

## COVID-19 AND THE BRAZILIAN REACTION

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SUMMARY: I. *Introduction.* II. *The federative powers and the National Law no. 13.979/2020.* III. *The international experience of the WHO and its regulations.* IV. *The legal, economic and social problems brought about by COVID-19.* V. *The main legal and political conflicts between the powers in Brazil in confronting the pandemic.* VI. *Conclusion.*

### I. INTRODUCTION

The objective of this text is to briefly address the most relevant constitutional and legal issues involving the COVID-19 pandemic, especially the measures adopted by the authorities and powers constituted in Brazil to face this enormous public health challenge.

Brazil is a Federative Republic formed by the indissoluble union of three autonomous spheres, the Federal Power, the Member States and the Municipalities. The 1988 Constitution is currently in force with 106 amendments promulgated until the month of February 2020.

First of all, it should be warned that Brazilian law does not have any specific legal rules affecting pandemics in the 1988 Federal Constitution.

The concepts of *state of exception*, such as the state of defense and state of siege (articles 136 to 139 of the Brazilian Constitution) are considered situations of defense of the State and democratic institutions, without relation to problems involving public health.

They are, in fact, norms for the restoration of public order or social peace threatened by serious institutional instabilities or hit by major natural calamities.

Both *states* admit some restrictions of rights (meeting, secrecy of correspondence, communications, obligation to stay at a certain place, detention, suspension of freedom of assembly, search and seizure at home and intervention in public services, for example).

In Brazil, it is the President of the Republic's competence to decree both states (of defense and of siege), submitting them to the National Congress.

Very few voices have advocated these states to be enacted with the coming of the pandemic to the Brazilian territory. In fact, in our opinion, it is not even the case of its application, except for a complicated and unwanted hermeneutic acrobatics of the constitutional text.

Nevertheless, as a member of the United Nations (UN), World Health Organization (WHO) and other international and regional organizations, Brazil maintains constant international contact (good institutional relationship) with such entities for the defense of peace, life and human health, having a human rights friendly Constitution, as the so-called *citizen Constitution* of 1988 is known.

It is important to point out that several Constitutions of the 1980s, as well as the Brazilian one, reinstalled the democratic life in different Latin American countries, in general, after long periods of dictatorship and authoritarianism that lasted on average twenty years.

## II. THE FEDERATIVE POWERS AND THE NATIONAL LAW NO. 13.979/2020

On the other hand, the Brazilian Constitution naturally covers several rules involving health and its protection, besides a complex system of competencies involving the Federal Power, the Member States<sup>1</sup> and the Municipalities.

Essentially, Brazil has a cooperative federalism with many asymmetries, but, in this regard, articles 21, XVIII (competence of the Federal Power to face and plan the permanent defense against public calamities), article 22, XXVIII (national mobilization), article 23 (everyone's common competence), II (health) and article 24, XII (health common legislative competence, with general federal norms, §§ 1 to 4), all of the Brazilian Constitution should be brought to mind.

It is also worth mentioning, in the same statute, the existence of a complex regulation regarding the right to social security, health and social assistance in articles 194, 195, 196 to 200, 203 and 204.

Before COVID-19 there was no comprehensive legal standard to deal with such serious situations. One can recall Law no. 6,259, of October

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<sup>1</sup> In the State of São Paulo, the Governor issued Decree no. 64,881 of March 22, 2020, decreeing the quarantine in the territory of the State, in the context of the COVID-19 pandemic and made other provisions.

30, 1975 (national), but which provides for the organization of epidemiological surveillance actions, on the National Immunization Program, establishes rules regarding compulsory notification of diseases, and makes other provisions. It was not made for an epidemic like the one we experience today.

With the advent of the epidemic, the National Congress hastened to approve Law No. 13,979, sanctioned by the President of the Republic on February 6, 2020, which provides for measures to address the public health emergency of international importance due to the coronavirus, responsible for the 2019 outbreak.

