

Balancing fundamental rights: What has the Brazilian Constitutional Court decided on mandatory vaccination?

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Almost one hundred and twenty (120) years ago, when the first mass vaccination campaign in Brazil (against smallpox) took place, the so-called Vaccine Revolt broke out. In mid-1904, the number of people infected with smallpox was growing. This motivated the National Congress to pass a law mandating vaccines against the disease and preventing those not vaccinated from getting work contracts, school enrolments, marriage certificates, travel permits etc. Added to this, people's natural ignorance about the immunizing agent and the Government's truculence, often invading people's homes to give them the vaccine *by force*, led to a great popular uprising and the State to give up making vaccination mandatory.¹ Interestingly, four (4) years later, due to a more violent smallpox epidemic, the population itself ended up spontaneously deciding to vaccinate.

With the spread of the SARS-CoV-2 virus and the ongoing Covid-19 pandemic, the Brazilian Federal Supreme Court (which is the Brazilian Constitutional Court) was

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¹ See <https://portal.fiocruz.br/noticia/revolta-da-vacina-2>, accessed on 6 December 2021. Also of a historical nature, it is important to recall a judgment that took place in 1905, right after the mentioned Vaccine Revolt, in which the Brazilian Federal Supreme Court (STF) granted *habeas corpus* to a subject so that he would not have his house sanitized by the agents of the Government. The decision, however, did not deal specifically with mandatory vaccination, but with the need for the disinfection order to have been issued by law and not by an act of the Executive Branch. (see STF, Full Court, RHC No. 2.244/RJ, reporting Justice Manuel Murinho, ruled on 31 January 1905, published on Official Journal of Court of 3 February 1905, majority vote).

recently called to rule on a similar theme that led to the Vaccine Revolt: the mandatory vaccination. Although the issue of coercibility of health treatments is not necessarily new or unprecedented – *see* three decisions in the two following paragraphs –, it was the first time that a Brazilian Superior Court, generally and binding on all other Courts and Brazilian judges, decided explicitly on the issue of mandatory vaccination.

To recap decisions dealing with the compulsory medical treatments issue, in a judgment held in 2011, the Superior Court of Justice (STJ), by majority vote, recognized that the parents, Jehovah's Witnesses, are not criminally liable for the death of their daughter because they refused the treatment to be followed indicated by the medical doctors (blood transfusion). In that same judgment, the Court understood that physicians and hospitals shall, in the case of a legally incapacitated patient (in this case, it was an adolescent), proceed with the treatment indicated by science, regardless of the consent of the legal guardians/parents².

The Court of Appeals of the State of São Paulo (TJ-SP), on two different occasions, rendered two antagonistic decisions: on the one hand, the Court granted to a hospital the permission to proceed with medical treatment contrary to the religion of the patient (legally capable)³; on the other hand, it decided that it was impossible to impose medical treatment not accepted by the patient (again legally capable)⁴.

Turning to the object of this article, by the enactment of a federal law determining mandatory vaccination against Covid-19, the Brazilian Federal Supreme Court was asked to rule on its constitutionality⁵ – sure of the existence of those who by religion, philosophy, ignorance, or denialism are against vaccines. At the same

² *See* STJ, 6th Panel, HC No. 268.459/SP, reporting Justice Maria Thereza de Assis Moura, ruled on 2 September 2011, published on Official Journal of Court of 28 October 2014, majority vote.

³ *See* TJ-SP, 3rd Chamber of Public Law, Appeal No. 1003243-34.2018.8.26.0347, reporting Judge Marrey Uint, ruled on 20 August 2019, published on Official Journal of Court of 9 March 2020, majority vote.

⁴ *See* TJ-SP, 3rd Chamber of Private Law., Appeal No. 1104890-13.2013.8.26.0100, reporting Judge Viviani Nicolau, ruled on 16.6.2005, published on Official Journal of Court of 17 June 2005, majority vote.

