COVID-19 AND FUNDAMENTAL RIGHTS: WEIGHTING AS A TECHNIQUE FOR THE PROTECTION OF THE LEGAL-SOCIAL ORDER

COVID-19 E DIREITOS FUNDAMENTAIS: A PONDERAÇÃO COMO TÉCNICA DE PROTEÇÃO DA ORDEM JURÍDICO-SOCIAL

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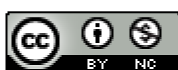
ABSTRACT

Objective: currently the world suffers from community contamination of a new coronavirus (Sars-Cov-2), which has even resulted in the recognition of the pandemic state by the World Health Organization. In Brazil, several measures have been formulated with the purpose prevent and control contamination. Among them, there are measures potentially capable of restricting the content of fundamental rights, which is why the objective of the research will be to analyse whether some of the measures are not proportionate as instruments for the control and prevention of COVID-19. Thus, the issue discussed will attempt to answer the following question: From the application of the weighting technique, is it possible to identify disproportionate offenses to the



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fundamental rights to locomotion and inviolability of personal data, resulting from the measures adopted to combat the pandemic of COVID-19?

Methodology: The method used will be the hypothetical-deductive, based on bibliographic, documentary research and analysis of secondary data, in order to build an exploratory study and applicable in the legal reality.

Contributions: The research contributions indicate a conflict between the search for the realization of the right to health – for the community control of the virus – and others fundamental rights related to freedom of movement and the inviolability of the confidentiality of personal data.

Results: Thus, weighing up this conflict, the measures addressed to restrict fundamental rights often suffer from necessity and, mainly, from proportionality in the strict sense.

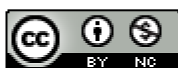
Keywords: covid-19; fundamental right to the inviolability of personal data; fundamental right to locomotion; weighting; proportionality.

RESUMO

Objetivo*: atualmente o mundo sofre com a contaminação comunitária de um novo coronavírus (Sars-Cov-2) que, inclusive, resultou no reconhecimento do estado de pandemia pela Organização Mundial da Saúde. No Brasil, diversas têm sido as medidas formuladas com a finalidade de prevenir e controlar a contaminação. Dentre elas, tem-se medidas potencialmente capazes de restringir o conteúdo de direitos fundamentais, razão pela qual o objetivo da pesquisa será analisar se algumas das medidas sem mostram proporcionais enquanto instrumentos para controle e prevenção ao COVID-19. Assim, a problemática discutida tentará dar resposta ao seguinte questionamento: A partir da aplicação da técnica da ponderação, é possível identificar ofensas desproporcionais aos direitos fundamentais à locomoção e inviolabilidade dos dados pessoais, decorrentes das medidas adotadas para combate à pandemia da COVID-19?*

Metodologia*: o método utilizado será o hipotético-dedutivo, com base em pesquisas bibliográficas, documentais e análise de dados secundários, com a finalidade de construir um estudo exploratório e aplicável na realidade jurídica.*

Contribuições*: as contribuições da pesquisa indicam um conflito entre a busca pela efetivação do direito à saúde – para o controle comunitário do vírus – e outros direitos fundamentais relacionados à liberdade de locomoção e à inviolabilidade do sigilo dos dados pessoais.*



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***Resultados**: Sopesando-se esse conflito, tem-se que as medidas abordadas para a restrição de direitos fundamentais muitas vezes padecem de necessidade e, principalmente da proporcionalidade em sentido estrito.*

***Palavras-Chave:** covid-19; direito fundamental à inviolabilidade dos dados pessoais; direito fundamental à locomoção; ponderação; proporcionalidade.*

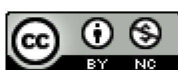
1 INTRODUCTION

At the end of 2019, in Wuhan (Hubei Province, China), a continuous outbreak of respiratory syndrome caused by a new coronavirus (Sars-Cov-2) was identified. The studies so far formulated in the health sciences have not been able to identify the situation that caused the virus to appear.

Among the more than 100 (one hundred) countries affected by COVID-19 community outbreaks, including justifying the recognition of a pandemic by the World Health Organization (WHO), China stood out with a reduction power of more than 90% (ninety percent) of the cases in its territory, so that, in terms of processing numerical data, it managed to flatten the virus transmission curve and overcome the state of community to sporadic contamination.

In Brazil, as community contamination has not yet reached its peak, several measures have been adopted to try to give an effective control and prevention response to COVID-19. Among the various measures available, two stand out that will be the object of further analysis: a) the attempt to form and manage a database by the Government, whose initiative was taken through the insertion of article 6 in Law No. 13,979 / 2020 and with the edition of Provisional Measure nº 954/2010; b) the restriction of locomotion made possible by means of article 3, of Law No. 13,979 / 2020, which authorizes the Executive Branch (whether at the state, municipal, district or federal level), to determine measures to restrict traffic, isolation, quarantine and - indirectly - curfew.

Based on this, the objective of the research will be to analyse whether the measures mentioned above are reasonable as instruments for the control and prevention of COVID-19. Thus, the issue discussed will attempt to answer the following



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question: From the application of the weighting technique, is it possible to identify disproportionate offenses to the fundamental rights to locomotion and inviolability of personal data, resulting from the measures adopted to combat the pandemic of COVID-19?

For the construction of the study, the first item will address the first impressions about the prevention and control measures of COVID-19 in the world context and, especially, about the main measures and normative instruments developed in Brazil.

In the second item, it will seek to analyse the judicial control carried out by the Supreme Federal Court in the measures elaborated, whether by municipal, state, district or federal managers, with emphasis on the content of the decisions handed down in: 672, under the reporting of Minister Alexandre de Moraes; b) security suspension action No. 5.362-PI, under the report of Minister Dias Toffoli and; in Direct Action of Unconstitutionality (ADI) No. 6,387, under the report of Minister Rosa Weber.

