CRITICAL DIALOGUES

Human Rights, Democracy and Pandemic Perspectives

CULTURA, DIREITO E SOCIEDADE DCP CNPQ UFMA

Organizers:

Cássius Chai • Alexandre Coura • Fabio Marcelli • Francesca Staiano

CONTENTS

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Organizers

CRITICAL DIALOGUES

Human Rights, Democracy and Pandemic Perspectives

São Luís
Brazil

CULTURA, DIREITO & SOCIEDADE (Research Group/DGP/CNPq/UFMA)

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OUR MISSION: Develop scientific research and contribute to the formation of citizen(s) and citizen(s)-leaders for the national society, through the irrevocable commitment to the Arts, Philosophy, Political Science and the Science of Law in their inseparable social immanence, in a transdisciplinary approach with all knowledge, with practice and with the transformation of mentalities in the reach of the republican objectives contained in art. 3rd, of the Brazilian Federal Constitution of 1988:
I – build a free, fair and solidary society;
II – guarantee national development;
III – eradicate poverty and marginalization and reduce social and regional inequalities;
IV – promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

OUR VALUES: Integrity; Resilience; Respect differences.

OUR VISION: The role of the University lies in understanding, first, the socio-economic and political needs of its surroundings and, considering its context, promoting and provoking a conscious, plural, scientifically directed intervention in reality, capable of strengthening the dignity of the human person, of sustainable, ethical and inclusive way.
Thus, the Research Group (Studies) Culture, Law and Society works as an institutional agent directing its actions of studies, sociological investigations and affirmative propositions aiming to contribute to the reduction of regional inequalities, promoting respect for cultural diversity and the strengthening of republican and democratic constitutional identity, reconciling Teaching, Research and Community engagement actions between the academy, the global vision and the local society. And yet, to create and maintain the conditions that allow its members to experience an educational journey that is intellectually, socially and personally transformative.

OUR GOALS
General: Investigate within the area of Culture, Law and Society social issues related to the lines of research, aiming to contribute to the historical process of reflection, discussion and political propositions suited to the needs of local society, transferring scientifically systematized knowledge, enabling its application in the discursive processes of formation and establishment of priorities for governance.
Specifics: To train, through a methodological approach to research, researchers initiated in scientific research, training them in the language, procedure and systematization of the research activity;
Develop projects related to research lines;
Disseminate the research reports in a systematic way, allowing a process of reflection with the forums of debates and the formation of local public opinion;
Establish an information network with other sectors, centers, groups and or research centers that reflect similar objectives;
Theoretical Framework: Critical-deliberative theories in law: Critical Criminology; Discursive Theory of Law in the proceduralist and phenomenological bias.

DADOS INTERNACIONAIS DE CATALOGAÇÃO NA PUBLICAÇÃO (CIP)
(CÂMARA BRASILEIRA DO LIVRO, SP, BRASIL)

Critical dialogues [livro eletrônico] : human rights, democracy and pandemic perspectives /Cássius Guimarães Chai, coordenador : organizadores Cássius Guimarães Chai ...

[et al.]. -- São Luís, MA : Grupo de Pesquisa Cultura, Direito e Sociedade, 2021. -- (Critical dialogues) ePub

Outros organizadores: Alexadre de Castro Coura, Fábio Marcelli, Maria Francesca Staiano

ISBN 978-65-00-40218-6

1. COVID-19 - Pandemia 2. Democracia 3. Direito constitucional 4. Direitos humanos 5. Direito internacional 6. Políticas públicas I. Chai, Cássius Guimarães. II. Coura, Alexandre de Castro.
III. Marcelli, Fábio. IV. Staiano, Maria Francesca. V. Série.

22-102144
CDU-342.7

ISBN: 978-65-00-40218-6

CBL

9 786500 402186

Índices para catálogo sistemático: 1. Direitos humanos : Direito 342.7
Maria Alice Ferreira - Bibliotecária - CRB-8/7964

https://doi.org/10.55658/gpcds978-65-00-40218-6

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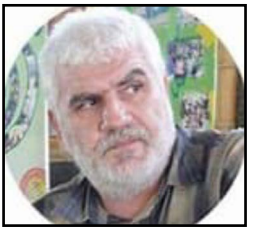

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This project results from the International Research Forum Critical Dialogues on Pandemic Perspectives held on September 10th and 11th, 2020, in pursuant of the shared participants objectives, an online event attended by confirmed colleagues and friends from 16 countries.
The International Online Congress "Critical Dialogues on Pandemic Perspectives: Global Justice, Rule of Law and Human Rights" comprises joined researchers efforts to promote international academic and scientific exchanging cooperation on the current global pandemic context on reflecting, thinking and scrutinizing government's, public policies and decision-making process and innovation in the fighting against direct and collateral damages caused by the Covid-19's social and institutional impacts, considering transnational implications to the political, economic and the rule of law systems from a Global Justice approach and, locally to human rights' protection.

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ORGANIZER'S NOTE

The present publication is brought about by the joined researchers efforts to share common concerns and scientific analysis to the global current pandemic Covid-19, which discussions were held abridged during the International Online Congress "Critical Dialogues on Pandemic Perspectives: Global Justice, Rule of Law and Human Rights" comprising professional and theoretical reflections and synergy to promote international academic and scientific exchanging cooperation on the current global pandemic context on reflecting, thinking and scrutinizing government's, public policies and decision-making process and innovation in the fighting against direct and collateral damages caused by the Covid-19's social and institutional impacts, considering transnational implications to the political, economic and the rule of law systems from a Global Justice approach and, locally to human rights' protection.

The Sustainable Development Goals achievements cannot ignore the technological challenges of The Industrial Revolution 4.0, the precariousness of labor relations, the growing of an economic inequality, and a return to extremist nationalism.

Yet, the pandemic context, after two years, forces us to think about the ascendancy of intramural violence, since social distance ends up challenging everyone, however, with outstanding, material, and dissimilar conditions since it tends to the social elimination of the socially vulnerable.

Despite the needed corporate and public adopted strategies, disenfranchisement and excessive administrative measures have been settled, reframing, and mitigating international relations pulling geopolitical, economic, and technological strings in the multipolar world.

For those finding facts, we are invited to discuss the new challenges and outcomes from a pandemic perspective to the Global Justice, Rule of Law, and Human Rights questioning if and how human rights can be ensured and mainstreamed in the taken prevention and recovery measures in democratic societies.

The International Congress was organized to celebrate the tenth anniversary of the Research Group Culture, Law and Society ((DGP CNPQ UFMA), and was upheld by The Graduate Law Program of

the Universidade Federal do Maranhão (PPGDIR/UFMA), together with the Graduate Law Program of the Faculdade de Direito de Vitória (PPGD/FDV), the Chinese Study Center of the Instituto de Relaciones Internacionales of the Universidad Nacional de la Plata, and the Institute for International Legal Studies of the National Research Council of Italy, by each representative, we are pleased to WELCOME you to the Critical Dialogues on Pandemic Perspectives, discussing Human Rights, Democracy and Pandemic Perspectives.

Cássius Guimarães Chai (Brazil)
Alexandre de Castro Coura (Brazil)
Fábio Marcelli (Italy)
Maria Francesca Staiano (Argentina)
Organizers

FOREWORD

I am honored and very happy to see professor Cássius Guimarães Chai ‘s book published. “Critical Dialogues: Human Rights, Democracy and Pandemic Perspectives” the title of the book has being gotten very popular during COVID-19’s spread in the world in the past more than two years. The spark of thought results from the International Research Forum Critical Dialogues on Pandemic Perspectives held on September 10th and 11th, 2020, in pursuant of the shared participants objectives, an online event attended by confirmed colleagues and friends from 16 countries. The International Online Congress “Critical Dialogues on Pandemic Perspectives: Global Justice, Rule of Law and Human Rights” embodies the ultimate concern of professor Chai as a constitutional scholar, prosecutor and professor for human beings. Due to the problem of network communication, I regret not being able to participate in this meeting, but I have fully appreciated Professor Chai’s enthusiasm. I think this is what a constitutional scholar who cares about the fate of mankind should do. For this, I admire Professor Chai in particular. It is worth mentioning that Professor Chai should have the most voice on this topic in the world, because he was attacked by the new crown virus himself, and once fought the new crown virus in the intensive care unit. Although Professor Chai relied on his belief in God to return to the world, his desire for freedom, democracy and human rights must have been a powerful psychological driving force for him to finally defeat the virus.

I am very pleased to see the electronic version of this book sent to me by professor Chai, and to see nearly 25 like-minded experts, scholars and friends from different countries, starting from their respective countries’ practices and experiences in dealing with the new crown pneumonia epidemic, from a professional point of view, comprehensively and systematically discuss how to correctly handle the relationship between human rights, democracy and epidemic prevention measures from a management system during the outbreak and epidemic of the new crown pneumonia. I have gained a lot of professional knowledge from the discourses of various experts, and I greatly admire the selfless contributions of these authors to the publication of this book.

In fact, as a constitutional scholar in the standard sense, my mind is filled with terms like the rule of law, democracy, and human rights, so no matter what major events are happening outside, such as the COVID-19 outbreak, which is rare for human beings , my first reaction is to deal with the state of emergency in response to the new crown pneumonia epidemic, what about the values of the rule of law, democracy and human rights that we are familiar with? Do you still want to persevere? How to persevere? Who will hold on? To what extent do you persist? These questions are the basic theoretical questions of constitutional law and the habitual constitutional thinking of every constitutional scholar in the true sense. When the new crown pneumonia epidemic broke out in Wuhan, China, as a constitutional scholar, my first reaction was that the government should initiate legal procedures to deal with the epidemic, and when exercising the power of emergency to deal with the epidemic, it should pay close attention to the protection of human rights. Those that should not be taken are best restrained by the principle of the rule of law. Therefore, I also put forward suggestions to the Chinese government such as "the more severe the epidemic is, the more important it is to prevent the epidemic in accordance with the law". I have also questioned in the open news media the practice of arbitrarily declaring a "wartime state" in some places. These suggestions, which well reflect the professional quality, have been paid attention to by the leadership, and have also been effectively responded by the local government. The reason why the Chinese government was able to quickly stabilize its position after the outbreak of the new crown pneumonia epidemic is closely related to carefully listening to the advice of experts. However, what is unexpected is that the new crown pneumonia epidemic is fierce and rampant for more than two years, and there is no weakening momentum in sight. This is very different from SARS in 2003. When SARS was rampant in 2003, I hid at home and completed a book titled "Extraordinary Rule of Law in the SARS Period". In this book, I emphasize the necessity of preventing epidemics according to law and exercising emergency powers according to law, and hope that pandemics like SARS should never happen again. Because the nature of such public health emergencies is the destruction of the basic system and civilization of human society. It's a headache for those of us who are architects of the

system. Because we are all accustomed to living in peace and serenity, the rule of law, democracy and human rights are some beautiful words with a poetic touch.

However, the emergence of the new crown pneumonia epidemic and the fact that scientists still have not found the root cause of its journey, the long-term continuation of this situation has to cause us constitutional scholars to think, that is to say, we should not only pursue the relationship between people, it is also necessary to pay attention to the harmony of the relationship between man and nature. Harmony in the relationship between people can be achieved by believing in the value of the rule of law, democracy and human rights, but when dealing with the relationship between people and nature, if you foolishly tell nature that we need harmony, the new crown pneumonia will disappear by itself. Such a naive idea is tantamount to a fool's dream. Therefore, some fundamental values advocated by traditional constitutional law, such as the rule of law, democracy and human rights, need to be re-examined, otherwise, the activities of human beings to fight against nature will be disturbed by negative emotions and ways of thinking. Now, the most urgent thing is to solve the problem of coexistence with the virus. If the new crown pneumonia virus continues to be domineering and unwilling to coexist with human society, then what is the point of the voices of people who shout "coexist with the new crown virus" asking for harmonious coexistence with nature?

I remember that Mao Zedong, the great leader of the Chinese people, said when he drafted the first constitution of the new China, "To do a constitution is to do science." That is to say, we constitutional scholars should not only have humanistic ideals, but also strive to be scientists, and at least show respect for scientific issues. Therefore, from this point of view, in the current situation where the existence mechanism of the new coronary pneumonia virus cannot be clearly explained, the new coronary pneumonia virus is an "enemy" for human beings, and the greatest risk of coexisting with the "enemy" is suicide. Therefore, I firmly support the "dynamic clearing" epidemic prevention policy adopted by the Chinese government, and try to "defend the enemy outside the country". When we humans have the ability to distinguish whether the new coronavirus is a friend or an enemy, it will not be too late to open the country.

Professor Chai is my old friend and also an old friend of the Institute of Law of the Chinese Academy of Social Sciences. He is full of passion and is a young constitutional scholar with worldwide influence. I also often meet him at the World Constitutional Conference and round table meetings organized by the International Association of Constitutional Law. We are very happy together. We can often come up with some relatively macro and big ideas. We sincerely hope that we can promote the continuous progress of human society. All constitutional scholars of the whole world gathered together to make suggestions for the better future of human society. Therefore, I simply use this preface as my lofty salute to Professor Chai's academic spirit.

MO Jihong
Honorary President of International Association
of Constitutional Law
Director of Law Institute of Chinese Academy
of Social Sciences
2 April,2022

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ISBN: 978-65-00-40218-6

COVID-19, ONLY THE BEGINNING?

by Fabio Marcelli

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter1

CONTENTS

COVID-19, ONLY THE BEGINNING?

by
Fabio Marcelli[1*]

1. INTRODUCTION

In the present moment (11 July 2020) nobody really nows until when will the Covid-19 pandemic last and which forms will it take in the various countries and situations. The more than six months since the beginning of the pandemic show the full inadequacy of the present world system to cope with the dangerous contagion. To be more specific, some crucial aspects of the present structure of world society paved the way to the expansion of the virus.

We can summarize them like follows.

a) Environmental degradation. The constant destruction of environment and resources entails severe consequences on the health of human beings and one of the ways in which such a noxious phenomenon happens is that of the diffusion of new viruses. Several scientific researchs succeeded in ascertaining a direct connection between the destruction of wild habitats and the diffusion of the virus. It is well-known that zoonosis, i. the passage of viruses from animal species to men, is facilitated by the reduction of biodiversity deriving from the destruction of natural habitats and the uncontrolled expansion of human settlement without any safeguard of the indigenous species[2]. Another relevant factor is constituted by air pollution which damages the respiratory organs of human being habitating certain dense industrialized areas, like the Po Valley (Valle Padana) in Italy, which were very heavily struck by the pandemic. But for sure many other connection among ecosystems, viruses and pandemics could be established deepeening and widening the scope of scientifical research.

[1] *Research director in the Institute for International Legal Studies of the National Research Council of Italy. (fabio.marcelli@cnr.it).

[2] https://www.unenvironment.org/covid-19-updates.

b) Social inequality on international and national level. The vast majority of the world population appears as totally deprived of any possible defence against the virus. This is due to the uneven distribution of medical services, determined by differences of whealth and income but also by the prevailing of neoliberal creeds which impeded also to very rich countries to be prepared against the scourge. The best example of that is of course offered by the United States, which is nowadays (July, the 12th, 2020) the country with most infected persons (3.097.300) and victims (202.934)[3]. This inequal situation is particularly crucial in the context of the pandemic, because the total elimination or strong reduction of the threat requires a fight to be conducted in the same way and with the same means in every single part of the world.

c) Weakening of social State and particularly of the institutions charged with the protection of health. The health sector is almost everywhere the province of powerful corporations interested only in their profits and surely not in the safeguard of health. That's way they orient themselves to fighting pathologies which permit a return in terms of money, because they target wealthier people, or require long and expensive therapies. Cancer is much more rentable for them than Covid-19, just to make an example. For this reason the preventive approach to health care is practically abandoned, also in countries like Italy which had built a territorial diffused health-protection system which practically doesn't exist any more. This is also the result of neoliberal policies aimed at disrupting public facilities and drastically reducing the number of physicians and nurses. In Italy there is, for insance, a tragical lack of intensive therapy facilities, due to the fact that organizing them in the view of possible emergency situations due to pandemics had been judged "antieconomic" by the capitalist managers of the health system. The existence of giantic enterprises controlling the market of health and drugs also represents a big hurdle on the way towards an effective vaccine and useful means to be successfuly implemented to contain the pandemic.

[3] www.salute.gov.it/portale/nuovocoronavirus/dettaglioContenutiNuovoCoronavirus.jsp?lingua=italiano&id=5338&area=nuovoCoronavirus&menu=vuoto.

The blatant impreparedness of health protection systems is even more scandalous since there had been many warnings by international agencies. May be the most important one was the one launched in September 2019, by the Global Preparedness Board set up by World Health Organization and World Bank, which issued a report affirming that "there is a very real threat of a rapidly moving, highly lethal pandemic of a respiratory pathogen killing 50 to 80 million people and wiping out nearly 5% of the world's economy"[4]. Apparently, no countries took such warning seriously.

Now we know that such pandemics can rapidly upset every country and the world system altogether, and that is probably only the beginning, but we are not at all sure that the lessons produced by this traumatic experience have been really learnt by the different governments and other authorities existing at national and international level.

What is clear is that we face an enemy which is largely still unknown, apparently extremely lethal and contagious, but whose consequences are still not ascertained at all by the scientific community.

Viruses are at the same time the most simple and most complicated entities circulating in the atmosphere. Quoting a passage of a recent short novel written by a Venezolan politician, lawyer, poet and writer, who has been until recently the Bolivarian embassador in Rome,

" – Los virus son unas criaturas fascinantes -le oyó decir-. A lo largo de los últimos siglos fueron considerados seres vivos, son las estructuras orgánicas más simples y a la vez más sofisticadas del planeta, el primer y el último estadio de la evolución del mundo -concluyó-"[5].

Therefore, humankind is nowadays facing a very difficult and unpredictable situation, which requires a new approach based on the unprecedented reinforcing of international cooperation and the deep revision of outdated and obsolete ways of thinking, but, as we will say, the reaction is not at all, until now, a satisfying one.

[4] https://www.rte.ie/news/coronavirus/2020/0321/1124579-should-we-have-been-caught-off-guard-by-covid-19/.

[5] Isaías Rodriguez, El paciente del miedo, in https://cotayorosebud.wordpress.com/2020/07/19/el-paciente-del-miedo/.

2. THE COVID AND THE CONFLICTS AT INTERNATIONAL AND INTERNAL LEVEL

Another reason of skepticism derives from the fact that several countries squarely rejected the invitation made by the UN Secretary General to suspend military activities and conflicts and also to interrupt the so-called unilateral coercive measures (UCMs) inflicted to other countries, during the whole phase of raging of the pandemic.

In situations like these the health system already suffered heavily because of the different forms of blockade and sanctions decided by the US government and some of its allies, notably the European Union. The International Association of Democratic Lawyers considered at this regard that "COVID-19 pandemic poses a major threat to people throughout the world and that it will especially impact those countries which are suffering from sanctions, blockades, occupation and siege". IADL further emphasized that **"**defence of public health is a stated purpose of the UN Charter (Art. 55)" that "All States are obliged to contribute to this end (Art.56)" and that "health constitutes a common and indivisible heritage of the whole of humankind. Given the capacity of viruses to spread rapidly all over the world, it is unthinkable – practically as well as morally and legally – to protect health only in certain countries or regions while neglecting the others".

- On this basis IADL made the following requests.

It urged the U.S. government:

- "To immediately lift all UCMs against Iran, a targeted nation that is heavily affected by COVID-19. While these sanctions persist and have even been expanded, 1,934 Iranians have lost their lives to COVID-19, including health workers and patients whose lives may have been saved with access to essential health items;
- To immediately lift sanctions against Syria in order to allow the government to buy all necessary medical supplies needed to cope with the pandemic;
- To take immediate action to end the siege of Gaza, including addressing the use of substantial amounts of U.S. military aid

by Israel and Egypt in order to enforce the siege against over two million Palestinian civilians threatened by COVID-19;

- To immediately lift the blockade against Cuba, a State which is playing a critical role in stopping the pandemic. Hundreds of members of Cuban health brigades are supporting COVID-19 patients in various parts of the world where many countries requested their assistance. The Cuban health brigades are in place in the Lombardy Region of Italy, the most affected area of the world; Cuban scientists have developed drugs which could provide effective in treating the virus and need testing, and
- To immediately lift all sanctions against Venezuela".

IADL further urged "the immediate withdrawal of sanctions against Nicaragua, the Democratic People's Republic of Korea and other sovereign States subjected to UCMs by the United States in order to coerce regime change".

IADL also urged "the governments of Canada, Australia, the United Kingdom and the countries of the European Union to end their own UCMs directed against many of the same countries, including Iran, Venezuela, Syria and the Democratic People's Republic of Korea. The governments that have imposed sanctions are also complicit in the spread of the pandemic in areas where these sanctions are in place".

IADL finally demanded "that COVID-19 must serve as a call for global solidarity rather than economic war and devastation".

Also the UN Secretary General Antonio Guterres, as anticipated, called for the suspension of the sanctions against a series of countries, like Venezuela, Cuba, Iran, North Korea and Zimbabwe[6].

But, notwithstanding such and other stances against the maintaining of UCM during the pandemic, US and other States continued with their policies. In some cases, like that of Venezuela, which recently suffered the hijacking of 31 tons of gold, attributed by the Bank of England and the High Court of England and Wales to the self-proclaimed bogus "president" Guaidò, the sanctions have

[6] https://foreignpolicy.com/2020/03/24/un-coronavirus-cuba-iran-venezuela-north-korea-zimbabwe-sanctions-pandemic/.

been even reinforced and accompanied with attempts of military intervention and infiltration of terrorist groups.

Military conflicts also continued to ravage entire countries like Yemen, Libya and others. Netanyahou, although Israel is gravely affected by the pandemic, decided to annex the Palestinian territories.

Another negative aspect of the present situation is the attempt by some authoritarian governments to instrumentalize the pandemic in order to approve measures aimed at impairing the possibility of social and political opposition movements to espress themselves, which appears even more important taking into account the different solutions and alternatives in face of the virus and of its shocking economic, social and political consequences. Moreover the contagion strikes very heavily inside the prisons and other repressive institutions such as refugees camps.

3. WORST AND BEST PRACTICES

There wasn't any coordinated response to the contagion among the different governments. Some of them took bizarre and noxious attitudes, denying the danger represented by the pandemic. So did US President Donald Trump and the Brazilian President Jair Bolsonaro. No surprise at all that these two big countries were devastated by the virus. Today, 19th of July 2020, the statistics tell us that the reported deaths until now are 140.119 in the US and 78.772 in Brazil, by large the most affected countries worldwide[7].

Catastrophic, at least at the beginning, was also the reaction of European governments and by EU as a whole. By now almost 200.000 casualties have been reported in the European continent. The most affected European country has been the United Kingdom with 45.273 deaths, followed by Italy (35.042 deaths) France (30.152 deaths) and Spain (28.420 deaths)[8].

[7] https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases.
[8] Ibidem.

A poll among European citizens effectuated by the well-known British newspaper "The Guardian" showed that the popular trust in the institutions of the Union dramatically decreased, and most citizens expressed "deep public disappointment in the EU's fragmented coronavirus response and European governments' handling of the pandemic", although at the same time "an overwhelming majority nevertheless say the pandemic has convinced them that EU governments should cooperate more closely in the face of future external threats"[9].

Only the adoption of the lockdown and social distancing approach permitted to save many lives. A research conducted by London based Imperial College estimates that no less than 3 millions of human lives could be saved in this way[10].

In Italy, such a line was successfully adopted by the Government, notwithstanding persistent critics of industrialist sectors and of some political forces. To some extent, the Government chose to safeguard the constitutionally protected value of human health above economic profit. Such a choice, albeit not easy and not undebated, helped to inverted the disastrous direction in which the country seemed to go in the month of March.

Other success stories, confirmed by the evident force of numbers, have been those of Cuba and Vietnam. In Cuba there have been until now only 2.445 cases and 87 deaths. To make a comparison, the neighbouring Dominican Republic, with a similar territory and population, had about twenty times more cases (51.519) and more than 10 times more deaths (971). Following an article published by the British Society of Medicine the secret of Cuban success is represented by the crossgovernment plan immediately put into action after the first imported (unfortunately by Italian tourists) cases of contagion: "Screening was carried out in Cuba by tens of thousands of family doctors, nurses and medical students on foot, with testing, tracing and quarantining of suspected cases in state-run isolation centres for 14 days"[11].

[9] https://www.theguardian.com/world/2020/jun/23/europeans-believe-in-more-cohesion-despite-eus-covid-19-failings.

[10] https://www.imperial.ac.uk/news/198074/lockdown-school-closures-europe-have-prevented/.

[11] https://www.rsm.ac.uk/media-releases/2020/covid-19-cuba-offers-uk-salutary-lesson-in-shoe-leather-epidemiology/.

Of course these positive results are due to a political and social system giving paramount importance to human health. As declared by professor Ashton in the article ""Cuba has long been renowned for its ability to turn in world beating health statistics while continuing to struggle economically. With a health system grounded in public health and primary care, the country invests heavily in producing health workers who are primarily trained to work in the community. Their efforts with COVID-19 have been outstanding.". This also on the plan of international cooperation: ""Cuba was one of the first countries to send health workers to support the control of the epidemic in Wuhan, back in January, just one example of its unrivalled commitment to international solidarity in humanitarian disasters."

The international commitment of Cuban doctors for the health of everyone is well-known in many countries of the world. A new element emerging from the Covid pandemic is nowadays the extension of such a commitment to some European countries like Italy and Spain. In Italy, two cuban medical missions making part of the "John Reeves medical emergency brigade" intervened in the most affected parts of the country, giving a substantial and precious aid to the health authorities in Crema (Lumbardy) and Torino.

An extremely interesting essay on various aspects of the Cuban reaction to COVID is contained in an essay written by the President of the Republic of Cuba, Miguel Diaz-Canel Bermúdez, together with the Cuban academician Jorge Nuñez Jover, President of the Chair of Cience, Technology and Society of the Habana University[12]. Objective of this essay is to "systematize and reflect on the experiences accumulated in the confrontation with COVID-19 in relation to the link between scientists and government". It shows "the working system used, the main actions and research carried out and summarizes the assessments and learnings that this experience yields", highlighting "the important role played in it by national science and technology, organically linked to government management, all depending on providing a social, scientific, political and health response capable of meeting the challenge that the

[12] Gestión gubernamental y ciencia cubana en el enfrentamiento a la COVID-19, in Anales de la Academia de Ciencias de Cuba, vol. 10, n. 2 (2020), especial Covid-19.

pandemic has posed to us". Considering that the COVID-19 crisis is global, "the article begins by exploring some features of neoliberalism that hinder confrontation with crises such as the one generated by the new coronavirus (SARS-CoV-2). The convergence of several crises at the global level and the increasing complexity of the challenges to be dealt with accentuate the need to escape the trap of neoliberalism. The text emphasizes that what has been achieved in Cuba also has an ethical and political significance"[13].

The other success story worth to be mentioned here is that of Viet Nam, with only 19 deaths. In this case, also the experience accumulated in previous analogous circumstances, like those of the Sars epidemic, surely played an important role. A study by the Johns Hopkins University and other research centers emphasized that "during the response to Severe Acute Respiratory Syndrome (SARS) in 2003, the country prioritized population health over concerns for the economic impact of its response"[14]. Already in that occasion "Officials deployed a multi-sector response incorporating military, public security services and grassroot organizations while ensuring that transparent risk communication and effective community mobilization were emphasized throughout the outbreak"[15]. In the case of COVID the response was extremely rapid and effective: "Vietnam began preparations for the outbreak in earnest as COVID-19 cases rose in its neighbor, China. Screenings for COVID-19 amongst passengers at airports began on January 11, 2020 - the day after China reported its first death - and mandatory quarantine upon arrival for passengers from high-risk areas was soon implemented. The Health Ministry convened a response strategy meeting with the World Health Organization and other partners on January 15. Schools were closed the same month. A National Response Plan and a National Steering Committee on Epidemic Prevention was in place before the end of January. In February and March, travel restrictions became even more

[13] Ibidem.

[14] https://www.outbreakobservatory.org/outbreakthursday-1/7/9/2020/zero-covid-19-deaths-in-vietnam.

[15] Ibidem.

strict with flights to China and other high risk countries suspended, and quarantine was mandated for all international arrivals. In late March, the country suspended entry for all foreign international arrivals. Leaders implemented a national lockdown for the first three weeks of April with a suspension of nonessential businesses, but local lockdowns occurred as early as mid-February as a rural community of 10,000 people faced a 20-day lockdown after seven cases were reported"[16].

To synthetize, the reaction by the Cuban and Vietnamese governments, which succeeded in protecting their citizens' health, constitutes an example to be followed. In both such experiences we can identify the following basic elements: 1) primary importance conferred to health protection with an adequate system and efficacious methods of containment and contrast based on the grass-root mobilization of health personnel, other sectors of the State, and the citizens altogether; 2) rejection of the neoliberal creed attributing central importance to profit and capitalist economic interest; 3) redaction of a national plan with the synergic interplay of various public institutions; 4) lockdown and social distancing defeating any undue pressure of the economic sector "to continue the business as usual" exposing the whole population and the working class in particular to dangerous contagion.

As mentioned, the Cuban strategy worked also at international level. This is even more impressive, since the country is subject, as said before, to heavy unilateral coercive measures by the government of the United States.

Confining ourselves to the Latin American situation, we have to notice that the other countries members of ALBA also had a very limited number of deaths: Nicaragua 99[17], Venezuela 110, despite the impact of US and European sanctions, while other countries paid a very high toll. Apart from the already mentioned Brazil, we had until 12.998 casualties in Peru, 5282 in Ecuador, 38.888 in Mexico, 6.516 in Colombia, 8.347 in Chile and 2.204 in Argentina. The most powerful State in the Western Hemisphere, the United States, totalized at its turn

[16] Ibidem.

[17] Nicaraguan opposition claimed that these figures are not credible and a scientific and political debate took place on the matter, on the scientific journal "The Lancet".

3.711.464 cases and 149.119 deaths, the worst national situation in the whole planet. All figures are updated to the 19th of July 2020.

4. THE MULTIFACETED ASPECTS OF INTERNATIONAL COOPERATION AGAINST COVID-19

The recent Covid pandemic evidentiated the urgent need for an international cooperation on the matter.

Such a cooperation is necessary in various fields.

First of all, international scientific cooperation is necessary in order to identify the most precisely the origins and causes of the pandemic. The particularly complex nature of the virus, whose characteristics are still very far from clear and well-known to the scientific community, requires a constant exchange of information and the joint promotion of research on many aspects. Access to big data concerning the matter is also extremely necessary in this perspective.

The intertwining between environmental problems and contagion diffusion indicates that international cooperation on environmental protection should be reinforced also in order to fight against the virus. As shown by the history of many centuries and the recurring scourge of pandemics which periodically affect the whole or a big part of the planet, viruses develop themselves in the framework of ecosystems, and we know that nowadays unfortunately our ecosystems are fragilized and affected by a long series of problems, first of all the so-called climate change. Therefore research on COVID has to be conducted together with research on environmental problems.

But research is necessary, too, on many other topics related to the pandemic. To sum up it is necessary to stimulate, promote and organize at international level "every research aimed at accumulating scientific knowledge on:

a) the origin of the virus;
b) the structural reasons which allowed the birth, multiplication and rapid diffusion of the virus;

c) the spread of the epidemic, giving precise figures of the people affected and dying;
d) the creation of a vaccine able to prevent the disease"[18].

Another very important field for international cooperation is that of the coordination among the various States on the measures to be adopted in order to contain the contagion. It is indeed impossible to fight successfully the pandemic, if some countries allow unrestricted circulation of persons and goods. This entails not only an unfortunately rather high number of casualties for the "undisciplined" countries but also an emperilment of public health at global level.

Furthermore, there is also the need for an equitable distribution of all means necessary to prevent and contain the pandemic, from the masks to the (future) vaccine to come, from the training of specialized medical personnel to diagnostic and therapeutical tools.

In this perspective, "there is a strong and urgent need to coordinate every initiative taken by States, international organizations and other subject in the following fields:

e) the containment of the pandemic.
f) the distribution of all means necessary to thwart the pandemic.
g) the distribution at equitable conditions of the vaccine, rendering it affordable and accessible to all.
h) the reinforcement of international organizations charged of fighting against this and other disease, first of all the World Health Organization (WHO)"[19].

Hence, international cooperation should be escalated and improved at every level. We also need a deep philosophical foundation for such an unprecedented upgrading of international cooperation, which can be found in the so-called *international symbiotic system*共生 (Gòngshēng)„ "a theory proposed by the so-called "Shanghai School" of International Relations, which has brought together knowledge of sociology, biology and philosophy with international relations", or, on

[18] Maria Francesca Staiano, Fabio Marcelli, Italy's response to COVID-19 and the need for International Cooperation.
[19] *Ibidem.*

a mere political and legal basis, in the doctrine of the shared future of mankind, "the new doctrine of international law and international relations approved by the XIX Congress of the Chinese Communist Party in October 2017, born as a reply to the growing global problems and challenges afflicting nowadays humankind, among them of course, that of pandemics like the present one"[20].

5. WHO

From all the mentioned points of view is indeed very crucial the role to be played by the World Health Organization, the United Nations agency active in the field of prevention and containment of diseases.

In this extremely difficult scenario, WHO confirmed the essential importance of the hubs dedicated to international cooperation in the framework of the United Nations system, foremost on such vital issues like control of pandemics and safeguard of human health.

First of all we have to briefly recall the legal foundations of WHO's existence and action. They lay in some basic norms contained in the United Nations Charter and in the WHO Constitution itself.

It is worth mentioning art. 55 of the Charter, which reads as follows:

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

[20] *Ibidem*. On the doctrine of the "shared future of mankind" see F. Marcelli, "A Shared Future of Mankind: a New Concept and its Paramount Pedagogical Importance", in *Proceedings of the 2019 International Conference on Pedagogy, Communication and Sociology (ICPCS 2019)*, https://download.atlantis-press.com/proceedings/icpcs-19/125906981

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

As we can see, health is specifically mentioned among the "international problems to be solved" with a view to the creation of a new international order with the mentioned characteristics.

As anticipated, the other important legal basis of international cooperation on health matters, including prevention, control and containment of pandemics, is contained in the WHO Statute itself.

In particular we have to recall Article 2 of WHO's Statute, establishing the functions of that organization, which entrusts to it the task, to act as the directing and coordinating authority on international health work (letter *a*), establishing furthermore a detailed and comprehensive list of more specific task including i.a. those of collaborating with UN agencies and governments, of assisting governments, of promoting and conducting research, teaching, of standardizing diagnostic procedures and so on. It is worth mentioning specifically letter *g* of this Article, concerning the function of WHO to stimulate and advance work to eradicate epidemic, endemic and other diseases.

Moreover art. 21[21] and 22[22] of the Statute give to WHO an outright legislative power in the field of prevention of international spread of disease.

We have to add that WHO has been, in the aftermath of the outbreak of COVID-19 on world scale, subject to many critics, some of which are entirely justified. At the same time, however, it has to be recognized that it still constitutes an essential and indispensable tool for international cooperation on the matter. Therefore it should be reinforced both from the financial point of view and from the legislative one, giving to it the powers necessary to coordinate efforts and attitudes undertaken at national level.

[21] "The Health Assembly shall have authority to adopt regulations concerning: a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease;...."

[22] "Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice"

To this regard, Trump's decision to withdraw from WHO[23] has to be denounced as an act of high international irresponsibility, totally not in line with some basic duties of a Great Power like the US. Fortunately, another Great Power, the Popular Republic of China, announced its intention to relaunch international cooperation in health issues, announcing, in the words of President Xi Jing Ping, the intention to build a "community of shared health" for mankind taking into particular consideration the urgent needs of the poorest parts of the planet[24].

6. POSSIBLE SYSTEMIC CONSEQUENCES OF THE PANDEMIC

Pandemics are, as usual, the occasion and the reason for redetermining the basic conditions of human society and coexistence on our planet. But in which direction?

Present signals are not at all encouraging. The virus continues to devastate the planet and in particular two huge countries like the US and Brazil, probably also because of precise responsibilities of the authorities of these countries, who openly underestimated the danger, assuming irresponsible attitudes inciting people to demonstrate against the social distancing. Doctors and nurses, exalted for a short period as "heroes" are again beaten and arrested by police in many countries when the ask for better working conditions, higher salaries and against the precarity of their jobs. An unprecedented collapse of world economy is coming up, without solicitating the Western ruling class to reconsider and abandon its neoliberal dogmas, although in the facts, some measures are taken which appears at odd with such a noxious ideology. Social and economic inequalities are increasing and the financial capital, especially its criminal wings, are taking control of many economic sectors and goods.

[23] https://edition.cnn.com/2020/07/07/politics/us-withdrawing-world-health-organization/index.html.

[24] See https://www.chinadaily.com.cn/a/202004/28/WS5ea77002a310a8b241152203.html.

This is not at all acceptable. A complete reversal and resetting of dominant patterns is necessary, if we want to survive and safeguard our health, the most important and indispensable of our assets. Refocusing the whole of the international system in all its aspects (political, social, legal, economic) on the primary objective of the safeguard of human life appears nowadays necessary more than ever. Continuing "business as usual" or "war as usual" is no solution but only a step more towards the abyss. We have to draw a series of important lessons from this unfortunate situation.

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ISBN: 978-65-00-40218-6

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by Heinz-Dietrich Steinmeyer

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter2

DEALING WITH COVID-19 – SOCIAL AND LEGAL ISSUES FROM A GERMAN AND EUROPEAN PERSPECTIVE -

by
Heinz-Dietrich Steinmeyer

1. INTRODUCTION

There is one thing in the world currently which affects almost all people on this planet. COVID-19 is in any country of the world; there may be one or two small states and islands in the Pacific which have no cases. The death toll on this planet is approaching one million people and more than 25 million people have suffered from COVID-19 or are currently ill. These are the official figures. There may be far more unreported cases.

The figures differ considerably between countries in the world – taking the figures in relation to population. The US have a death toll of 180.000 people and a population of 330 million. Germany has a population of 80 million and a death toll of about 10.000 people. So the US has a death toll about 4.5 times as much as Germany. The situation in Brazil is similar. There is a considerable discussion about why this is the case and what should be the consequences.

Taking Europe, it can be seen that the situation in the different countries differs very much[1]. Italy for example had real troubles in April with a high death toll and a lot of problems. Spain and Croatia are in trouble now; these countries very much depend on tourism from the north but it is of risk now to travel to Dalmatia, the Baleares and the Canary Islands. The German Federal Government has issued warnings because of high CIVID-19 figures in these areas or is close to – in case of the Canarias. The UK seems

[1] See on this and the following *Becker et al.,* Existenzsicherung in der Coronakrise: Sozialpolitische Maßnahmen zum Erhalt von Arbeit, Wirtschaft und sozialem Schutz im Rechtsvergleich, Max Planck Institute for Social Law and Social Policy, working papers law Vol. 6 Munich May 2020

to have trouble all the time also due to inconsistent policy when dealing with COVID-19.

Just now the figures in Germany are increasing again – very likely due to travelling during vacation to countries of higher risk. People in Germany also – at least in part – have the view that COVID-19 is not that dangerous as it was said to be due to the relatively low figures for a longer period and so – actually still a minority – is taking precautions not seriously.

There are serious concerns that the economy will suffer from the pandemia. The globalized economic system is suffering due to disruption of connections; Germany is very dependent on exports. Also the domestic market has changed; some branches gain during pandemia and others may almost loose their market. After a series of very good years with low unemployment people fear downturn of the economy, companies going out of business and increasing unemployment.

2. ANSWERS TO COVID-19 IN EUROPE

In March 2020 several countries in Europe reacted – some mid-March and others one or two weeks later. For a number of weeks this had been a total lockdown of the countries. Some asked for social distancing and others even reacted with curfews and all shops and facilities, had been closed except those necessary for day-to- day life like supermarkets, pharmacies, medical facilities etc. As far as possible people worked from home office and still do.

Travelling within the EU – usually without border control due to Schengen system most EU countries are participating in – was restricted and needed special reasons and permits. This has been a very special measure since one of the basic principles of the European Union is free movement of workers and persons and this had now to be restricted due to health reasons based on clauses in the TFEU (Treaty on the Functioning of the European Union).

Borders to outside EU have been closed generally or at least people have been warned and may have to endure quarantine for two weeks after returning from certain countries. .

Within the EU these measures are almost lifted now and in Germany all shops, hotels. restaurants are open again but there are still strong rules on hygiene[2]. Events with large number of people participating are still not allowed. The soccer matches are without fans, theater may allow only a limited number of people in the audience and carnival may be very much restricted or even may not take place.

3. ECONOMIC CONSEQUENCES

Due to lockdown and the obstacles caused for the globalized economy due to COVID-19 almost all countries suffered considerable decline in GDP. This ranges between 10 and 20 % in 2020 with certain differences between countries. The first – already weak – enterprises have filed insolvency proceedings at the beginning. Very likely many more will follow.

Very much affected are airlines – the German airline Lufthansa received a big state loan for survival since passenger air traffic came almost to a total stop. Restaurants were totally closed for weeks and hotels could be used for necessary business trips only. Big companies like Volkswagen stopped their production and most business trips have been replaced by online meetings. A number of facilities are still closed and soccer matches are still without audience. Theaters are restarting cautiously and concerts with a big audience are still out of range.

What we know right now is that we have a downturn of economy. What we do not know is if, how and when the economy will recover. Supply chains are interrupted and new supply chains have to be established not knowing now which enterprises will finally survive the crisis. It is expected to be some kind of a restart of the world-wide economy with new rules, different players and unknown effects.

If you travel Germany right now you will not see very much differences right now – life is going normal but face masks everywhere.

[2] Current information on Germany to be found at the website of the Federal Government https://www.bundesregierung.de/breg-de/themen/coronavirus

Companies already try to limit costs and therefore try to make redundant part of their staff. As far as possible people work in home office.

The Federal Government has set up a number of programs to help the enterprises to survive the crisis[3]. So companies may get loans or even subsidies in order to keep going. This causes a heavy deficit of the federal budget and may also produce a mood and trend towards a state-dominated economy. The usual and necessary entrepreneurship may not be attractive anymore and thus the restart of the economy may be slower after pandemia. There is also a discussion about "Zombie"-enterprises which have no real chance of survival in an after-pandemia world but are kept alive by state money.

The government has lowered VAT from 19 % to 16 % from July 1st to December 31st in order to stimulate consumption.

The government also tries to avoid insolvency proceedings now in a period with unclear economic perspectives. Therefore a suspension of the duty to file insolvency proceedings has been introduced which has had a deadline by September 30, 2020 and is now extended to December 31, 2020. After that date a considerable number of insolvencies are to be expected.

This very likely - in combination with other effects – will result in unemployment which is not yet the case – other than for example in the US. The unemployment rate in 2019 in Germany has been 5 %.

4. SOCIAL CONSEQUENCES

This leads to the social consequences of the pandemia.

As in almost all countries low-income people may be more affected than higher income people. Like in Brazil low-income people live in smaller homes and apartments and this closer together which means a higher risk of infection. Also a lockdown is far easier to be kept up in a house with a garden than in a small downtown apartment.

[3] See https://www.bundesregierung.de/breg-de/themen/coronavirus

In a number of countries it is also a matter of affordable health care and good health care might be a matter of money and price. For low-income people it is also more likely to loose jobs due to pandemia and even to loose housing since they might not be able to pay rent or mortgages anymore.

All this then may result in social tensions and even uproar. Therefore it is important for a country and for its government to address these problems. There might be special measures to be introduced during the pandemia and already existing instruments of a sound social state / welfare state.

In this respect Germany seems to be well prepared.

a. Health Care

As far as the health care system is concerned it was functioning sufficiently during the first wave of COVID-19; there have been no shortages and enough places where COVID-19 patients could be treated. Germany even opened its hospitals for patients from other European countries where the system did not work that way or where the pandemia was more severe like Italy and France. German hospitals are now prepared what might be the second wave of the pandemia. There are special programs for the hospitals to enable them to finance the preparedness.

b. Unemployment

Beside health care a very important social aspect is fighting unemployment in such a crisis. Almost not affected by this risk is the public service which needs to be functioning in times of such a crisis. In other areas there might be jobs finally redundant due to a different after-pandemia economy. But there are also branches of industry which might be prosperous again after pandemia but suffer during the pandemia. In the latter case companies might fire people now and rehire them later – and produce unemployment.

For this there are measures in Germany to avoid unemployment. These instruments have been used during the economic transformation of the East German economy after reunification and during the financial crisis in 2007/2008. This instrument is called "Kurzarbeit" which means short-time work. If the enterprise is expecting that there

is not enough work to be done for the entire staff they might reduce the working hours so that all employees might have work to do and would not be redundant. By this means "total unemployment" could be avoided. The employer then pays only for the work done and the rest is covered by a special short-time work allowance if the requirements of this benefit are met. It is a combination of a labor law instrument and a social security law instrument.

The short-time work allowance is a benefit like the unemployment benefit and constructed alike in general. So the law provides in Sec 95 Social Code Third Book that employees have the right to receive short-time work allowance. Therefore it is their entitlement. Another aspect is that in order to get this allowance paid the employer has to notify the employment agency. This can also be done by the Works Council. If the employer notifies, he has to attach the statement of the Works Council. According to Sec. 323 Subs. 2 Social Code Third Book the employer has to apply for short-time work allowance. This can also be done by the Works Council.

This and the reimbursement procedure is done for practical reasons. While unemployment is an individual risk of an individual person who then receives the benefit and looks for a new job and will be controlled individually the short-time work allowance covers a collective risk. A certain percentage of workers has to fulfil the requirements and the plant / enterprise as such has to be in a situation of need for short-time work. In such a case it is simply easier to manage it via the employer; the interests of the workers are sufficiently protected by the Works Council. The benefit as such still is a benefit where the employee holds the entitlement. This can also be seen from rules which take into account the individual situation of the employee – for example in case of work time bonus (to be taken into account or not).

There has to be a considerable lack of work – connected with loss of income, the enterprises (employers) and the employees have to meet certain requirements – and finally the Work Agency has been notified about the lack of work.

This benefit is usually limited to a duration of 12 months and replaces the income gap by 60 to 70 %. Due to Corona there are now some specific rules[4]:

a. The benefit level has been increased to finally 80 % (87 % in case of child) of the difference between previous wages and those as result of short-time work
b. The percentage of employees to be affected to be eligible for the allowance has been lowered from 30 % of the workforce to 10 %
c. The social security contributions will – upon application – be reimbursed by the employment agency. Generally – before Covid-19 – the employer had to cover also the social security contributions of the employee on the allowance which made short-time work expensive for him.
d. Also temporary agency workers may be eligible for the allowance. In principle they have had a claim for wages against the temporary employment agency. This does protect this kind of work economically.
e. This benefit may be received for up to 24 months – until end of 2021.

Obviously this measure may calm down social tensions – at least for the time-being. As a result a number of European countries has copied this program at least in part.

The program is run by the unemployment agency which usually finances all its benefits by contributions of employer and employees. In this case and with this more generous provisions it is beyond the financial ability of a contribution-financed system. Therefore there are considerable subsidies by the federal budget.

a. Pension Insurance and Old Age Income Security in General

Not really affected – at least for the time being – is pension insurance. Its mechanisms do work properly during pandemia which means that pensioners receive their benefit and pensions are even increased in accordance with last year's wages. Here there are

[4] See Gesetz zur befristeten krisenbedingten Verbesserung der Regelungen für das Kurzarbeitergeld of March 13, 2020 BGBl. I pp. 493

already issues on the contribution side. Germany has a Pay-As-You-Go system which means that the current benefits are financed by the current contributions. Companies now earn less and social security contributions based on short-time work are lower. Companies are also entitled to ask for deferment of contributions. So all in all the financial basis of pension insurance will come under stress and in the end an increase of contributions might be unavoidable with adverse results for the economic recovery. The alternative might be cuts in benefits which might result in social tensions.

This all will be an issue in the after-pandemia time.

As far as supplementary pension systems are concerned these are predominantly financed by the enterprises which are now facing financial problems. As a result they might not be able to make contributions and so the pension funds may get in trouble. Consequently there are discussions on how to deal with this issue. The employer may ask the workers to contribute themselves – but the procedure to achieve this takes time. The employer or the pension fund might consider to cut the benefits which again is difficult for legal reasons. There have to be very strong reasons to cut benefits if they are already earned by work done. It has to be proved that the problem is permanently there and not just as a temporary consequence of a temporary pandemia. If and how all this is the case is difficult to evaluate and therefore such an adjustment would face serious legal risks.

In this area it can be seen that the problems to be solved are still ahead and that it is not just a challenge to manage the actual crisis but also to deal with the future challenges after the pandemia.

5. EUROPEAN PERSPECTIVE

The countries of the European Union have been affected by the pandemia to different extents. In addition the economic strength of the countries is different. During lockdown the countries all were on their own and the European idea came under stress. Therefore about a month ago the EU countries agreed on a program to help

most affected countries and areas specifically and the EU economy in general. A program of about 1 billion Euro has been set up to help. This contains subsidies as well as loans and is in the end financed the economically string countries like Germany, the Netherlands and the Nordic countries as well as France[5].

Generally it is a program to sponsor specific projects rather than giving just money to Member States.

This is a sign of European solidarity and by this European integration has made a further step forward.

6. FUTURE CONSEQUENCES

What about the future? One time the pandemia will end. We may not be in the old world again but will live under different conditions and in a different social and economic environment. Unless you are a prophet you may not foresee what will happen and what the exact challenges are.

But what can already be pointed out is that our social systems will get under heavy stress. Are they financially affordable after the pandemia or do we have to cut them back. Can business and society ear the costs under different economic circumstances?

We will for sure have a discussion concerning more efficiency also in social policy but we should not simply cut back the system. It should be clear that it is important to have a sound social system in a severe crisis. This paper may have figured out how important this is.

A crisis produces problems for society and social problems or may make them worse. To face this challenge the best solution is a sound social system - combined with a strong economy.

[5] See *European Union*, The common EU response to COVID-19, https://europa.eu/european-union/coronavirus-response_en

ISBN: 978-65-00-40218-6

CHAPTER

3

THE IMPACT OF THE CURRENT PANDEMIC ON THE DETENTION CENTERS' POPULATION AND THE DIFFERENT ROLE OF THE GOVERNEMENT, THE JUDICIARY AND THE PRESS: AN ITALIAN PERSPECTIVE -

by Federica La Chioma

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter3

THE IMPACT OF THE CURRENT PANDEMIC ON THE DETENTION CENTERS' POPULATION AND THE DIFFERENT ROLE OF THE GOVERNEMENT, THE JUDICIARY AND THE PRESS: AN ITALIAN PERSPECTIVE

by
Federica La Chioma

Abstract: the current pandemic has dramatically urged every State to grant the preparedness of its detention system to protect from the risk of contagion its population, whose members are obliged to live in close proximity and whose clerks are mostly excluded from forms of smart or remote working. Patently such features expose the detention environment to develop a high risk of contagion of Covid 19 should adeguate prevention measures not be adopted and this argument was recently sustained by the Italian judges who placed under home arrest some Mafia associates who developed critical health conditions while being in custody under the most restrictive detention regime provided by the Italian legislation (so called art. 41 bis Ord. Pen.). The echo of such judicial decisions, that were perceived as a disguised release in favour of perpetrators of some of the most heinous crimes recognized by the Italian criminal code, determined a severe reaction both from the victims' families and from the press and ultimately led the government to intervene in order to reform the decision making process. This scenario therefore suggested a reflection upon the urgency of finding even in times of pandemic an adequate balance between the rule of law and the respect of the fundamental rights of the detained people, which is constantly pursued by judges through decisions which should be made accessible to public opinion, in order to prevent dangerous social conflicts expecially in areas where the traumatic memory of the effects of the committed crime is dramatically still alive.

1. INTRODUCTION: THE LEGISLATIVE FRAMEWORK AND THE CASE LAW

One of the pivotal achievement of the Italian legislation in the fight against Mafia was the *double track*, as the introduction of a differential procedural regime in the treatment of Mafia crimes (*i.e.* those listed in art. 51, para. 3 *bis* and 3 *quater* of the Italian criminal procedural code) was called in order to be distinguished from the ordinary one adopted to cope with all the other criminal offences. One of the feature of the *double track* is the exclusion of perpetrators of Mafia crimes from the access to some benefits that on the contrary are awarded, under certain circumstances, to those who are suffering a period of detention for other crimes[1]. Remarkably Mafia associates can have access to these benefits (*e.g.* home arrest in case of particularly severe health conditions pursuant to art. 47 *ter* of the Italian Detention Statute, adopted by means of law n. 354/1975) only if they cooperate with the judicial authority and if no pending connection with the organized crime is proved.

Nevertheless even Mafia associates who decided not to repent could be granted home arrest if a severe disease were proved, capable of hindering their chance of surviving or impeding them to be adequately treated within the medical centres displaced into the detention facilities or causing them additional and excessive sufferings. As a matter of fact according to the Italian Supreme Court[2] such a condition would be contrary to the sense of humanity inspiring the recovery of the perpetrators of crimes by means of detention pursuant to the Italian Constitution and would violate their fundamental right to the highest attainable standard of health. Notably such right not only is presided by the Italian Chart, but is also recognized by the European Convention of Human Rights and by the European Charter of Fundamental Rights, therefore a judge who refused the benefit despite the evidence of a severe illness affecting the requesting party would breach articles 27, 32

[1] See DOLCI, A., *Covid-19 e art. 41-bis Ord. Pen.*, in *Giurisprudenza Penale Web*, 2020, 5, p. 1.

[2] In particular see Cass., Sez. I, 17. 5. 2019, n. 27352, Cass., Sez. I, 1. 12. 2015, n. 3262, Cass., Sez. I, 14 aprile 1993, n. 1537.

and 117 of the Italian Constitution and expose the State, under certain conditions, to an international responsibility for violation of human rights[3].

A concrete application of this doctrine was made during the recent pandemic, that acted as a trigger of the trade off between national security and individual right to health tailored as above mentioned by the Italian Supreme Court, thus highlighing the difficulties in reaching a proper balance between such values.

The Italian public opinion was hit by some judicial decisions[4] that placed under home arrest some Mafia associates who were restricted – because of the high risk for the national security they embedded – under the most severe detention regime provided by the Italian Legislation and applied by means of a Ministry of Justice decree (art. 41 *bis* of the Italian Detention Statute or *Ordinamento Penitenziario*), according to which the ordinary detention treatment is supended in order to reach the substantial isolation of the detained person[5]. His or her contacts both with the other prisoners inside the center and with the relatives outside it are strictly limited on the assumption that the links with the organized crime are still existing despited the detention (*e.g.* by means of visiting permissions) and need to be interrupted.

Nevertheless in all the decisions at stake the key argument for the concession of home arrest was the serious life risk deriving from the documented disease affecting the requesting party, that could not be adequately treated in the medical centres operating within the jail or in connection with it. As a matter of fact in one of the case under discussion the hospital where the claimant could have been treated had been in the meanwhile transformed into a Covid-19 Centre deputed exclusively to the treatment of such virus and could not accept any other patient. Moreover the particularly severe illness affecting the

[3] Therefore this institute is often named as "*humanitarian home arrest*" according to DELLA BELLA, A., *Emergenza COVID e 41 bis: tra tutela dei diritti fondamentali, esigenze di prevenzione e responsabilità politiche*, in *Sistema Penale*, 1.5.2020, available online at https://www.sistemapenale.it/it/opinioni/scarcerazioni-boss-41-bis-milano-sassari-emergenza-covid-decreto-legge-28-del-2020-della-bella

[4] See in particular Trib. Sorveglianza Sassari, ord. 23.4.2020 and Mag. Sorveglianza Milano, ord. 20.4.2020.

[5] For further information on the *art. 41 bis Ord. Pen.* regime see DELLA BELLA, A., *Il "carcere duro" tra esigenze di prevenzione e tutela dei diritti fondamentali*, Giuffrè, Milano, 2016.

requesting party (also considering his age) constitued itself a cause of vulnerability as it improved the risk of being exposed to contagion. Therefore the judge in charge of the decision requested assistance from the Italian Department of Detention (*Dipartimento dell'Amministrazione Penitenziaria*) established by the Ministry of Justice, that nevertheless did not suggest an alternative medical centre in whose proximity find a prison where the requesting party could be transferred instead of being placed under home arrest. The latter was thus the only chance to protect the prisoner's fundamental right to health that, according to the above mentioned illustrated doctrine adopted by the Supreme Court, needs to be interpreted in accordance with the principle of non discrimination pursuant to art. 3 of the Italian Constitution: it means that not only every detained person has the constitutional right to an adequate medical treatment, but also that such a treatment must be equivalent, in terms of qualities and chance of success, to those avaliable for the rest of the community[6].

Obviously the judges in charge of the decisions granted a balance between the fundamental rights of the detained person and the security of the whole community by analysing the persistence of bounds linking the claimant to the organized crime, concluding that the behaviuor mantained during the whole procedure, the old age reached and the close termination of the imposed penalty would suggest the reasonable absence of current liens with the Mafia association.

Nevertheless the public opinion strongly criticized the decisions taken, so that the government announced inspections to the judicial offices involved and enacted a new law decree providing for a deeper involvement of the National Antimafia Prosecutor in the decision process for home arrest, while the chief of the Department of Detention resigned and was replaced by a new one appointed by the Ministry of Justice.

[6] See in particular Tribunale di Sassari, *cit.*, according to which such a principle abide by the Minimum Rules on the detention regime established by the United Nations (so called "Nelson Mandela rules") that impose the same standards of medical treatment both for prisoners and for free men.

2. THE BALANCING TEST BETWEEN SOCIAL SECURITY AND PRISONERS' FUNDAMENTAL RIGHTS

The harsh criticism expressed by the media[7] with regard to the release of few Mafia associates finds its roots in the state of emergency that affected the country when the pandemic exploded; as a matter of fact the suspension of visiting permissions to the prisoners and the initial uncertainty among the detained population on the management of the sanitary emergency within the jails caused riots in many detention center and the death of twelve prisoners[8]. Such a violence was considered by some commentators the effect of a deeper and global strategy developed by variuos criminal associations to weaken the State and to this extent many experts expressed their concerns that the riots in the detention centres were rooted in the same context according to which the pandemic could consititute an occasion for the Mafia families to strenghten their role also by exploiting the consequent economic struggles for small enterpreneurs to gain back their power[9].

Moreover the release of perpetrators of mafia crimes was perceived by some associations joined by the victims' family members as offensive since it was considered a renounce by the State to the punishment, in a social context where the restoration of the suffered

[7] Expressed by the slogan "*criminals are free, while honest men are detained at home*". For an insight into the debate on the press see in particular FERRARELLA, L, *Quelle scarcerazioni e la demagogia dei pm per attaccare i giudici*, in *Corriere della Sera*, 8.5.2020, TITO, C., *Rivolte, circolari, lettere. Cosa c'è dietro il caso scarcerazioni*, in *La Repubblica*, 8.5.2020, BIANCONI, G., *Boss, i magistrati rivaluteranno ogni scarcerazione. Ma la chiedono altri 456*, in *Corriere della Sera*, 8.5.2020, CUZZOCREA, A., *Il ministro Bonafede fallisce l'obiettivo. Attaccato anche nel governo*, in *La Repubblica*, 8.5.2020.

[8] See in particular TITO, C., *op. cit.*, who quotes the riots exploded in Naples, Milan, Salerno, Rome detention centres.

[9] See in particular DE LUCIA, M., PETRALIA, D., SAVA, L, *Infiltrazioni mafiose e Covid-19*, in *Giustizia Insieme*, 20.4.2020, avaliable online at https://www.giustiziainsieme.it/it/diritto-dell-emergenza-covid-19/1018-il-rischio-di-infiltrazioni-mafiose-nell-emergenza-da-covid19, where the three Chiefs and General Prosecutors of Messina, Reggio Calabria and Caltanissetta discuss the main routes that the Mafia associations could use to exploit the pandemic: inflitrating in the public procurement tenders for the construction of medical facilities made necessary by the sanitary emergency, competing for the European aids granted to the single Member States to face the financial crisis, buying out the enterprises incapable of surviving to the chash shortage due to the lockdown.

damage seems not reched yet[10]. Their scorn was echoed by the press and this led to social turmoils that engaged the political parties in a debate that was intended to be concluded by the enactment of a law decree[11], that imposed the intervention of the Antimafia prosecutor in the decision making process regarding the placement under home arrest. Nevertheless many commentators were unsatisfied by the new measures, as, due to the constitutional principle of equal dignity of all members of the judiciary in front of the law[12], the legal opinion of the prosecutor is not binding for the judges in charge of the request of benefit.

