



**THE CORONAVIRUS PANDEMIC AND LEGAL-THEORETICAL REFLECTIONS  
ON THE PRACTICAL INCIDENCE CONCERNING THE PROTECTION OF THE  
CONSTITUTION BASED ON HANS Kelsen AND CARL SCHMITT THEORIES:  
CONFLICTING RELATIONSHIPS BETWEEN INSTITUTIONS AND FEDERATIVE  
DEGREES IN BRAZIL**

*A PANDEMIA DO CORONAVÍRUS E REFLEXOS TEÓRICO-JURÍDICOS SOBRE A  
INCIDÊNCIA PRÁTICA DA GUARDA DA CONSTITUIÇÃO COM BASE EM  
TEORIAS DE HANS Kelsen E CARL SCHMITT: RELAÇÕES CONFLITUOSAS  
ENTRE INSTITUIÇÕES E GRAUS FEDERATIVOS NO BRASIL*

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**Resumo**

Este Artigo jurídico, subdividido em duas partes textuais, aborda e traz conclusões sobre os efeitos de uma relação entre atos dos Poderes Executivo dos primeiro e segundo graus federativos brasileiros e teorias clássicas bem definidas sobre quem deve ser o guardião da Constituição. Apesar de a ordem constitucional brasileira formal e expressamente se encontrar sob a guarda de um Tribunal, qual seja, o Supremo Tribunal Federal (STF), o objetivo central é verificar a existência, no Brasil e, durante o período da Pandemia de 2019/2021, de uma real e concreta oscilação sobre a guarda da Constituição. E isto, seja por meio de atos normativos, os quais nada mais são do que dois decretos escolhidos no texto como exemplo, seja por meio de interpretações dos chefes dos Poderes Executivos Estaduais e Federal. A utilização de métodos dedutivo e indutivo, com marcos

teóricos alicerçados, sobretudo, no Direito Constitucional e na teoria do Direito, com foco especial em Autores como Carl Schmitt e Hans Kelsen, faz com que o texto, paralelamente apoiado em fontes legislativas e normativas, tente dar e trazer algumas novas possibilidades, reflexões e imersões jurídicas em situações concretas entendidas como de alta relevância prática e, principalmente, teórica.

**Palavras-Chave:** Constituição; Coronavírus; Federação; Graus e Entes Federativos; Pandemia de 2019/2021.

### **Abstract**

This legal article, subdivided into two parts, analyzes the effects of the relationship between the acts of the Brazilian federal Executive Powers, of first and second degrees, and well-defined classic theories about who should be the guardian of the Constitution. Although the Brazilian constitutional order is formally and expressly under the custody of a Court, namely the Federal Supreme Court (STF), the central objective is to verify the existence, in Brazil, during the 2019/2021 Pandemic period, of a real and concrete oscillation concerning the protection of the Constitution. And this, either through normative acts, which are nothing more than two decrees chosen in this text as an example, or through interpretations by the heads of the State and Federal Executive Powers. The use of deductive and inductive methods, with theoretical frameworks based, above all, on Constitutional Law and Law theory, focused especially on authors such as Carl Schmitt and Hans Kelsen, parallelly supported by legislative and normative sources, contribute to give and bring some new possibilities, reflections and legal immersions in concrete situations understood as of highly practical and, mainly, theoretical relevance.

**Keywords:** 2019/2021 Pandemic; Constitution; Coronavirus; Federation; Federative Entities and Degrees.

## **1. INITIAL CONSIDERATIONS**

The pandemic reality that began in 2019 in China and continued in almost the whole world in 2020 and in 2021, brought so many political, legal, economic, and social consequences that it would be such a complex task to try to list them. In the Brazilian case, these consequences have had a major impact on the country's human and institutional spheres.

Based on the fact that Brazilian Executive Powers of the Union and the federated States have caused several conflicts and contradictory decisions that could have been prevented if there were a minimum sense of communication and mutual objectives among their respective leaders, this Article will be developed through a specific example that takes into account political decisions and the issue of two Decrees: a presidential one, and the other by a member state of the Brazilian

Federation.

To this end, classic theories will be revisited from a theoretical construction regarded as fundamental to enrich a constitutional and institutional debate on how to face a supposed balance of forces, especially in a Federal State like Brazil.

It must be highlighted that the use of deductive and inductive methods, with theoretical frameworks based on Constitutional Law and Law theory, focused especially on authors such as Carl Schmitt and Hans Kelsen, parallelly supported by legislative and normative sources, contribute to give, and bring some new possibilities, reflections and legal immersions in concrete situations understood as of highly practical and, mainly, theoretical relevance.

More precisely, the problems launched and resulting from colliding decision makings, as well as the manifest conflict between institutions and federative degrees, bring to light the relevance of what will be addressed in the following lines. At the same time, the specific union between concrete examples, the 2019/2021 global pandemic scenario, in addition to the aforementioned classical theoretical bases, but always and continuously current, makes this text contribute in a specific and punctually innovative way in the scenario and legal universe.

