI” (*Ações Diretas de Inconstitucionalidade*, Direct Action for the Declaration of Unconstitutionality - Concentrated/Abstract control of norms) on the Constitutionality of Law and Federal laws (laws, acts, decrees and executive orders), during six presidential terms (2000-2022), with the differentiation in the last term of the federal laws that regulated topics related or not related to COVID-19 and that were the subject of actions, from a larger survey that includes: Legislative process at Brazil Congress; Executive orders and decree power; Judiciary of the Brazilian States; The performance of other branches.

The main issues addressed in this study involve: how effective is the concentrated judicial review and abstract control of laws in decisional process? How autonomous are the Supreme Court and their decisions? Is the abstract control of norms important to democracy stability, to decisions of the government and majorities and to consensualism? Does the STF

decide in a “counter majoritarian” way? With the pandemic (COVID-19), has anything changed?

The main findings of the study demonstrate that there were no significant changes in the decisions of the Brazilian Supreme Court, during the last presidential term, compared to previous presidential terms, in the constitutional judicialization of federal legal norms not related to the COVID-19 pandemic.

However, in the constitutional judicialization of federal norms related to the COVID-19 pandemic, the Brazilian Supreme Court admitted and ruled in favor of the plaintiffs that are legitimized to file such as political parties and national associations and nullified federal norms and decrees of the Bolsonaro government that “contradicted” recommendations of health and of international organizations (WHO, etc.) in the implementation of public policies in the COVID-19 pandemic

1. PERFORMANCE OF THE BRAZILIAN SUPREME COURT (STF) AND RELATIONS JUDICIARY/EXECUTIVE/LEGISLATIVE IN THE FEDERAL LEVEL BEFORE PANDEMIC OF COVID-19

In studies on judicial institutions in Brazil and the role of the Judiciary in public policies, access to justice and citizenship rights, the most researched topic is, without a doubt, the STF (Brazilian Supreme Court). The main research has reflected a lot about the institutional forms, the decision-making process, the normative production in the control of constitutionality, its relations with other courts and judicial actors, the impacts of the Court's decisions. The issue of the STF relations with the other powers has been more controversial, as the analysis of the STF in the dynamics of political institutions seems to assume a normative position on the constitutional model of 1988 and the performance of democracy since then. This points to the more general problem of the field: the necessary clarity about how to combine policy analysis and normative decision. Obviously, during the COVID-19 pandemic, this aspect of the Supreme Court and its relationship with the executive and legislative branches has been accentuated.

The literature on Brazilian judicialization addressed the performance of judicial institutions and the performance of judges and what would be the institutional model and its appropriate role in post-1988 Brazilian politics¹. This is how the issue of constitutional courts

¹ CARVALHO, E. R. Os dilemas do controle de constitucionalidade no ordenamento jurídico brasileiro. *Política Hoje*, v. 1, n. 10, p. 153-168, 1999. CASTRO, M. F. Política e economia no judiciário: as ações diretas de inconstitucionalidade dos partidos políticos. *Cadernos de Ciência Política*, 7, 1993. CASTRO, M. F. O Supremo Tribunal Federal e a judicialização da política. *Revista Brasileira de Ciências Sociais*, v. 12, p. 147-156, 1997. KOERNER, A. O debate sobre a reforma do judiciário. *Novos estudos CEBRAP*, v. 54, p. 5, 1999. MACIEL, D. A. e KOERNER, A. Sentidos da Judicialização da Política: Duas análises. *Lua Nova*. 57: 113-134 p. 2002. SADEK, M. T. (Org.). *Uma introdução ao sistema de justiça*. São Paulo: Idesp/Sumaré,

in democracy discussed in comparative politics² relates to the significant changes in constitutional jurisdiction in post-1988 Brazil.

The institutional arrangement of constitutional jurisdiction introduced by CF 1988 broadened access to disputes over the constitutionality of norms by multiplying Legitimized Plaintiffs (Authors), inserting the judiciary (in particular, the STF) in the decision-making, legislative and democratic political process. Thousands of demands (ADI alone, more than 6 thousand since 1988) combined with the absence of clear decision-making rules that limit the form of STF participation in the political process (deadline to file an action, deadline to decide, chronological order in the decision, restrictions to the decision monocratic/temporary versus collegiate/final, etc.)³ generated an unusual form of constitutional jurisdiction, uncommon in other constitutional courts.⁴

There is no single theoretical-methodological approach to dealing with judicial institutions in the exercise of constitutional jurisdiction. In general, the literature tends to indistinctly treat the determinations of the institutional arrangement and its effects on the strategies of the actors and the political outcomes (policy outcomes) with approaches to sociological, political, and legal phenomena after the Constitution of 1988.⁵ Certainly, studies on constitutional jurisdiction in its institutional and comparative aspects, in Political Science, Law and other areas, have expanded descriptive and analytical knowledge about the participation of the Brazilian Supreme Court (STF) in the political process. Several research groups on the STF, analyzing thousands of ADI and their decision-making process, reached

1995. SADEK, M. T. O Judiciário em questão. *São Paulo em Perspectiva*, v. 10, p. 4, 1996. SADEK, M. T. Corpo e alma da magistratura brasileira. *Revista Brasileira de Ciências Sociais*, v. 13, n. 38, 1998. SADEK, M. T.; ARANTES, R. A crise do Judiciário e a visão dos juízes. *Revista USP*, 21, p. 34-45. 1994. TOMIO, F. R. L.; ROBL FILHO, I. N.; KANAYAMA, R. L. Controle de constitucionalidade abstrato e concentrado no Brasil, Espanha, Itália, México e Portugal. *Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional*, feb. 2017a. VIANNA, L. W. *A judicialização da política e das relações sociais no Brasil*. Rio de Janeiro: Revan, 1999.