In the third item, it will be analysed whether a) the attempt to form and manage a database by the Government, whose initiative was taken through the insertion of article 6 in Law No. 13,979 / 2020 and with the edition of Provisional Measure nº 954/2010 and; b) the restriction of locomotion made possible by means of article 3, of Law No. 13,979 / 2020, which authorizes the Executive Branch (whether at the state, municipal, district or federal level), to determine measures to restrict traffic, isolation, quarantine and - indirectly - curfew, are liable, from the application of the weighting rule, to result in an offense to the fundamental rights to locomotion and / or to the inviolability of personal data.

The method used will be the hypothetical-deductive, based on bibliographic, documentary research and analysis of secondary data, in order to build an exploratory study and applicable in the legal reality.

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2 FIRST IMPRESSIONS ON COVID-19 PREVENTION AND CONTROL MEASURES IN THE WORLD AND BRAZILIAN CONTEXTS

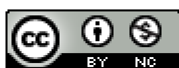
China, as the first country to register respiratory outbreaks, has entered a partnership with WHO, with the aim of seeking emergency responses to the public health problem. Thus, in December 2019, two working groups, called “Joint Prevention and Control Mechanism” and “Central Leadership Group for Epidemic Response”, were created to identify prevention and control measures for COVID-19 (WANG et. al., 2020).

The performance of these groups can be divided into three stages. The first, even in the initial moment of the outbreak, sought to prevent contamination of the virus in other provinces besides Hubei, as well as to identify the initial source of the virus and whether it would be the case of zoonotic contamination[1] (WANG et. Al., 2020). Although this first stage was not a success regarding to the containment of the virus, there was progress in the measures adopted, especially to manage contact between people and the application of laboratory tests to mitigate the risks of death (WHO; CHINA, 2020).

The second stage involved again the attempt to prevent the export of the Hubei virus to other provinces, but mainly preventive measures were taken to prevent the importation of the Hubei virus, with the intention of restricting the numerical spread of contamination. For this reason, there were determinations of restriction in the traffic of people between Provincials and in the region surrounding Wuhan it was sanitary isolated. At this point, the treatments of confirmed cases have also been improved, with the consequent social isolation from the people close to them who had contact with those infected (WHO; CHINA, 2020).

The traffic of people in China has been reduced considerably, while there has also been ample investment in the construction of hospitals, in the formation of

[1] A zoonotic contamination occurs when there is the transmission of parasites, fungi, viruses, among others from animals to man. In fact, this is one of the suspicions - which have not yet been the subject of scientific confirmation - for the cause of the appearance of the first transmission, since the SARS-COV-2 virus has genomic similarities to another virus identified in bats in China



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technical teams to monitor the pandemic and identify new contaminants. A deemed important point was the constant dissemination of information and guidance on the spread of the virus, as an apparent risk-based social control mechanism[2] (WHO; CHINA, 2020).

The third stage was concerned with implementable measures to prevent contagion in public places, with the constant monitoring of people in a risk group - use of artificial intelligence and big data[3] - and with economic policies for expanding health insurance programs on the part of the Chinese State (WHO; CHINA, 2020).

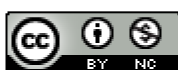
The whole process of care that China had with the control of the pandemic represents its concern in recent years: the planned management of unpredictable situations and risks, especially in the economic field, from a centralization of the measures to be adopted, all on behalf of the Republic, with the delegation of powers to the provinces and other sectors. It is for this reason that the Chinese State has managed to serve its population effectively and with a low metric of contagion for its population coefficient (WHO; CHINA, 2020).

To highlight the prevention and control measures adopted by China, a comparison[4] is valid, with the situation in the United States of America (USA). According to WHO data, until April 30, 2020, the United States, which has a population of approximately 333,000,000 (three hundred and thirty-three million people),

[2] The idea of social control through risk reporting is a measure that consists of making information about difficulties in risk management public. This technique is treated by Hans Jonas as a heuristic of fear, as he understands that in the face of a feeling of fear it is possible to change the behavior of the human being, with the purpose of avoiding negative prognosis. In other words, using a futuristic and chaotic vision, a feeling of reflection would awaken in the individual, capable of emerging in fear and, consequently, making him act in a way to redirect his conducts, avoiding prognosis negative (JONAS, 2006).

[3] Despite not having a conceptual uniformity - much because it is a current topic, which constantly suffers contributions in its content - the use of big data is related to the excessive production of data and, therefore, to the attempt to datify an entire society. In China, for example, its use served as an immediate decision-making mechanism, precisely with the purpose of imposing restrictions on locomotion to citizens and, specifically to those contaminated, to identify their contacts with other people.

[4] The comparisons formulated in this chapter are strictly numerical. They serve only to highlight the importance of analyzing contamination cases, with the purpose of verifying, later, if there is justification for any restrictions between fundamental rights. Unlike China, which has an authoritarian government and the understanding of Human Rights is different from the West (especially those related to freedom), democratic governments, such as Italy, the United States of America and Brazil (which will be discussed below), seek to bring about a greater axiological content to freedom and, because of that, in the first moments they took time to adopt measures of social distancing



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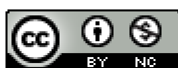
registered more than 1,000,000 (one million) confirmed cases of contamination by COVID-19, with a number of 52,428 (fifty-two thousand, four hundred and twenty-eight) deaths (WHO, 2020), while China, until the same date, had registered, with the WHO, the transmission of the virus to 84,373 (eighty-four thousand, three hundred seventy three and seventy-three) people, with an approximate number of 4,643 (four thousand, six hundred and forty-three) deaths[5] (WHO, 2020).

The experience in controlling contamination in the United States of America was considerably later compared to the measures adopted in China. While in this country the concern and the issuing of reports occurred in the first weeks of contagion, including with a wide dialogue with WHO, the one, even though he had a greater sensory knowledge on the subject - since he had already participated in a process of observation of the disease. contamination in other countries - still delayed the initial moment of prevention and control, so that the damage has been excessively serious[6].