## **2. THE PROTECTION OF A CONSTITUTION AS FIRST THEORY**

Much has been said about algorithms, dystopias, utopias, and ideologies, in an attempt to explain legal phenomena, sometimes short-sighted, sometimes curvaceous. A flood of new terms seems to have arrived to stay in scientific articles, books, and other legal works. However, in this brief article, an attempt will be made to reconstruct some theories that have not been necessarily destroyed, but since they were forgotten by contemporary phenomenology, they ended up becoming disconcerted.

In this sense, it is also important to emphasize that all the effort made here will be directed to the moment when Brazil experiences something new, together with practically the entire planet. In more precise terms, the new coronavirus pandemic.

While varied authors were concerned about numbers to the Law, or even in some opinion turnarounds, seeking morality and religion (VERMEULE, 2020), with the

resumption of perhaps more authoritarian theories for the conduct of the State, 2020<sup>1</sup> has shown itself to be a year of unique features. Everyday news in the internal and external scope, either because public health and sanitary issues require urgent and emergency measures, or because consequences and economic developments come together to set up a financial scenario never seen in the history of humanity, a statement that considers all possible elements of analysis of the current situation as a key point of support.

In this context, a certain approach to evaluate the Brazilian state acts has proved to be highly necessary, considering specific federative problems faced in the relationship among Union, States and Municipalities, especially between the first two federated entities. But in order to bring greater clarity, it is necessary to lay the foundations for the intended conclusions.

The journey begins with a first statement, or a hypothesis, that Brazil has already provided the visualization of several conflicts and contradictory decisions caused by the Chiefs of its Executive Powers. This could be avoided not only if a sense of communication and union of objectives existed, but also if each government observed its own role to be fulfilled based on the Constitution of the Republic, which in turn, is based on classic theories about the functioning of the State. On these theories, brief and objective comments will be made.

Indeed, and preliminarily, it must be said that the 1988 Brazilian Constitution, in addition to being compromissory (FARIA, 1989), is not born only due to a great agreement and a great combination of political interests. It is born based on legal theories sought by those who wanted it, who envisioned it, in short, who wanted it to be the national Maximum Law. Thus, their innumerable rights, their multiple guarantees and their varied duties were based on a series of classic theories of law. But theories that have been repeatedly obscured by new forensic generations in Brazil and abroad.

It is important to highlight that this fact would not necessarily be linked to the abandonment of classic models by the new generations. However, most likely it was linked to a possibly introvert or conscious<sup>2</sup> new decision making as well as practical

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<sup>1</sup> It could be important to say that 2021 has even shown its own features. But most of them involve facts started at 2020, mainly the ones connected to the coronavirus pandemic.

<sup>2</sup> Here is a vocab that will be used again further on: "conscious", linked more to Psychology as an autonomous branch of knowledge than to Law.

and theoretical directions, which have not forgotten classic conceptions. At the same time, they may have effectively forgotten to adequately proceed with the key and important exercise of interpretation, application, and adaptation of the referred concepts to the contemporary world and universe.

In this way, it is anticipated that the central theoretical frameworks of the analysis developed in this Article will revolve around the Kelsenian and Schmittian theories regarding, mainly and primarily, the protection of the Constitution. Because it is understood that this evaluation yields a highly powerful result for the demonstration of the primary hypothesis, with an almost natural and automatic thematic extension for the examination of Brazilian daily life in one of the pandemic effects in the adopted governmental restrictive measures.

Thus, in a dispute between the member states of the Brazilian Federation with the highest authorities of the Union, who should be right in making decisions, if the Constitution can falter from the hermeneutical point of view and lead to some antagonistic or distinct possibilities? Or if the interpreters themselves, who are widely considered, can also falter? It is necessary, above any other political, economic, social, or financial discussion, to make it clear that legal foundations exist because they were not invented and created in the blink of an eye. When building them, Brazil was based on long, old, and well-grounded theories, founded abroad and not in the young Monarchy, which later became the Brazilian Republic. Indeed, they were imported, in the same way that many countries did so, given the clear perception that the experience of an Old World could not be neglected and, concomitantly, there were no intellectual conditions for assembling new and distinct gears.

