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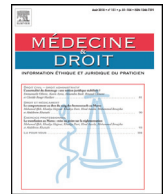


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Public Health

## Judicial protection of the right to health in the context of Covid-19 and populism in Brazil

*Brésil : la protection judiciaire du Droit à la Santé dans le contexte du Covid*

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### ABSTRACT

**Background.** – The Covid-19 pandemic has brought new challenges to the health systems of Latin America. However, the institutions and mechanisms created by the Social State of Law were unable to confront these new risks. As a result of that, populist governments have used this crisis as an opportunity to deepen the high levels of inequalities through the appropriation of power, wealth and social welfare. Courts have also reacted in order to guarantee the right to health; however, many challenges remain.

**Objective.** – To examine the challenges and opportunities of the judicial protection of the right to health in the context of Covid-19 and Populism in Brazil.

**Methodology.** – Qualitative, descriptive and exploratory. Documentary research was carried out by reviewing databases such as Scholar, PubMed, and Scopus. Indexed articles, jurisprudence, legislation, and literature were also reviewed. Additional publications were also identified through other sources.

**Results.** – There is an inversely proportional relationship between the intensity of the crisis and the level of judicial activism on the part of the Courts. Therefore, the more the scale and intensity of the crisis generated by populist governments in the context of pandemics, uncertainty, and inequality the more reflexive, and strategic courts should be and the more protection, defense and monitoring should be promoted in order to ensure the fulfilment of the right to the highest attainable level of health especially of the most vulnerable. On the other hand, the more compliance through the availability of health goods and services, and the more availability of health workers with better salaries, social security and working conditions the more resilient the State will be to face emergencies, which at the same time will promote fewer restrictions on fundamental rights.

**Conclusions.** – Courts play a special role in protecting the right to health, especially in the context of emergencies and crises. States must adopt measures by using the maximum available resources in order to protect the right to the highest attainable standard of health.

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### RÉSUMÉ

**Mots clés :**  
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Alors que le Droit à la Santé pouvait être menacé à l'occasion de l'épidémie de Covid-19, les tribunaux judiciaires par leurs décisions ont permis une meilleure allocation des ressources favorables à la population.

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Before the pandemic Covid-19, many countries were unable to protect the right to health due to a minimalist approach to the delivery of health services. Although some countries have recognised the right to health in their constitutions, due to a myriad of

reasons including the lack of regulation of the market in the health sector, however, many people were unable to access services. Even in developed countries such as the USA, the lack of universality of services and High-quality, affordable health care have led to more than 30 million Americans living without health protection [1]. However, this situation was further exacerbated in 2020 due to a sanitary crisis caused by the Covid-19 pandemic that led not only

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to the death of millions of people worldwide but also, it increased the lack of accessibility to health services that characterised many health systems worldwide. The reaction of the global community and States to confront this pandemic included a series of declarations of emergency and progressive measures that resulted very weak and inefficient. Indeed, such actions were characterized by a lack of coordination and political will despite many countries having acquired commitments at the international level in order to protect the right to health, especially in times of crisis and emergencies. This particular crisis also revealed many flaws in the health systems worldwide, for instance, poor availability of goods and services. Many people were unable to access services and as a result of this, Courts reacted in order to protect the right to health in many countries and their interventions ranged from issuing individual remedies such as access to vaccines, Intensive Care Units, tests, and health services for patient covid and non-covid as well as ordering structural remedies to States and other stakeholders, including public and private institutions in order to protect the right to health. The objective of this paper is to analyse the challenges and opportunities of the judicial protection of the right to health in the context of Covid-19 and Populism. In order to achieve this objective, the research was carried out using a qualitative, descriptive, exploratory and documentary design methodology. During the collection plan, different types of publications were reviewed, including indexed journal articles, jurisprudence and legislation by using databases such as Scopus, Vlex and Scholar. Additional publications were also identified through other sources. The main descriptors used for the search included “Covid-19” and “Right to Health” and “Courts” and in order to meet the inclusion criteria, it was reviewed specifically articles that evaluated the role of the judiciary in the protection of the right to health in the context of Covid-19 and Populism. This type of study is important, particularly in order to review the lessons learned from this crisis that left millions of deaths worldwide. Despite representing around 8.42% of the global population<sup>1</sup>, Latin American countries have had one of the highest number of cases of covid and a higher percentage of deaths from the virus<sup>2</sup>. The argument that this article attempts to develop is that there is an inversely proportional relationship between the intensity of the crisis and the level of judicial activism on the part of the Courts. Therefore, the more the scale and intensity of the crisis generated by populist governments in the context of pandemics, uncertainty, and inequality the more reflexive and strategic courts should be and the more protection, defense and monitoring should be promoted in order to ensure the fulfilment of the right to the highest attainable level of health especially of the most vulnerable. On the other hand, the more compliance through the availability of health goods and services, and the more availability of health workers with better salaries, social security and working conditions the more resilient the State will be to face emergencies, which at the same time will promote fewer restrictions on fundamental rights. Courts play a special role in protecting the right to health, especially in the context of emergencies and crises. States must adopt measures by using the maximum available resources in order to protect the right to the highest attainable standard of health.

