

# Medidas de **EMERGÊNCIA** na Administração Pública

**Antonio Gasparetto Júnior**  
Organizador



2020

Antonio Gasparetto Júnior  
(Organizador)

**MEDIDAS DE EMERGÊNCIA NA  
ADMINISTRAÇÃO PÚBLICA**



Pantanal Editora

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## APRESENTAÇÃO

Reformar a administração pública dotando-a de mais eficiência é um desafio corrente das nações. Uma boa gestão da máquina pública que faça usos sustentáveis dos recursos retribuindo serviços de qualidade à população é a meta de todos os Estados. No entanto, a contemporaneidade tem sido marcada por uma cadeia interminável de crises de aspectos econômicos, políticos, sociais ou, mais recentemente, sanitários. Diante disso, são necessárias medidas de emergência para atender demandas de momento que comprometem um planejamento mais contundente de médio a longo prazo.

Em 2020, sobretudo, o mundo conviveu com uma crise sanitária causada pela pandemia de coronavírus com impactos inimaginados até então. A pandemia se alastrou muito rapidamente pelo mundo, forçando os países a adotar medidas de isolamento para conter o avanço da doença. Com isso, abriu-se uma sequência de desafios decorrentes da pandemia, uma vez que foram prejudicados serviços, o desenvolvimento das atividades produtivas, o planejamento financeiro das nações e, claro, a segurança de vida das pessoas. Até o momento da publicação desta obra, mais de um milhão de pessoas já haviam perdido suas vidas em função da pandemia. Considerando-se os números oficiais.

Diante de desafios tão alarmantes, os países foram apresentados mais radicalmente a suas próprias realidades, tendo que implementar ações públicas capazes de manter, em alguma medida, suas atividades produtivas e seus serviços, por um lado, e, principalmente, zelar pela vida de suas populações, por outro. Nesse sentido, países mais abastados economicamente foram capazes de oferecer amplo apoio com volumosas medidas emergenciais empregadas pela administração pública. Outros países, menos providos de recursos, necessitaram, então, de um emprego muito qualificado da gestão pública, conciliando ciência e suas limitadas capacidades para a superação de tamanha crise.

Naturalmente, os resultados das ações estatais promovendo uma gestão pública eficiente da crise despertada pela COVID-19 foram muitos distintos. Assim como são diversas as respostas aplicadas para crises mais corriqueiras que também demandam medidas emergenciais da administração pública. A pandemia nos alerta para uma situação que carece de mais atenção nas pesquisas, a aplicação dessas medidas emergenciais. Pois, de modo geral, essas medidas são mais reativas e momentâneas para um rápido enfrentamento dos desafios. No entanto, analisar medidas emergenciais da administração pública em vários contextos oferece um vasto campo de abordagens fundamentais para a sociedade. Já que nos permite, por exemplo, aprender com experiências que podem se assemelhar em algumas situações ou mesmo avaliar aspectos positivos e negativos da condução das crises por gestores públicos. Prezando, dessa forma, pela inviolabilidade dos direitos, pelos princípios da administração pública e pela sustentabilidade.

Esta coletânea procura refletir sobre essas medidas emergenciais adotadas pela administração pública ou dela requeridas para lidar com situações de crise. São apresentados trabalhos que analisam

medidas tanto oriundas da gestão pública quanto as demandadas pela sociedade civil organizada para sanar algum tipo de problema. Refletir sobre essas condutas é algo cada vez mais urgente para, a partir de experiências, avaliar medidas mais ou menos eficazes e, a partir de ideias, propor abordagens que possam surtir mais efeitos em conjunturas de crises.

A obra que segue é composta de cinco capítulos, explorando com riqueza teórica e metodológica esses aspectos emergenciais na administração públicas. Todos os capítulos são de qualificada autoria e representam uma ampla variedade de proveniência, incluindo instituições nacionais e internacionais.

O primeiro capítulo desta coletânea, de autoria de David Marzzoni, Rodrigo Freitas e Breno Pereira, todos eles da Universidade Federal de Santa Maria (UFSM) oferece uma análise introdutória das transformações ocorridas na administração pública por meio da New Public Management e seus impactos sobre questões de transparência e governança no setor público. Considerar essas implicações é fundamental para compreensão do terreno sobre o qual gestores públicos precisam se atentar na condução das medidas emergenciais.

O segundo capítulo, de autoria de Laís Álvares (Universidade Federal de Juiz de Fora), concentra-se em um estudo de caso sobre estratégias econômicas aplicadas à crise do coronavírus. Muito especificamente, avalia as ações tanto do poder público quanto da sociedade civil em torno da renda de motoristas de vans escolares, que tiveram seus rendimentos prejudicados pela pandemia. A autora dedica-se, então, ao tema do auxílio emergencial promovido pelo Governo Federal no Brasil, introduzindo-se em um debate que, certamente, necessitará de mais profusão sobre sua formulação e aplicação, bem como seus resultados. Diante dessa necessidade, o terceiro capítulo, de autoria de Laís Álvares (UFJF), Marília Zechini (Faculdade Legale) e Larissa Siqueira (UFJF), traz uma importante e fundamental reflexão sobre o auxílio emergencial e a necessidade de transferência de renda para a população vulnerável como medida de emergência da administração pública para a superação de crises.

Os dois últimos capítulos são contribuições internacionais para análises de medidas emergenciais em situações excepcionais. O capítulo de João Archegas (Harvard University) é proveniente de um grande projeto internacional de pesquisa que avalia as medidas de emergência adotadas pelos países durante a crise do coronavírus. Integrante dessa equipe de investigação, Archegas oferece um recorte comparativo de tais medidas no Brasil e na Nicarágua durante a pandemia, países que se assemelharam em muitos aspectos na condução da crise, apesar de suas particularidades bem distintas.

