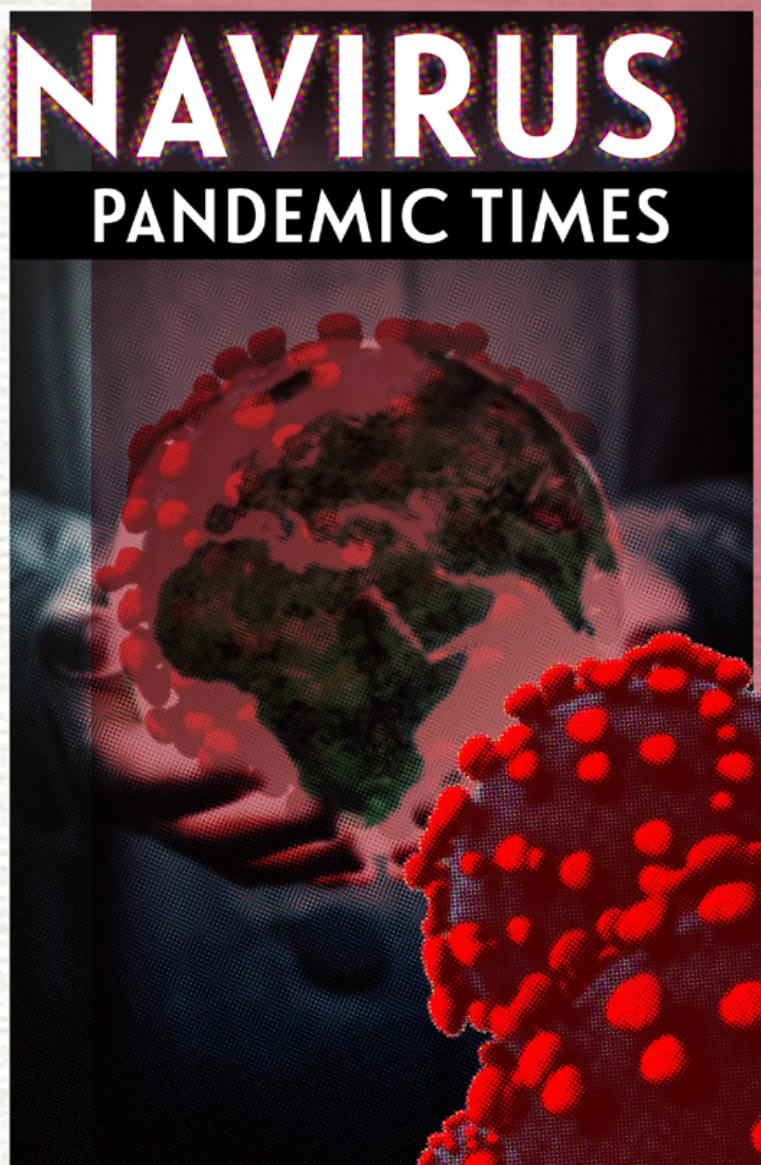
Fundamental Rights and Duties in CORONAVIRUS PANDEMIC TIMES



AUTHORS:

Adriano Sant'Ana Pedra
Agenor de Souza Santos Sampaio Neto
Alessandra Oitaven Pearce
Aloísio Cristovam dos Santos Júnior
Amanda Nunes Lopes Espiñeira Lemos
Ana Paula da Silva Sotero
Antonio Sá da Silva
Bruna Franco
Clóvis Reimão
Daniel Oitaven Pearce Pamponet Miguel
Fábio Periandro de Almeida Hirsch
Gabriel Dias Marques da Cruz
Hilda Ledoux Vargas
Julio Cesar de Sá da Rocha
Liliane Nunes Mendes Lopes
Luciano Martinez
Mario Jorge Lima
Marta Carolina Giménez Pereira
Mirtha Lorena Giménez Pereira
Ricardo Maurício Freire Soares
Saulo José Casali Bahia
Stephanie Silva
Valdir Ferreira de Oliveira Junior
Welliton da Silva Santos

COORDINATION AND ORGANIZATION:
Saulo José Casali Bahia
Carlos Eduardo Behrmann Rátis Martins
Rodolfo Pamplona Filho

PRESENTATION:
Carlos Eduardo Behrmann Rátis Martins

PREFACE:
Saulo José Casali Bahia

AFTERWORD:
Rodolfo Pamplona Filho

EDITORA
IASP

COORDINATION AND ORGANIZATION::
Saulo José Casali Bahia
Carlos Eduardo Behrmann Rátis Martins
Rodolfo Pamplona Filho

FUNDAMENTAL RIGHTS AND DUTIES IN CORONAVIRUS PANDEMIC TIMES

AUTHORS:

Adriano Sant'Ana Pedra
Agenor de Souza Santos Sampaio Neto
Alessandra Oitaven Pearce
Aloísio Cristovam dos Santos Júnior
Amanda Nunes Lopes Espiñeira Lemos
Ana Paula da Silva Sotero
Antonio Sá da Silva
Bruna Franco
Clóvis Reimão
Daniel Oitaven Pearce Pamponet Miguel
Fábio Periandro de Almeida Hirsch
Gabriel Dias Marques da Cruz
Hilda Ledoux Vargas
Julio Cesar de Sá da Rocha
Liliane Nunes Mendes Lopes
Luciano Martinez
Mario Jorge Lima
Marta Carolina Giménez Pereira
Mirtha Lorena Giménez Pereira
Ricardo Maurício Freire Soares
Saulo José Casali Bahia
Stephanie Silva
Valdir Ferreira de Oliveira Junior
Welliton da Silva Santos

PRESENTATION: Carlos Eduardo Behrmann Rátis Martins
PREFACE: Saulo José Casali Bahia
AFTERWORD: Rodolfo Pamplona Filho

EDITORA IASP

São Paulo - SP
Editora IASP | IASP, Publisher
2020

ISBN 978-65-87082-10-3

FUNDAMENTAL RIGHTS AND DUTIES IN CORONAVIRUS PANDEMIC TIMES

Edition and Distribution of IASP PUBLISHER

Instituto dos Advogados de São Paulo - IASP
CNPJ 43.198.555/0001-00
Av. Paulista, 1294 - 19º andar - CEP 01310-915
São Paulo - SP - Brasil

Founded on November 29, 1874
Site: www.iasp.org.br
E-mail: iasp@iasp.org.br

Review: *Instituto dos Advogados de São Paulo* / São Paulo Lawyers Institute

Cover and layout: contato@girafo.com.br

EBook

Cataloging data

BAHIA, Saulo José Casali (Coord.)

Fundamental Rights And Duties In Coronavirus Pandemic Times / Coordination and organization of Saulo José Casali Bahia, Carlos Eduardo Behrmann Rátis Martins e Rodolfo Pamplona. São Paulo: IASP Publisher, 2021. 350p.

EBook

ISBN: 978-65-87082-10-3

1. Constitutional law. 2. Fundamental rights. 3. Coronavirus. I. BAHIA, Saulo José Casali. II. MARTINS, Carlos Eduardo Behrmann Rátis. III. PAMPLONA, Rodolfo. IV. Author. V. Title

CDDoris 341.27
Cutter B151d

Karina Borsari
CRB-8/4951

A publication of the Constitutional Law Institute of Bahia *(Instituto de Direito Constitucional da Bahia)*, in association with the Lawyers' Institute of Bahia *(Instituto dos Advogados da Bahia)*, the Legal Letters Academy of Bahia *(Academia de Letras Jurídicas da Bahia)*, the College of Presidents of the Lawyers' Institutes of Brazil *(Colégio de Presidentes dos Institutos dos Advogados do Brasil)* and the Law Postgraduate Program at UFBA *(Programa de Pós-Graduação em Direito da UFBA)*.

ACHIEVEMENT:

IDCB
INSTITUTO DE DIREITO CONSTITUCIONAL DA BAHIA

INSTITUTO DOS ADVOGADOS DA BAHIA

Academia de Letras Jurídicas da Bahia

COLÉGIO DE PRESIDENTES DOS INSTITUTOS DOS ADVOGADOS DO BRASIL

UNIVERSIDADE FEDERAL DA BAHIA
FACULDADE DE DIREITO
PROGRAMA DE PÓS-GRADUAÇÃO STRICTO SENSU

Contents

FUNDAMENTAL RIGHTS AND DUTIES IN CORONAVIRUS PANDEMIC TIMES

Presentation

It is with great pride that we present this work to the legal community, gathering 15 (fifteen) scientific articles to deal with the legal issues involving fundamental rights and duties in times of pandemic, translating directly into the **PROJECT 100: union, resilience and solidarity**.

PROJECT 100 motivates the publication of four books in Portuguese and this volume in English, the result of a fantastic academic project, sponsored by the Lawyers' Institute of Bahia, by the Legal Letters Academy of Bahia, by the College of Presidents of Brazilian Lawyers' Institutes, by the Constitucioinal Law Institute of Bahia and coordinated by the Law Postgraduate Program at Federal University of Bahia, which over 18 (eighteen) Seminars had more than 100 lectures and authors who submitted works for publication, fulfilling these Academic Institutions with their main regimental fulfillment and sense of their existence: to produce scientific knowledge for the benefit of community.

Without a shadow of a doubt, the success of this academic project is mainly due to the competence, charisma and dedication to teaching, research and extension of two great Bahian teachers, which are great inspirations for several generations of students: **Rodolfo Pamplona Filho** and **Saulo José Casali Bahia**.

As well, it is necessary to highlight that this virtual book would not be possible if, since the beginning of the work developed at the Seminars, there was the indispensable support of the São Paulo Lawyers' Institute, through the celebrated Professor Doctor **Renato de Mello Jorge Silveira** and the great leader of Brazilian law and former Presidente of IASP, Professor **José Horácio Halfeld Rezende Ribeiro**, providing services

of the renowned Publisher of the São Paulo Lawyers' Institute, whose publications are used as references by Courts across the country.

We wish that the specific and informative articles in this volume presented here by members of the IAB, ALJBA, IDCB and PPGDUFBA, assist the various actor in the administration of justice, in the most diverse areas. Good reading!

Salvador, Bahia, November 1, 2020.

CARLOS EDUARDO BEHRMANN RÁTIS MARTINS

President of the Brazilian Lawyers' Institute College of Presidents

President of the Lawyers' Institute of Bahia

President of the Constitutional Law Institute of Bahia

Preface

The *I Virtual Seminar on Fundamental Rights and Duties in Coronavirus Pandemic Times* was held on April 1, 2020, a few weeks after the World Health Organization - WHO declaring a pandemic situation, on 03/11/2020, and Brazil entered the state public health emergency, referred to in Law 13,979, of February 6, 2020, with the beginning of forced social isolation measures.

The Constitutional Law Institute of Bahia *(Instituto de Direito Constitucional da Bahia)*, the Lawyers' Institute of Bahia *(Instituto dos Advogados da Bahia)*, the Legal Letters Academy of Bahia (*Academia de Letras Jurídicas da Bahia)*, the College of Presidents of the Lawyers' Institutes of Brazil (*Colégio de Presidentes dos Institutos dos Advogados do Brasil)* and the Law Postgraduate Program at UFBA (*Programa de Pós-Graduação em Direito da UFBA)*, realized the pressing need to provide an environment for debates and legal reflections on the pandemic, considering that several intergovernmental relations, between the public and private sector, and even among private individuals, have been intensely affected by the measures adopted.

During eighteen weeks, eighteen seminars were held (01, 08, 15, 22 and 29 April; 06, 13, 20 and 27 May; 3, 10, 17 and 24 June; 1, 8, 15, 22 and July 29), always on Wednesdays, in a series that has reached its maturity. All meetings brought together jurists from the institutions involved, as well as invited specialists.

Persistence (or rather, unity, resilience and solidarity) brought success to seminars and written works, perhaps the legal event of the pandemic with the largest number of participants (107), the largest extension (18)

and the greatest written production (105 chapters in four volumes and one volume in English). We did not expect so much success, nor the thousands of participations so far (more than four thousand), on the platforms used to broadcast the seminars.

With the works, we tried to avoid losing the records of the discussions and the intellectual effort developed, facilitating access to information. With this edition in English, we sought to produce the diffusion and the knowledge, in a more accessible language by other countries, of a part of the production brought by the four volumes in Portuguese. This will allow interested parties, outside of Brazil, a better understanding of how this country dealt, in the legal area, with the pandemic.

This work brings together 15 (fifhteen) essays, on various aspects related to the pandemic of Covid-19, in the most varied areas of law. As we said in the preface to the first volume of the series in Portuguese, some texts were written with the urgency that the moment requires, sometimes more objective or short in relation to texts present in more traditional collections. But the public health emergency required it, and we did, and I hope that this circumstance can be excused by the most rigorous reader.

The essays run through different themes, showing the restrictions caused to fundamental rights, the impacts on society and on individuals, covering the transformations that covid-19 generated in legal relations.

We are grateful to all 24 (twenty-four) authors who participated in this volume, aware of the importance of feeding debates about the implications and juridical effects of the pandemic: **Adriano Sant'Ana Pedra, Agenor de Souza Santos Sampaio Neto, Alessandra Oitaven Pearce, Aloísio Cristovam dos Santos Júnior, Amanda Nunes Lopes Espiñeira Lemos, Ana Paula da Silva Sotero, Antonio Sá da Silva, Bruna Franco, Carlos Eduardo Behrmann Rátis Martins, Clóvis Reimão,**

Daniel Oitaven Pearce Pamponet Miguel, Fábio Periandro de Almeida Hirsch, Gabriel Dias Marques da Cruz, Hilda Ledoux Vargas, Julio Cesar de Sá da Rocha, Liliane Nunes Mendes Lopes, Luciano Martinez, Mario Jorge Lima, Marta Carolina Giménez Pereira, Mirtha Lorena Giménez Pereira, Ricardo Maurício Freire Soares, Saulo José Casali Bahia, Stephanie Silva, Valdir Ferreira de Oliveira Junior e Welliton da Silva Santos.

We thank the President of the Lawyers' Institute of Bahia - IAB and the Constitutional Law Institute of Bahia - IDCB, Carlos Eduardo Behrmann Ratis Martins, and the President of the Legal Letters Academy of Bahia, Rodolfo Pamplona Filho. Finally, a special thanks to the College of Presidents of the Lawyers' Institutes of Brazil and the Publisher of the Lawyers' Institute of São Paulo.

Good reading!

Salvador, Bahia, on November 1, 2020

SAULO JOSÉ CASALI BAHIA (ORGANIZER)

Coordinator of the Law Postgraduate Program at UFBA

Participations in this work:

ADRIANO SANT´ANA PEDRA

Professor of Constitutional Law at Faculdade de Direito de Vitória – FDV, Brazil (bachelor, master and doctoral program). PhD in Constitutional Law (Pontifícia Universidade Católica de São Paulo – PUC/SP). Master in Fundamental Rights and Guarantees (Faculdade de Direito de Vitória – FDV). Federal Attorney (Advocacia-Geral da União – AGU). Member of the International Association of Constitutional Law – IACL. E-mail: adrianopedra@fdv.br. *Curriculum Vitae*: http://lattes.cnpq.br/0637600349096702.

AGENOR DE SOUZA SANTOS SAMPAIO NETO

Assistant Professor, State University of Feira de Santana. Master in Private and Economic Law (UFBA). PhD student in The Family at Contemporary Society (UCSAL).

ALESSANDRA OITAVEN PEARCE

PhD student (Jurisprudence – Universidade de Coimbra). PhD student (Law & Economics – UFBa). Master of Laws (Constitutional Law – Universidade de Coimbra). Former temporary professor of Jurisprudence and Sociology of Law at Universidade Federal da Bahia. Partner at Oitaven & Pearce Law Firm.

ALOÍSIO CRISTOVAM DOS SANTOS JÚNIOR

PhD in Law from the Pontifical Catholic University of Rio Grande do Sul (PUCRS). Master in Political and Economic Law from Presbyterian University Mackenzie (UPM). Postdoctoral fellow in Human Rights at the University of Salamanca (USAL). He completed a doctoral internship (Sandwich Doctorate) at the University of Coimbra (UC) as a scholarship holder at the PDEE of CAPES / MEC. Judge of the 1st Labor Court of Simões Filho - Bahia.

AMANDA NUNES LOPES ESPIÑEIRA LEMOS

PHD Student in Law at University of Brasília (UnB). Collaborating researcher at Fiocruz Brasília. Member of the research groups: The Telecommunications Law Research Group (Portuguese acronym GETEL) and Public Policy and Internet Laboratory (LAPIN/UNB). Reviwer at Journal of Law and Regulation. Interested in Constitutional Law, Fundamental Rights, Internet Regulation, Public Policies and Personal Data Protection.

ANA PAULA DA SILVA SOTERO

Lawyer. Student of Master in Law from the Universidade Federal da Bahia - UFBA. Specialist in Criminal Law and Criminal Procedure by Instituto Brasil de Ensino - IBRA. Specialist in Criminology by the Faculdade Paraíso do Norte - FAPAN / UNIBF. Graduate student in Fundamental Rights and Justice, with emphasis on the line of Restorative Justice and Contemporary Theories of Criminal Law at the State Universidade Estadual do Sudoeste da Bahia - UESB. Graduated in Law from the State Universidade Estadual do Sudoeste da Bahia - UESB. Professor of Criminal Law and Constitutional Jurisdiction at Faculdade Santo Agostinho in Vitória da Conquista - FASAVIC. Coordinator of the Center for Research and Scientific Production at Faculdade Santo Agostinho in Vitória da Conquista - FASAVIC. Member of the research group Culpability, Vulnerability and Criminal Selectivity (CNPq).

ANTONIO SÁ DA SILVA

PhD in Legal-Philosophical Sciences Faculty of Law - University of Coimbra - Portugal) and Professor at the Faculty of Law - Federal University of Bahia (UFBA). Salvador - Bahia - Brazil. antoniosa@antoniosa.com.br

BRUNA FRANCO

Law student (Universidade Federal da Bahia).

CARLOS EDUARDO BEHRMANN RÁTIS MARTINS

Lawyer. President of the Constitutional Law Institute of Bahia. President of the Lawyers' Institute of Bahia and of the College of Presidents of the Lawyers' Institutes of Brazil. Master and PhD, University of Lisboa. Professor of Law, UFBA and UEFS. Contact: carlosratis@behrmannratis.com

CLÓVIS REIMÃO

Specialist in Public Law and Civil Procedural Law. Graduated in Law from the Federal University of Bahia (UFBA). E-mail: reimao.clovis@gmail.com

DANIEL OITAVEN PEARCE PAMPONET MIGUEL

PhD in Social Sciences (Universidade Federal da Bahia – UFBa) and PhD in Public Law (UFBa). Former Professor of Political Theory and Political Institutions (UFBa). Professor of Legal Theory, Philosophy of Law, Legal Hermeneutics, Legal Argumentation, and Sociology of Law (UFBa). Professor of Theory of Justice, Theory of Law, and Law and Literature (PhD program – Programa de Pós-graduação *stricto sensu* em Direito da UFBa). Professor of Legal Theory, Philosophy of Law, Legal Hermeneutics, and Legal Argumentation (Faculdade Baiana de Direito). Partner at Oitaven & Pearce Law Firm.

FÁBIO PERIANDRO DE ALMEIDA HIRSCH

Doctor and Master in Public Law, both with an emphasis on Constitutional Law, from the Federal University of Bahia (PPGD-UFBA). Member of IDCB - Institute of Constitutional Law of Bahia. Adjunct Professor of Constitutional Law at the Federal University of Bahia (UFBA), Adjunct of Constitutional and Administrative Law at the State University of Bahia (UNEB) and Constitutional Jurisdiction at the Jorge Amado University (U NIJORGE). Lawyer and Arbitrator. Contact: academico@fabioperiandro.adv.br

GABRIEL DIAS MARQUES DA CRUZ

LL.M and Ph.D. in State Law, USP. Constitutional Law Professor at Federal University of Bahia (UFBA) and Baiana Law School (Faculdade Baiana de Direito). Judicial Review Research Group Coordinator. E-mail: gabriel_ dmc@yahoo.com.br.

HILDA LEDOUX VARGAS

Lawyer, Associate Professor and Researcher of the State University of Feira de Santana - UEFS, Phd in Family in Contemporary Society, by the Catholic University of Salvador - UCSAL, Master in Sustainable Development, by the University of Brasilia, Specialist in Business Law from Estácio de Sá University, member of the Commission of Law and Art of the Brazilian

Institute of Law and Family - IBDFAM, from Bahia , member of the Legal Studies Committee of the Brazilian Lawyers' Order - OAB, subsection of Feira de Santana.

JULIO CESAR DE SÁ DA ROCHA

Professor and Director of the Faculty of Law at UFBA. PhD and Master in Law from the Pontifical Catholic University of São Paulo (PUC SP). Post-doctorate in Anthropology from the Federal University of Bahia. Professor of the Postgraduate Program in Law at UFBA (PPGD / UFBA). Coordinator of the Research Group on State Historicity, Law and Human Rights (GPHEDDH). E-mail: julior@ufba.br

LILIANE NUNES MENDES LOPES

MSc in Family in Contemporary Society at UCSal. Assistant Professor at UEFS - State University of Feira de Santana – BA. Coordinator of the Project Popular Extension: Mediation and Guidance of rights. Member of the research groups: Sustainable Social Management and policies to support the family and paternity in Brazil (UEFS) and Fundamental Rights and Family (UCsal).E-mail: lnmlopes@uefs.br; @profa_lilianelopes

LUCIANO MARTINEZ

PhD Professor of Labor Law and Social Security at the Federal University of Bahia (UFBA), PhD in Labor Law and Social Security at the University of São Paulo (USP). Postdoctoral fellow in Labor Law from the Pontifical Catholic University of Rio Grande do Sul (PUCRS). Master in Private and Economic Law from UFBA. Judge of the 9th Labor Court of Salvador - Bahia.

MARIO JORGE LIMA

Professor Associated, Faculty of Law/UFBA. PhD, UFPE

MARTA CAROLINA GIMÉNEZ PEREIRA

PhD in Law, Institute of Legal Research, UNAM, Mexico. Post-Doctorate in Law, PNPD CAPES PPGD IMED, Brazil. Visiting Research Professor at the Federal University of Bahia. Member of the Permanent Panel of the Postgraduate Program in Law (PPGD UFBA), Brazil Email: magipe@ hotmail.com. Lattes: <http://lattes.cnpq.br/6905306640861147>

MIRTHA LORENA GIMÉNEZ PEREIRA

Master of Veterinary Sc endorsed in Veterinary Public Health, Massey University, New Zealand. Email: superoddie@hotmail.com

RICARDO MAURÍCIO FREIRE SOARES

Post-Doctor in Law from the Università degli Studi di Roma La Sapienza, Università degli Studi di Roma Tor Vergata and Università del Salento. PhD in Law from the Università del Salento / Universidade de São Paulo. PhD in Public Law and Master in Private Law from the Universidade Federal da Bahia. Professor of the Undergraduate and Graduate Courses in Law at the Universidade Federal da Bahia (Master / Doctorate). Researcher linked to CNPQ. Member of the Academia de Letras Jurídicas, the Brazilian Lawyers' Institute, the Bahia Lawyers' Institute and the Bahia Constitutional Law Institute.

RODOLFO PAMPLONA FILHO

PhD in Law (PUC-SP). Labor Judge (Bahia, Brazil). Professor (UFBA, UNIFACS). President of the Legal Letters Academy of Bahia and of the Labor Law Institute of Bahia.

SAULO JOSÉ CASALI BAHIA

Phd in Law (PUC-SP, 1999). Professor (UFBA). Federal Judge (Bahia, Brazil), Lattes: http://lattes.cnpq.br/7398414546353246. Orcid: https://orcid.org/0000-0002-3768-3664. Contact: saulo.bahia@trf1.jus.br

STEPHANIE SILVA

Law student (Universidade Federal da Bahia).

VALDIR FERREIRA DE OLIVEIRA JUNIOR

PhD and Master in Public Law from UFBA. Invited Professor at UFBA, LFG, Juspodivm, FAINOR, UESB and UNIME postgraduate courses. Professor of Constitutional Law at FAINOR - Vitória da Conquista. Member of the Brazilian Institute of Constitutional Law.

WELLITON DA SILVA SANTOS

BA in Law by the State University of Bahia (UNEB Jacobina). Lawyer and researcher in the Research Group *Teorias da Justiça, do Direito e da Decisão Judicial* (theories of justice, law and court decision). Salvador - Bahia - Brazil. wellitonsantosadv@gmail.com

1

The role of human duties in public health calamities

ADRIANO SANT'ANA PEDRA

CONTENTS: 1. Introduction; 2. Towards a minimal solidarity among people; 3. Justification of fundamental duties; 4. Fundamental duties as open-textured norms and sanitary measures; 5. References.

1. Introduction

A pandemic shows how connected human beings are, despite all the distance, and how we need each other. We are gregarious beings by nature and community life requires the collaboration of each individual in order to achieve common goals.

Although it is necessary for the Government, at all of its levels, to adopt public policies that are able to contain the evils of a pandemic, they will always be insufficient. In many situations, state action is not enough to protect and promote the health of the people, which will only happen with the accomplishment of duties by each citizen. It is necessary that each individual demonstrates responsible behaviors which give specific attention to the health of other people, based on a solidarity that arises from the Constitution and not necessarily from one's own altruism [1].

Human duties represent efforts that each one needs to effectuate in favor of himself/herself, a family member, and the community, to the accomplishment of essential needs.

1. PEDRA, Adriano Sant'Ana. Os deveres humanos. *A Gazeta*, 28 e 29 mar. 2020, p. 21.

In spite of the fact that Constitutions usually state duties in their texts, there has been a certain disregard of issues related to the fundamental duties required of the human person, and this is especially due to the liberal influence, in which there is contempt for solidarity, as well as because of the fear of those duties would serve in authoritarian regimes, as a way of reacting to the horrors that have been practiced against humanity throughout history.

However, liberty depends on solidarity. It may seem paradoxical, but it is not: there is only limited liberty. And there can be no liberty without responsibility.

Many people (both natural and legal) underestimate the seriousness of a calamity of a pandemic and fail to comply with necessary sanitary measures. We must not forget that we are all responsible for everyone's health, and a failure by a single person endangers an entire community.

A pandemic requires exceptional efforts from each individual, that is, sacrifices that are beyond what would be required during normal times. Such a situation requires restrictive measures of rights that impose obligations to do or not to do, or even to tolerate. These are difficult measures for a difficult time. But they are essential measures for the preservation and promotion of the health of the individuals, for the functioning of the economy, and for the continuity of our social life.

This study aims to analyze the role of human duties in enforcing rights and how much these may be restricted in times of a pandemic [2]. The research takes into account an approach of human duty, not as an egoistic or individualistic behavior, but, through a perspective in which the other

2. This essay was written in the context of the COVID-19 pandemic, caused by the new coronavirus SARS-CoV-2, thus declared on 03/11/2020 by the World Health Organization - WHO. However, the legal aspects dealt with here can also be taken into account in other public health calamities.

individual is respected and included. From the perspective of solidarity, ethical behavior makes one put himself/herself at the service of the other, which results in the realization of human rights. Thus, this study seeks to evaluate the legitimacy of the enforceability of certain behaviors of people in times of a pandemic in order to ensure fundamental rights.

2. Towards a minimal solidarity among people

Solidarity is a term that has several meanings, with different understandings in ethics, political theory, and sociology [3] . Since the second half of the 19th century, solidarity began to be widely considered in its normative dimension, but it was during the 20th century that solidarity became the object of political-philosophical reflection [4] and, in this context, began to serve as a rational justification for duties in situations of need. In fact, it will be in the Welfare State that the notion of solidarity will become institutionalized [5] .

It is much easier to have an intuitive notion of solidarity than to define it or delimit its content, scope, and application. It is a social virtue that presupposes a relationship of belonging and co-responsibility that binds the individual with the social group to which he or she belongs. Without a minimum of solidarity, no society could exist, and all individuals would be faced with the *bellum omnium contra omnes* [6] .

Solidarity imposes reciprocal obligations among those individuals who belong to a certain group. From the family group to that of the entire

3. OLIVEIRA JUNIOR, Valdir Ferreira de; SOARES, Ricardo Maurício Freire. O Estado constitucional solidarista e a pandemia de COVID-19: breves delineamentos. *In*: BAHIA, Saulo José Casali. *Direitos e deveres fundamentais em tempos de coronavírus*. São Paulo: IASP, 2020, p. 275.

4. ROJAS A., Luis Emilio. Dimensiones del principio de solidaridad: un estudo filosófico. *Revista Chilena de Derecho*. v. 46, n. 3, 2019, p. 851.

5. SEGADO, Francisco Fernández. La solidaridad como principio constitucional. *Teoría y Realidad Constitucional*. n. 30, 2012, p. 145.

6. SEGADO, Francisco Fernández. La solidaridad como principio constitucional. *Teoría y Realidad Constitucional*. n. 30, 2012, p. 139-140 e 148.

world community, without forgetting inter-generational solidarity for those who are yet to be born, the most diverse spheres of solidarity will require reciprocal collaborations among individuals to satisfy their basic vital needs.

Constitutions generally establish the principle of solidarity, both explicitly and implicitly. It is a normative solidarity, which stems from the legal system and not necessarily from the altruism of each one. People must show *solidarity*, and not be *solitary*, because, in addition to State action, positive and negative behaviors from individuals are necessary for the realization of fundamental rights [7].

Although there is a need to foresee fundamental rights in Constitutions, in order to protect what is essential for a life with dignity [8], it is not always possible to carry out all that is desirable and deserving to be accomplished. As Norberto Bobbio [9] warns, oftentimes there are required objective conditions that do not depend on the goodwill of those who proclaim the rights, nor on the good dispositions of those who have the means to protect them.

The satisfaction of people's essential needs depends upon the efforts of other people (natural or legal), in addition to the action of the State itself [10]. The right to education of a child, for example, will only be fully fulfilled upon the accomplishment of the duty of the parents or the guardians with regard to the child's education, which will occur through actions such as enrollment at school, school attendance and performance monitoring, among others. It is not enough that the State provides schools,

7. PEDRA, Adriano Sant'Ana. Los deberes de las personas y la realización de los derechos fundamentales. *Estudios Constitucionales*, Santiago, a. 12, n. 2, p. 13-28, jul./dez. 2014, p. 16.

8. PEDRA, Adriano Sant'Ana. *A Constituição viva*: poder constituinte permanente e cláusulas pétreas na democracia participativa. 5. ed. Rio de Janeiro: Lumen Juris, 2018, p. 177.

9. BOBBIO, Norberto. *A era dos direitos*. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992, p. 44-45.

10. PEDRA, Adriano Sant'Ana. A importância dos deveres humanos na efetivação de direitos. *In*: ALEXY, Robert; BAEZ, Narciso Leandro Xavier; SANDKÜHLER, Hans Jörg; HAHN, Paulo (Org.). *Níveis de efetivação dos direitos fundamentais civis e sociais*: um diálogo Brasil e Alemanha. Joaçaba: UNOESC, 2013, p. 284.

teachers, books, notebooks, transport, and meals, for example; the family needs to effectively participate in the child's education.

The same can be said about a person's right to health, which depends upon the behaviors of himself/herself, his/her family, and the community, in addition to the State itself. For those diseases caused by an arbovirus (such as Yellow fever, West Nile fever, Dengue, Chikungunya and Zika virus), which are transmitted by arthropods such as insects and arachnids, the actions of society are important in order to that there exist no vector breeding sites (such as mosquitoes of the genus *Aedes*, *Culex*, *Haemagogus*, and *Sabethes*) that can transmit the disease. Likewise, people's behavior (actions and omissions) is crucial in the spread of communicable diseases through direct or indirect contact, some with a relevant rate of transmissibility and lethality. Exclusive State actions are also insufficient in such situations to contain these diseases.

Thus, fundamental duties have the important role of protecting and promoting fundamental rights [11] ; some of these depend on those directly (*e.g.,* obligation to comply with sanitary requirements) while others depend indirectly (*e.g.,* obligation to pay taxes). Furthermore, due to the indivisibility, interdependence, and interrelatedness of fundamental rights, when an individual fulfills his/her own duties in order to protect rights of others, he/she will also protect his/her own rights.

Solidarity is not charity. Charity requires that a person help other just for love, without the other having the right to request such behavior. On the other hand, solidarity (normative) is not a gift that is offered to someone, but the fulfillment of a debt to the "other".

Solidarity imposes an action that impels the individual and the collective will to consciously seek to behave in accordance with the basic

11. PEDRA, Adriano Sant'Ana. Los deberes de las personas y la realización de los derechos fundamentales. *Estudios Constitucionales*, Santiago, a. 12, n. 2, p. 13-28, jul./dez. 2014, p. 16.

needs of the "other". As solidarity is a conscious behavior, it is an attribute that belongs solely to people. Therefore, it is necessary to have the ability to fulfill a commitment in relation to the "other" [12].

The "other" is someone within the sphere of relationship of the subject of that societal duty. Although it seems that people are not connected in any way, through family, friendship, or professional ties, for example, it is necessary to verify the level of interdependence among them. In a particular situation of a pandemic, for example, one can see how people are connected to each other, because a particular inappropriate behavior of a single individual, in relation to non-compliance with sanitary requirements, is able to impact upon the health of many other people, even from very distant points.

Thus, freedom must yield to the minimum solidarity indispensable to maintain a life with dignity. This does not mean that an individual's freedom is being violated, but, quite the contrary, solidarity will ensure all individuals' freedom. It does not refer here to a totalitarian perspective, in which there is an extremely high degree of control over public and private life. It is a renunciation of selfishness –that does not mean a renunciation of freedom – in which both private and public freedoms must be preserved.

The society that is refractory to solidaristic conceptions is neither just nor free [13] because freedom presupposes that all individuals are free. Resources should be made available to the needy groups to allow the achievement of fundamental rights in a compliant manner, in order to strengthen social cohesion, which is opposed to the idea of liberalism-

12. PEDRA, Adriano Sant'Ana. Los deberes de las personas y la realización de los derechos fundamentales. *Estudios Constitucionales*, Santiago, a. 12, n. 2, p. 13-28, jul./dez. 2014, p. 17.

13. OLIVEIRA JUNIOR, Valdir Ferreira de; SOARES, Ricardo Maurício Freire. O Estado constitucional solidarista e a pandemia de COVID-19: breves delineamentos. *In*: BAHIA, Saulo José Casali. *Direitos e deveres fundamentais em tempos de coronavírus*. São Paulo: IASP, 2020, p. 280.

individualism in its absolute form [14]. Solidarity does not aim to achieve uniformity among all individuals, but it intends only to achieve a minimum of harmony in their living conditions [15].

The search for an equilibrium that accommodates the demands of freedom and solidarity will depend on the context under analysis. Every social group has a scale of values, which is important for the characterization of different societies in space and time. The preference for certain values is related to the recognition of the superiority of one value over the other [16]. Although, within the scope of the individual each one establishes his/her preferences and forms a subjective hierarchy, in the domain of society a hierarchy common to all its members must be established so that the Law can protect each value according to its position on this scale.

Therefore, in addition to the provision of solidarity, Constitutions also establish fundamental duties necessary for the protection of these rights.

3. Justification of fundamental duties

As a result of the objective of building a free and solidary society, the individuals of that society must exhibit behaviors compatible with the realization of these values. For José Carlos Vieira de Andrade [17], the legal life would not be possible without the imposition of individual duties, which are closely associated with social interdependence.

Rights are neither a divine gift nor fruits of nature, and can only be protected by social cooperation and with individual responsibility.

14. DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias fundamentais*. Salvador: Juspodivm, 2011, p. 339.

15. SEGADO, Francisco Fernández. La solidaridad como principio constitucional. *Teoría y Realidad Constitucional*. n. 30, 2012, p. 160.

16. PEDRA, Adriano Sant'Ana. *A Constituição viva*: poder constituinte permanente e cláusulas pétreas na democracia participativa. 5. ed. Rio de Janeiro: Lumen Juris, 2018, p. 202-203.

17. ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na Constituição portuguesa de 1976*. 3. ed. Coimbra: Almedina, 2004, p. 167.

Organized communities are necessarily anchored in fundamental duties, which serve as the supports for the existence and functioning of that same community [18].

In addition to financial costs (costs *stricto sensu*), one cannot overlook the existence of other costs (costs *lato sensu*) for the maintenance of an organized society where the rights of people are ensured, since there are needs that are not only provided with financial contributions, but depend on personal efforts for their satisfaction. Thus, costs must previously integrate the very conception of fundamental (subjective) right, that is, costs must be made in part of the respective concept [19].

That is why Constitutions establish fundamental duties well suited for the promotion of fundamental rights in an organized society. Fundamental duties are based on the Constitution from both a *material* and a *formal* perspective.

Thus, on the one hand, *material fundamentality* takes into account the relevance of the duty in order to provide essential basic needs of an individual – of himself, others, or the community – and it must be aimed at the protection and promotion of fundamental rights [20].

It is possible to affirm that fundamental duties are directly linked to the need of people – gregarious beings by nature – to live in community, which requires the contribution of all so that the common aims are achieved [21]. In fact, authors who deal with the theme of fundamental duties emphasize

18. NABAIS, José Casalta. Por uma liberdade com responsabilidade: estudos sobre direitos e deveres fundamentais, Coimbra, Coimbra, 2007, p. 175-176.

19. GALDINO, Flávio, Introdução à teoria dos custos dos direitos: direitos não nascem em árvores, Lumen Juris, Rio de Janeiro, 2005, p. 235.

20. PEDRA, Adriano Sant'Ana. A importância dos deveres humanos na efetivação de direitos. *In*: ALEXY, Robert; BAEZ, Narciso Leandro Xavier; SANDKÜHLER, Hans Jörg; HAHN, Paulo (Org.). *Níveis de efetivação dos direitos fundamentais civis e sociais*: um diálogo Brasil e Alemanha. Joaçaba: UNOESC, 2013, p. 286.

21. SCHWAN, Felipe Teixeira; PEDRA, Adriano Sant'Ana. A democracia brasileira e o dever fundamental de votar. In: BUSSINGUER, Elda Coelho de Azevedo (org.). *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011, p. 178.

that it is necessary to understand them not as a counterpoint or mitigator of rights, but as a promoter of these [22].

Although constituting an autonomous category, fundamental duties are correlated with fundamental rights, since these are limited and ensured by those [23]. At this point, it is important to mention the concept of fundamental duty adopted in this study:

> Fundamental duty is a legal-constitutional category, founded upon solidarity, which imposes proportional conducts to those submitted to a democratic order, liable or not to sanctions, with the aim of promoting fundamental rights [24].

In fact, the relationship between fundamental rights and duties is justifiable, since the right of an individual leads to the rise of at least one duty for others [25], which may be the duty not to impede the realization of the right or even the duty to promote it.

On the other hand, a constitutional provision (*formal fundamentality*) about fundamental duties in kind is necessary, as these must be established by norms with legal force typical of constitutional supremacy [26]. According to Gregorio Peces-Barba Martínez, a legal duty must be recognized by a norm belonging to the order [27]. This is a logical foundation, since the necessity of the provision in the Constitution, created by the (primary or

22. PEDRA, Adriano Sant'Ana. Los deberes de las personas y la realización de los derechos fundamentales. *Estudios Constitucionales*, Santiago, a. 12, n. 2, p. 13-28, jul./dez. 2014, p. 18.

23. DUQUE, Bruna Lyra; PEDRA, Adriano Sant'Ana. Os deveres fundamentais e a solidariedade nas relações privadas. In: BUSSINGER, Elda Coelho de Azevedo. *Direitos e deveres fundamentais*. Rio de Janeiro: Lumen Juris, 2012, p. 18.

24. Concept coined collectively by members of the Research Group "State, Constitutional Democracy and Fundamental Rights" (2013), coordinated by professors Adriano Sant'Ana Pedra and Daury Cesar Fabriz, of Master and PhD Program in Fundamental Rights and Guarantees at Vitoria Law School (Faculdade de Direito de Vitória – FDV).

25. GONÇALVES, Luísa Cortat Simonetti; PEDRA, Adriano Sant'Ana. Deveres fundamentais: a ressocialização enquanto dever do próprio apenado. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011, p. 209.

26. PEDRA, Adriano Sant'Ana. A importância dos deveres humanos na efetivação de direitos. *In*: ALEXY, Robert; BAEZ, Narciso Leandro Xavier; SANDKÜHLER, Hans Jörg; HAHN, Paulo (Org.). *Níveis de efetivação dos direitos fundamentais civis e sociais*: um diálogo Brasil e Alemanha. Joaçaba: UNOESC, 2013, p. 285.

27. PECES-BARBA MARTÍNEZ, Gregorio. Los deberes fundamentales. *Doxa*. n. 4. 1987, p. 335.

secondary) constituent power and committed to popular sovereignty, of those norms that protect and restrict fundamental rights (in normal and exceptional circumstances).

It should be highlighted that the Constitution may establish fundamental duties, both explicit and implicit. The textual record of expressed duties prevents controversies about their existence – although there is a need for interpretation as to their content and scope –, but one should not think that explicit duties can be a *numerus clausus* list in the constitutional text. As duties serve to ensure rights, it is possible to acknowledge the existence of unwritten duties, which can be read between the lines of the constitutional text.

In this sense, José Carlos Vieira de Andrade [28] affirms that there are unwritten fundamental duties that result from the obedience of all individuals to a set of axiological and deontological principles that govern their relations with others and with the society in which they necessarily live. Also on this topic, José Afonso da Silva [29] states that a Constitution does not need to make a bill of duties parallel to the bill of rights, since duties derive from these.

In addition, in the same way as rights, there may be other duties arising from international treaties [30] to which a country is a party too [31], that brings us to the idea of a *block of constitutionality* [32]. In fact,

28. ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na Constituição portuguesa de 1976*. 3. ed. Coimbra: Almedina, 2004, p. 167.

29. SILVA, José Afonso da. *Curso de direito constitucional positivo*. 37. ed. São Paulo: Malheiros, 2014, p. 198.

30. PEDRA, Adriano Sant'Ana. Deveres humanos fundamentais estabelecidos em tratados internacionais firmados pelo Brasil. In: CYRINO, Rodrigo Reis; NEVES, Rodrigo Santos (coord.). *Temas de direito constitucional*. Rio de Janeiro: Lumen Juris, 2020, v. 1, p. 161-170.

31. See, for example, the duties to society established by the Article XXIX of the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, in Bogotá, in 1948: "Article XXIX. It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality".

32. VIEIRA, Pedro Gallo; PEDRA, Adriano Sant'Ana. O rol de deveres fundamentais na Constituição como *numerus apertus*. *Derecho y Cambio Social*. a. X. v. 31. jan./mar. 2013, p. 9.

the establishment of human duties at the international level [33] greatly contributes to the protection of rights, as international commitments in this regard reduce the possibilities of "tax incentives wars" among countries (mitigation of the duty to pay taxes which puts States in a lousy bargaining position in order to attract foreign investment), environmental racism (mitigation of the duty to protect the natural environment and the disproportionate impact of risks to ethnic minority communities), labor terrorism (mitigation of the duty to protect the work environment, with regard to health, hygiene, and safety standards, and the increasing of risks inherent to work, motivated by the terror of unemployment in a society), and even a pandemic (mitigation of the duty to care for public health and lack of international consensus on the necessary sanitary measures, according to the current state of science).

Several Constitutions expressly establish the duty to care for public health [34], as well as the duty to care for healthy environment [35] (natural and artificial) [36], which embraces obligations *to respect* (to refrain from interfering directly or indirectly with the enjoyment of the right to health), *to protect* (to take measures which prevent other parties from interfering), and to *promote* (to boost forward actions towards the full realization of the right to health).

33. The José Saramago Foundation and the National Autonomous University of Mexico (UNAM) proposed a "Universal Charter of Duties and Obligations of the Individuals", inspired by the speech that José Saramago gave in 1998, on the occasion of the Nobel Prize in Literature award, from which can be highlighted: "XIII. 1. All individuals have the duty and obligation to prevent diseases and infections, as well as to make a rational and responsible use of health services. 2. All companies and employers have the duty and obligation to ensure safe and healthy working conditions. 3. All individuals have the duty to demand free and universal health benefits as well as a proper regulation of medicine prices. 4. All pharmaceutical and medical companies have the duty and obligation to share scientific and technical knowledge, and to fix medicine pricing so that the access to basic health is not impeded to all the population. 5. All individuals, business organizations as well as social and cultural organizations have the duty and obligation to equitably distribute food and not waste them in order to eradicate hunger."

34. Examples: Brazil (Art. 198, III), Cape Verde (Art. 70, 1), Colombia (Art. 95, 2), El Salvador (Art. 65), Guatemala (Art. 95), Honduras (Art. 145), Italy (Art. 32), Macedonia (Art. 39), Mozambique (Art. 89), Nicaragua (Art. 59), Panama (Art. 109), Paraguay (Art. 68), Peru (Art. 7), Portugal (Art. 64), Sao Tome and Principe (Art. 50, 1) East Timor (Art. 57, I), Uruguay (art. 44) and Venezuela (Art. 83).

35. Examples: Angola (Art. 39, 1), Argentina (Art. 41), Bolivia (Art. 108, 16), Brazil (Arts. 7, XXII, 200, VIII, and 225), Cape Verde (Art. 72,1), Colombia (Art. 95, 2), Costa Rica (Art. 66), Guatemala (Art. 77), Haiti (Art. 52-A, h), Mozambique (Art. 90), Poland (Art. 86), Portugal (art. 66, 1) and Sao Tome and Principe (Art. 49, 1).

36. See: STF, ADI nº 3540/DF.

Thus, it is necessary to have an understanding of the scope of the fundamental duty and to analyze what behaviors may be required of people.

4. Fundamental duties as open-textured norms and sanitary measures

The constitutional norms that establish fundamental duties are, in general, norms with low normative density, that, by the way, is typical of constitutional norms [37].

In fact, due to their nature and function, constitutional texts are more open than those texts that convey other legal commands. The nature of the constitutional language makes norms more open, with a greater degree of abstraction and, consequently, less legal density [38]. The language used by the Constitution is endowed with a high degree of semantic abstraction that "authorizes the normative operator to act with a greater degree of freedom in determining the scope and depth of the institutes inserted in the body of the Fundamental Norm" [39]. Due to its own structure and function, "the constitutional norm almost always appears more undefined and fragmentary than the other norms of modern dogmatic legal systems" [40].

By not consciously regulating certain tasks, by opting for a normative technique of open norms, the Constitution becomes a democratic instrument that allows political discussions [41]. In addition, the opening of the constitutional system means the incompleteness and the provisional

37. DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias fundamentais*. Salvador: Juspodivm, 2011, p. 330. Vide também: DIMOULIS, Dimitri; MARTINS, Leonardo. *Teoria geral dos direitos fundamentais*. 4. ed. São Paulo: Atlas, 2012, p. 63.

38. BARROSO, Luís Roberto. *Interpretação e aplicação da Constituição*: fundamentos de uma dogmática constitucional transformadora. 4. ed. 2. tir. São Paulo: Saraiva, 2002, p. 107-108.

39. SANTOS, Sergio Roberto Leal dos. *Manual de teoria da Constituição*. São Paulo: RT, 2008, p. 195.

40. ADEODATO, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. 2. ed. São Paulo: Saraiva, 2006, p. 218.

41. PEDRA, Adriano Sant'Ana. *Mutação constitucional*: interpretação evolutiva da Constituição na democracia constitucional. Rio de Janeiro: Lumen Juris: 2012, p. 35.

nature of scientific knowledge [42] . A jurist, like any scientist, must be prepared to call into question the system that has been developed so far, to extend or modify it based on better consideration. To this aim, the open texture of language is an advantage, because it considers both the need for certainty and the need to leave certain questions open to be appreciated at the appropriate time.

The legal system provides several possibilities open and does not yet contain any decision on which of the interests at stake is the most valuable but lets the decision to determine the relative position of the interests to an act of normative production that will still be put.

José Joaquim Gomes Canotilho and Vital Moreira [43] comment that the duty to promote and protect health has as its object both self-health and the health of others (public health). As it is a legal duty, it can substantiate legal obligations to do (such as mandatory vaccination) or not to do (such as a ban on smoking in public places), the non-compliance of which may have consequences in the criminal sphere. For both authors, although the justification of the duty to take care of one's own health is questionable, it does not raise doubts when it comes to protecting the health of others – such as when there is a contagious disease, for example.

The non-constitutional legislator must establish the mandatory behaviors that the individual must follow to protect the corresponding fundamental rights that will be protected by such obligations. The lawmaker's inertia to establish the mandatory behaviors that the individual must follow ends up undermining the fundamental rights that should be protected by such obligations.

42. CANARIS, Claus Wilhelm. *Pensamento sistemático e conceito de sistema na ciência do direito*. 2. ed. Trad. Antonio Menezes Cordeiro. Lisboa: Calouste Gulbenkian, 1996, p. 106.

43. CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa anotada*. 4. ed./1. ed. Coimbra/São Paulo: Coimbra/RT, 2007, v. I, p. 826.

It is not correct to say that fundamental duties enshrined in Constitution are a mere reminder. Fundamental duties are enforceable, including in court, to ensure their implementation. Whenever possible and necessary, the constitutional norms that convey fundamental duties can have direct application, that is, without the intermediation of the ordinary legislator [44] , through a constitutional interpretation that ensures the maximum effectiveness and efficiency of the constitutional norm, according to its potentialities, and, therefore, the normative force of the Constitution itself. In this sense, the fulfillment of a duty can be judicialized and its breach implies some evil to be suffered.

However, legislative mediation will be necessary for the imposition of a punishment for breach of duty [45] , since usually such penalties are not foreseen in the constitutional text [46] . The prediction of punishment is important, because it is a coercive element, but it is not essential for the effectiveness of a fundamental duty. But, even if there are no punishments, there may be other legal consequences as a result of non-compliance with a fundamental duty, because of its normativity.

The non-constitutional legislation must then provide for the enforceability of certain behaviors in times of pandemic. To this end, ordinary rules must take into account the current stage of scientific knowledge as well as the precautionary principle. When an activity raises threats of harm to human health or the environment, precautionary measures [47] should be taken even if some cause-and-effect relationships are not fully established scientifically.

---

44. In the opposite direction: CHULVI, Cristina Pauner. *El deber constitucional de contribuir al sostenimiento de los gastos públicos*. Madri: Centro de Estudios Políticos y Constitucionales, 2001, p. 49. See too: RUBIO LLORENTE, Francisco. Los deberes constitucionales. *Revista Española de Derecho Constitucional*. a. 21. n. 62. mai./ago. 2001, p. 21. Cf. ainda: DIMOULIS, Dimitri; MARTINS, Leonardo. *Teoria geral dos direitos fundamentais*. 4. ed. São Paulo: Atlas, 2012, p. 66.

45. SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2007, p. 244.

46. BERNARDO SEGUNDO, Ronaldo Louzada; PEDRA, Adriano Sant' Ana. Limites ao dever de tolerância. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011, p. 203.

47. Wingspread Declaration (USA, 1998).

Due to the situation of sanitary calamity, the law may require from individuals, then, behaviors that would not be required in other situations, such as measures of social distance, confinement, quarantine, use of a mask, restriction of entering and leaving the country, and requisition of goods and services to meet demands arising from the pandemic. Due to the non-compliance with the established sanitary measures, the law can provide for from administrative monetary penalties to criminal penalties.

5. References

ADEODATO, João Maurício. Ética e retórica: para uma teoria da dogmática jurídica. 2. ed. São Paulo: Saraiva, 2006.

ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na Constituição portuguesa de 1976*. 3. ed. Coimbra: Almedina, 2004.

BARROSO, Luís Roberto. *Interpretação e aplicação da Constituição*: fundamentos de uma dogmática constitucional transformadora. 4. ed. 2. tir. São Paulo: Saraiva, 2002.

BERNARDO SEGUNDO, Ronaldo Louzada; PEDRA, Adriano Sant'Ana. Limites ao dever de tolerância. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011.

BOBBIO, Norberto. *A era dos direitos*. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992.

CANARIS, Claus Wilhelm. *Pensamento sistemático e conceito de sistema na ciência do direito*. 2. ed. Trad. Antonio Menezes Cordeiro. Lisboa: Calouste Gulbenkian, 1996.

CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. *Constituição da República Portuguesa anotada*. 4. ed./1. ed. Coimbra/São Paulo: Coimbra/RT, 2007, v. I.

CHULVI, Cristina Pauner. *El deber constitucional de contribuir al sostenimiento de los gastos públicos*. Madri: Centro de Estudios Políticos y Constitucionales, 2001.

DIMOULIS, Dimitri; MARTINS, Leonardo. *Deveres fundamentais*. In: LEITE, George Salomão; SARLET, Ingo Wolfgang; CARBONELL, Miguel. *Direitos, deveres e garantias fundamentais*. Salvador: Juspodivm, 2011.

DIMOULIS, Dimitri; MARTINS, Leonardo. *Teoria geral dos direitos fundamentais*. 4. ed. São Paulo: Atlas, 2012.

DUQUE, Bruna Lyra; PEDRA, Adriano Sant'Ana. Os deveres fundamentais e a solidariedade nas relações privadas. *In*: BUSSINGER, Elda Coelho de Azevedo. *Direitos e deveres fundamentais*. Rio de Janeiro: Lumen Juris, 2012.

GALDINO, Flávio, Introdução à teoria dos custos dos direitos: direitos não nascem em árvores, Lumen Juris, Rio de Janeiro, 2005.

GONÇALVES, Luísa Cortat Simonetti; PEDRA, Adriano Sant'Ana. Deveres fundamentais: a ressocialização enquanto dever do próprio apenado. In: BUSSINGUER, Elda Coelho de Azevedo. *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011.

NABAIS, José Casalta. Por uma liberdade com responsabilidade: estudos sobre direitos e deveres fundamentais, Coimbra, Coimbra, 2007.

OLIVEIRA JUNIOR, Valdir Ferreira de; SOARES, Ricardo Maurício Freire. O Estado constitucional solidarista e a pandemia de COVID-19: breves delineamentos. *In*: BAHIA, Saulo José Casali. *Direitos e deveres fundamentais em tempos de coronavírus*. São Paulo: IASP, 2020.

PECES-BARBA MARTÍNEZ, Gregorio. Los deberes fundamentales. *Doxa*. n. 4. 1987.

PEDRA, Adriano Sant'Ana. *A Constituição viva*: poder constituinte permanente e cláusulas pétreas na democracia participativa. 5. ed. Rio de Janeiro: Lumen Juris, 2018.

PEDRA, Adriano Sant'Ana. A importância dos deveres humanos na efetivação de direitos. *In*: ALEXY, Robert; BAEZ, Narciso Leandro Xavier; SANDKÜHLER, Hans Jörg; HAHN, Paulo (Org.). *Níveis de efetivação dos direitos fundamentais civis e sociais*: um diálogo Brasil e Alemanha. Joaçaba: UNOESC, 2013.

PEDRA, Adriano Sant'Ana. Deveres humanos fundamentais estabelecidos em tratados internacionais firmados pelo Brasil. In: CYRINO, Rodrigo Reis; NEVES, Rodrigo Santos (coord.). *Temas de direito constitucional*. Rio de Janeiro: Lumen Juris, 2020, v. 1.

PEDRA, Adriano Sant'Ana. Los deberes de las personas y la realización de los derechos fundamentales. *Estudios Constitucionales*, Santiago, a. 12, n. 2, p. 13-28, jul./dez. 2014.

PEDRA, Adriano Sant'Ana. *Mutação constitucional*: interpretação evolutiva da Constituição na democracia constitucional. Rio de Janeiro: Lumen Juris: 2012.

PEDRA, Adriano Sant'Ana. Os deveres humanos. *A Gazeta*, 28 e 29 mar. 2020, p. 21.

ROJAS A., Luis Emilio. Dimensiones del principio de solidaridad: un estudo filosófico. *Revista Chilena de Derecho*. v. 46, n. 3, 2019.

RUBIO LLORENTE, Francisco. Los deberes constitucionales. *Revista Española de Derecho Constitucional*. a. 21. n. 62. mai./ago. 2001.

SANTOS, Sergio Roberto Leal dos. *Manual de teoria da Constituição*. São Paulo: RT, 2008.

SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2007.

SCHWAN, Felipe Teixeira; PEDRA, Adriano Sant'Ana. A democracia brasileira e o dever fundamental de votar. In: BUSSINGUER, Elda Coelho de Azevedo (org.). *Direitos fundamentais*: pesquisas. Curitiba: CRV, 2011.

SEGADO, Francisco Fernández. La solidaridad como principio constitucional. *Teoría y Realidad Constitucional*. n. 30, 2012.

SILVA, José Afonso da. *Curso de direito constitucional positivo*. 37. ed. São Paulo: Malheiros, 2014.

VIEIRA, Pedro Gallo; PEDRA, Adriano Sant'Ana. O rol de deveres fundamentais na Constituição como *numerus apertus*. *Derecho y Cambio Social*. a. X. v. 31. jan./mar. 2013.

2

The freedom of creed in times of pandemic

AGENOR DE SOUZA SANTOS SAMPAIO NETO

CONTENTS: The freedom of creed in times of pandemic; References.

> "*The things of God and the things of Caesar have always needed regulation in the cultural environment of the civilization that is usually called Western*" (Paulo Ferreira da Cunha).

The coronavirus pandemic (COVID-19) is unprecedented in history. Faced with this perplexity, especially as a result of a globalized world, human beings began to revise their values, including spiritual ones, in order to deepen their relationship with the divine, to position themselves against this totally unforeseen and extraordinary scenario, alarming data in this pandemic period, such as the increase in domestic violence and the increase of more than 40% (forty percent) in the number of divorces, according to data from the Bahian court.

Religion, as Hugues Moutouh and Jean Rivero (2006, p. 522) warn, is a complex phenomenon [in a globalized world] and is difficult to fully grasp in relation to the outside world. For these authors, religion "[...] affirms the existence of supernatural realities whose respect man is in a situation of dependence; organizes the relationships that this dependency postulates. The religious man adheres to this statement, adopts this organization of his relations as the supernatural" (MOUTOUH; RIVERO, 2006, p. 522).

Freedom of belief, therefore, is one of the most important fundamental rights of the citizen. Fundamental rights were developed through a long historical process, based on essential values for community life, being extremely important for the evolution of a society.

Fundamental rights, still in this new order, are subjective and constitutionally guaranteed rights that aim to achieve the principle of the dignity of the human person (SARLET, 2004). According to the thought of Uadi Bulos (2008, p. 404):

> Fundamental Rights are the set of norms, principles, prerogatives, duties and institutes, inherent to popular sovereignty, which guarantee peaceful, dignified, free and egalitarian coexistence, regardless of creed, race, origin, color, economic condition or social status. Without fundamental rights, man does not live, doesn't coexists, and in some cases does not survive. Fundamental rights are known under the most different labels, such as fundamental human rights, human rights, human rights, individual rights, subjective public rights, natural rights, fundamental freedoms, public freedoms, etc. (BULOS, 2008, p. 404).

We can say, in this way, that the protection of these rights - with such a bias of promoting peaceful coexistence - is the essential core of constitutional democracy: the greater the protection of fundamental rights, the greater the degree of democracy of a society (GONET BRANCO, 2000). The declaration of rights, therefore, in its current sense, presupposes the strategic binding of all state powers.

Fundamental rights are characterized by their historicity and have taken on new dimensions with the development of the world. The evolution of human rights follows the historical process, social struggles, political regimes and the progress of the economy and science. In this sense, we

find the degree of its amplitude and ontological coherence for the use of fundamental rights in relation to every person and any situation, according to the thought of Taurino Araújo (2019), because this portrays the level and achievement of its historicity, comprehensive of all the unequal:

> It is logical that these transgressions (small and large) face the realization of fundamental rights, considering both the possession of property and its lack, by a singular and concrete subject, and this applies even to those who are being criminally prosecuted. (ARAÚJO, 2019, p. XXIV).

Freedom of creed meets in-depth treatment in the Brazilian Constitution of 1988 [1], it is a fundamental right that externalizes one's own human dignity. It is a fundamental right of the first dimension that imposes on the Public Power not to interfere in this sphere of the individual's life, [2] in terms of profession of faith.

Commenting on the 1946 Constitution, Pontes de Miranda (1960) already warned that freedom of belief is a fundamental right that is independent of any escalation and essential to guarantee a Democratic State of Law.

The constitution of Portugal ensures in its article 41 that: (i) Freedom of conscience, religion and worship is inviolable; (ii) No one may be persecuted, deprived of rights or exempt from civic obligations or duties because of his or her religious convictions or practice; (iii) No one may be asked by any authority about their religious beliefs or practice, except for

1. Freedom of religious creed is present in Article 5, caput and paragraphs VI, VII, VIII; Article 143, §1; Article 19, I; Article 150, VI, B; Article 210, § 1 and Article 226, §2.

2. In this sense, the Lusitanian author Paulo Ferreira da Cunha (2017, p. 106) draws attention that "Although another value did not have, at least as cultural heritage, religions could not be despised or minimized by states. Such a mistake would cost any society dearly and even more – it must be stressed – to a society that wants to be republican and, as such, secular." The author also points out that in the Marxist-Leninist Soviet regime, even with the attempt of the State to stifle religions, once the socialist state has ended, these religions, "[...] as a natural thing they were, they galloped again."

the collection of non-individually identifiable statistical data, nor be harmed by refusing to answer; (iv) Churches and other religious communities are separated from the State and free in their organization and in the exercise of their functions and worship; (v) The freedom to teach of any religion practiced in the context of their confession is guaranteed, as well as the use of their own media for the continuation of their activities.

In this regard, the Supreme Federal Court has a leading case on the issue of freedom of religious education that resided in the judgment of Direct Action of Unconstitutionality 4.439/DF, in which the Attorney General's Office questioned excerpts from the Law of Guidelines and Bases of Education and the agreement signed between Brazil and the Holy See (Decree 7.107/2010) that allowed confessional teaching in Brazilian public schools as to the meaning and scope of such right.

The Attorney General's Office argued in the initial of Direct Action of Unconstitutionality 4.439/DF that religious education classes in public elementary schools should have a secular dimension and focused on the doctrine of the various religions, that is, what was called a non-confessional model, so that in such lanes it would not be allowed to hire teachers linked to some religion.

In this Direct Action of Unconstitutionality 4.439/DF, by majority, 6 (six) votes to 5 (five), the constitutionality of confessional education in the Brazilian public school system was decided on 09/27/2017, and, therefore, the rejection of the Direct Action of Unconstitutionality proposed by the Attorney General's Office, although it has been recorded that religious education in public schools is optional.

In the aforementioned Direct Action of Unconstitutionality, the majority formed in the Conductive Vote of Minister Alexandre de Moraes

argued that students who made the choice to attend the discipline religious education, will be able to choose their preferred belief, and therefore have teachers linked to their religion for the purpose of teaching classes on the subject, as argued by Minister Alexandre de Moraes: "[...] who teaches religion, dogmas, are those who believe in their own faith and in those dogmas. Now, an army of teachers who teach religious precepts, some contradictory chosen by the State, do not configure religious teaching."

In turn, the minority, according to the Vote of Minister Luís Roberto Barroso, was based on the non-confessional character of religious education, understanding the prohibition of hiring teachers as representatives of religions for the purpose of teaching classes on religious education. Given this non-confessional model, "[...] the discipline consists of the neutral and objective exposition of the practice, history and social dimension of the different religions, including non-religious positions", in a reductionism of its meaning and scope.

Still on issues related to freedom of creed, the Supreme Court also ruled that "one aspect of religious freedom is the right that the individual has to not only choose which religion will follow, but also to do religious proselytizing", it is worth saying, it was decided in the Pretoria Excellency that the conviction of other people converting to their religion does not represent illegality, as remained based on the Appeal in Habeas Corpus 134682/BA, judged on 29/11/2019, of the Rapporteurship of Minister Edson Fachin.

In this panorama of the jurisprudence of the Supreme Federal Court, an important decision is one that protects religious diversity in situations of profession of faith in the face of religious intolerance and concerns the understanding established in the Appeal in Habeas Corpus 146303/RJ, of the Rapporteurship of Minister Dias Toffoli: "incitement to public hatred against any religious denominations and their followers is not protected by

the constitutional clause that guarantees freedom of expression". Still in this judgment: "[...], it is possible, depending on the case, for a religious leader to be convicted of the crime of racism (Article 20, § 2, of Law 7.716/89) for having delivered public hate speech against other religious denominations and their followers."

Therefore, the above, deals with an important issue in the sense of repelling religious intolerance, respecting, the right of people not to have against themselves and their creeds, speeches against the religious option, and may, depending on the specific case, be equated to the crime of racism public hate speech, to the disadvantage of other religions and also of its followers.

In such situations, as Leonardo Martins warns (2012, p. 360) it is possible to intervene in the state to ensure fundamental rights to freedom of conscience and belief. This author exemplifies such intervention situations:

> (i) in cases of reduction of the right of intimate forum to think freely according to the conscience and belief developed by the citizen himself; (ii) in cases of reduction of the right of religious or ideological expression in a positive way when establishing obligations to silence; (iii) in cases of reduction of the right of action and religious or moral ideological effectation when the State proceeds to contrary demonstrations, warnings about dangers arising from beliefs or ideologies; (iv) and in cases where the State reduces the freedom of belief and conscience, thus intervening in its areas of protection, when it prohibits certain actions or omissions and when they clash against the imperatives of conscience of the holder or when the belief followed respectively sends the action when the State prohibits or prohibits it when the State orders it , sanctioning the omission. [3] (MARTINS, 2012, p. 360).

3. In the first case, we have as an example the crucifix hanging on walls of public building. In the second case, it is the prohibition of religious proselytism, v.g. the prohibition of Freemasonry. In the third, we have the unequal treatment of certain cults in the face of the majority religion and national religious holidays. In the fourth case, the example is polygamy.

