

The Emergency of the new Coronavirus and the “Quarantine Law” in Brazil

A emergência do novo coronavírus e a “lei de quarentena” no Brasil

Deisy de Freitas Lima Ventura¹

¹ Universidade de São Paulo, São Paulo, São Paulo, Brasil. E-mail: deisy.ventura@usp.br.

ORCID: <https://orcid.org/0000-0001-8237-2470>.

Fernando Mussa Abujamra Aith²

² Universidade de São Paulo, São Paulo, São Paulo, Brasil. E-mail: fernando.aith@usp.br.

ORCID: <https://orcid.org/0000-0003-1971-9130>.

Danielle Hanna Rached³

³ Fundação Getúlio Vargas, Rio de Janeiro, Rio de Janeiro, Brasil. E-mail: danielle.rached@fgv.br. ORCID: <https://orcid.org/0000-0002-6759-3459>.

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Resumo

A Lei n. 13.979, de 6 de fevereiro de 2020, regula medidas de saúde pública relacionadas à emergência do novo coronavírus com alto potencial restritivo de direitos fundamentais, inclusive a quarentena e o isolamento. Esta análise crítica aborda a dimensão internacional da emergência, além da tramitação casuística e antidemocrática da lei brasileira. Com base na legislação epidemiológica em vigor, escrutina estas medidas excepcionais e as salvaguardas à sua implementação.

Palavras-chave: Quarentena; Coronavírus; Emergência Internacional.

Abstract

Law no. 13,979, of February 6, 2020, regulates public health measures related to the emergence of the new coronavirus with high potential to restrict fundamental rights, including quarantine and isolation. This critical analysis addresses the international dimension of the emergency, and the casuistic and anti-democratic procedure of the Brazilian law. Based on health law principles and the epidemiological legislation in force, it scrutinizes restrictive measures and safeguards for its implementation.

Keywords: Quarantine; Coronavirus; International Emergency.



Introduction

Law no. 13,979, of February 6, 2020¹, hereinafter referred to as the “quarantine law”, brings significant innovations to the Brazilian legal order insofar as it regulates matters such as the imposition of isolation and quarantine measures for people and animals; mandatory laboratory tests, vaccinations, exams and medical treatments; the temporary restriction on the entry and exit of people and goods from the country; the requisition of private goods and services by the State, among others, establishing limits but also safeguards in relation to the exercise of fundamental rights and freedoms provided for in the Federal Constitution in force. However, its reach is limited exclusively to “coping with the coronavirus responsible for the 2019 outbreak”, and cannot exceed the duration of the Public Health Emergency of International Concern (PHEIC)², which was declared by the World Health Organization (WHO) in January 30, 2020³. WHO recognized the existence of a “COVID-19 pandemic”⁴ on 11 March 2020⁵.

The purpose of this article is to offer a critical analysis of the quarantine law, highlighting its positive and negative aspects, having as reference values the protection of public health, democracy, health law principles, human rights and fundamental freedoms. Such analysis is justified by the growing trivialization of restrictive measures of rights at the global level, motivated, in general, by the widespread panic among populations. It is not just about China, a dictatorial regime and the epicenter of the international spread of the new coronavirus⁶, which has implemented radical measures

¹ BRASIL. Lei n. 13.979, de 6 de fevereiro de 2020. Dispõe sobre as medidas para enfrentamento da emergência de saúde pública de importância internacional decorrente do coronavírus responsável pelo surto de 2019. Diário Oficial da República Federativa do Brasil, Brasília, DF, 7 fev. 2020.

² See article 1 § 3 of the quarantine law.

³ OMS. Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV). Genebra, 30 jan. 2020. Disponível em <<https://www.who.int>>. Acesso em 28 fev. 2020.

⁴ The first denomination adopted by WHO was “2019 novel coronavirus”, later changed to SARS-CoV-2. On February 11, WHO started calling the disease “COVID-19”, which is the acronym for “coronavirus disease”, plus the year related to the outbreak (2019) , v. WHO. WHO Director-General's remarks at the media briefing on 2019-nCoV on 11 February 2020. Geneva, 11 Feb. 2020. Available at <<https://www.who.int>>. Accessed on 28 feb. 2020. Within the scope of this article, we chose to adopt the reference of Brazilian law, “coronavirus responsible for the 2019 outbreak”, simplified by the expression “new coronavirus”.

⁵ In the absence of a legal definition, in general, WHO calls the international spread of a new disease a pandemic. In the case of the new coronavirus, however, the statement refers to the speed of spread, the number of serious cases and the insufficient response, WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020. Geneva, 11 Mar. 2020. Available at <<https://www.who.int>>. Accessed on 11 mar. 2020.

⁶ According to the Ministry of Health, coronaviruses cause respiratory and intestinal infections in humans and animals, most of them caused by low pathogenic species that generate symptoms of the common cold,



to contain the disease in the most affected regions, including the isolation of populous cities, the closure of establishments, including schools, and the suspension of public transport operation⁷. Italy, which was the second epicenter of the disease and is an important European democracy, also adopted measures similar to those of China, which were considered “frantic, irrational and unmotivated”, capable of creating a “state of fear” as a justification for exceptional measures⁸. Significant tensions between local and central authorities have also been reported, stemming from the regionalism that characterizes the Italian health system, with the adoption of different protocols depending on the region in question⁹.

From a theoretical point of view, this article positions itself in the critical studies of global health as it addresses the interaction between political agendas and the ways in which ideas about emergencies are presented, interpreted, justified, legitimized and contested¹⁰. It also intends to be considered a critical study because it is “people-centered”¹¹, as opposed to security, dogmatic or technical approaches.

As it is a legal article, it is important to highlight the growing recognition of the importance of law in global health. Indeed, the different forms of regulation can positively or negatively influence: national health systems; the political agendas of States, international organizations and private actors; population access to health (including medicines and primary care); the fight against different forms of

which can eventually lead to serious infections in risk groups, the elderly and children. As for the new coronavirus, in particular, there is still no complete clinical description, with gaps in its patterns of lethality, mortality, infectivity and transmissibility. In addition, there is still no vaccine or specific drugs available; currently, the treatment offered to the patient is supportive and nonspecific, cf. BRAZIL. Ministry of Health. Epidemiological Bulletin n. 3 - New Coronavirus disease 2019 - COVID-19, Brasília, 21 Feb. 2020. The same bulletin highlights: “Before 2019, two highly pathogenic and animal-derived coronavirus species (SARS and MERS) were responsible for outbreaks of severe acute respiratory syndromes,” *Ibid.*

⁷ See CHEN, Simiao et al. “COVID-19 control in China during mass population movements at New Year”, *The Lancet*, v. 395, n. 10226, 2020, p.764-766.

⁸ AGAMBEN, Giorgio. O estado de exceção provocado por uma emergência imotivada. Tradução de Luisa Rabolini. Instituto Humanitas Unisinos, 27 fev. 2020. After the publication of the aforementioned article, the exceptional measures in Italy became even more extensive and drastic, v. Itália. Conselho de Ministros. Decreto del Presidente - Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19 (20A01522). Diário Oficial, *Série Generale* Roma, n.59, 08 mar. 2020.

⁹ ALONGE, Guillaume; GUARNIERI, Francesca. Le patient italien ou la vie au temps do Coronavirus. AOC - Analyse, Opinion, Critique. 02 mar. 2020.

¹⁰ NUNES, João; PIMENTA, Denise. “A epidemia de Zika e os limites da saúde global”. *Lua Nova: Revista de Cultura e Política*, n. 98, 2026, p. 21-46.

¹¹ BIEHL, João; PETRYNA, Adriana. “Peopling Global Health”. *Saúde e Sociedade*, n.23, v.2, 2014, pp. 376-389.



discrimination, among others and numerous topics, which influenced the emergence of the expression “legal determinants of global health”¹².

The article has five sections. The first presents the process by which a disease or condition becomes an international emergency. The second addresses the justification and processing of the quarantine law. The third synthesizes the epidemiological legislation in force with regard to emergencies and public health measures. The fourth presents the public health measures regulated by the quarantine law, while the fifth and last section scrutinizes the safeguards contained in the quarantine law. Finally, some conclusions are drawn.

The international dimension of the emergency declaration

As a specialized organization of the United Nations system, WHO is the authority charged with directing and coordinating international action in the field of health, with regulatory power¹³. The declaration of a PHEIC by WHO is based on the International Health Regulation (IHR)¹⁴. The current version of the IHR was approved in 2005 by the World Health Assembly and has been in force since 2007 in 196 states. According to article 1 of the IHR, a PHEIC is an extraordinary event that constitutes “a risk to other States through the international spread of disease”, and that potentially requires “a coordinated international response”.

The outbreak of the new coronavirus, which initially occurred in China, led WHO to declare the sixth PHEIC. Figure n. 1 offers some basic information about the history of these emergencies.

¹² GOSTIN, Lawrence et al. “The legal determinants of health: harnessing the power of law for global health and sustainable development”. *The Lancet*, v. 393, n. 10183, pp. 1857-1910.