In eight articles, the law provides for measures that may be adopted to address the pandemic, giving the Minister of Health jurisdiction over the duration of the public health emergency mentioned therein and linking it to that one declared”, stating that it may not be greater than that one indicated by the World Organization in question.

It also seeks to define “isolation” and “quarantine” (Article 2):

Isolation: separation of sick or contaminated persons, or baggage, means of transport, goods or postal parcels affected, from others in order to avoid contamination or spread of the coronavirus.

Quarantine: restriction of activities or separation of persons suspected of being contaminated from persons who are not sick, or from luggage, containers, animals, means of transport or goods suspected of being contaminated, in order to prevent possible contamination or spread of the coronavirus.

### III. THE INTERNATIONAL EXPERIENCE OF THE WHO AND ITS REGULATIONS

The definitions laid down in Article 1 of the International Health Regulations, contained in the Annex to Decree no. 10.212 of January 30, 2020, apply in Law No. 13.979/2020.<sup>2</sup>

That is to say, the Law and the Decree incorporated the revised text of the International Health Regulations, agreed at the 58<sup>th</sup> General Assembly of the World Health Organization on May 23, 2005. In turn, the Brazilian National Congress had already approved the revised text of these Sanitary Regulations by means of Decree-Law no. 395 of July 9, 2009.

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<sup>2</sup> Decree no. 10,282 of March 20, 2020 regulated Law no. 13,979 of February 6, 2020 to define public services and essential activities.

With this, practically all the international experience accumulated by WHO enters the Brazilian legal system, which seems to be a great virtue of Law 13.979/2020.

Important aspects such as definitions, information and numerous public health measures, recommendations, special provisions on travelers, goods, health documents, with strong international cooperation and technical assistance from WHO are thus incorporated into the Brazilian law, greatly facilitating the dialogue between national and foreign authorities.

#### IV. THE LEGAL, ECONOMIC AND SOCIAL PROBLEMS BROUGHT ABOUT BY COVID-19

The pandemic caused by the coronavirus hit Brazil hard, virtually paralyzing all non-essential sectors.

The United Nations Conference on Trade and Development (UNCTAD), held in March 2020, predicted that the pandemic could cost the global economy up to \$2 trillion this year. And it is estimated that the impact on countries that supply and sell raw materials, such as Brazil, will be even more aggressive, one of the reasons that gave rise to the official projection of the Brazilian government in the percentage of growth around 0.02% of GDP. General estimates indicate that the setback in the economy could be 4.4%.

Except for essential public services of health, of course, security, communications, armed forces, transportation, food supply and distribution, supply, everything else remained closed by determination of the federal, state or municipal authority, according to the scope of incidence of the norm and the regulated activity.

Developing countries like Brazil have enormous social needs, strong unequal distribution and income concentration, and a gigantic market of self-employed agents - workers without formal employment ties, or on their own. These segments were undoubtedly the hardest hit because they face the terrible dilemma of being exposed to the deadly virus when they leave their “homes” or dwellings - often with more than one family in each “home”.

It is to say, for hundreds of thousands of people, there is no way to respect quarantine and survive, all this added to an economic scenario of depression and slow evolution of the Brazilian economy that, at the beginning of the pandemic, began a slow recovery.

In addition, one of the major challenges brought about by the pandemic was to control the provision of health care in peripheral locations, slums and in very poor regions.

The so-called “outskirts” is conceptualized as hybrid and heterogeneous places of a daily life shared by individuals who live in adversity and in search of social justice, social rights and rights over the city - such as access to decent housing, health, transportation, education and cultural consumption - that interact and blend with the normatized, rational, “legitimized” city, overcoming old moral notions of guilt and poverty or territory of risk, which may suggest stigmatized meanings of criminalization of poverty.

On the other hand, as in several countries, Brazil has also suspended classes throughout the country’s public and private networks, from primary to higher education.

As is well known, the measure serves to avoid agglomeration and displacement. According to health authorities, one of the best ways to stop the transmission of cases of the disease is to maintain social isolation. Without classes, educational institutions have adopted distance education (ODL), through the use of computers and complementary activities, to give continuity to learning in general. However, not all students in the country have access to quality computers and the Internet.