Therefore, the structure of this paper is as follows, first, it will attempt to contextualize the role of the judiciary in the context of the pandemic Covid-19 and Populism, and then it will examine the

role of Courts in reaction to the denial and attacks by the federal government in Brazil, and finally, it will analyse the consequences of the actions and omissions by the Federal government of Brazil and provide some recommendations in relation to the role of Courts in contexts of emergency and crisis.

## 1. Methodology

The methodology used in this research was qualitative, descriptive and exploratory using the methodological design of documentary research. It is qualitative because it tries to understand and discover how the Courts reacted in relation to the crisis of the pandemic Covid-19 and the intervention of populist governments. By using a descriptive approach through the analysis of norms, jurisprudence and literature, it attempted to decompose the existing social and legal reality, trying to apply a deductive-inductive process that allowed the researcher to analyze patterns and differences in common and a range of relationships between categories and theories. Research with a descriptive scope consists of applying the analytical method in a pure way to a legal issue, that is, it consists of breaking it down into as many parts as possible [2]. Finally, this research attempted to evaluate in the end not only the reaction of populist governments and judicial systems but also, to generate some recommendations on how to strengthen the design of the justice system and the role of the judges.

## 2. The reaction of the Judiciary in the context of the emergency Covid-19 and populism

The Social State of Law was a reaction to the risks created by the industrial revolution. As a result of that, many countries, especially in the western world adopted new measures by introducing welfare states that varied in their intensity in order to protect the individual from risks and dislocations such as unemployment and poverty. Such initiatives were also a response to a particular context characterized, mainly, by the fragmentation and destruction of traditional structures of protection including, the family, the church and community, as well as the migration from rural into urban areas that prompted the individualization of society. However, these particular structures of the social state of law that we have set up until now to face such risks as well as to promote progress, have been currently unable to confront new risks such as the pandemic Covid-19, which has led to the death of millions of people worldwide and financial crises [3]. Indeed, the virus disrupted our daily lives and it certainly revealed the many flaws that are currently affecting health systems worldwide, for instance, in terms of poor allocation of budgets and lack of expenditure on health by States, lack of institutional capacity, lack of public policies that focus on prevention of health through public health interventions and primary care, lack of regulation and supervision, and lack of availability, accessibility and quality of services. In a similar vein, human rights are interdependent, therefore, it affected also other rights such as the right to education through the closure of schools and universities worldwide and the right to work affecting similarly the right to the vital minimum. The pandemic aggravated the situation of millions of people worldwide who are living in conditions of hunger and malnutrition and lack the capabilities to find a decent job, despite this, the economic aid and assistance from many governments were very minimal based on small-cash transfers that do not allow them to meet their vital minimum during the restrictions. Pandemics such as the Covid-19 are threatening to reverse the progress and development achieved in the last century<sup>3</sup> with millions of jobs lost,

<sup>1</sup> Worldometer (2022). Latin America and the Caribbean Population (live). <https://bit.ly/3yopM85>.

<sup>2</sup> Statista (2022). Number of deaths due to the novel coronavirus (COVID-19) in Latin America and the Caribbean as of October 5, 2022, by country. <https://www.statista.com/statistics/1103965/latin-america-caribbean-coronavirus-deaths/>.