E, por fim, o último capítulo é fruto de uma coautoria entre Mary Tobón (Universidad Libre de Bogotá / Colômbia) e Antonio Gasparetto Júnior (Universidade de São Paulo / Universidade Federal Fluminense) acerca das limitações do direito de educação em tempos de pandemia. Texto que explora as consequências do isolamento para grupos mais vulneráveis durante a crise sanitária.

Em suma, o livro que se apresenta transita entre macro e micro abordagens de medidas emergenciais da administração pública. Inicia-se pela reflexão em torno de uma nova concepção da administração pública, prossegue em torno de questões de renda e de educação em períodos de crise para finalizar com uma análise acerca da posição assumida pelo governo de dois países no enfrentamento da pandemia de coronavírus. Naturalmente, este livro não dispõe de todas as respostas para medidas emergenciais mais eficientes, equilibradas e sustentáveis, porém contribui com importantes reflexões a partir dos temas abordados para prover a sociedade de uma administração pública mais qualificada.

**Antonio Gasparetto Júnior**

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# Executive Underreach in Latin America: A Comparative Analysis Between Nicaragua and Brazil During the COVID-19 Pandemic

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## INTRODUCTION

The new coronavirus pandemic took the world by storm (and even this may be an understatement). As 2019 was drawing to a close and the reports of a new, deadly virus were coming in from mainland China, most Western countries seemed uncertain about the best way to react and prepare for a possible domestic outbreak.

Competing narratives on how much of a threat COVID-19 really was began to surface all over social media platforms, alongside conspiracy theories about the origin of the virus and the alleged political and economic interests behind the pandemic. Some argued that it was a Chinese biological weapon, others said that you could contract the virus by eating Chinese food, and yet a third group claimed that 5G technology was behind the spread of the virus, which ultimately led people to set cellphone antennas on fire in Europe (Business Insider, 2020).

Conspiracy theories aside, terrifying videos of people collapsing on the streets of Wuhan suggested that Sars-CoV-2 was a force to be reckoned with. But some leaders were quick to shrug off the challenge that loomed in the distance, falsely claiming that the new coronavirus should be treated just like the seasonal flu and that people were overreacting to a situation that could be solved through the implementation of common influenza protocols.

When the World Health Organization declared the novel coronavirus a pandemic on March 11, 2020, it should have been clear to all world leaders that we were facing one of the biggest challenges of our generation. Hundreds of people were dying and thousands were infected every day in Italy, Iran, and China. Hospitals were overwhelmed by the growing numbers of sick patients checking in every

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hour. The only possible solution was for national and subnational leaders to join forces against a common enemy.

Local and regional leaderships worked around the clock to secure all the medical supplies that frontline workers desperately needed to treat patients, including ventilators, surgical masks, face shields, and an array of different pharmaceuticals. Even the wealthiest nations struggled to produce or buy the most basic supplies.

In hindsight, it is undisputable that the majority of nations failed to come up with a cohesive (and effective) plan to fight COVID-19. Many actions taken by world leaders were erratic at best and failed to protect their population from the disease, especially the more vulnerable. During a pandemic, any misstep can be the difference between life and death for thousands of people.

Nevertheless – and even though the pandemic was far from over when I wrote this chapter –, it is safe to say that some countries fared better than others. Under the leadership of Prime Minister Jacinda Ardern, New Zealand got the outbreak under control in late April and was free of COVID-19 by June (BBC News, 2020). The Kiwis' stellar success can be attributed to massive testing, educational campaigns, and the implementation of lockdown orders and social distancing measures.

In South America, Uruguay emerged as a rare example of a country that conducted massive testing soon after the virus infiltrated its borders. In fact, “even before COVID-19 was not yet a clear threat on the continent, scientists from the Pasteur Institute in Montevideo [...] began to manufacture kits to detect the coronavirus using molecular technology” (Costabel, 2020). As a result, despite the fact that Uruguay shares its borders with hard-hit countries like Brazil and Argentina, it only had 1,876 confirmed cases and 46 deaths as of September 18, 2020.

On the flip side, countries like Brazil and the US failed to rise up to the challenge. As of the same date, Brazil had over 4 million confirmed cases and 135 thousand deaths, while the US had 6.7 million confirmed cases and was just short of 200 thousand coronavirus-related deaths. Unfortunately, the pandemic is still not under control in both nations and the death toll will continue to rise for the foreseeable future.

Although both countries had months to prepare in advance of the first COVID-19 wave – which showed its first signs sometime between March and April of 2020 –, they were unable to conduct massive testing and refused to enforce national quarantine and lockdown orders to keep the outbreak under control.

Trump and Bolsonaro downplayed the crisis from the get-go. On January 22, 2020, Trump proudly asserted that the US had the coronavirus “totally under control” (CNBC, 2020), only to watch his country lead the world in total number of infections and deaths in the following months.

Similarly, Bolsonaro called COVID-19 a “little flu” and dismissed the possibility of a national lockdown order because “more people will die due to unemployment than to the coronavirus” (Valor Econômico, 2020). The Brazilian leader made an explicit decision to put the economy before people’s lives.

The pandemic response in Brazil and the US is an example of executive underreach. According to David E. Pozen and Kim Lane Scheppele, executive underreach can be defined “as a national executive branch’s willful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address” (2020).

Brazil and the US are two of the largest democracies in the world and, at least in theory, are well positioned to deal with national health emergencies. In fact, Brazil has successfully dealt with Zika and Dengue epidemics before. Nevertheless, for reasons I will try to explain below, Bolsonaro decided that his administration would not address the problem this time around.

In times of emergency, legal scholars are familiar with cases of executive *overreach*, that is, the use of the executive apparatus to seize more power, restrict fundamental rights and liberties, attack the opposition and democratic institutions, and, ultimately, to erode constitutional democracy from within. The canonical example in the literature is the fall of the Weimar Republic and the rise of the Third Reich in Germany (*see* Dyzenhaus, 1997).