Nevertheless any divergent opinion between judges and prosecutors[13] could only invest the assessment of the seriousness of the disease affecting the claimant, the effective risk of contagion within the detention centres and the persistence of criminal links with organized crime since the prevailing role of the prisoner's fundamental right to medical treatment over social security (should all the conditions for placement under home arrest be met) has already been stated by the Supreme Court in the above mentioned decisions.

[10] The most recent studies developed on vulnerable victims (among which victims of Mafia can definitely be included) prove that the restoration of damage is gained not only by form of compensation and restitution but also of rehabilitation, that can be granted also by means of the celebration of the trial (see LA CHIOMA, F., *Vulnerabilità minorile e ruolo del P.M., Lecture held during the Livatino Course in Caltanissetta, September 21-22, 2018*, available online at file:///C:/Users/federica.lachioma/Downloads/La%20Chioma%20-%20Vulnerabilit%C3%A0%20minorile%20e%20ruolo%20del%20PM%20(1).pdf). Therefore in a context where the assessment of the criminal responsibility is not concluded yet (*e.g.* in Sicily, where for example many Mafia homicides classified as cold cases are still being investigated after being discovered following the declarations of repentants to the Antimafia prosecutors) the protection of the perpetrators' fundamental rights needs to confront with the dramatic process of the consolidation of a collective memory of the society and the victims, whose rights need to be recognized as well as those of the prisoners. To this extent it is worth reminding the case of one member of the criminal group that kidnapped, detained for two years and ultimately in January 1996 killed and dissolved in acid the body of the 12-years-old son of a repentant Giuseppe DI MATTEO: after being placed under home arrest due to a presumed higher risk of contagion because his health conditions and old age (85 years old) he was placed back in jail following a decision of the Court of Appeal, that reversed the conclusions reached by the Court of First Instance.

[11] See law decree n. 28/2020.

[12] Remarkably in Italy both judges and prosecutors are part of the judiciary.

[13] That engage an already existing and triggered debate between judges and prosecutors, that suggested some politicians to separate their respective carreers currently united into the same judiciary body.

Therefore the opponents of the case under discussion argumented, under a more judicial viewpoint, that the risk of contagion should by definition be reduced in an environment where social contacts are minimised[14] and that the assessment of the existence of contacts with the organized crime should be very detailed[15]. By contrast other commentators[16] pointed out that despite the reduced number of contacts permitted under *art. 41 bis Ord. Pen*. the detention population is by definition exposed to a greater vulnerability in case of pandemic due to its structural confinement into closed space and to its general poorer health condition[17]. Moreover, in many States like Italy, the jail population has been for long exposed to an overcrowded environment[18] that could potentially amplify the risk of contagion. To this extent the World Health Organization released in March 2020[19] an interim guidance for the *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*[20], on the assumption that "*people deprived of their liberty, such as people in prisons and other places of detention are likely to bemore vulnerable to the coronavirus disease (CO VID-19) outbreak than the general population because of the confined conditions in which they live together for prolonged periods of time. Moreover, experience shows that prisons, jails and similar settings where people are gathered in close proximity may act as a source of infection, amplification and spread of infectious diseases within and beyond*

[14] See DOLCI, A., *op. cit.*.

[15] According to the decision of the Constitutional Court of Italy n. 253/2019 stating that joining a Mafia association implies the steady participation to an organization socially rooted into the territory, based on personal contacts destined to last in time and grounded on the force of intimidation of its members.

[16] See GIANFILIPPI, F., *Emergenza sanitaria in carcere, provvedimenti a tutela di diritti fondamentali delle persone detenute e pareri sui collegamenti con la criminalità organizzata nell'art. 2 del dl 30 aprile 2020 n. 28*, in *Giurisprudenza Penale Web*, 2020, 5.

[17] This is particularly evident in the case of detention centres for immigrants, that cannot be strictly considered jails but are nevertheless centre of confinement. It is worth noticing that part of the public opinion (although in lack of reliable figures) related the recent increase of the contagion rates to the presence of immigrants in the Sicilian detention centres and this conclusion once more proves that in time of pandemic the social emergency tends to trigger pre existing social conflicts like the one mentioned in footnote n. 13.

[18] For which Italy has repeatedly been condemned by the European Court of Justice.

[19] See ROMICE, S., *Dum Romae consulitur, Saguntum expugnatur. A proposito di carcere e covid-19*, in *Giurisprudenza Penale Web*, 2020, 4.

[20] Available online at https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf

prisons. Prison health is therefore widely considered as public health. The response to COVID-19 in prisons and other places of detention is particularly challenging, requiring a whole-of-government and whole-of-society approach, for the following reasons:

1. Widespread transmission of an infectious pathogen affecting the community at large poses a threat of introduction of the infectious agent into prisons and other places of detention; the risk of rapidly increasing transmission of the disease within prisons or other places of detention is likely to have an amplifying effect on the epidemic, swiftly multiplying the number of people affected.

2. Efforts to control COVID-19 in the community are likely to fail if strong infection prevention and control (IPC) measures, adequate testing, treatment and care are not carried out in prisons and other places of detention as well.

3. In many countries, responsibility for health-care provision in prisons and other places of detention lies with the Ministry of Justice/Internal Affairs. Even if this responsibility is held by the Ministry of Health, coordination and collaboration between health and justice sectors are paramount if the health of people in prisons and other places of detention and the wider community is to be protected.

4. People in prisons and other places of detention are already deprived of their liberty and may react differently to further restrictive measures imposed upon them."

Moreover the WHO remarkably pointed out the risk of gross violations of human rights that the State administrations could incur should they neglect to undertake the necessary measure to grant detained people the same right to the highest affordable health standard conditions that are assured to the community. The WHO clearly stated that "*the rights of all affected people must be upheld, and all public health measures must be carried out without discrimination of any kind. People in prisons and other places of detention are not only likely to be more vulnerable to infection with COVID-19, they are also especially vulnerable to human rights violations. For this reason, WHO reiterates important principles that must be respected in the response to COVID-19 in prisons and other places of detention, which are firmly grounded in human rights law as well as the international standards and norms in crime prevention and criminal justice:*

- *The provision of health care for people in prisons and other places of detention is a State responsibility.*

- *People in prisons and other places of detention should enjoy the same standards of health care that are available in the outside community, without discrimination on the grounds of their legal status.*
- *Adequate measures should be in place to ensure a gender-responsive approach in addressing the COVID-19 emergency in prisons and other places of detention.*
- *Prisons and other detention authorities need to ensure that the human rights of those in their custody are respected, that people are not cut off from the outside world, and – most importantly – that they have access to information and adequate healthcare provision.*
- *Enhanced consideration should be given to resorting to non-custodial measures at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages. Priority should be given to non-custodial measures for alleged offenders and prisoners with low-risk profiles and caring responsibilities, with preference given to pregnant women and women with dependent children.*
- *Similarly, refined allocation procedures should be considered that would allow prisoners at highest risk to be separated from others in the most effective and least disruptive manner possible and that would permit limited single accommodation to remain available to the most vulnerable.*
- *Upon admission to prisons and other places of detention, all individuals should be screened for fever and lower respiratory tract symptoms; particular attention should be paid to persons with contagious diseases. If they have symptoms compatible with COVID-19, or if they have a prior COVID-19 diagnosis and are still symptomatic, they should be put into medical isolation until there can be further medical evaluation and testing.*
- *The psychological and behavioural reactions of prisoners or those detained in other settings are likely to differ from those of people who observe physical distancing in the community; consideration should therefore be given to the increased need for emotional and psychological support, for transparent awareness-raising and information-sharing on the disease, and for assurances that continued contact with family and relatives will be upheld.*
- *Adequate measures should be in place to prevent stigmatization or marginalization of individuals or groups who are considered to be potential carriers of viruses.*

- *Any decision to place people in prisons and other places of detention in conditions of medical isolation should always be based on medical necessity as a result of a clinical decision and subject to authorization by law or by the regulation of the competent administrative authority.*
- *People subjected to isolation for reasons of public health protection, in the context of prisons and other places of detention, should be informed of the reason for being placed in isolation, and given the possibility to have a third party notified.*
- *Adequate measures should be in place to protect persons in isolation from any form of ill treatment and to facilitate human contact as appropriate and possible in the given circumstances (e.g. by audiovisual means of communication).*
- *The COVID-19 outbreak must not be used as a justification for undermining adherence to all fundamental safeguards incorporated in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) including, but not limited to, the requirement that restrictions must never amount to torture or other cruel, inhuman or degrading treatment or punishment; the prohibition of prolonged solitary confinement (i.e. in excess of 15 consecutive days); the requirement that clinical decisions may only be taken by health-care professionals and must not be ignored or overruled by non-medical prison staff; and that while the means of family contact may be restricted in exceptional circumstances for a limited time period, it must never be prohibited altogether.*
- *The COVID-19 outbreak must not be used as a justification for objecting to external inspection of prisons and other places of detention by independent international or national bodies whose mandate is to prevent torture and other cruel, inhuman or degrading treatment or punishment; such bodies include national preventive mechanisms under the Optional Protocol to the Convention against Torture, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.*

- *Even in the circumstances of the COVID-19 outbreak, bodies of inspection in the above sense should have access to all people deprived of their liberty in prisons and other places of detention, including to persons in isolation, in accordance with the provisions of the respective body's mandate.*"

Remarkably besides the suggestions for staff training and case management the Guidance offers some instructions for the risk communication strategies, thus proving that in time of pandemics the reaction of the public opinion to any measure affecting the restricting conditions of the detenined population accused of severe criminal offences could have dramatic impact on the effectiveness of the adopted measures, potentially contributing to their functioning or, as it was demonstrated above, continuously doubting their consistency with the whole constitutional system.

3. CONCLUSIONS

The present paper proved that the current Covid-19 pandemic dramatically urged every State to grant the preparedness of its detention system to protect from the risk of contagion its population, whose members are confined into limited space and whose staff cannot take advantage of forms of smart or remote working. Moreover the detention pupulation suffers a greater health vulnerability, being exposed to smoke, overcrowded facilities, lower hygiene standard, distress and this condition expose it to develop a high risk of contagion of Covid 19 should adeguate prevention measures not be adopted.

To prevent this danger the decisions of some Italian judges were critically reviewed, who recently stated to place under home arrest some Mafia associates who developed a critical heath condition while being in custody under the most restrictive detention regime provided by the Italian legislation (so called *art. 41 bis Ord. Pen.*). The echo of such judicial decisions, that were perceived as a disguised release in favour of perpetrators of some of the most heinous crimes recognized by the Italian criminal code, determined a severe reaction both from

the victims' families and from the press, that seemed to emphasize a struggle between prosecutors (determined to grant social security) and judges (more keen on the defense of human rights)[21]. This scenario therefore suggested a reflection upon the urgency of finding even in times of pandemic an adequate balance between the rule of law and the respect of the fundamental rights of the detained people, that is constantly pursued by judges through decisions that should be made accessible to the public opinion, in order to prevent dangerous social conflicts expecially in areas where the traumatic memory of the effects of the committed crime is still dramatically alive.

It is worth noticing that despite the efforts for granting the victims their rights to restoration and rihabilitation, another duty should be pursued by a civilized society, consisting of the promotion of the condition of its detention population. According to the Palermo General Prosecutor Roberto Scarpinato[22], indeed, the detention regime remains a crucial issue of any judicial system, as it on one side states the principles of equality and educational purpose of the punishment and on the other still hosts in jail the same percentage of population as at the beginning of the 20th century, because as today as yesterday the detention population is mostly composed of the lowest class members.

Hopefully all the critics and debates arosen on the topic of the judicial reponse to the sanitary emergency in jail drew attention on this seemingly forgotten part of the population and urged all the community members to cope with the treatment of people who might have been condemned, but who still struggle for a life after the verdict.

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ISBN: 978-65-00-40218-6

CHAPTER

4

SUSPENSION OF EXERCISE OF RIGHTS IN TIMES OF CRISIS OF CONSTITUTIONAL VALUES

by
Pedro Trovão do Rosário

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter4

SUSPENSION OF EXERCISE OF RIGHTS IN TIMES OF CRISIS OF CONSTITUTIONAL VALUES[1]

by
Pedro Trovão do Rosário

Portugal is, with the 1976 Constitution of the Portuguese Republic, a State of Democratic Law. It has been materially and formally since then, in a process that has undergone seven constitutional revisions, which despite having altered the list of sovereign organs[2] and having suppressed some references of a more ideological political content[3], respected the essential and structural elements of the Fundamental Law of 1976, with the gradual deepening of rights, freedoms and guarantees.

In terms of the state of siege and the state of emergency, the evolution from the original version is clear. Thus, in 1976, Article 19 (Suspension) of the Constitution established: *1. The sovereign bodies cannot, jointly or separately, suspend the exercise of rights, freedoms and guarantees, except in the case of a state of siege or a state of emergency, declared as provided for in the Constitution. 2. The declaration of a state of siege or a state of emergency must be sufficiently substantiated and contain a specification of the rights, freedoms and guarantees whose exercise is suspended. 3. The declaration of a state of siege may in no case affect the right to life and personal integrity. 4. The declaration of a state of emergency can only determine the partial suspension of rights, freedoms and guarantees. 5. The declaration of a state of siege or a state of emergency gives the authorities the competence to take the necessary and appropriate measures for the prompt restoration of constitutional normality.*

In article 14 of Constitutional Law number 1/82 of 8 July[4], the first constitutional revision, article 19 of the Basic Law is revised as follows:

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[2] In 1982, in the first constitutional revision, the Council of the Revolution

[3] In Article 1, the expression "in its transformation into a classless society" is replaced by the expression "in the construction of a free, just and solidary society";

[4] https://dre.pt/web/guest/pesquisa/-/search/375254/details/normal?l=1

1 - The title of article 19 is replaced by:

(Suspension of exercise of rights)

2 - A new paragraph 2 is added to article 19, with the following wording: 2. The state of siege or the state of emergency can only be declared, in all or in part of the national territory, in cases of actual or imminent aggression by foreign forces, of serious threat or disturbance of the democratic constitutional order or of public calamity.

3 - Paragraph 2 of article 19 becomes paragraph 3 of the same article, its text being replaced by:

3. The declaration of a state of siege or a state of emergency is duly substantiated and contains a specification of the rights, freedoms and guarantees whose exercise is suspended and cannot be extended for more than fifteen days, without prejudice to any renewal for periods with the same limit.

4 - Paragraph 3 of article 19 becomes paragraph 4 of the same article, its text being replaced by:

4. The declaration of a state of siege may in no case affect the rights to life, personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of criminal law, the right of defense of the accused and the freedom of conscience and religion.

5 - Paragraphs 4 and 5 of article 19 become, respectively, paragraphs 5 and 6 of the same article.

In article 10 of Constitutional Law number 1/89 of 8 July, the second constitutional revision, article 19 of the Constitution of the Portuguese Republic is again revised as follows[5]: *1 - Paragraph 3 of article 19 becomes paragraph 5, with the following wording:*

5. The declaration of a state of siege or a state of emergency is adequately substantiated and contains a specification of the rights, freedoms and guarantees whose exercise is suspended, and the declared state cannot last longer than fifteen days, or the duration fixed by law when as a result of the declaration of war, without prejudice to possible renewals, with the safeguard of the same limits.

2 - Paragraph 4 of the same article becomes paragraph 6, with the expression "or the state of emergency" being added between "state of siege" and "in no case".

3 - Paragraph 5 of the same article becomes paragraph 3, with the following wording:

[5] https://dre.pt/home/-/dre/496551/details/maximized

3. The state of emergency is declared when the assumptions referred to in the previous number are less serious and can only determine the suspension of some of the rights, freedoms and guarantees that may be suspended.

4 - A new paragraph 4 is added to the same article, with the following wording:

4. The option for a state of siege or a state of emergency, as well as the respective declaration and execution, must respect the principle of proportionality and be limited, namely in terms of its extension and duration and the means used, to the strictly necessary to the ready restoration of constitutional normality.

5 - A new paragraph 7 is added to the same article, with the following wording:

7. The declaration of a state of siege or a state of emergency can only change the constitutional normality under the terms provided for in the Constitution and the law, and cannot affect the application of constitutional rules regarding the competence and functioning of the sovereign and government bodies. autonomous regions or the rights and immunities of the respective holders.

6 - Paragraph 6 of article 19 becomes a new paragraph 8 of the same article.

Thus, it is evident, with rigor and objectivity, that the matter regarding the suspension of the exercise of rights, freedoms and guarantees was undeniable for the original and derivative constituent legislator. Always in the sense of increasing the limits and guarantees of citizens when the state of siege or the state of emergency is decreed. Under the 1976 Constitution, the state of siege or the state of emergency had never been declared until 2020, whereas in the Third Republic and in Portuguese democracy, the state of siege was declared only once, following the events of 25 November 1975 where, after hearing the Council of the Revolution, the President of the Republic decreed a state of siege in the Military Region of Lisbon, with partial suspension of constitutional guarantees, with military authorities assuming the superintendence of civil authorities, according to a legal provision of 1956, that is, the Estado Novo.

In 2020, by Decree of the President of the Portuguese Republic no. 14-A / 2020 of 18 March, a state of emergency was declared in Portugal, based on the verification of a situation of public calamity.

This is based - in fact - on the qualification by the World Health Organization on March 11, 2020, of a situation of "public health

emergency caused by the disease COVID-19 as an international pandemic, constituting a public calamity". The legal basis was necessarily found in the aforementioned constitutional provision (article 19) and in Organic Law 44/86, of September 30, thus limiting itself to what is strictly necessary for the adoption of measures corresponding to the suspension of the exercise of rights, freedom and guarantees set out in that Decree.

Thus, the exercise of rights such as the right to travel and settle anywhere in the national territory was temporarily and partially suspended; property and private economic initiative; international workers' rights; meeting and demonstration; freedom of worship; of resistance.

The Decree further states that "the limitations of rights, freedoms and guarantees" had "the Constitutional support that only the state of emergency can give, reinforcing legal security and certainty and institutional solidarity": under the terms of articles 19, 134 ., Paragraph d), and 138 of the Constitution and Law No. 44/86, of 30 September, amended by Organic Law No. 1/2011, of 30 November and Organic Law No. 1/2012 of 11 September May.

Such reflecting, in a Rule of Law (article 2 of the Portuguese Basic Law) the one stipulated in article 19 of the Constitution of the Portuguese Republic (CRP) that "nº 1 - The sovereign organs cannot, jointly or separately, suspend the exercise of the rights, freedoms and guarantees, except in the case of a state of siege or a state of emergency, declared as provided for in the Constitution. ".

Ahead will be referred to the crisis of constitutional values, with different intensity and configuration from State to State, but very present in the beginning of the 21st century.

The state of exception, taking the form of a state of siege or a state of emergency, does not constitute an "enabling" norm for the State to suspend the exercise of rights, freedom and guarantees. On the contrary, it is a restrictive norm for state action, it limits its action: it imposes the participation of more than one sovereign body, it establishes temporal and material limits, etc.

Such is the intention of the state of exception that implies the configuration of norms such as that of article 19 of the Constitution of the Portuguese Republic.

Thus, it is necessary to distinguish the Declaration of the state of emergency (or the state of siege) from other forms of action such as the Declaration of the state of calamity, under the provisions of the Basic Law for Civil Protection.

Because the state of exception seeks to return to constitutional normality. Such is your goal and your ending.

In Portugal, immediately after the end of the state of emergency, almost as a substitute for it, measures were adopted under "the state of calamity", under the provisions of the Basic Law of Civil Protection, Law No. 27/2006, of 3rd of July. It is necessary to consider what such an Ordinary Law (unlike the Law with the State of Siege and the State of Emergency Regime that obligatorily takes the form of Organic Law - articles 166º / 2, 168º / 5, 136º / 2 e3, 112º / 3 of the CRP - thus with reinforced value and with the obligation of approval by an absolute majority of deputies in office) provides and thus realizes its applicability to a pandemic situation: Article 9/3 establishes that "The calamity situation can be declared when, in view of the occurrence or danger of the occurrence of any or some of the events referred to in article 3, and its foreseeable intensity, the need to adopt exceptional measures to prevent, react or restore normal living conditions in the areas affected by its effects ", in turn providing for the aforementioned (and limiting) article 3 the Definitions of serious accident and catastrophe, being" (nº 1) Serious accident is an unusual event with relatively limited effects in time and space, susceptible of reaching people and other living things, goods or the environment. " and "2 - Catastrophe is a serious accident or series of serious accidents that are likely to cause high material damage and, eventually, victims, intensely affecting living conditions and the socioeconomic fabric in areas or in the entire national territory."

In other words, the state of emergency, with a true constitutional guarantee (the state of emergency - article 19 CRP) was "replaced" by a legal mechanism for responding to "serious accidents", which is an enabling rule for the executive. In addition, it is clear that a situation of "public health emergency caused by COVID-19 as an international pandemic, constituting a public calamity" is not to be confused with a

serious accident with limited effects in time and space, or a catastrophe (as an accident serious series of accidents).

This issue, at a time of crisis of constitutional values, takes on a more worrying dimension. The weighting of threats that may define or at least condition the direction of the Law, with greater or lesser intensity depending on the Democratic State of Law in which we find ourselves, appears today in the different continents. Among these:

1. Principle of the Secularity of the State
2. Principle of separation of powers
3. Subjection of economic power to political power
4. De-fundamentalization of Rights
5. The disappearance of political parties

There is a fear of a "crisis of structural constitutional principles at the beginning of the twentieth century", choosing in this article two of the aforementioned, doing so in an increasingly globalized world, where influences and fashions fly without knowing barriers or criteria : Secularity of the State and Separation of Powers.

1. SECULARITY OF THE STATE

The Principle of the Secularity of the State, where we could immediately refer to the Portuguese Basic Law (articles 41, 288 / c), among others) or Decree 119-A of January 7, 1890 that made Brazil a secular state, following if the 1891 Constitution is now in a clear setback. In 2014, the Israeli government passed a law referring to Israel as a Jewish state and Betzalel Smotrich, whose Jewish home (Bait Yehudi) is part of the current coalition, said "In the long term I intend for Israel to be governed by the laws of the Torah" (during an interview with Kan public radio). We are seeing an increase in states that profess Islamic law, or Hinduism. In Brazil, religious dictates are affirmed in Municipalities, States or in the Congress itself, with religious organizations doing electoral propaganda, even though it is a crime.

Laicity translates into the effective separation, not subjection or contamination of political power by the religious, that is, the separation

between Churches and State. Such, taking care to ensure the political relationship between the citizen and the State, and between the citizens themselves. Thus, Laicity made it possible to establish the separation of civil society and religions: the state without any religious power and the churches without any political power.

This guarantees, immediately and simultaneously, the freedom of all and the religious freedom of each one. Secularism distinguishes the public domain, where citizenship is exercised, and the private domain, where individual freedoms (of thought, conscience, conviction). The public space, belonging to all, is indivisible and thus no citizen or group of citizens should impose their convictions on others, conditioning their action. Symmetrically, the secular state limits itself by being prohibited from participating or having religious action or on religious collective organizations. Secularism guarantees the right of every individual to adopt a conviction, to change his conviction, and not to adopt any if he so chooses. The secularity of the State is thus a presupposition of religious freedom and a condition for coexistence among all creeds in the public space. But it also has another domain: Religion must not interfere in political matters, ensuring religious plurality and the protection of religious minorities. As a rule and principle, Secularism guarantees freedom of belief and worship within the limits of common laws and public order, guarantees freedom of expression, safeguards the public interest, ensures plurality, multiculturalism and the principle of equality.

2. SEPARATION OF POWERS

If a few months ago we were told that in the United Kingdom, with a parliamentary system of government a government would try to suspend Parliament illegally, would we believe it? Were it not for the decision of the United Kingdom's Supreme Court to unanimously declare the suspension of Parliament unlawful, the principle of separation of powers in what is so often pointed out as the oldest democracy had collapsed.

In 2017 in Poland, deputies and senators approved rules that changed the rules in the choice of those responsible for the appointment of judges and that offer the Minister of Justice the power to dismiss magistrates. The approved diplomas changed the way of choosing the members of the body responsible for appointing judges - it is up to the Polish parliament, controlled by the executive party, to choose 22 of the 25 members of that body - and offer the Minister of Justice, on the other hand, the power to remove presidents of appeals and regional courts. First it was the Constitutional Court, then the fight against the Supreme Court of Justice. In Brazil we are witnessing a judicial activism and even a judicialization of politics, where the Courts' Decisions invade the other powers. Examples of judicial activism are the establishment of party loyalty where, without any legal provision, the Supreme Federal Court (STF) decided that the politician elected by a certain party, when changing parties during his term, loses him; or the prohibition of voting printed on electronic ballot boxes, where after the regular legislative procedure that approved the electoral reform, the Supreme Court intervened, in an activist way, declaring the unconstitutionality of the vote printed on the electronic ballot box.

The three powers that make up the State (legislative, executive and judicial powers) require separate, independent and harmonious action, maintaining, however, the characteristics of the sovereign political power of being one, indivisible and indelegible, having Constitutions such as the Portuguese evolved towards solutions of interdependence of the organs, which will nevertheless never question the separation of functions and accountability of the organs and their holders.

Since the Montesquieu doctrine, the principle of separation of powers has been a fundamental source of the promotion of balance in states that wanted to separate themselves from subordination to the excesses of the Executive. This principle started to be enshrined in all the 18th and 19th century Constitutions, in compliance with the provisions of art. 16 of the 1789 Declaration of Human and Citizen Rights. This is followed by the process of codifying the law, necessary to guarantee the rationality of the legal system.

After the Second World War, in most of the systems that are part of the Germanic Roman legal family, the judicial rise along with the valorization of the idea of constitutional supremacy and its normative force, with the development of constitutional hermeneutics with the prevalence of "value", "Weighting" "omnipresence of the Constitution" and predominance of the Courts before the norm.

It is, therefore, evident the tension between the Powers, first caused by the performance of the judicial function when censoring legislative acts through the control of constitutionality and, worse, in some systems the judicial acts that replace the action of the legislator and, even, of the executive.

With the intention of filling alleged gaps caused by the omissions of other powers, the Courts implemented rights of general scope and promoted public policies, in disrespect for the Principle of separation of powers and, reaching the Democratic Rule of Law: Judicial Activism, government of judges, protagonism judiciary, judicial proactivity, judicial lawful activity, etc., etc.

We must also consider the way in which the holders of sovereign bodies are appointed in order to be more concerned with the increase in competences assumed by themselves without control over their acts and their own composition.

3. CONCLUSION

Although the state of exception aims to return to constitutional normality, history has taught us that it can also be used as a tool to try to legitimize illegitimate actions to suspend rights, freedoms and guarantees.

In other words, in a moment of clear crisis of constitutional values, mechanisms for guaranteeing and defending rights and freedoms cannot be neglected, in which the state of exception is situated. Thus, its valorization as it was developed in the first constitutional revisions in Portugal, without the use of mechanisms such as the "state of calamity" or other forms of action outside

the Constitution and the principles of it that attempt against it, is decisive at a time when that disrespect for constitutional principles is common to several states and legal systems. It is thus necessary to establish, within the constitutional and legal framework and not by initiative or self-attribution of the judiciary, a legitimate framework of action for the judicial protection of rights, freedoms and guarantees. It is with this concern that in constitutional legal systems such as those in Spain, Germany or Austria we find the Constitutional Amparo Appeal (or Constitutional Complaint), or in so many other Constitutions such as Costa Rica (Article 19) or Guatemala (Article 265). There is a constitutional defense action in these systems before the Constitutional Court, once the existing ordinary remedies have been exhausted. Thus, in a subsidiarity logic, the citizen can only go to the Constitutional Court when other resources that fit in the respective forms of process are exhausted and only when the violation of fundamental rights is at stake. In Portugal, as in other systems without recourse to protection, through access to the courts, judicial measures are guaranteed against measures taken by public authorities, but not against judicial decisions handed down in the final instance and final and unappealable violations of fundamental rights. in jurisdictional proceedings (for example, "access to the law" action for the delay of a judicial solution). On the other hand, there may be no instruments of defense against certain acts of public authorities, such as "political acts".

The characteristic feature of the Courts is "to administer justice". And this consists, in addition to a theoretical outline, in the defense of citizens' legally protected rights and interests, in repressing the violation of democratic legality, and in resolving conflicts of public and private interests (Constitution of the Portuguese Republic, arts. 205 and 206)

In addition, the object of a Constitutional Court is Political Law, the fundamental law for the organization of political power and the guarantee of fundamental rights and freedoms.

If there is an appeal to the Constitutional Court to protect fundamental rights in relation to the various forms of action by the public authorities, the general principle of effective judicial protection,

the principle of legal certainty, the principle of equality are guaranteed and legal effectiveness is attributed to fundamental rights.

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ISBN: 978-65-00-40218-6

CHAPTER

5

DISASTER RISK GOVERNANCE: TRADE AND COVID

by
Hugo Cahueñas

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter5

CONTENTS

DISASTER RISK GOVERNANCE: TRADE AND COVID[1]

by
Hugo Cahueñas[2]

The spread of COVID-19 and the actions taken by governments have had severe consequences in the major world economies, affecting much of the productive activities and increasing unemployment, with a subsequent reduction in the demand for goods and services (CEPAL, 2020, p. 2). A disaster is "[a] serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability, and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts" (General Assembly, 2016, p. 13).[3] Specifically, a slow-onset disaster emerges gradually over time and could be associated with drought, desertification, sea-level rise, epidemic disease (General Assembly, 2016, p. 13).[4] Therefore, in several societies, COVID-19 produced or is producing a slow-onset disaster, disrupting the performance of some societies that emerge from an epidemic disease that produces human and economic losses, and other harmful effects on human physical, mental and social well-being.

This pandemic required governments to implement various forms of governance; however, many states lacked a specialized institution and entrust disaster risk management system the response to the crisis (Cahueñas, 2020). Consequently, several institutions worked

[1] My gratitude to Juan Felipe Idrovo, USFQ student, for his hardworking research and assistant for this paper.

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[3] Sometimes the term "emergency" is used interchangeably with the term disaster, in the context of biological and technological hazards or health emergencies; nevertheless, emergency relates to hazardous events that do not result in the severe disruption of the functioning of a community or society (General Assembly, 2016, p. 13).

[4] A sudden-onset disaster is one triggered by a hazardous event that emerges quickly or unexpectedly; for instance, it could be associated with one earthquake, volcanic eruption, flash flood, chemical explosion, critical infrastructure failure, or transport accident (General Assembly, 2016, p. 13).

on the response to COVID-19 under the umbrella of the disaster risk management system, including the international trade system as part of those institutions. As part of the disaster risk governance, the authorities established trade restrictions. For instance, in Ecuador, the Committee on Foreign Trade (COMEX) notified Ecuador's National Customs Service of the temporary ban, for one year, to export protective masks [5](Ministry of Production, Foreign Trade, Investment and Fisheries, 2020).[6]

Inadequate governance of disaster risk management increases vulnerabilities. The second priority of the Sendai Framework is to "strengthen disaster risk governance to manage disaster risk". The Sendai Framework focuses on disaster risks and thus emphasizes reducing the magnitude of disasters themselves rather than only focusing on the impacts, going beyond the humanitarian contexts, and including the development agenda (Munene et al., 2018, p. 659). Moreover, the Sendai Framework demands more collaboration across mechanisms and institutions to implement relevant international instruments of legally and non-legally binding nature (UNISDR, 2015, para. 56). A disaster could produce negative and positive effects; for instance, a disaster could produce economic losses or economic gains (General Assembly, 2016, p. 13). Therefore, trade mechanisms and institutions should also collaborate on the strengthening of disaster risk governance. Under that context, this paper is going to describe several examples at the World Trade Organization (WTO) which show that the WTO regime should be considered part of the global disaster risk governance in front of COVID-19, not only in the response stage but also in the recovery and the reconstruction.

[5]

[6] Resolution No.-004-2020, COMEX decided to reduce to zero tariffs a group of medical devices (protective glasses, masks, caps and surgical gloves, raw material for gel making antibacterial and ozone therapy devices, oxygen therapy or aerosol therapy; breathing and other respiratory therapy devices, among others). Available in: https://www.produccion.gob.ec/dispositivos-medicos-con-arancel-cero-para-enfrentar-emergencia-sanitaria/ (Visited August 20, 2020)And https://www.wto.org/english/tratop_e/covid19_e/covid_measures_s.pdf (Visited August 20, 2020)

1. GOVERNANCE

Governance is not the same as the government. The government refers to the state's formal institutions and their capacity to enforce decisions (Stoker, 2018, p. 15). In contrast, governance includes formal institutions of government and all stakeholders, such as networks and markets, to govern and their relationships (Peters & Pierre, 2006, p. 210). Therefore, there exist many formal and informal governance structures and mechanisms (Ahrens & Rudolph, 2006, p. 212). Governance systems rely "on the development and diffusion of various types of norms; both state regulation and self-regulation; market mechanisms; and other processes, such as negotiation, participation, and engagement, which facilitate collective decision making and action" (Tierney, 2012, p. 342)world-system dynamics, social inequality, and sociodemographic trends. Governance regimes are polycentric and multiscale, show variation across the hazards cycle, and tend to lack integration and to be formulated in response to particular large-scale disaster events. Disaster governance is nested within and influenced by overarching societal governance systems. Although governance failures can occur in societies with stable governance systems, as the governmental response to Hurricane Katrina shows, poorly governed societies and weak states are almost certain to exhibit deficiencies in disaster governance. State-civil society relationships, economic organization, and societal transitions have implications for disaster governance. Various measures can be employed to assess disaster governance; more research is needed in this nascent field of study on factors that contribute to effective governance and on other topics, such as the extent to which governance approaches contribute to long-term sustainability.","container-title":"Annual Review of Environment and Resources","DOI":"10.1146/annurev-environ-020911-095618","issue":"1","note":"_eprint: https://doi.org/10.1146/annurev-environ-020911-095618","page":"341-363","title":"Disaster Governance: Social, Political, and Economic Dimensions","volume":"37","author":[{"family":"Tierney","given":"Kathleen"}],"issued":{"date-parts":[["2012"]]},"locator":"342"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} .

The world-system organization and dynamics, including globalization, influence disaster governance in several ways (Tierney, 2012. p. 346)world-system dynamics, social inequality, and sociodemographic trends. Governance regimes are polycentric and multiscale, show variation across the hazards cycle, and tend to lack integration and to be formulated in response to particular large-scale disaster events. Disaster governance is nested within and influenced by overarching societal governance systems. Although governance failures can occur in societies with stable governance systems, as the governmental response to Hurricane Katrina shows, poorly governed societies and weak states are almost certain to exhibit deficiencies in disaster governance. State-civil society relationships, economic organization, and societal transitions have implications for disaster governance. Various measures can be employed to assess disaster governance; more research is needed in this nascent field of study on factors that contribute to effective governance and on other topics, such as the extent to which governance approaches contribute to long-term sustainability.",”container-title”:”Annual Review of Environment and Resources”,”DOI”:”10.1146/annurev-environ-020911-095618”,”issue”:”1”,”note”:”_eprint: https://doi.org/10.1146/annurev-environ-020911-095618”,”page”:”341-363”,”title”:”Disaster Governance: Social, Political, and Economic Di mensions”,”volume”:”37”,”author”:[{“family”:”Tierney”,”given”:”K athleen”}],”issued”:{“date-parts”:[[“2012”]]}}],”schema”:”https://github.com/citation-style-language/schema/raw/master/csl-citation.json”} . The world system has diverse forms of governance, including laws, institutions, and networked capabilities that can address disaster governance(Tierney, 2012. p. 346)world-system dynamics, social inequality, and sociodemographic trends. Governance regimes are polycentric and multiscale, show variation across the hazards cycle, and tend to lack integration and to be formulated in response to particular large-scale disaster events. Disaster governance is nested within and influenced by overarching societal governance systems. Although governance failures can occur in societies with stable governance systems, as the governmental response to Hurricane Katrina shows,

poorly governed societies and weak states are almost certain to exhibit deficiencies in disaster governance. State-civil society relationships, economic organization, and societal transitions have implications for disaster governance. Various measures can be employed to assess disaster governance; more research is needed in this nascent field of study on factors that contribute to effective governance and on other topics, such as the extent to which governance approaches contribute to long-term sustainability.","container-title":"Annual Review of Environment and Resources","DOI":"10.1146/annurev-environ-020911-095618","issue":"1","note":"_eprint: https://doi.org/10.1146/annurev-environ-020911-095618","page":"341-363","title":"Disaster Governance: Social, Political, and Economic Di mensions","volume":"37","author":[{"family":"Tierney","given":"K athleen"}],"issued":{"date-parts":[["2012"]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} . Moreover, underdevelopment and susceptibility to disasters are circularly linked because disasters cause massive losses to capital assets; they also disrupt production and the flow of goods and services in the affected economy, resulting in a loss of earnings (Ahrens & Rudolph, 2006, p. 208).

Under a disaster risk governance approach, it seems necessary to evaluate the rules and institutions at WTO, for disaster risk management.

2. DISASTER RISK MANAGEMENT

Historically, societies used to focus only on disaster management, which means only to prepare "for, responding to and recovering from disasters" (General Assembly, 2016, p. 14). Thus, disaster management does not eliminate threats (General Assembly, 2016, p. 14).[7] On the other

[7] "Emergency management is also used, sometimes interchangeably, with the term disaster management, particularly in the context of biological and technological hazards and for health emergencies. While there is a large degree of overlap, an emergency can also relate to hazardous events that do not result in the serious disruption of the functioning of a community or society" (General Assembly, 2016, p. 14).

side, disaster risk management (DRM) works not only in the response phase, but it also applies disaster risk reduction (DRR) "policies and strategies to prevent new disaster risk, reduce existing disaster risk and manage residual risk, contributing to the strengthening of resilience and reduction of disaster losses" (General Assembly, 2016, p. 15).

Therefore, DRM distinguishes disasters from hazards alone, considering the vulnerability of natural hazards, and capacity building of authorities (national and local) in DRM (Raju & da Costa, 2018, p. 280). Disaster risk management actions include prospective, corrective, and compensatory disaster risk management.

3. PROSPECTIVE DISASTER RISK MANAGEMENT AT THE WTO

Prospective disaster risk management addresses and seek to avoid the development of new or increased disaster risks in the future; for instance: better land-use planning or disaster-resistant water supply systems (General Assembly, 2016, pp. 15–16). In front of the risk produced by COVID, at the WTO, several situations could be labeled under this umbrella. Korea restricted the import into its territory of Wild animals that are considered possible intermediate hosts for COVID-19 transmission,[8] except for the CITES-listed species, where the exporter provides a sanitary certificate that will prove the animal does not carry the virus (WTO G/SPS/N/KOR/685, 2020, p.1). Also, in order to guarantee local food supplies, Honduras adopted a temporary export ban on certain dried leguminous vegetables[9] due to the COVID-19 pandemic (WTO, 2020a). These actions could be considered a prospective disaster risk management measure because they seek to avoid the development of new or increased disaster risks in the future.

[8] Including Snakes (suborder Serpentes), Bats (order Chiroptera), Racoons, Budgers, Civet cats (family Viverridae), Pangolins (family Manidae) (WTO G/SPS/N/KOR/685, 2020, p.1).–

[9] Frijol rojo en grano (HS 0713.33.40).

4. CORRECTIVE DISASTER RISK MANAGEMENT AT THE WTO

Corrective disaster risk management seeks to remove, manage or reduce existing disaster risks, for instance: the retrofitting of critical infrastructure or the relocation of exposed populations or assets (General Assembly, 2016, pp. 15–16). For instance, the temporary export prohibition on certain medical products, due to the COVID19 pandemic (WTO G/MA/QR/N/MDA/1/Add.1, 2020, p.2).[10] Greece, temporarily, prohibited the export of medicinal products, including vaccines and medicines that are or might be in shortage due to the COVID-19 pandemic (WTO, 2020a). Sri Lanka also bans exports of face masks - N95 type and disposable surgical face masks (WTO, 2020a). On the other side, Switzerland, Ukraine, and Indonesia eliminated import tariffs on specific personal protective equipment and medical goods (WTO, 2020a). The existing disaster risk is the virus, and certain medical products reduce the risk; therefore, the ban on masks reduces the spread of the virus. However, other countries facilitate importation.

Additionally, States adopted corrective measures regarding trade-related intellectual property rights. The China Patent Information Center launched a freely accessible database for various coronavirus-related patents (WTO, 2020b). The Colombian government issued a Decree 476 of March 25, 2020, which, among other things, designates as "public health interest" the medicines, vaccines, and other health technologies used for the pandemic (WTO, 2020b). Consequently, these measures from China and Colombia manage existing disaster risks through free access database for coronavirus-related patents and public health interest declaration.

Similarly, Greece makes available public "patented medical technology related to vaccines and diagnostic methods and 3D printing

[10] "Temporary export restrictions on: "anti-epidemic goods necessary to prevent the spread of acute respiratory disease caused by COVID 19 virus on the territory of Ukraine" (WTO G/MA/QR/N/UKR/4/Add.5, 2020, p.3). The Government of Albania temporarily restricted the exportation of drugs and medical devices, except when authorization is given by the Minister of Health and Social Protection (WTO G/MA/QR/N/ALB/1/Add.1, 2020, p.2).

patented technology for facial masques and respirators" (WTO, 2020b). Singapore has made freely available, under an open-source license, copyrighted software related to a contact tracing solution for COVID-19 (WTO, 2020b).

Additionally, other corrective measures focus on trade in services. Colombia required "mobile telephony operators (voice and data) to maintain minimum service levels despite not receiving adequate remuneration from the user" (WTO, 2020d).

5. COMPENSATORY DISASTER RISK MANAGEMENT AT WTO

Compensatory disaster risk management strengthen the social and economic resilience[11] of individuals and societies in the face of residual risk that cannot be effectively reduced, including preparedness, response, and recovery activities, and financing instruments, such as national contingency funds, contingent credit, insurance, and reinsurance and social safety nets (General Assembly, 2016, pp. 15–16). For example, the United States adopted the measure called "Economic Injury Disaster Loan Advance (EIDL)", where eligible small business owners may apply for an EIDL, which is a non-repaid loan designed to provide economic relief to businesses, including agricultural businesses, that are currently experiencing a temporary loss of revenue (WTO G/AG/GEN/161, 2020, p.4). Moreover, some central banks and financial regulators adopted some measures to stabilize markets, ensure the flow of credit to households and firms as well as the continuity of payments, and facilitate the ability of financial institutions (in particular banks) to absorb losses in an orderly manner (WTO, 2020c, p.10). Moreover, "regulatory authorities

[11] Resilience is the "ability of a system, community or society exposed to hazards to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions through risk management" (General Assembly, 2016, p. 22)

in various jurisdictions[12] have loosened requirements regarding liquidity and capital requirements, to ensure that banks are well-positioned to continue providing credit" (WTO, 2020c, p.10). On 16 March, "the Sweden Financial Supervisory Authority lowered the countercyclical capital buffer rate from 2.5% to 0% to support banks in extending credit" (WTO, 2020d).

Nevertheless, all these actions seem to be reactive. In deep, DRR "aims to prevent new and to reduce existing disaster risk and manage residual risk to strengthen economic, social, health and environmental resilience and to achieve sustainable development" (General Assembly, 2016, p. 16). Disaster governance includes the interrelated sets of norms, organizational and institutional actors, and practices in the pre-disaster, trans-disaster, and post-disaster stages (Tierney, 2012, p. 344)world-system dynamics, social inequality, and sociodemographic trends. Governance regimes are polycentric and multiscale, show variation across the hazards cycle, and tend to lack integration and to be formulated in response to particular large-scale disaster events. Disaster governance is nested within and influenced by overarching societal governance systems. Although governance failures can occur in societies with stable governance systems, as the governmental response to Hurricane Katrina shows, poorly governed societies and weak states are almost certain to exhibit deficiencies in disaster governance. State-civil society relationships, economic organization, and societal transitions have implications for disaster governance. Various measures can be employed to assess disaster governance; more research is needed in this nascent field of study on factors that contribute to effective governance and on other topics, such as the extent to which governance approaches contribute to long-term sustainability.","container-title":"Annual Review of Environment and Resources","DOI":"10.1146/annurev-environ-020911-095618","issue":"1","note":"_eprint: https://doi.org/10.1146/annurev-environ-020911-095618","page":"341-363","title":"Disaster Governance: Social, Political, and Economic

[12] Brazil, Hong Kong (China), India, the Republic of Korea, Mexico, Singapore, and South Africa.

Dimensions”,”volume”:”37”,”author”:[{“family”:”Tierney”,”given”:”Kathleen”}],”issued”:{“date-parts”:[[“2012”]]}},”locator”:”344”}],”schema”:”https://github.com/citation-style-language/schema/raw/master/csl-citation.json”}. The concept of disaster phases is deeply relevant to governance; nevertheless, disaster governance tends to be reactive and concentrate on recent events, ignoring a comprehensive risk and vulnerability assessments (Tierney, 2012, pp. 344, 348)world-system dynamics, social inequality, and sociodemographic trends. Governance regimes are polycentric and multiscale, show variation across the hazards cycle, and tend to lack integration and to be formulated in response to particular large-scale disaster events. Disaster governance is nested within and influenced by overarching societal governance systems. Although governance failures can occur in societies with stable governance systems, as the governmental response to Hurricane Katrina shows, poorly governed societies and weak states are almost certain to exhibit deficiencies in disaster governance. State-civil society relationships, economic organization, and societal transitions have implications for disaster governance. Various measures can be employed to assess disaster governance; more research is needed in this nascent field of study on factors that contribute to effective governance and on other topics, such as the extent to which governance approaches contribute to long-term sustainability.”,”container-title”:”Annual Review of Environment and Resources”,”DOI”:”10.1146/annurev-environ-020911-095618”,”issue”:”1”,”note”:”_eprint: https://doi.org/10.1146/annurev-environ-020911-095618”,”page”:”341-363”,”title”:”Disaster Governance: Social, Political, and Economic Dimensions”,”volume”:”37”,”author”:[{“family”:”Tierney”,”given”:”Kathleen”}],”issued”:{“date-parts”:[[“2012”]]},”locator”:”344, 348”}],”schema”:”https://github.com/citation-style-language/schema/raw/master/csl-citation.json”} . Pre-event activities can reduce vulnerabilities, such as hazards and vulnerability assessments; land-use regulations; building code development, adoption, and enforcement; warning systems; and education and training programs (Tierney, 2012, p. 344)world-system dynamics, social inequality, and sociodemographic trends. Governance regimes are polycentric and multiscale, show variation across the

hazards cycle, and tend to lack integration and to be formulated in response to particular large-scale disaster events. Disaster governance is nested within and influenced by overarching societal governance systems. Although governance failures can occur in societies with stable governance systems, as the governmental response to Hurricane Katrina shows, poorly governed societies and weak states are almost certain to exhibit deficiencies in disaster governance. State-civil society relationships, economic organization, and societal transitions have implications for disaster governance. Various measures can be employed to assess disaster governance; more research is needed in this nascent field of study on factors that contribute to effective governance and on other topics, such as the extent to which governance approaches contribute to long-term sustainability.","container-title":"Annual Review of Environment and Resources","DOI":"10.1146/annurev-environ-020911-095618","issue":"1","note":"_eprint: https://doi.org/10.1146/annurev-environ-020911-095618","page":"341-363","title":"Disaster Governance: Social, Political, and Economic Dimensions","volume":"37","author":[{"family":"Tierney","given":"Kathleen"}],"issued":{"date-parts":[["2012"]]},"locator":"344"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} . Moreover, at the post-disaster stage, adequate short- and longer-term recovery programs tend to reduce future disaster losses and promote sustainability (Tierney, 2012, p. 344)world-system dynamics, social inequality, and sociodemographic trends. Governance regimes are polycentric and multiscale, show variation across the hazards cycle, and tend to lack integration and to be formulated in response to particular large-scale disaster events. Disaster governance is nested within and influenced by overarching societal governance systems. Although governance failures can occur in societies with stable governance systems, as the governmental response to Hurricane Katrina shows, poorly governed societies and weak states are almost certain to exhibit deficiencies in disaster governance. State-civil society relationships, economic organization, and societal transitions have implications for disaster governance. Various measures can be employed to assess disaster governance; more research is needed in this nascent field of study on factors that contribute to effective governance

and on other topics, such as the extent to which governance approaches contribute to long-term sustainability.",",container-title":"Annual Review of Environment and Resources",",DOI":"10.1146/annurev-environ-020911-095618",",issue":"1",",note":"_eprint: https://doi.org/10.1146/annurev-environ-020911-095618",",page":"341-363",",title":"Disaster Governance: Social, Political, and Economic Dimensions",",volume":"37",",author":[{"family":"Tierney",",given":"Kathleen"}],"issued":{"date-parts":[["2012"]]},"locator":"344"}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} . Therefore, disaster stages (pre, during, and post-disaster) are the phases under which WTO law should be analyzed throughout DRG lenses.

6. BEFORE THE DISASTER: PREVENTION, MITIGATION AND PREPAREDNESS.

Prevention includes the activities and measures to altogether avoid existing and new disaster risks by reducing vulnerability and exposure in such contexts where, as a result, the risk of disaster is removed (General Assembly, 2016, p. 21). For example, prevention's actions include dams or embankments that eliminate flood risks, land-use regulations that do not permit any settlement in high-risk zones, seismic engineering designs that ensure the survival and function of a critical building in any likely earthquake, and immunization against vaccine-preventable diseases (General Assembly, 2016, p. 21).[13] Sadly, right now, there is no vaccine for COVID; nevertheless, when the vaccine will be discovered, access to it should be allowed by the patent rules and the export-import system of the WTO, which must open the doors for the vaccine as a mean for prevention.

Mitigation includes all the actions adopted to decrease or minimize the adverse impacts of a hazardous event that cannot be

[13] "Prevention measures can also be taken during or after a hazardous event or disaster to prevent secondary hazards or their consequences, such as measures to prevent the contamination of water" (General Assembly, 2016, p. 21).

entirely prevented; for instance, engineering techniques, hazard-resistant construction, environmental policies, social policies, and public awareness (General Assembly, 2016, p. 20). Specific corrective measures regarding trade-related intellectual property rights could be considered to mitigate the adverse impacts, such as access to patented medical technology.

Preparedness actions seek to build knowledge and capacities in governments, response and recovery organizations, communities and individuals, in order to effectively anticipate, respond to and recover from the impacts of all types of emergencies or disasters that might threaten society or the environment (General Assembly, 2016, p. 21). Preparedness includes such activities as contingency planning, the stockpiling of equipment and supplies, the development of arrangements for coordination, evacuation and public information, and associated training and field exercises (General Assembly, 2016, p. 21). In the WTO regime, as part of the preparedness, the Trade Facilitation Agreement, without doubts, is an essential means to prepare for disaster response.

7. DURING THE DISASTER: RESPONSE

Response actions are taken directly before, during, or immediately after a disaster to save lives, reduce health impacts, ensure public safety and meet the basic subsistence needs of the people affected (General Assembly, 2016, p. 22). The response includes the delivery of emergency services and public assistance by the public sectors, private actors, the community, and volunteers (General Assembly, 2016, p. 22).

In terms of the WTO, all the actions focus on the response phase of the cycle of the disaster. Around 80 countries and separate customs territories have introduced export prohibitions or restrictions, as temporary measures, in response to COVID-19 pandemic (WTO, 2020c, p.1). In response to the health emergency, Brazil allowed "the use of telemedicine for medical services, including medical consultation and digital medicine prescription" (WTO, 2020d).

8. AFTER THE DISASTER: RECOVERY, REHABILITATION, AND RECONSTRUCTION

After the disaster, recovery, rehabilitation, and reconstruction pursue to get a full functioning of a community or a society affected by a disaster, aligning with the principles of sustainable development and "build back better.[14] Recovery seeks to restore or improve the livelihoods and health, as well as economic, physical, social, cultural, and environmental assets, systems and activities, of a disaster-affected community or society (General Assembly, 2016, p. 21).[15] Rehabilitation means "the restoration of basic services and facilities for the functioning of a community or a society affected by a disaster" (General Assembly, 2016, p. 22). The reconstruction contemplates actions on the medium- and long-term rebuilding and sustainable restoration of resilient critical infrastructures, services, housing, facilities, and livelihoods (General Assembly, 2016, p. 21). The world-system is still working on the response to COVID; nevertheless, it seems necessary to think about the reconstruction of the society and the recovery of the economy. Countries with liberal international trade policy and

free trade agreements could be more resilient to diesters than an economy that is more

closed to international trade and with a limited number of commercial agreements (Cahueñas, 2019, p. 17). Therefore, WTO should keep promoting free trade policies for improving the resilience of the economy.

[14] "Build back better means the employ of the recovery, rehabilitation, and reconstruction actions after a disaster in order to "increase the resilience of nations and communities through integrating DRR measures into the restoration of physical infrastructure and societal systems, and into the revitalization of livelihoods, economies and the environment" (General Assembly, 2016, p. 11).

[15] It must be said that the division between the response stage and recovery stage is not clear- cut; for instance, some response actions, such as the supply of temporary housing and water supplies, may extend well into the recovery phase (General Assembly, 2016, p. 22).

9. CONCLUSIONS

At the WTO, it is necessary to shift from emergency management to DRM, working not only in the response stage but also in disaster risk reduction to prevent the disaster, reduce and manage the risk, and create more resilient economies and trade systems.

Several countries adopt and are adopting prospective measures to avoid the development of the pandemic disease; however, they are not sufficient. Therefore, States must adopt corrective and compensatory measures. Corrective measures mainly focus on the response, while compensatory actions relate to the social and economic resilience, which are fundamental in the post-disaster stage, applying the concept of building back better.

A complete analysis of the WTO's role in global disaster risk governance must analyze the pre-disaster, trans-disaster, and post-disaster phases, including WTO rules and mechanisms. For instance, in the reconstruction stage, the study should include the WTO's public procurement systems. Actually, in the context of the response and recovery to the pandemic, "transparent, efficient information-sharing is crucial" (WTO, 2020e). Therefore, the Trade Policy Review Mechanism is a pathway for transparency through country-specific trade policy reviews and regular monitoring and reporting. Moreover, the Government Procurement Agreement could be an essential measure for fighting corruption, which seems to be the more dangerous pandemic for some societies.

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CONTENTS

ISBN: 978-65-00-40218-6

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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter6

CONTENTS

CHINESE NEO-HUMANISM: A NEW INTERNATIONAL LEGAL PARADIGM

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Maria Francesca Staiano

Abstract: In this article we propose the concept of Chinese neohumanism to interpret the current Chinese internal reform process and China's international positioning. Although similar currents and ideas had already emerged in the history of China, the analysis will focus on the innovative aspects of the current Chinese reformist trajectory. In fact, it is argued that elements of "neo-humanist" thought in China have revealed their influence on international law and relations. The drafting of the new Civil Code of the People's Republic of China, approved in May 2020, and the construction of new theories and practices of international relations, especially the adoption of the concept of "Community of Shared Future for Mankind", offer many contents to interpret through a circular thought the construction of a system that stands as a people-centered approach ("people-centrism"), generating a new humanism.

Key Words: Humanism, China, Civil Code, International relations, Community of shared future for mankind.

1. INTRODUCTION

The last World Forum for Chinese Studies, organized by the Shanghai Academy of Social Sciences on September 10 and 11, 2019, was closed with a *lectio magistralis* by Tu Weiming, Professor Emeritus of Harvard University. After nearly 400 papers presented by researchers from around the world, talking about economics, international relations, politics, the Belt and Road Initiative and its implications in each region and globally, the rise of China, international geopolitics, etc., Prof Tu chose to close this world event, held in the financial center of Shanghai, with a conference on "benevolence as a universal value" (Tu, 2019). His intervention has put a firm point to all the debates of the Forum:

the *Rénqíng*[1] (人情) as the beginning and end of man's action at a global level, in all civilizations.

The aspiration for a new humanism, in line with the construction of sustainable development with the support of the 2030 Agenda, has recently manifested at the global level: many intellectuals[2] in recent years have published texts and analyzes in the hope of a new model of scientific, technical, moral and rational development that focuses on the human being in his natural context. Among these, one of the most incisive is undoubtedly Edgar Morin, who was the first to deepen the notion of "community of planetary destiny" (Morin, 2001 (a): 120) theorized by Otto Bauer with the term *Schicksalgemeinschaft* (Bauer, 1907), later adopted by Chinese government with the expression "community of shared future for mankind" 人类命运共同体 (Rénlèi mìngyùn gòngtóngtǐ).

Humanism was a cultural, artistic and political movement born in Italy in 1300 as a reaction to the dark ages of the Middle Ages. Humanism is a *unicum* in human history: born in the XIV century in Italy, it was characterized by the study of the Latin and Greek classics, considered as an instrument of "spiritual elevation" for man, and therefore called, according to Cicero's expression, *studia humanitatis*[3]. The development of humanism, understood as a historical cultural expression in 15th century Europe, led to the elaboration of a new form of human civilization expressed by the Renaissance, which in fact indicates a "rebirth". From this precise historical moment, a more general meaning of humanism[4] was born, to characterize "any

[1] *Rénqíng* (人情) expresses the feeling of humanity that is reflected in the moral obligation to maintain interpersonal relationships.

[2] Knowing not to be exhaustive, we can mention the following texts: Morin Edgar, *I sette saperi necessari all'educazione del futuro,* Raffaello Cortina Editore, Milano, 2001*;* Prenna Lino, *Un nuovo umanesimo europeo. Popoli, religioni, culture,* Il pozzo di Giacobbe Editore, 2020; Ciliberto Michele, *Il nuovo umanesimo,* Editore La Terza, 2017; Ferrarotti Franco, *Dalla società irretita al nuovo umanesimo,* Armando Editore, 2020; Torres Mauro, *Un nuevo humanismo,* Biblioteca Nueva, 2018; Ikeda Daisaku, *El nuevo humanismo,* Tezontle, 2013; Daodonnet Luc, *Pour un nouvel humanisme*, Editions L'Harmattan, 2016; Okwa-Ondo Abraham-Peter, *Nouvel humanisme et ontologie africaine,* L'Harmattan, 2015; Chomsky Noam, *Le nouvel humanisme militaire*, Page 2, 2000; Matesanz Eva Maria, *Tout savoir sur l'art du lien: le nouvel humanisme connecté*, Kawa Tout Savoir Sur, 2014.

[3] Definition available at: http://www.treccani.it/enciclopedia/umanesimo/

[4] Some authors also speak of "neohumanism" and "third humanism" with reference to the

orientation that takes the meaning and values established in humanist culture: from the love for classical studies and for humanism, to the conception of man and humanity, his 'dignity' as the author of his own history, a constant and central point of reference for philosophical reflection"[5]. Edgar Morin himself, referring to this connotation of Renaissance humanism, maintains that" humanity has not born only once, has been born many times and I am one of those who await a new birth "(Morin, 2001 (b)).

This article proposes the analysis of this "new birth", that is, of the humanistic characters that are currently developing in China, under the internal profile of the law, especially with reference to the new Civil Code recently approved by the National People's Congress. Likewise, it aims to dissect the Chinese humanistic elements in their external dimension, analyzing their influence on international relations, with particular reference to the construction of a "community of shared future for mankind."

2. HUMANISM AND NEOHUMANISM IN CHINA.

As masterfully described by Moore, "The Chinese tradition of thought and culture can be characterized by humanism, by its emphasis on the ethical, the intellectual (mainly in relation to life and activity), the aesthetic and the social" (Moore , 1968: 8).