<sup>3</sup> United Nations (2021). Pandemic threatens lost decade for development, UN report reveals. <https://news.un.org/en/story/2021/03/1088292>.

setbacks in gender equality [4] and it has led to many people being affected by hunger, deprivation and poverty. Without any doubt the pandemic Covid-19 did have a strong effect on our lives, however, the responses of many governments were very weak. The Covid-19 pandemic occurred in a context characterized by an imbalance in the system, namely, political, economic, social, legal and environmental and characterized by a high level of inequalities and a slow democratic erosion led by populist governments that make decisions under a framework of Abusive constitutionalism [5]. These populist regimes used the pandemic as an opportunity to obtain and accumulate more power by restricting fundamental rights, treating opponents as enemies, intimidating the press, threatening to challenge election results they do not like, manipulating the judiciary [6] as well as eliminating the opposition and reducing spaces for democratic processes. According to the populist view, society is divided into two groups: the people and the corrupt elite. The alternative during the pandemic Covid-19 was to think of the crisis as an opportunity to deepen the high levels of inequalities through the appropriation of power, wealth and social welfare. The strategy was to conduct a defensive, charismatic and restrictive attack to accumulate more power while enemies were eliminated. This situation worsened during the pandemic since it allowed populist leaders to declare laws, states of exception and emergencies and to use criminal law to eliminate anyone who did not comply with the orders issued by the regime<sup>4</sup>. Indeed, the pandemic revealed the failures of the many governments that were empowered through administrative executive decree of emergencies instead of issuing a declaration of states of exceptions that could make them more accountable to parliaments and Courts during this period of anxiety. The measures adopted by these governments have ended up infringing and restricting the rights, especially of the most vulnerable population, while ignoring the emergency<sup>5</sup>. Indeed, in many countries decisions were taken very late due to the prioritization of the economy. The lack of information and poor statistics was combined with the negation of the emergency from governments which led to many people suffering from access to services.

As a result of this, judges were forced to intervene. The reaction of the judiciary to the challenge of the emergency caused by the pandemic Covid-19 is not only related to the abuses of many populist governments, such as the limitations and restrictions on fundamental rights, but also in relation to access to justice and access to health services. For instance, the lack of second doses of the vaccine Pfizer led to writs of protection being filed by citizens. Thus, in a judgment, Courts in Colombia ordered access to Pfizer vaccines for 21 days<sup>6</sup>. During the lockdown, the judiciary also worked from home ordering remedies for protecting the right to health through email or WhatsApp messages. The judiciary reacted by strengthening its institutional capacity, increasing its personnel, as well as using new technologies in order to protect the right to health.

Health Systems in Latin America have been affected by many factors, for instance, the number of health personnel and infrastructure is still very precarious and the systems are characterized by high levels of corruption and a very low level of health expenditure. These particular characteristics are present in a context

<sup>4</sup> Forbes (2020). Duterte Threatens to 'Shoot' Quarantine Violators In Philippines. <https://www.forbes.com/sites/alexandrasternlicht/2020/04/02/duterte-threatens-to-shoot-quarantine-violators-in-philippines/?sh=4d6b66a2b85d>.

<sup>5</sup> France 24 (2020). The emergency declaration in Mexico came late due to the passive attitude of President Andres Manuel López Obrador. <https://www.france24.com/es/20200326-coronavirus-inc%C3%B3gnitas-y-desaf%C3%ADos-para-los-sistemas-de-salud-en-am%C3%A9rica-latina>.