Another important leading case on the subject was the Case Lautsi x Italy, known as the "case of crucifixes" that was processed in the European Court of Human Rights (ECHR), tried on 11/03/2009, and dealt with alleged violation of the right of parents to educate their children according to the convictions and the consequent right of students to freedom of religion, the summary of which is as follows:

> The European Court of Human Rights (ECHR) on 3 November 2009 ruled that the display of crucifixes in classrooms is "a violation of the right of parents to educate their children according to their convictions and the right of students to freedom of religion." Because it did not have the power to force the removal of crucifixes from Italian and European schools, the Court ordered Italy to fine the applicant €5,000 for moral damages. The final judgment of March 18, 2011, then overturned the decision at first instance. The judges of the ECtHR accepted the thesis that there is no evidence to prove any influence of the display of the crucifix to the students. The decision was adopted with 15 votes in favor and two against. (LAUTSI VS. ITÁLIA, [2020?]).

The ECHR ruling draws attention that educational pluralism is essential for the preservation of a democratic society, even when the judgment is given, and the ECHR has presented the following statement to the press:

> The presence of the crucifix, which is impossible not to notice in the classrooms, could easily be interpreted by students of all ages as a religious symbol, which could occur so as to be educated in a school environment that bears the mark of a particular religion. All of this can be encouraging for religious students, but annoying for individuals who practice other religions, particularly if they belong to religious minorities, or who are atheists. The Court of Justice is unable to understand how the display, in the classes of public schools, of a

> symbol that can reasonably be associated with Catholicism, can serve educational pluralism, which is essential for the preservation of a democratic society as it was conceived by the power of the European Convention on Human Rights, a pluralism that is recognized by the Constitutional Court of the Italian Republic. The required exposure of a symbol of a particular confession in places that are used by public authorities, and especially in classrooms, restricts the right of parents to educate their children according to their own convictions and the right of children to have or not a belief.

It is important to highlight - in the perspective of protecting citizens - the constitutional provisions that guarantee freedom of belief and the fact that the Judiciary, sensitive to this protection, is moving towards the elimination of violations of this right. In this light, decision of the 4th Panel of the Regional Labor Court of the 3rd Region that determined the reintegration of a worker who professed the Seventh-day Adventist religion and had been dismissed for not working on Saturdays, which is possible in Brazil to order the redistribution of the workload work on days that were not confessional to her. This decision went like this (TRABALHADORA..., 2012):

> PUBLIC ENTERPRISE - RELIGIOUS DISCRIMINATION - REINTEGRATION. The national legal system rejects discriminatory treatment on the grounds of race, color, religion, among others. Thus, the constitutional principles, associated with the legal precepts and international provisions that regulate the matter, authorize the understanding that the dismissal, when flagrantly discriminatory, should be considered null and void, and the reintegration into employment is due. Intelligence of the articles 1st, III and IV; 3rd, item IV; 5th, caput, VI and XLI, and 7th, XXX, all of the Constitution of the Republic; 8th and 9th clt; Law 9.029/95 and ILO Conventions 111/58 and 117/62. (Case No. 00745-2011-066-03-00-5, Regional Labour Court of the 3rd. Region).

Regarding the right to religious freedom, Paulo Gonet Branco, Inocêncio Mártires Coelho and Gilmar Mendes (2008), highlight the importance of this dimension in the citizen's life, in the following terms:

> The recognition of religious freedom by the Constitution denotes that the legal system has taken religiosity as a good in itself, as a value to be preserved and fostered. After all, jusfundamentais norms point to values considered as capitals for the collective, which must not only be preserved and protected, but also be promoted and stimulated.
>
> The Constitution protects freedom of religion to make it easier for people to live their faith. Hence the Constitution provides for religious assistance for those who are subject to collective hospitalization (Article 5, VII). The recognition of religious freedom certainly contributes to preventing social tensions, since, by it, pluralism is installed and neutralizes grudges and disagreements arising from the official veto of any beliefs. The recognition of religious freedom also has in itself the argument that so often moral formation contributes to shaping the good citizen. These reasons, however, are not sufficient in themselves to explain the raison d'10 000 of freedom of belief. The Constitution guarantees the freedom of believers, because it takes religion as a valuable asset by itself, and wants to protect those who seek God from obstacles to practice their religious duties. (BRANCO; COELHO; MENDES, 2008, p. 419-420).

As a reflection of this, in order to realize the right and facilitate people to live their faith, J. J. Gomes Canotilho (2007) points out the tendency of the current constitutional doctrine to consider the right to freedom of religion as an inseparable element of the protection of personality due to the fact that it builds personal identity and the right to develop personality as a fundamental right linked to one's own life – in keeping with the full exercise of citizenship in a globalized world.

According to the doctrine of José Afonso da Silva (2014), religious

freedom is subdivided into three other freedoms: (i) freedom of belief, which comprises the freedom to choose whether or not to have a belief; (ii) freedom of worship, which is the faculty of expression of religion without the interference of public power; and (iii) the freedom of religious organization, which "concerns the possibility of establishing and organizing churches and their relations with the State" (SILVA, 2014, p. 252).

Also for Paulo Ferreira da Cunha [4] (2017, p. 107) there are two questions on the subject: "on the one hand religious freedom and non-persecution of creeds and non-believers, and, on the other, the separation of the State from the Churches, the equitable treatment of all, the non-confusion of powers".

One of the great challenges of the theme of religious freedom lies in respecting and preserving the rights of those who have no belief - unbelievers, atheists, agnostics - in order to respect also those who share with (dis)belief, not being plausible any religious intolerance towards these people, even if it seems paradoxical.

Because of this, one of the great challenges to the theme of religious freedom lies in respecting and preserving the rights of those who have no belief at all – unbelievers, atheists, agnostics, so as to respect also those who share with the (dis)belief not being plausible, also, any religious intolerance towards these people, even if it seems paradoxical.

Moreover, recalls Araújo (2019, p. XXVII) that, through a hermeneutics of inequality, in the interpretation of fundamental rights has to be overcome implicit ilogicities and uncertainties, with a view to full justice and security. In this sense, it is worth noting epeistemological, ontological, logical and axiological – rigor comprehensive, because of the total consecration of the right to freedom of (un)belief –, all from:

4. The same author points out that "The basic issue is that there are hardly really secular, fully secular states. There always ends up being deviations and exceptions. That's the big problem." (CUNHA, 2017, p. 108).

> [...] an epistemic review of the so-called basic legal concepts, revealing to them, including the underlying ideological meaning, which does not contain and cannot/should contain scientific neutrality, but will constitute, at the very least, problematization of the dogmatic character of the theoretical common sense, by virtue of the very reasoning that mirror, concealing, through formal equality, the implicit ideologicalities, disorders and (in)certainties around something from which one expects (and propagates) full justice and security.

In conclusive routes, therefore, what we see is that discussions and debates on the theme of religious freedom are passionate and often try to impose only one point of view to the detriment of those who think in opposition or with the mark of difference. Hence why compassion, solidarity, respect and ethics must be strong colors of this eternal - and at the same time contemporary - cher about the freedom to believe or not to believe, all from inspiration and thought in a Higher Being, which is often called God, Buddha, Allah, Giva, Oxalá, Thor, be those who opt for (un) belief, but always with a view to peaceful conviviality among all members of the human community.

Happy, then, the day and the men when it becomes reality the verses John Lennon in *Imagine:*

Imagine trere´s no heaven
It's easy if you try
No hell below us
Above us only sky
Imagine all the people
Living for today
Imagine there's no countries
It isn't hard to do
Nothing to kill or die for
And no religion too
And the world will live as one
I hope that day comes!

References

ARAÚJO, Taurino. **Hermenêutica da desigualdade:** Uma introdução às Ciências Jurídicas e também Sociais. Belo Horizonte: Del Rey, 2019.

BRASIL. **Constituição da República Federativa do Brasil.** Brasília, DF: Senado, 1988.

_____. Supremo Tribunal Federal (STF). Ação Direta de Constitucioalidade 4.439/DF. Requerente: Procurador-Geral da República. Intimado: Presidente da República; Congresso Nacional; Confereência Nacional dos Bispos do Brasil. Relator: Ministro Alexandre de Moraes. Brasília, 27 de setembro de 2017. Disponível em:<http://portal.stf.jus.br/processos/downloadPeca.asp?id=314650271&ext=.pdf>. Acesso em: 06 jul. 2020.

_____. Supremo Tribunal Federal (STF). Recurso em Habeas Corpus 134682/BA. Recorrente: Jonas Abib. Recorrido: Ministério Público Federal. Relator: Ministro Edson Fachin. Salvador, 29 de novembro de 2016. Disponível em:<http://portal.stf.jus.br/processos/detalhe.asp?incidente=4988091>. Acesso em: 06 jul. 2020.

_____. Supremo Tribunal Federal (STF). Recurso em Habeas Corpus 146303/RJ. Recorrente: Tupirani da Hora Lores. Recorrido: Ministério Público Federal. Relator: Ministro Dias Toffoli. Rio de Janeiro, 10 de setembro de 2018. Disponível em:<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5233101>. Acesso em: 06 jul. 2020.

BRANCO, Paulo Gustavo Gonet. Aspectos de teoria geral dos direitos fundamentais. *In*: MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. **Hermenêutica Constitucional e Direitos Fundamentais**. Brasília: Brasília Jurídica, 2000.

BRANCO, Paulo Gustavo Gonet; COELHO, Inocêncio Mártires; MENDES, Gilmar Ferreira. **Curso de Direito Constitucional**. São Paulo: Saraiva, 2008.

BULOS, Uadi Lammêgo. **Curso de Direito Constitucional**. 2. ed. São Paulo: Saraiva, 2008.

CANOTILHO, J. J. Gomes. **Direito Constitucional e teoria da Constituição**. 3. ed. Coimbra: Almedina, 1999.

_____. **A liberdade religiosa entre o juspositivismo constitucional e a judiciarização dos conflitos religiosos**. In: Código das Sociedades Comerciais, homenagem aos Profs. Doutores A. Ferrer de Correia, Orlando de Carvalho e Vasco Lobo Xavier. Volume II. Coimbra: Coimbra Editora, 2007.

CUNHA, Paulo Ferreira da. Do Direito à (Des)crença. **Revista Lusófona de Ciências das Religiões**, Lisboa, n. 20, p. 99-124, 2017. Disponível em:<https://revistas.ulusofona.pt/index.php/cienciareligioes/article/view/6124>. Acesso em: 03 jul. 2020.

LAUTSI VS. ITÁLIA. [2020?]. Disponível em:<https://en.wikipedia.org/wiki/Lautsi_v._Italy>. Acesso em: 06 jul. 2020.

MARTINS, Leonardo. **Liberdade e Estado Constitucional.** Leitura jurídico-dogmática de uma complexa relação a partir da teoria liberal dos direitos fundamentais. São Paulo: Atlas, 2012.

MIGALHAS QUENTES. **Trabalhadora dispensada por motivo religioso será reintegrada.** 2012. Disponível em:<https://www.migalhas.com.br/quentes/156909/trabalhadora-dispensada-por-motivo-religioso-sera-reintegrada>. Acesso em: 06 jul. 2020.

MIRANDA, Jorge. **Manual de direito constitucional:** direitos fundamentais. Coimbra: Coimbra Editora, 1988. v. 4.

MOUTOUH, Hugues; RIVERO, Jean. **Liberdades públicas.** São Paulo: Martins Fontes, 2006.

PONTES DE MIRANDA, Francisco Cavalcanti. **Comentários à Constituição de 1967 com a Emenda n. 1, de 1969.** 2. ed. São Paulo: Revista dos Tribunais, 1974. v. 5.

SARLET, Ingo Wolfgang. **Eficácia dos Diretos Fundamentais.** Porto Alegre: Livraria do Advogado, 2004.

SILVA, José Afonso da. **Curso de Direito Constitucional Positivo.** São Paulo: Malheiros Editores, 2014.

3

Illness, social isolation and tragedy in Sóphocles' Filoctetes: why did the greeks trust the care with the vulnerability of our lives to the friendship and justice? [1]

ANTONIO SÁ DA SILVA

WELLITON DA SILVA SANTOS

CONTENTS: 1. Introduction; 2. Philoctetes: A token (among others) of the human life fugacity and the precariousness of our happiness projects; 3. Plato's accusation towards poets' scaremongering: knowledge and justice prevent the nature and the future unpredictability; 4. Justice, Friendship, community and its soothing for human misfortunes: what would Aristotle say about the pandemic and other uncertainties? 5. Final regards; 6. References.

1. Introduction

As a rule, the United Nations (UN) countries constitutional canons acknowledge the citizen's right to healthcare and give this responsibility to the State. Our Founding Charter, for instance, counts on an entire section on this subject (Articles 196 to 200). The infraconstitucional legislation otherwise, specifies how this right is to be exercised, which includes

1. T.N.: Translated by members of the Voluntary translation of informative materials related to COVID-19 project, offered by NUPEL / UFBA and supervised by professors MA. Daniel Vasconcelos, Dr. Lucielen Porfirio, and Dr. Monique Pfau. Translators: Jéssica de Jesus Costa Gama Soares and Vinicius Ferreira Alves. Abstract translated by Ana Beatriz Almeida. Translation revised by Alisson Alves Santos.

sanctions for the disobedience of the State obligation. Nonetheless, the recurring issue is: where does the first commandment come from? In other words, where does the fundaments of such constitutional determination (which stops everything from being merely a deliberate legislative act, contingently summonable even in the occasion when this duty vanishes from the constitution with an adequate quorum or with another Constitutional Assembly) come from?

No one ignores that our liberal inclination, restricted by European post-liberal philosophy [2] influences the way we usually base our political-social-constitutional structure: as a social contract in which the grantor's and the grantee's rights and duties are previously established within the limits of equality and responsibilities [3] . Nevertheless, we still dare to consider fragile such foundations in modern times, as not even the heralds of modern-Illuminism seem convinced that the freedom of contract is the ultimate *ratio* of the political community. In fact, if we pay close attention to only two of the important theorists of contractualism, Locke and Rousseau, we will have enough information to place under suspicion two presuppositions which the modern State would collapse without: human self-sufficiency and the mutual advantage of contractors. [4] For

2. On the origins of liberal State and its passage to social State, see BONAVIDES, Paulo. Do Estado liberal ao Estado social. 9. ed. São Paulo: Malheiros, 2007, *passim*.

3. In this sense, unlikely the pre-modern thinking, in which law is a presupposition of an order that precedes the will itself, in modern contractualism the legislator take the place of demiurge, from whom all things start and find their sense. In Hobbes, where the social contract derives from that law of reason which imposes to everybody the duty to seek peace, it results in a mutual agreement where each individual give up their right to all things, as well as overcoming the state of permanent war among them (HOBBES, Thomas. *Leviatã ou matéria, forma e poder de uma república eclesiástica e civil*. Tradução João Paulo Monteiro e Maria Beatriz Nizza da Silva. 2. ed. São Paulo: Martins Fontes, 2008.). In Locke, where this contract is an expedient through which the citizen, depriving themselves of their natural freedom, establishes a civil freedom, as they join other citizens to live comfortably together, enjoying their property and protecting themselves against non-signatories to this covenant (LOCKE, John. In: *Dois tratados do governo civil*. Tradução Miguel Morgado. Lisboa: Edições 70, 2006.). In Rousseau, where the social pact is a tool to resist everything that harms the preservation of all humans' state of nature it forms a conjoint moral body in order to each individual keep their original freedom possessed. (ROUSSEAU, Jean-Jacques. *Do contrato social*: princípios do direito político. Tradução Edson Bini. Baurú: Edipro, 2000.). In Kant, the contract is an assumption for a universal legislating will and because of that it obliges citizens within the state (KANT, Immanuel. *Fundamentação da metafísica dos costumes*. Tradução Paulo Quintela. Lisboa: Edições 70, 2009).

4. NUSSBAUM, Martha C. *Frontiers of justice*: disability, nationality, species membership. Cambridge: The Belknap press of Harvard University Press, 2007. Our inclusion of the author in this paper doesn't include another pressuposition she lists, the equality, since we believe that it is not specific to modern law, and it was decisive for the emergence of law Roman jurisprudence as well.

Locke, we can see it because he suggests that the contractual motivation is the vulnerability of the individual in the state of nature [5]; for Rousseau, because he denounces our miseries in the state of nature [6].

The constitutional placement of the right to health is crucial in a moment of humanitarian crisis such as the one we are experiencing because of a pandemic with still unknown consequences. Considering the broad debate that the pandemic has raised and the (quite plausible) well-discussed hypothesis that law needs to be brought closer to the humanities, our purpose here is to arrange, albeit briefly, a discussion on the challenges of the moment. To begin with, we could mention Hippocrates, since his medical writings discuss a possible relation between knowledge and tragedy: According to him, scientific knowledge must not be underestimated, as he understands that the lack of it would lead the treatment of patients to randomness [7].Then, to deepen the discussion, we can reflect on one of the most successful Greek tragedians, Sophocles. His theatrical play discussed here offers rich material for reflections, which dialogs with Aristotle and Plato, both meaningful interlocutors for this debate.

Philoctetes, an outstanding Greek warrior who sailed to Troy against Helen's kidnapping, was bitten by a snake when he unwarily touched Chrysies' altar. Thereby, he contracted an incurable disease [8]. The misfortune that struck him (αναγκαια, anangkaia) prohibited him from the right he thought he had to a successful life, although he was the heir of a powerful arrow, given by the god Heracles to defeat his foe. The Greeks, then, bothered by his whining, which disturbed both the worship and the

5. LOCKE, John. Do governo civil, cit., p. 241.

6. ROUSSEAU, Jean-Jacques. *Emílio ou Da educação*. Tradução Roberto Leal Ferreira. 3. ed. São Paulo: Martins Fontes, 2004.

7. HIPÓCRATES. A medicina antiga. In: PEREIRA, Maria Helena da Rocha. *Helade*: antologia da cultura grega. 7. ed. Coimbra: Faculdade de Letras da Universidade de Coimbra, 1990, p. 226.

8. The classists work with a few variations of this mythology character. The edition used here is the one given by Sophocles and probably staged in the year 409 b.C. It presents no loss of any important reference to be targeted in the Iliad by Homer, founding text of our western tradition: SÓFOCLES. Filoctetes. Tradução Josiane T. Martinez. Campinas: Programa de Pós-Graduação em Linguística do Instituto de Estudos da Linguagem da Universidade de Campinas, 2003.

troop's rest, left him in Lemnos in the solitude of an uninhabited island.

The narrative challenges us to consider the different (and to some extent inevitable) human vicissitudes as the vulnerability of our lives is a recurrently denounced theme by tragedy playwrights, and it exposes our happiness projects to unexpected events that occur throughout our lives, whether led by Destiny (τύχη, tyche), or caused by uncontrolled events. The major example at this moment is the fact that, perhaps, after World War II, no episode has affected humanity as touchingly as the pandemic of a virus which its lethality, as declared by medical and health organizations, research entities, international agencies and governments, will be of great proportions due the insidious way it affects health services.

The approximation between the tragedy's horror and the distress provoked by the coronavirus is believed to be quite plausible, as we will clarify later. Perhaps because of the lack of scientific knowledge on the origination, propagation and control of this virus; or because the health system is not sufficiently accessible for the whole population in this scenario of massive contagion; or even because political, economic and social planning does not provide enough peace for the population in these difficult times… the way , so far, unpredictable — and the world style as well, with its still quite unknown substances and laws, always unpredictable, always catching us unaware… how the pathological agent entered our lives denounces the mortality that makes us all equal in a human level, and how we constantly pretend not to be aware.

The following text presents some clues about the relation between tragedy (widely discussed in literature and classical philosophy) and the achievement of our happiness projects powered by genuine friendship, political planning and juridical supervision. The first topic will briefly explore the concept of tragedy on the social and the private life, a subject

the theatrical play chosen here is a good representation. The second topic briefly introduces the complex Plato's ethical-scientific project, that denounces the supposed resignation of the poets with the amorality of the gods and the determinism that rules the natural world. The third topic tries to introduce how Aristotle recognized that a happy life depends a little on Randomness (καιρός, kairos): it can either bring unforeseen misfortunes or friends to help us in bad situations. To this end, Aristotle does not renounce his thoughts that knowledge and political actions are capable of, at least, reduce the Moira's (μοῖρα, moira) power of distributing arbitrarily each one's part.

2. PHILOCTETES: A TOKEN (AMONG OTHERS) OF THE HUMAN LIFE FUGACITY AND THE PRECARIOUSNESS OF OUR HAPPINESS PROJECTS

Compared to other literary genres, tragedy shows a considerable difference between excellence and true happiness [9] . The coronavirus phenomenon reminds us Horace's warning that Misfortune (fatum) does not choose people in particular [10] : our own Fate shows us that this new virus does not spare doctors, athletes, religious, young, and even wealthy people. In this sense, Sophocles' theatrical play is rather outstanding, clearly presenting the frailness of human's life: after having his future ruined by an apparently insignificant creature and considerin g the attributes of his arrow as well as his handling skills, the hero warns his friend Neoptolemus about the fugacity of the power:

But now, since I have found a man as escort both and messenger,

9. ARISTÓTELES. Poética. Tradução Ana Maria Valente. Lisboa: Fundação Calouste Gulbenkian, 2004, 1453a13-25; 1453b14-1454a2-3.

10. HORACE. Odes. *In*: _____. *Odes et Épodes.* Traduction François François Villeneuve. Paris: Societé d'Edition "Les Belles Lettres", 2002, Book II, III.

> have pity on me and grant salvation, since you have seen how mortal life is so ordained that evil luck must follow good. The man whose life is innocent of suffering must be aware of misery, and so must care for his own life, if fortunate, to save himself from ruin unforeseen [11]

The play is focused on three main characters: Philoctetes, an experienced warrior blessed by the god Heracles with one of his most powerful arrows; Ulysses, king of Ithaca whose bravery and sagacity outstood in the war; and Neoptolemus, one of many young men who aspired glory (δόξα, doxa) but had a special mission (for the Greeks, he would better fit in the arrow stealing mission). It begins when the expedition was still in course and Philoctetes, bitten by a snake, becomes a nuisance, gets socially banished and proscribed from his assets, including the ones that would allow him to get back home. The only thing he had left was his arrow, which helped him survive (miserably). All in all, Philoctetes was deprived from all necessary things that a happy life requires: health, speech, family, homeland, and friends.

However, ten years later, due to the revelation that Priam's fortress could not be broken without Heracles' arrow, again the tricky (utilitarian, perhaps) Ulysses, besides having no scruples, created a plan to fool Philoctetes, take his weapons and leave him in the misery again. In this plan, Neoptolemus, Achilles' son, and Philoctetes' dear friend, became the most suitable person for the hoax, since he would win Philoctetes' trust more easily. The boy resisted at first (lying seemed not that virtuous), but the king of Ithaca convinced him to follow the plan stating that the end justifies the means [12], and that lying is not a bad thing as long as there are fruitful results to accomplish a project [13]. Therefore, Neoptolemus went

11. SOPHOCLES. Philoctetes, cit., 500.

12. Here, see WHITE, James Boyd. Heracles'bow: persuasion and community in Sophocles' Philoctetes. In: Heracles'bow: essays on the rhetoric and poetics of the law. London: The University of Wisconsin Press, 1985, p. 26.

13. SÓFOCLES. *Filoctetes*, cit., 109.

on his trip, and, when he found Philoctetes, he began the snare by saying that he returned to take him back home and cure his wounds.

The fact is that, when Neoptolemus reflected on how Philoctectes trusted him and became hopeful (even after ten years of solitude and injustice) and when he thought of the fate-human condition that we all have, he returned the arrow to its owner [14]. Not even Ulysses' rage, who severely threatened the emissary with the applicable punishment for war crimes, discouraged Neoptolemus to go back on taking part of the ambush. After saving his king from a venomous arrow that would be shot by Philoctetes and even after accepting Heracles' advices, Neoptolemus fulfills the promise that seemed to be appropriate in that alarming situation of misfortune: take his friend back to his homeland, cure his wounds and take part, right next to him, of the final combat where the Greeks left victorious. [15]

Nowadays, the chorus' social commotion due to the pandemic has been heard worldwide, however, the approximation of this narrative with the one represented in classical theatre demands, first of all, to answer the following question: are we really facing a tragic event? Jaeger states that there is no universal concept to define the word "tragedy", although it is possible to observe and highlight its fundamental traits according to original sources. He sees that the chorus' clear and vivid ecstatic representation of suffering through chants and dances and the introduction of several speakers became a full representation of a human Destiny. In this sense, it embodied the long-lasting religious problem, the mystery sent to human by the gods. In this sense, we believe that not only Philoctetes is hit by the pain and failure of his own happiness project, experiencing the horror of a scene in which Aristotle sees the features of tragedy (of which we will see

14. Ibid., 1286.

15. Ibid., 1409.

below), but also the many coronavirus' victims – who were squandering healthiness and making several future plans in a very recent past. Both deserve the well-known Achilles' alleviation against everything that makes us powerless before the things we can neither foresee nor avoid: the gods, who by mere whim, allow the fear of the future to torment us and unpleasable surprises to happen, while they live a comfortable life.

In fact, the inexorability of a human's Destiny and the precariousness of our projects for a successful life are the raw material that tragedians use, thus, for the Greeks and, later, for the Romans, the success or failure of the moral agent does not totally depend on what he or she does: Depends, above all things, on the place where the strands, woven in the wheel of Fortune, are placed in the moment of this agent's birth . In this manner, Pereira states that on one hand, the lesson of humility from tragedies, recognized in the gesture of those who know their places in the world, is crucial for a happy life, and on the other hand, pride (ὕβρις, hybris) should always be avoided, since the insolent is confronted with an exterior power that is opposed to their will . As Aristotle would magnificently point out, the distinction from a human event to a natural fact is that the latter is held by an order of Necessity (φύσις, physis) while the former is oriented by the quasi-logical Necessity (πράξις, praxis), and in this sense, only a certain scope of freedom and choice for the agent prevails .

However, would this pandemic phenomenon be enough to be qualified as a tragedy if we take into account the social, economic, legal and administrative effects? Not before analyzing other issues. First of all, according to Aristotle – the creator of this concept in our tradition – a tragic event is one that occurs to a human who is not guilty of the things that happen. The spectator, then, thinking of the possibility that this may happen to him or her due to the fact that s/he is also a human being, feels

terror and compassion for the damned . It is also not enough to just accept the whims of a Moira who works, restlessly, weaving the atrocious Destiny of our lives. It was majorly against this fact that Plato's academic building was raised and that is the reason to begin questioning whether or not the tragedy is the cause of our suffering.

3. Plato's accusation towards poets' scaremongering: knowledge and justice prevent the nature and the future unpredictability

In Brazil and in other countries, we see that there is a war declared by part of the Brazilian society against the press, under the argument that media is the sole responsible for the Brazilians' despair about the emergence of coronavirus. According to this part of the society, there would be no reasons to be scared, one stating that this disease is made up, another saying that the medication Hydroxychloroquine is able to heal patients even without any scientific evidence on its effects. The real motives behind this anti-scientific crusade cannot be proved, especially because it is going towards an opposite direction than the one taken by medical-health authorities, researchers, and worldwide agencies. Thus, we can certainly say that being enraged with the narrative of a humanitarian tragedy, which is empirically verified, does not leave a minimally plausible argument left. Today we witness the journalistic narrative getting disqualified and science debauched, while in classic Athens, Plato disdained the poets, but he confronted them with a scientific discourse .

It is already known that the Socratic intellectualism has weakened throughout the centuries. Despite Plato's beliefs, history proved that the scientific progress does not necessarily imply better life conditions . Aristotle himself, Plato's most important disciple, questioned the relation between to know and to do the right thing ; However, standing against the poets'

common sense that dignified the passions (πάθος, pathos), he esteemed the intellectual reason and universalized the scientific knowledge (ἐπιστήμη, episteme). Aristotle did it in an act of good faith in order to eliminate, or at least reduce, the sphere of unpredictability and the damages it causes. On his whole work, we find the most rigorous attempt to fight problems of contingency and uncertainty, which answers the original Greek question: how to find happiness (ευδαιμονία, eudaimonia) in a world that we cannot really control .

In effect, Plato's academy sought to recover the metaphysical-rational unity of Nature (φύσις, physis) that has been dissolved by the sophistry , as well as to find a satisfactory answer to the practical conflict issue raised by the tragedy . The list of charges against the poets, found in Republic, would end up expelling all poets from the ideal city . The purpose was the fulfillment of an extensive and rigorous study program by the aspirants of any form of magistracy. The anti-tragic theater that Plato's drafts takes place from a sincere conviction: the emotions, seeded by the traditional education, (παιδεία, paideia) whose poets were teachers, disturbs the pupils' intellect, preventing them to access the good itself and the truth that comes from it. In other words, poetry causes us to be dragged by the sympathy movement of our feelings , that is, it stimulates the worst features of ourselves and, because of it, cannot offer an adequate moral guide to the City (πόλις, polis). As Socrates said to Ion, poets are not serious persons: they are incapable of saying anything by means of art or science; they irresistibly submit themselves to the delusion that the gods instilled in them .

Plato's scientific ambition, resulting on the prerogative of the philosopher king to conduct public businesses, happens when there is a strong optimism regarding man's power to build their happiness project

in the world. Several situations can be described such as the human's fascination or their inventive engine (δαίμων, daimon) – which was some kind of "Greek Illuminism", as Reale says – the spectacle of creation and the progress of humanity – enthusiastically and eloquently narrated by Protagoras in the platonic dialog , as well as the subsequent discussion, which shows not only that for the first time the possibility of a public reason is systematically defended in the western tradition , but show as well the objective that Protagoras has in mind. Protagoras meant to encourage the young people of Athens, birthplace of future leaders of the polis, not to bow down to people's common sense and to poets' statement that life is subjected to the arbitrariness of Destiny and the contingency of our lives. In this manner, he faces the practical-deliberative problem, which is taken as a calculative knowledge or as a numbering science . As Jaeger states, such knowledge would eliminate this source of errors and settle our lives down on strong foundations . Perhaps it is an excessive confidence on human's self-sufficiency, of which Aristotle would ponder about, as we discuss in the next section.

4. Justice, friendship, community and its soothing for human misfortunes: what would Aristotle say about the pandemic and other uncertainties?

We would probably think that we are, in fact, invulnerable if we looked at Plato without the poets' counterpointing. We could send the ominous ones home, including Sophocles, who exposes our weaknesses and dependency on friends in Philoctetes. Aristotle, the most accomplished of Plato's disciples, was responsible for showing that even if well-intentioned, the happiness aspired by his teacher was not evident at all, as a human life is not like a god's one . As he warns, the moral and intellectual faculties allow us to aspire to a happier life without unforeseen events such as the

ones experienced by Philoctetes, and even by the thousands of people infected by the coronavirus in a few days. Only the gods, however, can enjoy this stability all the time . For the mortals, our public and private lives mean to work every day in order to handle this contingency.

Aristotle's starting point, which is evident in Nicomachean Ethics along with his other moral works, is that we are not self-sufficient. A fully happy life depends, besides studying, political planning and adequate performance of the judiciary, on some level of Luck (τύχη, tyche) . In this sense, he dissociates himself from Plato's metaphysical idealism, discussing his moral tradition, whose members share feelings of human misery and the obligation to avoid flirting with the dangers. In that sense, not only the poets (tragedians and lyrical poets, such as Archiloco, when he displays the power ephemerality , and epic poets, such as Homer, when he suggests the irrevocability of Moira's decree , etc.), but also historians (such as Herodotus, when he claims that Croesus' opulence was useless , and Plutarch, when he claims that Phocion's failure was due to disasters during his government), and politicians (such as Demosthenes, when he encourages Athenians to seize the opportunity in space and time that Chance (καιρός, kairos) forces us to make political choices , etc.) provided important research material to Aristotle. His missions, however, were to find a balance between Destiny's resignation in some individuals and intellectual pride in others.

For Aristotle, if we do not have good Fortune, happiness slips through our fingers and this applies specifically to those who are absurdly ugly, lowborn, friendless and heirless, as they cannot, in fact, be happy and similarly, this applies to those who have good Fortune but do not use it or are already dead . After all, in our isolated lives at home as much as Philoctetes' social isolation in Lemnos, it would become unbearable if we

could not count on friends. Thus friendship (φιλία, philia) might be more useful than justice (even if it is the greatest virtue for Aristotle), whereas among true friends justice is disposable, even righteous people need friends . Moreover, friendship and care are Aristotle's political theory and conception of justice mainstays: the necessities that cannot be provided individually are what brings the foundation of the political community . Apart from the intellectual self-sufficiency defended by Plato's happiness project, this lack of external goods instills harmony and unites citizens around a political project .

The Greeks were as aware of Fortune's instability in their personal lives as they were in their public lives. With their best precautions, their purposes were to avoid that a political tyche ended up ruining the City. In other words, magistrates and citizens had to neutralize natural disasters and other occurrences caused by idleness, selfishness and human wickedness . At this point, we agree that coronavirus, as a pathological agent, finds a parallel in the arbitrariness pointed by the tragedians. The pandemic, however, as an uncontrolled spread phenomenon, does not have resemblance with the Aristotelian tragedy concept: it lacks in guilt absence, hence suppression measures can limit its spreading and similarly, administrative and political planning can mitigate the harm that the pandemic has brought and will bring to our society.

We cannot stress enough that, for Aristotle, the purpose of the State and justice is no more than the providence of a better life for people. From this precaution comes his belief that the political activity is somehow a second life that we all should experience (βίος πρακτικός, bios praktikos). The individual who lives alone is either a god or a beast , says Aristotle, as no one in their right mind would accept everything that is good for the cost of loneliness. As a political animal (ζώων πολίτικον, zoon politikon) ,only

in polis will happiness really flourish. Justice here plays a leading role for the City: either by punishing citizens' offenses in a rigorous way and re-establishing the order or by distributing to the citizens their share of the available community's goods (proportional to their power and needs). The City may also demand from its citizens their duties towards the community (proportional to their capabilities) .

5. Final regards

We have shown that the current humanitarian crisis, due to COVID-19, is similar to the one presented in Philoctetes by Sophocles: therein, the hero is struck, by a sheer whim of his Destiny, by an incurable disease, culminating in his social isolation. Likewise, thousands of people have been (and will be) victims of a natural agent, maybe morphologically ignoble, but pathologically ravaging to the point which medical and health authorities recommend a radical lockdown. Both narratives have in common the insidious way in which the evil seizes its victims.

The idea of analyzing Philoctetes was, indeed, an opportunity to understand how the poets enticed their audience to contemplate, even before law, philosophy, general sciences, etc., the extent of our freedom to plan our lives and seize Misfortune's (τύχη, tyche) power. The tragedy condemns the anthropomorphic gods' amorality devoid of empathy towards our problems, as we have seen in Achilles, in the 5th century b.C. Greece was remarkably driven by philosophy, enlightened by the public discussion of citizens' daily life problems, which strengthened stakes on human domain over Nature's adversities. The fascination for Nature, also observed in another play written by Sophocles (with some diffidence), allowed meaningful advances in all spheres of knowledge, such as the public life. Plato's rebuke to settling over tragedy's horrors, portraits our argument; however, we do recognize an intellectual intrepidity in it.

Plato's deep dissent towards Athenian democrats and his eloquence against poetic education, did not dissuade his main disciple, Aristotle, from offering a conciliatory response between the schools. Concerned to a wealthy life free of surprises, Aristotle relates happiness with the immersion he makes into his tradition, listening to all of those who experienced their projects becoming subject to Destiny's irrationality. His lectures also help to understand the current issue from two perspectives. Firstly, by reasoning with poets, Aristotle admits a meaningful discrepancy between being good and dodging a sinister in life. Secondly, by portraying the failure of someone apparently invulnerable, he exposes Fortune's lack of predilection. Therefore, the narrative of Philoctetes being taken out of combat and getting socially isolated approaches to our contemporary one, when we witness doctors being struck by coronavirus.

We acknowledge that Aristotle makes an interesting synthesis of Greek's practical thinking, which is relevant since the current pandemic forces us to reflect on the concepts of a successful life. Thus, we believe that there are two possible conclusions here. The first is that once shrouded by a humanitarian crisis of unpredictable proportions, we are defied to acknowledge our limits, the boundaries and the risks that we are exposed to all the time. We know that the Greek hero faces a permanent tension to achieve excellence (ἀρετή, arete) in an adverse world. In this sense, Philoctetes has fears such as the risk of being insolent (ὕβρις, hybris), the risk of urging to be like the gods; Ulysses' ten years of mishaps, and the attempt of going back home after insulting Poseidon is indeed paradigmatic: although his insult was explained by the pressure he was facing, in a war which the god's side were doubted, his atonement did not hold any guilt. It has never seemed reasonable to rely on self-sufficiency, be it physical, intellectual, political, etc.

The second one is a corollary of the first and filled with ramifications. Considering that, for Aristotle, a smooth and stable life is the utmost desire, but only the gods can have it . Hence, due to our need of goods external of the soul which, most of the time, are unreachable, we may crave for some security, even though our beatitudes are only human . Taking the lessons learned with tragedy in a serious way (which seems inevitable because even Aristotle himself acknowledged poetry's philosophical dimension) demands to consider the contested statement extracted from common sense which allows tragedy to sustain any manner of social or natural determinism. We are on the side of those who have a positive perspective of this narrative genre. Given the ordinariness, the Greek hero acknowledges the limits of his actions but seeks the life he finds worth fighting for .

Iliad's chant IX portraits the brave Achilles warned by the goddess Tethys, his mother, that he was vulnerable, and she was waiting for him in Priam's house; He decided, however, to go ahead since he was aware that his glory was waiting for him there and returning home meant enjoying a lengthy life but then plunge into oblivion. The choir's reproach towards Agamemnon (Aeschylus) was not for Iphigenia's sacrifice, but for not withstanding Artemis' arbitrary imposed order enough . The utmost authentic gestures seen these days on balconies and houses around the world are the applauses to healthcare professionals for their bravery on fighting against the coronavirus' pandemic. Both patients and professionals rightfully resemble the well-known characters from the classic theatre: those who fight eagerly and dangerously even in adversity to defeat it . In this sense, we have to witness Destiny and its irrationality, as that character in Satyricon (Petronius): "There was no torch to light the way for us, as we wandered around [...]" .

Aristotle gave us a perception on political community's insight that sees the resistance of scarcity as a positive space as well as the future

uncertainty through discussion and political, administrative, juridical planning, etc. Seneca would not endorse Medea to compliment the public agents' magnitude, i.e., to protect citizens against Fortune's arbitrariness . Thus, poet's and journalists' bad news about the pandemic, instead of provoking uneasiness and outrage, should make us more careful, keeping things from getting worse. There is nothing wrong with our lack of control or with our weaknesses, obtuseness and lack of personality. This is not a sin, although it is difficult for some to face such humiliation.

Certainly, after the social and economic disturbance caused by coronavirus, citizens and nations shall engage on a discussion about the impact of State in people's life. This includes old dichotomies such as socialism and capitalism, east and west, nationalism and globalism, etc. They all must be rethought. Like a return to the classical theatre, now we have to learn that pain has an undeniable moral dimension . We will see that the boundary between excellence and Disgrace is extremely dim and, when Disgrace presents itself (and it always does), only friendship and care can give us some comfort. We should comfort each other as the blind Tiresias and the boy did . The most prepared nations, which invested on education, universal healthcare, revenue distribution, social services and welfare, will certainly inspire those which are still under predatory economical systems and politically authoritarianism.

The jurists also seem challenged by Philoctetes here, in this moment of self-isolation. We ask ourselves if we should take part on this to eliminate or at least reduce our common vulnerability . Above all, we should revisit our juridical education, maybe not uncritically joining those who see the humanities as a place where all the evils are purged, but acknowledging the opportunities that arts and literature give us to imagine a variety of worlds , beyond our life limitations. The analysis of Philoctetes can help on juridical education as it presents the continuum among language,

personality, community and person; all vital elements to those who lives, as White says, in a "culture of argument"; maybe we can perceive how unsympathetic we have been towards social and natural victims of Chance, invisible and dehumanized victims such as Philoctetes . Notwithstanding, we are living on artificial islands that we made through the wicked economy arrangements and political arrays that we have just got used to.

It is true that Sophocles challenges us to think, as professors, about the kind of jurists that we are graduating and the kind of world we are shaping. Such challenge is also displayed in the forum: the play asks us who we have become throughout our lives . We may have been enticed by Ulysses' eloquence to the point where we cannot hear Kant's pleas to treat people as an end, not as a mean . We may have also chosen Neoptolemus' humility by looking back at our decisions and obligations when they confront justice. The confidence that Achilles' son gives us to protect citizens from arbitrary dangers is not minor in such uncertain times.

Omission towards the obligation of protecting victims is not the only risk, social services usurpation is likely to happen in social disruptive times. In this sense, the western political tradition, after Plato and Aristotle, enhanced its institutions giving politics the duty of planning the future and to law-court the duty of solving past controversies . The latter certainly recognizes the importance of each service on public sphere, taking the ship captain's metaphor to explain the reasons of existence and the work methodology of politicians and jurists: Each one guide their boats with knowledge acquired throughout their own lives, which is enough in case a setback compromises their navigation plans, thus being able to take the best decision in a moment of contingency, without deviating the community values required by their positions.

6. References

ARISTÓTELES. Etica a Nicómaco. Traducción Maria Araujo y Julian Marias. Madrid: Instituto de Estudos Políticos, 1970.

_____. Poética. Tradução Ana Maria Valente. Lisboa: Fundação Calouste Gulbenkian, 2004.

_____. Política. Traducción Julian Marias y Maria Araújo. Madrid: Instituto de Estúdios Políticos, 1951.

_____. Retórica. Tradução Manuel Alexandre Júnior, Paulo Farmhouse Alberto e Abel do Nascimento Pena. Lisboa: Imprensa Nacional-Casa da Moeda, 1998.

AUBENQUE, Pierre. La prudencia en Aristóteles. Traducción Mª José Torres Gómez Pallete. Barcelone: Crítica, 1999.

BONAVIDES, Paulo. Do Estado liberal ao Estado social. 9. ed. São Paulo: Malheiros, 2007.

DEMÓSTENES. Primera Olintíaca. In: DEMÓSTENES; ESQUINES. Discursos completos. Traducción Francisco de P. Samaranch y Julio Pollí Bonet. Madrid: Aguilar, 1969. p. 123-137.

SQUILO. Agamémnon. In: _____. Oresteia: Agamémnon, Coéforas, Euménides. Tradução Manuel de Oliveira Pulquério. Lisboa: Edições 70, 1992. p. 13-100.

HERÓDOTO. Histórias. Tradução José Ribeiro Ferreira e Maria de Fátima Silva. Lisboa: Edições 70, 2002. livro I.

HIPÓCRATES. A medicina antiga. In: PEREIRA, Maria Helena da Rocha. Helade: antologia da cultura grega. 7. ed. Coimbra: Faculdade de Letras da Universidade de Coimbra, 1990. p. 226.

HOBBES, Thomas. Leviatã ou matéria, forma e poder de uma república eclesiástica e civil. Tradução João Paulo Monteiro e Maria Beatriz Nizza da Silva. 2. ed. São Paulo: Martins Fontes, 2008.

HOMERO. Ilíada de Homero. Tradução Haroldo de Campos. 2. ed. São Paulo: Arx, 2002. v. II. (Edição Bilíngue Latim-Português).

_____. Odisseia. Tradução Trajano Vieira. 3. ed. São Paulo: Editora 34, 2014. (Edição Bilíngue Latim-Português).

HORACE. Odes. In: _____. Odes et Épodes. Traduction François Villeneuve. Paris: Societé d'Edition «Les Belles Lettres», 2002. p. 197-235. (Édition Bilingue Latin-Français).

JAEGER, Werner. Paidéia: a formação do homem grego. Tradução Artur M. Parreira. 2. ed. São Paulo: Martins Fontes, 1989.

KANT, Immanuel. Fundamentação da metafísica dos costumes. Tradução Paulo Quintela. Lisboa: Edições 70, 2009.

LOCKE, John. Do governo civil. In: Dois tratados do governo civil. Tradução Miguel Morgado. Lisboa: Edições 70, 2006. p. 329-393.

NEVES, António Castanheira. O instituto dos "assentos" e a função jurídica dos supremos tribunais. Coimbra: Coimbra Editora, 1983.

NUSSBAUM, Martha C. The fragility of goodness: luck and ethics in greek tragedy and philosophy. New York: Cambridge University Press, 2001.

_____. Hiding from humanity: disgust, shame and the law. Princeton: Princeton University Press, 2006.

_____. Invisibility and recognition: Sophocles 'Philoctetes and Ellison's Invisible man. Philosophy and Literature, Baltimore, n. 23.2, p. 257-283, 1999.

_____. Not for profit: why democracy needs humanities. Princeton: Princeton University Press, 2010.

_____. Poetic justice: the literary imagination and public life. Boston: Beacon Press, 1995.

_____. Frontiers of justice: disability, nationality, species membership. Cambridge: The Belknap press of Harvard University Press, 2007.

_____. Toward a globally sensitive patriotism. Daedalus Summer, [s.l.], v. 137, n. 3, p. 78-93, 2008.

PEREIRA, Maria Helena da Rocha. Estudos de história da cultura clássica: cultura grega. 5. ed. Lisboa: Fundação Calouste Gulbenkian,1980.

_____. Fragilidad y poder del hombre em la poesia grieca arcaica. Estudios Clásicos, Murcia, n. 49, p. 301-318, 1966.

PETRÔNIO. Satiricon. Tradução Marcos Santarrita. São Paulo: Abril Cultural, 1981. p. 1-208. (Grandes Sucessos).

PLATÃO. A República. Tradução Maria Helena da Rocha Pereira. Lisboa: Fundação Calouste Gulbenkian, 2001.

_____. Íon. Tradução Frederico Lourenço. Lisboa: Colibri, 1994.

_____. Protágoras. Tradução Eleazar Magalhães Teixeira. Fortaleza: EUFC, 1986.

PLUTARCO. Foción. In: _____. Foción y Catón El Menor. Traducción Antonio Ranz Romanillos. Barcelona: Editorial Iberia, 1959. p. 5-31. (Vidas Paralelas, IV)

REALE, Giovanni; ANTISERI, Dario. Storia della filosofia. Milano: Bompiani, 2010. v. I.

ROUSSEAU, Jean-Jacques. Do contrato social: princípios do direito político. Tradução Edson Bini. Baurú: Edipro, 2000.

_____. Emílio ou Da educação. Tradução Roberto Leal Ferreira. 3. ed. São Paulo: Martins Fontes, 2004.

SÊNECA, Lúcio Aneu. Medéia. Tradução Giulio Davide Leoni. 3. ed. São Paulo: Nova Cultural, 1985. (Os Pensadores).

SILVA, Antonio Sá da Silva. Destino, humilhação e direito: a reinvenção narrativa da comunidade, 2016. 2 vols. Tese (Doutorado em Ciências Jurídico-Filosóficas) – Faculdade de Direito, Universidade de Coimbra, Coimbra. v. I.

SÓFOCLES. Filoctetes. Tradução Josiane T. Martinez. Campinas: Programa de Pós-Graduação em Linguística do Instituto de Estudos da Linguagem da Universidade de Campinas, 2003. Trabalho de tradução e de comentários para conclusão do Curso de Mestrado em Letras Clássicas. Available in: : < file:///C:/Users/Antonio/Downloads/MartinezJosianeTeixeira.pdf>. Accessed on: 08/06/2015.

SOPHOCLES. The Antigone of Sophocles. American Translation R. C. Jebb. New York: Cornell University Library, 1893.

WHITE, James Boyd. Heracles'bow: persuasion and community in Sophocles' Philoctetes. In: Heracles'bow: essays on the rhetoric and poetics of the law. London: The University of Wisconsin Press, 1985.

WILLIAMS, Bernard. Shame and necessity. Berkeley: University of California Press, 2008.

4

Freedom of movement in coronavirus times: a balance between fundamental rights and duties

CLÓVIS REIMÃO

CONTENTS: 1. Introduction 2. The unproportional limitations to freedom of movement 3. The importance of fundamental duties during the pandemic 3.1. Fundamental duty to stay at home 3.2. Fundamental duty of solidarity 4. Conclusion 5. References

1. Introduction

Revolutions, wars and pandemics are episodes of great changes in human history. New societies, new states, new economies and a new law.

In this essay, we reflect on the impacts of the Coronavirus pandemic on the fundamental right to freedom of movement and the tenuous relationship between fundamental rights and duties.

Lastly, we defend the need for a new post-Pandemic Constitutional Law based on the Aristotelian balance between fundamental rights and duties and on the achievement of responsible citizenship.

2. The unproportional limitations on freedom of movement

In the Post Truth Age, people believe what suits them. Therefore, it is necessary to state the obvious. No one has the fundamental right to

contaminate others. There is no freedom without responsibility. During the pandemic, the freedom of movement should be restricted for the sake of public health.

There will be restrictions decreed by states and municipalities, it is certain. However, the principal question is to what extent can freedom of movement be limited? What are the limits of these limitations (Schranken-Schranken)? How can one restrict without abolishing the essential core of the citizen's right to come and go?

The reflection on the subject will be made through some concrete cases; after all, each Brazilian state and municipality lives its own pandemic reality. These cases will be analyzed with Robert Alexy's maxim of proportionality, even though he is aware of the risks of solipsism and discretionary tendencies of this theoretical reference.

First, it is necessary to make a presumption. The decision of mayors and governors must be essentially technical. There is no "carte blanche" and no room for "achisms" and tyrannies in pandemic times. Therefore, the exceptional and temporary limitation to freedom of movement can only be imposed if there is scientific evidence and technical recommendation from the competent health department and if this limitation is proportional.

Let us get to the cases.

We started with the curfew decreed by the mayor of the municipality of Umuarama in the interior of the State of Paraná. The mayor, without technical advice from a health agency, authorized the opening of trade during the day and determined the curfew from 10 pm to five am. This municipal decision is as illogical as it is disproportionate. Obviously, the Coronavirus has no clock. Contamination is not restricted to the night period. Therefore, this municipal decree is disproportionate, because it

is not even adequate to prevent people from being contaminated. In this way, the Brazilians Supreme Federal Court (STF) suspended that curfew and the Paraná Court of Law (TJ/PR) suspended the reopening of trade.

In turn, the Governor of the State of Goiás has banned interstate road transport and air transport (interstate and international) from places with confirmed cases of Coronavirus. The decree dealt with an essential activity, violated WHO recommendations and did not make the ban more flexible even for the poorest people who need to travel for health treatment, for example. This means that, in terms of proportionality, although the measure is even adequate to avoid contamination, it is excessive in violation of the requirement of necessity. The Supreme Court (STF has already suspended this ban for serious violation of freedom of movement.

The mayor of the municipality of São Bernardo do Campo (São Paulo), on the other hand, ordered the obligatory home detention of people over 60 years old, under penalty of fines and other sanctions. According to the decree, only in exceptional situations the elderly could move around the city. This measure is also disproportionate, as it is inefficient and excessive. The majority of the Brazilian elderly still live with their relatives, so this vertical isolation does not prevent the contamination of the elderly. Moreover, this measure was not based on scientific orientation of ANVISA and violated the health policy recommended by the State of São Paulo. The STF also suspended this prohibition.

However, the most restrictive measures are not always disproportionate. Let us take the case of the municipality of Niterói (Rio de Janeiro).

Based on technical recommendations from Fiocruz and Federal University of Rio de Janeiro(UFRJ), the mayor of Niterói determined the

lockdown for the initial period of five days. The measure was determined by a law (and not by a decree) and there was care to safeguard the movement of people for justified essential activities. In addition, the city government had already adopted a series of social measures to mitigate the economic impacts of the restrictions. For all these reasons, we understand that the lockdown in Niterói was proportional, since the decision was adequate (avoiding contamination and exhaustion of hospital beds), necessary (scientific recommendation from Fiocruz and UFRJ) and proportional in the strict sense (the protection of public health overcomes the burden of temporary limitation to the right to come and go).

Finally, we go to the most disproportionate and inhumane limitation to freedom of movement: the Brazilian prisons (the true Hells of Dante). The National Penitentiary Department (DEPEN) proposed to the CNPCP the isolation of contaminated prisoners in containers. We will repeat, prisoners in containers! In other words, contaminated prisoners or those in risk groups would be canned in a place without access to adequate ventilation and sunlight, without full time running water and without distance between the custodians. This practice is so disproportionate that it borders on irrationality. It does not go beyond the requirement of adequacy, since it does not avoid contamination; on the contrary, it increases the chances of the prisoner dying without air, heat or by Covid-19. There is no point in taking the prisoner out of the dungeon and putting him in a metal crate.

By the way, the prison in containers already happened in the state of Espírito Santo in 2010 and was rejected by national and international organisms, because it violates national and international human rights law, coisifying the prisoner and abolishing his dignity. In this context, DEPEN deepen the sick prisoners in a hell of more than 122 °F (temperatures

reached in the containers of Espírito Santo). In this pandemic, not even Dante Alighieri would have the imagination to create the tenth circle of hell ("the Container"), in which the justifiable sin would be that the inmate had been contaminated by the Coronavirus or was part of a risk group.

In view of these hard cases analyzed, we conclude that scientific technique and proportionality can reduce the discretion of the public manager in restrictions of freedom of movement. We understand that the discretion of the manager can be extremely reduced and he can arrive at the "only correct Dworkin answer" to the case. Thus, no "achisms" or unreasonable impositions. Technique and science in the first place.

In a didactic way, based on the German doctrine of fundamental rights, we suggest a step by step for the public manager to decree limitations proportional to the right to come and go:

a) Does the restriction protect public health and is based on scientific evidence and technical guidance from a competent health agency?

b) Does the legal system allow this kind of restriction?

b^1) Analysis with emphasis on the Federal Constitution and the specific rules related to Coronavirus;

b^2) Is the restriction proportional? Check if it is efficient to avoid Coronavirus contamination (adequacy); if there is no other less onerous measure (necessity) and if the restriction is compensated by public health protection (proportionality in the strict sense);

b^3) The decree or law must contain clear and well determined restrictions, so that all citizens understand what is prohibited or not.

Sometimes that will be a Herculean task for the manager. However,

he should always seek the most coherent and rational restrictions to save citizens' lives.

By the way, if it is true that the State can limit, proportionately and technically, our fundamental right to freedom of movement. It is necessary to analyze the other side, that is, would Brazilian society have the fundamental duty to stay at home?

3. The importance of fundamental duties during the pandemic

The fundamental duties are the "ugly duckling" of contemporary constitutional law. This is a subject very little studied and debated by doctrine, especially in comparison with the celebrated fundamental rights.

According to the Lusitanian professor José Casalta Nabais, there are two main reasons for this. First, it would be a reaction to absolutist and totalitarian periods in which there were many duties and few rights. Second, it would be a return to a strict liberal view of fundamental rights, that is, the individual knows only his rights and loses his community responsibility.

Between the flight from state discretion and the construction of a freedom without responsibility, the fact is that the fundamental duties have been hidden or almost forgotten.

It turns out we are not an island. We are political animals (zoom politikon) and living in society denotes a series of duties to citizens. Besides the "I", there is the "other". This means understanding that my right ends when that of the other begins, and that there is no freedom without fundamental duties.

The historical achievement of rights, therefore, cannot imply the

ethical and legal disregard of duties. Duties are an instrument for the realization of fundamental rights and this is very evident at this time of the coronavirus pandemic.

After all, how do we realise the fundamental right to public health if no one fulfils the fundamental duty to stay at home? How to live in society without respecting the rights of others? Let us see here, two indispensable duties in order to face this sinister pandemic effectively.

3.1. The fundamental duty to stay at home

Professor Carlos Rátis maintains that, in this pandemic, the duty to protect public health involves the collective attached duty of staying at home. This fundamental duty of second dimension (which limits the right to come and go) should be imposed in a proportional way, based on technical arguments and aiming to materialize the fundamental right of public health and life of citizens.

In this sense, public health is not only a citizen's right and a duty of the State, but it is a duty of everyone.

The fundamental duty to stay at home is a constitutional duty linked to the protection of public health (articles 196 to 200 of CF/88) and imposed by pandemic legislation (art.3, caput and §4 of Law No. 13.979/2020). In the Lusitanian classification of Professor Jorge Miranda, for example, it has immediate application and follows directly from the constitutional text.

In this way, staying at home is a categorical imperative of Kant, it is a duty by duty, rationally dispense with legal sanctions or subsequent awards. It is ultimately a minimum duty of civility.

Obviously, not everyone can stay home. Therefore, this duty reaches each citizen in different degrees (differentiated duties) so that it

is proportional. Thus, for example, while a contaminated person must remain in compulsory isolation (article 2°, I, and article 3º, I, of Law no. 13,979/2020), a doctor (uncontaminated) has the duty to continue performing his essential activity and saving lives (art. 9, §1, of CF/88 c/c art. 3, §1, I of Decree no. 10,282/2020).

However, there is a "minimum of deverosity" that must be respected, is to say, everyone, to some extent and degree, should stay at home. Even the doctor, after his Herculean work, does not have the right to walk freely in the streets and generate agglomerations (it would be even a contradiction on his part).

The basis of the fundamental duty to stay at home (and of all the fundamental duties) is solidarity. Let us understand its importance.

3.2. The fundamental duty of solidarity

The fundamental duty of mutual solidarity is a milestone of life in society. For everyone to live well, a collective humanitarian conscience is indispensable, in which the individual can give up his personal right when he conflicts with a better collective interest.

This duty of fraternity does not mean defending cheap moralism or metaphysical entities, but rather realizing the normative force of our Constitution. This is a fundamental third dimension duty associated, above all, with the legal protection of the most vulnerable and the primary public interest.

In the pandemic, state action will not be enough to achieve public health if there is no solidarity from all citizens. Thus, solidarity is a duty with formal (constitutional provision) and material (relevant to the social objective of public health) grounds.

In this sense, public health comes first and must not give way to irresponsible individualism that despises the lives of others. Even the post-truth cannot legitimize selfish speeches such as: "I am not obliged to anything, because I am totally free", "I have my rights, I go to the street, I don't believe in science and I don't believe in universities either".

Living in a democracy does not mean being irresponsible. According to Boaventura de Sousa Santos, solidarity and cooperation strengthen the democratic system.

Recognizing the existence and importance of the other is a basic requirement of civilization. Freedom and solidarity are complementary, not exclusionary. It is not acceptable that the selfishness of some forces doctors to make the tragic choices of deciding between who will die and who will live, for lack of beds or breathers.

Is it better to kill the old or the young? We cannot let the right come to this utilitarianism without a break. That is why we must "take our fundamental duties seriously". As Ronald Dworkin rightly says, the law is a matter of principle, a life is equal to a life, and we cannot give up on that.

Selfishness leads us to an empty life and often leads us to a "living death". The book "The death of Ivan Ilitch", a art by Lev Tolstoy, tells the sad story of Ivan, a judge who lived a selfish life based on power and material goods. At his professional peak, Ivan was afflicted with a serious illness that made him agonize to death. Before dying, he realized that "he did not live as he should have".

Sometimes worse than dying in reality is "dying in life". To live a meaningless life based only on material goods and superfluous things. In this pandemic, let us not be an "Ivan". Let us be people of solidarity, not lonely. Let us be responsible citizens with well-balanced rights and duties.

The legal duties of staying at home and of solidarity, therefore, are essential if we are to face this pandemic.

4. Conclusion

The limitations and duties related to freedom of movement demonstrate that fundamental rights and duties must live together harmoniously in a Democratic State under the rule of law.

With this harmonious purpose, Constitutional Law must be renewed to face the postPandemic reality that is to come. We understand that the key word is balance, that is, the middle ground between excess and lack, as Aristotle already warned.

A post-Pandemic constitutional right must seek, above all, this Aristotelian balance between fundamental rights and duties. It is essential to build a constitutionalism that does not blindly defend the "Age of Rights" or the "Age of Duties", but that seeks to achieve a responsible citizenship (a balance between the two extremes).

A responsible citizen is one who understands and respects his or her fundamental rights and duties and who understands the importance of the "I" and the "other" for his or her social existence. We hope that this Post-Pandemic Constitutional Law will at least be able to collaborate with this new model of citizen and social contract.

I hope that this terrible pandemic will pass soon and that learning will remain for a more sympathetic humanity and a legacy for this new constitutional right.

5. References

ALEXY, Robert. Teoria dos Direitos Fundamentais. Trad. Virgílio Afonso da Silva. 2ª ed. São Paulo: Malheiros, 2014.

ALIGHIERI, Dante. A Divina Comédia. Trad. Ítalo Eugenio Mauro. São Paulo: Ed. 34, 4ª ed. 2018.

ARISTÓTELES. Ética a Nicômaco. Trad. Luciano Ferreira de Souza. São Paulo: ed. Martin Claret, 2015.

_____. Política. Trad. Torrieri Guimarães. São Paulo: Ed. Martin Claret, 2017.

BINEMBOJM, Gustavo. Uma teoria do direito administrativo. Rio de Janeiro: Renovar: 3ª ed, 2014.

BRAZIL. Constitution (1988). Constitution of the Federative Republic of Brazil: promulgated on October 5, 1988. Available at: . Access on: 12 May 2020.

_____. Decree No. 10.282 of March 20, 2020. Regulates Law No. 13.979, of February 6, 2020, to define public services and essential activities. Available at: Access on: 10 April 2020.

_____. Law No. 13,979 of February 6, 2020. Provides on measures to address the public health emergency of international importance due to the Coronavirus responsible for the outbreak of 2019. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L13979.htm> Access on: 10 March 2020.

_____. STF. APDF 672-DF. Rapporteur Min. Alexandre de Moraes. Judged in 08/04/2020.

_____. STF. Rcl 40014 MC-GO. Min. Dias Toffoli, Judged 15/04/2020

_____. STF. Suspension of preliminary injunction 1.309/2020- SP. Min. Dias Toffoli, tried 01/04/2020

_____. STF. Suspension of Decrease No. 1315- PR. Min. Dias Toffoli, tried 17/04/2020

DEPEN. Temporary Structures and Facilities for the Prison System. Available at: Accessed on May 14, 2020.

DWORKIN, Ronald. O império do direito. São Paulo: Martins Fontes, 2003.

_____. Ronald. Uma questão de princípio. Trad. Luís Carlos Borges. São Paulo: Martins Fontes, 2000.

FIOCRUZ. FIOCRUZ's position on the evolution of Covid-19 in Rio de Janeiro. Available at: Accessed on 13/05/2020.

GARCÍA DE ENTERRÍA, Eduardo. La lucha contra las inmunidades del poder, Revista do Occidente: Madrid, 1974.

GLOBO. URFJ recommends lockdown in Rio de Janeiro in a letter sent to the Public Ministry. See: Vide: Acessado em 13/05/2020.

GOIÁS (State). State Decree No. 9.638 of March 20, 2020. Amends Decree No. 9.633 of March 13, 2020 and makes other provisions. Available on the website: Accessed on 12/05/2020.

HIRSCH, Fábio Periandro de Almeida. O dever fundamental de fraternidade e pandemia. In: Direitos e deveres fundamentais em tempos de Coronavírus. Saulo José Casali Bahia (Org.) São Paulo: Editora IASP, 2020.

IBGE. National Household Sample Survey (PNAD). Available at: Accessed on 05/13/2020

KANT, Immanuel. Crítica da Razão Prática. Rio de Janeiro: Ed. Vozes, 1ª ed., 2016. KEYES, Ralph. The post-truth era: dishonesty and deception in contemporany life. New York: St. Martin's Press, 1st edition, 2004.

LAZARI, Rafael de. Os cinco deveres fundamentais do ser humano. Revista Jurídica LusoBrasileira, ano 6, 2020, n° 2, pgs.1113-1123. Disponível em: Acesso em 10/05/2020.

MARTINS, Carlos Eduardo Behrmann Rátis. Dever Geral de Recolhimento Domiciliar em Tempos de Coronavírus. In: Direitos e deveres fundamentais em tempos de coronavírus. Saulo José Casali Bahia (Org.) São Paulo: Editora IASP, 2020, p.54-55 _____. Carlos Eduardo Behrmann Rátis. Introdução ao estudo dos deveres fundamentais. Salvador : JusPodivm, 2009, p. 97/98.

MINISTRY OF HEALTH. WHO recommendations to avoid dissemination of the coronavirus. Available at: Accessed 10/05/2020

MIGALHAS. Official manifestation promoted by DPU, State Defenders, IBCCRIM, IDDD, OAB/SP and human rights institutions. Available at: Accessed on 14/05/2020.

MIRANDA, Jorge. Direitos e deveres fundamentais do Homem. Disponível em: Acessado em 10/05/2020

_____. Jorge. Manual de Direito Constitucional, Tomo IV, Direitos Fundamentais,, 4ª Edição, 2008, p. 290.

NATIONAL COUNCIL OF JUSTICE. Recommendation No. 62 of 17 March 2020. Available at: Accessed on 15 May 2020.

NITERÓI (Municipality). Municipal Law No. 3,495 of May 7, 2020. Establishes measures to contain the spread of the Covid-19 virus. Available at: Accessed on 13/05/2020.

NABAIS, José Casalta. A face oculta dos direitos fundamentais: os deveres e os custos dos direitos. Revista de Direito Mackenzie. Vol.3, n.2, 2002, p.9-10. Disponível em: Acessado em 07/05/2020

PARANÁ (State). TJ-PR. Bill of Review No. 0020002-72.2020.8.16.0000. Rapporteur: Leonel Cunha, Judged 30/04/2020 SANTOS, Boaventura de Sousa Santos. A cruel pedadogia do vírus. São Paulo: Boitempo editorial, E-book, 2020.