But in countries like Brazil and the US, almost the opposite took place during the coronavirus pandemic: “the national executive’s efforts to control the pandemic have been disastrously insubstantial and insufficient” (Pozen; Scheppele, 2020). One could have reasonably anticipated that Bolsonaro and Trump would use the crisis as an excuse to test the limits of their power, but instead they traveled down the path of executive underreach.

Alongside Brazil, Nicaragua is another example of this phenomenon in Latin America. Since 2006, the nation is controlled by President Daniel Ortega and his wife, Vice President Rosario Murillo. Like Trump and Bolsonaro, Ortega also dismissed the threat posed by the novel coronavirus. During a public address on April 16, the Nicaraguan strongman claimed that the coronavirus is a “sign from God” and that if the “country stops working, it dies”.

Furthermore, wearing his conspiracy theorist hat, he claimed that COVID-19 is a backlash against “transnational forces that just want to take control of the planet” (The Guardian, 2020a). Something similar happened in Brazil, when Ernesto Araújo, the Minister of Foreign Affairs, wrote an essay claiming that Sars-CoV-2 is the *Comunavírus*, an allusion to the Chinese communist party and the widespread conspiracy theory that China created the virus as a “biological weapon” (Araújo, 2020).

Aside his apocalyptic discourse, Ortega did absolutely nothing to fight the spread of the virus. More recently, the Ortega administration moved from denying the rising number of infections and

deaths in the country to ordering “express burials” overnight to hide the true extent of the crisis from the public (New York Times, 2020a).

Because the government closely controls the number of COVID-19 tests and is actively concealing information from health authorities and the population, there is no way of assessing the impact of the pandemic in Nicaragua. Nevertheless, media reports suggest that COVID-19 is nowhere near being under control. The government is only administering fifty coronavirus tests per day and experts say that the official numbers do not come close to reflecting the real extension of the public health crisis (Thaler, 2020).

What Bolsonaro, Trump, and Ortega have in common? At least to some extent, they all rose to power using populist techniques and talking points. What is more, they continue to govern like populist leaders. But first things first, what is populism? While I acknowledge that this is a highly controversial concept in the literature – particularly among political scientists and constitutional scholars –, here I rely on one influential conceptualization.

Jan-Werner Müller argues that populism is a “moralistic imagination of politics” that is both anti-elitist and anti-pluralist. Populism not only “opposes a morally pure and fully unified [...] people to small minorities, elites in particular”, but it also claims to hold the monopoly over the “moral representation” of the “authentic people” (2017). Populists present themselves as lone rangers, fighting against the “establishment” in the name of the “true patriots”.

This is why, once in power, populists try to establish what Müller calls “populist constitutionalism”, constitutionalizing their image of the “morally pure people” (2017). This will usually be accomplished by bulking up the executive branch and weakening constitutional mechanisms of horizontal accountability.

This is a reflection of the populist belief that the will of the people should remain unmediated and that no intermediary institution can sit in-between citizens and their representatives. The leader herself is the embodiment of the will of the people. Consequently, the very notion that the leader should be held accountable through the work of intermediary bodies ceases to make sense and can be duly discarded (Urbinati, 2019). In other words, “*We* the People” gives place to “*Me* the People”.

Although it is important to note that populists have an incentive to dismantle and neutralize independent checks on their power, this does not mean that they will necessarily rule out the constitutional system of checks and balances altogether. In Müller’s words, “populists are only against specific institutions [...]. Populists in power will be fine with institutions – which is to say: *their* institutions” (2017).

To put it differently, populists tend to keep the outer shell of democratic institutions intact, while they strip them from any meaningful substance. In the long haul, a country led by a populist leader

may end up with institutions that bark, but do not bite. This helps the populist to make the case that nothing has changed, that all institutions are up and running, and, finally, that warnings of democratic erosion coming from the opposition are just part of a bigger plan to create political instability and subvert state power.

To be sure, other leaders around the globe followed the populist handbook down to the smallest detail. In Hungary, under the leadership of Prime Minister Viktor Orbán, the Fidesz-controlled parliament passed into law the “Bill on Protecting Against the Coronavirus”. The new law authorized the Hungarian government to rule by decree. It also created a new crime for those who “claim or spread falsehood or claim or spread distorted truth in relation to the emergency” (Hungarian Spectrum, 2020; Kovács, 2020).

In a country where the constitutional framework had already been considerably eroded, this new law is all the more problematic. To put it another way, the new law gives Orbán “dictatorial powers under cover of declaring a state of emergency to fight the coronavirus” and shows (to anyone who still had any doubts) that the “Hungarian Prime Minister [...] never lets a crisis go to waste” (Scheppel, 2020).

Although the Hungarian parliament voted to revoke the new coronavirus law on June 16 (Reuters, 2020), it serves as a cautionary tale of how authoritarian governments can take advantage of a crisis to firmly entrench the ruling elite in power. A crisis is, at least historically speaking, always a good excuse to leave any pretense of democratic governance behind.

That being said, in this chapter I will be focusing on executive underreach in Brazil and Nicaragua during the COVID-19 pandemic, with a special focus on the legal and constitutional framework in both countries and the relationship between the executive, legislative, and judicial branches. Here we have two examples of countries that did not follow Orbán’s footsteps: neither Bolsonaro nor Ortega took advantage of the pandemic to declare a state of emergency and aggrandize the executive branch.

My objective, then, is to map the national government’s response to the novel coronavirus in both countries, tracing parallels and calling out key distinctions. Although both countries fit into the category of executive underreach, democratic institutions in Brazil showed signs of independence that were not seen in Nicaragua.