² VALLINDER, T. The judicialization of politics - a world-wide phenomenon: introduction. *International Political Science Review*, 15, 2, 91-9, 1994. TATE, C. N.; VALLINDER, T. (orgs.). *The global expansion of judicial power*. New York: New York University Press, 1995. SHAPIRO, N. L; STONE, A. The new constitutional politics of Europe. *Comparative Political Studies*, 26, 4: 397-420, 1994.

³ On December 19, 2022, there was a relevant change in the Standing Rules of the Federal Supreme Court, through Amendment nº. 52, determining that the precautionary and temporary measures granted monocratically must be submitted to the collegiate, in the next virtual session, to endorse/countersign or not the decision. Also, requests of examination must be returned within 90 (ninety) days (STF, 2022).

⁴ TOMIO, F. R. L.; ROBL FILHO, I. N.; KANAYAMA, R. L. Controle de constitucionalidade abstrato e concentrado no Brasil, Espanha, Itália, México e Portugal. *Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional*, feb. 2017a.

⁵ ROMANELLI, S. L. T. B.; TOMIO, F. R. L. Origins for the judicialization of politics in Brazil – historical and institutional aspects. *Constituição, Economia e Desenvolvimento*. vol. 7, n. 13, Jul.-Dez. p. 317-342, 2015. CARVALHO, E. R. Judicialização da política no Brasil: controle de constitucionalidade e racionalidade política. *Análise Social*, Lisboa, n. 191, v. 44, p. 315-335, abr. 2009. CARVALHO, E. R. Trajetória da revisão judicial no desenho constitucional brasileiro: tutela, autonomia e judicialização. *Sociologias*, v. 12, n. 23, 2010.

similar conclusions about:

- a) the presence of the STF in the decision-making process;
- b) the concentration of judgments in the subnational sphere by demand of governors and the PGR (Advocate-General of the Union/ Attorney General) against state laws by formal defect of initiative and competence, respectively;
- c) the superior performance (higher process success rate) of institutional (PGR) and legal (OAB - Federal Council of the Brazilian Bar Association and National Legal Professions Associations) authors in their claims against federal norms, and the low success and wide range of demands from Political Parties with representation in the National Congress and other National Associations/Class Entities.⁶

However, there are few studies that investigate with empirical data the Constitutional Courts in the abstract judicial review, in a comparative perspective, mainly investigating the decisions of the STF in comparison to Constitutional Courts in Latin America and Europe.⁷ In this fundamental field for understanding Brazilian abstract constitutional control, in contrast to Constitutional Courts in other countries, we continue to resort to some comparative studies on the decision-making process of Constitutional Courts that do not analyze the presence of the STF in the legislative process.⁸

In this sense, we can say, in a much more descriptive and historical than analytical way, that the main findings on the participation of the Brazilian Supreme Court in the decision-making process, in the relations between the Judiciary, Executive and Legislative branches, through decisions in Direct Action for the Declaration of Unconstitutionality (ADI) of federal

⁶ VIANNA, L. W. BURGOS, M. B.; SALLES, P. M. Dezessete anos de judicialização da política. *Tempo social*, v. 19, n. 2, p. 39-85, 2007. TAYLOR, M.; DA ROS, L. Os partidos dentro e fora do poder: a judicialização como resultado contingente da estratégia política. *Dados-Revista de Ciências Sociais*. v. 51, n. 4, p. 825-864. ago. 2008. POGREBINSCHI, T. *Judicialização ou representação? Política, direito e democracia no Brasil*. Rio de Janeiro: Elsevier, 2012. TOMIO, F. R. L.; ROBL FILHO, I. N. Empirical legal research: teoria e metodologia para a abordagem do processo decisório de controle de constitucionalidade no STF. In: SIQUEIRA, G. S.; VESTENA, C. A. (org.) *Direito e experiências jurídicas: debates práticos*, v.2. Belo Horizonte: Arraes Editores, 2013b. OLIVEIRA, F. L. Agenda suprema: interesses em disputa no controle de constitucionalidade das leis no Brasil. *Tempo social*, v. 28, n. 1, p. 105-133, Apr. 2016.

⁷ TOMIO, F. R. L.; ROBL FILHO, I. N.; KANAYAMA, R. L. Controle de constitucionalidade abstrato e concentrado no Brasil, Espanha, Itália, México e Portugal. *Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional*, feb. 2017a.

⁸ BZDERA, A. Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review, *Canadian Journal of Political Science*, XXVI:1, march 1993. FIGUEROA, J. R. e Taylor, M. M., Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico. *Journal Latin American Studies*, núm. 38, 2006. ALIVIZATOS, Nicos. Judges as veto players. In: DÖRING, H., *Parliaments and Majority Rule in Western Europe*. Frankfurt: Campus, 1995. GAROUPA, N. e GREMBI, V. Judicial Review and Political Partisanship: Moving from Consensual to Majoritarian Democracy. *International Review of Law and Economics*, 2015.

norms, STF decided:

- a) in favor of the Federal Government level against States and Municipalities of the federation;
- b) in favor of the Government/Coalition position (Federal Executive & Legislative Majority in Congress).