PEDRA, Adriano Sant'Ana Pedra. Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies: Proceedings of the XXVI World Congress of Philosophy of Law and Social Philosophy of the Internationale Vereinigunf für Rechts- und Sozialphilosophie. Belo Horizonte: Initia Via, 2015, P.1135-1136. Disponível em: Acesso em 11/05/2020

PIEROTH, Bodo; SCHLINK, Bernhard. Direitos Fundamentais. Trad. de Antônio Francisco de Sousa e Antônio Franco. São Paulo: Saraiva, 2012

SÃO BERNARDO DO CAMPO (Municipality). Municipal Decree No. 21,118 of March 24, 2020. Decrees health restrictions for the elderly who are in the territory of the Municipality, and makes other provisions. Available on the website: Access on 11/05/2020

STRECK, Lenio. Hermenêutica Jurídica e(m) crise: uma exploração hermenêutica da construção do Direito, Porto Alegre: Livraria do Advogado, 10.ed., 2011

TOLSTÓI, Lev. A morte de Ivan Ilitch. Tradução Boris Schnaiderman. São Paulo: editora 34, 2009.

UMUARAMA (Municipality). Municipal Decree No. 082/2020. Accessed on 08/05/2020.

5

Are female national leaders better at fighting the pandemic crisis? A quantitative research

DANIEL OITAVEN PEARCE PAMPONET MIGUEL,

ALESSANDRA OITAVEN PEARCE,

BRUNA FRANCO E

STEPHANIE SILVA

1. Introduction

On April the 13th, 2020, the article "*What do countries with the best coronavirus response have in common? Women leaders*" was published in *Forbes*. The piece starts by making reference to several cases of female national leaders who have been successful at fighting the pandemic crisis so far. Then, its female author, Avivah Wittenberg-Cox, suggests that women's success at managing such crisis could be due to their "alternative way of

wielding power", based on "truth", "decisiveness", "technology" (social media) and "love". "*It's like their arms are coming out of their videos to hold you close in a heart-felt and loving embrace*", writes the author, who concludes that it is time for a public recognition of the positive qualities of women's leadership style.

In the following days, several newspapers and magazines reacted to the piece published in *Forbes*, either by agreeing with its general terms (for example, praising female national leaders' sensibility at managing the pandemic crisis) or by criticizing the suggestion that women-led countries' good performance had something to do with an alleged "female style" of politics.

For instance, *The Guardian*'s Arwa Mahdawi deemed that tying traits such as "cooperation" and "empathy" to women could reinforce gender stereotypes. Besides, she suggested that female national leaders' good performance at fighting the pandemic crisis can probably be explained by the fact that women have to be "overqualified for a top job" because of structural gender barriers.

On the other hand, *The Atlantic*'s Helen Lewis suggested that the disproportion between male and female leaders' performance levels at managing the pandemic crisis is due more to the supposed failure of "strongmen" politics than to the success of "empathetic" female politics. In her words, "women leaders are a symptom of a political system's success, not necessarily its cause".

In a harsher tone, *Spiked*'s Ella Whelan wrote that other factors, such as wealth, populational density and health system, could be a bigger influence on a country's performance level at fighting the pandemic crisis than the gender of such country's political leader.

Such mixed reactions illustrate three theoretical positions that, in spite of assuming there is a correlation between the variables "gender of the national leader" and "performance level at fighting the pandemic crisis", disagree with *Forbes* on the very existence of a "causal relationship" between them or, at least, on its "causal" mechanism:

> (1) just like *Forbes*, some believe that there is a causal relationship between both variables and that it can be explained by a "female style" of politics similar to what Carol Gilligan has named "ethic of care";
>
> (2) just like *The Guardian*, there are those who assume the existence of a correlation and a causal relationship between both variables but don't believe that it is connected to the "ethic of care"; and
>
> (3) lastly, there are those who assume the existence of a correlation between both variables but don't believe there is a causal relationship between them, implicitly suggesting that such correlation would either be "spurious" or due to chance.

One should notice that the disagreement between those newspapers and magazines is limited to the causation issue, since none of them openly questioned the existence of a statistical correlation between the aforementioned variables. However, no quantitative research on the correlation issue is mentioned in the articles published in *Forbes*, *The Guardian*, *The Atlantic* and *Spiked*. Actually, we could not find any research studies on the matter. Hence, we had to investigate if the supposed correlation is real ("Hypothesis 1") before achieving this work's primary research aim – to assess if there is a "causal relationship" between the variables "gender of the national leader" and "performance level at fighting the pandemic crisis" that can be explained by the "ethic of care" typically

associated with the female gender ("Hypothesis 6"). We also tested four other hypotheses, which were freely inspired, with adaptations, by the pieces published in *The Guardian, The Atlantic* and *Spiked*.

LIST OF HYPOTHESES

Hypothesis 1: Female national leaders have been doing disproportionally better than male ones at managing the pandemic crisis.

Hypothesis 2: The disproportion between male and female leaders' performance levels at fighting the pandemic is due to the fact that most countries currently led by women have been political successful (high HDI; high average level of education; low state fragility; high gender equality; high quality of democracy) for a long time.

Hypothesis 3: The disproportion between male and female leaders' performance levels at fighting the pandemic crisis is just a coincidence; other variables, such as population size, population density and tourism, are key to a country's capacity to handle the pandemic.

Hypothesis 4: The disproportion between male and female leaders' performance levels at fighting the pandemic crisis can be explained by the failure of "*strongmen*" politics.

Hypothesis 5: The disproportion between men-led and women-led countries' performance levels at fighting the pandemic crisis can be explained by female national leaders' extraordinary skills, since a woman has to be twice as good than a man in order to become head of state and/or government because of structural gender barriers.

Hypothesis 6 (conclusion): Female leaders have been doing better at managing the pandemic crisis than male ones because of the "ethic of care" typically associated with the female gender.

We submitted hypotheses "2", "3", "4" and "5" to falsification tests through the addition of some control variables to our research design. For example, we used the variable "military expenditures" to test the plausibility of "Hypothesis 4", since "toxic masculinity" – a concept that can be theoretically related to the "*strongmen*" leadership style – is commonly associated with a culture of violence and war.

Since we could not find any reliable indicators to measure "how caring" a national leader is, "Hypothesis 6" was not directly tested. First, we tested "Hypothesis 1". Then, we tried to indirectly falsify "Hypothesis 6" by controlling for potential alternative explanations for the correlation between the variables "gender of the national leader" (we classified as

"women-led states" all countries with a female head of government and/or with an elected female head of state) and "performance level at managing the pandemic crisis" [1].

We analyzed the data through cross-tabulation, a technique for analysis suited to comparative researches that use qualitative data (nominal and ordinal). At first, only the data related to the independent variable ("gender of the national leader") are qualitative. However, we will present the numerical data related to the dependent variable and the control variables as ordinal data, which means a categorical scale [2]. We obtained the data related to the dependent variable from Deep Knowledge Group's (DKG) website. We chose to use the rankings published by DKG for two reasons: first, because they have become a reference for public debate on the subject; second, for their evaluation and classification methods, with more than 70 indicators, are very reliable [3].

Performing the falsification tests required analyzing data from two different research samples. The first one is limited to European states ("Sample – Europe"), while the second one is composed by states from different continents ("Sample – World"). We selected the same countries listed on DKG's rankings. Our samples, especially "Sample – Europe", are

1. We decided to classify the countries with a female head of state and a male head of government as "women-led countries" because we believe that the supposedly feminine trait of sensibility tied to hypothesis 2 and to "ethic of care" can be displayed by heads of state. A paradigmatic example is Slovakian female president's effort to stimulate her people to publicly wear face masks – she wore a fancy, colored mask during the government's swearing-in ceremony. See: SERHAN, Yasmeen. Lessons from Slovakia - Where Leaders Wear Masks. The country's politicians led by example, helping it flatten its curve. **The Atlantic,** 13 de maio de 2020. <https://www.theatlantic.com/international/archive/2020/05/slovakia-mask-coronavirus-pandemic success/611545/>. The reason why female heads of state that have not been elected are not included in the "women-led countries" stratum is that doing otherwise would make it impossible for us to test hypothesis 5. Indeed, speaking of "extraordinary women" overcoming "structural gender barriers" to become heads of state in, for example, hereditary monarchies would not make sense.

2. We can't display all the charts, tables and graphics in this article because of page limitations. All such information will permanently be available online. Link: <https://drive.google.com/drive/folders/17lTvMZ15c4BQxmT9WBaRQOcm8NQ2p63C?usp=sharing>.

3. The rankings were published on April, only about a month after OMS declared the outbreak to be a pandemic. Therefore, it is possible that the status of each country's performance level changes until the end of the pandemic crisis. For example, Belgium was classified by DKG as a successful country, but few weeks later it already had more deaths per million of the population than Italy and Spain. In the concluding remarks, we suggest that other quantitative researches can correct "blind spots" of our study. Accuracy of early data is probably one of those blind spots. See: COLLANGELO, Margareta. Covid-19 complexity demands sophisticated analytics deep analysis of global pandemic data reveals important insights. **Forbes**, April, 13, 2020. <https://www.forbes.com/sites/cognitiveworld/2020/04/13/covid-19-complexity-demands-sophisticated-analytics-deep-analysis-of-global-pandemic-data-reveals-important-insights/#320287472f6e>.

too small to allow test results to be significant if we set significance level to the conventional .05. Therefore, chi-square test results were considered significant if p-value < .10 for the "Sample-World" and < 0.15 for the "Sample-Europe". For this same reason, *p*-values were primarily used as a metric to allow comparisons between several correlations rather than as a metric to decide which of such correlations deserve our attention and which do not [4]. For example, if we found out that "performance level at fighting the pandemic crisis" is correlated with both "gender of the national leader" and "HDI", we could use *p*-values to compare the statistical significance of such correlations. Anyway, we checked for a spurious correlation or any kind of interesting pattern that might explain the disproportion between male and female leaders' performance levels at managing the pandemic crisis even when *p*-value had not reached the set standard – <.10 (Sample-World) or <.15 (Sample-Europe).

2. Female leaders have been doing disproportionally better than male leaders at fighting the pandemic crisis

The first hypothesis we tested concerns to the alleged correlation between the independent variable ("gender of the national leader") and the dependent one ("performance level at fighting the pandemic crisis"): have female leaders been more successful than male ones at managing the pandemic crisis so far? The following tables present the performance levels of each gender regarding two samples ("Sample – Europe" and "Sample – World").

4. The usage of statistical significance tests as a basis for rejecting promising hypotheses have been criticized by some scholars, since type II errors are common in small samples. In comparative politics, it is almost impossible to obtain a sample that is powerful enough to detect a true, positive influence of a variable on another under the established convention of *p*-value= .05. Therefore, either we increase our *p-value* threshold for determining the "statistical significance" of a correlation, or we abandon statistical significance tests once and for all. See: FIGUEIREDO FILHO, Dalson Britto et al. When is statistical significance not significant? **Bras. Political Sci. Rev,** 2013, vol.7, n.1, pp.31-55; REINHART, Alex. **Statistics done wrong: the woefully complete guide**. San Francisco: No Starch Press, 1991.

PERFORMANCE LEVEL	WOMEN	MEN
VERY HIGH	64,29%	25%
HIGH	28,57%	31,82%
LOW	7,14%	43,18%
TOTAL	100%	100%

Bivariate table "Gender of the national leader" (World)

PERFORMANCE LEVEL	WOMEN	MEN
VERY HIGH	66,67%	25%
HIGH	33,33%	30%
LOW	0%	45%
TOTAL	100%	100%

Bivariate table "Gender of the national leader" (Europe)

One can easily notice that in both samples ("Sample – Europe" and "Sample – World) the percentage of female national leaders who have been thriving at managing the pandemic crisis is higher than the percentage of male leaders who have been performing well. In "Sample – Europe", the probability of such results being due to chance is 12% (*p*-value = .12); in "Sample – World", 23% (*p*-value = .23). However, *p*-values decreased to .04 (Sample – World) and .09 (Sample – Europe) when we excluded the column "Women" from the tables. On the other hand, *p*-values for both samples increased to .34 when we excluded the column "Men" from the tables. Hence, we concluded that female leadership is significantly correlated with being successful at managing the pandemic crisis, since few women-led countries have failed so far. Male leadership, on the other hand, is not tied in any significant way to a specific performance level, since countries headed by men are regularly distributed among the strata "very highly successful", "highly successful" and "unsuccessful".

However, saying that two variables correlate with each other is not the same as saying that there is a causal relationship between them – or, in other words, that one variable "causes" the other. Before discussing any possible "causal relationship" between the factors "being a female national leader" and "high performance level at fighting the pandemic crisis", we needed to verify if the observed correlation is not spurious [5]. Such task was

5. A spurious correlation between two variables "X" and "Y" happens when both of them are effects of a same common cause "Z". Therefore, it would be incorrect to say there's a causal relation between "X" and "Y", since they are independent of each other.

fulfilled through falsification tests: we controlled for possible confounders related to hypotheses "2", "3" and "4" (sections 3, 4 and 5). We assumed that "Hypothesis 6" would become much more plausible than at first sight if it could resist such indirect testing.

While trying to control for confounders, one might end up finding other types of associations, such as "additivity" [6] and "interaction" [7], among three variables (the independent one, the dependent one, and a control variable). In those types of association, both the independent and the control variable have a true effect on the dependent one. To find "additivity" or "interaction" through cross-tabulation would mean it is plausible that there is something "special" about the female way of leading a country during the pandemic crisis.

It was also necessary to verify if "structural gender barriers" ("Hypothesis 5") can properly explain the supposed causal relationship between "having a female national leader" and "high performance level at fighting the pandemic crisis". We assumed that "Hypothesis 6" would become a strong candidate to explain the aforementioned correlation if "Hypothesis 5" were falsified – in other words, if the great number of countries headed by women that have been performing well at fighting the pandemic crisis so far could not be explained by the supposed "extraordinary skills" of national leaders who have surpassed structural gender barriers (see section 6).

6. "Additivity" between two (causally independent) variables "X" and "Z" happens when both of them have a causal effect on a variable 'Y' and "these effects do not intermingle with each other. [...]. 'Z' is independent of 'X'. [...]. The total effect on 'Y' is precisely the sum of the separate effects of variables 'X' and 'Z' on 'Y'." See: KLEINNIJENHUIS, Jan *et. at.* **Doing Research in Political Science**. 2.ed. London: Sage publications, 2006, p. 134-5.

7. "A variable z interacts with variable x when the effect of x on y depends on the level of the other variable. The magnitude or even the direction of the effect of x on y depends on z. [...]. The reverse is also true by definition: the precise effects of z on y depend on the value of x." See: KLEINNIJENHUIS, Jan *et. at.* **Doing Research in Political Science**. 2.ed. London: Sage publications, 2006, p. 135.

3. "Women leaders are a symptom of a country's political success, not necessarily its cause"

The second hypothesis we tested is related to the article published in *The Atlantic* and can be summarized as follows: female leaders' overall good performance reflect nothing more than the success of a political culture and a political system. We controlled for "HDI" [8], "average level of education" [9], "state fragility" [10], "gender equality" [11] and "quality of democracy" [12], all grouped under the notion of "political success".

Considering that it's easier for women to become head of state or head of government in "politically successful countries", and that such countries are better equipped to face the pandemic crisis, one can suppose that women-led countries have been performing better than male-led ones so far because of the lack of female national leaders in most "politically unsuccessful countries". If such hypothesis were correct, we would be able to affirm the existence of a spurious correlation between the "female leaders" and "good performance at fighting the pandemic crisis". However, we could detect no traces of spuriousness by comparing the partial tables ("HDI", "average level of education", "state fragility", "gender equality" and "quality of democracy") with the bivariate tables that display the distribution of the independent variable across the categories of the dependent variable (see section 2).

If it were a case of spurious correlation, the addition of control variables ("HDI", "average level of education", "state fragility", "gender

8. UNITED NATIONS. **Human Development Report.** < http://hdr.undp.org/en/data >

9. UNITED NATIONS. **Human Development Report.** < http://hdr.undp.org/en/data >

10. THE GLOBAL ECONOMY. **Fragile States Index;** <https://www.theglobaleconomy.com/rankings/fragile_state_index/>

11. UNITED NATIONS. **Human Development Report.** Disponível em: <http://hdr.undp.org/en/data >

12. THE ECONOMIST. **Democracy Index 2019.** <https://www.eiu.com/public/topical_report.aspx?campaignid=democracyindex2019>

equality" and "quality of democracy") would have reduced the difference between women-led countries and male-led ones in such a way that they would have very similar results in each row of the partial tables. However, the disproportion between the performance levels presented by female leaders and the performance levels presented by their male counterparts is still pretty much visible in both samples ("Europe" and "World") even with the addition of the control variables.

The tables show a statistically significant correlation between "HDI" and "performance level at fighting the pandemic crisis". For example, countries with very high "HDI" scores have been doing really well at managing the pandemic. Therefore, the variable "performance levels at fighting the pandemic crisis" seems to be influenced by both "HDI" and "having a female national leader" (additivity). *P*-values for HDI are .00011 ("Sample – World") and .008 ("Sample – Europe"), which means that HDI is likely to be a bigger influence on the dependent variable than "having a female national leader" [13].

13. [23] The chi-square test provides a basis to assess if a correlation is statistically significant in a cross-tabulation. The p-value generated from a chi-square test score is the probability of obtaining results at least as extreme as the ones observed while testing for correlation between variables, assuming that the null hypothesis is true. Therefore, when we say that "*p*-value= .00011", we mean there would be a less than 1% probability of the observed correlation between the control variable (HDI) and the dependent one happening in a hypothetical world where HDI had no influence at all on a country's performance level at fighting the pandemic crisis. That is why we can also say that the lower the *p*-value, the greater the probability of two variables being actually correlated (regardless of whether such correlation is spurious or not).

PERFORMANCE LEVEL	VERY HIGH HDI	HIGH HDI	MEDIUM HDI	LOW HDI
VERY HIGH	69,57%	10%	12,5%	14,29%
HIGH	17,39%	65%	12,5%	0%
LOW	13,04%	25%	75%	85,71%
TOTAL	100%	100%	100%	100%

Bivariate table "HDI" (World)

PERFORMANCE LEVEL	VERY HIGH HDI	HIGH HDI
VERY HIGH	69,23%	12,50%
HIGH	15,38%	43,75%
LOW	15,38%	43,75%
TOTAL	100%	100%

Bivariate table "HDI" (Europe)

		WOMEN	MEN
VERY HIGH HDI	VERY HIGH	90,00%	53,85%
	HIGH	10,00%	23,08%
	LOW	0,00%	23,08%
	SUBTOTAL	100,00%	100,00%
HIGH HDI	VERY HIGH	0,00%	11,76%
	HIGH	100,00%	58,82%
	LOW	0,00%	29,41%
	SUBTOTAL	100,00%	100,00%
MEDIUM HDI	VERY HIGH	0,00%	12,50%
	HIGH	0,00%	12,50%
	LOW	0,00%	75,00%
	SUBTOTAL	0,00%	100,00%
LOW HDI	VERY HIGH	0,00%	16,67%
	HIGH	0,00%	0,00%
	LOW	100,00%	83,33%
	SUBTOTAL	100,00%	100,00%

Partial table "HDI" (World)

		WOMEN	MEN
VERY HIGH HDI	VERY HIGH	100%	42,86%
	HIGH	0%	28,57%
	LOW	0%	28,57%
	SUBTOTAL	100%	100%
HIGH HDI	VERY HIGH	0%	15,38%
	HIGH	100%	30,77%
	LOW	0%	53,85%

Partial table "HDI" (Europe)

The control variable "average level of education" is not significantly correlated with the dependent variable ("level of performance at fighting the pandemic crisis") – *p*-values around .42 (Sample-World) and .56 (Sample-Europe). The partial tables do not show traces of spuriousness between the independent variable ("gender of the national leader") and the dependent one, since the addition of the control variable resulted in the percentage difference between male and female leaders being reduced in some performance levels and increased in others. Such results are compatible with the "interaction model" rather than with the "spurious correlation model".

PERFORMANCE LEVEL	VERY HIGH ED.	HIGH ED.	MEDIUM ED.	LOW ED.
VERY HIGH	60,00%	45,83%	100%	14,29%
HIGH	20,00%	37,50%	40,00%	21,43%
LOW	20,00%	16,67%	50,00%	64,28%
TOTAL	**100%**	**100%**	**100%**	**100%**

Bivariate table "Education" (World)

PERFORMANCE LEVEL	HIGH ED.	MEDIUM ED.	LOW ED.
VERY HIGH	50,00%	33,33%	8,33%
HIGH	25,00%	55,56%	41,67%
LOW	25,00%	11,11%	50,00%
TOTAL	100,00%	100,00%	100,00%

Bivariate table "Education" (Europe)

		WOMEN	MEN
	VERY HIGH	**80,00%**	**40,00%**
VERY HIGH ED.	HIGH	20,00%	20,00%
	LOW	0,00%	40,00%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	62,50%	37,50%
HIGH ED.	HIGH	37,50%	37,50%
	LOW	0,00%	25,00%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	0,00%	10,00%
MEDIUM ED.	HIGH	0,00%	40,00%
	LOW	0,00%	50,00%
	SUBOTAL	0%	100,00%
	VERY HIGH	0,00%	15,38%
LOW ED.	HIGH	0,00%	23,08%
	LOW	100,00%	61,54%
	SUBOTAL	**100,00%**	**100,00%**

Partial tables "Education" (World)

		WOMEN	MEN
	VERY HIGH	**75,00%**	**25,00%**
HIGH ED.	HIGH	25,00%	25,00%
	LOW	0,00%	50,00%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	66,67%	16,67%
MEDIUM ED.	HIGH	33,33%	66,67%
	LOW	0,00%	16,67%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	0,00%	10,00%
LOW ED.	HIGH	100,00%	30,00%
	LOW	0,00%	60,00%
	SUBTOTAL	**100,00%**	**100,00%**

Partial tables "Education" (Europe)

Only in the "Sample – Europe" (*p*-value= .14) the control variable "state fragility" is significantly correlated with the dependent variable ("performance level at fighting the pandemic crisis"). However, it is possible to notice in both samples that politically stable countries are more likely to perform well at fighting the pandemic crisis than politically unstable ones. Anyway, it was not possible to detect any traces of spuriousness by comparing the partial tables with the bivariate tables.

PERFORMANCE LEVEL	VERY LOW FRAG.	LOW FRAG.	MEDIUM FRAG.	HIGH FRAG.
VERY HIGH	69,23%	38,46%	17,65%	8,33%
HIGH	23,08%	30,77%	52,94%	16,67%
LOW	7,69%	30,77%	29,41%	75,00%
TOTAL	100%	100%	100%	100%

Bivariate table "State fragility" (World)

PERFORMANCE LEVEL	LOW FRAG.	HIGH FRAG.
VERY HIGH	64,29%	13,33%
HIGH	14,29%	46,67%
LOW	21,43%	40,00%
TOTAL	100,00%	100,00%

Bivariate table "State fragility" (Europe)

		WOMEN	MEN
VERY LOW FRAG.	VERY HIGH	83,33%	57,14%
	HIGH	16,67%	28,57%
	LOW	0,00%	14,29%
	SUBTOTAL	100%	100%
LOW FRAG.	VERY HIGH	50,00%	33,33%
	HIGH	50,00%	22,22%
	LOW	0,00%	44,44%
	SUBTOTAL	100%	100%
MEDIUM FRAG.	VERY HIGH	0,00%	18,75%
	HIGH	100%	50,00%
	LOW	0,00%	31,25%
	SUBTOTAL	100%	100%
HIGH FRAG.	VERY HIGH	0,00%	9,09%
	HIGH	0,00%	18,18%
	LOW	100%	72,73%
	SUBTOTAL	100%	100%

Partial table "State fragility" (World)

		WOMEN	MEN
LOW FRAG.	VERY HIGH	100,00%	37,50%
	HIGH	0,00%	25,00%
	LOW	0,00%	37,50%
	SUBTOTAL	100%	100%
HIGH FRAG.	VERY HIGH	0,00%	16,67%
	HIGH	100,00%	33,33%
	LOW	0,00%	50,00%
	SUBOTAL	100%	100%

Partial table "State fragility" (Europe)

Both samples show that countries with higher levels of gender equality [14] – whether they are led by men or women – have been performing better than less egalitarian countries. However, only in the "Sample – World" the correlation between the variables "gender equality" and "performance level at fighting the pandemic crisis" is highly statistically significant (*p*-value = .008). Anyway, controlling for the variable "gender equality" did not substantially change the disproportion between male and female leaders' performance levels at fighting the pandemic crisis. Therefore, we did not find traces of spuriousness between the independent variable ("gender of the national leader") and the dependent one ("performance level at fighting the pandemic crisis").

14. UNITED NATIONS. **Human Development Report.** Disponível em: <http://hdr.undp.org/en/data >

PERFORMANCE LEVEL	VERY LOW FRAG.	LOW FRAG.	MEDIUM FRAG.	HIGH FRAG.
VERY HIGH	69,23%	38,46%	17,65%	8,33%
HIGH	23,08%	30,77%	52,94%	16,67%
LOW	7,69%	30,77%	29,41%	75,00%
TOTAL	100%	100%	100%	100%

Bivariate table "State fragility" (World)

PERFORMANCE LEVEL	LOW FRAG.	HIGH FRAG.
VERY HIGH	64,29%	13,33%
HIGH	14,29%	46,67%
LOW	21,43%	40,00%
TOTAL	100,00%	100,00%

Bivariate table "State fragility" (Europe)

		WOMEN	MEN
VERY LOW FRAG.	VERY HIGH	83,33%	57,14%
	HIGH	16,67%	28,57%
	LOW	0,00%	14,29%
	SUBTOTAL	100%	100%
LOW FRAG.	VERY HIGH	50,00%	33,33%
	HIGH	50,00%	22,22%
	LOW	0,00%	44,44%
	SUBTOTAL	100%	100%
MEDIUM FRAG.	VERY HIGH	0,00%	18,75%
	HIGH	100%	50,00%
	LOW	0,00%	31,25%
	SUBTOTAL	100%	100%
HIGH FRAG.	VERY HIGH	0,00%	9,09%
	HIGH	0,00%	18,18%
	LOW	100%	72,73%
	SUBTOTAL	100%	100%

Partial table "State fragility" (World)

		WOMEN	MEN
LOW FRAG.	VERY HIGH	100,00%	37,50%
	HIGH	0,00%	25,00%
	LOW	0,00%	37,50%
	SUBTOTAL	100%	100%
HIGH FRAG.	VERY HIGH	0,00%	16,67%
	HIGH	100,00%	33,33%
	LOW	0,00%	50,00%
	SUBOTAL	100%	100%

Partial table "State fragility" (Europe)

Both samples show that democratic countries are more likely to perform well at fighting the pandemic crisis than hybrid/authoritarian states. However, there is no statistically significant correlation between the control variable "quality of democracy" and the dependent variable "performance level at fighting the pandemic crisis" (*p*-value= .60 for the "Sample – World"; *p*-value= .16 for the "Sample – Europe"). By the way, in the "Sample – Europe", most of the states classified as "full democracies" are also in the "very high HDI" stratum, while most of the countries classified as "flawed democracies" are not. Therefore, it is possible that even the loose correlation between the control variable "quality of democracy" and the dependent variable "performance level at fighting the pandemic crisis" is more attributable to "HDI" than to "quality of democracy".

Anyway, since controlling for "quality of democracy" did not substantially change the disproportion between male and female leaders' performance levels at fighting the pandemic crisis, the tables do not show any traces of spuriousness between the independent variable ("gender of the national leader") and the dependent one ("performance level at fighting the pandemic crisis").

		WOMEN	MEN
FULL DEM.	VERY HIGH	83,33%	40,00%
	HIGH	16,67%	20,00%
	LOW	0,00%	40,00%
	SUBTOTAL	**100,00%**	**100,00%**
FLAW. DEM.	VERY HIGH	57,14%	19,05%
	HIGH	42,86%	38,10%
	LOW	0,00%	42,86%
	SUBTOTAL	**100,00%**	**100,00%**
HYB./AUTOR.	VERY HIGH	0,00%	23,08%
	HIGH	0,00%	30,77%
	LOW	100,00%	46,15%
	SUBTOTAL	**100,00%**	**100,00%**

Partial table "Quality of democracy" (World)

		WOMEN	MEN
FULL DEM.	VERY HIGH	**100,00%**	**33,33%**
	HIGH	0,00%	11,11%
	LOW	0,00%	55,56%
	SUBTOTAL	100,00%	100,00%
FLAW. DEM.	VERY HIGH	**25,00%**	**18,18%**
	HIGH	75,00%	45,45%
	LOW	0,00%	36,36%
	SUBTOTAL	100,00%	100,00%

Partial table "Quality of democracy" (World)

Although it became plausible to assume that the "political success" of a country – especially when it comes to HDI – has some degree of influence on the dependent variable ("performance level at fighting the pandemic crisis"), it was still not possible to understand why women have been performing better than men even among countries with similar levels of political success. Therefore, we kept trying to falsify the hypothesis that considers female leadership as something "special", distinct from "traditional male leadership".

4. Female national leaders' success at fighting the pandemic crisis is nothing more than a coincidence – population size, population density and tourism are the key factors

The third hypothesis we tested can be summarized as follows: the disproportion between male and female leaders' performance levels at fighting the pandemic crisis is nothing more than a coincidence; other variables, such as population size, population density and tourism, are key to a country's capacity to handle the pandemic. Such hypothesis was loosely inspired by the article published in *Spiked*, which states that the disproportion between male and female national leaders' performance levels at fighting the pandemic crisis is not due to any "special trait" of the female gender. If it were true, there would be a spurious correlation

between the independent variable and the dependent one – that was why we controlled for the variables "population size", "population density" [15] and "tourism" [16] .

There is a statistically significant correlation between "population size" and "performance level at fighting the pandemic crisis" in the "Sample – World" (*p*-value= .03). Such tendency also appears in the "Sample – Europe" (*p*-value= .19), but it does not reach our *p*-value threshold for statistical significance. Anyway, since it is plausible to suggest that it is more difficult for countries with large populations to manage the pandemic crisis than for countries with small populations, we checked if there is a spurious correlation between the independent variable ("gender of the political leader") and the dependent one ("performance level at fighting the pandemic crisis") by controlling for "population size". The partial tables show that there is no traces of spuriousness, since female leaders have been doing better than their male counterparts in all levels of "population size" so far.

15. UNITED NATIONS. **2019 Revision of World Population Prospects**. <https://population.un.org/wpp/>

16. WORLD TOURISM ORGANIZATION. **Yearbook of Tourism Statistics**. 2019. <https://data.worldbank.org/indicator/ST.INT.ARVL>

PERFORMANCE LEVEL	LARGE POP.	MED. POP	SMALL POP.
VERY HIGH	22,22%	41,18%	39,13%
HIGH	11,11%	23,53%	52,17%
LOW	66,67%	35,29%	8,70%
TOTAL	100%	100%	100%

Bivariate table "Population Size" (World)

PERFORMANCE LEVEL	LARGE POP.	MED. POP	SMALL POP.
VERY HIGH	16,67%	54,55%	33,33%
HIGH	16,67%	9,09%	58,33%
LOW	66,67%	36,36%	8,33%
TOTAL	100%	100%	100%

Bivariate table "Population" Size (Europe)

		WOMEN	MEN
LARGE POP.	VERY HIGH	50%	18,75%
	HIGH	0%	12,50%
	LOW	50%	68,75%
	SUBTOTAL	100%	100%
MED. POP.	VERY HIGH	75%	30,77%
	HIGH	25%	23,08%
	LOW	0%	46,15%
	SUBTOTAL	100%	100%
SMALL POP.	VERY HIGH	62,50%	26,67%
	HIGH	37,50%	60%
	LOW	0%	13,33%
	SUBTOTAL	100%	100%

Partial table "Population Size" (World)

		WOMEN	MEN
LARGE POP.	VERY HIGH	100%	0%
	HIGH	0%	20%
	LOW	0%	80%
	SUBTOTAL	100%	100%
MED. POP.	VERY HIGH	66,67%	50%
	HIGH	33,33%	0%
	LOW	0%	50%
	SUBTOTAL	100%	100%
SMALL POP.	VERY HIGH	60%	14,29%
	HIGH	40%	71,43%
	LOW	0%	14,29%
	SUBTOTAL	100%	100%

Partial table "Population Size" (Europe)

Surprisingly, the bivariate tables show no statistically significant correlations between the dependent variable ("performance level at fighting the pandemic crisis") and the control variables "population density" and "tourism". Therefore, it is unlikely that such control variables have a great influence on the performance level at managing the pandemic crisis. Still, it was prudent to control for confounders. Anyway, controlling for the variables "tourism" and "population density" did not substantially change the disproportion between male and female leaders' performance levels at fighting the pandemic crisis.

		WOMEN	MEN
VERY HIGH POP. DENS.	VERY HIGH	80,00%	57,14%
	HIGH	0,00%	0,00%
	LOW	20,00%	42,86%
	SUBTOTAL	100,00%	100,00%
HIGH POP. DENS.	VERY HIGH	100,00%	16,67%
	HIGH	0,00%	50,00%
	LOW	0,00%	33,33%
	SUBTOTAL	100%	100%
MEDIUM POP. DENS.	VERY HIGH	0,00%	17,65%
	HIGH	100,00%	41,18%
	LOW	0,00%	41,18%
	SUBTOTAL	100%	100%
LOW POP. DENS.	VERY HIGH	50,00%	25,00%
	HIGH	50,00%	25,00%
	LOW	0,00%	50,00%
	SUBTOTAL	100%	100%

Partial table "Population density" (World)

		WOMEN
VERY HIGH POP. DENS.	VERY HIGH	100%
	HIGH	0%
	LOW	0%
	SUBTOTAL	100%
MEDIUM POP. DENS.	VERY HIGH	50%
	HIGH	50%
	LOW	0%
	SUBTOTAL	100%
LOW POP. DENS.	VERY HIGH	50%
	HIGH	50%
	LOW	0%
	SUBTOTAL	100% 100%

Partial table "Population density" (Europe)

		WOMEN	MEN
HIGH TOUR.	VERY HIGH	67%	23%
	HIGH	33%	23%
	LOW	0%	54%
	SUBTOTAL	100%	100%
MEDIUM TOUR.	VERY HIGH	100%	39%
	HIGH	0%	22%
	LOW	0%	39%
	SUBTOTAL	100%	100%
LOW TOUR.	VERY HIGH	20%	8%
	HIGH	60%	54%
	LOW	20%	38%
	SUBTOTAL	100%	100%

Partial table "Tourism" (World)

		WOMEN	MEN
HIGH TOUR.	VERY HIGH	50%	20%
	HIGH	50%	0%
	LOW	0%	80%
	SUBTOTAL	100%	100%
MEDIUM TOUR.	VERY HIGH	100%	33%
	HIGH	0%	50%
	LOW	0%	17%
	SUBTOTAL	100%	100%
LOW TOUR.	VERY HIGH	50%	25%
	HIGH	50%	38%
	LOW	0%	38%
	SUBTOTAL	100%	100%

Partial table "Tourism" (Europe)

One can easily notice that women-led countries have been more successful than men-led ones in almost all levels of tourism and population density so far, which means that the correlation between the independent variable ("gender of the national leader") and the dependent one ("performance level at fighting the pandemic crisis") does not seem to be spurious.

5. The disproportion between the performance levels presented by female and male leaders can be explained by the failure of the "strongmen"

Is "toxic masculinity", as a model of governance, more responsible for the disproportion between the performance levels presented by female and male leaders at fighting the pandemic crisis than any supposed special trait of women? We performed two different kinds of tests to measure the level of influence of a "toxic masculinity" way of governance – related to "Hypothesis 4" – on the dependent variable (performance level at fighting the pandemic crisis). The first test (1) focused on the personality and strategies of governance of current national leaders. The second test (2) did not focus on individual profiles, but rather on the broad political tradition of each country.

(1) We excluded "*strongleaders*"-related data from the tables: if no meaningful difference between male and female leaders remained, then we would find out that leaders who adopt a "*strongman*" profile have been performing worse at managing the pandemic crisis than the other – male or female – leaders; hence, we would be able to state that "Hypothesis 4" (inspired by the article published in *The Atlantic*) is likely to be correct.

In a certain way, hypotheses "4" and "6" are connected, since "toxic masculinity" in governance may be understood as nothing more than too much "ethic of justice" – or, one might say, a lack of "ethic of care" [17] . If

17. FORD, Maureen; LOWERY, Carol R. Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations. **Journal of Personality and Social Psychology,** 1986, vol. 50, n.4, pp.777-783. Robin West summarizes the difference between justice and care in the following words: "While 'justice' is typically associated with universal rules, consistency, reason, rights, the public sphere, and masculine virtues, ''care'' is typically associated with particularity, context, affect, relationship, the private sphere, and femininity". To be fair, it is essential to highlight that West criticizes the traditionally oppositional approach to the relationship between care and justice: "the 'ethic of justice' and the 'ethic of care' are in fact much more interrelated and interdependent than this widely accepted dualism suggests. Indeed 'justice', as it is generally understood, and 'care,' as it is widely practiced, are each necessary conditions of the other. The pursuit of justice,·when successful, must also be caring, and the activity of caring, when successful, must be mindful of the demands of justice. Put negatively, the zealous pursuit of justice, if neglectful of the ethic of care, will fail not just as a matter of overall virtue, but more specifically, it will fail as a matter of justice. Similarly, the pursuit of care, if neglectful of the demands of justice, will turn out to be, in the long run, not very caring." See: WEST, Robin. **Caring for justice**. New York and London: New York University Press, 1997, p. 23-4.

hypothesis 6 (inspired by the article published in *Forbes*) were correct, female leaders' overall good performance at fighting the pandemic crisis could be explained by a "feminine sensibility"; thus, excluding "*strongleaders*" from the tables would not make a difference. In other words, avoiding being a "manly, toxic leader" would not be enough, for male leaders would have to develop the same trait of sensibility that *Forbes* suggests to be easily found in womanhood – such a move would be a "step further" towards the "ethic of care".

For the purposes of the first test, we labeled as "strongleaders" the heads of government and/or state of the following states: China, Hungary, Israel, Hong Kong, Turkey, Thailand, Russia, Philippines, Cambodia, United States and United Kingdom [18]. So far, cases of success and cases of failure among "*strongleaders*" have come in almost equal proportion: four of them have been "very highly successful" at managing the pandemic crisis (China, Hungary, Israel and Hong Kong [19]); two of them have been "highly successful" (Turkey and Thailand); and five of them have been not successful at all (Russia, Philippines, Cambodia, United States and United Kingdom). Besides, excluding such states from both samples did not alter the disproportion between the performance levels presented by female and male leaders at fighting the pandemic crisis. Therefore, it was not possible to identify a relationship between "toxic masculinity" and "failure at fighting the pandemic crisis".

(2) The second test was meant to measure how much influence a

18. Several articles mention the leaders of these countries as examples of "*strongmen*". See: BREMMER, Ian. The "strongmen" era is here. Here's what it means for you. **Time**, May 3, 2018. <https://time.com/5264170/the-strongmen-era-is-here-heres-what-it-means-for-you/>; WALKER, Tony. Why the world should be worried about the rise of strongman politics. **The Conversation**, July 23, 2018. <https://theconversation.com/why-the-world-should-be-worried-about-the-rise-of-strongman-politics-100165>; BEAUMONT, Peter. Binyamin Netanyahu: strongman with a fearful heart. **The Guardian**, Jan 5, 2013. <https://www.theguardian.com/theobserver/2013/jan/05/binyamin-netanyahu-profile>.

19. Hong Kong was included in the list because its Prime Minister Carrie Lam, despite being a woman, has been criticized for backing supposedly excessive use of force by police against young protesters and calling them "enemies of the people", which would mean "to embody muscular treatment of opponents". See MCLAUGHLIN, Timothy. The leader who killed her city: Carrie Lam has been a unique failure. **The Atlantic**, Jun 18, 2020. <https://www.theatlantic.com/international/archive/2020/06/carrie-lam-hong-kong-china-protest/612955>

national political tradition based on the "law and order" model exerts on a country's performance level at fighting the pandemic crisis. We fulfilled such task by controlling for the variables "military expenditures" [20] and "quality of democracy" [21] . The first control variable was chosen because there is a common belief that "toxic masculinity" is closely tied to "violence, war and guns"; the second, because of another common belief – "political authoritarianism" is closely tied to "toxic masculinity".

In the "Sample – World", the variable "military expenditures" did not significantly correlate with the performance level at fighting the pandemic crisis (*p*-value = .98). Some heavily militarized states (Singapore, Israel, South Korea, Taiwan and United Arab Emirates) have been performing well at managing the pandemic crisis, but some states with low levels of militarization (Germany, Hungary, Japan, Switzerland, Belgium, Denmark and Austria) have been managing to succeed as well. However, Western European states are less militarized than Asian countries overall. In fact, most of the highly militarized states from the "Sample-World" are Asian ones; thus, there seems to be a substantial difference between the Western European tradition and the Asian tradition in what concerns the general attitude of peoples and governments towards militarization.

The "Sample-Europe" shows a statistically significant correlation between the control variable ("military expenditures") and the dependent variable ("performance level at fighting the pandemic crisis") – *p*-value = .09. More than ¾ of the states in the "low military expenditures level" stratum have been doing well at fighting the pandemic crisis. Besides, no heavily militarized European state has been able to achieve a "very high" level of success at managing the pandemic crisis and nearly half of those

20. [31] STOCKHOLM INTERNATIONAL PEARCE RESEARCH INSTITUTE. **SIPRI Military Expenditure Database**. < https://www.sipri.org/databases/milex>

21. [32] STOCKHOLM INTERNATIONAL PEARCE RESEARCH INSTITUTE. **SIPRI Military Expenditure Database**. < https://www.sipri.org/databases/milex>

states have failed so far. On the other hand, most states in the "low military expenditures level" stratum have been very highly successful at managing the pandemic crisis and less of ¼ of the countries in that stratum have failed so far.

PERFORMANCE LEVEL	VERY HIGH MIL.	HIGH MIL.	MEDIUM MIL	LOW MIL.
VERY HIGH	45,45%	21,43%	25,00%	43,75%
HIGH	18,18%	35,71%	37,50%	31,25%
LOW	36,36%	42,86%	37,50%	25,00%
TOTAL	100%	100%	100%	100%

Bivariate table "Military expenditures" (World)

PERFORMANCE LEVEL	HIGH MIL.	LOW MIL.
VERY HIGH	0,00%	55,56%
HIGH	54,55%	22,22%
LOW	45,45%	22,22%
TOTAL	100%	100%

Bivariate table "Military expenditures" (Europe)

It seems, after all, that "militarism" can only be understood as evidence of difficulty at fighting the pandemic crisis when it comes to the Western European tradition. Such perception could lead to two different assumptions: either the "law and order" model is only "toxic" to Western European countries, or "military expenditure" cannot measure "toxic masculinity" properly.

Controlling for the variable "military expenditures" in both samples did not reveal any traces of spuriousness between the independent variable ("gender of the political leader") and the dependent one ("performance level at fighting the pandemic crisis"). The partial tables show that female national leaders have been more successful than male ones so far regardless of military expenditures.

		WOMEN	MEN
	VERY HIGH	**100,00%**	**33,33%**
VERY HIGH MIL.	HIGH	0,00%	22,22%
	LOW	0,00%	44,44%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	0,00%	27,27%
HIGH MIL.	HIGH	66,67%	27,27%
	LOW	33,33%	45,45%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	66,67%	15,38%
MEDIUM MIL.	HIGH	33,33%	38,46%
	LOW	0,00%	46,15%
	SUBTOTAL	100,00%	100,00%
	VERY HIGH	80,00%	27,27%
LOW MIL.	HIGH	20,00%	36,36%
	LOW	0,00%	36,36%
	SUBTOTAL	**100,00%**	**100,00%**

Partial table "Military expenditures" (World)

		WOMEN	MEN
	VERY HIGH	**0,00%**	**0,00%**
HIGH MIL.	HIGH	100,00%	37,50%
	LOW	0,00%	62,50%
	SUBTOTAL	100,00%	100,00%
	VERY HIGH	**100,00%**	**33,33%**
LOW MIL.	HIGH	0,00%	33,33%
	LOW	0,00%	33,33%
	SUBOTAL	100,00%	100,00%

Partial table "Military expenditures" (Europe)

In addition, as we explained in section 3, (1) there is no statistically significant correlation between "quality of democracy" and "performance level at fighting the pandemic crisis"; and (2) we could not detect traces of spuriousness between "gender of the national leader" and "performance level at fighting the pandemic crisis" by controlling for "quality of democracy".

		WOMEN	MEN
	VERY HIGH	83,33%	40,00%
FULL DEM.	HIGH	16,67%	20,00%
	LOW	0,00%	40,00%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	57,14%	19,05%
FLAW. DEM.	HIGH	42,86%	38,10%
	LOW	0,00%	42,86%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	0,00%	23,08%
HYB./AUTOR.	HIGH	0,00%	30,77%
	LOW	100,00%	46,15%
	SUBTOTAL	**100,00%**	**100,00%**

Partial table "Quality of democracy" (World)

		WOMEN	MEN
	VERY HIGH	**100,00%**	**33,33%**
FULL DEM.	HIGH	0,00%	11,11%
	LOW	0,00%	55,56%
	SUBTOTAL	100,00%	100,00%
	VERY HIGH	**25,00%**	**18,18%**
FLAW. DEM.	HIGH	75,00%	45,45%
	LOW	0,00%	36,36%
	SUBTOTAL	100,00%	100,00%

Partial table "Quality of democracy" (World)

Since we could neither find out a statistically significant correlation between "toxic masculinity" and "performance level at fighting the pandemic crisis", nor detect traces of spuriousness between the independent variable ("gender of the national leader") and the dependent one ("performance level at fighting the pandemic crisis"), "Hypothesis 4" could not be confirmed.

6. The overall good performance of female national leaders is no surprise, since structural gender barriers make no room for less-than-brilliant women to occupy top political positions

So far, we have not been able to falsify the hypothesis that there is something special about female leadership. In this section, we assume that women national leaders have been performing better than their male counterparts at managing the pandemic crisis because of some "special" feminine trait (whether it is an "essential"/biological trait or a culturally constructed one). What could that be? A "typically" feminine, tied to an "ethics of care", sensibility or the "extraordinary skills" supposedly needed to overcome structural gender barriers? We will analyze the plausibility of the latter explanation, which was inspired by the article published in *The Guardian*.

Here is how "structural gender barriers" could explain women's overall good performance levels at fighting the pandemic crisis: the more sexist the people of a country is, the more difficult it is for women to be elected to top political positions, which means they have to be excellent in order to occupy the position of head of government and/or head of state; therefore, women-led countries have a greater chance to perform well at fighting the pandemic crisis than male-led ones.

PERFORMANCE LEVEL	HIGH GEN. EQUAL.	MEDIUM GEN. EQUAL.	LOW GEN. EQUAL.
VERY HIGH	58,33%	30,77%	9,52%
HIGH	25,00%	53,85%	23,81%
LOW	16,67%	15,38%	66,67%
TOTAL	100,00%	100,00%	100,00%

Bivariate table "Gender equality" (World)

PERFORMANCE LEVEL	HIGH GEN. EQUAL.	MEDIUM GEN. EQUAL.	LOW GEN. EQUAL.
VERY HIGH	62,50%	30,00%	18,18%
HIGH	12,50%	40,00%	45,45%
LOW	25,00%	30,00%	36,36%
TOTAL	100,00%	100,00%	100,00%

Bivariate table "Gender equality" (Europe)

		WOMEN	MEN
	VERY HIGH	**80,00%**	**42,86%**
HIGH GEN. EQUAL.	HIGH	20,00%	28,57%
	LOW	0,00%	28,57%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	33,33%	30,00%
MEDIUM GEN. EQUAL.	HIGH	66,67%	50,00%
	LOW	0,00%	20,00%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	0,00%	10,00%
LOW GEN. EQUAL.	HIGH	0,00%	25,00%
	LOW	100,00%	65,00%
	SUBTOTAL	**100,00%**	**100,00%**

Partial table "Gender equality" (World)

		WOMEN	MEN
	VERY HIGH	**80,00%**	**33,33%**
HIGH GEN. EQUAL.	HIGH	20,00%	0,00%
	LOW	0,00%	66,67%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	50,00%	25,00%
MEDIUM GEN. EQUAL.	HIGH	50,00%	37,50%
	LOW	0,00%	37,50%
	SUBTOTAL	**100,00%**	**100,00%**
	VERY HIGH	0,00%	22,22%
LOW GEN. EQUAL.	HIGH	100,00%	33,33%
	LOW	0,00%	44,44%
	SUBTOTAL	**100,00%**	**100,00%**

Partial table "Gender equality" (Europe)

One can notice that if such hypothesis were correct, women-led countries with high levels of gender equality would be less likely to thrive at managing the pandemic crisis, since their female leaders would not have had to be "spectacular" in order to overcome structural gender barriers. However, as we explained in section 3, this is not the case: both samples show that countries with higher levels of gender equality – whether they are led by men or women – have been performing better than less egalitarian countries. Hence, "Hypothesis 5" does not seem to properly explain the supposed causal relationship between "having a female national leader" and "high performance level at fighting the pandemic crisis".

7. Concluding remarks

This research aimed to assess if the hypothesis "Female leaders have been doing better at managing the pandemic crisis than male ones because of the "ethic of care" typically associated with the female gender" – inspired by an article published in *Forbes* – could be indirectly falsified. We performed a falsification test by (1) searching for a spurious correlation between the variables "gender of the national leader" and "performance level at fighting the pandemic crisis"; and (2) looking for statistically plausible causal explanations not related to the "ethic of care".

In section 2, we confirmed the existence of a statistically significant correlation between the factors "having a female national leader" and "high performance level at managing the pandemic crisis". Then, we controlled for confounders by using the following variables:

a) "HDI", "average level of education", "state fragility", "gender equality" and "quality of democracy" – all grouped under the notion of "political success" (section 3);

b) "population size", "population density" and "tourism" – all grouped under the heading of "other factors" (section 4); and

c) "'strongleaders'", " military expenditures" and "quality of democracy" – all grouped under the concept of "toxic masculinity" (section 5).

For we could not detect traces of spuriousness between the independent variable and the dependent one by using the aforementioned control variables – related to hypotheses "2", "3" and "4" – the hypothesis that there is, in fact, something "special" about female leadership became more plausible. The control variable "gender equality" allowed us to

test if such "special trait" could be the supposed extraordinary skills of female politicians who succeed in overcoming structural gender barriers ("Hypothesis 5", section 6) – a hypothesis that does not seem to be true.

Obviously, we did not test in this research countless alternative hypotheses that could reveal the existence of a spurious correlation between the independent variable "gender of the national leader" and the dependent variable "performance level at managing the pandemic crisis". That is why we cannot categorically state that "Female leaders have been doing better at managing the pandemic crisis than male ones because of the "ethic of care" typically associated with the female gender" – that would mean "jumping" to conclusions not supported by the data. It's essential to highlight that we cannot even attest that being led by a woman has any influence on a country's performance level at managing the pandemic crisis. Even if we could, the question about the degree of such influence would remain. For example, HDI correlated with the dependent variable "success at fighting the pandemic crisis" in a much more significant way than the factor "having a female national leader"; hence, it is more likely than not that socioeconomic conditions are a bigger influence on a country's performance level at managing the pandemic crisis than being led by a woman. Anyway, this work's primary research aim was not to assess if there is a "causal relationship" between the dependent variable "success at managing the pandemic crisis" and the control variables used here – such a task would require a specific study.

In any case, we can state that the hypothesis suggested in the article published in *Forbes* – "Female leaders have been doing better than male ones at managing the pandemic crisis because of the 'ethic of care' typically associated with the female gender" – seems more plausible now than before, since, at the very least, we were able to rule out the possibility of

spuriousness between the independent variable and the dependent one. A more solid confirmation of such hypothesis could be sought through qualitative research – for example, by comparing national leaders' political strategies and discourses concerning the pandemic – or by comparing the current crisis with different contexts of health/environmental "catastrophes". It would also be feasible to modify some elements of our research design (such as the data analysis technique, the control variables, the amount of countries in the samples, and the time period) in order to overcome any "blind spots", thus increasing the external validity of our conclusions.

8. References

BEAUMONT, Peter. Binyamin Netanyahu: strongman with a fearful heart. **The Guardian**, Jan 5, 2013. <https://www.theguardian.com/theobserver/2013/jan/05/binyamin-netanyahu-profile>.

BREMMER, Ian. The "strongmen" era is here. Here's what it means for you. **Time**, May 3, 2018. <https://time.com/5264170/the-strongmen-era-is-here-heres-what-it-means-for-you/>.

CHAMORRO-PREMUZIC, Tomas; GALLOP, Cindy. 7 Leadership lessons men can learn from women. **Harvard Business Review**, Apr 01, 2020. <https://hbr.org/2020/04/7-leadership-lessons-men-can-learn-from-women>.

COLLANGELO, Margareta. Covid-19 complexity demands sophisticated analytics deep analysis of global pandemic data reveals important insights. **Forbes**, Apr 13, 2020. <https://www.forbes.com/sites/cognitiveworld/2020/04/13/covid-19-complexity-demands-sophisticated-analytics-deep-analysis-of-global-pandemic-data-reveals-important-insights/#320287472f6e>.

FIGUEIREDO FILHO, Dalson Britto et al. When is statistical significance not significant?. **Bras. Political Sci. Rev,** 2013, vol.7, n.1.

FORD, Maureen; LOWERY, Carol R. Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations. **Journal of Personality and Social Psychology,** 1986, vol. 50, n.4.

GILLIGAN, Carol. Moral Orientation and Moral Development. In: Alison Bailey and Chris J. Cuomo (eds.). **The Feminist Philosophy Reader**. Boston: McGraw-Hill, 2008.

GILLIGAN, Carol. **In A Different Voice.** Cambridge: Harvard University Press, 1982.

KLEINNIJENHUIS, Jan *et. at.* **Doing Research in Political Science**. 2.ed. London: Sage publications, 2006.

LEWIS, Helen. The Pandemic Has Revealed the Weakness of Strongmen: Women leaders are a symptom of a political system's success, not necessarily its cause. **The Atlantic**, May 6, 2020. <https://www.theatlantic.com/international/archive/2020/05/new-zealand-germany-women-leadership-strongmen-coronavirus/611161/>.

MAHDAWI, Arwa. The secret weapon in the fight against coronavirus: women. **The Guardian,** Apr 11, 2020. <https://www.theguardian.com/commentisfree/2020/apr/11/secret-weapon-fight-against-coronavirus-women>.

MCLAUGHLIN, Timothy. The leader who killed her city: Carrie Lam has been a unique failure. **The Atlantic**, Jun 18, 2020. <https://www.theatlantic.com/international/archive/2020/06/carrie-lam-hong-kong-china-protest/612955/>.

NAI, Alessandro; TOROS, Emre. The peculiar personality of strongmen: comparing the Big Five and Dark Triad traits of autocrats and non-autocrats. **Political Research Exchange**, 2020, vol.2, n.1, pp.1-24.

REINHART, Alex. **Statistics done wrong: the woefully complete guide**. San Francisco: No starch press, 1991.

SERHAN, Yasmeen. Lessons from Slovakia - Where Leaders Wear Masks. The country's politicians led by example, helping it flatten its curve. **The Atlantic**, May 13, 2020. <https://www.theatlantic.com/international/archive/2020/05/slovakia-mask-coronavirus-pandemic-success/611545/>.

STOCKHOLM INTERNATIONAL PEARCE RESEARCH INSTITUTE. **SIPRI Military Expenditure Database**. <https://www.sipri.org/databases/milex>.

THE ECONOMIST. **Democracy Index 2019**. <https://www.eiu.com/public/topical_report.aspx?campaignid=democracyindex2019>.

THE GLOBAL ECONOMY. **Fragile States Index.** <https://www.theglobaleconomy.com/rankings/fragile_state_index/>.

UNITED NATIONS. **2019 Revision of World Population Prospects**. <https://population.un.org/wpp/>.

UNITED NATIONS. **Human Development Report**. <http://hdr.undp.org/en/data>.

WALKER, Tony. Why the world should be worried about the rise of strongman politics. **The Conversation**, July 23, 2018. <https://theconversation.com/why-the-world-should-be-worried-about-the-rise-of-strongman-politics-100165>.

WEST, Robin. **Caring for justice**. New York and London: New York University Press, 1997.

WHELAN, Ella. No, female leaders are not better at fighting covid-19. Stop fawning over Jacinda Ardern and Angela Merkel – it's sexist and embarrassing. **Spiked**, Apr 20, 2020. <https://www.spiked-online.com/2020/04/20/no-female-leaders-are-not-better-at-fighting-covid-19/>.

WITTENBERG-COX, Avivah. What Do Countries With The Best Coronavirus Responses Have In Common? Women Leaders. **Forbes**, Apr 13, 2020. <https://www.forbes.com/sites/avivahwittenbergcox/2020/04/13/what-do-countries-with-the-best-coronavirus-reponses-have-in-common-women-leaders/#25fb73ef3dec>

WORLD TOURISM ORGANIZATION. **Yearbook of Tourism Statistics**. 2019. Disponível em: <https://data.worldbank.org/indicator/ST.INT.ARVL>.

6

The fundamental duty of fraternity and the pandemic

FÁBIO PERIANDRO DE ALMEIDA HIRSCH

CONTENTS: 1. Explanating the starting point; 2. Fundamental rights and duties; 3. A proposed classification of fundamental duties in Brazil; 4. The fundamental duty of fraternity and its practical application in pandemic times; 5. Conclusions; 6. References.

1. Explaining the starting point

The phenomenon of social isolation forced by the exceptional and devastating advance of COVID-19, recognized by the World Health Organization (WHO) as one of the most relevant pandemics in universal history, produces undeniable effects in different segments of Brazilian life - among them in the legal world.

The so-called Corona Virus caused a mobilization (or rather, a demobilization) never seen before in the last four decades of Brazilian history. The scenario is one of almost empty streets, a good portion of commerce with closed doors, limited services, reduced mobility, confinement in homes and many contacts with relatives and friends only through the mechanisms of technology (video calls, calls, conversations via meeting applications) remote).

The so-called quarantine was initially self-imposed by a significant portion of the citizens who followed, with a mixture of deep sadness and

real fear, the alarming numbers of patients and victims with their own lives in countries such as China, Singapore, Italy and Spain. More nowadays, the United States, unfortunately, pontificates as one of the places with the highest records of cases of the disease and with deaths increasing.

The restrictive measures of social coexistence are harsh, associated with administrative restrictions of various orders, being certain that there is a greater amount of protective attitudes in large centers, notably in the capitals of the member states and in municipalities with a larger population or vocation for tourism and, consequently, with concrete evidence of becoming focus for the spread of the virus in cases of agglomerations.

In this scenario of extreme differentiation of procedures, the State of Bahia and the Municipality of Salvador stand out, as well as the State of São Paulo. In these units, even disparate political ideologies gave way, republicanly, to a joint performance worthy of record and applause to the managers who have been focusing their forces and material and institutional resources in facing an invisible but devastating enemy.

The acts of the Federal Government, with due respect, do not demonstrate the minimum (including legal) security necessary to control and combat an extravagant situation such as that experienced since February in the country.

What is shown is a picture of mismatch between the technical needs of the medical field, with the focus of the Palácio do Planalto, especially of His Excellency the President of the Republic, of minimizing the social impact derived from the disease due to the personal mandates of the major representative (the which has no medical training) and a seemingly exacerbated concern with the economic issue without taking into account the sacrifice of hundreds or thousands of human lives of Brazilians who deserve to be protected.

The lack of secure command at the national level contrasts with the efforts of the subnational units to keep the campaigns for people to stay in their homes steadily and with oversight, go out only for indispensable activities and understand that general isolation is the way, until then, more effective way of coping with the dissemination of COVID-19.

The pandemic, however, gave rise to a change in mentality that generates relevant reflexes for the legal community. The dichotomy of fundamental rights and duties has never been so current and so open to study and reflection.

The tension that exists between the primary public interest (of the collectivity, of the citizens, of those who "emanate power", as referred to in the sole paragraph of article 1 of the 1988 Federal Constitution - the people, here in the sense of population, for embracing all those in the national territory) and the secondary (of the state bureaucracy, of public servants who, now more than ever, have to put their condition of authorities in a smaller perspective and that of public servants in primacy, focusing on what is best for the people rather than entourage labels, ideological conceptions and pressure groups sometimes try to impose).

The previous generation ever faced an invisible adversary, which spreads even with its asymptomatic hosts, with a high degree of lethality and with an expansion so gigantic that it makes the health systems of countries with a very different structure from Brazil impossible - see Spain, China, Italy and the United States as major examples.

If there is a good side to experiencing and trying to overcome the COVID-19 pandemic, in the legal bias that this paper aims to evaluate, it is the growth of the *fraternity* aspect as an almost forgotten idea in national society - or, at least , undersized in times of normal sanitary, institutional and conviviality.

The work begins with an attempt to bring fundamental rights and duties closer together; it involves offering a useful classification of duties in Brazil and concludes with the development of the fundamental duty to the fraternity.

2. Fundamental rights and duties

The distinction between fundamental rights and fundamental duties must be clarified. While the former, as already mentioned, are the norms that protect individuals claims in order to compensate their protection when abuses by the State or other individuals occur, *fundamental duties* are imperative of conduct that impose obligations on each individual to do , not doing and tolerating in order to allow the best possible social cohesion:

> Fundamental duties - although the doctrine in pursuit is still relatively few - cannot be conceived anywhere other than alongside fundamental rights (NABAIS, 2004, p. 64; PECES-BARBA MARTÍNEZ, 1987, p. 330), until because it is not possible, today, to conceive of the individual as having rights only, and one should also observe him as a subject of duties - in relation to himself, to society and to future generations. The idea that human beings are both subjects of rights and duties will be very common in the ancient world, but that has been lost over the years in the history of Western society, so that the notion of the human being holding a commitment with its community or society it lost value, mainly due to the need to protect the person from state interference. In view of this situation, talking about individual rights was very common, especially since the constitutionalism of the era of revolutions (18th century). However, this old-fashioned model needs to be replaced, because people have both rights and duties, implying

> the existence of those in their existence (LOPES, 2006, P. 84-87). [...] It is, therefore, a legal category that establishes for each individual, society and the State the need to respect the legally established legal order and to provide the formation and maintenance of a material base that meets the needs basic principles of public institutions and make the goods of paramount importance effective, so that there is the correct exercise of fundamental rights. [1]

For this reason, José Casalta Nabais explains that

> All the fundamental duties are in certain sense, duties to the community (and therefore duties of members of this or citizens), i.e. they are directly in the service of the realization of assigned values by the organized community in a state as values. Which means that fundamental duties are an expression of statehood at its highest level. [2]

It must be understood, therefore, that a fundamental duty is a complement to the fundamental rights regulated by the Constitution. The duty focuses on making individual and even collective subjective rights feasible, not from the egoistic perspective, of exclusive protection of the individual and loss or cost to be borne by the community in general.

Carlos Eduardo Behrmann Rátis Martins, in a specific study about fundamental duties in the Portuguese and Brazilian perspective, well identifies essential elements regarding them:

> a) the legal nature of the duties is of *entrenchment clauses*, therefore norms with reinforced protection in our order against definitive changes or even

1. SIQUEIRA, Júlio Pinheiro Faro Homem de. Fundamental duties and the Brazilian Constitution. *In*: *Fides*. Natal, v. 1, n. 2, Aug. / Dec. 2010, p. 215 and 223.

2. NABAIS, Jose Casalta. *The fundamental duty to pay taxes*. Coimbra: Almedina, 1998, p. 101. In Brazilian doctrine, see RUSCHEL, Caroline Vieira. The fundamental duty of environmental protection. In: *Law & Justice*, Porto Alegre, v. 33, n. 2, p. 231-266, Dec. 2007 and RUSCHEL, Caroline Vieira. *Environmental partnership*: the fundamental duty of environmental protection as a prerequisite for the realization of the environmental law. Curitiba: Juruá, 2010.

decreases in the effective capacity of the duties [3];

b) even if the individual does not want to, the duties must be carried out for the benefit of the community, and arguments based on exclusively legal reasons, such as exemptions from liability, should not be accepted. [4];

c) the duties are not *numerus clauses*, but an open list, own the Brazilian constitutional reality based on Article 5 § 2º [5];

d) the prognosis of duties is to expand them in the most democratic way possible, promoting individual preservation as a derivation of the fulfillment of duties. [6]

It presupposes, therefore, balance and moderation between the exercise of personal prerogatives provided by the set of fundamental rights provided for and the achievement of general objectives within society.

That is why José Carlos Vieira de Andrade states that there are fundamental duties of citizens "even if not written, which result from the obedience of all men, due to the fact that they are, to a set of axiological and deontological principles that govern their relations with others and the society in which they necessarily live". [7]

The theory of fundamental duties mediates the good or bad

3. "As in the Portuguese Constitution (art. 288, d) and e)), the Brazilian Constitution (art. 60, § 4, IV) did not expressly establish, as a material limitation to the reforming power, the duties fundamental rights, however, insofar as fundamental duties are indispensable to guarantee fundamental rights, it can be said that, like rights, all fundamental duties are also stone clauses." - MARTINS, Carlos Eduardo Behrmann Ratis. *Introduction to the study of fundamental duties*. Salvador: JusPodivm, 2009, p. 95.

4. "However, even if the recipient of fundamental duties may give rise to exclusion of liability in order to get rid of their obligations, there is a minimum nucleus of protection of fundamental duties that cannot be neglected to the extent that there may be irreparable damage to the associated fundamental right "- MARTINS, Carlos Eduardo Behrmann Ratis. Introduction to the study of fundamental duties. Salvador: JusPodivm, 2009, p. 97/98.

