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**Between Science and populism:**  
the Brazilian response to COVID-19  
from the perspective of the legal  
determinants of Global Health  
**Entre ciência e populismo:** a  
resposta brasileira à Covid-19 da  
perspectiva dos determinantes  
jurídicos da Saúde Global

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# Between Science and populism: the Brazilian response to COVID-19 from the perspective of the legal determinants of Global Health\*

## Entre ciência e populismo: a resposta brasileira à Covid-19 da perspectiva dos determinantes jurídicos da Saúde Global

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### Abstract

A populist government has been held accountable for the 120 thousand preventable deaths in Brazil so far, due to the Covid-19 pandemic. Domestic law has played a major role in the pandemic response, both as an opposing force and as an instrument of populism and denialism. The international legal sphere has, for its turn, provided an alternative of resistance against the latter. This piece assesses the Brazilian response in the light of the Legal Determinants of Health framework, put forward by The Lancet-O'Neill Institute of Georgetown University Commission on Global Health and Law. The two first sections unfold the origins and contents of the legal determinants of health. The third offers a brief account of the Brazilian experience during the pandemic, stressing the far-right populist agenda of the federal government. The last section explores the legal aspects of the response, in its domestic and international dimensions. Lastly, we pinpoint some preliminary conclusions we may draw from the pandemic experience thus far, in particular by the interplay of populism and global health law.

**Keywords:** COVID-19. Bolsonaro. SUS. Populism. International cooperation. Global health.

### Resumo

Um governo populista é considerado responsável pelas mais de 120 mil mortes evitáveis no Brasil até o momento, devido à pandemia de Covid-19. O direito interno tem desempenhado um papel importante na resposta à pandemia, tanto como força opositora quanto como instrumento do populismo e do negacionismo. A esfera internacional, por sua vez, provê uma alternativa de resistência contra os últimos. Este trabalho avalia a resposta brasileira à luz do quadro dos Determinantes Legais da Saúde, apresentados pela Comissão sobre Saúde Global e Direito da The Lancet-O'Neill Institute da Georgetown University. As duas primeiras seções desvelam as origens e o conteúdo dos determinantes jurídicos da saúde. A terceira oferece um breve recorrido da experiência brasileira durante a pandemia, destacando a

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agenda populista de extrema direita do governo federal. A última seção explora os aspectos legais da resposta, em suas dimensões nacional e internacional. Por fim, nós pontuamos algumas conclusões preliminares que podemos aferir da experiência em pandemia até o presente, em particular, a interação entre populismo e o direito da saúde global.

Palavras-chave: COVID-19, Bolsonaro, SUS, populismo, cooperação internacional, saúde global

## 1 Introduction

A continental country with 212 million inhabitants, Brazil is one of the most important laboratories on the Covid-19 pandemic evolution in the Global South. The disease has spread rapidly in the country and according to official data has reached four million confirmed cases and over 120 thousand deaths as of September 01st<sup>1</sup>. Considering that in the first weeks of the pandemic only the most acute patients were tested, and that the testing capacity has since remained quite limited<sup>2</sup>, the consensus is that there has been a systematic underreporting of cases. As of August 2020, the entrance of Brazilians has been either banned or restrained in most countries, including the United States and the European Union.

The international literature has ranked the Brazilian response to Covid-19 as one of the worst in the world and laid bare how “Bolsonaro Made Brazil a Pandemic Pariah”<sup>3</sup>. One of the most relevant global health journals, the *Global Public Health* has recently published an article which defines the Brazilian case as follows: “Governing COVID-19 without government in Brazil: Ignorance, neoliberal authoritarianism, and the collapse of public health leadership”<sup>4</sup>. An editorial from *The*

*Lancet*, one of the most influential medical journals, has depicted President Jair Bolsonaro as a threat to Brazilian public health<sup>5</sup>, and has also published a piece recognizing serious institutional risks resulting from the federal government’s actions<sup>6</sup>.

Brazil stands out from almost all other countries for the lack of legislation seeking to regulate and give an effective response to Covid-19 on the federal level. In fact, there has been a systematic obstruction from the Executive branch of government to contain the pandemic, coming from other actors, such as the National Congress and local governments. Such hindrance plays itself out through the abusive use of presidential veto prerogatives, the delay to enact urgent laws, the issuance of provisional measures and other normative acts<sup>7</sup>.

In this exploratory piece, drafted during the ongoing dissemination of Covid-19 in Brazil, we intend to analyze some aspects of the dramatic Brazilian health crisis, which may be related to populism and international law. We thus aim to address two questions raised by the editors for this Special Issue on *Populism and International Law: Perspectives from the Global South*, specifically with regards to the Brazilian response to Covid-19. Does the preventable catastrophic 120 thousand-death toll, led by a populist government, offer different insights that could enlarge the universe of analysis related to authoritarian or illiberal governments and international law? Also, can some elements of the Brazilian response to the pandemic signal alternative roles to international law beyond binarism, that is either as a tool to ban populist-driven policies or as an instrument to allow such policies to thrive?

To approach these questions, we look into the main elements of the Brazilian pandemic response in the light of the framework of Legal Determinants of Health, put forward by *The Lancet-O’Neill Institute of Georgetown University Commission on Global Health and Law*<sup>8</sup>.

<sup>1</sup> BRASIL. *Covid-19: Pánel Coronavírus*. Available in: <https://covid.saude.gov.br/> Accessed on: 01 Sept. 2020.

<sup>2</sup> CÂMERA, Aline. *Capacidade nacional de testagem para Covid-19 é ampliada*. 2020. Available in: <https://portal.fiocruz.br/noticia/capacidade-nacional-de-testagem-para-covid-19-e-ampliada> Accessed on: 28 Aug. 2020.

<sup>3</sup> OSBORN, Catherine. Bolsonaro Made Brazil a pandemic pariah: can local leaders restore the country’s reputation for health leadership? *Foreign Affairs*, Jul. 2020. Available in: <https://www.foreignaffairs.com/articles/brazil/2020-07-07/bolsonaro-made-brazil-pandemic-pariah> Accessed on: 28 Aug. 2020.

<sup>4</sup> ORTEGA, Francisco; ORSINI, Michael. Governing COVID-19 without government in Brazil: ignorance, neoliberal authoritarian-

ism, and the collapse of public health leadership. *Global Public Health*, v. 15, n. 9, p. 1257-1277, 2020.

<sup>5</sup> THE LANCET. Editorial: COVID-19 in Brazil: “So what?” *The Lancet*, v. 395, May 2020 Available in: [https://doi.org/10.1016/S0140-6736\(20\)31095-3](https://doi.org/10.1016/S0140-6736(20)31095-3) Accessed on: 28 Aug. 2020.

<sup>6</sup> BARBERIA, Lorena; GÓMEZ, Eduardo. Political and institutional perils of Brazil’s COVID-19 crisis. *The Lancet*, v. 396, n. 10248, Aug. 2020. Available in: [https://doi.org/10.1016/S0140-6736\(20\)31681-0](https://doi.org/10.1016/S0140-6736(20)31681-0) Accessed on: 30 Aug. 2020.

<sup>7</sup> VENTURA, Deisy et. al. Editorial. *Boletim Direitos na Pandemia*, São Paulo, n. 4, Aug. 2020. p. 2-3.

<sup>8</sup> Set up in 2015 by the O’Neill Institute for National and Global

The Commission's final Report, published in 2019, named "The legal determinants of health: harnessing the power of law for global health and sustainable development", assesses where and how law works locally, nationally, and internationally, and why the rule of law is essential for health, development and justice, aiming to identify more strategic linkages between health and law that could substantially strengthen the overall global health agenda<sup>9</sup>.