<sup>6</sup> El Tiempo (2021) Tutela ordena a Minsalud aplicar segunda dosis de Pfizer a los 21 días. <https://www.eltiempo.com/salud/tutela-ordena-a-minsalud-aplicar-segunda-dosis-de-pfizer-a-los-21-dias-603291>.

where poverty, inequality, exclusion and lack of political will is the rule. Generally speaking, the health systems in Latin America have been achieving some progress in the last 50 years and this is due to different factors including the development of new technologies. However, the pandemic Covid-19 revealed many flaws in its health policies, in different areas, for instance, States are not fulfilling their obligations of conduct, resources, results<sup>7</sup> and supervision in order to protect the right to the highest attainable level of health as established in the International Covenant on Economic, Social and Cultural Rights<sup>8</sup>. In addition to that, one central characteristic of the health systems in Latin America is their fragmentation. The situation is indeed very complicated in some countries. The crisis generated by the pandemic has affected dramatically health services, and has particularly affected progress in terms of mortality rates and other indicators. The pandemic has particularly shown the lack of availability of health personnel in order to face the emergency, including doctors and professionals of health. In addition to that, many countries ran out of supplies, including ventilators and medicaments. Many doctors did not have sufficient equipment for personal protection such as masks and gloves and many professionals of health signed informal and temporal civil contracts that did not provide them with social security.

### 3. The Case of Brazil. The role of the Courts in reaction to the denial and attacks by the federal government in Brazil

Brazil is a federation with more than 200 million inhabitants of different cultures. It is well known in the literature how courts have been protecting the Right to Health due to problems of its health system known as *Sistema Unico de Saude*<sup>9</sup>, including its management failures<sup>10</sup>, lack of funding, lack of coordination, institutional capacity and fragmentation that is leading to the denial of health services and medicaments despite the constitution of 1988 has recognized the right to health as a fundamental right<sup>11</sup>. Such problems have increased litigation which has persisted [7] and is currently perceived as a threat to the Brazilian Health System [8]. Most of this litigation is individual and related to medicaments not incorporated into the SUS [9,10]. The health system in Brazil is public [11] and funded by taxes in a country that operates through a federation of different States that differs not only in terms of political issues but also in terms of culture and socio-demographic characteristics. Indeed, the problems of access to healthcare are mainly related to issues of accessibility and availability of services and medicaments, which have increased the judicialization process in the last 20 years. This high level of litigation is related to different factors including pressure from pharmaceutical companies [12], lack of financial resources, lack of clarity in relation to essential levels as well as pressure from civil society. However, these massive levels of judicialization were aggravated by the arrival of a new populist government and the pandemic Covid-19 that until now has left more

<sup>7</sup> International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, available at: <https://www.refworld.org/docid/48abd5730.html>.

<sup>8</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html>.

<sup>9</sup> The legal framework that regulates the Sistema Unico de saude of Brasil is Law 8080 of 1990.

<sup>10</sup> There are many studies that have been documenting this issue, for instance, according to de Freitas et al., 2020 Studies show management failures and dysfunctions in health systems.

<sup>11</sup> Art. 6 of the Brazilian constitution states that Education, Health, nutrition, labour, housing, transport, leisure, social security, protection of motherhood and childhood and assistance to the destitute, are social rights as outlined in this constitution.



than 686,000 deaths<sup>12</sup> in the country. President Jair Bolsonaro was elected for the period 2019-2022 and lost the election on October 2022 against ex-president Luis Ignacio Lula da Silva . . . During the period president Bolsonaro was in power many violations and restrictions of fundamental rights were documented.

The country was unable to design a clear and solid strategic response to mitigate the effects of the virus in the country and this is caused because of different factors at the external and internal levels, including poor data sharing mechanisms at the internal level and among public and private institutions. In addition to that, the strategy was characterized by the introduction of weak organizational structures to conduct a solid and effective response to the crisis with very poor coordination.