5. "In spite of the majority doctrine understanding by the existence of a closed list of fundamental duties in the Constitution, it is understood that there is no constitutional provision that establishes *numerus clausus* in relation to them, insofar as they are not exhausted in the Constitution formal, assuming
fundamental extra-constitutional duties that are indispensable for the protection of fundamental rights"- *Idem*, *ibidem*, p. 99.

6. "The current dimension of fundamental duties tends to recognize passive subjects chosen by the State that are equivalent to human duties, breaking the Rousseauian contractual perspective of fundamental duties for its Kantian universalization according to a categorical imperative of practical reason, aiming protect the right to democracy, the right to information and pluralism in a global sense (e.g. duty of cooperation with the peoples of Latin America (art. 4, sole paragraph), as well as duties that protect the identity of the human being, in the face of advances in genetics (see duty to protect the manipulation of genetic material (art. 225, § 1 °, II of the CF) "- *Idem* , *ibidem* , p. 56.

7. ANDRADE José Carlos Vieira de, *Fundamental rights in the Portuguese Constitution of 1976*, Coimbra: Almedina, 2004, p. 167

realization of rights in the face of the dilemma between *the protection of the collective* and *the protection of the individual.* There is no absolute right, but there must also be no absolute duty. In this sense, Bruna Lyra Duque and Adriano Santana Pedra state:

> Thus, recognizing the other, in private relationships, becomes the challenge in understanding fundamental duties and their applicability. Thus, the fundamental duties can be designed as legal duties of a person, both physical and juridical, that for determining the position fundamental of individual, have a meaning for the particular group or society and thus can be demanded from a public, private, political, economic and social perspective. The fundamental duties are reflected, therefore, both in the notion of abstention, when the subject of duty is prohibited from doing something, as well as in the imposition of positive behavior. [8]

The public interest needs to be harmonized, like a good wine, with the individual interest - making the necessary adjustments so that there is no abuse by either party.

3. A proposal for classification of fundamental duties in Brazil

The theme includes several attempts at classification, usually linked to the free thinking of authors who focus on fundamental duties. An important example is that of Carlos Ratis Martins [9] :

> In effect, the expansion of fundamental rights implied the creation of new fundamental duties to protect them, which allows to identify dimensions of duties associated with fundamental rights.

8. DUQUE, Bruna Lyra; PEDRA, Adriano Sant'Ana. *The harmonization between the fundamental duties of solidarity and the space of freedom of individuals in the exercise of private autonomy*. Available at http://www.publicadireito.com.br/artigos/?cod=a1f0cf94512f963e. Accessed on 29 Mar. 2020.

9. For a broad analysis and synthesis of the classifications of fundamental duties cf. SIQUEIRA, Júlio Pinheiro Faro Man from. Elements for a theory of fundamental duties: a legal perspective. Constitutional and International Law Review. V. 95, Apr.-Jun., 2016. Available at http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RDConsInter_n.95.06.PDF . Accessed on 28 Mar. 2020.

The fundamental duties of the 1st dimension would be those that correspond to the passive subjections essential to the existence of the Liberal State and maintenance of freedoms and property: a) duty to defend the country; b) duty to pay taxes; c) duty of suffrage, etc.

The affirmation of the fundamental duties of the 2nd dimension, in turn, is associated with the recognition of the social rights conquered, in the period between the advent of the Industrial Revolution and the second war, demanding the behavior of the individuals who came to meet the interests of the community, whatever , among others : duty to protect health; duty to work ; basic schooling duty (art. 208, I); fundamental duty on the part of workers and public servants to continue providing services that are indispensable to imperative social needs (art. 9, § 1 of CF / 88); parents› duty to assist, raise and educate their children (art. 229 and art. 5 °, LXVII); the duty of children to support their parents (art. 229); duty of accountability (art. 70, sole paragraph); duty to respect the social function of property (art. 182, § 4 and art. 186) etc.

The 3rd dimension of the fundamental duties arises from the logic responsible inherent solidarity with the welfare state, given that they come to fulfill a redistribution of work, influenced by the ideals of solidarity, assuming the individuals a series of concrete obligations to contribute to the social order, aiming to protect transindividual interests. They correspond to: duty to preserve, defend and value cultural heritage (art. 216, § 1 °); duty to defend the environment (art. 225). [10]

It is possible to mention some fundamental duties of the most basic, without exhausting the theme: duty of solidarity (article 3 of the Federal Constitution), duty to pay taxes; duty of citizen participation and, in particular, duty of self-restraint and tolerance.

10. MARTINS, Carlos Eduardo Behrmann Ratis. Introduction to the study of fundamental duties. Salvador: JusPodivm, 2009, p. 76/77.

The last two deserve, due to their relevance and topicality, greater detail.

By duty of self-restraint, one must understand the obligation of each individual to limit himself to exercising his fundamental rights while allowing other individuals to enjoy their own rights. The concomitant exercise of fundamental rights, therefore, derives from an obligation not to do on the part of each individual, whatever this may be, enabling the interest of other members of social life to be served even when an individual wants to exercise his fundamental prerogatives.

An example of the most current in Brazil: in the name of exercising the right to freedom of expression and assembly, individuals (overwhelmingly often in small numbers) exceed only the limits of domestic education, but advance against other individuals by closing streets and roads in an integral way, which leads to violence against fundamental rights of others, such as freedom of movement, profession, health care, for example.

As for the duty of tolerance, based on Article 1, sole paragraph, item V (with the name of political pluralism), one must understand the obligation to *tolerate* , in the sense of accepting and living with what is different and, in particular , which is not acceptable for a specific social group. Who tolerates does not need to like, but only respect what the other likes and fights for. And, in the same line, those who tolerate already fulfill the legal function of respect for other individuals. Imposing your belief, your will or your point of view must sometimes be countered by the concrete application of the duty of tolerance, even though the circumstances are complex - because the duty to tolerate has a clear inhibitory function in conflicts and, therefore, generates greater social pacification.

An example also of the most current in Brazil: the protection of fundamental rights such as same-sex marriage, to the detriment of

infraconstitutional norms still using gender for such a distinction, does not need to be praised by everyone who, given their personal conditions, they consider this legal evolution to be an error or a setback; however, the latter, if they have a right to an opinion on the subject, must at the same time tolerate that social progress may not please them.

What can be concluded about the fundamental duties is that they promote the strengthening of active citizenship (that is, the performance of people seeking, each in their own way and with their resources, to protect their individual legal sphere and, at the same time, preserve and protect the collectivity) and, at the same time, aim to balance the individual will with social needs (that is, they seek to coordinate efforts so that the empowerment of each one is an integral part of a process of evolution of the group of individuals).

Given the relevance of fundamental duties, it is important to indicate specific and main types, without exhausting their prediction:

a) *Civic Duties* - the exercise of the right to vote, the provision of mandatory military service and public assistance in the event of disasters;

b) *Ethical Duties* - respect and application of administrative morality, generalized action through subjective and objective good faith and the most active exercise of social oversight of public spending and public management at all federal levels;

c) *Social Funding Duties* - social solidarity [11] and pay taxes [12];

11. "REGIONAL DAMAGE IN THE INSTRUMENT DRAFT. COFINS. LEGAL PERSON WITHOUT EMPLOYEES. WIDE EMPLOYER CONCEPT, IN PRESTIGE TO THE UNIVERSALITY OF COVERAGE. REFERIBILITY CONCEPT MITIGATED BY THE SOCIAL SOLIDARITY PRINCIPLE. 1. The concept of employer that is extracted from the social security legislation must include flexibility in relation to the labor concept, so that it comprises the largest possible universe. 2. Social solidarity and universality in coverage support the extensive interpretations in favor of withdrawal and mitigate the referibility of the exactions that maintain social security." - STF, Interlocutory Appeal in the Interlocutory Appeal 764794 / SP, Rapporteur Minister Dias Toffoli, DJe of 12/19/2012.

12. "THE CONFLUENCE BETWEEN THE DUTIES OF THE CONTRIBUTOR (THE FUNDAMENTAL DUTY TO PAY TAXES) AND THE DUTIES OF THE TAX (THE DUTY OF WELL TAXING AND SUPERVISE) As it is a matter of mere sharing of confidential information, it would be more appropriate situate the legal provisions combated in the category of

d) *Duties of Tolerance* - political pluralism (in the sense of plurality of ideas, conceptions of life, different points of view that must be respected, even if not accepted by the individual) and self-restraint (exercise of subjective rights and advantageous positions sparingly and without the creation of embarrassments for the community due to individual satisfaction).

Gilmar Ferreira Mendes synthesizes, with complete reason, that fundamental rights assume a position of definitive highlight in society when the traditional relationship between State and individual is reversed and "it is recognized that the individual has, first, rights, and, later, duties before the State, and that the rights that the State has in relation to the individual are ordered with the objective of better taking care of the

concrete elements of the duties of citizens and the Tax Authorities in the implementation of social justice, which has, as one of its most powerful instruments, taxation. The solution in the present case therefore involves understanding that, in Brazil, the payment of taxes is a fundamental duty. Regarding the theme, it is worth highlighting, for its pioneering spirit, the work of the Portuguese jurist José Casalta Nabais. In the book "The Fundamental Duty to Pay Taxes", the professor at the Faculty of Law of the University of Coimbra demonstrates, in summary, that, in the contemporary State - which is, essentially, a Fiscal State, understood as the one that is mostly financed by taxes paid by individuals and companies - paying tax is a fundamental duty. In Brazilian doctrine, it is worth mentioning the studies of Marciano Buffon, who, focusing on the concept in reference, highlighted the importance of the fundamental duty to pay taxes in a society that is organized under the characteristics of the Social State - as is the case in Brazil - because, in this model, the State has a duty to ensure a dignified existence for all, which presupposes the realization of social, economic and cultural rights of the citizen, through the services that demand public resources. The author says: "Anyway, a deep intellectual effort is not necessary to understand the importance of the fundamental duty to pay taxes, since without it the very figure of the State remains almost unfeasible, since it is not possible to think of an organized society without that there are sources of funds to finance the onus of this organization, unless the example envisaged is a society in which the production goods are concentrated in the hands of the State itself. This fundamental duty becomes more significant when society is organized under the characteristics of the so-called Welfare State, as this model aims to guarantee a dignified existence for all, and this involves, especially, the realization of so-called social, economic and cultural rights, which demands an expressive range of resources. (…) Within the Social State model, taxation plays an extremely important role, because it is this State model that has the duty to ensure fundamental rights, and such rights are more necessary for those less able to contribute to with the community" (BUFFON, Marciano. Taxation and human dignity: among the fundamental rights and duties. Livraria do Advogado. Porto Alegre, 2009. p. 91). The tax therefore corresponds to the contribution of each citizen to the maintenance of the State and, consequently, to the performance of activities that ensure fundamental rights - notably the rights of those who are less able to contribute financially to the State. Taking this into account, José Casalta Nabais emphasizes that the tax should not be seen as a mere exercise of power by the State, or as a sacrifice by the citizen, but as "an indispensable contribution to life in a community organized in a fiscal state. A type of state that has the subsidiarity of its own action (economic and social) and the primacy of citizens' self-responsibility for their livelihood their true support" (The fundamental duty to pay taxes. Coimbra: Almedina, 1998, p. 679, emphasis added). In this context, the solidarity nature of the tax is evidenced, which is due by the citizen for the simple fact of belonging to society, with which he has a duty to contribute. The fundamental duty to pay taxes is therefore based on the idea of social solidarity. As Marciano Buffon adds, "the solidarity bond is the foundation that justifies and legitimizes the fundamental duty to pay taxes, given that this duty corresponds to an inescapable consequence of belonging to a society" (p. 99). The constitutional order established in 1988 set, among the objectives of the Federative Republic of Brazil, to build a free, just and solidary society, to eradicate poverty and marginalization and to reduce social and regional inequalities. To that end, the Constitution was generous in providing individual, social, economic and cultural rights for the citizen. It happens that, related to these rights, there are also duties, whose fulfillment is also a sine qua non condition for the realization of the project of society sculpted in the Federal Constitution. Among these duties, there is the fundamental duty to pay taxes, since they are the ones who, for the most part, finance state actions aimed at the realization of citizens' rights. Since the payment of taxes in Brazil is a fundamental duty, since it represents the contribution of each citizen to the maintenance and development of a State that promotes fundamental rights, it is necessary to adopt effective mechanisms to combat tax evasion"- BRAZIL, Supreme Federal Court, RCL 22009 / PR, Min. Teori Zavascki, DJe of 12-05-2016.

citizen's needs ". [13]

4. The fundamental duty of fraternity and its practical application in pandemic times

The exceptional moment that the world in general and Brazil in particular is going through in history invites - or rather, *compels* - that the broader and deeper levels of both fundamental rights and duties are the target of greater attention by the legal community.

In the field of Brazilian fundamental rights, the so-called third dimension is called *transindividual rights.* They dominated the 21st century and are still present.

Third dimension rights are characterized by an even broader concern than the exclusive protection of the isolated individual or even of the collectivities: their focus is on the generality of people, even if undetermined and, sometimes, even not yet born - hence the reference transgenerational rights such as the 1988 Federal Constitution appear at the end of Article 225 (" *imposing on the Public Power and the community the duty to defend and preserve it* [the environment] *for present and future generations* ") .

The third dimension prominently involves consumer rights and differentiated protection and protection of the ecologically balanced environment. More recently, the Federal Supreme Court has included historical and cultural heritage in this list. [14]

In fact, it is almost impossible not to recognize at once the general

13. MENDES, Gilmar Ferreira *et alli*. *Constitutional law course*, 2. ed. São Paulo: Saraiva, 2008, p. 232-233.

14. "The legal protection of Brazilian cultural heritage, as a fundamental third generation right, is a matter expressly provided for in the Constitutional Text (art. 216 of the CRFB / 1988). The current constitutional order welcomed the DL 25/1937, which, when organizing the protection of the national historical and artistic heritage, established its own and specific discipline to the tipping institute, as a means of protecting several dimensions of the Brazilian cultural heritage"- BRAZIL. Federal Court of Justice. ACO 1.966 AgR, Rel. Min. Luiz Fux, DJe of 27-11-2017.

scope of these branches of law. The consumerist or environmental injury generates simultaneous losses to each injured person, those closest to him, who did not even know about the injury but can still be affected and harmed as well. In turn, the historical findings guide the country's memory and its relevance for new studies and new discoveries for the benefit of society.

In the view of the Supreme Federal Court, Brazil is in the third dimension in terms of the evolution of fundamental rights. [15]

Among the fundamental duties of the third dimension, in the expression of Carlos Rates Martins, and José Joaquim Gomes Canotilho points out (for whom the fundamental duties mean "problems of articulation and the relationship of the individual with the community" and "they are Portuguese legal-constitutional order as an autonomous category. (…) Here, the principle of asymmetry between fundamental rights and duties applies, even understanding that asymmetry between rights and duties is a necessary condition of a 'state of freedom' ") , it is imperative to recognize that "The ideas of 'solidarity' and 'fraternity' point to fundamental duties among citizens"\;

> The constitutional foundation, as outlined in the 1976 Constitution, is not primarily the need to defend moral ideas or metaphysical entities (virtue, fraternity, people, state, republic), but to root rights positions fundamental

15. "ENVIRONMENT - RIGHT TO THE PRESERVATION OF ITS INTEGRITY (CF, ART. 225) - QUALIFIED PREROGATION FOR ITS META-INDIVIDUALITY - RIGHT OF THIRD GENERATION (OR NEW BRAND DIMENSION) THAT ACCOMPLISHES THE POSTULATE OF SOLIDARITY - IMMEDIACY NEEDED TRANSGRESSION TO THAT RIGHT IS TO BREAK, IN THE COLLECTIVITY, INTERGENERATIONAL CONFLICTS - SPECIALLY PROTECTED TERRITORIAL SPACES (CF, ART. 225, § 1, III) - ALTERATION AND DELETION OF THE LEGAL REGIME TO THEM BELIEVING THE SUBSIDIARY MEASURES OF LAW - DELETION OF VEGETATION IN A PERMANENT PRESERVATION AREA - POSSIBILITY OF PUBLIC ADMINISTRATION, COMPLYING WITH LEGAL REQUIREMENTS, AUTHORIZING, LICENSING OR ALLOWING WORKS AND / OR ACTIVITIES IN THE TERRITORIAL SPACES THAT ARE PROTECTED UNDER THE TERRITORIAL SPACES, THAT ARE PROTECTED BY THE TERRITORIAL AREAS, WHICH ARE PROTECTED TO THE TERRITORIAL TERRITORIES. JUSTIFICATORS OF THE SPECIAL PROTECTION REGIME - RELATIONS BETWEEN ECONOMY (CF, ART. 3, II, C / CO ART. 170, VI) AND ECOLOGY (CF, ART. 225) - COLLISION OF FUNDAMENTAL RIGHTS - CRITERIA FOR OVERCOMING THIS STATE OF TENSION BETWEEN RELEVANT CONSTITUTIONAL VALUES - THE BASIC RIGHTS OF THE HUMAN PERSON AND THE SUCCESSIVE GENERATIONS (PHASES OR DIMENSIONS OF RIGHTS) 164/158, 160-161) - THE ISSUE OF THE PRECEDENCE OF THE RIGHT TO THE PRESERVATION OF THE ENVIRONMENT: A CONSTITUTIONAL LIMITATION EXPLICIT TO ECONOMIC ACTIVITY (CF, ART. 170, VI) - NON-REFERRED DECISION - CONSEQUENTIAL INDEFERENCE OF THE REQUEST FOR PRECAUTIONARY MEASURE. (BRAZIL. Supreme Federal Court. Precautionary Measure in Direct Action of Unconstitutionality 3540 / DF, DJU of 02/03/2006, p. 14).

principles anchored in freedom, human dignity, equality in law and through law. [16]

The apparent criticism does not hide the importance of fraternity as a basis of moral support for the norms and interpretations that make possible the protection of rights and duties of the third dimension. In this sense, the considerations of Júlio Pinheiro Siqueira are illuminating:

> When building the bases of the legal regime of fundamental duties, its characteristics are inevitably pointed out and, with them, its nature. Thus, also to identify the nature of the institute, it is necessary to have an in-depth knowledge of the general domain of duties, both with regard to legal obligations and with regard to moral duties and obligations. In this sense, and only very superficially, it can be said that the nature of fundamental duties is based on notions such as responsibility, solidarity, fraternity, cooperation, values and, perhaps mainly, otherness. That is, the real meaning of the existence of duties is how each person perceives his role in society and how he relates to other people. If in a society people only value others when they contribute to the development of their happiness and well-being, then the exaltation of the self-highlights a precedence of rights over duties, establishing the existence of a crisis of values in this society. And this is because, although rights may be an instrument of solidarity, they are normally used, in the Western world, as assets, that is, duties will only be exercised when rights have been realized, a fact that reflects the solipsist perspective (extreme individualist), which makes individuals and society sabotage themselves, revealing a crisis of values. This is so because while arising from values, that is, from guidelines for the maintenance of social order, it is the duties that determine the behavior of the powers, that is, how the impulses and needs of individuals, that is, their rights, will be exercised (carried out or implemented), not the other way around. [17]

16. CANOTILHO, José Joaquim Gomes. *Constitutional law and theory of the constitution*. 7. ed. Coimbra: Almedina, p. 531, 532, 533 and 536.

17. SIQUEIRA, Júlio Pinheiro Faro Homem de. Elements for a theory of fundamental duties: a legal perspective. Constitutional

The foundations of the fundamental duty of fraternity in Brazil include the following essential elements:

a) *solidarity as a basic and expressed* third-dimensional *fundamental duty* in the Federal Constitution of 1988 (article 3, I);

b) *diffuse protection of the most vulnerable as an implicit fundamental duty* , extracted from the macro principle of human dignity (Federal Constitution, article 1, sole paragraph, III);

c) *self-restraint as an unfolding of the idea of fraternity* , considering that private abstentions, even with some bearable and temporary sacrifice, are the concrete basis for collective needs (here in the sense of generalized, for the purpose of preserving several other individuals) come to fruition with the minimum loss of lives and human resources , also generating the so-called *safeguard against the abuse of fundamental rights* ;

d) *revisited calibration of the notion of primary public interest* , analyzed in the context of a free, fair and solidary society like the Brazilian Democrat, as explained by Luís Roberto Barroso , and corresponding to the concrete requirement to give priority to the protection, protection and preservation of fundamental values of all people even though, in the specific case, the individual wills will be the object of temporary restriction :

> The primary public interest, embodied in fundamental values such as justice and security, must enjoy supremacy in a constitutional and democratic system. (...) The problem gains in complexity when there is a confrontation between the primary public interest embodied in a collective goal and the primary public interest that takes place by guaranteeing a

and International Law Review. V. 95, Apr.-Jun., 2016. Available at http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RDConsInter_n.95.06.PDF . Accessed on 28 Mar. 2020.

> fundamental right. Freedom of expression can clash with the maintenance of minimum standards of public order (...) The use of *public reason* implies removing religious or ideological dogmas - whose validity is accepted only by the group of its followers - and using arguments that are recognized as legitimate by all social groups willing to have a frank debate, even if they do not agree on the specific result obtained. [18]

The duty of fraternity, therefore, rests on the essential idea that acting with a focus on the simultaneous protection of both the individual and other fellow citizens (whether they are from the family circle, friendship, professional relationships or even totally unknown) is not a favor that the person he does acting socially with dilettantism and gallantry. It is, rather, a demand that needs to be cultivated for every act practiced in the social sphere, in each community, based on the premise that human life has no gradation of values and each life is worth in itself.

In the same sense, the fraternity is more clearly exposed when it focuses on preserving the most socially vulnerable. In times of pandemic, for example, the protection of people who fill the streets of the whole country has to be rethought and prioritized, since the normal conjuncture of social care (deficit as a rule in Brazil as a whole) is reduced to almost zero when people who donate items like food, water, medicine, clothes are in isolation inside their homes, shopkeepers have their stores closed and there is almost no circulation of money or people to see the plight of homeless residents.

To act in a fraternal manner also involves self-restraint, that is, the setting of limits specific to individuals by the individuals themselves, either through conduct of very personal reasons (religious, civic, derived

18. BARROSO, Luís Roberto. *Contemporary constitutional law course*: the fundamental concepts and the construction of the new model. 7. ed. 2 tir. São Paulo: Saraiva, 2018, p. 98, emphasis in the original.

from common sense and the possibility of living together in society), or through conduct of public orders that are justified in cases of abnormalities such as the current pandemic of COVID-19. [19]

Even with regard to self-containment, it enshrines the fundamental notion that *losses cannot be socialized*, especially when the recipients of criticisms, complaints and individual "rebellious" attitudes towards public authorities managing a crisis do not have legal and institutions to solve the demands involved.

It is, therefore, the typical case of the attempted civil disobedience of the elderly and other people who, during the pandemic outbreak of COVID-19 in contemporary Brazil, based on personal convictions without any scientific basis, and barely employing a - in their view - right absolute freedom to come and go, they intend to travel on public roads, to gather in

19. The Governor of the State of Bahia, by means of Decree 19.529 of 03/16/2020, published in the Official Gazette of March 17 of this year, established temporary measures to be adopted, within the State, to confront public health emergency arising from the coronavirus. It expressly considered that the World Health Organization classified COVID-19 on March 11, 2020 as a pandemic and that the situation demands the urgent use of measures to prevent, control and contain risks, damages and health problems. in order to prevent the spread of the disease. It also considered, not explicitly, the growing numbers of victims and the chaos in the medical systems of countries that did not act with the necessary prudence. All the restrictions contained in the 18 original articles and their derivations put in place by new later normative acts are significant individual limitations, but justified by the public context envisaged in the country and already experienced, with very sad results, in other countries that preferred to despise social isolation and quarantine of the sick proven to benefit individual selfish well-being and scathing effects.
In the wake of the same exceptional facts, the Municipal Mayor of Salvador issued Decree nº 32.248, of 03/14/2020, supported by Federal Law nº 13,979, of February 6, 2020 and Ordinance MS / GM nº 356 of March 11, 2020 , defining, at the local level, limitations such as the use of public and private classes for 15 days ; shutdown gyms and cinemas for 15 days ; closing public parks indefinitely; suspension of vacation and licensing of health professionals, Municipal Civil Guard, Always, Civil Defense and the Office of the Mayor and remote work for employees over 65, provided they do not develop essential activities and strategic ties, and openings without the presence of public .
The numbers, however, indicate a more satisfactory result than the average of the places where there was no isolation and containment measures, as exposed in the last Corona Virus Bulletin issued by the Bahia Department of Health (SESAB): " Bahia registers 147 confirmed cases of coronavirus (Covid-19), one death and 1,380 cases discarded in the laboratory. These numbers account for all records from January until 11 am this Sunday (29). The counties with positive cases are these: Alagoinhas (1); Barriers (1); Brumado (1); Camaçari (1); Canarana (1); Conceição do Jacuípe (1); Count (1); Feira de Santana (9); Ilhéus (2); Itabuna (2); Itagibá (1); Itamaraju (1); Itororó (1); Jequié (1); Juazeiro (2); Lauro de Freitas (11); Pojuca (1); Porto Seguro (10); Prado (3); Salvador (94, three of which are imported); São Domingos (1) and Teixeira de Freitas (1)" . - BAHIA. Health Secretariat. Available at http://www.saude.ba.gov.br/2020/03/29/bahia-registra-147-casos-confirmados-de-covid-19-e-um-obito/. Accessed on 29 Mar. 2020.
Likewise, within the scope of Salvador: Salvador 's strategies for combating the coronavirus pandemic have gained international prominence on the Cities for Global Health platform, which brings together the best public policies to combat covid-19. Salvador is the only city in the North and Northeast considered a world reference. The platform, created by the World Cities Network (Metropolis) and the Euro-Latin American Alliance for Cooperation between Cities (ALLAS), features around 90 initiatives from 23 cities in different regions of the world against the coronavirus. Cities like Brussels (Belgium), Jeonju (Korea), Barcelona (Spain), Montreal (Canada), Bogotá (Colombia) and five Brazilians: Salvador, São Paulo, Rio de Janeiro, Belo Horizonte and Curitiba share their experiences and promote an exchange good practice technician. (...) The work of monitoring decisions is carried out by the Municipal Secretariat for Development and Urbanism (SEDUR). From the 18th of March until this Thursday (26th), more than 2,100 inspections were carried out, 33 interdictions and 20 operating permits were revoked". - *Salvador gains international prominence for practices against coronavirus: Salvador is the only city in the North and Northeast considered a world reference*. Available at https://www.correio24horas.com.br/noticia/nid/salvador-ganha-destaque-internacional-por-praticas-contra-coronavirus/ . Accessed on 27 Mar. 2020.

squares and streets and to despise medical recommendations and public norms of social isolation as a kind of "individual protest", which most resembles a daydream or rapture of inconsequence. Here is a clear example of an offense against the duty of fraternity, from the perspective of the need to respect self-restraint.

Founded on the theory of Fábio Konder Comparato, referring to Kant when dealing with the morally good will , it can be concluded that complying with the duty of self-restraint implies fulfilling his designs in line with the reasons of others, most often guided by public authorities even if it not be of interest agent and not even there is a natural inclination of the same for the fulfillment d and such a task, sympathy towards those who need help, for example - but because you cannot deliberately harm others only for their own vainglory or intentionality. [20]

The fraternity still goes through the calibration of the primary public interest. If it is right to say that the people are the holder of all power in Brazil, it is no less correct to say that there are interests of the people at different levels (individual, collective, diffuse). The priority way of organizing the gradient of concretization, that is, which must be preserved in each specific case, should be - in the general view and as a first rule - protect the individual with primacy, then the groups and, finally, perform the protection diffuse "society" intangible asset.

However, in times of a pandemic, for example, normality inevitably gives way to the exceptionality of diffuse demands to the detriment of those of determined groups (social and religious for example) and the will of individuals (social isolation as a fundamental duty as opposed to the freedom to come and go and to meet).

20. COMPARATO, Fábio Konder. *Ethics*: law, morals and religion in the modern world. São Paulo: Companhia das Letras, 2006, p. 65.

In other words: what changes is not to diminish the importance of individual or diffuse fundamental rights, but to give greater expression to the diffuse fundamental duty of fraternity, attributing to each person a part of the responsibility for the preservation of the other members of the social fabric - thus creating a protection network or web that occasionally sacrifices personal will for the benefit of a whole group of vulnerable and needy people who depend on the common effort so that their lives and physical and psychological integrity are maintained and preserved.

5. Conclusion

Now is not the time to hypertrophy the very personal fundamental rights ego.

They are important historical achievements, no doubt, and deserve to be protected. However, in a context of global exceptionality, the result of a legal fact not dominated by human beings and their state of the art technology (pandemic of the Corona Virus or any other disease with numbers and lethality as alarming) , the democratic scenario must be read in a pendular way, and concentrating the forces in the temporary individual sacrifice for the protection of the lives diffusely be prioritized, even *unwillingly* certain individuals. This is the cost of humanity in democracy.

The duty of fraternity has an umbilical connection with ethics, behold, " Whenever one speaks of ethics, one speaks of freedom and responsibility ", since the " ability to correlate the intimate sphere of my freedom of self-determination and responsibility for the outer sphere of the results of my action " [21] undoubtedly constitute the substratum of the duty of cooperation that each citizen must respect for the benefit of the community, even if unknown to their closest social circles.

21. BITTAR, Eduardo C.B.; ALMEIDA, Guilherme Assis de. *Course in philosophy of law*. São Paulo: Atlas, 2007, p. 480.

A vivid example of how much is exposed is the need to review premises that, in situations of absolute constitutional and social normality, are extremely expensive. Luís Roberto Barroso affirms that if a certain policy represents the achievement of an important collective goal (such as the guarantee of public security or public health, for example), but it implies the violation of the dignity of the human person of only one person, such politic must be refused. [22]

The statement is full of correction in the normal circumstances of social life. It remains correct if the restrictions promoted by the State to the detriment of individuals are abusive, that is, devoid of tangible and measurable reasons by the community (here the adequate space for neutralizing the abuses that fundamental rights allow so efficiently in our order).

However, in the context of a pandemic, in which protectionism to individual wishes may give rise to a public health calamity with an expressive number of deaths due to the alarmingly rapid proliferation and, also, with cases that are underreported to all evidence, one must resort to temperate interpretations when the subject touches on the equation individual freedom *versus* collective medical protection.

Therefore, it is justified to put innovative ideas into practice, although for some with an "authoritarian bias", such as the existence of the *fundamental duty to stay at home in times of Corona Virus*, supported by Carlos Ratis Martins in an unprecedented work. The aforementioned professor from Bahia says that in times of public calamity such as the one Brazil is now experiencing, the general duty of self-communion "will be exercised through essential, adequate and proportional subjections, aiming at restricting the right to travel to protect the greater good that is public

22. BARROSO, Luís Roberto. *Contemporary constitutional law course*: the fundamental concepts and the construction of the new model. 7. ed. 2 tir. São Paulo: Saraiva, 2018, p. 99.

health and the lives of all Brazilians", recognizing that respect for this posture constitutes the exercise of so-called responsible citizenship.

The duty of fraternity, therefore, set up a way to raise the constitutional level and realize the postulate arising from the Ulpian Digest called *alterum non laedere* , i.e. to anyone offended - that is what translates the phrase Latin *neminem laedere* , insert in the Institutes of Justinian "founds a social duty, elementary to the legal order itself, imposes, in principle, that one should not harm anyone, respecting the rights of others, as others must respect the rights of all". [23]

The current, and momentary, messages are clear and should be repeated over and over: stay at home; comply with the instructions of the competent medical health authorities; exercise resilience for the most vulnerable and make sure that we have a future if we take care of everyone now.

6. References

ANDRADE, José Carlos Vieira de. *Fundamental rights in the Portuguese Constitution of 1976*, Coimbra: Almedina, 2004.

BAHIA. Health Secretariat. Available at http://www.saude.ba.gov.br/2020/03/29/bahia-registra-147-casos-confirmados-de-covid-19-e-um-obito/ . Accessed on 29 Mar. 2020.

BARROSO, Luís Roberto. *Contemporary constitutional law course*: the fundamental concepts and the construction of the new model. 7. ed. 2 tir. São Paulo: Saraiva, 2018.

BITTAR, Eduardo CB; ALMEIDA, Guilherme Assis de. *Course in philosophy of law.* São Paulo: Atlas, 2007.

BRAZIL, Federal Supreme Court, RCL 22009 / PR, Rel. Min. Teori Zavascki, DJe of 12-05-2016.

BRAZIL. Federal Court of Justice. ACO 1.966 AgR, Rel. Min. Luiz Fux, DJe of 27-11-2017.

23. SILVA, De Plácido e. Legal Vocabulary v. I-IV. Rio de Janeiro: Forensic, 1996, p. 240, emphasis in the original.

BRAZIL. Federal Court of Justice. Regulatory Appeal in Instrument Appeal 764794 / SP, Rapporteur Minister Dias Toffoli, DJe of 12/19/2012.

BRAZIL. Federal Court of Justice. Precautionary Measure in Direct Unconstitutionality Action 3540 / DF, DJU of 02/03/2006, p. 14.

CANOTILHO, José Joaquim Gomes. *Constitutional law and theory of the constitution*. 7. ed. Coimbra: Almedina, 2008.

COMPARATO, Fábio Konder. *Ethics*: law, morals and religion in the modern world. São Paulo: Companhia das Letras, 2006.

CORREIO DA BAHIA. *Salvador gains international prominence for practices against coronavirus: Salvador is the only city in the North and Northeast considered a world reference*. Available at https://www.correio24horas.com.br/noticia/nid/salvador-ganha-destaque-internacional-por-praticas-contra-coronavirus/. Accessed on 27 Mar. 2020.

DUQUE, Bruna Lyra; PEDRA, Adriano Sant'Ana. *The harmonization between the fundamental duties of solidarity and the space of freedom of individuals in the exercise of private autonomy*. Available at http://www.publicadireito.com.br/artigos/?cod=a1f0cf94512f963e . Accessed on 29 Mar. 2020.

MARTINS, Carlos Eduardo Behrmann Ratis. Introduction to the study of fundamental duties. Salvador: JusPodivm, 2009.

MENDES, Gilmar Ferreira *et alli*. *Constitutional law course*, 2. ed. São Paulo: Saraiva, 2008.

NABAIS, Jose Casalta. *The fundamental duty to pay taxes*. Coimbra: Almedina, 1998.

RUSCHEL, Caroline Vieira. The fundamental duty of environmental protection. In: *Law & Justice*, Porto Alegre, v. 33, n. 2, p. 231-266, ten. 2007.

RUSCHEL, Caroline Vieira. *Environmental partnership*: the fundamental duty of environmental protection as a prerequisite for the realization of the environmental law. Curitiba: Juruá, 2010.

SILVA, De Plácido e. Legal Vocabulary v. I-IV. Rio de Janeiro: Forensics, 1996.

SIQUEIRA, Júlio Pinheiro Faro Homem de. Elements for a theory of fundamental duties: a legal perspective. Constitutional and International Law Review. V. 95, Abr.-Jun., 2016. Available at http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RDConsInter_n.95.06.PDF . Accessed on 28 Mar. 2020.

7

Nudge against covid-19 [24]

GABRIEL DIAS MARQUES DA CRUZ

CONTENTS: 1. Introduction. 2. Concept and Meaning of Nudge. 3. Experiences in Fighting COVID-19. 4. Conclusions 5. References

> *"Science is far from a perfect instrument of knowledge. It's just the best we have. In this respect, as in many others, it's like democracy. Science by itself cannot advocate courses of human action, but it can certainly illuminate the possible consequences of alternative courses of action."* [25] . Carl Sagan

1. Introduction

Imagine three curious situations, apparently unrelated: (I) picture a fly drawn on the bowls of male restrooms' urinals, in Schiphol Airport, Amsterdam; (II) how food is disposed in school cafeterias; (III) false speed bumps drawn on Philadelphia highways. What are the similarities between these experiences? How can they help to fight COVID-19, a dangerous pandemic that has challenged authorities to find solutions?

24. T.N.: Translated by members of the Voluntary translation of informative materials related to COVID-19 project, offered by NUPEL / UFBA and supervised by professors M. Daniel Vasconcelos B. Oliveira, Dr. Feibriss Henrique Meneghelli Cassilhas, Dr. Lucielen Porfirio, and Dr. Monique Pfau. Translators: Daniel Vasconcelos B. Oliveira, Amanda de Oliveira Santos, Marília Portela Pereira e Natasha Farias de Oliveira. I would like to thank UFBA – Instituto de Letras professors for translating this article to English. Especial thanks to Professors Daniel Vasconcelos, Monique Pfau, Lucielen Porfirio, Feibriss Cassilhas and their outstanding team. By joining our efforts, we prove that the spirit of university collaboration is not just an idea. It is a practice: the use of knowledge on behalf of the society. This article is dedicated to everyone who believes that science, research, and education are the path to achieve a more just and less unequal society.

25. SAGAN, Carl. **The Demon-Haunted world**, p. 30.

The above-mentioned situations are examples of *nudge*, a concept that became famous in 2008 after Professors Cass Sunstein and Richard Thaler's researches.

This article is divided in two essential parts: (I) the concept of *Nudge,* its meaning and correlation with the notions of *choice architecture* and *libertarian paternalism*; (II) cases able to validate and demonstrate the efficiency of the concept in fighting COVID-19.

We shall shed some light on this difficult moment of our history.

As a start, we must understand this intriguing concept.

2. Concept and Meaning of *Nudge*

The concept of *nudge* is extremely interesting. However, before further analysis, we must explore two other ideas. *Libertarian paternalism* and *choice architecture* are key concepts for Professors Sunstein and Thaler, winner of the 2017 [1] Nobel Prize of Economy

A *choice architect* is responsible for organizing environments where people are led to make decisions [2] . It includes, for example, ballot papers manufacturers; doctors explaining possible treatments to patients; business men and women developing health insurance application forms; parents presenting college options to their children or salespeople when describing the product they want to sell [3] .

1. "Nobel prize in economics awarded to Richard Thaler". **The Guardian**. Available at: https://www.theguardian.com/world/2017/oct/09/nobel-prize-in-economics-richard-thaler. Accessed: 22 June 2020; "Entenda a teoria que deu a Richard Thaler o Prêmio Nobel de Economia". **Revista Época Negócios**. Available at: https://epocanegocios.globo.com/Economia/noticia/2017/10/entenda-teoria-que-deu-richard-thaler-o-nobel-de-economia.html Accessed: 22 June 2020. RIBEIRO, Márcia Carla Pereira; DOMINGUES, Victor Hugo. Economia comportamental e direito: a racionalidade em mudança. **Revista Brasileira de Políticas Públicas**, p. 468.

2. THALER, Richard. H; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade, p. 11.

3. THALER, Richard. H; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade, p. 11. All the examples are mentioned by authors.

Sunstein and Thaler also advocate the definition of what they call *libertarian paternalism*.

Human beings do not always make rational and careful choices. Therefore, the authors believe that well meaning choices must be praised in order to encourage behaviors capable of resulting personal gains. Beneficial choices can produce advantageous outcomes even for people who are unable to measure all the variables involved in complex decisions making processes. It is the role of *choice architects* to offer the best possible standard option, focusing on making those decisions easier. This is the idea behind the notion of *paternalism*. *Choice architects* are allowed to try to influence people's behavior, as long as their goal is making those people live longer, healthier and better [4].

However, Sunstein and Thaler added a thought-provoking notion to this idea: the so-called *libertarian paternalism*. It is libertarian because of the importance it gives to individual free will. Sunstein and Thaler believe that the freedom to choose cannot be taken away from individuals. There must be, on one hand, stimulus for making the best choices, and, on the other hand, autonomy to freely decide what the individuals want to do. According to the authors, the libertarian aspect of their strategies lies in the belief that people must be free to do whatever they want, including to refuse disadvantageous agreements [5].

The concept of *nudge* represents, in turn, a stimulus to adopt beneficial behavior. The person responsible for the *choice architecture* builds an environment that induces people to select the best choices for themselves and the community. The nudge preserve people's freedom to have the final

4. THALER, Richard. H; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade, p. 13.

5. THALER, Richard. H; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade, p. 13. There are some debates about libertarian paternalism limits; for more information about it, see RIBEIRO, Márcia Carla Pereira; DOMINGUES, Victor Hugo. Economia comportamental e direito: a racionalidade em mudança. **Revista Brasileira de Políticas Públicas**, pp. 459-463.

say in decision processes, idea that is included in the notion of *libertarian paternalism*. In short, *nudge* means a little push towards the best possible choice. According to Professors Sunstein and Thaler, nudge is [6]:

> (…) is any aspect of the choice architecture that changes people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To be considered a nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting the fruit at the eye level counts as a nudge. Simply banning junk food does not.

The examples given in the introduction of this article show a common element: the intention behind an individual behavior capable of resulting in individual and collective gains. We shall look into each case now.

There was a major incident regarding male behavior in the restrooms at Amsterdam airport. Many men used the urinals inappropriately, leaving the place dirty and in very bad condition. Someone came up, then, with the idea of drawing a fly on the bowls of the airport urinals. The simple existence of the drawings led to a reduction of dirt in the bathrooms, preserving a clean environment for a longer period of time, and, consequently, reducing bathroom cleaning costs. According to Thaler and Sunstein, drawing a fly on the urinals reduced by 80% urinal spillage, an extremely successful nudge [7].

The same logic can be applied to encourage healthy food consumption. An employee responsible for the school cafeteria in a large city in the USA wanted to encourage students to consume low fat foods. But how could she do it without appealing to an arbitrary imposition? He discovered that disposing healthy food in a more visible way increased its consumption,

6. THALER, Richard H.; SUNSTEIN, Cass R. **Nudge**: improving decisions about health, wealth, and happiness. Yale University Press, 2008. p. 6.

7. THALER, Richard. H; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade, p. 99. The same example is given on pp. 12 e 275.

with variations of up to 25% [8].

The third example happened in Philadelphia. Local authorities were looking for a way to encourage drivers to reduce their speeds. But how could they do it besides using traditional speed cameras and traffic education? Someone had the idea of painting fake speed bumps on the asphalt. That simple idea resulted in a speed reduction from 37 mph to 22 mph. Even though the effect is temporary — since drivers will eventually learn where the fake speed bumps are located —, their costs, which are very low, can be compensated by slowing the speed of cars driven by tourist in the region [9].

Therefore, *nudges* can be a valuable tool to encourage good behavior, and consequently contribute to increase society's well-being. In some contexts, this encouragement will not be enough, and they will require stricter rules regarding undesirable behavior. *Nudges*, however, show incredible potential. They stimulate creativity during the search for simple and easy solutions that could lead to short term good results. It is crucial, though, to stay alert to its misuse [10].

The current global scenario raises constant concerns. Many people are trying to find ways to fight COVID-19. Therefore, an issue remains: has the concept of *nudge* already been used against the pandemic? This is what we shall see in the next topic.

3. Experiences in Fighting COVID-19

Outside Brazil, the use of *nudges* has shown successful results in institutional experiences. In Brazil, however, it is not used as much.

8. THALER, Richard. H; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade, pp. 9-12.

9. THALER, Richard. H; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade, p. 268.

10. THALER, Richard H. Nudge, not sludge. **Science**, p. 431.

Regarding the use of *nudges*, one of the most cited international experiences is the British unit known as BIT (Behavioural Insights Team). According to their website, the organization's purpose is to improve the people and communities' lives. It works in partnership with several institutions to build simple solutions to major problems within the scope of public policies [11]. The United States also has a department with a similar characteristic linked to the White House [12].

The use of *nudges* is even more important in countries that are not responding well to the COVID-19 pandemic.

Unfortunately, Brazil fits perfectly in this description. Moreover, the poor way that the Brazilian Federal Government handles the pandemic is connected to its democratic decay process marked by exhibitions of populism and attacks on institutions [13]. The Brazilian President has denied the seriousness of the virus, associating it, initially, with just a "little flu". He even made appearances in manifestations organized by his supporters in clear breach of the authorities' official recommendations of isolation.

The way Brazilian Federal Government has dealt with COVID-19 has been strongly criticized and is among the worst worldwide [14]. Brazil's President questioned scientific and behavioral parameters adopted by the most successful world models to fight the pandemic, which recommend massive testing and the adoption of measures to restrict people's circulation. This terrible situation still includes constant political fights

11. "The Behavioural Insights Team – About us". Available at: https://www.bi.team/about-us/. Accessed: 22 June 2020. "The Behavioural Insights Team exists to improve people's lives and communities. We work in partnership with governments, local authorities, businesses and charities, often using simple changes to tackle major policy problems". See also RIBEIRO, Márcia Carla Pereira; DOMINGUES, Victor Hugo. **Economia comportamental e direito**: a racionalidade em mudança. **Revista Brasileira de Políticas Públicas**, p. 459, Note nº 1.

12. SUNSTEIN, Cass. Nudging: Um Guia (Muito) Resumido. (Nudging: a Very Short Guide). **Revista Estudos Institucionais**, pp. 1027, 1033 e 1034.

13. LEITE, Glauco Salomão. COVID-19 e Democracia no Brasil: controlando a proliferação do populismo. *In*: CONCI, Luiz Guilherme Arcaro. **O Direito Público em Tempos Pandêmicos**, pp. 27-28.

14. "Leaders risk lives by minimizing the coronavirus. Bolsonaro is the worst". The Washington Post, 14/4/2020. Available at: https://www.washingtonpost.com/opinions/global-opinions/jair-bolsonaro-risks-lives-by-minimizing-the-coronavirus-pandemic/2020/04/13//6356a9be-7da6-11ea-9040-68981f488eed_story.html. Accessed: 23 June 2020.

and two Ministers of Health being fired during the pandemic [15].

In short: insensitivity, disrespect, and arrogant amateurism.

Despite the chaotic national scenario, Brazilian Mayors and Governors have locally adopted important and necessary measures against the pandemic. There have been cases in which different political inclinations were put aside, and forces were joined to fight COVID-19. The Governor of the state of Bahia [16] and the mayor of its capital, Salvador [17], politicians of opposing parties, are an example of this bipartisan union to fight the pandemic.

Fortunately, many of the Federal Government actions have been blocked by democratic institutions. Glauco Salomão Leite highlights three reasons that explain why these actions have been blocked: (I) the absence of a solid parliamentary base supporting Brazilian Federal Government; (II) an independent Judiciary Power, especially the Brazilian Supreme Court, the STF; (III) the fragmentation of political power in a Federation, which ensures autonomy to States and Municipalities [18]. Emilio Peluso Neder Meyer and Thomas Bustamante map out important investigations and ongoing lawsuits in the Brazilian Supreme Court (STF), a vital institution that tries to contain the constant threats to the Brazilian Democratic State and the rule of law [19].

Brazil is a Federal Republic. Articles 1º and 18 of its Constitution ensure the autonomy of the federation regions to adopt local policies.

15. For an analysis of the President's performance during the pandemic, cf. MEYER, Emilio Peluso Neder; BUSTAMANTE, Thomas. Bolsonaro and COVID-19: Truth Strikes Back. **Int'l J. Const. L. Blog**, 24 March 2020. Available at: http://www.iconnectblog.com/2020/03/bolsonarism-and-covid-19-truth-strikes-back/. Accessed: 23 June 2020.

16. See http://www.saude.ba.gov.br/temasdesaude/coronavirus/. Accessed: 23 June 2020.

17. See http://www.informe.salvador.ba.gov.br/coronavirus/. Accessed: 23 June 2020.

18. LEITE, Glauco Salomão. COVID-19 e Democracia no Brasil: controlando a proliferação do populismo. *In*: CONCI, Luiz Guilherme Arcaro. **O Direito Público em Tempos Pandêmicos**, pp. 31-48.

19. MEYER, Emilio Peluso Neder; BUSTAMANTE, Thomas. Judicial Responses to Bolsonarism: The Leading Role of the Federal Supreme Court. **Verfassungsblog**. VerfBlog, Available at: https://verfassungsblog.de/judicial-responses-to-bolsonarism-the-leading-role-of-the-federal-supreme-court/. Accessed: 22 June 2020.

Brazilian Supreme Court (STF) reinforced this autonomy. ADPF 672 ensured, at a preliminar decision, the functional attribution of the federal regions to adopt health protection measures, given the existence of shared and supplementary competence on the matter. The Court's decision quoted the feasibility of adopting measures such as the imposition of distancing/social isolation, quarantine, suspension of teaching activities, and restrictions on commerce, cultural activities, and the circulation of people, among others [20]. Some people say that the STF waved in favor of *centrifugal federalism*, giving greater autonomy to the federal regions [21].

Regional Consortia, such as the Northeast Consortium, stand out as well. The initiative, under Bahia State Law nº 14.087, issued on April 26, 2019 [22], defines and allows the exchange of good practices between Brazil's Northeastern federal states. The goal is to join as a bloc for negotiations and find better deals when purchasing international goods and services of common interest.

Given the current critical and adverse reality, it becomes clear that all solutions recommended by science are extremely necessary to Brazil, especially simple, affordable and easy to implement ones.

Authorities may choose to use *nudges* as valuable tools to save lives, which, naturally, legitimize an in-depth study on the topic focused on their efficiency [23]. *Nudges* can be used alongside with other more restrictive measures such as closing beaches, parks and stores.

Unfortunately, relying solely on people's civic awareness is not

20. STF, ADPF 672, Rel. Min. Alexandre de Moraes, 8 April 2020.

21. CONTINENTINO, Marcelo Casseb; PINTO, Ernani Varjal Medicis. Estamos diante de um novo federalismo brasileiro? **Consultor Jurídico**. Available at: https://www.conjur.com.br/2020-abr-18/observatorio-constitucional-estamos-diante-federalismo-brasileiro. Accessed: 22 June 2020.

22. Similarly, see the 'Whereas' in the Protocol of Intentions.

23. For a critical view on how the concept of nudge is applicable in the scope of the pandemic, cf. Derrig, R. (2020). Lockdown Fatigue: Pandemic from the Perspective of Nudge Theory. **Verfassungsblog** [Online]. Available at: https://verfassungsblog.de/lockdown-fatigue-pandemic-from-the-perspective-of-nudge-theory/ Accessed: 22 June 2020.

enough to promote solidarity. Severe measures, that limit fundamental rights, enforced by public authorities, can harmoniously coexist with low-cost and less invasive ones – measures that are very convincing and likely to be repeated.

It is important to acknowledge that the importance of *nudges* has been recognized by some Brazilian authorities, even before the pandemic [24]. For instance, the pioneer *NudgeRio* initiative, which was designed to contribute to the formulation and implementation of public policies, has obtained good results in actions related to the cleaning of beaches, students' enrollment rate and tax revenue [25].

Choosing simple, effective and low-cost solutions to fight the pandemic respects the core values of the Brazilian Constitution. It: a) guarantees the central principle of human dignity, under article 1º, item III; b) ensures the right to health and life, provided for articles 5º, *caput*, 6º and 196; and; c) safeguards the right to freedom, established in article 5º, *caput*, given that the use of well-designed incentives by the State does not replace the sovereignty of the individual will.

Presumably, the concept of *nudge* is compatible with the Brazilian Constitution.

Furthermore, the concerns related to people's health and well-being, which are *nudges'* main goals in the battle against COVID-19, comply with the guidelines under Law nº 13.979/20 (Quarantine National Law), regarding the criteria that authorities must follow when adopting the

24. It is, however, a recognition that so far is still incipient; in this sense, see RIBEIRO, Márcia Carla Pereira; DOMINGUES, Victor Hugo. Economia comportamental e direito: a racionalidade em mudança. **Revista Brasileira de Políticas Públicas**, p. 469.

25. "Seminário NudgeRio: Fundação João Goulart dissemina uso da Ciência Comportamental Aplicada no setor público". **Prefeitura do Rio de Janeiro**. Available at: https://prefeitura.rio/fazenda/seminario-nudgerio-fundacao-joao-goulart/. Accessed: 22 June 2020. Nudge Rio is described as a unit of the Fundação João Goulart institute, which carries out projects connected to Applied Behavioral Science. It also highlights the use of the concept in the formulation of public policies; see "Nudge influencia nossas decisões. Como o governo pode usar o empurrãozinho?" GovTech. Available at: https://govtech.blogosfera.uol.com.br/2020/01/25/nudge-influencia-nossas-decisoes-como-o-governo-pode-usar-o-empurraozinho/. Accessed: 22 June 2020; "Nudges: o potencial de uso em políticas públicas". WeGov. Available at: https://wegov.net.br/economia-comportamental-e-nudges/. Accessed: 22 June 2020.

measures provided for in article 3º. It is important to point out item III of article 3º, which ensures the respect for human dignity, human rights and fundamental freedoms, as provided for in article 3 of the International Health Regulations.

We shall look at some examples of possible actions:

(1) *Social Norms*: except for essential activities, general social isolation has been one of the health authorities' most recommended measures. In addition, behavioral studies have shown that people tend to behave like the majority or, at least, in accordance to what most people believe to be the right thing to do [26] . Therefore, scheduled text messages or any other kind of alert reminding people of the importance of keeping social distancing is a good example of *nudge*. It encourages people to follow the recommendations during the pandemic. A wide research recently published in Nature Human Behaviour journal supports this idea [27] . There are also similar reports published by the United Nations Development Programme in Somalia, which has encouraged local leaders to produce videos, animations and photos in order to spread the need for social isolation. In Egypt and Sudan [28] , similar actions were also put into practice. It is recommended that the messages directed at the population should be easy to understand, catchy, social and opportune [29] . In Brazil, cars from Rio de Janeiro Civil Defense Agency and also from the Fire Department are used to send alerts in front of bars,

26. SUNSTEIN, Cass. Nudging: Um Guia (Muito) Resumido. (Nudging: a Very Short Guide). **Revista Estudos Institucionais**, p. 1030 (the author deals with social norms in a broader sense, here adapted to fight COVID-19).

27. BAVEL, J.J.V., BAICKER, K., BOGGIO, P.S. et al. Using social and behavioural science to support COVID-19 pandemic response. **Nat Hum Behav** 4, 460–471 (2020). Available at: https://www.nature.com/articles/s41562-020-0884-z#citeas. DOI: https://doi.org/10.1038/s41562-020-0884-z. Accessed: 23 June 2020.

28. "Using behavioural insights to respond to COVID-19". **United Nations Development Programme**, 7/5/20. Available at: https://www.undp.org/content/undp/en/home/stories/using-behavioural-insights-to-respond-to-covid-19-.html. Accessed: 23 June 2020.

29. "A Conversation with Cass Sunstein on Behavioral Science and Using Nudges: Recommendations for Overcoming Covid-19", 18/5/20. Available at: https://blogs.iadb.org/ideas-matter/en/a-conversation-with-cass-sunstein-on-behavioral-science-and-using-nudges-recommendations-for-overcoming-covid-19/. Accessed: 23 June 2020.

restaurants and beaches, pointing out the need for isolation [30];

(2) *Hand washing sinks in low-income neighborhoods*: a recent initiative of the Federal University of Bahia is remarkable due to its simplicity and effectiveness: placing easy to handle hand washing sinks in low-income areas in the city of Salvador (Bahia state capital). Professors and students from the School of Architecture produced sinks using simple materials and rainwater with chlorine tablets. The sinks are activated by pedals, so people do not need to use their hands [31]. The public hand washing stations are low-cost and reach extremely impoverished communities, which, unfortunately, are very common in Brazil's unequal society. The initiative is not limited to the fight against COVID-19: hand hygiene and cleaning habits will certainly help avoiding other diseases reinforcing the importance of keeping those habits even after the pandemic is controlled [32]. Here, it is worth mentioning the *nudge* experience in two elementary rural schools in Bangladesh. Footprints were painted on the floor creating a trail from the toilet to the hand washing stations. There were no other additional messages, only these very subtle signs on the ground. The intervention increased hand washing from 4% to 68% on the day after the use of the *nudge*, and after six weeks, the increase reached 74% [33]. The authors of this study point out that, obviously, the experience should be adapted when destined to adults. They suggest – as supermarkets and pharmacies are doing – marking lines especially for the elderly in scheduled flu vaccination campaigns organized in Brazil by the Family Health

30. GARCIA, Flávio Amaral. COVID-19 e o nudges. **JOTA**. Available at: https://www.jota.info/opiniao-e-analise/artigos/covid-19-e-o-nudges-25032020. Accessed: 18 June 2020.

31. "Pias simples e de material barato: uma ação original para ajudar comunidades onde há falta de água". **Edgar Digital**. Available at: http://www.edgardigital.ufba.br/?p=17044. Accessed: 22 June 2020.

32. "5 de Maio – Dia Mundial de Higienização das Mãos". OPAS Brasil. Available at: https://www.paho.org/bra/index.php?option=com_content&view=article&id=1143:5-de-maio-dia-mundial-de-higienizacao-das-maos&Itemid=463. Accessed: 22 June 2020.

33. GOTTI, Eduardo Sousa; ARGONDIZZI, João Gabriel Ferreira; SILVA, Viviane Silvestre; OLIVEIRA, Elimar Adriana de; BANACO, Roberto Alves. O uso de nudges para higienização das mãos como estratégia mitigatória comunitária diante da pandemia de Covid-19. **Revista Brasileira de Análise do Comportamento. Brazilian Journal of Behavior Analysis**, p. 135.

teams of each location [34] . They also address the possible use of stickers, glued on the shoulders or on the arm joints, to encourage coughing such spots, and avoiding using their hands or coughing in the air [35] ;

(3) *Nudges Contest*: Why don't we stimulate people's creativity, especially through digital media? The desire to help others can be encouraged, especially during confinement. *Creative solidarity* can be of valuable support. As an example, a *nudges* contest can encourage people to suggest simple, inexpensive and easy to implement ideas, of course, always giving credit the authors. It would even be possible to consider attracting partner brands. They could use their knowledge to design good behavioral tools and new solutions. The communicative potential of social media is used to stimulate the development of new ideas, a positive use of digital technology in order to build a healthier environment, with less prejudice and misinformation [36] .

Brazilian researchers have already outlined some solutions against the coronavirus.

In this sense, Rafael Lima Daudt Oliveira [37] suggests strategies to encourage people to behave according to the majority and respect the isolation. He also emphasized the need of constant and continuous awareness based on relevant data. Flávio Amaral Garcia [38] highlighted the importance of tools such as persuasion, induction and convincing, which are

34. GOTTI, Eduardo Sousa; ARGONDIZZI, João Gabriel Ferreira; SILVA, Viviane Silvestre; OLIVEIRA, Elimar Adriana de; BANACO, Roberto Alves. O uso de nudges para higienização das mãos como estratégia mitigatória comunitária diante da pandemia de Covid-19. **Revista Brasileira de Análise do Comportamento. Brazilian Journal of Behavior Analysis**, p. 137.

35. GOTTI, Eduardo Sousa; ARGONDIZZI, João Gabriel Ferreira; SILVA, Viviane Silvestre; OLIVEIRA, Elimar Adriana de; BANACO, Roberto Alves. O uso de nudges para higienização das mãos como estratégia mitigatória comunitária diante da pandemia de Covid-19. **Revista Brasileira de Análise do Comportamento. Brazilian Journal of Behavior Analysis**, p. 138.

36. BAVEL, J.J.V., BAICKER, K., BOGGIO, P.S. et al. Using social and behavioural science to support COVID-19 pandemic response. **Nat Hum Behav** 4, 460–471 (2020). Available at: https://www.nature.com/articles/s41562-020-0884-z#citeas. DOI: https://doi.org/10.1038/s41562-020-0884-z. Accessed: 23 June 2020.

37. OLIVEIRA, Rafael Lima Daudt. Direito Administrativo em tempos de crise: simplificação, nudges e o coronavírus. **Revista Colunistas – Direito do Estado**. Available at: http://www.direitodoestado.com.br/colunistas/rafael-lima-daudt-doliveira/direito-administrativo-em-tempos-de-crise-simplificacao-nudges-e-o-coronavirus. Accessed: 18 June 2020.

38. GARCIA, Flávio Amaral. COVID-19 e o nudges. **JOTA**. Available at: https://www.jota.info/opiniao-e-analise/artigos/covid-19-e-o-nudges-25032020. Accessed: 18 June 2020.

strategies of a contemporary Administrative Law focused on overcoming the adversities brought by the pandemic. Diógenes Faria de Carvalho and Vitor Hugo do Amaral Ferreira [39] recommended empirical research on behavioral economic tools capable of increasing the population's well-being. The same warning had already been issued by Natália Lacerda Macedo Costa [40], although referring to the fight against corruption.

It is possible to think of new solutions that encourage *creative solidarity* in addition to other initiatives adopted by the authorities at different levels and contexts.

4. Conclusions

Three concepts were presented in this paper: the notions of *choice architecture*, *nudge* and *libertarian paternalism*. *Choice architects* are responsible for organizing choice possibilities; *nudge* is a stimulus capable of inducing people to adopt positive behavior; and *libertarian paternalism* is a behavioral model that encourages people to adopt the best choices regarding their health, money and happiness, while preserving their decision-making autonomy.

We see several examples of good initiatives to encourage people to adopt healthy behaviors, preserving their health and the health of their community. These are simple measures, often easy to implement, and with positive results.

In this tragic moment of our existence, when countless lives have been lost and many families have been inflicted by pain, it is urgent that we use our *creative solidarity* in order to save as many lives as possible. For

39. CARVALHO, Diógenes Faria de; FERREIRA, Victor Hugo do Amaral. Políticas públicas e as lições preliminares da COVID-19. **Consultor Jurídico**. Available at: https://www.conjur.com.br/2020-abr-01/garantias-consumo-politicas-publicas-licoes-preliminares-covid-19. Accessed: 22 June 2020.

40. COSTA, Natália Lacerda Macedo. "Nudge" como abordagem regulatória de prevenção à corrupção pública no Brasil. **Revista de Informação Legislativa**, pp. 106-107.

this, we need to learn the lessons taught by science and research, and treat each human being with as much care, respect and attention as possible. We appeal to the authorities, which are responsible for the policies to fight the pandemic, to learn from the best national and international practices on how to use successful, simple, low-cost and effective *nudges*.

Since science is a candle in the dark, let us spread a light of hope to the world.

5. References

BAHIA. State Law nº 14.087, de 26 April 2019. Ratifica o Protocolo de Intenções do Consórcio Interestadual de Desenvolvimento Sustentável do Nordeste – Consórcio Nordeste, e o Convênio de Cooperação firmado entre o Estado da Bahia e o Estado do Ceará. Available at: http://www.legislabahia.ba.gov.br/documentos/lei-no-14087-de-26-de-abril-de-2019. Accessed: 23 June 20.

BAVEL, J.J.V., BAICKER, K., BOGGIO, P.S. *et al*. Using social and behavioural science to support COVID-19 pandemic response. **Nat Hum Behav** 4, 460–471 (2020). Available at: https://www.nature.com/articles/s41562-020-0884-z#citeas. DOI: https://doi.org/10.1038/s41562-020-0884-z. Accessed: 23 June 2020.

BRASIL. Law nº 13.979, 6 February 2020. Dispõe sobre as medidas para enfrentamento da emergência de saúde pública de importância internacional decorrente do coronavírus responsável pelo surto de 2019. Available at: www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/l13979.htm. Accessed: 22 June 2020.

CARVALHO, Diógenes Faria de; FERREIRA, Victor Hugo do Amaral. Políticas públicas e as lições preliminares da COVID-19. **Consultor Jurídico**. Available at: https://www.conjur.com.br/2020-abr-01/garantias-consumo-politicas-publicas-licoes-preliminares-covid-19. Accessed: 22 June 2020.

CONTINENTINO, Marcelo Casseb; PINTO, Ernani Varjal Medicis. Estamos diante de um novo federalismo brasileiro? **Consultor Jurídico**. Available at: https://www.conjur.com.br/2020-abr-18/observatorio-constitucional-estamos-diante-federalismo-brasileiro. Accessed: 22 June 2020.

COSTA, Natália Lacerda Macedo. "Nudge" como abordagem regulatória de prevenção à corrupção pública no Brasil. **Revista de Informação Legislativa**: RIL, v. 54, n. 214, p. 91-111, April/June. 2017. Available at: http://www12senado.leg.br/ril/edicoes/54/214/ril_v54_n214_p91. Accessed: 22 June 2020.

DERRIG, Ríán. Lockdown Fatigue: Pandemic from the Perspective of Nudge Theory. **Verfassungsblog**. Available at: https://verfassungsblog.de/lockdown-fatigue-pandemic-from-the-perspective-of-nudge-theory/. DOI: https://doi.org/10.17176/20200526-164131-0. Accessed: 22 June 2020.

GARCIA, Flávio Amaral. COVID-19 e o nudges. **JOTA**. Available at: https://www.jota.info/opiniao-e-analise/artigos/covid-19-e-o-nudges-25032020. Accessed: 18 June 2020.

GOTTI, Eduardo Sousa; ARGONDIZZI, João Gabriel Ferreira; SILVA, Viviane Silvestre; OLIVEIRA, Elimar Adriana de; BANACO, Roberto Alves. O uso de nudges para higienização das mãos como estratégia mitigatória comunitária diante da pandemia de Covid-19. **Revista Brasileira de Análise do Comportamento. Brazilian Journal of Behavior Analysis**, 2019, Vol. 15, Nº 2: 132-129.

LEITE, Glauco Salomão. COVID-19 e Democracia no Brasil: controlando a proliferação do populismo. *In*: CONCI, Luiz Guilherme Arcaro. **O Direito Público em Tempos Pandêmicos**: 9 países, 11 trabalhos e uma porção de inquietudes. São Paulo: Tirant lo Blanch, 2020.