That is, in the current state of the art of research on Brazilian abstract constitutional jurisdiction, we can say, in a much more descriptive and historical way than predictive, that the main findings on ADI decisions against the constitutionality of federal legal norms, the STF decided more frequently: in favor of the Union and against legitimate states/norms; in favor of the position of the Government/Coalition (Executive and parliamentary majority in Congress) and against the demands of legitimate members linked to associations (Political Parties and Confederations/Associations).⁹

Table 1. Success rate in nullifying norms by Legitimized Plaintiffs - Authors (2000-2022) - Brazilian Supreme Court (STF) Decisions in ADI (Direct Action for the Declaration of Unconstitutionality - Concentrated/Abstract constitutional control)

Legitimized Plaintiffs	ADI Against Federal Law and Norms	ADI Against State Law and Norms	ADI (Total)
GOVERNADOR (Governors)	18%	55%	51%
PGR (Advocate-General of the Union/Attorney General)	37%	44%	43%
OAB (BAR Association)	19%	47%	37%
ASSOCIAÇÃO/ CONFEDERAÇÃO (National Trade Union/ Associations/ National Class Entities)	10%	30%	21%
PARTIDO (Political Parties)	13%	30%	19%

Source: “Estatísticas – Corte Aberta” (Statistics, Brazilian Supreme Court)¹⁰

In addition, when considering all ADI, against both federal and state norms, institutional actors (legitimized plaintiffs) with higher success rate of STF’s decisions of declaration of unconstitutionality are State Governors and PGR (Advocate-General of the Union/Attorney General). Historically, the PGR has a high success rate in nullification the legal norms: nearly one for every two actions result declared unconstitutional against federal and state norms. The PGR (Advocate-General of the Union/Attorney General) and the governors

⁹ TOMIO, F. R. L.; ROBL FILHO, I. N.; KANAYAMA, R. L. Controle de constitucionalidade abstrato e concentrado no Brasil, Espanha, Itália, México e Portugal. *Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional*, feb. 2017a. ROMANELLI, Sandro Luís Tomás Ballande. *Suprema (in) dependência: mecanismos da relação entre governos e o Supremo Tribunal Federal*. Tese (doutorado) em direito. Curitiba: Universidade Federal do Paraná, 2016. <https://www.acervodigital.ufpr.br/handle/1884/44038>

¹⁰ BRASIL, Supremo Tribunal Federal. **Decisões do STF**. Portal da Transparência. Disponível em: <https://transparencia.stf.jus.br/extensions/decisooes/decisooes.html>. Acesso em: 03 fev. 2024.

star in the declaration of unconstitutionality against state legal norms. Political Parties have a low success rate. Many ADI (unconstitutional lawsuits) of this last institutional actor is filed as a way of responding to their electorate (see Table 1).

2. DATABASE, ANALYSIS AND VARIABLES

As described earlier, the subject of this paper is the concentrated and abstract constitutional control of Brazilian Supreme Court (STF) as part of the decision-making process at the federal level, the impact on public policies in the COVID-19 pandemic and its determinants by political institutions. The main issues are: how effective is the Concentrated judicial review in decisional process? How autonomous are the Brazilian Supreme Court and their decisions? Is the abstract constitutional control important to democracy stability, to decisions of the government and majorities and to consensualism? Does the STF decide in a “counter majoritarian” way? With the pandemic (COVID-19), has anything changed?

The decision-making process judicialized at the STF is treated as a set of interactions between institutional actors (individual and collective) that produces a set of policy outcomes, depending on institutional and political variation. The explanatory/independents and dependents variables of this approach are:

INDEPENDENTS/EXPLANATORIES VARIABLES:

- LEVEL ADI – Institutional level of Norms (FEDERAL or STATE Law, Acts, Decree and Executive Orders) that ADI was filed by legitimized plaintiff - only decisions against **federal norms** are investigated in this paper;
- PRESIDENTIAL TERMS (2000/2022) – Fernando Henrique Cardoso - FHC (2000/2002), Lula (2003/2010), Dilma (2011/2016), Temer (2016/2018) and Bolsonaro (2019/2022);
- LEGITIMIZED PLAINTIFF – Institutional Actors with constitutional competence to file a Direct Action for the Declaration of Unconstitutionality to be judged by the STF (Brazilian Supreme Court): Advocate-General of The Union/Attorney General (PGR), Political Parties, Governors, State Legislature, BAR Association (OAB), National Trade Union/National Class Entities. The legitimized plaintiff and the constitutional prerogatives of these institutional actors to initiate the direct action (variable that measure the accessibility to the constitutional court). The number of legitimized plaintiffs is broader and plural in Brazil, which favors litigation;
- COVID STF - Actions filed in the Supreme Court and decisions by the STF (Brazilian Supreme Court) classified "the COVID-19 pandemic Law" by STF.

DEPENDENT VARIABLE:

- DECISIONS SUPREME COURT (Preliminary INJUNCTION & FINAL Decision) – success rate in Nullification of the content of FEDERAL Norms (partially/ completely and temporary/permanent) in Abstract/Concentrated judicial review (ADI) filed by authors between presidential terms (“in favor”/”against” plaintiff). [see Table 1]

The variable dependent on the analysis is the nullification rate of the content of Federal Norms (laws, acts, decrees and executive orders). Court decisions "in favor of legitimized plaintiff" are treated here as a *proxy* for "defeats" of the government/coalition in the constitutional courts. Certainly, this is a limited and imprecise perspective. The government itself can be the author (legitimized plaintiff) of a Direct Action for the Declaration of Unconstitutionality (rare event) or the government is indifferent to the nullification of a Norm.