Global Health is a polysemic expression referring to a diffuse academic field comprising conflicting political agendas. Although the term is relatively recent, historians often signal the onset of an international order related to public health between the late 19th and early 20th centuries<sup>10</sup>. In the scope of this article, refraining from the conceptual debate, we regard as global health issues those linked to political dynamics, structures and relations of the international sphere; the events likely to have cross-border effects, beyond the mere disease spread and, lastly, events resulting in international governance norms and mechanisms that regulate several forms of cooperation, ranging from epidemiological surveillance to trade and food<sup>11</sup>.

In the first section, we explain the origin of the expression "legal determinants of health" and further present them according to the abovementioned Commission. The third section explores the assets and challenges for Brazil in the face of Covid-19, highlighting the role of populism. The fourth and last section turns

to legal aspects of the Brazilian response, under the framework of the legal determinants of health. In our final remarks, we try to indicate some preliminary takeaways from the Brazilian response so far, in particular concerning the links between populism and international law -- more precisely in the realm of global health law<sup>12</sup>.

## 2 Why legal determinants in global health?

Historically, two contrasting perspectives have emerged in the field of Global Health. On the one hand, one that regards punctual interventions tackling particular diseases as unfulfilling, the role of public health experts as vectors of social change, health as a human right and the community engagement as an asset; on the other hand, the technocratic perspective correlates health improvement to the control of epidemic outbreaks, the supply of hospital assistance and the economic development of a liberal society<sup>13</sup>. The first perspective has gradually overlapped with the approach of Social Determinants of Health (SDH), mainly after the World Health Organization (WHO) published a high-level commission report concerning the issue<sup>14</sup>.

According to WHO, the SDH are the conditions in which people are born, grow, live, work and age, shaped by the distribution of money, power and resources at global, national and local levels<sup>15</sup>. In other words, hereditary and biological factors, such as age and gender, as well as their lifestyle directly affect an individual's health status. Yet some aspects such as income, working and housing conditions, transport and nutrition; the health-care system provision, political regime, economic and

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Health Law at Georgetown University Law Center along with The Lancet. The journal's commissions are conceived with diverse partners and goals and share the aim to raise awareness on a particular issue, foment the scientific output around it and draft recommendations. Coordinated by the jurist Lawrence Gostin, the Commission was made up of 20 experts from different fields, mostly qualified and acting in renowned institutions from developed countries and international organizations, among which the WHO Legal Counsel, Gian Luca Burci, Howard Koh, public health expert who served the Obama administration and Timothy Evans, the Senior Director for the Health, Nutrition and Population Global Practice at the World Bank Group. The O'Neill Institute for National and Global Health Law and Georgetown University Website: <https://oneill.law.georgetown.edu/resources/lancet/>

<sup>9</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020.

<sup>10</sup> CUETO, Marcos; BROW, Theodore; FEE, Elizabeth. *The world health organization: a history (global health histories)*. Cambridge: Cambridge University Press, 2019. p. 6.

<sup>11</sup> VENTURA, Deisy; NUNES, João. Apresentação. *Lua Nova*, São Paulo, n. 98, p. 7-16, Aug. 2016.

<sup>12</sup> In the scope of this piece, Global Health Law "is a field that encompasses the legal norms, processes, and institutions needed to create the conditions for people throughout the world to attain the highest possible level of physical and mental health", GOSTIN, Lawrence; TAYLOR, Allyn. *Global Health Law: a definition and grand challenges*. *Public Health Ethics*, v.1, n. 1, p. 53-63, Apr. 2008.

<sup>13</sup> CUETO, Marcos. The Alma-Ata legacy, 40 years later. *Trab. educ. saúde*, v. 16, n. 3, p. 845-848, 2018.

<sup>14</sup> WORLD HEALTH ORGANIZATION. *Closing the gap in a generation*. 2008. Available in: [http://www.who.int/social\\_determinants/final\\_report/csdh\\_finalreport\\_2008.pdf](http://www.who.int/social_determinants/final_report/csdh_finalreport_2008.pdf) Accessed on: 10 Apr. 2020.

<sup>15</sup> WORLD HEALTH ORGANIZATION. *Closing the gap in a generation*. 2008. Available in: [http://www.who.int/social\\_determinants/final\\_report/csdh\\_finalreport\\_2008.pdf](http://www.who.int/social_determinants/final_report/csdh_finalreport_2008.pdf) Accessed on: 10 Apr. 2020.



environmental circumstances, racial or gender discrimination, all play a major role in health as well. Brazil has strongly supported this approach and hosted the World Conference on SDH in Rio de Janeiro, in 2011, which convened representatives from more than 120 countries<sup>16</sup>. The safeguard of SDH counts as one of Brazil's most paradigmatic agendas in the realm of international cooperation in health<sup>17</sup>.

Although SDH are taken as a central concept from the academic output and the latest official documents concerning public health, a recent literature review has highlighted the use of a wide-ranging set of conceptual models, lists and frameworks, depending on the authors and their targeted audience<sup>18</sup>. Within such a vast debate, we underline three prominent ideas. Firstly, SDH tend to account for most health inequities, which are the preventable differences between the health results of social groups in the same country or from different ones. Secondly, while the lists of SDH vary according to authors and do not encompass all possible factors, the explicit reference to legal determinants is increasingly prevalent. As an example, one may consider the rule of law as a paramount determinant of health; therefore, the hurdles to implement the rule of law would represent structural barriers to public health<sup>19</sup>.

Lastly, the wide application of the SDH perspective has given rise to new terms in the literature based on the same principle, according to which health is a complex and intersectoral field, shaped by elements well beyond the occurrence of disease and staged at multiple levels, including the global. The so-called “commercial determinants of health”, for instance, are often brought up to sustain that governments and international organizations should proactively commit themselves with the commercial factors affecting health, particularly those concerning the prevention of non-communicable diseases (cancer, diabetes, cardiovascular diseases etc.)<sup>20</sup>

The commercial determinants of health have been defined as “strategies and approaches used by the private sector to promote products and choices that are detrimental to health”, and comprise the wide spectrum ranging from the consumer and health behavior to the global risk society, the global consumer society, and the political economy of globalization<sup>21</sup>. We believe that such a definition is already implicit in most SDH definitions, including that by WHO. Nevertheless, we assume that its authors do not intend to set out an academic or conceptual debate, but rather to promote this interpretation as a strategy to advocate for particular aspects of the global health agenda. The above-mentioned Lancet Commission on the Legal Determinants of Health follows suit to promote the legal agenda of global health.

### 3 What are the Legal Determinants of Health?

According to the Commission, the approach of Legal Determinants of Health (LDH) stands for a broad Law concept, comprising “legal instruments such as statutes, treaties, and regulations that express public policy, as well as the public institutions (e.g., courts, legislatures, and agencies) responsible for creating, implementing, and interpreting the law”<sup>22</sup>. Without engaging in the conceptual debate on the “determinants”, the Commission justifies its use on the premise that “it demonstrates the power of law to address the underlying social and economic causes of injury and disease”<sup>23</sup>.

According to the Commission, the existence of

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is critical to emerging economies. *Ciênc. saúde coletiva*, Rio de Janeiro, v. 20, n. 4, p. 968-969, Apr. 2015.; MIALON, M. An overview of the commercial determinants of health. *Globalization and Health*, v. 16, n. 74, 2020.

<sup>21</sup> KICKBUSCH, Ilona; ALLEN, Luke; FRANZ, Christian. The commercial determinants of health. *The Lancet*, v. 4, n. 12, p. 895-896, 2016.

<sup>22</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020. p.1857.

<sup>23</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020. p.1857.

<sup>16</sup> PELLEGRINI FILHO, Alberto. Conferência Mundial sobre Determinantes Sociais da Saúde. *Cad. Saúde Pública*, v. 27, n. 11, p. 2080-2082, 2011.