MEYER, Emilio Peluso Neder; BUSTAMANTE, Thomas. Bolsonaro and COVID-19: Truth Strikes Back. **Int'l J. Const. L. Blog**, 24 March 2020. Available at: http://www.iconnectblog.com/2020/03/bolsonarism-and-covid-19-truth-strikes-back/. Accessed: 23 June 2020.

MEYER, Emilio Peluso Neder; BUSTAMANTE, Thomas. Judicial Responses to Bolsonarism: The Leading Role of the Federal Supreme Court. **Verfassungsblog**. *VerfBlog*, 16 June 2020. Available at: https://verfassungsblog.de/judicial-responses-to-bolsonarism-the-leading-role-of-the-federal-supreme-court/. Accessed: 22 June 2020.

OLIVEIRA, Rafael Lima Daudt. Direito Administrativo em tempos de crise: simplificação, nudges e o coronavírus. **Revista Colunistas – Direito do Estado**. Available at: http://www.direitodoestado.com.br/colunistas/rafael-lima-daudt-doliveira/direito-administrativo-em-tempos-de-crise-simplificacao-nudges-e-o-coronavirus. Accessed: 18 June 2020.

RIBEIRO, Márcia Carla Pereira; DOMINGUES, Victor Hugo. Economia comportamental e direito: a racionalidade em mudança. **Revista Brasileira de Políticas Públicas**. Volume 8, Nº 2, August 2018: 457-471.

SAGAN, Carl. **The Demon-Haunted world.** London: Headline Book Publishing, 1997.

SUNSTEIN, Cass. *Nudging*: Um Guia (Muito) Resumido. (*Nudging*: a Very Short Guide). **Revista Estudos Institucionais**. Vol. 3, 2, 2017: 1023-1034.

THALER, Richard H.; SUNSTEIN, Cass R. **Nudge**: improving decisions about health, wealth, and happiness. Yale University Press, 2008.

THALER, Richard H.; SUNSTEIN, Cass R. **Nudge**: como tomar melhores decisões sobre saúde, dinheiro e felicidade. Translation: Ângelo Lessa. Rio de Janeiro: Objetiva, 2019.

THALER, Richard H. Nudge, not sludge. **Science** 361 (6401), 431. 3 August 2018.

News Articles

"ACM Neto e Rui Costa se reúnem para debater medidas contra o coronavírus". Correio 24Horas, 20/03/20. Available at: https://www.correio24horas.com.br/noticia/nid/acm-neto-e-rui-costa-se-reunem-para-debater-medidas-contra-o-coronavirus/. Accessed: 23 June 2020.

"A Conversation with Cass Sunstein on Behavioral Science and Using Nudges: Recommendations for Overcoming Covid-19", 18/5/20. **Inter-American Development Bank ("IDB")**. Available at: https://blogs.iadb.org/ideas-matter/en/a-conversation-with-cass-sunstein-on-behavioral-science-and-using-nudges-recommendations-for-overcoming-covid-19/. Accessed: 23 June 2020.

"Bolsonaro, Isolated and Defiant, Dismisses Coronavirus Threat to Brazil". **The New York Times**, 1/4/20. Available at: https://www.nytimes.com/2020/04/01/world/americas/brazil-bolsonaro-coronavirus.html. Accessed: 23 June 2020.

"5 de Maio – Dia Mundial de Higienização das Mãos". **OPAS Brasil**. Available at: https://www.paho.org/ bra/ index.php ?option = com_content &view=article&id=1143:5-de-maio-dia-mundial-de-higienizacao-das-maos&Itemid=463. Accessed: 22 June 2020.

"Entenda a teoria que deu a Richard Thaler o Prêmio Nobel de Economia". **Revista Época Negócios**. Available at: https://epocanegocios.globo.com/Economia/noticia/2017/10/entenda-teoria-que-deu-richard-thaler-o-nobel-de-economia.html Accessed: 22 June 2020.

"Leaders risk lives by minimizing the coronavirus. Bolsonaro is the worst". **The Washington Post**, 14/4/2020. Available at: https://www.washingtonpost.com/opinions/global-opinions/jair-bolsonaro-risks-lives-by-minimizing-the-coronavirus-pandemic/2020/04/13//6356a9be-7da6-11ea-9040-68981f488eed_story.html. Accessed: 23 June 2020.

"Nobel prize in economics awarded to Richard Thaler". **The Guardian**. Available at: https://www.theguardian.com/world/2017/oct/09/nobel-prize-in-economics-richard-thaler". Accessed: 22 June 2020.

"Nudge influencia nossas decisões. Como o governo pode usar o empurrãozinho?"

GovTech. Available at: https://govtech.blogosfera.uol.com.br/2020/01/25/nudge-influencia-nossas-decisoes-como-o-governo-pode-usar-o-empurraozinho/. Accessed: 22 June 2020.

"Nudges: o potencial de uso em políticas públicas". **WeGov**. Available at: https://wegov.net.br/economia-comportamental-e-nudges/. Accessed: 22 June 2020.

"Pias simples e de material barato: uma ação original para ajudar comunidades onde há falta de água". **Edgar Digital**. Available at: http://www.edgardigital.ufba.br/?p=17044. Accessed: 22 June 2020.

"Seminário NudgeRio: Fundação João Goulart dissemina uso da Ciência Comportamental Aplicada no setor público". **Prefeitura do Rio de Janeiro**. Available at: https://prefeitura.rio/fazenda/seminario-nudgerio-fundacao-joao-goulart/. Accessed: 22 June 2020.

"The Behavioural Insights Team – About us". **BIT**. Available at: https://www.bi.team/about-us/. Accessed: 22 June 2020.

"Using behavioural insights to respond to COVID-19". **United Nations Development Programme**, 7/5/20. Available at: https://www.undp.org/content/undp/en/home/stories/using-behavioural-insights-to-respond-to-covid-19-.html. Accessed: 23 June 2020.

8

The right to family life and the social isolation imposed by the covid 19 pandemic

HILDA LEDOUX VARGAS

CONTENTS: 1. Initial considerations; 2. The importance of family life for human development in the context of divorce; 3. Shared coexistence, shared custody and the right to family coexistence; 4. The right to family life and the coronavirus pandemic in Brazil; 5. Conclusion; 6. References

1. Initial considerations

Family life is conceptualized by Lôbo (2011, p. 74) as the "daytime and lasting affective relationship interwoven by the people who make up the family group, due to kinship ties or not, in the common environment". In this article, we seek to examine the right to family life, between separated parents and their children and the restrictions imposed on that right, by the social isolation determined by State Decree n. 19529, of March 16, 2020, to control the COVID – 19 pandemic.

Family coexistence is seen, in the national constitutional system, as a fundamental right of children and adolescents and in the infra constitutional system, as a principle of Family Law and must, therefore, guide the interpretation of all family legal rules. In addition, family life can constitute evidence for the recognition of the socio-affective family.

The right to family life is guaranteed to children and adolescents by the Federal Constitution, in art. 227, which gave the State, society and the

family the responsibility for its guarantee. This constitutional rule was regulated by the Statute of the Child and Adolescent (Law n. 8.069/1990) and the Youth Statute (Law n. 12.825/2013), and reflects the doctrine of comprehensive protection of children and adolescents, originated from the Declaration 1924 Geneva Convention, the United Nations Universal Declaration of Human Rights (Paris, 1948) and the American Convention on Human Rights (San José Pact of Costa Rica, 1969) and the Convention on the Rights of the Child (UN, 1989), ratified by Brazil on 9/24/1990.

According to Article 9 of the Convention on the Rights of the Child (the most widely ratified human rights treaty in the history of mankind - it has been ratified by 196 countries), children should not be separated "from their parents against their will". In the event of separation from the parents, the convention guarantees the right of children to "regularly maintain personal relationships and direct contact with both", except in cases where this is contrary to the child's best interest [1].

The right to family coexistence, in the national legal system, has the nature of a fundamental right. For Andrade (2013, p. 690), "family life is a fundamental right of children, duly protected by the Brazilian legal system, and not a choice of parents". For this reason, it must be understood as the duty of parents to provide their children with family life, which is not limited to the relationship between parents and children, but reaches the extended family, conceptualized, by art. 25, sole paragraph of the Statute of the Child and Adolescent as that "formed by close relatives with whom the child and adolescent live and maintain bonds of affinity and affection". The right to family coexistence, therefore, expands to reach even the socio-affective family and must be guided by the principle of the child's best interest (KREUZ, 2012, p. 78).

1. The Convention itself exceeded this determination in providing for removal in specific cases, for example, "when the child when a child suffers abuse or neglect by the parents, or, in the case of separation from the parents, when a decision must be taken with regard to the child's place of residence".

Lôbo (2011, p. 75) emphasizes that decisions that involve the right to family life should observe "the scope of the family considered in each community, according to its values and customs". According to the author, the relationship of coexistence and solidarity with grandparents, brothers and uncles is natural in the Brazilian family, which has served as a basis for judicial decisions that guarantee the coexistence of the children of separated parents with their grandparents. However, due to the choice of the methodological approach for the development of this article, we will seek to understand the difficult compatibility between the right to family life between separated children and parents and social isolation, in the context of the pandemic of COVID 19, in Brazil.

The fundamental adjective used to qualify the right to family life links it to the human condition and concerns the relevance of family life to the development of the individual. In this sense, Andrade warns:

> Parents and guardians must be aware of the delicacy of the process of building an individual's personality, so that they can measure, more clearly, the effects of their actions. It is essential to recognize the power of affect that all people have in the life of a child/adolescent, especially those with whom they have affinities and memories. (ANDRADE, 2013, p. 690).

Psychosocial and psychoanalytic studies highlight the relevance of the role of the child's coexistence with his family for the construction of his personality and for his development. "It is important that the child feels supported by a family nucleus, as it is the first space of power that he knows; it is in this environment that She begins to develop her skills, discover her preferences and overcome her deficiencies", in the words of Andrade (2013, p. 691).

2. The importance of family life for human development in the context of divorce

The family has the function of "mediator between the child and society, enabling their socialization, an essential element for children's cognitive development", in the words of Andrade, Santos, Bastos, Pedromônico, Almeida Filho Barreto (2005, p. 607). For a healthy and adequate personal development and construction of the individual's identity, family coexistence has a fundamental role, insofar as:

> The family is a resource for the person, in the most diverse aspects of their existence, being present as a symbolic reality that provides experiences at the psychological and social level, as well as ethical and cultural orientations. It contains the fundamental elements of the symbolic identity of the individual as a human being, which differentiate him from an animal individual (PETRINI, 2004, p. 56).

Reinforces this statement the thought of Groeninga (2003, p. 128), for whom the family does not work just like cell *mater* of the society, but as "the human psyche constitution matrix you know to be." In addition, the author understands that the psyche is constituted through similarities and differences and that the family "is a privileged place for these experiences and for the establishment of differences - between parents and children, between functions, between sexes and genders, between the public and the private".

> Therefore, it can be said that it is within the family that the individual maintains his first interpersonal relationships with significant people, establishing emotional exchanges that work as an important emotional support when individuals reach adulthood. These emotional exchanges established throughout life are essential for the development of individuals and for the acquisition of central physical

> and mental conditions for each stage of psychological development. (PRATTA, SANTOS, 2007, p. 250)

Winnicott (2011) reinforces the relevance of family life with father and mother for the development of the individual, highlighting the problems that affect men and women deprived of family relationships. For him, the absence of family members whom we can complain about, whom we can love, hate or fear constitutes a serious deficiency in the formation of the individual.

However, family life between parents and children can change due to the separation [2], which will require parents, especially in the first or the first two years after the breakup of the marital relationship [3], the ability to deal with the challenges arising from the changes imposed by the separation of the couple in the children's lives.

A survey conducted by the University of Coimbra in 2013 indicates that, for children, the problem is not in the separation itself, but in the way the parties involved behave in relation to these situations of conjugal outcome. According to the survey results, each child or adolescent reacts differently to their parents' divorce. While for some, the impact on social emotional development can be significant, for others, the effects will not be felt as severely. According to the research, for children and adolescents, what matters is the parents' ability to manage the difficulties that arise after separation.

The researchers warn couples who intend to separate or divorce so that they understand that the construction of a new family structure by the other spouse or partner, after the separation, does not imply the deterioration of parental relationships nor does it cause limitations in the

2. In this article, the word separation will be used in its general connotation (not in the procedural sense) to cover the hypotheses of divorce and dissolution of a stable union, since in all these hypotheses, separation actually occurs.

3. Studies in the field of psychology inform that divorce causes family transformations and the people involved in the process enter a crisis context, which usually will stabilize after 1-2 years. (MORGADO, DIAS, PAIXÃO, 2013)

development of children. And more: "the fact of living within a traditional family does not, therefore, constitute a protective factor for the development of socialization, nor does living in a non-traditional household represent a risk factor". According to these authors, regardless of the characteristics of the family structure, "the most relevant is the way in which the couple deals with changes in family life and structure, trying to the maximum to avoid high levels of conflict, before, during and after divorce". (MORGADO, DIAS, PASSION, 2013, p. 141).

From the couple's decision to leave one of them from the family environment, the conflicts that involve living with their children appear. Doubts, indecision and insecurities about issues involving the home address, the regulation of custody and the visitation of the child populate the complex moment of separation. Feelings such as hurt, resentment, frustration, the desire for retaliation, revenge, to cause suffering to the spouse that caused the other, the feeling of abandonment, the pain of infidelity and guilt, among others, mix and hinder decision making about the fate of the children and the maintenance of a family life that allows them full personal development.

Medeia, the Greek tragedy of Euripides, serves as an illustration for the conflict between couples who separate, in relation to living with their children, especially when one of the spouses has built a new family relationship. The plot of Euripides' play tells the story of Medea, who was betrayed by her husband, who separated from her and decided to marry a younger woman: the king's daughter. Medea did not accept the possibility that her children would live with her husband's new wife, whom he hated for holding her responsible for the end of their marriage. Upset with rage and jealousy, Medeia swore revenge on her ex-husband and his new wife. The king, upon learning of Medeia's intention to take revenge on his daughter, ordered that she and her children be banished from the city. Then, Medeia

appealed to the king and asked him for time to prepare for exile.

During the time that she was granted, Medeia planned the perfect revenge, so that her former husband would suffer the pain of the loss of their loves. So he killed the king and the king's daughter. Upon returning home, he stabbed his children to death. Her former husband went crazy and she lived in terror with guilt until the end of her days.

The Medeia tragedy instigates reflections on situations in which children and adolescents are used as an instrument of revenge against the former spouse or partner or for others in which the exercise of motherhood is used as an instrument of possession and power to keep the father from living together with their children, recognized by the national normative system as hypotheses of parental alienation. More than that, Eurípedes' play calls on couples who are in the process of separating to seek the harmonization of their conflicts in order to safeguard their children's best interests, especially with regard to their healthy relationship with their father and mother families.

In this sense, shared coexistence presents itself as a viable alternative to harmonize the interests of parents and to safeguard the right of children to full, harmonious, shared and balanced family life, so that it can contribute to their personal development.

3. Shared coexistence, shared custody and the right to family coexistence

It is a fact that, with the separation of the couple, living with the children will not happen in the same way. However, this does not mean that the separation of the parents implies the removal of the spouse who left the couple's home, from raising their children. This is what Teixeira reflects:

> What will change in the relationship between parents and children after the end of the conjugal relationship will be the right to have them in your company, since the guardian will be the parent responsible for the daily care of minors. However, the decisions relevant to your life must be taken by both, together, since they affect family power and not custody. (2013. p. 425).

In fact, deciding, the couple, due to the separation, should also define the custody and coexistence regime with the children, in the form of art. 1.583 of the Civil Code [4], which presents two alternatives: unilateral custody, "attributed to only one of the parents or someone who replaces it" and shared custody, understood as "the joint responsibility and the exercise of the rights and duties of the father and mother who do not live under the same roof, concerning the family power of ordinary children", according to the wording of the first paragraph of that article.

According to Brant (2018, p. 99), among the alternatives presented by art. 1.583 [5] of the current Civil Code, shared custody would be the most appropriate model to serve the best interests of children, with regard to guaranteeing the exercise of the right to family life. So too, understand, psychologists, social workers and other professionals who work in family relationships.

Shared custody can be understood as "a system where the children of separated parents remain under the equivalent authority of both parents, who come together to make important decisions regarding their well-being, education and upbringing", in the words of Oliveira (2009, p. 59). For Teixeira (2013, p. 426) shared custody consists of "a custody plan where both parents share the legal responsibility for making important decisions

4. Guardianship for placement in a substitute family is dealt with by the Statute of Children and Adolescents (Law n. 8.069/1990), in the arts. 28, 33, 34 and 35.

5. Although the current Civil Code refers only to unilateral custody and shared custody, from the theoretical point of view, there are four types of custody: unilateral or exclusive, alternating; nesting or nesting and shared or joint custody, as taught by Gagliano and Pamplona Filho (2020, p. 1,440).

regarding minor children, jointly and equally".

With regard to shared custody, there is a technical inaccuracy in the use of the nomenclature. What can be observed from the concepts presented here by Teixeira (2013) and Oliveira (2009) is the joint exercise of parental responsibility [6] as a defining aspect of shared custody. It is clear, then, that it would not be necessary for the law to give parents shared custody, to the extent that it is already common to them, parental responsibility, which survives separation, divorce and even remarriage or union of parents, separated/divorced [7] .

In this sense, Teixeira comments:

> It is for this reason that shared custody was not necessary in our country, since we already have the possibility of realizing its attributes through family power. It is suitable for those legal systems that, with the end of the conjugal society, the non-guardian parent also loses, the family power, as it happens in Italy. In these cases, there must be a rule that determines that custody will be shared, so that, through consequences, there is a sharing of family power. (2013, p. 425)

However, it is present in the Brazilian Civil Code and can be established by the manifestation of the parties' will, in an action of separation or divorce, dissolution of a stable union or in a precautionary measure or even, decreed by the judge, when there is no agreement between the parents and both are able to exercise family power, as provided in art. 1.584.

6. I chose the term parental responsibility because I found the expressions parental authority and parental power inappropriate for the institute. The first is to refer to an authority that does not exist by itself, but stems from the responsibility that the law imposes on parents to care for, support and protect their children, and the second is to express the idea of parental ownership over their children. The parental responsibility nomenclature, to my mind, seems appropriate for naming the nature of the parental power/duty towards their children.

7. For Dias (2015, p. 524) "the separation of parents, divorce and dissolution of the stable union do not alter the relations between parents and children (CC 1.632). Regardless of the marital situation of the parents, it is incumbent on both the full exercise of family power, and the assignment of the two is the duty to direct the creation and education of the children (CC 1.634, I)".

The Civil Code also establishes, in its art. 1.583, § 2 that: "in shared custody, the time spent with the children should be divided evenly with the mother and father, always bearing in mind the factual conditions and interests of the children". In order to define shared custody, the judge has technical-professional guidance or an interdisciplinary team to decide on the duties of the father and mother and the balanced division of the children's time with their parents, as provided in art. 1.584, §3 of the Civil Code.

Family life is therefore an important element in defining shared custody. In the dictionary, to live together means "1. Having coexistence, having intimacy or living with others; 2. To relate amicably or to get along. 3 Experiencing difficult situations; withstand, withstand [8] ". The linguistic meaning of the verb denotes the responsibility of parents for providing their children with the opportunity for personal growth through living with their family members, to allow them to learn from the relationships that create bonds of affection and teach them how to deal with difficulties. and discomfort of life.

For the establishment of shared custody, the home base [9] of the couple's children will be determined, with one of the parents, when they live in different cities, and the other will have the supervision of the children's interests and the right to visit them and to have them in your company according to what is agreed by the former spouses or partners or determined by the judge, as prescribed in arts. 1.583, §§ 3 and 5 and art. 1.589 of the Brazilian Civil Code, for the hypothesis of unilateral custody.

8. Michaelis, 2020.

9. Regarding the subject, Pereira (2020) ponders: "In true shared custody the children have two residences. Serious studies in Europe have shown that children of separated parents who have experienced shared custody in two households have fewer problems than children of separated single-care parents, and single residence. It is important to children that they feel they have two houses. And they incorporate this routine easily. Of course there are exceptions, as in every rule. But in most of the guards shared in Brazil, magistrates and prosecutors, mistakenly, imprisoned and supported by an old and outdated psychology, require, even in agreements, to establish a single residence, which is usually in the mother's house. Well, if father and mother are also important and fundamental references for the child, there is no logical and psychic reason to continue paralyzed in these references of a patriarchal ideology in which the mother is always the protagonist in the creation of children, and the father is the supporting actor".

When the parents reside in the same city, there is no need to define a parent's home as a home base or as a reference home for the children, when custody is shared, but "so that one is not at the mercy of the will on the other, especially when there is no agreement, it is up to the judge to establish the attributions of each one and the period of coexistence in a balanced way (CC 1.584, §3) ", Dias (2015, p. 527) reflects.

For Brant (2018, p.109) "what Brazilian legislation in fact makes feasible is a hybrid model in which elements of shared and unilateral custody blend to serve the best interests of the minor", for situations where it is not possible, to parents, to exercise full shared custody, in which parents make joint decisions and coexistence with their children occurs in a balanced way.

The expression right to visit enshrined in art. 1.589 of the Civil Code is used inappropriately to refer to the right to family life [10] . Dias (2015, p. 532) rebels against the nomenclature visit "because it" evokes a protocol, mechanical relationship, as a task to be performed between the ascendant and the child, with the limitations of a meeting of rigid and tenacious inspection". For this author, right of coexistence or relationship regime would be more appropriate expressions to deal with these relationships. Brant also criticizes the visitor condition that is attributed to the non-guardian spouse and ponders:

> Coexistence is not deciding on the direction of certain situations of the children, choice of school, extra activities, among others. To live is to be present in the life of the child and not just a visitor on alternate weekends and small meetings during some days of the week. Children should live together with both parents. It is of utmost

10. According to Simão (2020), "it is noted that, in Brazil, the guard is still maternal, with the right of visits from the father. It is unilateral guard that, sometimes, is called shared by the simple fact that the father, once a week, dinner and/or stay with the child".

> importance for the strengthening of the affective bonds and psychic structure of a being in development. (BRANT, 2018, p. 106).

As it is a fundamental right that aims to mitigate the loss of living with parents at the same address, the right to family living should be analyzed, according to Dias (2015, p. 532) as the child's personality right, in category of the right to freedom, based on elementary principles of natural law, "in the need to cultivate affection, to establish family bonds for real, effective and efficient subsistence" and, according to Brant (2018, p. 106) "should only be minimized in extreme situations that involve risk to the child or due to some major impediment, such as the breastfeeding period, for example, when more maternal contact is required ".

4. The right to family life and the coronavirus pandemic in Brazil

The routine of Brazilians and the population around the world was affected by COVID-19, an acute respiratory disease caused by the coronavirus SARS COV 2, first identified in Wuhan, in the People's Republic of China and considered a pandemic, on March 11 2020, by the World Health Organization - WHO. Social isolation was recommended by the WHO as one of the necessary measures to contain the contamination of people by the virus, as reported by Moreira and Pinheiro (2020). This is a public health emergency of international importance, which imposes restrictions on social life, with consequences, therefore, on the right to family life for the children of separated parents.

Problems arising from the orientation towards social isolation permeate the universe of separated parents and their children: the displacement of children and adolescents between the homes of the father and mother may represent a risk to their health, as well as the inability

to pay child support, in reason of reduction of the income of the feeder, among others. Here, in this space, we will seek to analyze only the issues that involve the right of children to live with their separated parents.

Conflicts involving the right to family coexistence, from one extreme to the other: from situations in which parents who do not accept keeping away from physical contact to others in which parents avoid even virtual contact with their children illustrate the arising conflicts. Numerous judicial decisions have already been taken modifying or suspending family life, based on the best interest of the child/adolescent, configured by the risk of contagion of the disease [11].

According to information from the Brazilian Institute of Family Law - IBDFAM (2020), in a recent publication, on March 25, 2020, judge Fernanda Maria Zerbeto Assis Monteiro, of the 3rd Family and Succession Court of Curitiba, granted the request from a mother to temporarily suspend her daughter's face-to-face contact with her father, already limited on weekends and determined the maintenance of contact between them, on the same visitation days agreed between the parties. According to the decision:

> (...) The measure is necessary in the present case considering the information that the child **resides with a person in a risk group,** according to the classification of the Ministry of Health**, including, in home isolation**. I emphasize, again, that this is a temporary measure, at a time when care for the child must be adopted by both parents, not completely breaking the relationship with either parent, even if this contact occurs in a virtual. In this case, thinking about the child's well-being and aiming to avoid the rupture of the paternal-

11. Pereira (2020) proposes a reflection on the theme. For him, "in Family Law, much more than in other branches of Law, interpretation and subjectivity are present, and contaminated by a patriarchal moral and ideology. According to him, the suspension of "visits", in most cases, is always in favor of the mother. And here it has functioned as in domestic violence prosecutions: the protective measure is always granted, and it even becomes a security measure for judges, because if you deny it, and the husband/partner/boyfriend, kill the woman, the judge would be involved in some responsibility for not granting the protective measure. In the same way, they could be held responsible, if the failure to suspend the "visit" results in virus contamination. It is better to sin for excess than for lack, because being without physical contact with the child for a month or two, however painful, does not kill anyone. But the opposite, yes, can kill. I imagine this is the logic of most of these decisions".

> filial bond, it is appropriate to maintain the paternal coexistence in a safe way by means of a video call on the same visiting days agreed between the parties (emphasis added in the original).

In relation to virtual interaction with parents, Simão (2020) [12] warns of the need to observe the children's age. According to him, "Very young children have difficulty concentrating and simply cannot have the discipline to stand in front of the cell phone talking or interacting with the interlocutor". For these situations, it recommends as alternatives, the sending to the father, mother and/or grandparents away from the physical contact of videos and audio of the minors or the maintenance of a call in real time with camera so that the father/mother away from their contact can see the child.

Family life was also suspended, in another decision by Judge Eduardo Gesse, from São Paulo, on March 25, 2020, in a lawsuit in which the child's father is an airplane pilot. The judge from São Paulo understood that it would be advisable, due to the profession exercised by the father, to suspend family life with the daughter until the date fixed by him, and to reestablish, afterwards, if the father did not present any symptoms of COVID 19 (IBDFAM, 2020)

Although difficult, the judicial decisions for the temporary suspension of family life of children with separated parents, the measure seems adequate to preserve the best interests of the child and adolescent, preserving them from the risks of contamination by the coronavirus. This is Simão's understanding (2020) for whom "these are times of tragic choices. The game is actually a lose-lose game. This can be compensated for in the future". Simão also presents João Aguirre's suggestion to allow children, in this moment of suspension of face-to-face and distance learning classes, to spend 15 days (recommended period for social isolation) with their father and 15 days with the mother, highlighting as an advantage in this

12. Considering the remark of Gisele Groeninga.

coexistence regime, the fact that the child coexists with father and mother in a balanced way and does not stay away from any of them for a long period".

In cases where the risk of contagion is greater because one of the parents or both work in the health field, measures to guarantee the full protection of the children may be tougher in the sense of suspending family life for a longer period of time or even the change of residence of the child, until the pandemic ceases. According to Simão (2020), "the child can stop living with the mother and move in with the father, or stop physically visiting the father and stay with the mother all the time". For him, these measures apply even though, through examinations, it is proved that the father and/or mother have already contracted the disease, but asymptomatically, because it is a public health issue (the pandemic) and, they can, even if asymptomatic, transmit the virus. So far, as far as information is concerned, there is no medical guarantee that those affected by the disease are immunized. Therefore, isolation measures are necessary to preserve the full protection and best interest of children.

Also according to Simão (2020), if father and mother are health professionals, and they are in contact with people infected or with a high probability of contracting COVID-19, the decision should be to transfer the custody of the children to third parties, godparents and godmothers, uncles, friends of the parents or even the grandparents (with greater caution in choosing because they are in the risk group for contamination by the disease). The person who will have custody of the children during this period must be chosen, jointly by the parents by judicial decision, according to the child's best interest, taking into account the affective relationship, the proximity, the possibility of caring and feeding the child, or teenager, by the third person.

5. Conclusion

Limits and restrictions on the right to come and go, the opening of shops

and schools, the holding of public and private celebrations, the practice of sports and sports competitions, leisure, among others, were imposed by municipal and state public authorities, following the recommendations of the WHO, which recommends social isolation as a necessary measure to try to contain the advance in the contamination of people by a virus for which there is still no vaccine or specific medical treatment and which has been killing the lives of thousands of people. We must not lose sight of the fact that this is an exceptional moment and that it provides for measures of an equally exceptional and transitory character also in the field of Family Law.

Although the importance of family life between parents and children is recognized, the issue of public health, at the moment, imposes itself as a priority, to safeguard human lives. Protecting the interests of children and adolescents, now means avoiding the risk of contagion, circulating between the homes of the father and mother. The moment asks parents to put aside any disagreements and overcome resentments so that they can care for and protect their children against the risk of contagion.

The watchword is **common sense** beyond what determines the judicial sentence (of separation, divorce or dissolution of a stable union) in relation to custody and coexistence regime between them. It is time for a separate mother and father to seek consensus in order to preserve the best interests of their children, in the light of full protection. If a parent has symptoms of COVID 19 or has been exposed to possible contagion, either due to travel abroad or due to his professional activities, he must communicate with the ex-spouse to consider the best way to remain present in the children's lives, avoiding physical contact and readjusting the regulation of family life for remote contact with the children, for example.

It would be more beneficial for the children's well-being if, instead of flooding the judicial channels with actions that intend to ban the ex-

spouse or companion from living with their children, under the pretext of the pandemic (which may even constitute parental alienation), or on the other hand, to avoid coexistence with their children, separated parents sought to readjust, by consensus and temporarily, the rules of coexistence with their children, in this period of exceptionality. The adoption of the vacation regime, for example, in which children stay 15 days with each parent can be an alternative to reduce the displacement of children and adolescents and allow them to enjoy more time with each parent without overburdening the other, who will need to make childcare and professional activities compatible at *home* or away from home.

Parents should find ways to re-adjust the exercise of parental responsibility to the crisis situation caused by the most stressful pandemic for those who fear the contagion of the disease, but need to work remotely, attend virtual classes, learn digital technologies for virtual communication, maintain family revenue, manage eventual income reduction. The best interests of the child and the adolescent and the right to family life are not opposite values, but sensible, adjustable to achieve the integral protection of children. Although family life is restricted to the guarantee of the health of all, the affection, the active participation in the life of children, sharing of care and parental responsibility must be maintained, with wisdom, serenity and love.

6. References

ANDRADE, Susanne Anjos, SANTOS, Darci Neves, BASTOS, Ana Cecília Bastos, PEDROMÔNICO, Márcia Regina Marcondes, ALMEIDA FILHO, Naomar de, BARRETO, Mauricio L. Family environment and child cognitive development: an epidemiological approach. In: *Revista Saúde Pública*, 2005, 39(4), 606 -11.

ANDRADE, Denise Almeida. Parental alienation and family relations in Brazil. *In:* MENEZES, Joyceane Bezerra de., MATOS, Ana Carla Harmatiuk (orgs.). *Family law by Brazilian jurists.* São Paulo: Saraiva, 2013.

ASSESSORIA DE COMUNICAÇÃO DO INSTITUTO BRASILEIRO DE DIREITO DE FAMÍLIA – IBDFAM**.** Pandemic of coronavirus: shared custody is among challenges faced in the Law of Families. Published on 25/03/2020. Available in: http://www. ibdfam. org. br/ noticias/7189/ +Pandemia+do+coronav% C3%ADrus%3A+guarda+compartilhada+est%C3%A1+entre+desafios+ enfrentados+no+Direito+das+Fam%C3%ADlias. Accessed on 01 may 2020.

BARBOSA, Ivone Garcia, REIS, Fernando Figueiredo dos Santos e. *The role of the family in the constitution of identity in childhood: the perspective conveyed in books and journals of psychology and the socio-cultural vision of the Vygotskyans.* Available in: https://files.cercomp.ufg.br/weby/up/248/o/1.5.__2_.pdf Accessed on 24 apr. 2020.

BRANT, Cássio Augusto Barros. Shared custody and shared coexistence: differences and applications in the Brazilian hybrid system. *In: Revista IBDFAM: Família e Sucessões*, v. 26(mar./abr.). Belo Horizonte: IBDFAM, 2018, p. 91-114.

DIAS, Maria Berenice. *Handbook of Family Law.*10 ed. Re., atual. e ampl. São Paulo: Editora Revista dos Tribunais, 2015.

EURÍPEDES. Medeia; Hipólito. *As troianas*. Rio de Janeiro: Jorge Zahar, 1991.

GAGLIANO, Pablo Stolze, PAMPLONA FILHO, Rodolfo. *Civil Law Manual.* Volume único. 4 ed. São Paulo: Saraiva Educação, 2020.

GROENINGA, Giselle Câmara. Family: a kaleidoscope of relationships. *In:* GROENINGA, Giselle Câmara, PEREIRA, Rodrigo da Cunha. (coords.). *Family law and psychoanalysis: towards a new epistemology.* Rio de Janeiro: Imago, 2003, p. 125-176.

KREUZ, Sergio Luiz. *Right to family coexistence of children and adolescents:* fundamental rights, constitutional principles and alternatives to institutional care. Curitiba: Juruá, 2012.

LÔBO, Paulo. *Civil law:* families. 4 ed. São Paulo: Saraiva, 2011.

MICHAELIS.*Michaelis brazilian dictionary of the portuguese language.* ISBN: 978-85-06-04024-9: Editora Melhoramentos Ltda., 2020. Available in: http://michaelis. uol.com.br/moderno-portugues/ Accessed on 30 apr. de 2020.

MOREIRA, Ardilhes Moreira, MOREIRA, PINHEIRO, Lara. *WHO declares coronavirus pandemic.* Available in: https://g1.globo.com/bemestar/coronavirus/ noticia/2020/03/11/oms-declara-pandemia-de-coronavirus.ghtml Accessed on 30 apr. de 2020.

MORGADO, Alice Murteira; DIAS, Maria da Luz Vale; PAIXAO, Maria Paula. The development of socialization and the role of the family. *Aná. Psicológica*, Lisboa, v. 31, n. 2, p. 129-144, jun. 2013. Available in: <http://www.scielo.mec.pt/ scielo.php?script=sci_arttext&pid=S0870-82312013000200002&lng=pt&nrm=iso>.

Accessed on 29 apr. 2020

NERY, Maria Aparecida. Family and community life is a right of children and adolescents and a reality to be rethought by the school. *In: Cad. Cedes*, Campinas, vol. 30, n. 81, p. 189-207, mai.-ago. 2010 Available in: http://www.cedes.unicamp.br Accessed on 24 abr. 2020.

OLIVEIRA, Nayara Hakime Dutra de. *Starting over: family, children and challenges* [online]. São Paulo: Editora UNESP; São Paulo: Cultura Acadêmica, 2009. 236 p. ISBN 978-85-7983-036-5. Available in: SciELO Books <http://books.scielo.org>. Accessed on 24 apr. 2020.

PEREIRA, Rodrigo da Cunha. Family law, coronavirus and shared custody. *In: IBDFAM artigos.* Published on April 9, 2020. Available in: http://www.ibdfam.org.br/ artigos/ 1409/Direito+de+Fam% C3%ADlia%2C+coronav% C3%ADrus+e+guarda+compartilhada. Accessed on 01 may 2020.

PETRINI, João Carlos. Notes for a family anthropology. *In*: FARIAS, Cristiano Chaves de. (coord.). *Current issues of family law and process.* First series. Rio de Janeiro: Lúmen Júris, 2004, p.41-64.

PRATTA, Elisângela Maia Machado, SANTOS, Manoel Antonio dos. Family and adolescence: the influence of the family context on the psychological development of its members. *In: Psicologia em Estudo*, Maringá, v. 12, n. 2, p. 247-256, may/aug. 2007

SIMÃO, José Fernando. *Family law in times of pandemic:* time for tragic choices. A reflection of April 7, 2020. Published on 04/07/2020. Available in: http://www.ibdfam.org.br/ artigos / 1405 /Direito+de+fam% C3%ADlia +em+tempos +de+ pandemia%3A +hora+de+escolhas +tr %C3%A1gicas. +Uma+reflex%C3%A3o+de+7 +de+abril+de+2020 Accessed on 01 may 2020.

TACQUES, Ana Paula Pizarro. *Family coexistence as a fundamental right:* An analysis of the complexities of contemporary family entities. Available in: http://www.egov .ufsc.br/portal. Accessed on 24 apr. 2020.

TEIXEIRA, Ana Carolina Brochado. Family power and the final aspects of promoting the development and well-being of the person. *In:* MENEZES, Joyceane Bezerra de., MATOS, Ana Carla Harmatiuk (orgs.). *Family law by Brazilian jurists.* São Paulo: Saraiva, 2013, p. 411- 431.

WINNICOTT Donald W. *Family and individual development.* Translation: Marcelo Brandão Cipolla Editora: WMF Martins Fontes. Year: 2011 - 4ª Edição Coleção: Textos de Psicologia.

9

COVID-19, Wuhan Soup and the contribution of ancestral views and their rights

JULIO CESAR DE SÁ DA ROCHA

CONTENTS: 1. Introduction: Wuhan soup; 2. Contribution of ancestral views and their rights; 3. Considerations in the course of the pandemic; 4. References.

1. Introduction: Wuhan soup

In the midst of the Coronavirus pandemic (Covid-19), several intellectuals collaborated in a publication called "Wuhan soup: contemporary thinking in times of pandemic" (Aspo, 2020), with texts by Giorgio Agamben, Slavoj Zizek, Jean Luc Nancy, Franco Bifo, Santiago Petit, Judith Bluter, Alain Badiou, David Harvey, Byung-Chul Han, Raúl Zibechi, Maria Galindo, Markus Gabriel, Gustavo Yañes González, Patrícia Manrique and Paul B. Preciado. The chapters discuss, in a compiled form, several writings written between February 26 and March 28, 2020, reflecting on the perplexity of the global health crisis, its consequences and prospects after the pandemic outbreak

In this sense, the text brings Agamben's contribution, which starts from the concept that in the pandemic it implements the "State of Exception" as a normal government paradigm, the state of collective fear and panic in a vicious vicious circle in the name of the desire for security that has been implemented by the government. Ahead, Zizek points out that the corona virus epidemic is a kind of attack against the global capitalist system, a sign

that we cannot follow the current path and that radical change is necessary; for Nancy, we are in full viral exception and "a whole civilization is in doubt" with a kind of biological, computer and cultural exception; Bifo Berardi indicates that it is difficult for the collective organism to recover from this psychotic-viral shock and for the capitalist economy to return to its glorious path, because "the planet and its degree of extreme irritation and the collective body of society suffers"; Petit says that "neoliberalism is shamelessly dressed as a state of war" and that capital "is afraid".

Next, Judith Butler recognizes that the "virus does not discriminate", but notes that capitalist exploitation is observed "in white supremacy, violence against women, queer and trans people"; Badiou points out that this type of situation (world war or world epidemic) is particularly neutral at the political level and that he does not believe in "significant political change in countries, such as France"; Harvey deals with "economic effects that go uncontrolled", with the exponential increase in contagions provoking incoherent war responses and frequency of panic; Byung-Chul Han maintains that Europe is a failure, sustains the advantages of Asia and that "we are once again building immune thresholds and closing borders".

In turn, Maria Galindo maintains that "Coronavirus is a weapon of destruction and prohibition, apparently legitimate, where they say it is more dangerous to come together and come together", proposing a "return to ancestral medicine" and supports disobedience for collective survival ; Markus reflects "why it is not heard when more than 200 thousand children die each year from viral diarrhea due to lack of drinking water", responding immediately because they are not in Europe; Gonzalez deals with "human fragility and tyranny in times of a pandemic", adding that nothing compares to what is currently going on due to the pandemic; Manrique immediately says that "thinking philosophically about an event

as we are going through requires, in the first place, time", even leaving us with an apex of reflection on the conditions and possibilities of such an oversizing; finally, Preciado brings reflections from Michel Foucault and analyzes biopolitics and indicates that "our portable machines are our new jails and our homes have become soft prisons".

To clarify at the end of the considerations in the publication, it is worth noting that Wuhan Soup proposed to be a compilation of contemporary thought around Covid-19 and the realities established in various parts of the globe, seeking to reflect on recent controversies surrounding the scenarios that open up with the Coronavirus pandemic, in the present and about the hypotheses about the future. The absence of a contribution from a Brazilian reflection is registered here, proposing a contribution of a different order based on the views of traditional communities.

2. Contribution of ancestral views and their rights

To begin this point, we start from the conception of "ways of seeing ancestry and its rights" as being based on traditional conceptions that originated and come from the African diaspora. In fact, now demands rescuing solidarity and care, reminding the speeches of Ekedy (or Equede) Sinha of the Casa Branca in seeking "ancestry" and what really matters is the principle that the orixás "are our deified ancestors that integrated with the energies of nature, with the tradition of "a religious Yoruba, built with parts of countless sacred dialects that came from Africa". (BRANDÃO, 2016). In effect, there are community normative standards, of a non-state nature, which are produced in traditional territories resulting from the ethos of African diasporic peoples, they are legal orders loaded with dimensions that value wisdom and a way of understanding differently from the dominant models that recognize the system. state law as a single

instance of legal production. Regarding the situation of the pandemic, Ekedy Sinha demands the protection of the community from ancestry and orixás (african godness and gods).

Figure 1: Book by Ekedy Sinha

Quilombola leader Antônio Bispo proposes the category "counter-coloniality" and defends the protection of "intergenerationality". In the counter-colonial perspective Antônio Bispo points out that "in the perspective of cultural resistance, these identities have been reframed as a way to face prejudice and ethnocide practiced against Afro-Pindoramic peoples and their descendants" (SANTOS, 2015: 21). The trajectory of these peoples transposes any scientific text. "It is visible and palpable materially and can be felt immaterially, both when we look at the past and refer to our ancestors, as today when we visit today's communities and talk to their organizations and cultural events". (SANTOS, 2015: 38)

Indeed, Bispo clearly indicates his categorization by "treating the peoples who came from Africa and the peoples originating in the Americas under the same conditions, that is, regardless of their specificities and particularities in the process of enslavement, we will call them against

colonizers" (SANTOS, 2015: 48). Overcoming the invisibility of vulnerable groups in Brazil and the demand for new rights can be framed as counter-colonial thinking by indigenous and diasporic peoples. Peoples demand respect for traditional knowledge, traditional territories, ways of life and dignity and organic rights. In the end, regarding the pandemic, the traditional wisdom of Bispo points out that "We are the viruses that have not seen! Arising from the heat that breaks dormancy " [1] .

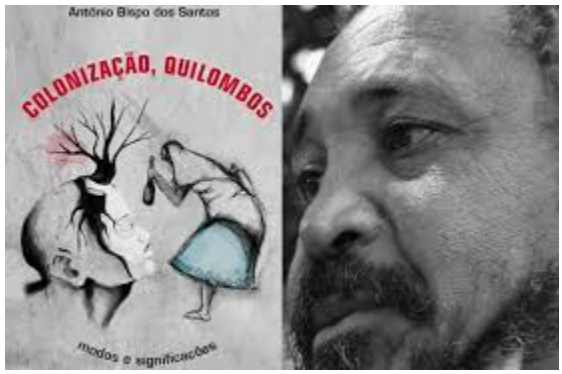


Figure 2: Book by Antônio Bispo.

3. Considerations in the course of the pandemic

Finally, reflections are necessary to understand what is happening with the pandemic and its effects, even in the face of the "duty to stay at home", as proposed by Professor Carlos Eduardo Behrmann Ratis Martins; in the actions (or omissions) of the state apparatus in the "geopolitics of the territory", as indicated by geographer Diosmar Marcelino Santana Filho; on the State as constituting a set of fields - legal, administrative, intellectual, parliamentary - each as a space for specific struggles, as Pierre Bourdieu points out; or "not listening to the genocidal appeal", as anthropologist

1. Antônio Bispo dos Santos. Text released by social media.

Ordep Serra points out [2] . All this in the midst of a survey [3] that indicates that "92% of mothers in the favelas say they will be short of food after a month of isolation", promoted by Data Favela and Instituto Locomotiva The information posted indicates that Brazil's favelas have 5.2 million mothers . Of these, 72% say that their family's food will be affected by the lack of income during social isolation. 73% say they have no savings to keep spending without working for a day. 92% say they will have difficulty buying food after a month without income. Eight out of ten say that income has already fallen because of the Coronavirus, and 76% report that, with their children at home without going to school, spending at home has already increased (GUIMARÃES, 2020).

It is observed that in the Brazilian reality, the reflections deserve to be registered because significant contingents of the population live in popular neighborhoods and favelas, lacking access to public policies, such as low sanitation coverage, irregular collection of solid waste and supply of drinking water, among others, making the Corona virus pandemic in the country, an extremely worrying component for the majority of Brazilian society that is black (black and brown). Anyway, we are going in different boats crossing the Coronavirus (Covid-19) pandemic, most of them with nothing.

4. References

AMADEO, Pablo (org.). Sopa de Wuhan: pensamento contemporâneo em tempos de pandemias. Aspo, 2020.

Brandão, Gersonice Equede Sinha Azevedo. Equede: A Mãe de Todos. Salvador: Barabô, 2016.

Bourdieu, Pierre. Sobre o Estado: cursos no Collège de France (1989-92). São Paulo: Companhia das Letras, 2009.

2. Ordep Serra. Text released by social media

3. In the survey, carried out between March 26 and 27, 2020, 621 women over 16 years of age, with children, living in 260 slums in all states of the country were interviewed. The survey's margin of error is 2.9 percentage points up or down.

Guimarães, Ligia. Coronavírus: 92% das mães nas favelas dizem que faltará comida após um mês de isolamento, aponta pesquisa. BBC News. Disponível em:https://www.bbc.com/portuguese/brasil-52131989. Último acesso em 06.04.2020.

Martins, Carlos Eduardo Behrmann Rátis Dever fundamental de ficar em casa em tempos de corona vírus, impresso, 2020.

SANTANA FILHO, Diosmar Marcelino. A geopolítica do Estado e o território quilombola no século XXI. Jundiaí (SP): Paco Editorial, 2018.

SANTOS, Antônio Bispo dos. Colonização, quilombos: modos e significados. Brasília, DF: s.n., 2015.

_____. Texto divulgado pela mídia social. Disponível em: https://www.facebook.com/antonio.bispo.501151. Último acesso no dia 05.04.2020.

SERRA, Ordep Jose Trindade. Texto divulgado pela mídia social. Disponível em: (https://www.facebook.com/ordepjose.trindadeserra). Último acesso no dia 06.04.2020.

10

The duty to dejudicialize conflicts during and after the covid-19 pandemic

LILIANE NUNES MENDES LOPES

AMANDA NUNES LOPES ESPIÑEIRA LEMOS

CONTENTS: 1. Introduction; 2. The importance and standardization of the appropriate means for conflict resolution; 3. The duty to adopt appropriate means of resolving extrajudicial conflicts during and after the pandemic as compliance with the principles of social pacification; 4. Virtual mediation (ODR): an appropriate path in pandemic; 5. Conclusion; 6. References.

1. Introduction

COVID-19 brought numerous impacts in the most diverse areas of human relations. The need for personal and collective protection against the virus has led the world to adopt drastic measures of physical/social isolation and suspension of face-to-face activities, keeping only the essential ones, whose characterization is established at each time and place.

As humans are a systemic being, it is observed that measures such as the physical/social isolation imposed, the new rules of hygiene conduct, the normative measures of the most diverse areas, both global, national, state, and municipal, have a direct or indirect impact on human life.

The legal field is on alert, attentive to the new social, economic and normative changes and their provisional and permanent effects on the

Brazilian Legal Ordinance and Justice System. In a pandemic moment like this, unfortunately the most diverse conflicts arise, either by the perception of violation of rights, or the requirement to perform duties, or by the destabilization of relationships, both of individuals and legal entities. There is a pandemic conflict in family, labor and/or social relationships.

The post-pandemic world will not be as before: it is said of a "new normal", in an attempt to express that, after this moment, it is unlike that everything is going to be as previously. It will be necessary to pay attention to values and concepts previously regarded as utopian, for some people, such as solidarity, empathy, creativity, understanding and fraternity. The fulfilment of the constitutional duties of solidarity, cooperation and pacification are necessary to face conflicts at this delicate time.

Would maintaining an adversarial culture of dispute resolution fit in this scenario? Would the judiciary be the appropriate place for resolution during and post-pandemic? Is the virtual mediation a good alternative?

The goal of this paper is to understand the effects of the duty of dejudicialization of conflict resolution, by the use of appropriate means of the Brazilian multidoors system, especially virtual mediation, during and after the pandemic. And, also, to analyze the effectiveness of this measure, as a guarantee of compliance with the principles of social pacification, cooperation and adequacy.

The methodology used was bibliographic review and documentary analysis, with the study of Brazilian National Council of Justice (in Portuguese acronym CNJ) data, by the qualitative method.

The first part of the paper presents the importance and standardization of the appropriate means for conflict resolution, based on the analysis of the normative microsystem on the subject and the experiences in Brazil

prior to and during COVID-19 pandemic. Following the demonstration of the duty of dejudicialization of conflicts through the adoption of the means of resolution of extrajudicial disputes during and post-pandemic, as compliance with the principles of social pacification, adequacy and cooperation, exemplifying with the successful experiences of Argentina and New York.

The last section analyzes virtual mediation (ODR) as an appropriate mean for resolving pandemic disputes, according to the amendment of articles 22 and 23 of the Law of Courts and the provisions of Resolutions No. 314 and No. 322 of 2020.

2. The importance and standardisation of appropriate means of resolving conflicts

After almost five years of validity of the Brazilian Code of Civil Procedure /2015 (CPC/2015) and more than thirty years of promulgation of the Brazilian Constitution of 1988, the debates about the multidoor model of the justice system adopted in Brazil only intensify. That happens both in the legal community and outside it, in the face of situations of mismatch between social reality, the constitutional text, the procedural text and the judicial provision effected.

The displacement of social problems to the judicial sphere is a result of the inefectivity of the Executive Power to comply with what the Legislative had promised. Therefore, we have exacerbated "judicialization" of issues normally pertaining to politics and economy. Certainly, other factors interfere in this context, such as the role of the Public Prosecutor's Office in guaranteeing rights and duties.

On the other hand, the Judiciary suffers influxes unrelated to the state's own will; economic modernization and globalization bring with

them the need for immediate responses, that meet the dynamics of the international financial market, which seeks faster solutions by cost/benefit logic (SCHMITZ, 2013).

In the fundamental guarantees established in the Brazilian Federal Constitution, the principle of the inafastability of judicial assessment is emphasized, in the article 5, item XXXV, i.e. the so-called right of action, which effectively enforces access to justice, which, in a mistaken manner, it is contemplated only in the aspect of judicial provision by the State, disregarding the indispensable effectiveness.

Cândido Rangel Dinamarco (2001, p. 53) presents the idea of access to justice as much more than just admission, moreover appropriate treatment in judicial provision.

Marinoni, Mitidiero, Sarlet (2017, p.778) present three prisms for the analysis of the right to judicial protection: access to justice; the adequacy of the guardianship and the effectiveness of that.

The effectiveness of the fundamental guarantee of broad access to justice has contributed considerably to the increase in the number of actions brought before the Judiciary, contributing to the problem of judicialization and being a major obstacle to social pacification, as demonstrated by data from the Brazilian National Council of Justice (CNJ).

In 2018, there were 28,052,965 (twenty-eight million, fifty-two thousand and nine hundred and sixty-five) new cases entered, which, even with a reduction of 1.9% (one point nine percent), compared to the year 2017, still is a significant number (CNJ, 2019).

It should be noted that the year 2018 accounted for a huge effort by the Judiciary to discharge the ongoing proceedings, having significant global

and individual growth in the productivity of magistrates in all instances, revealing the highest percentage of the last decade. There was an average productivity growth of 4.2% (four point two percent), reaching an average of 1,877 (one thousand, eight hundred and seventy-seven); and a single judge judged on average 8 (eight) case/business day in this year (CNJ, 2019).

However, the average length of time for a case from its filing to the judgment was 1 (one) and a half years in 2015, increased to 2 (two) years and 2 (two) months in 2018. In the common court, it takes on average 2 (two) years and 4 (four) months in the state courts for the trial of a process in the knowledge phase and 1(one) year and 10 (ten) months in federal courts; time higher than that practiced in the Courts (CNJ, 2019).

It is possible to conclude, based on these data from the CNJ, that in 2018 even with the reduction of 1.9% (one point nine percent) of cases compared to the year 2017, it was not accompanied by a swift response from the judging body to the settlement of those actions brought under its jurisdiction.

In an attempt to mitigate this problem that drags on for a few years and meet the ideas of Justice, the 2015 Brazilian Code of Civil Procedure adopted the multi-door justice model for conflict resolution, in which each conflict should be directed to the most appropriate means for its solution, using the most appropriate technique in each type of dispute.

The expression multi-doorcouthouse was created by Frank Sander of Harvard Law School in 1976, to name alternative dispute resolution methods, such as mediation, in which there is a shift from judicial protagonism to those involved in the conflict, which are advised by the figure of the mediator or conciliator. (SANDER; CRESPO, 2012)

Jeffrey Stempel (1996) conceived the Multidoor Tribunal as "a government-run clearing house" that would resolve disputes, because it was intended at the time only to unburden the Judiciary, despite the

valuable perspectives it brought to the solution of social conflicts.

Argentina, for example, has more than twenty-eight years of experience in the subject. The movement to use more appropriate methods of conflict resolution began to be developed in 1991, with several initiatives, especially Law No. 24,573/1995, which instituted mediation in the country, being derogated from Law No. 26,589/2010, which is the current regulatory instrument of mediation in the country. (PANUTTO, 2018)

The *Dirección Nacional de Mediación y Promoción de Métodos Participativos de Resolución de Conflictos* is linked to the Ministry of Justice and Human Rights of the Federal Executive Power, and the Free Legal Office, linked to the Faculty of Law of the *Universidad de Buenos Aires* (UBA) both are public centers where public mediations are carried out in the federal capital of Argentina, however, private mediation takes place in private offices. (LUPETTI, 2015)

Argentina's vast experience with mediation confirms to us that it is an assertive path to complete implementation of the multidoor system in Brazil, including the empowerment of citizens and the development of democracy.

As Mariana Hernandez Crespo (2012, p. 121) points out:

> The invaluable experience of collaborating to achieve a sustainable agreement can contribute to the awakening of local communities, encouraging citizens to take a more active role in local democratic processes. Promoting more effective forms of interaction when a conflict occurs in the personal, social or political sphere can give strength to local communities. A more inclusive and participatory democracy is a more stable democracy [1].

1. A inestimável experiência de colaborar para a obtenção de um acordo sustentável pode contribuir para o despertar das comunidades locais, incentivando os cidadãos a assumirem um papel mais ativo nos processos democráticos locais. A

Brazil was already walking the tracks of Multidoor Justice, even before the emergence of the normative microsystem on the subject in 2015, composed of CPC/15 (art. 3), the Arbitration Law (Law No. 9307/96, with amendment in 2015), and the Mediation Law (Law No. 13,140/2015) aligned with CNJ Resolution 125/10. The greatest defenders of this path to the Justice System were the indoctrinators Ada Pellegrini Grinover, Kazuo Watanabe and Marco Aurelio Gastaldi Buzzi.

Mediation and conciliation were not new in the national legal system even before 2010, for example, the Law of Special Civil Courts in 1995, in articles 17, 21 to 23 (Law No. 9099/95 - part of them today with an amended wording) already took care of the theme, in the form of pre-procedural mediation, with those popularly named "shifts", where the parties could seek the judiciary to approve the agreements previously signed by them (self-composition) and with the pre-procedural composition, through the conciliations signed at previous hearings conducted by a conciliator bound to the respective court.

CNJ Resolution 125, of 2010, establishes practical guidelines aimed at the spread and encouraging the adoption of the various means of consensual settlement of conflict, which were subsequently positive in the Brazilian Legal System through the Mediation Law and the CPC in 2015, that were already aligned with the aforementioned CNJ Resolution, it is clear that this over the years has undergone necessary changes to regulate in practice the implementation of this public policy, which becomes law in CPC/15.

The CNJ over the past fourteen years has fostered projects to stimulate consensual composition in conflicts, in particular conciliations in judicial

promoção de formas mais eficazes de interação quando ocorre um conflito na esfera pessoal, social ou política pode dar força às comunidades locais. Uma democracia mais inclusiva e participativa é uma democracia mais estável. (Free translation)

proceedings, both of the common justice and with the courts. After the emergence of this normative system, the adoption and dissemination of other consensual means of conflict composition was more evident.

The legislator sought to structure in CPC/15 and the Mediation Law, an effective system of consensual dispute resolution aligned with Resolution 125, of 2010 CNJ, with "techniques, developed by own staff and qualified professionals (mediators and conciliators), as part of civil justice and the concern to direct disputes to the means most appropriate to their solution." (LESSA NETO, 2015, p. 1).

The article No. 3, paragraphs 2 and 3 the Civil Procedural Code accepted as a principle the consensual solution of conflicts, establishing the multidoor system as a mandatory public policy for the judiciary, stating that all judges, lawyers, members of the public prosecutor's office and public defenders should encourage the pacification of conflicts, in extra-procedural, pre-procedural and procedural form. Mediation and conciliation have been used on a larger scale, "in an effort to bring the parties closer and empower citizens as actors in the solution of their conflicts [2] " (LESSA NETO, 2015, p. 2).

It is the organizational paradigm shift of the justice system to recognize other potentially capable means - no longer being treated as alternative means but adequate to resolve a conflict between - than not just traditional procedural model. There is an integration between the contracting and consensual means, disciplined in CPC/15 (article 3), mediation law and CNJ Resolution No. 125, of 2010.

As Lessa Neto states, the role of the judiciary and the process is now

2. num esforço de aproximação das partes e de empoderamento dos cidadãos, como atores da solução de seus conflitos (Free translation)

seen in another dimension (2015, p.2):

> The change of conception [...] involves a resizing of the process and the very role of the forum and the judge. [...],create a model in which the parties have greater autonomy in choosing the means by which they want to resolve their conflict. Resolving conflicts takes on a broader and richer meaning than judging a dispute. This is a paradigmatic change [3] .

It is observed that the adjudicatory model and the so-called "culture of judgment" (WATANABE, 2005) are rooted in the ideas of Brazilian society even today, hindering the broad implementation of the legislative paradigm of multidoor justice and the effective guarantee of access to justice in Brazil.

The slowness, the lack of effectiveness and of adequacy of judicial solutions to conflicts generate a considerable crisis in the Justice System. The long wait for judicial provision brings instability to litigants and potential internal and external investors, providing unpredictability in the legal, social and economic field, causing damage to the country's development and legal certainty.

There were many obstacles to the implementation of the multidoor model in Brazil in 2016, post CPC/2015, among them the need to qualify "professionals to act in the new model, the establishment of the centers leading to the mediation or conciliation hearings or sessions and the challenge of changing a culture established among legal operators resisting consensual means of resolution [4] ." (LESSA NETO, 2015, p. 1).

3. A mudança de concepção [...] passa por um redimensionamento do processo e do próprio papel do fórum e do juiz. [...], criasse um modelo no qual as partes detêm uma maior autonomia na escolha do meio pelo qual querem resolver o seu conflito. Resolver conflitos assume um significado mais amplo e rico que o de julgar um litígio. Trata-se de uma mudança paradigmática. (Free translation)

4. os profissionais para atuarem no novo modelo, a criação dos centros que conduzirão as audiências ou sessões de mediação ou conciliação e o desafio de mudar uma cultura estabelecida entre os operadores jurídicos de resistência aos meios consensuais

In order to put this model into practice, the CNJ has been assisting the Brazilian Courts, with various actions and policies, including the training of mediators, conciliators and instructors for the proper functioning of the Judicial Centers for Conflict Resolution and Citizenship in the State Justice (Portuguese acronym CEJUSCs) and the Permanent Centers for Consensual Conflict Resolution Methods (Portuguese acronym NUPEMECs) created with CNJ Resolution 125, of 2010. In 2014, there were 362 (three hundred and sixty-two) CEJUSCs, in 2015 the structure grew by 80.7% (eighty point seven percent) and advanced to 654 (six hundred and fifty-four) centers, growing gradually over from the years 2016 and 2017, until 1,088 (one thousand and eighty-eight) CEJUSCs (CNJ, 2019) were accounted for in 2018.

To comply with the protocol of the so-called 2030 agenda for sustainable growth, the CNJ already planned and organized itself to carry out, in the distance learning modality, distance training to train more mediators and judicial conciliators, as, in the legal system Brazilian (art. 11 of the Mediation Law), the mediator and judicial conciliator must undergo continuous training with program content established by the CNJ and the Ministry of Justice and be trained for at least two years in any higher education course [5] .

With the COVID-19 pandemic, this training was accelerated and took shape for the first course of this type in agreement with 10 (ten) Courts of Justice among them the TJ of Bahia, and still the one of Alagoas, Amazonas, Rio de Janeiro, Minas Gerais, Pará, Paraná, Pernambuco, Rio Grande do Sul and São Paulo [6] .

The course has two stages, with the first stage being 40 (forty) hours in distance education, and then practical training with each Court that the server / participant is linked to. In total, 760 (seven hundred and sixty)

de resolução. (Free translation)

5. Source: https://www.conjur.com.br/2020-mai-13/curso-cnj-formar-mediadores-lista-espera.

6. Source: https://www.conjur.com.br/2020-mai-13/curso-cnj-formar-mediadores-lista-espera.

places were offered to 10 (ten) Brazilian states and had a waiting list of 1200 (one thousand and two hundred) people.

Such distance education of mediators and conciliators by the CNJ will help CEJUSCs linked to the ten participating Brazilian courts to expand the service to citizens who seek the effective guarantee of their rights at this time when pandemic litigation is evident [7].

3. The duty to adopt appropriate means of resolving extrajudicial conflicts during and after the pandemic as compliance with the principles of social pacification

Those involved in a conflict, as a rule, aim to deliver a fair solution as quickly and effectively as possible, using the most appropriate means to this end, and no longer the claim of large theses and the use of many methods of challenge to delay a process, because this defense strategy of rights makes the outcome very costly, and often the decision of the judiciary does not mirror what the plaintiffs involved in the dispute wanted.

The appropriate means of conflict resolution - mediation/conciliation/ negotiation/arbitrage/dispute board - are also nominated as ADR - acronym for alternative means of conflict resolution, which are no longer considered alternative but appropriate, as already pointed out. In this article, a focus will be given to special to presential and virtual mediation.

It has as some important principles: orality, isonomy of the parties, impartiality, autonomy of will, confidentiality, empowerment, informality, informed decision and respect for public order and applicable laws (article 2nd Law No. 13.140/95, article 166 of the Code of Civil Procedure, article 1st of Annex III to CNJ Resolution No. 125). These principles provide scope for

7. Source: https://www.conjur.com.br/2020-mai-13/curso-cnj-formar-mediadores-lista-espera.

the intended objectives with the consensual, dialogued and peaceful disputes.

In mediation, the decisions are conducted by an impartial third party, the mediator, who adopts its own and varied techniques, that help the parties to build for themselves a negotiated solution to the conflict, enabling empowerment and social emancipation, in addition to the exercise of the fundamental rights and duties of the citizen.

In addition to the conflict, there are the needs and links of these relationships, and, in mediation, it is possible, through the techniques used, such as active listening and NVC (non-violent communication), if you realize what is behind this conflict, what the parties involved really need and seek to solve.

According to Flávia Tartuce (2018, p. 224):

> Through active listening, the mediator not only listens but also attentively considers the words spoken and the messages not expressed verbally (but revealed by the behavior of those who communicate). Many relevant elements can be inferred from postures, facial expressions and even visual contacts. [8]

> "Mediation values the verbal and the non-verbal, the sensory, the body posture, what happens at the energetic level of people, and nothing, in principle, should be neglected" [9] (BUITONI, 2007).

Through the mediation procedure, it is possible to restore communication broken by those involved in the controversy, through techniques that lead to a collaborative dialogue and the construction of a solution in the win-win system, preserving the bond at that time. This

8. Pela escuta ativa, o mediador não só ouve como também considera atentamente as palavras ditas e as mensagens não expressas verbalmente (mas reveladas pelo comportamento de quem se comunica). Muitos elementos relevantes podem ser depreendidos a partir de posturas, expressões faciais e mesmo contatos visuais. (Free translation)

9. A mediação valoriza o verbal e o não verbal, o sensorial, a postura corporal, o que acontece no nível energético das pessoas, e nada, em princípio, deve ser desprezado (Free translation)

phenomenon is more noticeable in the continuing relationships whose maintenance of relational links is important, such as in family relationships, between partners, consumerists or within companies.

It is worth highlighting the fungibility of the appropriate extrajudicial means of conflict resolution. As the legal microsystem predicts on the subject, composed of Law No. 13,140/95 (Mediation Law), Law No. 9,307/96 (Arbitration Law), the Code of Civil Procedure and by Resolution No. 125 of the CNJ, one can initiate the attempt to resolve by a means and during the procedure if it is observed that the dispute would be better elucidated by another means and change to the proper and fair achievement of consensus.

Mediation within the Brazilian legal system can be extrajudicial (regulated by Resolution 125/10 CNJ) and judicial (CPC/15, Law 13.140/95 and Resolution 125/10 CNJ), and this is divided into pre-procedural and procedural. The first exercised mainly by private mediation chambers, the second takes place within the CEJUSC of the Courts, and the third (the procedural) takes place in the course of the proceedings, may be adopted at any time and at any procedural stage in an attempt to resolve the dispute in a consensual way, it is mediated by the judges, may also be by judicial mediators and conciliators.