Regarding Brazil, after the identification of the first cases of the virus in its territory, the country started to adopt numerous decentralized and local measures to contain the risks. So far, given its population number of approximately 220,000,000 (two hundred and twenty million people) (COUNTRYMETERS, 2020) - compared to the United States - it has been shown to be more effective in containing risks[7].

In Brazil, prior to the first virus contamination notified to the Ministry of Health (MS), the Public Health Emergency Operations Center (COE-COVID- 19), whose primary act was the elaboration of the 'National Contingency Plan for Human Infection by the new Coronavirus COVID-19'. This plan served to present the levels of

[5] China, on the other hand, whose territory is among the five largest in the world, has a population of approximately 1.4 billion people (COUNTRYMETERS, 2020). These data guide the need for further reflection on the adoption of measures that are effective in containing the virus.
[6] This situation is remarkably interesting because it challenges the leadership of the United States in trying to offer a global response to the crisis, so that it privileges China as an exponent in global risk management, so much so that it has been the only one capable of providing material assistance to others. countries, providing masks, guidelines, prevention kits, vents, and other essential instruments.
[7] Here the comparison is already valid, because the criterion of distinction between the three countries (Brazil, Italy and the USA) is only in the number of populations. The three have democratic governments, in which the definition of the axiological content of the right to freedom is similar. Therefore, what differs in the containment and management of risks is related to the moment in which the social distance measures started to be taken.



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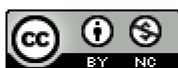
responses and the command structures to be adopted in each case[8]. In addition, the State of Emergency in Public Health of National Importance (ESPIN) has already been declared, as provided by Decree No. 7,616, of November 17, 2011 (BRASIL, MS, 2020).

For the direct confrontation with the pandemic, the content of Law nº 13.979, of February 6, 2020[9], which was processed in an emergency regime, stands out, which sought to provide for measures to confront the ESPIN State. Right in §1, of article 1, there is an indication of the motivation of the legal norm, which is the protection of the community (BRASIL, 2020a). This rule is presented as the main legal instrument to legitimize all decisions related to the attempt to control the community transmission of the virus. Because of this, Article 3 provides forecasts of measures that can be adopted concurrently by local, state, and national authorities, within the scope of their competences:

[8] In general, the document, to apply a response, seeks to understand levels of assessment of contamination on the effectiveness of transmission in Brazil, geographic spread - whether between humans or animals -, clinical severity of the disease, vulnerability of the local population, adoption of preventive measures, such as vaccines, for example, and also WHO guidelines (BRASIL, MS, 2020).

[9] In addition to the measures described in Law no. 13,979 / 2020, with the purpose of balancing the economy, the realization of health and social development, several others were adopted by the Federal Executive Branch, such as: i) Law No. 13,982 / 2020, which provides for the granting of basic income emergency to informal workers, without fixed income, self-employed, among others, while ESPIN lasts; ii) the granting of credit for the maintenance of jobs, regulated through Provisional Measure (MP) No. 935/2020; iii) the possibility of collective agreements to reduce wages and working hours, the provision of which comes from Provisional Measure No. 936/2020; iv) The Union's partnership with states and municipalities to release implementable resources in the policy for the prevention and control of coronavirus (MP nº 938/2020); v) The implementation of a flexible school calendar, as indicated in Provisional Measure No. 934/2020, which will serve as a corollary to the attempt at social distance vi); The exemption from the Tax on Financial Operations (IOF) in credit operations (Decree No. 10,305 / 2020); vii) The extension for the submission of the Individual Income Tax (IRPF) declaration, for June 30, according to Normative Instruction No. 1,930 / 2020, of the Special Secretariat of the Federal Revenue of Brazil; viii) The suspension of payment of the Guarantee Fund for Length of Service (FGTS), determined by means of Circular No. 897/2020, of the Ministry of Economy and; ix) The postponement of the payment of social security contributions, authorized through Ordinance No. 139/2020, of the Ministry of State for the Economy.



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> I - isolation[10]; II - quarantine[11]; III - determination of mandatory performance of: a) medical examinations; b) laboratory tests; c) collection of clinical samples; d) vaccination and other prophylactic measures; or e) specific medical treatments; IV - epidemiological study or investigation; V - exhumation, necropsy, cremation and corpse management; VI - exceptional and temporary restriction, according to the technical and well-founded recommendation of the National Health Surveillance Agency [(ANVISA)], by highways, ports or airports from: a) entering and leaving the country and; b) interstate and intercity transportation; VII - requisition of goods and services from natural and legal persons, in which case the subsequent payment of a fair indemnity will be guaranteed; and VIII - exceptional and temporary authorization for the import of products subject to health surveillance without registration with Anvisa, provided that: a) registered by a foreign health authority; and b) provided for in an act of the Ministry of Health (BRASIL, 2020a).

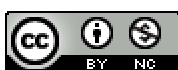
In addition to these measures, it is still necessary to point out the content of article 6, *caput* and its paragraph 1, which provides for the obligation to share data between bodies and entities from all areas of the Federation - including being able to make requests to legal entities under private law - provided that it is performed by a health authority - with the intention of identifying people infected or suspected of being infected with the coronavirus (BRASIL, 2020a).

In view of the discipline of the caput of article 3 of Law No. 13979/2020, all authorities, within the scope of their competences, will be able to determine the measures available and necessary to face the public health emergency (BRASIL, 2020a). It means to say that in the municipal and state plans, the managers will be able to provide determinations that they consider relevant for the containment or prevention of viruses[12], even if the adopted measures result in restriction of fundamental rights. In addition, under paragraph 4 of the same article, there is a

[10] The concept of isolation used in the Law replicates the same concept presented by the WHO International Health Regulations. It therefore refers to "[...] the separation of sick or contaminated persons, or luggage, means of transport, affected goods or postal parcels, from others, in order to avoid contamination or the spread of the coronavirus" (BRAZIL, 2020a).

