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HEALTH AND LAW: OBLIGATION OR FACULTY OF VACCINATION AGAINST COVID 19?

SAÚDE E DIREITO: OBRIGATORIEDADE OU FACULDADE DA VACINAÇÃO CONTRA COVID 19?

Recebido em:	14/01/2021
Aprovado em:	03/09/2021

Bruno Martins Duarte Ortiz[1]

Tereza Rodrigues Vieira[2]

ABSTRACT

The present work aims to analyze the coronavirus vaccination legal aspects. Aprroach the SARS-CoV-2 origins and its evolution around the world, focusing at the Brazilian territory. Beginning with an analysis of all the State powers and federal entities, ahead of the pandemic impacts. At the end, focus at the vaccination and the health crucial right. The study is based

[1] Master's student in Civil Procedural Law at Universidade Paranaense (UNIPAR). Specialist in Civil Procedural Law from Universidade Católica Dom Bosco (UCDB). Attorney. http://lattes.cnpq.br/5396675590318812, https://orcid.org/0000-0002-7171-6415. Endereço Eletrônico: bruno.ortiz.adv@hotmail.com

[2] Post-Doctorate in Law from the Université de Montreal, Canada. Master and PhD in Law from Pontifícia Universidade Católica de São Paulo, PUC-SP. Specialist in Bioethics, Faculty of Medicine, Universidade de São Paulo, USP. Professor of the Master in Procedural Law and Citizenship and, in the undergraduate course in Medicine and Law, at UNIPAR, Universidade Paranaense. http://lattes.cnpq.br/1171420054286283, https://orcid.org/0000-0003-0333-7074. Endereço Eletrônico: terezavieira@uol.com.br.

on deductive metodology by bibliographics and database, using the law and the Supreme Court judgements.

KEYWORDS: Coronavirus. Pandemic. Covid-19. Jurisdiction. Vaccine.

RESUMO

O presente artigo tem como finalidade analisar os aspectos jurídicos da vacinação do coronavirus. Aborda-se a origem do SARS-CoV-2, e a evolução do vírus no mundo, com enfoque no território brasileiro. Parte-se da análise da atuação de todos os poderes do Estado, bem como de todos os entes federativos, diante dos reflexos da pandemia. Por fim, enfoca-se na vacinação e no direito fundamental à saúde. O estudo baseia-se na metodologia dedutiva de bibliografias e de banco de dados, utilizando-se da legislação e da jurisprudência da Suprema Corte.

PALAVRAS-CHAVE: Coronavirus. Pandemia. Covid-19. Judicialização. Vacina.

1 INTRODUCTION

In mid-December 2019, an epidemic outbreak of a disease started in the city of Wuhan, China, which subsequently became a pandemic of catastrophic levels, resulting in the biggest collapse of the health care system and economy in history.

A new respiratory disease virus has spread rapidly across the planet, leaving overwhelming negative consequences. As a result of it, countries and pharmaceutical companies from different parts of the world have invested meaningful amounts in the search for the production of an effective vaccine in record time.

We will analyze, throughout this text, the legal aspects related to the vaccine and vaccination of coronavirus, addressing the measures that were taken by the Executive and

the Legislative, as well as the manifestations of the Judiciary, especially through the Supreme Federal Court.

2 THE ORIGIN AND EVOLUTION OF SARS-VOC-2 (COVID-19)

Terminologically, Sars-CoV-2 is the official name given to the virus that causes the pandemic of the new coronavirus[3] (COVID-19[4]).

Several evidences exclude the hypothesis that Sars-CoV-2 had a laboratory origin. In December 2019, an outbreak began that affected around 50 people in Wuhan City, in China, with the majority of patients that have been exposed to the Huanan market, which sells live and dead wild animals, perhaps this was the great milestone of the new coronavirus. However, many patients from this initial outbreak had no epidemiological relationship with the market, creating the possibility that other sources of infection could be involved. (GRUBER, 2020).

A study that was published on 11/30/2020 by the United States Center for Disease Control and Prevention (CDC) that was based on blood samples donated between 12/13/2019 and 1/17/2020 found that some people in the United States have already had developed antibodies to coronavirus, even before the outbreak alert in China. The USA, in fact, only officially registered the first case in the country on 01/21/2020, which adds a great question regarding the real origin of Sars-CoV-2, reinforcing thus, the idea that the disease may have arisen much before the that people thought.

