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Democracy and participation: changes and challenges in Bolsonaro's government — analyzing brazilian federal decree 9.759/2019

Democracia e participação: mudanças e desafios no governo Bolsonaro - analisando o decreto federal 9759/2019

Democracia y participación: cambios y desafíos en el gobierno de Bolsonaro: análisis del decreto federal brasileño

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Abstract
This paper analyzes the impacts of Decree 9,759/2019 on participation in government bodies. The decree was issued by the Bolsonaro government in Brazil, extinguishing participatory structures. Later, other bodies were recreated, reducing the participation of civil society representatives. Therefore, the question is: what impacts does this change generate for Brazilian democracy? Is it possible to identify a new role for institutions in political participation without democratic debate? What would be the motivations for this decree? For that, this article presents the main points about this norm – participatory bodies that were extinct and those that were later recreated, the criticisms of social movements about this context, and the lawsuit that questioned this change. This research uses literature review, document analysis, and data

collection on participatory bodies. The hypothesis is to state that this movement harms participatory democracy in Brazil.

Keywords: Brazil. Democracy. Participatory bodies.

Resumo
Este trabalho busca analisar os impactos do Decreto 9.759/2019 na participação em órgãos deliberativos governamentais. O decreto foi editado pelo governo Bolsonaro no Brasil, extinguindo estruturas participativas. Posteriormente, outros órgãos foram recriados, reduzindo a participação de representantes da sociedade civil. Diante disso, questiona-se: quais impactos essa mudança gera para democracia brasileira? É possível identificar um novo papel para as instituições na participação política sem o debate democrático? Quais seriam as motivações deste decreto? Para isso, este artigo apresenta principais pontos sobre essa norma - órgãos extintos e recriados, as críticas dos movimentos sociais sobre esse contexto, e a ação judicial que questionou essa alteração. Utilizou-se de revisão bibliográfica, análise documental, e coleta de dados sobre os órgãos participativos. O artigo conclui que o processo engendrado pelo decreto gera prejuízos para a democracia participativa no Brasil.

Palavras-chave: Brasil. Democracia. Instituições participativas.

Resumen
Este trabajo busca analizar los impactos del Decreto 9.759/2019 sobre la participación en los órganos deliberantes del gobierno. El decreto fue emitido por el gobierno de Bolsonaro en Brasil, extinguiendo las estructuras participativas. Posteriormente, se recrearon otros órganos, reduciendo la participación de representantes de la sociedad civil. Por tanto, la pregunta es: ¿qué impactos genera este cambio para la democracia brasileña? ¿Es posible identificar un nuevo rol de las instituciones en la participación política sin un debate democrático? ¿Cuáles serían las motivaciones de este decreto? Por eso, este artículo presenta los puntos principales sobre esta norma: órganos extintos y recreados, las críticas de los movimientos sociales sobre este contexto y las acciones legales que cuestionaron este cambio. Se utilizó la revisión de la literatura, el análisis de documentos y la recopilación de datos sobre los órganos participativos. El artículo concluye que el proceso engendrado por el decreto perjudica la democracia participativa en Brasil.

Palabras clave: Brasil. Democracia. Instituciones participativas.

INTRODUCTION

At the end of the first round of the Brazilian elections in October 2018, when Jair Bolsonaro was running for president, he said: "We are going to put an end to all activism in Brazil." His statement set the tone of a government that would be known for lacking meaningful commitment to democracy. But to understand the exact kind of political change that has happened in Brazil since 2018, it is essential to answer these questions: What happened after the elections? Did Brazil return to old-day authoritarianism? Are all democratic institutions being dismantled? Did the government engage in political persecution? What kind of institutional structures have been implemented in the Bolsonaro government?

Some answers to some of these questions can be found through analyses of Federal Decree 9.759/2019 and its effects on state-society relations, policymaking and public administration.[1] Through this decree, the Bolsonaro government regulated the process for social participation in federal public administration––an area where Brazil had made enormous progress and had become a global leader (Avritzer, 2009; Avritzer & Navarro, 2003; Avritzer & Wampler, 2008; Abbers, 2016; Dagnino, 2002; Filgueiras, 2008). The main objective of this article is to discuss the impact brought by the decree. What changes did it provoke in Brazilian democracy? How did it affect the organizational structures of participatory institutions like Councils and other *órgãos colegiados* (OCs)[2]? Did the decree primarily hollow out these institutions and curtail the space for democratic debate in policymaking? These are the issues we shed light on in this article.

Our article has two fundamental purposes: (1) to present data on what happened in practice to public policy councils and participatory institutions in the first years of the Bolsonaro government and to discuss the specific impacts of Federal Decree 9.759/2019 on Brazilian public administration and (2) to examine how democracy has been attacked in Bolsonaro's government and how participatory institutions fit this process.

We find that Brazil's institutional capacity for participatory democracy has been negatively affected by the decree, although there have been reactions within and outside institutions that deserve further attention and follow-up. Moreover, we posit that the decree's implementation reveals Bolsolaro's government rationale (its approach to public administration and civil society), and how undemocratic his government is. In practice, the decree served to reinforce the primacy of economic issues in the government's agenda as well as to alienate citizens and career bureaucrats from important policy decisions, helping shape the set-up of an autocratic administration.

The article has four sections, in addition to this introduction. Section 2 contextualizes the principle of participation in the Brazilian constitutional order, offering readers some information about Brazil's model of participatory democracy. Section 3 presents the decree and investigates the reasons why it was enacted, as well as the effects it immediately produced on Brazilian public administration. This section is based on data on the OCs terminated after the decree was enacted, as well as on the

1 This decree is part of what became popularly known as "*Revogaço*" as it reflects the government's aim to "revoke" norms in the federal administration that it alleged were "excessive", adding red tape to the government's performance.