#### 4. Denial of the Covid-19 pandemic

The World Health Organisation issued a declaration on 30th January 2020 about the public health emergency, then through Act 188/GM/MS the country declared the outbreak and through Law 13979/2020 it began adopting some measures. It was only until March 2020 that the government published Act 356/2020 that provided some regulations and implementation of the measures to deal with the crisis. However, in general terms, the reaction, of the federal government in front of the pandemic Covid-19 was negative. First, the government of President Bolsonaro fiercely denied the crisis by ignoring scientific advice [13] and the dimensions and consequences of the emergency, particularly in the most vulnerable population. Despite substantial empirical evidence and the declaration of a pandemic by the World Health Organisation, the government rather focused its efforts on adopting measures in order to give full priority to the economy rather than the protection of the health of the population. Populist governments use a charismatic approach that tends to include an emotional appeal to achieve their objectives. This populist strategy in the Brazilian context is particularly characterized by the engagement of military personnel in the government. This approach crucially affected the way the federal government handled the crisis, which was characterized by the easing of Covid-19 rules including social distancing measures and allowing public agglomerations. Indeed, the reaction of the federal government lacked coordination and might be considered “. . .confusing and inefficient” [14]. Although the government adopted some social policies such as cash transfers in order to protect informal workers, self-employed, and beneficiaries of the family allowance programme to improve living conditions [15], however, such social protection policies were uncoupled from strong public health interventions [16]. Such fragmentation in the delivery of policies is one of the central causes of the high increase in death in the country and especially in the most vulnerable. The implementation of these emergency aid programs also has many problems in terms of accessibility that generated exclusions [17].

As a result of this denial, Courts in Brazil reacted in order to protect the right to health during the crisis<sup>17</sup>. In general terms, the issues that the Supreme Federal Court has been solving are related to the different conflicts between those who argue that strong measures of public health might violate the right to property and those who argue that it might violate the right to health. Thus, on several occasions, the Supreme Federal Court of Brazil reviewed several disputes between the Federal government and States and municipalities in which the Court “confirmed the concurrent competence of States and municipalities to adopt and keep public health

measures in place to combat the pandemic” [18]. Notably, such conflicts at the federal level have led to the reaction of several powers. The Supreme Court for instance has allowed States and municipalities to use their own vaccines if the central government does not make them available. In other words, even if there is no authorization from the main agency of Sanitary Surveillance in the country, States and municipalities could initiate vaccination based on for instance foreign registrations. It also blocked the federal government from soliciting ventilators acquired by the States<sup>18</sup>.

On the other hand, and very importantly, in a move to grant protection to the most vulnerable population, the Supreme Court reviewed a case in relation to the protection of the health of indigenous people and ordered the government to adopt actions in order to protect this particular group. This petition requested the adoption of actions by the government such as the implementation of sanitary barriers and the removal of invaders from land as well as to ensure the availability of health subsystems for the indigenous population including those living in urban areas<sup>13</sup>. The Supreme Court effectively protected the right to health of indigenous people by ordering Federal states to develop a plan in order to fulfill this right based on legislation that “. . .was enacted establishing the Indigenous Healthcare Subsystem within the Brazilian Unified Health System” (ibid).

In addition to that, the Court recognized the validity of the measures adopted during the emergency, including by reviewing the actions of public forces, for instance, in Rio de Janeiro. At the same time, it abolished several provisions that were limiting the information in relation to the monitoring of Covid-19. Thus, “In a suit brought by the Brazilian Bar Association, the highest court upheld the right of access to public information considering government restrictions imposed by Provisional Measure No 928”<sup>14</sup>. Access to information during a pandemic is vital since it is necessary to continuously monitor the number of active cases, the number of deaths in the country as well as the number of people who have tests and vaccination. Real-time data for everyone will allow not only the government to have access to crucial information in order to make crucial decisions, but also it will promote democratic deliberation by involving different types of stakeholders in the process.

Generally speaking, the pandemic massively increased the judicialization process. According to Biehl et. al., (2021) [19], between March and December 2020, judges in Brazil reviewed more than one billion procedural acts and issued more than 22 million rulings. Most of these rulings were related to the availability of beds and access to treatment and medications as well as claims that requested some economic help in the context of disagreements and conflicts between the federal government, states and municipalities. This suggests that despite the lockdown and closure of public facilities Courts responded to the challenges of reviewing claims in order to protect the right to health. Indeed, Courts were very creative by using new technology in order to be closer to the citizen. A study also found that “129 lawsuits were related to access to intensive care” [20]

This has also at the same time led to a reaction at the international level with the Interamerican Commission of Human Rights issuing precautionary measures in order to protect vulnerable

<sup>18</sup> Brazil, Supremo Tribunal Federal (2020). ACO 3385. Case available at: <https://bit.ly/3FvVTqO>.