Professor Arthur Gruber explains (2020), that the Sars-CoV-2 virus is 96% similar to that of the RaTG13 virus, that was obtained from a bat species, as well as 85 to 92% similarity to a virus found in pangolins, that`s the reason why some researchers support the possibility

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[3] Coronavirus: family of viruses that cause respiratory infections.

[4] COVID-19: *coronavirus disease 2019* .

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that the virus transmitted to humans may have been a chimeric product that resulted from the recombination between a virus close to the bat RaTG13 and a second virus close to the pangolin virus.

The pandemic caused by Sars-CoV-2 caused the World Health Organization (WHO) to declare, on January 30, 2020, a public health emergency of international interest, and, shortly after just over a month, Brazil decreed a state of public calamity through Legislative Decree number 06/2020 (MELLO, 2020).

The evolution of the virus in the Brazilian territory was actually gigantic. In a period of 12 (twelve) months, we went from just over 4,000 confirmed cases on 3/31/2020 to more than 12 million cases registered on 3/24/2021, with 136 deaths at the end of March / 2020 and more than 300 thousand deaths by COVID-19 at before the end of March / 2021[5].

The numbers are even more frightening because it is related to a virus that spreads a respiratory disease, which, in its most advanced stages, leads the patient to need respiratory aid by devices. However, what to do when there are not enough devices in the country? It is obvious that the biosafety measures have the goal not only to prevent the spread of the new virus, but also to relieve the health system, by reason of the lack of sufficient respiratory devices.

The health system tried to prepare itself, both the public and the private system. The number of beds was expanded, field hospitals were built, but there was not enough specialized contingent to work in intensive care units, nor fans to meet the expected demand. As a matter of fact, there have never been enough devices in the country. And then, logically, the demand would be exponentially increased. Nor was there enough autonomous production of these devices in Brazil, and the countries that produced them wanted them for themselves. (ACIOLI, 2020).

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[5] Available on the website: https://covid19.who.int/region/amro/country/br. JHU CSSE COVID-19 Data Accessed: March 24, 2021.

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Faced with a pandemic unprecedented in history so far, the world scientific community more than ever has not measured and has not measured efforts in the search for drugs and a possible vaccine that can be capable of at least minimizing the effects of the disease. What was previously thought to be just a temporary outbreak ended up resulting in the worst collapse of the global health system, imposing rules of social coexistence that brutally changed the social life of humanity, with no prediction of returning to the normal life.

3 PUBLIC POWER REGARDING COVID-19 PANDEMIC

3.1 Concurrent Competence in Health Matters

According to the Brazilian Federal Constitutionof 1988, the federative entities - Union, States, Federal District (DF) and the cities - must act in harmony, with no competition between them, but cooperation (art. 23, sole paragraph of the Federal Constitution[6]). In fact, this is the initial issue of the Federal Constitution, which defines the State through its article number 1 as a symmetrical federation formed by the indissoluble union of States and cities and the Federal District [7].

[6] Article 23, Sole paragraph, Federal Constitution: Complementary laws will establish rules for cooperation between the Union and the States, the Federal District and the cities, with a view to balancing development and well-being at the national level.
[7] Article 1, Federal Constitution: Article 1 The Federative Republic of Brazil, formed by the indissoluble union of States and cities and the Federal District, constitutes a Democratic State of Law and has as its fundamentals:
I – the sovereignty;
II –the citizenship;
III - the dignity of the human person;
IV - the social values of work and free enterprise;
V – the political pluralism.
Single paragraph. All power emanates from the people, who exercise it through elected representatives or directly, under the terms of this Constitution.

Comparing the model adopted by Federal Constitution/ 1988 with the previous Brazilian constitutions, it is correct to state that the concentrated model is not adopted in Brazil in the present days, but actually, a decentralized power. However, there is no extreme decentralization, so the doctrine usually says that there is a balanced form of federalism among us and in this meaning, the aforementioned in the article 23, sole paragraph, of the Federal Constitution must be understood. (MEDINA, 2020).