<sup>17</sup> BUSS, P. Brazilian international cooperation in health in the era of SUS. *Science and Collective Health*, n. 23, p. 1881-1890, 2018.

<sup>18</sup> LUCYK, Kelsey; McLAREN, Lindsay. Taking stock of the social determinants of health: a scoping review. *Plos One*, v. 12, n. 5, 2017.

<sup>19</sup> PINZON-RONDON, Ângela Maria *et al.* Association of rule of law and health outcomes: an ecological study. *BMJ Open*, e007004, 2015. Available in: <https://doi.org/10.1136/bmjopen-2014-007004>, Accessed on: 29 Aug. 2020.

<sup>20</sup> KICKBUSCH, Ilona. Addressing the commercial determinants

LDH stems from the potential use of Law's three functions -- that is, the means by which Law shapes social interactions -- essential to the field of global health: to set standards and norms within both national and international law; solve disputes on national and international spheres; and regulate the foundation and functioning of both private and public institutions<sup>24</sup>. Global players should take advantage of these functions, namely States, International Organizations and non-state actors, in particular philanthropic entities, public-private partnerships and civil society organizations<sup>25</sup>.

The Commission rightfully states that norms, programs, policies and court rulings, which are not directly related to public health, might significantly affect it. Therefore, this debate does not only concern the practitioners in Health Law, but all legal disciplines. On the other hand, the health branch still lingers as "the poor relations" of International Law<sup>26</sup>, which mobilizes a rising yet marginal academic literature. In this regard, it seems relevant to foster critical reflection on health among Law professionals and vice versa, in order to debate on justice in the field of Global Health. The pandemic may have raised awareness among jurists on the prominence of global health regulation, besides the overwhelming impact on national law, which is to be further discussed.

The Commission has in short defined four LDH, as follows<sup>27</sup>:

1. Law can be a tool on behalf of the Sustainable Development Goals, defined by the United Nations on the 2030 Agenda, particularly to fulfill the goal related to

Universal Health Coverage<sup>28</sup>;

2. Law can reinforce the governance of national and international health institutions, by favoring the coordination between actors and the effectiveness of international commitments, besides promoting principles such as transparency and accountability;
3. Law can implement evidence-based health interventions, across three domains of health: infectious diseases, non-communicable diseases and injuries (road traffic crashes, drowning, poisoning, falls, burns and violence etc.) and
4. legal capacities in the health field must be strengthened, including by training key actors on the drafting and enacting of law.

Based on such determinants, the Report fundamentally sustains that Law is an essential tool in advancing "global health with justice". Although the Report does not provide any definition to that phrase, Lawrence Gostin outlines it as a goal shared by both the law and health communities to "attain the highest attainable standard of physical and mental health for the world's population", whereas justice should instill the field to provide equitable conditions of health for all, and particularly the most disenfranchised<sup>29</sup>. The universal human rights framework would then stand as a cornerstone on the path towards global health with justice<sup>30</sup>.

Several of the Report's authors have stood for the negotiation of a binding international convention which would elaborate on the right to health<sup>31</sup>, while contributing to the implementation of Sustainable Development Goals<sup>32</sup>. In that regard, the Report seems to

<sup>24</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020. p.1863.

<sup>25</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020. p.1869.

<sup>26</sup> SALMON, Jean. Rapport introductif. In: MEHDI, Rostane; MAIJEAN-DUBOIS, Sandrine. *La société internationale et les grandes pandémies*. Paris: Pedone, 2007. p. 13.

<sup>27</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020.

<sup>28</sup> The goal 3.8 consists of "achieving universal health coverage (UHC), including financial risk protection, access to quality essential health care services, and access to safe, effective, quality, and affordable essential medicines and vaccines for all". SUSTAINABLE DEVELOPMENT GOALS. *Proposed Indicators*. Available in: <https://indicators.report/targets/3-8/> Accessed on: 30 Apr. 2020.

<sup>29</sup> GOSTIN, Lawrence. *Global Health Law*. Cambridge: Harvard University Press, 2014.

<sup>30</sup> GOSTIN, L. *et al.* 70 years of human rights in global health: drawing on a contentious past to secure a hopeful future. *The Lancet*, v. 22, n. 392, p. 2731-2735, Dec. 2019.

<sup>31</sup> GOSTIN, L. *et al.* Towards a framework convention on global health. *Bulletin of the World Health Organization*, v. 91, n. 10, p. 790-793, 2013.

<sup>32</sup> FRIEDMAN, Eric; GOSTIN, Lawrence. The United Nations sustainable development goals: achieving the vision of global health with justice. *Georgetown Public Policy Review*, v. 21, n. 1, 2016.

be particularly out of step with the current context of decline in multilateralism. Consequently, the emphatic defense of Law is the Report's main strength and weakness simultaneously. On the one hand, it stands against the current skepticism around the expectations for the collective action from States on behalf of human rights and justice. By addressing objective recommendations to several actors, it demonstrates how much could be done if there were enough political will. Conversely, such political will seems unlikely to emerge, due to the distinctive nationalist forms of populism that have recently risen in world politics.

While not being an ideal tool to address global health, we believe this framework is suitable to analyze the Brazilian response to the pandemic, as it allows for the understanding of the role of law with regards to health and the means by which populism may cause harm to public health.

## 4 Overview of the Brazilian response to the Covid-19 pandemic

Despite the ever-growing figures and the brisk expansion of Covid-19 in Brazil, it is misleading to consider the failure of the country's response to the pandemic as a natural and expected result of its economic and political peculiarities. Quite the opposite, Brazil was deemed the best prepared developing country to tackle this sort of emergency. The Global Health Security Index from the prestigious Johns Hopkins Bloomberg School of Public Health ranked Brazil 22nd on the overall score among 195 countries in terms of health security; 16th on the prevention of the emergence or release of pathogens; 12th on early detection and reporting for epidemics of potential international concern; and 9th on rapid response to and mitigation of spread of an epidemic<sup>33</sup>.

The data from the ranking provide a compelling point for the effects of populism on health, since Brazil, the United States and the United Kingdom were all well placed on the list and yet are likely to report the

least efficient responses to the pandemic worldwide. Such results suggest that structural comparative advantages may be largely outweighed by an inadequate governance during the crisis, even more so when coupled with populist denialism.

The main Brazilian asset, which distinguishes the country from similar ones, is the existence of a state-funded single health system (SUS). Built up over three decades and based on the constitutional guarantee of free and universal access to healthcare, SUS covers almost all of the national territory. SUS is the most meaningful institution of the Brazilian Health Law, for it defines, integrates and manages the policies from several Public Law institutions, such as the Ministry of Health, the state and municipal Health Secretaries, the Regulating Agencies and Health Councils<sup>34</sup>.

Nevertheless, three major constraints may hamper this head start: the aggravation of chronic deficiencies in healthcare equipment and supplies; the obstacles to isolation measures due to social and economic inequalities; and the inability of the federal government to lead an effective response. SUS has been underfunded since its creation<sup>35</sup> and competes with a robust private healthcare sector that collects massive fiscal incentives and competes for public resources with the system serving most of the population. In 2016, at the peak of a political and economic crisis, a constitutional amendment (n. 95) set a cap on public healthcare expenses which, according to the National Health Council, resulted in a USD 4.3 billion loss between 2018 and 2020<sup>36</sup>.

The fact is that the shortage of intensive care beds, personal protective equipment, and other materials – including ventilators – existed prior to the pandemic. The underfunding has caused health facilities to close down, mainly in peripheral zones, as well as long waiting lists on consultations, exams and health proceedings. There are frequent complaints of corruption and poor ma-

<sup>34</sup> AITH, Fernando Mussa Abujamra. *Manual de direito sanitário com enfoque em vigilância em saúde*. Brasília-DF: CONASEMS, 2019.