2 Órgãos *colegiados* are administrative bodies that gather stakeholders from both government and civil society to deliberate and generate input to policymaking, implementation, and evaluation processes. The composition and the powers of these bodies varies: some have true decision-making power; others play an advisory role.

OCs that were recreated (as of October 2019)[3]. Section 4 focuses on extra-institutional and institutional attempts to resist the termination of OCs, with an emphasis on litigation before the Supreme Court (judicial review). Section 5 presents concluding considerations, linking our findings to democratic theory, public administration scholarship, and regulatory debates.

1 PARTICIPATORY DEMOCRACY IN BRAZIL SINCE 1988

Recent Brazilian history has been characterized by the restoration of democracy. Between 1964 and 1985 Brazil lived an authoritarian period, where the military governed the country in the absence of democratic guarantees. This time is known as the military dictatorship and, at the end of this period, democracy returned with its other freedom mechanisms, a new constitution being one of them. The Constitution drafting process began in 1986, through a constitutional assembly, and was finalized on October 5, 1988, when the *Carta Magna* (Bill of Rights) was enacted.

The new constitution brought about great institutional innovation: it included a principle of participation. But what does this mean? To answer this, it is important to understand the role of the "new social movements" (Sader 1988) in the Constitution-making process. In his book *Quando os Novos Personagens Entraram em Cena* (When new characters entered the stage), Sader describes how these movements against the military dictatorship created a new kind of political action that placed the participation principle at the center of political institutions. Thus, representative democracy had to become open to popular voices (Doimo 1995). From a constitutional studies viewpoint, the principle of participation is understood to complement, not replace representative democracy.

Many articles in the Federal Constitution refer to this principle, including Articles 1, 10, and 194, among others. The constitutional assembly wanted institutional participation to be present in the new constitutional agreement.

About participatory institutions (PIs), Midlej e Silva (2019, 4) show that:

> Participatory institutions (PIs) can be conceptualized as "differentiated forms of incorporation of citizens and civil society associations in the deliberation on policies," being possible to point out three forms of participation in the process of political decision-making (Avritzer 2008, 45). The first is the bottom-up participatory design, such as the participatory budget in Brazil, when delegates and councilors are elected by the population. The State acquires an important role in the implementation of this initiative; however, a bottom-up institutionality

3 The decree allowed for the re-creation of the OCs it terminated provided that certain requirements and procedures were observed. We investigate the pattern of OCs re-creation.

> is created. The second way is through participatory institutions functioning within a process of power sharing between state actors and civil society actors, such as public policy councils. It differs from the participatory budget in that it incorporates a smaller number of social actors and is determined by law, with sanctions in cases where the participatory process is not established. The third form is that of a participatory institution that operates within a process of public ratification: social actors do not participate in the decision-making process but can publicly endorse it, as in the case of Municipal Master Plans, with mandatory public hearings. (Avritzer 2008)

Considering these three forms, Midlej e Silva (2019, 5, 6) list some types of participatory institutions, namely:

- Public policy conferences
- Public ombudspersons offices
- Public hearings
- Public consultations
- Working groups
- Negotiation tables or dialogue tables
- Participatory multiannual plans (PPAs)

Those types constitute the participatory structure that was built in public administration after 1988. Several studies in Brazil seek to understand how these institutions have developed and the main challenges to implementing them in an effective manner (Teixeira, Almeida, and Moroni 2020). The Fernando Henrique Cardoso government (1994–2002) was characterized as a period when civil society put a lot of pressure on the government to implement these institutions. Some laws were then created to institutionalize these forms of participation in public administration, and in the Workers' Party governments (2003–2016) these institutions were expanded and improved. A number of working groups and other participatory institutions were created in the latter period to fully implement a participatory government method, where different views could be presented and consensus could be built around public policies, which were used to consolidate the democratic sphere.

Since President Dilma Rousseff was ousted from office in 2016, this participatory structure has been severely undermined. This erosion process began with a significant episode in Rousseff's government in 2014, when a framework to regulate social participation in federal policies was approved by the government (the National Policy

for Social Participation) but then faced strong opposition in Congress[4]. After Rousseff was ousted, the subsequent Michel Temer's government (2016–2018) issued executive orders that also weakened participatory institutions (Avelino; Alencar and Costa 2018). In 2019, the newly elected Bolsonaro government took a more radical step, enacting a decree that in fact terminated all kinds of participatory institutions that had not been created by a statute[5]. In the next section we are going to explain the main features of this decree.

2 INSTITUTIONAL FRAMEWORK: THE TEXT AND THE CONTEXT OF DECREE 9.759/2019

In April 2019, President Jair Bolsonaro fulfilled his campaign promises of "putting an end to activism" by enacting Decree 9.759/2019, in an alleged attempt to reduce government red tape. According to his speech, the participatory framework was resulting in high public spending.[6] Building on that, the decree established that participatory structures of all kinds—working groups, committees, commissions, councils, forums, advisory groups, coordination groups, study groups, management groups (Article 2)—that had not been created through a statute[7] were to be terminated (Article 1, Decree 9.759/2019). Thus, on June 28, 2019, the OCs referred to by this decree were shut down. Article 2, paragraph 1 of the decree indicates some exceptions;[8] the remainder of the text proceeds with instructions on how new structures can be created (or structures that were being terminated could be re-created). The decree : (1) regulates the duration of meetings and the system of votes in OCs, (2) orders the termination of OCs (while recognizing some exceptions), (3) regulates the submission of proposals for the re-

4 The PNPS was enacted through Decree n. 8.243/2014, which was much criticized on the grounds that the executive had overreached the power of other branches. The House of Representatives passed a *legislative decree* repealing the PNPS/Decree n. 8.243/2014, but this decision was never confirmed by the Senate. Decree n. 8.243/2014 was finally revoked through Decree n. 9.759/2019 analyzed herein. We will return to these events in our analysis of how the principle of participation was interpreted under judicial review.