This relationship of cooperation and coordination between federative entities is what the doctrine came to call cooperative federalism. Regarding the theme, Fachin (2015) teaches in the judgment of ADI (Direct Actions of Unconstitutionality) 5356 / MS (Ministry of Health):

> The division of competences is a fundamental characteristic in a federated state so that the autonomy of each of its members is protected and, consequently, the harmonious coexistence between all spheres, with the goal of avoiding secession. [...To share competences is related to combining interests to reinforce federalism in a truly cooperative and diffuse dimension, refusing to centralize in one or the other and corroborating that the harmonious functioning of legislative and executive powers optimizes the foundations (article number 1) and goals (article number 3) of the Constitution of the Republic. When building a network which is interconnected with competences, the State undertakes to exercise them for the attainment of the common good and for the satisfaction of fundamental rights.

Silva explains (2007, p. 477) that competences are divided into the items below: (1) material competence, subdivided into (a) exclusive - article 21, Federal Constitution; (b) common, cumulative or parallel - article 23; and (2) legislative competence: (a) exclusive -

article 25, §§1 ° and 2 °; (b) private - article 22; (c) competitor - article 24; and (d) supplementary - article 24, §2 °.

Effectively, the Constitution Federal, in its article 24, regulates themes on which the Union, States, Federal District and cities can legislate concurrently. In the event that there is concurrent legislative competence, the way in which these entities relate and interact is disciplined in the paragraphs of the article 24. In view of the provisions of these paragraphs, the competence between States and the Federal District is supplemented by the Union (§2 °), and, within the scope of competing legislation, the competence of the Union must be limited to establish general rules (§1°). This means that it is up to the Union to draw up general rules that establish a plan, but without laying down details (MEDINA, 2020)[8].

Likewise, if the Federal Union does not have unlimited powers that enable it to transpose the scope of the general rules, in order to therefore invade the sphere of normative competence of the Member States, the States can not in case of general rules, exceed the limits of purely supplementary jurisdiction (BRAZIL, 2005).

Nesta ótica, no caso de regras que estabeleçam matéria de saúde, como disciplinar harmonicamente entre os entes federativos, as normas inerentes à pandemia do coronavirus?

Still related to the mid-February / 2020, the provisional measure, number 926 (BRAZIL, 2020) was issued by the President of the Republic, with the goal of mitigating the international crisis of coronavirus that arrived in Brazil, even though in the Brazilian territory it was still, at the time, in an embryonic phase.

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[8] Medina (2020) explains that, in the light of the text of the articles 22 and 24 of the Federal Constitution, a balanced form of federalism has been established. These provisions, incidentally, encourage decentralization, at least regarding local peculiarities or specific issues of matters that are subject to the broadest competence of the union. The most adjusted way to the idea of balanced and cooperative federalism, leads that from the interpretation of these provisions it could even allow the extension of the local legislative competence (for example: article 24, caput, item VIII of the Federal Constitution establishes competing competence between the Union, States and Federal District to legislate on consumer law)

Right after the issuance of that rule, the Supreme Federal Court (STF) was provoked through A.D.I. (Direct Actions of Unconstitutionality), number 6341 / Federal District (BRAZIL, 2020) filed in order to recognize and declare some formal unconstitutionalities contained in the provisions of the normative act. On that occasion, the then rapporteur, Minister Marco Aurélio briefly explained regarding the concurrent competence in the judgment of the cautionary measure:

> Article 3 refers to the authorities' duties as to the measures that need to be implemented. One can not see a transgression according to the Federal Constitution. The measures do not exclude acts to be performed by the State, the Federal District and the city considered the competing competence in the form of the article 23, item II, of the Major Law. [...] it must be recognized, simply in a formal way, that the discipline resulting from Provisional Measure number: 926/2020, in which it printed a new wording to the article 3 of the Federal Law number: 9.868 / 1999, does not preclude the taking of normative and administrative measures by the States, Federal District and cities.

In other words, it recognized the Supreme Court for the competing competence of the federal entities to deal with rules regarding health, mainly, in this case, regarding measures related to coronavirus pandemic.