<sup>13</sup> Droubi, S., Marquez, L., & Terena, L. (2020). The Brazilian Federal Supreme Court comes to the protection of indigenous people's right to health in the face of Covid-19 - EJIL: Talk! <https://www.ejiltalk.org/the-brazilian-federal-supreme-court-comes-to-the-protection-of-indigenous-peoples-right-to-health-in-the-face-of-covid-19/>.

<sup>14</sup> UN Commission on Human Rights, Report of the Special Rapporteur on the independence of judges and lawyers, 9th April 2021. <https://www.undocs.org/en/A/HRC/47/35>.

<sup>12</sup> Statistics of the John Hopkins University of Medicine suggest 686,371 deaths by October 2022: <https://coronavirus.jhu.edu/region/brazil>.

<sup>17</sup> See for instance: Brazil, Supremo Tribunal Federal (2020). ADPF 672 MC. Case available at: <https://bit.ly/3U4xlJF>.

indigenous populations including the Yanomami and Ye'kwana indigenous peoples, Munduruku, Guajajara and Awá and drawing special attention to the prison system of Brazil massively affected by high levels of overcrowding and Covid-19. The case against the indigenous people also reached the International Criminal Court and has generated a debate that questions the intervention by the federal government which has affected this vulnerable group.

## 5. The attack on the courts

In addition to the attitude of denial, the populist government attacked the Courts and other federal States by promoting and using a charismatic and nationalist discourse that convinced many of its followers. The attack was also directed toward the different measures adopted by States such as local campaigns in relation, for instance, to social distancing and not providing the means to acquire very early the vaccines needed to inoculate the population. No doubt States in Brazil have been trying to fulfill their constitutional duties, however, they have been affected by the policies at the federal level. This has generated a conflict between different levels and as a result of that judges were forced to intervene, particularly in relation to issues of power, functions and competencies, while questioning public measures to deal with the crisis and ordering the parties more cooperation and coordination. There was no clarity in relation to the competencies among the several authorities. Therefore, this led the federal government to undertake several persecutions against those critics under the framework of a National Security Law. Such actions at the federal level were executed through a series of decrees and measures that were provisional and demonstrated an increase in the level of power acting even as a legislator. This power is granted through art. 84 IV of the constitution, which was invoked in order to give a constitutional basis to these measures. The president fought on several occasions against congress and the Federal Supreme Court and criticized the use of vaccines, thus, failing to deliver an efficient plan for buying, distributing and inoculating vaccines.

The government also used the crisis as an opportunity to deepen the high levels of inequality and as a strategy to obtain more power rather than focusing on the well-being of the population. Thus, “[b]etween January and May 2020, the Government of President Jair Bolsonaro and other federal bodies issued a total of 1236 legal norms during the Covid-19 pandemic”<sup>15</sup>. These particular norms, unfortunately, were not designed with the clear purpose of reducing the number of cases as well as avoiding the number of deaths given the high priority that the Federal Government gave to the Economy.

## 6. Consequences of the actions and omissions by the Federal government of Brazil and recommendations in relation to the role of the Courts in contexts of emergency and crisis

This study examined the challenges and opportunities of the judicial protection of the right to health in the context of Covid-19 and Populism in Brazil. This research found that in the context of Covid-19 the strategy of the Brazilian government was to deny the crisis and attack the judiciary and as a result of that Courts in Brazil reacted in order to protect the right to health. In order to avoid a context where abusive and authoritarian constitutionalism is the norm, the judiciary should play a stronger role in the protection and defense of rights.

<sup>15</sup> Conectas. (2020). Covid-19 propels number of rules issued by the federal government. <https://www.conectas.org/en/noticias/covid-19-propels-number-of-rules-issued-by-the-federal-government/>.

Despite having a constitution that recognizes the right to health as a fundamental right since 1988 as well as a universal public health system that in theory is accessible to everyone, however, the actions and inactions of the Federal government in Brazil led to massive violations of human rights. Indeed, many people died of suffocation in Manaus, Amazonas due to lack of oxygen [21] and many could not access an intensive care unit because of a lack of beds as well as medicaments [22]. The results of the measures adopted by the government had a devastating impact on the progress achieved until now by the country and it has even “...generated a decline in life expectancy” [23].