Table 2. Classification of Brazilian Supreme Court (STF) Decisions (Preliminary Injunctions and Final Decisions) in “ADI” (Direct Actions of Unconstitutionality - Concentrated/Abstract judicial review) on the Constitutionality of Norms (laws, acts, decrees, and executive orders)

NULLITY			COMPATIBILITY
(partially/completely and temporary/permanent) of Legal Norm with the Constitution “In favor of the legitimized plaintiff”			of Legal Norms with the Constitution “Against of the legitimized plaintiff”
Preliminary INJUNCTION & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (In favor of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff or Awaiting judgment)

Source: Classification organized by the authors¹¹

The main purpose of the dependent variable is to describe the nullification rate of federal norms. However, given the descriptive purposes of this paper, the decisions of the STF are classified into two kinds of decisions, the first one (the nullification of the norms) being

¹¹ BRASIL. Supremo Tribunal Federal. **Processos relacionados à COVID-19**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

described by three kinds of possible decisions. Therefore, in this paper, the classification of the decisions Supreme Court are classified in (see Table 2):

(1) NULLITY (partially/ completely and temporary/permanent) of a Norm with the Constitution, designated as “In favor of the legitimized plaintiff”, occurs in three kinds of decisions, due to the peculiar possibilities of decisions by the STF:

(1.1) Preliminary INJUNCTION & FINAL Decision (In favor of the legitimized plaintiff);

(1.2) Preliminary INJUNCTION (In favor of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff);

(1.3) Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (In favor of the legitimized plaintiff).

(2) COMPATIBILITY of Norms with the Constitution designated as “Against of the legitimized plaintiff”: Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff or Awaiting judgment).

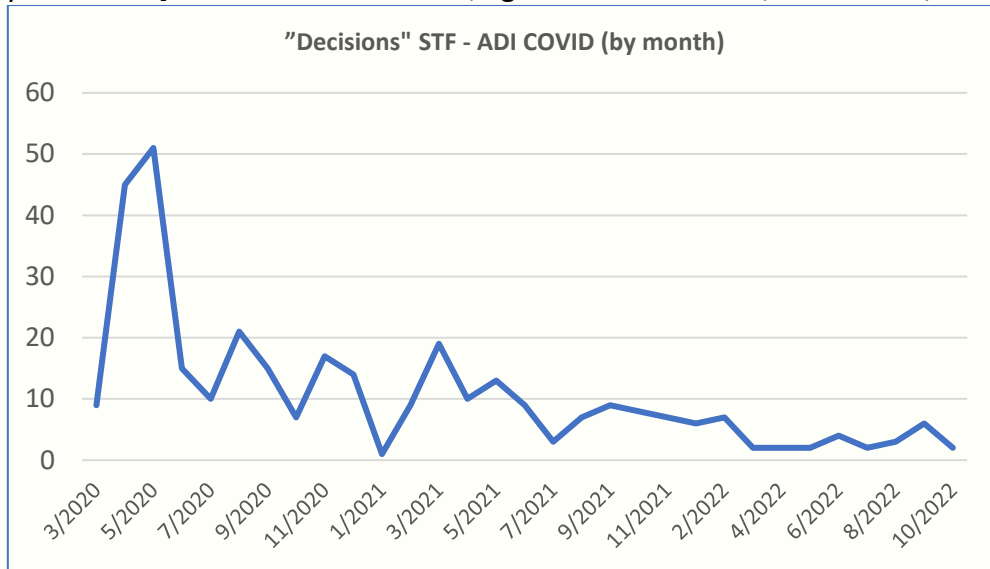
The research design, basically descriptive, at this stage of the study, seeks to verify whether in the last term of the Brazilian President (Bolsonaro Term, 2019-2022) there was a political and institutional conflict between the Executive and Judiciary. And, as a result:

(1) verify whether this relationship between the executive and judicial powers resulted (exploratory hypotheses) in a generalized change in the decision-making pattern of the STF (Brazilian Supreme Court) in abstract/concentrated constitutional control (ADI) of federal norms;

(2) or verify whether the change in the decision-making pattern of the STF was limited to the norms that regulated federal public policies aimed at the COVID-19 Pandemic.

As there is not, in this study, an in-depth examination of each of the ADI, the indicator used to measure the possible variation in the decision-making pattern of the STF (and, of the judiciary/executive relationship) is the nullification rate of federal norms. Secondly, to broaden the interpretation of this relationship, we verified the variation of STF decisions in ADI proposed by the institutional legitimized plaintiffs.

Graph 1. Decisions of STF (Brazilian Supreme Court) classified "the COVID-19 pandemic Law" by the Court [148 Decisions in 79 ADI, against FEDERAL Acts, until oct 18/2022)]



Source: "Painel de Ações COVID"

The empirical basis of this study is: a section of 2,743 Brazilian Supreme Court Decisions in 1,850 ADI presented against Federal Norms (laws, acts, decrees and executive orders, between 2000/2022 (see Table 3); in five Presidential Terms: FHC, Lula, Dilma, Temer and Bolsonaro; and a subsection of 148 Decisions in 79 ADI, about Pandemic COVID-19 Law, against Federal Norms (until Oct 18, 2022) in Bolsonaro Presidential Term (see Graph 1 and Table 4).