In fact, it is analyzed in the constitutional text, that rules that regulate health are always endowed with competing competence, and (i) article 23, II, of the Federal Constitution establishes that it is the common material competence of the Union, States, District Federal and cities take care of health and public assistance; and (ii) article 24, XII established that it is up to the Union, States and the Federal District to legislate concurrently regarding health protection and defense.

Besides, in the article 22, which deals with issues of exclusive competence of the Union, there is no specific provision regarding health, seeing that this when referred to by the Federal Constitutionis always treated in matters of competing competence, be it material competence or legislative competence.

With this same goal, Minister Alexandre de Moraes decided in the Arguition of Non-Compliance with Fundamental Precept, ADPF , number 672 (BRAZIL, 2020) that States, Federal District and cities can adopt measures against the pandemic of coronavirus and that it is not for the federal executive branch to unilaterally take away the decisions of local governments that, in the exercise of their constitutional powers and in their territories, will adopt some sanitary measure against the consequences of the pandemic within their territories.

Effectively, all federative entities are responsible for caring, protecting and defending health. One entity will invade the competence of the other, for example, if the Union establishes local details or if a city defines a general restriction of national scope. In other words, there is no hierarchy between the entities, all of them have the authority to dispose within the scope of their competences regarding health issues. (MEDINA, 2020).

3.2 Judicial Activism

The pandemic brought not only new debates regarding competing competence among federal entities, but also favored another well-known legal phenomenon: judicial activism.

As a consequence of the overwhelming effects of coronavirus pandemic, the governments of almost all countries have felt strong negative effects on their territories, with

the loss of thousands of human lives, the collapse of public health systems and incalculable economic disasters. From then on, the world has been forced to adapt to this new reality, and one of these adaptations has actually reached the universe of Law, which has now been forced to find urgent solutions for the management of this unprecedented health problem. (MAZZUOLI and FRAZÃO, 2020).

As a result, Brazilian democracy has as a corollary the system of checks and balances inscribed in the article 2 of the Constitution of the Republic. "They are powers of the Union, independent and harmonious with each other, the Legislative, the Executive and the Judiciary". The idea of *checks and balances* – guided by Montesquieu and influenced by the ideas of John Locke and Aristotle - provides typical and atypical attributions for each of the three functions of the State (FILHO; BRAZ e SILVA; ALVES, 2020).

The Brazilian State, when adopted the tripartition model of powers, had the goal that each power is free to act within its respective competences, however avoiding omissions and abuses and establishing limits for its competences.

Judicial activism, basically, deals with decisions emanating from the judiciary that go beyond its competence. Activism can be configured when the judiciary refuses to judge something it should or when it judges something when it shouldn't. Any judicial decision based on any argument other than the law, such as moral, religious, political or any other that is not based on legislation, law, can be considered activism (ABBOUD, 2020).

Nevertheless, judicial activism has long been considered a “remedy” for omissions that arise from the state's legislative functions. After all, it is the dosage that distinguishes the medicine from the poison (AQUINO FILHO; BRAZ and SILVA; ALVES, 2020). However, for Abboud (2020), correcting possible legislative omissions does not constitute more judicial activism, in the light of contemporary constitutionalism (*for example*-injunction order).

And this is due to the slowness of the legislative process, which ends up, often becoming insufficient and unable to keep up with the evolution of society, worsening even more with the advent of the pandemic of coronavirus.

According to Aquino Filho, Braz and Silva and Alves (2020) analyzed, the activism - mainly in times of pandemic - ends up becoming a valuable escape valve in the face of the Legislative's untimely nature. Without this interventionist posture by the judge-state, citizens would be the victims of the legislative slowness and internal confusions of the Executive.

However, the exceptional character of "good activism" is emphasized, only in times of pandemic, when the jurisdiction is called upon to enforce urgent rights. Any activism outside this meaning, other than to ensure fundamental rights and guarantees, even in times of pandemic, must be removed.