The pandemic Covid-19 has revealed several challenges affecting the health system, thus “...aggravating an existing crisis and favouring the judicialization of health” [24]. In the last 20 years, the *Sistema Unico de Saude* has been unable to fulfill the constitutional promise of the right to the highest attainable level of health as established in General Comment 14 of the Economic, Social and Cultural Rights due to different factors that are affecting the quality of services. Thousands of cases are filed every year in the Courts, many of them mostly related to medicaments, however, the crisis has revealed other crucial areas where the system is failing. Indeed, there are many challenges ahead in order to strengthen the system and “...the judicialization of health can be a sign of dysfunctions and failures in the management of the health system, evidenced by the Covid-19 pandemic, which could lead to the possibility of a scarcity of health resources in the country” [25]. Despite the reaction of the Supreme Federal Court, however, there was strong pressure from the Federal to local governments to support the president by receiving the funds needed in order to deal with the crisis, therefore, some rulings issued by the Court might have some limited effect.

The pandemic also aggravated different situations that were affecting groups such as workers, thus, “...Covid-19 pandemic exacerbated pre-existing vulnerabilities of CHWs [Community health workers] (pertaining to low salary, precarious and hazardous working conditions and inadequate training) and created new ones...” [26]. This particular group was working every day and was not recognized properly for their work in this crisis, some were even asked to work without any type of protection or training. In addition to that, the crisis was aggravated due to problems “...such as the invasion of protected lands, the increase in illegal logging, and the deforestation of forest areas...” [18]. As a result of that, many people such as the indigenous population were affected since there has been a massive campaign to remove them from their lands in order to obtain economic benefits.

In terms of availability, in 2016, Brazil had 34.9 nurses per 100,000 population working in the mental health sector and 3.2 psychiatrists, per 100,000 population while in 2017 the number of doctors per 1000 population was 1.8 and nurses 1.5. This number of professionals of health has not been enough in a country of more than 200 million people, which is considered as one of the most unequal countries in the world and with the highest number of cases. A study found that the number of beds is insignificant in relation to the standards suggested by the World Health Organisation “...with an ICU rate of 2,19 according to a census conducted in 2016 by the Brazilian Association of Intensive Care Medicine (AMIB)” [25]. Therefore, “[t]he scarcity of ICU beds (7 per 100,000 inhabitants, one of the worst rates in Brazil)” [18] has led to different problems of accessibility. During the pandemic, the situation was worst because many doctors were not qualified for this type of procedure and due to the lack of infrastructure and medicines.

There is an inversely proportional relationship between the intensity of the crisis and the level of judicial activism on the part of the Courts. Therefore, the more the scale and intensity of the crisis generated by populist governments in the context of pandemics, uncertainty, and inequality the more reflexive and strategic

Courts should be and the more protection, defense, and monitoring should be promoted in order to ensure the fulfilment of the right to the highest attainable level of health especially of the most vulnerable.

A crisis such as the pandemic Covid-19 has completely transformed our lives, however, populist governments are using the crisis as an opportunity to obtain more power by attacking the courts, threatening, criminalizing and restricting the right to health. Therefore, Courts should adopt a stronger approach to this type of crisis by guaranteeing their independence and adopting a strategy more oriented towards the protection against abusive constitutionalism. This strategy should also include a defense of the deliberative process and a defense of the changes and transformations achieved until now in relation to the right to health and socio-economic conditions. The intensity of emergency and intensity of judicial activism are two variables that under normal conditions behave in a direct relationship as a mechanism of checks and balances, however, in this research, we have found that such variables are behaving opposite, particularly because they are immersed in the context of abusive constitutionalism. Such opposite behaviour might be explained precisely because a strategy of populist leaders in order to obtain more power is to co-opt and attack the courts by reducing their powers. These findings might coincide with the argument of Gargarella and Roa [27] who suggest that the greater the emergency and the greater the powers concentrated on the executive, the greater the deliberation and control. However, courts also must move gradually from impulsive-reactive approaches to litigation in times of pandemics to more reflexive and strategic approaches by focusing more on the quality of their decisions. In addition to that, when balancing rights courts should focus more its efforts in the protection of the most vulnerable population. This will require more adaptation, creativity, innovation, imagination and flexibility amid this type of crisis. Similarly, during a crisis characterized by uncertainty, lack of knowledge and the protection of public interest temporary decisions have to be made with the commitment to constantly monitor the evolution of their effects<sup>19</sup> while adjusting accordingly. Therefore, not only States but also Courts must strengthen their evaluation and monitoring approaches, strategies and processes. The role of Courts should also include encouraging and motivating citizens in order to be more resilient in front of the crisis and by countering the legislative blind spots and burdens of inertia especially when there is evidence of omissions by the legislators [28]. The case of Brazil has shown that Courts could serve as a mechanism of defense of the constitutional principles and values, especially when governments adopt a particular attitude of ignoring and denying the crisis, as well as attacking and restricting the right to health.