5 Most participatory institutions created since 1988 were based on decrees and norms that do not have the same stability and hierarchy as statutes and constitutional clauses; hence, it was always technically possible for presidents and heads of government agencies to eliminate these institutions.

6 Congresswoman Carla Zambelli's Facebook page (PSL-SP) states that this decision was responsible for extinguishing approximately seven hundred working groups, councils, and public administration committees, which, from her point of view, were a big "*cabide*" (employment hanger). Also, in her opinion, they were expensive and ineffective. See: https://www.facebook.com/ZambelliOficial/posts/2322988324458327.

7 According to the second paragraph of Decree 9.759/2019, the Act applies to OCs instituted by an infralegal act, whose law in which they are mentioned does not contain anything about competence or composition.

8 The exceptions in the Decree are the boards of directors of certain executive entities (*autarquias* and foundations), commissions of investigation and disciplinary proceedings, and bidding committees.

creation of OCs (or for new ones to be created), (4) regulates the processing of these proposals within the President's Chief of Staff's Office (Casa Civil), (5) consolidates a list of the existing OCs, and (6) revokes any existing rules related to the extinguished OCs.[9]

In this article, we collect data on the number and kinds of OCs terminated as a result of the decree, as well as the federal institutions in which they were located. It is worth mentioning that the decree did not take into account the functioning or efficiency of OCs. Indeed, based on our dataset, we find it possible that there were structures that had no longer been operative and others that had been very active. This was, nevertheless, irrelevant to the decree.

2.1 Number of terminated OCs

We find that, as a result of Decree 9.759/2019, 446 OCs were terminated, including different forms of working groups, committees, commissions, councils, forums, advisory groups, coordination groups, study groups, management groups, and others. We elucidate the exclusions in the chart below:

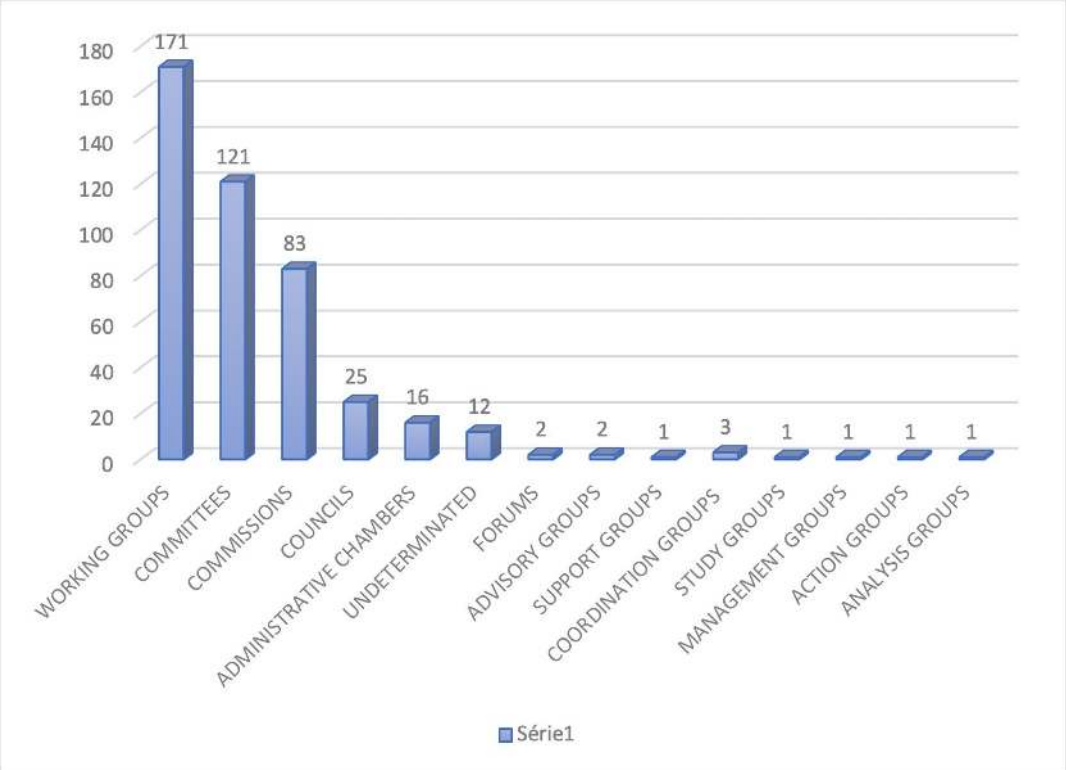

Figure 1 – Number of terminated OCs
Source: Elaborated by the authors.

9 Decree 9.759/2019 is attached.

This chart shows that the highest numbers of terminated OCs belong to the *working group* category. These represented 171 participatory bodies across different ministries (see the graph on ministries below). As the government ignores the competencies of these working groups, which provide technical support to political decisions, it limits the scope of its policies and enables autocratic rule, wherein policy decisions are made only based on relationships of trust with the agent responsible for sectorial policies.

An example is the termination of the Inter-ministerial Working Group, created in 2004, to analyze and consolidate society's contributions to a draft bill meant to regulate basic sanitation public services and the National Policy on Environmental Sanitation (PNSA). No one ever cared to ask: Is the job of this working group finished? Brazil has one of the worst public sanitary systems in the world, and in July 2020 (in an ongoing pandemic), there were changes made to the main statute on this subject (Law 11.445/2007).

The lack of a prior assessment on the functioning of this and other participatory institutions makes it difficult to evaluate whether they were effective and needed in the first place. Even though many of the terminated groups were probably not fully functional, the question is why not? Were they just fulfilling a formal need for existence? The sudden, wholesale termination of all OCs via the decree makes it difficult to understand the institutional context in which public administration actions had been developing.