Part of my effort here will be to show how key democratic institutions outside the executive branch can rise up to the challenge and help fill the void left behind by executive underreach. This was the case in Brazil, where the Supreme Federal Tribunal and Congress consistently shaped the country’s pandemic response by keeping President Bolsonaro at bay.

On the other hand, I am equally interested in what happens when these institutions have already been co-opted by the regime by the time the crisis ensues. This was the case in Nicaragua, where the judiciary and the national legislature were neutralized by *Sandinistas* well before the pandemic. Consequently, the Supreme Court of Justice and the National Assembly could not exercise any meaningful checks on Ortega.

In the next section, I will justify why I have selected Brazil and Nicaragua to conduct this comparative study. After that, I go on to the empirical part of the paper, evaluating first the legal and constitutional landscape in both countries regarding emergency powers and regulations that are specific to the coronavirus pandemic (if there are any). In the second part of my empirical analysis, I focus on the relationship between the three branches of government in Brazil and Nicaragua during the pandemic. Finally, I offer some concluding remarks.

## **METHODOLOGY**

I have selected Brazil and Nicaragua for this comparative analysis for three main reasons. First and foremost, both countries have similar institutional structures at the national level. The executive power is overseen by the President of the Republic who is elected through universal suffrage. The legislative branch is overseen by the National Assembly in Nicaragua, a unicameral body comprised of ninety deputies, and by the National Congress in Brazil, a bicameral body comprised of 513 deputies and eighty-one senators. Finally, the judicial branch is overseen by the Supreme Court of Justice in Nicaragua and by the Supreme Federal Tribunal in Brazil, with both courts exercising judicial review.

Nevertheless, there are two important structural differences that must be highlighted. First, the Supreme Court of Justice in Nicaragua is comprised of sixteen magistrates appointed by the National Assembly for a term of five years, while the Supreme Federal Tribunal in Brazil is comprised of eleven magistrates that must retire at the age of seventy-five and are appointed by the President and approved by the Senate. Furthermore, while Brazil is a federal state composed of twenty-six states and a federal district, Nicaragua is a unitary state divided into departments, autonomous regions of the Atlantic Coast, and municipalities.

Second, both countries are relatively young constitutional democracies that are now headed by populist leaders. Nicaragua was ruled by the Somoza family from 1936 until 1979, when the military-backed dictatorship was overthrown by the leftist *Sandinista* insurrection. The country held free and fair elections for the first time in 1984 and adopted a new constitution in 1987, protecting key principles of liberal constitutionalism such as the rule of law, first generation rights, and so on.

Likewise, Brazil was ruled by a military dictatorship between 1964 and 1985, when Tancredo Neves was indirectly elected by an electoral college to lead the transition to democracy. While Neves

died before his inauguration, José Sarney, his VP, was installed as President and oversaw the promulgation of the 1988 Brazilian Constitution. The 1988 document also protects key principles of liberal constitutionalism.

Nonetheless, historical parallels aside, the process of democratic erosion in Nicaragua is way more advanced than it is in Brazil. Although both Bolsonaro and Ortega equally despise the touchstones of liberal constitutionalism and would rather do away with any checks on their power, the Nicaraguan strongman rose to power for the second nonconsecutive time in 2006 with 38% of the votes and found a way to hold on to power ever since. This includes electoral frauds and a highly controversial Supreme Court decision on presidential term limits.

As a result, Nicaragua is considered “not free” by Freedom House, with a score of only 31/100 – a low one, even by Latin American standards. The speed of Nicaragua’s democratic decay is staggering; in 2017, the Central American nation was rated “partly free”, with a score of 47/100 (Freedom House, 2020a; Freedom House, 2017a). The drop of 16 points in just four years – which is deeply troubling – can be traced back to the brutal suppression of a popular uprising against the regime in 2018.

On the other hand, President Bolsonaro was elected in 2018 and, by the time I am writing this chapter, he is only twenty-months into his presidency. Bolsonaro is an army captain turned politician who constantly praises the atrocities committed by the military dictatorship – including torture and extrajudicial killings – and is not shy about his homophobia and racism.

Although there are clear signs that Bolsonaro has no respect for democratic rules and traditions, Brazil is far from experiencing the levels of democratic backsliding seen in Nicaragua. Bolsonaro lacks a majority in Congress – although he is now working on a new coalition – and is still to appoint his first justice to the Supreme Court. Until now, this has prevented him from fully implementing his authoritarian agenda.

As a result, Brazil is ranked as a “free” nation by Freedom House, with a score of 75/100 in 2020. Nevertheless, Brazil’s score has been in a free fall since former President Dilma Rousseff was impeached in 2016 on highly partisan grounds and her Vice, Michel Temer, succeeded her in the presidency. Once he became president, Temer implemented a right-wing agenda, undoing most of Dilma’s left-leaning policies.

During Temer’s presidency, the levels of political polarization in Brazil continued to rise. He was then succeeded by Bolsonaro in January 2019. Between 2017 (one year after Dilma’s impeachment) and 2020 (one year into Bolsonaro’s presidency), Brazil’s freedom score dropped from 79 to 75 and the tendency is that it will continue to drop throughout Bolsonaro’s mandate (Freedom House, 2017b; Freedom House, 2020b).

Third, both Nicaragua and Brazil are unequivocal examples of executive underreach during the COVID-19 pandemic. According to the Washington Post, in an article published on April 14,

[T]he rulers of Belarus, Turkmenistan, Nicaragua and Brazil have dismissed the seriousness of the virus and urged their citizens to carry on more or less as normal. [...].