According to Confucius, "man has a sacred mission: to reaffirm and elevate his humanity more and more" (Cheng, 2000: 62). Man as the center of philosophical speculation in ancient China generated the definition of Confucian doctrine in terms of "humanism" (Grecchi, 2009). The indissoluble link between philosophy and human relations, and the pragmatic social action of Confucianism, have led

pedagogical orientations of Germany of the 18th and 19th centuries, inspired by the ideas of W. Von Humboldt, F.E. Niethammer, J.G. Herder and the philosophical and historiographical currents, always in Germany after the war, by W. Jaeger and J. Stenzel, who strongly promoted classical studies and underlined the perennial value, for modern man, of the Hellenic world also as an educational experience fundamental. http://www.treccani.it/vocabolario/neoumanesimo/

[5] Definition available at: http://www.treccani.it/enciclopedia/umanesimo/

to a direct interest of Chinese thinkers and scholarly officials, towards politics and governance in terms of harmonious social stability. The "feeling of humanity" (rén, 仁) manifested through the rites, therefore, responds to the need to "perfect oneself in order to rule men", 修己 治 人 (xiuji zhiren) as detailed by Zhu Xi (Cheng, 2000: 548). The strong political and social influence of Confucian thought can easily be identified in terms of the "formation of man", not only in a pedagogical key but above all in a legal one (Staiano, 2016; Moore, 1968: 6). It is with Mencius[6] that an even more humanistic impulse will be given to Confucian thought, not only through a deeper conviction about the benevolent nature of the human being, but also by extending the latter, perceiving "the continuity between Heaven and Man within of a morality derived directly from nature "(Cheng, 2000: 290) and arguing" the need for Confucian humanism to be transferred to a broader context to assume its meaning more comprehensively "(Cheng, 2000: 290).

In fact, an essential element of Chinese humanism is given by the encounter between Confucianism and Taoism, which allowed the penetration of human nature in the environmental context in which it is inserted, that is, "that context of Chinese humanism that consists in the symbiosis of man with the universe, it allowed the fusion between these two philosophical currents "(Grecchi, 2009: 35; Cheng, 2000). As also held by Chan Wing-tsit "The opposition between humanistic Confucianism and naturalistic Taoism is, at first glance, almost irreconcilable. But any complete distinction inevitably distorts the picture. Early Taoism is closer to Confucianism than is generally understood, especially in its philosophy of life "(Chan, 1968 (b): 31). It is no coincidence that the redefined concept of *Tianxia* (天下) constitutes the apex of this union, representing "everything under the sky" and including all beings and non-beings, each with its own political, cosmological and energetic, institutional and moral

[6] Pre-Qin philosopher who developed his activities in the times of Guanzi, Laozi, Confucius, Mozi, Xunzi and Hanfeizi. It belonged to the school of Legism, which –among other postulates- proposed a direct connection between morality and interstate order (Yan, Xuetong, *Ancient Chinese Thought, Modern Chinese Power*, Princeton University Press, 2011).

function[7]. Then the neo-Confucians (11th-12th centuries) synthesized the concept of "heavenly principle" (天理) which, by regulating the universe through its moral nature, "equates to the highest Confucian virtue, *rén* (仁), 'love of neighbor', which should no longer be understood as referring only to humanity, but extends to the entire universe. The universal value of *rén* (仁) and the existence of a single entity (一体) that would cancel out any difference between the nature of the cosmos and the nature of man merge into a single Principle, which can take different forms (理一而分殊)" (Scarpari, 2019). Chan Wing-tsit states that "the closest statement to a definition of *rén* (仁) is that it consists in mastering oneself and returning to ownership: this is practically equivalent to all Confucian philosophy, since *rén*, thus defined, implies the realization of the self and the creation of a social order "(Chan, 1968 (b): 33).

Interestingly, many western authors argue that we cannot speak of Chinese humanism, given the extreme cultural difference and historical remoteness of the periods in the west and in China, while others speak of a dehumanization of Confucianism due to the westernization of China (Grecchi , 2009: 40). However, there is no doubt that "in China, the note of humanism has been strong, not only in Confucianism, but also in Taoism and Buddhism. It is not necessary to continue arguing that humanism is the keynote of Chinese thought. That keynote vibrates throughout the history of China "(Chan, 1968 (a): 22).

Now, the Chinese humanistic spirit, through the values of Confucian and Taoist thoughts, lasts from the 6th century B.C. until today. However, the hybridization of China due to the initial collision with the colonial West, today has favored a social openness to certain instances of the population, adapting to the new needs arising from the development of the last forty years and the progressive internationalization of the country. Therefore, domestically and

[7] For a deepening of the notion of *Tianxia,* Staiano M.F.-Bogado Bordazar L., *Las teorías de las relaciones internacionales con "características chinas" y sus implicaciones en América Latina,* in Staiano – Bordazar (Coordinators), *Dossier especial sobre China: China y su proyección en el siglo XXI, Revista de Relaciones Internacionales,* Vol. 26, N. 53, Universidad Nacional de La Plata Press, December 2017.

internationally, we are witnessing an affirmation of innovative principles and a crisis between Western human rights and Asian values, subsumed in "Chinese characteristics". Already in the 1960s, in fact, the development of a peculiar "scientific humanism" had been observed in China (Irti, 2017), as a representative of this *unicum*, due to the western impact that has generated crucial changes at the epistemological and philosophical level (Chan, 1968 (b): 67).

3. THE ELEMENTS OF CHINESE NEOHUMANISM IN LAW: THE NEW CIVIL CODE.

The Chinese legal experience is the product of a multidimensional and cumulative cultural process, in which the various layers of modern legal innovations overlapped with those of ancient Chinese thought, generating a fluid sedimentation of concepts, schemes, models and paradigms belonging to different periods, which were sometimes fragmented (Staiano, 2016). Fragmentation and legal flexibility (Castellucci, 2007) is one of the main characteristics of Chinese law, as well as "legal pluralism" (Juárez Aguilar, 2015). However, several elements lead us to identify a conspicuous unification of the Chinese legal model, through: a) the construction of a socialist rule of law with Chinese characteristics (Staiano, 2016); b) a qualitative evolution of Chinese law, in line with the principles of international law (Staiano, 2014; Li, 2008; Liu, 2008); c) the adoption of a Civil Code (Esborraz, 2019).

The adoption of the new Chinese civil code reveals a gap between the real and the symbolic. Western codes, in Europe in particular, are always thought of as the best legal experiences for several reasons. For its historical ties to Roman and medieval law; for its modernity and constant updating. On the other hand, as has been analyzed by Esborraz, the first civil code of the PRC, and the Argentine civil code as reformed in 2015, represent the only true codifications of the 21st century, including a series of legal institutes almost absent in European codes (Esborraz, 2019). Many are the analogous aspects between the Chinese and the Argentine code, especially with reference to the humanistic elements. As Esborraz emphasizes with his deep research:

From the comparison of both codifications, the community of concepts, principles, institutions and provisions existing between them emerges, which is justified by the fact that both orders belong to the Romanistic legal system. This can be seen, in particular, in the general system adopted by both Codes, as well as in the particular attention paid to the protection of the human or natural person and the environment. Belonging to the Romanistic legal system facilitates dialogue not only between the Argentine and Chinese legal systems, but also between the latter and the other legal systems that make up the Latin American Subsystem, since they are all based on the common tradition of Roman Law. In addition, all of this acquires particular interest in view of the relations that China is establishing with Latin America. (Esborraz, 2019: 335)

Regarding the "humanist" vocation of the Chinese civil code[8], at least two aspects can be considered relevant for the purpose of this discussion: the "people-centered approach" and the "green principle". As stated by Wang Chen, Vice Chairman of the Standing Committee of the National People's Congress, in his report to the Third Session of the Thirteenth National People's Congress on May 22, 2020: "Codification of the civil code is an unavoidable requirement to improve the welfare of the people and safeguarding the fundamental interests of the greatest number of people »[9].

With reference to the human person, there are at least two cardinal signs: a) Article 2 of the Law on the general part of civil law of 2017 that provides "civil law regulates personal relationships and property relationships between natural persons, legal persons, entities and organizations without legal personality situated on an equal footing "; b) Book V of the code entirely dedicated to personality rights (人格权编). This aspect coincides with the strong development of the people-centered approach promoted by Chinese socialist policy. In this sense, we recall "Xi Jinping's Thought on socialism with Chinese characteristics for the new era", inserted in Chinese Constitution in

[8] The humanistic character of the new Chinese code is also supported by Esborraz (2019), p. 372, and other authors, as well as cited by Esborraz in note 144.

[9] Availabe at: http://www.mod.gov.cn/topnews/2020-05/22/content_4865574.htm

March 2018, where "People-centrism" is a key aspect of all legal and economic instruments implemented by Chinese government; the construction of the socialist rule of law with Chinese characteristics, the moderately prosperous economy and the new normality. Personality rights are inserted in a special section of the civil code, not only representing an innovation at the level of civil law systematization, but also reflecting an evolution, in a civil key, as a operational corollary of the constitutionalization of fundamental human rights. Human rights, in fact, were already present in Chinese Constitution, in art. 33, reformed in 2004, with a very general and open notion. However, the general theory of human rights law "with Chinese characteristics" has been merged with domestic law, providing a full title of implementation of these in the new code. At the same time, the right to dignity (人格权保护) had already been affirmed, at the opening session of the XIX National Congress of the Communist Party of China on October 18, 2017, as reported by the Supreme People's Court: " The right to dignity is a fundamental human right. Entering a new era, China's main social contradiction has changed, and now people's material demands have been basically satisfied, people's demand for dignity is stronger than before"[10]. In fact, art. 109 of the General provisions of the civil code establishes: "The law protects personal liberty and the dignity of the natural person", endorsing the declaration of the Supreme Court and making it manifest.

As Liu Huawen argues, the progressive approach to international human rights law has pioneered the development of Chinese domestic law, which functions as a "tool of legal culture" (Liu, 2008). In fact, according to Liu: "Human rights law and concepts have their own humanistic and moral foundations; therefore, they produce not only general legal obligations but also humanitarian repercussions on public opinion and the moral evaluation of their implementation process, so their importance goes beyond the legal sense. In this regard, Orientals tend to add an internal moral obligation to the legal obligation "(Liu, 2008: 6). The mix between the creation of a modern legal science and the evolution of the Chinese moral sense is clear, and they cannot do

[10] Available at http://english.court.gov.cn/2017-11/08/content_34308303.htm

without their cultural roots. The Chinese humanist turn, therefore, is not a novelty, but a modernization of legal culture. The civil code approved on May 28, 2020, which will enter into force on January 1, 2021, is one more confirmation of this.

The other element in line with Chinese humanism in which we detect the peculiar encounter between man and nature, through the confluence of Confucianism and Taoism, is precisely the protection of the environment. Article 9 of the General Part of the Chinese Civil Code establishes: "in carrying out activities of a civil nature, subjects must contribute to the conservation of natural resources and the protection of the environment". The so-called "green principle" (**绿色 原则**), like personality rights, represents the result of a long process of legal evolution, in line with the objectives established by the CCP for the construction of an "ecological civilization"[11] and with the Chinese Constitution that establishes in art. 9: "[…] The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by any means is prohibited "[12].

Domestic legislation on environmental protection has been conspicuous in China, as the international effort to reduce polluting emissions in order to achieve a "sustainable development." As stated by the Supreme People's Court, there are two fundamental principles that have allowed a mandatory application of environmental protection:

a) The ecological and environmental damage compensation system (**生态 环境 损害 赔偿 制度**)[13]: according to the system, the people or companies that cause environmental damage should not only assume administrative and criminal responsibility, but will also be responsible for repairing the damage they cause to the environment and pay compensation for any ecological or environmental loss they

[11] This aspect is also marked by Esborraz. For a legal historical overview of the evolution of environmental law in China, see Esborraz, 2019, p. 387 (and references in notes 194 and 195); Toti E., *Il diritto dell'ambiente della Repubblica Popolare Cinese*, in *Leggi tradotte della Repubblica Popolare Cinese*, vol. VIII (*Legge sulla tutela dell'ambiente*), Torino, 2016, IX-XLIII; Xu Guodong, *Il diritto romano come ponte tra diritto cinese e diritto latinoamericano*, en Formichella L. – Terracina G. – Toti E. (coordinators) *Diritto cinese e sistema giuridico romanistico. Contributi,* Giappichelli, Torino, 2005, pp. 119-127.

[12] Text available at: http://www.leggicinesi.it/view_doc.asp?docID=384

[13] Available at: http://english.court.gov.cn/2017-12/20/content_36013880.htm

cause. The compensation will be collected by local governments as a kind of non-tax revenue. This pilot program was launched by the central government in some provinces in 2015 and has been extended to the entire country since January 1, 2018.

b) The environmental protection tax (环保 税)[14], provided for by the Environmental Protection Tax Law, was approved at the meeting of the Standing Committee of the National People's Congress on December 25, 2016 and has been in force since January 1st 2018. It is the first law in China that imposes the collection of an ecological tax and aims to end the policies applied by some local governments that exempt companies that are large contributors to the local economy. Also force companies to update their technology and switch to cleaner production.

The "green principle" was added to the general part of the civil code, reserved for "fundamental rights", which marks its aspiration to the universal application of the entire population, natural or legal persons, assigning specific protection, in line with the evolution of international environmental law[15].

What emerges from this brief analysis is the strong humanistic element, interpreted in the light of traditional Chinese thought and the modern definition of "human development", which includes sustainable development[16]. This content, which has permeated the "spirit of the laws" in the last forty years of normative evolution in China, today finds its most complete manifestation in the drafting of the new civil code, which functions at the same time as a moral and legal reference for all the citizens.

[14] Available at: http://english.court.gov.cn/2017-12/14/content_36013836.htm

[15] Consider the United Nations International Conferences on the Human Environment in Stockholm (1972), on Sustainable Development in Rio de Janeiro (1992), Johannesburg (2002), the Millennium Development Goals (2000-2015) and the current Sustainable Development Goals of the 2030 Agenda and the United Nations Conferences on Climate Change (COP 21 and COP 25).

[16] To deepen these aspects, cfr. Cadìn R., *Profili ricostruttivi e linee evolutive del diritto internazionale dello sviluppo,* Giappichelli editore, Torino, 2019.

4. CHINESE NEOHUMANISM IN INTERNATIONAL RELATIONS: THE COMMUNITY OF SHARED DESTINATION FOR HUMANITY.

Chinese civil code has also had substantial social relevance for its sense of community. The spirit of community in the civil code, inspired at the same time by its own cultural experience and by the legal tradition of Roman law (Esborraz, 2019), is the internal manifestation of a broader community vocation.

The idea of creating a "community of shared future" emerged in September 2011 in the White Paper on Peaceful Development[17], later upheld in Wen Jiabao's speech during the XIV China-ASEAN Summit[18] and taken up by Hu Jintao in the opening speech of the XVIII National Congress of the Communist Party in 20123, in which the expression was improved with the formula "human community with a shared future", later perfected by Xi Jinping in his famous 2015 speech, on the occasion of the 70th anniversary of the United Nations , "building a community of shared destiny for mankind"[19], which includes five contents: political association, security, economic development, cultural exchanges and the environment. This perspective was taken up in the speech at the United Nations in Geneva in January 2017[20] and the idea of the essential need to "build a community with a shared future" was confirmed in October of the same year in the Report of the XIX National Congress of the

[17] Full text of the Document of the State Council of the People's Republic of China, *China's Peaceful Development*, 2011, available at http://english.www.gov.cn/archive/white_paper/2014/09/09/content_281474986284646.htm, accessed on 07/17/2020.

[18] WEN, Jiabao, 14th summit between China and the Association of Southeast Asian Nations (ASEAN) (10 + 1), Bali, Indonesia, November 18, 2011, Statement, available at http://english.qstheory.cn/news/201111/ t20111121_124891.htm, accessed on 07/20/2020.

[19] HU, Jintao, "Firmly advance on the path of socialism with Chinese peculiarities and fight for the consummation of the integral construction of a *Moderately prosperous society* ", in 18 National Congress of the Communist Party of China (CPC), November 8, 2012, Beijing, Full text of the report, available at http://cr.chineseembassy.org/esp/zt/t992906.htm , accessed on 07/20/2020.

[20] XI, Jinping, "Working Together to Forge a New Partnership of Win-Win Cooperation and Create a Community of Shared Future for Mankind" (speech at the UN General Assembly, New York, September 28, 2015), https://gadebate.un.org/sites/default/files/gastatements/70/70_ZH_en.pdf

Communist Party[21] and inserted, through Xi Jinping's Thought on Socialism with

Chinese Characteristics for a New Era, in the Chinese Constitution with the March 2018 reform[22].

The international importance of this community vocation for the future of humanity and the planet has been manifested in numerous international summits and Chinese foreign policy documents[23]. However, one of the most recent and relevant occasions is the Resolution 43/21 of the Human Rights Council of June 22, 2020 called "Promoting mutually beneficial cooperation in the field of human rights", in which the importance of promote international relations based on mutual respect, equity, justice and mutually beneficial cooperation and build a community of shared destiny (future) for human beings in which all enjoy human rights[24]. It should be noted, then, as the internationalization of the community through the formula of "community of shared future" coincides with the progressive affirmation of international human rights law in China: Liu Huawen underlines "international laws offer a legal consensus of community, or better said, a common norm "(Liu, 2008: 7).

In such a way that the "community of shared future for mankind", 人类命运共同体 (Rénlèi mìngyùn gòngtóngtǐ), is presented as a key objective of China's international relations towards the creation of a

[21] XI, Jinping, "Work Together to Build a Community of Shared Future for Mankind" (speech at the UN Office, Geneva, January 18, 2017), http://www.xinhuanet.com/english/2017-01/19/c_135994707.htm

[22] http://www.iri.edu.ar/wp-content/uploads/2018/03/opiniones-en-el-iri-staiano-marzo.pdf http://spanish.xinhuanet.com/2018-03/05/c_137016847.htm

[23] See, with special reference to Latin America, the "Document on China's Policy towards Latin America and the Caribbean" of 2016. Already in the Foreword, emphasis is placed on globalization and multipolarity to achieve the difficult goals of "peace world and common development ". Likewise, reference is made to the need to "build international relations of a new type", with the win-win principle as the core and "to forge a community of shared future for mankind". In this process, the aim is to "take the China-LAC international cooperation association to a New Height". "All countries, large or small, strong or weak, rich or poor, are all equal members of the international community." Full text of the Document available at https://www.fmprc.gov.cn/esp/wjdt/wjzc/t1418256.shtml, accessed on 07/20/2020.

[24] Full text of Resolution 43/21 of the Human Rights Council of June 22, 2020 called "Promote mutually beneficial cooperation in the field of human rights", available at https://undocs.org/es/A/HRC/43/L .31 / Rev.1, accessed on 07/22/2020.

new international order, which also includes the three expressions of "relationality", "human authority" and "symbiosis" (Staiano, 2018). The community of shared future for mankind represents "a new solution of global governance proposed by China", which foresees the creation of "a global five-in one "including" politics, security, economy, culture and ecology "(Xue, 2017: 337). The "community" refers to the set of states, small and large, that peacefully coexist among them (relationality) through common values inspired by the leading countries as responsible for international order (human authority), respecting and helping each other (symbiosis). In fact, the "community" does not refer "strictly to a right but to a responsibility" (Feng, 2017). The most difficult issue for the international community to accept is surely the leadership role of China as one of those responsible for international peace and security, implicit in the expression of "human authority": this element can be understood only by analyzing the term王 (wáng) in its "chineseness". Many authors speak about *Wangcracy* and *Wangrencracy*, deepening the difference between the concept of 王道 (Wángdào), the king's way of governing, as opposed to that of 霸道 (Bàdào), the hegemon's way of governing, where it is evident "the political ideal of unity and harmony of the state civilization model of more than 2000 years of history in ancient China "(Tan, 2015).

These concepts represent elements of innovation in the framework of international relations, which in practice already have empirical results and mark the beginning of a new development of international relations at a global level. The Belt and Road Initiative (BRI) is an essential corollary to building a Community of Shared Future for Mankind. The BRI project, in fact, not only represents a concrete alternative to the traditional "assistance" cooperation, offered by western countries of the North, but it is also presented as a response through the resurgence of the real economy with respect to the financial and speculative economy, typical of Western systems, especially Anglo-Saxon. The BRI deconstructs the traditional division of roles between stronger and weaker countries, giving a voice to the peoples of areas long ignored in building the norms of international law: Africa, Eurasia, Latin America. The BRI has played an important driving role in the

regional integration processes in Europe by highlighting the "gray spaces", deliberately left in the shadow by the European Union. These spaces have been skillfully filled by Chinese diplomacy, which has therefore restored considerable importance to the countries of Eastern Europe[25]. In the same way, China is gradually reactivating an equilibrium in Latin America, intercepting the traditional role of the "backyard of the United States" and integrating new protagonist aspects of the Latin American region (Staiano-Bogado Bordazar, 2019).

In these months, the spread of Covid-19 pandemic continues to destroy the lives of thousands of people around the world and has created a general upheaval in the world economy, accelerating international conflicts. Despite this, the virus functioned as a "truth serum" by dropping the "veil of Maya" of the Western self-narrative and revealing a true "solidarity policy" of the countries of the South. China's cooperation, also in these dramatic circumstances, is demonstrating the construction of a shared future for humanity in theory and in practice, through solidarity. In fact, in the pandemic, the international aid provided by China to the countries with the greatest difficulties has been very evident, as well as very significant have been the statements of President Xi Jinping at the WHO summits (Staiano-Marcelli, 2020). Even before the health crisis, China had developed the "Belt and Road" project with a deep aspiration for international win-win and south-south cooperation, through additional variations such as "the Health Silk Road". In addition, active participation in the Summits on the environment and the commitment with respect to emission cuts, towards the creation of a "more beautiful and harmonious country", with a "perseverance in the harmonious coexistence of people and nature"[26] and towards the implementation of the 2030 Agenda represent obvious signs of deep humanist inspiration.

[25] For example, the "17 + 1" Summit between China and 12 EU countries and 5 non-EU Eastern European members. http://www.china-ceec.org/eng/

[26] XI, Jinping, "For the achievement of the definitive triumph in the culmination of the integral construction of a modestly well-off society and for the conquest of the great victory of socialism with Chinese peculiarities of the new era", 19th National Congress of the Communist Party of China (CCP), October 18, 2017, Beijing, available at http://spanish.xinhuanet.com/2017-11/03/c_136726335.htm , accessed on 07/18/2020.

5. SOME FINAL CONSIDERATIONS.

China is designing new internal and international schemes inspired by general principles shared by the international community and currently in existence: human rights, win-win cooperation, international solidarity, protection of natural resources, human development, among others. It seems that there is taking place in China that "double consciousness" barbarism-humanism described by Morin according to which «to the consciousness of barbarism must be integrated the consciousness that Europe produced - through humanism, universalism, the progressive constitution of a planetary consciousness - the antidotes to their own barbarism» (Morin, 2005: 109-110). China attributes a new framework of meaning to humanism through a new shared humanist mission, capable of aligning the Western democracies, which are now suffering a structural economic, social and cultural crisis, and the global South, which aspires to a rebirth to improve the life of their peoples. The new role of China will not be exempt from opposition from some Western countries that disbelieve this idea, however China has been demonstrating its firm vocation for several years now.

In the famous novel by Luís Sepúlveda "An old man who read love novels" (Sepúlveda, 2009) the final duel between the tiger, who represents nature, and the man annihilated for existing in his anthropomorphic isolationism, only the latter can triumph tragically. However, the sign of the possible redemption of human barbarism, manifested by the shared reading of love novels, capable of building a community spirit, is undoubtedly the metaphor that describes the historical step we are taking. Man and the environment, through sustainable development that unites peoples in a common discourse, marks their destiny, their future. This is the humanism of the third millennium that we are all called to realize.

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ISBN: 978-65-00-40218-6

CHAPTER

7

THE NEED TO DISCIPLINE THE USE OF BLOCKCHAIN FOR THE ORGANIZATION OF REFUGEES BY INTERNATIONAL LAW

by
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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter7

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by
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Otavio Noura Teixeira

Abstract: Based on the experience of using the disruptive technology of blockchain as a way of identifying Syrian refugees in Jordan by the UN from 2017, as part of a pilot project of the World Food Program - WFP, this article aims to demonstrate the need for discipline of this technology by law, from the introduction of its basic operational concepts, in addition to the presentation of international law from the perspective of human rights in relation to the protection of the refugee person, presenting the practical advantages and disadvantages of its use, from the observation not only of the experience carried out but also of the feasibility that may be applied to the future, which will have to face analyzes of the ethical and legal implications, having as a guideline of International Refugee Law. The research, initially theoretical, is interspersed with empirical research, predominantly a qualitative approach of dialectic-inductive logic in a phenomenological view due to the possibility of expanding the use of this technology for the purposes of registering for refugees worldwide from this experience. Based on these premises, one should consider the benefits as well as the high risks of violating the rights of these hypervulnerable people with the large-scale application of this technology, concluding with the creation of guidelines or interpretive guidelines in the light of the fundamentals and principles of the system. International Refugee Law, in order to reduce the overlap of vulnerabilities in which they find themselves.

Key-words: Refugees; international refugee law; Blockchain; dignity of the human person.

1. INTRODUCCIÓN

Coming from the planetary technocapitalist context observed in the last decades, blockchain technology was conceived by Stuart Haber and W. Scott Stornetta in the early 1990s, initially involving the creation of a network of cryptographically protected document blocks that could not alter their date and time records. This technology was further developed, after more than a decade, by a person, or group of people, whose pseudonym became known as Satoshi Nakamoto, creating, through this improvement, the most widespread cryptocurrency in the world, Bitcoin[1].

Blockchain is a kind of distributed ledger technology. It is a digital system in which data is recorded in multiple places simultaneously, unlike traditional databases, because there is no central administrator or centralization of data storage, which is automatically replicated in "blocks" or "chains". Thus, this feature would ensure greater security, since it is not possible to delete or modify information in the chain of stored data[2].

Thus, it is based on an architecture of computers or networks that share data files among themselves, distributing such data in a decentralized way, using programs or algorithms that help manage this data. The blockchain, in this way, once it has its information encrypted, becomes a private environment, with no way to track who added the information to the network, but only to verify if such addition is valid.

Mainly associated with cryptocurrencies, due to the inability to tamper with transactions and track recorded data fragments, its proponents claim that this makes this technology safer and more secure than more traditional systems.

Blockchain platforms can offer other possibilities, such as smart contracts or smart contracts, implemented automatically, reducing the time involved and the risk of errors; for the purpose of storing medical records, so that patients can be sure that their information is not altered; elections; or used to store property records.

[1] LAMOUNIER, Lucas. *A História da Tecnologia Blockchain: Conheça sua Timeline.* 101*Blockchains*, 2018. Disponível em https://101blockchains.com/pt/historia-da-tecnologia-blockchain/ Acesso em 22 abr. 2021.

[2] TAPSCOTT, Don; TAPSCOTT, Alex. *Blockchain Revolution*. São Paulo: SENAI-SP, 2016, p. 3-39.

The use of this technology bypasses the need for a financial provider, such as a bank, thus reducing costs by up to 98%, one of the reasons thought for its application in the well-known experience of Syrian refugees in the Jordan region from the year 2017, when the UN begins to use the so-called building blocks, in aid of the World Food Program - WFP through the use of technologies such as blockchain, initially used as a form of economy, with the aim of reducing fees and prevent fraud and corruption attempts[3].

The current version of Building Blocks, used in Jordan in connection with Syrian refugees, runs on a private or permissioned version of Ethereum where a central authority decides who can participate. The advantage of this permission system is that transactions can be processed faster and at a lower cost. The disadvantage is that since the PMA controls who enters its own network, it also has the power to rewrite transaction histories, which can cause some instability regarding security[4].

Because of the real-time information, call takers in the customer service center can perform tasks such as answering inquiries, unlocking accounts, and authorizing transactions in minutes instead of weeks, without the need for paper coupons or vouchers. Information such as name and date of birth are not visible to callers accessing the system, but only the identification number of a particular person and the benefits to which they are entitled.

Created out of the need to save money through the use of Building Blocks, the organization has moved from distributing food products to transferring money to people who need to buy food. This approach aims to feed more people, while trying to improve local economies and increase transparency.

After all, why should international law intervene, disciplining the use of blockchain technology, which shows such promise and efficiency, fulfilling its role in helping refugees?

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[3] THE NATIONAL FUTURE. *How blockchain technology has changed the game for Syrian refugees in Jordan*. Abu Dhabi, 2019. Disponível em https://www.thenational.ae/arts-culture/how-blockchain-technology-has-changed-the-game-for-syrian-refugees-in-jordan-1.932432. Acesso em 22 abr. 2021.

[4] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

The essential objectives of this paper are: (i) to highlight the points of practical advantages and disadvantages of the use of technology for the purposes of organizing refugees, or even, in the future, for full conservation of data that retain personal elements concerning the preservation of their anthropological ancestry and culture of origin; as well as ii) the need for the interpretation of the use of this technology in the light of the International Refugee Law, which must guarantee the principles of ethical humanism that permeates the most basic human rights of these people, being necessary a systematic analysis of the rights gained from the 1951 Geneva Convention, known as the "Refugee Statute".

Many points must be raised about the gaps that still exist in order to fully guarantee the dignity of these people based on the use of this technology that, first of all, uses all the data of a human being.

This is because the problem is based on a paradox: while on the one hand it can be beneficial and promote the rights of refugees, on the other there are still doubts about who releases this data and how it is released, as well as what the release criteria are, raising the possibility of the use of this data with biased purposes for an exacerbated control. And even if this technology is considered, in an ideal situation, to be totally private or shielded from possible external interference, it could still be used for illicit purposes, jeopardizing the rights of refugees, such as the insertion of fraudulent information for the purpose of irregular entry and stay, i.e., without fulfilling the de facto legal requirements for granting refuge to people who actually need it.

Thus, the technological phenomenon is considered an event that must not only be analyzed scientifically, but also reflected upon so that human rights can be put into effect, essentially on hyper vulnerable populations, as is the case of refugees, thus defined by the Geneva Convention as any person who fears being persecuted for reasons of race, religion, nationality, or political opinions - elements that are not only inherent to the individual's life project, but to his very essence since the beginning of his existence - in his own country of origin, who requests refuge in another country.

The justification of the problem and the central concern of the scope of the investigation is the effectiveness of International Refugee

Law, which seeks not only to recognize but also to guarantee the most basic existential needs of those who are forced to leave their country for a grave and understandable fear, with the right to request asylum, which became a worldwide concern after the intense displacements of people caused by the great world wars. These people should not be seen ethically as objects, but as subjects of rights.

Paradoxically, it is pointed out how technology has the ability to both expand and reduce the concept of person, since privacy and identity are intertwined in the digital sphere, as the world wide web interacts with an individual's biography, which can do so in multiple versions, at the risk of losing one's identity to the data network[5].

Besides this, there is also the doubt about the ethics of using this technology, in relation to experiments with refugees, who deserve more protection given their condition of hypervulnerability, since the massive collection of information and identification by means analogous to biometrics has historically been a big problem for people in a situation of migration.

In this way, such information can be used for discriminatory purposes and violations of international conventions and treaties, such as through the use of its data for the formation of "crimigratory" policies, a term highlighted by Santos and Brazil , the use of data obtained through this technology in order to justify the tightening of policies to discourage possible illegal entries, granting harsher treatment, applying exacerbated surveillance, interceptions, deportations, and detentions, having security as a weak argument, turning structural difficulties into the guilt of individuals.

This is because host states often disregard the specificities of each people, which can even cause cultural erosion, or even when host countries have their levels of tolerance and solidarity put to the test, making room for racism and discrimination[6].

This context, therefore, leads to the suggestion of a specific discipline for the use of this technology to refugees under international

[5] RODOTÀ, Stefano. *Dal soggetto alla persona*. Napoli: Editoriale Scientífica, 2007, p. 53-59.

[6] PIOVESAN. Flávia Cristina. OLSEN, Ana Carolina Lopes. Tolerância e refúgio: Um ensaio a partir do acordo EU-Turquia. *Revista de Direito Internacional*, Brasília, v. 14, n.2, 2017, p.221

law, not to suppress it, given its great potential for use for a number of benefits including the promotion of a dignified life for these people, on the other hand always within the established limits.

Thus, in relation to the methodology used, we justify below the approaches, methods, and techniques used to achieve the purposes to which this work proposes, using alternatively, the documentary methodologies of a theoretical nature, as well as the empirical bases.

Divided into three parts, this article has specific methodological steps, starting from the predominantly theoretical research, with empirical elements collected essentially on the case study of the experimentation of the use of blockchain technology on refugees from Syria from the year 2017.

In the first part of the research, the importance of the use of blockchain technology by international law is highlighted, essentially when it is used in relation to hypervulnerable populations, as is the case of refugees. Based on a quanti-qualitative approach, the methodological nature, in this first moment, is basic of exploratory objective, given the general analysis about the need for discussion about applications and limits of this technology. We proceeded with a bibliographic-documentary survey, essentially confronting the ethical values of the use of technology to be considered, in relation to the possibilities of application on hypervulnerable populations, as in the case of refugees, which justifies a first debate and discipline on the part of international law. The logic that predominates in this first moment is the hypothetical-deductive one, for the construction of hypotheses to be considered by International Law.

In the second stage or part of the research, with a greater focus on empirical research, the case study procedure was essentially used. Based on a qualitative approach, the research has an applied nature and descriptive objectives so that a subsequent critical analysis can be performed, with inductive logic predominating on this occasion. On this occasion, there is an interpretativist phenomenological observation, based on the analysis of the observed case, as well as on the description, understanding, and interpretation of the application phenomena of the use of technology under a transdisciplinary and

transversal look. The variables and their incidences are described based on the longitudinal analysis of the specific case of the experience of blockchain use by Syrian refugees in Jordan.

From this point on, the data will be submitted to meta-analysis and, subsequently, confronted with the experience of the use of technology by the UN in Jordan in relation to Syrian refugees. In this sense, the logical criterion of inductive analysis will be applied.

Thus, in order to highlight the central thesis, the so-called "International Refugee Law" is presented as an interpretative guide, for the creation of guidelines on the use of blockchain to these hypervulnerable populations, as suppression of the overlapping of vulnerability, returning to the methods of quantitative approach of applied nature, of prescriptive objective in the sense of suggesting a specific interpretation in the light of the normative principles that permeate the rights of refugees to ensure the effectiveness of their dignity and a dignified life in this moment of technological turn of law occurred worldwide, respecting the origins, culture, language, freedom and the guarantee of all interests legally protected so that refugees can resume their life projects, already diverted by wars or other reasons that made them abruptly request refuge in another country.

2. THE IMPORTANCE OF THE DISCIPLINE OF THE USE OF THE BLOCKCHAIN BY INTERNATIONAL LAW: The particularity of refugee law.

Parallel to the phenomenon of globalization, the technological development of the last decades characterizes another world phenomenon to be observed with care to discover its existential structures as well as the entities that correspond to them, in order to gain contours of questionability to what is called "technoglobalization".[7]

Concepts such as ethics, justice, and dignity are traditional universal precepts, which can never be surpassed, although their

[7] HUSSERL, Edmund. *A ideia da fenomenologia. Lisboa*: Edições 70, 1989, p. 53.

readings have been modified throughout social changes and, nowadays, by technological development.

Therefore, there will always be a space for questioning human actions, which go beyond the mere reach of cogitated or intended results. And, in the words of Rosas , "in the scope of technological development, an apparent ethical and human distancing is observed, from the conception of an idea to the first steps towards its realization, "caused by the reduction of direct contact between people and by the ease of anonymization", essentially by the creation of frameworks and interactive fictitious realities or even by the action of artificial intelligence, and one should always alert to the importance of ethics and dignity inside and outside the digital environment.

In fact, it must be ensured that all the victories over the humanization of the law won over the centuries do not suffer some degree of erosion when part of the attention paid to the subject of law turns to the object, as in the case of the technologies developed in recent decades.

Technology, as a phenomenon, has a much more cartesian, radical, final, and accelerated character than philosophy, sociology, law, or politics.

It is noteworthy that technology limits adjustments in conflict solutions according to social expectations or concrete cases, i.e., casuistry. In cyberspace, determinism, binarity, the architecture of simplicity, and privacy as an expression of freedom are evidenced[8].

In the first article of the Universal Declaration of Human Rights - UDHR , many essential principles are already extracted, such as freedom, equality, and dignity. Far beyond an axiological charge, they enshrine values and goals to be realized[9]

[8] KARAVAS, Vaios; TEUBNER, Gunther. *The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law*. Cambridge: Cambridge Press University, 2002. Disponível em https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6195520133A79D7A577B9AFCFC383BB3/S2071832200012153a.pdf/httpwwwcompanynamesuckscom_the_horizontal_effect_of_fundamental_rights_on_private_parties_within_autonomous_internet_law.pdf Acesso em 22 abr. 2021.

[9] DECLARAÇÃO UNIVERSAL DOS DIREITOS HUMANOS. Assembleia Geral das Nações Unidas em Paris. 10 dez. 1948. Disponível em: https://nacoesunidas.org/wp-content/uploads/2018/10/DUDH.pdf Acesso em: 22 abr. 2021.

By the words of Piovesan[10] , the international conception of contemporary human rights is that by which they are an "indivisible, interdependent and interrelated unit, in which the values of equality and freedom are combined and complement each other". Necessarily, one must focus on an understanding of the international system of human rights protection in relation to the examination of its human rights protection apparatuses.

That is a right whose essence has a protective character, guaranteeing the most basic legal assets for human existence, marked with a logic of its own, aimed at protecting human beings, not the State or other legal entities, which, many times, can cause greater damage than the public power itself, given the aggrandizement of today's private power. It does not govern, therefore, the relationship between equal subjects, but rather those in vulnerable situations, aiming to diminish the effects of the unbalance of power relations and the disparities originated therefrom.

The logic used in this way is of an existential ethics, of a transcendent nature in its essence, not being deduced from a merely cartesian or mathematical logic, which means that even if a disruptive innovation may seem, at first, operational and, numerically effective in relation to the degree of efficiency of production or productivity extracted from the relationships established, it can never violate the content of human personality rights, which gives it its existential character.

In a technological context whose speed exceeds ethical, sociological and legal analysis, one must worry about the realization of the purposes expressed in the norms of the first article of the UDHR. This is because the new generations are already being techno-literate from the first months of life, and there is also a movement of almost forced insertion of the elders to the digital novelties. As recalled by Rosas[11], "the individual or social reflexes of these transformations are still to be fully known and are far from being adequately evaluated..

[10] PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional Internacional.* 14 ed. São Paulo: Saraiva, 2013, p. 75.

[11] ROSAS, Eduarda Chacon. Alcance resultados, mas não se esqueça dos propósitos: a dignidade, a ética e os elevados fins. In: MALDONALDO, Viviane Nóbrega; FEIGELSON, Bruno. *Advocacia 4.0*. São Paulo: Revista dos Tribunais, 2019, p. 211.

The tendency of novelty is the absence of time to impose limits, tending to observe the occurrence of abuses, which increases the possibility of conversion, over time, into illegality, and should be controlled by the courts or the legislature.

Compounding an enormous collection of data, the so-called big data on the world wide web, distributed at immense speed like a torrent, there is a risk of loss of privacy.

In this context, blockchain technology is, in the same way, inserted in this torrential system of information, inserted in a technology that, like any other, in relation to its use, "can generate unpredictable and uncontrollable consequences"[12], being that it can often, after great care, be necessary to deactivate or restructure it.

According to Moore, since the late 1990s, three central characteristics can be deduced, namely: the use of information as an economic resource; the diffusion of the use of information as its own sector of the economy; and the development of information as its own sector of the economy[13].

Rodotà[14] points out that the fragmentation of the person reduced to data can be used both as a protection mechanism and for illegal activities with regard to the person, essentially using his biometric data, whose basis is precisely the peculiarity of the user, as if the body became its own password.

In this new virtual environment, personal data or sensitive data is easily transported, essentially to what today are called clouds, forming what is called "data shadow" - personal information that people leave daily when they participate in daily activities online, to which one must be very careful not to reduce the person to a number, a raw material, essentially when he needs privacy and protection of his personality rights[15].

[12] MAGRANI, Eduardo; SILVA, Priscilla; VIOLA, Rafael. Novas perspectivas sobre ética e responsabilidade de inteligência artificial. In: FRAZÃO, Ana; MULHOLLAND, Caitlin. *Inteligência artificial e direito.* São Paulo: Revista dos Tribunais, 2019, p. 117

[13] MOORE, Nick. *The information Society.* In: UNESCO. *World information report* 1997/1998. Paris: Unesco, 2007. Cap. 20, p. 271.

[14] RODOTÀ, Stefano. Transformações do corpo. *Revista Trimestral de Direito Civil.* Rio de Janeiro: Padma. v. 5, n. 19, jul/set. 2004, p. 93.

[15] SCHULMAN, Gabriel. www.privacidade-em-tempos-de-internet.com: O espaço virtual e os impactos reais à privacidade. In: TEPEDINO, Gustavo; TEIXEIRA, Ana Carolina Brochado;

In this way, the use of this technology cannot go unnoticed by the sieve of the social sciences, the law and its purposes of protecting the human being, who cannot be reduced in his humanity.

IThis is because, in relation to this new scenario of hyper-connectivity in the Age of the Internet of Things, innovations such as the blockchain should be thought through so that the parameters that guide a society increasingly shaped by technology can meet social and human purposes[16].

With this concern, about new technologies, on February 16, 2017, the European Parliament issued a resolution with recommendations from the European Court about the applicable rules on robotics, highlighting, among other issues, about "electronic people" or "e-persons" and their impacts on natural persons, and considering a scenario of disconnection between ethics and technology, the European directive states that dignity should be the center of a new digital ethics[17].

For the deputy director of The Engine Room, a non-profit organization that supports civil society in advancing missions through the strategic and responsible use of data and technology, Zara Rahman, an expert on technology and power, considering race and identity[18], the ethical questionableness of experimenting with vulnerable populations can be asserted, since the massive collection of information and catalogued identification by means analogous to biometrics has historically been a major problem for people in a migratory situation, as was the case at the time of the holocaust, or the terrible ethnic cleansing of the Rohingya in Myanmar[19].

ALMEIDA, Vitor. *O Direito Civil entre o sujeito e a pessoa*. Belo Horizonte: Fórum, 2016, p. 347.

[16] MAGRANI, Eduardo. *A internet das coisas*. Rio de Janeiro: FGV, 2018, p. 24. Disponível em https://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/23898/A%20internet%20das%20coisas.pdf?sequence=1&isAllowed=y Acesso em 22 abr. 2021.

[17] HÄUSER, Markus. *Do robots have rights? The European Parliament addresses artificial intelligence and robotics*. Lexology: CMS Germany. Disponível em https://www.lexology.com/library/detail.aspx?g=8233438f-4ad0-432a-a27e-0018f41468f3 Acesso em 22 abr. 2021.

[18] RAHMAN, Zara. *About me now*. Blog Zahahanet. Disponível em https://zararah.net/about/ Acesso em 22 abr. 2021.

[19] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

International law, from its earliest beginnings, is traditionally recognized in Western law as a dynamic system that aims to discipline and regulate the activities outside the activity of states, as well as international organizations and individuals themselves, and aims to regulate the relationship between the interests of states and global society.[20]

Mazzuoli's[21] important point is the necessary separation between belonging to international society and being a subject of international law. Thus, mentioning international actors is much broader than just subjects of international law. It is preferable to refer to international actors, including Non-Governmental Organizations (NGOs) and other entities that do not have legal personality, but that also actively participate in international society.

It highlights the decentralized character of the world society order, organized cooperatively by international law in favor of peace and international security, respecting interdependence, always having to manage the issue that is affected by regulations, often non-legal, alien to its field of action, which at the same time must interact and discipline them, within the globalization phenomenon[22].

This trend of international cooperation, intensified after World War II in view of the atrocities committed by authoritarian states, transformed human rights from national options to an international responsibility for the peace and security not only of nations, but of all humankind[23].

According to Mont'Alverne and Matos[24], "globalization, with its speed for the constitution of legal relations, promotes a spatial relativization in which more and more extraterritorial activities are performed, causing an internationalization of all law"..

[20] CARREAU, Dominique. *Droit Internacional*. 8 ed. Paris: A. Pedone, 2004, p. 24-32.

[21] MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. 5 ed. São Paulo: Revista dos Tribunais, 2011, p. 58

[22] MAZZUOLI, Valério de Oliveira. *Curso de Direito Internacional Público*. 5 ed. São Paulo: Revista dos Tribunais, 2011, p. 59

[23] TEIXEIRA, Carla Noura. *Por uma nova ordem internacional: Uma proposta de constituição mundial*. 2009, 306 f. Tese (doutorado). Programa de Pós Graduação em Direito. Pontifícia Universidade Católica de São Paulo, São Paulo, 2009, p. 126-127

[24] MONT´ALVERNE, Tarin Cristino Frota; MATOS, Ana Caroline Barbosa Pereira. Crônicas de Direito Internacional Público – A política australiana de refúgio e a decisão da suprema corte de Papua Nova Guiné: A ilegalidade do centro de detenção offshore. *Revista de Direito Internacional*, Brasília, v. 14, n. 3, 2017, p. 5

Thus, technological advances and their promises of improvements in human life must necessarily come with disciplines and debates on the forms of guarantees that can always preserve the dignity of the human being.

To perform the necessary critical analysis, empirical research is justified in the next section, using qualitative research, through the application of methods and techniques with the objective of providing a deeper analysis of social processes or relationships, in order to analyze a greater amount of information within the facts that allow the demonstration of the object of study in its complexity, in its multiple characteristics and relationships[25].

A case study is used, combining methods, based on the analysis of a specific phenomenon or group[26]. The empirical experience presented to the world one of the pioneering experimental uses of blockchain technology for humanitarian aid, applied to Syrian refugees located in Jordan, from the first months of 2017.

3. THE EXPERIENCE OF THE USE OF BLOCKCHAIN BY THE UNITED NATIONS IN JORDAN: The case of syrian refugees

The paradigmatic case of the use of blockchain on Syrian refugees in the Jordan region leads to the initial elements of the debate related to the application of this technology to these hypervulnerable populations, those with overlapping vulnerabilities. The case in question thus enables the construction of starting points to provide a representation of the phenomenon, in a specific context, based on the data and information already provided, in a meta-analysis.[27].

[25] IGREJA, Rebecca Lemos. O Direito como objeto de estudo empírico: o uso de métodos qualitativos no âmbito da pesquisa empírica em Direito. In: MACHADO, Maíra Rocha (org.). *Pesquisar empiricamente o Direito.* São Paulo: Rede de Estudos Empíricos em Direito, 2017, p. 14.

[26] IGREJA, Rebecca Lemos. O Direito como objeto de estudo empírico: o uso de métodos qualitativos no âmbito da pesquisa empírica em Direito. In: MACHADO, Maíra Rocha (org.). *Pesquisar empiricamente o Direito.* São Paulo: Rede de Estudos Empíricos em Direito, 2017, p. 15.

[27] MACHADO, Maira Rocha. Estudo de caso na pesquisa em direito. In: MACHADO, Maira Rocha (org.). *Pesquisar empiricamente o direito*. São Paulo: Rede Empírica de Estudos do Direito, 2017, p. 357

The Syrian civil war, also known as the Syrian Revolt or Syrian Revolution, as it became known, began in mid-2011, based on the occurrence of a series of popular protests that progressed into a violent armed uprising aimed at ousting then-President Bashar al-Assad, in order to establish a new democratic leadership[28].

In this context, the government began to publicly consider the leaders of this uprising as terrorists who aim to destabilize the country. In 2013, the situation was aggravated by the Islamic State's reclaiming of Syrian territories, causing even more violations of the rights of civilians, who were faced with the advances of these groups, and their most basic rights were violated.

At this juncture, many civilians sought refuge in countries in part of Europe or nearby countries, such as Lebanon and Jordan, causing a great migratory wave, fleeing atrocities in their home countries, war crimes and crimes against humanity perpetrated in the armed uprisings, as well as the hunger and misery that worsened in the face of such facts.

Local violence still persists, the confrontation between government troops and the so-called *jihadists*, a term commonly used in the West to designate Muslim groups that understand armed struggle to be necessary for the implementation of sharia, the interpretation of Muslim law in the sense of politically organizing society according to its norms, still causes many waves of violence and consequently intensifies migration[29].

Thus, many left their homes without documents, often with only the clothes they were wearing, traveling in a risky way in crowds of people transported in land cargoes or ships in search of refuge in places where they can restart their lives in a dignified way, or even simply survive, often having dead people in their families, but far from warlike conflicts.

In this context, in mid-2017, the United Nations Organization - UN, launched a humanitarian aid program applied in an experimental

[28] ENCYPLOPAEDIA BRITANNICA. *Syrian civil war*. Britannica, 2020. Disponível em https://www.britannica.com/event/Syrian-Civil-War Acesso em 26 abr. 2021.

[29] BBC. *O que é o jihadismo?* News Brasil: BBC, 2014. Disponível em https://www.bbc.com/portuguese/noticias/2014/12/141211_jihadismo_entenda_cc Acesso em 26 abr. 2021.

way to Syrian refugee groups that were located in the territory of Jordan, using a disruptive technology, with the purpose of not only ensuring the food of these people, but also the security and economy in the transactions required to obtain food.

In June 2017, the ID2020 event was held, a public-private consortium signed, among other objectives, to develop a prototype of a legal identity for everyone on the planet [30]. The partnership, at the time, signed with the United Nations Organization - ONU, aimed at promoting objective 16 of the Sustainable Development agenda 2030, directed at providing a legal identity for all, including birth registration[31].

The event took place at the United Nations headquarters, when Accenture and Microsoft teamed up to develop a prototype digital identification network using technology commonly known as blockchain, as part of a project to provide legal identification on a global scale to 1.1 billion people who have no official documents, with the essential goal of helping refugees seek the most basic services such as education, health and food[32].

The project took as its starting point the premise that identity, in this sense, is a basic human right. The model studied was developed on a platform owned by Accenture, in charge of feeding the identity management system through biometric data to be collected from refugees[33].

From this prototype, Houman Haddad, head of emerging technologies at the World Food Plan - WFP, envisioned the use of this technological tool as a cash transfer system, then launched in 2017 the largest pilot project of the use of blockchain on the humanitarian sector. By the end of 2019, the project reached 110,000 people in the

[30] ID2020. *We need to get digital ID right*. Disponível em https://id2020.org/ Acesso em 22 abr. 2021.

[31] UNITED NATIONS. *Transforming our world: the 2030 Agenda for Sustainable Development*. UN Platform, 2015. Disponível em https://sustainabledevelopment.un.org/post2015/transformingourworld Acesso em 22 abr. 2021.

[32] IRRERA, Anna. *Accenture, Microsoft team up on blockchain-based digital ID network*. Technology News: Reuters, 2017. Disponível em https://www.reuters.com/article/us-microsoft-accenture-digitalid/accenture-microsoft-team-up-on-blockchain-based-digital-id-network-idUSKBN19A22B Acesso em 22 abr. 2021.

[33] IRRERA, Anna. *Accenture, Microsoft team up on blockchain-based digital ID network*. Technology News: Reuters, 2017. Disponível em https://www.reuters.com/article/us-microsoft-accenture-digitalid/accenture-microsoft-team-up-on-blockchain-based-digital-id-network-idUSKBN19A22B Acesso em 22 abr. 2021.

Syrian refugee camps of Azraq and Zaatari, Jordan[34], in partnership with Parity Technologies and Baltic Data Science, based on Ethereum - a form of digital cryptocurrency, for its current financial infrastructure based on this technology[35].

It should be noted that the technology was initially tested in Pakistan. The way in which it was used made transactions with this technology slow and with very high fees. Haddad decided that one of the problems was that the system was built on the blockchain in a public version, where anyone can use the network and validate transactions. In this way, even though there is difficulty in tampering or falsifying transactions, the fees accumulated and became higher[36].

On the other hand, it also introduces a notable point of inefficiency: working with local or regional banks. For WFP, which transferred more than $1.3 billion in such benefits in the year 2017 (about 30 percent of its total aid), the transactions and other fees are money that could have been spent on millions of meals[37].

By using iris-scanning machines on registered refugees, their identity is confirmed in a traditional United Nations database, a family account held on a variant of the so-called Ethereum blockchain is queried by the World Food Program (WFP), and the refugee can pay his or her food bills without the need to use cash, while getting a real-time view of transactions[38].

In this way, this aid to Syrian refugees would be distributed as something analogous to a cryptocurrency voucher that can be used in adhering markets, thus allowing greater control of spending and detection of possible fraud.

[34] THE NATIONAL FUTURE**.** *How blockchain technology has changed the game for Syrian refugees in Jordan***.** Abu Dhabi, 2019. Disponível em https://www.thenational.ae/arts-culture/how-blockchain-technology-has-changed-the-game-for-syrian-refugees-in-jordan-1.932432 Acesso em 22 abr. 2021.

[35] JI-HYOUNG, Son. *Tech disruption plays out in WTP humanitarian initiative*. Seul: The Investor, 2019. Disponível em http://www.theinvestor.co.kr/view.php?ud=20190905000902 Acesso em 22 abr. 2021.

[36] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

[37] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

[38] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

The program, known as Building Blocks, has gone on to help distribute aid to over 100,000 Syrian refugees in Jordan. By the end of 2018, it covered all 500,000 refugees in the country. If successful, the project aims to accelerate the uptake of using blockchain disruptive technologies in United Nations agencies and even in other refugee cases around the world[39].

The program has begun to provide direct access to cash to account holders, and in the future a "multiple wallet" concept is envisaged whereby people could use the system to pay for other goods such as education, travel history, and health care, with the aim of expanding its reach to other refugee groups such as those who have migrated to Bangladesh and Palestine[40].

Thus, it is imagined that the refugee will later be able to carry a form of "digital wallet" of his or her data and metadata, which can even be stored on a cell phone filled with the transaction history of the camp he or she is in, as well as government identification and access to financial accounts, linked through an identity system based on blockchain technology.

Based on this perspective, the format of this data would be encrypted inside the refugees' smartphones, being able to recover the data of identities lost when they needed to leave their homes in their homeland, which would facilitate future proof of their education, vaccines or other data in an eventual change of country, facilitating their stay in a legalized way[41].

In this context, the refugee could more easily enter the world economy by having a place for a prospective employer to deposit payments, or for a bank to view his credit history, and even for an immigration agent to verify his identity, duly attested by the United Nations and the Jordanian government[42].

Enthusiasts claim that the use of this technology would benefit both refugees and host nations, as this experiment could evolve into a so-called

[39] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

[40] THE NATIONAL FUTURE. *How blockchain technology has changed the game for Syrian refugees in Jordan*. Abu Dhabi, 2019. Disponível em https://www.thenational.ae/arts-culture/how-blockchain-technology-has-changed-the-game-for-syrian-refugees-in-jordan-1.932432 Acesso em 22 abr. 2021.

[41] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

[42] JUSKALIAN, Russ. *Inside the Jordan refugee camp that runs on blockchain*. Massachussets: Mit Technology Review. may/june 2018. Disponível em https://www.technologyreview.com/s/610806/inside-the-jordan-refugee-camp-that-runs-on-blockchain/ Acesso em 22 abr. 2021.

"global passport," avoiding even the possibility of migration of war criminals or excessive bureaucratization of those who need the most basic services for a dignified life. This would help the problem of governance in immigration policy[43].

Nevertheless, based on this qualitative data from the case study, the analysis of possible variables should be sought, considering the central objective of understanding the relationships involved regarding the observation of its evolution, aiming at the generalization of the substratum, in subsequent search for theorization in favor of the protection of the human person in his or her dignity in an integral way.[44]

But expectations of Building Blocks are high from the project's creators, being one of several ways in which blockchain can be used in the sector. The Norwegian Refugee Council notes that the technology offers a revolutionary approach by proposing trust in the platform rather than between people, while providing checks and balances in the system. Nevertheless, none of today's humanitarian projects are perfect systems because of the persistent need to still use paper procedures for verification and auditing purposes. A major challenge in this regard would be offline functionality in places without a World Wide Web connection, as is the reality in many refugee camps.[45]

Another major challenge raised was the detection of illicit material inserted in bitcoins, the largest user of blockchain technology, linking it to the dark web[46], a form of access to the world wide web destined to anonymity, with a vast content considered illegal by several countries, linked to the drug market, weapons, hacking among other activities contrary to Law[47].

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[43] O´NEAL, Stephen. *DLT in Migration Policy: How Blockchain Can Help Both Refugees and Host Nations.* Cointelegraph, 2018. Disponível em https://cointelegraph.com/news/dlt-in-migration-policy-how-blockchain-can-help-both-refugees-and-host-nations?_ga=2.157462527.436306420.1587005638-1708324271.1584115364 Acesso em 15 abr. 2020.

[44] GÜNTHER, Hartmut. *Pesquisa qualitativa versus pesquisa quantitativa: Esta é a questão?* Psicologia: Teoria e pesquisa. Brasília: Unb. v. 22, n. 2. mai/ago 2006, p. 201-205.

[45] THE NATIONAL FUTURE**.** *How blockchain technology has changed the game for Syrian refugees in Jordan***.** Abu Dhabi, 2019. Disponível em https://www.thenational.ae/arts-culture/how-blockchain-technology-has-changed-the-game-for-syrian-refugees-in-jordan-1.932432. Acesso em 22 abr. 2021.

[46] THE NATIONAL FUTURE**.** *How blockchain technology has changed the game for Syrian refugees in Jordan***.** Abu Dhabi, 2019. Disponível em https://www.thenational.ae/arts-culture/how-blockchain-technology-has-changed-the-game-for-syrian-refugees-in-jordan-1.932432. Acesso em 22 abr. 2021.

[47] BARBOSA, Daniel Cunha. *Os mistérios da Dark Web: descubra o que essa rede tem a oferecer e por que*

In the same way that it has shown openness for the practice of illicit acts within the use of this tool, it could occur with the use of data from refugees, who are already in a situation of hypervulnerability.

The worrying factor is that, although very difficult to hack, blockchain technology is not at all secure, with the risk of invasion, identity theft, fraud, cyberclones, and the need for acceptance by those who possess the technology, which can lead to the misuse of the refugee's sensitive data for illicit purposes.

In any case, a new business model has been presented to the world in which payment is made in exchange for the privacy of a human being's most sensitive data, this data being the condition of use or even the currency of exchange itself, being inherent to its very nature.

Tapscott Drawing on Tapscott's[48]critique of technology, there are many obstacles to be overcome, such as the fact that the equivalent value of money cannot be transferred more than once, as would be the case with other information assets or intellectual property, such as a photograph. In addition, central government powers often override the issue of information collection, which is beyond mere economic data and may not be financial control, but personal data.

Thus, information emerges not only as a class of product, subject to new commercial transactions, but also its illicit appropriation[49] or contrary to ethics and human rights, and should be disciplined by law, considering not only the aspects of the great disruption it has caused in the ways of doing business or managing personal information, or the issue of the great expense of energy and computing power it demands, which would demand a high initial capital cost, but the debate about the nature and purpose of this object, so that it can be disciplined as a protected legal good, in order to fulfill the interests that involve and permeate human rights, essentially regarding the ethics of the use of information on personality rights, as well as legal security.

Another problem to be pondered is the fact of confirmation of the information provided by the refugees, when there is no way to

pode ser tão perigosa. São Paulo: Eset Brasil, 2019. Disponível em https://www.welivesecurity.com/br/2019/05/17/os-misterios-da-dark-web-descubra-o-que-essa-rede-tem-a-oferecer-e-por-que-pode-ser-tao-perigosa/ Acesso em 22 abr. 2021.

[48] TAPSCOTT, Don; TAPSCOTT, Alex. *Blockchain Revolution*. São Paulo: SENAI-SP, 2016, p. 3-39.

[49] DELL. *Underground hacker markets. Secure Words. Round Rock*: Dell, 2014. p. 5

prove who they are or their most basic data, thus facing the risk of registration of ideological falsehood.

The points analyzed above must be considered and discussed as legal facts, capable of generating recognition and discipline by international law, in order to guarantee the effectiveness, finality, and promotion of human rights, essentially in the case of refugees, who are in a position of vulnerability and may face serious problems in other countries, such as xenophobia or some form of invasive and excluding control, from the possession of their data.