Table 3. Abstract/Concentrated Judicial Review – Decisions of Brazilian Supreme Court (STF) in ADI Filed against FEDERAL Legal Norms (Law, Acts, Decree and Executive Orders) – by President's Term (2000-2022)

Presidential Terms	NULLITY (partially/ completely and temporary/permanent) of Legal Norm with the Constitution - "In favor of the legitimized plaintiff"			COMPATIBILITY of Legal Norms with the Constitution - "Against of the legitimized plaintiff"	TOTAL
	Preliminary INJUNCTION & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (In favor of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff or Awaiting judgment)	

FHC (2000/02)	11 3%	25 6%	53 12%	340 79%	429
Lula (2003/10)	7 1%	22 4%	63 12%	417 82%	509
Dilma (2011/16)	8 3%	14 5%	43 14%	241 79%	306
Temer (2016/18)	7 3%	14 6%	27 12%	184 79%	232
Bolsonaro (2019/22)	5 1%	74 20%	15 4%	280 75%	374
Bolsonaro (COVID)	5 2%	38 13%	13 4%	239 81%	295
Bolsonaro (Not COVID)	0 0%	36 46%	2 3%	41 52%	79
TOTAL	38 2%	149 8%	201 11%	1,462 79%	1,850

Source: STF, *Estatísticas – Corte Aberta; Painel de Ações COVID*¹²

Table 4. Abstract/Concentrated Constitutional Control – Decisions of Brazilian Supreme Court (STF) in ADI filed against FEDERAL Norms (Law, Acts, Decree and Executive Orders) – Bolsonaro President's Term (2019-2022), by Legitimized Plaintiff

COVID/ Not COVID Legitimized Plaintiff (2019/2022)	NULLITY (partially/ completely and temporary/permanent) of Legal Norm with the Constitution - "In favor of the legitimized plaintiff"			COMPATIBILITY of Legal Norms with the Constitution - "Against of the legitimized plaintiff"	TOTAL
	Preliminary INJUNCTION & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (In favor of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff or Awaiting judgment)	
COVID (Total)	0	36	2	41	79
National Trade Union/ / National Class Entities/ Associations	0	8	0	15	23
Governors	0	1	0	3	4

¹² SUPREMO TRIBUNAL FEDERAL. **Corte Aberta**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

OAB (BAR Association)	0	2	0	1	3
Political Partie	0	23	2	19	44
President	0	2	0	2	4
PGR (Advocate-General of the Union/Attorney General)	0	0	0	1	1
Not COVID (Total)	5	38	13	239	295
State Legislature	0	0	0	2	2
National Trade Union/ National Class Entities / Associations	2	7	3	113	125
Governors	0	0	1	12	13
OAB (BAR Association)	0	1	1	11	13
Political Partie	3	28	5	89	125
Citizen	0	0	0	1	1
President	0	2	0	1	3
PGR (Advocate-General of the Union/Attorney General)	0	0	3	10	13
TOTAL	5	74	15	280	374

Source: STF, *Estatísticas – Corte Aberta; Painel de Ações COVID*¹³

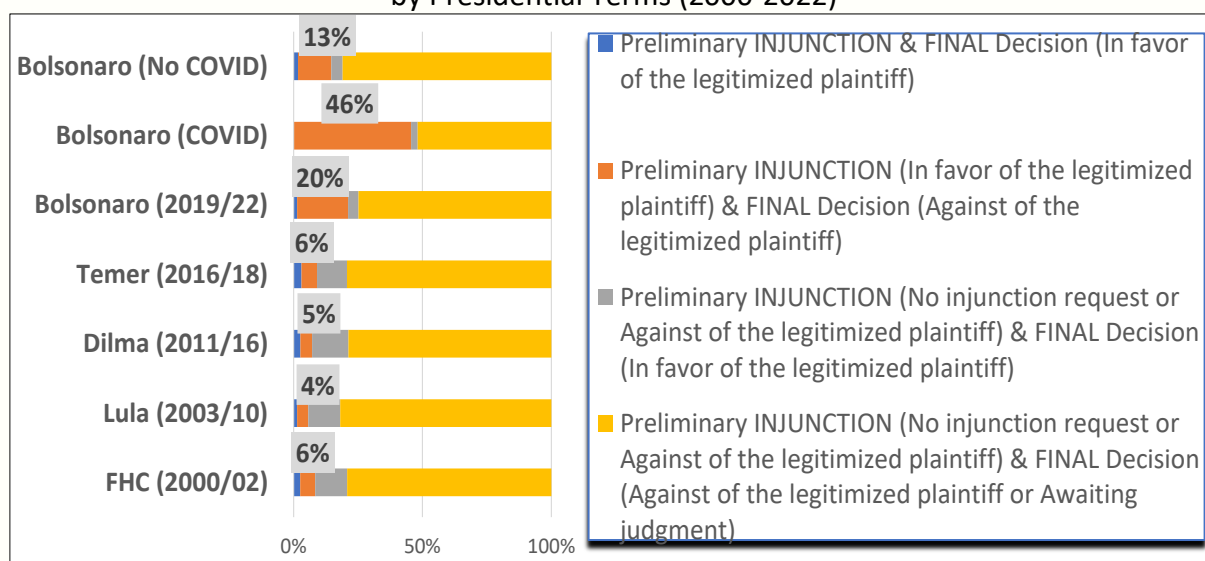
3. EMPIRICALS EVIDENCES: WITH APPEARANCE OF THE PANDEMIC OF COVID-19, HAS ANYTHING CHANGED IN STF DECISIONS?

As can see in the Graph 2, the confrontation between the STF and Bolsonaro (in the ADI judgments, abstract/concentrated constitutional control) focuses on the ADI against federal norms (laws, acts, decrees, and executive orders) that regulated aspects of public policies related to the COVID-19 Pandemic (the classification of this issue area is from the STF).