<sup>35</sup> FUNCIA, Francisco Rózsa. Subfinanciamento e orçamento federal do SUS: referências preliminares para a alocação adicional de recursos. *Ciência & Saúde Coletiva*, Rio de Janeiro, v. 24, n. 12, p. 4405-4415, 2019.

<sup>36</sup> CONSELHO NACIONAL DE SAÚDE. *CNS reivindica revogação imediata da Emenda Constitucional 95/2016*. Available in: <https://conselho.saude.gov.br/ultimas-noticias-cns/1064-nota-publica-cns-reivindica-revogacao-imediata-de-emenda-que-retirou-verba-do-sus-prejudicando-enfrentamento-ao-coronavirus>, Accessed on: 27 Aug. 2020.

<sup>33</sup> NUCLEAR THREAT INITIATIVE; Johns Hopkins; The Economist. *GHS Index - Building Collective Action and Accountability*. Oct. 2019. Available in: <https://www.ghsindex.org/wp-content/uploads/2019/10/2019-Global-Health-Security-Index.pdf> Accessed on: 29 Aug. 2020.

agement, waiting lines and avoidable deaths. In many cities, successful primary care programs, such as the Family Health Strategy and the Community Health Agents, which could be decisive in mitigating the pandemic in low-income communities, have been undermined by mismanagement and theft<sup>37</sup>. Moreover, health surveillance has not received the necessary investments over the last few years, and its performance has been heavily undervalued<sup>38</sup>.

The pandemic adds to the endemic diseases already challenging SUS, particularly dengue. In 2020, as of July 2020, 874 thousand cases of dengue had been reported in Brazil<sup>39</sup>. In 2019, 1,544,987 cases were reported<sup>40</sup>. More than the absence of progress, there are setbacks in tackling diseases like tuberculosis. Despite a steady decrease from 2010 to 2016, the TB-incidence coefficient rose from 2017 to 2018 compared to the previous period, at 73,864 new cases in 2019<sup>41</sup>.

The rise of the extreme right in 2018 to the presidency has brought a coarsening of policies and rhetoric toward democracy and human rights not seen since the end of the dictatorial military regime (1964-1985). It is a consensus among analysts that President Bolsonaro is a far-right populist: as a far-right politician, mostly due to his open defense of human rights' violators and authoritarian regimes in Latin America; for the absence of institutional or party intermediation between him and his increasingly radicalized supporters<sup>42</sup>, since he deserted his party affiliation by late 2019. Even before the pandemic, Bolsonaro's minoritarian political strate-

gy led to several clashes with other institutions, mainly the National Congress and the Federal Supreme Court, as well as continuous attacks on the mainstream media, social minorities and the academic community, which reveals his populist style.

The Covid-19 outbreak coincided with demonstrations against the legislature and judiciary branches of government. Supporters of President Jair Bolsonaro were calling for the closure or weakening of both branches of government as institutional checks on executive power. Despite being himself a suspected COVID-19 case and allegedly falling ill himself later this year, the President attended several demonstrations. Despite his efforts to downplay the threat of the virus, more than 20 members of the federal government have tested positive to SARS-CoV-2; some of them have ignored the recommendation for isolation and social distancing.

Throughout the changes in government, the Ministry of Health (MoH) remained a highly qualified technical body up until April 2020, which cooperated with international institutions and local governments. The minister at the onset of the outbreak, the Dr Luiz Henrique Mandetta, managed to engage with the Congress and the main public and private healthcare institutions. A few days after the PHEIC by WHO and weeks prior to the first reported case in Brazil, MoH declared COVID-19 a national emergency and set up a strategic response along with state and municipal governments. On February 6th, Brazil adopted a law allowing the MoH and local governments to implement isolation measures, quarantines, compulsory exams and treatment, and to raise private support to respond to the emergency<sup>43</sup>. Public universities and research institutes also mobilized quickly and provided thousands of tests and the genome sequencing of Coronavirus only 24 hours after the first reported case.

However, insofar as the pandemic took over the political agenda, the president adopted an openly aggressive and contradictory strategy. First, there was conflict inside the government itself, as the President systematically contravened MoH recommendations. He strongly politicized the recommendation for social iso-

<sup>37</sup> LOTTA, G. *et al.* Community health workers reveal COVID-19 disaster in Brazil. *The Lancet*, v. 396, n. 10248, p. 365-366, 2020.

<sup>38</sup> LANA, R. M. *et al.* Emergência do novo coronavírus (SARS-CoV-2) e o papel de uma vigilância nacional em saúde oportuna e efetiva. *Cad. Saúde Pública*, Rio de Janeiro, v. 36, n. 3, Mar. 2020.

<sup>39</sup> BRASIL. Ministério da Saúde. *Boletim Epidemiológico*: Especial Tuberculose. 2020. Available in: <https://www.saude.gov.br/images/pdf/2020/marco/24/Boletim-tuberculose-2020-marcas--1-.pdf> Accessed on: 30 Aug. 2020.

<sup>40</sup> BRASIL. Ministério da Saúde. *Boletim Epidemiológico*: Especial Tuberculose. 2020. Available in: <https://www.saude.gov.br/images/pdf/2020/marco/24/Boletim-tuberculose-2020-marcas--1-.pdf> Accessed on: 30 Aug. 2020.

<sup>41</sup> BRASIL. Ministério da Saúde. *Boletim Epidemiológico*: Especial Tuberculose. 2020. Available in: <https://www.saude.gov.br/images/pdf/2020/marco/24/Boletim-tuberculose-2020-marcas--1-.pdf> Accessed on: 30 Aug. 2020.

<sup>42</sup> AMORIM NETO, Octavio; ALVES PIMENTA, Gabriel. The first year of Bolsonaro in office: same old story, same old song? *Rev. Cienc. Polít.*, Santiago, v. 40, n. 2, Jun. 2020. Available in: <http://dx.doi.org/10.4067/S0718-090X2020005000103> Accessed on: 30 Aug. 2020.

<sup>43</sup> VENTURA, Deisy; AITH, Fernando; RACHED, Danielle. The emergency of the new coronavirus and the "Quarantine Law" in Brazil. *Revista Direito e Práxis*, Rio de Janeiro, v. 20, n. 10, 2020. Available in: <https://www.e-publicacoes.uerj.br/index.php/revistacea-j/article/view/49180/32954> Accessed on: 10 Apr. 2020.

lation in cities where there was local transmission and downplayed the disease, even in official statements, and prematurely announced chloroquine as a cure for COVID-19, in clear-cut contradiction to MoH initial recommendations<sup>44</sup>. Mandetta stepped out of government by mid-April and his successor remained for less than a month in office. Since May 15th, in the midst of a pandemic, Brazil has had an interim Minister of Health, a military official with no experience or qualification in health whatsoever. The technical team at MoH has been dismantled and the institution militarized<sup>45</sup>. The net effect has been to mislead the public and jeopardize the ministry's credibility.

The second main conflict occurred between the federal and the local governments, particularly with the governor of Sao Paulo, Joao Doria, and Rio de Janeiro, Wilson Witzel. Former allies of the president, they are now regarded as his likely opponents in presidential elections in 2022. Doria and Witzel lead the COVID-19 epicenter regions and adopted quarantine-like measures as soon as there was local virus transmission, based on scientific evidence. Schools and shops were closed and gatherings suspended, yet essential services have been maintained.