Therefore, in order to start to elaborate an initial answer to the questions above, it is vital to think about the separation of Powers, in the concrete existence of the latter and, finally, the definition of the exact functions of each one. Since, if it is understood that the Executive, with greater evidence in times of serious crises, such as the pandemic of the new coronavirus, can be a final interpreter - although casuistic, but a producer of effects and consequences - and, therefore, defender of order legal-constitutional, a road must be followed. And it will be very different from that if it is understood that a strong and active Judiciary, or even, a higher judicial court, is considered the true guardian of the 1988 Constitution, proceeding to the interpretation, application, and final concretization of the constitutional text, causing any and all disputes involving the constitutional content to quickly dissipate and resolve. If control

is given to the Executive, a complex Federation (BOLONHA, LIZIERO, SEPULVEDA, 2019, p. 73-112) such as Brazil's, one path is followed; however, if the Judiciary holds the last word, not necessarily concrete final decisions will exist, but certainly, different bases for the solution of conflicts and for the conduct of the State's legal affairs will be formed and have a place.

Thus, the conjuncture of the years 2020 and 2021 is highly favorable to revisit what has been proposed in this article, which aims to be punctual in examining the theoretical questions raised from the beginning as essential to the results and collimated objectives.

Kelsen and Schmitt were names that, at least until the third decade of the 21st century, remained firm in the most basic legal studies in the Western world. The main schools of continental European law and the Americas failed to build their pillars without using, in some way and measure, the teachings of Hans Kelsen and Carl Schmitt.

However, if both authors have a wide range of theories and works, what matters most in the present academic production is the one linked to the protection of the Constitution. Who should be responsible for this task? This debate was promoted by the two authors, and it means, still in the contemporary world, a polarization of ideas, essential for the study of any nation-state and possible behaviors in different historical moments.

Obviously, the theories of the two authors will not be scrutinized, but directly used as an assumption for understandings considered necessary to show that Brazil needs to clearly position itself on which theoretical line will follow, in its various historical moments, so that unnecessary clashes occur and will not destabilize an entire nation, in the most varied areas. That is, the Law transcending its sphere and producing relevant effects on society, the economy, politics, etc. More precisely, governmental decision making is the protagonist of legal lines and currents, based on conscious choices or not<sup>3</sup>, as previously mentioned.

Kelsen argued that the separation of State Powers would not be a problem, but a solution, the existence of an autonomous body to defend the Constitution of a country. According to the author, the defended Constitutional Court would not harm neither the legitimacy or, above all, the government, and the parliament, which is the

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<sup>3</sup> This point will be seen again at the end, respecting the thematic limits of this Article.

target of Schmitt's theory.

It is noteworthy, therefore, that the institutional discussions and clashes, in which the Executive and Legislative would overlap with the Judiciary, are not recent, let alone of Brazilian origins. Could the Judiciary remove from the legal system a norm elaborated with popular support, either through the members of parliament who created it, or through the walls of governmental power and its ministers, whose representation would be supported by the Constitution itself?

In reality, Kelsen has always attacked the thesis that the Judiciary or, more precisely, a Court specifically, created to defend the Constitution, would not have a state power, in a broad sense, to execute constitutionality control and, by corollary, protect the Constitution. One of its central bases has always been the fact that a degree of exemption legitimately granted to an organ, would make the Maximum Law of a country better defended and, therefore, also the interests of the nation, represented in the constituent will of each individual.

It is also important to stress that the traditional separation of the State Powers would not remain threatened, but more strongly defended. Since a Constitutional Court, among other advantages, would avoid the concentration of central and nodal functions and tasks within a state structure, in the hands of a single Power. Thus, there would be no contradiction between constitutional jurisdiction between the Kelsen lines and the aforementioned separation of powers.

In this sense, it should be noted that in a democratic republic the division of Powers would summarize more than the separation, that is, the idea of the division of power among different bodies, not to isolate them reciprocally, but to allow a reciprocal control of each other (KELSEN, 2007, p. 152). If it is not possible to affirm that an orchestrated relational dialogue among the Powers would already be proclaimed, at least admit that, in addition to a harmony, there was already an imperative need for the Powers of a republic, above all democracy, to work together for the greater interests of those represented.

Traveling through the centuries and in the theoretical application suggested in different corners of the planet, the reality of the second decade of the 2000s shows that, in Brazil, a presidential decree turns a spotlight on what has been discussed for years and will continue to be evaluated for some time. The space-time relationship makes Brazil a highly fertile storehouse to demonstrate the current concepts and discussions that have become classic, certainly, not by chance.

Thus, the Kelsenian constitutional jurisdiction, with regard to the respect for the separation of powers until today explored, investigated, contested, scrutinized, but practically and, until nothing new and different comes to emerge, immortalized, makes one to continue to emphasize that “the institution of constitutional jurisdiction is in no way at odds with the principle of separation of powers; on the contrary, it is his statement” (KELSEN, 2007, p. 152, my translation)<sup>4</sup>.

Besides, such jurisdiction would find the best and most consensual haven in a Court that could exempt itself from relations among the government, its ministers, parliament and society, escaping from what Carl Schmitt advocated, in some form and measure, as will be seen.