In this sense, the decision of the Court of Diffuse and Collective Interests of the district of São Luiz Island (MARANHÃO, 2020) stands out, one of the first post-pandemic judicial decisions that debated judicial activism:

> [...]It happens, however, that for the present moment, the measures of social distance were proved to be ineffective to contain the spread of the virus that causes COVID-19, demanding from the Public Power the adoption of more intense measures to avoid a collapse of the public health system, which, in the Capital, is already evident, with the maximum capacity of the I.C.U. (Intensive Care Units) beds for patients with COVID-19. [...]. For this stage, according to the Epidemiological Bulletin of the Ministry of Health [2], the measure recommended by O.M.S. (World Health Organization) to contain the uncontrolled proliferation of the disease and enable the recovery of the health system, in case the social distance is not more effective, it is the

lockdown (total blocking of activities). In the present case, it is necessary to adopt the total blockade, even for a short period, seeing that this is the only possible and effective measure in the scenario to contain the proliferation of the disease and to enable the public and private health system to reorganize itself, in order to be able to allocate appropriate treatment to patients. [...]Although the lockdown may raise doubts regarding its constitutionality, seeing that it involves restrictions on the movement of people, operation of commercial establishments and sacrifices of other rights, it must be noted that fundamental rights are not absolute. For harmonious coexistence between them, it is necessary that the exercise of one does not imply damage to public order or to the rights and guarantees of third parties [...]. In the present case, the most important thing at the moment is to ensure the health of the community, using the necessary means to prevent the proliferation of the disease, even if it means depriving the citizen momentarily of enjoying, in full, certain individual prerogatives. [...]. In view of the items that were described above and based on the article, number 300 of the CPC (Code of Civil Procedure), I GRANT the request for the granting of the injunctive relief and, therefore, I DETERMINE WHAT IS DESCRIBED BELOW: (i) the State of Maranhão: a. to apply, in the Decrees dealing with social distance as non-pharmacological measures against the spread of the virus that causes COVID-19, the *lockdown*, initially for a period of 10 days, starting on 05/05/2020 [...]

In casu, it is observed that although the competence to legislate and adopt the necessary measures to contain the proliferation of coronavirus either from the Executive Branch, from the State of Maranhão or from the city of São Luiz, the judiciary was provoked through a public civil action proposed by the Public Prosecutor of the State of Maranhão and, in an activist way, responded to the call usurping its competence.

Not entering into the merits of this decision, but the judicial intervention in this case does not seem correct. This happened, because (i) there was no legislative omission; and (ii) there was no inertia of the Executive, which, as it was explained in the decision itself, issued sanitary measures for the containment of coronavirus.

In the current pandemic scenario, mere judgments of value of the magistrates cannot be admitted, simply because they understand that the measures taken by the Executive or the Legislative are not being efficient. There is no need to legitimize decisions of this kind, in which it is judged to be legislating, creating true "judicial laws". The judicial decision must be based on legal grounds, otherwise legal activism will be legalized.

4 THE VACCINATION OF COVID-19 AND ITS LEGAL ASPECTS

4.1 Vaccine and Vaccination

Historically speaking, the first vaccine was developed by an English doctor named Edward Jenner, in 1976. In his studies, Jenner observed, at the time, that people who contracted the disease called bovine pox, rarely contracted the human form of smallpox (an even more serious illness). Through experiments, Jenner concluded that the bovine smallpox material had acted as a vaccine against human smallpox, hence the reason that people who had already contracted the bovine modality did not contract the human modality.

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Vaccines are substances that prevent the spread of disease. Vaccines are made with microorganisms from the disease itself that prevents. However, these microorganisms are weakened or dead, causing the body not to develop the disease, but to become prepared to fight it if it is necessary. It is a biological preparation that establishes active acquired immunity to a particular disease.

Mass vaccination and its effectiveness has been widely studied and verified. Public health measures - such as mandatory vaccines against the pandemic - they may be unpopular, however, they have a scientific basis and their goal is to preserve the health of the community. Therefore, when a citizen refuses to be vaccinated, he is not using a fundamental right and freedom of choice. He is, rather, manifesting its inability to live in community, to understand public health as a collective good and to understand that, in democracy, there are no absolute rights. (FARIA, 2020).

Those who do not get vaccinated do not only put their own health at risk, but also that of their families and other people who are in contact, besides contributing to the increasing the circulation of diseases.

