

THE PERPETUAL CONFLICT BETWEEN FREEDOM AND CONTROL: THE CASE OF MANDATORY VACCINATION

No one is naïve enough to believe that in the 21st century it is possible to find any government immune to the political strength emanated by large global corporations economical power. Indeed, governments are proud in describing themselves as marketing partners/agents of companies that have their respective states as corporate headquarters¹. In the same way, this naiveté is no longer possible when it comes to the frontier between the juridical and the political. The Brazilian case is exemplary, but, to avoid the allegation of subjectivity, it is convenient to examine what happened with the regulation of tobacco consumption in Austria: The Freedom Party in Austria (FPÖ) demanded to join the coalition to allow the constitution of a government, the withdrawal of the total ban on smoking in bars, restaurants and discotheques, provided by 2015 legislation that should take effect on May 1².

An imagined response in the second half of the 20th century, during the period of extraordinary growth of the Social Rule of Law in Europe, would aim specially at preserving the law. Systematized, above all by *Luhmann*, the systemic theory of law proposes the application of the notion of system developed in the other half of the century, allowing for the understanding of the provisions, processes and products of every sector in social life, and thus, enabling a better control of eventual dysfunctions. Very much criticized since its proclamation, specially with respect exactly to the relationship of the system with the environment, there is no doubt that such theory reveals its usefulness for the eventual preservation of the law as a social system, that operates according to its own processes, generating rights from the law.

However, in the third millennium, it is necessary to consider that this dreamed of autonomy of the social systems may be no longer possible in a world absolutely networked. It seems that there is only one path left for humanity to preserve its rights, always accomplished with much struggle: the extension of the democratic mechanisms, and the possibility of their use, formalized in the legal framework. Only the judicial control of democratic processes of creation and implementation of rights are capable of guaranteeing some autonomy to the law of these days. This is perhaps the noble task of the legal system in the 21st century: to guarantee that the declared right be fully realized in the lives of concrete people.

¹The examples are numerous, verifiable specially in the so called "State visits" and in the profusion, on the occasion of the World Economic Forum in Davos.

²GAUQUELIN, B. Coup de tabac sur la santé publique autrichienne. *M le magazine du Monde*, 30 déc. 2017. p. 15.

This complex world, totally interconnected, is the stage of conflict among several rights formally declared, which resolution implies both in the preservation of the underpinning values and their effective and concrete accomplishment³. Therefore, procedures acquire a privileged place. Firstly, it is necessary to understand the legal text. Next, clarify whether it is a norm that represents a rule, to be completely accomplished or excluded from the respective legal system, or a principle. And lastly, in this hypothesis, it must be identified in the concrete case, what principle expressed in the norm should prevail, always seeking the optimization of all the principles involved in the conflict. And all these procedures should be clearly expressed – perhaps one can even say didactically expressed – to enable the judicial control in this complex world.

It is in this social, economic and cultural scenery, but particularly in this judicial environment, that the obligation to take a vaccine or have own children vaccinated, should be examined. This demand is becoming strong in the contemporary world. Indeed, in France, children born as of the 1st of January 2018 must be vaccinated against 11 infectious diseases to be allowed to attend kindergarten or school. The government justifies the increase in the number of mandatory vaccines (previously, they were only three) in the name of safety, because, with only 70% of the population immunized against meningitis C or 80% having received a vaccine booster against measles, mumps and rubella, the protection against an eventual outbreak of such diseases is not assured. On the other hand, part of the population is frustrated with the incompetent management of a few recent sanitary crises. An example of this is the case of the hepatitis B vaccine: the World Health Assembly, in 1992⁴, recommended the introduction of universal vaccination against hepatitis B in the national vaccination programs, and continues enthusiastic about the vaccination from birth as a safe and efficacious prevention measure against the disease⁵. It is evident that the vaccine provided good revenue to its manufacturers, and continues to do so, despite of not having become accessible to all, as recommended by the World Health Organization. In the 1990s, France adopted the adolescents' vaccination strategy, being this age range more exposed to the appearance of sclerosis in plaques. In this way, in spite of never having been proved the increase of cases of this type of neurological disease caused by the vaccine, physicians felt they had little support to recommend it. Likewise, the management of the influenza pandemic caused by virus H1N1 was disastrous for the

³It is a subject largely discussed in contemporary judicial theory. Excelent the article of professor Virgílio Afonso da Silva about this, synthetizing the thesis presented for his application to become Full Professor (SILVA, V. A. O conteúdo essencial dos direitos fundamentais e a eficácia das normas constitucionais. *Revista de Direito do Estado*, v. 4, p. 23-51, 2006. Available at: <https://constituicao.direito.usp.br/wp-content/uploads/2006-RDE4-Conteudo_essencial.pdf>).