Schmitt, in its orbit, did not neglect the idea that a Total State would practically eliminate existential conflicts between government and society. Common interests would unite in favor of a *res publica*, duly consolidated from fundamental political decisions taken with less questionable representativeness and legitimacy.

In this sense, giving in the protection of the Constitutional State to bodies other than those with the greatest popular support, would be a repudiable act and not suitable for a real democracy. Governors and their ministries, in continuous relationship with the legislative elaboration process, would have the greatest combination of favorable and productive elements to a constitutionality control. And this possibility would remain, focused on diminishing anti-democratic particles that pollute the system, well supported if handed over to the supreme head of a nation.

Schmitt, therefore, argued that with the migration to the State he called “Total”, - an expression here and previously cited as Shmittian and now, better explained - the distinction between State and society ceases to exist and, in this direction, between government and people (KELSEN, 2007, p. 277). The forces that would unite and strengthen the state power would, then, be clearly based on the idea - here considered somewhat totalitarian - of a defended union of interests, more precisely to join the will of people and the will of the government. Society and State legitimately intertwined to form a power capable of dispensing with a court or any independent or autonomous

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<sup>4</sup> “The question of whether the body called to annul unconstitutional laws can be a court is, therefore, unimportant” (KELSEN, 2007, p. 152, my translation). It should be noted that the withdrawal of importance mentioned in the excerpt from Kelsen’s Work, in fact, represented the opposite: a decrease in the relevance of issues supposedly linked to the so-argued separation of the Powers of a State, so that it could defend itself, with greater vigor, the idea that a Constitutional Court, without disrespecting any principle, would represent the ideal model for the protection of a Constitution.



body to protect the constitutional rights present in a Constitution<sup>5</sup>.

A real executive and legislative democracy, with the traditional caveats - which is not necessary to analyze in favor of the thematic approach - to possible discrepancies in the activities carried out by the Executive and Legislative Powers, in order to defend the law by the government and vice-versa. Then, a circularity capable of strengthening the Total State, but by Carl Schmitt understood as State much more oriented towards neutrality, based, also, on studies by Benjamin Constant (CONSTANT, 2005, p. 204)<sup>6</sup>.

What is more, Schmitt was clear by defending that "*in a legislative State there must not be any Constitutional Justice or Constitutional Court as an authentic defender of the Constitution*" (KELSEN, 2009, p. 316, my translation). According to Schmitt, the constitutional relevance granted to the Reich President made it imperative to conceive his most precise and neutral condition as the greatest defender of the Constitution<sup>7</sup>.

Therefore, Carl Schmitt argued that "*the President of the Reich is at the center of an entire system – built on plebiscitary foundations – of neutrality and independence from political parties*" (SCHMITT, 2009, p. 284, my translation). It is worth highlighting: a type of central head of a constitutionally designed system and pronouncements made at a time when the German State was recovering from the tremors caused by the First World War (1914-1918).

And, in order to demonstrate what matters to this Article, Carl Schmitt continues: "the political ordering of the current German Reich is conditioned to it<sup>8</sup>, as

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<sup>5</sup> It is worth remembering that all theoretical basis by Carl Schmitt takes into account the historical moment of his main productions, with emphasis and focus on the validity of the German Constitution of 1919, that is, the Weimar Constitution.

<sup>6</sup> "The three political powers, as they have been known so far - the executive, the legislative and the judiciary -, are three competences which must cooperate, each in their own sphere, in the general movement. When these competences, disturbed in their functions, cross, clash with and hinder, you need a power which can restore them to their proper place. This force cannot reside within one of these three competences, lest it should assist it in destroying the others. It must be external to it. And it must be in some sense neutral, so that its action might be necessarily applied whenever it is genuinely needed, and so that it may preserve and restore without being hostile. Constitutional monarchy creates this neutral power in the person of the head of state. The true interest of the head of state is not that any of these powers should overthrow the others, but that all of them should support and understand one another and act in concert." (CONSTANT, 1989, p. 184).

<sup>7</sup> "*The Weimar Constitution says: 'Officials are servants of the whole community and not of a party' (art. 130), 'The delegates should be representatives of the whole people' (art. 21), 'The President of the Reich shall be elected by the whole German people' (art. 41), 'and represent the Reich in international relations'*" (SCHMITT, 2009, p. 283-284, my translation). And, continuing: "*The reference to the politics as a whole always implies an opposition to pluralist groups in economic and social life, and must enable the superiority over groups of this kind*" (SCHMITT, 2009, p. 284, my translation).

<sup>8</sup> To the Reich President.

the pluralist system tendencies make it difficult and even impossible for the normal functioning of the legislative State" (SCHMITT, 2009, p. 284-285, my translation). He concludes (SCHMITT, 2009, p. 285, my translation):

Before establishing a Court for high political issues and conflicts, as a defender of the Constitution, before taxing and endangering Justice with these political contaminations, it would be better to remember, first of all, the Weimar Constitution's positive content and its precepts system. According to the effective content of the Constitution, there is already a defender of the Constitution, namely: the President of the Reich.