In the Graph 2 we emphasized the ADI judgments that the preliminary injunction was favorable, and the final judgment resulted, in most cases, "Impaired", "Extinct the Process", "Loss of Object" (Preliminary Injunction "In favor of the legitimized plaintiff" and Final Decision "against of the legitimized plaintiff"). When grouped all ADI that had a favorable decision (preliminary injunction or final decision) and results in NULLITY (partially/ completely and temporary/permanent) of Legal Norm with the Constitution ("In favor of the legitimized plaintiff").

¹³ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

Graph 2. Abstract/Concentrated constitutional control – Decisions of Brazilian Supreme Court (STF) in ADI filed against FEDERAL Norms (Law, Acts, Decree and Executive Orders) – by Presidential Terms (2000-2022)



Source: STF, *Estatísticas – Corte Aberta*; *Painel de Ações COVID*¹⁴

In the Table 5 (and Graph 3) it is possible to see that the result of the judgment of ADI filed by POLITICAL PARTY (Legitimized Plaintiff) against FEDERAL norms is even more atypical in the Bolsonaro government: In ADI (issue area COVID) the rate reaches 57% of favorable decisions (preliminary injunctions or finals decisions in favor of the legitimized plaintiff) resulting in NULLITY (partially/ completely and temporary/permanent) of Norms. However, even in the other ADIs, favorable decisions are higher than in previous governments, including the Temer’s Government, which had been the government where the parties were most successful in their ADI against the federal norms.

Table 5. Abstract/Concentrated Constitutional Control – Decisions of Brazilian Supreme Court (STF) in ADI Filed by **POLITICAL PARTIES** (Legitimized Plaintiff) against FEDERAL Norms (Law, Acts, Decree and Executive Orders) – by Presidential Term (2000-2022)

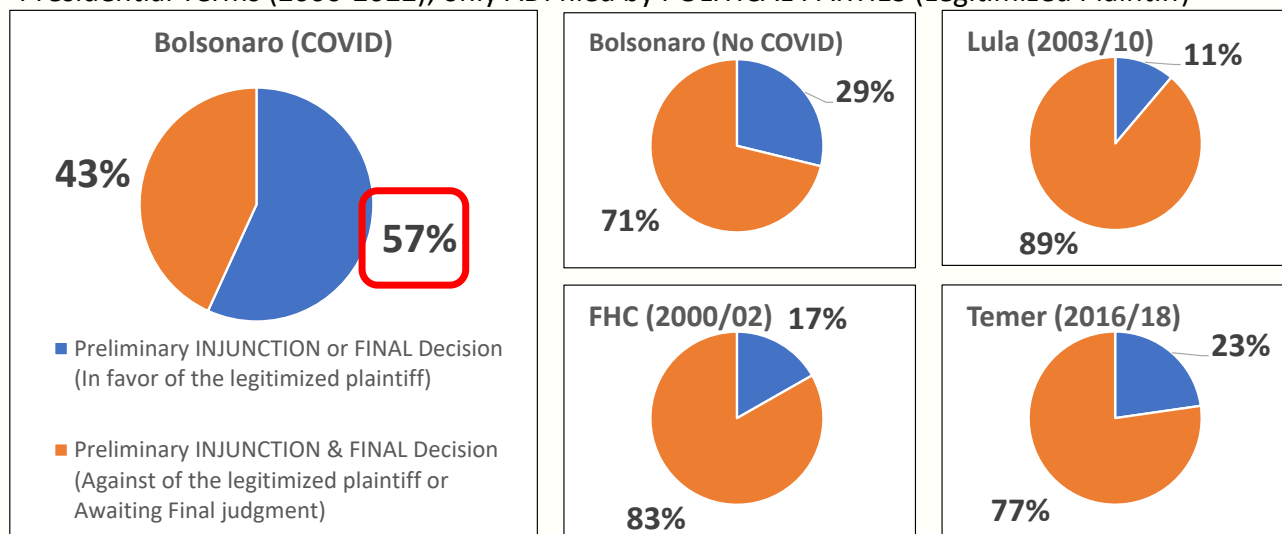
President's Term	NULLITY (partially/ completely and temporary/permanent) of Legal Norm with the Constitution - “In favor of the legitimized plaintiff”			COMPATIBILITY of Legal Norms with the Constitution - “Against of the legitimized plaintiff”	TOTAL
	Preliminary INJUNCTION & FINAL Decision (In	Preliminary INJUNCTION (In favor of the	Preliminary INJUNCTION (No injunction request or	Preliminary INJUNCTION (No injunction request or Against of the	

¹⁴ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

	favor of the legitimized plaintiff)	legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff)	Against of the legitimized plaintiff) & FINAL Decision (In favor of the legitimized plaintiff)	legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff or Awaiting judgment)	
FHC (2000/02)	3	11	15	144	173
Lula (2003/10)	2	5	9	127	143
Dilma (2011/16)	2	2	4	53	61
Temer (2016/18)	3	3	9	51	66
Bolsonaro (2019/22)	3	51	7	108	169
Bolsonaro (COVID)	0	23	2	19	44
Bolsonaro (Not COVID)	3	28	5	89	125
TOTAL	13	72	44	483	612

Source: STF, *Estatísticas – Corte Aberta; Painel de Ações COVID*¹⁵

Graph 3. Abstract/Concentrated constitutional control – Decisions of Brazilian Supreme Court (STF) in ADI filed against FEDERAL Norms (Law, Acts, Decree and Executive Orders) – by Presidential Terms (2000-2022), only ADI filed by POLITICAL PARTIES (Legitimized Plaintiff)