The State University of Feira de Santana- UEFS, by means of the extension project, Popular Mediation and guidance on rights, for example, conducts extrajudicial popular mediations, in partnership with the non-governmental organization JUSPOPULI. That happens through the training of popular mediators belonging to the Capuchin neighborhood where the Popular Office is located, who collaborate to pacification of conflicts with peripheral communities of Feira de Santana-Bahia-Brazil. During 2019, 261 (two hundred and sixty-one) people were served, belonging to twenty-six neighborhoods around them. The aforementioned Project acts based on

the conceptions defended by Luiz Alberto Warat (2004) and Boaventura de Souza Santos (2013), adopting alternatives built by society to give effectiveness of rights and give access to justice.

The city of Salvador-Bahia-Brazil has three large and relevant mediation chambers that provide safe and extrajudicial ways to resolve conflicts, provide swift, qualified, efficient, economic and confidential dispute resolution, like: the Conciliation, Mediation and Arbitration Chamber of the Commercial Association of Bahia (ACB), CAMES - Chamber of Mediation and Specialized Arbitration and CAMARB - Chamber of Mediation and Business Arbitration - Brazil. Private chambers may optionally register with the Courts of Justice or Federal Regional Courts of their localities for pre-procedural mediation or conciliation sessions, acting as a private chamber registered, in accordance with the sole paragraph of article 12-C of CNJ Resolution No. 125/10, included by Amendment No. 02/2016.

However, once the registration is made, the private chambers will have to follow the rules set out in CNJ Resolution 125/10, as well as the provisions contained in Code of Civil Procedure (articles 167, "caput" and paragraph 3 and 4, 169, paragraph 2 and 175, paragraph). Its members must be registered mediators in the court, and therefore, the continued training in the guidelines determined by the CNJ is necessary; and must take into account, in return for the accreditation, a percentage of unpaid hearings fixed by the Court to which it is bound, in the case of cases in which it is granted the gratuitousness of justice.

It is important to note that mediation has been more used in the last five years, after the regulation of Law No. 13,140/95, both in the private sphere, as well as public. In the aforementioned law there is regulation for the self-composition of conflicts of private individuals and legal entities and public law (article 32 and following).

It is worth mentioning the pioneering initiative in Bahia of the Association of Prosecutors of the State of Bahia (Portuguese acronym APEB), in creating its Mediation, Conciliation and Arbitration Chamber, CAM-APEB, which aims to resolve disputes involving the Society and the Public Administration. This is the first chamber of an association with a link to the professional category of Judicial Services, demystifying old paradigms, to spread consensus, and to reconcile the principles of Public Administration with mediation and the others appropriate means of conflict resolution. Large companies, responsible for a range of legal disputes, called major litigants (e.g. telephone and airline companies), have adopted a collaborative stance in recent times, in the search for non-adversarial dispute resolutions, understanding the social function they should exercise and the advantages of the solution by extrajudicial means (reduction of direct and indirect costs, time and opportunities).

In 2018, for example, 12% (twelve percent) of all cases tried in the Brazilian court were reconciled. 4.4 (four point four) million approval judgments of agreements were handed down, of which 3.7 million were in the procedural phase and 700,000 in pre-procedural phase (CNJ, 2019).

This number is still small for what is expected of a society a solidary and peaceful society. It is true that not every dispute can be resolved by consensus and that some demands require the assistance of arbitration or state guardianship, through judicial settlement; however, the amount of shares is still large.

There was a need for the adoption by the federal, state and municipal governments of some public policies and a transitory set of rules to guide legal and social relations (see Law No. 14,010, of 2020), in order to mitigate the impacts of the pandemic COVID-19 for the Brazilian population. The adversarial culture still present in the ideals of the Brazilian people has

already promoted, during this pandemic moment, judicial lawsuits for adversarial resolution of disputes in several areas of law; and after this moment of social / physical isolation, the number of these demands is already expected to increase significantly.

In Brazil there is still prejudice for the practice of consensual dispute resolution and the use of virtual and / or face-to-face mediation is still timid, however it tends to change, with the already glimpsed pandemic conflict and the economic crisis generated by the isolation measures.

It is questioned, for example, would it be appropriate for a landlord after the tenant defaulted for a few months during the pandemic to require the abrupt breach of contract and eviction for non-payment in the justice system? Even if the landlord has the right to rent and eviction, should a judge grant it during or even after the pandemic?

The fairest and most appropriate would be for the parties to negotiate a non-adversarial solution to the dispute and the justice system to encourage the use of mediation (or other appropriate means to resolve this demand), as prescribed in article 3rd of the CPC, dejudicializing the resolution of the dispute, given the effects that a judicial decision brings to society.

As an example, mediation in Argentina is a condition of the action, that is, the parties should only seek the Judiciary if they have previously gone through a mediation procedure, conducted by a mediator, who must be a lawyer with at least three years of experience, except in cases where, due to the law or the nature of the demand, composition is not possible. Thus, as a matter that can be mediated, the parties accompanied by their lawyers must seek a mediator to resolve the conflict.

It should be noted that they are not obliged to compose, but to go through the dialogue attempt to reach a consensual resolution of the

conflict, and if the attempt to compose it is not successful, they may resort to the Judiciary to settle the dispute, provided with a negative mediation certificate. This Argentine Justice System ends up allowing the country's Judiciary to take care of more complex actions and spreading a culture of peace in society, besides bringing cost savings.

In the United States, in New York City, for example, which also adopts the multidoor system efficiently, a judge has the power to refer the parties to a mediation office, to carry out as many sessions as necessary until they are able to achieve the consensual solution; but if they do not come up with a self-composing solution, they can return to Judiciary.

After five years of the normative adoption of the multidoor model by Brazil, where the Judiciary is yet another door, there is still a greater demand from those in jurisdiction for the traditional, adversarial judicial solution of dispute resolution, it turns out that this means is disadvantageous and creates burdens on the State Brazilian. The expenses of the Judiciary, in 2018, totaled R$ 93.7 (ninety-three point seven) billion, this amount corresponds to 1.4% (one point four percent) of the national Gross Domestic Product (GDP), or 2.6% of total spending by the Union, the states, the Federal District and the municipalities (CNJ, 2019).

For the Justice System, the advantages of using face-to-face and / or virtual mediation are significant, such as: the appropriate resolution of conflicts, the reduction of the number of litigation, the reduction of costs, the interaction with electronic lawsuits (online), faster resolution of demands, the possibility of meeting targets and reducing old cases, better monitoring of lawsuits with complex cases, less appeals and executions.

It has already been proven through research that the mediated decision is much more effective, than the decision imposed by the courts when saying the law in a specific case, since the parties feel self-responsible for the fulfillment of the decisions they build.

With regard to citizens, the following stand out as advantages of face-to-face and / or virtual mediation: the quick, effective and dialogued solution; the low cost; the prevalence of will among the parties; self-responsibility and involvement in the face of conflicts; less emotional distress; preservation of relational bonds; the possibility of being held in many places and with people from different parts of the country and the world (online); pacifying disputes in families, businesses, neighborhoods, workplaces and communities; the emancipation of the citizen to find creative solutions to simple or complex disputes; confidentiality; the development of communication skills through respectful dialogue and the empowerment of society.

The adoption of collaborative practices by lawyers during attempts to resolve disputes by consensus is essential, as they can guide the best agreement, guarantee the rights of their clients, give creative and alternative ideas for resolution, ensuring the effectiveness of the compositions. The mediation lawyer is as much a protagonist as the parties. The Mediation Commissions of the Brazilian Bar Association (OAB) have played an important role in disseminating and stimulating mediation and other consensual means of resolving conflicts with lawyers during the pandemic.

The duty to dejudicialize conflict resolution during and after the pandemic, adopting one of the appropriate means of resolving disputes, especially face-to-face or virtual mediation, guarantees compliance with the principles of social pacification, adequacy and cooperation, bringing legal security. This seems to be an adequate and effective way to be taken by society, by the operators of the law and by the justice system from now on.

4. Virtual mediation (ODR): an appropriate path in the pandemic

Virtual mediation, whose acronym ODR - stands for Online Dispute Resolution, was already taking place in Brazil, mainly in private chambers, with provision and normative regulation in article 46 of Law Nº 13.140 / 15, "mediation can be done through the internet or by another means of communication that allows the remote transaction, as long as the parties agree ". Supported by the principle of autonomy of will, article 166, paragraph 4 of the CPC provides for the freedom of the parties as to the choice and definition of procedural rules, allowing the use of virtual mediation, for example.

The parties involved in the dispute can opt for private mediation to be carried out by telephone, in person, telepresential or by electronic means, with the consent of both in the choice of procedure. In addition to those already listed in the previous item of this article, virtual (or online) or telepresential mediation has the advantages of privacy, time and cost savings with mobility, in addition to emphasizing the parties' autonomy.

In the consumer sphere, many companies have subscribed to the free public service of "Consumidor.gov.br", which is a virtual tool managed, made available, maintained and monitored by the Ministry of Justice, through SENACON - National Consumer Secretariat; but also PROCONs, Public Ministries, Defenders, and ultimately society, monitor it, allowing the dialogue between consumers and companies to mediate to resolve conflicts electronically. It has a high rate of resolving complaints (80% - eighty percent) directed by consumers, within an average period of 7 (seven) days, quickly, transparently and without bureaucracy [10].

Participating companies need to formally adhere to the service by signing a specific term in which they commit to making available efforts to resolve the complaints raised. Ultimately, services like this enhance

10. Source: https://consumidor.gov.br/pages/conteudo/sobre-servico

the improvement of consumer relations, spread the culture of peace, foster new public policies for consumer protection. SENACON works in technical cooperation with bodies and entities of the National System of Consumer Protection.

With the pandemic, some sectors of the economy were more affected, such as air transport, and provisional measures were issued to protect consumers and companies, such as Provisional Measure 925/2020 on the payment of passengers in installments in up to two months. SENACON and the Federal Public Ministry also signed a TAC - Term of Adjustment of Conduct with the Brazilian Associations of Airline Companies and companies in the industry, with the aim of regulating the cancellation of flights resulting from the pandemic, protecting consumers and transport companies by air, seeking ultimately to pacify the possible controversies arising from this exceptional situation of the COVID-19 pandemic.

Some resolutions have been edited by the CNJ in order to regulate the functioning of the Judiciary during the pandemic, regulating remote and face-to-face work, deadlines and procedural acts, including hearings, which as regulated by Resolution No. 314 and No. 322 of 2020, can now be virtual. There was the provision in cooperation of its own platform, but allowing the use of others, opening a new way for the practice of public online mediations.

The Law on Special Civil and Criminal Courts, Law No. 9099/95, was amended on April 24, 2020, only in articles 22 and 23, to include the authorization for non-face-to-face conciliation hearings. This normative change opens the way for extrajudicial and judicial mediations in a virtual way within the Courts that receives a range of actions of little complexity, being an important alternative for the non-adversarial solution of disputes in this delicate pandemic moment. This alternative allows the reduction of

animosities and the maintenance of the pacification of social bonds.

It is important to note that the Internal Affairs Division of the São Paulo Court of Justice edited Provident CG nº 11/2020 creating a commendable pilot project for pre-procedural conciliation and mediation for business disputes resulting from the effects of COVID-19, this project will certainly contribute to reduce pandemic litigation in the state of São Paulo-SP- Brazil.

It is worth pointing out some possible vulnerabilities or disadvantages of the virtual mediation institute, the first of which is the guarantee of compliance with the principle of confidentiality, since it is very complex in a virtual environment to control the sharing and disclosure of data and information collected in the mediation session. compromising the guarantee of this principle.

Pursuant to article 30 and 31 of Law No. 13,140 / 2015 and 166, § 1 and 2 of CPC / 15, any information relating to the session and the mediation procedure must be confidential in relation to third parties and this confidentiality applies to the "mediator , to the parties, their representatives, lawyers, technical advisers and other persons who have directly or indirectly participated in the mediation procedure ".

Even if the information is not valid as evidence in a judicial or arbitration process, it can be used to convince the magistrate; thus, if the dispute involves secrets of companies or society, personal and emotional issues, the digital medium should not be used.

The second is that it is essential to use reliable and secure software when conducting online mediation, so that there are no technical problems that make it impossible for the parties and their lawyers to meet in an oral, informal way (principles of orality and informality) and effectively , in order

to reach the desired consensus (principle of seeking consensus). The third is the need for a good internet provider by all parties and their lawyers, to guarantee the principle of equality between the parties in dispute.

It should be noted that the difficulty of privacy of lawyers with their clients for the proper guidance on the composition being discussed, can happen in a separate virtual room, opened by the mediator for this purpose. It turns out that there is no guarantee that the audio from this other virtual environment will not actually be released to the main room of the mediation session, which could be a vulnerability of the modality.

Another disadvantage is the difficulty in applying some perception techniques by the mediator, such as Rapport, in virtual mediation, since physical presence and body language communicate together with verbal expressions and generate greater empathy as a mediator and the parties involved, facilitating consensus and encouraging the construction of a creative solution to the dispute.

In view of the vulnerabilities presented, it is important to emphasize that both in virtual mediation and in other dispute resolution means, the choice of the means and the procedure is carried out on a case-by-case basis, observing the most appropriate and compatible with the interests in question, in order not to compromise the dialogue and peaceful resolution of the controversy.

5. Conclusion

Brazil has an adversarial culture of conflict resolution, from the simplest to the most complex cases end up being analyzed by the Judiciary and, given the current scenario, this posture needs to be revised, a paradigm shift is urgently needed, otherwise we will have a further collapse of the

post-pandemic justice system. Adopt as a priority the appropriate means of out-of-court consensual conflict resolution, in particular virtual mediation (ODR), is an effective and peacemaking path in this pandemic context.

Thus, law firms, the Ombudsman's Office, the Public Prosecutor's Office, the Judiciary, the Brazilian Lawyers' Organization (in Portuguese acronym OAB) and the whole need to organize for the exercise of mediation, especially in the virtual modality at this pandemic moment, otherwise there is no effective delivery of the judicial provision in the proposed actions, because of an overloaded justice system and unable to absorb the flow of conflict during and after the pandemic, which will jeopardize the compliance with the principles of access to justice, the reasonable duration of the procedure and legal certainty.

The Duty to Dejudicialize conflicts during and after the COVID-19 pandemic, in particular through virtual mediation (ODR), is an appropriate way to ensure compliance with the principles of social pacification, cooperation and adequacy.

6. References

BRASIL. **Constituição Federal de 1988.** Promulgada em 5 de outubro de 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituição.htm. Acesso em 16 nov. 2019.

_____. **Código de Processo Civil (2015)**. Código de Processo Civil Brasileiro. Brasília, DF: Senado, 2015. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm. Acesso em: 16 nov. 2019.

_____. **Resolução n° 125, de 29 de Novembro de 2010**. Dispõe sobre a Política Judiciária Nacional de tratamento adequado dos conflitos de interesses no âmbito do Poder Judiciário e dá outras providências. Disponível em: http://www.cnj.jus.br/busca-atos-adm?documento=2579. Acesso em: 15 nov. 2019.

_____. **Lei nº 13.140, de 26 de junho de 2015**. Dispõe sobre a mediação entre particulares como meio de solução de controvérsias e sobre a autocomposição de

conflitos no âmbito da administração pública; altera a Lei nº 9.469, de 10 de julho de 1997, e o Decreto nº 70.235, de 6 de março de 1972; e revoga o § 2º do art. 6º da Lei nº 9.469, de 10 de julho de 1997. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm. Acesso em: 16 de nov. 2019.

_____. **Lei Nº 9.307, de 23 de Setembro de 1996**. Dispõe sobre a arbitragem. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l9307.htm#:~:text=LEI%20N%C2%BA%209.307%2C%20DE%2023,Disp%C3%B5e%20sobre%20a%20arbitragem.&text=Art.,relativos%20a%20direitos%20patrimoniais%20dispon%C-3%ADveis.&text=2%C2%BA%20A%20arbitragem%20poder%C3%A1%20ser,eq%C3%BCidade%2C%20a%20crit%C3%A9rio%20das%20partes. Acesso em 14 de jun. 2020.

_____. **Lei nº 9.099, de 26 de setembro de 1995**. Dispõe sobre os Juizados Especiais Cíveis e Criminais e dá outras providências. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l9099.htm. Acesso em: 14 de jun. 2020.

_____. **Lei nº 14.010, de 10 de junho de 2020.** Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Lei/L14010.htm. Acesso em 20 de jun. de 2020

BUITONI, Ademir. A função da intuição na mediação. **Revista Jus Navigandi**, ISSN 1518-4862, Teresina, ano 12, n. 1621, 9 dez. 2007. Disponível em: https://jus.com.br/artigos/10746. Acesso em: 15 jun. 2020.

CAM- APEB. **Câmara de Mediação, Conciliação e Arbitragem da Associação dos Procuradores do Estado da Bahia (APEB).** Salvador: APEB, 2018. Disponível em: http://www.camaraapeb.com.br/. Acesso em 20 de jun. de 2020

CNJ. **Justiça em números 2019**. Brasília: CNJ, 2019. Disponível em:

https://www.cnj.jus.br/wp-content/uploads/conteudo/arquivo/2019/08/justica_em_numeros20190919.pdf. Acesso em 07 jun. 2020.

_____. **Sumário Executivo - Justiça em números 2019.** Brasília: CNJ, 2019. Disponível em: https://www.cn j.jus.br/ wp-conte nt/ uploa ds/con teu do/arqui vo/ 2019/08/8ee6903750 bb4361b5d0 d1932ec6632e.pdf. Acesso em 07 jun. 2020.

_____. **Resolução nº 314, de 20 de abril de 2020**. Brasília: CNJ, 2020. Disponível em: https://atos.cnj.jus.br/files/original071045202004285ea7d6f57c82e.pdf. Acesso em: 15 maio 2020.

_____. **Resolução nº 322, de 01 de junho de 2020.** Brasília: CNJ, 2020. Disponível em: https://atos.cnj.jus.br/files/or iginal155 64720 200602 5ed6 76bf4c0d5.pdf. Acesso em: 15 maio 2020.

CONJUR - Revista Eletrônica Consultor Jurídico (Brasil) (ed.). **CNJ lança curso EAD para formar mediadores e já tem lista de espera**. 2020. 13 de maio de 2020, 12h38. ISSN 1809-2829, www.conjur.com.br. Disponível em: https://www.conjur.

com.br/2020-mai-13/curso-cnj-formar-mediadores-lista-espera. Acesso em: 18 maio 2020.

CONSUMIDOR.GOV.BR. **Serviço da SENACON - Secretaria Nacional do Consumidor do Ministério da Justiça. Brasília**, 2014. Disponível em:

https://consumidor.gov.br/pages/principal/?1593410546212. Acesso em: 18 de maio de 2020.

CRESPO, M. H. A construção da América Latina que queremos: complementando as democracias representativas através da construção de consenso. In: **Tribunal multiportas: investindo no capital social para maximizar o sistema de solução de conflitos no Brasil.** Rafael Alves de Almeida, Tania Almeida, Mariana Hernandez Crespo (Org.). Rio de Janeiro: FGV, 2012.

DINAMARCO, C. R.. **Instituições de direito processual civil.** São Paulo: Malheiros, 2001.

LESSA NETO, João Luiz. Métodos Alternativos de Solução de Conflitos – ADR. Revista de Processo 2015. **RePro** vol. 244 (Junho 2015). Disponível em: http://www.mpsp.mp.br/portal/page/portal/documentacao_e_divulgacao/doc_biblioteca/bibli_servicos_produtos/bibli_boletim/bibli_bol_2006/RPro_n.244.17.PDFo de disputas. Acesso em: 16 nov. 2019.

LUPETTI, Bárbara. Nossos *hermanos porteños* têm muito a ensinar sobre mediação de conflitos. **Revista Consultor Jurídico**, 29 de agosto de 2015, 9h05. ISSN 1809-2829 . Disponível em: https://www.conjur.com.br/2015-ago-29/barbara-lupetti-portenos-ensinar-mediacao-conflitos . Acesso em: 18 jun. 2020.

MARINONI, G.; MITIDIERO, D; SARLET, I. W. **Curso de Direito Constitucional**. 6.ed. São Paulo: Saraiva, 2017.

PANUTTO, Peter. Possíveis Contribuições da Argentina na Implementação da Mediação no Brasil. **Revista Em Tempo**, [S.l.], v. 16, n. 01, p. 120-139, feb. 2018. ISSN 1984-7858. Disponível em: https://revista.univem.edu.br/emtempo/article/view/2394. Acesso em: 17 jun. 2020. doi: https://doi.org/10.26729/et.v16i01.2394.

SANDER, F.; CRESPO, M. H.. Diálogo entre os professores Frank Sander e Mariana Hernandez Crespo: explorando a evolução do Tribunal Multiportas. In: **Tribunal multiportas: investindo no capital social para maximizar o sistema de solução de conflitos no Brasil**. Rio de Janeiro: FGV, 2012.

SANTOS, Boaventura de Sousa. **Pela Mão de Alice: o social e o político na pós-modernidade.** 9ª ed. Coimbra: Almedina, 2013.

SÃO PAULO. **PROVIMENTO CG/TJ-SP Nº 11/2020, Processo 2020/42835, de 17 de abril de 2020**. Tribunal de Justiça- SP. Disponível em: https://www.tjsp.jus.

br/Download/Portal/Coronavirus/Comunicados/Provimento_CG_N11-2020.pdf. Acesso em: 20 de maio de 2020.

SCHMITZ, Leonard Ziesemer. Compreendendo os "Precedentes" no Brasil: Fundamentação de Decisões com base em outras Decisões. **Revista de Processo**, vol. 226, p. 349, Dez / 2013 DTR-2013-11585. Acesso em: 14 de dez. de 2019.

STEMPEL, Jeffrey. **Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?** 1 Ohio St. J. on Disp. Resol. 297, 331, 1996.

TARTUCE, Fernanda. **Mediação nos conflitos civis.** 4. ed., rev., atual. e ampl. Rio de Janeiro: Forense; ISBN 978-85-309-7733-7. São Paulo: MÉTODO: 2018.

TZU, Sun. **El arte de la guerra.** Madrid (2004) (Colección Filosofia y teoría social)

WARAT. Luis Alberto. **O ofício do mediador**. Florianópolis: Fundação Boiteux, 2004.

WATANABE, Kazuo. Cultura da sentença e cultura da pacificação. In: MORAES, Maurício Zanoide; YARSHELL, Flávio Luiz (coords.) **Estudos em homenagem à Professora Ada Pelegrini Grinover.** São Paulo: DPJ, 2005.

11

The duty of reasonable accommodation in favor of immunodeficient employees in the time of coronavirus

LUCIANO MARTINEZ

ALOÍSIO CRISTOVAM DOS SANTOS JÚNIOR

CONTENTS: 1. Introduction; 2. The non-existence of the supposed right of the employee to absence the service on his own initiative, in order to protect himself from the Coronavirus; 3. Reasonable accommodation, social right to work and worker dignity; 4. Why currently the legal systems make an effort to adjust working environments to people with disabilities, including people with immunodeficiency? 5. The most important forms of reasonable accommodation in times of the Coronavirus and the consequences arising from the denial of reasonable accommodation; 6. Conclusion; 7. References

1. Introduction

The spread, in geometric progression, of a disease of immense transmissibility and high lethality among the most vulnerable was the scenario caused by Coronavirus or COVID-19 in the first months of 2020.

The disease caused by the Coronavirus had its starting point in China. The first studies indicated Wuhan, in Hubei province, as the location from which the viral mutation that generated the so-called "species jump" came from, an alteration that allowed a virus typical of animals, in particular bats,

to become capable of attack the man. For this reason, the contamination route of COVID-19 may have been a result of the consumption of wild animals by the Chinese. The dominant market for live wild animals sold was, it seems, the perfect incubator for this evil never mapped by scientists until that moment. Thus, the Coronavirus emerged, and thus the pandemic arose.

This pandemic, however, unlike the previous ones, had the special consequence of a rapid proliferation, capable of causing the collapse of the health system of any country, regardless of its degree of development and organization. Were it not just that, the fact that the infected person did not show immediate symptoms of the disease, taking some time to become weak, increased the risk of contagion in that period when the patient continued to exercise his regular activities and to frequent public spaces, making therefore, and thus, an unconscious diffuser of this powerful evil.

In view of the problem, no strategy has proved to be more effective in combating the Coronavirus than the social isolation of entire populations, contained within the limits of their homes. Parallel to this, the closing of shopping centers, schools, convention centers, bars,restaurants, among other spaces that allowed people to meet, was essential to contribute to the success of this measure of containment and the preservation of the health of the entire community.

The big problem with all the strategies devised to curb COVID-19 was an incoherent discourse that, despite claiming that people should stay at home, did not give them the subjective right to not go to work. This is the starting point of the entire discussion that will be held in this study.

2. The non-existence of the supposed right of the employee to absence the service on his own initiative, in order to protect himself from the Coronavirus

In view of the diffusion of efforts to make people subject themselves to social isolation, the first and one of the most important questions posed in the face of the Coronavirus pandemic was, without a doubt, the one regarding **work absenteeism** and its consequences within employment contracts [1].

After all, it is not uncommon to see an employee ask if he would have the right to leave the service on his own initiative on the grounds of protecting himself from a virus with a high degree of transmissibility.

The answer here is negative. No, the employee, as a rule, does not have the right, on his own initiative, to decide whether or not to attend work to protect himself from the Coronavirus, at least as long as there is no prohibition imposed by public authorities for the development of the service.

It is evident the non-existence of right to be absent from the service, because, until a certain moment, without state regulations determining closing of companies or the suspension of the development of some activities, it is assumed that, observing the general guidelines dictated by the World Health Organization Health, there is a controlled risk.

And if the risk is controlled, there is no claim that the employer would be, simply for keeping his activity in operation - when it is legal to do so - subjecting the employee to danger of considerable damage.

A different situation would be visible if the employer insisted on keeping open spaces that public authorities determined to be closed. In such cases, there would be an authentic right of resistance for the worker and a clear abuse of employer's authority.

1. To learn more about this subject and to understand the full extent of the workers' problem in the face of COVID-19, consult MARTINEZ, Luciano; POSSIDIO, Cyntia. (O trabalho nos tempos do Coronavirus. São Paulo: Saraiva, 2020).

Good examples of this are noted in daycare centers, schools and social clubs. It is known that local authorities, as a rule, determined the complete closure of these spaces for socializing and entertainment, given the high risk of diffusion of COVID-19. In these terms, if an employer were to insist on keeping such spaces open and if it persisted in having employees working for the external public, it would then be subjecting its employees to a high and disproportionate risk, and, without a doubt, imposing them danger of considerable harm.This, in theory, would give the employee the right not to appear and, in extreme cases, to invoke the breach of the employment contract by the employer who failures to follow the state orders. The local public administrationauthorities, for the infraction, would have the right to revoke the operating license of the offending company.

It should be noted, in any case, that the hours worked internally in companies whose activities were closed to the external public do not, as a rule, constitute an infringement by the employer, **unless, of course, the health authorities state otherwise**.Thus, although a school is closed to the public, nothing would, as a rule, prevent that, within it, the principal, teachers and pedagogical coordinators may be carrying out activities to organize the school calendar for future resumption of activities.

This right to not come to work may, however, be backed up in even more extreme situations.

And what are these measures that justify employee's absence from work?

To cope with the public health emergency of international importance due to the Coronavirus, was adopted measures such as:

I - **compulsory isolation or segregation**, thus understanding the separation of sick or contaminated people, from others, in order to avoid contamination or the spread of the Coronavirus.

Thus, the employee's right to not come to work arises if, for some reason, he, because he is contaminated, receives a medical order of isolation. In this case, the employee is hospitalized, under medical care, and in clear compulsory segregation. In this case, the employer will have to accept the isolation of this employee and, consequently, for more than obvious reasons, understand his absence as justified.

It is not possible, however, confuse "individual isolation", understood as "compulsory segregation" to prevent contamination or spread of the Coronavirus, with the general recommendation of "social isolation", which is voluntary, spontaneous and optional behavior of citizens in support of pandemic containment measures.

II - **quarantine,** understood as restriction of activities or separation of people suspected of being infected by people who are not sick, in order to avoid possible contamination or the spread of the Coronavirus. This hypothesis involves employees with suspected contamination. An example of this was visible in situation of the citizens who were in Wuhan and were rescued from there by government of their countries of origin.

Upon reaching their home countries, both rescued citizens and crew members began to quarantine in reserved spaces. Until the quarantine was closed, these individuals did not return to their community lives.

It turns out that, in the face of isolation and quarantine, the people involved have not only the right, but the duty not to go to work, for the safety of the entire community.

III - **determination of compulsory realization of:**

a) medical examinations;

b) laboratory tests;

c) collection of clinical samples;

d) vaccination and other prophylactic measures; or

e) specific medical treatments, as well as

IV - **epidemiological study or investigation.**

In these situations, the public administration can impose on certain groups, taking into account the characteristics of their work, the imposing performance of medical examinations, laboratory tests and other control measures and epidemiological verification, which, in practice, has already it occurred, for example, with passengers and crew members, about to disembark, from cruises where was found some individual with the covid-19.

Therefore, one could not imagine that an employee who in vacation in one of these cruises had no compelling reasons for not return to work. Your return from vacation will therefore be aborted.On the contrary, there are many justifications for not attending, given the requirement to undergo tests of various kinds and, even, isolation or quarantine, referred to in the previous topics, if inserted in the situations highlighted above.

VI - **exceptional and temporary restriction on entering and leaving the country,** according to a technical and well-founded recommendation from the health surveillance agencies,by highways, ports or airports.

This situation can also affect the employees. Imagine that one of them went to an important meeting abroad, when, then, he was prevented from returning to his base of work because the entry of flights into his own national territory was prohibited. In this case, of course, their absences are justified until the repatriation is diplomatically resolved, and the employer is responsible for defraying the expenses of his employee who is abroad for

the entire time he is constrained to remain there.

t cannot be forgotten that the measures referred to above, which interfere with labor activity, must be reasonably adopted by governments, although it is difficult to say what is reasonable and what is not in the face of such an unknown evil. In any case, measures can only be determined based on scientific evidence and analysis of health strategic information and should be limited in the time and space to the minimum necessary for the promotion and preservation of public health.

This topic is concluded, making it clear that the employer can, **by his own reflection,**determine the closure of the workplace and the closure of activities with the consequent assumption of costs resulting from the removal of his employees. The employer's directive power there will be the essential reason for the contractual interruption, in which case he will fully bear the costs of this internal decision.

It says more. In fact, and strictly speaking, the employer will be able to carry out sanitary control and prohibit the presence of employees suspected of contamination in the work environment. The basis for this special way of acting is the **duty of protection** imposed on the employer. Finally, the *company is responsible for the adoption and use of collective and individual measures for the protection and safety of the worker's health.*Among these collective measures and proactive conducts aimed at stopping viral spread are included the assessment of conditions health of its employees and the determination of removal of those that the criteria of company doctors, observing the professional secrecy, cannot continue working there.

At this point, the duty of protection is always invocable,since it is up to companies to comply with and enforce safety and occupational health standards and, in addition, instruct employees, through service orders, as

to the precautions to be taken in order to to avoid accidents at work or occupational diseases.

And if one of the employers' orders is to remove the worker suspected of having an infectious disease, this is a determination that must be followed, under penalty of the employee being dismissed for just cause.

It is important remember that the duty of protection of the employer goes hand in hand with the duty of protection of the worker, and it is up to him to *observe the rules of safety and occupational medicine,under penalty of his unjustified refusal constituting a serious fault.*

It also cannot be forgotten that, in addition to the employer being obliged to send home an employee suspected of having an infectious disease, it is also his responsibility, while preserving his name and image as much as possible, to inform the other workers who have been shoulder to shoulder with the sick companion so that they personally adopt and with their families the conduct of certification of possible contagion and prophylactic measures of a protective nature. This is a reflection of the important **duty to inform,**as it is known that it is *company's duty to provide detailed information on the risks of the operation to be carried out and the product to be handled.*

Evidently, considering the fact that the boss is the risk of his business, one could not imagine the existence of losses generated on the remuneration of the employee who has been preventively removed from the scope of the services. Obviously, considering that the risk of the business belongs to the employer, the employee who was preventively removed should not suffer loss in his salary. As a rule, if this compulsory leave was imposed by the employer, it will be up to the employer to maintain the same salary who was paying to worker.

Are immunodeficient employees and other vulnerable organic workers exempted from attending work in times of pandemic? Is there a duty of reasonable accommodation in favor of this special group?

This is a delicate question, which, however, can be answered by careful reflection on the extent and limits of the extremely relevant *duty of reasonable accommodation*.

But is the Coronavirus pandemic enough to conclude that the work environment is unhealthy in the face of possible aggressive biological agents?

It does not seem to be so, since exposure to Coronavirus is not a risk condition that specifically affects only the environment at work. In fact, there is an absolutely diffuse risk, which manifests itself in the entire social environment as a result of human interaction. Immunodeficient employees, therefore, wherever they are, inside or outside the workplace, including at home, will also be in a situation of potential damage to their health.

Therefore, employees with immunodeficiency, including those suffering from autoimmune diseases and employees with high age and employed pregnant and lactating women, due to their condition of vulnerability, must be accommodated in a position compatible with the depreciation of their work capacity, precisely to avoid their submission to a manifest danger of considerable damage.

But what exactly is this "duty of reasonable accommodation" and where does it come from?

The history of the institute is based on American law. The imposition on the employer of the so-called reasonable accommodation duty there emerged with the clear objective of combating discrimination motivated by religious beliefs in the workplace. In its origin, therefore, the duty of

reasonable accommodation emerged as a legal instrument designed to guarantee the maximum effectiveness of the employee's religious freedom in the workplace. What was sought to accommodate, at the time, were the religious needs of the most fragile part of the employment contract.

It is important to say, moreover, that the idea was born as one of the developments of the civil rights movement that, although in its beginnings essentially aimed at tackling racial segregation, has expanded its scope to include the fight for equality in favor of sections of the population that suffered discrimination from other species, such as those motivated by differences in gender and religion. Precisely for this reason, the most important federal statute designed to protect workers (employees, job seekers and interns) from religious discrimination in the workplace was Title VII of the Civil Rights Act, promulgated by the American Congress in July 2, 1964 [2].

That statute prohibited unequal treatment, retaliatory actions, hostile work environments and the employer's refusal to reasonably accommodate the religious practices of its employees. Although it applied only to companies with a minimum number of 15 (fifteen) employees who operate a business related to interstate commerce, the federal states also passed substantially similar laws, which extended the same prohibitions to companies whose economic activities were limited to their territorial area.

It is quite true that in its original wording, Title VII did not specifically refer to the duty of accommodation. However, still in 1964, the first of the guidelines issued by the United States Equal Employment Opportunity Commission, known by the acronym EEOC, created by the Civil Rights Act, ordered employers to reasonably accommodate religious needs of its

2. On the subject, see GREGORY, Raymond F. (*Encountering religion in the workplace:* the legal rights and responsibilities of workers and employers. Ithaca, New York: Cornell University Press, 2001), especially chapter 15, the content of which is, to a large extent, used in this topic

employees, since this could be done without "serious inconvenience" for the conduct of business affairs. A year later, the Commission revised its guidelines, replacing the idea of serious inconvenience with that of "undue hardship".

In 1972, the United States Congress added to Title VII a provision that expressly established the duty of accommodation. The inserted legal device reflected the EEOC guidelines, stipulate that the religious practice and observance of employees would be reasonably accommodated by the employer, unless the employer demonstrated that it was not possible to do so without "undue hardship" for the development of their economic activity.

With the introduction of the new provision, the judicial protection of the right to accommodation in American law is done as follows. The employee must demonstrate that their beliefs are sincere (*bona fide religious practice*), have been communicated to the employer and that, because of them, he has been discriminated against by the company. The employer, in turn, may defend himself by demonstrating that he tried to accommodate the employee's religious needs or that such accommodation would not be feasible without the company being subject to an "undue hardship" in conducting its business [3].

The *duty of reasonable accommodation*, however, has not restricted to United States, whose courts built powerful jurisprudence on the subject. In the 1980s, the idea of reasonable accommodation arrived in Canada, where it gradually became detached from the roots strictly connected to the defense of the religious freedom of the employee in the work environment and acquired a broader reach, being used as a juridical instrument aiming

3. For the purpose ofthe device added, "the term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business" (SEC. 2000e. *[Section 701])*

to guarantee real equality in favor of the most vulnerable in different areas of social life.

The basis for expanding the outlines of reasonable accommodation can be found in the decision handed down by the Supreme Court of Canada in the "Simpsons-Sears" case. There, although the Court was still dealing with the religious issue, it was established that reasonable accommodation translates into social acceptance of the general obligation to respect equality and to take reasonable measures to protect it, provided that it recognizes that an apparently neutral rule or decision could have a discriminatory effect on a person because it is incompatible with their religious observances.

The idea is no longer foreign to other national legal systems that have received, in dealing with the issue, some influence of American or Canadian law.

Currently, the idea of a duty of reasonable accommodation has ceased to be restricted to the work environment and can be applied - with appropriate adjustments - to other fields of social life, such as schools and public services. Likewise, the duty of accommodation is no longer limited to protecting a specific group of vulnerable people (such as religious workers) and can come to be used to combat other types of discrimination, such as those motivated by disability, gender, age and ethnic identity.

Within the scope of Labor Law, the duty of reasonable accommodation can be conceptualized as an action rule attributed to the employer, resulting from his duty of protection, which translates into the adoption of reasonable measures, thus understood those that do not impose on him undue hardship, able to accommodate the needs of the service to the vulnerabilities or personal disadvantages of employees, especially in

view of the finding that an apparently neutral conduct could produce a discriminatory effect.

Strictly speaking, however, satisfy the specific needs of the worker, recognizing an employer's duty of reasonable accommodation, is an idea that must be assimilated as a natural consequence of the primacy of human rights. On the other hand, its relevance to the preservation of the dignity of the worker requires that its field of incidence be expanded and not only benefit those who invoke their religious identity and the people with disabilities.

3. Reasonable accommodation, social right to work and worker dignity

On the steep path of human rights, the dignity of the human person is both a starting point and an end point. Indeed, the doctrine of human rights starts from the idea that humans have an essential dignity that distinguishes them from other beings and, because of that, they should be treated as ends and not as means, which is why they are entitled to certain universal and inalienable rights. On the other hand, the dignity of the human person is an end that is only fully achieved - that is, it is only realized in the world of facts - when human rights are respected, protected and promoted.

The dignity of the human person does not make sense if individuals cannot satisfy the basic needs of themselves and their dependents, which is generally done through paid work. In fact, in order to enjoy other human rights, it is necessary to guarantee individuals minimum conditions of survival. It is not without reason, therefore, that the right to work shines in the constellation of human rights as a social right of the highest relevance

and whose realization is always urgent.

A social right of such magnitude could never be ignored by the Universal Declaration of Human Rights (UDHR), so that, in its article 23, it resoundingly proclaims that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". In the same vein, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is equally clear when it enshrines "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts".

It is also true that the right to work is not to be confused with the right to employment, as wage labor does not exhaust all forms of work by which individuals gain their living. But, without a doubt, the employment contract is, in the capitalist system, the type of work relationship that enjoys greater historical and social importance (besides being, still, the most common), which, in itself, justifies that be taken here as the main focus of consideration.

In this light, it should be noted that the configuration of the employment contract as a power relationship makes it a fertile ground for discrimination against workers based on the most diverse reasons, including immunodeficiency.

There is no doubt that the right to work is fully guaranteed only when all kinds of discrimination are banned from the work environment. If so, just as important as guaranteeing individuals the right to get a job, it will also be to ensure that their permanence in the workplace will not depend he maintain, throughout the employment agreement, a physical or psychological health impeccable, like a superhuman. It is necessary to ensure to the employee that no one manifestation of any personal condition

related to health will make him undesirable to the employer only because this is a factor capable of reducing the profitability of the business.

What has been said is valid for any time, even when not facing a global health crisis.

It is certain, however, that the problem manifests itself with greater severity in acute situations such as that produced by the pandemic of COVID-19, which claimed the lives of thousands of people around the world, primarily victimizing immunodeficient individuals, some due to the degeneration brought by high age, others due to preexisting or acquired morbid entities and still others due to some natural condition experienced, such as pregnancy and lactation.

If a worker, due to his immunodeficiency, has a well-founded fear of exposing himself to the risk of contamination and possible death by COVID-19, the request addressed to the employer to consider his personal condition will also promote the social right to work.

Just like Sofia's choice narrated in William Styron's work, it is inhuman to see the worker subjected to the choice between subjecting himself to a high risk of death or preserving his livelihood. It is an immeasurable sacrifice that violates, unmistakably, the dignity of the human person and that, precisely for this reason, in the context of the Democratic and Social State of Law, cannot flourish.

However, as the employer's directive power undoubtedly understands the prerogative of organizing work, including, eventually, measures that restrict the autonomy of the worker, it is imperative to clarify the position in which the employer is placed in the face of the need of his employees. It is therefore necessary to investigate how the employer should behave in the face of the claim of immunodeficient employees to change their

working conditions in order of they are accommodated to their need for self-preservation.

It is argued here that, regardless of an express legal rule, the employer has the duty to accommodate the claim of his immunodeficient employees and to change their working conditions, aiming at minimizing the risk of contamination by COVID-19, when it does not imply undue hardship for the realization of the economic activity.

In view of the problem, it can be argued that the absence of a provision expressed in legal rules would conspire against the admissibility of a duty of reasonable accommodation in this regard. This argument, however, is not convincing, because completely ignores the normative character of human rights.

An argument that could also be raised against the recognition of that duty would be that accommodation in favor of immunodeficient would represent a loss for their co-workers, because would not labor in equal conditions. Thus, accommodation could generate particularly complex problems, considering that the principle of equality would impose that those who are not immunodeficient should be equally protected by law in the same way as immunodeficient workers [4] .

Indeed, any accommodation in favor of a specific worker, regardless of the type of accommodated need, does have the potential to be seen as discrimination by other workers.The imposition of duty to accommodate the needs of some employees can, in fact, produce the immediate creation of a corresponding disadvantage for others.For example, allowing a sales employee to provide his services via telecommuting in a commercial

4. For more, see JOVER, Adoración Castro (*La utilización de signos de identidad religiosa en las relaciones de trabajo en el derecho de Estados Unidos.* Madrid: Servicio de Publicaciones de la Facultad de derecho – Universidad Complutense de Madrid, 2005, p. 168–169).

activity may result in a disadvantage for other workers who, as a result, have to go more often to the physical store or stay there for more time. The argument can also be reinforced with the idea that accommodation would provoke the prevalence of the interest of a single individual over the interest of the group.

Would be that argument an impediment to the attribution to the employer of the duty to reasonably accommodate the needs of immunodeficient employees?

The answer depends on the evaluation about the importance that should be given to the specific condition of the worker with deficit of immunity. First of all, one cannot lose sight of the fact that immunodeficiency, either of its own or of third parties with whom it resides, is not a personal condition chosen by the worker. Putting him in the position of having to choose between self-preservation or that of one of his relatives and maintaining his job is clearly a violence that does not seem justified in a society that affirms to be in solidarity.

To deny reasonable accommodation in such cases would represent the imposition of an *a priori* disadvantage on *the* immunodeficient worker based only on the fact that he has a deficiency in his immune system, thus making him, even if only momentarily, unwanted by corporate policy.

Furthermore, it does not seem that the social function of the company, which must be understood with a scope that goes beyond the mere distribution of income, supports the defense of the necessity of accommodating the needs of the immunodeficient worker. Socially, it is also important that the company be a place where the inclusion of minorities is promoted, including - especially for the purposes of this study - the organically vulnerable workers, that is to say, it is relevant that the

company be a place in which the citizenship can be fully exercised to the extent, of course, that there is no undue hardship in the conduct of business.

However, it is notorious the weakness of any argument that rejects the duty of reasonable accommodation in favor of the immunodeficient worker, based on the idea that this would result in the breaking of equality in the workplace, because the situation of the immunodeficient worker is different from the situation of their healthy colleagues. The inequality between the immunodeficient worker and others justifies a different treatment, because the equality rule also means treating the unequal in an unequal way in the extent of their inequality.

4. Why currently the legal systems make an effort to adjust working environments to people with disabilities, including people with immunodeficiency?

The answer is very clear. There is a consensus that guaranteeing the dignity of workers with disabilities requires specific protective measures aimed not only at their inclusion in the labor market, but also to adjust the physical space where services are provided, constituting an agenda whose relevance for construction of a solidary society justifies the imposition of the resulting costs to the company.

The insertion of the disabled people - including the immunodeficient - in the company, in fact, demands a positive conduct from the employer that, although it represents at first sight an unequal treatment, complies with the principle of equality, because is flagrant the inequality among workers with disabilities (including those with immunodeficiency) and those who are not. Still, it is worth remembering that there are many types of disabilities and that the needs of disabled workers can be accommodated at different levels, requiring in some cases low-cost measures.

The example serves to demonstrate that the mere argument that accommodating the needs of their immunodeficient employees would represent a violation of the isonomic principle is not decisive for removing such an obligation from the employer in situations where workers live in a special condition of vulnerability [5].

Another argument that can be raised against the need to recognize the duty of reasonable accommodation is that meeting the needs of the immunodeficient employee would be solved simply with the balance of rights, since the worker and the employer would already have a mutual duty to respect life each other. We cannot forget, however, that the parties to the employment contract are not on an equal footing. The socioeconomic inferiority of the worker puts him, as a rule, in an unfavorable condition to have his needs met. The fear of suffering retaliation and being taken out of work makes him even more vulnerable to the vagaries of an employer who ignores or devalues his personal condition of vulnerability. Therefore, the duty of accommodation does not rule out the need to balance the interests of employees and employers. It only imposes on the employer the argumentative burden of demonstrating the impossibility of accommodation. In this sense, the recognition of employer's duty of accommodation better meets the principle of protection of the vulnerable than its denial.

Another difficulty that may arise in discussions about the reasonable accommodation is to know, in some cases, if the worker's request is really sincere, specially when refer not to his own immunodeficiency, but to that of members of your family with whom he lives and to whom he needs to give attention and assistance. This is because in these cases the employer, at first, will have to base his decision on the information provided by the worker.

5. On the subject, it is worth checking out VIVES, Juan Martín (*La "acomodación razonable" de las prácticas religiosas en el ámbito laboral. Su posible aplicación al Derecho Argentino.* Buenos Aires, Sup. Const. 2012 (junio), 28/06/2012, 1 - LA LEY2012-D, 828).

The difficulty in proving the sincerity of a worker's application, however, is not substantially different from the difficulty in demonstrating the sincerity of any other statement whose acceptance depends on the credibility of its author. Whenever the content of a statement refers to a subjective condition, it will be difficult to measure its sincerity. Thus, supposing that someone can argue against the duty of accommodation based on the difficulty of gauging the sincerity of the worker's claim, it is necessary to register that the danger of someone presenting a false claim to benefit from a change in the conditions of work does not differ from the danger that someone will present a false professional qualification or from the risk of lying about their past work experience. Such occurrences, due to their exceptional nature, cannot be presumed, under penalty of no longer having any space in the employment contract for the principle of good faith. In the specific case, moreover, it is justifiable to demand that the employee demonstrate in detail, through reports and other documents, the condition of organic vulnerability of the person with whom he resides and who needs his non-transferable attention. In addition, insincere claims will deserve exemplary punishment to be applied by the employer in the exercise of his disciplinary power.

An argument that could also be opposed to the duty of accommodation is that it could represent an unnecessary and unwanted cost for the employer, with negative effects on the results of his economic activity, especially in times of crisis. It can be argued that requiring the employer to meet the needs of its employees will imply reduced profits. The argument, in a first analysis, could be confronted with the expanded conception of the social function of the company that imposes its commitment to the objective of promoting a just and solidary society.

Indeed, economic ends are not the only ones that must be considered in business activity. However, if there is no way to ignore that the duty of

accommodation always entails some cost, as only occurs with measures aimed at including other minorities, there are ways to minimize it, so that the reflexes on the results of economic activity as small as possible. That is what in the United States is meant by "reasonable" accommodation. In the specific case, moreover, the need for self-preservation is inherent to the right to life, certainly the most important of human rights.

Attention should also be drawn to the fact that the recognition of the duty of accommodation does not necessarily dispense the method of balancing fundamental rights. This is very evident because the duty of accommodation does not hide the conflict. Rather, the recognize of the employer's duty has the virtue of pointing, in the vast majority of cases, to prima facie precedence of the need for the employee to try to prevent the risk of death [6], introducing an important starting point for balancing interests, which ultimately facilitates the argumentative process leading to the solution of the rights collision.

In fact, the notion of the duty of accommodation is not even incompatible with the principles of proportionality and reasonableness. The assertion that the employer has a duty to reasonably accommodate the working conditions of his immunodeficient employee, as long as it does not imply excessive difficulty in conducting business, is another way of saying that he is prohibited from disproportionately or unreasonably restricting worker's autonomy in search for his self-preservation in the face of situations that put him at risk of death.

It is important note, at the end of this topic, that although the text often refers to the words "company", "business", "profits" or "business", the system of reasonable accommodation is, strictly speaking, also required

6. A more detailed analysis of the arguments against the duty of accommodation can be found in the excellent study by VICKERS, Lucy (*Religious freedom, religious discrimination and the workplace.* Oxford and Portland, Oregon: Hart Publishing, 2008). What has been written on this topic is greatly benefited by her lessons.

of the employer domestic. However, should be observed some precautions related to work in residential units and also to the vicissitudes of a employer characterized as a person or family. The same can be said about the extension of the duty of reasonable accommodation to the employing State, which, incidentally, due to its visibility, is responsible for offering the example of conduct to be followed by private individuals.

It is relevant be observed, although this has already been announced in some passages of the text, the employee, especially in the time of the Coronavirus, and due to an imperative of safety, may come to want a reasonable accommodation not only to preserve himself, due to his organic vulnerability, but also aiming to preserv the health of anyone immunodeficient his family's member, with whom he lives and who need of his necessary and non-transferable care and assistance.

5. The most important forms of reasonable accommodation in times of the Coronavirus and the consequences arising from the denial of reasonable accommodation

Among the most important forms of reasonable accommodation in times of the Coronavirus are, without a doubt, the removal of vulnerable employees from contact with the external public, their relocation in reserved physical spaces of the company and, ultimately, if possible and viable, the adoption of a teleworking system.

It should be noted, because it is important, that **the refusal to reasonable accommodation may come to constitute discrimination due to disability** or, in a broad sense, due to the employee's organic vulnerability.

The Convention on the Rights of Persons with Disabilities, the text of which was approved by the United Nations General Assembly on December

13, 2006, is very clear in that sense by including the refusal of reasonable accommodation in the definition of discrimination on the grounds of disability. This is what appears in its article 2, *in verbis:*

> "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, **including denial of reasonable accommodation**" [7]

Although the pregnant woman, the lactating woman, the elderly or the employee contingently vulnerable due to her immunodeficiency do not fit the definition of a person with a disability endorsed by the said convention, since there is not a long-term impediment, the situations are so similar that there is no way to avoid the analogical application of conventional precept, according to the tutelary spirit of Labor Law.

Thus, if the employee is able to be accommodated in a post compatible to the depreciation of its working capacity, the employer that not do so, in the final analysis, will be causing the termination of the contract due to himself fault, submiting, thus, to pay possible compensation for moral damage resultant the discrimination suffered by worker.

It is always good to say that it will be up to the employee who invokes non-compliance with the duty of reasonable accommodation to bear the burden of proving the existence of a post compatible with the depreciation of his working capacity.

7. In particular, it follows the understanding of STEINMETZ, Wilson (A vinculação dos particulares a direitosfundamentais. São Paulo: Malheiros, 2004), which supports the prima facie precedence of fundamental rights of personal content over private autonomy, imposing the argumentative burden on the employer in favor of prevalence of its directive power. Such an understanding is in line with the protection principle.

Finally, we must never forget that, in addition to a possible indemnity for moral damages resulting from the discrimination suffered, the employee who sought accommodation, but did not find it, also will can submit to the court a demand aiming obtain reparation for material damages produced from the denial of his request. To better understand the situation, an illustration is needed:

Imagine that an employee of the administrative sector of a health insurance company has communicate to your employer, in writing, the fact of being the one to live with his grandmother more than 80 years old. Consider, also, that this same employee has also demonstrated the wide possibility of carrying out his bureaucratic work in home office, without any prejudice to the performance always showed in face-to-face activities.

Suppose that the aforementioned employee, on the basis of the employer's reasonable accommodation duty, has requested, in writing, to change the face-to-face work regime for teleworking.

See the text of the letter, which can serve as a suggestion for similar situations:

Dear Mr. Manager.

Considering the fact that I am the only one to live with my grandmother, who is over 80 (eighty) years old (see attached copy of identity) and multiple pathogenic comorbidities that affect her immune system (see demonstrative medical reports), and taking into account that my face-to-face work, developed in hospital units, makes me a vector of an accentuated risk to health and to her life, considering the pandemic of the Coronavirus, I REQUEST, supported by an employer's duty of reasonable accommodation, during the decreed period of public calamity, that I will be allowed to carry out my work in home office, without any prejudice to the performance shown in the

face-to-face activities and with ample possibility for the company to check and monitor my performance.

reiterate that my grandmother and I live alone together (see attached certificate signed by the building manager) and that the circumstances of my work have raised my concerns and a fair apprehension for her, because the requirement of work face-to-face will lead us - and especially her - to run a manifest danger of considerable harm.

In view of the urgency that the case requires, I will understand that my request was granted, if no response to this message is offered within 48 hours.

Therefore, I will be available to the company and will continue to carry out my activities in full, observing the same working hours, fulfilling tasks with the same performance and offering the service with identical quality.

Certain that I will count on your understanding, I subscribe attentively,

Now consider that, despite not suffer any loss accepting this request, the employer decided deny it under the mere argument that, if he did so, other employees would feel discriminate simply because they did not live together with an immunodeficient person, which would produce a real babel within the company.

Due to the rejection of his request, imagine that the same employee, although upset, continued to attend the administrative sector of the hospital where were being treated dozens of suspicious and effectively affected people of the Coronavirus, and that, in one of the visits made by relatives of internees, has been infected with COVID-19.

Consider still that this employee, upon returning home, also infected his elderly grandmother and that, due to her multiple immunodeficiency situation, she died of respiratory failure produced precisely by the Coronavirus that the employee wanted to avoid.

Now, the company, due to the violation of the duty of reasonable accommodation, would possibly be inserted in civil liability claim with a high possibility of conviction. Indeed, it would not lack material and immaterial damage and neither the causal link necessary to worker initiate the process with a view to the payment of compensation in front of the Labor court. The refusal to comply with the request, made in writing, for reasonable accommodation would undoubtedly be an important demonstration of the employer's guilt and his failure to accommodate a situation that would not cause him an undue hardship.

6. Conclusion

As was said in the course of the text, the employment relationship is characterized, as a rule, by the power given to the employer and by the observable subjection in the condition of employee. It is precisely for this reason that the relationship under analysis here becomes fertile ground for discrimination based on the most diverse reasons, includingthe worker immunodeficiency in the times of the Coronavirus. Thus, if the worker, due to his immunity deficit, has a well-founded fear of exposing himself to the risk of contamination and of eventual death by COVID-19, his request for that employer consider his personal condition will also represent the promotion of the social right to work.

However, as the employer's directive power undoubtedly understands the prerogative of organizing work, including, eventually, measures that

restrict the autonomy of the worker, it became imperative to clarify the position in which the employer is placed in the face of the need of its employees. Thus, it was necessary to investigate how the employer should behave in the face of the requests of immunodeficient employees to have their working conditions changed and are accommodated to their need for self-preservation.

This article defends the thesis that, regardless of the existence of an express legal norm, the employer has a duty to accommodate the needs of its immunodeficient employees and to change their working conditions, aiming at minimizing the risk of infection by COVID-19, as long as this does not, of course, imply an "undue hardship" on the operation of the employer's business.

Likewise, it is sustained here the thesis that it is important that the company is a place in which citizenship can be fully exercised up to the limit where there is no a undue hardship in the conduct of business. Thus, as long as it is considered natural - and even understandable - that the immunodeficient worker seeks nothing more than to preserve his life, it is notorious the fragility of any argument that rejects the attribution of such duty to the employer based on the idea that its acceptance could result in a break in equality in the workplace. The inequality between the immunodeficient worker and the others justifies the different treatment, based on the understanding that the equality rule also consists in treating unequally the unequal to the extent of their inequality.

The present article also concludes that the insertion of the disabled person - including the person with immunodeficiency - in the company demands, in fact, a positive conduct of the employer that, although it represents at first sight an unequal treatment, meets the principle of equality, as far where the inequality that exists between workers with disabilities (including immunodeficiency within this scope) and those who

are not is striking.

Finally, it was highlighted in the text that the removal of vulnerable employees from contact with the external public, their relocation in reserved physical spaces of the company and, ultimately, if possible and viable, the adoption of a teleworking system, would be undoubtedly the most important forms of reasonable accommodation in the time of Coronavirus.

In final lines, the text draws attention to the fact that the refusal to reasonable accommodation may come to constitute discrimination on the basis of disability or, in a broad sense, of employee's organic vulnerability.

Article 2 of the Convention on the Rights of Persons with Disabilities - with possible analogical application in favor of any employee with immunodeficiency - is very clear in including in the definition **the refusal of reasonable accommodation** in the definition of "Discrimination on grounds of disability".

In addition to a possible indemnity for moral damage based on discrimination, this article also stresses that there will be in favor of the employee who intended the accommodation, but was not get, the possibility to postulate in front of the Labor court the reparation of the material damages suffered due to the denial of reasonable accommodation.

7. References

GREGORY, Raymond F. *Encountering religion in the workplace:* the legal rights and responsibilities of workers and employers. Ithaca, New York: Cornell University Press, 2001

JOVER, Adoración Castro. *La utilización de signos de identidad religiosa en las relaciones de trabajo en el derecho de Estados Unidos.* Madrid: Servicio de Publicaciones de la Facultad de derecho – Universidad Complutense de Madrid, 2005

MARTINEZ, Luciano; POSSIDIO, Cyntia. *O trabalho nos tempos do Coronavirus*.

São Paulo: Saraiva, 2020

STEINMETZ, Wilson. A vinculação dos particulares a direitos fundamentais. São Paulo: Malheiros, 2004.

VICKERS, Lucy. *Religious freedom, religious discrimination and the workplace.* Oxford and Portland, Oregon: Hart Publishing, 2008.

VIVES, Juan Martín. *La "acomodación razonable" de las prácticas religiosas en el ámbito laboral. Su posible aplicación al Derecho Argentino.* Buenos Aires, Sup. Const. 2012 (junio), 28/06/2012, 1 - LA LEY2012-D, 828.

12

COVID-19 human social drama and economic losses: the opportunity to reform the fiscal systems

MARIO JORGE LIMA

CONTENTS: 1. Introduction; 2. The Unfortunate Human Losses; 3. Material Losses, Economic Crash, Opportunity for Reforms; 4. The Ordinary Taxation; 5. The new Taxation; 6. Final Remarks; 7. References.

1. Introduction

The pandemic spread by the coronavirus (covid-19) reachs across all continentes, scares the human societies and paralyzes common daily activities, with progressively declining reflexes on economic operation, beyond the intensive overloading on some specific sectors such as health services, security, cargo transportation and even funeral services.

The pandemic started in the early days of 2020 in Asia, has already consumed the first quarter of the year, and it is still not possible to guarantee when it will be controlled, since, despite the reduction of contamination in China and the hopeful forecasts for August in most of western countries, there is no way to ensure that, after the relaxation of distance and social isolation measures, new successive waves of worsening contamination will not resume worldwide.

Furthermore, the pandemic does not appear to have fully affected the countries of Latin America and Africa yet, with their impoverished populations, and WHO [1] remains expressing its fears for the spread of the virus in those regions, where the fragility of the human contingents vulnerable by social inequalities , depressed by concentrated housing conditions, weakened by miserable conditions of nutrition, and lacking economic and material resources to meet special demands such as cleaning and food, tend to be heavily affected by contamination, and poorly assisted by public health and social services available.

It should be noted that the pandemic also accentuates the immanent and growing social inequality in developed countries too, where there are sharp amount of homeless people or living in precarious and crowded housing [2] , as well as the contingents of underserved refugees and other vulnerable populations.

At the moment, expectations to face the pandemic remain only the personal hygiene and social distance controlled by governments, and the quest to apply large-scale clinical tests, in order to outline a quantitative and spatial dimension of contamination, necessary to determine routines and action map, while scientific teams from across the world make efforts in the elaboration or use of existing medications and treatments, to control the effects of the new disease.

Beside the health and social drama, the process of economic decline is accentuated and will require important interventions by national governments through economic recovery programs, which should be comprehensive and differentiated by sectors of activity, and who may also determine changes in the tax structure of nations, which has been claimed

1. World Health Organization
2. Santos, 2020

for some time in developed and emergents countries. In this article, we intend to analyze the opportunities to carry out a tax reform that improves the dynamics of economies affected by the pandemic crisis.

2. The unfortunate human losses

The most significant losses are the human lives mown by the respiratory disease caused by the coronavirus and which extend through the famillies that are directly affected by these rapid deaths of people able to a full social life, which, in addition to emotional loss, it can deprive families of their main sources of material support.

The second type of distressing human loss consists of the contagion of health professionals exposed to contamination by the virus, and who are struck or temporarily removed from their jobs because of the disease, causing even more suffering in those who need their care and emotional affect to fellows who remain in the direct effort to treat and control patients with the disease.

This drama overcomes difficulties even in war situations where health professionals receive special attention even from international conventions, and the sacrifice character of this service rendered at that moment, elevates these professionals to the level of the heroism of the Chernobyl firefighters.

Indeed, there hasn't been such pandemic since the early 20th century, 100 years ago, with the so-called spanish flu caused by the influenza vírus. The situation highlights the speed with which the current pandemic spreads, the ease of contamination and the lethal danger. Above all, the pandemic is spreading rapidly just because of the globalized world we live today, marked by the intense movement of people, where the virus travels by plane.

At this time, the way to reduce human losses is to disseminate the use of tests to size, segregate and treat the affected population, and thus facilitate the reduction of collective procedures of isolation and social distance. In addition, seek ways of clinical treatments for the effects of the disease according to knowledge acquired in the treatment of other diseases with the same effects as SARS and MERS.

This sad situation just fits the sensible three-stage action plan proposed by billionaire philanthropist Bill Gates [3], which calls as a short-term action the large-scale testing of populations to design the effective and potential extent of the pandemics, as a medium-term action the production or adaptation of effective drugs and treatments to assist those infected and prevent people at potential risk as health workers, and as a long-term action, the vaccine, when future waves of virus attacks can be prevented.

The search for safe medicines and vaccines to attack and prevent coronavirus should not be expected in the medium term, because they are products to be provided with guaranteed results, that is, the dissemination and commercialization of pharmaceutical products of this type demands reliability of results, which takes place only when a great majority of treatments with these products are successful, otherwise there is a great risk of financial loss and credibility for suppliers.

It is worth remembering that other contagious diseases caused by viruses affected humanity during the 20th century, such as measles, which causes death, and polio, which causes disability. These diseases were controlled by vaccines, but the development of these vaccines took decades, like the polio whose virus was identified in 1908 but the vaccine only appeared in 1957, and measles whose virus was identified in 1954 and the vaccine became useful only in 1963.

3. Bill Gates tem um palno detalhado para nos tirar da crise da saúde, 2020.

It should be noted that the nature of the contaminating agent can cause additional difficulties, as in the case of the influenza virus, which has developed several strains and hence requires a multiple vaccine, which in turn does not prevent other strains from appearing through genetic mutation. Others viruses are resilient and multifaceted, such as HIV, for which there is still no complete drug or treatment, despite its identification 30 years ago. Others viruses are recurrent and persistent like HSV (herpes simplex) and HPV, which are neutralized but not eliminated, causing dangerous relapses and reduce immunity to other diseases.

Thus, the long term currently estimated at two years, in fact, may be much longer than the hopeful expectations [4] , until the coronavirus becomes just another disease.

The test is also a problem because its use on a large scale is justified only with a reliable and fast result, which demands plenty of material, personnel and laboratory equipment, but the investment in its production requires few risks, since its failure does not interfere in the result of the treatment to be applied to the contaminated people.

3. Material losses, economic crash, opportunity for reforms

Beside the human losses come the material losses brought by the economic brake resulting from the isolation and social distance procedures forced by governments, in attempt to reduce contamination and hospitalization caused by the spread of the coronavirus. The isolation procedures has resulted in the partial paralysis of national economies and global business, which has severely affected even the most powerful economies, as reported by the international media.

4. Amigorena, 2020

Only China recorded GDP losses of 6.8% in the first three months of the year 2020, the USA decreased 4.8% in the first quarter, Japan has already had a 7% drop in the last quarter of 2019 and the pandemic should record technical recession. The World Economic Forum predicts a 7% drop in the eurozone's GDP in 2020 and a 2.5% decline in global GDP.

3.1. The Economic Recovery Programs

Currently, the governments efforts are focused on controlling the pandemic in their territories and it is still not possible to estimate safely the effects of the relaxation of isolation procedures and the gradual resumption of economies, since populations may once again be affected by new and contamination waves [5].

The next step will be the measures to recovery the national economies and the dynamics of global business, and for this purpose, several economic teams are already drawing up plans to help harmed companies and people and encourage the resumption of business chains.

This planning shall need comprehensive and transnational recovery programs, especially in integrated territories such as Europe, where it is recommended that the general lines of action should be taken in solidarity [6] by the governments to promote a collective egalitarian recovery instead of seek concurrent national recoveries.