Indeed, if Schmitt argued that the President of the German Reich would be the most appropriate figure to protect the Constitution, sustaining the uselessness and inadequacy of a Constitutional Court, Hans Kelsen, as previously confirmed, declared, *a contrario sensu*, that a Constitutional Court is that it would be endowed with minimally sufficient neutrality for the protection of the Constitution as a normative document that occupies the apex of a legal system.

However, if lines and paragraphs have so far been dedicated to mentioning two of the most classic legal theorists (and not just Constitutional Law), to what extent can such theoretical-methodological construction contribute to what will continue to be discussed in this Article?

### **3. TWO DECREES, TWO THEORETICAL-LEGAL PATHS: WHO PROTECTS THE BRAZILIAN CONSTITUTIONAL ORDER IN TIMES OF PANDEMIC CRISIS?**

In reality, any brief previous work ends up serving as a basis for proving that, at the same time, and also in Brazil, the discussion on who dominates the Constitution and its resulting powers remains. Since, in addition to discussions on the Brazilian Federation, which not only imposes a division of powers among the Union, States, Municipalities and the Federal District, but also establishes hierarchies - for example, by allowing laws created by the Union to be effective at a national level- the highly complex relationship between the Executive and Legislative Powers of all federal entities in the country causes a real collision of interests<sup>9</sup>.

And, if the collision is thoroughly examined, it can be noted that, many times,<sup>10</sup>

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<sup>9</sup> Due to the thematic limits, there will be no mention of conflicts that also exist between the three Powers, including the Judiciary, in the first and second Brazilian federal degrees, since in the Third degree (Municipalities), it is not autonomous and independently present.

<sup>10</sup> Disputes between any of the Powers are not left out. For instance, between Legislative and Judiciary.

either the Head of the national Executive Power determines the directions to be adopted in the country based on his/her interpretation of constitutional norms or it must be submitted to another power - in this case, the Supreme Federal Court (STF), equivalent to a Constitutional Court<sup>11</sup>- the decision on the best interpretation of the order created by the 1988 Constitution.

However, it is important to observe that all the disputes mentioned above, and any others not addressed, may or may not end up in the hands of the magistrates, that is, the Ministers who are part of the highest Court in the country. Nevertheless, for the purposes and goals sought here, with regard to the examination of the specific example chosen in this Article, the concrete action or omission of the Supreme Federal Court will not be explored.

What is meant is that decisions already taken or yet to be made, by the guardian of the Constitution of the Federative Republic of Brazil<sup>12</sup>, will be left out of the central discussion of this paper. A theoretical license will be requested for the real, objective and, again, concrete performance of the Supreme Federal Court, so that the backbone can be molded from the beginning.

Thus, if the Court that protects the Brazilian Constitution has already acted in favor of a solution to the shocks of interpretations between the Decrees elected as the final illustrations of this study, it is applauded here<sup>13</sup>, even more because Brazil has

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However, they escape what is intended to approach in this Article.

<sup>11</sup> The Author makes it clear that he does not conceive the Brazilian Supreme Court (STF) as a true Constitutional Court, especially if the bases of the Kelsenian theories presented above are taken into account. The Author, however, makes use of comparison, so that the purposes of this work can be achieved.

<sup>12</sup> Here is the content of Art. 102, *caput*, of the Brazilian Constitution of 1988: "Art. 102. *The Supreme Federal Court is primarily responsible for protecting the Constitution and is responsible for: (...)*".

<sup>13</sup> The Federal Supreme Court, the highest Brazilian judicial body and guardian of the 1988 Constitution, has already ruled on the possible conflict of actions and actions to protect health, a matter that is the central and main subject of the Decrees below. After a preliminary injunction issued in Direct Unconstitutionality Action (ADIN) No. 6,341 / Federal District, confirmed in a decision of the Full Court of the Supreme Federal Court on April 15, 2020, the same Court held, unanimously by the votes of its Ministers, that jurisdiction among Union, States, Municipalities, and the Federal District is competing in matters of "public health actions and services", in reference to Art. 198, item I, of the Constitution of the Republic. However, in order to consider the constitutionality of § 9, Article 3, of Law 13,979, of February 6, 2020 (initial legislative framework in Brazil to combat Pandemic and also amended by Provisional Measure No. 926, of December 20, 2020), it was given "interpretation according to the Constitution", making the President of the Republic maintain his power to issue decrees that may provide for public services and essential activities, respecting, however, the constitutionally provided legislative powers of the other Brazilian federative entities. Next, the idea that such a decision failed to prevent the President of the Republic from making and bringing a new interpretation to essential activities, as well as preventing governors from several member states of the Brazilian Federation or simply ignoring the presidential decree, in extreme obedience to what was decided by the Supreme Federal Court, or to issue new decrees to confirm the same decision taken by the Brazilian maximum court, by means of patent interpretation of its content.

adopted, in practice and, formally, the control of constitutionality and the defense of the Constitution by a Court and not by the person in charge of the Executive Branch. And if it has not yet acted, it is expected to try to act, if provoked.