Another problem is keeping the concentration - especially of children - while the parents also work at home. According to the United Nations Children’s Fund (UNICEF),<sup>3</sup> 154 million students are or have been without classes in Latin America and the Caribbean. The entity warns that the situation could extend leading to the risk of definitive school dropouts.

The apostles of ultraliberal economicism relativize the deaths of workers in favor of the productivist maintenance of the market, which cannot be interrupted. However, more than ever, it is a fact that the world is not in an optimal situation, and thus it is urgent that humanitarian interests prevail over the stock market and over the business aspirations of the most aggressive capitalism.

In Brazil, some segments irritated with the loss of capital make movements in large cities to call on the population to disobey the sanitary resolutions of social isolation and return to their jobs, under the justification that only then will there be no problems of lack of goods and food supply.

The profit motive should be left aside in situations where life is threatened. Of course, we must follow science and its recommendations in the face of a pandemic and not listen to segments that only move by financial accumulation and profit-making logic.

It is not the case to list all the measures taken by governments (federal, state and municipal) and it would not be possible. But we can state that in

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<sup>3</sup> Fiocruz institutional repository. Available at: [www.arca.fiocruz.br](http://www.arca.fiocruz.br). Access on: June 04, 2020.

the face of total paralysis of the economy, it was necessary to cancel, extend or renegotiate obligations and payments (debts) of public and private suppliers in various economic segments.

Numerous aid programs (including financial), especially for the poorest and neediest sections of the population, have been triggered by the federal government, which has more resources to deal with difficulties of this nature (family grants and other aid to individuals).

The fact is that the moment is one of volatility as much for the virus as for the economic chaos, what forced governments of the whole world - and, in Brazil, it was not different - to abandon their tax austerity guidelines and low intervention of the State in the economy, to inject billions in aid for companies and citizens.

Among the various measures adopted by the federal government (Federal Power) to confront COVID-19, we highlight: *a)* the decree of the occurrence of the state of public calamity through Legislative Decree no. 06/2020<sup>4</sup> (The President of the Republic requests the Congress) waiving the achievement of the fiscal results previously established, observing the directing of voluminous resources for actions aimed at confronting the crisis beyond issues and concerns in the area of health; *b)* measures to encourage the economy, such as increasing assistance policies, creating new rules for private, labor and tax relations, financial aid to self-employed workers, extension of deadlines for payment of taxes and for employers in general to pay loans and financing from bank resources, public or private; *c)* reduction of interest rates and reference rates; suspension or postponement of payment of installments of loans from official banks; *d)* enactment of legislative measures by the Executive Branch (called Provisional Measures) to stimulate economic activity with the social protection of the most vulnerable, directly or indirectly, including even direct contribution of resources to private initiative; *e)* reduction of tax rates and social contributions; *f)* release of extraordinary credit for several Federal Government Ministries.

## V. THE MAIN LEGAL AND POLITICAL CONFLICTS BETWEEN THE POWERS IN BRAZIL IN CONFRONTING THE PANDEMIC

The coronavirus pandemic has once again raised the question of the responsibilities of each entity of the Brazilian federation in the search for solutions

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<sup>4</sup> Effective until December 31, 2020, including for the purposes of article 65 of the Fiscal Responsibility Act.

to the biggest health problem of the 21<sup>st</sup> century. There is no doubt that the effective fight against the pandemic is necessarily done through the articulation between the federal entities guided by the Federal Power, with action and implementation plans defined by the managers at regional (state) and local (municipalities) scales.

With the enactment of the 1988 Constitution, Brazil experienced a new wave of appreciation of subnational entities, which guaranteed the municipalities the position of a federative entity with responsibilities on matters of local interest.

One of the great problems of Brazilian federalism - which is complex - and oscillates with periods of centralization and decentralization - is that financial capacities have not accompanied the process of increasing attributions to such entities (state and municipal - especially municipal), in themes such as education, health, basic sanitation and mobility. More responsibilities were attributed to these entities without the necessary public revenue (financial autonomy) to meet such expenditures.