This is because one must consider the risks arising from the use of technology essentially due to the absence of guidelines, or general lines to be followed for the use of blockchain in relation to the organization or attempt to facilitate the rights of refugees, pointing out that when applying technological resources, one must be aware of who will be the provider, who will maintain, how is the secrecy, how is the respect for fundamental rights exposed to this, how to comply with the basic principles of the rights of refugees. These are points that must be satisfied in order to think of a strengthened and protected principles.

In fact, despite the risks, there are possibilities to be cogitated about the positive aspects of the use of the blokchain beyond the PMA, but as reflections on the offer of effective protection to refugees of other occasions, such as the important issue of protection of indigenous refugees, in order to be a way to safeguard their cultural specificities and those derived from their traditional lands[50].

In this way, it is possible to apply this technology as a way to safeguard cultural identity in the process of losing the link with their culture once they are forced to leave their country of origin, in a situation of loss, of shock, of rupture. The blockchain could thus be a way of keeping the culture and ancestry of that person to protect and defend it within its origins.

In this way, the protection of the human person could be safeguarded, avoiding damage to his existence and to his life projects, since,

[50] FIGUEIRA, Rickson Rios. *Indigenous refugee and cultural erosion: possibilities and limits of international refugee and indigenous peoples law in the protection of indigenous cultural expression related to traditional land and traditional native languages.* Revista de Direito Internacional, Brasília, v. 17, n. 3, 2020, p. 441.

when forced into a cultural adaptation because he has no other option, he is often robbed of the viability of conditions to realize his own culture and end up avoiding erosion, since even food is a cultural issue[51].

Technology can bring great advantages as well as great risks - thus justifying the need to create standards of conduct - guidelines within international law, more specifically directed at these populations that find themselves in a situation of overlapping vulnerability, that is, hypervulnerability.

4. INTERNATIONAL REFUGEE LAW AS AN INTERPRETATIVE GUIDELINE FOR THE USE OF BLOCKCHAIN

The protection of human rights has strong philosophical bases, essentially of Kantian matrix. In the face of the State, in this way, the theme of its political justification is composed, seeking to protect human beings from the violation of their most basic rights, thus avoiding a repetition of the atrocities that have occurred throughout world history. This protection is timeless, and should always be adequate and reinterpreted in the light of new risks.

In fact, not only the war situations but also the continuous development of society that gradually increases its risks by predatory activities of public and private law people, in the exploitation of energy forms, media, means of information, industrialization, standardization of behaviors and lifestyles and the attribution of these very methods of predatory exploitation to each and every enterprise have caused the person to be usurped of his human nature and existence, as if becoming totally dependent on the new needs imposed on him[52].

The creation of the United Nations – UN, in 1945, an intergovernmental organization of universal character and

[51] FIGUEIRA, Rickson Rios. *Indigenous refugee and cultural erosion: possibilities and limits of international refugee and indigenous peoples law in the protection of indigenous cultural expression related to traditional land and traditional native languages*. Revista de Direito Internacional, Brasília, v. 17, n. 3, 2020, p. 448.

[52] BECK, Ulrich. *Sociedade de Risco: Rumo a uma outra modernidade*. Trad. Sebastião Nascimento. São Paulo: Editora 34, 2011, p. 111

representative of the international community, was directed to act in the maintenance of international peace and security, to develop friendly relations among states, as well as to foster cooperation among peoples, especially in the systematization and enforcement of human rights, besides acting as a harmonizing center for international actions, promoting the internationalization of human rights, protected even in the absence of international wars.

Refuge, as one of the protection forms of international human rights law[53], is not a discretionary act of the granting state, because the recognition of refugee status is linked to well-defined legal texts and hypotheses, regulated by international norms, which recognize this right as inherent to the human being..

The concept of refugee is not confused with the concept of migrant nor with the concept of resident alien, thus possessing its own basis of protection and its own rules for its protection, embodied by the complex system of international protection, not limited to the Geneva Convention of 1951

This institute, as a complex normative structure composed of a plurality of norms and legal models subordinated to common requirements of superior orders and principles, arose at the beginning of the twentieth century, under the auspices of the League of Nations, in the face of a large contingent of people persecuted during and after World War II, making individual qualification by the institute of asylum unfeasible, demanding a collective qualification that would ensure international protection within minimum standards to be safeguarded, with the States having the power to increase the list of protection and hypotheses for the recognition of refugee status[54].

In this sense, international refugee protection operates through a framework of individual rights and state responsibility that derives from the same philosophical basis as international human rights protection.

[53] JUBILUT, Liliana Lyra *O Direito internacional dos refugiados e sua aplicação no orçamento jurídico brasileiro*. São Paulo: Método, 2007, p. 42-43.

[54] JUBILUT, Liliana Lyra *O Direito internacional dos refugiados e sua aplicação no orçamento jurídico brasileiro*. São Paulo: Método, 2007, p. 43-45.

International human rights law is the source of the principles of refugee protection and at the same time complements this protection[55].

According to Jubilut[56], International Human Rights Law and International Refugee Law have the same object - the protection of the human being in the international order; the same method - the international rules of protection; the same subjects - the human being as the beneficiary and the State as the addressee and main obligator of the fulfillment of the rules; the same principles and purposes - the dignity of the human being, the guarantee of respect for the dignity of the human being, and the guarantee of non-discrimination, differing only in the content of their rules, depending on their scope of application.

As a branch of International Human Rights Law, the protection of refugees, the basis of what is conventionally called "International Refugee Law" also suffers from consensual philosophical foundations, residing the strength of its justification in less tangible bases, such as philosophy, morality and ethics, which, in a way, weakens its effectiveness. Thus, for this reason, the need was recognized for the creation and international positivization of a specific institute to protect people persecuted for their fundamental freedoms, with the great challenge of putting it into practice, which depends on the States in their sovereignty[57].

This principle, extracted from the International Refugee Law, is based on the Solidarity Principle, directed towards a welcome and lasting solutions for those who have been forced to relocate, with civil and citizenship conditions that allow for their locomotion and attempt to continue their life project, if possible, or a new project, ensuring their existential interests so that they can meet their most basic needs and choices in their history within a dignified life.

Solidarity, before being a principle, is one of the feelings found in the human race for the longest time, constituting one of the

[55] PIOVESAN, F. O direito de asilo e a proteção internacional dos refugiados. In: ALMEIDA, G. A. e ARAÚJO, N. *O Direito Internacional dos Refugiados: Uma perspectiva brasileira*. Rio de Janeiro: Renovar, 2001. p. 37.

[56] JUBILUT, Liliana Lyra *O Direito internacional dos refugiados e sua aplicação no orçamento jurídico brasileiro*. São Paulo: Método, 2007, p. 60

[57] JUBILUT, Liliana Lyra *O Direito internacional dos refugiados e sua aplicação no orçamento jurídico brasileiro*. São Paulo: Método, 2007, p.62-64

greatest values for the construction of human rights, since without it there is no recognition of the status of person and, consequently, of human rights themselves. From this point of view, it is the deepest philosophical foundation for the granting of refuge, since the protection of the human being is the responsibility of all human beings[58].

Such solidarity is justified given that the refugee finds himself in a situation of overlapping vulnerability. The situation of not having a choice and having to leave one's own country, considering that a great fear already makes the person vulnerable, many times without full documentation, limiting the possibility of opening and maintaining bank accounts, enrolling in courses or enrolling their children to exercise their right to education.

Many times, while they are waiting for the analysis of the political attributes of the refugee condition, having their right to move restricted, they are directed to shelters maintained by governmental entities; and if they feel unable to stay there, they look for shelter in vacant or abandoned places or even wander in city streets, exposed to a high risk situation, and sometimes end up ignored by society, in a picture of invisible vulnerabilities[59].

This is due to the fact that often the increased waiting time for refugee recognition in refugee camps materializes a process of segregation and even social exclusion.

In fact, refuge does not grant a permanent status, but rather moves in a lasting solution, which can be the return to your country when the fear that caused your request for refuge ceases, or even direction to host countries.

In this sense, the blockchain could facilitate and even accelerate the checking of legal requirements for granting refuge and regularization of stay, enabling the exercise of the most basic civil rights such as health, education, work, and even prevent capture of refugees for

[58] JUBILUT, Liliana Lyra *O Direito internacional dos refugiados e sua aplicação no orçamento jurídico brasileiro*. São Paulo: Método, 2007, p. 67-69

[59] FIGUEIRA, Rickson Rios. *Indigenous refugee and cultural erosion: possibilities and limits of international refugee and indigenous peoples law in the protection of indigenous cultural expression related to traditional land and traditional native languages*. Revista de Direito Internacional, Brasília, v. 17, n. 3, 2020, p. 451-454.

human trafficking purposes, since the "passport" for personal data would be their biometric data.

It is pointed out that there is no standard that creates a routine or a determined procedure on how the receiving countries should proceed, and there is no system to standardize, for example, the granting of the necessary documentation for the exercise of the rights inherent to the refugee.

In general, the receiving countries sought by those seeking refuge are those that already have a reference in human rights, that is, that have at least signed and ratified the United Nations conventions on Refugee Rights.

However, deviations can still occur, as in the case of Australia's so-called "Pacific Solution" measures in 2012, when the country moved its detention centers out of its territory, not subject to Australian law, and, through a memorandum of understanding with Papua New Guinea, sent refuge seekers to detention centers on Manus Island in exchange for economic advantages[60].

In a publication of the same year, the United Nations High Commissioner for Refugees issued guidelines for the detention of refugee applicants, in respect of the refugee's freedom of movement and safety, who cannot suffer arbitrary detention without due process of law, and even if they do, the conditions must be humane and dignified[61].

Another example occurred in 2016, regarding an agreement between the European Union and Turkey, in which all migrants fleeing the Syrian war, not yet officially refugees, if they were considered irregular upon landing on Greek soil, would be returned to Turkish territory[62].

[60] MONT´ALVERNE, Tarin Cristino Frota; MATOS, Ana Caroline Barbosa Pereira. Crônicas de Direito Internacional Público – A política australiana de refúgio e a decisão da suprema corte de Papua Nova Guiné: A ilegalidade do centro de detenção offshore. *Revista de Direito Internacional*, Brasília, v. 14, n. 3, 2017, p.4.

[61] ACNUR. *Diretrizes sobre os critérios aplicáveis e os padrões relativos à detenção de solicitantes de refúgio, e soluções alternativas à detenção*. Genebra: ACNUR, 2012.Disponivel em: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=53d602884 Acesso em 29 abr. 2021.

[62] PIOVESAN. Flávia Cristina. OLSEN, Ana Carolina Lopes. Tolerância e refúgio: Um ensaio a partir do acordo EU-Turquia. *Revista de Direito Internacional*, Brasília, v. 14, n.2, 2017, p.221

When nation-states sign international conventions, as in the case of refugee protection norms, they agree to adapt their legal outlines to international law, limiting their sovereignty[63] within a cooperative model, for the sake of the reinforcement of humanistic policies.

This is because International Law is based on diversity and pluralism, with tolerance and otherness, the foundation of the principle of non-refoulement - "non-return" to the country of origin without serious and justifiable reasons, or even the cessation of risk to the applicant. This principle is, according to Piovesan, the "cornerstone of refugee law"[64].

With the possibility of inserting inappropriate data, if there is no certainty about who will be the host of this data, and, essentially, who will be responsible for the secrecy and security of this data, there are serious risks, essentially when a State tends not to receive refugees. For example, if an algorithm, a program that uses artificial intelligence to perform programmed tasks with or without human supervision, were to verify in a refugee's data that the refugee had already been the neighbor of a person wanted for acts of terrorism, it could apply a biased logic understanding that the one requesting refuge would also be so, denying him his right, at the same time reinforcing the discourse of protecting the territory from terrorism, as has often been observed as a justification for denying refuge.

In the same way, another elocubation would be about the control of refugees in periods of global calamity, such as occurred after the COVID19 pandemic, in which one could never think of using technology to harm refugees, in a period in which the effectiveness of solidarity should be observed.

It is noteworthy that the central idea is the insertion of the very notion of tolerance as the foundation of the International Refugee Law and even of all human rights, seeing the human being as a historical

[63] TEIXEIRA, Carla Noura. *Por uma nova ordem internacional: Uma proposta de constituição mundial*. 2009, 306 f. Tese (doutorado). Programa de Pós Graduação em Direito. Pontifícia Universidade Católica de São Paulo, São Paulo, 2009, p. 104.

[64] PIOVESAN. Flávia Cristina. OLSEN, Ana Carolina Lopes. Tolerância e refúgio: Um ensaio a partir do acordo EU-Turquia. *Revista de Direito Internacional*, Brasília, v. 14, n.2, 2017, p. 216.

and concrete person, placing the human being as the source of all legal systems[65].

International Refugee Law must be interpreted in line with international human rights law, since the protection of the human person is due even before the refugee status[66].

Much progress has been made with respect to the human rights of refugees, although several reports of violations point to gaps in international political and administrative arrangements or even problems that must be addressed by receiving countries, which challenge the sincerity of the host country's values, seemingly merely a conditioned tolerance, since, with strangeness for the different, or even fears of losing the job market, generating a division and a behavior of not belonging by the population, causing indirectly and consequently, reprovable attitudes of racism and xenophobia, in an ideological discourse between good and evil[67].

However, unconditioned tolerance can also be harmful because it is a form of domination or even indifference to the inevitability of coexistence, leading to social exclusion, since it does not promote dialogue or understanding of the other[68].

In this sense, one could cogitate on the viability of blockchain as a way of, from the personal data inherent to the refugee's person, bringing him/her closer to his/her origins, not only in relation to space, but in relation to ideologies, politics, ethnicity, religion or culture[69], since the world wide web makes this crossing of borders possible, at least in a virtual way.

This rapprochement should never collide with the defense of human rights, not admitting the possibility of conditioning, for the sake of maximum tolerance towards the figure of the other, and

[65] PIOVESAN. Flávia Cristina. OLSEN, Ana Carolina Lopes. Tolerância e refúgio: Um ensaio a partir do acordo EU-Turquia. *Revista de Direito Internacional*, Brasília, v. 14, n.2, 2017, p 218.

[66] CANÇADO TRINDADE, Antonio Augusto. *Tratado de Direito Internacional dos Direitos Humanos*. V I. Porto Alegre: Sergio Antonio Fabris Editor, 1997, p. 270-271.

[67] PIOVESAN. Flávia Cristina. OLSEN, Ana Carolina Lopes. Tolerância e refúgio: Um ensaio a partir do acordo EU-Turquia. *Revista de Direito Internacional*, Brasília, v. 14, n.2, 2017, p 224-225.

[68] SILVA, Sérgio Gomes da. Direitos Humanos: Entre o princípio da igualdade e tolerância. *Revista Praia Vermelha*, Rio de Janeiro, v. 19, n 1, p.79-94 jan-jun 2010, p.90-91.

[69] RORTY, Richard. *Contingência, Ironia e Solidariedade.* São Paulo: Martins Fontes, 2007, p. 315.

cannot result in the violation of rights or devolution in the face of irregular entry, its interpretation should be directed to a practice of inclusion and respect as master guides, or guidelines for the application of technology, taking its maximum advantage in order to ensure an improvement in the quality of human life.

Even if there is an acceptance of the refugee's person, many times he/she will have no other option but to accept to give up his/her biometric data, among others, and there is still the hypothesis that he/she may change his/her phenotypic physical form, which is no longer recognized by the recognition technology, or develop retinal problems, making it impossible to use all the other data he/she has given, because there is no certainty of other alternative means of retrieving the encoded information based on that data.

The goal of these guidelines should be essentially to assign the power to manage and ensure the security of this data, establishing exact criteria for how this data is recorded and how it is stored, in order to establish a true system of international responsibility within the states that will use the data provided by the blockchain, even with the supervision of the UN and other international bodies.

Responsibility is the justice system that ensures the reasonableness and proportionality of a legal order, system or micro-system, inserting the subscribing states of international norms in a new order of sovereignty in which co-responsibility prevails. And, as pointed out at the 1993 Human Rights Conference, true solidarity is sharing responsibilities - From this perspective, it is possible to think about the use of the blockchain, so as to always think about mechanisms for protecting the rights of refugees as human beings.

5. CONCLUSÃO

Blockchain technology, initiated as a revolutionary model of not only storing encrypted and unalterable information within a logical chain of information, was empirically tested in mid-2017 as part of an initial UN project as a means of effecting its World Food Plan, having had

apparent success on the economy, data security, and fraud prevention in Syrian refugee camps located in Jordan, fleeing the conflicts occurring in their homeland.

The enthusiasm about the mechanism of application of this technology refers to the fact that it was designed to speed up transactions related to donations or obtaining food, as well as to avoid corruption or misappropriation, and was also positively received by the refugees themselves, who many times were forcibly displaced without any planning as a result of the Syrian civil war, and left their personal identification documents behind when they left the country, making it impossible for them to exercise their most basic civil rights.

Essentially using biometrics, this technology collects and subsequently uses personal data based on the human anatomy itself, such as scanning a person's iris, on their most basic personality right that guarantees their very dignity: their own body.

Without a specific discipline within the law, in a general scope, technology develops without establishing parameters or limits in relation to the use of data or in relation to its security, which can mean risks to the rights of the subjects involved, and consequently, to human rights in their essence of protection to the vulnerable, a situation that is aggravated in relation to refugees, who find themselves in a situation of overlapping vulnerability or hypervulnerability.

In this sense, the first objective of the research was reached, about highlighting the practical advantages and disadvantages of the use of technology for the organization of refugees, or even, in the future, for the full conservation of data that preserve personal elements related to the preservation of their anthropological ancestry and culture of origin.

In international law, specifically in the case of refugees, blockchain technology may, without any discipline, endanger the physical or psychological integrity of the refugee or even fail to control the falsity of data that may be entered inappropriately and used maliciously by or against them. This is because the refugee will not have absolute certainty that their data will be used solely to provide them with food or basic rights and not to label them in a discriminatory manner or for other purposes contrary to human rights.

Data such as health status, vaccinations, and level of education may be included in the refugee's record, making it possible, for example, in times of a pandemic, such as the one that began in 2020 in relation to COVID19, which could serve as a form of abusive control of freedom, classification, or stigmatization among people who migrate, fleeing certain wars or disease outbreaks.

Thus, for the enthusiasts of the subject, the use of technology could help both refugees and host nations. But it should be noted: using the technology inappropriately could cause a lot of harm, which is why the use of blockchain technology for refugees must be discussed and disciplined as a matter of urgency, given that it is a goal to be achieved by the year of 2030, its mass use in other cases around the world.

This is because the logic of human rights can never be the same logic applied to the uses of technologies. The former have an existential, humanistic logic, and the latter a numerical, Cartesian, utilitarian logic. Both of these logics do not dialog in a way to realize human rights. The humanitarian element should always prevail.

Finally, due to this situation, it is necessary to establish regulatory stability, standardization in the use of this technology for a certain purpose, as well as the discipline and ethical-legal limits of its use and management of the risks that may arise from its use, in order to ensure the full dignity of the human being, in any case in which it may be used.

The States that choose to use technology, or even data related to it, should, even under the supervision of international bodies for the defense of human rights, guarantee the transparency of the criteria and mechanisms for the insertion and management of this data, as well as their responsibility, explaining any contradictory conduct, admitting the possibility of flexibility of sovereignty - and never its suppression - for the protection of the human being in a universal manner.

The scope must always be to ensure that, no matter how great the promises of improvements in relation to human life, the normative set that guarantees the effectiveness of human rights must always come together, so that, just like the airplane or dynamite, there are no discoveries that can be misused, in the bad turn of the discourse

of protection of the human being, which must be aligned with the coherence and commitment to protect the vulnerable.

In this sense, the second objective initially set was reached, directing the interpretation needs of the use of this technology in the light of International Refugee Law, forming interpretative guidelines to guarantee the principles of ethical humanism that permeate the most basic human rights of these people, requiring a systematic analysis of International Refugee Law.

All the reflection on the use of blockchain - today considered as one of the most promising technologies for the future - should be within a safe and protected system with strong parameters of tolerance directed to the concrete subject, within his or her historicity, existence, culture, and dignity, guaranteeing his or her permanence as long as the requirements of the law are met, promoting conditions for his or her dignity and construction - or reconstruction - of his or her life project, after the forced departure from his or her country of origin.

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ISBN: 978-65-00-40218-6

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by
Viacheslav V. Sevalnev, Artem M. Tsirin, and Cássius Guimarães Chai
https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter8

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COMBATING CORRUPTION DURING THE CORONAVIRUS PANDEMIC: a Russian and Brazilian Critical Dialogue

by
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Abstract. The present article is devoted to existing problems and prospective tasks of preventing corruption risks in the period of the COVID-19 pandemic. Based on empirical evidence, the authors conclude the consequences of the pandemic COVID-19 on state and public activity. Corruption practices are changing during the pandemic period, requiring adequate responses. The authors identify areas of public activity associated with the emergence of the most acute corruption risks caused by the coronavirus pandemic. Besides, the article systematizes long-term and latest trends related to combating corruption in the pandemic.

Keywords: Combating corruption · Legislation · Legality · The rule of law Coronavirus pandemic COVID-19.

1. INTRODUCTION

The problem of the current state of corruption and the extent of its impact on the lives of Russian and Brazilian citizens in the context of the new coronavirus infection pandemic caused by COVID-19 occupies a leading position in the rating of major social problems.

The pandemic factor COVID-19 affects most areas of the state and public activity. This factor includes:

the outflow of investments from emerging markets has noticeably decreased the exchange rates of currencies of developing countries (Brazilian Real (BRL), Mexican peso (MXN), Russian ruble

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(RUB), South African rand (ZAR), Indonesian rupee (IDR), Turkish lira (TRY));

- the effect of adverse exchange rate differences due to the weakening of the ruble exchange rate and revaluation of foreign currency liabilities (many domestic companies reported net losses instead of profit (Rosneft, Novatek, etc.));
- reducing the consumption of citizens and changing its structure (towards less expensive goods, necessities);
- banning mass events and restricting air traffic (110 countries significantly limited air traffic, which amounted to about 98% of the aviation market (according to the data of KPMG));
- the difficulty of current loan payments and servicing other payments;
- bankrupting of medium and small business organizations (during the pandemic, about 4.5 million individual entrepreneurs and small business organizations' failure (according to the data of Commissioner for Human Rights T. Moskalkova)[2];
- reduction in the staffing of companies and decrease in wage funds (more than 60%).

In Russia, the number of cases of corruption offenses has increased - residents of the country have begun to give and take bribes more often and become intermediaries in such cases. These issues may be due to the coronavirus pandemic and the crisis that came last year, due to which the population's income fell. Meanwhile, in our opinion, this is not the only reason why people become bribe-takers during an epidemic.

Identical social phenomena occur in Brazil. Unfortunately, health system's corruption cases related have increased after the emergency of the Covid-19. Recently, The Brazilian national congress opened a parliamentary inquiry commission to investigate fraud in the acquisition and provision of medical and hospital supplies, respirators, vaccines, and contracting of medical services.

[2] URL: https://ombudsmanrf.org/news/corona_v/view/tatjana_moskalkova:_v_uslovijakh_pandemii_stremitelno_menjaetsja_sistema_cennostej

2. MATERIALS AND METHODS

We have used a qualitative research methodology, linked to interpretive or comprehensive paradigm, approach characterized by the analysis of reality using several data collection methods (Maxwell, 2009). In qualitative research, through interviews, life histories, case studies, or documentary analysis, the researcher can merge his observations contributed by others (Khabrieva, 2015).

3. RESULTS

In a pandemic, some officials could lose part of their salaries, and their spouses could be reduced. Therefore, they took bribes to make up for the fall in family income.

The current situation of the scientific knowledge of the problem of corruption is characterized by a gradual transition from especially criminological and criminalistic nature of research to the application of the interdisciplinary approach focused on consolidation of methodology and techniques of various branches of scientific knowledge (sociology, economy, psychology, law, philosophy, etc.).

The philosophical approach to these existential changes allows us to conclude that corruption manifestations as sensuous things and without a pandemic are continually evolving. In contrast, the prototype of corruption itself as a socio-legal phenomenon remains unchanged-continues to exist. In change, only the properties of corruption are quantitative characteristics, and structure can become different.

At present, the pandemic changes are becoming a starting point for understanding and fixing corruption through new situations, moving science to penetrate the stable forms of object-corruption.

Currently, several organizations in Russia and in Brazil carry out anti-corruption research on an ongoing basis. Most of them are implemented within the sociological paradigm framework and are focused on the tasks of studying public opinion, the level of corruption, and its dynamics. However, such studies are not a priority; therefore, they are

either carried out irregularly or imply a scientific approach to their organization. Therefore, they do not provide an in-depth understanding of the internal logic of the processes associated with the COVID-19 pandemic and corruption.

A significant part of such research is carried out by government departments at the federal and regional levels to implement national anti-corruption plans adopted for the respective periods.

Russian Assessment on Corruption Phenomena

According to a survey by the Levada Center in August 2020[3], Russians are worried about:

- price increases - 61%;
- poverty, impoverishment of the majority of the population - 39%;
- corruption, bribery - 38%;
- inaccessibility of many types of medical services - 29%;
- a sharp stratification between the poor and the rich - 28%;
- crisis in the economy, production declined - 26%.

In 2020, 3649 cases of bribery were registered in Russia (data from the Ministry of Internal Affairs). That is 15% more than in the previous year.

According to the statistics of the Prosecutor General's Office for January-November, most bribes were given in Moscow (230), Tatarstan (166), Moscow region (156), Stavropol (126), and Perm (97) regions.

The most significant increase in the number of such crimes during this period is noted in Buryatia (+ 566%), Vologda Oblast (+ 400%), Nenets Autonomous Okrug (+ 400%), Magadan Oblast (+ 300%), and Trans-Baikal Territory (+ 272%).

Interestingly, the peak increase in the number of bribe-giving cases occurs from January to March (+ 19.8%). Simultaneously, its pace slowed down during restrictions amid the coronavirus pandemic - in April (+ 8.3%) and May (+ 8.6%). The increase in the number of such crimes became more noticeable in June (+ 11.2%) and July (+ 14.5%).

[3] URL: https://www.levada.ru/2020/08/26/odobrenie-institutov-vlasti-25/

Among other things, Russians also began to take bribes more often (4174, + 4.7%), become intermediaries in bribery (1451 cases, + 11.9%), and commit commercial bribery (1162, + 17.4%).

During the pandemic arise a new specific group of risks of corruption in control and supervision activities. They consist of:

- risks associated with difficulty obtaining information about control measures
- risks associated with the impossibility of operational interaction in the formal framework.
- risks associated with excessive universalization of Legislation in recruitment, tax burden, etc.
- risks associated with the lack of financial resources necessary to meet the legitimate requirements of control and supervisory authorities.
- risks associated with difficulty in promptly appealing unlawful decisions.
- risks associated with the possible imposition of significant sanctions, up to the suspension of activities, freezing of funds in accounts.
- Distinctive features and dynamics of informal payments in the framework of control and supervision activities include:
- systematic payment of monetary remuneration, gifts;
- tolerance of corruption as a habit of corruption for business entities;
- reducing the frequency of informal payments;
- growth in the average size of informal payments (almost twice (from 27.6 to 48.8 thousand rubles) over the past three years (2017-2020) according to surveys conducted by the Russian Presidential Academy of National Economy and Public Administration in 2017 and 2020)[4];
- reducing of the corruption burden on individual entrepreneurs: (in 2017, 15.8% of individual entrepreneurs announced the facts of informal payments as part of the last audit, then in 2020 - 8.9% only).

In the Russian Federation, questions of responsibility for corruption offenses traditionally focus on scientific attention, as measures

[4] URL: https://www.ranepa.ru/sobytiya/novosti/issledovanie-obshchestvo-i-pandemiya-opyt-i-uroki-borby-s-covid-19-v-rossii-nauka/

of legal responsibility are mainly used by the state for counteraction to various manifestations of corruption. The legislator determines by the main criterion of differentiation of corruption offenses a type of responsibility established for their performance. Using this criterion, in the Russian Federation, four types of corruption offenses are allocated: crimes, administrative offenses, civil delicts, and disciplinary offenses (Khabrieva, 2012).

Application of strategy of «multi responsibility» allows using possibilities of multidimensionality of national legal system and its substantial potential for achievement of necessary balance of different types of responsibility at the realization of anti-corruption policy.

- The amount of bribe under the Criminal Code of the Russian Federation:
- petty bribery less than 10,000 rubles (Article 291.2);
- a significant amount of bribe over 25,000 rubles (Art. 290);
- the large-scale of bribe over 150,000 rubles (Art. 290);
- the colossal size of bribe over 1 million rubles (Art. 290).

Corruption is a criminal offense. The punishment for it depends on the severity of the act. For example, a bribe to an official can result in up to two years in prison. If the money is transferred in significant quantities, the person will be jailed for up to five years. In contrast, a bribe for knowingly committing illegal actions can lead to an eight-year stay in a correctional institution. Regarding a bribe on an enormous scale, they are sentenced to imprisonment for up to fifteen years.

It can be hypothesized that people found themselves in a difficult situation; therefore, by giving or receiving bribes, they tried to improve their situation or solve the problem.

Residents could give bribes for various reasons. For example, so that they or their sick relative in the hospital receive better coronavirus treatment. In particular, to use artificial lung ventilation devices, drugs in therapy, etc.

In a pandemic, certain officials could lose part of their salaries, and their spouses could be laid off. Therefore, they took bribes to make up for the drop in family income. Some lost their jobs, were laid off, forced to seek employment, some of their relatives fell ill. They are in

such a state that they are looking for how to survive in this situation. That is, people were put in a situation without which they would never have committed a crime.

Despite a slight decrease in the number of corruption crimes in the first quarter of 2020, on the contrary, the number of cases of bribery increased by 8.7% (up to 4.7 thousand). Similarly, the number of significant – scale bribes increased to almost 800. The amounts of bribes that appear in the materials of the criminal cases considered are still small. In particular, for bribes and commercial bribery in 50 thousand to 1 million rubles, only 885 (2018 – 823) people were convicted, and more than 1 million rubles – 189 (150)[5].

Measures of disciplinary responsibility regarding the introduction of such punishment as dismissal for «loss of trust» which is applied in cases of non-compliance with anti-corruption restrictions and bans, requirements about prevention or settlement of conflicting interests, and non-executions of the duties established for anti-corruption have undergone severe additions. In 2018 more than 1300 officials have been dismissed in connection with loss of trust.

Since January 1, 2018, the information about the officials dismissed from public service in connection with loss of trust will join in the special register of the persons dismissed in connection with loss of trust[6]. The specified register will join data on application to the person replacing the state position of the Russian Federation, the state position of the territorial subject of the Russian Federation, a municipal position, collecting's in the form of dismissal (dismissal) in connection with loss of trust with the commission of corruption offense. The register of the persons dismissed in connection with loss of trust is subject to placement.

In 2019, 876 officials were dismissed in connection with loss of trust[7].

[5] URL: https://мвд.рф/reports/item/23163626/

[6] The Federal law from 7/1/2017 No. 132-FZ "About introduction of amendments to separate acts of the Russian Federation regarding placement in the state information system in the field of public service of data on application of collecting in the form of dismissal in connection with loss of trust for commission of corruption offenses"

[7] URL: https://gossluzhba.gov.ru/reestr

It should be noted that legal consequences of dismissal in connection with loss of trust on the weight can reasonably be compared to criminal and legal measures. For example, the application of dismissal for loss of trust to the public civil servant means that he will be forever deprived of access to the public civil service. At the same time, at the doctrinal level discussed the question of the possibility of distribution of this anti-corruption measure equally on all public sector – on employees of the state companies and corporations, and other state organizations.

According to part 3 of article 1.8 Code of the Russian Federation on Administrative Offenses, the legal entity who has committed the administrative offense provided by article 19.28 of this Code (Illegal remuneration on behalf of the legal entity) is subject to administrative responsibility according to the Code in the following cases:

- if the specified administrative offense is directed against the interests of the Russian Federation;
- in the cases provided by the Russian Federation's international treaty if the specified legal entity hasn't been brought for the corresponding actions to criminal or administrative liability in the foreign state.
- In 2018 – 388 legal entities have been subjected to administrative responsibility for illegal remuneration on behalf of the legal entity. In 2019 – 309 legal entities have been subjected to administrative responsibility for illegal remuneration on behalf of the legal entity. In 2020 – 232 legal entities have been subjected to administrative responsibility for illegal remuneration on behalf of the legal entity[8].

The Civil Code of the Russian Federation (article 235) contains the unique basis of the property right's termination – the court's decision to income for the Russian Federation of property, which provenance isn't confirmed in the order provided by the Russian anti-corruption legislation.

Modern statistical data show the increasing efficiency of application of such measures of prevention of corruption as submission of data on income, expenses, about property and obligations

[8] URL: http://www.cdep.ru/index.php?id=79&item=5461

of property character (Mikhaylov V.I., 2017). Based on the results of control of expenses, in 2018, prosecutors returned to the state income of property for the total amount of over 21 billion rubles[9].

Brazilian Assessment on Corruption Phenomena

It is unnecessary to reconstruct here the context of social ills that are experienced throughout Brazilian society, with their daily chronicles, with different actors, but similar characters and plot: misconduct; the shameless appropriations of public goods, as if the absolutist regency were still present, that is, the king's will without the premise of the law. – Of the episodes of endemic corruption investigated in Brazil, only the names and their attributes change: anti-corruption and money laundering operations Farol da Colina; Anaconda; Razor; Covidão-19 etc. And, unfortunately, the pandemic accentuates the social dysfunctions pressed by the arrangements of an organized criminality guided by corruption and its deviations from values and public property.

If, on the one hand, the characteristics of the interests and acts of public administration impose a clear conduct based on valid legal principles and norms, on the other hand, they are only considered legitimate if they aim at the efficiency and implementation of Social Justice as objectively described in the pursuit of the efficiency of the administrative acts to achieve Social Justice through planned intervention to reduce material inequalities; that is, promoting the good of all, without prejudice based on origin, race, sex, color, age, and any other forms of discrimination, and also to:

- preserve human dignity;
- build a free, fair and solidary society;
- ensure national development;
- eradicate poverty and marginalization and reduce social and regional inequalities;
- assure Social peace;

During the pandemic, there is no doubt that social concerns are structural and conjunctural, involving all sectors of the economy,

[9] URL: http://crimestat.ru

agribusiness, industry, and services, aggravating vulnerable populations and accentuating the perceived inequalities in the social determinants of public health.

In February 2021, Instituto DataSenado carried out a new round of national research, with a historical series applied since 2010, to assess the opinion of Brazilians on democracy, the performance of parliamentarians and some of the main topics under debate in the country. Health was identified as the main concern by 45% of respondents.[10]

The Saúde Brasil survey, conducted by the Center for Research in Political Communication and Public Health at the University of Brasília (CPS/UnB) together with the IBPAD, revealed important data on the impressions of Brazilians regarding the covid-19 pandemic in the country. The data indicate the level of concern of citizens relating to the disease and perceptions about who is responsible for accelerating Covid-19 in Brazil. The alarming number of 86% of respondents claim to know someone who died of coronavirus, which reinforces the thesis of lack of control of the disease in the national territory. Of this percentage, 63% said they were not so close; 22% a close friend; 17% a family member; and 1% a person who lived together.[11]

According to the research center itself, the investigation is part of a series of joint efforts to measure, evaluate and interpret the population's assessments relating to the pandemic in the country based on the data. The results of this latest initiative belong to the period between March 31 and April 16, 2021, when 1,232 people from all regions and federative units in Brazil were interviewed.

The principle of the rule of law in the democratic dimension not only represents but operates the movement for the legitimacy of normative production. In other words, a democratic administration presupposes the participation of all interested parties when making

[10] URL: https://www12.senado.leg.br/radio/1/noticia/2021/02/23/datasenado-aponta-que-saude-e-a-principal-preocupacao-do-brasileiro

[11] URL: https://www.ibpad.com.br/blog/nova-pesquisa-com-participacao-do-ibpad-revela-preocupacoes-dos-brasileiros-em-relacao-covid-19/

the decision, whatever it may be, and always respecting in this decision-making composition the diversity of interests, ethnicities, cultures, since all of them are convex or coupled in the system of Right by the Constitution. As said elsewhere, the contemporary world reflects and seeks to locate, through Law, in Law, a foundation of validity for the use and establishment of Power relations.

Every question of inspection and control of the public administration is unconditionally clear about concepts and the limits and attributions of each public office and function. The mistakes of representative politics cannot be perpetuated, at the cost of a total absence of user participation in the public administration itself. Under Brazilian constitutional provision, the Art. 37 determines that the law will regulate the forms of user participation in direct and indirect public administration, specifically regulating: I - complaints related to the provision of public services in general, ensuring the maintenance of user service services and periodic evaluation, external and internal, of the quality of services; II - access by users to administrative records and information on government acts, subject to the provisions of article 5, X and XXXIII; and, III - the discipline of representation against the negligent or abusive exercise of a position, job or function in the public administration. (Wording given to the paragraph by Constitutional Amendment nº 19/98).

After the impeachment process of former president Dilma Rousseff in August 2016, the Federal Congress, following the executive branch's legislative representation agenda, through its parliamentary leadership, promoted sensitive legislative changes in budget norms, reducing the degrees and inspection instruments in the management of resources in public administrations, criminalization, and accountability of public administrators (Law of Introduction of Brazilian Law), and very recently, changes in the law to combat administrative misconduct (Federal Law 8429/92) and to the Supplementary Law 101 which establishes public finance rules enforcing responsibility in fiscal management, and other provisions.

Despite these legal reforms, the National Judicial Council (Conselho Nacional de Justiça – Metas Nacionais do Poder Judiciário –

2021)[12] has established among 2021 judiciary goals, the Goal 4 of 2021 – related to prioritize the judgment of cases related to crimes against public administration, administrative improbity and to electoral offenses, to identify and judge until 12/31/2021, 70% of administrative misconduct actions and criminal actions related to crimes against the public administration, distributed until 12/31/2017, in particular active and passive corruption, embezzlement in general and concussion.

The GOAL 4 **establishes to identify and judge by 12/31/2021:**

- Superior Court of Justice: 99% of administrative misconduct actions and criminal actions related to crimes against the Public Administration distributed until 12/31/2018 and 90% of shares distributed in 2019.
- State Courts: 70% of administrative misconduct actions and criminal actions related to crimes against the Public Administration, distributed until 12/31/2017, especially active corruption and passive, embezzlement in general and concussion.
- Federal Justice: RANGE 1: 70% of administrative misconduct actions and criminal actions related to crimes against the public administration, distributed until 12/31/2018. RANGE 2: 60% of administrative misconduct actions and 70% of criminal actions related to crimes against the public administration distributed until 12/31/2018.
- Electoral Justice: 90% of the processes related to the 2018 elections and 50% of the processes related to the 2020 elections, distributed until 12/31/2020, which may result in the loss of an elective mandate or ineligibility.
- Federal Military Justice: 99% of criminal actions related to crimes against the Public Administration, including Law 13.491/17, distributed until 12/31/2019 in the STM, and 95% of those distributed until 12/31/2019 in the 1st degree.
- State Military Justice: at least 95% of criminal actions related to crimes against the Public Administration, including Law 13.491/17, distributed until 12/31/2019 in the 1st degree, and at least 95% of those distributed in the 2nd degree until 12/31/2020.

[12] URL: https://www.cnj.jus.br/wp-content/uploads/2021/01/Metas-Nacionais-aprovadas-no-XIV-ENPJ.pdf

On behalf of administrative punishments until July 2018, the disciplinary control body of the Judiciary Branch (CNJ) accounted for 87 punishments determined to magistrates and civil servants after judgment of Administrative Disciplinary Proceedings (PADs). The CNJ can also review penalties applied against magistrates in the courts of origin through Disciplinary Reviews (RevDis). With them, the CNJ counted to July 2018 another 20 punishments. On the other hand, a survey conducted by the National Public Prosecutor's Office gathered data on administrative disciplinary procedures (PADs) instituted and judged by the National Council of the Public Ministry (CNMP) from 2005 to 2019. According to the survey, in 15 years, the CNMP instituted 237 disciplinary procedures and judged 212. Of these, 138 PADs resulted in some type of penalty - from a verbal admonition to mandatory retirement of MP members.[13]

Trends

State and public structures play an essential role in expert support of the state's anti-corruption policy.

Unfortunately, corruption often thrives in crisis times, especially when state institutions and oversight are weak and public trust is low.

The problem of a high level of corruption is closely related to the lack of the rule of law (Dahlstrom C., 2012). It is, firstly, about strict adherence to the principle of the rule of law, with which lawmaking should be commensurate (Andrianov M.S. et al., 2017).

The problem of public procurement. As you know, the most massive corruption revenue generates by public procurement, especially medical products (consumables, tools, equipment, and so on).

The problem of distributing business assistance.

Trade-in medical supplies. Surges in demand and disrupted supply chains create shortages or opportunities for higher prices. The trade-in medical counterfeit goods are becoming another area that generates corruption.

[13] URL: https://www.cnmp.mp.br/portal/todas-as-noticias/14067-levantamento-da-corregedoria-nacional-demonstra-efetividade-do-cnmp-no-julgamento-de-pads-nos-ultimos-15-anos.

Medical assistance to citizens. Small-scale bribery is also a problem that has re-emerged in the pandemic context (for access to health services; bribery of law enforcement officials to evade quarantine.

The activities of the migrants. The life and employment of migrants sharply criminalized, generating the development of corruption crimes.

Aggravation of the struggle for the redistribution of property in connection with the alleged mass bankruptcy of enterprises.

Deterioration of the functioning of private business. During this crisis, the private sector faces increased corruption risks.

There are some recent trends in the legislative support of anti-corruption in modern states. They consist of:

- incorporation of anti-corruption norms into the Constitution;
- obtaining non-material benefits as a subject of conflict of interest;
- implementation of the concept of criminal liability for the corruption offenses committed by organizations;
- minimization and elimination of consequences of corruption offenses;
- implementation of risk-management procedures in the anti-corruption field on the basis of international standards (UN Global Compact, ISO, BSI, FERMA, etc.).

Transparency International warns that Brazil faces serious setbacks in the fight against corruption, denounced in the report "Brazil: setbacks in the legal and anti-corruption frameworks".[14]

The variation from 35 points in 2019 to 38 points in 2020 is within the research's margin of error (4.1 points more or less). This means that the perception of corruption in Brazil remains stagnant at an awful level, below the BRICS average (39), the regional average for Latin America and the Caribbean (41) and the world (43) and even further away from the average of the countries of the G20 (54) and the OECD (64).

The increase made the country move from 106th to 94th, in a ranking of 180 countries and territories.

[14] URL: https://comunidade.transparenciainternacional.org.br/brazil-setbacks-in-the-legal-and-institutional-anti-corruption-frameworks-2020

Forecasts

There is a noticeable increase in corruption in terms of state orders related to the purchase of medical equipment, medicines, and consumables and the distribution of budget subsidies to support small and medium-sized businesses. Another process that is vulnerable to corruption in the near term is an investment in the research and development of drugs and vaccination against COVID-19. There is a forecast of new types of crime.

As soon as the immediate threat from the pandemic dissipates, many will expect an increased focus on the enormous amounts of aid that individuals and businesses received during the epidemic and crisis. Such approaches are increasing attention to high-profile manifestations of corruption.

The development of scientific views on corruption at present and in the future should be based on recognizing the close connection between changes in corruption manifestations and the preservation of the stability of the existence of corruption as a negative social phenomenon.

Perspective directions for joint investigations include a program of the international scientific monitoring of corruption repatriation of corruption assets, taken out abroad; prevention and settlement of the conflict of interests in the state and private spheres; responsibility of legal entities for corruption offenses; protection of the persons reporting about the corruption facts, etc.

4. DISCUSSIONS

According to the statistics of the Russian Ministry of Internal Affairs, in April and May 2020[15], bribes were given less often due to restrictions, including the self-isolation regime. The increase in the number of police officers on the streets also affected. It is more difficult to give or take a bribe under these conditions.

[15] URL: https://мвд.рф/reports/item/23163626/

Currently, the Russian Ministry of Internal Affairs has stepped up the fight against bribery. The police mainly work for middle-level employees, for example, municipal officials.

The Ministry of Internal Affairs shows us that the general trend is to strengthen the fight against bribery. The fact that growth is not an indicator that the situation is deteriorating in any way. The fight against bribery is intensifying in the Ministry of Internal Affairs itself.

Recently, several sectors have dropped out of the corruption sphere, for example, associated with obtaining foreign passports and various procedures under the one-stop-shop system.

At the same time, new areas for corruption are emerging. Concerning the receipt of dividends from budgetary processes.

Lately, lawmakers have tightened the punishment for corruption, and in this regard, there is no need to take any urgent measures. However, there are questions about how it is administered.

We have unreasonably broad discretion of the court in this regard. We have massive gaps between the minimum and maximum penalties. And, unfortunately, we very often meet with cases when bribe-takers get by with a suspended sentence. That is, there may be questions about the practice of sentencing, but in terms of legislative support, enough has been done there. We need to improve law enforcement. The increase in the number of bribery cases maybe because law enforcement officers have become more likely to identify such crimes.

5. CONCLUSIONS

There is a noticeable increase in corruption in terms of state orders related to the purchase of medical equipment, medicines, and consumables and the distribution of budget subsidies to support small and medium-sized businesses. Another process that is vulnerable to corruption in the near term is an investment in the research and development of drugs and vaccination against COVID-19. There is a forecast of new types of crime.

As soon as the immediate threat from the pandemic dissipates, many will expect an increased focus on the enormous amounts of aid that individuals and businesses received during the epidemic and crisis. Such approaches are increasing attention to high-profile manifestations of corruption.

The development of scientific views on corruption at present and in the future should be based on recognizing the close connection between changes in corruption manifestations and the preservation of the stability of the existence of corruption as a negative social phenomenon.

Fight against corruption is a complex purpose for harmonious interaction of all Russian legislation branches, including the criminal, civil, labor, and administrative legislation. And, yet this applies to the Brazilian reality, including tax policies and legislation.

Perspective directions for joint investigations include a program of the international scientific monitoring of corruption repatriation of corruption assets, taken out abroad; prevention and settlement of the conflict of interests in the state and private spheres; responsibility of legal entities for corruption offenses; protection of the persons reporting about the corruption facts, etc.

It is important to note that a democracy, anywhere, is only strong due to the autonomy, transparency and governmental political independence of the Federal Police, the Judiciary and the Prosecutors' Office capable of fulfilling its constitutional mission of defending the legal order, the democratic regime, and social and individual interests, without political subordination to government. Unfortunately, the most recent attempt by the Brazilian National Congress is to promote a constitutional amendment removing the independence of the Public Ministry, enabling the annulment, interruption, and alteration of investigative objects and procedures against political agents and other criminal procedures and administrative responsibility, weakening integrity and accountability.

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ISBN: 978-65-00-40218-6

CHAPTER

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THE ORGANIZATION OF AMERICAN STATES AND THE RIGHTS OF OLDER PEOPLE

by
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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter9

THE ORGANIZATION OF AMERICAN STATES AND THE RIGHTS OF OLDER PEOPLE

by
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Abstract: This paper aims to outline a brief itinerary of the process of explaining human rights arising from aging within the Organization of American States. It starts from the American Declaration of the Rights and Duties of Man (1948) until reaching the Inter-American Convention on the Protection of the Human Rights of Older Persons (2015). It is a documentary research guided by the deductive method.

Keywords: Older people; Organization of American States; human rights.

Resumo: Este artigo busca traçar um sucinto itinerário do processo de explicitação de direitos humanos decorrentes do envelhecimento no âmbito da Organização dos Estado Americanos. Parte-se da Declaração Americano dos Direitos e Deveres do Homem (1948) até alcançar a Convenção Interamericana sobre a Proteção dos Direitos Humanos das Pessoas idosas (2015). Trata-se de uma pesquisa documental orientada pelo método dedutivo.
Palavras-chave: Pessoas mais velhas; Organização dos Estados Americanos; Direitos Humanos.

1. INTRODUCTION

The Organization of American States (OAS), following what can be called a global trend, is engaged in a process of explaining human rights arising from aging. The objective of this paper is to describe a brief itinerary of this process within the scope of this regional organization: Starting from the scarcity of the American Declaration of Human Rights (1948) to the recognition of rights in the different facets of human existence with the Inter-American Convention on the Protection of Human Rights of Elderly People (2015).

The research is basically documentary and is guided by the deductive method. The documents analyzed are the treaties and declarations adopted by the OAS general assembly involving human rights. It is important to note that comparisons were also made with the normative production of the United Nations (UN) for purposes of contextualization.

It is also important to clarify that the study does not intend to enter the spheres of effectiveness of rights, limiting itself to identifying formally recognized rights.

2. RIGHT AND AGING

Before moving on to the analysis of documents produced within the framework of the OAS, it is worth noting that, in general, the relationship between old people and declarations of rights is marked, until the end of the 1970s and early 1980s, by two basic attitudes: 1) silence and 2) recognition of specific rights restricted to social security and assistance. These postures stem from a particular way of perceiving old age. As Debert (2004, p. 14) notes, from the second half of the 19th century, old age is treated as a stage of life characterized by physical decay and the absence of roles; and advancing age is seen as a continuous process of loss and dependence. Founded on this perception of aging, international organizations consistently limited themselves to recognizing the right to remunerated inactivity for older people, viewing old age as an inescapable cause of disability and, consequently, deserving of help.

The International Labor Organization (ILO) constitutes a notable exception in this period for at least two reasons: Convention No. 111, 1958, and Recommendation No. 162, 1980. In art. 5, §2, of Convention no. 111, concerning Discrimination in Respect of Employment and Occupation, the element of age is pointed out as a cause of special protection in a policy to promote equality in labor relations[1]. Recom-

[1] It should be noted that the text attached to Decree No. 62,150, of January 19, 1968, which promulgated ILO Convention No. 111 in Brazil, is imprecise. In the attached text, the translation

mendation No. 162, which takes care of the work of older people, should be seen as the first document developed within an international organization to specifically address issues relating to older people.

From the 1980s onwards, the process of reframing old age became visible, in which the UN played an important role. According to Silva (2006, p. 44), in two main moments, in 1982 and 2002, the UN leaned specifically on the aging process and, from the debate among its members, produced documents called International Action Plans on Aging, which are the true foundations of the new gerontological culture.

Currently, the social context has allowed the rediscussion of the role of older people in society with the questioning of various stereotypes, not that this is happening in a linear and uneventful crescent. In any case, it is possible to affirm with considerable certainty that aging is seen as a complex phenomenon and that the rights inherent to aging cannot be limited to welfare and social security benefits.

3. NOTE ON THE CREATION OF THE OAS

The Organization of American States (OAS) is the result of pan-Americanism encouraged by the United States of America. According to Rangel (2005, p. 62), since the 1st American International Conference, in which the International Union of American Republics (October 1889 and April 1890) was constituted, based on partially empirical development, through successive solutions Conferences, a regionalism was processed under clear American influence. With the UN Constitution, it was necessary to adapt regional norms to Chapter VIII (Regional Agreements) of the Charter of the United Nations, and the

corresponding to the word age is omitted. The text of art. 5, 2, in portuguese is: 2. Qualquer Membro pode, depois de consultadas as organizações representativas de empregadores e trabalhadores, quando estas existam, definir como não discriminatórias quaisquer outras medidas especiais que tenham por fim salvaguardar as necessidades particulares de pessoas em relação às quais a atribuição de uma proteção ou assistência especial seja, de uma maneira geral, reconhecida como necessária, por motivos tais como o sexo, a invalidez, os encargos de família ou o nível social ou cultural.

IX Pan American Conference was responsible for preparing and approving, in 1948, the Charter of the Organization of American States.

Within this new organization, a human rights protection system is structured. As reported by Terezo (2011, p. 171-172), despite the controversies surrounding the geopolitical interests of the United States of America and the proliferation of authoritarian regimes in the region, the OAS Charter was amended in 1967, through the Protocol of Buenos Aires, to incorporate a list of human rights with the approval of the American Convention on Human Rights.

It is with these peculiarities that one of the most comprehensive systems for protecting the human rights of older people is born.

4. FIRST MOMENT: SCARCITY

Even before the structuring of the inter-American human rights system, the American Declaration of the Rights and Duties of Man was adopted in April 1948. There are few references to the rights of older people. To be more precise, the word old age is mentioned only once. This occurs in art. XVI that provides:

> Every person has the right to social security which will protect him from the consequences of unemployment, **old age**, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living. (emphasis added).

As can be seen, the American Declaration has a limited focus on the social security and assistance aspect. It is true that the elders are the recipients of others' rights, since they are included in generic expressions such as "all people" and "all human beings". However, this only confirms that aging was not a significant topic at that time.

In this regard, the American Declaration and the Universal Declaration of Human Rights, which would be adopted by the United

Nations Organization approximately 8 months after the regional document, are similar. This is because they denote a posture of silence and limited explanation regarding the rights of older people.

Before proceeding, note a marked peculiarity of the American regional system. According to Advisory Opinion No. 10, of July 14, 1989, issued by the American Court of Human Rights based on art. 64 of the American Convention on Human Rights, the American Declaration is mandatory, that is, it makes up the jus cogens within the framework of the OAS Member States.

The American Convention on Human Rights or the San José Pact of Costa Rica, adopted on November 22, 1969, also does not pay attention to issues related to old age, not even in matters of social security. There are few references to age, such as, for example, prohibiting the submission of a person over seventy years of age to the death penalty (art. 4, § 5) or, to establish requirements for marriage (art. 17, § 2) and for the enjoyment of political rights (art. 23, §2).

This scarcity of the San José Pact of Costa Rica is most likely due to the characteristics of the instrument, which, strongly focused on first-rate human rights, follows the lines of the International Covenant on Civil and Political Rights adopted by the UN in 1966.

5. SECOND MOMENT: EXPLICITATION

The stance of silence and clarification limited to social security and assistance issues is only changed with the adoption, on November 17, 1988, of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or simply the Protocol of San Salvador. Old age is mentioned in art. 9, § 1, when establishing the right to social security that protects from the consequences of old age.

The most striking aspect of this instrument, however, is to have dedicated a specific article to the protection of the elderly, which includes:

> Article 17. **Protection of the Elderly**
> Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:
> a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;
> b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;
> c. Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

Note that the innovation brought by this device is not limited to its capitulation. Its content conveys rights that break with the concern with social security for old age. The obligation of States Parties to carry out specific labor programs for the elderly aimed at enabling them to carry out productive activities opens, in the inter-American normative plan, a new perspective for older people. Now, no longer limited by the stereotype of disability, they are recognized with the right to cultivate their abilities according to their desire or vocation.

It should be noted that the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights is, as far as old age is concerned, much more advanced than the counterpart instrument adopted by the UN, the International Covenant on Economic, Social and Cultural Rights. This is largely explained by the fact that the adoption of the San Salvador Pact was already under the influence of the First World Assembly on Aging and the Vienna International Plan of Action on Aging; while, at the time of the adoption of the International Covenant by the UN (1966), questions about aging from an international perspective were still incipient.

It is also interesting to note that the San Salvador Pact did not use the chronological element (*a priori* fixation of age, for example, 60 years) to define the recipient of the rights provided for in art. 17. From this provision there is the proclamation that everyone has the right to special protection in old age (*caput*) and, further on, in item "b", which deals with labor matters, mentions the expression "the elderly". Thus, differently from what has become usual, in the midst of the Pact of San Salvador neither old age nor the elderly person is defined from the *a priori* and closed chronological element.

6. THIRD MOMENT: DIVERSIFICATION

On June 15, 2015, the General Assembly of the Organization of American States approved the Inter-American Convention on the Protection of the Human Rights of Older Persons. This is an important milestone in the recognition process as it is the first *stricto sensu* convention dedicated specifically to the rights of older people in a comprehensive perspective[2], that is, with the approach of the most varied aspects of human life.

This document is the result of a synthesis effort that transcends the scope of the OAS itself[3]. When the eighth recital of its preamble is read (transcribed below), an attempt is made to link it with the main initiatives of the United Nations and the Pan American Health Organization.

> Recalling what has been established in the United Nations Principles for Older Persons (1991), the Proclamation on Ageing (1992), and the Political Declaration and Madrid International Plan of Action on Ageing (2002), as well as in such regional instruments as the Regional Strategy for the Implementation in Latin America and the Caribbean of the Madrid International Plan of

[2] In 2016, the African Union of Nations adopted the Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Older Persons in Africa.

[3] The Convention was approved despite the opposition of the American delegation.

> Action on Ageing (2003), the Brasilia Declaration (2007), the Plan of Action on the Health of Older Persons, including Active and Healthy Aging (2009) of the Pan American Health Organization, the Declaration of Commitment of Port of Spain (2009), and the San José Charter on the Rights of Older Persons in Latin America and the Caribbean (2012);

It should be noted that the Convention recognizes a multiplicity of rights compatible with the complexity of the aging process and the challenges related to the protection of the human rights of those who are socially identified as old. The list of protected rights contained in chapter IV of the aforementioned instrument starts from "Equality and non-discrimination for reasons of age" (art. 5º), "Right to life and dignity in old age" (art. 6º) and "right to independence and to autonomy" (art. 7º); going through "Right to safety and a life free of violence of any kind" (art. 9º) and "Right to privacy and intimacy "(art. 16); and achieved "rights to education" (art. 20), "right to a healthy environment" (art. 25) and "Access to Justice" (art. 31).

The recipients of these rights are the elderly, thus defined as those aged 60 or over, unless domestic law determines a lower or higher base age, provided that it is not over 65 years of age. As noted, unlike what happened with the San Salvador Pact, the Convention adopted the chronological criterion to determine the elderly person. Care must be taken not to restrict the scope of the new convention inappropriately to the elderly.

Firstly, it should be noted that the convention is a response to the demands of those people vulnerable due to aging, which, as defined in the instrument itself, consists of the "gradual process that develops during the course of life and that implies biological, physiological, psychosocial and functional consequences, which are associated with dynamic and permanent interactions between the subject and his environment ". So, it remains clear that it is not a "suddenly elderly" issue.

So much so that some rights only make sense in the perspective of aging if the protection measures are implemented before the

purely chronological framework. Take as an example the right to work provided for in art. 18. If qualification measures and other actions that avoid the professional gap are not continuously offered, especially in the years preceding the age mark, there will be little use in any policy aimed at promoting the participation of the elderly in the labor market.

A similar situation occurs with the right to health established in art. 19. If healthy conditions are not guaranteed in the course of the aging process, particularly after the age of 40, once again little or almost nothing will serve as a policy for the elderly. Limiting the right to health in old age only to the elderly collides with active and healthy aging, defined in the convention as the process by which the opportunities for physical, mental and social well-being are optimized; to participate in social, economic, cultural, spiritual and civic activities; and to count on protection, security and attention, with the objective of increasing the healthy life expectancy and the quality of life of all individuals in old age and thus allowing them to continue to contribute actively to their families, friends, communities and nations.

With regard to the guarantee system, in order to follow up on the commitments assumed and promote the effective implementation of the instrument, a monitoring mechanism was established, consisting of a conference of States Parties and a Committee of Experts (art. 33). It should be noted that the monitoring mechanisms will only be defined when the tenth instrument of ratification or accession has been received. To date, seven deposits have been registered[4], the most recent being made by Ecuador on March 21, 2019[5].

The convention also provides for a system of individual petitions through which a person, group of persons or non-governmen-

[4] According to the data available on the OAS website, until June 5, 2020, the following member states had deposited the instrument of ratification with the Secretary General of the Organization: Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador and Uruguay.

[5] To date, Brazil has not yet ratified the Inter-American Convention on the Protection of the Human Rights of Older Persons. On October 24, 2017, the President of the Republic submitted the text of the convention to the Chamber of Deputies, accompanied by Message No. 412, of 2017. After approval by the Commissions: Foreign Affairs and National Defense Commissions; Defense of the Rights of the Elderly; and Constitution and Justice and Citizenship, the proposition is currently subject to the appreciation of the Plenary of the Chamber of Deputies, being processed under the priority regime, under the terms of art. 54 of the Regulations of this Legislative House.

tal entities legally recognized in one or more OAS member states can submit petitions to the Inter-American Commission on Human Rights containing complaints or complaints of violations of some of the instrument's articles.

The Inter-American Convention on the Protection of the Rights of Older Persons entered into force at the international level on January 11, 2017, thirty days after the deposit of the instrument of ratification by Costa Rica with OAS General Secretariat.