Thomas Piketty [7] points out the opportunity to realize deeper actions that lead to a new stage of global growth and wealth, because the current crisis exposes the violence of social inequality and concentration of wealth that has been accentuated in the last decades, including in developed

5. Massad, 2020
6. Habermas, 2020
7. Piketty, 2020

countries, due of ideologies against to governamental interventions in the economy.

The main ideas of broad economic recovery programs for Europe range from the European Stability Mechanism (ESM) [8] implementation alternatives, to maintain financial flow for small and medium companies and covid expenses, the eventual launch of the 'coronabond' that intends to issue financial bonds guaranteed by all eurozone countries, or a new 'Marshall Plan' for general economic recovery, as suggested by European Commission President Ursula von der Leyen.

The United States maintains, for now, the use of financial mechanisms to guarantee market liquidity and currency supply, as seen in the recent interventions carried out by the FED to stabilize US treasury bills, through renegotiation of short-term loans, securitization operations and easing of regulations for banks financial assets [9], following the script outlines since the 2008 crisis of using FED Money to finance tax cuts [10], as suggested by accredited experts.

In fact, the Marshall Plan used for Europe's recovery after the Second World War and its causes are not reproduced in the current geopolitics [11], but it was not the only one in those times. Other economic recovery plans of that period contained a similar program such as the New Deal in the United States and the Schacht Plan in the pre-war of Nazi Germany. Other plans for different situations may also provide inspiration for part of the recovery, such as the Brady Plan in the 1990s, to reorganize the foreign debt of Latin American countries, and the IMF and ECB plans to renegotiate debts during the PIIGS [12] crisis.

8. Sanders, 2020
9. Younger, Cheng, Wessel, 2020
10. Bernanke, 2016
11. Macshane, 2020
12. Portugal, Ireland, Italy, Greece, Spain

However, the investments to be made signal more then trillion dólar or euro dimension, as can be estimated from the figure used by the USA to end the financial crisis of 2008. It means astronomical amounts that cannot be supported by only few countries, but calls for coordinated action for total western economy of developed countries, who should aim to maintain vitality and avoid indebtedness or dependence on China.

Such a comprehensive plan challenges the ability of governments staffs to take a gather leading role because the world economy should be reshaped, with no guaranteed glimpse of the effective outcome, considering the immeasurable turbulende caused by the change.

Indeed, along the last 5 years the relationship between developed economies has been marked by rivalry divisions, as can be seen in Germany's resistance to accept a collective plan for Europe, drawing on self-referential nationalism [13], and the isolationist tradition of the Anglo block (US-UK) where is located the true leader of the western economy, who always intends to prevail in the composition of joint solutions or prefers not to participate.

Other G7 countries, such as Canada and Japan, will remain with the Anglo block, as the tradition, and emerging countries will be invited to join the efforts through the G20, without major benefits, so they agree or contribute according to their interests.

For now, the US leadership is dependent on the 2020 electoral race between Democrats and Republicans, that will certainly induce important changes in the country's economic and geopolitical guidelines, with immediate effect on the economic recovery planning. It means that comprehensive decisions will only arrive in 2021 and the only immediate

13. Habermas, 2020

economic action will be tax relief in several countries [14] , including the USA [15] .

Anyway, the implementation of comprehensive economic recovery programs such as the Marshall plan will demand large participation of corporate corporations and private funds, since most of the accumulated global wealth is in private funds, as shown by economic studies [16] ..

Otherwise, the failure of recovery programs may result in the loss of hegemony of western economy in the world, forcing key players to deal with a treacherous and hostile business environment manipulated by China, and, above all, to lose control of their own financial market, which will not be so easily maintained with agreements like petrodólar.

3.2. The Opportunity to Tax Systems Reform

The models of broad economic recovery programs include intervention in taxation as feasible tool to stimulate the economy and to relief on business in general, and can seize the opportunity for more ambitious reform [17] , not only adjusting the distortions of current taxes, but also reshaping the structure of tax systems with the creation and increase of new taxes, more suited to assist the economic dynamics and reaching new sources of wealth [18] , while traditional taxes are removed because of their inadequacy for the new business formats.

The call for change and even reform the means and targets of taxation in the western economy has been mentioned since the beginning of the 21st

14. Enache, Asen, Bunn, DeHart, 2020
15. AICPA
16. Piketty, 2014
17. Rodriguez, Alonso, 2016
18. Schmidt, 2007

century [19], even by the OECD, to facilitate the real productive economy and to follow the dizzying technological innovations, which significantly alter the flows and concentration of wealth.

Thus, there is studies and proposals for taxation on digital transactions, digital services and financial transactions [20], and further find resources to supply environmental preservation investments, that are expected to be deployed in the short or medium term in Western economies and now may be the appropriate opportunity.

Indeed, approaching the subject of tax is never comfortable for private business entrepreneurship because the taxation is always an undesirable cost to companies and citizens, and tax collection procedures demand bureaucracy and additional tasks for management teams. However, taxes reality in the free business world is unequivocal, and even China establishes its citizens' duty to pay taxes [21]. Therefore, the only useful reaction of entrepreneurs and managers to toil with it is planning, to avoid the adverse effect on prices and profits, and complains for more simplicity and lower taxation.

The tax systems are usually an outstanding matter in the firm's current activity and, when it means business crossing over the territories border lines, the diversity of the systems becomes a great challenge. Above all, the change of the tax systems is not a problem available for corporate power, but a hindrance to be faced by government staff, always slower then private enterprise, and limited by the public political circumstances.

The possible reform of the tax systems to be carried out by the economic recovery programs should try to replace the old ordinary taxes

19. Paul, Wahlberg, 2002

20. Biron, 2012

21. Constitution law of People's Republic of China, Article 56. UNESCO.

and advance for a new schedule of taxes adapted to the current business designs and transactions.

4. The ordinary taxation

The ordinary taxation has developed along the history of the economies of the human communities and can be classified in two types of taxes, according to the actual taxpayer who supports the burden: 'direct' taxes and 'indirect' taxes. Direct Tax is that demanded from anybody who must to pay it and Indirect Tax is a tax paid by someone that intends to shift the burden to someone else, normally, included on the sale price.

Using this division, we can perceive that the 'indirect taxes' incur over the trade operations, they are suitable to burden the dynamic wealth, while the 'direct taxes' are suitable to burden the static wealth. Today, nations uses the two kinds of taxes to collect funds from citizens and firms, to support government expenditure and tasks.

The income tax, perhaps, is the most well-known of taxes. The income tax aims the revenue earned by the taxpayer, the citizen or the company, generally over a year, and it accepts diversified concepts and range of 'income' and 'revenue' description from country to country. The income tax works as an example of direct tax.

Another old specie of tax is the property tax or land tax. This tax is normally charged on real estate property and it means that somebody, who owns a plot of land or a building, is obliged to pay this tax annually. Companies as well citizens are obliged by this tax. It's an example of direct tax.

Nation's tax systems usually collect taxes over the 'gift or death transfer' that is charged on change of the owner of property or goods, in

the family succession on account of death. Gift taxes avoid tax evasion by free transfer before the death and it is an example of direct tax, too.

Import taxes charged on border commerce among the nations, keep outstanding interest for the world commerce. Through these taxes, nations protect their inside market and their work and production systems against the foreign commodities. These taxes use two alternative systems, charged on foreign products entering the country or on domestic products sold to outside. The border taxes are indirect tax.

The consumption taxes are indirect tax too. These kinds of taxes are imposed over the transfer price of the commodities sold or over the service price that was given. Sometimes, the tax charges the sum of the goods and services, when sold together. Sales tax is normally demanded only once at the end sale to the definitive consumer and consumption tax is usually assessed, step by step, throughout the production of a commodity.

Watching these types of taxes, it is easy to perceive that, all of them have an impact on business, but the most important taxes for commerce are import taxes and consumption or sales taxes, that overload just on trade operation.

5. The new taxation

Taxes mean transfer of private wealth for the government availability, justified by the public demand satisfaction. Therefore, taxes can be extracted only where wealth exists, and business is usual activity which keeps and increases wealth. Contemporary tax systems of the nations are sustained on the geographic extension of their legal jurisdiction, the space and the people which is feasible to collect taxes. However, the methods and sources for taxation throughout the history are changing in according to economic dynamic progress.

The change of taxation methods accompanies the change of economic facts expressive of wealth that makes them susceptible to taxation. It means, when an economic operation emerges as latent wealth, the taxation system includes it in the attainment of one of its taxes. On the other hand, when the old economic sources lose their wealth potential, the state seeks other sources to obtain revenue.

5.1. Changing Ordinary Taxation

In the past, wealth was based on the land and its products. Along the predominance of agrarian economy, taxation was aimed at land properties and their production. Later, with the development of commerce, the progressive taxation emerged on the income and the production/ consumption commodities circulation. The predominance of taxation incurred over that goods and affected local economic events. After the arising of industrial society dynamic, the economic activity was shared among several stages and moved wealth power to the sales and revenues.

The transformation of economic structures leads to the transformation of the ordinary taxation before acting. Border taxation, for instance, tends to be standardized and it will be performed only with regulatory intention, because the border lines will become less rigid, to favour the free market.

The income tax tends to be harmonized by countries in order to avoid double taxation and maintain equivalent incidence to guarantee a standardized balance of return on investments.

The consumer taxes tend to be reduced by automated bureaucracy and their standardized rates to facilitate economic activities.

An example of this attempt to simplify the US tax system, that contains a tangle of interstate and local taxes on sales and consumption

in force in the country, which has many local jurisdictions qualified to collect taxes. The most important harmonization initiative is the operation of SSUTA - Streamlined Sales and Use Tax Agreement in 2005, and last amended in December 2018 [22] , which seeks to simplify and standardize state and local taxes through the premises of centralized management in state administration, uniformity of local tax bases, standardization and simplification of rates, and the formulation of rates for internal and external sales to states.

5.2. Digital Taxes

The globalized movement of electronic media shortens the dimensions of time and space. In the space dimension this movement means the interconnection between new places, new markets and new business opportunities. In the time dimension, the electronic medium allows greater agility in conducting business.

However, the increase in e-business, especially in its use in international trade, should occur with taxation similar to that of conventional business, to avoid undue competitive advantages for electronic commerce, as recommended by the OECD [23] .

Guided by this sensible guideline, developed countries [24] have gradually introduced taxes for both digital transactions and digital services, and the longstanding commitment to free business done electronically has been overcome in Europe, and the USA [25] the digital taxation aim the digital goods and digital services.

22. streamlinedsalestax.org
23. Guidelines, 2014
24. Bunn, 2018
25. Maguire, 2013

Beside, the taxation of internet use in the US follows the free of taxes enacted by the Internet Tax Freedom Act, became permanent in 2016.

5.3. Environmental taxes coming to stay

Taxes are also used to support environmental preservation actions. An example of local effect tax is verified in the garbage taxes required by the municipalities, an example of regional effect tax is is the use of income tax grades of companies that carry out actions of environmental preservation in their activities, and an example of global effect tax is the CO2 rate to dicourage carbon emission.

The environmental taxes, in general, are not used for the same purpose of traditional taxes on wealth facts, that is, the intention of the public power does not consist in the simple collection of resources for the maintenance of institutional activities, as it happens along the taxation history. The intention of environmental taxes, is to intervene in social and economic activities in order to encourage the achievement of environmental objectives and sustainable development.

5.4. The Financial Taxation

Today, the main feature of wealth is mobility. The best expressive wealth is the bonds, stocks and on line funds transfer using the electronic framework [26] . The faster circulation of goods or their holder certificates keeps the same importance for economic development and world wealth improvement. Therefore, taxation framework certainly must change to accompany the technical mobility advance, such occurred at former ages of the economic history. Nowadays, there are some proposals to inlude

26. Schneider, 2013

new taxation methods [27] in the economic scenario to reach that new dynamic wealth.

The Tobin Tax was perhaps, the pioneer theoretical proposal to reach the wealth mobility, defending the institution of a international standard tax, to discourage the transfer of short-term funds across borders, motivated by financial speculation, inducing economic unbalance, currency instability and business insecurity. The Tobin Tax would operate through a percentage rate on the financial transfer across borders, and would be collected by the country from which the asset withdrew. The experiment was attempted in Sweden between 1984 and 1990 without success.

Another idea is 'Unitary Profits Tax' [28] . This proposal suggests that the accounting analysis to determine where the revenues are obtained, and so, apportion the profits on taxation in according the true place of revenue realization.

Meanwhile, imposing taxation on financial transactions will only be advantageous if it replaces a large part of ordinary taxation, as well as intend the APT Automatic Payment Transactions Tax proposal in USA.

There are some proposals and experiences of imputation of taxation on financial transfer in Latin Amercia, especially in Brazil, which maintained between 1997 and 2007 a tax on financial transactions, the CPMF - Provisional Contribution on Financial Transactions. The tax was criticized for representing additional burden on the traditional tax system, where the requirement of other taxes remained in the same business transactions. In Brazil there is still a tax on financial transactions charged on financial investments, loans, foreign exchange, insurance, acquisition of securities

27. Wilmott, 2017

28. Mold, 2014

and other banking business.

However, for the modern requirements: efficiency, equity and effectiveness, the possible taxation of financial transactions would be very appropriate and important. Efficiency is obtained by the automatic electronic extraction, equity can be obtained by variable rate's bands and effectiveness is granted by the unlikely tax evasion. So, the fiscal policy and the compliance costs of firms are helped and the dynamic of non-financial business, freed from tax load and collection procedures, would be impeled for development and integration.

Business integration, began through commodities with free acceptance and simple barter, after, metallic exchange, following, by standard metallic money, finally, the paper money. Since a few decade, the current demands the businesses substitution of payment with paper money by simple electronic transfer between two bank accounts.

Nowadays, the 'plastic money' by cards that ease the electronic transfers and files, or QR codes, and the encrypted electronic currency (bitcoins) [29] . This latest innovation, the cryptocurrency, not yet admitted by national financial systems is also subject to taxes [30] .

It is impossible, at the updated business world, to think about any return on that evolution, even to the recent abandoned paper money or gold exchange standard. Today, it is not feasible even to print on paper all the world money accounted in electronic files. So, the usual business today is gradually dependent on the magnetic and electronic framework and the effect of the fund transfer binded on trade operation is unalterable.

The main problem could be 'bank secret' and the government access

29. Hougan, 2019

30. Langer, 2017

in funds privacy. But, this question is reduced now, because of financial terrorism's sustaining, the drug organization's operations and the corruption prevention, that demand the enforcing over 'tax havens' and the funds movement revelation.

The control of that collection does not need the access on funds files, but only the comparative rate between bank funds operations and accounts with tax amount collected. The taxpayer will be the account owner and he needs only to control his amount movement and to reckon the rate of tax extracted from his funds. The bank needs only to transfer the electronic register of tax collection for the government account, and to maintain the list of amounts sent. The banks would be authorized to cash the service.

6. Final remarks

The experience of the pandemic of the covid -19 will cause an important review of the functioning patterns of health services worldwide, led by the actions of developed countries, which will inevitably require that mechanisms and resources for rapid mobilization remain available in cases where threats of similar new events arise.

Another consequence will affect medical research structures in favor of longer-term permanent programs, with extensive coverage over potential pathogens and not guided by the viability of the investment. It will also be necessary to compose prevention structures and abbreviated procedural techniques, which can be mobilized in cases where health incidents require intensive efforts to prevent the spread of contagious diseases.

In the economic sphere, the programs of economic recovery of unmistakable implantation cannot be deflated by ideological differences or nationalist preferences, since the hegemony of the western economy

and its currencies will be in risk, because they had been battered by the greed solutions taken ahead since the 2008 crisis, and facing China's powerful and cohesive adversity, which does not need the West to become the hegemonic power.

In its turn, the mobility of wealth is a notable feature of business today and advises the change on traditional taxation methods to keep tax base and revenues of the governments. The electronic tool is expanded inside any business, but it is specially essential in digital services and financial transactions, where electronic files and assets keeps the register of accounts and transfers.

The change of economic facts expressive of wealth demands change in the taxation mode too. Thus, considering the current dependence of the general business from electronic means, the imposition of taxes on financial and digital transactions to replace ordinary taxes reveals a significant and attractive opportunity to simplify the tax systems and help the sucess of economic recovery programs.

7. References

AICPA. State tax filing guidance for coronavirus pandemic. SSTGB-Streamlined sales tax governing board, Inc. https:\\streamlinedsalestax.org May, 2020. <acess 05.05.2020>

AMIGORENA, Santiago. La covid-19 à long terme nesera qu'une maladie de plus. Paris: Le Monde, 28Avril2020.<acess 05.01.2020>

BERNANKE, Ben S. What does the FED heve left? Part 3: helicopter money. www.brookings.edu. April, 11th.2016.<acess 05.01.2020>

BIRON, Carey L. US financial professionals call for transaction tax. www.globalpolicy.org. June 2012.<acess 05.01.2020>

BUNN, Daniel. A wave of digital taxation. Taxfoundation.org. November, 2018.<acess 05.01.2020>

ENACHE, Cristina. ASEN, Elke. BUNN, Daniel. DEHART, Justin. Tracking economic relief plans around the world during coronavirus outbreak. Tax Foundation. April, 22.2020.<acess 05.01.2020>

GATES, Bill. Bill Gates tem um plano detalhado para nos tirar da crise da saúde. Entrevista ao site Vox reproduzida no site www.uol.com.br/tilt. Gabriel Francisco Ribeiro 29.04.2020.<acess 05.01.2020>

HABERMAS, Jürgen. A solidariedade é a única cura. Entrevista a Nicola Truong. Reprodução Le Monde e La Republica, 12.04.2020. Instituto Humanitas Unisinos 13.04.2020.<acess 05.01.2020>

HOUGAN, Matt. How bitcoin is taxed. www.forbes.com. June, 2019.<acess 05.01.2020>

LANGER, Matthias. Taxation of cryptocurrencies in Europe. Cryptoresearch. report. December, 2017.<acess 05.01.2020>

MACSHANE, Denis. Covid-19 and the Marshall Plan illusion. www.theglobalist.com April, 2020.<acess 05.01.2020>

MAGUIRE, Steven. State taxation of internet transactions. Cogressional Research Service. May, 2013.<acess 05.01.2020>

MASSAD, Eduardo. Coronavirus pode ser só 'ensaio' de uma próxima grande pandemia, diz médico e matemático da USP. Entrevista a Monica Manir, BBC News Brasil, 05Maio2020<acess 05.05.2020>

MOLD, Andrew. A proposal for unitary taxes on the profits of transnational corporations. CEPAL REVIEW, 82. 2014. www.cepal.org./en/publication/11008 <acess 05.01.2020>

OECD International VAT / GST Guidelines2014, www.oecd.org/ctp/consumption.<acess 05.01.20>

PAUL, James A, WAHLBERG, Katarina. Global Taxes for Global Priorities. www.globalpolicy.org. March, 2002.<acess 05.01.2020>

PIKETTY, Thomas. Economist Thomas Piketty: coronavirus pandemic has exposed the 'Violence of Social Inequality'. April, 30th.2020, by Ian Schwartz, site realclearpolitics.<acess 05.01.2020>

PIKETTY, Thomas. O Capital no século XXI. Rio de Janeiro: Ed Intrínseca, 2014.

RODRIGUES, Susana Ruiz. ALONSO, Rosa Cañete. Time do tax for inclusive growth. UN/ECLAC-OXFAM. Santiago: March, 2016.<acess 05.01.2020>

SANDERS, Lewis. ESM, coronabonds and 'Marshall Plan': How the EU could

manage the coronavirus fallout. DW, April, 07th.2020.<acess 05.01.2020>

SANTOS, Boaventura de Souza. A cruel pedagogia do vírus. Coimbra: Almedina, 2020.<acess em 05.01.2020>

SCHMIDT, Rodney. The currency transaction tax: rate and revenue estimates. www.nsi-ins.ca. October, 2007.<acess 05.01.2020>

SCHNEIDER, Howard. A new European tax on financial transactions is set to go global. www.globalpolicy.org. February, 2013.<acess 05.01.2020>

The Economist,V 414, N8923, Still Kicking, p. 57-58. London, Jan 31th-Feb, 6th. 2015.

WILMOTT, Paul. How a Financial Transaction Tax would benefit us all. World Economic Forum.www.weforum.org/agenda/2017 May 2017<acess 05.01.2020>

YOUNGER, Joshua. CHENG, Jeffrey. WESSEL, David. How did covid-19 disrupt the Market for US Treasury debt?. www.brookings.edu. April,30th. 2020 <acess 05.01.2020>

13

Inclusive dynamics of technological development in pharmaceutical patents: the mexican and argentinian experiences in a pandemic reassessment [1]

MARTA CAROLINA GIMÉNEZ PEREIRA

MIRTHA LORENA GIMÉNEZ PEREIRA

CONTENTS: Introduction; 1. Brief background on the epidemiological behavior regarding covid-19; 2. The inclusive dynamics of technological development; 3 compulsory licenses; 3.1. The case of compulsory licenses in the health field. the international experience and the mexican case; 4. The relevance of the notion of health within public policies: public production of medicines (ppm) and redefinition of the concept of bureaucracy in the health system; 5. Therapeutic inovation, medical research with patient contribution and the medicines producing units (MPU) in Argentina; 6. Conclusions; 7. References.

Introduction

A Manifesto on solidarity in the world emphasizes the situation of COVID-19 in a homogeneous way, "*from any corner of the planet*", regardless of our race, religion or nationality, stating that "*the time has come to take on*

1. Translation from Spanish to English by Samantha Albuquerque de Mello, Law Student at Catholic University of Salvador – UCSal. Member of the Research Group in Intellectual Property and New Technologies – PINTEC at the Federal University of Bahia – UFBA. E-mail: a.mellosamantha@gmail.com. Lattes: <http://lattes.cnpq.br/7488843869718692>.

our world community as an opportunity to build a new movement ... where respect, solidarity and the pursuit of well-being represent the future. It is necessary to start together and from now on, a common manifest and as a human community…". The intention is none other than union in solidarity, in order to achieve a more protective, respectful, amiable and happy union, understanding our own differences and similarities [2].

The goals traced in the document list, in order of importance: *"The health of the planet is the main priority and that of the human being, the second. 2) Each country must be capable of building health facilities ... as well as having a preventive medicine network capable of providing one health team for every 400 inhabitants. 3) All financial and economic benefits should be allocated to the following absolute public priorities: food, home, education and health".* [3]

In the words of French indoctrinators, the pandemic is a testament to political and economic organizations' ability of to confront and endure it. The COVID-19 pandemic is a global health, economic and social crisis of an exceptional level, little comparable to other historical occurrences, at least in the last decades, and it tests the ability of such political and economic organizations to confront a global problem linked to individual interdependencies, that is, the most elementary aspects of social life. It is like a dystopia that became reality. Dardot and Laval, as exponents of Gallic sociology, express with those words that what we are experiencing hints at what awaits humanity in the coming decades if these structures do not change rapidly and radically [4].

The situation is clear and intellectual property, as will be analyzed in this article, is a tool of this Manifesto. It, through its legal institutes, its

2. DELUCHEY, Jean-François, « Manifeste de Solidarité Globale », in report from the Séminaire du Groupe d'études sur le néolibéralisme et les alternatives (GENA) du Laboratoire de sociologie, philosophie et anthropologie politiques SOPHIAPOL, Université Paris Nanterre. Electronic publication not available from LAVAL, Christian, April 8, 2020.

3. *Vide* previous note.

4. DARDOT, Pierre; LAVAL, Christian, « L'épreuve politique de la pandémie », internet edition in <https://blogs.mediapart.fr/les-invites-de-mediapart/blog/190320/l-epreuve-politique-de-la-pandemie>, accesed on April 10th, 2020.

public policy of research and development – specifically public production of medicine as well as private production – and along with its monopoly exceptions – namely, compulsory licenses also determined in law – makes it possible to advocate for and accompany the evolution of human health of our times within a system of priority goals that should have always been placed above all to the service of men, in clear coexistence with the *ut supra* paradigms expressed, which now emerge more than ever.

1. Brief background on the epidemiological behavior regarding covid-19

In nature, exists what is called an "ecological triad", composed by three members that maintain themselves in a constant natural balance: the infectious agent, the environment and the host. When any of the axes that maintain this balance is broken, an infectious process is ignited; in this case, it is said that this process occurs in the host, which can be any living being such as humans or animals.

Some ancestral and cultural habits inherent to customs of some countries suggest that the beginning of this pandemic happened at the city of Wuhan, China. Thus, an imbalance in the ecological triad, necessary for the start of any infectious process, enabled an initial endemic that presented itself in the form of a contagion focus, quickly leading to an outbreak in a specific area, for a certain amount of time. Due to the infectious agent's characteristics of high infectiousness and virulence, the endemic quickly began to acquire typical epidemic characteristics, that is, the presence of a high number of infection cases in a defined geographical area. Subsequently and in current times, that epidemic assumed characteristics of a pandemic behavior, as it spread and expanded to practically all continents.

With adequate epidemiological surveillance and action measures, it is expected that the endemic can be contained and stopped in its initial stages. However, at present, the exacerbated behavioral characteristics of the disease and its causative agent require prompt, accurate and joint measures by countries in conjunction with conscious actions in their populations.

2. The inclusive dynamics of technological development

Entering the field of medicines, relevant concepts of "production" and "supply" are found within a current trend of doctrine that outlines an idea of inclusive innovation. From this, we will analyze and trace what we call "Inclusive Dynamics of Technological Development", that is, a development dynamics aiming to include all the sectors partaking in the production chain of invention within an integrated and articulated policy, characterized by the premises of efficiency of public and private spending in the production of medication within a very broad set of strategies, as well as the guarantee of access to health in equal conditions and in a timely manner and the no less important distribution of drugs within of a geographical area drawn up as part of the aforementioned policy.

The ultimate benefit of the Inclusive Dynamics of Technological Development, according to the international experience emphasized in this section in the Argentine experience, a country with high indices of public production of medicines (hereinafter PPM), is that ultimately there is an instrument of public policy capable of remedying and homogenizing, in terms of adequate functioning, access to health on equal conditions to all sectors of the population.

In order to better understand what it means to "soften" industrial property rights with the goal to satisfy public policies, we will now cover

the concept of mandatory licenses, also called compulsory licenses, a tool that is already better known within the aforementioned branch of law, which has gained relevance in important events of comparative law (Brazil, among the countries to be cited).

3. Compulsory licenses

Compulsory licenses can be understood as the permission given by a government to manufacture a product or a patented procedure, or to import it, without the patent owner's consent. This is one of the flexibilities in the protection of patents contemplated in the Agreement of the World Trade Organization (WTO) on Intellectual Property, that is, the Agreement on Aspects of Intellectual Property Rights related to Trade (TRIPS) through the Doha Declaration of 2001 and its subsequent amendments, which soften the right to protection held by drugs, by recognizing countries' rights to take measures to protect public health and promote access to medicines, as claimed by developing countries and non-governmental organizations.

In a strict sense, through the license agreement, the licensor authorizes a third party - the licensee - with or without consideration, to exploit a protected invention, through the bestowal of a right of personal nature (JOLIET, 1982, p. 294). Normally, the governmental authority will grant the license to companies or people other than the patent owner, allowing them to utilize the patent rights in order to manufacture, use, sell or import the protected product or procedure without necessity of the owner's authorization.

Despite the fact that this international law figure has been observed and consistently adopted by the majority of the countries adhering to the WTO under its domestic legislation, its implementation has generated controversies over the whole scope of health in the event of public health emergencies.

A priori, the same doctrine is not unanimous regarding the debate if its legal nature is a mere tolerance or a consideration that assures an economic taste for the licensor. A posteriori, numerous questions regarding its effectiveness arise, creating uncertainty for both the licensor and the licensee, fears that even have terminology problems. On the other hand, once the contract has been celebrated, the success cases are scarce, the jurisprudence is insufficient to provide solid and long term solutions and, in consequence, the general principles of contractual termination erroneously and irremediably return, as means to fully solve the concrete problem that was presented.

In fact, the specialized doctrine indicates the case of license contracts and technology transfer as a typical case of uncertainty in the private sector due to the lack of regulations directly applicable to the theme (DE LAS CUEVAS, 1994, p. 12) that are also adequate and correct in the sense of adjusting to the reality of the country in question, in addition to the requirements of the international legal framework, which only stipulates basic concepts in a similar and homogeneous way for all members of WTO. Comparative law offers limited solutions regarding the subject, because specifics of the economic structure of the country where the contract is celebrated must be taken into account.

3.1. The case of compulsory licenses in the health field. the international experience and the mexican case

In September 2009, a proposal was formulated in Mexico to reform the second paragraph of article 77 of the Industrial Property Law, aiming to shortening the term stipulated for the resolution of the licensing by the authority. That initiative did not prosper.

The article had already been reformed in 2004 and previously in 1994. The initiative to reform the second paragraph of article 77, made by Senator Adolfo Toledo Infanzón, of the "Partido Revolucionario Institucional"

(PRI), dated of September 8, 2009, reads as follows: In cases of serious illnesses that are an emergency or threaten national security, the General Health Council will make the declaration of priority care, on its own initiative or at the written request of national institutions specialized in the disease, which are accredited by The Council, in which the need for priority attention is justified, this will order the granting of public utility licenses. The declaration of the Council being published in the Official Gazette of the Federation, the pharmaceutical companies may request the granting of a license of public utility to the Institute and the latter shall grant it, within a period not exceeding three days, from the date of presentation of the application before the Institute [5].

The proposal's intention was to grant greater applicability to the figure of compulsory license due to a national emergency and specifically for serious illnesses, reducing the term presented in the current second paragraph of the aforementioned article.

The proposal established a maximum term of 3 days for the authority to rule, leaving the pertinent part of the current provision with no effect: ... as soon as the case warrants it, in accordance with the opinion of the Health Council General within a period not exceeding 90 days ... and which also requires the party to be audited. It should be noted that the current text strangely does not include the phrase expressly proposed in the reform initiative, that in the aforementioned cases the objective of the order will be the "granting licenses for public utility" [6].

The reasoning gave special importance to the health emergency caused by the outbreak of the influenza virus, also warning about the presence of other diseases such as dengue, which prevent the possibility

5. *Cfr.* Second paragraph of article 77 of the current Industrial Property Law.

6. *Cfr.* article 77 of the current Industrial Property Law.

of importing patented drugs under the mandatory licensing regime, not counting with sufficient manufacturing capacity at local level, a repeated problem in developing countries.

It is worth noting that the essential license requirement should always obey the requirement established by the first paragraph of the aforementioned article 77 of the Mexican Industrial Property Law [7]. It says that the licenses must be granted in case of national security emergency that motivated its celebration, excluding case of orphan drugs, which we will deal with further in the chapter on Medicines Producing Units (hereinafter MPU) in PPM.

Within the meager international experience regarding compulsory licenses, in the context of comparative law we will review the special relevance of the Brazilian experience with the retroviral called Efavirenz, produced by the pharmaceutical company Merck Sharp & Dohme, considered nowadays as the most effective way to fight HIV / AIDS infection. Despite the heavy criticism coming from the International Federation of the Medicine Industry, the government of Brazil, through its then President in office Luiz Inácio Lula da Silva, based on the information provided by the Industrial Law 9279/96 in its controversial article 68, which regulates "compulsory licenses", imposed such flexibility on the patent of the aforementioned drug because it considered it "legitimate and necessary, of national interest and too expensive", allowing, with a broad support of the Congress, importation of the generic produced in laboratories in India certified by the World Health Organization (among these generic laboratories are Ranbaxy, Cipla and Aurobindo), that are

7. For its importance, here is its transcription: "For causes of emergency or national security and while they last, including serious illnesses declared of priority attention by the General Health Council, the Institute, by declaration to be published in the Official Gazette of the Federation, will determine that the exploitation of certain patents is do it through the granting of public utility licenses, in the cases in which, if this is not done, the production, provision or distribution of basic satisfactors or medicines for the population is impeded, hindered or made more expensive".

working with the generic production of Efavirenz and selling it at lower prices, oscillating around one third of the product originated in the patent owner's laboratory.

While each unit of the drug Merck costs 1.65 USD in Brazilian territory, the cost per generic unit manufactured in India is 0.44 USD. The treatment per patient has a cost per year of 580 USD using the same medicine patent, while the treatment using the generic reaches the sum of 165 USD per year, perhaps less than a third, which implies savings of 240 million USD up to the year 2012, when the patent expired. Before imposing a compulsory license on the drug, Lula remained in negotiations with the titular laboratory; the North American government also participated in those. Brazil declined the second offer of marketing the product for 30% less the originally fixed price because it seemed insufficient, since the reduction by 60% was considered the minimum. In negotiations, Lula proposed the price tag paid by Thailand, which is 0.65 USD for each 600-milligram drug pill. Merck did not accept this proposal.

The United States denounced article 68 of the Brazilian patent law to the WTO on the grounds that it was a violation of TRIPS, requesting from such organization a Conflict Resolution Panel, in order to settle the differences between these two countries. Brazil defended itself before the WTO, alleging the measure was justified because of the high number of AIDS or HIV patients, which could be considered a national health emergency. Finally, on June 25, 2001, the United States withdrew the panel request from the WTO.

President Lula's measure sought to ensure treatment for close to 75 thousand patients in Brazilian territory. The country, with over 500 thousand cases of AIDS / HIV, was one of the biggest purchasers in the world of said medicament. In the government's opinion, beyond demonstrating

the failure to negotiate the price of the patent drug, the measure became rather a test of the government's firmness to bet on the generic market in a national emergency situation.

It should be noted that the argument has also been supported by the treatment currently administered to near 200,000 people, who receive from the State a set of 17 medicines, 8 of which are manufactured in Brazil within the framework of a government program to fight the disease. This program has received countless praises internationally.

As a precedent, as early as the 1999 World Assembly, Brazil had exerted strong pressure for the World Health Organization (WHO) to improve its efforts to control drug prices around the world and to evaluate the impact of WTO patent rules. In April 2001, at the annual meeting of the United Nations Human Rights Commission, 52 votes in favor, 0 against and 1 abstaining (United States) approved the Brazilian proposal linking adequate access to medicines with fundamental human rights. In this regard, the United States considered that such proposal violated international standards for the protection of intellectual property rights. Brazil had already announced in 2005 the breaking of the patent for the active ingredient Kaletra, owned by Abbot Laboratory, but both parties were able to reach an agreement to reduce the price of the drug.

In Efavirenz's case, the license agreement had been carried out in full compliance with the procedure provided for that purpose in the Doha Declaration, which consists of three stages, namely, the negotiation, the declaration of the situation that justifies its use and the payment of royalties to the affected owner, who, in this specific case, agreed on releasing 1.5% of the import value of medications similar to Efavirenz [8].

8. INSTITUTO ESPAÑOL DE COMERCIO EXTERIOR (ICEX), Oficina Económica y Comercial de la Embajada de España en Brasilia, Patentes y acceso a los medicamentos, 2009, internet edition in <http://www.fedeto.es/area_internacional/marco_politico_datos_brasil.pdf>, accesed on 15th October, 2019.

On the other hand, Thailand also announced the imposition of a compulsory license so that patients with AIDS or HIV in this country could receive treatment with the generic Efavirenz produced in laboratories in India, a country known in recent times for its high production of generic drugs.

Non-governmental organization Doctors Without Borders uses almost all medicament produced in India to treat patients with AIDS or HIV in 30 countries around the world.

Thailand maintained its position despite all the pressure from the pharmaceutical industry, setting precedents in the matter of health emergencies. Subsequently, this country also broke the patent for two other drugs also useful in the treatment of AIDS and HIV. Other countries such as Canada and Italy have experience in compulsory licenses for pharmaceutical products and in the previous decade, attentions turned to the decision of the President of Ecuador, Rafael Correa, to issue a decree that completely repeals pharmaceutical and agrochemical patents of multinationals that are effective in this country, with the exception of cosmetic patents, so that all medicines are produced in the country and, thus, can achieve their lower prices, considering that health is a priority issue humans rights comes before "the pocket of transnational corporations", with emphasis on drugs that fight AIDS or HIV and cancer.

Given the balance of the current situation of compulsory licenses between the domestic and the comparative scope, it appears that this figure presents several positive aspects, among which are, besides the access to medicines at a lower price, the promotion of competence and the development of national production. It is imperative to remember that a country that does not recognize the patents of transnational pharmaceutical companies will not count on the presence of these laboratories in its territory and, consequently, it will find itself short of essential medicines of high

complexity produced exclusively by them, due to their technology and broadening experience in research and development. Emerging laboratories of local production do not have such assets. On the other hand, with such measure and by not recognizing the patents, local pharmaceutical industry will not be able to import the necessary pharmaceuticals for manufacturing medicines. All this without mentioning the sanctions that the country could be subject to by the WTO and the impossibility of being able to supply medicines to an entire country solely with national production, which, in the case of Ecuador, currently accounts for only 22% of the total sales. In fact, it is noted that an excessive growth of generic drugs would require in the future a comprehensive control by the Ministry of Health (JALIFE DAHER, 2005, p. 332).

Ecuador's case, with such a decree, could be seen as an exceptional one, and even a violation of the norms foreseen for the celebration of compulsory licenses since, apparently, it does not contemplate the required and prior first stage of negotiation. Moreover, the idea of generalizing the measure for all patents on medicines produced by non-local laboratories is absurd. In the very least, this is not the function of the figure of compulsory license, which is granted for each specific case in order to attend to certain health problems, for a certain time, being subject to the government's justification of the situation that motivates it. The position that this country assumes, through its ruler, must be framed in another figure - nonexistent, certainly - that justifies a total suppression of the protection conferred on any non-local inventor of a drug. It is the extreme case of the defense of public health, which is detrimental to the promotion of research and development, the only tools capable of promoting technological advancement and better medicines.

4. The relevance of the notion of health within public policies: public production of medicines (ppm) and redefinition of the concept of bureaucracy in the health system

In the early 2000s, modern French doctrine warned that the practice of medicine had mutated in its nature with the development of new medical specialties and the multiplication of the number of specialists, i.e., doctors. Parallel to that, due to such growth and to increasingly sophisticated methods of care, following the advancement of science and technology, the volume of consumption and medical spending has also increased significantly. From this, comes the conclusion that the extension of social protection to the entire population has been the mainstay of this evolution: the word "health" has now become one of the main sectors of activity in countries (ADAM & HERZLICH, 1994, p 36). In other words, within health policies, the results reveal that in recent decades such policies have been oriented towards expanding investment in increasingly complex medical technologies. This decisive kick in this evolution carries, at the same time, the same weight as the diversification of medical professionals and, as a result, denotes a progress in medical science, as pointed out.

Within this context, the notion of "medicalization of society", as the French sociologist calls it, closely relates to the creation of laws on social protection. In the 20th century, this notion transpired in France the fact that the "medical model" is imposed as the definition, taking responsibility for numerous contemporary public problems, such as alcoholism, mental illness, drugs. So, in a medicalized society, the health sector becomes relevant as a factor in state public policies and, among the great questions about the various mechanisms and programs to be developed or emphasized within the established health policies, there is the new trend of PPM.

Now, before delving into the main concerning subject of this article, it is necessary to establish the place occupied by the concept of "bureaucracy" in the public health administration, merely by way of reference.

Typical of regulatory systems, some countries such as Brazil refer to bureaucracy as a prominent feature within the administrative process, even if in a pejorative sense, mainly referring to public power, and with its own negative, ancient characteristics of paternalism, nepotism, and corruption. However, and paradoxically, the historical evolution of the administrative process emphasizes the importance of implementing adequate bureaucratic processes in order to guarantee the maintenance of service quality standards in the structures of private and public institutions. The bureaucracy is, in a broad sense, a means of perfecting administrative policies capable of reaching levels of efficiency compatible with modernity (CAMPOS & PRESOTO, 2002, p. 5).

To exemplify the function of the aforementioned word bureaucracy within the context of health, it is noteworthy that health policy as a guideline emanating from the public power must encompass, among other main functions, the essential one of promoting the structure and operation of the health services system, as established by the Pan American Center for Health Planning, belonging to the Pan American Health Organization (PAHO), its founding members being Argentina, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Honduras, Nicaragua , Panama, Paraguay, Peru, Uruguay and Venezuela [9] . As early as 1972, the document named Topic 27, which covers the program of the same Center Program, established as its objective: "Strengthen PAHO's advice to governments to improve their health planning processes." It lists among its activities: "Research program with the countries: ... analysis of the relationship

9. PAN AMERICAN HEALTH ORGANIZATION (PAHO), **Subject 27** of the program's project, 1972, internet edition, p. 8, <http://iris.paho.org/xmlui/bitstream/handle/123456789 >, accesed on April 8th, 2020.

between health and the rest of the socioeconomic system" [10] as a kind of domestication of the program, in accordance with the reality of each country-member and its own regulations.

Moreover, referencing the Center itself, one of its own established responsibilities is that of "Research", setting the need to support its expansion in developing countries in order to elaborate or boost planning techniques to complete and improve the health planning methodology, through the study of areas or variables that should be considered and the countries that could develop them, while also giving regular advice until the final phase of said research.

Furthermore, the "Information" section appears where it is stated that all information referring to health planning and the evolution of the respective processes in the American countries and other regions must be collected, promoted in its collection and analyzed. It is conspicuous to emphasize that it must be disseminated and publicized in order to promote, guide and motivate planning processes and political and administrative decision levels, informing and stimulating those who carry out the direct work of health planning, emphasizing the known field experiences [11].

Within the Center's Program, it is possible to perceive the possibility of contemplating the Inclusive Dynamics of Technological Development as a national public health policy. This will be further explained in detail, but it can be anticipated in this section that it can be described as a real need for public and integral health policy, deserving to be adequately formulated and reflected in its planning, its project and its resulting programs, those of which must must be coordinated with its execution in mind. This dynamic

10. PAN AMERICAN HEALTH ORGANIZATION (PAHO), **Subject 27** of the program's project, 1972, internet edition, p. 9, <http://iris.paho.org/xmlui/bitstream/handle/123456789/5924/49176.pdf >, accesed on April 8th, 2020.

11. PAN AMERICAN HEALTH ORGANIZATION (PAHO), **Subject 27** of the program's project, 1972, internet edition, p. 13, <http://iris.paho.org/xmlui/bitstream/handle/123456789/5924/49176.pdf >, accesed on April 8th, 2020.

is reflected in this proposal through MPU at the public level, that is, the PPM.

Returning to the term bureaucracy, used in a broad sense, it will therefore be used to encompass and describe everything that implies the comprehensive layout of a country's health system, with its regulations and organizational charts, its social and even political context, in an ample sense. Strictly speaking, we are facing the bureaucracy of a health system limited to an effective implementation of the aforementioned MPU.

5. Therapeutic inovation, medical research with patient contribution and the medicines producing units (MPU) in Argentina

In this field, the sociologist Renée Fox emphasizes the possibility of the patient exercising an active role in contributing to the development of medical science in the hospital, being a reference to this practice the use of test medications in hospitals such as cortisone or cyclosporine, active substance commonly used in organ transplantation. Her theory outlines that the doctor is developing research inside same hospital, through his practice with the patient and within what she calls "dilemma between experimentation and therapy", because it is about testing the effectiveness of their innovation through their patient with a double intention: to cure the disease or at least treat it, and also to carry out his own research work with the patient, who goes from being a passive subject to being an active one from the moment he or she knows that the procedure not only pursues his or her cure or relief, but also the very progress of science.

Regarding medicines in hospitals and their relationship with technological innovation through their protection title, namely patents, the function proposal of an MPU has a social nature in the sense that, as is

pointed out by Oro Boff, a patent system can also become an instrument for social foment and poverty eradication, because we are facing a role considered within a broader set of nationwide political measures for technological development and obeying the same interests of the country. Indeed, as she sustains, spreading the culture of safeguarding intellectual property rights, prioritizing the availability of resources above all and guaranteeing the necessary infrastructure, seems to pave the way for thinking that intellectual property can contribute to social and economic development (BOFF, 2009, p. 57).

Intellectual property, an important mechanism for protecting inventions born from the human intellect, is a distinguished area of material property, and nowadays it counts with an important stimulus when linked with collective utility, here included the inventions (BOFF & LIPPSTEIN, 2015, p. 30).

As an implementation factor of the previous issue, in specific, as well as of the general issue here discussed, it is necessary to acknowledge a theory developed in Argentina, a country notoriously concerned about the PPM theme. This theory was recently carried out in this country by specialists in social studies of technology and innovation whose proposal is to approach PPM with a focus on organizational technology and public policy, as well as an instrument that seeks to promote processes of inclusive development. This article is based on the works of Santos, Guillermo y Becerra, Lucas, researchers at the Area of Social Studies of Technology and Innovation at the Institute of Studies on Science and Technology (Universidad Nacional de Quilmes).

Talking about inclusive development means highlighting the science and technology of a region and subsequently of a country, but in spheres that go beyond the private or mixed. We refer to PPM through the articulated work of public laboratories and hospital pharmacies, and, already at the

dawn of the year 2000, public hospitals had distanced themselves from the secular image of being the home of the poor to becoming a prototype institution of modern societies, a privileged place of reference in medical research and in the development of advanced techniques (ADAM & HERLIZCH, 1994, p. 37).

In Argentina, the issue goes beyond the already complex provision of medicines. Rather, it focus on strategic points currently raised by the health sector, which include: integrated public policy, as a factor in itself and as a factor capable of developing transformative public policies within of the Inclusive Dynamics of Technological Development; the efficiency of public and private spending generated in the production of medicines, which implies a very broad set of strategies to be developed; a guarantee of equal access to health for all; the innovation factor with its challenge of generating dynamics with a view to inclusive development. From these four mentioned strategic points raised by the health sector, specialists bring three questions: what is the capacity of the current public sector that produces drugs and what is the relationship between health policy and the drug market? As a factor of implementation and transformation, is it possible to configure a comprehensive PPM policy that coexists with private purchasing? Under what conditions can a PPM public policy unfold concrete dynamics of inclusive development? (SANTOS & BECERRA, 2016, p. 251)

The general sector should observe both the complexities and the opportunities presented by this panorama.

The private system and the pharmaceutical industry that it develops are heavily criticized for owning the general budget for the health sector and the supply chain of medicines, but this is not seen as the root of the problem: if there were a greater budget scenario intended for innovative

efficiency by the MPUs and their concrete and efficient participation within the legal and regulatory apparatus, a large part of such private hegemony could be more open.

The outstanding question that must be asked is: what is the importance of the medicine market and its dynamics within the concept of health spending? There are many well-known inconsistencies such as the decrease in purchasing capacity in contrast with the upward permanence of selling capacity, which is a product of the structure and design of the health system, and its consequent dynamics.

The secret for the inclusive development of the MPU seems to lie in the concepts of Budget + MPU Efficient Participation, not regarding the eternal discussion between the generic and the innovative sector, but against the appropriation and hegemony of the entire private pharmaceutical sector in the public budget, consequently giving a very high concentration in national and transnational private laboratories with the consequent price control determined by the dominant sector, resulting in the formula: the higher the concentration, the greater the price control.

MPUs make up the PPM sector and are subdivided into public laboratories and hospital pharmacies. Both types produce medications, but are aimed at a different audience since the latter directs their products generally for the patients being treated in the hospital they belong to, while public laboratories supply medications to an extensive network of health systems throughout the country, covering public or private hospitals, plans and programs for public provision of medicines or even retail in pharmacies.

It is also noteworthy that, among these laboratories, it is possible to find those depending on the national government, national universities, provincial governments and even municipalities (SANTOS & BECERRA, 2016, pp. 255-259).

Analyzing what is contemplated in the study of hospital pharmacies, in the PPM, based on the Argentine Ministerial Resolution 286/08, health is a right and medicine is a social good, being the State's function to guarantee accessibility and organize the distribution of resources and the use of installed capacities and human resources [12] .

Faced with the problem of access to medicines as a product, for example, during a crisis, it is always the public effort, through the State, that ends up responding with alternative measures, for example, the free provision of medicines at a certain time and place over concrete plans. Once economic activity has recovered, private production is rises again, increasing its turnover (price control correspondingly) and, consequently, the public sector fully absorbing the crisis (SANTOS & BECERRA, 2016, pp. 257-258). As an example, there is 2002 Remedy Plan, when medicine was provided free of charge for 15 million people.

There are several proposals and they would belong to another chapter, but among the possible solutions, the MPUs are particularly relevant. To guarantee of timely supply of medicines, although part of the public agenda and an obligation of the State, does not necessarily imply that these goods must be purchased from the private sector. Consequently, public policy should be linked to a production strategy and not a direct purchase strategy, as Argentinian scholars explain.

The elaboration of medicinal specialties by public laboratories would end the radical thought of the nature of the medicine as a marketing asset, transforming it into a social good (SANTOS & BECERRA, 2016, p. 281), but there are realities of the MPU regarding: production and supply, patents

12. HOYA, Arturo, en informe del XIV Congreso Argentino y II Congreso Sudamericano de Farmacia Hospitalaria, Producción Pública de Medicamentos: una respuesta a los medicamentos huérfanos pediátricos, internet edition in <http://www.aafhospitalaria.org.ar/imagenes/descargas/2014-6-b.pdf>, accesed on September 7th, 2019.

as an obstacle to the development of MPUs [13] ; an adequate mechanism for the distribution of medicines prepared by these MPUs; existing MPU number; local technology and infrastructure. Regarding this last point, the fact that the active ingredients or pharmaceuticals are acquired abroad due to a lack of sufficient local production, signifies a limited inventive capacity by the national importing industry of those formulas, which continues to be a significant obstacle, reflecting a reduced dynamic of local innovation.

In this regard, the authors argue that the cause of the problem might be the rationalities that prevail in science and technology policy programs, in the sense that they respond to the linear model of innovation. Thus, although there are a significant number of medical research institutes and centers, they still have low levels of interaction with production units. Here, laboratories belonging to national universities receive an important exception, but the country's total production of innovative dynamics is not happier because of such exception. (SANTOS & BECERRA, 2016, pp. 261, 262).

It is important to highlight that, among the main active ingredients prepared by Argentinian public laboratories, the most commonly used are painkillers and antibiotics, as well as drugs used to treat chronic diseases. The province with the largest supply of publicly produced medicines is Santa Fe, followed by San Luis and Río Negro [14] . In 2014, financing was planned by the National Agency for Scientific and Technological Promotion at the Argentinian Sectorial Fund (FONARSEC) for the PPM for tuberculosis, integrating the joint work of Universidad del Litoral and the

13. MPU manufactures medicines with active ingredients with expired patents and they face restrictions to develop medicines with a current patent. The patent protection argument is broadly developed in the current doctrine but in the case of the PPM, there is a big gap, in which case the production - and the distribution of the medicine referred to by the MPU - must consider exceptional policies, especially if we are dealing with orphan drugs, through appropriate legal provisions such as compulsory licenses, a subject that still lacks coverage in the legislation when it comes to implementing them.

14. MINISTERIO DE ECONOMÍA Y FINANZAS PÚBLICAS DE LA SECRETARÍA DE POLÍTICA ECONÓMICA Y PLANIFICACIÓN DEL DESARROLLO, SUBSECRETARÍA DE PLANIFICACIÓN ECONÓMICA, DIRECCIÓN NACIONAL DE PLANIFICACIÓN REGIONAL – DIRECCIÓN NACIONAL DE PLANIFICACIÓN SECTORIAL, Complejo Farmacéutico. Serie Complejos Productivos, June 2015, internet edition in <http://www.economia.gob.ar/peconomica/docs/Complejo_Farmaceutico.pdf>, accesed on April 8th, 2020.

Pharmaceutical Industrial Laboratory S.E. (LIF), covering strategic areas and vacancies in the provision of priority medicinal specialties [15].

6. Conclusions

Within the Inclusive Dynamics of Technological Development, the PPM carried out through its MPUs play a preponderant role in the public agenda of a country's health sector. When it is implemented in a coordinated and positive manner, it carries with it the aims of inclusion as well as social and productive development, and it is an instrument of integrated public health policy and innovative dynamics with the capacity to manufacture for a specific demand, obeying a pre-established national territorial layout, with demographic limits. This way, it fulfills the function of ensuring adequate provision and distribution to the population and developing orphan drugs.

Seen as what it is, and despite the unfortunate reality of the problems inherent in the necessary legal bureaucratic apparatus, PPM is an option for the traditional private preparation of medicines, carried out by national laboratories, with active ingredients that are accessible in the national and foreign market. It is a tool that carries in itself the noble action to which a drug is destined, which is none other than complying with a social asset of access to health beyond its heritage value, without detracting from the intellectual property of the patent held by the medicine, which can be achieved with an Action Plan that foresees not only timely legislative mechanisms but above all, strategies for implementation in the different cycles of pharmaceutical innovation seen in its different phases and until reaching the hands of the final consumer.

15. MINISTERIO DE CIENCIA, TECNOLOGÍA E INNOVACIÓN PRODUCTIVA, Nuevo financiamiento para producción pública de medicamentos tuberculostáticos, Presidencia de la Nación, 2014, internet edition in <http://www.mincyt.gob.ar/noticias/nuevo-financiamiento-para-produccion-publica-de-medicamentos-tuberculostaticos-10181>, accesed on September 7th, 2019.

Finally, regarding the first topic that we have addressed, we assume the positive task that a well-structured, celebrated and fundamentally granted compulsory license would entail respecting any of its two main purposes, namely, to save a national emergency situation or the to guarantee its effective exploitation if it has not occurred in the territory. However, it should not be forgotten that many times the promotion of this figure conceals a hidden purpose, in the sense that, beyond guaranteeing public health, what it really seeks is to facilitate and sponsor the illegal copying of medicines, which constitutes a blatant attack on intellectual property that translates into a lack of legal security for the investor, causing a great discouragement to foreign investment in any country in the world.

In times of a pandemic outbreak, a reassessment of the primordial function of intellectual property in its artery that connects it with access to health is what this work attempts to outline. The plural and articulated participation of all the gears integrating the subject and, in short, of all the actors of innovation, becomes essential for obtaining immediate and certain results.

7. References

ADAM, Philippe; HERZLICH, Claudine, **Sociologie de la maladie et de la médecine**, 2010, Saint-Jean de Braye: Editorial Armand Colin, Imprimerie Nouvelle, 1994.

ARGENTINA, **Ley 26.688 del 29 Junio de 2011**. Que declara de interés nacional la investigación y producción pública de medicamentos, materias primas para la producción de medicamentos, vacunas y productos médicos. Internet edition, <https://www.argentina.gob.ar/normativa/nacional/ley-26688-185041/stexto>, accesed on April 10th, 2020.

BOFF, Salete Oro, **Propiedade intelectual e desenvolmiento. Inovação, gestão e transferência tecnológica**, Passo Fundo: EDIMED, 2009.

BOFF, Salete Oro; Lippstein, Daniela, **Biodiversidade, conhecimentos tradicionais y propiedade intelectual: um caminho para o desenvolvimiento sustentável** in Boff, Salete Oro et al. (Coord.), **Novas Tecnologias, Direitos intelectuais e Políticas públicas**, Vol II, São Paulo: Letras jurídicas, 2015.

CAMPOS, Juarez De Queiroz; PRESOTO, Lúcia Helena, **A burocracia na administra**ção de saúde, São Paulo: Editora Jotacê, 2002.

DARDOT, Pierre; LAVAL, Christian, **L'épreuve politique de la pandémie**, in Les invités de Médiapart, internet edition, <https://blogs.mediapart.fr/les-invites-de-mediapart/blog/190320/l-epreuve-politique-de-la-pandemie>, accesed on April 10 th, 2020.

DE LAS CUEVAS, Guillermo Cabanellas, **Contratos de licencia y de transferencia de tecnología en el derecho privado,** Buenos Aires: Editorial Heliasta, 1994.

HOYA, Arturo, en informe del XIV Congreso Argentino y II Congreso Sudamericano de Farmacia Hospitalaria, **Producción Pública de Medicamentos: una respuesta a los medicamentos huérfanos pediátricos**, in XIV CONGRESO ARGENTINO Y II CONGRESO SUDAMERICANO DE FARMACIA HOSPITALARIA. 2014, Santa Fe (Argentina), internet edition, <http://www.aafhospitalaria.org.ar/imagenes/descargas/2014-6-b.pdf>, accesed on September 7th, 2019.

INSTITUTO ESPAÑOL DE COMERCIO EXTERIOR (ICEX), Oficina Económica y Comercial de la Embajada de España en Brasilia, **Patentes y acceso a los medicamentos,** año 2009, internet edition, <http://www.fedeto.es/area_internacional/marco_politico_datos_brasil.pdf>, accesed on October 15th, 2019.

JALIFE DAHER, Mauricio, **Régimen de licencias obligatorias de patentes en el campo de la salud**, in Sesma, Ingrid Brena (Coord.), **Salud y Derecho. Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados**, Ciudad de México: Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México, 2005.

JOLIET, René, **Der Patentlizenzvertrag im belgischen und französischen Zivilrecht**, Munich: GRUR Int., 1982.

MÉXICO. **Ley de la Propiedad Industrial del 27 de junio de 1991**. Ciudad de México: Cámara de Diputados, internet edition, <http://www.diputados.gob.mx/LeyesBiblio/pdf/50_180518.pdf>, accesed on April 10th, 2020.

MINISTERIO DE CIENCIA, TECNOLOGÍA E INNOVACIÓN PRODUCTIVA. **Nuevo financiamiento para producción pública de medicamentos tuberculostáticos,** Presidencia de la Nación, 2014, internet edition, <http://www.mincyt.gob.ar/noticias/nuevo-financiamiento-para-produccion-publica-de-medicamentos-tuberculostaticos-10181>, accesed on September 7th, 2019.

MINISTERIO DE ECONOMÍA Y FINANZAS PÚBLICAS. Secretaría de Política Económica y Planificación del Desarrollo. Subsecretaría de Planificación Económica. Dirección Nacional de Planificación Regional - Dirección Nacional de Planificación Sectorial, **Complejo Farmacéutico. Serie Complejos Productivos**, June 2015, internet edition, <http://www.economia.gob.ar/peconomica/docs/Complejo_Farmaceutico.pdf>, accesed on April 8th, 2020.

PAN AMERICAN HEALTH ORGANIZATION (PAHO), **Subject 27** of the program's project, 1972, internet edition, <http://iris.paho.org/xmlui/bitstream/handle/123456789/5924/49176.pdf?sequence=1&isAllowed=y>, accesed on April 8th, 2020.

SANTOS, Guillermo; BECERRA, Lucas, **La producción pública de medicamentos como parte de una estrategia de política de salud integrada. Reflexiones y recomendaciones para el desarrollo inclusivo en salud**, in Thomas, Hernán y Santos, Guillermo (coordinadores), **Tecnologías para incluir. Ocho análisis socio-técnicos orientados al diseño estratégico de artefactos y normativas**, Agenda CTD, Buenos Aires: IESCT y Universidad Nacional de Quilmes, Editora Lenguaje Claro, 2016.

14

Fundamental rights, Judiciary and covid-19 pandemic

SAULO JOSÉ CASALI BAHIA

CONTENTS: 1. Introduction. 2. Impacts on the functioning of the Judiciary. Legal framework (Law 13,979 / 2020). Teleworking. Virtualization. Suspension of Deadlines. Public admissional exams. Corporate recovery and bankruptcies. Videoconferences. Children and adolescents. Prison establishments. Domestic violence. 3. Impacts on the judicial function. Restrictions on fundamental rights. Health. Differentiated allocation of resources. Emergency aid. 4. Post-pandemic impacts. Control of bids and contracts. Prince Fact and Change in circumstances theory. Taxes. Expansion of virtualization. Teleworking and budget gain. Teleworking and productivity gains. Budget cuts. Efficiency. 5. References.

1. Introduction

The pandemic related to COVID-19 had a profound impact on the functioning of the Judiciary and the judicial function. This impact was not short-lived, and is expected to show long-term effects. This text intends to analyze these issues.

2. Impacts on the functioning of the Judiciary

Legal framework (Law 13,979 / 2020). Law 13,979, of February 6, 2020, providing for the measures that may be adopted to face the public health emergency of international importance resulting from the coronavirus responsible for the 2019 outbreak (art. 1), foresaw the possibility of

occurring, within the period defined in an act of the Minister of State for Health (on the duration of the public health emergency referred to in the Law, which cannot exceed that declared by the World Health Organization, cf. art. 1, §§ 2 and 3, 2, I and II, and art. 3):

> a) isolation: separation of sick or contaminated persons, or luggage, means of transport, goods or affected postal parcels, from others, in order to avoid contamination or the spread of the coronavirus;
>
> b) quarantine: restriction of activities or separation of persons suspected of being infected by persons who are not sick, or of luggage, containers, animals, means of transport or goods suspected of being contaminated, in order to avoid possible contamination or the spread of the coronavirus ;
>
> c) determination of compulsory medical examinations, laboratory tests, collection of clinical samples; vaccination and other prophylactic measures; or specific medical treatments;
>
> d) epidemiological study or investigation;
>
> e) exhumation, necropsy, cremation and corpse management;
>
> f) exceptional and temporary restriction, according to technical and reasoned recommendation by the National Health Surveillance Agency, for highways, ports or airports entering and leaving the country; and interstate and intercity transportation;
>
> g) requisition of goods and services from natural and legal persons, in which case the subsequent payment of fair compensation will be guaranteed; and
>
> h) exceptional and temporary authorization for the import of products subject to health surveillance without registration with Anvisa, as long as they are registered by a foreign health authority; and provided for in an act of the Ministry of Health.

There was the Declaration of Public Health Emergency of National Importance - ESPIN, conveyed by Ordinance no. 188 / GM / MS, on February 4, 2020.

It was stipulated that these measures could only "be determined based on scientific evidence and analysis of strategic health information" and should "be limited in time and space to the minimum necessary for the promotion and preservation of public health" (art 3, para. 1), and they could not violate "the dignity, human rights and fundamental freedoms of the people" (art. 3, par. 2, III). All persons should be subject to compliance with the measures provided for (art. 3, par. 4), and it was the responsibility of federal authorities and local managers to practice them (art. 3, §§ 5, 6 and 7) [1].

Teleworking. Thus, under the allegation of containing the expansion of contamination, preserving the lives of users of the justice system, avoiding the overload of hospital services reported by the press as occurred in other countries, and considering the forecast that public services and essential activities should not cease (art. 3, §§ 8, 10 and 11), the Judiciary has embraced teleworking, with magistrates and public servants being removed from the buildings where they operated and the closing of forums and courts.

The normative framework of this measure corresponded to Resolution CNJ 313, dated 3.19.2020, which sought to standardize the treatment by the courts on the issue, avoiding "legal uncertainty and potential damage to the protection of fundamental rights" that the existence of conflicting criteria regarding the suspension of forensic expedient could generate [2].

The Extraordinary on-call Duty regime, for the whole Judiciary in the country, was then established to standardize the functioning of judicial

1. *Cf. BAHIA, Saulo José Casali, Pandemia, relações privadas e eficácia horizontal dos direitos fundamentais: o caso dos condomínios edilícios. Capítulo de livro in BAHIA, Saulo José Casali (Org.) Direitos e deveres fundamentais em tempos de coronavírus. São Paulo: Editora Iasp, 2020. ISBN: 978-65-87082-00-4.*

2. *https://atos.cnj.jus.br/atos/detalhar/3249. Acess: 06jul2020*

services and guarantee access to justice in this emergency period, with the objective of preventing contagion by the new Coronavirus - Covid-19". The tradition of refusing the administrative action of the National Council of Justice regarding the STF and, in this case (covid-19), regarding the Electoral Justice (which can be explained only by the circumstance of proximity to the municipal elections) was maintained.

Since the provision of jurisdiction is an essential public activity, it should now continue to be given priority in a virtual way, with guaranteed access to magistrates, public agents, lawyers and users in general, through the available electronic means, with a remote service channel to be disclosed by each court, providing for face-to-face assistance only in the absence of a means for remote assistance, and decisions must continue to be drawn up and enforced (art. 3, paragraphs 1 and 2). Teleworking should require a minimum presence of public servants, already "excluded from the presence scale all magistrates, public servants and employees identified as at risk, which includes people with chronic, immunosuppressive, respiratory and other diseases with pre-existing morbidities. that can lead to a worsening of the general health status from contagion, with special attention to diabetes, tuberculosis, kidney diseases, HIV and co-infections, and who have returned, in the last fourteen days, from traveling in regions with a high level of contagion " (art. 2, paragraphs 2 and 3).

The "Extraordinary On-Call Duty" regime was implemented at the same time as the regular forensic hours, and each Court, with the suspension of the face-to-face work of magistrates, public servants, interns and collaborators in the judicial units, to maintain essential services, ensuring minimum :

a) the distribution of judicial and administrative proceedings, with priority to urgent procedures;

b) maintenance of services for the dispatch and publication of judicial and administrative acts;

c) assistance to lawyers, prosecutors, public defenders, members of the Public Prosecutor's Office and the judicial police, in a primarily remote manner and, exceptionally, in person;

d) maintenance of payment services, institutional security, communication, information technology and health; and

e) urgent jurisdictional activities provided for in this Resolution. (art. 2, caput, and par. 1).

Expected until April 30, 2020, the term was extended until May 15, 2020 (CNJ Resolution 314, of April 20, 2020 [3]), after May 31, 2020 (CNJ Resolution 318, of July 7, 2020 [4]), and until June 14, 2020 (PRESI Ordinance) -CNJ 79, of May 22, 2020 [5]). Finally, CNJ Resolution 322, of June 1, 2020 [6] , considering that "some federal states and municipalities are relativizing the rules of social isolation, while others have been facing greater difficulties, even establishing the lockdown regime, in order to prevent a regulation single for all courts in the country "; and that there would be a "need to establish a plan for a gradual return to face-to-face activities, where possible and according to criteria established by medical and health authorities"; admitted the "reestablishment of face-to-face activities" starting with a preliminary stage, which could occur from June 15, 2020, if sanitary conditions and public health care that make it feasible are verified (art. 2, para. 1). In other words, it was delegated to each court to decide on the gradual return to activities, while ensuring social isolation to magistrates and public servants in the risk group.