The more fulfillment of the right to health through the availability of goods and services, and the more availability of health workers with better salaries, social security and working conditions the more resilient the State will be to face public health emergencies, and the fewer restrictions on fundamental rights will be promoted.

There are many challenges to infrastructure and facilities in Brazil. Another important challenge for the country is to increase its health workforce, especially in rural areas. In addition to that, many community health workers died due to the lack of personal protective equipment (PPE) and many more faced threats and aggression while receiving low salaries and precarious working conditions<sup>21</sup>.

<sup>19</sup> According to Cafaggi and Lamiceli (2021) "Differences in the balancing have emerged compared to ordinary times".

<sup>21</sup> See also: Lotta, G., Wenham, C., Nunes, J., & Pimenta, D. N. (2020). Community health workers reveal COVID-19 disaster in Brazil. *The Lancet*, 396(10248), 365-366.

According to the World Health Organization, the number of pandemics such as Covid-19 will increase in the foreseeable future, therefore, States should be prepared for another crisis. Many lessons have been learned from this crisis. However, if States were able to fulfil the principles and standards of human rights as established in international conventions and instruments<sup>16</sup> such as availability, accessibility and quality, it could allow them to be more resilient to confronting the negative effects of the pandemic such as lockdowns, stay-at-home orders and curfews. More fulfilment of the principles and standards of human rights will increase the maturity of States in relation to legal, political, social and environmental challenges. This will help the economy and will avoid ordering quarantines since, for instance, more availability of beds<sup>20</sup>, technologies, medicaments and human resources as well as infrastructure means fewer risks of collapsing the health system, which was the main worry of States during the Covid crisis. This implies that in order to provide a strong response against risks such as Pandemics, Health systems should be strengthened and provided with available goods and services.

In the context of Covid-19, the strategy of the Brazilian government was to deny the crisis and attack the judiciary and other stakeholders as a result of that Courts in Brazil reacted in order to protect the right to health. In order to avoid a context where abusive and authoritarian constitutionalism is the norm, the judiciary should play a stronger role in the protection and defense of rights. There is an inversely proportional relationship between the intensity of the crisis and the level of judicial activism on the part of the Courts..Therefore, the more the scale and intensity of the crisis generated by populist governments in the context of pandemics, uncertainty, and inequality the more reflexive and strategic courts should be and the more protection, defense, and monitoring should be promoted in order to ensure the fulfilment of the right to the highest attainable level of health especially of the most vulnerable. On the other hand, the more compliance through the availability of health goods and services, and the more availability of health workers with better salaries, social security and working conditions the more resilient the State will be to face crises and emergencies, which at the same time will promote fewer restrictions on fundamental rights. Courts play a special role in protecting the right to health, especially in the context of emergencies and crises. States must adopt measures by using the maximum available of resources in order to protect the right to the highest attainable standard of health.

#### Disclosure of interest

The authors declare that they have no competing interest.

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<sup>16</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/docid/4538838d0.html>.

<sup>20</sup> According to Gargarella and Roa Roa (2020) different epidemiological studies sustain that "...If Colombia had 100,000 Intensive care units, no mitigation measures would be necessary; if Colombia had 35,000 intensive care units, social distancing should only affect older adults or those most at risk; and if Colombia had 4,000 to 15,000 intensive care units, social and generalized social distancing should be ordered" (p. 14).

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