7. FINAL CONSIDERATIONS

The approximately 67 years that have elapsed between the American Declaration of Human Rights and the Inter-American Convention on the Protection of the Human Rights of Older Persons - have witnessed a significant increase in the set of human rights expressly recognized due to aging. During this period it was possible to outline three phases. The first, which covers the American Declaration and the San José Pact of Costa Rica, is marked by scarcity. Very little translates into specific rights for older people. To be precise, the only right that escaped generic formulations was the right to social security benefits. Further on, with the adoption of the San Salvador Pact, there is the milestone of the second phase: the explicitation. In this instrument with a focus on second dimension rights, in addition to the right to social security, old age is highlighted as a special cause of protection; and it is even possible to recognize rights in the sphere of labor relations for the elderly. Today, the third phase is underway, in which there is a clear diversification of the human rights inherent to people reached by the aging process. The landmark of this new phase is, without a doubt, the Inter-American Convention on the Protection of the Human Rights of Older Persons, which contemplates rights in the various dimensions of human existence and places them under the prism of older people.

This is probably the most important contribution of the American convention: to remove the older human being from the legal in-

visibility of generic declarations and to force to rethink each of the well-known human rights from the perspective of the old person.

The convention's impact is not limited to reframing human rights. The regional instrument fills a gap. Until its adoption and entry into force, there was no international norm with binding force (jus cogens) dealing so widely with "human rights and aging". It should be noted the effort shown by American nations for a long time to fill this gap within the United Nations. This effort can be exemplified by the Argentine Republic, which led, still in 1948, the first attempt to explicitly include older people in the process of recognizing human rights. Argentina is the first proposal for a declaration of rights over old age formulated at the United Nations General Assembly. This proposal included the rights: assistance, accommodation, food, clothing, physical and mental health, moral health, recreation, work, stability and respect.

It is reasonable to assume the emergence of new instruments of a general and regional scope. The United Nations has been working in this direction. There is a working group created by Resolution 65/182, of 2010, charged with examining proposals for an international legal instrument to promote and protect the rights and dignity of older people. This group would hold its 11th working session between April 6 and 9, 2020. However, due to the covid-19 pandemic, the event was suspended and, until June 6, 2020, the group's website did not indicate a new realization date.

Without prejudice to the important and necessary global cooperation to promote the rights of older people, today the challenge facing members of the Organization of American States is to enforce the rights already recognized. Not least because the formal recognition of a right does not automatically convert into concrete legal benefits for the recipients of the rule. There is even a proliferation of rules on old age with reserve. As a French historian dedicated to the study of aging recalls, "inúmeras leis atenienses insistem na obrigação de respeitar os velhos pais e a repetição dessas leis deixa entender que não eram muito respeitadas"[6] (MINOIS, 1999, p. 83). Therefore, an important step was

[6] In free translation: "numerous Athenian laws insist on the obligation to respect old parents and the repetition of these laws suggests that they were not well respected'.

taken: the rights were recognized. The next - and just as important as the previous step - is to enforce the rights.

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ISBN: 978-65-00-40218-6

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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter10

OBLIGATIORY VACCINATION AGAINST COVID-19 AND CIVIL DISOBEDIENCE: CONSIDERATIONS REGARDING THE LEGITIMACY OF ANTI-VACCINE MOVEMENTS

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Abstract: This article aims to analyze the relationship between civil disobedience and the insurgent movement in Brazil against vaccination, and whether such an act would be housed by the constitutional guarantees for the defense of the rights of conscientious objectors. To this end, this article analyzes the institute of civil disobedience and how it can be considered a fundamental right inherent in the democratic process of the Democratic State of Law. Subsequently, this research displays a brief historical study about the vaccine revolt in Brazil as well as the contextualization of the contemporary anti-vaccine movement regarding coercive vaccination to reduce the effects of the catastrophic Covid-19 pandemic. The conclusion is that the contemporary anti-vaccine movement is not contextually related to anti-vaccine movements of the past, nor is it identified with an interpretation of the constitutional text that gives legitimacy to the practice of civil disobedience in the case in question, consisting of a purely organic-political movement without any legal or philosophical foundation to legitimize it.

Keywords: Civil Disobedience; Pandemic; Covid-19, Coronavirus; Vaccine

1. INTRODUCTION

The beginning of the second decade of the 21st century arrived with an important and tragic historical event: the worldwide pandemic caused by COVID-19. An unprecedented global effort in human history has been undertaken to find a vaccine to stop the spread of a disease

that has killed more than two million and two hundred thousand people across the planet, according to WHO data as of February 1, 2021.[1]

Extraordinary historical periods like this have always been fertile ground for both new discussions and for updating old issues in the field of constitutionalism.

In a scenario of accentuated political polarization such as the one currently experienced not only in Brazil, but also in other countries, such as the United States, for example, one can notice an increase in political manifestations about the newly discovered COVID-19 vaccines.

In this context, the issue of Civil Disobedience returned to light in Brazil, after the joint Judgment of Direct Actions of Unconstitutionality (ADIs) 6586 and 6587, which dealt solely with vaccination against Covid-19, and the Extraordinary Appeal with an Interlocutory Appeal (ARE) 1267879, in which the Federal Supreme Court Judges discussed the right to refuse immunization due to philosophical or religious convictions.

Due to their extraordinary and urgent nature, the aforementioned Actions were scheduled for joint judgment, aiming to provide a quick response to avoid doubts regarding the application of the National Immunization Plan, a public policy to be implemented by the Ministry of Health; as well as to avoid social upheaval caused by groups against it.

Therefore, this article aims to analyze the legitimacy of popular movements that voluntarily aim to abstain from vaccination, and whether this act can be framed in the concept of civil disobedience, and whether it is backed by any of the constitutional guarantees, most notably the invoked rights to freedom and self-determination. Such analysis is combined with the recent decisions of the Brazilian Federal Supreme Court (STF) in the Joint Judgment mentioned above.

[1] WHO. **World Health Organization**. WHO Coronavirus Disease (COVID-19) Dashboard, 2021. available at: **https://covid19.who.int/**. Accessed in: 01 de fev. de 2021.

2. THE NOTION OF CIVIL DISOBEDIENCE AND ITS CONTEXTUALIZATION IN THE WORK OF HENRY DAVID THOREAU

What is Civil Disobedience? Initially, one can resort to a more intuitive notion of what the institute would be, according to a popular Brazilian magazine of Brazilian scientific and cultural dissemination:

> Civil disobedience, in a nutshell, is not respecting a law because you think it doesn't make any sense. If a rule isn't fair, no one should be forced to follow it, right? The problem is that what is fair is not always provided for by law (apart from the fact that each person can have their own sense of fairness, of course). But there are some simple examples: no one disagrees that opposing slavery in Brazil in the 19th century was the right thing to do – despite the practice being allowed by the Constitution at the time.

\In a first analysis, Civil Disobedience is a lawful public act, as although illegal it is not unlawful, since it rests on constitutional grounds. The suppression of loyalty to the State aims to create a dialogue channel, aiming to observe the ideal of representativeness, and to create the engagement of a certain group and public opinion to, in this way, produce a change of orientation in some public policy, legislation or interpretation of the Law, always based on the Constitution.

The institute of Civil Disobedience gained its first theoretical foundation through the work Henry David Thoreau, in 1849.

His strong religious influence was due to the upbringing he had within his family, his parents were Quakers, a religious group with common origin in a 17th century British Protestant movement, Religious Society of Friends. They are known for defending pacifism

and simplicity, they sought to live with an ideal of moral purity and the practice of pacifism, solidarity and philanthropy.

In his work, "Civil Disobedience", the author makes incisive criticism of the State, which he considers a convenient resource and most of the time an inconvenience, he considers that the government should be the resource for the people to exercise their will, however, the same people end up being subject to the abuses and perversions of the people who control the State (THOREAU, 2019, p. 7).

For the author, the legitimacy of the State resides mainly in the faithful way of representing the people, and as the State moves away from the ideal of representation, citizens could, according to their own concepts of morality and justice, disobey the government's determinations, this attitude being legitimized from the point of view of justice, even if deemed illegitimate by the public administration.

However, despite the criticism of the State, he did not advocate its extinction, but rather a better government, which would be achieved through the assessment of each citizen, individually, of what type of government, would be able to deserve their respect. (THOREAU, 2019, p. 9)

Thoreau considered that laws never made men more just, and that thoughtless respect for laws often turned men into agents of state-sponsored iniquity, such as the cited examples of the invasion of Mexico and slavery. He considered that the State expects the subservience of man not as a citizen, but as a machine, as the conscience of justice could make men question the Laws and the will of the minority that runs the State, as well as its legitimacy. (THOREAU, 2019, p. 10).

He recognized the right to revolution, exercised through the denial of loyalty to the government, when its inefficiency and tyranny becomes unbearable, exemplifying such a hypothetical situation with the American Revolution of 1775 (THOREAU, 2019, p. 12).

In this sense, he recalls again the invasion of the neighboring country and the fact that one sixth of the population of the country that proposed to be the refuge of freedom was made up of slaves (THOREAU, 2019, p. 12).

He claimed that it is not enough to simply disapprove of the government, when not satisfied with its measures, and still maintain its loyalty and support for it. It is not enough to simply issue petitions or express repudiation, but to take actions based on principles in order to demonstrate that there will be no more loyalty to a government that does not legitimately represent the aspirations of its people. Therein lies the revolutionary character of such actions and principles (THOREAU, 2019, p. 14). Since the law is unjust, and if injustice is a product of the friction of the functioning of the governmental machine, men should not allow themselves to be agents of an injustice, serving the evils they condemn, in which case the transgression of the law is justified, and it's not enough simply to wait until the desired majority is achieved in an electoral process to carry out the reforms that are beneficial to the community (THOREAU, 2019, p. 15).

Therefore, civil disobedience would not be an act against the entire State, but specifically against the measure considered arbitrary perpetrated by the State, within the scope of its three powers, according to the classic division proposed by Montesquieu.

Thoreau's thought reflects the most important essay on the subject, the eloquent character is not by chance, since it was a speech given in the city of Massachusetts, and which was later published as a book. His work concludes that the legitimacy of the State must be based on its representativeness; his theory is influenced by moral-religious values and based on natural law; predominance of the individual over the collective, so the collective would be the sum of individual conscience and attitudes, and perhaps this is why the theory of Civil Disobedience was used by so many world leaders in movements in favor of minority rights.

Several leaders, personalities and popular movements in world history were influenced by the theory created by Thoreau, among them: Mahatma Gandhi, Martin Luther King Jr., Mohammed Ali and the Conscientious Objectors (Vietnam War), protesters against nuclear tests; and in Brazil, most notably the Landless Rural Workers' Movement – MST, the Homeless Workers' Movement – MTST, and the Petrobrás Oil Workers' Strike in 1995. (REPOLÊS, 2003, p. 21).

3. THE MODERN LEGAL CONCEPT OF CIVIL DISOBEDIENCE

Civil disobedience as a citizen's political act is taught in different ways by different authors, but it can be conceptualized in order to synthesize what it means, and the impact that such act has on the State.

> We can now present our own working definition. Civil disobedience involves illegal acts, usually on the part of collective actors, that are public, principled, and symbolic in character, involve primarily nonviolent means of protest, and appeal to the capacity for reason and the sense of justice of the populace. The aim of civil disobedience is to persuade public opinion in civil and political society (or economic society) that a particular law or policy is illegitimate and a change is warranted. Collective actors involved in civil disobedience invoke the utopian principles of constitutional democracies, appealing to the ideas of fundamental rights or democratic legitimacy. Civil disobedience is thus a means for reasserting the link between civil and political society (or civil and economic society), when legal attempts at exerting the influence of the former on the latter have failed and other avenues have been exhausted. (COHEN, ARATO, 1995, p. 587-588)

Thus, through such a conceptualization, one can see the affinity of the idea of civil disobedience with the paradigm of the Democratic State of Law, in a way that, although it is carried out through illegal acts, it has in its essence the search for justice and a reinterpretation of the norm, or its replacement in the legal environment, since such norm is understood as being profoundly unfair. In this sense, such illegal acts cannot be considered

unlawful - that is, contrary to the law - because although they violate some legislation in force, they have in their essence respect for the system of law in its entirety, which is subject to constitutional values and fundamental rights that guide all legal relationships of a given society.

In this understanding, it is important to draw the fundamental distinction between the right of resistance and civil disobedience. The right of resistance has old historical bases, where the very legitimacy of authority and the system in question are questioned. The right of resistance is exercised by people who oppose the government as a whole, as they do not recognize its legitimacy. Civil disobedience is rooted in constitutional bases, as it is an institute where the citizen calls for justice and the fundamental values provided for in the Constitution, by disobeying a norm they deem unjust. The civil disobedient seeks to transform the legal system by changing society's opinion with regard to an unfair norm, but never to question the current legal system that imposed this norm (REPOLÊS, 2003).

Civil disobedience, therefore, goes against the common sense of living in society, since the necessary communication between the citizen and the State authority is achieved through disrespect and protest to the unjust law so that there is a democratic transformation of the legal order.

The term "civil disobedience" as a properly recognized institute in the political panorama and in modern law, was designated by Henry David Thoreau, through his already cited work "Civil Disobedience", where the author reported that he was imprisoned during a night for refusing to pay taxes, because he believed that such taxes were used to finance an unjust war against Mexico that had the purpose of increasing the American territory.

It is clear that the author did not intend to only violate the norm, as his actions had democratic purposes and had values of justice at their heart, so that the only way not to legitimize the decisions of the State that he considered profoundly unjust, was to disobey the law. That is why he was punished. It is important to emphasize that civil disobedience as a fundamental right recognized in the legal system is not synonymous with the disobedient not being punished

for their acts, something that will be studied further through the work of Ronald Dworkin and also with the theory of Michel Rosenfeld, who analyzes the subject's participation in the construction of constitutional identity.

Rosenfeld emphasizes that the process of construction of constitutional identity is established from a constant tension between the need for reconstruction of individual constitutional subjects, in opposition to other identities (ROSENFELD, 2003).

The constitutional subject develops in a hiatus or absence and has affinities with Freud and Lacan's psychoanalytic theory of the subject, and with Hegel's philosophical theory of the subject. In this sense, the constitutional subject is in constant need of reconstruction, which never becomes definitive or complete. In this way, the constitutional identity must be constructed in opposition to other identities, as it cannot survive unless it remains distinct. Therefore, the constitutional subject is only susceptible to partial determination through a process of reconstruction, in the search for a balance between the assimilation and rejection of other relevant identities, such as national, ethnic, religious or cultural. (ROSENFELD, 2003).

In this sense, construction and reconstruction were designed to build bridges between the real and the ideal, between facts and counterfacts, one can make, in this case, the analogy with an act of disobedience and penalty (ROSENFELD, 2003).

Thoreau (2019) proposes the idea of non-violent resistance to the State and is a strong critic of a society that is subject to laws that are unfair because they do not have, in their essence, a moral sense. In this way, it is the obligation of those who are subject to the State not to participate in the injustices that they themselves condemn. Thus, Thoreau proposes civil disobedience as a way to stop the state machine. The State must recognize the individual with independent and superior power, from which its power and authority derive. The ancient ideal of popular sovereignty present in the author's writings can be seen, so that the State must act in accordance with the moral and common sense of individuals, and that it should not require them to comply with unjust and immoral laws.

For the author, passive resistance, through debates and an attempt to change through the legislative system, for example, was an ineffective means of demonstrating the citizen's dissatisfaction with unfair laws, since it took too long. Therefore, when the citizen is faced with an unjust law, he must act immediately to challenge it. As an example, Thoreau (2019) encouraged all abolitionists in Massachusets to withdraw their support for the state government immediately – which supported slavery at the time – and not wait for the formation of a majority in the legislative process so that only after that, they could contest slavery.

Civil disobedience, for Thoreau, is a proposal for individual action regarding the violation of the rule, which is considered unjust, so that the existence of the institute is not debated or affirmed as a constitutionally foreseen right in the legal system. One can say that this idea is more linked to the idea of the paradigm of the Liberal State of Law, therefore, related to the first dimension fundamental rights, where the abstention of the State is required so that justice could be achieved.

Ronald Dworkin presents civil disobedience in a more elaborate way in his work "A Matter of Principle". He reiterates that (2005) civil disobedience is not a political experience of a people, or why some people are virtuous and others bad, or why some are wise and others ignorant, but rather it stems from deep disagreements about the sense of justice among people on moral issues and political strategy. He intends to formulate a theory on civil disobedience that has practical utility, without reducing the debate to who is right or wrong in breaking a law:

> (...) So a teory of civil disobedience is useless if it declares only that people are right to disobey laws or decisions that are wicked or stupid, that the rightness of the disobedience flows directly from the wrongness of the law. Almost everyone will agree that if a particular decision is very wicked, people should disobey it. But this agreement will be worthless in particular, concrete cases, because people will

> then disagree whether the law is that wicked or wicked at all.
>
> We must accept a more difficult assignment. We must try to develop a theory of civil disobedience that can command agreement about what people should actually do, even in the face of substantive disagreement about the wisdom or justice of the law being disobeyed. But that means that we must be careful not to make the rightness of any decision about civil disobedience depend on which side is right in the underlying controversy. We must aim, that is, to make our judgments turn on the kinds of convictions each side has, rather than the soundness of these convictions. We might call a theory of that type a working theory of civil disobedience. (DWORKIN, 2005, p. 156)

Thus, the author proposes two questions:

> The first is this: what is the right thing for people to do given their convictions, that is, the right thing for people who believe that a political decision is wrong or immoral in a certain way? The second is: How should the government react if people do break the law when that is, given their convictions, the right thing to do, but the majority the government represents still thinks the law is sound? (DWORKIN, 2005, p. 156)

The first question is the most important for the purpose of this article, and Dworkin (2005, p. 157) classifies civil disobedience into three general types, to outline what type of action the disobedient

should take when judging any unjust law fundamentally contrary to their convictions. First, there is civil disobedience "based on integrity", which occurs when a person's personal integrity, their conscience, prohibits them from obeying a law. Such as, for example, when a drafted soldier refuses to fight a war they believe is unjust.

The second general type of disobedience identified by the author is civil disobedience "based on justice" (2005, p. 157-158), where people act in ways that oppose a law they believe to be unjust, because there is an oppression of a minority by the majority. The historically recognized struggle of Martin Luther King against segregationist Jim Crow laws, as well as the protests in the United States against the Vietnam War, are examples of this type of civil disobedience.

Both categories of civil disobedience involve convictions and principles, albeit in different ways. However, Dworkin points out a third type of civil disobedience, which he calls "policy-based" disobedience (2005, p. 158-159), which differs from the aforementioned categories. In this case, people are not opposed to the law because they think it is unjust, or that it oppresses a minority, but because they consider such a law unwise, stupid or dangerous. They believe that the majority made a tragically wrong choice in adopting a certain policy. The protests carried out in the 1980s against the placing of US nuclear missiles in Europe are an example of this type of civil disobedience.

Although there is this distinction between the types of civil disobedience, nothing prevents a person from being in accordance with different types simultaneously, such as, for example (DWORKIN, 2005, p. 159), people who protested against the War in Vietnam, they believed the war was unjust (disobedience based on justice) and also foolish (disobedience based on policy). However, such a distinction between the types of civil disobedience is important because

> We can try to identify the conditions under which acts of civil disobedience would be justified if the beliefs and motives of the actors were those associated with each type of disobedience, leaving as a further question

> whether the beliefs in play on a particular occasion might plausibly be thought to be or include beliefs of that sort. (DWORKIN, 2005, p. 159)

Thus, in a situation of integrity-based civil disobedience, the person will act correctly, by reason of their convictions, when they violate the law, since by obeying such law, they would suffer a definitive loss to their conscience that they will never recover, as, for example, in the case of the Fugitive Slave Act which, during the time of slavery in the United States, stipulated that a person must hand over runaway slaves to the authorities. If a person complies with this law, which according to their convictions is immoral, they will suffer a definite loss in their heart. Therefore, there cannot be a caveat in operational theory about disobedience for integrity when it comes to waiting for the legislative debate to change the law. Disobedience for integrity, therefore, is a matter of urgency (DWORKIN, 2005, p. 159).

In the case of disobedience based on justice, the situation is different. In this case, people must exhaust the political legislative process in order to change the law, before civil disobedience is the justified and correct alternative for the specific case. They must not violate the law unless normal constitutional political means offer no hope of success. "Someone whose justification for breaking the law is 'but I'm doing this to reverse an immoral policy' has no good reply to the objection 'You're simply promoting that policy through what you do" (DWORKIN, 2005, p. 160).

In this sense, there is a difference between these two types of disobedience. Integrity-based disobedience is typically defensive, as it serves to prevent the agent from doing something their conscience forbids; while disobedience based on justice tends to be strategic, as it has a general objective, which is the dismantling of a political program that the disobedient deems immoral. Thus, in disobedience based on justice, there are two types of strategies to achieve your goals. The persuasive strategy, where one hopes to force the majority to change their minds

and reject the current political program; and the non-persuasive strategy, where the objective is not to change the majority's opinion, but rather to "raise the cost of continuing the program that the majority still prefers, in the hope that the majority finds the new cost unacceptably high" (DWORKIN, 2005, p. 161).

The persuasive strategy only works when social conditions are favorable so that it can be effective. The civil rights movements of the 1960s in the United States took place in a post-World War II moment, where a landscape of equality and awareness of racial justice permeated the American political debate. However, suppose justice-based disobedience in South Africa during Apartheid. In this case, social conditions were not favorable for the persuasive strategy. So would the non-persuasive strategy be justified? Dworkin (2005, p. 162) answers yes, but only if there is a political program or law that is really unfair, so that the common political process does not offer any hope that something will be changed, and in a situation where there also isn't an effective form of persuasive civil disobedience.

In this sense, the persuasive strategy is even more important in policy-based civil disobedience, because in this case policy-based disobedience cannot use the non-persuasive strategy feature because

> Once it is conceded that the question is only one of the common interest – that no question of distinct majority and minority interest arises – the conventional reason for constraining a majority gives way, and only very dubious candidates apply for its place. Someone who hopes not to persuade the majority to his point of view by forcing it to attend to his arguments, but rather to make it pay so heavily for its policy that it will give way without having been convinced, must appeal to some form or elitism or paternalism to justify what he does. And an appeal of that form does seem to strike at the roots of the principle of majority rule, to attack its foundations

> rather than simply to call for an elaboration or qualification of it. (DWORKIN, 2005, p. 164)

After elucidating the types of civil disobedience, as well as pointing out the strategies to be used by people according to each concrete case that relates to some specific type of disobedience, the question also remains: would civil disobedience, against a law or a court decision supported by the majority be legitimate and harmonic with the constitutional values of a society? Should the operational theory of civil disobedience only consider the agent's convictions to determine how the person should act, or should there be some kind of caveat with regard to the state policy, law or court decision in question being as accepted in the legal system as legitimate, consonant with the fundamental rights and constitutional values of a society, which means that the disobedient behavior of certain groups, in certain situations may not be considered legitimate as a builder of a society's democracy, but something that harms it?

4. THE EVOLUTION OF THE FUNCTION OF INTERPRETATION IN THE PARADIGMS OF MODERN LAW AND THE RELATIONSHIP WITH CIVIL DISOBEDIENCE

After the specific study of the notions and definitions of the institute of civil disobedience, one must understand the legal framework in which such institute is inserted, in order to understand that civil disobedience can be considered an act that, although unlawful, when one adopts a purely formal analysis perspective, it should not be considered unlawful, as it is deeply democratic in its essence, since it pressures governments and society as a whole to reinterpret or change an existing rule that is considered unjust by the disobedient. In this way, constitutional hermeneutics is shown as a means of absolute importance for the classification of civil disobedience as a fundamental right that the individual has with regard to the State.

To situate constitutional law and constitutionalism as a whole, in current times, Menelick de Carvalho Neto (1998, p. 4) brings the concept of paradigm, which comes from Thomas Khun's philosophy of science:

> This notion has a double aspect. On the one hand, it makes it possible to explain scientific development as a process that takes place through ruptures, through schematization and clarification of central aspects of the great general schemes of pre-understandings and worldviews, embodied in the naturalized background of silence based on the grammar of social practices, which at the same time makes language and communication possible, and limits or conditions our actions and our perception of ourselves and the world. On the other hand, it also suffers from obvious simplifications, which are only valid insofar as they allow the presentation of these general selective grids presupposed in the prevailing and tendentially hegemonic worldviews in certain societies for certain periods of time and in certain contexts

Thus, the author identifies three great paradigms of Law in modernity through which he carries out a work on the role of the judiciary and how the interpretation of the rules in each of them takes place: the Paradigm of the Rule of Law; the Welfare State Paradigm; and the Democratic Rule of Law Paradigm.

The contextualized study of constitutional hermeneutics in each of these paradigms is essential so that civil disobedience can be understood not as a merely illicit act, but as a transforming democratic institute and its purpose is to change the current norms, or their reinterpretation.

The paradigm of the Rule of Law concerns the period of rise of the philosophical-political current known as liberalism, after the French Revolution of 1789, where the ideas of a secular legal system, governed by rational rules was embraced, where the Law was seen as

> (...) a normative system of general and abstract rules, universally valid for all members of society. Public Law, however, should ensure, even if through various forms and systems of government, the non-return to absolutism, precisely so that those abstract ideas could have free course in society, by limiting the State to the law and, adopting the principle of separation of powers (...)" (CARVALHO NETO, 1998, p.6)

There is, therefore, a great concern, in this paradigm, with the protection of the fundamental rights of individuals with regard to the State, notably the rights of freedom, equality and private property. Here, the intention is to to get the State to abstain from action towards individuals.

In this understanding, Paulo Bonavides (2006) elucidates that Fundamental Rights are expressed in three successive generations, where each one of them represents the relationship between state action and the individual. In this paradigm, one can notice the first generation fundamental rights, where the main characteristic is the non-action of the State, being, therefore, rights of a negative nature, in order to guarantee the above-mentioned ideals.

The paradigm of the Rule of Law, then, had as its main characteristic the limitation of the State to legality, imposing on the State a minimum level of action, in order to guarantee the exercise of individual freedoms, within a legal system of general and abstract rules. In this sense, the role of interpretation made by the judiciary is a mere "mouth of the law":

> The issue of the judge's hermeneutic activity could only be seen as a mechanical activity, the result of a direct reading of the texts that should be clear and distinct, and the interpretation was something to be avoided even by consulting the legislator in the event of doubts by the judge when facing obscure and intricate texts (CARVALHO NETO, p. 7).

It is noteworthy that, in classical liberalism, a philosophy that permeates the paradigm of the Rule of Law, John Locke (2001) theorized about the right of insurrection of the people against the government that is considered tyrannical, when this government disrespects the purpose of its creation, offending the natural law. In other words, in the case of tyranny, there was the possibility of a right of resistance to overthrow a tyrant ruler who abuses his power. Such right of resistance – where the people see the government as illegitimate – should not be confused with civil disobedience.

Furthermore, given the hermeneutic activity of the judge as a mere mouth of the law, where interpretation should be avoided, one can conclude that civil disobedience, within this paradigm of the Rule of Law, cannot be considered a right of the individual, given that such institute is, essentially, the disrespect to the positive norm, which, in this case, is precisely inserted in a paradigm where the State is the legality. Civil disobedience can be seen, then, only as a moral defense mechanism against that which is considered an abusive activity or law of the State, but not as a right itself, recognized by the legal system.

As Menelick de Carvalho Neto (1998) points out, the abstract freedom and equality, as well as private property, so desired by the Liberal State, became rights that remained only in the formal field, in a way that founded the social practices of this period in which there was the greatest exploitation of man in recent history, where there was an immense accumulation of capital, in addition to an unprecedented spread of misery.

> (...)Socialist, communist and anarchist ideas are now beginning to call into question the liberal order and at the same time animate increasingly significant mass collective movements and they reinforce the struggle for the right to vote, for collective and social rights, such as the right to start a strike, of free union and party organization, to a minimum wage, to a maximum labor day time, social security and welfare, the access to health, education and leisure. Deep changes of all kinds also shape the new mass society that emerges after the 1st World War and, with it, the new constitutional paradigm of the Welfare State (CARVALHO NETO, 1998, p. 8).

The author goes on to say that in this new Social State paradigm, there was the materialization of rights that were previously merely formal. In addition, second-generation fundamental rights were added to the legal system.

Second-generation fundamental rights are those that require a positive action by the state to guarantee the materialization of formally foreseen rights. These are not just collective rights, but are linked to social justice claims (MENDES, COELHO e BRANCO, 2008).

Freedom itself should no longer represent just the possibility of doing everything that the law does not prohibit, but is now conditioned and interpreted taking the social collective into account, in order to recognize a number of laws that should privilege the side that is socially or economically weaker in a legal relationship, thus materializing the right to equality, in order to make the system fair and equitable (CARVALHO NETO, 1998).

Considering the new social purposes of the State, and with the legal system gaining a new degree of complexity - considering that in this paradigm it is not enough for the State to abstain so that the rights of individuals can be fulfilled, but that it should act ostensibly

to guarantee social rights - the interpretive activity of the judge can no longer be limited to being a mouth of the law, through a hermeneutics based on the literality of the normative text, in order only to achieve the meaning that the legislator wanted to give to the text:

> Legal hermeneutics calls for more sophisticated methods such as teleological, systemic and historical analysis capable of emancipating the meaning of the law from the subjective will of the legislator towards the objective will of the law itself, deeply embedded in the guidelines for the materialization of Law that it prefigures, immersed in the dynamics of the needs of social programs and tasks (CARVALHO NETO, 1998, p. 9).

This paradigm can be considered the cradle of the interpretive possibility of the rules in a systematic way, so that civil disobedience is likely to be recognized as a right, and not just an affront to the legal system.

Finally, with the economic crisis and the end of World War II, the Social Rule of Law paradigm began to decline. From the 1970s onwards, the crisis became more intense. Post-industrial, information-age societies became much more complex. The intervening state misrepresented its purpose and ended up becoming as if it were a company above all other companies. In addition, there was the advent of 3rd generation fundamental rights, namely, collective or diffuse interests (environmental rights, consumer and child rights, etc.), making the relationship between public and private, State and individual even more complex. Fundamental Rights became protagonists in the legal systems of societies, anchored in the Constitutions and acquire

> strong procedural connotation that immediately demands citizenship, the right to participate, even if institutionally mediated, in the public debate constituting and shaping the democratic

> sovereignty of the new paradigm, the constitutional paradigm of the Democratic State of Law and its participatory, pluralist and open legal system (CARVALHO NETO, 1998, p. 10)

It is in this paradigm that a better interpretation of civil disobedience can be performed as an inherent right to the democratic process that the citizen possesses, through the notion of a legal system that is irrigated by the supremacy of the Constitution and the fundamental rights that guide it.

The hermeneutic activity of the Judge, then, must adapt to all the complexity of this new legal and social structure, in order not only to analyze the legal text, but "even in the face of the concrete case, the factual elements that are equally interpreted and that, in fact, necessarily integrate the process of normative densification or application of law". In this way, the legal system is no longer a set of "all or nothing" application rules, as the positivists believed, and the principles gain strength by subsisting in a way that they can be contrary to each other, without eliminating each other, so that they compete between themselves so that they can be applied in a given situation. The judge must be sensitive to the specifics of the case so that they can find the appropriate rule applicable to the case, in each specific situation. (CARVALHO NETO, 1998, p. 10).

In this environment of analysis of the competition of principles and rules that guide a factual situation, which must be analyzed by the law enforcer, one can finally integrate civil disobedience in order to no longer understand such action by individuals as contrary to the legal system, but according to the democratic and participatory process of interpretation and reinterpretation of the legal norms of a given system, which is inherent to the paradigm of the Democratic Rule of Law, a paradigm where the Law is not just a system of mechanical reproduction of written laws, but one that reveals its constructive character, where the rules and factual situations are interpreted and reinterpreted in accordance with the current system, subject to the Constitution and the fundamental rights present in it.

In this way, intrinsic to the paradigm of the Democratic Rule of Law, civil disobedience can be understood as a fundamental right, as it converges with the fundamental constitutional values of a nation, where norms are constantly reinterpreted in light of these values and also in light of factual cases that present themselves to the law enforcer. Therefore, civil disobedience is not an exception to the Democratic Rule of Law, to be invoked in moments of institutional crisis, but rather it constitutes the basis for its functioning (MATOS, 2006).

5. THE CURRENT ANTI-VACCINE MOVEMENT AND THE VACCINE REVOLT OF 1904

The political polarization environment that Brazil has been going through in recent years has prompted political groups to rise up against vaccination, either because they do not believe in the effectiveness of vaccines in general (anti-vaccine movement); or because they do not believe in the effectiveness of these specific vaccines, as they were the result of an unprecedented effort and investments in human history, which resulted in the development of vaccines in record time never seen before; in other words, for not believing in the efficacy of the vaccines produced by just a few specific manufacturers, given the ideological divergence with the host country of a specific manufacturer.

Demonstrations arose not only on the internet and on social networks, but there were also significant protests against COVID-19 vaccination in the streets of the largest cities in the country.

However, this fact is not unprecedented in the history of Brazil, in the beginning of the 20th century, the movement called "Vaccine Revolt" broke out, which was a popular movement, with features of Civil Disobedience, which occurred in the city of Rio de Janeiro, in 1904, against the government's determination of compulsory vaccination of the population against smallpox, an epidemic that devastated the country at the time. The President at that time, Rodrigues Alves, adopting the posture of a statesman, accepted the suggestion of the famous Brazilian

scientist Oswaldo Cruz, and determined the mandatory vaccination of the population of the federal capital. (SEVCENKO, 2013)

> In mid-1904, the number of admissions due to smallpox at Hospital São Sebastião reached 1,800. Even so, the popular groups rejected the vaccine, which consisted of the liquid from the pustules of sick cows. After all, the idea of being inoculated with this liquid was weird. And there was still a rumor that those who got vaccinated developed bovine features.
> In Brazil, the use of smallpox vaccine was declared mandatory for children in 1837 and for adults in 1846. But this resolution was not complied with, and even because the production of the vaccine on an industrial scale in Rio only started in 1884. Then, in June 1904, Oswaldo Cruz motivated the government to send a bill to Congress to reinstate mandatory vaccination throughout the country. Only individuals who proved to be vaccinated would get employment contracts, school enrollment, marriage certificates, travel authorization, etc.
> After intense debate in Congress, the new law was approved on October 31 and regulated on November 9. This served as the catalyst for an episode known as the Vaccine Revolt. The people, already so oppressed, could not accept having their house invaded and having to take an injection against their will: they went to the streets of the capital of the Republic to protest. But the revolt was not limited to this popular movement.

> All the confusion surrounding the vaccine also served as a pretext for the action of political forces that wanted to depose Rodrigues Alves – a typical representative of the coffee oligarchy. "Reorganized monarchists, military, more radical republicans and workers united in the opposition (...).[2]

This movement, initially of the people, brought together several political movements in the city of Rio de Janeiro, in 1904, and consisted of the Rio citizens' insurrection against the mandatory vaccination against smallpox. The vaccine was made with liquid from bovine udder pustules, which seemed quite strange to less educated people. Although there was already scientific proof, the Government at the time lacked the necessary duty of transparency and information to the population.[3]

The revolt was much more related to the urban remodeling policy in Rio de Janeiro, nicknamed "Bota Abaixo", implemented by Mayor Pereira Passos. (BARBUGIANI, 2020)

It so happens that this movement was also used in a political way by monarchists dissatisfied with the newly created Republic, who aimed at a coup but failed.

Therefore, in a nutshell, the Vaccine Revolt movement was much more a movement against the exclusion of poorer people from the process of rapid urbanization in the city of Rio de Janeiro than against the vaccine itself, as the federal capital of the time had terrible sanitary conditions, an exponential increase in the population with the arrival of European immigrants, which created a favorable environment for the proliferation of diseases since most of the population lived in unhealthy conditions. (SEVCENKO, 2013)

[2] NOTICIAS. Agência FIOCRUZ de. A Revolta da Vacina. **Portal FIOCRUZ**. 2005. Available at: <https://portal.fiocruz.br/noticia/revolta-da-vacina-2#:~:text=Em%20meados%20de%201904%2C%20chegava,ser%20inoculado%20com%20esse%20l%C3%ADquido>, Accessed in: 01 de fev. de 2021.

[3] NOTICIAS. Agência FIOCRUZ de. A Revolta da Vacina. **Portal FIOCRUZ**. 2005. Available at: <https://portal.fiocruz.br/noticia/revolta-da-vacina-2#:~:text=Em%20meados%20de%201904%2C%20chegava,ser%20inoculado%20com%20esse%20l%C3%ADquido>, Accessed in: 01 de fev. de 2021.

It should also be noted "Later, in 1908, when Rio was hit by the most violent smallpox epidemic in its history, the people rushed to be vaccinated, in an episode contrary to the Vaccine Revolt".[4]

> Interestingly, in 1908, faced with the disastrous consequences of sanitary nature due to the lack of mandatory vaccination, the citizens of Rio de Janeiro, desperate with one of the biggest epidemics they faced due to the proliferation of smallpox, madly sought this same vaccine, a situation that would not have occurred if, years ago, the so-called Vaccine Revolt had not occurred. (BARBUGIANI, 2020, P. 11)

The conclusion is that, without a shadow of a doubt, even though the Chief Executive's position in the intention of immunizing the population by listening to the most respected Brazilian sanitarist was commendable, he lacked care in the execution of the project, many citizens died, others were sent to the distant State of Acre, for their participation in the revolt, which took place in very different conditions from those present today.

6. OBLIGATION OF THE VACCINE AND CIVIL DISOBEDIENCE - THE SUPREME FEDERAL COURT'S DECISION IN THE JOINT TRIAL OF THE DIRECT ACTIONS OF UNCONSTITUTIONALITY (ADIS) 6586 AND 6587 AND THE EXTRAORDINARY APPEAL WITH INTERLOCUTORY APPEAL (ARE) 1267879 (GENERAL REPERCUSSION)

The year 2020 began with a major global effort to contain the spread of COVID-19, and after this unprecedented global effort and

[4] NOTICIAS. Agência FIOCRUZ de. A Revolta da Vacina. **Portal FIOCRUZ**. 2005. Available at: <https://portal.fiocruz.br/noticia/revolta-da-vacina-2#:~:text=Em%20meados%20de%201904%2C%20chegava,ser%20inoculado%20com%20esse%20l%C3%ADquido>, Acessed in: 01 de fev. de 2021.

investment in science in the history of mankind, scientists and researchers in the pharmaceutical industry managed, in a time never seen before, to produce some types of vaccines to stop the spread of the disease that has already killed more than three million, four hundred and ninety-two thousand people across the planet, according to data from the WHO as of May 27th, 2021.

As highlighted in the introductory chapter, the topic of Civil Disobedience returned to the legal discussion agenda in Brazil, after the joint judgment of Direct Unconstitutionality Actions (ADIs) 6586 and 6587, which dealt solely with vaccination against Covid-19, and the Extraordinary Appeal with Interlocutor Appeal (ARE) 1267879, in which the controversy revolved around the right to refuse immunization due to philosophical or religious convictions.

By the judgment of the appeal and the ADI's, the Brazilian Supreme Federal Court (STF) established the following theses of general repercussion:

> "The obligation to immunize through a vaccine that, registered with a health surveillance agency, has been included in the national immunization plan is constitutional; or has its mandatory application decreed by law; in other words, determined by the Union, the states, the Federal District or the municipalities based on medical-scientific consensus. In such cases, it is not characterized as a violation of the freedom of conscience and philosophical conviction of the parents or guardians, nor of the family power". **(ARE 1267879)**
>
> "(I) Compulsory vaccination does not mean forced vaccination, the user is allowed to refuse, but it can be implemented through indirect measures, which include, among others, the restriction to the exercise of certain activities or the frequency of certain

> places, provided that they are established by law, or arising from it, and based on scientific evidence and relevant strategic analyses, they are accompanied by extensive information on the efficacy, safety and contraindications of immunizing agents, respecting human dignity and the fundamental rights of individuals; meet the criteria of reasonableness and proportionality; and that vaccines are distributed universally and free of charge.
> (II) Such measures, with the above limitations, can be implemented by both the Union and the states, the Federal District and the municipalities, respecting their respective spheres of competence." **(ADIs 6586 e 6587)**

The Judgment of ARE 1267879 was drafted as follows:

> Summary: Constitutional law. Extraordinary appeal with interlocutory appeal. Mandatory vaccination of minors. Parental freedom of conscience and belief. Presence of general repercussion. 1. It is a constitutional issue to know whether parents can stop vaccinating their children, based on philosophical, religious, moral and existential convictions. 2. Recognized general repercussion.
> (STF - ARE 1267879 RG, Relator (a): ROBERTO BARROSO, Full Court, judged in 27/08/2020, PROCESSO ELETRÔNICO DJe-256 DIVULG 22-10-2020 PUBLIC 23-10-2020)

According to the established theses of General Repercussion, the excerpts that most interest this work are the statements that: "the

obligation of vaccination is constitutional", and that "sanctions may be imposed on those who voluntarily refuse to receive it, consisting of restrictions to the exercise of certain activities and limitation of attendance to certain places".

For the first statement, one can infer that, through a court decision, the STF interpreted that it is constitutional for the Brazilian government, at the three levels of the Federation (since SUS - the Brazilian Universal Healthcare system - is responsible for the National Immunization Plan and it acts in a decentralized way in the three aforementioned spheres), to require that all its citizens comply with the provisions of the National Vaccination Plan.

The second statement establishes the sanction resulting from the voluntary refusal to be vaccinated, with no exceptions for flexibility, unless medical reasons recommend one not to take the vaccine.

According to the STF, the obligation would be non-coercive, since the State could not coerce citizens to be vaccinated and the penalties arising from voluntary refusal would consist of limitations on activities, such as boarding on public transport, enrollment in schools and colleges, among others.

7. CONCLUSION

According to the famous historian Yuval Noah Harari, pandemics are not a new episode in human history, the last having occurred at the beginning of the last century, the so-called Spanish Flu pandemic. The author considers, however, that never in history has humanity been so prepared to face and overcome this problem, mainly due to technological advances, especially in the health area. (HARARI, 2020)

Exactly therein lies the distinguishing factor between the current situation and the previous Civil Disobedience movements related to vaccines, exemplified in the present work with a brief digression on the Vaccine Revolt, which took place in the city of Rio de Janeiro in 1904.

At that time, the smallpox vaccine was already known to be effective, however, due to the low level of education of the poorest layers

of society and the inefficiency of the Government in implementing the Immunization Plan, this generated mistrust on part of the population, which was manipulated by political groups opposed to the recently created Republic, who encouraged the people to rebel. In this case, the vaccine was the trigger for a movement that rebelled against the terrible housing and sanitary conditions in the Federal capital of the beginning of the 20th century, gaining a syncretic feature, resembling a movement of resistance rather than civil disobedience itself, since the population's revolt was not solely against the vaccine.

Currently, although the agenda of the anti-vaccine movement really looks like a civil disobedience movement, it can be questioned as to the legitimacy of its claim considering the Constitutional Text. Differently from the individualist conception of Thoreau's work, the Supreme Court, when analyzing the decision under discussion, emphasized that the right to collective health and safety must prevail over individual wills.

A fact that draws attention is that while the Vaccine Revolt lacked adequate information for the population about what was being done, there is currently an excess of information, however many people sought information through sources without scientific proof - "Fake News" -, whic the World Health Organization (WHO) called an "Infodemia"[5]. (PAHO, 2020)

The Supreme Court rightly declared the constitutionality of mandatory vaccination based on the above thought, but without giving it the character of forcibility, respecting the right of conscientious objectors who voluntarily refuse to be immunized, bearing the burden of restrictions and limitations imposed as sanctions on those who do so.

The STF's decision appears to have a very interesting strategic component, since by not establishing penalties (administrative or criminal), it does not provide opportunities for the component of tension on the part of conscientious objectors, since history

[5] PAHO. **Pan American Health Organization.** Entenda a infodemia e a desinformação na luta contra a COVID-19. 2020. Available at: <https://iris.paho.org/bitstream/handle/10665.2/52054/Factsheet-Infodemic_por.pdf?sequence=14> . Acessed in 01 de fev. de 2021.

is replete with examples that are precisely the submission to the penalty that reinforces the engagement of the civil disobedience movement.

What actually happened is that the STF delegated the exercise of restrictions to civil society, declaring that any limitations on the right to come and go and attend certain public places will be legitimate.

In a globalized world like nowadays, such restrictions make coexistence almost impossible in society. Not being able to travel by plane or use public transport, not being able to enroll children in schools or not being able to use certain public services makes life in society almost impracticable.

The works consulted on the topic of Civil Disobedience report that most cases occurred against public policies implemented by the Executive Branch or against legislation in theory, with cases of conscientious objection movements against acts of Judiciary Authorities being uncommon. However, with the collectivization of legal demands, this fact becomes increasingly more common, and the fact that in today's Brazil, the Judiciary has often been complementing the role of the Executive Branch in the pursuit of public policies, when the Executive branch fails to act. Various sectors of society (mainly the scientific community in the health field) criticized the Executive Branch's omission in combating the pandemic, thus opening the space for the Judiciary Branch to act.

Therefore, the absence of forcibility, provided for in the aforementioned decisions, guarantees the right of conscientious objectors to not want to undergo vaccination, and in this case, the existence of legitimacy before the Constitutional Text to support the anti-vaccine movement is doubtful, since as highlighted in the votes of the Supreme Court Judges, the right to health of the community must supersede the right of conscientious objectors.

Additionally, under the criminal justice point of view, whoever refuses to be subjected to immunization, and purposefully exposes society to risk of disease may be criminally liable for the crime provided for in art. 132 of the Penal Code, which establishes penalties from three months to one year for anyone who exposes the life or health of

others to dangerous situations, such crime being located in chapter III of the aforementioned Code, relating to Crimes of endangering life and health; or also for the crime provided for in art. 268, in the case of infraction of preventive sanitary measure, listed in the chapter on crimes against public health.

This does not mean that anyone who does not take the vaccine could be held criminally responsible, as this would go against all the logic established by the STF regarding the possibility of refusing the vaccine, however, those who refuse to vaccinate and further expose, intentionally, other people to danger with regard to their health or life, commit a crime in accordance with the Brazilian penal code.

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ISBN: 978-65-00-40218-6

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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter11

COVID-19's ANTI-VACCINE MOVEMENT AS AN ACT OF CIVIL DISOBEDIENCE

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Abstract: The purpose of this article is to analyze the anti-vaccine movement and examine civil disobedience from a constitutional perspective so that the anti-vaccine movement can be subsumed as an act of civil disobedience.

Keywords: ***Anti-vaccine Movement. Civil disobedience. Constitutional aspects of civil disobedience.***

1. INTRODUCTION

Amid the Covid-19 pandemic, so declared by the World Health Organization (WHO) in March 2020, one behavior that has been observed is the anti-vaccine movement. A significant percentage of the population opts not to be vaccinated, both in Europe (France, Germany, among other countries) and in the United States of America (USA). In Brazil, the situation is no different: several people decided not to be immunized, while others even received the first dose but chose not to take the second when the vaccine brand recommended it.

Thus, the scientific investigation reported in this article sought to answer the following question: can the anti-vaccine movement be considered an act of civil disobedience?

Therefore, the article is structured in two parts. The first will examine the history of vaccines, the characteristics of the anti-vaccine movement, and the vaccine as a fundamental collective right. In the second part, civil disobedience is analyzed from a constitutional perspective. In the final considerations, the answer to the question presented is highlighted.

2. VACCINES AND ANTI-VACCINE MOVEMENTS

The vaccine is one of the most significant inventions of humanity, health, and medicine, with more than 200 years of history. Millions of lives are saved every year in vaccination campaigns, which changed the course of the human species for the better and significantly increased our quality of life. According to the WHO, vaccination prevents 2 to 3 million deaths each year (WORLD HEALTH ORGANIZATION, 2021; VANDERSLOTT; DADONAITE; ROSER, 2013).

The first traces of the use of vaccines concern the insertion of virus versions in people's bodies, a procedure present in the history of fighting smallpox in the 10th century in China. However, how the vaccine was applied was quite peculiar: the dust resulting from the crushing of scabs resulting from the pathology against which protection was intended blown onto people's faces (INSTITUTO DE TECNOLOGIA EM IMUNOBIOLOGICOS, 2016).

The term "vaccine" appeared in 1796, resulting from a scientific experiment by the English physician Edward Jenner. Upon learning, through reports, that English workers in the countryside were not contaminated with smallpox, as they had already had cowpox, which had less impact on the human body, Jenner inserted the two viruses in a child and found that the reports were supported by scientific experience. Thus, we arrive at the term "vaccine," which derives from *Variolae vaccinae*, the scientific name for cowpox.

In 1853, the first government act that made the vaccine mandatory was *the compulsory vaccination act*, which instituted compulsory smallpox vaccination for every child in the first three months of life. The penalty for relatives not complying with the Law was fine or imprisonment. Later, the Act of 1867 was enacted, which extended the measure to children up to 14 years of age, adding penalties for refusing vaccination. The laws received severe resistance from citizens, who claimed the right to control their bodies and their children. From then onwards, there is a clash between public interventions in defense, on the one hand of the collective right to health (vaccination) and individual freedoms.

At the end of the 17th century, in 1881, the French scientist Louis Pasteur created the first vaccine to fight avian cholera (*Pasteurella multocida*) and anthrax (*anthrax*). This marked the beginning of the mass production of vaccines and the fight against diseases across the planet. Nevertheless, as for every action, there is a reaction, vaccination as the vanguard of science gave rise to resistance from specific segments of society, stimulated by unfounded skepticism, obscurantism, and fundamentalism (THE HISTORY, S.d.).

Vaccine opponents have held diverse positions over time, based on philosophical premises, theological arguments, and even scientific fraud. During the 19th century, these opponents coalesced and began to manifest themselves through movements such as the anti-vaccination leagues, present in the US and the UK.

Jenner's ideas about the spread of smallpox were distrusted. This was an "anti-Christian" procedure for opponents of the vaccine, as it came from an animal – Jenner inoculated a boy with the cowpox virus, causing him to immunize himself to smallpox that affected the human species, caused by *Orthopoxvirus variolae*.

Although vaccination is safe, effective, and inexpensive, smallpox decimated many lives in Europe and the US throughout the 19th century and even into the early 20th century. The pace at which people received the immunizing agent was slow, but what hampered the process most was the lack of structure and misinformation.

At the end of the 19th century, several anti-vaccine societies emerged in the USA, such as the Anti-Vaccine Society of America, created in 1879, following the British. Two other North American organizations emerged with the same purpose, the New England Anti-Compulsory Vaccination League (1882) and the New York Anti-Vaccination League (1885). These organizations engaged in legal disputes to overturn the vaccination laws in their states and California, Illinois, and Wisconsin (WOLFE; SHARPE, 2002). In the same period, the list of preventable disease outbreaks increased, even with the appearance of several new vaccines (NOVO, S.d.).

In Brazil, the vaccine appeared in 1804. However, the historical milestone on immunization takes place with the "Revolta da Vacina"

in 1904, Rio de Janeiro, at the time, the country's capital. That year, the immunization of Brazilians took place on a compulsory basis, headed by the general director of public health Oswaldo Cruz, whose objective was to immunize the population against smallpox, which was killing thousands of people at the time. In that period, which corresponded to the Second Industrial Revolution, Rio was a showcase for Brazil and, attracting foreign investors and tourists, and it was changing, such as urban remodeling.

The previous urban model, with colonial characteristics, made the city a favorable environment for disease outbreaks. However, to implement these changes, the government adopted exceptional laws that empowered the city's mayor but silenced any defense rights for the community. In this reality, Oswaldo Cruz, supported by the Law that allowed the invasion, inspection, inspection, and demolition of houses and buildings, began the campaign to combat and eradicate yellow fever.

This campaign became known as the "sanitary dictatorship," producing a popular movement that culminated, according to Sevcenko (1993), with the support of politicians, workers, and the press against the government. His speech defended the citizen's right to freedom of choice, weaving fierce criticisms of the obligatory nature of the vaccine and putting the campaign in check, calling it "poison injection." This traumatic memory of the yellow fever vaccination campaign inspired resistance to the smallpox campaign. It influenced the population, primarily poor and lacking information on how the immunization agents worked, to refute and fear the measure imposed by the government in an authoritarian manner.

In the 1970s, the anti-vaccination movements again raised doubts and misinformation when they argued that the triple vaccine against diphtheria, whooping cough, and tetanus caused neurological problems in children. This significantly reduced vaccination rates in the period.

More than a century after the Vaccine Revolt in Rio de Janeiro, at the beginning of the 21st century, a group called anti-vaccination emerged, with successors to those who opposed compulsion and/or were afraid of vaccination, according to Levi (2013), composed of the

wealthiest classes of the population. These people defend the use of alternative health treatments, such as homeopathy and natural medicine, betting only on food care to maintain children's health. According to Levi (2013), the decision not to get vaccinated currently happens for philosophical reasons, fear of adverse reactions, medical advice, and, although to a lesser extent, even religious reasons.

The anti-vaccine movement gained even more momentum due to a fraudulent article by physician Andrew Wakefield in the British scientific journal Lancet in 1998, which linked autism spectrum syndrome with the MMR vaccine against measles, mumps, and rubella. The scientific community, in further studies, later refuted this assertion. However, the harm had already been caused. It is noteworthy that the misinformation that the triple viral vaccine causes autism persists today, is one of the arguments disseminated on social networks by anti-vaccine groups.

In Brazil, although the anti-vaccine movement is slight, adherence to these groups worries the Ministry of Health, as a drop in the coverage rate of some immunization agents offered by the Unified Health System (UHS) was noted. Only 76.7% of the population took the second dose of the MMR vaccine in 2016 when the target was 95%. In the same year, there was an outbreak of mumps and the lowest rate of vaccination in 12 years (only 84%) against polio, a disease eradicated from Brazil since 1994 (BRASIL, 2018a).

According to data released by the National Immunization Program, 2017 had the lowest rate, in 16 years, of vaccination coverage in children (COELHO, 2017). In addition, 312 cities had low coverage against polio in the following year (BRASIL, 2018a), leading to the reintroduction of the virus in the country. Also, states such as Amazonas and Roraima suffer from measles outbreaks (BRASIL, 2018b). In Europe, recent measles outbreaks in several countries are linked to anti-vaccine movements' influence. The result of low vaccination adherence is alarming, as, according to the European Center for Disease Prevention and Control (2017), outbreaks and 35 deaths from the disease were recorded (Romania, Portugal, Germany, and Italy).

The scenario described here is contextualized in the context of recent data released by the World Health Organization (2021), which

reveal that there was a drop in vaccination coverage by 86% (2019) and 83% (2020). In 2017, for example, one in ten children globally (about 12.6 million) did not receive a vaccine in 2016, and only 85% received the first dose against measles. The percentage is even lower in the second dose, which reached only 64% when the vaccine target was set at 95%. According to the entity, measles was considered endemic in nine European countries, while rubella in 14, according to the World Health Organization (2017) report.

In the US, according to BBC15, the anti-vaccine wave gained visibility with the militancy of names like Jenny McCarthy, a former bunny from Playboy magazine and who became one of the movement's spokespersons in 2007 after her son left—diagnosed with autism. Today, several entities in the country are designed to provide information about the supposed risks of vaccines. The influential National Vaccine Information Center chaired by Barbara Loe Fisher is among them. A pioneer of the anti-vaccine movement, Fisher was one of the center's founders in 1982, having authored three books on the subject. According to her report, her son suffered a severe reaction to the triple DPT vaccine (against diphtheria, whooping cough, and tetanus) when he was 2.5 years old in 1980 and was left with sequelae and learning problems.

An emblematic case on the subject was Jacobson v. Massachusetts, 1905, in which the US Supreme Court upheld the states' authority to enforce mandatory vaccination laws. The Court's decision articulated the view that individual liberty is not absolute and is subject to the State's police power (JUSTIA US SUPREME COURT, 1905), concluding for the legality of compulsory vaccination carried out in Massachusetts.

Currently, a very significant percentage of the North American population, around 24%, has chosen not to be vaccinated against Covid-19 (BALL; LESLIE; STEPHANIS, 2021). Low adherence to vaccination programs and disease outbreaks has led some local governments to enact laws that mandate previously recommended vaccines.

In Brazil, mandatory vaccination was implemented by Law 6.259/1975, in which the National Immunization Plan was instituted

and which already emphasized the obligation of vaccination. The Child and Adolescent Statute (ECA) also provides compulsory vaccination with applicable sanctions. What can be seen on social networks, especially on Facebook's anti-vaccine pages, is that these public policies have given rise to resistance from many people, who do not trust the pharmaceutical industry and governments, are afraid of side effects, defend the freedom of choice not to be vaccinated, in addition to the right to their own body.

According to the researchers at the University of São Paulo, the growth of the groups occurred here as in the United States. In Brazil, a country with a long tradition of vaccination, this movement was reduced but still grew 18% during the pandemic only throughout 2020, counting thousands of followers on social networks (ZIEGLER, 2020).

Available vaccines against Covid-19 – which by mid-August 2021 had claimed approximately 4.4 million lives worldwide (WORLDOMETER, S.d.) – have also become the target of these groups. In Brazil, the vaccines used are Coronavac, AstraZeneca, Pfizer, and Jansen. The technologies used by immunizers are different, and one of them, used at Pfizer, for example, is the messenger RNA, whereby immunizers are produced from ribonucleic acid (RNA) sequencing.

During the current pandemic, the anti-vaccine movement used social media and significantly expanded the reach of its nefarious propaganda, spreading false ideas among the public fearful of an unknown virus. Its supporters are suspicious of the messenger RNA technology and its rapid arrival on the market, arguing, for example, that it would alter the genetic material of those vaccinated.

Such an assumption is widespread on the internet, despite tens of thousands of tests and no evidence to that effect. In addition, the more severe side effects of the immunizers AstraZeneca and Jansen have been a source of suspicion since the vaccination campaigns began.

According to Salvadori and Vignaud (2019), movements of this nature spread information without a scientific basis. On the other hand, health authorities are slow to get to the front of this battle because it is premised on the fact that the vaccine is essential to protect people (MOVIMENTO, 2021).

Disinformation has spread in this pandemic due to the lack of available knowledge, errors in official communication, such as those relating to masks, initially considered unnecessary – and the lack of scientific culture. The anti-vaccine movement has since spread, with the emergence of several Facebook accounts spreading false information about immunizations, according to a BBC study published in late March in seven countries – Brazil, Mexico, India, Ukraine, France, Tanzania, Kenya (MOVEMENT, 2021).

The phenomenon of disinformation on the internet takes on frightening proportions. This was exemplified by the documentary "Hold-up," in France, seen by thousands of people, which alleges a "global manipulation" around the pandemic, of which the vaccines themselves would be part. In addition, Agence France Press, one of the most prestigious news agencies globally, has published 700 articles on vaccine verifications, which have repeatedly been deemed ineffective or even fatal by anonymous "doctors."

Throughout 2020, major digital media platforms and corporations, such as *Facebook, Twitter,* and *YouTube*, excluded anti-vaccine content and false information, widely known as "*fake news*," supporting guidelines from health authorities. In September of the same year, the WHO and several agencies of the United Nations warned about the excessive proliferation of information, making it difficult for the population to do what was helping to protect against the new coronavirus. The effects of a kind of pandemic (ANDRADE, 2020; PAHO, 2020) can be fatal: several people died for following wrong advice to fight the coronavirus, being, for example, poisoned by the consumption of methanol or the incorrect use of cleaning products.

The right to health is provided for in art. 196 of the Federal Constitution (CF), presupposing two fundamental state measures for its implementation: the adoption of public policies that avoid the risk of harm to health and the guarantee of public care services of universal and equal access, under the responsibility of the integrated federative entities in an interfederative network within the SUS (BRASIL, 1988, 1990). The principle of sanitary security imposes on the State the duty to preserve the health of people, who must not become ill for avoidable

reasons, priority state action, according to constitutional determination (arts. 196; 198, II; art. 200 of the Federal Constitution) (BRASIL, 1988).

The jurisprudence established by the Federal Supreme Court (STF) regarding the right to health is that individual medical treatment is part of the State's duties, with public responsibility for its guarantee. The vaccine, which cannot be reduced to an individual right because its purpose is collective protection, is emphatically inserted in the list of state duties as a fundamental right of collective nature (INSTITUTO DE DIREITO SANITÁRIO APLICADO, 2021).