¹³ OMS. Constituição (1946). In: BRASIL. Decreto n. 26.042, de 17 de dezembro de 1948. Promulga os Atos firmados em Nova York a 22 de julho de 1946, por ocasião da Conferência Internacional de Saúde. Diário Oficial da União (DOU), Rio de Janeiro, RJ, 25 jan. 1949, especialmente artigos 2º e 21 a 23.

¹⁴ BRASIL. Decreto n. 10.212, de 30 de janeiro de 2020. Promulga o texto revisado do RSI, acordado na 58^a Assembleia Geral da Organização Mundial de Saúde, em 23 de maio de 2005. Diário Oficial da República Federativa do Brasil, Brasília, DF, 30 jan. 2020, retif. em 31 jan. 2020.



| 1. Influenza A (H1N1) | 2. Polio (ongoing) | 3. Ebola | 4. Association between Zika virus and malformations | 5. Ebola (ongoing) | 6. Coronavírus (ongoing) |
|--|--|---|---|---|--|
| <ul style="list-style-type: none"> • Declared in April 2009, extinguished in August 2010, originating in Mexico and initially called swine flu • declared a pandemic in June 2009 • denunciations pointed out conflicts of interest in the composition of the WHO emergency committee • high-level commissions have strongly criticized the text or the application of the IHR | <ul style="list-style-type: none"> • Declared in May 2014 (33rd meeting of the Emergency Committee on 01/07/2020) <ul style="list-style-type: none"> • currently involves more than 20 states with varying degrees of risk of international spread of the disease, including Afghanistan, Nigeria, Pakistan and Syria • risk of spreading the virus was increased by armed conflicts and political crises, causing the compromise of immunization programs | <ul style="list-style-type: none"> • Declared in August 2014 and extinguished in March 2016, it had West Africa as its epicenter, with about 11,000 reported deaths • represents a turning point in the field of global health, with great repercussion of the 7 cases of the disease treated in the West • WHO action was considered a failure; a UN mission (UNMEER) took control of the international response, focused on geographic containment of the disease and marked by militarization | <ul style="list-style-type: none"> • Effective between February and November 2016, its epicenter was Brazil that revealed the Congenital Zika Syndrome to the world • raises the issue of endemic diseases within the scope of PHEICs • impact on women's sexual and reproductive rights, and children's rights • marked by a serious political crisis and the simultaneity with the Olympic and Paralympic Games | <ul style="list-style-type: none"> • Declared in October 2019 (2nd meeting of the Emergency Committee on 02/12/2020) <ul style="list-style-type: none"> • epicenter in the Democratic Republic of Congo, marked by armed conflicts and political instability • generated controversy about late declaration and political relativization of the ESPII concept by the respective Emergency Committee | <ul style="list-style-type: none"> • Declared in January 2020 with epicenter in China, followed by international spread • declared pandemic on March 11, 2020 • highly restrictive rights measures are adopted, including in European democracies • repercussions of the disease have an increasing impact on the international market |

Figure n. 1 - PHEICs declared by WHO until February 2020

It is striking that, of the three PHEICs currently underway, it is only the new coronavirus that has achieved significant repercussions at the global level. Both the PHEIC referring to poliovirus, which is six years old, and the recent PHEIC referring to Ebola in the Democratic Republic of Congo, are rarely mentioned by the media.

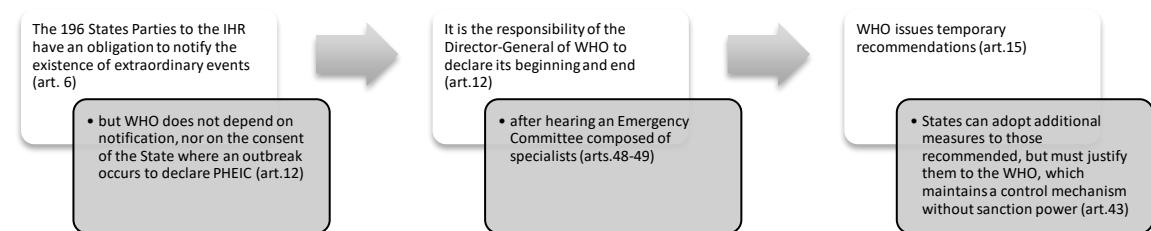
The analysis of Figure n. 1 also demonstrates that the lethality of the threat in question; the number or severity of the cases; the impacts on the affected populations, or even the eventual inefficiency of the States where the outbreaks occur are not the factors that determine the declaration of a PHEIC. The decisive elements, according to the concept already mentioned in the IHR, are: the extraordinary character of the event; the potential for the spread of the disease across regions of the world; and the need for



internationalization of the response. It follows that diseases that affect millions of people are not considered emergencies for the IHR¹⁵.

Figure n. 2 briefly describes the mechanism for declaring a PHEIC.

Figure 2 - Declaration of a PHEIC according to the IHR



The current IHR grants WHO a responsibility of the greatest relevance, since the declaration of a PHEIC can cause economic, political and social repercussions, as is the case of the new coronavirus. However, there is a vast critical literature on the IHR and the WHO emergency reporting mechanism. It indicates dysfunctions concerning the emergency committees that support the declaration of a PHEIC by the Director-General, including its composition¹⁶ and the opacity of its decision-making processes¹⁷; in addition to the lack of sanctioning power that could convert WHO recommendations into obligations for States, among other aspects¹⁸.

Emergency declarations, whether international or national, have the potential effect of adopting exceptional measures to protect public health, which demands an extra need to balance the rights of the individual and the rights of the collectivity.

¹⁵ The relevance of this concept is a recurring topic in the critical literature on global health. Recent experiences of expanding the concept of health emergencies are described in the literature, v. SUNSHINE, Gregory et al. "Emergency Declarations for Public Health Issues: Expanding Our Definition of Emergency". *The Journal of Law, Medicine & Ethics*, v. 47, n. 2_suppl, 2019, pp. 95–99.

¹⁶ When declaring the first PHEIC, regarding influenza A (H1N1), WHO only released the identity of the committee members at the end of the emergency, giving rise to accusations of conflict of interest of its members, some of them linked to the pharmaceutical industry. As of the second PHEIC, the composition of the committees started to be disclosed simultaneously to the declaration of the PHEIC, see list of committee members on the new coronavirus available at <<https://www.who.int>>. Accessed on 28 feb. 2020.

¹⁷ See FIDLER, David. "To Declare or Not to Declare: The Controversy Over Declaring a Public Health Emergency of International Concern for the Ebola Outbreak in the Democratic Republic of the Congo". *Asian Journal of WTO & Int. Health Law and Policy*, V.14, N. 2, Set. 2019, pp. 287-330.

¹⁸ On the IHR negotiations, its legal scope and a summary of the criticisms see VENTURA, Deisy. *Direito e saúde global - o caso da pandemia de gripe A(H1N1)*. São Paulo: Expressão Popular/Dobra Editorial, 2013, part. capítulos 3 e 4.



New Brazilian quarantine law: a casuistic and anti-democratic procedure

Drafted in less than a week, with two days of processing between the two houses of the Congress, Law no. 13,979/2020 resulted from a close coordination between the Executive Branch and the leaders of the Legislative Branch.

The corresponding Bill (proposed legislation - PL) no. 23/2020, introduced by the federal government, was not submitted to democratic debate, except for a few hours of discussion in the plenary of the House of Representatives, pressed by the urgency of the text¹⁹, requested by the Congress itself²⁰. Modified by the House of Representatives, PL n. 23/2020 was converted into law after its full approval by the Senate, and then received a full presidential sanction.

Although, at the time, Brazil did not have confirmed cases of coronavirus and had a small number of suspected cases, such urgency was a condition imposed by the Executive Power to repatriate the Brazilians who were in Wuhan, China, then the epicenter of the PHEIC. At the beginning, the far-right leader Jair Bolsonaro, President of the Republic, had ruled out the possibility of repatriation for two reasons: the high financial cost of the operation, considering the special conditions for transferring potential patients; and the absence of legal measures in force to guarantee the quarantine, generating the risk that returnees could be removed from isolation through legal actions²¹. Thus, as acknowledged by the Senate Opinion that recommended the approval of the aforementioned PL, "the issue of a new law is necessary to provide legal certainty for the repatriation of Brazilians who are in Wuhan, the Chinese city that is the

¹⁹ By virtue of art. 152 of the Internal Regulations of the House of Representatives, "Urgency is the dispensation of requirements, interstices or regimental formalities, except those referred to in § 1 of this article [publication and distribution, in separate or by copy, of the main proposal and, if any, of the accessory; opinions of the Committees or appointed Rapporteur; and quorum for deliberation], so that a certain proposal (...) is considered immediately, until its final decision" BRASIL. Congresso Nacional. Câmara dos Deputados. Regimento interno da Câmara dos Deputados. 9. ed. Brasília: Edições Câmara, 2011.

²⁰ On 02/04/2020, by Deputy Aguinaldo Ribeiro, as Leader of the Majority, based on art. 155 of the aforementioned Internal Regulations of the House of Representatives, according to which "It may be automatically included in the Agenda for immediate discussion and voting, even if the session in which it is presented begins, a proposal that deals with matters of relevant and urgent national interest, at the request of an absolute majority of the composition of the House, or of Leaders representing that number, approved by the absolute majority of the Representatives (...)", Ibid.