But none of that will matter for the final results of this Article. As will be seen, such results will not depend on an action and measure already taken by any Court, especially by the Supreme Federal Court. The link that began in the examination of Kelsenian and Schmittian theories is established with the evaluation and interpretation developed and unfolded in this Article on the chosen example(s).

Therefore, the conflictual dynamics previously exposed is clearly seen in the case of Decrees or decisions of Governors, from several member states of the Brazilian Federation, on the specific functioning of beauty parlors, barber shops, gyms (“sports academies of all modalities”, in the exact terms of item LVII, of Decree nº 10.344, of May 8, 2020, as well as of item LVI, of the same presidential concerning the “beauty parlours and barber shops”)<sup>14</sup>, gymnastics centers and similar establishments, in opposition to the President of the Republic’s Decree, which determined that these establishments would provide essential services and, therefore, allowed to operate during the state of emergency<sup>15</sup>, that is, during the new coronavirus pandemic in Brazil.

It is must be noted that, if a Presidential Decree, of the same matter as a Decree <sup>16</sup> edited by the State Governor and linked to a question of Law conceived as minimally controversial, prevails (over the Decree or decision of any governor), depending on what the Constitution has and on the non-respect or pronouncements of the judicial institution responsible for constitutional custody, there will be a clear preponderance of the Schmittian aspect over the questions and arguments defended by Kelsen, within the exact limits of the above.

But, if the prevalence mentioned above does not occur, due to the performance of the judicial court responsible for protecting the Constitution, a new model of state action will automatically establish itself. Something purely and simply related to the supremacy of a Constitutional Court over the Executive (and also Legislative) Power

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<sup>14</sup> Decree nº 10.344, of May 8, 2020, changes Decree nº 10.282, of March 20, 2020, which, in turn, regulates Law 13,979, of February 6, 2020, with regard to the definition of public services and essential activities.

<sup>15</sup> Emergency situation decreed, mainly, by States and Municipalities, starting from what is permitted by Federal Law, of national effectiveness No. 12,608, of April 10, 2012, in its articles 6th, 7th and 8th. Without forgetting the initial and central legislative framework created in the country to regulate the fight against the pandemic: Law 13,979, of February 6, 2020.

<sup>16</sup> Or mere, expressed and publicized decisions.

in the defense of the legal order, based on the rule of law, on the idea that the law and, above all, the Constitution, were created not only to regulate and organize the State, but also to bring limits to the rights exercise, as well as guarantee, by all citizens, including the government.

However, it is vital to stress that this Article works on the hypothesis outlined from the beginning, according to which, although the Constitution of the Republic defines that the Supreme Federal Court is responsible for protecting the Constitution, political decision factors are influencing due to a complete lack of communication between the Union and other federal levels, in order to allow a (unreasonable) punctual change of course regarding the prevalence and interpretation of the Constitution. Again, it was formally established in the country that the defense of the Constitution is not the responsibility of the Head of Government and State, but of the Supreme Federal Court, member of the national Judiciary.

In this context, if the above guidelines are considered for the examination of the case that is now being brought up as an example, there is an important construction to be unraveled. And, in order for the theme to support a more concise analysis, but without any loss of precision, this Article will finally proceed to a direct and objective illustrative comparison of two Decrees.

With greater specificity, Presidential Decree nº 10.344, of May 8, 2020, and State Decree nº 47.068, of May 11, 2020, of the State of Rio de Janeiro (State subject to the Author's mere choice for examination, more than intended in this Article)<sup>17</sup>.

Therefore, notice both Decrees highlighted above, with focus on the functioning of gyms or sports academies. That is what Presidential Decree nº 10.344 /

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<sup>17</sup> already stated in previous statements, but not directly pointed, it is worth mentioning that countless States have not followed the provisions of the Presidential Decree. Either they maintained the interpretation of what they had already edited in previous decrees, or they simply edited new ratifying decrees, as in the case of the State of Rio de Janeiro, now chosen for exemplification.