Besides, without vaccination there seems to be no possibility of economic recovery. For now, the overwhelming majority of those immunized are concentrated in the ten nations that represent 60% of the world Gross Domestic Product. As it was highlighted by Mark Jit, professor at the London School of Hygiene and Tropical Medicine:

> "To ensure large quantities of vaccines is equivalent to countries opposing the widespread vaccination of their own populations to that of health workers and the high-risk populations of the poorest countries" (GUTIERREZ, 2021)

Article from the field of seven researchers, it was published in the Lancet Magazine (GUTIERREZ, 2021) and they classify vaccines according to risk it has. Red if effectiveness

levels are less than 50% based on the provisions of phase 3. Amber color has effectiveness levels between 50-69% and green color (low risk) 70% or more.

A study was carried out and reached 18,610 hospitalized patients by Covid-19, Planisa, a company that is specialized in cost management in the health area, from March to December 2020, found that the expenditure on these hospitalizations reached the amount of: R$ 465.3 million reais (brazilian currency). The mentioned "value would be enough to buy approximately 15.5 million doses of vaccine against the virus, at an average value of R$ 30.00 reais (brazilian currency) for each dose", based on the price of vaccines that have been applied in the country. (PORTAL HOSPITAIS BRASIL, 2021). As the director of Planisa highlighted, Eduardo Agostini: "Immunization is extremely cheaper than any treatment and could quickly bring us back to an economic recovery". (PORTAL HOSPITAIS BRASIL, 2021)

Therefore, it is important to get vaccinated and considering the limited number of vaccines, it will still be fundamental to continue with the use of preventive measures, preventing the virus from spreading and thereby protecting yourself and the others.

4.2 A Vaccine Judicialization: Obligation or option?

In the case of Brazil, the Federal Constitutionlists the right to health in the list of fundamental rights, that were established in its article 6, *caput*[9], therefore, it is subject to jurisdictional protection, which leads to a perspective of universality and mandatory nature of the Brazilian State related to health protection. (MELLO, 2020).

In the current pandemic of coronavirus, it is obvious the State obligation regarding the vaccine supply, regardless of which brand is approved by the National Health Surveillance Agency (ANVISA). In other words, the federal entities must promote the distribution of vaccines to all citizens, throughout the national territory.

However, the controversy that has been the subject of debate concerns whether or not it is mandatory to submit a vaccine against Covid-19. In this sense, the Law 13.979 (BRAZIL, 2020), which establishes the measures to deal with the public health emergency resulting from coronavirus, establishes in its article 3, item III, “d”, that the authorities may adopt, within the scope of their competences, the measure of determination of mandatory vaccination and other prophylactic measures. That is, it is the competent authorities that will be able to determine, or not, the mandatory nature of the vaccine, as well as the extent of this fortuitous mandatory nature. (MELLO, 2020).

Notwithstanding, the Law 6.259 / 1975, which establishes the organization regarding Epidemiological Surveillance actions and the National Immunization Program, establishes in its article 3 that “It is up to the Ministry of Health to prepare the National Immunization Program, which will define vaccinations, including those ones of a mandatory nature (BRAZIL, 1975). In the same sense, the decree 78.231 / 1976, which regulates the mentioned Law 6.259, establishes, in turn, that “it is the duty of every citizen to submit themselves and the minors of whom they have custody or responsibility, to mandatory vaccination” (BRAZIL,

[9] Article 6, Federal Constitution: Social rights are education, health, food, work, housing, transportation, leisure, security, social security, maternity and child protection, assistance to helpless people, in the form of this Constitution.

1976). Therefore, it does not seem that there is an option regarding vaccination, but actually, an obligation.

And it was in this exact sense the understanding of the Plenary of the Supreme Federal Court, which decided, on 12/17/2020, that the State can determine to the citizens that they subject, mandatorily, to the vaccination against Covid-19, established by the Law 13.979/2020[10].

However, it is worth noting that, according to the Supreme Court decision, the State can impose on citizens that refuse vaccination the restrictive measures that are established by the law (fine, impediment to attend certain places, to enroll in a school), but can not forcibly immunize.