²¹ "If we bring Brazilians here, it is our idea to place them in a quarantine location, but any legal action may take them from there" said the President. G1, TV GLOBO. "Bolsonaro diz que não traz brasileiros da China porque 'custa caro' e não há lei de quarentena". Globo.com, Brasília, 31 jan. 2020. Disponível em <<https://g1.globo.com/politica/noticia/2020/01/31/bolsonaro-reune-ministros-para-avaliar-risco-do-coronavirus-e-situacao-de-brasileiros-na-china.ghtml>>. Accessed on 28 feb. 2020.



epicenter of the outbreak, and to the quarantine regime to which they must be submitted when returning to the country”²².

The “Operation Return to Homeland”²³ was then launched, which comprised the so-called “rescue” of 34 Brazilians who were in Wuhan through two Brazilian Air Force (FAB) planes, and their subsequent submission to quarantine, together with 24 professionals who accompanied the mission, at Anápolis Air Base, for 14 days²⁴.

It is an old dilemma: “an imperialist approach to public health leads to questioning or an unacceptable limitation of fundamental freedoms, but a minimalist conception can cause human dramas of exceptional gravity”²⁵. Therefore, public health measures can, in fact, “invade the sphere of individual freedom in a very aggressive way”, an invasion that, “under the Democratic Rule of Law, will always be allowed when done under the law and in defense of the public interest, in this case, the protection of public health against health risks identified in society”, based on a “broad social debate” about the rules and procedures that the State must adopt²⁶. Immunization programs, increasingly attacked by campaigns against vaccination, are a very telling example of the complexity of this issue²⁷.

The tensions between legitimate interests, but eventually diverse or even antagonistic, highlight the importance of a “sanitary democracy” that calls for the inclusion of popular participation in health-related decision-making processes; the

²² BRASIL. SENADO FEDERAL. Parecer n. 1/2020. De Plenário, em substituição à Comissão de Assuntos Sociais sobre PL n. 23, de 2020, do Poder Executivo, que dispõe sobre as medidas sanitárias para enfrentamento da ESPII decorrente do coronavírus responsável pelo surto de 2019. Relator: Senador Nelsinho Trad. Brasília, 5 fev. 2020.

²³ Interministerial action involving the Ministry of Defense (in particular through the Brazilian Air Force, FAB), the Ministry of Health, the Ministry of Foreign Affairs and the Brazilian Health Surveillance Agency (ANVISA), for which an official website was created available at <<http://www.fab.mil.br/operacaoregresso/>>. Accessed on 28 feb. 2020.

²⁴ AGÊNCIA BRASIL. “Coronavírus: todos os protocolos foram cumpridos, diz ministro”. EBC, Brasília, 23 fev. 2020. Disponível em <<http://agenciabrasil.ebc.com.br/saude/noticia/2020-02/coronavirus-todos-os-protocolos-foram-cumpridos-diz-ministro>>. Accessed on 28 feb. 2020.

²⁵ TABUTEAU, Didier. “Santé et liberté”, *Pouvoirs*, vol. 130, no. 3, 2009, pp. 97-111.

²⁶ AITH, Fernando; DALLARI, Sueli. Vigilância em saúde no Brasil: os desafios dos riscos sanitários do século XXI e a necessidade de criação de um sistema nacional de vigilância em saúde. *Revista de Direito Sanitário*, São Paulo v. 10, n. 2, Jul.-Out. 2009, p.121.

²⁷ “The mandatory vaccination represents a protection for the common public good of prevention and health promotion, but it should not be taken in an absolute way, being always subject to flexibility in cases in which non-vaccination does not represent relevant risks to public health. It is a conflict between individual freedom and public health that must always be considered in the light of the legal principles of reasonableness and proportionality, balancing health protection with the protection of individual freedoms in the best possible way”, BARBIERI, Carolina; COUTO, Márcia; AITH, Fernando. A (não) vacinação infantil entre a cultura e a lei: os significados atribuídos por casais de camadas médias de São Paulo, Brasil”. *Cad. Saúde Pública*, Rio de Janeiro, v. 33, n. 2, e00173315, 2017.



organization of the State for the practice of participatory decision-making processes; in addition to expanding the spaces of debate, allowing all interested parties to be able to present their arguments and influence the decision-making process²⁸.

In democratic states, measures that restrict fundamental rights and freedoms must be regulated in detail, in order to ensure that they are properly motivated, reasonable and proportionate, in addition to being potentially efficient. In the health field, in particular, it is imperative that they are based on scientific evidence.

However, the Brazilian quarantine law, in spite of having the merit of regulating any restrictive measures of rights, does so in haste, in a moment of notable decline in democracy and human rights within the national territory. The next section will seek to place this new law within the broader context of the pre-existing legal system.

Public health emergencies and measures: synthesis of the epidemiological legislation in force

The current Brazilian epidemiological legislation was created in the 1970s, therefore, before the existence of the 1988 Federal Constitution and the creation of the Unified Health System (Sistema Único de Saúde [SUS]), and under the 1969 IHR, which was designed to combat specific diseases: cholera, fever yellow, plague and smallpox²⁹. Such anachronism adds to the broader problem of fragmentation of the Brazilian health surveillance³⁰ into specialized fields of surveillance, such as epidemiological, sanitary and environmental surveillance; and the overlap between them, both at the conceptual and practical levels, especially with regard to the exercise of state's police power³¹.

This section presents the main rules that can be directly related to the new quarantine law.

²⁸ AITH, Fernando. Direito à saúde e democracia sanitária. São Paulo: Quartier Latin, 2017, p.185-6.

²⁹ OMS. Règlement Sanitaire International 1969. 3. ed. anotada. Genebra: OMS, 1983. Em 1981, a Assembleia Mundial da Saúde excluiu a varíola do alcance do RSI, tendo em conta a sua erradicação. Ibid.

³⁰ “surveillance” means the systematic ongoing collection, collation and analysis of data for public health purposes and the timely dissemination of public health information for assessment and public health response as necessary (art. 1º of the IHR).

³¹ AITH, Fernando; DALLARI, Sueli. Vigilância em saúde no Brasil: os desafios dos riscos sanitários do século XXI e a necessidade de criação de um sistema nacional de vigilância em saúde. Revista de Direito Sanitário, São Paulo v. 10, n. 2 p. 94-125 Jul.-Out. 2009.



Still in force, Law no. 6,259, of October 30, 1975, remains the main Brazilian standard for general epidemiological surveillance, at least regarding the subject under consideration³². The epidemiological surveillance action comprises the information, investigations and surveys necessary for the programming and evaluation of measures to control diseases and health problems. The Ministry of Health is responsible for regulating the organization and attributions of its services, both public and private, in addition to promote its implementation and coordination (art. 2). The law provides for compulsory notification to health authorities of suspected or confirmed cases of diseases that may involve isolation or quarantine measures, according to the IHR (above), in addition to other diseases and "unusual health problems" that can be indicated by the Ministry of Health (art. 7). It further stipulates that "it is the duty of every citizen to inform the local health authority of the occurrence of a fact, proven or presumed, of a case of communicable disease". It is also mandatory the notification of suspected or confirmed cases of diseases provided for in article 7 by doctors and other health professionals, in addition to those responsible for public and private health and education establishments (art. 8). Once notified, the health authority is obliged to carry out the relevant epidemiological investigation to elucidate the diagnosis and investigate the spread of the disease in the population at risk, and may require and carry out investigations, inquiries and epidemiological surveys with specific individuals and population groups, whenever he/she deems appropriate to protect public health (art. 11). As a result of the outcomes, partial or final, of such initiatives, the health authority is obliged to promptly adopt the measures indicated for the control of the disease, with regard to individuals, population groups and the environment (art. 12).

Finally, individuals and public or private entities, covered by the measures referred to in article 12, are subject to the control determined by the health authority (art.13). This, in particular, was the main legal provision to guarantee the Executive Power the exercise of police power in cases of epidemic risks until the advent of the quarantine law. This article is generic and does not contain which sanitary measures could be imposed, nor the specific sanctions for those who do not comply. It is dependent on the subsidiary application of Law 6.437, of 1977, which provides for

³² BRASIL. Lei n. 6.259, de 30 de outubro de 1975. Dispõe sobre a organização das ações de Vigilância Epidemiológica, sobre o Programa Nacional de Imunizações, estabelece normas relativas à notificação compulsória de doenças, e dá outras providências. Diário Oficial da República Federativa do Brasil, Brasília, DF, 31 out. 1975.



sanitary infractions and respective sanctions, or even the Brazilian Penal Code, as it will be explained later.

It is, therefore, a silent legislation with regard to procedures for the adoption and implementation of emergency measures in public health, especially when it comes to the protection of the rights of those affected. The only safeguard provided for by Law no. 6,259/1975 concerns the confidential nature of compulsory notification of disease cases, stipulating that patient identification, outside the medical scope, "can only be carried out, in an exceptional character, in the event of great risk to the community in the judgment of the health authority and with prior knowledge of the patient or of his/her guardian" (art. 10).