In May, the President declared war on the governors who adopted the suspension of non-essential activities and incited businessmen to "play hardball" with them<sup>46</sup>. His supporters announced police operations against governors and mayors who tried to implement efficient measures to tackle the pandemic, based on alleged corrupted procurement of health supplies. Some of those operations have effectively taken place and on August 28th the governor of Rio de Janeiro was ousted by a

controversial judicial ruling<sup>47</sup>.

According to the President, however, the most rigorous measures against the pandemic should be reversed, for they harm the economy. Instead he argues that the main focus should be the isolation of the elderly and at-risk groups only. He believes the protection of the economy would justify the loss of a considerable group of people, as the deceased would be elderly or those near-death anyway<sup>48</sup>. The federal government has even developed a campaign named 'Brazil cannot stop', urging the public to ignore the quarantine and resume work. At the request of federal prosecutors, the courts have banned the campaign<sup>49</sup>, because it contradicts scientific evidence and violates the principles of precaution and prevention.

Yet, the president has supported public demonstrations against the isolation, organized by extremists in many Brazilian cities and even repeatedly appeared in public to make personal contact with supporters, which deserved heavy backlash in the country and abroad<sup>50</sup>. Technical issues such as the use of drugs with no proven effectiveness and the adoption of quarantine measures have been highly politicized amid conspiracy theories and fake news<sup>51</sup>. Denialism and death banalization are a common stance among the President's supporters, who often draw upon hate speech to agitate their bases and, therefore, enhance the damage resulting from the pandemic.

The most affected groups are undeniably those who bear historical discrimination and poverty, mainly the African descendant<sup>52</sup> and indigenous populations, who

<sup>44</sup> WATANABE, Phillippe. O que Bolsonaro, Mandetta, a OMS e os hospitais de ponta dizem sobre a cloroquina. *Folha de S. Paulo*, Mar. 2020. Available in: <https://www1.folha.uol.com.br/equilibrioesaude/2020/03/o-que-bolsonaro-mandetta-a-oms-e-os-hospitais-de-ponta-dizem-sobre-a-cloroquina.shtml>, Accessed on: 30 Aug. 2020.

<sup>45</sup> FREITAS, Carolina. Militarização marca o apagar das luzes no Ministério da Saúde, diz Mandetta. *Valor Econômico*, Aug. 2020. Available in: <https://valor.globo.com/politica/noticia/2020/08/12/militarizacao-marca-o-apagar-das-luzes-no-ministerio-da-saude-diz-mandetta.ghtml> Accessed on: 30 Aug. 2020.

<sup>46</sup> DELLA COLETTA, Ricardo *et al.* É guerra, tem que jogar pesado com governadores, diz Bolsonaro a empresários. *Folha de S. Paulo*, May 2020. Available in: <https://www1.folha.uol.com.br/poder/2020/05/e-guerra-tem-que-jogar-pesado-com-governadores-diz-bolsonaro-a-empresarios.shtml>, Accessed on: 30 Aug. 2020.

<sup>47</sup> RODAS, Sérgio. *Afastamento cautelar de governador por decisão monocárstica é controverso*. 2020. Available in: <https://www.conjur.com.br/2020-ago-28/afastamento-cautelar-witzel-decisao-monocratica-controverso> Accessed on: 30 Aug. 2020.

<sup>48</sup> PHILLIPS, Tom. Jair Bolsonaro claims Brazilians 'never catch anything' as Covid-19 cases rise. *The Guardian*, Mar. 2020. Available in: <https://www.theguardian.com/global-development/2020/mar/27/jair-bolsonaro-claims-brazilians-never-catch-anything-as-covid-19-cases-rise>, Accessed on: 30 Aug. 2020.

<sup>49</sup> VITAL, Danilo. Em liminar, ministro Barroso proíbe campanha "O Brasil não pode parar". *Conjur*, Mar. 2020. Available in: <https://www.conjur.com.br/2020-mar-31/liminar-barroso-proibe-campanha-brasil-nao-parar> Access on: 30 Aug. 2020.

<sup>50</sup> THE LANCET. Editorial: Covid-19: Learning from experience. *The Lancet*, v. 395, n. 10229, Mar. 2020. Available in: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30686-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30686-3/fulltext) Accessed on: 28 Aug. 2020.

<sup>51</sup> DOURADO, Daniel; RIBEIRO, Tatiane. Controvérsias sobre a cloroquina/hidroxicloroquina. *Boletim Direitos na Pandemia*, São Paulo, n. 2, Jul. 2020.

<sup>52</sup> RIBEIRO, Helena; MENDES, Viviana; WALDMAN, Eliseu.

make up 72.7% of the poor or 38.1 million people. Poverty limits the access to drinking water, sanitation and decent living conditions, which precludes the basic hygiene and social distancing recommendations, particularly to sick people. There is a synergy between hate speech, inequality and discrimination, for the hate rhetoric validates the inequities by reinforcing stigmas and intimidating its recipients. Moreover, structural discrimination and inequality hamper the access of discriminated groups to the public debate and the justice system<sup>53</sup>.

Opposition to the president's policies has emerged in other government branches. The president of the Chamber of Deputies, Rodrigo Maia, has become a major figure by mediating conflicts caused by the executive branch. And the Congress has passed an additional USD 960 million investment in SUS, but the funds have failed to trickle down to lower levels. On March 24th, 26 out of the 27 state governors attended a meeting with Mr. Maia and defined an agenda to respond to the crisis<sup>54</sup>. The federal executive was notably absent.

The most relevant element of the Brazilian response so far has been a minimum income of USD 115 for five months, provided to one or two members of the same family, approved by the Parliament by late March. The President has sought to obtain popularity from the income program by presenting it as an initiative from his administration. Such policy, in principle temporary, energized the debate to review the austerity-oriented economic policies in force over the last few years.

It is clear that the system of checks and balances worked to minimize the mistakes and loopholes of the federal government at the beginning of the pandemic. Over time, however, local governments and institutions have bent under political and economic pressure and gradually relaunched non-essential activities, even though the pandemic has not been under control. Furthermore, the lack of an accountable and efficient coordi-

nation at the national level implied a waste of time that has proven fatal to thousands of Brazilians. The fragmentation of initiatives, besides challenging local governments to perform a role in principle corresponding to the federal government, hinders positive results. One example is *Consortio Nordeste*<sup>55</sup> – an alliance of the nine states in the Northeast region, where the president lacks popular support – which has sought direct cooperation aid from China.

The political unrest besets any social actor who may criticize the President. Bolsonaro has constantly resorted to aggressiveness, including inciting violence, against anyone daring to take issue with his viewpoint, which then sets the stage for a permanent tension with any public but his own supporters. That is why he then persistently attacks the press, which he claims has provoked unnecessary hysteria. Meanwhile, social movements are ignored or ostensibly harassed by the government.

Concerning science policy, Brazilian public higher education and research institutions are undergoing an unprecedented attack in the country's recent democratic history, due to continuous funding cuts, including previously granted scholarships. Such policies pose a serious threat to academia and oppose any sensible project to tackle present and future health emergencies<sup>56</sup>.

## 5 The Brazilian response according to the legal determinants of health

In this section, we discuss the main legal elements from the Brazilian response to the pandemic, which at this point may be depicted as populist, in the light of the key messages from the Report, selected in terms of their relevance to the topic.

### 5.1 The role of Law during the emergency

According to the Commission, "Law affects global health in multiple ways, by structuring, perpetuating,

In the COVID-19 pandemic in Brazil, do brown lives matter? *The Lancet*, v. 8, Jul. 2020, Available in: [https://doi.org/10.1016/S2214-109X\(20\)30314-4](https://doi.org/10.1016/S2214-109X(20)30314-4) Accessed on: 30 Aug. 2020.