Going further, it is important to analyze where the participatory structures terminated by the decree were located. For that purpose, we will use the following table:

Table 1 – Ministries where the OCs terminated by Decree 9.759/2019 were located

MINISTRIES	ABBREVIATION	NUMBER OF COUNCILS	%
CASA CIVIL	CC	86	25,07
MINISTRY OF ECONOMIC AFFAIRS	MECON	55	16
MINISTRY OF FOREIGN AFFAIRS	MRE	40	11,7
MINISTRY OF AGRICULTURE, LIVESTOCK AND SUPPLY	MAPA	20	5,8
MINISTRY OF WOMEN, FAMILY, AND HUMAN RIGHTS	MMFDH	18	5,2
MINISTRY OF CITIZENSHIP	MCIDADANIA	15	4,37
GENERAL SECRETARIAT	SG	14	4,1

(Continuação)

MINISTRIES	ABBREVIATION	NUMBER OF COUNCILS	%
MINISTRY OF REGIONAL DEVELOPMENT	MDR	12	3,5
MINISTRY OF JUSTICE AND PUBLIC SAFETY	MJSP	11	3,2
MINISTRY OF HEALTH	MS	11	3,2
MINISTRY OF MINES AND ENERGY	MME	10	3
MINISTRY OF DEFENSE	MD	10	3
MINISTRY FOR SCIENCE, TECHNOLOGY, INNOVATION AND COMMUNICATION	MCTIC	7	2
MINISTRY OF INFRASTRUCTURE	MINFRA	6	1,7
MINISTRY OF EDUCATION	MEC	6	1,7
MINISTRY OF THE ENVIRONMENT	MMA	5	1,45
CABINET FOR INSTITUTIONAL SECURITY	GSI	3	0,87
CASA CIVIL / MINISTRY OF FOREIGN AFFAIRS	CC AND MRE	2	0,58
MINISTRY OF TOURISM	MTUR	2	0,58
GOVERNMENT SECRETARIAT	SEGOV	2	0,58
CASA CIVIL / MINISTRY OF INFRASTRUCTURE	CC AND MINFRA	1	0,3
MINISTRY OF CITIZENSHIP / MINISTRY OF TOURISM	MCIDADANIA AND MTUR	1	0,3
CASA CIVIL / MINISTRY OF ENVIRONMENT / MINISTRY OF FOREIGN AFFAIRS	CC, MMA, AND MRE	1	0,3
MINISTRY OF HEALTH / MINISTRY OF HUMAN RIGHTS	MS AND MDH	1	0,3
OFFICE OF THE COMPTROLLER GENERAL	CGU	1	0,3
MINISTRY OF REGIONAL DEVELOPMENT / MINISTRY OF ENVIRONMENT	MDR AND MMA	1	0,3
OFFICE OF THE SOLICITOR GENERAL	AGU	1	0,3
MINISTRY OF REGIONAL DEVELOPMENT / MINISTRY OF TOURISM	MDR AND MTUR	1	0,3
Total		**343**	**100%**

Source: Elaborated by the authors

As seen in the graph above, the *Casa Civil* [Office of the President's Chief of Staff] was the government entity mostly affected by the termination of OCs. This reinforces our argument: the main intention of Bolsonaro's government is to diminish the role of civil society and their institutional possibilities of dialogue with the government. The Casa Civil is the locus where political dealings between these sectors are conducted. It is possible to infer that interaction with civil society on technical and political matters is not relevant to the Bolsonaro government.

The dissolution of OCs was allegedly intended to cut back on government red tape and reduce government spending, but the true intention behind it was to reduce civil society participation in important matters (most of which were located at Casa Civil) and around progressive agendas. As indicated below, most of the affected bodies had been created during Lula's first term in office.

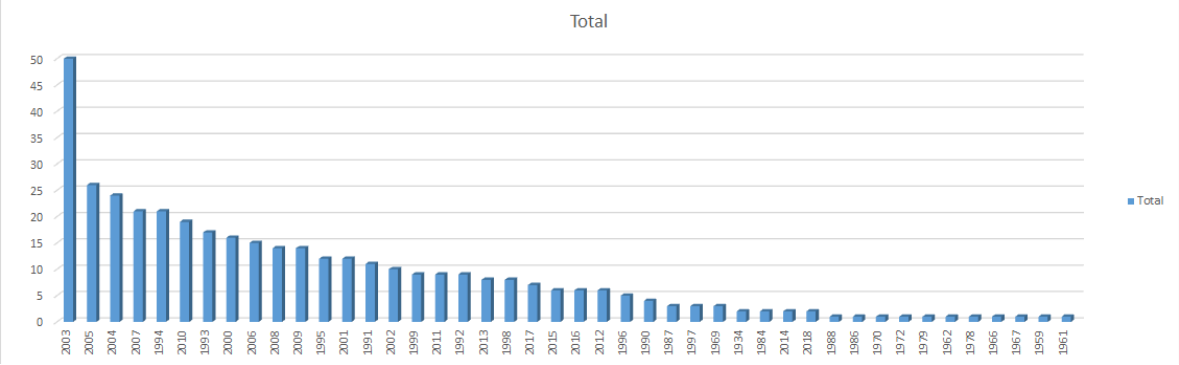

Figure 2 – Years when the OCs terminated by Decree 9.759/2019 had been created
Source: Elaborated by the authors.

Most terminated OCs had been created in 2003. This was the first year of Lula's administration, which had as one of its guiding principles the expansion of dialogue with civil society (his government was named as "societal," referring to the importance conferred to this state-society dialogue). Moreover, the frequency is continuous so that the following years with the greatest numbers of terminations were 2005, 2004, and 2007.

Interestingly, when we look at the affected OCs by the year of their creation, it is possible to say that President Bolsonaro's words, enunciated when he was a presidential candidate in 2018, "Let's put an end to the activism," have become true. Decree 9.759/2019 (though it does not reach the OC structures that had been created by statutes) destroyed the model of government from previous years, which favored dialogue and participation. Lula's model can surely be critiqued, but Bolsonaro's decree replaced it with one in which proximity to the Chief (a type of contemporary populism) is more important than the plural mediation exercised by participatory bodies.