⁵ *See* STF, Full Court, ADI No. 6.586/DF and ADI n. 6.587/DF, reporting Justice Ricardo Lewandowski, ruled on 17 December 2020, published on Official Journal of Court of 7 April 2021, majority vote.

time, an appeal had also reached the Court in which a similar issue was discussed: the possibility of compelling parents to vaccinate their children with the vaccines included in the Brazilian National Vaccination Program (PNI)⁶. Due to the relevance, urgency and intersection of the themes, the cases were ruled together.

As for the judgment of constitutionality of mandating vaccination, two main currents were opposed. On the one hand, those who understood that the decision to take the vaccine is individual freedom argued the unconstitutionality of the law and the illegality of compulsorily imposing the vaccination (even against Covid-19). On the other hand, those who understood that the pandemic (or any epidemic disease) is a public issue and that the collective should override the individual advocated the constitutionality of the law and the mandatory nature of vaccination. The Brazilian Federal Supreme Court ruled that the law is constitutional. Still, it should be interpreted under the Brazilian Federal Constitution, following specific and strict requirements to make vaccination “mandatory”. Balancing fundamental rights, the Court ruled the following.

First, despite considering the vaccination essential and mandatory, the Court granted the right of any legally capable person to refuse the immunization (*i.e.*, prohibition of vaccination by force). In addition, the State's decision to institute compulsory vaccination shall be based on scientific criteria and relevant strategic analyses, with wide dissemination of information on the efficacy, safety, and contraindications of the vaccine. Furthermore, the obligation can only concern immunization agents distributed universally and free of charge by the State.

Second, mandatory vaccination can only be imposed through indirect, reasonable, and proportionate measures (e.g., restriction on the exercise of activities or attendance to certain places), respecting human dignity and civil liberties. The obligation “cannot contemplate any invasive, distressing or coercive measures, as a

⁶ The PNI was created on 18 September 1973 and is a world reference government program of universal access to vaccination. It has included or includes, among others, vaccines against yellow fever, polio, measles, tetanus, tuberculosis, diphtheria, whooping cough, influenza and rubella (see <https://www.gov.br/saude/pt-br/aceso-a-informacao/acoes-e-programas/programa-nacional-de-imunizacoes-vacinacao>, accessed on 7 December 2021).

⁷ See STF, Full Court, ARE No. 1.267.879/SP, reporting Justice Luis Roberto Barroso, ruled on 17.12.2020, published on Official Journal of Court of 7 April 2021, unanimous vote.

direct result of the right to intangibility, inviolability and integrity of the human body, as well as other constitutional guarantees". It is "flagrantly unconstitutional any legal, regulatory or administrative determination implementing forced vaccination of people without their express consent". Therefore, vaccination may "be required as a condition for the practice of certain acts, such as the enrolment of a child in a school, public or private, or as a condition for the perception of benefits (...) or it also allows them to be applied the penalties in case of non-compliance", said the reporting Justice Ricardo Lewandowski.

Third, mandatory vaccination and indirect measures shall be imposed by law (and not by mere action of the Executive Branch, unless the law so authorizes), and it cannot be mandatory to those people who for health condition cannot be vaccinated (*i.e.*, indirect measures do not apply to such people in case of non-vaccination).

Fourth, indirect measures can be instituted by all federative members (Union, States, Federal District and Municipalities), provided that their respective power to legislate is respected.

There is no doubt that vaccination refusal cannot be admitted as an acceptable externality. Therefore, while it is recognized that there can be no forced vaccination, it is also accepted that refusal may lead to indirect measures restricting the exercise of certain activities or the frequency of certain places. These measures should encourage immunization but cannot cross the barrier of civil liberties. As is well known, non-democratic regimes – of different tendencies and political spectrums – have already invoked the motto of the prevalence of the collective as an instrument of subjugation; the Rule of Law does not accept this sort of "concept".