The vaccine is neither a medical act nor a disease treatment, but an act prior to the disease, to prevent it, a priority sanitary action in health care, as per item II of art. 198 of the FC establishes comprehensive care as a guideline for the health system, **with priority given to preventive activities** (BRASIL, 1988).

Vaccination is a fundamental social right that cannot be postponed, which requires consistent efforts by the government. In the Allegation of Non-compliance with Fundamental Precept 756, the Federal Supreme Court recognized that the vaccine is a fundamental right, which could not even be different, as the right to health to access medicines promptly is based on the fact that Court. Procedures, products, and inputs (BRASIL, 2020).

After this exposition, in the second part of the article, below, it is asked whether the Brazilian citizen, supported by the CF, can disobey the health authorities' recommendation and not get vaccinated. The history of civil disobedience and its perspective on constitutional Law will be examined.

3. CIVIL DISOBEDIENCE FROM THE ONSTITUTIONAL PERSPECTIVE

The question that we seek to answer in this second part of the article is whether there is a fundamental right for civil disobedience in light of the democratic Rule of Law paradigm. The discussion starts from a practical problem. In its preamble, the Constitution of the

Federative Republic of Brazil of 1988 establishes the Brazilian State as a democratic State of Law, from which a series of fundamental rights can be stated that are expressed throughout the constitutional text, not only in art. 5th, but mostly on him. Art. 5, § 2 says that: "**The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and principles adopted by it**" (BRASIL, 1988, emphasis added).

This is the starting point for the discussion undertaken here: can it be said that civil disobedience is a fundamental right arising from the Brazilian constitutional system? The answer to this question is yes, according to Repoles (2001). In other words, there is no such right expressed in the FC but rather an implicit one. Hence, it would have to be proven that this right stems from understanding a democratic state under the Rule of Law, a paradigm adopted by the Constitution in force. To do so, we will use Jürgen Habermas' theory of discourse (1997), as we understand that it allows us to go to the heart of the problem of thinking about civil disobedience as a fundamental right.

These questions can express such a concern: how is it possible to recognize a right to disobey the Law? Is there a tension between legitimacy and legality? How to legitimize such a right in a State that enshrines institutional mechanisms for reviewing and exercising citizenship?

The questions posed present a paradox. On the one hand, political rights find reflexive application in the interpretation of constitutional rights and the subsequent political configuration of fundamental rights. On the other hand, fundamental rights underlie the status of free and equal citizens, a self-referential status, as it allows citizens to change their material position relating to Law, to interpret and configure public and private autonomy, that is, your will (HABERMAS, 1997).

This is precisely the meaning of civil disobedience in the democratic rule of Law: enabling citizens to change how the law is interpreted. Civil disobedience is one of the rights that can be affirmed, in concrete legal communities in time and space, from political rights.

Civil disobedience is manifested as an illegal *prima facie* conduct aimed at defending fundamental values of the democratic constitutional

order, sustainers of the system's legitimacy, without which the rationality expected inherent to every right placed in the context of democratic constitutional states (RIBEIRO, 2019).

Habermas's (1997) model of democracy is that of deliberative politics, founded on the correlation, connection between human rights and popular sovereignty, and reinterpretation along the lines of the Discourse Theory. The axiological framework is justice, a procedural guarantee of participation on equal terms. Therefore, it is necessary to implement legitimate training and political will deliberations. Political power must interact with communicative power. The disobedient will draw attention to the legitimacy crisis generated by the periphery's lack of connection between the central official circle of power decisions and the communicative power.

Civil disobedience is a lawful public act because, although illegal, it is not anti-legal. Although it does not preserve the legality of the Law, it raises a claim to its legitimacy, which differentiates it from a crime (REPOLES, 2003). Under the republican paradigm, society presents itself as a political whole, constituted in forming democratic opinion and will. Society is politically self-organized to constitute a political totality that, in a certain way, is opposed to a bureaucratized State (ARENDT, 2010).

Society is *societas civilis* (REPOLES, 2003). Furthermore, to live in society, what is needed is the consent of all, including the right to disagree that elucidates and articulates a tacit consent given in exchange for the tacit welcome to new arrivals, to the internal immigration through which it is renewed. Arendt (2010) states that tacit consent is not fiction; it is inherent in the human condition. From Tocqueville onwards, the philosopher emphasizes that general tacit knowledge, tacit agreement, is a kind of *Consensus universalis.*

To obtain consent, it is necessary to submit to the dialectic of clarification, which shows that barbarism, with a scientific and rational guise, dominates the spheres of life and is not even perceived. It is even encouraged and supported by the masses, incapable of realizing that scientific advance has brought with it the permanent exploration of their bodies and souls (HORKHEIMER; ADORNO, 1985).

Horkheimer and Adorno (1985) refer to the need to free man from the superstitious belief in malevolent forces, in demons or fairies, in blind fate for Enlightenment and intellectual progress. Thus, man must free himself from fear, in which reason is the most outstanding service that can be rendered to humanity. The same thinkers remind us that the Enlightenment backfired, since, if we live in times of light, with more and more techniques and technologies, why, instead of heading towards the end of conflicts, towards the solution of the world's problems, such as hunger, wars, political and social inequalities of humanity, are we in even worse times, such as the one we are living in, the pandemic?

Man cannot renounce Enlightenment, as it is a sacred right of humanity, and even a ruler cannot decide on the Enlightenment of his people (Kant, 1985, p.110). So, the question is: why could human beings not leave the State of tutelage that was at their own risk? How was it possible, after World War II, the Enlightenment, and its attempt to universalize knowledge, which should take humanity to another level, its maturity, to emerge, in such an intense way, the Nazism? Why did the masses support Hitler, Mussolini, Salazar, and other authoritarians? At the same time, it is the State that will impose the limits on individual freedoms, to reconcile the maximum space for the private sphere with the restricted state discretion and with the freedom of other individuals, based on legal equality, through legal norms general and abstract, valid for everyone.

Civil disobedience endangers the security of social relationships based on equality. To situate it, it is necessary to bring to light the idea of Alexy (2002), who treats the Constitution as a process and fundamental rights as principles, which guides the interpretation of the constitutional text.

Haberle (1997) brings a lucky formula, that of the open society of constitutional interpreters - which would bring together actors beyond specialized jurists -, enabling the interpretation of the Constitution as a form of democratic participation, a task in which all bodies, citizens, and groups, must participate.

In this sense, civil disobedience would be a form of instrumentalization of defense of the Federal Constitution. Persuasive strategies, whether they feature disobedience based on justice or politics,

have a considerable advantage. Someone whose goal is to persuade the majority to change their minds, accepting arguments they believe to be sensible, clearly does not challenge the principle of majority rule in any fundamental way (DWORKIN, 2005, p. 163).

The *Stanford Encyclopedia of Philosophy* (2021) brings the following characteristics of civil disobedience: disobedience based on principles, has to be deliberate and conscious, with aspects of civility – civil (communication – communicative act, speeches); publicity (openness of the act, non-anonymity of the agent, prior notice of the planned action, taking responsibility for the action and/or an appeal based on publicly shared principles of justice); non-violence, essential for the communication of a disobedient civil act, part of its readability as a form of treatment); non-evasion (disobedient civil servants are expected to take responsibility and accept the legal consequences of their violation); decorum (dignified and respectful behavior, following conventional social scripts that explain demonstrations of dignity and ways to show respect to society); fidelity to the Law – to the legal system.

Civil disobedience can be identified among the connections necessary to implement the democratic principle enshrined in the Constitution, demonstrating, by definition, an active instrument of citizen participation in the exercise of power and, therefore, an instrument of democracy, as advocated by the Habermasian theory, interpreted by Garcia (2003).

In a pluralistic society, dissent is possible; moreover, not only possible but necessary. Obey or disobey the Law – the dilemma of civil disobedience is the citizen's dilemma. In short, civil disobedience seeks to replace protest speech with exemplary action. For this reason, it is crucial to highlight examples of acts of civil disobedience.

One of the most emblematic examples of civil disobedience in history was the trial of Socrates, a notable ancient Greek philosopher, accused of subverting the order by influencing the young and encouraging the belief in other deities. Socrates was tried and sentenced to death. He chose to disobey the established order rather than betray his thoughts. He could, during the trial, plead for clemency, yet he awaited

the death sentence rather than being ostracized and having to leave the city. On the other hand, he kept his ideas intact. This would have been the first case of civil disobedience, As Arendt (2010) mentioned.

Another relevant case was narrated by Henry Thoureau (2012) in "About the duty of civil disobedience," in which he tells about his position of not paying a specific tax destined to finance the Mexican War (1846-1848), promoted with the end to expand territories in the south of the United States, thus increasing the number of states in which slavery was legal, as a strategy to preserve the working conditions of the US economy.

Thoreau (2012) took a stand against the slavery regime and wars with immoral ends. He believed that the attitude of the US government was immoral and contrary to the principles of freedom of individuals who were subject to the laws and government policies adopted. As one way of bringing about a change in their logic, in such circumstances, individuals would have the right and the duty to disobey the law or government policy that contradicted these principles. That is what Thoreau (2012) did, who therefore spent a night in jail. He dreams of a free and cultured State, which does not interfere with the private sphere and in which the individual is recognized as the superior power.

For his part, Locke (1965) even defends resistance to the government that threatens the fundamental social pact. In turn, in the liberal political theory formulated by him, any individual citizen oppressed by the rulers of the State has the right to disobey their commands, violate their laws, and even rebel and seek to replace the rulers and change the laws (WALZER, 1997).

Among the renowned disobedient, the charismatic figure of the Indian leader Mohandas Gandhi (2005) stands out, who fought against racial segregation in South Africa and India's independence. Gandhi incorporated into the notion of civil disobedience the character of non-violence. Thus, civil disobedience is made up of peaceful acts, and its practitioners do not react to repression when they are subjected to it. His policy of civil disobedience and the use of fasting as a form of protest brought him international notoriety. For these reasons, his arrest was ordered several times by English authorities.

Another strategy of Gandhi for the independence of his country relating to England was the boycott of imported products. He encouraged Indians to wear homemade clothing rather than buying British textiles. The handloom, a symbol of affirmation, would later be incorporated into the flag of the National Congress of India and the country's flag. Its pro-independence stance hardened after the Amritsar Massacre in 1920 when British soldiers killed hundreds of peaceful protesting Indians (MOHANDAS, 2005).

On the American continent, another noteworthy historical example is the peaceful struggle waged by North American blacks, grouped around the protestant pastor Martin Luther King (2006), a function started in 1954 in Montgomery, capital of Alabama. King was involved in the incident where Rosa Parks refused to give up her seat to a white man on a bus, an act of civil disobedience and led a strong boycott against racial segregation. The move lasted for almost a year. King was arrested, but in the end, the Supreme Court decided to end racial segregation in public transport.

In one of his most famous speeches, Martin Luther King said: "I have a dream. The dream of seeing my children judged by character, not skin color." Due to the various manifestations, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were born. In 1964, King received the Nobel Peace Prize. In early 1967, he joined the movements against the Vietnam War. In April 1968, he was gunned down by an opponent at a hotel in Memphis, where he was supporting a garbage collectors' strike (MARTIN, 2006).

Characters in recent history have gained notoriety by disobeying the rules and revealing to the world what is going on in the virtual universe. This is the case of Julian Assange, from *Wikileaks* – an electronic site that released several diplomatic messages, some images, and videos that haunted humanity, such as the case of "*collateral damage*" in which an American helicopter attacks Iraqi civilians.

Another well-known character when it comes to civil disobedience today is Edward Snowden. He worked at an outsourced company of the US Intelligence Agency. He released information about the massive espionage on social networks, the internet, and phone calls,

exposing that many countries' human and fundamental right to privacy is not being guaranteed. The Arab Spring is also among recent social movements of civil disobedience, which emerged on social media and led to the downfall of numerous authoritarian governments in the Middle East.

In Brazil, various popular movements express civil disobedience, such as the 2013 demonstrations against the price of urban transport. Currently, with the pandemic, the anti-vaccine movement has intensified on social networks and among social movements, as highlighted in some media headlines:

> The anti-vaccination movement generates an outbreak of the disease in the USA (CORRÊA, 2014).
> Facing anti-vaccination resistance, the USA does not reach the target of 70% immunized" (ENFRENTANDO, 2021).
> France protests against the demand for vaccine or Covid-19 testing in recreational spaces (FRANCE, 2021).
> Some France prefers not to be vaccinated against Covid-19 and pay hundreds of euros to obtain false certificates, while others, more radical, attack health posts. Although almost 53% of the French population already has the complete immunization cycle, skeptics and anti-vaccines threaten the advance of the campaign in the country amid street protests that have been intensifying recently (FERNANDES, 2021).
> The anti-vaccination movement is a criminal and a serious and growing threat to global health. An anti-vaccination movement is growing in Brazil, so we cannot ignore it. An article published on 10/09/2020 in The Lancet magazine involving 284,381 people in 149 countries shows that the anti-vaccination movement, religious extremism, political instability, populism, fake news, and

issues such as security can harm campaigns of mass vaccination and confidence in vaccines in countries with these problems (DIAS, 2020).
However, can the anti-vaccine movement be considered an act of civil disobedience? This is the question that we intend to answer in the final considerations of this article.

4. FINAL CONSIDERATIONS

Individual freedom and freedom of belief, both constitutional rights, are at the heart of the argument of those who oppose mandatory vaccination. In the joint judgment of Direct Actions of Unconstitutionality 6,586 and 6,587 - related to vaccination against Covid-19 - and of the Extraordinary Appeal with Penalty 1,267,879 - on the right to refuse the vaccine based on arguments of a philosophical and/or religious nature -, the STF decided that the Brazilian State can determine that citizens are compulsorily submitted to vaccination against Covid-19, as provided for in Law 13.979/2020.

> [...]
> I) Compulsory vaccination does not mean forced vaccination, as it always requires the user's consent, but it can be implemented through indirect measures, which include, among others, the restriction to the exercise of certain activities or the frequency of particular places, since provided for by Law, or arising from that place, and (i) are based on scientific evidence, and relevant strategic analyses, (ii) are accompanied by extensive information on the efficacy, safety, and contraindications of immunizing agents, (iii) respect human dignity and fundamental rights of people, (iv) meet the criteria of reasonableness and proportionality and (v) are vaccines distributed universally and free of charge;

> [...]
> (SUPREMO TRIBUNAL FEDERAL, 2021).

The STF's decision is based on the supremacy of collective Law concerning individual rights, since when an individual is not vaccinated, he puts himself at risk and does so to others, exposing them to contamination. This decision does not allow the State to immunize citizens by force but imposes, for example, a fine, restriction of movement, and even school enrollment, which would be punitive measures for those who refuse the vaccine.

The application of restrictive measures, in Rosa Weber's analysis, must be compelling to protect health and life, as required by the constitutional complex of rights: "In the face of a serious and real threat to the lives of the people, there is no other way to go trodden, in the light of the Constitution, if not the one that ensures the use of necessary, adequate and proportional means for the preservation of human life" (BRASIL, 2021), argued the minister.

As highlighted by Minister Alexandre de Moraes when pronouncing his vote, the State has to provide the vaccine, as it is the duty of the individual to be vaccinated. The collective immunity, therefore, constitutes a double obligation, being, in the argument of minister Edson Fachin, "[...] a collective public good" (BRASIL, 2021). To guarantee it, minister Carmen Lúcia highlighted the prevalence of the constitutional principle of solidarity in her vote, arguing that "The Constitution does not guarantee freedoms to people so that they are sovereignty selfish" (BRASIL, 2021).

Thus, the anti-vaccine movement can be considered an act of civil disobedience, according to the concept of Cohen and Arato (1995, p. 587-588):

> Civil disobedience involves illegal (anti-legal) acts, usually by collective actors, which have a public, symbolic and principled character, primarily involving non-violent means of protest and appealing to reason and the population's

> sense of justice. Civil disobedience aims to persuade public opinion in civil society and politics (or economic society) that a specific law or policy is illegitimate and that a change is justified. Collective actors involved in acts of civil disobedience evoke the utopian principles of Democratic States of Law, drawing attention to the ideas of fundamental rights or democratic legitimacy. Civil disobedience, therefore, is a means of strengthening the link between civil society and political society (or civil society and economic society) when legal attempts by the former to exert influence over the latter have failed, or other means have been exhausted.

This disobedience is supported by the Constitution's dynamics and its unfinished project, a perspective by which, according to Luhmann (2009), the Democratic Rule of Law is not seen as something already fully outlined. Thus, it needs to be constantly revised, as it constitutes an undertaking with weaknesses and is susceptible to risks.

The anti-vaccine movement is agreeing with cases in which individuals disobey the Law because "[...] their integrity, their conscience, prohibits disobeying" (DWORKIN, 2005, p. 157), as in the case of being against the slavery regime, reported in Thoreau's (2012) and religious writings. Furthermore, it is based on justice, as civil rights support the movement. People disobey the Law, not because of the exercise of freedom of conscience, but rather "to oppose a policy they considered unjust and change it, a policy of oppression of a minority by the majority" (DWORKIN, 2005, p. 157).

In the end, an anti-vaccine movement is an act of civil disobedience to operational theory. In the view of Dworkin (2005, p. 158), "people sometimes violate the law, not because they believe that the policy, they oppose is immoral or unfair, [...] but because they think it is unwise, stupid, and dangerous for the majority, as well as for any minority". In these cases, civil disobedience based on politics takes place (ABREU; COURA, 2020).

The use of the Law as an instrument of State domination for controlling and regulating subjects in society continues to operate on vaccination. On the other hand, the words "freedom" and "right" mark the demands of the people and are forceful in both moments, working to stimulate the mobilization and resistance of the population against the government's authoritarianism and express the demand for human rights, a desire of the people for the autonomy to deliberate on matters of their own body.

Some information circulating on the internet, such as the interview with David Martins (2021), generate reflections on the coronavirus patents, the test to verify Covid-19 contamination, in addition to the fanfare about the pandemic's early announcement and the weather short of vaccine trials – usually 15 years. This causes many people to choose not to get vaccinated, at least for now. Perhaps in a few years, they will be able to convince themselves of the benefits of vaccination.

The anti-vaccine movement is global, not only present in Brazil, as shown in the article. It is quite present in the United States, England, France, among other countries. Not to vaccinate is a Brazilian citizen's right. However, this liberality must be supported by the assumption of the consequence of the exercise of not doing, such as travel restrictions, fines, contractual terminations, dismissals, among others.

In light of the discussion, we understand that an anti-vaccine movement is an act of civil disobedience constitutionally supported. It is an implicit right, provided for art. 5, § 2 of the Federal Constitution. It is necessary to differentiate the collective right to health, compulsory vaccination, already appreciated by the STF, from forced vaccination, contrary to Brazilian citizens' fundamental rights and guarantees. The subjective right of citizens to do or not do to disobey is an individual decision, supported by individual freedom and free will to do or not do something, in the autonomy of will, in a liberal society.

Effective vaccination by force is to institute a dictatorship incompatible with The Democratic Rule of Law and the fundamental rights enshrined in the Brazilian Federal Constitution. Therefore, the anti-vaccine movement should be seen as a possibility to review and improve the collective health right of public vaccination.

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ISBN: 978-65-00-40218-6

CHAPTER

12

INTERNATIONAL LAW AND COVID19: TAKING HUMAN RIGHTS INTO CONSIDERATION?

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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter12

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by
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Abstract: Human rights have been designed for defending human beings against illegal or arbitrary acts of States. However, what about legal acts that are against certain specific rights (life, free movement)? Is international law of human rights designed for the purpose of defending these rights considering a higher value like the life and health of human being as a group? This contribution will tackle this problem from two standpoints: doctrinal and normative.

Kewords: promotion of human rights, pandemic, prevention, emergency and policy powers, cooperation, coordination

1. INTRODUCTION

Various authors and international bodies have tackled the problem of human rights of human beings diminished or suppress during the virus or in danger due to the measures of many States and national bodies related to the administrative bodies of these States (Global Alliance on Human Rights Institutions, Covid an National Human Rights Institutions, 2021. Organization of American States, 2020, European Disability Forum, Impact of Covid 19 on persons with disabilities, 2020, Chetail, V., 2020, World Health Organization, 2020). however, approaches work more on doing than on preparing a clear viewpoint considering the changes to "human Rights" today and the possibility to propose theoretical responses to human rights. Unfortunately, such lack has not been developed due to another lack in international law and international human rights law, what about the problem of crisis derived from natural hazards or natural disasters. This article shows an approach to such difficulty aiming to

clarify the problem than to give an answer to Covid 19 and Human Rights (waiting for a next article on the other subject).

From a pure doctrinal viewpoint it is possible to mention the contribution of Joseph Raz or Armin von Bogdandy with Pedro Villarreal. International bodies like the Human Rights Commission of the Inter-American Convention of Human Rights have addressed these difficult measures as well as the Institute of International Law.

These international administrative bodies have established minimum standards for action of States in order to combat adverse effects of the virus while rejecting violations of human rights and fundamental freedoms. On the other hand, they have been clear that a large amount of measures have not been considered the "human factor" in which people consider their rights previous or in a higher stage than rules on the measures related to prevention of the adverse effects of virus.

Therefore, a contradiction is possible to find, rights of individuals versus legal measures in favour of the community. Such contradiction is not new but now is extremely important.

Others have pointed out the problem of rule of law and its violations and later the human right to health (Valerio, 2020: 379–381). Such approach bring us to the international law and legal rules. The nature of international human rights legal rule are not able to be discharged or even violated without preventing such violation or sanction it. One main point is that any of the of the exceptions established for the application of these international legal rule do not accept the violation of them. Such a contradiction derived from the main point that certain specific restrictions may be established in order to confront the consequences of the pandemic. However, these international legal rules on Human Rights do not reject basic human rights to be protected, for example the right to life and even at the national level protection to other human rights by the public administration as well as tribunals is not contradictory from diminishing or restricting certain human rights. Therefore, it is possible to argue that rules on human rights are not possible to be violated while facing an crisis like a pandemic (Lebret, 2021:5-6). Certain international human rights rules are mandatory not only as part of international obligations

but precisely in time of pandemics. Such international legal rules do have a high aim protecting basic rights of anyone that is a human being.

Community would act as a whole in certain way and in achieving this objective (without knowing the objective, sometimes) the cost is right (s) of members of the society being neglected or violated. For example, the right of community to walk freely on the street might neglect or violate the right to life or health to one person being contagious by the group. It is possible to consider the main problem in the total opposite way. A person with or without contagion walks on the street exercising the rights of freedom of movement, however, he is ordered to return to his home because the possibility of contagion. The problem is not easy to solve. Even, it is interesting to consider that unfortunately authors have focused on groups that are not the most affected (Lebret, Audrey, 5-11). First, those affected by these measures are old people due to the idea that they will not need hospitalization. All lives matter. Certainly other groups matter but first we have to deal with large groups of our society and so far elders are becoming a big group in many societies. The same it is possible to say in relation to disable people. Another problem are the reason for protection by human rights. Without doubt the problem of persons with psychological problems due to confinement is real (Lebret, Audrey, 2021:12). However, a large group of people have problems related to keeping their capacity to survive because they lost their means of income, their jobs and even the possibility to have enough food for survival.

This contribution will focus on international human rights analyzing views on the problem and later on the legal rules involved. The discussion is related to other important problems, among them, adverse effects of climate change and rights for water with the community saving water from individual use but use in agro food in agriculture for everyone.

2. DOCTRINAL VIEW

Some authors have expressed the idea of a turning point in globalization as a consequence of Covid19 pandemic, Covid 19 as a

consequence of globalization and a change in globalization, even in the "short term" and in the "long term". In social terms, short term, nationalism and populism and, in the long term, lack of foreseen upcoming disaster and being prepare to them. In political and legal terms, short term effects are the decrease and even close of courts at the international and national level protecting human rights, international treaties have been violated or established in a "stand by" (for example, foreign direct investment diminished due to protective measures of countries). In long term consequences a rise of cosmopolitanism and globalization is expected. On the economic side, short term consequences were the effects (disastrous) on economies (stock markets fall 21%, oil prices fall, borders were closed) and lack of global response. In the long term, the fragility of the "global supply chain" has to be repaired.International institutions like World Trade Organization, have to be reconsider. Trade war between United States of America and China has been another economic problem during this pandemic (Yacoub, Amin and El-Zomor, 2020). Even, it is possible to consider a new view of "force majeure" (Berger and Behn, 2020). Authors have focused on contracts but it is possible to consider not only obligations related to them but derived from other sources, national laws and in international law, treaties. As well a problem with intelectual property has pointed out. Main issue are rights from intellectual property opposing a free access to elements to protect against contagion and free use of vaccines formulas or vaccines themselves (Thambisetty, 2021). Even cyber attacks and misinformation have been accounted in this crisis, some of them against testing facilities of Covid19 (Groups attacking or the reality of the pandemic, contagion even vaccination with enough power to develop such attacks), Further, sovereign rights and sovereignty have been violated by these kind of attacks, even a violation of the use of force can be considered (Milanovic and Schmitt, 2020). However, the question on attacks by criminals remains. How to find them. When the attack is from a state it creates international responsibility and it is possible to check the aggressor (with limitations). However, this is not easy. In the case of groups, they like to argue reasons related to conspiracies without facts to be included, the pandemic is still a threat to our lives.

As pointed out by von Bogdandy and Villarreal (von Bogdandy and Villarreal, 2020: 1), it is possible to find various areas of international law dealing with virus as well with human rights. A first area is the international rules of the World Health Organization and a second area is human rights (von Bogdandy and Villarreal, 2020: 2-21), a third one is securitization (von Bogdandy and Villarreal, 2020: 2-21). Clearly they have stated the current existence of international legal rules based on expertise. WHO rules are an important element for diminishing uncertainty although large differences in the application of these international rules (Armin von Bogdandy and Pedro A. Villarreal, 2020: 25). On the other hand, Alemanno, Paces and Weimer argue in favour of a regulatory coordination in the European Union in the field of risk management helping less developed countries in the EU in matters of regulation and public policy measures (Alemanno, 2020, Pacces, Weimer, 2020). This line of argument is related to a more economic one established by the idea of information in "real time" to take measures based on a public policy orientation in which law as a tool of public policy is not absent (Luchini et al, 2020). Bronin makes a comparison with the problems derived from adverse effects of climate change and the low response to these effects vis a vis Covid19. She argues that climate attorneys should learn how to deal with climate change from the experience derived from Covid19 in courts (Bronin, 2020). She refers to various law suits to be taken into account, the types are "failure to protect suits, misinformation suits, and takings suits" (Bronin, 2020: 159).

As well, others focus on national measures to create public trust on certain technological devices without considering human rights and most probably violating them (Greenleaf and Kemp, 2020). Cechi Demegio and a group of researchers propose changes in the behaviour of people by using a model in which legal measures based on scientific knowledge on the spread of the virus gives certainty to diminish the spread of the virus (Cecchi-Dimeglio et al.,2020). A key point is the problem of the rule of law, democracy and human rights derived from measures being taken by governments in containing the adverse effects of the pandemic (Ayala Corao, 2020). On the other hand, Chaisse

has argued in favour of a possible source of dispute in investment (Chaisse, 2020).

Certainly, it is possible to focus on crisis, disasters, and this view has been put forth two views, state responsibility and resistance by international law (Quintana and Uriburu, 2019:1) addressing the responsibility of China on the Covid19 pandemic in various areas, measures, liability and others. As pointed out, this contribution is based on preventive measures to protect or safeguard human rights of individuals and communities. Considering Covid19 as a natural disaster the first task of any State are legal measures on international human rights.

As well, how to repair the injuries and deaths caused by the mismanagement of the pandemic in international law? Foundations for this question is lack of harm to others in international law. To achieve such goal, reparations, one viewpoint is the "lawsuit" approach based on "violation of the international health regulations", "(...) the general duty to prevent transboundary harm" and ""(...)licit activitis" but "hazardous"(Guidi and Maisley, 2021: 4000-4008).

3. CRITICISM HAS BEEN VOICED BY JOSEPH RAZ.

Joseph Raz has written about the topic of how Covid 19 will change our life. The nature of the change and the responses from governments have already change many of the features of the world we live in. Raz has pointed out the good outcomes of the pandemic, positive effects. He explains about the relationship with our physicians and labour relationships. However, he puts the accent in three elements that are important for international scholars. On one hand globalization, on the other hand personal liberties and fights against discrimination and, last but not least, the conflict between democratic and scientific decisions.

On the first one, globalization, the isolation of responses to adverse effects of measures against Covid 19, something already express by international law scholars might being change in the long run. He

expresses the idea of respect to diversity based on differences between human beings. Raz presents the argument of being the USA a country that should exercise leadership, it might be helpful for the world the absence of the USA from the international scene. Such absence may provoke the possibility for developing new form of cooperation. A second topic face by Raz is the problem of personal liberties today diminished by measures from governments to diminish people in public areas. However, he puts forth not only current problems for certain liberties or freedoms but the accent is on the trends related to liberties like "privacy, freedom of expression and related liberties" in which these liberties have been diminished. This trend continues by the possible erosion of them by measures being taken to confront the adverse effects of the pandemic. He present the idea of finding ourselves in the need to fight, again, for these liberties, without considering the threat from various external problems like money laundering, cybercrime, terrorism. Even the "test and track for limiting infections" implies the possibility of limiting or eroding liberties recognized already by law and they imply a cost for everyone. Another problem, highlighted by Raz and already mentioned is the type and source for decisions on public policies. A large amount of persons reject the idea of a pure scientific decision and ask for political decision. The reason is based on the argument that science is extremely related with politics, it is not objective and in science is possible to find politics among scientists (Raz, 2020).

4. NORMATIVE STANDPOINT

Legal standards

International legal standards, in the sense of international rules that are basic and applicable to this issue are important to be considered. The Inter American Commission on Human Rights had published a document on the topic (Comisión Interamericana de Derechos humanos, 2020). It had pointed out the consideration for the disadvantageous persons in our society. The thesis of the Commission

is based on the Inter American Treaty on Human Rights. Prevention on the negative of measures vis á vis rights of the persons at the national and local level is presented in the document. The Inter American Treaty on Human Rights provides protection to all people during the pandemic without exception. This international treaty has been the cornerstone in the defense of rights of people, particularly their right to life.

Today, the International Institute of Law has addressed the issue (Murase, 2021). The document focus on the same topics already mention, protection of all human beings, without exemption, as pointed out by other international documents. This rejects ideas like "compassion treatments" to old persons (CNN Chile, 2020). Such treatment to old population seems more like genocide or other international crimes.

5. COOPERATION AND COORDINATION?

It is possible to contribute with three ideas, one is the human rights factor. The second idea is cooperation in the sense already mentioned but with a third idea, necessary on this subject, coordination. International Law on Human Rights have developed a large set of legal rules all applicable in cases like the pandemic. Although there is a need of emergency measures, law is still in place and measures shall respect and limit their effects vis a vis international (and national) legal rules derived from international treaties and constitution.

On the other hand, it is necessary to consider cooperation in matters of knowledge on the virus, characteristics, interaction with human beings and adverse effects. What is more important is that coordination should be established in any international and national response. The last seven months, in matter of prevention, all kind of contradictions have been seen.

First, the type of effects (if this will affect or not national and international economies, second the possibility of deaths (the rate of people death by the disease, the relationship between Covid19 and

other illnesses), third, preventive measures (types of policy to be taken by governments, type of preparations for individuals or groups of individuals, older people or those with immune deficiency, economic measures to confront economic and business adverse effects, clear knowledge on immunity derived from being patient of Covid19), to give few examples.

6. APPROACHES TO PANDEMICS WITHOUT DIMINISHING HUMAN RIGHTS

Response to the Pandemic should address human rights. If the response is related to current legal rules they should follow an interpretation of these rules in accordance to the need for prompt action against adverse effects of the pandemic vis á vis the respect of human rights of those most fragile in our societies. Such an approach might be the most suitable in accordance to current circumstances.

We should not forget the difficulties in cooperation and coordination relate to an international common problem like climate change. It is necessary to consider more coordination between and inside authorities of countries to diminish the uncertainty related to the pandemic and the disease on order to know the features of the ill to take proper measures by authorities in the matter. If afterwards it is necessary to draft a treaty various possibilities might be possible to search, for example the Inter-American Convention to Facilitate Disaster Assistance (Inter-American Convention to Facilitate Disaster Assistance, 1991, GA, Draft articles on the protection of persons in the event of disasters, 2016, Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998).

7. CONCLUSIONS

View points on measures and responses to adverse effects of pandemic brings new problems for international law. The idea of

cooperation is still needed in order to confront pandemics, the one today and other in the futures.

As well it is needs more cooperation on common threats like the posed by climate change. On the other hand, liberties and rights are under threats of illegal violation by measures like those being taking by Sates to prevent the spread of COVID19. Important feature is the current tendency for limitations of these rights and liberties. Law has not been prepared for this colossal challenge derived from the need to confront adverse effects to human population derived from measures to combat the virus.

Merely more important is the lack of response of international law by the international rule of law in finding sources to achieve not only cooperation but coordination of international as well as national responses. As pointed out by learned scholars, the variety of responses express the disparities of viewpoint on the sources and consequences of the pandemic making political authorities all kind of assumptions, most of them wrong. It unveils the need for an international treaty coordinating efforts to fight natural disasters as well as giving a chance to good science, in other words, science through facts. Threats to international human rights are clear. If administrative measures based on emergency powers will be in place longer the damage to the liberties of people will be immense.

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ISBN: 978-65-00-40218-6

CHAPTER

13

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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter13

CONTENTS

LANGUAGE AND INTERSUBJECTIVITY IN TIMES OF COVID-19

by
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Abstract: This paper intends to demonstrate that Robert Alexy's Theory of Fundamental Rights was adopted in the legal argument of ADPF 881 – STF, which dismissed the fundamental precept of the rule provided for in art. 2nd, II, letter A, of Decree No. 65.563/2021-SP, which determined restriction of religious activity at COVID-19, did not present itself as an adequate alternative to replacing the rules model in the tension that appeared in the conflict of fundamental rights between protection of health and the holding of religious services. At the other end, it was demonstrated that the performance of the Public Prosecutor of the State of Espírito Santo, based on the elements of Jürgen Habermas's Theory of Discourse, promoted the effectiveness of the fundamental rights in conflict, through a consensual and intersubjective solution, in the light of paradigm of the Democratic Rule of Law.

Keywords: Pandemic. Theory of Fundamental Rights. Weight. Language. Intersubjectivity.

1. INTRODUCTION

Recently, the Brazilian Supreme Court harbors Robert Alexy's Fundamental Rights Theory, which considers the principles as optimization warrants. The practice seeks to apply a late jurisprudence of values to overcome a model of rules inserted in the legal tradition, which did not recognize the Theory of principles in Brazil.

The model of rules presupposes the legal paradigm of the old exegetical, liberal-conservative school, founded on a personal conception of Law, which understands social conflicts only as inter-

individual ones and to this adds an authoritarian concept of the State, for which, even acting in favor of social issues, it assumes a police character, paternalistically appropriating social-political demands.

In the rules model, collective conflicts are resolved in a populist and guerrilla way, without autonomous social mobilization, without political participation. The Judiciary Branch moves away from the center of decisions considered political issues, assuming a secondary role of seeking to guarantee the minimum, as if it were possible to ensure the principles of the Rule of Law without Democracy.

Part of the doctrine points out that the reception of the Alexian Theory by the Federal Supreme Court is not an adequate alternative to overcome the old model of rules and its conventionalist jurisprudence, to guarantee the effectiveness of fundamental rights consistently and constitutionally in the Democratic State of Right.

Jürgen Habermas, a critic of Robert Alexy's thesis based on Discourse Theory and from the principle of separation of powers, indicates that by adopting the Alexyan idea that the Judiciary Power ends up judicializing politics, judging it in the light of the supposed supreme values of the community, an invasion of the justification discourse, proper to the Legislative Power.

The Judiciary, in this perspective, imposes itself as the tutor of politics, an almost constitutive and permanent super-power as an alleged and only way of guaranteeing a materialized and mass democracy, without, however, considering the risks to which cultural pluralism exposes, social and political, proper to the Democratic State of Law.

The criticism and caution of the normative discourse of the decisions of the Brazilian courts with assumptions in the Alexian thesis can be taken to the scope of action of the Public Ministry, from the third wave of access to justice, which reveals the active duty of its members in the search unavailable of the self-compositional solution of conflicts, to promote the effective implementation of fundamental rights, considered basic principles of the Federal Constitution of 1988.

The investigation is justified by the increase in new methods of self-composition in the construction of multi-door justice, through the

recent national legislative innovation, when the Institution has expanded the possibilities of an almost provision of constitutional jurisdiction in the construction of normative discourse in extrajudicial procedures with stabilization consensual, within its walls, of the conflicts between fundamental rights without the eventual and imperative review by the Judiciary Power.

As a general objective, this essay intends to demonstrate, in light of Junger Habermas' critique, that Robert Alexy's Theory of Fundamental Rights adopted in the legal argument of ADPF 881 – STF, which he deemed an unfounded breach of a fundamental precept of the rule provided for in art. 2, II, letter A, of Decree No. 65.563/2021-SP which determined restriction of religious activity at COVID-19, there is no adequate alternative to replace the rules model in the tension of the conflict of fundamental rights in the protection of health and fulfillment of religious cults.

Therefore, the research intends to analyze the foundations that support Robert Alexy's Theory of Fundamental Rights in the sense that this was not an adequate alternative to replace the rule model in the solution of the hard case in concrete, as it removes the participation of those affected by the procedure for constructing the normative discourse and decision-making, not being appropriate to the paradigm of the Democratic Rule of Law.

From this perspective, it is intended to answer the following problem: in the face of severe criticisms pointed out by the doctrine, in particular, by Jürgen Habermas that the Alexian Theory is not adequate to replace the model of rules in the solution of conflicts between fundamental rights, as it removes the participation of those affected in the procedure and construction of the normative discourse, could the Public Ministry, regarding its constitutional attribution in defense of the democratic regime, have adopted Robert Alexy's Theory in the present case?

As specific objectives, based on the best doctrine and criticism of Jürgen Habermas, we seek to point out: i) that Robert Alexy's Theory of Fundamental Rights, adopted in the legal argumentation of ADPF Decision 881-STF, was not an adequate alternative for a solution

the tension between health protection and the holding of religious services; ii) that in the face of the same controversy, the MPES, using self-composition and elements of Jürgen Habermas's Discourse Theory, presented adequate normative argumentation, observing the pillars of the Democratic State of Law, with the promotion of the participation of those affected in the construction of normativity a posteriori.

The theoretical framework adopted consists of the philosophical hermeneutics proposed by Hans-Georg Gadamer and the discourse theory of Jürgen Habermas, which designates the mobility of being in the world, encompassing all its experience with the historicity that surrounds it, making something conscious. That precedes the actual application of the methods. In short, it is about how the being experiences historical traditions and not about a general methodological theory of interpretation.

Phenomenology is used as a methodology, consisting of the comprehensive Theory from the perspective of experiencing the phenomenon from its standpoint, returning to things in themselves, searching for its unveiling from within itself, without an a priori referential.

The theoretical content of the research was developed from the reading of the legislation, jurisprudence, doctrinal works, scientific articles, monographs, and theses presented in Universities, and based on information from the Administrative Procedure (PA) GAMPES/MPES No. 2020,0007.9173-70, of 03.28.2020, with confidentiality being preserved, as authorized by the Attorney General's Office of the Public Ministry of the State of Espírito Santo.

It is noteworthy that the philosophical foundations presented in the article are restricted to the understanding of the authors, not being extended to the other participants of the administrative procedure mentioned above. They may have used a different strategy, obtaining, in the end, the desired fruitful result, the consensual solution of the conflict.

2. CRITICAL ANALYSIS OF ROBERT ALEXY'S FUNDAMENTAL RIGHTS THEORY: the inadequacy of his assumptions in the self-compositional solution of collective complex cases

2.1. Brief Considerations of Robert Alexy's Theory of Fundamental Rights

The essay does not intend to exhaust the analysis of theoretical and pragmatic assumptions of the Alexian Theory, only offering elements for a better understanding of the criticism invested by the doctrine and by Junger Habermas in the face of Robert Alexy's Theory of Fundamental Rights, pointing out that it is not an adequate alternative to overcome the model of legal positivism rules for solving complex cases.

Alexy's Theory has the balance of goods and interests and the application of the principle of proportionality as its main theoretical perspectives. Consolidated by the German Federal Constitutional Court, it has also had repercussions on the decision-making practice of Brazilian judges and courts.

Alexy (2001, p. 81-82) adopts as a fundamental point of his Theory the difference between norms (rules and principles):

> Therefore, the distinction between rules and principles constitutes the mark of a normative-material theory of fundamental rights and a starting point to answer the possibility and limits of rationality in the scope of fundamental rights. For all these reasons, the distinction between rules and principles is one of the basic pillars of constructing the Theory of fundamental rights.

It states that in the Theory of rulemaking, there is no fundamental structural differentiation of fundamental rights, and these only differ from other forms of the legal system because they occupy the top of the legal system and indicate more abstract and more relevant rights (COURA, 2009, p. 114).

Without neglecting the preservation of the validity of fundamental rights and the normative force of the Constitution, including in cases of conflicting situations between fundamental rights, Alexy proposes an intermediary path between binding and flexibility with the construction of principles, considering them as commands or warrants. Of optimization. A broader construction than the construction of rules seeks to resolve normative conflicts outside the scope of the validity of norms.

In the construction of principles, these can be carried out in different degrees or intensities, subjecting their application to the limit of what is possible since, being optimization warrants, their measure of realization will depend on the factual and legal situations found at the time of judging. The weighing of goods and values as a solution to the collision between fundamental rights replaces the existing subsumption of the rules model (COURA, 2009, p. 114).

According to Alexy (1998, p. 11):

> (...) whoever undertakes consideration in the legal sphere assumes that the norms between which the weighing is carried out are endowed with a structure of principles. Whoever classifies the norms as principles ends up arriving at the weighing process.

An important point for this essay is the question of the study of constitutional jurisdiction pointed out by Alexy (1998, p.1-2), "how intense should be the control exercised by the Constitutional Court relating to the legislator, without harming the principle of democracy and the division of powers?".

Criticizing legal positivism, Alexy responds with the correlation between the dogmatic of fundamental rights to constitutionalism and legal hermeneutics, indicating that the traditional rules of interpretation, linked to the model of rules, are incompatible with the complexity of contemporary constitutional jurisdiction, offering no answers appropriate to current claims.

Robert Alexy (2001, p.89) believes that:

> There is no "collision-free catalog of fundamental rights," in this perspective, the collision phenomenon is the starting point for the development of its Theory, in that fundamental rights correspond to "optimization warrants," the realization of which is subject to factual and legal limits related to the normative conflicts themselves, considered inherent to the structure of constitutional rights.

According to Coura (2009, p.121), in Alexy's Theory:

> The conflicts between the principles will be resolved according to the dimension of the weight attributed to the fundamental rights in the specific case, which will not affect the validity of the rules involved, with the establishment of the relationship of prevalence between the competing principles, in light of the weighting of goods and interests developed by judges and courts that will establish the measure or intensity of realization of fundamental rights, in a gradual and, if applicable, limited manner.

Then, they will be demonstrated considering the lessons of Jürgen Habermas and other authors, methodological mistakes of Alexy's Theory, which indicate that the Alexian Theory is not an alternative in the replacement of the rules model in the solution of complex cases of conflicts between fundamental rights, due to of the subjectivism present in the construction of the normative argumentation that presents itself a priori, removing the participation of those affected from decision-making.

1.2. Theoretical critique of "values jurisprudence" in the light of Jürgen Habermas's Discursive Theory

Habermas develops the foundations for a critical analysis of the Alexandrian jurisprudence of values, starting from the classic separation of powers arising from the liberal legal paradigm. His arguments gain more unique contours when the existing tension between the liberal and republican models is revealed.

Warning about the existence of a deficit of legitimacy of the Welfare State values jurisprudence and the self-restrictive interpretation practiced during the Liberal State paradigm, it proposes the search for (self) understanding of the role of judges and courts adequate to the complexity of current issues, without neglecting the methodological assumptions and legitimacy of jurisdictional activity in the Democratic State of Law.

Regarding the principle of separation of powers as the foundation of Habermas' critique of Alexy's Theory, he teaches Coura (2009, p.155):

In this sense, certain assumptions are highlighted that, in the light of discursive Theory, can reduce politics to a process of ethical self-realization and strengthen the dangerous conception that equates the Constitution with a concrete order of values. Thereby, Habermas intends to prevent the Judiciary from assuming a culturalist-based concept that is not very open to social pluralism and inadequate to the Democratic Rule of Law paradigm. (Emphasis added)

It further clarifies (COURA, 2009, p.155):

> [...], considering that the legitimacy of current Law (on which any claim to rationality concerning jurisdictional activity depends) has as its axis the preservation of the rationality of a legislative process that is not available to the bodies responsible for the application of the Law, Habermas demonstrates in what sense the question of the limits and possibilities of constitutional jurisdiction in the Democratic State of Law

> involves an adequate distribution of functions between the Legislative and the Judiciary, that is, a discussion about the principle of separation of powers. (Emphasis added)

From the social, legal paradigm with the inappropriate expansion of the Judiciary's performance on German soil based on Alexy's Theory, in the conception that fundamental rights correspond to an objective order of values, Habermas indicates methodological correspondents in the so-called constitutional "key concepts," being the principle of proportionality and the clause or reservation of the possible (COURA, 2009, p.159).

After the jurisprudence that developed the key concepts, Habermas reveals the intention to reconcile the negative rights in the face of the State (liberal paradigm) and the guidelines for the provision of services (paradigm of Social Welfare), analyzing the radical second perspective which would be inevitable in the transition from a Parliamentary Legislative State to a Jurisdictional-Constitutional State, in which the distinction between the elaboration and application of the Law and the functional separation between the legislature and the Judiciary would necessarily be reduced (HABERMAS, 1996, p. 247-248). Otherwise, let's see:

> This conception is linked to the idea that reserving the function of developing the Law to parliament is to make the increased understanding of the existing fundamental rights in the Welfare State unfeasible, reducing them to the personal rights of individual freedom in the face of state power, which has arisen in the liberal paradigm. According to this perspective, in addition to the parliament, the Constitutional Court should also develop the Law, in a competitive relationship in which the legislator has the leadership, but the Constitutional Court, the primacy.

Considering the complex rationality of the processes of creation and application of Law in contemporary societies and the questionable role played by the Judiciary in the social, legal paradigm, Habermas proposes the methodological assumptions capable of ensuring the legitimacy and functionality of judicial decisions in the current constitutional paradigm, they are the paradigmatic resizing (realignment) of the principle of separation of powers and the reinterpretation of the principles of the Rule of Law (Liberal), in the light of a new historical context (COURA, 2009, p. 155-160).

The proposal of new methodological assumptions involves questioning the legitimacy of the Decisions of the German Constitutional Court (CCA) and the Brazilian Courts, especially the STF, based on the jurisprudence of values. Habermas emphasizes that the principles of the Rule of Law should not be confused with one of its historically contextualized modes of interpretation, reaffirming the importance of the separation of powers in the Democratic Rule of Law paradigm, to understand the logic of the discourses of creation and normative application (COURA, 2009, p.160).

Habermas opposes Alexy, disagreeing that fundamental rights are optimizable legal goods, agreeing with Ronald Dworkin that fundamental rights are ethical principles. In the Democratic Rule of Law, fundamental rights must be taken deontologically, different from Robert Alexy's theoretical proposal, based on values. Habermas (1996, p.254) states that in Alexyana theory, the application of fundamental rights is reduced to the limit of what is possible and conditioned to a weighing oriented by objectives, bearing in mind the idea that a (relative) value cannot claim to have, by itself, an absolute priority over other matters, values having a teleological meaning, corresponding to an objective order of values.

To better clarify the defense that fundamental rights have a deontological nature in the discourse on the application of Law, Habermas reveals the difference between distinct norms and distinct values.

He indicates that different norms must fit into a coherent system, with deontological validity having an absolute sense of an

unconditional and universal obligation. Something "equally good for all" is intended. On the other hand, the distinct values are related to what "is good for us," competing for priority. In such competition, preference relations are established to affirm that certain goods are more attractive than others, which operates in a gradual code that allows an agreement in different degrees with the respective evaluative sentence. Even finding intersubjective recognition in a particular culture or way of life, values constitute essentially flexible configurations full of contradiction (HABERMAS, 1996, p.247-248).

Seeking to equate the Constitution as a concrete order of values ignores that fundamental rights are constituted according to a model of binding norms of action and not according to the model of attractive goods. Value-oriented jurisdictional activity disregards the distinction between the application and creation of Law, contemplating the status of concurrent legislation and disregarding that the normative perspective must prevail over any other purpose or objective envisioned in the jurisdictional activity, which should not be meant for the teleological content to enter the Law.

In this sense, Habermas (1996, p.247-248) demonstrates the correlation between the misunderstanding of "norm and value" and the undemocratic assumption underlying the decision-making practice of the CCA that it must fight for the updating of pre-established material values, which turns into an authoritative instance of review. It is verified, then, the possibility of any reason taking the character of political argumentation, of legal relevance, in case of conflict in the application of the Law.

Habermas states that this compromises the protective shield established by the deontological understanding of legal norms and principles. As rights are equated with goods and values, they begin to compete at the same level for priority in the jurisdictional activity (COURA, 2009, p. 166). The critique of the jurisprudence of values that Habermas performs in the face of Alexian Theory has as its synthesis the absence of consistency and rational acceptability. He claims a compromise of the normative force and the very possibility of a constitutionally adequate justification of judicial decisions, with

the loss of the correction category being the price to be paid for balancing, weighing, or weighing. Thus, balancing can take the form of a negotiation aimed at achieving other purposes, which do not correspond to current Law. The balancing approach would remove constitutional rights from their normative power: the rights are degraded in terms of ends, policy objectives, and values, resulting in dilution and irrationality.

1.3. Critique of Robert Alex's Fundamental Rights theory in legal arguments in ADPF 881 – STF

For a better understanding of the plexuses in the critical analysis of the use of Alexy's method in the context of ADPF 811, the object of the essay, it is worth emphasizing other criticisms of its use in the protection of fundamental rights by the German Constitutional Court (CCA) and the Federal Supreme Court.

Within the Brazilian constitutional jurisdiction scope, it is possible to identify judgments carried out by the Federal Supreme Court, which evidence the materialization of the concepts defended in the Alexian thesis of balancing goods and interests as a legally consistent alternative to the subsumption of legal positivism[1].

The adherence of the methodological assumptions of Alexy's thesis by the Federal Supreme Court in the protection of fundamental rights has been criticized by the doctrine; Marcelo Cattoni (COURA, 2009, preface) states that:

> The STF explicitly assumes the task of reflecting on what would be an adequate constitutional method for protecting fundamental rights. However, the alternative that is outlined, strongly influenced by Alexy's theses and by a late jurisprudence of values, does not correspond to a consistent guarantee of rights, since, on the one hand, it submits the exercise

[1] Case of the judgment of ADI nº 319/DF, in which the constitutionality of Law n. 8.039/90 (RTJ 149:666/692). In the same sense, the arguments presented in the judgment of Habeas Corpus 82.424-2 and in the grounds for the injunction issued in the judgment of ADI 855-2.

> of these rights to a cost/benefit calculation, and, on the other hand, makes the Court a second-degree legislative power, controlling, from a legislative and non-jurisdictional perspective, the legislative, and executive policy choices, as well as the citizens' conceptions of a dignified life, in light of its eleven ministers, consider it to be the best – and not the constitutionally adequate – for Brazilian society. And all of this, due to the realization of material premises, themselves, NOT DISCUSSED, throughout the votes.

Daniel Sarmento (2003, p.171) criticizes explicitly the principle of proportionality in the strict sense (subprinciple), a methodological assumption of Alexy's thesis:

> […] This task will necessarily involve a certain amount of SUBJECTIVISM, which is why the judge is recommended to exercise special prudence in the exercise of constitutional review based on this subprinciple, avoiding the substitution of the weighting done by the legislator for that of the judicial body. (Emphasis added)

Ingeborg Maus (2000, p.186) harshly criticizes the German Constitutional Court, stressing that the overcoming of liberal interpretation by judges and courts occurred disastrously due to the emergence of the concept that the Judiciary should exercise the role of guardian of values of society, affirms that […] "will not justice in its current configuration be, in addition to being a substitute for the emperor, the monarch himself replaced?

In times of pandemic (COVID-19), the fundamental duty of religious temples in the observance of sanitary rules in the COVID-19 pandemic and the apparent antinomy between the fundamental rights in the protection of health and the performance of liturgies was discussed, generating many debates, judicial decisions, and legislative production on the subject.

Triggered to provide constitutional jurisdiction, the Judiciary decided on several occasions for the constitutionality of legal provisions, including religious temples among essential activities or essential public services, with the proviso that the activities should comply with the sanitary rules issued by the government.

ADPF 881-MC/DF's arguments remained in line with the legal discourse of the Federal Supreme Court, evidencing the methodology of Alexy's thesis, unveiling the subjectivism pointed out by Sarmento and the superego indicated by Maus.

The Habermasian critique of the need for a paradigmatic resizing of the principle of separation of powers and the reinterpretation of the principles of the Rule of Law (Liberal), considering a new historical context, reveals itself in the merely political justification of part of the legal argumentation of ADPF 881, an assumption based on axiology and not on a deontological rule, let's see:

> The present judgment coincides with the historic milestone of 337,364 deaths caused by the global pandemic of the new Coronavirus. Yesterday's date marked the record 4,211 per day. Brazil – which has already been an example in significant public health activities, such as, look at this, vaccination policy – is currently the world leader in daily deaths caused by Covid-19. In approximate numbers (and I use the most conservative ones here), we have about 2.7% of the world's population, but 27% of deaths by covid-19 that occur on the Planet occur here, under our eyes. Par hazards, Your Excellencies, that this judgment coincided with World Health Day, which takes place today – in honor of the Constitution of the World Health Organization (WHO). Fate wanted our country to receive World Health Day in a millenary moment of mourning. We have before us the biggest epidemiological crisis of the last hundred years, characterized by excessive mortality, accompanied by profound impacts in the face of the state public

> power. A tragedy whose confrontation requires strong collaboration from all entities and public bodies and whose administrative and operational consequences are felt even more intensely by small states and municipalities 2. Here is the social and political complexity framework that courts this funeral judgment. Under the ominous mantle of an unprecedented humanitarian catastrophe, this Supreme Court has the legitimate and democratic intention of opening religious temples to the practice of in-person collective religious activities.

In the same way, from the analysis of the Decisum argumentation, the subjectivity that guides the entire procedure is evident, completely hiding and removing the possibility of the participation of those affected, eroding the principles of the Democratic Rule of Law, moving towards the field of discretion, so fought in the liberal system of rules, being cited only the practical contours of the Alexian methodology as customary in the Court, let's see:

> "In cases such as the present one, in which it is alleged that the temporary ban on holding cults, masses, and other collective religious activities, promoted by Decree n. 65.563/2021 of the State of São Paulo, the task that is imposed is to know if the measure does not incur in the prohibition of excess. Therefore, the jurisprudence of the German Constitutional Court developed a methodology, consolidated in the famous Mitbestimmungsgesetz case (1978 BVerfGE 50, 290), which reveals degrees of intensity in the constitutionality control of laws, considering the evaluation of legislative prognoses. At the first level, that of evidence control (Evidenzkontrolle), the rule is only unconstitutional if the measures are clearly unsuitable for protecting the fundamental legal asset effectively. At the second level, there is

> the justifiability control (Vertretbarkeitskontrolle), in which it is investigated whether the measure was taken after an objective and justifiable assessment of all sources of knowledge then available (BVerfGE 50, 290). On the third and last level, there is the material control of intensity (intensive ten inhaltlichen Kontrolle), reserved for legislative interventions that affect more significantly goods of extraordinary importance, such as individual freedom. This third level of control was made explicit by the German Constitutional Court in the famous Apothekenurteil decision (BVerfGE 7, 377, 1958). The scope of protection of the fundamental right to freedom of profession was discussed. Locating these doctrinal parameters in the jurisprudence of this Supreme Court, I realize that the decisions of this Court relating to the control of restrictions on fundamental rights imposed for the protection of health, expressly, depending on the situation, have adopted a perspective following the methodology above. By the way, in the judgment regarding whether the sanitary measure is adequate, necessary, and proportional, it has special meaning for the jurisprudence of this Court, the position that the World Health Organization (WHO) has on the matter."

The legal discourse in the heart of ADPF 881 does not find an echo in the Democratic Rule of Law paradigm. Wrapped in subjectivism methodology, it does not reflect the philosophy of language. It only technically replaces the subsumption of the model of rules by removing religious leaders and interested society from the procedure for constructing the norm, offering an abstract proposal (a priori) in the solution of the conflict of fundamental rights in question, the protection of health and the realization of liturgies.

According to Coura (2009, p. 162) when he says:

> In borderline situations or cases where doubts and ambiguities remain, it must be ensured that the inevitable action of a judge or Court configures a legal application, and not a "creation of Law, which must be reserved to the democratically legitimate legislator, according to the logic the principle of separation of powers," which is often disregarded in the paradigm of the Welfare State. (Emphasis added)

Jürgen Habermas's Discursive Theory allows us to understand in what sense the political project of a community is something more complex than what judges and courts can legitimately deliberate during jurisdictional activity, without underestimating the relevant role of Constitutional Jurisdiction for guaranteeing fundamental rights in the paradigm of the Democratic Rule of Law.

In the next chapter, it will be demonstrated that sensitive to the historical and actual moment of the health crisis caused by the COVID-19 pandemic, MPES, aware of its applicable duty to exhaust the self-composition means in the consensual solution of hard cases, used communicative, public, and democratic, based on the premises of Junger Habermas's Discursive Theory, promoting the defense of the secular State attentive to religious prejudices. These factual arguments provided the understanding, interpretation, and application of the constitutional text, dispelling the apparent antinomy between the fundamental rights to the protection of health and liturgies in the first wave of the pandemic.

3. INTERSUBJECTIVITY AND THE PUBLIC COMMUNICATIVE PROCEDURE IN THE QUESTION OF RELIGIOUS TEMPLES IN THE COVID-19 PANDEMIC

Initially, the Public Ministry performed the inspector of the Law and holder of criminal proceedings. The 1988 Constitution gave a new

institutional appearance. It included it in the list of essential functions to justice, emphasizing that the activities carried out by the Institution are equivalent to those of the other powers, with the expansion of the list of actions it holds as plaintiff, moving the Judiciary Branch, through the filing of different types of activities.

The obstacles encountered in the effectiveness of rights by Mauro Cappelletti and Bryant, revealing the need to review the meaning of access to justice, ended up promoting a transformation in the role of the Public Ministry as an institution essential to the jurisdictional function.

One of the obstacles pointed out was procedural, arising from the inadequacy of traditional forms of conflict resolution, which, having the Judiciary as the primary access to justice, has not been promoting the adequate realization and guarantee of fundamental rights over time, being this deficit of effectiveness is enough to rethink access to justice.

Given the difficulty of the Judiciary in providing jurisdiction in the face of more complex issues involving fundamental rights, in particular rights involving hard cases, there is a need to seek other access doors to justice.

From this perspective, several rules break out disciplining self-composition and strengthening instruments such as the behavioral adjustment term, which was already being used on a large scale by those legitimated for its implementation. Within the scope of the Public Prosecutor's Office, the increase in multi-door justice has been promoting a transformation in the Institution's framework and attributions, which used to be a faculty, now reveals itself as a fundamental duty of behavior.

The increase of new methods of self-composition, through the instruments of mediation, negotiation, and conciliation, inserted in Resolution Nº 125/2010 of the CNJ, Resolution Nº 118/14 of the CNMP, Law nº 13.105/2015 (Code of Civil Procedure) and in the Law of Mediation No. 13.140/2015, among others, points out the possibility of extending the attribution of the Public Ministry as an institution essential to the jurisdictional function of the State, in the stabilization of conflicts and legal relations in defense of the legal order, the democratic regime, and unavailable social and individual interests.