In 2005, with the adoption of the IHR, which entered in force in 2007, Brazil assumed major international obligations in terms of health surveillance, in particular the development of "basic capabilities", which, in practice, are the essential conditions so that the regulation can be complied with³³. The Ministry of Health (MS) has now a Health Surveillance Strategic Information Center (HSSIC) of the Health Surveillance Secretariat (HSS)³⁴, defined as the Brazilian IHR focal point with the WHO. Also in 2005, an Interministerial Executive Group (IEG), composed of different federal government bodies and coordinated by the Ministry of Health, was created as an element of the Brazilian response to a possible influenza pandemic³⁵. As of 2009, the year in which WHO declared the PHEIC regarding influenza A (H1N1), HSSIC started to lead a network of state surveillance centers, which includes the Brazilian capitals and other municipalities considered strategic³⁶. There was great mobilization by the federal government to face that pandemic³⁷, leaving a significant legacy to Brazilian health surveillance system at the regulatory level³⁸ and in terms of emergencies.

³³ See Annex 1 of the IHR.

³⁴ Teixeira, Maria Glória et al. "Vigilância em Saúde no SUS - construção, efeitos e perspectivas". Ciênc. saúde colet. 23 (6) Jun 2018, pp.1811-1818.

³⁵ BRASIL. Presidência da República. Decreto de 24 de outubro de 2005 (s/n). Institui o Grupo Executivo Interministerial para os fins que especifica e dá outras providências. D.O.U., Brasília, DF, 25 out. 2005. Modificado em duas oportunidades, e revogado em dezembro de 2010, v. BRASIL. Presidência da República. Decreto de 6 de dezembro de 2010 (s/n). DOU, Brasília, DF, 7 dez. 2010.

³⁶ Temporão, José Gomes. "O enfrentamento do Brasil diante do risco de uma pandemia de influenza pelo vírus A (H1N1)". Epidemiol. Serv. Saúde 18(3), 2009, pp. 201-204.

³⁷ In addition to a PHEIC, WHO also recognized influenza A (H1N1) as a pandemic, which was controversial at the time, see DOSHI, P. "The elusive definition of pandemic influenza". Bull World Health Organ. 2011 Jul 1;89(7):532-8.

³⁸ COSTA, Ligia; MERCHAN-HAMANN, Edgar. Pandemias de influenza e a estrutura sanitária brasileira: breve histórico e caracterização dos cenários. Rev Pan-Amaz Saude, Ananindeua , v. 7, n. 1, mar. 2016, pp. 11-25.



In 2011, Ordinance 104, of January 25, 2011³⁹, adapted the terminologies used by the Brazilian legislation to the lexicon of the IHR⁴⁰. In the same year, through Decree no. 7,616, of November 17, 2011, regulated by Administrative Rule no. 2,952⁴¹, the legal category of Public Health Emergency of National Importance (PHENI) was created. Although it is clearly a transposition of the PHEIC category to the national legal system, they are independent categories from each other⁴². To date, two PHENIs have been declared in Brazil: the one related to Congenital Syndrome associated with infection by the Zika virus (CZS), between 2015 and 2017; and the one related to the new coronavirus, as will be seen below.

In addition to the response to the influenza A (H1N1) pandemic, such normative evolution is related to the Brazilian State's mobilization to host, between 2007 and 2016, important international mass events, among them the Pan-American Games (2007), the Confederations Cup (2013) and the World Cup (2014), World Youth Day (2013) and the Olympic and Paralympic Games (2016)⁴³. In 2013, a specific regulation on surveillance and health care actions in mass events was adopted, but it makes no direct reference to public health measures⁴⁴.

In 2015, despite its chronic underfunding and countless ailments, SUS revealed to the world the Congenital Syndrome associated with infection by the Zika virus (CZS),

³⁹ Brasil. Presidência da República. Decreto Nº 7.616, de 17 de novembro de 2011. Dispõe sobre a declaração de Emergência em Saúde Pública de Importância Nacional - ESPIN e institui a Força Nacional do Sistema Único de Saúde - FN-SUS. DOU, 18 nov. 2011.

⁴⁰ Brasil. Ministério da Saúde. Gabinete do Ministro. Portaria nº 104, de 25 de janeiro de 2011. Define as terminologias adotadas em legislação nacional, conforme o disposto no RSI 2005, a relação de doenças, agravos e eventos em saúde pública de notificação compulsória em todo o território nacional e estabelece fluxo, critérios, responsabilidades e atribuições aos profissionais e serviços de saúde. DOU, Brasília, p. 37-8, 26 de jan. 2011.

⁴¹ Brasil. Ministério da Saúde. Portaria nº 2.952, de 14 de dezembro de 2011. Regulamenta, no âmbito do SUS, o Decreto no 7.616, de 17 de novembro de 2011, que dispõe sobre a declaração de ESPIN e institui a FN-SUS. DOU, Brasília, DF, 15 dez. 2011.

⁴² According to the aforementioned Decree, the PHENI declaration will occur in situations that demand the urgent use of measures to prevent, control and contain risks and damages to public health (art. 2), due to the occurrence of epidemiological situations (outbreaks or epidemics that present a risk of national spread; are produced by unexpected infectious agents; represent the reintroduction of an eradicated disease; are of high severity; disasters; or lack of assistance to the population (art. 3). The same decree establishes the National Force of SUS (FN-SUS) as a cooperation program aimed at implementing measures for prevention, assistance and repression of epidemiological situations, disasters or lack of assistance to the population. (art. 12).

⁴³ Teixeira, Maria Glória et al. "Vigilância em Saúde no SUS - construção, efeitos e perspectivas". Ciênc. saúde colet. 23 (6) Jun 2018, pp.1811-1818.

⁴⁴ Brasil. Ministério da Saúde. Portaria Nº 1139, de 10 de junho de 2013. Define, no âmbito do Sistema único de Saúde (SUS), as responsabilidades das esferas de gestão e estabelece as Diretrizes Nacionais para Planejamento, Execução e Avaliação das Ações de Vigilância e Assistência à Saúde em Eventos de Massa. DOU, Brasília, DF. 10 jun. 2013.



thanks to the notable health professionals working in the hinterlands of the northeastern Brazil⁴⁵ and the public research institutes that have been resisting the recently intensified brutal attacks on Brazilian science. In the midst of a serious political and economic crisis, including the impeachment process of President Dilma Rousseff, Brazil was able to organize a large-scale response, thanks to SUS⁴⁶. On November 11, 2015, the Ministry of Health declared PHENI⁴⁷; on February 1, 2016, WHO declared PHEIC⁴⁸. Noteworthy that the object of the emergency, both at the national and international levels, was not the outbreak of the Zika virus disease, but the association between infection and microcephaly and other malformations.

As shown in Table no. 1, PHENI and PHEIC related to CZS had a significant impact on Brazilian legislation, being the origin of laws and numerous normative acts from the Executive Branch.

Table no. 1 - Main rules related to the emergence of CZS

| | |
|--|--|
| Normative Resolution 387, of October 28, 2015 | Provides for the List of Procedures and Events in Health within the scope of Supplementary Health, to regulate mandatory coverage and the use of diagnostic tests for infection by the Zika virus (Amended by RN nº 407, of June 3, 2016, and revoked by RN 428, of 11/7/2017) |
| Ordinance No. 2,121, of December 18, 2015 | Amends Annex I of Ordinance No. 2,488 / GM / MS of October 21, 2011 [which approves the National Primary Care Policy], to reinforce actions aimed at controlling and reducing health risks by Primary Care Teams. |
| Decree No. 8,612, of December 21, 2015 | Institutes the National Coordination and Control Room, to face Dengue, Chikungunya Virus and Zika Virus (Revoked by Decree No. 10,087, 2019) |
| Provisional Measure No. 712, of January 29, 2016 | Provides for the adoption of health surveillance measures when the situation of imminent danger to public health is verified by the presence of the mosquito transmitting the Dengue Virus, the Chikungunya Virus and the Zika Virus is |

⁴⁵ On the association between the Zika virus, microcephaly and other malformations, see DINIZ, Debora. *Zika: do sertão nordestino à ameaça global*. Rio de Janeiro: Civilização Brasileira, 2016.

⁴⁶ V. BRASIL. Ministério da Saúde. SVS. *Vírus Zika no Brasil: a resposta do SUS*. Brasília: MS, 2017. Disponível em <http://bvsms.saude.gov.br/bvs/publicacoes/virus_zika_brasil_resposta_sus.pdf>. Acesso em 28 fev. 2020.

⁴⁷ BRASIL. Ministério da Saúde. Portaria GM nº 1.813, de 11 de novembro de 2015. Declara ESPIN por alteração do padrão de ocorrência de microcefalias no Brasil, com base no Decreto nº 7616, de 17 de novembro de 2011. DOU, Brasília, DF, 12 nov. 2015.