By far the most serious case of malfeasance is that of Brazilian President Jair Bolsonaro. As infections began to spread in a country of more than 200 million people, the right-wing populist dismissed the coronavirus as “a little flu” and urged Brazilians to “face the virus like a man, dammit, not a boy”. Worse, the president has repeatedly attempted to undermine steps taken by the country’s 27 state governors to contain the outbreak (The Washington Post, 2020a)

What the Washington Post calls “cases of malfeasance” can also be understood as executive underreach. That is, these countries arguably had the resources to fight COVID-19 at their disposal but ultimately fell short of the ideal threshold. That is not to say that Nicaragua and Brazil tried to curb the spread of the virus and failed. On the contrary, they did not even try.

Bolsonaro and Ortega made the conscious choice not to fight the virus. Both leaders resorted to frivolous verbal attacks directed to foreign and international actors – Bolsonaro’s favorite targets were the World Health Organization and China, while Ortega generally referred to malign “transnational forces” – and worked to undermine local leaders’ efforts to curtail the infection. Furthermore, they both placed the national economy before people’s lives.

As Pozen and Scheppele put it, the concept of executive underreach can be used to assess those “situations where an executive sees a significant threat coming, has access to information about what might mitigate or avert the threat along with the power to set a potentially effective plan in motion, and refuses to pursue such a plan” (2020).

In the case of COVID-19, Bolsonaro and Ortega cannot claim ignorance about the threat posed by the virus. As we know, the first reported outbreak happened in Wuhan, China, months before the virus became a domestic problem. That is, the virus was a well-known threat to Bolsonaro and Ortega way before it reached American shores.

Both countries also had access to information about what could mitigate the threat; they observed major nations in Europe and Asia – Germany, Japan, South Korea, and others – deal with the coronavirus and had time to prepare in advance. They could have reached out to those countries to better understand what had been effective in the fight against COVID-19.

In sum, Brazil and Nicaragua were in the best possible position: they could learn from other national experiences, come up with a cohesive plan, and implement the plan in advance. Nevertheless, both countries refused to take these steps.



Instead of looking into every single sign of executive underreach in both countries – given that such approach would extrapolate the scope of this paper –, I will focus on one key aspect that is common to Nicaragua and Brazil: the refusal to declare a state of emergency under the Constitution.

As we will see below, both the 1988 Constitution in Brazil and the 1987 Constitution in Nicaragua allow for the temporary suspension and/or restriction of fundamental rights and freedoms to deal with public health emergencies. Under both national constitutions, it is up to the President to decree a state of emergency and exercise emergency powers throughout the duration of the emergency. Nevertheless, Bolsonaro and Ortega refused to travel down this path.

All in all, I rely on a methodological approach that is often used in the field of comparative constitutional studies, one that Ran Hirschl refers to as the “most similar cases logic” (2005). The idea, in Hirschl’s words, is to “hold constant non-key variables while isolating the explanatory power of the key independent variable” (2005). When you select cases that share institutional, historical, and political roots, it is easier to isolate and study the forces behind key disparities.

As stated above, my goal is to understand the role played by democratic institutions outside the executive branch of government when the president refuses to address a national crisis. Because Brazil and Nicaragua are similar across a range of different dimensions – they have comparable institutions, have both transitioned to democracy around the same time, are experiencing a process of democratic erosion and showed signs of executive underreach during the pandemic –, my hope is that this approach will make key independent variables stand out.

## **LEGAL AND CONSTITUTIONAL FRAMEWORK**

The 1987 Nicaraguan Constitution allows for the declaration of a state of emergency “when the security of the nation, the economic conditions, or some national catastrophe demand it” (Article 185). It is up to the President of the Republic, after consulting with the Council of Ministers, to decree a state of emergency.

According to Article 138 of the Constitution, the National Assembly has the power to approve, reject, or amend the presidential decree that declares an emergency under Article 185. But it is noteworthy that the President does not need to seek the Assembly’s prior authorization. The President alone decides whether an emergency should be declared. After the declaration, the Assembly will convene to approve, reject, or amend it.

Latin American countries are known for delegating broad powers to their national executives and often have strong presidential offices. In the area of emergency powers, most Latin American presidents have the prerogative of declaring a state of emergency after consulting with advisors or

ministers (Gross, 2011). Likewise, Roberto Gargarella has denounced what he calls “hyper-presidentialism” in Latin America (2013).

Moreover, the Constitution delegates to the National Assembly the power to enact an Emergency Law to further regulate the mechanism (Article 185). This law would be responsible for establishing the modalities of emergency that would then become available to the President (Article 185). The Nicaraguan Emergency Law was passed on October 19, 1988 (Law No. 44/1988), but the Assembly refused to create new kinds of emergency.

Even though the Nicaraguan Constitution and the Emergency Law of 1988 allow for the use of emergency powers, the Nicaraguan government did not invoke this constitutional prerogative to deal with the coronavirus pandemic. President Ortega and his wife, Vice President Murillo, downplayed the crisis and refused to take action to prevent the spread of the virus within the national territory.

Instead, the national government called for Nicaraguans to keep on working and go on with their daily activities. Ortega fears that the economic impacts of lockdown order would create more social and political instability in the future. To attenuate the economic crisis, Ortega and his wife decided that the best way forward was to simply ignore the virus, giving the Nicaraguan people the false impression that they had nothing to fear or worry about.

In 2018, President Ortega faced a massive public uprising that killed over three hundred people and forced another 100 thousand to flee the country, causing a humanitarian crisis in Central America. In response to the way Ortega and his allies handled the crisis, Nicaragua faced all sorts of international sanctions, leading to an unprecedented economic crisis in the country. Now the government seems to fear a second wave of public unrest if the economic conditions deteriorate any further.

Thus, in order to avoid a repeat of the 2018 showdown, Ortega mobilized his citizens to oppose the guidelines of the World Health Organization and other health experts (e.g., social distance, quarantine, face masks, etc.). On March 14, for example, Vice President Murillo organized public rallies throughout the country under the slogan “Love in Times of COVID-19”, ultimately causing major agglomerations. Furthermore, sports leagues continued to hold public events that lure big crowds (CNN, 2020).