As Saltz points out (in ZANETTI JR; CABRAL, 2016, p.250), given the new constitutional appearance given to the Institution with the increase of self-composition instruments for the consensual solution of conflicts, the realization of the right by the Public Ministry becomes like the jurisdiction conferred on the Judiciary:

> The touchstone is the fact that the Public Ministry, adapted to the challenges that the Constitution has imposed, when it "negotiates" the rights whose defense it has been granted, "is implementing the right, that is, interpreting the established right – not just the legal rule applicable to the case, but the entire legal system – in the light of the concrete situation to identify the standard of the concrete case. He is identifying which rule(s), and principle(s) apply to a given situation and in what way." The only difference from the implementation made by the Judiciary is that the institute of res judicata is added to it, granting it the attribute of immutability. (Emphasis added)

Criticisms of the Alexian thesis take on unique contours within the scope of the Public Ministry's performance. By pointing out that its methodological assumptions forged in the late jurisprudence of values remove the participation of those affected from the normative construction procedure, it ends up creating an obstacle for the Institution to exercise its role as guardian of the democratic regime, a fundamental principle of the Democratic State of Law.

The subjectivism present in the Alexian methodology is crystal clear when compared with the assumptions of Jürgen Habermas's Discourse Theory, which has intersubjectivity and language elements that open possibilities for the realization of complex fundamental rights in the paradigm of the Democratic State of Law, through of communicative public procedure, deliberative Democracy.

On the deliberative Democracy present in Habermas' Theory, Leonardo Avritzer (LEAL, 2011, preface) discusses:

> The concept of deliberative Democracy has become one of the essential foundations of the most radical conceptions of Democracy at the beginning of the 21st century. In its Habermasian matrix, deliberative Democracy is dependent on a public communication process, through which society debates, argues, and takes decisions on relevant political issues. (HABERMAN, 1994). Thus, a model of contrast with liberalism is established, which thinks of deliberation only as a constitutional standardization of sovereignty and cannot give life to the spirit of popular sovereignty that remains the basis of the democratic system.

Leal (2011, p. 10) has been defending the possibility of Democracy as a regime for the management of public interests, now inserting "the deliberative features" of Democracy, notably Jürgen Habermas and his interlocutors, calling attention to the fact that "the constructs Theorists will serve to assess how the Instituted Powers of the Contemporary State fit into the deliberative model of politics and Society, giving special emphasis to the Administrative and Judiciary Powers, including in Brazil."

On the elements of language and intersubjectivity, pillars of the Habermasian Communicative Action Theory, Leal (2011. p. 16) teaches that:

> To remember some general concepts developed in CAT, it is crucial to bear in mind that it does not seem possible, since modernity, to accept social relations that are, fundamentally, communication and language relations (physical, virtual, symbolic, etc.) authoritarian and monological, still centered on the perspective of the philosophy of consciousness or the subject. The thesis of communicative action by Habermas reveals itself as the opposite of this one, as it is based

> on a different perspective of communication, namely, dialogic, having as a starting point of an intersubjective relationship the analysis of the pragmatics of speech and its speakers/listeners, assuming that everyone is oriented towards mutual understanding aimed at understanding (ideal speech situation).

And adds:

> With such a posture, the condition of speaker and listener is inseparable since it assumes that they can adopt an affirmative or negative stance when seeking the validity of their existential needs. This ability to adopt the posture presupposes the possibility of rationally building, between speakers/listeners, a semantic and pragmatic agreement to recognize the corresponding requirements of validity, truth, integrity, and accuracy of the (assertoric) propositions they use to obtain understanding. (Our italics)

The specific case under analysis indicated the apparent unconstitutionality[2] of the wording of §2 of art. 2 of State Decree No. 4599/20[3], triggering the establishment of administrative procedure (PA), GAMPES/MPES No. 2020.0007.9173-70, of 03.28.2020, within the scope of the Public Ministry of the State of Espírito Santo – MPES.

The issue that involved the defense of secularism in the Brazilian State revealed the unique possibility of observing different strategic options adopted by the Brazilian Public Ministry.

The Federal Public Prosecutor's Office, through the Public Prosecutor's Office in the State of Espírito Santo (PR/ES),[4] decided for

[2] The Institution has the functional duty to defend the legal order by analyzing all acts performed by State bodies and may file the necessary measures to curb abuses of legality, seeking to keep them restricted to the limits of the Constitution and Law, and may trigger control constitutionality (art. 103, I and §4 of CF/88).

[3] § 2 Religious temples are not covered by the provisions of this article, which are responsible for taking decisions to avoid the concentration of faithful and their exposure to risks.

[4] The Federal Public Prosecutor's Office in Espírito Santo (PR/ES), headquartered in Vitória, is a unit of the Federal Public Ministry (MPF) that works in cases under the jurisdiction of the Federal

the resolution through heterocomposition, filing with the Public Civil Action - ACP No. 5008153-73.20200.4.02.5001/ES[5], 06.04.2020, in the face of the Government of the State of Espírito Santo. Unsuccessful injunction dismissed (the action was dismissed at the time).

On the other hand, the MPES, following the guidelines of the CNMP[6], through the Permanent Nucleus of Incentive to the Self-Composition of Conflicts – NUPA[7], initiated a public and communicative extrajudicial procedure self-composition (negotiation[8]).

Two assumptions supported the Institution's operating strategy in searching for a quicker and more proactive solution to the issue. The first was to move away from the adversarial conflict resolution method (heterocomposition), which was no longer adequate, having considered judicial decisions[9] consolidating the constitutionality of federal, state, and municipal texts, which included religious temples among essential activities or public service. The second assumption was the non-adversarial conflict resolution method (self-composition) option through negotiation. Functional duty in the paradigm shift in the resolution of mass conflicts. A transformation of institutional rationality.

Court of First Instance in Espírito Santo.

5 Judgment that dismissed the request: https://eproc.jfes.jus.br/eproc/controlador.php?acao=acessar_documento_publico&doc=501623689601605938976429112533&evento=50162368…

6 Resolution No. 118, of December 1, 2014, of the CNMP provides for the National Policy for Incentives to Self-Composition within the Public Ministry and Recommendation No. 54, of March 28, 2017, of the CNMP provides for the National Development Policy to the Resolution Action of the Brazilian Public Ministry, indicating that the principles of peace and ethics should guide the procedure for the self-composition of conflicts.

7 Ordinance No. 8071 of October 28, 2015, of the Attorney General's Office, institutes, within the scope of the Public Ministry of the State of Espírito Santo, the Permanent Nucleus for Incentives to the Self-Composition of Conflicts - NUPA.

8 The concept of negotiation is taken from Resolution 118/2015 of the National Council of the Public Ministry – CNMP. Chapter III deals with self-composition practices within the scope of the public prosecutor's office. Art. 8th establishes: "Negotiation is recommended for controversies or conflicts in which the Public Prosecutor's Office may act as a party in the defense of society's rights and interests, due to its condition as an adequate and legitimate universal collective representative (art. 129, III, of CR/1988); Single paragraph. Negotiation is also recommended for solving problems related to the formulation of agreements, working networks and partnerships between public and private entities, as well as among the members of the Public Ministry.

9 In this regard: Process No. 5002992-50.2020.4.02.0000/RJ. PLAINTIFF: UNION - GENERAL ADVOCACY OF THE UNION DEFENDANT: FEDERAL PROSECUTION OFFICE.

The paradigm shift[10] through the choice of the self-composition procedure was accompanied by elements of Junger Habermas's Theory of Discourse[11]. Language becomes the logos, replacing the pure Kantian reason (MOREIRA, 2007, p. 13). Intersubjectivity in the relationship between subjects changes the ethos of the subject-object relationship of the philosophy of language.

The opening of the speaking place of those affected in the democratic public procedure promotes a public space for the possibility of communicative action between the actors involved. The validity (legality) of the procedure, anointed the participation of those affected (legitimacy), enables the coexistence between Democracy and the Rule of Law. It is popular sovereignty enshrining deliberative Democracy, defended by Habermas.

The consensual solution to the conflict involved understanding and opening possibilities with the legitimate arguments presented in the speech of religious leaders, resistant to admit, at that time of extreme sensitivity to the faithful, the restriction of the exercise of the fundamental right to hold cults, liturgies, opening possibilities for a better understanding of the world of life.

Coura reinforces the idea that man's existential conditions also determine the conditions under which he interprets and lives with the world. In other words, regardless of human will, prejudices determine the meaning seized of the world by the subject, which is inevitably recorded by its historical condition (COURA, 2009, p. 35).

Only the apparent conflict between the fundamental rights to the protection of health and the performance of liturgies remained. The opening of the possibility of communicative action in the procedure by NUPA promoted a consensual solution to the problem. With the granting of speech space, it was possible to put oneself in the other's shoes, fostering a relationship of intersubjectivity and communicative action, leading to a consensual solution in the light of the paradigm of the Democratic State of Law.

[10] What is paradigm? What is your double aspect? The concept of paradigm comes from Thomas Kuhn's philosophy of science. KUHN, Thomas S. The structures of scientific revolutions. Translated by Beatriz Vianna Boeira and Nelson Boeira. São Paulo: Perspective, 1994.

[11] Considering Junger Habermas's discursive theory of law, it is possible to state that the issue of the interpretation and application of Law reflects, at bottom, a paradigm dispute (COURA, 2009).

Those affected, represented by the religious leaders, argued that, due to the pandemic, the faithful needed to attend the liturgies as a way of spiritual strengthening and, consequently, to protect their health.

According to the risk map, the closed doors of religious temples were never the foundation of NUPA, except in exceptional cases. The arguments were presented because the Temples should observe the sanitary rules defined in the federal, state, and municipal legislation in force at the time.

Based on the new Institutional paradigm, through self-composition (negotiation), with a normative argument backed by elements of the philosophy of the sciences of the spirit, communicative action prevailed, where the concerted dialogue in a Rule of Law allowed the emergence and unveiling of legitimate foundations, prejudices, opening space of possibilities in the search for consensus.

The communicative, public, and democratic extrajudicial procedure introduced by the MPES allowed the construction of a posteriori normativity, the Technical Note COVID-19 No. 72/2020 - SESA/SSVS/GEVS/NEVS, which indicates the fundamental duty to observe specific health rules in the fight against COVID-19 by religious temples, it ended up promoting the effectiveness of the fundamental rights under discussion, protecting the health of society and holding liturgies within legal limits, observing the paradigm of the Democratic Rule of Law, uniting validity and legitimacy.

4. CONCLUSION

Complex collective demands and hard cases are increasingly frequent nowadays, characterized by the conflict between fundamental rights and the founding principles of the Brazilian Democratic State of Law.

Issues involving the defense of the environment (basic sanitation, pesticides, land regularization, combating various forms of pollution), consumer, health, education require the effective participation of those affected and collegiate, making the legal discourse valid and legitimate.

The model of rules that supported legal positivism was inadequate in the construction of a solution to the most complex issues, as it did not consider the difference between rules and principles and, therefore, an inappropriate hermeneutics in the legal discourse in the solution of conflicts between fundamental rights, considered pillar principles in the paradigm of the Democratic State in the 1988 Constitution.

Robert Alex offers the Theory of Fundamental Rights; his thesis is based on the difference between rules and principles. However, the assumptions of the Alexian Theory, considering the principles as optimizable goods, proved to be inadequate to solve the apparent antinomy between the fundamental rights in the concrete case analyzed, as it excludes from the procedure the participation of those affected or co-associated in the normative construction and decision-making, according to the criticism of the normative argument of ADPF 811 -STF.

The method of heterocomposition, even in lower instances, was not successful, and the tension remained. On the other hand, the procedural category adopted by the Public Ministry of the State of Espírito Santo - MPES following the current guidance of the National Council of the Public Ministry - CNMP reached a consensual solution to the conflict between fundamental rights that arose, making its action swift, proactive and resolutive.

The non-adversarial method of self-composition (negotiation) was used in the context of a public and deliberative extrajudicial procedure, enabling the opening of dialogic participation between those affected and the Institution. All religious leaders and related doctrines were invited to an extensive debate agenda.

The self-composition procedure was based on Jürgen Habermas's Discourse Theory, especially in the construction of debates, where deliberative Democracy (and not just participatory) was the touchstone in the realization of citizenship. Intersubjectivity, putting oneself in the other's shoes, was essential in understanding the apparent conflict of constitutional principles. The religious prejudices unveiled in the speech revealed the need to open possibilities.

The pandemic has weakened society's health. The exercise of belief and faith was considered to protect the principle of human

dignity. The world of life unveils the need for a new paradigm of institutional action in the face of praxis.

The MPES was successful with the concreteness of the conflicting fundamental rights, both in protecting the community's health and in carrying out in-person liturgies when permitted, despite the exceptional emerging methodological approach of a posteriori deliberative rulemaking procedure to convey and observe democratic fundamentals.

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ISBN: 978-65-00-40218-6

CHAPTER

14

PRIVACY OF MEDICAL DATA UNDER THE CORONA PANDEMIC (COVID-19),COMPARATIVE STUDY WITH ANGLO AMERICAN LEGAL SYSTEM

by
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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter14

PRIVACY OF MEDICAL DATA UNDER THE CORONA PANDEMIC (COVID-19),COMPARATIVE STUDY WITH ANGLO AMERICAN LEGAL SYSTEM

by
Samir Hosney Elmasry

Abstract: It is an unimpeachable fact that the world went through complete mayhem overnight due to the Covid-19 pandemic. The wheel of the economy was completely paralyzed in all countries of the world, global stock markets collapsed and the price of a barrel of American oil fell below zero[1], for the first time in history, due to the repercussions of the global closure resulting from the virus. Theworld started to apply restrictive measures to contain the plague, including social distancing, the matter which adversely impacted the general psychological state in the world.

In the midst of those events, new cases of coronavirus infection increased among the world, as they exceeded twenty seven million infections and more than nine hundred thousand death toll - as of writing the following paper -[2] which caused chaos among the global medical community due to the rapid spread of the epidemic and the lack of providing Medical supplies needed to combat it. Medical teams around the world have yet to come up with a vaccine to prevent this epidemic.

It is well noticed from the audiovisual media across the globe and social mediathat there is lack of privacy to the news regarding the infected patients and their medical data, notably, if they are confirmed to be infected. Sometimes, their identity is revealed by their names and photos. In some cases, one would ponder, if it is permissible to reveal the identity of the person who is infected with the virus, including revealing his name, photo and personal data?

- The issue of the electronic medical record (EHR) has also raised many questions about the medical privacy of patients with the spread of the new corona pandamic , especially with the spread of the idea of the electronic medical record in most countries and the ability of that record

[1] *Bennett Purser,* ***U.S. oil prices fall below zero for the first time, report, published on Apr 21, 2020 https://www.marketplace.org/2020/04/20/u-s-oil-prices-fall-below-zero-for-the-first-time***

[2] Worldometer, Coronavirus Cases, https://www.worldometers.info/coronavirus/ retrieved on 8 of September 2020

and the data it contains to violate publication and circulation quickly.

- The spread of the new Corona epidemic also showed the effectiveness and success of the idea of telemedicine - as we will see in the present paper - which in turn seriously contributed to limiting the spread of the virus, but it also contributed at the same time to the possibility of violating the medical privacy of patients from Through the means of communication between the treating physician and the institution of care and between the person receiving treatment.

- We will try to answer all these questions in this paper , with the help of what the comparative legislation has concluded in this regard.

1. PRIVACY OF MEDICAL DATA UNDER THE CORONA PANDEMIC

Some defined medical privacy as the patient's right to decide when, how, and to what extent others can access his health information, and then it maintains confidential patient data and does not share protected health information with those who need it to provide medical care or improve it. In the event that he wishes to use the patient's health information for research purposes, researchers must obtain his informed consent and this may include using his medical information without revealing his identity to conduct research.[3]

- While others went to take a more basic approach to the definition of medical privacy, explaining that there is no comprehensive prohibitive definition of the right to medical privacy, given that medical privacy combines both confidentiality and security , so confidentiality is between the patient and the treated parties (Such as the doctor, hospital, and nurses) means preserving the information exchanged in that relationship from disclosing it to third parties. Confidentiality, for example, prevents doctors from disclosing information that is shared with them by a patient in the context of the doctor-patient relationship and unauthorized or unintended disclosure of the data obtained

[3] https://www.radiologyinfo.org/en/info.cfm?pg=article-patient-privacy#part_three

is considered breaches of confidentiality. While security means the procedural and technical measures required to prevent unauthorized access to patient data, or the modification, use or dissemination of data stored or processed in the computer system, and security helps in keeping health records safe from unauthorized use with the assurance that no measure can Security Preventing breach of privacy by those who have authority to access the registry. [4]

At the outset, we should point out that the constitutions around the world have imposed protection on the sanctity of the private life of individuals, for example the Egyptian constitution provided in Article 57 for the sacredness of individuals' privacy[5]. Therefore, the public exposition of individuals' medical data is a violation of the sanctity of their private lives. The Brazilian Federal Constitution of 1988 establishes well also the doctrine of privacy and provides for the confidentiality of correspondence, telegrams, telephone and data communications[6].

- It is imperative to accentuate the difference between enumerating the number of infected cases and the number of those who recovered from the epidemic on one hand and disclosing the identity (name or photo) of the infected or deceased individuals on the other. This distinction is the standard in determining whether there is a violation of the medical privacy of the infected or the deceased individual.

- Disclosure of information, data and statistics, including the number of individuals infected, is consistent with the bulk of world wide constitutions, including the Egyptian constitution. Article 68 of the Egyptian constitution stipulates that information, data, statistics and official documents belong to the individuals who should have access to them transparently. Likewise, the Brazilian constitution allows access to personal information collected by government agencies and from which Habeas Data No. (9507) of 1997 emerged, which allow

[4] https://www.ncbi.nlm.nih.gov/books/NBK9579/
[5] Egypt's Constitution of 2014, https://www.constituteproject.org/constitution/Egypt_2014.pdf , retrieved on 28 of August 2020
[6] Brazil's Constitution of 1988https://www.constituteproject.org/constitution/Brazil_2014.pdf, retrieved on 28 of August 2020

also to reach to the information related to the individual stored in government or public databases, to correct or update the data.

That procedures and laws cuts off the integrity of what the organs of states are doing in these precise circumstances in terms of disclosing the numbers of people infected with the virus in various audio and visual media, on the other hand, The principle of transparency and The frankness that states follow in this regard before their citizens ، the international community and the World Health Organization directly reflects on awareness of the citizens about the severity of the virus and then taking the necessary precautions to prevent it internally or externally.

- The previous case is distinguished from the case in which the name, identity, or image of the person who is infected with the virus or who died due to it، is publicly disclosed in the media or social media, as according to the provisions of international constitutions, it is not permissible to infringe the sanctity of the private life of the individual, considering that the individual's pathological condition in the community is considered as sensitive data (mental, physical or genetic health data, biometrics data, financial data, religious beliefs, political opinions, security status, etc.) that may not be seen by others as a secret is only disclosed to the treating physician or the treatment team of the injured person, which is consistent with what the jurisprudence established in defining the right of privacy as the right of the person to be alone [7], and his right not to be pursued by others in the sanctity of his private life, which may make the tort liability arise for the person or entity that has revealed or disclosed the identity of the carrier of the virus or the person who died due to it, which may make compensation available in the event that the three pillars of tort are proven infringement, damage and causation, and that may cause In paying exorbitant compensation to the patient whose condition was detected or who have died due to the virus.

- However, there is a case of exemption from the responsibility to reveal the identity of the patient who infected with virus [8], which is

[7] Sherali zeadally ,Mohamed Badra (Privacy in a Digital, Networked World: Technologies, Implications and Solutions),springer international publishing Switzerland 2015, page 297

[8] Katja S Ziegler, Human Rights and Private Law (Privacy as Autonomy), Hart Publishing 2007, page 38

the previous consent of the patient with the disclosure of his identity (the name or image or both together), and if the authority revealing the identity of the patient with the virus obtained his prior express approval by revealing his identity, there is no room after that to talk about the inviolability of his private life, after he disclosed his intention to inform others of his satisfactory data, which is included in most of the comparative legislation, including for example the Brazilian Personal Data Protection Law LGPD issued in 2019, who made the prior consent of the owner of the data a reason to exempt from liability in the event of collecting and publishing it[9].

- As with the outbreak of the epidemic and the closure of many countries their borders with other countries, the closure of many medical clinics and hospitals and their transformation into quarantine centers for those infected with the virus, and the application of partial and comprehensive ban inside cities, the importance the electronic medical record has emerged, and it has become a necessity.Telemedicine is urgent, given the need for many patients to follow up daily with their doctors, especially the elderly and those with chronic diseases, as direct interaction between these and their doctors through clinics and health centers may expose them to the risk of transmission. However , and despite the effectiveness of the electronic medical record and the effectiveness of telemedicine [10] , concerns and potential violations of patients' medical privacy have rightly been raised in light of these modern technologies, as telemedicine is mostly done through mobile phones or the applications on various electronic devices such as computers or electronic panels or even through biosensors (sensors) that track a person's disease status, and the patient data on these devices represent fertile ground for abuse, whether through the third party or through the medical institution Same itself.

The digital transformation of medical records has had a great impact on exposing patients' privacy to being violated - as referred to - by medical institutions and others, which is revealed by the spread

[9] Renato Leite Monteiro, The new Brazilian General Data Protection Law — a detailed analysis, article published August 15,2018, https://iapp.org/news/a/the-new-brazilian-general-data-protection-law-a-detailed-analysis/

[10] https://www.healthaffairs.org/doi/10.1377/hlthaff.2013.0997

of the recent Corona epidemic, as there has become a feverish race between global medical companies to win the production of the first vaccine for the virus. Which necessarily requires reviewing the patients' medical data and sometimes revealing their identity in preparation for conducting clinical trials on them, which is what lawmakers in many countries have faced are unable to address these attempts.

- As we take this opportunity to draw attention of legislators around the world to the need to take into consideration the medical privacy of patients, which may cause of negative psychological and financial effects if this privacy was violated . The international legislations had defined personal data as any data related to a person a specific natural or identifiable, directly or indirectly by linking it with other data, , but until writing this article, most international legislations did not a real steps for the protection of medical data for patients, which is one of the sensitive data that must be stated explicitly and accurately due to the negative effects of disclosure.

- It should be noted that , although it was mentioned in some medical profession regulations in various countries of the world that the disclosing of the patient's secrets is prohibited, but this still is not enough in itself to protect the medical privacy of patients, especially if the outcome of that violation will be confined to the disciplinary responsibility of the violating the medical profession without being financial penalties for the doctor or compensation for the patient whose identity has been revealed, and these regulations did not specify controls for disclosing the patient's secrets, thus opening the door to violating the medical privacy of patients.

- We call on lawmakers around the world to follow the example of the American legislator in issuing a special law to protect the medical privacy of patients, aware of the seriousness of the effects resulting from the violation of patient privacy, this law is called the patient's medical privacy law "HIPAA" [11], which was issued in 1996 and made

[11] U.S. Department of Health & Human Services https://www.hhs.gov/hipaa/for-professionals/privacy/index.html

several amendments to accompany it, With the emergence of modern technologies of communications.The most important characteristic of that law is that it imposes on health service providers several provisions , the most important of which is that the consent of the patient must be taken before passing on his health information, which includes any information that The identity of the patient is might determined as an individual such as name, address, date of birth and social security number, it also includes any information related to the patient's physical or mental health such as information about diseases or psychological symptoms that the patient suffers and any information about an infectious disease that may affect the patient's health or the value of his insurance. That law obliges health service providers to obtain patient consent before use his secured data in any medical research or before sending his information to pharmaceutical companies for the purpose of marketing. Also, the law requires clinics Electronic records to use encryption software to prevent access to patient data, and all patients files must be kept secure even when not in use. The law included many measures that aim in its entirety to protect the medical privacy of patients and prevent others from violating which may cause in psychological and financial damages for the patient and his relatives. The Ministry of Health and Human Services in the United States of America (HHS) is responsible for monitoring all procedures above and supervise the implementation of the articles of the law.

Finally, the American legislator, desiring that the law achieves its goals in protecting the medical privacy of patients, so the law included various financial and deterrent penalties at the same time, some of which may reach fifty thousand dollars for a single violation with a maximum of one and a half million dollars per year in the case of Intentional disclosure of the patient's medical condition with prior knowledge of a violation of the HIPAA law.

In conclusion, we confirm that countries around the world have started taking serious steps towards the issuance of legislation that protects the privacy of citizens in light of the spread of technical means, such as the Egyptian Information Technology Crime Law No. (175) for the year 2018 and the general regulation for data protection

GDPR includes users in the European Union countries as well as the Brazilian General Law to protect The data (LGPD), and other relevant laws, Which makes us look forward to issuing a law to protect patients 'medical data as indicated and demonstrated the practical reality of the need for such a law in light of the outbreak of the Corona epidemic, which made patient privacy vulnerable daily.

Dr. Samir Hosni Al-Masry
judge and International lecturer

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U.S. Department of Health & Human Services https://www.hhs.gov/hipaa/for-professionals/privacy/index.html

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ISBN: 978-65-00-40218-6

CHAPTER

15

THE ADVANCE OF THE NEW CORONAVIRUS IN BRAZILIAN PRISONS

by
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https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter15

THE ADVANCE OF THE NEW CORONAVIRUS IN BRAZILIAN PRISONS

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Cássius Guimaraes Chai

Abstract: The present work derives from a lecture at the event Critical Dialogues on Pandemic Perspectives. The lecture took place on September 11, 2020, when the general context of the Brazilian prison in the pre-pandemic period was presented, followed by an exhibition on the measures adopted by the State to face the spread of the new coronavirus in prison environments and the consequences of these measures. This is the same structure of this article, in which it is argued, in the end, that the most efficient public health policy in prison is broad and rational extrication.

Keywords: Coronavirus. Pandemic. Prison.

1. INTRODUCTION

The coronavirus pandemic generalizes a new form of sociability that, increasingly, seems to be the only possible form of self-preservation in this historical time: contactless society. The encounter with the outside world and the touch of the other requires proper preventive healthcare taken measures of hygienic protocols. It is necessary to wash clothes whenever you leave, use of a surgical mask, alcohol, and keep two meters away from anyone. In the context of viral warfare, these hygiene and physical distancing protocols are also necessary methods of life's saving and preservation.

However, none of these self-preservation measures is fully accomplished and effectively observed in situations of incarceration, especially in the context of Brazilian prisons. In this sense, this article aims to discuss the policies to combat the new coronavirus in the national penitentiary system. For this, it will first present the picture in

which the prison was in the period before the pandemic reached Brazil. Next, this research scores the measures effectively adopted to prevent the spread of the new coronavirus in the prison system. And, finally, we present the discussion of the effectiveness of these measures and the impact of the pandemic on The Brazilian prison, collecting systematized data by October 2020, the moment of completion of this article. [1]

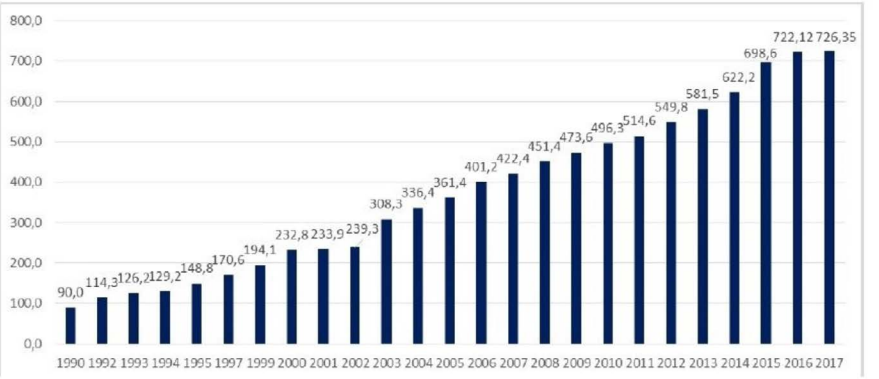
2. THE BRAZILIAN PRISON IN THE PRE-PANDEMIC ERA

The Brazilian prison has its differences from the prison model developed in Europe, which was the tremendous analytical reference point in studies on the prison. This is one of the reasons why the panoptic prison model, famous for the analysis of Michel Foucault (2013; 2015), seems so far from what happens in Brazil. The bet on social control via prison never reached the same standards of guarantees of the European continent, mainly because, in a country that experienced slavery so drastically, prison never was a form of punishment that was enough. The tremendous disciplinary power in Brazil remains torture and not, exactly, prison.

This picture has begun to change significantly in the last thirty years. In addition to the commitment to torture, Brazilian soil was fertile for a new punitive phenomenon: mass incarceration. In 1990, the number of people arrested here in the country was around 90,000; while, according to the National Penitentiary Department, Brazil sur-

1 According to official data collected by the National Health State Council, until December 2021, approximately 8.8% of Brazilian prisoners have been infected by Covid-19, according to the report "Denunciation of Violations of the Rights to Life and Health in the context of the Covid-19 pandemic in Brazil". Signed by the National Health Council (CNS), National Human Rights Council (CNDH). Regarding the application of tests to the population deprived of liberty, until August 2021, 354,019 tests were applied in the prison system, with confirmation of 66,040 positive cases. In the socio-educational system, 20,879 tests were applied, and 2,673 cases were confirmed. Last access december 2021: https://conselho.saude.gov.br/ultimas-noticias-cns/2221-8-8-dos-presos-brasileiros-foram-infectados-pela-covid-19-mostra-relatorio-do-cns-e-cndh#:~:text=Em%20rela%C3%A7%C3%A3o%20%C3%A0%20aplica%C3%A7%C3%A3o%20de,testes%20e%20confirmados%202.673%20casos.

passed 726,000 people arrested in June 2017 (Brasil, 2019, p. 9). This growth of the prison population can be seen in the following graph:



Source: National Penitentiary Survey (BRASIL, 2019, p.9).

The above figures are very impactful, especially when faced with the everyday discourse (primarily carried by the media) that the Brazilian criminal justice system is too lenient. If imprisonment has grown by more than 800% in 27 years, leading the country to third place in the ranking of countries that hold the most globally, it is impossible to maintain that the Brazilian criminal justice is pusillanimous. On the contrary, what is possible to recognize in the graph above and the exponential increase in the Brazilian prison population, a phenomenon that has been called mass incarceration.

May this tremendous punitive wave not be an exclusively Brazilian evil. This is quite true. The exponential increase in incarceration rates is a neoliberal phenomenon to the most significant degree. The United States' pioneering experience of the Richard Nixon and Ronald Reagan governments in the 1970s and 1980s, former Republican presidents responsible for dismantling the Welfare State in that country. As a result of *the Welfare State crisis*, mass imprisonment became the paradigm of punishment in neoliberalism, which bet on criminal law to solve the problems previously solved by the social policies of the Social Welfare State. That is how the U.S. went from 199,000 prisoners in 1970 to 2 million at the turn of the century.

This phenomenon is explained sociologically by the loss of the disciplinary sense of the penalty and by the need to control the black population that, in the 1960s, had finally achieved the end of the laws of racial segregation and no longer had legal obstacles to access spaces traditionally occupied by whites (Alexander, 2017; Wacquant, 2003, 2011). The great punishing wave begun in the 1970s brought crowds to prisons, most populated by people from socially vulnerable groups – the prisons' famous clientele. Mass incarceration transferred pockets of poverty from ghettos to penitentiaries, transforming prison into a typical experience for specific social segments, a *continuum* between the poor regions of large urban centers and the prison system.

According to David Garland (2001, p. 1-2, author griffin):

> What are the defining features of mass imprisonment? There are, I think, two that are essential. One is sheer numbers. Mass imprisonment implies a rate of imprisonment and size of the prison population that is markedly above the historical and comparative norm for societies of this type. The U.S. prison system meets these criteria. The other feature is the social concentration of imprisonment's effects. Imprisonment becomes *mass imprisonment* when it ceases to the incarceration of individual offenders and becomes the systematic imprisonment of whole population groups. In the case of the USA, the group concerned is, of course, young black males in large urban centers.

At the end of the century, this specific form of social control was exported from the U.S. to the rest of the world and became the new punitive paradigm, hitting Latin American countries more intensely. In this sense, explains Loïc Wacquant (2011, p. 9, the author's griffin) that:

> (...) it is *precise* because the elites of the State, having converted to the ideology of the total

> market coming from the United States, diminish their prerogatives on the economic and social front that it is necessary to increase and strengthen their missions in the field of "security," suddenly relegated to the mere criminal dimension. However, the neoliberal penalty is even more seductive and more fun when applied in countries at the same time hit by substantial inequalities of conditions and opportunities for life and devoid of democratic tradition and institutions capable of cushioning the shocks caused by the mutation of work and the individual on the threshold of the new century.

As supported by the passage above, the phenomenon of mass incarceration is even more worrisome in regions of profound social inequality such as Latin America and, in particular, Brazil. This is because, in achieving neoliberal values, states end up using prison as an institution that replaces social inclusion policies. This fact is intensified in the Brazilian prison system since there has never really been a judicial culture that would effectively guarantee due process in the criminal sphere. That is why many people are taken to prison without a fair trial. By way of example, about one-third of the convicts are still without definitive conviction (Brasil, 2019, p. 23).

By itself, this picture would be too worrying, but it becomes worse when attached to the latent necropolitical nature of our prisons so that the expansion of imprisonment directly implies the expansion of the power to kill by the State (Ferro, Ramos & Rocha, 2020). In prison, there are several reasons: torture by public officials, the conflict between criminal factions, lack of medical care for diseases that are now already treatable etc. All these are ways that the State finds of making those undesirable subjects die and that, every day more, they are pushed in droves into prisons.

Mass incarceration has become a particularly harmful problem in Brazil in pandemic times. Since the pandemic ushers in new social forms in which human proximity is potentially deadly, overcrowding of the prison system is a death decree for many inmates.

As mentioned above, in 2017, Brazil reached the mark of 726,000 prisoners. However, according to the report "National Survey of Penitentiary Information," there were only 423,000 vacancies in prisons in the country, with a deficit of 303,000 vacancies (BRASIL, 2019, p. 22). This gives an average occupancy rate of 171.62%. For everyone a hundred vacancies, there are 71.62 more prisoners in Brazilian prisons.

For this reason, the Supreme Federal Court (STF) recognized, in 2015, that the Brazilian prison system constitutes an unconstitutional state of things. The situation is so severe that, in some states, the occupancy rate far exceeds the national average. In Pernambuco, it reaches 260%. While in Paraná, it is 267%. The more people occupied the same space, the greater the risk of spreading the new coronavirus.

3. MEASURES TO COMBAT THE NEW CORONAVIRUS IN A PRISON ENVIRONMENT

The proportion between the number of vacancies and the occupation of prison units is not contingent in Brazil. It is a constant that characterizes national prisons and crosses our sense of criminal punishment. Being in a cell with several people beyond the bearable is another form of punishment to be applied, which automatically accompanies the deprivation of liberty on Brazilian soil.

Considering this prison context, the arrival of the new coronavirus in Brazil and the declaration of the pandemic situation by the World Health Organization (WHO), the National Council of Justice (CNJ) issued, on March 17 of this year, Recommendation No. 62 (Council, 2020B), which recommends preventive measures for the spread of the new coronavirus in the sphere of the prison and socio-educational systems.

Within the prison system, this normative text is intended for the revision of provisional prisons, the suspension of the duty of periodic presentation to the court, the maximum exceptionality of new orders of pretrial detention, the anticipation of the progression of the

regime, the granting of house arrest relating to all persons imprisoned in compliance with the sentence in open and semi-open regimes, etc. The purpose of this set of measures is to:

> (...) the protection of the lives and health of persons deprived of liberty, magistrates, and all civil servants and public agents who are part of the criminal, prison, and socio-educational justice system, especially those who are part of the risk group, such as the elderly, pregnant women and people with chronic, immunosuppressive, respiratory and other comorbidities that may lead to a worsening of the general state of health from the contagion, with particular attention to diabetes, tuberculosis, renal diseases, HIV and coinfections. (Council, 2020B, p. 4)

Thus, the Recommendation aligns with the need to contain punitive power throughout the pandemic period, avoiding the pathologizing effect of over-incarceration and guaranteeing the right to health and life of people who constitute what has been called a "risk group." Pregnant women, lactating or mother, indigenous, elderly, people with disabilities, patients with diseases and comorbidities, HIV-positive, tuberculosis patients, cancer, etc.

This is because prisons are environments conducive to the spread of infectious diseases. Lack of running water, lack of hygiene materials, unhealthy cells, lack of adequate medical care, food that does not meet nutritional needs are just some of the problems that Brazilian prisons face and impact the spread of infectious diseases such as Covid-19.

Although Recommendation No. 62 of the CNJ was an important step to avoid mass contamination in prisons and socio-educational units, it did not produce the necessary effect to avoid a tragedy. One of the reasons is that, although the recommendation constitutes a significant normative source that must be observed, it does not have the effect of embarrassing magistrates to observe it. Far from promoting

a broad and rationalized discharging movement according to an objective criterion to be observed by law or judicial decision, the Recommendation ended up boosting the complex analysis on a case-by-case basis of the arrests ordered.

The Supreme Court itself tried to take measures to mitigate the normative effects of the Recommendation. The day after adopting Recommendation No. 62, the Supreme Court revoked the injunction granted by Minister Marco Aurélio Mello in the Complaint of Non-Compliance with Fundamental Precept No. 347. The injunction provided, among other initiatives, for the execution judgments to grant parole to prisoners aged 60 years or older and home regime for several people who fall into what has been called a pandemic risk group.

In addition, the Minister of Justice and Public Security at the time (Sérgio Moro), a few days after the adoption of the Recommendation of the CNJ, gave an interview saying that "We cannot, under the pretext of protecting the prison population, excessively vulnerable the population that is out of prisons" (Moro, 2020), revealing the intransigence of the executive regarding the recommendations of exceptional incarceration in a pandemic period. Intransigence also exists at the bottom of the judiciary, between singular judges and judges.

Thus, the *incarceration discharging* guidelines of Recommendation No. 62 did not produce the expected effects, which is why the management of the health crisis in prison ended up focusing on the constriction of the flow between the interior and the exterior of prisons, primarily through the suspension of visits and contact between lawyer and client. In the end, the confrontation with the new coronavirus in prison intensified, in practice, the punitive power of the State, in the sense that the health policy adopted was based on another form of punishment that was the suspension of visits by spouses, family members and patrons, avoiding incarceration as recommended by the National Council of Justice.

Finally, it is pointed out that other measures of little efficacy have been adopted, such as the isolation of infected prisoners. Since the incubation period of the coronavirus is 2 to 14

days (according to the Ministry of Health), the isolation of the prisoner detected with Covid-19 becomes ineffective because it is likely that he has been infected before expressing symptoms rest of his cell. This is the substantial risk of the virus: the possibility of contamination even if infected people do not show symptoms. That is why we are all potential transmitters, and isolation is necessary to protect public health.

4. THE EFFECTS OF THE PANDEMIC ON THE PRISON SYSTEM

If human contact and agglomerations are potentially lethal during the pandemic, the Brazilian prison becomes, all of it, the realization of a comprehensive policy of death. On this, the Cameroonian philosopher Achille Mbembe (2016, 2017) coined, in the early 2000s, a term that can explain well this prison context: necropolitics. Thus, understood as the power that the State must make a specific segment of the population die. In the national case, the prison population is composed of a large majority of black people.

The punitive mentality narrated in the previous topic demonstrates the worst face of Brazilian criminal justice and reveals that the lives of people arrested do not matter. Alternatively, instead, these are lives that should not be lived. The judicial decisions and the purposeful omission of the executive are on the same side of history and demonstrate that the necropolitical nature of the Brazilian prison takes advantage of the pandemic moment to expand. Thus, the national criminalization wave culture has already reached its most intense necropolitical moment[2]. In other words, judges, ministers, and public authorities (in addition to a massive portion of civil society) believe that they really must make as much die as it takes. As signaled at the text's beginning, the arrest was never enough in Brazil.

[2] For a reading of the relationship between necropolitics and the prison system during the Covid-19 pandemic, see *the text Pandemic and prison necropower: death by Covid-19 in the prison of Paraíba* (Ferro, Ramos & Rocha, in press).

The frequent argument that suspending visits and contact between the lawyer and client would avoid contamination is also fallacious. Although the prisons are architecturally constructed to forget that there are people inside, the prison is not a completely isolated place from its surroundings. New prisoners enter daily, there is a movement of materials taken by the relatives of the prisoners (since the State does not provide them), and the prison staff enters and goes every day. These are contact points between the outside world and prison, making the actual prisons epicenters of the new coronavirus. Potentially lethal contact points can lead to mass contamination of the prison population and employees who deal directly with this public, causing a ripple effect.

Considering these facts, several countries worldwide have opted for out-of-jailer measures as an acceptable public health policy. In April, Turkey's parliament passed a law that provisionally released 45,000 and permanently another same number of prisoners out of a total of 286,000 people deprived of liberty (Wilks, 2020). Before that, in March, Iran took an equally bold move: it temporarily released 85,000 of its 240,000 prisoners (Hafezi, 2020). Both countries released about a third of their prison population.

This was not the same path followed by Brazil, which, as narrated in the previous topic, did not choose to adopt a rational policy of incarceration during the health crisis of the new coronavirus. In the omission of the Legislative Power, several initiatives to provoke the judiciary were unsuccessful. Two are known: the Action for Non-compliance with Fundamental Precept (ADPF) No. 684, filed on May 13, 2020, by the Socialism and Freedom Party (PSOL), and the Collective Habeas Corpus No. 596189, filed by the Collective of Human Rights Advocacy (CADHu).

Among other measures, ADPF No. 684 expressly requested the replacement of pretrial detention with alternative precautionary measures for the custody of people who have committed crimes without violence or severe threat that are in places that exceeded maximum capacity; for those belonging to the Covid-19 risk group; for the new red-handed arrest for crimes that were not committed with violence or

serious threat; in addition to those deprived of liberty by civil debt of maintenance. This action, however, was not judged even when Brazil reached the peak of the contamination curve[3].

Habeas Corpus No. 596189 resulted from the famous Fabrício Queiroz case. The former aide to Senator Flávio Bolsonaro (son of Jair Bolsonaro, President of the Republic), Fabrício Queiroz, and his wife were preemptively arrested on June 18, 2020. However, the then president of the Superior Court of Justice (STJ), Minister João Otávio Noronha, granted both home freedom restrictive measures days later due to the defendant's health conditions, highlighting the Covid-19 risk group. In addition, his wife benefited from the measure because the minister understood that she was indispensable for the care of her husband.

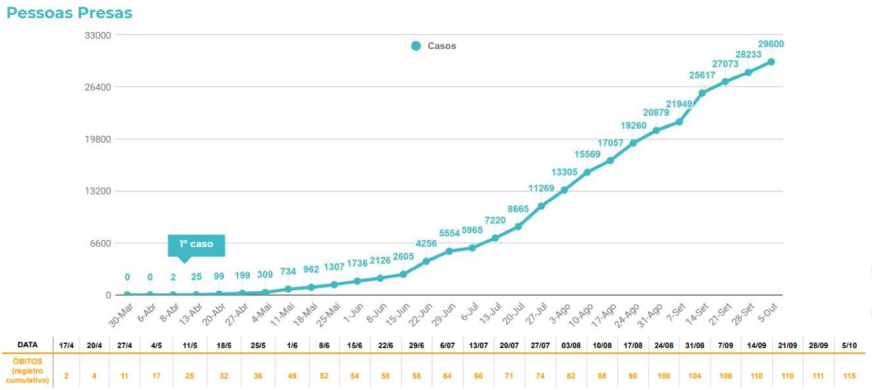
As a result of this episode, CADHu filed a collective habeas corpus that called for the extension of the granting of house arrest to other prisoners classified as a risk group in the pandemic which had not committed crimes with violence or serious threat. However, this time, the same Minister-President of the Court decided that this extension would not be possible through the need to observe the actual condition of each prisoner on a case-by-case basis.

This situation had the effect of advancing the pandemic into the prisons, achieving a scenario of mass infection. On April 15, the first death occurred by the new coronavirus in the Brazilian prison system. As of October 5, 2020[4], this number had 199 deaths, of which eighty-four were server deaths and 115 deaths of people deprived of liberty. In addition, there were 35,595 confirmed cases of infection on the same date, with a growth of 28.9% compared to the previous 30 days. Of the confirmed cases, 9,995 were from servers, and 29,600 were from persons deprived of liberty.

Data on infection by the new coronavirus in the prison system are recorded in the National Council of Justice bulletins. Until October 5, the number of contagions can be seen in the diagrams below, which present the epidemic curves in the context of the prison system, indi-

[3] Until the date of completion of this article: October 10, 2020.
[4] Last update of the report before the termination of this article.

cating the number of cases of infection and deaths involving people deprived of liberty and servants of prisons.



Source: National Council of Justice (Council, 2020A)

Source: National Council of Justice (Council, 2020A)

Despite the underreporting by the low amount of tests for the prison population in a context of mass incarceration and poor conditions of prisons, it is possible to extract from the diagrams that the absence of a policy of broad incarceration based on general and rational criteria was a fertile field for the dissemination of the new coronavirus in the penitentiary, affecting both persons deprived of liberty and servants of prison units just as the groups were defending the people arrested.

5. CONCLUSION

The health crisis should have imposed the contraction of the prison system, building a barrier to the exacerbated number of prisons. Mass incarceration seems to have finally reached its limit, not because it has already held enough, but because the war against the coronavirus has established a barrier that is no longer allowed to transpose. In the context of viral warfare, every agglomeration is a risk to public health, and mass confinement turns out to be also a risk of mass infection. For this reason, from the criminal standpoint, the only serious alternative to face the current health crisis is the immediate discharge of a significant prison segment to provide conditions for physical distancing and the realization of hygiene protocols at home.

Such a vast discharging policy would be unthinkable in the pre-pandemic era. The decision taken by countries such as Turkey and Iran was only possible because mass incarceration was disrupted by the pandemic, which imposes on society the experience of drastic distancing. However, the decision to break with the current punitive model is not automatic. The experience of these and so many other countries that have chosen to release (temporarily or not) a portion of the prison population shows that the number of prisoners in a country is a political issue. So that the incarceration will not occur if there is not a strong mobilization in this direction.

It is necessary to take advantage of the current moment of a health crisis to rethink the criminal punishment that confines thousands of people in unhealthy environments. In pandemic times, one cannot bet on the same forms of social control. This is because, despite quarantine being an experience that is expected to be temporary, the world is preparing for a new era in which agglomerations will be impossible for a long time, forcing physical distancing is a technique of life control.

The coronavirus pandemic highlighted the social risks related to over-incarceration and imposed an end to the punitive paradigm adopted today, making a new pact on criminal punishment necessary. Furthermore, as for that, the future is still in dispute. For a more demo-

cratic way of punishing, it is necessary to bet on the expansion of alternative penalties and restorative justice practices, adopt another model of criminal drug policy, reduce the maximum time of compliance that was expanded by the "Anticrime Law," among other measures that inwood the prison system, which reaches the most vulnerable layer of the population exclusively.

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ISBN: 978-65-00-40218-6

CHAPTER

16

PROTECTION AGAINST DISEASES AND THE USE OF VACCINES: REFLECTIONS BETWEEN LAW AND PUBLIC HEALTH

by
Alberto Manuel Poletti Adorno

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter16

CONTENTS

PROTECTION AGAINST DISEASES AND THE USE OF VACCINES: REFLECTIONS BETWEEN LAW AND PUBLIC HEALTH

by
Alberto Manuel Poletti Adorno

Abstract: Despite the increase of the health budget in Paraguay and the existence of different laws related to the gratuity of health services for complex diseases, many public hospitals do not offer quality services. Many people opt to request private health services or litigation to receive the medical services they need.

With the Covid pandemic, Paraguay did not receive vaccines early due to problems with the Vaccine Alliance system (Covax). The country is below the average vaccination rate in South America. Some people were reactionary to vaccines, and others decided to wait.

Act 4621/2012 establishes the gratuity of vaccines that the Health Department approves. Act 6685/2020 allows the government to obtain vaccines from other sources considering the failure of Covax.

There is a National Fund for Solidary Resources for health (FONARESS) created by Act 4392/2012 that is currently used for highly complex diseases for people, national or foreign living in the country, with an effective treatment.

The IAHRC sentence in case Acevedo vs. Peru (July 1, 2009) was taken into consideration to contemplate that the development of social, economic, and cultural rights cannot be reached in short terms and that every country should act and provide measures to fulfill with effectivity remedies to necessities of the people.

The paper also considers the civil actions in Comparative Law related to vaccination in Covid and the debate between pro and anti-vaccination.

1. PROTECCIÓN CONTRA ENFERMEDADES Y USO DE VACUNAS: REFLEXIONES SOBRE EL DERECHO PÚBLICO Y LA SALUD

Resumen

A pesar del incremento del presupuesto de salud en Paraguay y la existencia de diferentes leyes que garantizan la gratuidad de servicios de salud para enfermedades graves, en la práctica muchos hospitales públicos no aseguran servicios de calidad. Muchas personas optan por recurrir a servicios privados de salud o inician acciones para recibir los servicios médicos que precisan.

Con la pandemia de Covid en Paraguay, el país no recibió temprano las vacunas debido a problemas con el sistema de alianza para Vacunas Covid (Covax) y el país está por debajo del promedio de vacunación de la región sudamericana. Algunas personas desconfiaban de la vacuna y otras decidieron esperar.

La ley 4621/2012 establece la gratuidad de las vacunas que fueron aprobadas por el Ministerio de Salud. La ley 6685/2020 permitió al gobierno obtener vacunas por otros medios considerando las falencias del Sistema Covax.

Existe un Fondo de Recursos Solidarios para la Salud (FONARESS) creado por Ley 4392/20112 al que pueden recurrir personas, nacionales o extranjeros residentes, con enfermedades con un tratamiento efectivo.

La sentencia de la Corte IDH Acevedo c. Perú (del 1º de julio de 2009) fue tomada en consideración y contempla el desarrollo de los derechos económicos, sociales y culturales que no puede ser obtenido en corto tiempo y que todos los países tienen la obligación de actuar y realizar acciones para cumplir con las necesidades de las personas.

El estudio contiene también un resumen de las acciones adoptadas en el ámbito del Derecho comparado y el debate entre personas favorables y contrarias a la vacunación.

2. PROTEÇÃO CONTRA ENFERMIDADES E USO DAS VACINAS: REFLEXÕES SOBRE O DIREITO E SAÚDE PUBLICA

Resumo

Apesar do aumento do orçamento da saúde no Paraguai e da existência de diferentes leis que garantem serviços de saúde gratuitos para doenças graves, na prática muitos hospitais públicos não garantem serviços de qualidade. Muitas pessoas optam por recorrer a serviços de saúde privados ou iniciar ações judiciarias para receber os serviços médicos de que necessitam.

Com a pandemia de Covid no Paraguai, o país não recebeu vacinas precocemente devido a problemas com o sistema de aliança para Vacinas Covid (Covax) e o país está abaixo da média de vacinação da região sul-americana. Algumas pessoas desconfiaram da vacina e outras decidiram esperar.

A Lei 4.621/2012 estabelece a gratuidade das vacinas aprovadas pelo Ministério da Saúde. A Lei 6.685/2020 permitiu ao governo obter vacinas por outros meios considerando as deficiências do Sistema Covax.

Existe um Fundo de Recursos Solidários para a Saúde (FONARESS) criado pela Lei 4392/2012 ao qual podem recorrer pessoas, nacionais ou residentes estrangeiros, com doenças com tratamento eficaz.

A sentença da Corte Interamericana Acevedo c. O Peru (de 1º de julho de 2009) foi levada em consideração e contempla o desenvolvimento de direitos econômicos, sociais e culturais que não podem ser obtidos em pouco tempo e que todos os países têm a obrigação de agir e realizar ações para atender às necessidades das pessoas.

O estudo também traz um resumo das ações realizadas no campo do Direito Comparado e do debate entre pessoas a favor e contra a vacinação.

3. THE COST OF HEALTH

In Paraguay, during 2021, the Ministry of Health was granted a budget of 7.5 billion Guaranies. In April, 3.9% was used, and similar levels of implementation existed in other institutions. The press echoed a budget increase in September 2021, and it is mentioned that the amount will settle only part of the institution's debts. It was indicated that the outstanding debt of 2020 was U.S. $ 50 million, and that of this year is U.S. $ 52 million, providing the credit for the payment of the debt of the previous year.[12]

Health expenditures constitute an important part of a country's budget, and it should be noted that in the case of Paraguay, a country with a low tax burden, numerous laws were enacted providing for free complex treatments and health promotion measures. And if, in theory, this is so, in practice in many public hospitals, these treatments cannot be resorted to and must resort to judicial actions or the private sector.

Some of the laws that legislate in the field of health and establish regulations, benefits, or gratuity for the inhabitants are:

1) Law 1032/1996 "National Health System" and its amendments Law 2319/2006 and 3007/2006

2) Law 1478/1999 "On the marketing of breast milk substitutes."

3) Law 2310/2003 "On child protection against preventable immunocompetent diseases," which in its article 1 provides for the obligation of acquisition by the State of vaccines included in the Expanded Program on Immunizations (EPI) and new vaccines recommended by WHO. This has BCG (tuberculosis) vaccination; DPT (against diphtheria, coqueluche, and tetanus); PWV (anti-polio); Td (against tetanus and diphtheria); MMR (against measles, mumps, and rubella); anti – Hemophilus influenzae type b; and anti – Hepatitis

[1] Diario La Nación, Paraguay, April 2, 2021 https://www.lanacion.com.py/negocios/2021/04/02/el-presupuesto-general-de-la-nacion-es-ejecutado-en-un-4/

[2] Jorge Torres, Diario La Nación, September 26, 2021. https://www.lanacion.com.py/columnistas/2021/09/26/que-hicieron-con-la-plata-para-salud/

B. Article 3 recognizes that every infant has the right to receive the vaccines in a timely and free of charge.

4) Law 3940/2009, "Which establishes rights, obligations and preventive measures concerning the effects produced by the human immunodeficiency virus," that in its article 17 provides for the right to comprehensive health care.

5) Law 4143/2010 creates the national assistance program for customized patient.

6) Law 4305/2011 "That creates the program of comprehensive care for people with lysosomal diseases." Article 5° inc. 1° modified by Law 5388/2014 provides that the protection granted must promote access to free comprehensive care and treatment of enzyme replacement of patients with lysosomal diseases following international protocols for the treatment of said disease.

7) Law 4392 2011 "That creates the National Fund of Solidarity Resources for Health (FONARESS)" that in its article 2° indicates as its primary objective the financing of medical care of pathologies of high complexity and high cost, understood as that which requires highly specialized human resources, complex medical structure, and diagnostic or therapeutic procedures that use advanced technology and whose deprivation means a vital risk for the patient in the short term or medium term. Article 11 provides as pathologies and financed medical specialties:

- Acute and Chronic Renal Failure: Include peritoneal dialysis and hemodialysis.

- Organ and Tissue Transplantation: Include histocompatibility studies, surgical and post-surgical events, and immunosuppressive medication.

- Heart disease: Include interventional cardiology, diagnostic and therapeutic, cardiac stimulation, cardiac surgery with or without extracorporeal circulation.

- Cancer: include supplies and reagents for early diagnosis, second-line antineoplastic drugs, supplies for palliative treatment, as well as the use of specialized diagnostic and therapeutic techniques.

The Law in question was amended by Laws 6553/2020 and 6703/2020.

8) Law 4744/2012 incorporates the vaccine against the Human Papillomavirus (HPV) into the Expanded Immunization Program.

9) Law 4769/2012 incorporates vaccines against pneumococcus, chickenpox, and hepatitis A into the Expanded Immunization Program.

10) Law 4793/2012 on medical assistance and health coverage favors the victims of the dictatorship of 1954-1989.

11) Law 4996/2013 creating the National Antineoplastic Drug Program

12) Law 5099/2013 provides free tariffs on health benefits of establishments of the Ministry of Public Health and Social Welfare.

13) Law 5210/2014 "School feeding and health control."

14) Law 5372/2014 "Prevention and comprehensive care of diabetes" which in its article 11 refers to the fact that the State must implement at the national level medical care aimed at the prevention, early diagnosis, and adequate treatment of diabetes and in its article 15 provides that the State must guarantee through national health programs the implementation of services with accessible technology at all times and places, basic early diagnosis programs and access to free treatment for people with diabetes.

15) Law 5482/2015 "That creates the national telehealth program" intending to grant support to the National Public Health System based on the principles of efficiency, universality, solidarity, integrality, unity, quality, and the other basic principles.

16) Law 5578/2016 "Mandatory use of an automatic external defibrillator (AED) in places of public and private access of mass concurrence" that institutes with mandatory character in places of high public concurrence the acquisition, commissioning, and maintenance for the correct use of an AED

17) Law 5809/2017 "That establishes medical coverage within the national health system for the treatment of multiple sclerosis" that in its article 3° grants the inhabitants of the country the benefit of the free provision of immunomodulating and/or specific medication that has been indicated by a neurologist professional authorized by the Registry of Professions of the Ministry of Public Health and Social Welfare, comprehensive coverage of neuro-rehabilitation treatments

with an interdisciplinary character, without limits or limits of sessions, range of medical and pharmacological treatments and therapies that are considered necessary in each case for affected people, regardless of their age and according to prescription.

18) Law 6266/2018 approves comprehensive care for people with cancer.

19) Law 6283/2019 on medical coverage within the national health system to treat neuromyelitis optic.

20) Law 6612/2020 regulates the use of plasma therapy of Covid convalescents in a practical way.

21) Law 6781/2021 establishes the rights and obligations in the prevention, comprehensive health care, and social protection of people affected by tuberculosis.

4. VACCINATION AND JUDICIAL PRACTICE

The amount of the budget corresponding to vaccines was increased in 2021 due to the Covid pandemic. Paraguay did not receive immediate answers from the COVAX mechanism to purchase doses, so it was among the last to initiate vaccination and did so through direct purchases and donations, even reforming its legal framework. It is important to note that vaccination for diseases other than Covid continued. There are essential differences between both assumptions since the additional vaccines are approved (so there were no significant controversies for their application). In the case of Covid, it was necessary to work urgently due to the magnitude of the pandemic. In addition to the limited doses, many people were still reluctant to apply the vaccine, so the attention of the most affected groups, the elderly, was prioritized. Then ages were established from which the vaccine could be used to those people who attend the authorized places.

It should be borne in mind that the Paraguayan State has, under the Constitution, the power to impose measures to provide disaster relief (art. 68) through a law (art. 202 para. 13).

In addition to article 68 of the Constitution, which enshrines the right to health, articles 34 et seq. of the Health Code and the vaccination law make established vaccines compulsory. The Sanitary Code provides:

Article 34 - Vaccination of persons is mandatory in the cases and forms determined by the Ministry.

Art. 35 - The Ministry must develop vaccination programs against preventable diseases in coordination with the other institutions of the sector.

Art. 36 - The manufacture and marketing of vaccines for human use and against zoonoses require the prior authorization of the Ministry.

5. LAW 4621/2012 ON VACCINES

Article 5 provides that "*vaccines, which by the provisions of this Law, are part of the National Vaccination Scheme shall be available for administration free of charge and promptly, during all days of the year, in all establishments of the public health system and social security; without prejudice to the possibility of carrying out specific campaigns or operations, including the weeks or days of vaccination. The Special Vaccination Schemes will be implemented exclusively in the National Vaccination Centers authorized by the Expanded Program on Immunization for this purpose.*"

Individuals, groups, or institutions may access other vaccines at the private sector's request if the National Vaccination Scheme established by the Expanded Program on Immunizations of the Ministry of Public Health and Social Welfare has been complied with. However, there was a change in the legal framework.