The Governor of the State of Bahia, for example, as well as that of the State of São Paulo, among others, clearly expressed their opinion in order to ignore the Presidential Decree on activities performed in health and sports academies, beauty parlour and barber shops, to be considered essential activities and services. Check the following pieces of news:

RUI COSTA SAYS BAHIA WILL IGNORE BOLSONARO'S DECREE RELEASING PARLORS AND GYMS - OTHER GOVERNORS HAVE ALSO AFFIRMED THAT 'NOTHING CHANGES' IN RESTRICTION POLICIES IN THEIR STATES

Jornal Correio 24 Horas (Bahia). Available at: <https://www.correio24horas.com.br/noticia/nid/ruy-costa-diz-que-bahia-vai-ignorar-decreto-de-bolsonaro-liberando-saloes-e-academias/>. Last accessed on 18th May 2020.; and AFTER BOLSONARO'S DECREE, DORIA KEEPS GYMS AND BEAUTY PARLOURS CLOSED IN THE STATE OF SÃO PAULO. Portal G1. SP. Available at: <https://g1.globo.com/sp/sao-paulo/noticia/2020/05/13/apos-decreto-de-bolsonaro-doria-mantem-academias-e-saloes-de-beleza-fechados.ghtml>. Last accessed on 18th May 2020.

2020 determines, by adding item LVII, to the list of essential activities included in Article 3, § 1, of Decree 10.282 / 2020:

LVII - sports academies of all modalities, obeying what has been determined by the Ministry of Health.<sup>18</sup>

And soon afterwards, within the scope of the State of Rio de Janeiro, it was decided, by State Decree nº 47.068 / 2020 that:

Art. 5º - Exceptionally, with the sole objective of safeguarding the interest of the community in preventing contagion and in combating the spread of the Coronavirus (COVID-19), in the face of confirmed deaths and the increase in infected people, I DETERMINE THE SUSPENSION, until May 31, 2020, of the following activities:  
(...)

XIII - operation of gyms, sports centers, as well as similar activities.

In this context, what is sustained and defined is that, if it's considered that the Head of the national Executive Power has the most politically and legally adequate conditions to interpret the Brazilian constitutional order, formed by the Constitution and by all the legal systems, the Decree nº 10.344 / 2020, edited by the Union, must be prevailed. Considering a classic case of conflict of constitutional competences but resolved by an act of the President of the Republic himself, whose constitutional hermeneutic deference should be addressed.

On the other hand, it will be up to a Constitutional Court or any similar body within a nation, since urged to pronounce itself, and if, in that nation the principle of inertia of such law prevails, decide which device, which Decree, should prevail.<sup>19</sup> It is a true theoretical decision, which reaches the legal epistemology in its broadest spectrum. From there, it must be emerged not only those who say the last word about

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<sup>18</sup> The item LVI states: "beauty parlours and barber shops, obeying what has been determined by the Ministry of Health". It is certain that such a device also clashes with State Decrees in Brazil, including with the State Decree of Rio de Janeiro nº 47.068 / 2020. And it also seems evident that a simple interpretation of the aforementioned - but here decided as not interesting for a better understanding of the theoretical link from the beginning - Decision of the Supreme Federal Court, leads to the same conclusion of the shock just mentioned above. However, thematic direction was chosen more focused on the predictions of the functioning or not of gyms or sports, considering, mainly, the more direct equivalence of words and vocabs used.

<sup>19</sup> As already explained above, the Brazilian Supreme Court has already pronounced on the matter and the Decision interpretation is understood by this Author as absolutely sufficient for the resolution of any dispute (although in Brazil new doubts have arisen and been the subject of intense discussions) although here and in this Article, it has sometimes been explained that any decision itself is not and will not be the central focus of examination.

the constitutionality or not of normative acts, but also who is the real responsible for protecting the Constitution, reviving the classic debate by two scholars of Law until today remembered and persistent theoretical influencers of a series of modern and contemporary studies.

Therefore, regarding the clash between the Decrees, regardless of any outcome, which in this Article it is preferred not to announce - since the foundations of the present study can survive and remain without such a conclusion - the fact is that Brazil formally adopts, a system similar to the one predicted and defended by Hans Kelsen, when, logically, only the element linked to who should protect the Constitution is compared<sup>20</sup>. More precisely, a system in which a body that works the core of the Judiciary and as guardian of the Constitution, must be provoked to pronounce on the constitutionality or not of normative acts submitted to its appreciation. Occasional prevalence of the Chief Executive's opinion - which does not depart, due to the constant and perennial political disputes in the Democratic State of Brazilian Law - should be considered casuistic and not defining, *a priori*, a new order for custody, defense, and protection of the national and current Constitution.

Nevertheless, let us not ignore that informal and formal institutional disputes have dominated the Brazilian scenario for some time and will continue to dominate, given the sedimentation of internal political and social collisions. In the present case, and, finally, resuming the quotations preceding "conscious" and "unconscious"<sup>21</sup> acts, if aware of the presidential and governor measures, it's facing a formal, real, and concrete dispute. But, if unconscious of the relations among the Powers, federative degrees and institutions, there is a dispute unconsciously caused, especially on the part of the Chief Executive, from whom the first Decree came from, temporarily. And all of this, even though "being conscious or unconscious" may not produce concrete effects for any purpose of a legal-objective solution to the real problems and effectively launched here.