In constitutional terms, the decision of the Brazilian Federal Supreme Court is reasonable and proportional, balancing civil liberties and collective interest without violating the fundamental rights of the Rule of Law.

The decision of the Brazilian Supreme Court follows a similar understanding adopted by the Supreme Court of the United States in *Jacobson v. Massachusetts*⁸ and *Zucht v. King*⁹, ruled in the first half of the 20th century. Also, recently, the European Court of Human Rights, ruling *Vavříčka and Others v. the Czech Republic*¹⁰, has decided accordingly.

As for the ruling of the appeal involving the possibility of forcing parents to vaccinate their children, two main currents were also opposed: on the one hand, those who understood that the State cannot interfere in family affairs and that the decision to vaccinate a child is civil liberty and a right of parents to raise their children following what they believe; on the other hand, those who argued that it is a public health issue, involves the health and life of a person who is not legally capable and is a constitutional duty of the State and society to take care of legally incapable people.

Balancing constitutional rights of equal relevance, the Brazilian Supreme Court ruled that vaccination¹¹ is mandatory in the case of legally incapable people, especially children and adolescents. Balancing constitutional rights, the Brazilian Federal Supreme Court has concluded that the compulsory vaccination of a legally incapable person does not violate the freedom of conscience or philosophical conviction of the parents or guardians, nor the parental authority. It must be distinguished “the choices that someone makes for themselves and the choices that someone makes as someone else’s guardian (...) when adults make choices for themselves, under certain circumstances, it is possible to give precedence to individual autonomy as an expression of their civil liberty, as long as this does not illegitimately affect the rights of third parties”, said the reporting Justice, Luis Roberto Barroso.

The Brazilian Supreme Court dismissed the appeal, upholding the decision rendered by the Court of Appeals of the State of São Paulo, which determined the

⁸ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁹ See *Zucht v. King*, 260 U.S. 174 (1922).

¹⁰ See *Vavříčka and Others v. the Czech Republic* (2021).

¹¹ Vaccines distributed by the public health system.

“regularization of the mandatory vaccination of the child (...), under penalty of limited suspension of parental authority (...) [and] search and seizure”¹² of the child.

As for this second judgment, unlike the mandatory vaccination through indirect measures, the Brazilian Federal Supreme Court concluded that a legally incapable person could be vaccinated by force, regardless of the will of their legal guardians. The Court understood that the obligation is not imposed against the person’s will – the will of a legally incapable person is not endowed with any legal effect under Brazilian law –, but against the conscience or philosophy of the person’s parents or guardian. The Court balanced the freedom of conscience of legal guardians and the legally incapable person’s right to health, ruling for the second.

Although the potential risks arising from the second decision are as severe or more severe when compared to the decision of the first case judged by the Brazilian Federal Supreme Court, Brazilian Law oblige the State and the society to protect the health of those who cannot legally make their own decisions (especially children and adolescents). In addition, unlike what was decided on the possibility of making choices concerning the person himself, in this second case, the decision of taking vaccine interferes with the life and health of a third person, legally incapable. Considering both premises, one can conclude that the second decision is as reasonable and proportional as the first one, despite the risks arising from its abusive utilization in the future.

There is no certainty about what restrictions can be imposed, nor what will be the exact limits of mandatory vaccination of legally incapable people – and who can legally impose so –; and it is not clear to what extent the cost of refusal, especially in the Brazilian reality, should, even partially, be considered of social responsibility (obviously not at the price of contaminating other people). These are problems for which not even the good antidotes of broad information, respect for human dignity, fundamental rights, civil liberties, reasonableness, and proportionality can

¹² See TJ-SP, Special Chamber, Appeal No. 1003284-83.2017.8.26.0428, reporting Judge Fernando Torres Garcia, ruled on 11 July 2017, unanimous vote.

be enough. Only future cases brought with the Brazilian Courts – including the Supreme Court – will be able to say about the adherence of their decisions to the Brazilian Federal Constitution¹³.