One of the consequences of this paradigm shift is the generation of a decision-making dynamic that (unlike the participation paradigm) is static, bureaucratic, and a little hasty, because more predictable procedures (which were formalized and culturally stabilized in the last thirty years) have been replaced by the will of political appointees who know little about public administration, many of them coming from the military corps.

In the next section of the article, we will analyze the process of re-creation of OC structures. What does it tell us?

2.2 Re-creation of OCs: some hypotheses and an agenda for future research

As mentioned earlier in this article, Decree 9.759/2019 stipulates that the OC structures it terminated could be restored (Article 3)[10]. The OCs to be re-created should use videoconferences for the participations of members living outside of the Federal district, and present a detailed travel budget, ensuring that there are resources available for travels (which ought to be justified). These rules applied to new OCs to be created as well. Moreover, proponent bodies had to justify the need for the OC and provide a summary of the OC meetings in 2018 and 2019, with the results produced. Also, there were tight requirements for the creation of sub-OC structures (working groups, subcommittees, etc.).

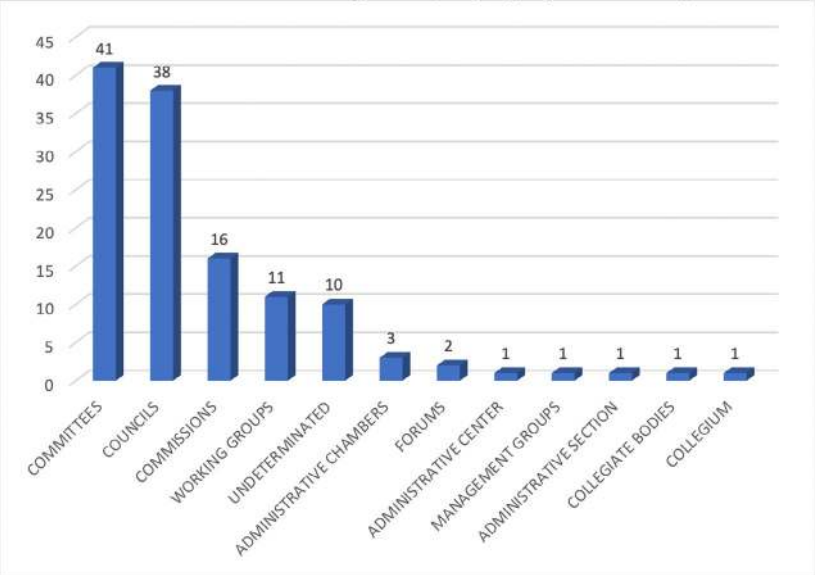

Figure 3 – Number of OCs that were reorganized ,[11] by type (October 2019)

Source: Elaborated by the authors.

10 These stipulations were later amended and refined by Decree 9.812/2019.

11 We use the term "reorganized" but some of them were created, others restored, and other re-created with a different configuration.

Our data shows that by October 2019, 125 OCs had been reorganized. In appendix 1[12], we map the normative acts that created, re-created, or restructured those OCs to the extent that these were available back then. But what kind of organizational structure did OCs then adopt? Do they have the same number of members as they had before? Who are their chairs? Are these chairs linked to the government or to civil society? While a definitive answer to these questions requires in-depth qualitative research, evidence suggests that the political dynamics have changed. These changes are focused on economics, technique, and a kind of bureaucratic logic that neglects the link between administration and politics (Waldo 1952). The re-creation of some OCs that were cut shows a prevalent concern with economic affairs and involves a tactic to cut societal participation in important areas through a restructuring of the bodies as they were re-created (e.g., environment)

An initial analysis can be made on the number of councils. While twenty-five councils were initially terminated, thirty-eight reemerged with their composition changed by the government's decision[13]. This was an opportunity for the government to change the political and administrative dynamics in participatory bodies: decreasing the number of civil society members, changing the rule of occupation of the body's chairmanship, and increasing the power of government representatives, among others. Further research is needed on the reorganized structures to determine the extension of these changes. But three cases are particularly illustrative of what we hypothesize may have happened: the National Council to Combat Discrimination (CNCD, in Portuguese), the National Council for the Environment (CONAMA, in Portuguese), and the National Council for Water Resources (CNRH, in Portuguese). In these three OC structures there was a decrease in the number of members and changes in attributions (particularly with the CNCD), and an increase in the number of seats for government representatives and more formal procedures for the composition of civil society representation (CNRH and CONAMA).

With CONAMA, Decree 9.806/2019 brought about changes in its composition. This council is composed of government, private sector, and environmental entities. The decree made the following changes: seats for environmental entities were reduced from eleven to four; terms were reduced from two years to one; instead of one representative from each state, there is now one representative from each region (five regions in Brazil); and the selection process for the environmental entities, previously an election among the organizations registered with the Ministry of the Environment,

12 https://drive.google.com/file/d/1b2YTyLWmG2R5HiPoDCF1kfHoLiDpotZm/view?usp=sharing

13 A potential problem exists with data availability. By August 30, 2019, each agency or entity of the federal public administration should have published on their website the list of OCs that were terminated and then restructured, and an update should have been made every month. This approach, however, is very dispersed and not the best form of active transparency (Law 12.527/2011, Article 8) and of accountability to society.

is now a lottery. Based on this, the Attorney General proposed the ADPF 623 lawsuit, arguing that this change violates a fundamental principle in the constitution, as it creates difficulties for social participation (Brazil STF 2021; CONAMA 2021).