⁴⁸ OMS. WHO statement on the first meeting of the International Health Regulations (2005) (IHR 2005) Emergency Committee on Zika virus and observed increase in neurological disorders and neonatal malformations, Genebra, 01 fev. 2016.



| | |
|--|---|
| Converted into Law No. 13,301, of 2016 | authorized to determine and execute the necessary measures to control the diseases caused by the aforementioned viruses, under the terms of Law 8,080, of September 19, 1990, and other applicable rules [SUS authorities may determine and implement measures to contain diseases related to the aforementioned viruses, including forced entry into public and private properties , in the event of a situation of abandonment or absence of a person who can allow access by a public agent, regularly appointed and identified] |
| Decree No. 8,662, of February 1, 2016 | Provides for the adoption of routine measures for the prevention and elimination of outbreaks of the Aedes aegypti mosquito, within the organs and entities of the federal Executive Branch, and creates the Articulation and Monitoring Committee of the mobilization actions for the prevention and elimination of outbreaks of the mosquito Aedes aegypti (Revoked by Decree No. 10,179, 2019) |
| Ordinance No. 1,046, of May 20, 2016 | Establishes the National Network of Experts on Zika and related diseases (RENEZIKA) |
| Ordinance No. 204, of February 17, 2016 | Defines the National Compulsory Notification List of diseases, conditions and public health events in public and private health services throughout the national territory, in accordance with the annex, and provides other measures [makes notification of Zika virus disease and deaths mandatory resulting from it] |
| Provisional Measure No. 716, of March 11, 2016 Converted into Law No. 13,310, of July 7, 2016 | Opens extraordinary credit, in favor of the Ministries of Science, Technology and Innovation, Defense and Social Development and Fight against Hunger, in the amount of R \$ 420,000,000.00, for the purposes specified [combating microcephaly and the Aedes mosquito] |
| Interministerial Ordinance / Ministry of Social and Agrarian Development (MDS) No. 405 of March 15, 2016 | Institutes, within the scope of SUS and the Unified Social Assistance System (SUAS), the Rapid Action Strategy for Strengthening Health Care and Social Protection for Children with Microcephaly - Extended by Ordinance Interministerial MS / MDS no. 1,115 on June 3, 2016 |
| Ordinance No. 58, of June 3, 2016 | Provides for articulated actions of the Social Assistance and Social Security networks in the care of children with microcephaly for access to the Continued Social Assistance Benefit - BPC |
| Ministry of Cities Ordinance No. 321, of July 14, 2016 | Redraws the Instructions Manual for selection of beneficiaries within the scope of the Minha Casa, Minha Vida Program [families with microcephaly exempt from the draw for the program] |



Ordinance No. 1,682,
of July 30, 2017

Declaring the closure of PHENI due to a change in the pattern
of microcephaly occurrence in Brazil and disabling the Center
for Emergency Operations in Public Health (COES)

Among the different contributions of this normative framework, we highlight that, despite its tradition in programs to combat vectors that transmit diseases, only within the scope of the response to CZS did Brazilian law expressly allow the entry of public agents in abandoned private properties for disposal outbreaks of mosquitoes⁴⁹. Even so, Brazil has lost the so-called “war against the mosquito”, with a high incidence of vector-borne diseases, mainly due to structural deficiencies related to basic sanitation and access to drinking water, including in the richest regions of the country, marked by persistent health inequities. In 2019, Brazil had more than 1.5 million dengue cases, with a greater number of cases in the Southeast and a higher incidence⁵⁰ in the Midwest; more than 130,000 chikungunya, with the highest number of cases and the highest incidence in the Southeast; and more than 10,000 Zika, with a greater number of cases and a higher incidence in the Northeast⁵¹. Accordingly, endemic diseases transmitted by vector, contrary to old stigmas, are not concentrated in the Northeast and North regions of the country.

Despite its importance, the emergency related to CZS was not sufficient to create to the drafting of a new general epidemiological surveillance law.

Unlike CZS, in which the PHENI declaration preceded the PHEIC - which is explained by the fact that Brazil was the epicenter of the emergency and that the SUS detected the object of the emergency - the Brazilian response to the new coronavirus accompanied the emergency declaration at the international level, as shown in Table no. 2.

⁴⁹ BRASIL. Lei n. 13.301, de 27 de junho de 2016. Dispõe sobre a adoção de medidas de vigilância em saúde quando verificada situação de iminente perigo à saúde pública pela presença do mosquito transmissor do vírus da dengue, do vírus chikungunya e do vírus da zika ; e altera a Lei nº 6.437, de 20 de agosto de 1977. DOU, Brasília, DF, 28 jun. 2016.

⁵⁰ Number of cases per 100 thousand inhabitants.

⁵¹ BRASIL. Ministério da Saúde. Boletim Epidemiológico n. 2 – Monitoramento dos casos de arboviroses urbanas transmitidas pelo Aedes (dengue, chikungunya e zika), Semanas Epidemiológicas 01 a 52, Brasília, 16 jan. 2020. Sobre a SCZ, ver BRASIL. Ministério da Saúde. Secretaria de Vigilância em Saúde. Boletim Epidemiológico N. Especial. SCZ: situação epidemiológica, ações desenvolvidas e desafios, 2015 a 2019. Brasília, 14 nov. 2019.



Table no. 2 – Infralegal rules adopted in the scope of the Brazilian response to the coronavirus until February 2020

| | |
|---|--|
| Decree nº 10.211, of January 30, 2020 | Institutes the Interministerial Executive Group on Public Health Emergency of National and International Importance (GEI-PHEIC), revoking the Decree of December 6, 2010 that had the same object |
| Decree No. 10,212, of January 30, 2020 | Implements the revised IHR text |
| Ordinance n. 188, of February 3, 2020 | Declares Public Health Emergency of National Importance (PHENI) due to Human Infection with the new Coronavirus (2019-nCoV). |
| Decree No. 10,238, of February 11, 2020 | Amends Decree nº 10.211, of January 30, 2020, which provides for the GEI-PHEIC, to include in its composition the Ministry of Foreign Affairs |
| Provisional Measure no. 922, of February 28, 2020 | Amends Law No. 8,745, of December 9, 1993, which provides hiring for a fixed period of time to meet the temporary need for exceptional public interest, among others, including public health emergencies in the list of exceptional situations. |

The federal government made a point of promulgating the IHR, already approved by the Congress, by legislative decree⁵², despite the fact that it had entered into force for Brazil, on June 15, 2007, pursuant to Article 59 of the IHR itself. In accordance to international law and due to the nature of the WHO regulations, its incorporation is not necessary (and, strictly speaking, not even applicable)⁵³. It is evident that this promulgation aims to elude any and all questions about the validity of the IHR in the Brazilian legal system.

As Table n. 2 shows, on February 3, 2020, the Ministry of Health declared a public health emergency at the national level (PHENI). Among the justifications contained in the preamble is the need to establish a strategy for monitoring nationals and foreigners who enter into the country and who fall under the definitions of suspected and confirmed cases. Also on February 3, the Ministry of Health forwarded to the Presidency of the Republic the Bill, which would be converted into the current law.

As a justification for the Bill, the Minister of Health, Luiz Henrique Mandetta, maintained that Brazilian legislation was outdated, without “appropriate legal and

⁵² See VENTURA, Deisy. Direito e Saúde Global ..., op. cit., p.144-147.

⁵³ BRASIL. Congresso Nacional. Decreto Legislativo nº 395, de 9 de julho de 2009. DOU, Brasília, DF, 10 jul. 2009.



sanitary measures and instruments so that the State and Brazilian society can organize themselves to combating new threats to public health”⁵⁴.

Health measures regulated by Law no. 13,979 / 2020

The new quarantine law refers to the provision on "measures to combat PHEIC resulting from the coronavirus responsible for the 2019 outbreak" (epigraph), with the objective of protecting the community (art. 1 § 1). Table no. 3 identifies the exceptional measures provided for in art. 3 of the new law, which due to its restrictive character of rights came to be referred to as "a Sanitary AI-5 in 2020"⁵⁵.

Table no. 3 - Measures to face the PHEIC (art. 3 of Law 13,979 / 20)

| Measure | Definition ⁵⁶ | Competent authorities ⁵⁷ |
|-----------------|--|---|
| I – Isolation | Separation of sick or contaminated persons, or luggage, means of transport, goods or affected postal parcels, [or] from others, in order to avoid contamination or the spread of the coronavirus (art. 2.1 Law 13,979 / 20) | <ul style="list-style-type: none"> - Act of the Minister of State for Health provides for applicable conditions and deadlines - - - Can be applied by the Ministry of Health (MH) and by local health managers, as long as authorized by the MH |
| II - 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 | |

⁵⁴ BRASIL. Ministério da Saúde. EM n. 9/2020 – MS. Brasília, 3 fev. 2020.

⁵⁵ CORRÊA FILHO, Heleno Rodrigues. “Lei do CoronaVirus 2019 – autoritarismo sem garantias de cidadania”. CEBES, Rio de Janeiro, 06 fev. 2020. Available at <<http://cebes.org.br/2020/02/comentario-a-lei-do-coronavirus-2019-uma-lei-autoritaria-sem-garantias-de-cidadania/>> Accessed on 28 fev. 2020.