To declare a state of emergency would be to contradict this false impression of normality, one that was carefully nurtured by the government. Therefore, following the wisdom of the Penguins of Madagascar, Ortega and Murillo decided they would just “wave and smile”. Of course, there were little tweaks here and there. According to the reports issued by the government, as of September 23, 2020, Nicaragua only had 5,073 confirmed cases and 149 deaths.

The official numbers are surprisingly low because the government refuses to test its population. Moreover, media reports show that citizens who die due to “atypical pneumonia” are buried overnight

by public authorities while their families are instructed to self-isolate (Atlantic Council, 2020). Nicaraguans are not the only ones affected by this gross case of mismanagement and inaction. According to the Atlantic Council,

Nicaragua's reckless response to COVID-19 puts an already fragile Central America at risk and should worry the international community. In the fight against this global pandemic, Nicaragua and Costa Rica provide a clear example of how one country's flawed response to the virus can drastically impact its neighboring countries. As countries around the world approach combatting COVID-19, they must remember that this is a borderless phenomenon that requires concerted action (Atlantic Council, 2020).

In Brazil, the 1988 Constitution also allows for the declaration of a state of emergency. Though, unlike Nicaragua, there are two different "states of emergency" with a distinct set of emergency powers associated with each of them. The President can declare a state of defense or a state of siege (Article 84, Section IX). The latter is only meant to be invoked when the former turns out to be insufficient to deal with the crisis.

The state of defense can be declared by the President after hearing from the Council of the Republic and the National Defense Council (Article 136). It is intended for cases of institutional instability or large scale natural disasters and must be restricted to a specific territory. After the declaration, the presidential decree is submitted within twenty-four hours to the National Congress, which will then decide by an absolute majority in ten days whether to approve it or not.

The state of siege can be declared by the President after consulting with the Council of the Republic and the National Defense Council (Article 137). Furthermore, unlike the state of defense, it requires previous authorization by the National Congress. It is intended for two specific circumstances. First, when there is a serious disturbance with national repercussions or when a measure taken during the state of defense is shown to be ineffective. Second, to declare a state of war or respond to a foreign armed aggression.

Even though President Bolsonaro could have easily declared a state of siege across the country to deal with the new coronavirus, he opted not to invoke his constitutional emergency powers. Just like his Nicaraguan counterpart, Bolsonaro was fearful that a national lockdown order would push Brazil further into an even worse economic crisis.

The President is indifferent to the rising death toll in the country. When Brazil surpassed China in number of coronavirus-related deaths, Bolsonaro said: "So what? I'm sorry, but what do you want me to do?" (The Guardian, 2020b). On another occasion, Bolsonaro claimed that the pandemic was nothing but a "neurosis" and "a media trick".

Despite deciding not to invoke the constitutional emergency powers, President Bolsonaro did ask Congress to declare a state of public calamity under Article 60 of the Brazilian Fiscal Responsibility Act (Complementary Law No. 101/2000). According to the law, Congress may declare a state of public

calamity to temporarily suspend the national executive's spending limits. Accordingly, the Brazilian Senate declared a state of public calamity on March 20 (Legislative Decree No. 06/2020).

The declaration has two main effects,

First, it suspends important statutory limitations and allows the government to expend more financial resources to fight the pandemic than it would otherwise be authorized to. Second, and most importantly, it creates an oversight committee that will be responsible for tracking governmental expenditure related to the public health emergency (Archeegas, 2020).

This was a step in the right direction. When national emergencies strike, ordinary limits on the government's spending power can defeat efforts to counter the crisis. As I mentioned above, the fight against the novel coronavirus involves buying medical supplies, masks, ventilators, and even building new medical facilities from scratch in just a few weeks. However, this does not mean that Bolsonaro changed his mind and suddenly started to take the pandemic seriously after Congress declared a state of public calamity.

Quite the contrary, he continued to downplay the crisis and pretend that everything was under control. In fact, on April 16, Bolsonaro fired his popular Health Minister, Luiz Mandetta, over disagreements about the national response to the pandemic. A doctor turned politician, Mandetta advocated for social isolation, followed the guidelines of the World Health Organization, and publicly contradicted the President.

So, what explains Bolsonaro asking Congress to declare a state of public calamity if he was not sincerely committed to the fight against COVID-19? I believe it was just an old-fashioned political stunt designed to immunize the President from a potential impeachment trial. Back in 2016, President Dilma Rousseff was impeached for disrespecting the Fiscal Responsibility Act. As one commentator puts it, she was "under scrutiny over arcane fiscal maneuvers her government allegedly used to pump up the economy and disguise a deficit in the public accounts" (Financial Times, 2016). In Brazil, we call this *pedaladas fiscais*.

Therefore, is no stretch to say that President Bolsonaro wants to use the declaration of public calamity under Article 60 of the Fiscal Responsibility Act as a shield against a potential impeachment trial in the future. While Dilma had to actively conceal deficits in the public accounts, Bolsonaro can just claim that he was under no obligation to respect ordinary fiscal limits throughout 2020 due to the declaration of public calamity.

## **COURTS, LEGISLATURES, AND FEDERALISM**

In this second and final part of my empirical analysis of COVID-19 responses in Nicaragua and Brazil, I will be focusing on democratic institutions outside the executive branch, namely courts

(especially the Supreme Court of Justice in Nicaragua and the Federal Supreme Tribunal in Brazil) and legislatures (especially the National Assembly in Nicaragua and the National Congress in Brazil).

I will also consider federalism as a mechanism that can potentially fill the void left behind by executive underreach at the national level. It is important to note that Nicaragua is not a federal state, but there certainly is some administrative decentralization between the different departments, autonomous regions, and municipalities.