Source: STF, *Estatísticas – Corte Aberta; Painel de Ações COVID*¹⁶

¹⁵ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

¹⁶ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

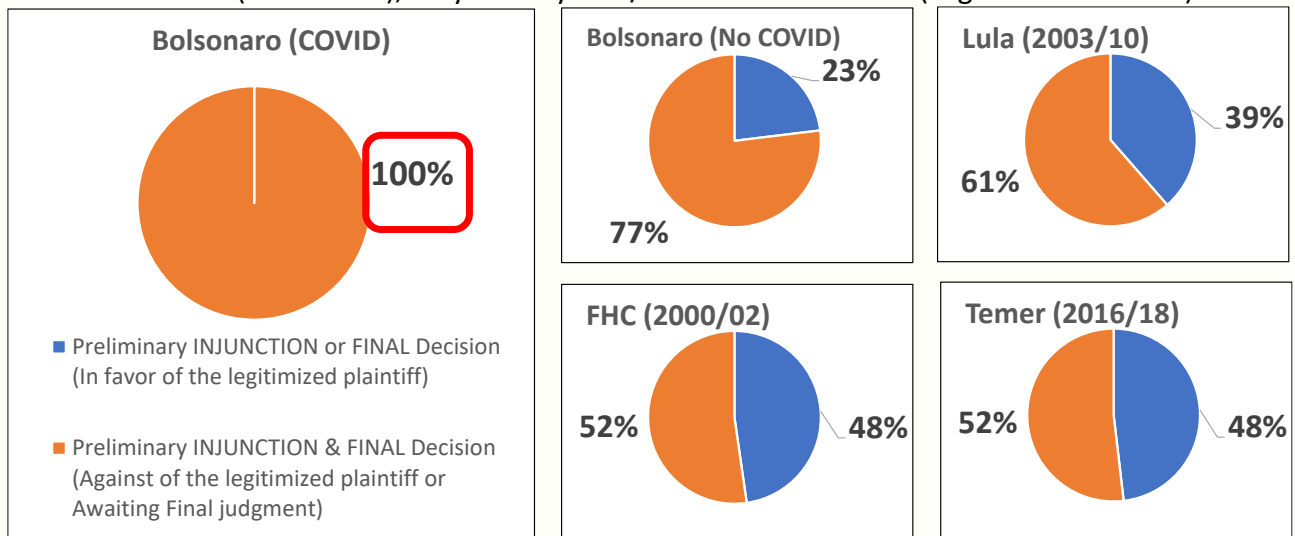
Table 6. Abstract/Concentrated Constitutional Control – Decisions of Brazilian Supreme Court (STF) in ADI Filed by ADVOCATE-GENERAL OF THE UNION /ATTORNEY GENERAL (Legitimized Plaintiff) against FEDERAL Norms – by Presidential Term (2000-2022)

President's Term	NULLITY (partially/ completely and temporary/permanent) of Legal Norm with the Constitution - "In favor of the legitimized plaintiff"			COMPATIBILITY of Legal Norms with the Constitution - "Against of the legitimized plaintiff"	TOTAL
	Preliminary INJUNCTION & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (In favor of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff or Awaiting judgment)	
FHC (2000/02)	3	3	15	23	44
Lula (2003/10)	2	3	22	43	70
Dilma (2011/16)	2	2	18	32	54
Temer (2016/18)	2	4	7	14	27
Bolsonaro (2019/22)	0	0	3	11	14
Bolsonaro (COVID)	0	0	0	1	1
Bolsonaro (Not COVID)	0	0	3	10	13
TOTAL	9	12	65	123	209

Source: STF, *Estatísticas – Corte Aberta; Painel de Ações COVID*¹⁷

¹⁷ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta.** Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19.** Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

Graph 4. Abstract/Concentrated Constitutional Control – Decisions of Brazilian Supreme Court (STF) in ADI filed against FEDERAL Norms (Law, Acts, Decree and Executive Orders) – by President's Term (2000-2022), only filed by PGR/ATTORNEY GENERAL (Legitimized Plaintiff)



Source: STF, *Estatísticas – Corte Aberta; Painel de Ações COVID*¹⁸

In the Table 6 (and Graph 4) it is possible to see that the result of the judgment of ADI filed by the ADVOCATE-GENERAL OF THE UNION/ATTORNEY GENERAL (PGR) (Legitimized Plaintiff) against FEDERAL norms is a lot more (much more) atypical in the Bolsonaro government:

- ADVOCATE-GENERAL OF THE UNION/ATTORNEY GENERAL (PGR) has always been the institutional actor with the highest success rate in filed actions against federal norms;

- In Bolsonaro’s term, the ADVOCATE-GENERAL OF THE UNION/ATTORNEY GENERAL (PGR) is apparently “friendly” with the government (coalition, majority), 0% of the actions (ADI) filed by the PGR in the last government were successful. In fact, the number of Direct Actions for the Declaration of Unconstitutionality (ADI) presented by the PGR in this government is insignificant.

In the Table 7 (and Graph 5) it is possible to see that the result of the judgment of ADI filed by National Trade Union/Association/ National Class Entities (Legitimized Plaintiff) against FEDERAL norms is even more atypical in the Bolsonaro government. In ADI (issue area COVID) the rate reaches 35% of favorable decisions (preliminary injunctions or finals decisions) resulting in NULLITY (partially/ completely and temporary/permanent) of federal Norms.