⁴FORTY-FIFTH WORLD HEALTH ASSEMBLY *Hbk Res., Vol. III (2nd ed) f 1.15.3; 1.16.1* (Twelfth plenary meeting, 13 May 1992 - Committee A, third report) GENEVA, 4-14 MAY 1992.

⁵ORGANISATION MONDIALE DE LA SANTÉ – OMS. *Hépatite B*. Aide-mémoire, N. 204, Juil. 2017. Available at: <<http://www.who.int/mediacentre/factsheets/fs204/fr/>>.

French population trust, who criticized the Minister of Health for purchasing large quantities of the only medicine recommended for its treatment and of doses of vaccines not so efficient against the virus at issue, specially when it was verified that the pandemic had low infectivity and virulence. Anyway, the high profits provided to the manufacturing companies became evident⁶. The structures in charge of controlling the medicine were equally questioned on the occasion of the Mediator scandal, that would have caused between 500 and 2.000 casualties; despite of existing a warning since 1997, the medicine was only withdrawn from the market in November 2009 and triggered a reform in the system of medicines control⁷. In sum, the news of the change from three to 11 mandatory vaccines finds very reticent communities: “a suspicion on everything chemical”, “a brutal decision that infantilize parents”, “some of them were adopted only for commercial reasons”⁸.

Likewise, it is on the same stage that should be examined the obligation imposed by the Emilia Romagna Region, in Italy, to doctors and health professionals to vaccinate against certain diseases, under penalty of being transferred to other services. Indeed, from August 2017, ten vaccines became mandatory for children attending the nurseries, daycare and schools⁹. The regulation of this law determines that education and health administrators present a declaration of their staff vaccination status¹⁰. Other Italian regions consider following Emilia's example, among them are Tuscany, Lazio, Lombardy, Piedmont and Veneto¹¹.

There is, therefore, an expansion of the obligation of vaccination, imposing heavy restrictions to the offenders (not allowed to attend school, or keep their jobs, for example). This expansion comes followed by serious doubts concerning the effectiveness of the vaccines (such as hepatitis B or the yellow fever vaccines, the last with the dilution currently proposed in Brazil¹²). The good faith or, at least, the

⁶FRANCE. Sénat. Session Ordinaire de 2010-2011. *La gestion d'une crise sanitaire: la pandémie de grippe A (H1N1)*. Rapport d'information. Fait au nom de la commission des affaires sociales (1) sur l'étude de la Cour des comptes relative à l'utilisation des fonds mobilisés pour la lutte contre la pandémie grippale A (H1N1), Par M. Alain Milon. Available at: <http://www.senat.fr/rap/r10-270/r10-270_mono.html>.

⁷L'AFFAIRE Mediator et la sécurité des médicaments: dossier documentaire. Service documentation. Mise à jour: 8 octobre 2012. Available at: <https://documentation.ehesp.fr/wp-content/uploads/2012/10/DO_AffaireMediator_20121008.pdf>.

⁸BÉGUIN, F. En Ardèche, voyage au pays de la défiance. *Le Monde*, 31/12/2017.p. 6. Available at: <http://www.lemonde.fr/sante/article/2017/12/30/vaccins-dans-le-canton-des-vans-en-ardeche-voyage-au-pays-de-la-defiance_5235962_1651302.html?xtmc=vaccins_obligatoires&xtcr=2>.

⁹Legge 31 luglio 2017, n. 119. *Conversione in legge, con modificazioni, del decreto-legge 7 giugno 2017, n. 73, recante disposizioni urgenti in materia di prevenzione vaccinale*.

¹⁰ITALIA. Ministero della Salute. Direzione Generale della Prevenzione Sanitaria. *Ufficio V - Prevenzione delle Malattie Trasmissibili e Profilassi Internazionale*. Available at: <<http://www.trovanorme.salute.gov.it/norme/renderNormsanPdf?anno=2017&codLeg=60282&parte=1%20&serie=null>>.