⁵⁶ By virtue of art. 2 of Law 13,979 / 20, the definitions established by art. 1 of the IHR are applicable to it “as appropriate”.

⁵⁷ See. art. 3º§§ 5 a 7 da Lei 13,979/20.



| | | | |
|--|--|---|---|
| | | coronavirus (art. 2.2 Law 13,979 / 2020) | |
| III - Determination of the compulsory performance of | a) Medical examinations | means the preliminary assessment of a person by an authorized health worker or by a person under the direct supervision of the competent authority, to determine the person's health status and potential public health risk to others, and may include the scrutiny of health documents, and a physical examination when justified by the circumstances of the individual case; (Art. 1 IHR) | - MH - Local health managers |
| | b) Laboratory tests c) Collection of clinical samples d) Vaccination and other prophylactic measures e) Specific medical treatments | There is not | |
| IV - Epidemiological study or investigation | | There is not | - MH - Local health managers |
| V - Exhumation, necropsy, cremation and corpse management | | There is not | MH and local health managers, as long as authorized by the MH |
| VI - Exceptional and temporary restriction on entering and leaving the country, according to the technical and reasoned recommendation of the National Health Surveillance Agency (Anvisa), by highways, ports or airports | “departure” means, for persons, baggage, cargo, conveyances or goods, the act of leaving a territory; “port” means a seaport or a port on an inland body of water where ships on an international voyage arrive or depart; “airport” means any airport where international flights arrive or depart; (art. 1º IHR) | - It should be regulated by a joint act of the Ministers of State for Health and the Minister of State for Justice and Public Security - Can be applied by the MH and by local health managers, as long as authorized by the MH | |
| VII - Requisition of goods and services from natural and legal persons, | | | - MH |



| | |
|--|---|
| in which case the subsequent payment of fair compensation will be guaranteed | - Local health managers |
| VIII - Exceptional and temporary authorization for the import of products subject to health surveillance without registration with Anvisa, provided that they are registered by a foreign health authority; and foreseen by the MH | <ul style="list-style-type: none"> - Act of the Minister of State for Health grants authorization - Can be applied by MH and local health managers, as long as authorized by the MH |

There is no doubt about the operational and ethical complexity of the measures listed by the quarantine law. The specialized literature has reservations regarding mandatory treatment (art. 4, III, e) and quarantine (art. 4, II). As for the first, it is clearly an “extreme-situation in public health”, as the “codes of Medical Ethics only authorize treatment imposed against the patient's will in situations of imminent risk of life”. When it comes to quarantine, studies demonstrate the “low effectiveness of coercive methods and also deterioration in the general living conditions of quarantined patients”⁵⁸. However, the undoubted existence of situations that potentially justify restrictive measures from the perspective of protecting public health, such as large-scale epidemics, seems sufficient to justify its regulation, especially to guarantee its exceptional character and to minimize its impact on the rights of those affected. The doubts that assail health authorities and health professionals during emergencies should also be considered, in the absence of more detailed regulations.

In 2014, the advent of the first suspected case of Ebola in Brazil, which has not been confirmed, offered a privileged laboratory for the risks caused by poor regulation, which contributed to the patient's information and consent rights being violated in the first stage of his care, together with the violation of his privacy as a consequence of the wide diffusion of his identity and image in the media⁵⁹. At the time, it was questioned: “If the patient refuses to remain hospitalized, should the team call the police? Should police officers wear PPE [Personal Protective Equipment] to contain the patient? Will

⁵⁸ SANTOS, Iris; NASCIMENTO, Wanderson. As medidas de quarentena humana na saúde pública: aspectos bioéticos. *Revista Bioethikos*, São Paulo, v. 8, n. 2, 2014, pp. 174-85.

⁵⁹ VENTURA, Deisy; HOLZHACKER, Vivian. Saúde Global e Direitos Humanos: o primeiro caso suspeito de ebola no Brasil. *Lua Nova*, São Paulo, n. 98, 2016, p. 107-140.



the patient be placed under surveillance at the referral hospital?', among other aspects⁶⁰.

On March 11, 2020, Ordinance no. 356⁶¹ regulated the quarantine law⁶². It turns the *free and informed consent term* mandatory for people affected by isolation or quarantine, as well as the notification of isolation, offering such forms in Annex 1. It also determines the duration of these measures: fourteen days for isolation, which can be extended for the same period; and up to forty days for quarantine, extendable indefinitely. The purpose of the quarantine is: to ensure the maintenance of health services in a certain and determined place. It also indicates that isolation should preferably occur at home, in addition to providing several operational details related to exams and tests, among others.

Such regulation, however, did not provide details on sanctions for non-compliance with the measures, being limited to determining that the doctor or epidemiological surveillance agent inform the police authority and the Public Prosecutor's Office about possible non-compliance. According to art. 1 of the IHR, a "health measure" corresponds to the procedures applied to prevent the spread of contamination or disease, "not including police or security measures". The new Brazilian law does not allow supposing the exclusion of police or security measures, although it does not expressly provide for them. In effect, article 3 § 4 of the quarantine law stipulates that "people must be subject to compliance with the measures provided for in this article, and failure to comply with them will result in liability, under the terms provided by law". In the absence of an explicit reference to the applicable law, it is possible to assume a reference to the "violations of federal health legislation" provided for by Law No. 6,437, of August 20, 1977. Said Law, in its art. 10, typifies and provides for sanctions of conducts such as non-compliance with the duty to report disease or

⁶⁰ CERBINO NETO, J. Questões éticas no manejo de pacientes com doença pelo vírus Ebola. *Cadernos de Saúde Pública*, v. 30, n. 11, 2014, pp. 2256-58.

⁶¹ BRASIL. MS. Portaria n. 356, de 11 de março de 2020. Dispõe sobre a regulamentação e operacionalização do disposto na Lei nº 13.979, de 6 de fevereiro de 2020, que estabelece as medidas para enfrentamento da emergência de saúde pública de importância internacional decorrente do coronavírus (COVID-19). DOU, Brasília, DF, 12 mar. 2020.

⁶² Before the regulation of the law was adopted, the Judiciary of Rio de Janeiro determined, in a process protected by a secret of justice, the compulsory internment of French tourists in the Municipality of Paraty (RJ) Justiça determina que casal suspeito de contrair coronavírus fique internado. *Revista Consultor Jurídico*, 28 de fev. de 2020. Available at <<https://www.conjur.com.br/2020-fev-28/justica-determina-internacao-compulsoria-suspeitos-coronavirus>>. Accessed on 28 fev. 2020. In Brasília, a judicial decision ensured the mandatory examination and home care of a suspected case cf. Justiça manda marido de paciente com coronavírus no DF fazer exams, *Folha de S. Paulo*, 10 mar. 2020.



zoonosis transmissible to man (item VI); the gesture of preventing or hindering the application of sanitary measures related to communicable diseases and the sacrifice of domestic animals considered dangerous by the health authorities (VII); or to hinder or oppose the execution of sanitary measures aimed at the prevention of communicable diseases and their dissemination, the preservation and maintenance of health (VIII), among other conducts⁶³. More recently, a federal law had the exclusive goal of defining as "health infraction" the non-compliance with the obligations provided for by Law No. 6,437, mentioned above, without prejudice to the other applicable criminal sanctions⁶⁴.

In criminal matters, according to the Ministry of Health⁶⁵, two crimes typified by Brazilian criminal law could be evoked at this point: "causing an epidemic by spreading pathogenic germs" corresponds to 10 to 15 years' imprisonment, the penalty being applied twice when death results (art. 267)⁶⁶; and "breach of preventive health measure", "designed to prevent the introduction or spread of a contagious disease", punishable by imprisonment from one month to one year and a fine⁶⁷. The Minister of Health declared: "I felt a lack of clarity in the French episode", although he acknowledged the good intentions of everyone involved⁶⁸.

It is also necessary to raise the question of the compatibility of the measures provided for in the law with the IHR. In principle, States Parties may not impose on travelers⁶⁹ any medical examination, vaccination, prophylactic measure or health measure without their prior express and informed consent, or from their parents or

⁶³ BRASIL. Lei nº 6.437, de 20 de agosto de 1977. Configura infrações à legislação sanitária federal, estabelece as sanções respectivas, e dá outras providências. DOU, Brasília, DF, 24 ago. 1977.

⁶⁴ BRASIL. Lei n. 13.730, de 8 de novembro de 2018. Altera o art. 14 da Lei nº 6.259, de 30 de outubro de 1975, para considerar infração sanitária a inobservância das obrigações nela estabelecidas. DOU, Brasília, DF, 24 ago. 1977. The justification for this change would be to clearly state that the absence of notification of diseases by health professionals as a health infraction, due to the finding made by the Special Subcommittee aimed at investigating the use of pesticides and their health consequences (2011) that there was underreporting illness, including compulsory notification, see. CÂMARA DOS DEPUTADOS. Comissão de Seguridade Social e Família. PL n. 1.068, DE 2015. Parecer do Relator. Deputado Adelmo Carneiro Leão. Brasília, 27 out. 2015. It is worth remembering that the omission of notification of compulsory notification by a doctor constitutes a crime punishable by detention, from six months to two years, and a fine, according to article 269 of the Penal Code in force.