<sup>53</sup> PEREIRA, Jane Reiss; OLIVEIRA, Renan; COUTINHO, Carolina. Regulação do discurso de ódio: análise comparada em países do Sul Global. *Revista de Direito Internacional*, Brasília, v. 17, n. 1, p. 195-228, 2020.

<sup>54</sup> VILELA, Pedro. Governadores manterão medidas de isolamento social contra a covid-19. *Agência Brasil*, Mar. 2020. Available in: <https://agenciabrasil.ebc.com.br/politica/noticia/2020-03/governadores-manterao-medidas-de-isolamento-social-contracovid-19> Accessed on: 30 Aug. 2020.

<sup>55</sup> CONSÓRCIO Nordeste solicita material para tratar Covid-19 à China. *Diário de Pernambuco*, Mar. 2020. Available in: <https://www.diariodepernambuco.com.br/noticia/politica/2020/03/consorcio-nordeste-solicita-material-para-tratar-covid-19-a-china.html> Accessed on: 30 Aug. 2020.

<sup>56</sup> VENTURA, Deisy *et al.* Challenges of the COVID-19 pandemic: for a Brazilian research agenda in global health and sustainability. *Reports in Public Health*, v. 36, n. 4, 2020.

and mediating the SDH”<sup>57</sup>. This key message underlines the notion that LDH are an inseparable element of SDH. The social conditions determining the health of individuals and populations are pervaded by legal forms expressing different force correlations, including oppression and resistance. In Brazil, the Judiciary branch has performed both roles over history.

Such duality persists under the extraordinary impact the pandemic has exerted on Brazilian law. Up until July 2020, 1,838 norms related to Covid-19 had been enacted only in the federal realm<sup>58</sup>, whereas at state and municipal levels, the estimates reach 22 thousand norms in the same period<sup>59</sup>. The abuse of veto prerogatives by the President has also been an instrument restraining the Congress’ attempts to contain the pandemic. Among the most consequential we may cite the veto to almost all of the law setting out the Covid-19 containment strategy in indigenous communities; the integral veto of the law providing compensations to health professionals unable to work due to Covid-19; and most of the law making it compulsory to wear masks in public spaces<sup>60</sup>. Even if such vetoes have been partially reverted by the Federal Supreme Court or overturned by the Congress, they delay the implementation of urgent measures, disavow the health authorities and confuse the public.

The contradictions and inconsistencies between norms have triggered intense judicialization. By late August 2020, the Federal Supreme Court had processed 4,840 Covid-19-related cases alone<sup>61</sup>. The Court’s ruling has been decisive in many cases, among which the one asserting the competence of local governments to adopt quarantine measures<sup>62</sup> and the one suspending

an executive branch order to limit access to information from government agencies during the pandemic<sup>63</sup>, interpreted by many as a breach to allow the federal government to conceal the number of cases and deaths.

At the same time, thousands of cases have been processed by state courts. The judicialization of health is an ongoing phenomenon in Brazil and has been widely examined by the academic community, yet it has clearly escalated during the pandemic. Most of the judicialization translates into legal terms the clash between the government and the opposing political forces with respect to the outbreak. Populism has strongly affected the Judiciary, in particular regarding the dispute over the use of chloroquine and the quarantine measures. By neglecting the best scientific evidence and the duty to protect public health, many magistrates have explicitly joined the presidential discourse and favored individual liberties and economic interests in detriment of health authorities’ recommendations and public health in a broader sense.

Accordingly, many court decisions have ordered the mitigation of quarantine -- for example, by reopening sport clubs and car dealerships during the sharp increase of Covid-19 cases<sup>64</sup> -- whereas other rulings forced policymakers and health professionals to offer chloroquine<sup>65</sup>. Such decisions have led to exposing vulnerable groups to contagion, mostly employees constrained to resume work in non-essential activities, besides instigating the false belief that chloroquine could prevent or treat the disease. By contrast, other court rulings have sought to guarantee an efficient response, such as the one ordering the lockdown in the state of Maranhão<sup>66</sup>.

<sup>57</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020. p.1857.

<sup>58</sup> BOLETIM DIREITOS NA PANDEMIA, São Paulo, n. 3, Aug. 2020.

<sup>59</sup> LIZ SERVIÇOS. *Portal Leis Municipais*. Available in: <https://leis-municipais.com.br/coronavirus> Accessed on: 30 Aug. 2020.

<sup>60</sup> BERTONI, Estevão. Quais os vetos de Bolsonaro a medidas de combate à pandemia. *Nexo*, Aug. 2020. Available in: <https://www.nexojournal.com.br/expresso/2020/08/04/Quais-os-vetos-de-Bolsonaro-a-medidas-de-combate-%C3%A0-pandemia>. Accessed on: 30 Aug. 2020.

<sup>61</sup> BRASIL. Supremo Tribunal Federal. *Painel de Ações Covid-19*. Available in: [https://transparencia.stf.jus.br/extensions/app\\_processo\\_covid19/index.html](https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html), Accessed on: 30 Aug. 2020.

<sup>62</sup> BRASIL. Supremo Tribunal Federal. *STF reconhece competência concorrente de estados, DF, municípios e União no combate à Covid-19*. 2020.

Available in: <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=441447&ori=1> Access on: 30 Aug. 2020.

<sup>63</sup> BRASIL. Supremo Tribunal Federal. *Suspensa norma que restringe acesso a informações públicas*. 2020. Available in: <http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=440207&ori=1> Accessed on: 30 Aug. 2020.

<sup>64</sup> PAGNAN, Rogério. Depois de academia de tênis, desembargador de SP libera concessionária de veículos. *Folha de S. Paulo*, May 2020. Available in: <https://www1.folha.uol.com.br/cotidiano/2020/05/depois-de-academia-de-tenis-desembargador-de-sp-libera-concessionaria-de-veiculos.shtml>, Accessed on: 30 Aug. 2020.

<sup>65</sup> SCHNEIDER, João Paulo; ESTÁCIO, Verlane. Justiça obriga Estância a fornecer cloroquina em casos menos graves. *Infonet*, Jul. 2020. Available in: <https://infonet.com.br/noticias/saude/justica-obriga-estancia-a-fornecer-cloroquina-para-casos-menos-graves/> Accessed on: 30 Aug. 2020.

<sup>66</sup> RODAS, Sérgio. *Afastamento cautelar de governador por decisão monocrática é controverso*. 2020. Available in: <https://www.conjur.com.br/2020-ago-28/afastamento-cautelar-witzel-decisao-monocratica->

The Brazilian experience has also validated another key message from the Report, namely that Law, as a capacity to advance global health with justice, remains substantially underutilized, particularly among professionals in the fields of health and science. The Brazilian epidemiological legislation is still too fragmented and underdeveloped, which explains the surge of such a high number of local norms and the controversies around them; the previously cited new quarantine law came into effect to rule the Covid-19 response and is rather incomplete<sup>67</sup>. For that matter, another key message from the Report should be taken into account: to realize the full potential of law to advance global health with justice, the global health community should build legal capacity and establish a sustained dialogue with legislators, regulators, judges, civil society, and researchers. Nevertheless, in the Brazilian case, the political polarization between denialism and the evidence-based decision making has not only opposed jurists and scientists, but also law and health practitioners among themselves, by an irrational divide between the federal government and whoever opposes it.

It is worth underlining that the rise of extreme right populism worldwide has increased the risk of the diffusion or the recrudescence of discriminatory juridical orders. As stated by the Report, “laws that stigmatize or discriminate against marginalized populations are especially harmful and exacerbate health disparities”<sup>68</sup>. That is the case of low-income international migrants and refugees, who suffer from precarious labor and housing conditions, particularly in big cities like São Paulo, where hundreds of thousands of non-Brazilians concentrate.