Table 2 shows what ministries had more OCs reorganized:

Table 2 – Reorganized OCs, by ministry

MINISTRIES	ABBREVIATION (PORTUGUESE)	NUMBER OF COUNCILS	%
MINISTRY OF ECONOMIC AFFAIRS	MECON	27	21,43%
NON-SPECIFIED	-	24	19,05%
MINISTRY OF DEFENSE	MD	13	10,32%
MINISTRY OF JUSTICE AND PUBLIC SAFETY	MJSP	9	7,14%
CABINET FOR INSTITUTIONAL SECURITY	GSI	8	6,35%
MINISTRY OF CITIZENSHIP	MCIDADANIA	8	6,35%
CASA CIVIL	CC-PR	6	4,76%
MINISTRY OF MINES AND ENERGY	MME	4	3,17%
MINISTRY FOR SCIENCE, TECHNOLOGY, INNOVATION AND COMMUNICATION	MCTIC	4	3,17%
MINISTRY OF WOMEN, FAMILY, AND HUMAN RIGHTS	MMFDH	3	2,38%
MINISTRY OF AGRICULTURE, LIVESTOCK AND SUPPLY	MAPA	3	2,38%
MINISTRY OF FOREIGN AFFAIRS	MRE	2	1,59%
MINISTRY OF REGIONAL DEVELOPMENT	MDR	2	1,59%
MINISTRY OF DEFENSE/ MINISTRY OF FOREIGN AFFAIRS	MD/MRE	1	0,79%
GENERAL SECRETARIAT/ MINISTRY OF ECONOMIC AFFAIRS/ MINISTRY OF HEALTH	SEGE-PR/MECON/MS	1	0,79%
OFFICE OF THE COMPTROLLER GENERAL	CGU	1	0,79%

(Continuação)

MINISTRIES	ABBREVIATION (PORTUGUESE)	NUMBER OF COUNCILS	%
MINISTRY OF ECONOMIC AFFAIRS/CASA CIVIL/OFFICE OF THE COMPTROLLER GENERAL	MECON/CC-PR/CGU	1	0,79%
MINISTRY OF CITIZENSHIP/ MINISTRY OF DEFENSE/ MINISTRY OF JUSTICE AND PUBLIC SAFETY	MCID/MD/MJSP	1	0,79%
MINISTRY OF ECONOMIC AFFAIRS	MECON	1	0,79%
MINISTRY OF WOMEN, FAMILY AND HUMAN RIGHTS / MINISTRY OF CITIZENSHIP/ MINISTRY OF EDUCATION / MINISTRY OF HEALTH	MMFDH/MCID/MEC/MS	1	0,79%
MINISTRY OF FINANCE	MF	1	0,79%
MINISTRY OF HEALTH	MS	1	0,79%
CASA CIVIL/MINISTRY OF CITIZENSHIP/ MINISTRY OF EDUCATION	CC-PR/MCID/MEC	1	0,79%
GOVERNMENT SECRETARIAT	SEGOV	1	0,79%
CASA CIVIL / GENERAL SECRETARIAT	CC-PR/SEGE-PR	1	0,79%
MINISTRY OF MINES AND ENERGY / MINISTRY OF ECONOMIC AFFAIRS	MME/MECON	1	0,79%
Total		**126**	**100%**

Source: Elaborated by the authors

The Ministry of Economy (MECON) stands out with 21.43% of reorganized bodies, which confirms that the government's focus is on economic matters, not on strengthening public management or improving distributive policies. Further research is needed to determine how this restoration process was used not only to reconfigure specific OCs, but also to shift the balance of power within the administration's structure. In this sense, it is important to note that the second highest percentage in Figure 5 involves unidentified bodies "(-)". This poses an opportunity for new research that may seek to understand the substantial impact on the political dynamics of these spaces.

3 RESISTANCE TO DECREE 9.759/2019 AND THE DECREE'S JUDICIAL REVIEW

The termination of OCs via Decree 9.759/2019 was, nevertheless, resisted by civil society. A group of researchers created a campaign entitled "Brazil needs councils" (*O Brasil precisa de Conselhos*)[14], to showcase to the general public the importance of participatory institutions in Brazilian democracy. The campaign produced some short videos shared on social media. They also put together a web platform entitled *Democracia e Participação* (Democracy and Participation) where these and other materials were stored and shared.[15]

Resistance also took place via institutional domains, namely the Judiciary. A lawsuit was filed with the Supreme Court and challenged the Decree on constitutional grounds. This section aims to analyze the lawsuit. We ask: What did it seek? How did the Court respond? What does this response say about the way in which Justices construe the value of social participation?

The lawsuit ––a direct action of unconstitutionality (ADI 6121)––was filed by the Workers' Party (PT) before the Brazilian Federal Supreme Court (STF). A request for preliminary injunction was made. The plaintiff asked for the effects of the decree to be suspended and, in the end, for the decree to be declared unconstitutional.

The Workers' Party alleged that the decree: (1) violated the separation of powers, since the National Congress had the legal mandate to create and terminate OCs in public administration; (2) did not specify the OCs affected by the measure, causing uncertainty; (3) violated the principles of republican, democratic, and popular participation (Article 1, sole paragraph of the constitution); and (4) compromised the activities developed by the OCs, considered essential for the functioning of institutions. The federal solicitor general and the president, in response, argued that: (1) the competence of Congress had not been invaded, since the organization of the executive branch is a responsibility of the Chief Executive; and (2) the OCs to be terminated were those created by decrees, not by statutes.

After this lawsuit was filed, the government amended Decree 9.759/2019 through Decree 9.812/2019. This new decree restricted the termination of OCs to those that had been created by means other than statutes, such as presidential decrees and other executive orders (Article 1, § 1º, I, II, and III) *or to cases where the statute did not make stipulations about the mandate and the composition of the OC* (in other words, where the statute simply stipulated that the OC should be created). The Supreme Court

14 In Portuguese, this title creates some ambiguity, implying that Brazil needs "advice".

15 See: https://www.democraciaeparticipacao.com.br/index.php/quem-somos2.

understood that this new arrangement still fell under the scope of judicial review and continued with the judgement.

At the end of the trial, the court justices, by majority, decided to partially grant the request. In other words, the effects of the decree in relation to the termination of the OCs created by statutes were suspended. The trial took place in mid-June 2019, with the opinion of the court being published on November 28, 2019.