⁶⁵ SOUZA, André. Após internação forçada, Saúde criará regra para quarentena de turistas com sintomas de Covid-19, Rio de Janeiro, O Globo, 02 mar. 2020.

⁶⁶ According to the same article, in case of fault (absence of intent and negligence, malpractice or imprudence, the penalty is imprisonment, from one to two years, or, if death results, from two to four years).

⁶⁷ According to the sole paragraph of the same article, the penalty is increased by one third if the agent is a public health worker or exercises the profession of doctor, pharmacist, dentist or nurse.

⁶⁸ SOUZA, André. Após internação forçada, Saúde criará regra para quarentena de turistas com sintomas de Covid-19, Rio de Janeiro, O Globo, 02 mar. 2020.

⁶⁹ "traveller" means a natural person undertaking an international voyage (art. 1 of the IHR).



legal guardians, (art.31.1). However, when there is evidence of an imminent risk to public health, the State Party may, to the extent necessary to control such risk, compel the traveler to undergo medical examinations that will achieve the intended public health objective in the least invasive⁷⁰ and intrusive⁷¹ manner as possible; vaccination or other prophylactic measure; or measures such as isolation and quarantine (art.31.2).

On the other hand, the exceptional and temporary restriction on entering and leaving the country (art. 3, VI), although conditioned to the technical and well-founded recommendation of the National Health Surveillance Agency (Anvisa), may also create incompatibility with the IHR when there is no WHO recommendation, based on scientific evidence, to restrict the international movement of people. In view of article 43.1 of the IHR, any additional measures to those recommended by WHO should not be more restrictive to international traffic, nor more invasive or intrusive towards people. This type of restrictive measure is potentially harmful to human rights because it hinders the international circulation of human resources necessary for the response, in addition to favoring stigma and discrimination against travelers, migrants and refugees because of their origin.

To date WHO has not recommended restrictions on the international movement of people in the case of the ongoing PHEIC. In fact, its recommendations go in the opposite direction and can be summarized in seven axes, as shown in figure n. 3.

⁷⁰ ““intrusive” means possibly provoking discomfort through close or intimate contact or questioning; (art. 1 IHR).

⁷¹ “invasive” means the puncture or incision of the skin or insertion of an instrument or foreign material into the body or the examination of a body cavity. For the purposes of these Regulations, medical examination of the ear, nose and mouth, temperature assessment using an ear, oral or cutaneous thermometer, or thermal imaging; medical inspection; auscultation; external palpation; retinoscopy; external collection of urine, faeces or saliva samples; external measurement of blood pressure; and electrocardiography shall be considered to be non-invasive (art. 1 IHR).



Figure n. 3 - Summary of WHO recommendations on PHEIC for the new coronavirus ⁷²



Despite these recommendations, on February 27, 2020, 41 states had notified the adoption of measures restricting international traffic⁷³; until that moment, no commercial restrictions had been notified⁷⁴. According to the WHO, the majority of these measures target people from China or countries with sustained transmission of COVID-19, including the prohibition of foreigners from entering national territory, the imposition of quarantine measures or isolation of nationals or foreigners, or even restrictions on granting visas. The justification for the measures is generally related to two types of arguments: the vulnerabilities of the health system (for example, lack of capacity for diagnosis and response) and uncertainties regarding the transmission of the virus and the severity of the disease; both justifications are hardly supported by the available scientific evidence. Also, according to WHO, such measures may have delayed the importation of new cases, but did not prevent the importation of the disease. Unfortunately, such measures are part of the established tradition of associating foreigners and diseases that mark the history of epidemics and is part of the process of building national identities in the West, maintaining in contemporary times the potential to induce or justify human rights violations⁷⁵.

⁷² Own elaboration based on WHO. Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV). Portal da OMS. Genebra, 30 jan. 2020. Available at <<https://www.who.int>>. Accessed on 28 fev. 2020.

⁷³ Within the scope of the control mechanism established by article 43 of the IHR.

⁷⁴ OMS. COVID-19 Situation Report n. 39. Genebra, OMS, 28 fev. 2020, p.2.

⁷⁵ VENTURA, Deisy. Impacto das crises sanitárias internacionais sobre os direitos dos migrantes. *Sur - Revista Internacional de Direitos Humanos*, São Paulo, Conectas Direitos Humanos, v. 13, n. 23, p. 61-75, 2016.



In addition to the possible illegality of the measures, many States have not even notified WHO of the measures they have adopted⁷⁶. Brazil, so far, has not adopted restrictive measures for entering and leaving the country, which can only be done through a joint act of the Ministers of Health and Justice and Public Security (art. 3 § 6 of Law 13,979/20).

To sum up, the Brazilian quarantine law is not, *per se*, incompatible with the IHR, being the motivation and the proportionality of its measures the decisive criteria for assessing its compatibility with the international standard, in addition to the effective application of the safeguards that will be dealt with in the next section.

As a last note, the law establishes one kind of exceptionality of another nature. It waives bid requirements for the acquisition of goods, services and health supplies intended to deal with the public health emergency, only as long as the PHEIC resulting from coronavirus lasts (art. 4).

Safeguards from Law no. 13,979 / 2020

Without entering into the necessary debate on the relevance or efficiency of restrictive measures in the case of the new coronavirus, it is important to highlight that, when adopted, these measures cannot represent a “carte blanche” for the State in relation to the fate of the affected people.

The first safeguard provided for is that measures to confront the PHEIC “can 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 to the promotion and preservation of public health” (art. 3 ° § 1). Scientific evidence corresponds to “information that provides a level of evidence based on established and accepted scientific methods” (art. 1 ° IHR). The relevance of this safeguard becomes especially sensitive in a context where the denial of scientific knowledge and religious obscurantism are widespread in several sectors of the federal government.

The Law guarantees people affected by the measures “the right to be permanently informed about their state of health” and the right to receive free

⁷⁶ HABIBI et al. “Do not violate the International Health Regulations during the COVID-19 outbreak”, *The Lancet*, v. 395, n. 10225, 2020.



treatment (art. 3 § 2). In the lexicon of the IHR, "affected" means an infected or contaminated person that carries "sources of infection or contamination, so as to constitute a public health risk" (art. 1 IHR).

In addition to these safeguards, the House of Representatives modified or inserted new provisions, with a significant contribution to the improvement of legislation, as shown in Table no. 4.

Table no. 4 - Safeguards introduced in Law 13,979 / 20 by the House of Representatives⁷⁷

| | |
|---------------|--|
| Art. 1° | Inclusion of the expression "responsible for the 2019 outbreak" to qualify the public health emergency initially referred to only as "due to the coronavirus" |
| Art. 1° | Addition of §3 to limit the maximum period of validity of the law to the duration of PHEIC declared by WHO |
| Art. 3° VI | Addition of the need for a "technical and reasoned recommendation by ANVISA" to guide the eventual exceptional and temporary restriction of entry and exit from the country |
| Art. 3° §2° I | Inclusion of family assistance as a guarantee to people affected by the measures provided for in the law, through regulation |
| Art. 3° §2° | Addition of item III to assure affected persons "full respect for the dignity, human rights and fundamental freedoms of persons, as recommended by Article 3 of the IHR" |
| Art. 4° | Addition of § 2 ° to give greater transparency and publicity to the contracts and acquisitions made by exemption from bid requirements: "All contracts or acquisitions carried out under this Act will be immediately available on a specific official website on the world wide web (internet), containing, as appropriate, in addition to the information provided for in § 3 of art. 8 of Law No. 12,527, of November 18, 2011, the name of the contractor, the number of his registration with the Federal Revenue of Brazil, the contractual term, the amount and the respective contracting or acquisition process " |
| Art. 5° | - Modification of the caput to replace the phrase "It is the duty of every natural person in Brazilian territory to immediately communicate to the health authorities of [I - possible contacts with infectious agents of the coronavirus; II - circulation in areas considered to be regions of |

⁷⁷ Own elaboration based on BRASIL. SENADO FEDERAL. Parecer n. 1/2020. De Plenário, em substituição à Comissão de Assuntos Sociais sobre o PL n. 23, de 2020, do Poder Executivo, que dispõe sobre as medidas sanitárias para enfrentamento da ESPII decorrente do coronavírus responsável pelo surto de 2019. Relator: Senador Nelsinho Trad. Brasília, 5 fev. 2020.



| | |
|---------|--|
| | <p>contamination by the coronavirus] by the phrase: "Everyone will collaborate with the health authorities in the immediate communication of"</p> <ul style="list-style-type: none"> - Suppression of item III, which required reporting to the health authorities of the "manifestation of symptoms considered characteristic of illness by the coronavirus" |
| Art. 6° | Addition of §2 °: "The Ministry of Health will keep public and updated data on confirmed, suspicious and investigating cases, related to the public health emergency situation, safeguarding the right to confidentiality of personal information" |
| Art. 8° | Inclusion to determine that the "Law will remain in force for the duration of the international emergency for the coronavirus responsible for the 2019 outbreak" |

There is no doubt about the importance of the safeguards inserted by the House of Representatives, despite the short processing time of the Bill, both in terms of protecting the affected people (adopting the broader guarantee of dignity, rights and freedoms provided by the IHR) and assistance to the respective families (although it depends on specific regulation), as in the imposition on the State of a clearer temporal limitation (by linking the PHENI duration to the PHEIC duration, that is, prohibiting the possibility of indefinitely extending the term of exceptional measures based on this law) and guarantees of transparency (regarding the waiver of bid requirements and emergency data)⁷⁸.