Although Brazil is not among the preferential destination countries to international migrants, it has become a pole to those fleeing conflict or harsh economic constraints in countries such as Congo, Angola, Venezuela, Haiti and even Syria, besides some more consistent flows from neighboring countries in South

America, like Bolivia, Paraguay and Peru. Yet during the Covid-19 pandemic, the federal government has issued a series of decrees ruling over the transit of foreigners and the border controls, which violates the Brazilian legislation and many international treaties of which the country is a State Party, discriminating in particular against Venezuelan migrants<sup>69</sup>. It has become clear that the federal government is taking advantage of the pandemic to impose setbacks to migration law.

## 5.2 The international legal sphere

Still consonant with the Report, “although the ability to enforce compliance with international legal obligations is generally limited, and largely dependent on power dynamics and political will, creative mechanisms can foster compliance and help establish impetus for action”<sup>70</sup>. On an article aiming to update the LDH framework in the face of the pandemic, two of its authors highlight “the need for brave and contemplated political leadership”, a leadership “that looks globally, not just nationally”<sup>71</sup>. Brazil has wasted the historical opportunity to exert such leadership. In the international realm, the Brazilian government has never been farther from its traditional cooperative stance in the field of health. Following a dramatic shift in its diplomatic orientation since the rise of the Bolsonaro administration, the country has turned its back on multilateral initiatives and forums where it had previously played a key role, particularly those fostering cooperation with neighboring and similar developing countries<sup>72</sup>.

The WHO has played a crucial role in the pandemic response worldwide. In Brazil, its scientific evidence and recommendations have underpinned the measures

controverso Accessed on: 30 Aug. 2020.

<sup>67</sup> VENTURA, Deisy; AITH, Fernando; RACHED, Danielle. The emergency of the new coronavirus and the “Quarantine Law” in Brazil. *Revista Direito e Práxis*, Rio de Janeiro, v. 20, n. 10, 2020. Available in: <https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/49180/32954> Accessed on: 10 Apr. 2020.

<sup>68</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020. p.1857.

<sup>69</sup> ROSA, Alexia Viana da *et al.* Migrantes e refugiados na pandemia: discriminação e violação de direitos humanos. *Boletim Direitos na Pandemia*, São Paulo, n. 1, 2020. Available in: [https://www.conectas.org/wp/wp-content/uploads/2020/07/01boletimcovid\\_PT.pdf](https://www.conectas.org/wp/wp-content/uploads/2020/07/01boletimcovid_PT.pdf) Accessed on: 27 Aug. 2020.

<sup>70</sup> GOSTIN, L. *et al.* The legal determinants of health: harnessing the power of law for global health and sustainable development. *The Lancet*, v. 393, n. 10183, May 2019. Available in: [https://doi.org/10.1016/S0140-6736\(19\)30233-8](https://doi.org/10.1016/S0140-6736(19)30233-8) Accessed on: 30 Apr. 2020. p.1857.

<sup>71</sup> COGGON, John; GOSTIN, Lawrence. Postscript: COVID-19 and the Legal Determinants of Health. *Public Health Ethics*, v. 13, n. 1, Apr. 2020. Available in: <https://doi.org/10.1093/phe/phaa015> Accessed on: 30 Aug. 2020.

<sup>72</sup> BUSS, P. Brazilian international cooperation in health in the era of SUS. *Science and Collective Health*, n. 23, p. 1881-1890, 2018.



of local governments and court jurisdictions which resist denialism and populism. It is no coincidence that, following WHO warnings on the situation in the country, the President and his supporters have heavily criticized the organization, and even threatened to leave it, replicating the stance of US Donald Trump<sup>73</sup>.

It is important to underscore that Brazil was one of the countries that proposed the foundation of WHO, during the San Francisco Conference in 1945, and the Brazilian Marcolino Candau presided over the organization for two decades (1953-1973). Brazil has led relevant initiatives and forged alliances that contributed to undermine the interests of developed countries in the governance of global health. Concerning international health emergencies, Brazil is a State Party to the International Health Regulations<sup>74</sup>, adopted in 2005, whose implementation elicited a long preparation process, mainly due to the major international events hosted by the country. According to the periodic assessment of capacities to apply IHR, Brazil performed above the average in the Americas and worldwide. Moreover, the country chaired the WHO Executive Council between 2018 and 2019.

The decline of the Brazilian international presence has also expressed itself in the case of the Union of South American Nations (UNASUR), which has been abandoned by most of the Member States over leadership disputes. Brazil officially left the organization in April 2019, which in practice entailed the derailment of some important institutions. Among the latter were the South American Council on Health (CSS) and the South American Institute of Governance in Health (ISAGS), inactive since last year. Based in Rio de Janeiro, ISAGS was the harbinger of an intergovernmental agency in health, which kept intense cooperation with several public health institutions from different countries of the region, in order to produce an intense knowledge interchange among government and research centers. The role of CS and ISAGS is acknowledged by the in-

ternational literature as a successful example of health diplomacy<sup>75</sup>.

Focusing on the opportunities open for international cooperation in the health field in the region, it would be essential to restore political and technical mechanisms in order to deal with the new coronavirus pandemic, as well as with potential new health challenges of international concern<sup>76</sup>. Some measures could decisively contribute to countries' decisions related to the COVID-19 pandemic and other diseases, such as data and experience exchanges and follow-up of the pandemic; the creation of a regional network of laboratories for the diagnosis of COVID-19 and other viruses, with standardized quality; adoption of mechanisms for joint negotiation and purchase of strategic inputs for dealing with the pandemic; building regional funds for emergency financial support to deal with the pandemic and other public health contingencies; mobilizing structural networks of existing South American institutions (national institutes of public health, schools of public health, and polytechnic health schools) aiming to share timely research, human resources training, and technical assistance and cooperation, among others<sup>77</sup>. Unfortunately, none of them have been deployed so far in the region.

It is thus not surprising that Brazil has taken quite the opposite path from that of Argentina, despite the latter being its most relevant political and economic partner in South America. The recently elected Argentinian President Alberto Fernández, following the example of most world leaders, has implemented a strict lockdown in the country<sup>78</sup>, in a context of previous economic hardship, which tends to deepen in the aftermath of the sanitary crisis. He has been able to judiciously unite and reap the support from the different

<sup>73</sup> DELLA COLETTA, Ricardo *et al.* É guerra, tem que jogar pesado com governadores, diz Bolsonaro a empresários. *Folha de S. Paulo*, May 2020. Available in: <https://www1.folha.uol.com.br/poder/2020/05/e-guerra-tem-que-jogar-pesado-com-governadores-diz-bolsonaro-a-empresarios.shtml>, Accessed on: 30 Aug. 2020.

<sup>74</sup> WORLD HEALTH ORGANIZATION. *Closing the gap in a generation*. 2008. Available in: [http://www.who.int/social\\_determinants/final\\_report/csdh\\_finalreport\\_2008.pdf](http://www.who.int/social_determinants/final_report/csdh_finalreport_2008.pdf) Accessed on: 10 Apr. 2020.

<sup>75</sup> RIGGIROZZI, Pía. *Coronavirus y el desafío para la gobernanza regional en América Latina*. 2020. Available in: <https://www.fundacion-carolina.es/wp-content/uploads/2020/03/AC-12.2020.pdf> Accessed on: 27 Aug. 2020; HERRERO, MB; TUSSIE, D. UNASUR Health: a quiet revolution in health diplomacy in South America. *Glob. Soc. Policy*, v. 15, n. 3, p. 261-277, 2015.

<sup>76</sup> BUSS, P.; TOBAR, S. COVID-19 and opportunities for international cooperation in health. *Cad. Saúde Pública*, Rio de Janeiro, v. 36, n. 4, 2020.