The debate is complex. It is affirmed, on the other hand, that with almost six thousand cities, Brazil was mistaken in granting federative autonomy to the Cities, because the great majority of them would not have minimum conditions of survival except for the federal and municipal aid and transfers. It is to say, there are hundreds of Cities that should be incorporated to neighboring and near entities so that they effectively have some strength and autonomy. It is obvious that the so-called “municipalists” do not accept these arguments, opposing the historical reality of the initial cells of the cities, the Municipality and the proximity to solve the problems of their inhabitants, as the best form of federative organization.

The fact is that the so-called Brazilian federal pact has always been prone to political bargaining and to a lack of clarity in relation to the political-institutional design established in 1988, which made possible a progressive recentralization of the role of the Federal Power (central power) over the years.

Moreover, there are serious problems of political-territorial coordination that manifest themselves in three different dimensions: *a)* the institutional dimension and in the order of Brazil’s political system, characterized by a federative pact that is fairly centralized and unclear in the definition of the limits of competencies; *b)* party-political conflicts that affect the governance of the system; *c)* the design of the actions and political choices adopted. There is a lot of political-institutional tension resulting in arrangements and accommodations for conflict management.

The Federal Power, for its part, complains that despite the fact that it holds most of the resources from direct and indirect public revenue from the country's wealth, it has many compulsory expenses linked under the Constitution. What it has left is a very small percentage for investments and cooperative and federative aid for the entire national territory.

The coronavirus came at a time when we have an elected President (Jair Bolsonaro) who has established a great distance from the National Congress and the majority of the Brazilian society.

The President's ability to generate conflict is immense. In addition, he has discriminated against regional groups supposedly opposed or competing. He has a very rudimentary and crude discourse and apparently has not the slightest capacity to govern, as well as encourage hate speech and scorn political and cultural minorities.

In this tense climate, several political conflicts flow into the Judiciary Branch. The latter, in view of being the Constitution of the country analytical and generous in terms of fundamental and human rights, opens and accepts a series of demands that in principle could be resolved in the public arena, especially through the extensive constitutionality control that exists in Brazil (*judicial review*).

To exemplify this picture, it became common, after the advancement of the pandemic, a dispute of federative competence over which authority is the most legitimate or appropriate to determine the opening of trade in the state capitals, as in the Municipality of Rio de Janeiro, which is also the capital of the State of Rio de Janeiro: whether it would be the President of the Republic, the State Governor or the Municipal Mayor.

On this occasion, the President of the Republic granted a press interview against the Decrees enacted by the Government of the State of Rio de Janeiro that established isolation and trade closure measures. The Mayor of Rio de Janeiro allowed their reopening, but then the governor intervened and revoked the decrees. Legal chaos ensued and the population, until a later court decision, did not know what to do.

The same occurred in relation to the closure of airports and roads throughout the country. Many state governors were trying to isolate their respective territories and prevent the circulation of people from places with high levels of virus infection.

Other governors went to the Judiciary to create a health barrier for travelers from other parts of the country. All these conflicts reached the Supreme Court, the highest court in the country, which over the months decided numerous cases, either through its Justices (preliminary decisions) or through its full body (collegiate). In general, in cases of opening of bars,



restaurants and other types of commercial establishments, the decision would fall to the municipalities (local government) and not the central government.

With regard to road, port and airport transportation, at least one of the Justices of the Supreme Court has decided that everyone, in principle, can legislate and regulate the matter to different degrees and effects.

In general, it is worth remembering the following court decisions during the pandemic:

a) ADPF (Action of Non-compliance with Fundamental Precept) 672-DF-Applicant: Federal Council of the Brazilian Bar Association; Interested Party: President of the Republic, in which the personal performance of the latter was highlighted in contrast to the guidelines recommended by the health authorities of the world and of Brazil; it points out several constitutional provisions violated or not applied and requires the President to refrain from acts that go against the recommendations of the WHO and the Ministry of Health.