One of those most important cases is to be decided by the Brazilian Supreme Court. Its judgment began on 15 December 2021 and is expected to be concluded on 17 February 2022. Deciding on the implementation of proof of vaccines (vaccine passport or Covid pass) by visitors coming from other countries to Brazil, the majority of the Supreme Court Justices¹⁴ endorsed the precautionary measure that had been partially granted by the reporting Justice Luis Roberto Barroso.¹⁵ However, the judgment was suspended after Justice Nunes Marques had requested that the case be ruled in an in-person trial – the case was originally designated to be ruled in a virtual trial, and the Justices could change their opinion until the judgment is reached concluded.

In this case, a political party defied the purported Federal Government's failure to adopt all measures recommended by the National Health Surveillance Agency (Anvisa) to prevent the entry of people from other countries without proving their vaccination or, at least, their non-contamination. Indeed, the Federal Government issued an executive order partially adopting the recommendation.

In its defence, the Federal Government reasoned that the Court could not intervene in the decision within its competence, based on a political judgment of convenience and opportunity. The Federal Government also claimed that any decision would violate the constitutional principle of separation of powers.

Despite the relevant reasons presented by the Federal Government – and their merits are not to be confused on how the pandemic has been conducted at the

¹³ For instance, the Brazilian Supreme Court will rule whether employers can dismiss employees who refuse to be vaccinated, *i.e.*, whether this would be a constitutional, proportional, and reasonable measure (See ADPFs No. 898, 900, 901 e 905, under the report of Justice Luis Roberto Barroso).

¹⁴ They are Justice Luiz Fux, Justice Rosa Weber, Justice Ricardo Lewandowski, Justice Camen Lucia, Justice Dias Toffoli, Justice Luis Roberto Barroso, Justice Edson Fachin and Justice Alexandre de Moraes.

¹⁵ See STF, Full Court, ADPF n. 913 MC-Ref, reporting Justice Luis Roberto Barroso, ruled on 16 December 2021.

federal level –, the current majority of the Supreme Court Justices voted to endorse the single decision issued by the reporting Justice Luis Roberto Barroso. According to them, “the decision does not involve a judgment on the political preferences of the Judiciary Branch, but rather an assessment of the compatibility of the measures adopted by the Executive Branch with respect for such rights”.

Giving “constitutional interpretation” to the executive order issued by the Federal Government, the Justices who have already voted concluded that: (a) people not domiciled in Brazil could only enter the country upon proof of vaccination, except in cases of people who for medical reasons cannot be immunized, who come from places where vaccines are not available or, for some humanitarian reason, who have entered the country before being vaccinated; (b) people domiciled in Brazil may return to the country upon proof of vaccination or quarantine, which only ends after a negative Covid-19 test.

From the perspective of safeguarding the health and inducing vaccination, the decision is adequate and should be applauded. However, with all due respect, by prevailing the votes already issued by the Justices, one can understand that the Brazilian Supreme Court crossed the boundaries of its own jurisdiction and violated the principle of separation of powers.

Regardless of whether the Federal Government's decisions are questionable – to say the least –, by establishing different and even stricter criteria for the entry of people which had not been adopted by the Federal Executive Branch, the Judiciary Branch could create a dangerous exception. The Brazilian Federal Constitution defines the competence of each of the three Branches of the State, deferring to the Executive the power to adopt public policies, which understands to be the right ones. Regardless of whether one supports the current Federal Government, it was democratically elected, which shall be respected. Criticism and objections must be made through freedom of speech and, when applicable, through the exercise of voting, not by replacing the decisions of the Federal Government with the decisions of the Judiciary Branch just because the former does not adopt the measure which the Justices thought was the right one. Indeed, this is not a case in

which the Federal Government crossed the limits of its discretion; only in cases like that, the Judiciary Branch could control the political decision rendered by the Executive Branch.

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