[11] Likewise, the concept of quarantine used by the standard is contained in the WHO International Health Regulations, dealing with "restriction of activities or separation of persons suspected of being infected by persons who are not sick, or of luggage, containers, animals, means of transport or goods suspected of being contaminated, in order to avoid possible contamination or the spread of the coronavirus" (BRASIL, 2020a).

[12] It is important to consider the provision of paragraph 1, of article 3 of the aforementioned Law, which states that: "The measures provided for in this article can only be determined based on scientific evidence and analyses of strategic health information and must be limited in time. and in the space to the minimum indispensable to the promotion and preservation of public health" (BRASIL, 2020a).



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binding and mandatory determination of the standard whose non-compliance may result in liability, under the terms of a specific law[13] (BRASIL, 2020a).

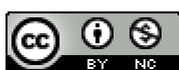
The express delimitation of the application of the most relevant measures is described in §7, of article 3, which provides that the cases of: isolation must be previously authorized by the Ministry of Health; quarantine; exhumation, necropsy, cremation and corpse management; exceptional and temporary restriction, by highways, ports or airports and; exceptional authorization to import products subject to health surveillance without registration with ANVISA, to be determined by local health managers. The other hypotheses described in items III, IV and VII of the same articles, on the other hand, may be deliberately applied by local managers (BRASIL, 2020a), without prior examination or authorization by the Ministry of Health.

3 THE JUDICIAL CONTROL OF THE SUPREME FEDERAL COURT ON MEASURES ADOPTED TO COMBAT COVID-19

Despite the concern to provide quick responses for the prevention and control of community contamination of the new coronavirus, certainly the measures adopted by the Executive Branch (Federal, State, Municipal, or District) are subject to repressive control by the Judiciary, especially in cases that represent offenses or delimitations to the fundamental rights. Ever since the enactment of Law No. 11.979/2020, several points have had their constitutionality questioned by the Federal Supreme Court, whether in the face of a Federal Executive Power act or acts practiced by municipal, state and / or district managers, based on authorization granted by the aforementioned Law.

The first case stems from the multiplicity of agents that can perform the competencies indicated in Law No. 13.979 / 2020. especially those that matter in restricting people and using public places. This prediction generated instability in the

[13] There is no expressed mention of which liability will be liable to the agent who does not comply with the legal determination.



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Brazilian management and political system, as it resulted in the issuing of numerous decrees, determining the restriction of locomotion (in places and times), of intercity traffic, suspension of business activities, among others; and revealed a mismatch between the objectives of local managers and the Federal Executive Branch itself, regarding the effectiveness and importance of the measures that are being taken, with the concern of the latter aimed at maintaining the economic stability that had been built until then[14].

In view of this situation, with the intention of carrying out the local measures adopted and guaranteeing the autonomy of the Municipal, State and District Executive Powers, there was the proposition of the Rule of Non-Compliance with Fundamental Precept (ADPF) No. 672, by the Federal Council of the Bar Association of the Brazil (OAB), in the face of omission and commissive acts by the Federal Executive Branch, which occurred during the pandemic. The argument that would justify the judicial measure would be that "[...] the [Federal] government has not always made adequate use of the prerogatives it has to face the public health emergency, constantly acting in an insufficient and precarious way" (BRASIL, STF, 2020a), so that it could embarrass the adopted measures and, more than that, offend the Federative Pact.

In a preliminary decision issued by Minister Alexandre de Moraes, the importance of the decisions of municipal, state and district governments were recognized, under the argument that the competence to achieve public health is concurrent and, therefore, the measures that can be applied at local levels may supplement federal laws, provided there is a legal act based on local interest (BRASIL, STF, 2020a):

[14] As an example, for this mismatch of objectives, we highlight the intention of adopting 'vertical isolation', which consists of determining that the measures of social distance, especially quarantine, were intended only for the people who make up the risk groups (with older age). sixty years old or with serious diseases, such as bronchitis, lupus, nasturtium, among others). The idea that came to be thought of, for example, - not only in Brazil but also in the United States of America - is the so-called 'herd effect', which consists of the voluntary act of purposely contaminating the virus to, afterwards, become immune to the diseases that can be caused by it, in case of overcoming its effects. Certainly, these ideas were rejected at local levels, which maintained the social distance measures adopted as a way to prevent the contamination of the virus.

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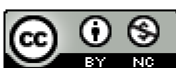
> The rules for the allocation of administrative and legislative powers must be respected in the interpretation and application of Law 13,979 / 20, Legislative Decree 6/20 and Presidential Decrees 10,282 and 10,292, both from 2020, observing, in an “explicit manner”, as well emphasized by the eminent Minister MARCO AURÉLIO, when granting cautionary measure in ADI 6341, “in the pedagogical field and in the diction of the Supreme Court, the competing competence”.
> Thus, it is not the responsibility of the federal executive branch to unilaterally dismiss the decisions of state, district and municipal governments that, in the exercise of their constitutional powers, have adopted or will adopt, within the scope of their respective territories, important restrictive measures [...] (BRASIL, STF, 2020a).

The content of this decision makes it clear that the emergency to face the pandemic requires mutual cooperation between the Federation's Executive Powers. But more important than recognizing the existence of a competing competence, is to attribute the motivation of the measures adopted under the canopy of local interest, justified especially through technical reports. In this sense, it is noteworthy that article 3, item VI, of Law No. 13.979 / 2020, requires in addition to local interest for restrictive mobility measures (interstate or intermunicipal), ANVISA's technical and reasoned recommendation to avoid vilifying the right fundamental to locomotion (BRASIL, 2020a).