While under the Nicaraguan Constitution health service is a non-transferable duty of the State (Article 105), municipalities have administrative and financial autonomy and are responsible for “matters affecting the socio-economic development of their administrative unit” (Article 177).

However, President Ortega and his allies control the vast majority of town halls in the country. In the 2012 municipal elections, Ortega’s party, the *Frente Sandinista de Liberación Nacional* – FSLN, won in 134 of the 153 municipalities in Nicaragua. Ortega has also been hard at work to strip municipalities in Nicaragua from their constitutional, administrative, and financial autonomy.

Writing for the Journal of Democracy, researcher Kay Thaler shows how “Ortega undercut municipal autonomy by putting his wife in charge of partisan Citizens’ Power Council (CPCs) that acted as parallel local governments and controlled the distribution of public goods and services” (2017). The CPC’s were later replaced by the Family, Community, and Life Cabinets, which continue to impose a system of patronage upon municipalities.

With such level of centralization and control, it is no wonder that Nicaraguan cities stood on the sidelines and quietly followed Ortega’s lead when the pandemic reached their shores. Nevertheless, there are some reports of local leaders acting to prevent the spread of the virus (The Washington Post, 2020b). Churches and schools closed their facilities and moved to online activities, while beaches remained empty even after Murillo encouraged citizens to travel more.

According to the Atlantic Council,

Despite government encouragement to continue working, citizens have implemented self-isolation measures, moving to telework, closing stores, and keeping children home from school. Google Mobility Reports show that time spent at residences is up 10 percent—only half of the same measurement in Costa Rica, but notable given the effort the Nicaraguan government has put into keeping the country’s economy open. For example, legislators who attempted to telework were sanctioned by the National Assembly’s majority Sandinista party (2020).

In Brazil, on the other hand, subnational leaders became the main actors in the fight against COVID-19. At the beginning of the pandemic, Bolsonaro was infuriated when the governor of São Paulo, João Doria, and the governor of Rio de Janeiro, Wilson Witzel, decreed regional lockdown orders. Both Doria and Witzel embraced Bolsonaro during the 2018 presidential election. But when the federal government failed to control the pandemic, they had no other option than to antagonize the President they helped get elected.

Bolsonaro tried to undermine the states' efforts to curb the spread of the virus. He resorted to social media platforms to spread the word that governors had no authority under the Constitution to keep people at home and called them “dictators”. Some of Bolsonaro's most loyal supporters went to the streets to protest. But the President's crusade against subnational leaders was a complete disaster. Despite the rage of *Bolsonaristas*, twenty-five governors (including the federal district) stood their ground and kept lockdown orders in place.

The constitutional crisis between the Union and several Brazilian States eventually reached the Supreme Federal Tribunal. On March 24, Justice Marco Aurélio decided that public health is a joint competence shared between the Union, States and Municipalities. The decision basically reinforces Article 23, Section II of the Brazilian Constitution, which states that all federal entities “shall have joint powers to safeguard public health, public assistance, and the protection and guaranty of handicapped persons”.

Therefore, contrary to what the President sustained, States and Municipalities are constitutionally authorized to order local and regional lockdowns to safeguard public health within their territories. In other words, the STF empowered subnational leaders to act in a decentralized fashion when the federal government had decided it was not in its best interest to fight the coronavirus and prevent the infection of millions of Brazilian citizens.

The President first received the decision with anger. In the following weeks, Bolsonaro participated on a number of demonstrations calling for a “constitutional military intervention” and advocated for the closure of the STF and the National Congress (Arhegas & Kreuz, 2020). But as the pandemic worsened and Brazil rose to the top of COVID-19 statistics globally, the President used the decision as an excuse for his own inertia.

Deceptively, he now claims that the STF prohibited him from acting by transferring this power to governors and mayors. During his opening remarks at the 2020 UN General Assembly, Bolsonaro claimed that “by means of a judicial decision, all lockdown measures and individual freedom restrictions were delegated to the 27 governors”. However, as stated above, the decision only reinforced a *joint* competence inscribed in the constitutional text.

But this was not the only instance where the Court checked the President during the pandemic. On the first week of June, Bolsonaro ordered the Ministry of Health to withhold official data on new COVID-19 cases and deaths until 10 pm every day. According to the President, this was intended to prevent major TV stations to report on the numbers and spread fear among the populace.

Most TV stations air their nightly news shows around 8 pm, so a 10 pm release would ultimately prevent them from reporting on the updated statistics. But the President did not stop there. Bolsonaro ordered his Minister of Health to discontinue the disclosure of comprehensive and cumulative data on

the new coronavirus (The New York Times, 2020b). Using its official social media pages, the federal government started to report only on the number of recovered patients across the country, concealing the total number of infections and deaths.

The government's move was challenged before the Supreme Federal Tribunal and, on June 8, Justice Alexandre de Moraes ordered the federal government, based on the constitutional principle of transparency, to reestablish the full disclosure of coronavirus data. Although the government conceded defeat and resumed the publication of comprehensive statistics, news media organizations teamed up to monitor COVID-19 data independently over fears that the official numbers could not be trusted.

The STF's independence was critical to the fight against the pandemic in Brazil. Unfortunately, the same cannot be said about Nicaragua. Just like his Brazilian counterpart, President Ortega went to great lengths to hide the true extent of the crisis from his population. To give the false impression that everything was under control, Ortega closely monitored the number of Sars-CoV-2 tests and ordered overnight, express burials. But unlike Brazilians, Nicaraguans could not count on an independent Supreme Court to force the government to publish comprehensive and cumulative coronavirus data.

Since he took office in 2006, Ortega and his cronies did everything within their reach to co-opt courts and judges. In fact, Ortega only held on to power for so long because in 2009 the Supreme Court of Justice declared Article 147 of the Constitution, which prohibited presidential reelection in Nicaragua, unconstitutional. In David Landau's words, "the Court reasoned that the term limit discriminated against the President and limited his political rights" (2015). When Ortega finally secured a supermajority in Congress in 2014, he successfully amended the Constitution to remove term limits altogether. Unsurprisingly, there are no signs of judges and courts challenging Ortega's inaction during the pandemic.