At the trial, Barroso analyzed that although the Constitution protects the right of every citizen to maintain his philosophical, religious, moral and existential convictions, society's rights must prevail over individual rights. Therefore, the State can, in exceptional situations, protect people, even against their will - as, for example, when forcing the use of seat belts. The minister also expressed his opinion regarding the constitutionality of mandatory vaccination, provided that the following requirements are met: (i) the immunizer is duly registered by a health surveillance agency; (ii) is included in the National Immunization Plan (PNI); has its obligation included in law or has its application determined by the competent authority.

For Alexandre de Moraes, vaccination has a double obligation: the State has a duty to provide the vaccine, and the individual has the duty to accept the vaccine.

It is also pertinent to mention an excerpt from the vote of Gilmar Mendes, who observed that while the refusal of an adult to a certain therapeutic treatment represents the

[10] Understanding that was rendered in the judgment of A.D.I.s (Direct Actions of Unconstitutionality) numbers: 6586 and 6587 - that are related to the vaccination of covid-19 - as well as in the judgment of the A.R.E. (Extraordinary Appeal), number 1267879 - in which it is discussed regarding the right to refuse immunization due to philosophical or religious convictions.

exercise of his individual freedom, even if this implies his death, the same principle is not applied to vaccination issues, because, in this case, the priority is community immunization.

At last, the following theses were established:

(1) A.R.E. (Extraordinary Appeal), number: 1267879: It is constitutional to have the obligation regarding immunization by means of a vaccine that is registered with a health surveillance agency, has been included in the national immunization plan; or has its mandatory application decreed by the law; that is, the object of determination by the Union, of the States, of the Federal District or of the cities that are based on medical-scientific consensus. In such cases, there is no violation of the parents 'or guardians' freedom of conscience and philosophical belief, nor does it affect family power.

(2) A.D.I. (Direct Actions of Unconstitutionality) 6586 and ADI 6587: Mandatory vaccination does not mean forced vaccination, the refusal by the user is allowed, however, it can be implemented through indirect measures, which include, among others, the restriction to the exercise of certain activities or to the frequency of certain places, provided that they had been established by the law, or that derive from it, and are based on scientific evidence and relevant strategic analyzes, accompanied by ample information on effectiveness, safety and contraindications of immunizers, respect human dignity and the fundamental rights of people; meet the criteria of reasonableness and proportionality; and whether vaccines are distributed universally and free of charge. Such measures, with the exposed limitations, can be implemented by both the Union and the States, the Federal District and the cities, respecting the respective spheres of competence.

In general, the requirement for vaccination is not absolute, that is, any citizen can refuse to submit to the vaccine, but the refusal can be “penalized” with the restriction of some

rights, seeing that the collective rights (in this case, health) will always have to prevail over the individual ones.

5 CONCLUSION

As it can be noted, the pandemic has revived the debate regarding relevant legal issues. Intense discussions have been taking place regarding the competing legislative and material competence among the federal entities regarding certain matters, mainly regarding health, as well as the judicial activism that is necessary or not, that is practiced by the judiciary in this crisis scenario.

The vaccine and the vaccination process have brought more controversies.

Obligation can be decreed, but not absolutely, that is, there is no need to talk about forced vaccination. Nevertheless, the restriction of rights to those people who refuse the vaccination process is something constitutional, seeing that it is the duty of the State to ensure public health, always prevailing the collective right to the detriment of the private one.

Thus, any determination of the Union, States, Federal District or cities imposing the obligation of the vaccine in their territories, is something constitutional.

It is hoped that the population will recognize the importance of vaccines, which have already eradicated several diseases from humanity, and that the vaccination process will be adhered to, so that the contingent at least reaches the mathematical concept known as “herd immunity”, which does not require everyone to be immunized, seeing that if the largest portion of the population is vaccinated, the non-vaccinated people end up benefiting.

More than ever, it is necessary to increase the large-scale production of vaccines at prices that are accessible to everybody. For the moment, the demand is well above supply. More countries must produce them, facilitating their distribution locally, ensuring a dynamic

tactic of global immunization. The technology sharing is something essential to overcome the production challenge.

Besides obtaining the vaccine and combating misinformation, governments must still convince the population that the vaccine is something safe, effective and that produces few adverse reactions in healthy people.

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