On this point, it is worth highlighting another decision issued in the context of the security suspension action No. 5.362-PI, within the scope of the Supreme Federal Court (STF), under the report of Minister Dias Toffoli, who, when analyzing a decree issued by the State of Piauí in perfunctory court, it was understood by the indispensability of a technical report for the adoption of restrictive measures in the right to travel (BRASIL, STF, 2020b); that is, he maintained that the discretionary power in the exercise of competing competence requires scientific proof of its effectiveness:

> It is of certain due, to emphasize that the seriousness of the situation faced by all requires the taking of state measures, in all its spheres of activity, but always through coordinated and duly planned actions by the competent entities and bodies, and based on proven scientific information and data. .
> For this reason, the legal requirement for taking extreme measures, such as the one under analysis, is always based on a technical opinion and issued by ANVISA. In the present situation of facing a pandemic, all efforts undertaken by public agencies must take place in a coordinated manner, led by the Ministry of Health, the highest federal body to deal with the issue, and certain isolated decisions, such as the one under analysis, that meet only a portion of



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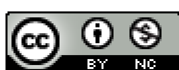
> the population, and from a single location, seems more endowed with the potential to cause disorganization in the public administration as a whole, even acting contrary to the intended (BRASIL, STFb, 2020).

In view of these considerations, it is possible to verify that the characterization of the pandemic situation - even though already in an outbreak of community contamination in Brazil - does not justify the adoption of arbitrary measures that lack the necessary motivation to formulate legal norms or take administrative decisions; on the contrary, according to the construction that has been made by the Supreme Federal Court, the motivation in making decisions and, therefore, the formulation of legal rules (whether Laws or Decrees), requires the presence of local interest (BRASIL, STF, 2020a) and scientific certainty in the concreteness of the measure[15] (BRASIL, STF, 2020b). Evidently, the state of public calamity in Brazilian health requires a collective effort to control and combat the spread of COVID-19, but in view of the preponderance of fundamental rights, further technical examinations are essential to identify if there are no possible vilifications to the constitutional order.

[15] At this point, two measures stand out that directly conflict with the intention of realizing local interest and the need for a prior technical examination capable of attesting the effectiveness of the act:
1. Article 4, item VIII, of Decree No. 47.006 / 2020, of the State of Rio de Janeiro, provided for the suspension, for a period of fifteen days, of the circulation of intercity passenger transport, which connects the metropolitan region to the capital of Rio de Janeiro, except in the case of ferries and trains. In addition, Decree No. 47,019 was also issued, also from the State of Rio de Janeiro, which increased the traffic restriction to the municipalities of Pinheiral, Barra Mansa and Volta Redonda (ESTADO DO RIO DE JANEIRO, 2020). In any case, these decrees were the subject of a Public Civil Action (ACP) proposed by the Federal Public Ministry (MPF), which, when received and processed, was granted a preliminary decision in order to suspend the effectiveness of the decrees, on the following grounds: " [...] when it comes to imposing restrictions on certain rights, notably those inscribed as fundamental in the Federal Constitution, one must inquire not only about the constitutional admissibility of the restriction that may be fixed, but also about the compatibility of the restrictions established with the proportionality principle. Thus, even in emergency situations, the weight and balance between the restrictive measures adopted and the objectives pursued by the public authorities must prevail "(TJRJ, 2020).
2. The State of São Paulo issued Decree No. 64,881, of March 22, 2020, with the purpose of decreeing quarantine in the State of São Paulo. For this purpose, by means of article 2, it determined the suspension of the following activities: "I - attendance to the public in commercial establishments and service providers, especially in nightclubs," shopping centers ", galleries and similar establishments, gyms and centers gymnastics, except for internal activities; II - local consumption in bars, restaurants, bakeries and supermarkets, without prejudice to delivery services (delivery) and drive thru (ESTADO DE SÃO PAULO, 2020a). The discussion on this measure is related to the interest that the Governor of the State of São Paulo would have in editing Decree that bind other municipal managers and that, even, does not show their local interest, especially to determine the closure of branches of activity in municipalities that at the time of the first quarantine Decree did not even have records of contamination.



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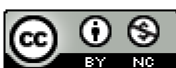
There is another decision that is also important in the judicial control carried out by the Supreme Federal Court, which was rendered in a preliminary order by the Minister of the Supreme Federal Court, Rosa Weber, in Direct Action of Unconstitutionality (ADI) No. 6,387, tending to judicial discussion about Provisional Measure (MP) No. 954, of April 17, 2020. The MP imposed on the telecommunications companies providing STFC and SMP the duty to "[…] make the list of names, telephone numbers and addresses of their consumers, individuals or legal entities"(BRASIL, 2020b). When the question raised was analysed, the suspension of its effectiveness was determined, under the grounds for the absence of urgency or collective public interest that justifies the publication of the MP and, mainly, due to the lack of guarantees of adequate and safe treatment of the shared data, the consequence of which may result in an offense to the right to inviolability of the confidentiality of personal data citizens (BRASIL, STF, 2020c).

It should also be noted that although the content of article 6, caput and paragraph 1 of Law no. 13.982 / 2020 is not directly analysed, the transcendence of the effects of this decision serves as a parameter for the application of the legal norm, as it advises that measures such as this - data sharing - in a democratic state, they are excessively fearful, and the application depends on a deep examination in a hard case. The content of this device, despite not yet having its own regulation - which makes it a blank legal norm, because there is an antecedent in its matrix rule, without a legal consequence that makes an imposition liquid - nothing more than the possibility to create a database (big data) about citizens.

All the aforementioned decisions were rendered by precautionary courts and, therefore, are subject to a new review of their content, by the collegiate body of the Supreme Federal Court. Anyway, a deep analysis of the measures that are being adopted by the Executive Power (federal, state, municipal and / or district), based on the weighting technique, is necessary to verify if there is legitimacy in the restriction/limitation of the effectiveness of rights. fundamental, before the State of ESPIN.



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4 THE NEED FOR WEIGHTING IN THE MEASURES ADOPTED IN RESPONSE TO COVID-19

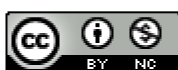
The emergency situation in public health, resulting from the community transmission of a virus, can certainly serve as a justification for the adoption of measures capable of restricting fundamental rights, after all, as Sarlet (2001, p. 10) points out "[...] health[16], as a fundamental legally good, is protected against any aggression by third parties; that is, the State (as well as other private individuals) has a legal duty not to affect people's health, to do nothing to harm health "and, in addition, to make decisions capable of giving concreteness to the axiological content of law therefore, abiding to the teachings of José Afonso da Silva (2008, p. 178) the teleology of fundamental rights "[...] is reserved to designate, at the level of positive law, those prerogatives and institutions that he concretizes in guarantees of a dignified, free coexistence and equal to all people ", without which, the human person is not fulfilled and, in the case of health, does not even survive.