¹¹BOCCI, M.; DI RAIMONDO, R. L'ora del vaccino obbligatorio per i medici. *La Repubblica*, 7/1/2018. Available at: <<http://ricerca.repubblica.it/repubblica/archivio/repubblica/2018/01/07/lora-del-vaccino-obbligatorio-per-i-medici04.html>>.

¹²FIORAVANTI, Carlos. Examinando a vacina contra febre amarela. *Pesquisa FAPESP*, ed. 264, fev. 2018. Available at: <<http://revistapesquisa.fapesp.br/2018/02/02/examinando-a-vacina-contra-febre-amarela/>>.

competence of governments is also challenged when verifying the high profits of the vaccine manufacturers and the inability of extending their distribution to all the populations in need, with the guarantee of safe and efficient conditions. What behavior can be legitimately expected from the judicial powers in face of this situation?

In first place, it is necessary to understand what exactly the referred laws protect. And the answer is complex, because at the same time it is pursued the protection of everyone taking the vaccine, and the protection of the community with expressive decrease of the causing agents of diseases prevented with the vaccine. Then, this is the characterization of the protection to the fundamental right to health, not only individual but also collective. Regarding the possible restrictions placed to the implementation of the right to health, can be mentioned the right to individual freedom, that enables to choose not to submit to the risk of the vaccine adverse effects or the right to education, or even, the right to professional freedom. All this, without forgetting the inclusion of medicines and vaccines production and trade in a capitalist system, which implies the pursuit of profit. In Brazil, all those fundamental rights are contemplated in the constitution¹³. And let it not be said that the State is not obliged to intervene, regulating concrete situations for the accomplishment of each one of the declared rights¹⁴. On the contrary, the government is definitely obliged to protect each one of these fundamental rights. Therefore, it is expected that the legal system substantiate and debate widely, from the consideration of the concrete situation, the option for the adopted protection.

And here it is introduced the indispensable juridical assessment of the effective democratic accomplishment required in every Democratic State of Law. Indeed, it is evident that the demand of the democratic origin of the law and its accomplishment under democratic rule is becoming universal¹⁵. This means that the lack of a wide community participation (unqualified and specialized), both at the moment of the creation of the norm that expresses the right – and its scope – and at the moment of its accomplishment in the concrete case, will hinder enormously the legal system in achieving a fair solution. Furthermore: the fair solution demands from the legal system the assessment of the diverse rights involved in the concrete situation and vast argumentation on the reasons for the decision in every hypothesis.

¹³Article 6° combined with 196 (right to health); article 5° (right to freedom); article 205 (right to education); article 5°, paragraph XIII (freedom of professional practice); article 170, paragraph II (economic order based on private property). BRASIL. *Constituição da República Federativa do Brasil de 1988*. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm>.

¹⁴In Brazil, expressly: articles 197 and 200 paragraph I (obliging the regulation, surveillance and control of healthcare activities and services and, particularly, products and substances relevant to health); article 170, paragraphs I and III (subjecting the economic order to national sovereignty and to the social role of property). BRASIL. *Constituição da República Federativa do Brasil de 1988*, cit.

¹⁵I examined this subject in: DALLARI, Sueli Gandolfi. A internacionalização das regras jurídicas no campo do direito sanitário. In: LOURENÇO, Cristina Sílvia Alves; OLIVEIRA, Frederico Antonio Lima de (Orgs.). *Estado, direito e sociedade: os desafios da nova ordem social*. 1. ed. Rio de Janeiro: Lumen Juris, 2016. v. 2, p. 205-226.

The obligation of vaccination does not evade the referred demands: wide community participation; wide procedural argumentation based on concrete situations, clarification of the limits of the requested right; wide procedural argumentation clarifying the regulatory limits to the rights involved in the concrete situation - all that leading to a procedural decision motivated largely on the consideration of the concrete situation relevant rights. All parties involved in the judicial process are equally obliged to wide argumentation. And more: the whole healthcare system is obliged to foster wide community participation (unqualified and specialized) concerning the scope of each right involving mandatory vaccination. This is the only way of enabling the legal system to determine a fair balance between freedom and control on mandatory vaccination in the complex world of the 21st century.

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