It is worth noting the reframing of the obligation resulting from article 5, which goes from the "duty of immediate communication to the authorities" of possible contact with the virus to the final wording that excludes the reference to symptoms and stipulates, in a milder way, that everyone will collaborate with health authorities in the immediate communication of possible contacts with infectious agents of the coronavirus; and circulation in areas considered to be regions of contamination. The new wording can contribute to prevent stigmatization, in addition to avoid temptations to, through the infra-legal route, make mandatory the reporting of cases by establishing sanctions for the alleged violation of a duty to communicate.

⁷⁸ The mere right to information, by itself, does not make the law a model of accountability mechanism, which would be ideal in this case. Accountability mechanisms work as a tool to control the decision-making process and, consequently, as a limit to the autonomy of the agent with the authority to decide. For a more detailed conceptual elaboration see RACHED, Danielle Hanna. The Concept(s) of Accountability: Form in Search of Substance. *Leiden Journal of International Law*, v. 29, p 317-342, 2016.



However, an explicit reference to the treatment that should be given to travelers is missing from the Law. In addition to the general guarantee provided for in article 3 of the IHR, and contemplated in the Brazilian quarantine law thanks to the House of Representatives, by virtue of article 32 of the IHR, States Parties have an obligation to minimize "any inconvenience or anguish associated with restrictive measures", treating all travelers with courtesy and respect; taking into account the gender and socio-cultural, ethnic or religious concerns of travelers; providing adequate food and water, appropriate accommodation and clothing, protection for luggage and other goods, appropriate medical treatment, necessary means of communication, "if possible in a language they can understand"; and other appropriate assistance to travelers who are quarantined, isolated or subjected to other procedures for public health purposes.

If the absence of an explicit reference to article 32 can eventually be offset by a general judicial protection, the lack of other safeguards not included in the IHR may contribute to human rights violations. It is worth mentioning at least four of them.

First, health authorities deciding on health measures that restrict individual freedom should be obliged to communicate its decision to the competent Public Prosecutor's Office or to some external and popular control body, within a maximum of 24 hours. These bodies should verify whether the legal and formal requirements for the adoption of the measure have been met and should take the appropriate legal measures⁷⁹.

Second, with respect to nationals of other States, if the person affected by these measures does not speak Portuguese, there should be a mandatory translation into an understandable language, an indispensable condition for the exercise of the right to information about one's own state of affairs, and not just "as far as possible" as recommended by the already mentioned article 32 of the IHR. The submission of a person to measures such as exams and compulsory treatments, in addition to isolation or quarantine, when associated with the inability to communicate with health professionals and others involved in the service in question, constitutes inhuman and

⁷⁹ AITH, Fernando; DALLARI, Sueli. Vigilância em saúde no Brasil: os desafios dos riscos sanitários do século XXI e a necessidade de criação de um sistema nacional de vigilância em saúde. *Revista de Direito Sanitário*, São Paulo v. 10, n. 2, Jul.-Out. 2009, p.121.



degrading treatment, which is totally incompatible with the constitutional order and the international commitments assumed by Brazil in the area of human rights.

Third, the current legislation does not provide legal solutions to the heavy consequences that quarantine, compulsory treatment or isolation can have on labor relationships. The current legislation is limited to considering a justified absence from public service or private work activity for the period of absence resulting from these measures (art. 3 § 3). Certainly, regulation that would protect workers more broadly from economic risks would be welcome.

Finally, in the event of certain restrictions related to the burial of people, in order to prevent agglomerations, or even in the event of the need to organize collective burials, the regulation of the exercise of the inalienable rights of watching over and saying goodbye to the dead remains pending.

Conclusions

Public health measures, including quarantine, already existed in a general way in the Brazilian epidemiological legislation. However, the new quarantine law, which comprises important safeguards, represents an improvement over the previous order. Having said that, the quarantine law maintains essential features of the preceding legislation, namely the reactive and case-by-case elaboration of normative instruments; the fragmentation of the legal system in a diversity of instruments whose hierarchical consistency can be questioned; the absence of a democratic debate; and the pending standardization of numerous details that are decisive for the correct implementation of the law, evidencing a still insufficient exercise of regulatory power.

It is also evident that despite the time limit for the parliamentary procedure, the House of Representatives made modifications to the original text submitted by the Executive Branch, which represented fundamental contributions to the protection of democracy and human rights in Brazil during the emergency. These safeguards seem even more relevant and sensitive in the context of an increasing institutional encouragement to the violation of human rights domestically and the fact that, at the international level, Brazil's position on human rights suffers unprecedented degradation, which is compromising the leadership role that Brazil has always exercised in global



health governance⁸⁰. Nevertheless, the quarantine law still needs to be significantly improved so that it can achieve both efficiency and legitimacy.

In an extremely adverse political context for Brazilian public health, debased by successive budget cuts and suffering competition from religious fundamentalism and negation in relation to science, SUS remains the main axis of response to emergencies. The analysis of the powers in the new law indicates the strengthening of health authorities to respond to the emergence of the new coronavirus, and with them the affirmation of scientific evidence as an indispensable criterion for the adoption of public health measures. The current Minister of Health would have declared: "I'm glad we have SUS"⁸¹. However, the persistence of headlines about the new coronavirus, in addition to causing panic in the population and stigma towards the people involved, can obscure the evidence that there is only true health security in systems capable of covering the entire territory with universal access to health. The detection of a disease cannot depend on financial resources to pay for care, and even less its prevention and treatment. In addition, public research institutions carry out essential work in responding to emergencies. The dismantling of universal health systems and the devaluation of science are today the greatest threats to global health security.

The current event also reinforces the importance of WHO's actions, despite its dysfunctions. WHO's standards, based on scientific evidence, are a reference for immeasurable dissemination at the global level, enhancing its ability to share knowledge essential to the detection and response to the disease. Furthermore, it is difficult to imagine another international actor who would affirm, in the face of this emergency, "it is a time of facts, not of fear; of science, not of rumors; solidarity, not stigma"⁸².

Finally, it is imperative that Brazil adopts a general and permanent epidemiological law, that is, one that is not restricted to a specific emergency, elaborated in a democratic way, which systematizes the various infra-legal rules in force. With a world population of 7.8 billion people, part of them capable of making about 1.5

⁸⁰ See BUSS, Paulo. "Cooperação internacional em saúde do Brasil na era do SUS". *Ciência & Saúde Coletiva*, 23(6), 2018, p.1881-1890.

⁸¹ CRISTINA, Paula. [Luiz Henrique Mandetta] "Ainda bem que temos o SUS". *Isto É Dinheiro*, s/l, 28 fev. 2020. Available at <<https://www.istoeedinheiro.com.br/ainda-bem-que-temos-o-sus/>>. Accessed on 28 fev. 2020.

⁸² OMS. Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV). Genebra, 30 jan. 2020. Disponível em <<https://www.who.int>>. Acesso em: 28 fev. 2020.



billion international trips a year⁸³, the global ecosystem today serves as a playground for emergencies and exchange of animal viruses with high rates mutations that turn into existential threats to humans⁸⁴. The successive economic crises that deplete huge population numbers, the acceleration of the devastation of the environment and the persistence of armed conflicts and areas with high levels of violence dramatically increase the risks of pandemics, including diseases that today seem easily preventable⁸⁵. Pandemics tend to definitively integrate the legal and political landscape at the national and global levels.

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⁸³ Organização Mundial do Turismo. UNWTO World Tourism Barometer v. 18 n. 1, Jan. 2020.

⁸⁴ MORENS, David et al. “Escaping Pandora’s Box — Another Novel Coronavirus”. New England Journal of Medicine, 2020. Disponível em <<https://www.nejm.org/doi/full/10.1056/NEJMp2002106>>. Acesso em 28 fev. 2020.

⁸⁵ Hirschfeld, K. “Microbial insurgency: Theorizing global health in the Anthropocene”. The Anthropocene Review, 2019. Disponível em <<https://doi.org/10.1177/2053019619882781>>. Acesso em 28 fev. 2020.



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About the authors

Deisy de Freitas Lima Ventura

Universidade de São Paulo, São Paulo, São Paulo, Brasil. E-mail: deisy.ventura@usp.br

Fernando Mussa Abujamra Aith

Universidade de São Paulo, São Paulo, São Paulo, Brasil. E-mail: fernando.aith@usp.br

Danielle Hanna Rached

Fundação Getúlio Vargas, Rio de Janeiro, Rio de Janeiro, Brasil. E-mail: danielle.rached@fgv.br

The authors contributed equally to the writing of the article.