The following table shows where each Justice stood:

Table 3 – Justices' opinions summary on ADI 6121/DF 2019

Justice	OCs created by law	OCs created by infralegal acts
Marco Aurélio Melo (*rapporteur*)	OCs created by statute cannot be terminated by decrees	OCs created by other means (decrees, executive orders, etc.) can be terminated by decrees
Alexandre de Moraes	Followed the rapporteur's opinion	Followed the rapporteur's opinion
Luiz Edson Fachin	Followed the rapporteur's opinion	Dissented
Luís Roberto Barroso	Followed the rapporteur's opinion	Dissented
Rosa Weber	Followed the rapporteur's opinion	Dissented
Cármen Lúcia	Followed the rapporteur's opinion	Dissented
Ricardo Lewandowski	Followed the rapporteur's opinion	Followed the rapporteur's opinion
Luiz Fux	Followed the rapporteur's opinion	Followed the rapporteur's opinion
José Celso de Mello	Followed the rapporteur's opinion	Dissented
José Antonio Dias Toffoli	Followed the rapporteur's opinion	Followed the rapporteur's opinion
Gilmar Mendes	Followed the rapporteur's opinion	Followed the rapporteur's opinion

Source: Elaborated by the authors based on data released by STF.

The table above shows a map of the Justices' opinions. The categories used are explained below. The *rapporteur*, Justice Marco Aurélio, partially granted the request. That is:

(1) regarding "OCs created by statutes," he understood that they "cannot be terminated by decree," granting the request on this matter; and

(2) regarding "OCs created by other means (i.e., decrees and other executive orders)," he espoused the position that "decrees may terminate them" (Brazil STF 2019b).

Once this opinion was issued, the other justices expressed their respective positions, sometimes following the *rapporteur* and sometimes dissenting from him[16]. The point of dissent was whether decrees could terminate OCs created by means other than statutes (decrees, executive orders, etc.). According to dissenters, this is technically possible, but there is also a need to: (1) specify the OCs the decree is terminating and (2) give a motivation for the termination (onerosity, inefficiency, inoperability, and non-necessity). Terminating these bodies indiscriminately violates democratic principles. Therefore, in summary: those "following the *rapporteur*" (partially granting the plaintiff's request) understood that the decree was unconstitutional just in the portion where it terminated OCs created by statutes; those who "dissented" (granting the plaintiff's request in total) understood that the decree was unconstitutional both in the portion where it terminated OCs created by statutes and in the portion where it terminated OCs created by other means (decrees, executive orders, etc.) without specifying the bodies affected and providing justifications for the termination carried out (Brazil STF, 2019b). As the majority was with the *rapporteur*, the decree was suspended only in part.

In this article, we analyze how the term "participation" was used in each opinion. This reveals how some court justices—Edson Fachin, Rosa Weber, and Carmen Lúcia—understand the participation principle present in the Brazilian Constitution of 1988. These justices brought strong positions on this subject and dissented from the *rapporteur* (Brazil STF 2019a, 2019b). We present the results of our analysis in the following table:

16 This reflects the dynamic of Brazil's Supreme Court deliberation, where a rapporteur is assigned for each case; this justice writes his or her opinion and presents to the Court, then each justice responds, delivering his or her opinion, concurring with or dissenting from the rapporteur.

Table 4 – Summary of the "participation" category approach in some opinions

Justice	Opinion on Participation
Luiz Edson Fachin	• The decree violates constitutional principle of social participation and control. • The terminated OCs are instruments of participatory democracy and bring civil society and government closer together. • In Brazil's "citizen's constitution", popular participation is encouraged.
Rosa Weber	• The decree violates constitutional principle of social participation and control. • Participation is the foundation of citizenship and the sharing of power and responsibility between public authorities and social actors. • Participatory institutions assist in democratic improvement.
Carmen Lúcia	• Public administration is joint activity (it does not depend on an absolute master) and must be governed by legality.

Source: Elaborated by the authors based on STF, ADI 6121.

Edson Fachin said that the debate is relevant because it allows the court to analyze the extension of the participation principle. According to him, the terminated OCs would be "instruments of participatory democracy encouraged by the constitutional order, serving as a venue for rapprochement between civil society and the government" (Brazil STF, ADI 6121, 43). In addition, the "citizen's constitution,"[17] during its elaboration, counted on popular participation, and the constitution-makers envisioned the permanent integration of citizens in OCs (Articles 1 [sole paragraph], 10, and 194, CF). According to Edson Fachin, the constitution encourages popular participation in the formation of the State's will. So, in the justice's interpretation, it would not be democratic to terminate the bodies that promote social participation (Brazil STF, ADI 6121, 2019)

From Rosa Weber's similar perspective, there is a violation of the constitutional principles of participation and social control in public policies, since such OCs instituted by decree have been terminated wholesale. This principle is the foundation of citizenship and it translates into the idea of sharing power and responsibility among government branches and social actors. Thus,

> [...] if an institutional design of public administration prevails that lacks OCs, which democratize access to public decision-making, and promote the real participation of citizens [...] we have to conclude that what prevails is a legal order of concentrated and authoritarian profile. (Brazil STF, ADI 6121, 2019, 69).[18]

17 The 1988 Brazilian Constitution is also called the "citizen's constitution."

18 Translated from the original, in Portuguese: "[...] prevalecer o desenho institucional de uma administração pública sem órgãos colegiados que democratizem o acesso à tomada de decisões do poder público, bem como à real participação dos cidadãos [...] temos que concluir pela prevalência de uma ordem jurídica com perfil concentrado e autoritário. (Brazil STF, ADI 6121, 2019, 69)"

She also mentions several constitutional articles that empirically translate the institutional designs that provide for social participation (Brazil STF, ADI 6121, 2019, 70). Finally, she concludes that participation and social control help improve democracy.