¹⁸ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta.** Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19.** Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

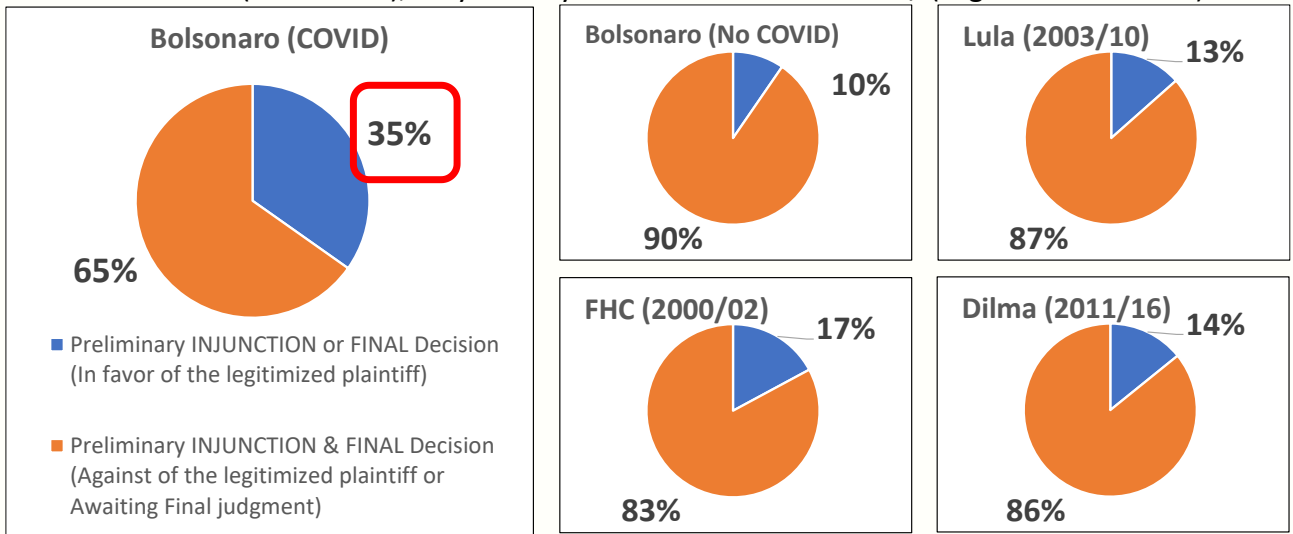
Table 7. Abstract/Concentrated Constitutional Control – Decisions of Brazilian Supreme Court (STF) in ADI Filed by **National Trade Union/Associations/ National Class Entities** (Legitimized Plaintiff) against FEDERAL Legal Norms – by Presidential Term (2000-2022)

President's Term	NULLITY (partially/ completely and temporary/permanent) of Legal Norm with the Constitution - "In favor of the legitimized plaintiff"			COMPATIBILITY of Legal Norms with the Constitution - "Against of the legitimized plaintiff"	TOTAL
	Preliminary INJUNCTION & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (In favor of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (In favor of the legitimized plaintiff)	Preliminary INJUNCTION (No injunction request or Against of the legitimized plaintiff) & FINAL Decision (Against of the legitimized plaintiff or Awaiting judgment)	
FHC (2000/02)	4	6	14	116	140
Lula (2003/10)	3	4	21	180	208
Dilma (2011/16)	2	6	13	127	148
Temer (2016/18)	1	6	7	102	116
Bolsonaro (2019/22)	2	15	3	128	148
Bolsonaro (COVID)	0	8	0	15	23
Bolsonaro (Not COVID)	2	7	3	113	125
TOTAL	12	37	58	653	760

Source: STF, *Estatísticas – Corte Aberta; Painel de Ações COVID*¹⁹

¹⁹ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta.** Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19.** Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

Graph 5. Abstract/Concentrated Constitutional Control – Decisions of Brazilian Supreme Court (STF) in ADI filed against FEDERAL Norms (Law, Acts, Decree and Executive Orders) – by President's Term (2000-2022), only filed by NATIONAL TRADE UNION/ (Legitimized Plaintiff)



Source: STF, *Estatísticas – Corte Aberta*; *Painel de Ações COVID*²⁰

FINAL CONSIDERATIONS

The main findings of the study demonstrate that there were no significant changes in the decisions of the Brazilian Supreme Court, during the last presidential term, compared to previous presidential terms, in the constitutional judicialization of federal norms not related to the COVID-19 pandemic.

However, in the constitutional judicialization of federal norms related to the COVID-19 pandemic, the Brazilian Supreme Court admitted and ruled in favor of the Legitimized Plaintiff, through Direct Actions for the Declaration of Unconstitutionality filed by unusual institutional actors, such as Political Parties and National Trade Union/ National Class Entities/ Associations which, historically, in other presidential terms had low rates of nullification of federal norms. In the absence of the PGR (Advocate-General of the Union /Attorney General) as the legitimized plaintiff privileged by the STF to nullify federal norms, the Supreme Court admitted and ruled in favor of other legitimized (political parties and national associations) and nullified federal norms and decrees of the Bolsonaro’s government that “contradicted” recommendations of entity international organizations (WHO, etc.), in the implementation of public policies in the COVID-19 pandemic.

²⁰ SUPREMO TRIBUNAL FEDERAL. **Corte Aberta**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/corte_aberta/corte_aberta.html. Acesso em: 15 fev. 2024. SUPREMO TRIBUNAL FEDERAL. **Processos relacionados à COVID-19**. Portal da Transparência. Disponível em: https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html. Acesso em: 14 jan. 2024.

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