The big question behind the debate that we intend to settle with the present study is related to the attempt to understand to what extent the illusion of concern about the realization of the right to health can restrict other fundamental rights, especially when faced with the absence of an in-depth study and able to settle the coalition of these categories of rights.

Before entering the weighted examination of the selected measures, it is essential to make a reservation about the possibility of restricting fundamental rights in the Brazilian legal system. These rights, regardless of their dimension[17], are the

[16] The right to health is provided for in Article 196 of the Federal Constitution, which regulates that "health is the right of all and the duty of the State, guaranteeing through social and economic policies aimed at reducing the risk of disease and other diseases and universal access and egalitarian to actions and services for their promotion, protection and recovery" (BRASIL, 1988, CRFB).

[17] Like Human Rights, Social Rights are presented in dimensions, because they are the result of historical struggles and conquests. At this point, the term "dimension" is chosen instead of "generation", as as well explained by Rocasolano and Silveira (2011, p. 69-70), the dimensions of human rights are complemented, insofar as those more recent they take as an assumption or starting point the previous ones, especially to be able to explain its relevance in the legal scenario. However, it is to be recognized that the 'theory of generations of human rights' cannot be dismissed, since it is possible to identify - and better explain new 'generation / dimension'.



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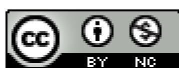
rights of defense of citizens who, according to Canotilho (2003, p. 407), have a double perspective, as they constitute “[...] negative competence norms for public authorities, fundamentally prohibiting their interference in the individual legal sphere; [which] imply, [for citizens] the power to positively exercise fundamental rights and to demand omissions from public authorities”. Under this premise, it is possible to say that, in view of the axiological burden, corroborated by means of the content of article 5, paragraph 1, of the Federal Constitution[18], cases of restriction of fundamental rights must be carefully considered and carried out based on a rigorous formal procedure.

The restriction of fundamental rights is possible in a democratic system, but as Canotilho (2003) maintains, it is limited to the very proof of its validity, the purpose of the Law that determines the restriction, the subjective judgment in the scope of the protection of the right and, mainly, to the limits imposed in the Federal Constitution. There are several cases - in the Political Charter itself, for example -, which authorizes the restriction of fundamental rights; however, in a situation similar to that which permeates the world, the innumerable fundamental rights delimitation measures that have been occurring, especially through Decrees, are justified by two instruments: State of Defense and State of Siege.

Therefore, the caveat that is necessary to build, in the first instance, is that: the mechanism used by the Brazilian State to determine the restriction of fundamental rights, whether in the right to locomotion, the inviolability of the confidentiality of information and others that may be offended in view of the measures adopted, they are legitimized through the decree, by the President of the Republic, the State of Defense and, being insufficient, after authorization by the National Congress, the State of Siege. This is because the Federal Constitution, for the situation of reestablishing public order resulting from a calamity of great proportions in nature and / or a serious commotion of national repercussion, allows the adoption of these exceptional states,

[18] Said provision refers to the immediate application of the norms that inform fundamental rights (BRASIL, CRFB, 1988).



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whose consequence of their recognition is the similar handling of the measures conveyed in Law no. 13,979 / 2020[19].

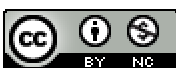
At this point, there is no question as to whether materially there could be a limitation of fundamental rights - this will be the object of analysis below -; but in a constitutionally conceived way to legitimize measures that can be adopted that influence the content of fundamental rights. Furthermore, these states are the responsibility of the Federal Executive Branch and, therefore, the harshness of their acts derives from national representation and not from municipal, state or district agents. In this way, the most coherent system possible, especially in order to avoid a 'state of decrees formally and materially unconstitutional' would be the recognition of one of the exceptional States (Defense and / or Siege)[20], the issuance of a decree that provides for the measures applicable and, finally, the delegation of powers on the pretext of local interest[21].

Once this issue is overcome, the examination of the need to weigh the measures adopted to control and prevent COVID-19 is considered. This is because, in order to find suitable parameters, there is a concomitant confrontation with scientific

[19] 1. In the case of a State of Defense: "[...] I - restrictions on the rights of: a) meeting, even if exercised within associations; b) confidentiality of correspondence; c) secrecy of telegraph and telephone communication; II - occupation and temporary use of public goods and services, in the event of a public calamity, the Union being responsible for the resulting damages and costs "(BRASIL, CRFB, 1988) e;
2. In the case of a State of siege: "[...] I - obligation to remain in a specific location; II - detention in a building not intended for those accused or convicted of common crimes; III - restrictions related to the inviolability of correspondence, the secrecy of communications, the provision of information and freedom of the press, broadcasting and television, in accordance with the law; IV - suspension of freedom of assembly; V - search and seizure at home; VI - intervention in public service companies; VII - requisition of goods (BRASIL, CRFB, 1988).

[20] Although it is recognized that the use of the State of Defense or Site are serious historical representations adopted in Brazil, during the time of the military government, it is important to recognize, on the other hand, that the function of the institute underwent changes when the Federal Constitution of 1988. In other words, at a time of historic resumption of citizen representation, the institute was still an instrument at the disposal of maintaining the public interest. Therefore, not only attachments or historical preciosities are valid as a justification for the gravity of the adoption of the measure when, in fact, there is subsumption of the situation experienced as a result of the pandemic to the constitutional norm. In fact, respect for the form established in the Federal Constitution is capable of keeping the Constitutional State unscathed, as the restrictions of fundamental rights that may have been carried out would be formally justified.