<sup>77</sup> BUSS, P.; TOBAR, S. COVID-19 and opportunities for international cooperation in health. *Cad. Saúde Pública*, Rio de Janeiro, v. 36, n. 4, 2020.

<sup>78</sup> ARGENTINE. *Decreto 297/2020*. Available in: <https://www.boletinoficial.gob.ar/detalleAviso/primera/227042/20200320> Accessed on: 27 Aug. 2020.

political forces around social interests, despite a deeply polarized spectrum in the country. The denialism of Bolsonaro, adding to the ideological divide between the *peronist* Fernández and his Brazilian right-wing extremist counterpart, has prevented that the two most influential countries in South America define a common strategy to manage their border control, the surveillance of their trade flows and the impact of measures on the lives of those involved in their transnational relationships.

A relevant contribution to the regional response to the COVID-19 pandemic are two Resolutions from the Inter-American Commission on Human Rights (IACHR), an autonomous branch of the Organization of American States (OAS), based in Washington D.C. It consists of a set of recommendations to the countries to approach COVID-19 response in the continent from a human rights perspective. The first Resolution<sup>79</sup> features health as a public good, which should be protected by the State; that human rights should be placed as a parameter to all policies related to the pandemic, which entails that restrictive measures ought to be legal, temporary, proportionate and non-discriminatory and that transparency and information should be made available, ensuring the protection of journalists and human rights advocates. On July 27th, 2020, the IACHR adopted Resolution 4/2020, which sets out specific guidelines on the human rights of those affected by Covid-19<sup>80</sup>. These Resolutions represent a legal landmark in the defense of health in the Americas. Besides the output of norms, the IACHR took precautionary measures against Brazil in favor of Yanomami and Ye'kwana peoples, for considering their rights to life and personal integrity under serious threat<sup>81</sup>.

The evident discrepancy between a human rights approach to the pandemic response and President Bolsonaro's reckless posture has even motivated at least three criminal complaints filed with the International

Criminal Court (ICC) for crimes against humanity by the Brazilian Association of Jurists for Democracy (ABJD), the Democratic Labor Party (PDT) and the Union Network UNISAúde<sup>82</sup>. The complaints add to the bulk of over fifty impeachment complaints against Bolsonaro for crimes of responsibility filed with the Chamber of Deputies, which remain ignored<sup>83</sup>. Furthermore, at least other seven inquiries for ordinary criminal offenses by the President, some of them against public health, have been shelved by the Attorney-General's Office<sup>84</sup>, which calls into question whether the State is unwilling or unable to genuinely carry out the investigation or prosecution against Bolsonaro.

As a whole, the complaints before the ICC sustain that the president has attempted to discredit the severity of the pandemic while violating the recommendations of health authorities and WHO's guidelines, which cripples the containment of the disease and threatens the lives of countless people in the country, among which health professionals and indigenous peoples. The complaints request therefore an investigation by the ICC into the President's conduct and his indictment, based on Article 7 (1) (k) of the Rome Statute, which encompasses the "inhumane acts [directed against any civilian population] intentionally causing great suffering, or serious injury to body or to mental or physical health".

These allegations are preceded by an informative note filed in November 2019 with the same ICC, which required to investigate the "incitement to genocide and widespread systematic attacks against indigenous peoples" by Bolsonaro<sup>85</sup>. The health of indigenous peoples in the Amazon is of particular concern. Besides the escalation of environmental devastation, the incentive to illegal land seizures by mining and farming allows the disease to reach them. New complaints are still likely to be filed with the ICC regarding the indigenous peo-

<sup>79</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Pandemic and Human Rights in the Americas*. Resolution 1/2020. Available in: <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf> Accessed on: 27 Aug. 2020.

<sup>80</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Human Rights of Persons with COVID-19*. Resolution 4/2020. Available in: <http://www.oas.org/en/iachr/decisions/pdf/Resolution-4-20-en.pdf> Accessed on: 27 Aug. 2020.

<sup>81</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. *Resolución 35/20 MC 563-20: Miembros de los Pueblos Indígenas Yanomami y Ye'kwana, Brasil*. Available in: <http://www.oas.org/es/cidh/decisiones/pdf/2020/35-20MC563-20-BR.pdf> Accessed on: 27 Aug. 2020.

<sup>82</sup> BOLETIM DIREITOS NA PANDEMIA, São Paulo, n. 4, Aug. 2020.

<sup>83</sup> CAMARGO, Gerson. *Maia tranca 50 pedidos de impeachment contra Bolsonaro*. *Extra Classe*, Aug. 2020. Available in: <https://www.extraclasse.org.br/politica/2020/08/maia-50-pedidos-impeachment-bolsonaro/> Accessed on: 27 Aug. 2020.

<sup>84</sup> CRUZ, Isabela. *A responsabilização de Bolsonaro na pandemia sob análise*. *Nexo Jornal*, Jul. 2020. Available in: <https://www.nexojornal.com.br/expresso/2020/07/12/A-responsabiliza%C3%A7%C3%A3o-de-Bolsonaro-na-pandemia-sob-an%C3%A1lise> Accessed on: 27 Aug. 2020.

<sup>85</sup> MACHADO, Eloísa; SANTOS, Juliana. *Incitação ao genocídio dos povos indígenas e ataques sistemáticos aos direitos socioambientais*. *Boletim Direitos na Pandemia*, n. 4, Aug. 2020. p. 7-9.

ples, insofar as they have not been adequately protected during the pandemic, which has profoundly aggravated the risks previously affecting them<sup>86</sup>.

## 6 Final remarks

In short, the Brazilian context amid COVID-19 pandemic seems grim and inspires deep concern. The populist approach amid a public health emergency turns out to be even more shocking as the history of epidemics shows that physical distance policy must go hand in hand with informed and transparent public communication strategies, in a unprecedented period of social separation, loneliness, emotional detachment and disruptions to social and economic life<sup>87</sup>. The Bolsonaro administration makes matters even worse, by undermining the most effective envisageable strategy, that of social distancing, and failing to compromise to a consistent, science-based, human-rights-centered response. Overcoming institutional conflicts would have been paramount to directing a robust response and focusing on the reduction of avoidable deaths resulting from the health system overload.

From the foregoing discussion, we may conclude that the Brazilian response to Covid-19 provides a clear example of the risks populism poses to international relations and in particular to international law, inasmuch as international treaties, institutions and recommendations are ignored or heavily blamed, precisely when most needed. The LDH framework demonstrates the consequential role Law might fulfill in the health field and how the nationalist populism alienates the potential benefits from the global health community, through international cooperation and other timely tools. One of the major challenges to be faced is the access to Covid-19 vaccines, which is likely to spark even more arduous legal debates. The absence of Brazilian leadership among developing countries, as a player willing to bring about alliances opposing the interests of the great economic powers will certainly harm the health of populations in the Global South.

<sup>86</sup> VENTURA, Deisy *et al.* Genocídio dos Povos Indígenas. *Boletim Direitos na Pandemia*, São Paulo, n. 2, Jul. 2020. p. 14-15.

<sup>87</sup> GOSTIN, L.; FRIEDMAN, E.; WETTER, S. Responding to COVID-19: How to navigate a Public Health Emergency Legally and Ethically. *Hastings Center Report*, v. 50, n. 2, p. 8-12, 2020.

We hope the pandemic leaves at least four legacies to Brazil: the increase and the consistency of public investment in the healthcare sector and in science; the recognition that economic and social inequalities, mainly those related to race and gender, besides being ethically unacceptable, jeopardize health security in the whole country; that effective social engagement in a huge democratic front, even at a time of crisis, represent the only chance to avoid the loss of thousands of lives; and the awareness that restoring the leadership in Global Health, by means of alliances and international commitments, is the most plausible stance in order to prepare for the next pandemic.

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