3. *https://www.cnj.jus.br/wp-content/uploads/2020/04/Resolu%C3%A7%C3%A3o-n%C2%BA-314.pdf. Acess: 06jul2020.*
4. *https://atos.cnj.jus.br/atos/detalhar/3308. Acess: 06jul2020.*
5. *https://atos.cnj.jus.br/atos/detalhar/3326. Acess: 06jul2020.*
6. *https://atos.cnj.jus.br/atos/detalhar/3333. Acess: 06jul2020.*

Virtualization. The main impact that the pandemic had with regard to the functioning of the Judiciary, with teleworking, was the admission of the non-face-to-face mode of continued operation.

The regular judicial on-call duty already had aspects of virtuality, since there was no requirement for the activity in the forum or court environment, by magistrates and public servants, who performed most of the activities in the domestic environment. But there was always the possibility of physical or personal remittance or delivery of legal documents, and the on-call duty was only during the days and times without regular operation of the judicial units.

The electronic process, in any of the hundreds of modalities existing in the country (unfortunately, standardization was not prioritized for some administrations ahead of the CNJ), brought, in turn, a real virtualization experience. But, as on-call duty, there was always the possibility of personal contacts or work in a non-domestic environment.

With the pandemic, the importance and significance of the electronic process increased, and the respective lawsuits were soon re-stablished, as will be seen below, and virtual means became the only viable mean, at first, for the provision of jurisdiction. in times of pandemic. Courts began to encourage the conversion of physical pages into electronics, which was achieved in some judicial units, despite the lack of human and material resources for the task.

Suspension of Deadlines. All procedural deadlines from the publication of Resolution 313 on March 19, 2020 until April 30, 2020 were suspended. This included physical and electronic lawsuits. At first, there was a concern with the adaptation of those involved with the new dynamic of teleworking, and no distinction was made in relation to electronic lawsuits,

which by their nature would not have been paralyzed. A real regime of on-call duty was installed, this time extraordinary, and following the rules of the ordinary judicial on-call duty, established in CNJ Resolution 71/2009.

According to art. 4 of CNJ Resolution 313/2020, during the Extraordinary On-Call Duty Period, the following sujectswere guaranteed:

a) habeas corpus and writ of injunction;

b) preliminary injunctions and precautionary measures of any kind, including within the scope of small claims courts;

c) reports of arrest in the act, requests for the granting of provisional release, imposition and replacement of precautionary measures other than prison, and disinternation;

d) representation of the police authority or the Public Prosecutor's Office with a view to decreeing preventive or temporary arrest;

e) requests for search and seizure of persons, goods or valuables, telephone and telematic interceptions, provided that the urgency is objectively proven;

f) requests for permits, requests for withdrawal of money or values, replacement of guarantees and release of seized goods, payment of court orders, Small Value Requisitions - RPVs and dispatch of deposit forms;

g) requests for family and institutional care, as well as removal;

h) requests for progression and precautionary regression of the prisonal regime, grant of conditional release, pardon and commutation of sentences and requests related to the measures provided for in CNJ Recommendation 62/2020;

i) requests for corpse cremation, exhumation and inhumation; and

j) travel authorization for children and adolescents, in compliance with CNJ Resolution 295/2019.

> l) lawsuits related to social security benefits due to incapacity and assistance with continued provision. (Included by Resolution No. 317, dated 4.30.2020)

The Extraordinary On-Call Duty was not intended to reiterate the request already considered in the original judicial body or in previous on-call duties, nor to its reconsideration or review (art. 4, para. 1).

The suspension provided for in the caput did not prevent the practice of a procedural act necessary for the preservation of rights and of an urgent nature, respecting the provisions of article 4 of the Resolution (art. 5).

The electronic lawsuits (except for the STF and the electoral justice) could again have impulse with Resolution CNJ 314, of April 20, 2020, whose art. 3rd predicted that the procedural deadlines would be resumed, without any kind of escalation, as of May 4, 2020, being prohibited the designation of face-to-face acts. Resolution CNJ 322, of June 1, 2020, also admitted the possible suspension of deadlines in physical cases, as each court decided, "for as long as necessary".

The CNJ created a useful tool to monitor the deadlines in each court, making it available on its website.

Public Admissional Exams. Recommendation CNJ 64/2020 dealt with the suspension of the validity of public admissional exams carried out during the term of Legislative Decree No. 6, of March 20, 2020, as a means of mitigating the impact resulting from measures to combat contamination caused by Coronavirus Sars -cov-2. Previously, CNJ Resolution 313/2020 had already provided that, in ongoing public admissional exams, within the scope of any body of the Judiciary, it was forbidden, whatever the phase to which it was related, to conduct face-to-face sessions. choice and re-selection of services, in notarial and registration competitions, as well as other acts that required the presence of candidates in person.

Corporate recovery and bankruptcies. The CNJ Recommendation 63/2020 addressed the Courts with jurisdiction to judge corporate recovery and bankruptcy lawsuits, suggesting the adoption of measures to mitigate the impact of measures to combat contamination by the new.

Videoconferences. CNJ Ordinance 61/2020 instituted the emergency videoconference platform to hold hearings and judgment sessions in the Judiciary organs, in the period of social isolation, resulting from the Covid-19 pandemic.

Children and adolescents. The Joint Recommendation CNJ / CNMP / MDH / MCidadania 01/2020 [7] , on the other hand, provided for the care of children and adolescents with protective measures of reception, in the context of community transmission of the new Coronavirus (Covid-19), throughout the national territory.

Prison establishments. Special attention was given to those subjected to the prison regime, even given the recognition, in relation to them, of the unconstitutional state of affairs [8] .

Through Recommendation CNJ 62/2020 [9] it was predicted that the risk group for infection with the new coronavirus - Covid-19 comprises elderly people, pregnant women and people with chronic, immunosuppressive, respiratory diseases and other pre-existing comorbidities that can lead to a worsening of the state general health from contagion, with special attention to diabetes, tuberculosis, kidney diseases, HIV and co-infections; the maintenance of the health of persons deprived of their liberty is essential to guarantee collective health and that a scenario of large-scale contamination in the prison and socio-educational systems has significant

7. *http://www.in.gov.br/web/dou/-/recomendacao-conjunta-n-1-de-16-de-abril-de-2020-253004251. Acess: 06jul2020.*

8. *Vide http://www.stf.jus.br/arquivo/informativo/documento/informativo798.htm. Acesso em: 06jul2020)*

9. *https://www.cnj.jus.br/wp-content/uploads/2020/03/62-Recomenda%C3%A7%C3%A3o.pdf. Acess: 06jul2020.*

impacts on the safety and public health of the entire population, exceeding the internal limits of establishments; the need to establish procedures and rules for the purpose of preventing infection and the spread of the new coronavirus, particularly in confinement spaces, in order to reduce the epidemiological risks of transmission of the virus and preserve the health of public agents, persons deprived of liberty and visitors , avoiding large-scale contamination that could burden the public health system. With this, it was recommended to the Courts and magistrates the adoption of several preventive measures to the spread of the infection by the new coronavirus - Covid-19 in the scope of the establishments of the prison system and the socio-educational system.

These measures were complemented by Recommendation CNJ 68/2020 [10] .

Domestic violence. Another theme that deserved special attention during the pandemic period was domestic violence, whose numbers increased due to measures of social isolation and greater intensity of conjugal contact in residential environments. Recommendation CNJ 67/2020 [11] provided for the adoption of emergency measures, during the pandemic, to protect the physical, mental and life integrity of victims of domestic and family violence against women.

3. Impacts on the judicial function

In addition to the impacts of the pandemic on the functioning of the Judiciary, there were also effects on the very function exercised by this Power. New matters, new issues and new approaches have been imposed since the beginning of the pandemic, significantly altering judicial activity.

10. *https://atos.cnj.jus.br/atos/detalhar/3364. Acess: 06jul2020.*

11. *https://www.cnj.jus.br/wp-content/uploads/2020/06/Recomendacao67-2020_17062020_DJE190_19062020.pdf. Acess: 06jul2020.*

Restrictions on fundamental rights. The limitations provided or determined by Law 13,979 / 2020, and exercised at the federal, state and municipal levels, and even inter-individual [12], produced conflicts from the first day they were imposed. The reasonableness of some lockdown measures and restrictions on various activities were brought to the Judiciary as soon as they were established, by those who felt they were harmed or by any legimated.

It is undeniable that some measures were excessive, unreasonable, and others absolutely necessary, appropriate and proportional, considering the balance between conflicting valuable legal principles, such as life and physical integrity (grounds for the adoption of restrictive sanitary measures) and freedoms in general (circulation, professional action, expression, etc.).

Some jurists saw in the limitations, whatever they were, the mark of absolute unconstitutionality, when creating an analogy with the state of siege, which allows only the constitutionally foreseen limitations. According to art. 139, while the state of siege is in force, only measures of obligation to remain in a specific location may be taken against persons; detention in a building not destinated for those accused or convicted of common crimes; restrictions on the inviolability of correspondence; the secrecy of communications, the provision of information and freedom of the press, broadcasting and television, as provided by law; suspension of freedom of assembly; home search and seizure; intervention in public service companies; requisition of goods. But since its enactment took place according to all legal formalities, which would not have been in the case of Law 13,979.

In our opinion, such an analogy is unreasonable. The restrictions of the sanitary normative act were born, and the measures adopted are

12. *See BAHIA, Saulo José Casali, idem, ibidem.*

specifically associated with this (sanitary) nature, being limitations in theory reasonable in the face of trade, transportation, services, etc., and provided for in Brazilian health legislation for decades, inspired by situations somewhat different from those related to the state of siege. Any excess could only be verified in the specific (concrete) case, after analyzing the circumstances that promoted the adoption of restrictive measures.

Some measures were soon reproved, including through constitutional concentrated control, such as the changes initially intended in the employment relationship (see ADIs 6342, 6344, 6346, 6348, 6349, 6352 and 6354, related to the edition of Provisional Measure MP 927 / 2020, as amended by MP 928/2020). Others have been demanding the performance of diffuse constitutionality control, or legality control.

The inevitable politicization of the subject of restrictions in the face of the pandemic led the Judiciary to be even demanded in an unusual way, to declare the need for observance of science (and not of faith, or of own opinions without foundation in scientific evidence).

Health. Among the normative acts issued due to the pandemic, the CNJ Recommendation 66/2020 [13], addressed to the Courts with jurisdiction to judge the lawsuits that deal with the right to health, deserves mention for the adoption of measures to guarantee the best results. to society during Covid-19's exceptional pandemic period. This Recommendation intended to remove any incompatibility of the Judiciary's performance in relation to the measures taken by health service managers, with concern about prioritizing the concentration of financial and human resources in order to control the pandemic. To this end, it was envisaged to adopt deference and self-restraint in court proceedings involving requests for admission to ICUs and in court proceedings involving the control of normative acts on social

13. *https://www.cnj.jus.br/wp-content/uploads/2020/05 /Recomendacao66_2020-13052020-DJE137.pdf. Acess: 06jul2020.*

isolation, avoiding personal fines to health managers during the pandemic, avoiding application of fines to public entities for noncompliance with court orders during the pandemic, and allow the extension of deadlines for compliance with decisions whose purpose is more difficult to achieve because of that.

Differentiated allocation of resources. As predicted in terms of health, the different allocation of resources occurred in relation to those managed by the Judiciary from the criminal sphere. CNJ Resolution 313/2020 provided, in its art. 9, that the courts should regulate the allocation of resources arising from the fulfillment of the penalty of pecuniary provision, criminal transaction and conditional suspension of the process in criminal lawsuits, prioritizing the acquisition of medical materials and equipment necessary to combat the Covid-19 pandemic, to be used by health professionals. In the same vein, Technical Note CNJ / CNMP 1/2020 [14] dealt with the allocation of resources from the National Penitentiary Fund in view of the decree of Public Health Emergency of National Importance for the new Coronavirus.

Emergency aid. Judicial demand typical of pandemic times, temporary emergency aid was negative for many who depended on it, and was obtained by so many others in an improper way. All these disputes have reached and will reach the Judiciary for some time.

4. Post-pandemic impacts

The pandemic brought to the Judiciary a legacy that may last for many years in its agenda and in its functioning. We will highlight some:

Control of bids and contracts. Law 13,979 / 2020 provided for the

14. *https://www.cnj.jus.br/wp-content/uploads/2020/04/NotaTecnica-CNJ_CNMP-Funpen-28042020.pdf. Acess: 06jul2020.*

possibility of waiving the bidding process for the contracting of goods, services and supplies necessary to face the emergency, changing the public regime (arts. 4, and 4-A to 4-I).

Such openness has generated, as reported by the media, countless cases of deviations, overpricing and misdemeanors, with which the Judiciary must deal for years, in the civil and criminal spheres, not to mention the administrative control itself. Add to this the civil and criminal investigation of deviations related to emergency aid, as already mentioned.

Prince Fact and change in circumstances theory. The pandemic has interfered with the balance of contractual relations, be it in relation to the relationship between the Public Power and individuals, or in relation to the relationship between individuals themselves. The limitations brought to retailers unimagined premises when entering into a contract with shopping centers, for commercial tenants it brought an unconditional reality with the closure of their businesses, etc. The impact took place in all branches: administrative, labor, commercial, civil ... The fact of the prince and the theory of change in circumstances now serve for an attempt to adapt and rebalance, which, if not voluntarily agreed between the parties, will be taken by the injured to the Judiciary Power, so that in the public space the dispute can be mediated and solved, obtaining the desired social accommodation.

Taxes. Several tax administrations waved to the taxpayer with the mere postponement of the payment of the tax, when they claimed the pure and simple exemption. Undoubtedly, such a dispute will be heard in court.

Expansion of virtualization. As already pointed out above, procedural virtualization came to be considered imperative during the pandemic, and will be so later. It is a path of no return, irreversible, with

the pandemic throwing the Judiciary the challenge and the urgency to eliminate immediately or in the short term the physical lawsuits, which are proving to be slower, always more costly and with data and content security always critical.

Teleworking and budget gain. The adoption of teleworking has caused, from the first moment, a reduction in public charges, with the reduction of expenses associated with face-to-face work (water, electricity, computer or office supplies, rent, property tax, condominium, surveillance, cleaning, telephone, furniture, outsourced, vehicles, fuel, etc.) or in-person travel (tickets, daily allowances). In the "new normal", "videoconferences promise to replace a good part of meetings and business trips". The savings have already been estimated at hundreds of millions of reais per year, according to a balance sheet from the Management Secretariat of the Ministry of Economy. In three months (March to May / 2020), there was a reduction of two hundred million with commuting and business travel alone, compared to 2019. Even with the return of essential trips, this current year of 2020 is estimated at five hundred million less reais, henceforth, with business trips. In three months, "Associação Contas Abertas saw a cut of R $ 40.4 million in spending by the Executive, the Judiciary and the Legislature on furniture, in addition to a decrease of R $ 13.9 million in real estate leasing; R $ 8.5 million, with consumables; and R $ 8.3 million, with working material (between March and May this year). Significant reductions were also observed in the payment of transport assistance (reduction of R $ 34.1 million) and additional risk premium (less R $ 22 million) " [15] .

According to Cristiano Heckert, Secretary of Management of the Ministry of Economy, "the pandemic left the lesson that distance work

15. *https://www.correiobraziliense.com.br/app/noticia/economia/2020/07/05/internas_economia,869461/home-office-de-servidores-gera-corte-anual-de-gastos-de-ate-r-500-mil.shtml. Acess: 06jul2020.*

can generate savings for the public administration without jeopardizing the service to citizens. So, it accelerated a process that had already been advancing in some public agencies in recent years in relation to teleworking".

However, associations of public servants complain that the costs are simply being passed on to them, who now bear, for the benefit of the Public Power, the expenses of internet, water and electricity, without any consideration, and often without adequate means, since broadband access may be non-existent, and the home environment may sometimes make labor unstable. In addition, they fear that reducing travel could compromise the quality of control and inspection. It is, therefore, an open question, since the novelty effectively demands greater attention from the Public Power for the due compensation, or at least in order to guarantee the adequate means, in the residence of the publics servant or magistrate, for the offer of the telepresencial activity .

Teleworking and productivity gains. The experience of teleworking during the pandemic proved that the Judiciary can act virtually, without loss of volume or quality. In fact, with a gain in these directions. There are countless news published by courts that celebrate the increase in productivity compared to face-to-face work. There are references to an increase between 10% and 15% in productivity [16] .

It is anticipated, therefore, that the courts and the National Council of Justice itself should remain more permeable to the idea of admitting distance work, even if partial, provided that the contact and access of the parties and lawyers, by electronic means, is ensured (to judges and servants). Telehearings, telesessions, teleexams, teleinspections etc. they are modalities that virtualization has imposed as a reality.

16. *https://www1.folha.uol.com.br/poder/2020/03/juizes-e-defensores-conseguem-aumento-de-produtividade-durante-pandemia.shtml. Acess: 06jul2020.*

For the sake of productivity and quality, dead time with the physical displacement of the servant and the magistrate from their residence to the court is eliminated, and vice versa. Interruptions can now be better managed, which was not the case when operating on the previous model.

It is known that several normative acts stipulate slightly higher goals for the servers who work in the home office, considering the time savings with avoided physical commuting and the conditions of service provision.

Budget cuts. The economic crisis related to the pandemic is an inevitable fact. The drop in GDP due to the slowdown in business and the prohibition of establishments has been continuously measured [17] . The inevitable consequence of the economic decrease will be the tax loss, which has an impact on the budget of the Judiciary, which had already suffered cuts since the adoption of the spending ceiling through EC 95/2016.

Efficiency. The budget reduction, however, forces managers of the Judiciary to improve and optimize the use of scarce resources, migrating to the adoption of more efficient and economical models, systems and solutions. The crisis thus generated an excellent opportunity to rethink the maintenance of physical lawsuits, sectors with excessive servers, buildings with high costs, unnecessary services, tasks capable of automation and not yet automated, etc.

Undoubtedly, the crisis sparked the call for the Judiciary to focus on issues of relevance, as the pandemic places life and physical integrity as major interests to protect. Attention was drawn to the fact that some guidelines of the Judiciary failed to pay attention to more urgent matters that should be a priority.

17. *https://www.folhape.com.br/noticias /coronavirus/ pandemia-provocara-a -crise-mundial-mais-extensa-desde-1870-adverte/143246/. Acess: 06jul2020.*

The Judiciary Power breathes post-pandemic airs that demand more efficiency, more modernity, more accessibility, and a greater perception of the importance of real fulfillment of its protective function of the fundamental rights of the citizen. Faced with the wishes of society, not as a power in itself or for itself, but as a power for the service of the common good.

5. References

BAHIA, Saulo José Casali. Pandemia, Relações Privadas e Eficácia Horizontal dos Direitos Fundamentais: O Caso dos Condomínios Edilícios. Capítulo de livro in BAHIA, Saulo José Casali (Org.) Direitos e deveres fundamentais em tempos de coronavírus. São Paulo: Editora Iasp, 2020. ISBN: 978-65-87082-00-4.

CONSELHO NACIONAL DE JUSTIÇA. Nota Técnica CNJ/CNMP 1/2020. https://www.cnj.jus.br/wp-content/uploads/2020/04/NotaTecnica-CNJ_CNMP-Funpen-28042020.pdf. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Portaria CNJ 61/2020. https://www.cnj.jus.br/atos_normativos/. Acesso em: 06jul/2020.

CONSELHO NACIONAL DE JUSTIÇA. Portaria Conjunta CNJ/MS 01/2020. https://www.cnj.jus.br/wp-content/uploads/2020/03/PortariaConjunta-1_2020-CNJ_MS.pdf. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Portaria PRESI-CNJ 79. https://atos.cnj.jus.br/atos/detalhar/3326. Acesso em: 06jul2020

CONSELHO NACIONAL DE JUSTIÇA. Prazos Processuais. https://paineisanalytics.cnj.jus.br/single/?appid=6c9a3799-e931-4c5a-8900-a13a8bb8a05a&sheet=a45a7e28-6d3b-409a-a78e-145fd8d6cc5c&lang=pt-BR&opt=currsel. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Recomendação CNJ 62/2020. https://www.cnj.jus.br/wp-content/uploads/2020/03/62-Recomenda%C3%A7%C3%A3o.pdf. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Recomendação CNJ 63/2020. https://www.cnj.jus.br/atos_normativos/. Acesso em: 06jul/2020.

CONSELHO NACIONAL DE JUSTIÇA. Recomendação CNJ 64/2020. https://www.cnj.jus.br/wp-content/uploads/2020/04/Recomenda%C3%A7%C3%A3o-CNJ-64-2020.pdf. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Recomendação CNJ 66/2020. https://www.cnj.jus.br/wp-content/uploads/2020/05/Recomendacao66_2020-13052020-DJE137.pdf. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Recomendação CNJ 67/2020. https://www.cnj.jus.br/wp-content/uploads/2020/06/Recomendacao67-2020_17062020_DJE190_19062020.pdf. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Recomendação CNJ 68/2020. https://atos.cnj.jus.br/atos/detalhar/3364. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Recomendação Conjunta CNJ/CNMP/MDH/MCidadania 01/2020. http://www.in.gov.br/web/dou/-/ recomendacao-conjunta-n-1-de-16-de-abril-de-2020-2 53004251. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Resolução CNJ 313/2020. https://atos.cnj.jus.br/atos/detalhar/3249. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Resolução CNJ 314/2020. https://www.cnj.jus.br/wp-content/uploads/2020/04/Resolu%C3%A7%C3%A3o-n%C2%BA-314.pdf. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Resolução CNJ 317/2020. https://atos.cnj.jus.br/atos/detalhar/3302. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Resolução CNJ 318/2020. https://atos.cnj.jus.br/atos/detalhar/3308. Acesso em: 06jul2020.

CONSELHO NACIONAL DE JUSTIÇA. Resolução CNJ 322/2020. https://atos.cnj.jus.br/atos/detalhar/3333. Acesso em: 06jul2020.

CORREIO BRAZILIENSE. Home Office de servidores gera corte anual de gastos de até 500 milhões. https://www.correiobraziliense.com.br/a pp/noticia/economia/2020/07/05/internas_economia,869461/home-office-de-servidores-gera-corte-anual-de-gastos-de- ate-r-500-mil.shtml. Acesso em: 06jul2020.

15

The solidarist constitutional state and the pandemic of covid-19: brief lineaining

VALDIR FERREIRA DE OLIVEIRA JUNIOR

ANA PAULA DA SILVA SOTERO

RICARDO MAURÍCIO FREIRE SOARES

No man is an island to himself; each one is a piece of the continent, a part of the whole: the death of any man diminishes me because I am part of humanity and, therefore, never ask to ask for whom the bells toll, they toll for you. John Donne

Introduction

This scientific article deals with the relevant theme of the Solidarist Constitutional State and the pandemic generated by the coronavirus. To this end, it is intended, in a tight synthesis, to present: an exposition of the

panorama of the pandemic of COVID-19; a description of the Solidarist Constitutional State as an institutional alternative in the face of the aforementioned health crisis; and the correlated indication of the main vectors of solidarism that can guide the proceeding of the Public Power in the face of this serious and current problem of global reach.

1. The Actual Pandemic Context of Covid-19

The world experiences the tragic effects of COVID-19, an acute respiratory disease caused by the coronavirus, having been initially identified in Wuhan, province of China, in December 2019. On March 11 of this year, the World Health Organization formally declared the emergence of a pandemic (OMS, 2020).

In effect, as of January 2020, the first confirmed cases outside mainland China began to be identified, namely: Thailand (January 13); Japan (January 16); South Korea (January 20); Taiwan and the United States (January 21); Hong Kong and Macau from China (January 22); Singapore (January 23); France, Nepal and Vietnam (January 24); Malaysia and Australia (January 25); Canada (January 26); Cambodia (January 27); Germany (January 28); Finland, United Arab Emirates and Sri Lanka (January 29); Italy, India and the Philippines (January 30); and the United Kingdom (January 31).

During the month of February, the number of countries affected increased significantly: Belgium (February 4); Egypt (February 14); Iran (February 19); Israel and Lebanon (February 21); Afghanistan, Bahrain, Iraq, Kuwait and Oman (February 24); Algeria, Brazil, Croatia, Austria, Switzerland (February 25); Georgia, Greece, North Macedonia, Norway, Pakistan, Romania (February 26); Denmark, Estonia, Nigeria, the Netherlands, San Marino (February 27); Azerbaijan, Iceland, Lithuania,

Mexico, Monaco, New Zealand, Belarus (February 28); Ecuador, Ireland, Luxembourg and Qatar (February 29).

More recently, during the month of March, cases were also confirmed in the following countries: Armenia, Guadeloupe, Czech Republic, Dominican Republic, Saint Bartholomew (March 1); Andorra, Indonesia, Jordan, Latvia, Morocco, Portugal, Senegal (March 2); Argentina, Chile, Gibraltar, Liechtenstein, Ukraine (March 3); French Guiana, Faroe Islands, Hungary, Poland (March 4); Slovenia, Bosnia, Palestine, South Africa, Martinique (March 5); Bhutan, Vatican, Serbia, Togo, Cameroon, Slovakia (March 6); Maldives, Colombia, Peru, Malta, Paraguay, Costa Rica, Moldova (March 7); Bulgaria, Bangladesh (March 8); Albania, Cyprus, Brunei, Burkina Faso, Guernsey (March 9); Mongolia, Cyprus, Panama, Jamaica, Congo, Jersey, Turkey (March 10); Bolivia, Guyana, Honduras, Ivory Coast, Polynesia (March 11); Gabon, Ghana, Guyana, Cuba, Saint Vincent and the Grenadines, Trinidad and Tobago (March 12); Antigua and Barbuda, Aruba, Burkina Faso, Kazakhstan, Curacao, Ethiopia, Guatemala, Guinea, Cayman Islands, Virgin Islands, Mauritania, Mayotte, Kosovo, Puerto Rico, Kenya, Saint Lucia, Sudan, Suriname, Uruguay, Venezuela (March 13); Congo, Guinea, Mauritania, Namibia, Rwanda, Seychelles, Swaziland (March 14); Bahamas, United States Guam and Uzbekistan (March 15); Greenland, Liberia and Tanzania (March 16).

It should also be noted that, by the end of March 2020, an expressive contingent of 710. 918 cases were identified in more than 200 countries, with a large concentration in Europe, China, the United States, Iran and South Korea , with, at least, until the moment, 33. 551 confirmed deaths worldwide (OMS, 2020).

From the point of view of Constitutional Law, tackling this pandemic, at the global and national levels, demands the necessary substantiation

of a true Solidarist State, as the most appropriate political-legal formula for dealing with the prevention and facing the negative effects of the coronavirus.

Indeed, the establishment of a Solidarist Constitutional State, including on Brazilian soil, is revealed as the most appropriate institutional way to respond to the enormous challenges posed by this health crisis, by contributing to the maximization of protection and the promotion of the fundamental rights of threatened citizens or violated in this dilemma, such as life, health, protection for the elderly, consumer protection and work.

That said, one can ask: what would a Solidarist Constitutional State be then?

2. The Solidarist Constitutional State as an Institutional Alternative for Combating Covid's Pandemic -19

2.1. Conceptual premises

However great the effort is to reveal new possibilities for the realization of fundamental rights and to understand the constitutional phenomenon, every attempt will be futile without the clear perception that solidarity constitutes the identity and main legal foundation at the dawn of this third millennium.

The system of guarantees and fundamental rights, as a human creation, could never deviate from its own nature. Health, leisure, housing, freedom, dignity, education, food, family, security, property, work, life, equality, peace, healthy and sustainable environment and other fundamental legal assets, constitute, interdependently, the minimum existential nucleus basic needs of any human being.

The biggest mistake of all that contemporary society could make would be to understand fundamental rights in isolation. Such rights exist in a context of objective and subjective solidarity. Fundamental rights only exist in solidarity. The denial of a certain fundamental right results in the denial of all others. Removing any individual from the simple possibility of living with dignity or having access to any fundamental right compromises the human condition itself.

Constitutional concretization and solidaristic thinking go together. Where one is separated from the other, the possibilities for building a free, just and solidary society cease, a fundamental objective of the Federative Republic of Brazil (art. 3º, I, CRFB).

The idea of solidarity has two major impacts on constitutional thinking. The first one concerns fundamental rights and their insertion in global constitutionalism through supranational constitutional letters or the reception of human rights incorporated in international treaties through constitutional opening clauses (art. 5º, § 2º e § 3º da Constituição Federal de 1988). The second impact creates a new paradigm in the understanding of the Constitutional State, both in the external aspect (for example, cooperation, interdependence, interconstitutionality, interculturality, inclusive democracy and supranational citizenship), as well as in the internal sphere (for example, pluralism, happiness, multiculturalism, tolerance , multidimensional citizenship).

Thus, the interpretation and realization of fundamental rights, especially in countries where the essential rights to the realization of the human condition are constitutionalized due to their lack on the factual level, must be carried out in the light of the Solidarist Constitutional State paradigm.

2.2. Theoretical and Philosophical Foundations of the Constitutional State

When it comes to *the rule of law, Rechtsstaat or L'État légal*, it is referring to what is called, in the constitutional tradition, the democratic-constitutional rule of law, or simply the constitutional state, all of which are foundations of state legality.

According to Peter Häberle (2007, p. 5), the referred concepts reflect not only the real or already safely achieved. The Solidarist State does not appear to be only a possible form of development of the Constitutional State, as it has already assumed this conformation in reality, being, necessarily, the necessary form of the legitimate status of tomorrow, of reaffirming social justice, pluralism and fundamental rights.

Much more important than strengthening solidarity at the state level is strengthening it in society, understanding its complexity and pluralism, which is affirmed in the ideas of tolerance, respect for differences, defense of minorities, diversity and, above all, strengthening of ties of social solidarity.

Certainly, contractualism, in general terms, refers that the State is the product of man's rational decision in the face of social need. Among the political philosophers who follow this current of thought are: Thomas Hobbes (1588-1679), John Locke (1632-1770) and Jean-Jacques Rousseau (1712-1778).

According to Thomas Hobbes (1983, p. 223), such reason will be the peace and security that the State must guarantee before the belligerent society, after all, in his conception, man is the wolf of man himself‖. Without the sword, pacts are nothing but words. In its conception, the State assumes an institutional structure that in practice will be virtually self-sufficient, due to the magnitude of its attributions, self-referential by

the foundations of its power, hermetic due to its impermeability to claims from the subjects, unconditional because the fulfillment of their purposes is incompatible with the formulation of reservations by the contractors at the time of hiring, unpunished, since any intended sanction applicable to the sovereign would be a sanction of the subject against himself, and irreversible due to dangers of returning to the pre-contractual situation.

On the other hand, John Locke (2017, p. 5) bases the existence of the State on guaranteeing freedom, property and equality between individuals. Men in a state of nature are free to order their actions and to dispose of their properties according to their own will, within the limits of natural law, without the need to ask for permission and without depending on the will of another person, and they are the same, since they do not there is something more evident than the fact that beings of the same species and identical nature, born to participate without distinction of all the advantages of nature and to use the same faculties, are also equal among themselves, without subordination or subjection. His model of the state is liberal and man is by nature a selfish being who wants only his personal progress.

In turn, J.J.Rousseau (2006, p. 6.) affirms the incompatibility between equality and property, since it is in the latter that the origin of inequality between men is found, at the moment when one of them surrounded a certain territorial space. Therefore, freedom and equality will be the foundations of the State. Man is good by nature, and each one, uniting everyone, however obeys only himself, hence the law, in Rousseau's conception, is the expression of the general will.

Contractualists and other political thinkers of the 17th and 18th centuries, like Montesquieu, Voltaire, Sieyès, historically contributed to the formation of the Constitutional State, the result of the movement known as constitutionalism, which took place in England after the Glorious

Revolution of 1688, in the movement of Independence of the United States of America in 1776, and in the French Revolution of 1789, which began under new ideals and new hopes, which were present in the Universal Declaration of Human and Citizen Rights of 1789, incorporated in the Constitution of France of 1791.

For Montesquieu (2005), modern societies set out in search of freedom by limiting the power of the State in the face of the individual, freedom expressed in individual rights and guarantees. The model of state that followed, after absolutism, was the Liberal State.

After the two great world wars, capitalism found its first limits, expressed in the second generation of fundamental rights (social, economic and cultural), because, in this historic moment, the State needed to strengthen itself to meet these new social demands that now it imposed an obligation to do and not just to refrain from interfering with individual freedom.

The great depression of the USA, in 1929, on the other hand, will point to the failure of economic liberalism, in its place comes state interventionism. There is a failure of the Liberal model. The State becomes dualistic: it seeks economic development to guarantee social well-being. The Social Constitutional State is affirmed, seeking its legitimacy in the realization of social, economic and cultural rights and in the achievement of material equality. Now the State is called upon to intervene in society to guarantee equality, after all, second generation rights demand a positive performance. The first constitution in the world to incorporate second generation rights was Mexico's 1917 Constitution, followed by Germany's 1919 Constitution.

The legitimate foundation of the State is found in solidarity and human dignity, involved by multidimensional and pluralistic citizenship

practices aimed at the realization of fundamental rights. It is also on a constant and effective path towards the fulfillment of the fundamental objectives of building a free, just and solidary society, guaranteeing national development, eradicating poverty and marginalization, reducing social and regional inequalities and promoting the good of all without any form of discrimination.

As Posada (1935, p.11) rightly states, the State fulfills constitutionally determined goals and must organize itself rationally and effectively to fulfill them. Hence its dynamic nature, since the State is a process. Therefore, it is moving towards a Republic built as a people that governs itself, that decides its destinies and contributes in solidarity to the fundamental political decisions of the State.

In Brazil, the Constitutional State is conformed by the Federal Constitution of 1988 in its articles 1 to 4, as well as in the other provisions referring to constitutional organizational law, it is legitimate in the exact measure that it manages to guarantee and make fundamental rights effective. Its limits, guidelines, possibilities and institutional functions are all linked to the strengthening of bonds of social solidarity.

To understand it in its essence, is to understand it as the motive for the political, social, cultural, economic and normative aspirations of the people. It is realized through the new theoretical and philosophical framework of solidary constitutionalism, reaching the so-called Solidarist Constitutional State.

2.3. The constitutional place of solidarist thought

Solidarity is revealed as a multi-meaning term. In ethics, it is understood as a group feeling that supposes mutual sympathy and a willingness to fight and fight for each other. In political theory, it appears as an added awareness of rights and responsibilities. In sociology, it appears

as the consensus between similar units that can only be ensured through the feeling of cooperation that necessarily derives from the similarity and division of labor, as well as a social fact that consists of the spontaneous consensus of the parts of the social whole.

For Durkheim (1999, p. 34), solidarity is a social fact, so his study belongs to the domain of sociology, a fact that can only be well known through its social effects. The law reproduces the main forms of social solidarity. Criticizing the classic division of law into public and private, Durkheim will propose a classification of social solidarity following the classification of legal rules according to the different sanctions that are linked to them.

With regard to sanctions, some essentially consist of pain or a reduction inflicted on the agent, depriving him of something he enjoys. They are said to be repressive - this is the case with criminal law. As for the other type, it consists of restoring disturbed relationships in their normal form, being linked to the repair of things. There are, therefore, organized repressive sanctions or only restitution sanctions.

The bond of social solidarity to which the repressive law corresponds is one whose rupture constitutes a crime. Thus, criminal law symbolizes solidarity for similarity, which Durkheim calls mechanical solidarity. All members of the group are individually attracted to each other, because they resemble each other, but they are also attached to what is the condition of existence of this collective type, that is, the society they form through their meeting. Solidarity, born out of similarities, directly links the individual to society. This connection that is established between individuals, creating a link between individual consciences and collective conscience is fundamental for understanding solidarity by similarity and is situated on a more psychological than properly sociological level.

Solidarity due to the division of labor or organic corresponds to a restorative sanction. Part of civil law, therefore, aims to determine the way in which different family functions are distributed and what they should be in their mutual relations; this means that it expresses the particular solidarity that unites family members together as a result of the division of domestic work, exemplifies Durkheim. This division of family work dominates the entire development of the family. Administrative law establishes the so-called administrative functional division. The same is true of constitutional law in the case of government functions and the system of division of powers.

Indeed, the division of labor creates among men the whole system of rights and duties that link them to each other in a lasting way. In the same way that social similarities give rise to a right and a moral that protect them. The division of social work gives rise to rules that ensure the peaceful and regular competition of divided functions.

At the end of his work, Durkheim makes reference to the idea of justice, which will be developed by his disciple, Léon Duguit. Durkheim says that rules are not enough, they have to be fair and, for that, it is necessary that the external conditions of competition are equal.

As Renato Treves (2004, p. 57) rightly states, life in society cannot extend into any field without legal life following it simultaneously in the same relationships. In Durkheim, law is the visible symbol of social solidarity.

Durkheim's great merit was to present the concept of solidarity very close to society, constituting almost the reflexive identity of society itself, laying the foundations of what was called sociological solidarism and which, later, Duguit would develop to build his legal solidarity.

According to Reinholdo Ullmann and Aloysio Bohnen (1993, p.159), solidarity appears today as an update of fraternity, which differs fundamentally from solidarism by its Christian reference, centered on the notions of charity and communion.

Indeed, Solidarism will offer a different path from that of the fanatics of exasperated individualism that expands the self-awareness to the dimensions of everyone's consciousness. Plato's dream, in the work - República, where he entrusts the direction of the city to the wise, is no different from that of the adherents of the Terror of 1793, nor that of the dictatorships that find in the principle of an absolute reason or moral the legitimacy of a abusive power.

Therefore, to be solidary is to assume common responsibilities towards the other and give to us, in a constant and reciprocal vigilance between society's partners, where each task accomplished in the interest of serving others is part of the democratic and pluralist edification of the Solidarist Constitutional State.

Léon Duguit (1975) developed a broad critique of the doctrines that support the principle of the nationalization of law. For him, man conceived the law before conceiving the State and not the State before conceiving the right, and the notion of the right, both in an objective and subjective sense, is, therefore, prior and superior to the notion of the State.

Therefore, the State is subject to the rule of development of solidarity as are the individuals themselves, being the will of the governors, a legal will capable of imposing constriction only when it manifests itself in the limits that are drawn by the rule the right. The State is none other than the product of natural differentiation between men in the same group from which the so-called public power derives, which cannot in any way be

legitimized by its origin, but only by the services it provides, according to the rule of law.

For Adolfo Posada (1934, p. 25), in the treatment that the latter gives to the teleological conception of the State. The State arises ideally from the conscious decision to establish a suitable means at the service of achieving the ends of human life and, above all, to guarantee freedom. That is why for Posada the State is constitutively a servant State, with public services offered to citizens. The State would therefore be a reflection of solidarity.

Therefore, the form of social constitutional state would reflect the constitutional and ethical implications of the realization of social justice and in the legal harmonization of the individual and social sphere of man in his various social roles, establishing a system of guarantees of essential rights and freedoms, with a view to more broad achievement of human ends. His pure idea of the State reflects his commitment to the rule of law committed to human rights, being the conditioning substance of his legal form.

In the same sense, Duguit (1975) affirms social reform as a central task of the State, revising individualistic liberal constitutionalism, providing the basis for social and solidary constitutionalism. Observes that, in all forms of human grouping, there is a single reality, the human person, that is, the individual's conscience and will‖ and concludes by stating that this individuality seems more alive and more active the more coherent, complex and comprehensive is the social group. Building this universal ideal necessarily involves three phenomena related to our conception of solidarity: pluralism, inter-constitutional cooperation and interculturality.

For Duguit (1930), the foundation of the law is solidarity or social interdependence, all members of society, under the rule of law, are obliged to do nothing contrary to social solidarity and to do everything in their capacity

to ensure its realization. Solidarity belongs to the constitutional level. It is its reference and first foundation, present and never-ending experience, in constant construction. The evolutionary bridge of the constitution theory, therefore, lies in the affirmation of solidarist constitutionalism.

In the Brazilian context, the 1988 Federal Constitution was not affiliated with any specific conception of solidarity, however, coming close to the thinking advocated by Duguit. The solidarity to be realized in the constitutional text demonstrates infinite possibilities of application, after all, our Constitution is a living, open and plural text, reflecting the hopes of a society currently in crisis. The 1988 Brazilian constitutional preamble makes reference to fraternal society, while art. 3º, I prescribe as an express objective of the Federative Republic of Brazil, the construction of a free, just and solidary society. Affirms pluralism in art. 1º, IV as the foundation of the Federal and Democratic Republic.

A solidary society is the center of gravity for the development and effectiveness of the law. Combining the sociological perspective with the legal perspective, we can define it as the institution that determines the conditions for the possibility of social life, which will be as broad as the greater the bonds of solidarity that unite their individuals to fulfill the fundamental political project established in our Constitution.

The solidary society has its most significant aspect in its connection with the free and just society. The link between freedom, justice and solidarity is not free. Freedom without social justice is illusory and oppressive. Justice that asserts itself in the absence of freedom imposes fear and discredit. The society that is built selfishly, refractory to solidaristic ideas and conceptions, is not just, nor free, because freedom presupposes that the other is equally so.

Regarding the social values of work and free enterprise, they reflect the balance of two subsystems: the liberal and the social. Duguit firmly believed that modern societies were evolving towards this solidarist project.

The individualistic conception of freedom, which motivated, however, the construction of the doctrine on the foundation of law and the limitation of the State, with great repercussions in the Revolution of 1789, has a prominent place in the history of political ideas, with reflections in the current political system Brazilian. This conception is still the basis of the legislation, although it is increasingly converging towards solidarism. Sometimes, the error of some theorists and legislators in considering individual freedom as intangible and definitive, universal dogma remains. Ownership is more than just a social function.

The solidarity that is being built today has already surpassed the mere fraternity of the liberal bourgeois revolution, it is its evolution. Despite the great motto of the French revolution being expressed in the trilogy - freedom, equality and fraternity, the latter term was not present in the Universal Declaration of the Rights of Man and the Citizen of 1789. It will reappear in 1948, when the Universal Declaration of Human Rights, UN, advocating that all human beings are born free and equal in dignity and rights.

In liberal-individualist doctrine, if the State can make certain laws it is because the individual has certain subjective rights against him, which are preserved insofar as laws are made that limit the rights of some, preserve the freedom of all. An example of this is the right to property. On the contrary, in the solidarist conception of freedom, the individual has no right, he has social duties, and the State cannot do anything to prevent him from fulfilling these duties, notably the duty to freely carry out his activities.

The fundamental political project established in article 3º of the Federal Constitution of 1988 is the duty of all social institutions and of

the individual himself imbued with his duty of solidarity arising from the social division of labor.

If man is obliged to work he is not, however, obliged to work on what is beyond his strength. If one man abuses another in the exploitation of his work, it compromises social values. Herein lies the legitimacy of all modern-day laws in all countries that organize the exercise of work.

Converging to the realization of solidaristic thinking, the original constituent established in art. 4º, IX of the Federal Constitution of 1988 the principle of cooperation between peoples for the progress of humanity. Here Brazil becomes part of the set of Cooperative Constitutional States.

Solidarity, fraternity and cooperation are terms that the constituent legislator used to give greater phenomenological density to solidaristic thinking. Therefore, the influence of solidarist thinking is found in all constitutional provisions. After all, solidarity is the way of realizing many constitutional provisions, especially those that reaffirm solidarity by similarity, assigning protective duties to the whole society.

The fundamental rights in the Solidarist State must be understood in their multiple dimensions, giving them unity and systematicity, without, however, abandoning the epistemological density that the correct classification in generations offers for the understanding of the historicity of fundamental rights.

3. New Solidarist Vectors for the Performance of the Brazilian State in Face of the Covid-19 Pandemic

3.1. Cooperative federalism

The Federal State had its initial landmark in 1787 with the famous Philadelphia Convention, which, as a proposed solution to overcome the

difficulties initially encountered by the thirteen English colonies when they were freed, formed a confederation of sovereign states through a treaty celebrated in 1776 and ratified in the year 1781.

As Fernanda Almeida (2005, p. 19) points out, federalism introduced the adoption of a truly new political organization that transcended the limits of previous political thought and became an alternative to the model of centralized political authority, developed during the French Revolution.

Thus, the Confederation became a Federation. This was the first and great step towards the consolidation of the form of the Federal State. The second and not least important was the materialization of the agreements and commitments signed in the Philadelphia Convention by the United States Constitution of 1787, the first written constitution in the world.

During the memorable debates then held at the Philadelphia Convention, the creators of the new model had an opportunity to point out the Confederacy's shortcomings. They did so in many speeches and articles, worth mentioning those that, under the collective pseudonym of *Publius*, were ruled by Alexander Hamilton, James Madison and John Jay, later, gathered in the classic work - the federalist.

The Constitution is, therefore, the legal basis of the federative system, consolidating the agreement signed and repository of the essential rules of coexistence between the unit and the component entities. The Federal Constitution is the federal pact of the type of Federal State.

In turn, the division of competences is the cornerstone of the federative system, therefore involving the assignment of certain tasks as well as the means of action necessary for their pursuit. In addition, competence delimits the legal framework for the performance of one organizational unit in relation to the other.

In the federative model, political decentralization prevails, that is, the legislative competence conferred on partial units (local governments), coexisting with the constitutional legislative competence conferred on total unity (national government). Decentralization implies the division of competences. So that decentralization does not de-characterize the federal state, the unity of the whole must be maintained. Thus, the Federative Republic of Brazil is endowed with sovereignty, unlike the partial units that have only autonomy.

In this sense, federalism is presented as a way to preserve the particularity in the context of a larger state union, maintaining the balance between the sovereignty of the nation as a whole and the autonomy of the federated entities, concomitantly with their interdependence, which in our understanding is strengthened by the bonds of solidarity that must exist between federal, national and local entities.

The federative model was born initially from the need to integrate exclusive and limited fields of power, which make up a unit that also has an exclusive and restricted field of power. It is about dual federalism. Here there was an absolute equality, in terms of competence, between the state governmental spheres and the Union, at that moment there was no talk of common or competing competence, only exclusive.

With the replacement of classical liberalism by the interventionist conceptions of the State of social welfare, the system of sharing competences acquired a new conformation that resulted in the strengthening of central power at the expense of the weakening of the power of States, moving to cooperative federalism.

Such a cooperative experience was already present in the German Constitution of Weimar of 1919, and Austrian of 1920, which already

outlined a model of cooperative federalism and which served as a model for our Federal Constitution of 1934. In previous constitutional moments, we had been following the classic American federalist model of rigid dualistic federalism.

Certainly, in the context of cooperative federalism, there is no complete abandonment of the horizontal competence sharing technique, only a new technique, called vertical, appears, which provides for an area of common or competing competences that can be shared.

Regarding the Brazilian Federation, although it formed differently from the North American matrix, since there was a centrifugal formation process here, it mirrored our Federation, which was born with the Republic, in the American model, initially in *dual federalism*. It was with the Constitution of 1934 that we sought inspiration in the German cooperative federalism of the Weimar Constitution of 1919 and Austrian of 1920.

The paths of the Brazilian Federation were oriented, however, towards a new north, in which the coexistence of the Union, States, Federal District and Municipalities is verified, as it does not occur in the North American model, nor in the German model. For this reason, the term "second-degree federalism" is attributed to Brazilian federalism, that is to say, a type of federalism in which the municipality is a member of the federation endowed with its own autonomy and competences derived directly from the federative pact.

In Brazil, the system of dual federalism was only accepted in the Constitutional Text of 1891, since the 1934 Charter welcomes the influences of movements that led to the emergence of state interventionism, initiating the centripetal shift of competences and powers, moving to the cooperative model, which suffered refluxes with the Constitutions of 1937 and 1967.

The main aspect of Brazilian cooperative federalism, taken up by the 1988 Constitution, is the absorption of solidaristic thinking in the search for the reduction of regional inequalities, as we have said.

However, we have to seek cooperative equilibrium federalism, where the less favored regions develop their productive potential to leave the situation of dependency, contributing to the country's economic development. Therefore, public policies, at all levels, when, naively, distribute resources without productive consideration, are fraternalist (minimum existential), never solidarist (maximum potential). In order to materialize the solidarity principle, there is a need for consideration, an idea reinforced by the constitutional principle of efficiency and the duty to progress (CRFB/88, art. 37, caput and art. 3º, II).

Another relevant aspect is the educational, scientific and technological solidarity that must exist between the entities of the federation, both at the vertical level (Union, States, Federal District and Municipalities) and horizontally (States or Municipalities), through cooperation protocols, something that it must also be extended to the Direct and Indirect Public Administration of each entity.

Thus, cooperative federalism presents itself as a model of state organization that is more compatible with the need for prevention and the confrontation of COVID-19, by enabling the articulation of national and local governments, within the limits of their respective competences, with a view to formulation and execution of joint public policies and, therefore, endowed with the necessary synergy to safeguard human dignity.

3.2. Solidary citizenship

The concept of citizenship has been central to legal and political philosophy.

For Adela Cortina (2003, p. 275), the citizen is one who belongs to a modern political community, whose institutions claim to be fair and precisely acquire their legitimacy from this claim to justice. Therefore, exercising citizenship means actively participating in this construction process.

The Greek dream of cosmopolitan citizenship is realized in the new model of multicultural citizenship, which seeks to reconcile the diversity of cultures with the need for universal ethics.

Starting to build the model of civic ethics in pluralist society, it is closer to the idea of solidary citizenship. Law in the post-positivist perspective must claim to be justified within a moral and ethical framework.

According to Adela Cortina (2003, p. 284), the characteristics of this civic ethics would be as follows: 1) social reality that is integrated into the vital world of a pluralist society; 2) axiological substrate that links people as citizens and not as subjects or vassals; 3) dynamism, as it constitutes the crystallization of the values shared by different life proposals; 4) advertising, as it is made known to the community through public opinion, with understandable and admissible reasons; 5) belonging to citizens, therefore belonging to members of civil society, unlike state ethics; 6) secularism, because it does not bet on any particular religious confession, but it also does not propose to eliminate them.

Therefore, solidary citizenship is the product of an ethical and humanistic commitment to the effectiveness of fundamental rights through solidarity, which fulfills the Kantian dream of a cosmopolitan ethical

community to the exact extent that citizenship tends to be worldwide.

As Ricardo Torres (2001, p. 310) maintains, with greater integration between the Constitutional Cooperative States, where the enabling principles of the effectiveness of human rights constitute their ethical basis, public international law is no longer the set of norms and principles that they regulate relations between nations to acquire the outline of an international human rights law.

Democracy in a solidarist perspective is materialized, in general terms, when the content of the acts of the representatives is made fair to the citizens, enabling the integral development of the human condition in social, economic and cultural terms, respecting fundamental freedoms and strengthening ties of solidarity. While civil liberties are a necessary condition for the exercise of political freedom, political freedom, that is, popular control of political power, appears as a necessary condition to first obtain and then preserve civil liberties.

According to Friedrich Müller (2007, p. 50), the possibility of exercising and effectively exercising fundamental rights is a necessary condition of democracy: this means that human rights do not replace democracy; but a democracy worthy of the name is based on human rights.

Solidary citizenship also takes shape in the form of political participation that demands the basic conditions of dignified life for all, guaranteeing access to the essential goods to the existential minimum. It is effective in meeting the expectations of the least favored, providing them with a fair equality of opportunity, because where social exclusion is present, freedom and justice are not manifested, but for a few.

Thus, the exercise of solidary citizenship is revealed as one of the ethical-political pillars for the prevention and confrontation of the tragic

consequences of the coronavirus pandemic, by enabling the construction of a fraternal network of public and private efforts, in favor of dignity human and the existential minimum.

3.3. The resizing of the performance of state powers

The 1789 Declaration of the Rights of Man and the Citizen stated that any society in which the guarantee of rights is not guaranteed, nor the separation of powers determined, would not have a Constitution.

The separation of state functions includes instrumental functional interdependence combined with substantial harmony, both subordinate to the constitutional objectives and purposes of the State, specifically to the constitutional legal regime for social well-being and economic development. In short, the State is organized to realize fundamental rights.

The art. 2º of our Fundamental Law establishes the Legislative, the Executive and the Judiciary as Powers of the Union, independent and harmonious with each other.

Independence and harmony lead to interdependence. Functional interdependence is instrumentalized by the Federal Constitution so that the State can achieve, based on the precepts established therein, its fundamental objectives, namely: the construction of a free, just and solidary society; the guarantee of national development; the eradication of poverty and marginalization, reducing social and regional inequalities and, finally, the promotion of the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination.

According to the teachings of J.J. Canotilho (2002, p. 881), the principle of separation and interdependence of the Powers has the function of guaranteeing the Constitution, since the schemes of responsibility and

control between the Sovereign Bodies become relevant factors of observance of the Basic Law.

Indeed, it is in the observance of the Fundamental Law that the substantial harmony of the Powers must reside, leading to the principle of the conformity of the State's acts with the Constitution. Even political acts must be subject to constitutional parameters and to the control of their conformity with constitutional norms.

As Habermas (2003, p. 81) maintains, the integration problems, which all highly complex societies need to overcome, can only be solved through modern law, if this integration, and here I refer to the integration between the sovereign bodies , is generated from a legitimate Law constituted by that abstract form of political solidarity, whose continuity or rupture will depend on the realization of fundamental rights.

Today, the Judiciary is given a greater role in the democratic rule of law, so that judicial activism can be jointly identified with the realization of fundamental rights, so that the jurisdiction asserts itself as a new instrument of social protection, contributing directly to the achievement fundamental objectives of political society.

The Legislative Power has the important task of implementing, at the political-legislative level, from the text of the constitutional norm, through political decisions with normative density, the legislative acts, the precepts of the Constitution. Subsequently, it has a democratic duty to produce simple and accessible laws for the poorest social strata, in a dialogue open to the active participation of all the recipients of the rule.

Therefore, realizing fundamental rights based on legislative activity is made possible with a greater democratization of legislative processes and of the law itself, but above all, in the absence of popular participation

in the formative dialogue of the laws, adequately respecting the autonomy of individual citizens, strengthening the bonds of solidarity.

In turn, through the Executive Branch, based on the text of the constitutional norm and its subsequent implementation at the legislative and legal level, concrete work is carried out, through decisions, procedures and rules that implement public policies or government action programs.

In this way, such a redimensioning of the performance of the state powers contributes decisively to the prevention and the confrontation of the harmful effects of COVID-19, in order to increase a synergistic and ethically compromised performance of the Legislative, Judiciary and Executive Powers, with a view to protecting the life, public health, the market, consumption and human work.

4. Final Considerations

International society experiences the tragic effects of COVID-19, an acute respiratory disease caused by the coronavirus, having been initially identified in Wuhan, China's province, in December 2019 and, since March this year, formally declared by the World Organization Health as a true pandemic.

In the light of Constitutional Law, tackling this pandemic, at the global and national levels, demands the necessary substantiation of a true Solidarist State, as the most appropriate political-legal formula for dealing with the prevention and facing the negative effects of the coronavirus.

Certainly, the establishment of a Solidarist Constitutional State, including on Brazilian soil, is revealed as the most appropriate institutional way to respond to the enormous challenges posed by this health crisis, by

contributing to the maximization of protection and the promotion of the fundamental rights of threatened citizens or violated in this dilemma, such as life, health, protection for the elderly, consumer protection and work.

In turn, cooperative federalism presents itself as a model of state organization that is more compatible with the need for prevention and the confrontation of COVID-19, by enabling the articulation of national and local governments, within the limits of their respective competences, with a view to the formulation and execution of joint public policies and, therefore, endowed with the necessary synergy to safeguard human dignity.

Furthermore, the exercise of solidary citizenship is revealed as one of the ethical-political pillars for the prevention and facing of the tragic consequences of the coronavirus pandemic, by enabling the construction of a fraternal network of efforts in favor of the protection and promotion of fundamental rights of citizens.

Finally, it should be noted that the aforementioned redimensioning of the performance of the state powers also contributes to the prevention and the coping with the harmful effects of COVID-19, in order to increase a synergistic and ethically compromised performance of the Legislative, Judiciary and Executive Powers, having with a view to protecting life, public health, the market, consumption and human work.

5. References

ALMEIDA, Fernanda Dias Menezes de. *Competências na Constituição de 1988*. 2. ed. São Paulo: Atlas. 2000.

ARNAUD, Jean. *Dicionário enciclopédico de teoria e de sociologia do direito.* Tradução: Patrice Charles, F. X. Willlaume. Rio de Janeiro: Renovar, 1999.

BARROSO, Luís Roberto. *Curso de Direito Constitucional Contemporâneo*. São Paulo: Saraiva, 2009.

BOBBIO, Norberto. *Da Estrutura à Função – Novos Estudos de Teoria do Direito.* Tradução: Daniela Beccaccia Versiani. Barueri: Manole, 2007.

CANOTILHO, J. J. Gomes. *Direito Constitucional e Teoria da Constituição.* 5. ed., Coimbra: Almedina, 2002.

CORTINA, Adela. Ética e Cidade Cosmopolita. Trad. Cláudio Molz. In: *Direito e Legitimidade.* MERLE, Jean-Christophe; MOREIRA, Luiz. São Paulo: Landy, 2003.

CRISAFULLI, Vezio. *Stato, popolo, governo – ilusioni e desilusioni costituzionale.* Milano: Giufrè, 1985.

CUNHA JUNIOR, Dirley da. *Curso de Direito Constitucional.* 8. ed. Salvador: Juspodivm, 2014.

DONNE, John. *Devotions upon Emergent Occasions*. Meditation XVII. 1623.

DUGUIT, Léon . *Traité de Droit Constitutionnel.* Paris: Éditeurs E. de Boccard, 1930.

_____. *Las Transformaciones del Derecho (Público y Privado).* Buenos Aires: Editorial Heliasta, 1975.

_____. *Fundamentos do Direito.* Tradução e notas de Ricardo Rodrigues Gama. Campinas: LZN Editora, 2003.

DURKHEIM, Emile. *Da Divisão do Trabalho Social.* Trad. Eduardo Brandão. 2. ed. São Paulo: Martins Fontes, 1999.

DUVIGNAUD, Jean. *A solidariedade – Laços de Sangue e Laços de Razão.* Trad. Vasco Casimiro. Lisboa: Piaget, 1986.

FARIAS, José Fernando de Castro. *A Origem do Direito de Solidariedade.* Rio de Janeiro: Renovar, 1998.

GIUFFRÈ, Felice. *La solidarietà nell'Ordinamento Costituzionale*. Milão: Giuffrè, 2002.

GURVITCH, Georges. *La Vocation Actualle de la Sociologie. Antécédents et Perspectivas*. Paris: Presses Universitaires. 2. ed. 1963.

HABERLE, Peter. *Estado Constitucional Cooperativo.* Trad. Marcos Augusto Maliska e Elisete Antoniuk. Rio de Janeiro: Renovar, 2007.

HAURIOU, Maurice. *Princípios de Derecho Público y Constitucional.* Tradução: Carlos Ruiz del Castillo. Granada: Editorial Comares, 2003.

HOBBES, Thomas. *Leviatán.* Trad. Antônio Escohotado. Madrid: Ed. Nacional, 1983.

KANT, Immanuel. *Fundamentação da metafísica dos costumes.* 2. ed. Lisboa: Edições 70, 2007.

LOCKE, John. *Ensayo sobre el gobierno civil.* Trad. Amando Lázaro. Madrid: Ed. Aguilar, 2017.

LOEWENSTEIN, Karl. *Political power and the governmental process*. Chicago: University of Chicago Press, 1957.

MONTESQUIEU, Charles Louis de. *O Espírito das Leis.* São Paulo: Martins Fontes, 2005.

MÜLLER, Friedrich. *Teoria Estruturante do Direito.* 3. ed. Tradução de Peter Naumann e Eurides Avance de Souza. São Paulo: RT, 2011.

_____. Teoria e interpretação dos direitos humanos nacionais e internacionais – especialmente na ótica da teoria estruturante do direito. In: *Direitos Humanos e Democracia.* Clemerson Merlin Clève *et. al* (organizador). Rio de Janeiro: Forense, 2007.

OLIVEIRA JUNIOR, Valdir Ferreira de. O Estado Constitucional Solidarista: estratégias para sua efetivação In: *Tratado de direito constitucional*. Tomo I. 2. ed. Coordenadores: Gilmar Ferreira Mendes; Ives Gandra da Silva Martins e Carlos Valder do Nascimento. São Paulo: Saraiva, 2012.

OMS. *Organização Mundial do Comércio*. Disponível em: https://www.who.int. Consulta em: 29 de março de 2020.

PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional Internacional.* 4. ed. São Paulo: Max Limonad, 2000.

PISIER, Evelyne. *História das Idéias Políticas.* Trad. Maria Alice Farah Calil. Barueri: Manole, 2004.

POSADA, Adolfo. *La crisis del Estado y el Derecho Político.* Madrid: C. Bermejo, 1934.

_____. *La Idea Pura del Estado.* Madrid: Editorial Revista de Derecho Privado, 1935.

POZZOLO, Susanna. *Neocostituzionalismo e positivismo giuridico.* Torino: Giappichelli, 2001.

RAWLS, John. *Justiça e Democracia.* Trad. Irene Paternot. São Paulo: Martins Fontes, 2002.

ROUSSEAU, Jean-Jacques. *O Contrato Social.* São Paulo: Martins Fontes, 2006, p. 6.

SANCHÍS, Luis Prieto. Neoconstitucionalismo y ponderación judicial. In: *Neoconstitucionalismo(s)*. Edición de Miguel Carbonell, Madrid: Editorial Trotta, 2003.

SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de Direito Constitucional.* São Paulo: RT, 2012.

SILVA NETO, Manoel Jorge e. *Curso de Direito Constitucional.* 8. ed. São Paulo: Saraiva, 2013.

SOARES, Ricardo Maurício Freire. *O princípio constitucional da dignidade da pessoa humana.* São Paulo: Saraiva, 2010.

TORRES, Ricardo Lobo. A Cidadania Multidimensional na Era dos Direitos. *In: Teoria dos Direitos Fundamentais.* Ricardo Lobo Torres (organizador). 2. ed. Rio de Janeiro: Renovar, 2001

TREVES, Renato. *Sociologia do Direito.* Tradução: Marcelo Branchini. São Paulo: Manole, 2004.

ULLMANN, Reinholdo; BOHNEN, Aloysio. *O solidarismo.* São Leopoldo: Unisinos, 1993.

VANONI, Ezio. *Opere Giuridiche,* vol. II. Milão: Giuffrè, 1962.

VERDU, Pablo Lucas. *O sentimento constitucional – aproximação ao estudo do sentir constitucional como modo de integração política*. Trad. Agassiz Almeida Filho. Rio de Janeiro: Forense, 2004.

ZAGREBELSKY, Gustavo. *El derecho* dúctil. *Ley, derechos, justicia.* 7. ed. Madrid: Editorial Trotta, 2007.

Afterword

What is the purpose of a postscript?

It is an addendum, explanation or warning, located at the end of a book, often after it is finished.

It often serves as a way of making a final record that cannot yet be done ...

This is the purpose of this text.

Record the satisfaction of the Legal Letters Academy of Bahia with the edition of another volume - the last one - of the book "Fundamental Rights and Duties in Times of Coronavirus". This time in english.

It is a historic initiative, which marks the strength of Brazilian legal thinking, notably from Bahia, in the contemporary academic scenario.

In fact, the initiative of the talented and dynamic Professor Carlos Eduardo Behrmann Ratis Martins, simultaneously President of the Lawyers' Institute of Bahia and the Constitutional Law Institute of Bahia, to organize a "Virtual Seminar on Fundamental Rights and Duties in Times of Coronavirus" he found ideal partners at the Legal Letters Academy of Bahia, which I chaired, and in the Postgraduate Program in Law at the Federal University of Bahia, coordinated with excellence by the hard-working Professor Doctor Saulo José Casali Bahia. It joined after the College of Presidents of the Lawyers' Institutes of Brazil, chaired by Professor Doctor Carlos Eduardo Behrmann Ratis Martins.

This partnership proved to be extremely fruitful.

In fact, what was an unprecedented and isolated seminar was repeated, then a new edition and, from grain to grain, became a permanent event with 18 (eighteen) events in successive weeks, bringing together 107 (one hundred and seven) speakers! In addition, it showed the local, national and international legal community the impressive productivity of everyone involved with the launching schedule of 5 (five) literary works of school, in addition to a present volume in English, totaling 105 (one hundred and five) texts!

And it is precisely for the last work of these five that this afterword is written!

With 15 (fifhteen) texts of great academic depth, it is with great pride that the Legal Letters Academy of Bahia recommends to everyone a careful reading of each of the reasons collected here, also drawing attention to the four prior volumes of this cornucopia.

Therefore, it is only up to this "posfaciador" to register the enormous honor, pleasure and privilege of writing these brief notes, in the certainty that, from this leafy tree that was cultivated collectively, many other tasty fruits will still be born!

Salvador, November 1, 2020.

RODOLFO PAMPLONA FILHO (ORGANIZER)

President of the Legal Letters Academy of Bahia

ACHIEVEMENT:

IDCB
INSTITUTO DE DIREITO CONSTITUCIONAL DA BAHIA

INSTITUTO DOS ADVOGADOS DA BAHIA

Academia de Letras Jurídicas da Bahia

COLÉGIO DE PRESIDENTES DOS INSTITUTOS DOS ADVOGADOS DO BRASIL

UNIVERSIDADE FEDERAL DA BAHIA
FACULDADE DE DIREITO
PROGRAMA DE PÓS-GRADUAÇÃO STRICTO SENSU

ISBN: 978-65-87082-10-3
9 786587 082103

EDITORA IASP