In the decision, the Federal Supreme Court Justice Alexandre de Moraes, after long considerations, states that the competence in the case is common between the Federal Power, the States and the Municipalities and that it is not up to the Federal Executive Branch to unilaterally remove the decisions of the state, district and municipal governments, without prejudice to the general competence of the Federal Power (general rules).

a) Cautionary Measure in the Direct Action for Unconstitutionality 6,341-DF, Applicant Labor Democratic Party (PDT). Interested: President of the Republic.

In this action, the PDT challenged the Provisional Measure no. 926/2020 that dealt with the isolation, quarantine and circulation restriction measures in the country. The Federal Supreme Court Justice Marco Aurélio, rapporteur of the case, explained the concurrent competence of the matter between the Federal Power, States and Municipalities in terms of health. The Provisional Measure, on the other hand, was not considered unconstitutional.

b) In Complaint no. 39,790-Espírito Santo, being Justice Luiz Fux of the Supreme Court the rapporteur of the case, dealt with a conflict between State Decree and Municipal Decree involving the opening of retail trade in veterinary products and animal nutrition.

A constitutional complaint was filed, with a request for urgent injunctive relief proposed by the Municipality of Pedro Canário, in the State of Espírito Santo, against the decision of the Single Circuit Court, issued in the writ of mandamus, for alleged affront to the contents of Binding Precedent no. 30 of the Federal Supreme Court.

Municipal Decree no. 71/2020 determined the closing of trade for 15 days (the first time) due to the pandemic. It was alleged to be illegal because it went against State Decree no. 4.605-R-2020, which authorized the operation of animal care and agricultural inputs businesses.

The Complainant, the Municipality, claims that the Supreme Court had already established the Binding Precedent no. 38, establishing the municipal competence to legislate on the opening hours of commercial establishments. It was understood that no normative conflict had occurred because the Binding Precedent was not conceived to face a pandemic.

In this case, Article 23, I and II of the 1988 Constitution shall apply, conferring common competence among the Federal Power, States and Municipalities to deal with public health.

The competence of the state to legislate on public health at the time of the pandemic would be justified, according to the rapporteur. The controversy was concluded with the understanding that the decision of the magistrate of first instance was correct in determining the opening of that type of trade and that there was no conflict between the state and municipal regulations.

The Supreme Court ruled:

Thus, considering that it is obvious the direct relationship between pets and the mental health of people that intensively worsens in a situation of home isolation, it shows its unreasonable nature - especially when there is no basis to indicate that at the municipal level it is diverging from the state guidance - and therefore it justifies the preliminary award of the *writ*, the restriction on the operation of the claimant commercial establishment foreseen in the administrative act in the statement of claim. I grant the injunction to authorize the opening and operation of the commercial establishment pursuant to State Decree no. 4605.

## VI. CONCLUSION

Finally, it is worth remembering that despite the problems we have experienced because of the coronavirus, so far the Brazilian institutions have functioned properly, despite the political misuse of the way to face it caused in

part by the authorities of the Federal Power, and the member states of the Brazilian federation.

The 1988 Constitution has prevailed as a fundamental framework, the rule of law seems solid - despite the erratic behavior of the current President of the Republic - and fundamental and human rights in general have been reasonably respected.

It is to say, despite acute and occasional problems in some member states of the Brazilian federation allusive to the provision of health services, especially public (lack of vacancies, respirators and doctors), etc. it cannot be said that on a large scale there has not been, until now, reasonable compliance with the Syracuse Principles, adopted by the Economic and Social Council of the UN in 1984, and the general comments of the UN Human Rights Committee on the state of emergency or similar concept (of public calamity by pandemic); moreover, the freedom of movement of people in national territory has been guaranteed.

The economic and social effects of the pandemic in the future in Latin America seem to be cruel, since the region, even before it was hit by COVID-19, already suffered from the concentration of income, its poor and unfair distribution and the poor performance of its growth.