[21] Although it is not the chosen way to determine the restriction of fundamental rights, it is valid to issue a second warning: adopting the authorizations described in Law no. 13,979 / 2020 and considering that, in most cases, they matter in restrictions of fundamental rights, it would be essential the joint action of the Executive and Legislative Powers (municipal, state and district) so that the determinations were made through Law and not decrees.



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parallaxes, such as essential content, restrictions (possibility of restriction or regulation) and effectiveness of fundamental rights. In this way, it intends to present nerve points of concern that meet the restrictions imposed on privacy, intimacy and confidentiality of data, as means of socio-sanitary control.

There is a fruitful dispute about the nature and extent of limitations on fundamental rights. Alexy (2014), for example, addresses the possibility or impossibility of limiting fundamental rights. In his work, there is even reference to Friedrich Klein, who, when adopting the Internal Theory, professed that it was impossible to limit fundamental prerogatives. In order to elucidate the teachings of this theorist, Sarlet's teaching (2009, p. 388) stands out, who in an elucidative way ponders that:

> [...] a fundamental right has always existed with its determined content, even affirming that the right is already 'born' with its limits. In this sense, there is talk of the existence of 'immanent limits', which consist of implicit borders, of a priori nature, and which are not to be confused with authentic restrictions, as these are, in general, understood (for external theory) as' normative disadvantages' imposed externally to rights, inadmissible by internal theory, since law has its scope defined beforehand, in such a way that its restriction proves to be unnecessary and even impossible from a logical point of view.

On top of that, in another north, the External Theory, adopted by Silva (2014), can be understood as the perception of fundamental rights in which there is, in one plane, the right to itself and, on the other hand, its restrictions (or its restrictive scope) -interventive). For those interested in the natural sciences, the restrictive scope, permitted by the constitutional canopy, consists of a surface of contact with other legal spheres, being characterized by a superficial tension shaped by norms of constitutional foundation (rules and principles). In this spectrum, Alexy (2014, p. 277) addresses that:

> Although external theory may admit that, in a legal system, rights are presented mainly or exclusively as restricted rights, it has to insist that they are also conceivable without restrictions. Therefore, according to external theory, there is no necessary relationship between the concept of law and the concept of restriction. This relationship is created only from the requirement, external to the right itself, to reconcile the rights of several individuals, as well as individual rights and collective interests.

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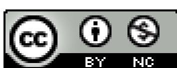
The relevance of understanding the possibility of restricting fundamental rights, both by rule and by principles, consists in the knowledge that, a priori, fundamental rights are restricted by constitutional rules and, if necessary, in a contextual way, they can experience restriction on its relative essential content. Here is the current context. The profusion of contamination by COVID-19 created an excitable state which, due to health restrictions - with inexorable implications for the right to life and health -, proved possible, by considering constitutional rights and guarantees, to create restrictions on freedom of movement (isolation, quarantine, road transport restrictions), free initiative (impediment to opening ventures), the exercise of professional activity, the right to assemble (prohibition against accumulation in public places), among others.

Resuming the measures discussed in the previous chapter, which by the way have already been the subject of a perfunctory judgment by the Supreme Federal Court, it is possible to see, in plan, that their contents were subject to improvement through the judicial system, precisely because of the tension that exists between the realization of the measures - which consequently matter in delimiting the scope of fundamental rights - and fundamental rights themselves.

In order to better understand the necessary approach in these devices, the following measures will be analysed: the intention to use data by the Public Power (art. 6 of Law No. 13.979 / 2020) and b) the instruments that matter in restriction on the right to travel, specifically in relation to the determination of curfew.

As previously discussed, in repressive control, the Supreme Federal Court, through a preliminary injunction ruling by Minister Rosa Weber, decided in Direct Unconstitutionality Action (ADI) No. 6,387, due to the need to suspend the effectiveness of Provisional Measure (MP) No. 954, of April 17, 2020. The MP imposed on the telecommunications companies providing STFC and SMP the duty to "[…] make available to the IBGE Foundation, in electronic form, the list of names, telephone numbers and of the addresses of its consumers, individuals or legal entities"(BRASIL, 2020b).

Likewise, administrative acts that imply a restriction on the right to travel should be carefully studied, since in addition to the requirements that the Federal Supreme Court has already indicated (local interest in the measure and the need for scientific



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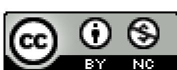
certainty), it is essential to identify whether there would be other conducts to be practiced, which may imply less harm to fundamental rights.

While seeking to attribute the greatest efficiency to the fundamental right, Silva (2014) proposes the use of the weighting technique as a special rule, which serves as a guide for the application of other rules. For that, the adequacy, necessity, degree of efficiency and proportionality must be analysed, in order to carry out a weighing capable of protecting the essential content of fundamental rights. In this case, there is an evident conflict between the right to health, which serves as a motivation for the administrative acts under analysis and, also, the right to privacy and personal data and locomotion.

In terms of adequacy, as Silva (2014) brilliantly points out, it must be analysed whether the measure adopted is sufficient to promote the achievement of the intended objective, provided that it is in the face of a conflict of fundamental rights of the same category.

In this case, the function not only of MP nº 954/2020, but also of the provision of article 6, of Law nº 13,979 / 2020, would be the protection of the community during the state of emergency in public health. However, there is no adequacy between the intended conduct - especially in the case of the Provisional Measure - and the fundamental right that can potentially be offended, precisely because the current crisis in public health will not be overcome through the formation of a database by the government. public.

Likewise, in the case of the curfew, the justification is aimed at protecting the community and controlling the contamination of COVID-19. Its ultimate goal, compared to the damage treatment measure, is more genuine and has greater potential for realizing the reason why it is used. However, even so, in terms of adequacy, the use of the curfew opens room for discussion, especially given the need to weigh the effect of the restriction of the right to locomotion with the effectiveness of achieving a control of the virus. This is because, for example, in most municipalities where curfews were determined, trade works - despite public restrictions and health guidelines - normally, which puts the effectiveness and scientific certainty of curfew in check.