Law 4621/2011	Law 6685/2020
Article 30.- The vaccines and syringes acquired by the Expanded Program on Immunizations contemplated within the National Vaccination Scheme and those required for the vaccination service shall be considered national security supplies. In this sense, the acquisition of vaccines and syringes through the Pan American Health Organization Vaccine Revolving Fund will be established as an exclusive purchasing system. The acquisition of vaccines by the Expanded Program on Immunizations made through the mechanism provided for in this article may only be excepted when the Revolving Fund does not offer the vaccines and/or does not have enough amount to cover the requirements of the National Vaccination Scheme. In these cases, it must be referred to ordinary public procurement procedures, and vaccines must comply with all the requirements established by the National Regulatory Authority.	Article 30.- Vaccines and syringes acquired by the Ministry of Public Health and Social Welfare, included in the National Vaccination Scheme and those required for the vaccination service, shall be considered national security supplies. In this sense, the acquisition of vaccines and syringes through the Revolving Fund for Vaccines of the Pan American Health Organization will be established as a purchasing system. The acquisition of vaccines by the Ministry of Public Health and Social Welfare carried out through the mechanism provided for in this article, maybe excepted: a) If the Vaccine Revolving Fund of the Pan American Health Organization does not offer the vaccines or does not have enough to cover the requirements, based on the target population of the vaccine, belonging to the National Vaccination Scheme. b) In the case of Health Emergency, in the face of the Covid-19 pandemic, which justifies the intervention and immediate protection of the population, objective with vaccines. In this case, the Ministry of Public Health and Social Welfare is authorized to acquire biologics through mechanisms other than the Vaccine Revolving Fund of the Pan American Health Organization, either through other international organizations or directly from authorized suppliers. Likewise, the processing and payment of corresponding advances for acquiring new vaccines are authorized. Vaccines must meet all requirements, which the National Regulatory Authority will establish. “

Note that it went from only acquiring vaccines through PAHO’s Rotatory Fund to enabling MSPyBS (acronym for Ministry of Health) to acquire vaccines through other means.

In Paraguay, the following vaccines are mandatory: BCG, Rotavirus, OPV (Sabin), Pentavalent, DPT, SPR, Diphtheria Tetanus Pertussis, Measles-Mumps, Rubella, A.A. (Yellow Fever), Anti Influenza and H.B. (Hep. B)[3]

Other countries in the region may have vaccines depending on their epidemiological level.

[3] Ministry of Public Health and Social Welfare
http://www.guiamedica.com.py/vacunacion/
Notebooks adolescent health http://www.mspbs.gov.py/libretas-de-salud-adolescente-disponibles/

The jurisprudence enshrined the obligation of white professionals to alert the courts to cases of children without vaccines. The Court held:[4]

"It is appropriate to make room for the protection measure requested so that two minors are subjected to the Official Vaccination Plan of the Ministry of Health when it must be guaranteed that children have a dignified life in the future, free of preventable infectious diseases and since it is the most convenient for their evolutionary development. As a health worker, the plaintiff doctor has to denounce violations of the rights and guarantees of children – art. 5 of the ANC".

6. THE NATIONAL FUND OF SOLIDARY RESOURCES FOR HEALTH (FONARESS)

FONARESS was created by Law 4392/2011 includes as its beneficiaries all the inhabitants of the Republic of Paraguay, nationals, and foreigners legally settled in the country, provided that they do not have the necessary coverage from the insurance of a private, public or mixed nature (art. 2º) and establishes as its primary objective the financing of Medical Care for pathologies of High Complexity and High Cost but limited to those whose treatment has demonstrated effectiveness; allowing it to be available to the entire population in an equitable manner and with the maximum possible efficiency, efficacy, and quality, under the scientific and technological advances of current evidence-based medicine.

It must be considered that the State should attend to the inhabitants' health, which has been upheld by the Inter-American Court of Human Rights in the case of Acevedo Buendía et al. v. Peru. Judgment of July 1 2009, Series C, No. 198, stating: *102. The Court notes that the progressive development of economic, social, and cultural rights has been the subject of a pronouncement by the United Nations Committee on Economic, Social and Cultural Rights that the full realization of these rights "cannot be achieved in a short period " and that, to that extent, "requires a necessary flexibility device*

[4] Court of Children and Adolescents of the Judicial District of Misiones A.B., T. J. R. and A.B., B. A. s/ Protective measures. (SD No. 119 of 09/02/2015)

that reflects the realities of the world [...] and the difficulties involved for each country in ensuring [such] effectiveness." The State will have essentially within the framework of such flexibility in terms of time and modalities. Still, not exclusively, an obligation to do, that is, to adopt measures and provide the means and elements necessary to respond to the demands of the effectiveness of the rights involved, always to the extent of the economic and financial resources at its disposal for the fulfillment of the respective international commitment acquired. Thus, the progressive implementation of these measures may be held accountable. If applicable, compliance with the individual obligation acquired by the State may be demanded before the bodies are called upon to resolve possible human rights violations.

103. As a correlation to the previous, there is a conditional duty of non-regression, which should not always be understood as prohibiting measures restricting the exercise of a right. In this regard, the United Nations Committee on Economic, Social and Cultural Rights has stated that "measures of a deliberately re[gresive] nature in this regard will require the most careful consideration and must be fully justified by reference to all the rights provided for in the [International Covenant on Economic, Social and Cultural Rights] and in the context of the full use of the maximum of the resources available to [the State]." In the same vein, the Inter-American Commission has considered that to evaluate whether a regressive measure is compatible with the American Convention, it must "determine whether it is justified for reasons of sufficient weight."

It is not the first time that the Paraguayan State has been overwhelmed in its possibilities. Already on the dengue pandemics, the country went through situations in which the State was dominated in its health services. The population that does not have medical insurance is rushed to hospitals to seek care.

To partially solve this situation, article 6 of the FONARESS Law provides for the incorporation into the Fund of "*all health provider entities, whether public or private, accredited and categorized as Level 3 (High Complexity) or those that have adequate infrastructures for the benefits included, provided that they are accredited and categorized by the Superintendence of Health. All incorporated Entities must be registered and authorized by the Ministry of Public Health and Social Welfare. The Entities Providing Private Health Services may be used when the medical situation warrants it, which will be determined in each particular case*."

Undoubtedly, the pandemic in which we find ourselves merited the qualification of high complexity. In dealing with serious situations and to reflect on the cost of health and existing constraints, we must refer to comparative Law. We have considered transcribing the translation of sentences where the obligation to vaccinate and the pandemic's restrictions for access to health were discussed.

7. LEGAL ACTIONS OF COMPARATIVE LAW IN THE FIELD OF VACCINATION AGAINST COVID

It may be seen that Law 4392/2011 does not provide for funds to be allocated for vaccines. Law 6685/2020 modified articles 24 and 30 of Law 4621/2012 "On vaccines" and provided that the necessary and sufficient resources for the free and adequate provision of vaccination and epidemiological surveillance services contemplated in the Law be included annually in the general budget of expenses of the nation in a unique item.

In October 2021, only 39.8% of the population received at least one dose, and 1,998,275 (28%) were fully vaccinated. Given the lack of doses for all inhabitants, priority was given to vulnerable groups, and requests were made first to vaccinate certain irrigation professions (white personnel) and then Amparo's. Thus, vaccination was requested for a woman with cancer-based on Law 6266/2020. Days later, a lawyer suffering from asthma and allergy managed to receive his first dose.[567]

In comparative Law, actions have been proposed to achieve rapid vaccination and then responsibility against States.

[5] Ourworldindata.org https://ourworldindata.org/covid-vaccinations?country=PRY

[6] Diario La Nación, June 8, 2021 https://www.lanacion.com.py/judiciales/2021/06/08/defensa-publica-logra-via-amparo-que-una-mujer-con-cancer-sea-inmunizada-contra-el-covid-19/

[7] Diario Última Hora, June 11, 2021. https://www.ultimahora.com/un-abogado-recibe-vacuna-contra-el-covid-19-via-amparo-judicial-n2945412.html

8. PRECAUTIONARY MEASURES REJECTED TO OBTAIN THE COVID VACCINE

The judge of référés (emergency measure) of Châlons-en-Champagne, France rejected in a judgment of January 7, 2020, Cause 2100005 the request of a man with a disability who asked him to order the Ministry of Health to vaccinate him within 48 hours.

Articles L-511-1 and L-521-2 of the Code of Administrative Justice provide:

"The judge of faith decides through measures that present a provisional character. It is not issued on the main [case]."

"When a request to that effect justified by urgency is made to him, the judge of faith may order all the measures necessary for the safeguarding of fundamental freedom in which a legal person governed by public Law or a body governed by private Law responsible for the management of a public service or a body governed by private Law responsible for the management of public service would have caused, in the exercise of its powers, serious and manifestly unlawful harm. The judge of référé pronounces himself within forty-eight hours."

The judgment mentions:

"3. By application of article L-521-2 of the code of administrative justice, the right to respect for private life constitutes a fundamental freedom within the meaning of the provisions of this article. In addition, a marked lack of an administrative authority in the use of the powers conferred by law to implement the right of every person to receive, subject to their free and informed consent, the treatment and care appropriate to their state of health, such as appreciated by the doctor, can produce, for the application of these provisions, a serious and manifestly illegal damage to a fundamental freedom when there is a risk of generating a serious alteration of the state of health of the person concerned".".

The circumstances and the context of the dispute

4. The emergency of the new Coronavirus, responsible for the coronavirus disease 2019 or Covid 19 and particularly contagious, has been qualified as a public health emergency of the international scope by the World Health Organization on January 30, 2020, after the pandemic on January 11, 2020. The spread of the virus over French territory has led the minister in charge of health and then the Prime Minister to take, as of January 4, 2020, increasingly strict measures with the aim of reducing the risks of contagion. To deal with the aggravation of the epidemic, the Law of March 23, 2020, has created a state of health emergency regime, defined in articles L.3131-12 to L. 3131-20 of the public health code and declared a state of a health emergency for two months from March 24, 2020. The Law of May 11, 2020, extended the condition of a health emergency, and completing the provisions has extended the State of health emergency until July 10, 2020. A new progression of the epidemic has led the President of the Republic to take on October 14, 2020, based on articles L. 3131-12 and L. 3131-13 of the public health code, a decree declaring the State of health emergency and adopting various provisions for the management of the health crisis has extended the State of emergency until February 16, 2021, inclusive...

On the request for référé/urgency

7. It follows from the instruction that Mr. F. ... suffers from severe myasthenia and needs continuous respiratory support with tracheostomy and obesity, and diabetes. He has been recognized as 70% invalid. Considering that contamination by the virus would undoubtedly be fatal, considering his State of health, as well as the impossibility in which he finds himself to benefit from the vaccine, violates the fundamental freedoms referred to in point 3, it must be seen as a complaint against the emergency judge, based on Article L. 521-2 of the code of administrative justice cited, to order the Ministry of Solidarity and Health to take the necessary measures to enable it to receive the necessary injections within forty-eight hours of notification of this resolution.

8. However, on the one hand, the medical reports produced by the applicant in support of his claim are ancient, with the sole exception of a medical certificate of January 6 2021, made after the hearing. If this certificate indicates that Mr. F ... "is part of patients at risk of Covid 19" considering their State of health, it does not provide any additional precision in this regard. It does not demonstrate that the interested party would be within the populations particularly vulnerable to the disease. The applicant's exposure to the risk of contamination is also limited. His representative stated at the hearing that he lives at home, that he does not work due to his disability, and that he does not need to receive the daily assistance of other people outside his wife. Thus, if the State of health of Mr. F. ... it certainly makes him vulnerable to Covid-19, it was not demonstrated, at this stage of the instruction, that he would be among the people who by comorbidity factors would be particularly vulnerable to that disease despite his age, to such an extent that characterizes the need for him to be vaccinated in a short time, nor in any state of the case, which is particularly exposed to a risk of contamination.

9. Furthermore, it does not result from the instruction that a doctor prescribed the Covid vaccine to Mr. F. ... whereas, as mentioned in the recommendations of the High Health Authority of December 23 2020, a medical consultation before vaccination is, in general, necessary to prescribe the vaccine after a case-by-case assessment of its relevance. In this regard, the medical certificate of January 6, 2021, is limited to indicating that the applicant "may benefit from the vaccine according to the recommendations and subject to a specialized opinion considering the counter-indications of the vaccine." Thus, it follows from the instruction that at the date of this resolution, the vaccine against Covid-19 has not been prescribed to Mr. F. ... and has not been subject to a prior assessment of its compatibility with its medical history...".

10. It follows from what was mentioned in points 8 and 9 that Mr. F... does not demonstrate that there has been a situation of characterized urgency in the species that justifies ordering the health authorities to benefit, in a short period, from the administration of the vaccine against Covid 19.

11. Furthermore, in the State of the case, as mentioned in point 2, the manifestly unlawful nature of the infringement of a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice must be assessed in the light of the means available to the competent administrative authority and the measures which have already been taken. By merely maintaining that the absence of the acquisition by the State of vaccines in insufficient numbers for the entire French population reveals a defective deficiency on its part and that the very existence of a vaccination strategy is discriminatory, whereas this rests precisely, and has been mentioned in point 5, on the need to prioritize the populations to be vaccinated according to the number of doses of vaccines available, Mr. F... that he intends to benefit from this vaccine within a few weeks to a few months, after [the vaccine] has been provided to other people more vulnerable than him, does not demonstrate that the impossibility in which he finds himself of having immediate access characterizes a serious and manifestly illegal infringement of the freedoms outlined in point 3.

9. ACTIONS OF RESPONSIBILITY OF THE STATE FOR LACK OF VACCINATION

The European Court of Human Rights in the case le Mailloux v. France (No. 18108/20) in the judgment of November 5, 2020, held that the State could not be forced to vaccinate a person in the current situation of Coronavirus leaving aside the plan adopted by the health authorities. We transcribe the translation of the ruling:

Facts

1. The applicant, Mr. Renaud Le Mailloux, is a French citizen born in 1974 and resident in Marseille

The circumstances of the species

2. The facts of the case, as set out by the applicant, may be summarized as follows.

3. The spread of a new coronavirus, responsible for the Covid 19 disease, over French territory has led the French authorities to adopt measures to prevent and reduce the consequences of health threats on the population's health. To this end, various decrees were adopted and the Law of March 23, 2020. The State of health emergency has been declared for two months from March 24, 2020. It was extended until July 10, 2020, by a law of May 11, 2020.

4. Dissatisfied with the management of the Coronavirus health crisis by the State, the Union of Doctors of Aix and Region (SMAER) and two individuals presented to the Council of State an action of référé-liberté (protection measure equivalent to Amparo for cases of urgency) based on article L-521-2 of the Code of Administrative Justice to force the State to take all appropriate steps to provide FFP2 and FFP3 masks to doctors and health professionals, surgical masks to the sick and the general population, mass screening tests to health professionals and for tests in the population, as well as to authorize doctors and hospitals to prescribe and administer to patients at risk the association of hydroxychloroquine and azithromycin and medical biology laboratories to perform screening tests.

5. The applicant, who mentions being weakened by a severe pathology, intervened in supporting the requests. A letter filed on March 26, 2020, concluded that the submission of SMAER and others should be granted, invoking the State's lack of management of the health crisis to the detriment of articles 3, 8, and 10 of the Convention.

6. By decision of March 28 2020, the judge de référé (cases of urgency), after having declared the admissibility of the applicant's intervention, rejected the application of SMAER and the other persons.

Grievances

7. The applicant is aggrieved, under the angle of Articles 2, 3, 8 and 10 of the Convention, by the omissions of the State in the management of the Covid 19 crisis. Invoking the State's positive obligations, it denounces an insult to the right to life of the French population derived from the limitations of access to diagnostic tests, prophylactic measures, and specific treatments. It also denounces an attack on the private lives of people who die alone from the virus.

In Law

8. The applicant invokes Articles 2, 3, 8, and 10 of the Convention in terms of which:[8]

9. The Court notes that if the right to health is not as such part of the rights guaranteed by the Convention, States have a positive obligation to take the necessary measures for the protection of the lives of persons under their jurisdiction and to protect them in their physical integrity, falling within the scope of public health (Lopes de Sousa Fernandes v. Portugal [G.C.] nº 56080/13 § 165, December 19, 2017, Vasileva v. Bulgaria No. 23796/10 §§ 63-69, March 17, 2016). That said, the Court should not resolve whether the State has failed to fulfill its positive obligations to the extent that the present application is inadmissible for the following reasons.

10. The Court notes that to avail himself of article 34 of the Convention, an applicant must be able to claim to be a victim of a violation of the Convention; the notion of "victim" according to the Court's consistent jurisprudence must be interpreted autonomously and independently of domestic concepts such as those concerning interest or quality to act. The interested party must be able to demonstrate that he has "directly suffered the effects" of the measure at issue (Lambert et al. v. France [G.C.] No 46043/14 § 89 TECH 2015 (extracts).

11. Furthermore, article 34 of the Convention does not permit complaints in the abstract *of violations of the Convention. It does not recognize* actio popularis, *which means that an applicant cannot be aggrieved against a provision of domestic Law, a national practice, or a public act simply because it appears to him to be contrary to the Convention.*

For an applicant to claim to be a victim, it is necessary to produce reasonable and convincing indices of the likelihood of the occurrence of a violation as far as they are personally concerned; mere suspicions or conjectures are insufficient in that regard (Legal Resource Centre on behalf of Valentín Câmpenanu v. Romania [G.C.] No 47848/01 § 101, ECtHR 2014 and the references cited).

12. The Court finds that the applicant is aggrieved in the abstract by the inadequacy and inadequacy of the measures taken by the French State to combat the spread of the Covid 19 virus. First, the Court finds that the applicant did not raise these grievances during the référé proceedings before the Council of State as a third-party intervener. However, that status is not sufficient to confer on him the

[8] Simple translation of the French text. Original text in https://hudoc.echr.coe.int/eng#{%22appno%22: [%2218108/20%22], %22itemid%22: [%22001-206611%22]}

position of a direct victim within the meaning of Article 34 of the Convention (mutatis mutandis Tourkiki Enosi Xanthis and Others v. Greece No 26698/05 No 39, March 27 2008 Winterstein and Others v. France, No 27013/07 §§ 107-108, October 17 2013.

13. Secondly, the Court notes that the applicant does not provide any information on his pathology and refrains from explaining why the alleged faults of the national authorities would be likely to affect his health and private life. It does not produce any reasonable and convincing indication that would make it plausible that the application of the measures adopted by the legislator and the government would characterize, in what it respects, a lack likely to lead to the shortcomings that it denounces. In these circumstances, the Court considers that Mr. Le Mailloux, whose request must be observed for the sole purpose of answering in a general way the texts and the measures adopted in France to combat the pandemic, do not allow under any circumstances to grant him the status of the potential victim.

14. The Court further considers that if the applicant were faced with a situation of refusal of care or care that would result from the sanitary measures on which he denounces the insufficiency, he could answer the compatibility of those rules with the Convention before domestic jurisdictions.

15. In those circumstances, the Court considers that the injunction concerns an actio popularis. T*he applicant could not be regarded as a victim within the meaning of article 34 of the Convention regarding the violations alleged. The application is therefore incompatible* ratione personae *with the provisions of the Convention.*

For these reasons, the Court, unanimously.

Declares the application inadmissible.

The examples mentioned show that there are always controversies in the matter. Some people do not want to be vaccinated, leading to difficult situations. In 2019 a French boy reintroduced measles to Costa Rica. The Central American country had not registered autochthonous cases since 2006 or imported cases since 2014. An action plan had to be made to prevent the disease from spreading among the local population.[9]

Many people don't want to get vaccinated against Covid. Who recognized that vaccine hesitancy is one of the main threats to global

[9] BBC 28 February 2019 https://www.bbc.com/mundo/noticias-47402499

health? There are logistical problems for moving doses, and people who refuse to be vaccinated must be convinced.

California Governor Gavin Newsom ordered that starting October 15, teachers and staff at educational institutions must have vaccination tests or undergo weekly testing for the presence of Coronavirus. According to the New York Times, it is the first U.S. state to do so in an article signed by Jill Cowan on August 11, 2021.

"We think [the initiative] will be well received to keep our most precious resources safe and sound," said the Governor, "which are our childhood."[10]

The announcement was made in a context, as in other countries, in which cases of the Delta variant are increasing. It is mentioned that several companies, including Google, Disney, Tyson Food, and Microsoft, announced vaccine requirements to their employees.

Some countries announced requiring a health passport to enter certain places. Other personalities in entertainment also announced that they would only receive vaccinated people.

It was indicated that if all people were initially urged to get vaccinated, the Governor announced last month that he would require public employees to submit their vaccination certificates or undergo weekly tests for the presence of the virus.

10. THE DEBATE BETWEEN PROPONENTS OF THE VACCINATION SYSTEM AND THE SO-CALLED "ANTI-VACCINE."

On the one hand, it must be considered that the vaccines were subjected to different tests and that today they are suitable for the population. It should be noted that we are facing a new disease. According to specialists, the vaccine does not prevent contracting the disease but increases the defenses so that it is without severe symptoms.

[10] Jill Cowan: "California teachers must have proof of vaccination or face regular testing, the governor says". New York Times, 11 de agosto de 2021

Several of the hypotheses of the defenders of the other position go through the risks that could occur for health, religious arguments, or even the existence of a plot without mentioning other hypotheses that political representatives of different countries defend.[11].

It has been stressed that medical treatment should be informed to the patient. Each person must be advised before the white professional of their trust, undoubtedly the specialist in the field.

The example of Jehovah's Witnesses who do not accept blood transfer was used as a precedent to force vaccination. In Paraguay, in August 2019, the Supreme Court of Justice declared the constitutionality of article 24 of Law 3441/2008 on Blood in a case of Amparo against a patient who refused to receive a blood transfusion because she was of that religion.[12]

We believe that the example is not appropriate for two reasons.

In the first place, it must be considered that in this case, the affected person can make the decisions that affect him with the appropriate information when he is in use of his faculties. If your life is at risk, the decision is up to the doctors who must, when the situation is not urgent, require authorization from a family member or, where appropriate, the judicial one. In an emergency, they are empowered to act and then communicate the situation.

Secondly, in the case of Covid, the risk of disease is not only for the person who refuses to receive the treatment but for the community. Therefore, the health authority should be considered to have the power to provide for measures for general protection.

Between the option of taking the Covid test weekly and the protection of the vaccine, many people will opt for what the science tells us. After the vaccine, we must continue to inform and respect the slogans of health professionals to try to eradicate this disease from the face of the earth and remember the people who have left us. This

[11] Piñar Ramírez, Anabel: ¿Quiénes son y qué defienden los antivacunas? La Vanguardia, 20 de noviembre de 2021 https://www.lavanguardia.com/vida/junior-report/20201120/49551491409/quienes-son-y-que-defienden-los-antivacunas.html

[12] Diario Última Hora, August 14, 2019 h ttps://www.ultimahora.com/corte-resuelve-transfusion-sangre-testigo-jehova-n2838137.html

situation also requires awareness for the close people who died because of the disease and the community that deserves an opportunity to return to everyday life, which will not be possible if the control of the disease and the chances of contagion remain high.

The Supreme Court of Justice of Argentina held in a case that resolved to intimate parents to vaccinate their child under warning to do so compulsively that the refusal affected public health and the best interests of the child that according to the public health policy established by the State includes methods of prevention of diseases among which are vaccines[13].

The French Constitutional Council ruled on August 5, 2021, that the health passport is following the Constitution, as is mandatory vaccination for certain professions. The required isolation of patients, however, has not been authorized.[14]

The examples mentioned in which international bodies were reached to obtain health care and vaccines should be analyzed with the cases of children Charlie Gard and Alfie Evans, of British nationality and who had rare diseases that could not be treated by medical science. After separate court battles, both died in 2017 and 2018.

There is a fundamental principle of public health administration that overly onerous treatment should not be applied if it impairs people's ability to obtain health benefits.

Some authors consider that it should be discussed about "a life worth living" and that one is not obliged to use those therapeutic measures that offer a reasonable priory of benefit. And this must be decided by health professionals and not by judges, as well as the granting of vaccines, even in complicated cases.

[13] Corte Suprema de Justicia de Argentina, "N.N. o U., V. s/ protección y guarda de personas", del 12/06/2012.

[14] Diario Libération, Paris, 5 August 2021 https://www.liberation.fr/societe/sante/le-conseil-constitutionnel-valide-le-pass-sanitaire-et-la-vaccination-des-soignants-mais-retoque-lisolement-obligatoire-20210805_LLLIRNBY3RBDDFUQ62MALZHPZM/?xtor=CS8-60

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ISBN: 978-65-00-40218-6

EDUCATION AND CULTURAL DIVERSITY. CHALLENGES OF THE 2030 AGENDA

by Pedro Garrido Rodríguez

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter17

CONTENTS

EDUCATION AND CULTURAL DIVERSITY. CHALLENGES OF THE 2030 AGENDA

by
Pedro Garrido Rodríguez[1]

Abstract: Currently, no one doubts educational rights. International law grants them the category of universal, compulsory and free. However, the reality is that not all people can enjoy them. There is still a very large group whose circumstances do not allow them to enjoy their educational rights on an equal basis with the rest of the world. The situation is worse in the case of migrants, refugees and the excluded. The current health crisis has further exacerbated these vulnerabilities globally.

Keywords: Human Rights, educational rights, immigration, equity, education.

Whenever we talk about human rights, it is necessary to be clear about the concepts and draw the appropriate relationship between signifiers and meanings. Another added difficulty in the educational debate is that of the very definition of conceptually elusive terms such as equality or equity.

Today, there are many people in the world who, despite having their educational rights recognized, cannot enjoy them in practice. The people who suffer most from this lack are those with fewer resources. The data allow us to establish a very clear direct relationship between poverty and educational exclusion. The situation of people from countries in conflict is especially difficult. Over the past decades, especially since 2000, progress in international cooperation and

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multilateral agreements have narrowed the gap. However, 50% of the 57 million children out of school live in sub-Saharan Africa. Regional differences continue to be enormous.

This relationship can also be seen in reverse. People with low education are three times more likely to experience relative poverty than people with higher education[2]. The relationship is 30.1% in people with a low level of education compared to 8.4% in people with higher education. In this sense, López et alii also analyze in their research on unaccompanied minors the importance of this conditioning factor in the situation of this particular group that is especially vulnerable to exclusion[3].

UNICEF (United Nations Children's Fund) indicates in its State of the World's Children 2019 report[4] that at least 1 in 3 children under 5 years of age suffers from malnutrition or overweight and 1 in 2 hidden hunger, that is, lack of essential vitamins and nutrients. The report states that most of the different forms of malnutrition are caused by poverty and inequality. One of the most dire consequences of malnutrition is that it compromises the child's entire developmental process and is a huge burden that on many occasions hinders or directly prevents their correct educational development or even attendance at school:

> *Children living in extreme poverty in low-income countries, especially in remote areas, are more likely to be undernourished and malnourished. They are also less likely to have access to clean water, sanitation and health care. Given their disadvantage, they are also less likely to finish school; they are more likely to get sick and, finally, to continue in the cycle of poverty*[5].

[2] Ayala Cañón, Luis y Ruiz-Huerta Carbonel, Jesús (Dirs.) (2018): *Informe sobre la desigualdad en España*. Ed. Fundación Alternativas. Madrid.

[3] López *et alii* (2019): "Avanzando hacia la inclusión intercultural: percepciones de los menores extranjeros no acompañados de centros educativos españoles". En: *Revista Nacional e Internacional de Educación Inclusiva*. Volumen 12, Número 1, junio 2019. Pp. 331-350.

[4] UNICEF (2019): *Estado Mundial de la Infancia 2019.Niños, alimentos y nutrición: crecer bien en un mundo en transformación*. UNICEF, Nueva York.

[5] *Ibidem.*

In 2018, the stunting rate stood at 21.9%, overweight at 5.9% and wasting at 7.3%. When the global commitment is to try to reduce them to 12.2%, 3% and 3% respectively in the year 2030. The Report makes it very clear that much remains to be done and that we are far from what would be desirable.

In 2015, more than 150 heads of state and government adopted the 2030 Agenda at the UN[6]. This is made up of 17 Sustainable Development Goals and 169 specific goals to be achieved before said date and which are interrelated by three basic elements that serve as a common thread: economic growth, social inclusion and environmental protection. The 2030 Agenda proposes an inclusive and equitable sustainable development model in which the eradication of poverty in all its forms and dimensions is an essential condition[7]. The first example of this is that the first of the 17 objectives refers precisely to the eradication of poverty.

The 2030 Agenda establishes the fourth Sustainable Development Goal to achieve Quality Education. Specifically: *Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all*[8]. The achievement of this general objective implies effectively ensuring a series of specific objectives linked to the completion of compulsory and free education, reaching the minimum learning standards, access to quality preschool education, access of women and men to training technical, professional and higher quality under equal conditions, increase the number of young people and adults with the necessary skills to access decent employment, eliminate gender inequalities in education and ensure equal access to all levels of education and training education for vulnerable people, ensure literacy for all young people and as many adults as possible, and promote education for sustainable development.

The procedures proposed to achieve these objectives must be gradually implemented and monitored, both regarding their execution

[6] United Nations General Assembly (2015): *Transformar nuestro mundo: la Agenda 2030 para el Desarrollo Sostenible*. Resolución A/RES/70/1, de 21 de octubre de 2015. Nueva York.

[7] *Ibidem.*

[8] *Ibidem.*

and their effects. They are related to the provision of facilities and infrastructure, increasing scholarships and funding and also increasing the supply of qualified teachers:

> *Build and adapt educational facilities that take into account the needs of children and people with disabilities and gender differences, and that offer safe, non-violent, inclusive and effective learning environments for all.*
> *By 2030, substantially increase globally the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, to enable their students to enroll in higher education, including vocational training programs and technical, scientific, engineering and information and communications technology programmes, from developed and other developing countries.*
> *By 2030, substantially increase the supply of qualified teachers, including through international cooperation for teacher training in developing countries, especially least developed countries and small island developing States*[9].

Progress has been made in recent years, the planning is ambitious, it is methodologically well articulated, it has a comprehensive approach and it has the legitimacy of international consensus. However, the detailed analysis of the contrasted reality is not so hopeful. According to the Report on the Sustainable Development Goals[10], 55% of children and adolescents have not reached the minimum skills in Reading or Mathematics. If the data itself is shocking, from our point of view it is even more so to verify the fact that within this figure there are 1/3 of minors who have not been to school and, most surprising of all, there are 2/3 that despite having been schooled, they have not achieved the skills either. The figures vary greatly from one region to another. In Europe and North America it stands at 14%, while in Sub-Saharan

[9] *Ibidem*.
[10] United Nations (2019): *Informe de los Objetivos de Desarrollo Sostenible 2019*. Ed. United Nations, New York.

Africa it is at 84% in Mathematics and 88% in Reading. Central and South Asia is the second highest rate region at 76% in Reading and 81% in Mathematics.

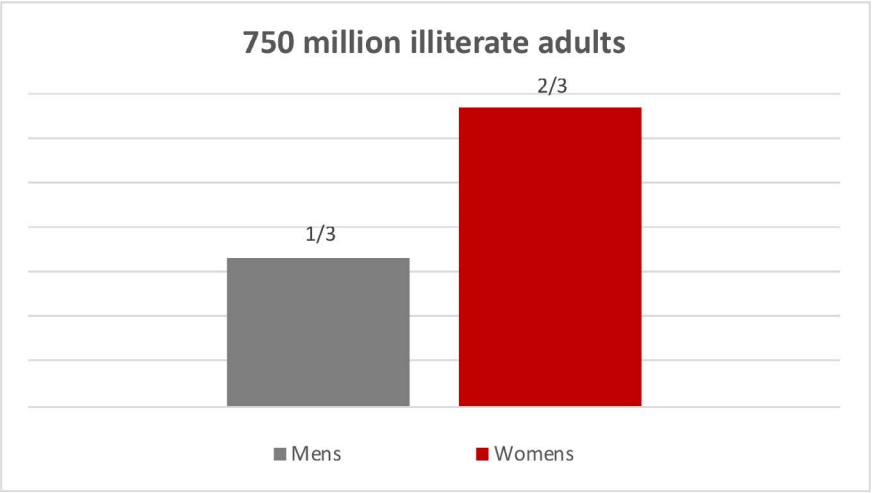
Regarding schooling in the early childhood period, it has increased considerably from 63% in 2010 to 69% in 2017. However, the gap between countries remains enormous. The average enrollment rate one year before the start of primary education is 42% among the least developed countries. The countries with the lowest enrollment rate in this period are found in Sub-Saharan Africa (42%), North Africa and West Asia (52%) and Central Asia (56%). In the rest of the countries, it exceeds 80%.

Despite progress in schooling, there are still 262 million children and adolescents between the ages of 6 and 12 who are not in school. This figure represents 1/5 of the population of their age. The figures are especially high in the upper secondary stage with 67% in the case of women and 71% in that of men. It must be said that much progress has been made since 2000, when the number of out-of-school people in this age group amounted to almost 400 million. However, despite the efforts to reduce this gap, the reality is that the global out-of-school rate continues to be unaffordable and incompatible with the objectives of fair, equitable and sustainable development that the International Society has set itself as a goal. .

The deficiencies in infrastructures, means and facilities are an insurmountable limitation in many cases. Especially, once again, in sub-Saharan Africa where less than half of its primary and lower secondary schools have access to clean water, electricity, computers and the Internet. The asymmetry with the rest of the world is abysmal.

Over the past 25 years, female literacy has increased more than male literacy in all regions. However, there are still 750 million illiterate adults. Of them, 2/3 are still women. Within this figure, almost half, 49%, are in South Asia and 27% in Sub-Saharan Africa. In other words, more than 75% of illiterate adults are found in these two regions. Only 5% are found in developed countries.

Fig. 1. Literacy level in the world



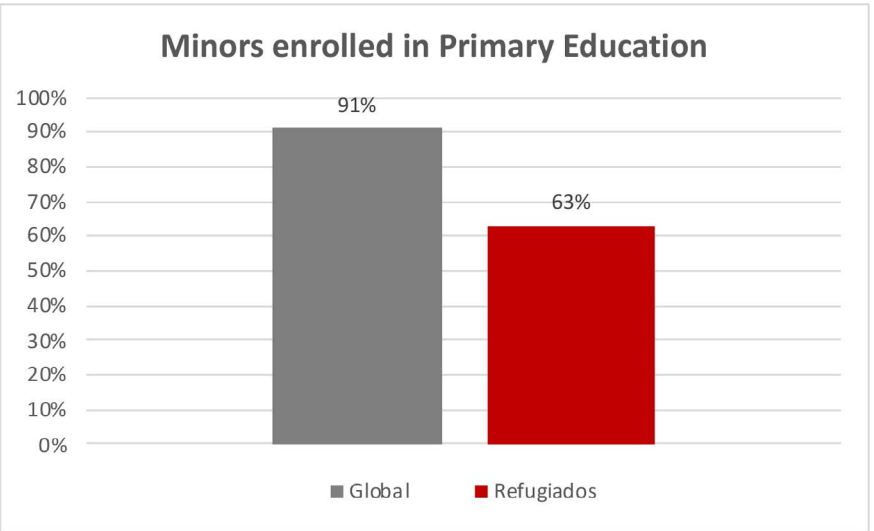
Source: *Report on the Sustainable Development Goals*. UN. 2019

The case of people living in conflict zones is even more dramatic. According to the UNESCO (United Nations Educational, Scientific and Cultural Organization) Global Education Monitoring Report[11], about half of asylum seekers in Greece and Italy who have completed primary education lack a minimum literacy level. A figure well above the world average, the result of the enormous difficulties that people in this situation go through. Comprehensive, real-time monitoring of people in these circumstances is not always possible, given the complexity and how quickly their situation can change. Added to this is the fact that the samples on the displaced population are taken mainly in camps in which there are barely around 40% of asylum seekers and an even smaller proportion of internally displaced persons. Therefore, the data referring to this group must be viewed with caution. The illiteracy rate may be even higher. As stated in the Report: *monitoring the educational attainment of these people on a global scale will undoubtedly continue to be a mosaic of diverse approaches for some time to come*[12].

[11] UNESCO (2019): *Global Education Monitoring Report*. Ed. UNESCO, París.
[12] *Ibidem*.

UNHCR (United Nations High Commissioner for Refugees) highlights in its report Strengthening the education of refugees in crisis[13] that there are some 7.1 million refugee children of school age, of which 3.7 million are out of school. This is more than half. In the primary education stage, the enrollment rate is higher, but it continues to be well below what is desirable: 63%, compared to 91% for the global rate. Despite the fact that the figure is two points higher than the previous year, the gap continues to be enormous and the devastating figure: 1.6 million refugee children out of school. Many of the refugee children are in developing countries. These countries already struggle to provide quality education to their own populations, limiting their ability to meet the educational needs of newcomers. Another difficulty is that on many occasions the refugees, who arrive fleeing from their own countries, do not have the necessary documentation to be able to attend school. All this redounds even more to the problem.

Fig. 2. Schooling in Primary Education

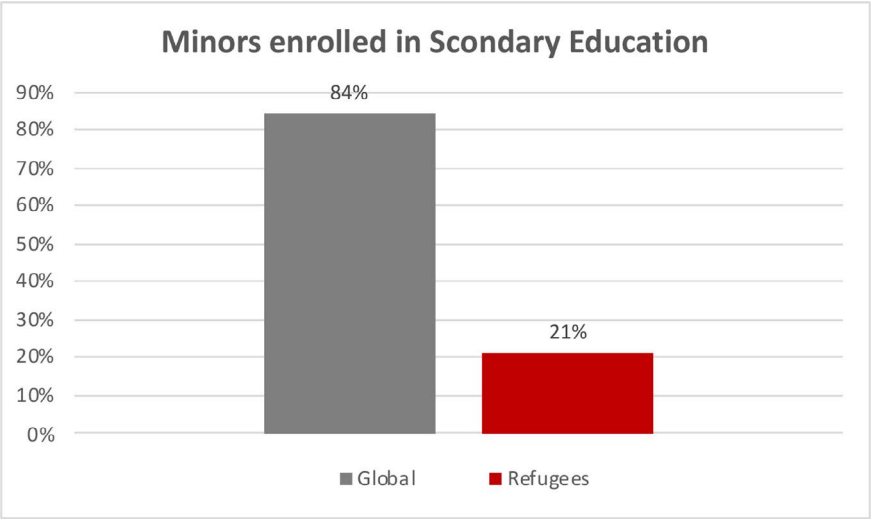


Source. *Reforzando la educación de los refugiados en crisis*. UNHCR 2018

[13] UNHCR (2018): *Reforzando la educación de los refugiados en crisis*. Ed. UNHCR.

As children get older, the gap in schooling gets bigger and bigger. The number of minors who are left out of the education system during the secondary stage is enormous: only 24% are in school. The global average is 84%[14]. The difference is truly great. Secondary education is the door to higher education and is increasingly necessary to access a job. Low schooling greatly limits the possibilities of having a future with minimum conditions of well-being.

Fig. 3. Schooling in Secondary Education



Source. *Reforzando la educación de los refugiados en crisis*. UNHCR 2018

UNHCR's proposal to improve this situation consists of coordinated work among all sectors of society. To do this, it insists that responsibility must be shared and proposes a series of specific actions to be carried out by governments, companies, schools and universities, NGOs and citizens[15].

In its 2019 Report, UNESCO also stresses that there are very few countries that have developed precise policies on multicultural or intercultural education[16]. Among the few experiences that exist,

[14] *Ibidem*.
[15] About all this: UNHCR (2018): *Reforzando la educación de los refugiados en crisis*. Ed. UNHCR.
[16] About the management models of cultural diversity and the intercultural model, see: Garrido

the example of Ireland stands out, which created the Intercultural Educational Strategy 2010-2015. Its priority objectives were to provide education, foster language proficiency, promote partnerships with civil society, and improve educational monitoring. Immigrant children constituted 15% of the population under 15 years of age in the country in 2015. Another essential factor to strengthen good integration is to maintain ties with the society of origin. The intercultural model is based on exchange and mutual enrichment through interaction between the various cultures that make up the community.

> *The intercultural model, contemporary to the multicultural, was born in France in the 70s. It arose as a reaction to the social reality that immigration was shaping at that time. The model extends to Canada, Switzerland and Belgium, acquiring an international dimension. Strongly influenced by French republicanism, it is based on the fundamental principle of equality – as opposed to freedom, the main axis of the multiculturalist approach. The intercultural model proposes that cultural diversity should not be an obstacle to social equality and considers that for this there must be a shared, common social context, in which cultural differences remain in the private sphere. The social context in which the intercultural model is born is very different from that of the multicultural model. It arises in countries without a great immigration tradition that in a few years are forced to respond to a cultural diversity that for them is quite new. The geographical environment surrounding the emergence of interculturality is characterized by the presence of ghettos based on ethnic or cultural origin. Paradigmatically, interculturality is born as a response to this, as a model to combat this social structure that is so strongly ethnicized. Interculturality thus goes one step further than the multiculturalist approach in search of integration. Interculturality does not seek mere coexistence, but coexistence, exchange and interaction between people of*

Rodríguez, Pedro (2014): *Inmigración y diversidad cultural en España. Su gestión desde la bonanza económica a la crisis*. Ed. Fundamentos. Madrid.

> *diverse cultures but who make up the same society defined by equal rights and freedoms for all its members, regardless of particular differences*[17].

In its World Report on Children[18], Save the Children echoes the dramatic situation in which millions of minors live in the world and proposes three priority recommendations: increasing investment in boys and girls, reaching excluded childhood; taking measures to ensure equal treatment for boys and girls, eliminate discrimination and guarantee access to basic services; and the inclusion of all children, regardless of their situation and origin.

The Report includes the measures that, in the opinion of the NGO, are unavoidable in order to achieve the Sustainable Development Goal of guaranteeing inclusive and equitable quality education. In the first place, the creation of national plans that ensure the completion of free basic education and provide them with the minimum skills. The equitable allocation of public resources to provide safe, inclusive and equitable education to the most excluded boys and girls. The persistence in cooperation, with the commitment to increase the allocations for education in less developed countries. Increased investment in education globally. The support of multilateral institutions, such as the Partnership for Education and Education Cannot Wait. Compliance with the G7 commitments to reduce the gap in access to education for refugees and internally displaced persons, both immediately and in long-term plans, identifying the specific difficulties of this group.

The Pandemic situation that is devastating the world in 2020 has brought even more difficulties. Although the entire world population is being affected in one way or another, the population with low resources, belonging to depressed socioeconomic backgrounds or migrants, is experiencing even greater difficulties in accessing basic needs. Educational rights are no exception. In this sense, Save the Children has activated its emergency program "By your side". This program has

[17] In: Garrido Rodríguez, Pedro (2014): *Inmigración y diversidad cultural en España. Su gestión desde la bonanza económica a la crisis*. Ed. Fundamentos. Madrid. P. 110.

[18] Save the Children (2019): *Informe Mundial de la Infancia*. Save the Children Federation. London.

the objective of offering attention to the most vulnerable boys and girls. It does so in three main directions: provide them with basic food for their development, provide psychological support to families and offer them distance school support and provision of means.

With its multisectoral initiative "Global Coalition for Education", UNESCO intends to offer a global response to the difficult situation caused by the pandemic. The global panorama at the beginning of August 2020 is chilling. 60.5% of the student population is affected by the closure of schools and universities; 1.058 million students are out of their schools and 109 countries affected by their closures. The Coalition proposes to respond to the most urgent educational needs, provide resources to maintain educational continuity during confinement, and provide logistical and psychological support and accompaniment.

UNESCO's global response also includes other actions. The most significant are technical assistance to promote distance learning; webinars on the provision of inclusive education in different contexts; national platforms to contribute to the monitoring of educational programs; establishment of alliances and promotion of cooperation to provide resources at the national and local levels; virtual ministerial meetings on educational policies in the face of school closures due to the pandemic; monitoring of school closures and affected students in real time and on a global scale.

The case of indigenous peoples is very unique. Currently only 58.7% of the world's population has access to the Internet. A large proportion of these people live in rural, hard-to-reach areas or inner-city neighborhoods. UNESCO has proposed various initiatives with the aim of alleviating the extraordinary difficulties that these groups are going through. The aforementioned "World Coalition for Education" was born with the aim of reaching the people most affected by the crisis through distance learning. Various platforms and learning tools have been created at the national level to maintain school continuity. An example of this is the case of New Zealand, where specific actions have been developed in the face of the pandemic focused on ensuring the access of indigenous populations to the courses taught in the school program, making them available in English and Maori. In the Latin

American and Caribbean region, websites and web resources have been created in response to COVID-19 and there has been an advocacy to include elements of indigenous cultures in educational initiatives and to make resources available in indigenous languages. From the regional office of UNESCO in Lima, support has been given to the different measures for the substitution of face-to-face academic activity. Specifically, the "I learn at home" program offers educational content through digital media, radio and television available in 10 indigenous languages and sign language. Also noteworthy is the "Framework for the reopening of schools" in which the main guidelines to be taken into account as the de-escalation begins are established and in which people belonging to the most vulnerable groups are taken into account.

UNHCR's "Connected Learning" strategy deserves special attention. It is an initiative specifically aimed at the refugee and migrant population, doubly vulnerable in the situation in which we find ourselves. UNHCR's strategy focuses on six fundamental lines with the aim of promoting educational continuity for all: identify the resources available with open licenses, as well as the tools for virtual learning; coordinate these resources with national curricula; make digital literacy effective among students and families; provide assistance to educators so that they can develop their programs; invest in digital infrastructure; provide guidance on the use and functionalities of connected learning.

After the detailed analysis of all the questions developed, it is appropriate to make some final considerations. In the first place, despite all the progress, achieved largely thanks to the international consensus reached within the international system for the protection of human rights, it can be proven that poverty and socioeconomic and cultural exclusion continue to be insurmountable obstacles to equal access to of conditions to an inclusive and quality education.

It is true that much progress has been made in recent decades, especially from 2000 to now, but it continues to have a very large group of people outside the educational system. There is also a very large group of people who, being within the educational system, are not trained or provided with the most basic skills. Which is also very worrying.

The highest levels of inequality are seen in Africa, especially Sub-Saharan Africa. Also, although to a lesser extent, in South and Central Asia. The gap between these regions and the rest of the world is staggering.

We could say that there is a certain agreement that it is necessary to increase spending on education, invest in educational infrastructure, support the most vulnerable groups, in short, provide the necessary means to correct the dysfunctions and asymmetries in education and guarantee a egalitarian, equitable and universalized quality education. Education, as a recognized human right and, therefore, enforceable, must be fully guaranteed[19]. However, binding commitments by states are lacking. There is consensus that greater coordination is needed at the international level in educational matters. But the necessary responsibilities are not assumed to make it possible.

There is also a general agreement on the part of international organizations in proposing a quality, inclusive and intercultural education. This implies making resources available, being sensitive to the needs of all students and the co-responsibility of all the agents that make up the educational communities to put this educational model into practice.

On the other hand, there is hardly any international consensus when it comes to establishing clear, concrete, technical guidelines on what educational methodologies to use to achieve equitable and quality education. It is a matter of investment, yes. But it is also a qualitative question. If how much is necessary, so is clarifying how. Both are interrelated. The Sustainable Development Goals would be, in our opinion, the ideal place. In this sense, a clearer, more inspiring, more decisive pronouncement is lacking, about what are the educational lines, also didactically, that are more appropriate to achieve an equitable and quality education for all.

It is necessary to appeal to agreement, cooperation and co-responsibility between countries[20]. We have pointed out the lack of

[19] About the enforceability of social rights, as human rights, see: Abramovich, V. y Courtis, C. (2004): *Los derechos sociales como derechos exigibles*. Editorial Trotta. Madrid.

[20] About this, see: Garrido Rodríguez, Pedro (2014): *Inmigración y diversidad cultural en España. Su gestión desde la bonanza económica a la crisis*. Ed. Fundamentos. Madrid. Op. Cit.

binding commitments as one of the main weaknesses that prevent the universalization of education. Faced with the growth of protectionism, exclusionary nationalisms and skepticism towards multilateralism, international consensus becomes even more necessary to achieve minimum standards of well-being and universal norms of coexistence. A global approach is necessary to reduce the current enormous educational gap. International cooperation is essential to effectively universalize quality and equitable education that offers opportunities to all.

Finally, the situation caused by COVID-19 has further increased vulnerabilities on a global scale and has made the enormous inequalities even more visible. There are important initiatives such as those that have been studied in this research promoted by UNHCR, UNESCO, UNICEF, etc. All this is valuable and helps to alleviate the situation. But it is necessary to strengthen international commitments and cooperation, as well as appeal to multilateralism in the search for global solutions that imply an improvement in the standard of living of the people to whom they are addressed and that are lasting.

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ISBN: 978-65-00-40218-6

CHAPTER

18

CORRECTLY AND PRUDENTLY SELECTING THE POLICY OF ANTI-VIRUS IN ORDER TO SEEK MORE EFFECTIVE FREEDOM

by MO Jihong

https://doi.org/10.55658/gpcds978-65-00-40218-6.chapter18

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CORRECTLY AND PRUDENTLY SELECTING THE POLICY OF ANTI-VIRUS IN ORDER TO SEEK MORE EFFECTIVE FREEDOM

by
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It has been more than two years since the outbreak of the new crown pneumonia. During this period, countries all over the world have been severely affected by the new crown pneumonia epidemic, and two completely different worlds have been formed before and after the epidemic. The process of globalization has been disrupted, and in the foreseeable future, it is difficult to predict when human beings will truly and effectively get rid of the troubles and effects of the new crown pneumonia epidemic. Since the outbreak of the new crown pneumonia, there have been two main attitudes in terms of epidemic prevention policies. One is the "dynamic clearing" insisted by the Chinese government, and the other is "coexistence with the new crown" advocated by Western society. These two epidemic prevention policies are more effective, and a simple conclusion cannot be drawn at present. But at least one thing is certain, the "dynamic clearing" policy adopted by the Chinese government since the outbreak of the new crown pneumonia epidemic has avoided the death of a large number of people, the depletion of social medical resources and the disorder of the social management system. China is the first country to restore production and living order from the COVID-19 disaster. China's adoption of an independent epidemic prevention policy has a very enlightening effect on all countries in the world. It has gained useful experience in correctly handling the interrelationship between epidemic prevention and production, public interest and human

rights protection, lawful epidemic prevention and scientific epidemic prevention.

1. CORONAVIRUS: AN UNEXPECTED AND UNPRECEDENTED DISASTER

The Coronavirus Pandemic (COVID-19) has become another symbolic event of the 21 century comparable to, if not more than, the 9.11 terrorist attack in 2001 and the global financial crisis in 2008. The UN Secretary-General António Guterres announced that "we are facing a global health crisis unlike any in the 75-year history of the United Nations — one that is spreading human suffering, infecting the global economy and upending people's lives". The US columnist Thomas Friedman even predicted that COVID-19 might become a new historical division: before Coronavirus (B.C.) and after Coronavirus (A.C.).

They are not exaggerating. This pandemic seems like a "pause" button on the whole world in turn: first China, then Asian, European and American countries. Most of cities have largely lost their vigor and energy during this unexpected and unprecedented disaster.

2. CORONAVIRUS : HUMAN ENEMY OR CREATURES IN NATURE?

Since the outbreak of New Coronary Pneumonia, one of the biggest epistemological questions about New Coronavirus has always plagued all humans: What is New Coronavirus? Where does it come from? Where is it going? Is the new coronavirus a common enemy of human beings, or is it a natural organism that can coexist with humans? The answer to this question also directly affects the attitudes of various countries in responding to the new coronary pneumonia epidemic. Focusing on the different understanding of the nature of the new coronavirus, at least three different attitudes have emerged in the response to the new corona pneumonia epidemic.

There are three main controversies in western countries, including the US, France, Italy, the UK, and Brazil, especially at the governmental level, in the fight against the COVID-19 endemic: first, the controversy between "herd immunity" and "quarantine"; second, the controversy between "scientific prevention and control of the endemic" and "effective prevention and control of the endemic"; and third, the controversy between effective supply medical resources and monopoly. Besides, the origin of the coronavirus is also a controversial issue.

How should the emergence of the new coronavirus be treated ideologically? In fact, since there was human civilization on the earth, there have been more than a thousand epidemic disasters caused by various viruses. Like humans, viruses are creations of nature. When humans have not yet understood the mechanism and existence of viruses, the impact of viruses on humans is negative and harmful. When humans can recognize the rules and mechanisms of viruses, the harm of viruses is not so terrible, and even viruses can be used by humans to defeat certain inborn diseases that humans possess. Therefore, it is epistemologically flawed to say that viruses are human enemies in general. The correct attitude should be that when humans have not yet recognized and mastered the rules and mechanism of the existence of viruses, they should treat viruses as enemies and take effective isolation and preventive measures to prevent unknown viruses from invading human life and health. When humans have recognized and mastered the rules and mechanisms of virus occurrence, they should adopt an open mind that coexists with them, respect the objectivity of the virus itself, seek effective ways to use the virus to benefit humanity, and turn enemies into friends and to turn bad things into good things.

3. THE VIRUS IS THE FAIREST JUDGE

At present, in a situation in which the scientific community has not fully understood the source, existence, and mechanism of action

of the new coronavirus, the pneumonia epidemic caused by the new coronavirus has caused great harm to all human beings. China was the first country attacked by the new crown epidemic, but the Chinese government adopts a scientific and realistic approach to responding. In the absence of a sufficient understanding of the existence and mechanism of the new coronavirus, the new coronavirus is regarded as the "common enemy" of all mankind, and it cooperates closely with the World Health Organization and countries around the world to fight against the epidemic, and adopts in accordance with law the measures of "closing the city", "quarantine" and "restriction on normal production and living freedom and rights" which have effectively prevented the invasion of the new coronavirus, and achieved the success of the first stage of the epidemic prevention work. The Chinese government's approach is a scientific attitude of the human society in the face of the infestation of unknown viruses, which will help the international community unite and cooperate in epidemic prevention, and finally understand and master the occurrence rules and mechanism of action of the new coronavirus to thoroughly defeat the new coronavirus. Prior to this, any irrational prevention and control measures that underestimated the new coronavirus were fragile and harmful. In particular, some countries did not respect scientific laws and did not take effective measures to prevent and control the epidemic. In an attempt to luckily win, these irrational actions undoubtedly exposed the serious lack of national governance capacity of these countries in responding to the new coronary pneumonia epidemic. The new coronavirus is a mirror. In the face of the new coronavirus pneumonia epidemic, any lies and arrogance have been ruthlessly mocked and tried by the objective laws of the virus itself. Those who do not look at the laws of the virus , respond blindly, or take irrational "throwing the pot" and "attempting to speculate" will eventually fall in front of the objective law of the new crown virus, which is still a "common enemy" for humans.

4 THE TEMPORARY RESTRICTION OF HUMAN RIGHTS IS TO EVENTUALLY DEFEAT THE UNKNOWN HUMAN ENEMY

With regard to the issue of human rights, it should be pointed out that the concept of human rights has undergone a process of development from negative rights, which only require the state to restrict its own power and respect individual freedom, to that of positive rights, which require the state to take active measures to ensure their realization. This development also reflects the role played by human rights in the progress of human civilization. The COVID-19 endemic has showed that some western countries have failed to take positive measures and establish a scientific and effective legal mechanism to safeguard human rights, especially the right to life and right to health.

With regard to the issue of "double standard" and "stigmatization", it should also be pointed out that they are like "political viruses" that are spreading in western countries along with the coronavirus and reflect to a certain extent the friction, even confrontation, between different values and ideologies in today's world. UN Secretary General Antonio Guterres pointed out that the international community should respect human rights and refrain from acts of stigmatization in the fight against the COVID-19 endemic.

Human rights are standards that all countries in the world follow, especially the right to life and health. When the new coronavirus exists as a common enemy of the mankind, a rational government and society will mobilize all national forces and social resources. Only after defeating the unknown virus as a common enemy of humanity can we really let go and protect everyone's freedom and rights. .For the purpose of seeking more effective freedom, we need pay some costs for realizing the objective laws of the new coronovirus. In the case of knowing nothing about the new coronavirus, irresponsibly let everyone do whatever they want without restriction, which is tantamount to letting soldiers on the battlefield rush out of the trench without any protection to die. In Chinese Old Sayings, if you would not like to give up firstly, you have to lose all you have gotten finally. Therefore,

in the prevention and control of the new coronavirus pneumonia epidemic, we must respect the objective laws, believe in science, rely on science, endure the inconvenience of the moment, and win long-term peace. Otherwise, the new coronavirus will never belittle any irrational response to despise its existence. The new coronavirus is the fairest judge, and it represents natural justice. The mankind must form an effective community of destiny to courageously and scientifically cope with the great challenges posed by the new coronavirus.

The fact which happens in the present days manifests such a truth that because from the very beginning the effective measures were taken by the governments in China, we are restoring the orders almost in all fields at present. On the basis of necessary costs, we can obtain such a wonderful result in anti-virus , it is a real logic and dialect for realizing the freedom ,of course, including individual freedom which can been seen easily by everyone.

5 THE CHINESE GOVERNMENT CANNOT ABANDON ITS "DYNAMIC ZERO-OUT" POLICY

Since the outbreak began in Wuhan, China, in early 2020, COVID-19 outbreaks have been seen in every province in China. As for COVID-19, biological scientists have so far been unable to effectively answer the question of how COVID-19 occurred. Therefore, in order to maximize the prevention of the spread of COVID-19 and the deaths caused by the epidemic, local governments in China, under the leadership of the Central People's Government, have made use of modern Internet information technology and strict community management systems to establish a more effective "dynamic zero-out " mechanism. Facts have proved that the "dynamic clearing" policy has suppressed the extension and spread of the new COVID-19 pneumonia epidemic to the greatest extent, greatly reduced the fatality rate of patients, effectively maintained the normal operation of social order, and prevented the currently underdeveloped medical assistance from system failures and crashes. The latest spread of the Omicron

strain in Hong Kong Special Administrative Region of China further proves that the new coronary pneumonia is not a common cold, and patients may be infected with many important diseases. At the same time, the sequelae of the patients are very obvious. The normal life functions of patients with new coronary pneumonia will be seriously damaged and affected in the future. That irresponsible policy that advocates liberalizing the prevention of the new coronary pneumonia virus may lead to more tragic consequences, that is, once a new type of new coronary pneumonia strain with a very high fatality rate appears in a short period of time, then , the collapse of the basic social order is imminent.

At present, the new crown pneumonia virus is still the enemy of mankind, and human society is still unable to resist the new crown pneumonia virus. In such a dangerous situation, as long as China's "dynamic clearing" policy is adhered to in place, from a long-term perspective, its contribution to human civilization will be immeasurable. In particular, when the international community generally doubts that the new crown pneumonia virus may be a weapon of biological warfare, the lack of due vigilance about the possible harm caused by the new crown pneumonia will undoubtedly ruin the beautiful home of the people. The idea of being overly credulous and relying on vaccines may face the challenge of a larger epidemic. Therefore, for the new crown pneumonia strain that is the enemy of mankind, we must always pick up the weapons in our hands, and at least protect ourselves before we can win the victory over the enemy.

Regarding how to deal with the relationship between public interests and individual human rights in the process of epidemic prevention, the Chinese government has always advocated that a dynamic balance should be established between the two. On the one hand, when wartime control measures should not be taken, the personal interests of ordinary people must be placed in an important position; on the other hand, when strict control policies are adopted, citizens' rights to life and health must be put the epidemic prevention work first. On February 5, 2020, General Secretary Xi Jinping clearly stated at the third meeting of the Central Committee for Comprehensively

Governing the Country by Law: "Under the centralized and unified leadership of the Party Central Committee, the safety and health of the people must always be put first. It is necessary to make efforts in all aspects of legislation, law enforcement, judiciary, and law-abiding, comprehensively improve the ability of law-based prevention and control and law-based governance, and provide a strong legal guarantee for epidemic prevention and control. " General Secretary Xi Jinping also pointed out: "The more severe the epidemic is, the more attention must be paid to epidemic prevention according to law." Therefore, epidemic prevention should be done in accordance with the law, and various human rights issues and interest issues arising in the process of epidemic prevention should be properly handled within the scope of the Constitution and laws.

In addition, the prevention and control of the new crown epidemic is also a scientific issue. Scientific problems must be solved through using the scientific method. Under the premise of attaching importance to prevention and protection according to law and safeguarding citizens' rights to life and health, the government, scientific research institutions, and medical departments should actively promote the research and development of effective vaccines to ensure that the vaccinated population can carry out normal social interactions to the greatest extent possible. After all, human society is constantly moving and developing. If we no longer work on scientific epidemic prevention, it will be difficult for human beings to truly get out of the shadow of production and life caused by the new crown pneumonia epidemic in a short period of time.

ISBN: 978-65-00-40218-6

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