In any case, it is essential that the country, its institutions, several public and

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<sup>20</sup> Brazil, with regard to the control of constitutionality, adopts a mixed system, as it unites the Austrian and North American models, that is, concentrated and diffuse, respectively. However, what's be wanted to explain and make clear here is that, regardless of the model, the delivery of the defense of the Constitution, mainly, to a high court and not to the chief executive (The Reich President, in reference to the Schmittian theory), is a common factor to the two models mentioned.

<sup>21</sup> Again, it is important to point out that elements such as "conscience" and "unconsciousness" are more linked to another branch of knowledge, namely Psychology, with which the Law should interact more and more. However, in this Article, such mentions were of no greater interest than what is directly extracted from reading the text, also from a very objective, rational and even literal interpretation.

private bodies, know more and more how to deal with situations like this<sup>22</sup>. Because if their actions lead to more clashes and polarizations, Brazil loses, the Brazilian people lose, they lose all mechanisms of institutional stability. And this must be avoided, especially in times of such insecurity as that caused by the 2019/2021 pandemic, including the primary cause for the aforementioned Decrees to be edited and for new disputes to arise within the political, social, and legal context of the country.

In fact, new disputes and clashes cause the topic of this Article to remain alive and the discussions around it are very often at the core of varied legal and social questions. Especially in a contemporary and current universe, marked by refreshed conflicts among the Executive, Judiciary and, in the same way, Legislative Powers.

It is very common for these two values to be always present in most contemporary societies, based on their legal systems: freedom and security. The balance of such values makes it possible to move forward legally. In case of a moment of strong restrictions on freedom, so restrictions and threats must be avoided, also to the other and equally fundamental value: security.

#### 4. FINAL CONSIDERATIONS

Carl Schmitt and Hans Kelsen led a recorded and revisited debate to this day. And, in the present Article, such protagonism was sought, but with the aim at showing how, in addition to formally existing models and systems, conflicting political interests can lead to the invocation of doubts about who has the real domain of custody and protection of the Constitution. Apart from that, and, of course, what is formally established in the Constitution of the Brazilian Republic, a stress between institutional relations and federal degrees, can show an imbalance with serious legal, economic, social consequences, etc., especially in times of an unprecedented pandemic crisis.

Consequently, by using the aforementioned classical theories to, through the example linked to the editing of decrees within the scope of two the First and the

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<sup>22</sup> It's important to also have in mind the relevance of informal and formal institutional dialogues, the last one now in more theoretical evolution in Brazil. In this way the words of Maria Valentin de Moraes and Mônia Clarissa Hennig Leal, mentioning Roberto Gargarella: "*The language adopted in terms of dialogue between branches of government plays an important role in harmonizing institutional relations as it urges for a civilized and respectful resolution of conflicts, sometimes marked by political antagonisms*" (GARGARELA, 2014, not paged)" (LEAL, MORAES, 2020, p. 43-44, my translation). But it is important to point out that these observations and considerations, although relevant, are mainly complementary to what is presented in this Article.



Second federal degrees, try to confirm or not a simple and initial hypothesis, this Article intended to show how disputes, both formal, informal, conscious, and unconscious, jeopardize the balance of democratic forces in a State like Brazil. Especially if considering the complexity of infinite institutional relations, possibilities, and ways of interpreting the 1988 Constitution.

If the Executive Power is normatively and historically equipped to act in crisis situations, this does not eliminate the necessary and concomitant performance of the other Powers. Legislative and Judiciary, each in its own way, permanently exercise fundamental roles in a constitutional and democratic State.

However, the respect for the Constitution of the Brazilian Republic and for the harmony and coexistence of the three Powers makes the custody and defense of the Constitution inherent to all, that is, Powers, institutions, and people, but with the last word being formal and specifically established and determined. In the national case, the Supreme Court, the highest court of the Judiciary, is responsible for defending the Brazilian maximum law.

In this sense, whatever represents a clash of interests or legal-political-normative actions requires special attention and care from society and its groups and categories more directly focused on the study and confrontation of such problems. Even more rigorously if the latter ones involve the complex Brazilian federative structure, within which competences are at times divided, at times intertwined, or aggregated, in a panorama of a more difficult understanding and solution in crisis situations, reputed and framed in some degree and level of exceptionality.

Freedom and security, above all, aimed at protecting the Brazilian constitutional order, show that a constant balance of powers and forces is essential, so that the State can remain committed to its lower constituent bases and free from political wills that cause macro and micro institutional instability. A constitutional and democratic State must - even in the midst of pressures, arrangements, communications, and their consequences - assume and have as a guide the constant and permanent search for balance, stability, and not for clashes and disputes that harm the legislation, judicial decisions, constitutional rules and its axiological bases, or acts that lead and provoke institutional destabilization.

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