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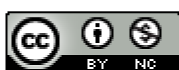
Furthermore, along the same lines of ideas, there is the importance of examining the need, which, according to Silva (2014), consists of the comparative examination of possible measures to achieve a desired end. Thus, there are two variables that guide the technique: "[...] *1. The efficiency of the measures in achieving the proposed objective; and 2. The degree of restriction on the fundamental right reached* "(SILVA, 2014, p. 104). In fact, the need can be understood as the pursuit of the least burdensome means to the fundamental right or the one that is more efficient in achieving the desired end. Therefore, when confronting the two variables, it is advisable to observe the one that best impacts efficiency. All this means to say, in this way, that *"[...] in the test of necessity, one should not ask if there are more efficient measures than the measure adopted, but only if there are measures as efficient as, but less restrict the affected right* "(SILVA, 2014, p. 105).

For both cases analysed, there are alternatives capable of attributing a degree of effectiveness to the construction of the intended objective (protection of the community and control of the public health emergency), as is the case, for example, of the incentive to voluntary social distance and the exercise of policies economies capable of guaranteeing them. Therefore, there is no elementary restriction on the content of the right to locomotion and the inviolability of personal information, on the pretext of safeguarding the right to health.

On top of that, when examining the weighting, it is necessary to identify whether there is proportionality in the measures adopted. According to the teachings of Silva (2014), only the verification of the suitability and necessity of the adopted measure is not enough to attribute the best purpose, as it could be in the face of an eminently efficient situation, but, in return, results in a wide restriction to others. rights. Thus, the examination of proportionality in the strict sense is also essential, as "[...] it consists of a weighing up of the rights involved" (2014, p. 109) and its main function is to avoid exaggerations that, although adequate and necessary, excessively restrict fundamental rights. In this sense, there are categories of questions that must be asked to ensure an effective application of the proportionality rule and, above all, the essential content of a fundamental right.



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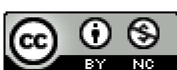
In the case of an attempt to use personal data by the Government, it is not possible to identify a connotation that relates it to the effectiveness of the control and prevention of COVID-19. Unlike what happens in China, for example, whose government regime is authoritarian, a democracy does not allow the restriction in the inviolability and confidentiality of information, without an effective pretext of relevant danger. It means to say, in this way, that the intention of adopting measures like this is to completely empty the axiological content of the fundamental right whose objective is the protection of personal life and the privacy of citizens.

In addition, in the case of article 6, of Law 13,979 / 2020, the lack of a delimitation in the scope of the provision and, therefore, the prominence of an elasticity in the legal norm, requires, as a means of guaranteeing the essential content of the fundamental right to inviolability of personal data, the examination of proportionality, precisely with the intention of avoiding the adoption of measures, including by municipal, state or district governments that are effectively fearful of the constitutional order.

In relation to the delimitation of the right to locomotion, the adoption of the curfew does not mean the complete disappearance of the essential nucleus of the fundamental right. In this sense, as has already been warned above, it is possible to understand the prominence of the measure, but from the very complement that built the Supreme Federal Court, that is, provided it is imposed in the face of repercussions of a local character - therefore, by municipal managers and never state - and, mainly, with technical recommendation that the measure has high effectiveness. This is because, talking about low effectiveness, in terms of proportionality, can be a risk to the right to locomotion, insofar as the restriction of that fundamental right will be excessively burdensome when compared to the effectiveness attributed to the right to health.

In view of these considerations, it is possible to understand that the measures that have been adopted by the Executive Branch, whether at the municipal, state, district or federal levels, need to be carefully analysed, with the pretension of not allowing the emptying of the essential content of other fundamental rights, under the premise of protecting the right to health.



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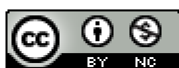
5 CONCLUSION

During the research, it was understood that the recognition of a pandemic by WHO - in the global context - and the state of Public Health Emergency of National Importance - internally - justify the idea of several measures collectively thought, with the purpose of overcoming the outbreak of community contamination of the spreading virus of COVID-19.

As discussed, in Brazil, a general Ordinary Law (13,979 / 2020) was drafted, which provided for the legal measures that may be adopted by municipal, state, district and federal governments, with the objective of reestablishing public order with regard to preservation of health. In this sense, it was seen that the right to health has immense importance in the legal system, since its content is intrinsically related to the care of the dignity of the human person and the right to life. Thus, the attempt to preserve them has been the starting point for the spheres of the Executive Branch to build their solutions in local and competing ways.

However, the claim to control the community transmission of the virus cannot be used as a basis for reflecting, the emptying of the content of fundamental rights. It is for this reason that the Federal Supreme Court, has been carrying out a repressive control over the adopted measures, either to improve them, as is the case, for example, the recognition of the competing competence of the Executive Branch in being able to even supplant the Federal content, as long as there is a relevant local interest in motivating the act; whether to impose rules on measures taken by managers, as is the case with the need for a technical report to determine social isolation or quarantine; or, still, the suspension of effectiveness of the measure that sought to grant to the Public Power access to personal data of citizens.

As these decisions were rendered in precautionary judgments, they will certainly involve an in-depth analysis, especially to verify possible offenses to fundamental rights. For the examination in meritorious court, the use of the weighting technique will certainly be elementary, in order to seek to attribute the greatest efficiency to the fundamental right. In this case, there is an evident conflict between the right to health, which serves as the motivation for the administrative acts that are



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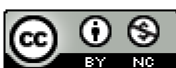
being analysed and also the right to inviolability of the confidentiality of personal data and locomotion.

Thus, it was possible to conclude that, when previous examinations are carried out, based on the weighting technique, in the curfew determinations and attempt to use personal data by the Government, the measures suffer from adequacy, necessity and, mainly, proportionality, whose consequence ends up being the offense to the fundamental rights to locomotion and the inviolability of personal data.



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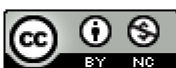

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