Carmen Lúcia, in turn, begins her opinion by mentioning that, in a rule of law system (*estado democrático de direito*), the limitation of power made by law occurs in order to avoid the temptation to absolutism. "Administration is an activity of those who are not absolute masters" (Brazil STF, ADI 6121, 2019, 73). Moreover, she seconded Edson Fachin's opinion.

These opinions valued and promoted reflection on participation, albeit briefly. In this sense, one perceives an association with other categories and examples of application of this democratic principle: social control, liberal democracy, participative/deliberative democracy, realization of values, and contribution of social sector proposals to the elaboration of the Brazilian Constitution. Furthermore, the absence of justification and the mass termination of OCs were very much questioned. In view of that, the dissenting justices affirmed that the decree reflected authoritarian tendencies within the government. But they were part of a defeated minority.

4 DEMOCRACY, PARTICIPATION, AND PUBLIC SPACE: CHALLENGES RAISED

What kinds of lessons can we draw from the events described herein? What can we learn from the data and the judicial review? We want to make two general points. The first is about how the changes promoted by Bolsonaro's decree are shrinking public spheres in Brazil, turning these into "authorized practices". Although the system is formally democratic, practices are authoritarian and spaces for consensus, dialogue, and discussion diminish.

Habermas (1976/1993, 105) states that the central hypothesis defended by the philosopher Hannah Arendt is that "[...] no political leadership can replace power with violence with impunity; and it can only gain power through a non-deformed public space (Öffenltlinchkeit)." In this way, legitimate power can only be engendered by nondeformed communication structures. According to Habermas (1976/1993), when a state's order degenerates into dominance based on violence, isolating citizens through mutual distrust and thereby obliterating the public exchange of opinions, the structures that legitimize power are destroyed. The main problem of representative democracies and highly bureaucratic public administrations is that they deprive citizens from their power and the ability to act directly. When there is no separation

between the public and the private spheres, the sociopsychological conditions for totalitarian dominance are favored.

Habermas (1962/1996) states that this nondeformed Arendtian public space does not exist in a political scene dominated by the media, because what we have is a bourgeois public sphere developed in the eighteenth, nineteenth, and twentieth centuries, situated in the private domain, engendered by the ideology of the bourgeois patriarchal family. According to Silva (2001), for Habermas, the bourgeois public sphere arose from two types of conflicting publicity: publicity representative of the feudal courts and the critical and democratic publicity of the Enlightenment of the eighteenth century, which seeks to distinguish the public from the private. During the nineteenth century, a third element became part of this conflict: the interpenetration between the state and society, between the public and the private, that "rearranges" the public sphere. Emphasis was placed on cultural elements, leaving aside economic and social aspects, which contributed to the exclusion of different ethnic, social, and sexual groups from the dominant social group, which was male, white, and westernized.

According to Silva (2001), in *The Structural Change of the Public Sphere* (1962), Habermas admits that in the twentieth century, the State emerged as a resistance to the publicity sought in the public sphere so that the bureaucracy and the power of capital became the main obstacles for critical and rational advertising. However, years later, in *The Theory of Communicative Action* (1981), the philosopher claimed that the State would be influenced by this public sphere, moving from opacity to transparency. Habermas seems to return to the Arendtian origins of the concept, looking for norms and procedures to constitute a "non-deformed public space" in which communicative action was possible. In the words of Silva (2001, 128), Habermas proposes the basis of a deliberative democratic policy, which consists of a

> ... dual theoretical model, related not only to the formation of the will, institutionalized in the "parliamentary complex", but also to a notion of the public sphere that refers to a spontaneously generated set of informal, dialogically discursive and democratic political arenas and to their respective cultural context and social base.

Habermas might not have expected the degeneration of state-ordered violence with media collaboration in several countries, as well as the emergence and participation of digital social networks, which are distancing citizens and emptying the public sphere, providing a favorable climate for the establishment of a totalitarian regime.

The literature on democracy has shown the complexity of bureaucratic forms for policy implementation. Thus, even without a specific study on the collegial

structure, Lotta (2019, 13, 14) inquired about "the differences between the objectives planned and the results achieved", arguing for the need "to open the black box of public policy implementation processes, including the decisions made there and the consequences of those decisions."

The OC structure can show how well a policy is implemented or not. What is more, when there is an indiscriminate termination of collegial structures, it is very possible that many topics that could be better addressed by the public administration are disregarded, and this has an impact on the plurality of organizational contexts (Paula 2016 Santos 2018), the application of the principle of "good public administration" (Solé 2019), and the construction of arguments that could bring about changes in the public debate on the design of these policies (Fischer 1998; Silva 2019).

Our second point is about how the principle of participation is regulated in Brazil. In the section on judicial review, we saw that three different Justices considered that this principle can be legally enforced. This raises questions about the role of regulation for the development of social participation. In 2014, when Dilma Rousseff's administration tried to regulate this principle through the National Policy of Social Participation (*Política Nacional de Participação Social*, or PNPS) there was great negative reaction[19]. However, the absence of regulation on this matter is a great threat to democracy, as leaders who prefer violence to public spaces can issue restrictive norms and deprive the public sphere of a deepening of democratic structures.

Indeed, the arguments employed by President Bolsonaro ("there is so much bureaucracy," "it's so expensive") are out of touch with reality, with no evidence of public evaluations on the functioning, efficiency, and effectiveness of these structures. "With the stroke of a pen", he can diminish the public sphere because there are no discussions and no convincing; there is only a rhetorical style that has support in social media.[20] The rhetoric around "debureaucratization" to extinguish the participatory bodies reveals that it is just window-dressing for a structural change in state–society relations, to which Supreme Court litigation seems to offer very limited hope.

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19 See footnote supra.

20 It is symbolically contradictory that Congresswoman Carla Zambelli's Facebook page, without showing any data, states that there is too much bureaucracy in these structures.

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