It is noteworthy that in Nicaragua the magistrates of the Supreme Court of Justice are appointed for a mandate of only five years, while in Brazil the justices serve on the bench until they reach seventy-five years of age. This may partially explain why Ortega managed to influence the Court in a short span of time, while in Brazil the independence of the STF towards Bolsonaro can be partially accredited to the fact that the President will not have a vacancy to fill until Justice Celso de Mello's retirement on November 1<sup>st</sup>, 2020.

Finally, another important difference between Brazil and Nicaragua has to do with their national legislatures. In Nicaragua, the FSLN controls 71 out of 91 seats in the National Assembly. There is simply not enough opposition in the legislative branch to hold President Ortega and Vice President Murillo to account. As noted by Thaler, "the November 2016 elections marked the emergence of a full-scale FSLN party-state" in Nicaragua (2017, p. 160).

Furthermore, the Supreme Court of Justice removed Eduardo Montealegre from the presidency of the main opposition party, the PLI, and Pedro Reyes, who is friendly with the national government, took over the party's leadership. After PLI deputies refused to follow Reyes, the Supreme Electoral Council "stripped them of their Assembly seats, ruling that their election had been invalidated by their deviation from the 'party line'" (Thaler, 2017).

Accordingly, the majority in the National Assembly blocked one attempt by the opposition to vote on a declaration of a state of emergency in Nicaragua and defeated an Economic Bill that would have granted an emergency subsidy to low-income families alongside a fiscal exemption to local businesses that are struggling to cope with the economic consequences of the pandemic (La Prensa, 2020). In sum, the role of the National Assembly boils down to following Ortega's lead, preventing the opposition from formally recognizing the emergency, and blocking meaningful economic reforms.

In Brazil, on the other hand, the National Congress was a key player in the pandemic response. Its most important initiative to date came when the Brazilian Senate approved the payment of an emergency subsidy to low-income families that were negatively affected by the economic crisis. Bolsonaro initially opposed the bill, but once the first payments were made and he experienced a sharp increase in popularity, the President began bragging about it. During his opening remarks at the 2020 UN General Assembly, for example, he said that his government was behind "the largest economic relief plan in Brazil and maybe the world."

## CONCLUSION

According to a global survey of COVID-19 responses led by Tom Ginsburg and Mila Versteeg, "85% of the countries surveyed have a detailed emergency regime in their constitutions", but, surprisingly, "just 36% [...] declared a state of emergency" (2020). What is more, the survey found that "in no more than 81% of the countries [...] did we observe either legislative involvement *or* judicial enforcement *or* resistance from subnational units" (2020).

Both Nicaragua and Brazil had a detailed emergency regime in their constitutions and, just like 64% of the countries surveyed by Ginsburg and Versteeg, they did not declare a state of emergency. Startlingly, Nicaragua emerged as a rare exception of a country that had no legislative involvement, no judicial enforcement, and no significant resistance from subnational units. In sharp contrast, Brazil had all three elements at the same time, consistently shaping the country's response to the novel coronavirus.

Remember that both countries are clear examples of executive underreach. Bolsonaro and Ortega were constitutionally and functionally equipped to fight the pandemic, but they decided not to address the crisis. While in Brazil the executive's inaction prompted subnational leaders, the STF, and Congress into action, in Nicaragua the executive's inaction went unchecked and undisputed. This is not



to say that Brazil was a success story in the fight against COVID-19 – quite the contrary, it is second in deaths and infections worldwide, behind just the US –, but it is noteworthy that other democratic institutions attempted to rise up to the challenge and, at the very least, they are holding Bolsonaro to account and exposing his inertia to the populace.

The same cannot be said about Nicaragua. President Ortega's power is so entrenched that the National Assembly, the Supreme Court of Justice, and subnational leaders have no effective means at their disposal to oppose and challenge his decisions. Nicaragua should serve as a cautionary tale for what succeeds when an emergency strikes and key democratic institutions lack the independence needed to wield a meaningful check on the national executive, especially when the national executive's preferred public policy is to pretend that everything is under control and actively conceal the true extent of the crisis from the public.

Finally, I also want to stress that, just like executive overreach in Hungary, executive underreach in Brazil and Nicaragua can advance an illiberal and authoritarian agenda. Although Bolsonaro and Ortega did not use the pandemic as an excuse to aggrandize the national executive through a declaration of emergency, they ably used a populist rhetoric to justify their inaction. Bolsonaro blamed the WHO and successfully turned his supporters against Congress and the STF. Ortega blamed the transnational forces that allegedly want to overthrow his government.

According to Pozen and Scheppele, “executive underreach may tend to foster executive overreach by creating conditions of precarity or unrest that will then be addressed through more legally questionable means” (2020, p. 13). Some were quick to interpret populists' failure to control the spread of the virus as a sign of political weakness. Nevertheless, Ortega and Bolsonaro may have just started to clear the path for more ominous power grabs in the future. We should resist the tempting conclusion that populism in Nicaragua and Brazil was a total failure and stay vigilant, for there may be overreach after underreach.

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**R**eformar a administração pública dotando-a de mais eficiência é um desafio corrente das nações. Uma boa gestão da máquina pública que faça usos sustentáveis dos recursos retribuindo serviços de qualidade à população é a meta de todos os Estados. No entanto, a contemporaneidade tem sido marcada por uma cadeia interminável de crises de aspectos econômicos, políticos, sociais ou, mais recentemente, sanitários. Diante disso, são necessárias medidas de emergência para atender demandas de momento que comprometem um planejamento mais contundente de médio a longo prazo.

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