

The (un)constitutionality of the COVID-19 health passport: An analysis under the medico-legal approach



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ABSTRACT

The work aims to analyze, from the perspective of Medicine and Law, the possibilities of relativizations - and even suppressions - of fundamental rights and guarantees in the face of the global health crisis imposed by the coronavirus (COVID-19). The pandemic, in general, has implemented numerous restrictions aimed at the gradual opening of the economy and the consequent return to normalcy. However, these limitations, however necessary they may be considered, have also led to violations of the constitutional rights of citizens, under the pretext of promoting the well-being of the social body. Thus, the justification of the thematic relevance is based on the consequences of the sophistry that the COVID-19 health passport,

imposed by the public authorities, may cause for society, especially in the absence of previous and/or technical parameters capable of proving the effectiveness of the measure, which is extremely burdensome and flirts with the state of exception. The so-called COVID-19 health passport is problematic, that is, to examine the motivation of the State to relativize and even suppress the guarantees and individual freedoms of those who are deliberately affected by such a measure. The objective of this study is to demonstrate that the COVID-19 health passport, because it is an atypical measure, cannot be used haphazardly by the Government, under penalty of causing social segregation, since they privilege certain groups to the detriment of others, in addition to focusing on evident abuse of power. The methodology used was bibliographical, with a selection of books, articles, legal and jurisprudential texts and news extracted from official journals. The most important results of the study indicate that the health passport, at first, sought to implement the standardization of vaccination, however, in the background, it began to be used as a discriminatory measure. Finally, it is imperative to highlight that research cannot be equated with the anti-vaccine movement, much less be understood as a way of encouraging non-vaccination, on the contrary, the proposed approach aims to demonstrate that public policies should be based on humanization, and not on disrespect for rights, freedom and fundamental guarantees.

Keywords: Law and Medicine, Vaccination passport, Covid-19, Fundamental guarantees.

1 INTRODUCTION

Brazil falls into the category of Democratic State of Law, which presupposes a form of State based on popular sovereignty, that is, state power is conceived, subordinated and supervised by popular desires.



Because it is a free and democratic society, the fundamental guarantees are essential to protect the freedom to come and go of all those who are in the national territory, without any restrictions, reprisals or censures of the governmental powers (Executive, Legislative and Judiciary) or even of the citizens themselves.

The Federal Constitution of 1988 brought in its core inextinguishable rights, which provide ample and free movement in national territory, and any citizen can enter, remain or leave it with their goods. From these rights, the dignity of the human person stands out, enshrined as a constitutional principle provided for in article 1, item III, of the Magna Carta, being one of the pillars of the Federative Republic of Brazil and consists in the search for equity among citizens.

Based on these premises, it is easily perceived that individual freedoms, especially the right to come and go, are intrinsically related to the dignity of the human person, receiving protection not only from the constitution, but also from the United Nations Universal Declaration of Human Rights of 1948.

Faced with such magnitude, it is extracted that individual freedoms aim at the protection of the human being, subject of rights and obligations supported by the State, entity charged with protecting those who are under its guard against any and all acts of a degrading and inhuman nature, as well as promoting the minimum existential conditions for a healthy life.

Despite the salutary importance of the figure of the State in the protection of the guarantees provided for in the Constitutional Digest, currently, it is observed that the Public Administration has relativized - even suppressed - these rights, under the justification of the decree of the state of emergency resulting from the COVID-19 pandemic, in order to protect the interests of the collectivity.

Consequently, infra-constitutional legislation was enacted, which imposed very serious restrictions on the right to come, such as the requirement of proof of vaccination of COVID-19 for free access to public and private agencies. At first glance, the vaccination card was designed with the purpose of promoting the standardization of immunization in the face of the numerous laboratory brands available. However, over time, the document lost its purpose, so that even its nomenclature was modified, starting to be called "sanitary passport".

Then, the controversy arises about the constitutionality of the indispensability of proving COVID-19 vaccination, upon presentation of the health passport, for the wide and free access to public and private spaces, maximum for the conflict of individual freedoms with the interests of the social body (health and life).

That said, the paper intends, under a thorough analysis, to demonstrate in the light of the fundamental guarantees, that the imposition of the requirement of the sanitary passport for access to certain places can be considered unconstitutional.



2 THE DYSTOPIA OF SANITARY METHODS TO CONTAIN COVID-19

The first complaint about something different in terms of contagion was registered on December 19, 2019 in Wuhan City, Hubei Province, People's Republic of China, according to the World Health Organization (WHO). It is worth remembering that, at first, a "Strange Pneumonia" was detected and the ophthalmologist who made such an appointment was arrested and after some time died of the infectious viral disease. The first case was of a Wuhan market vendor, who fell ill on December 11, 2019 (Worobey *et al.*, 2020).

Afterwards, speculation arose about the possibility of the disease having started in October 2019, due to contamination by seafood ingestion (Huang *et al.*, 2020). The truth is that when the Chinese sanitary system could no longer cover up the gravity of the situation, the disease was then admitted around December 29, 2019 and the sanitary measure with restrictive imposition, such as the departure of the population from the region, was only taken on the date of January 19, 2020.

Despite the attempt to contain the contamination of the disease and taking into account the number of inhabitants of the city (11 million), of cosmopolitan character, with business in several countries of the world, mainly in the north of Italy, approximately 5 million people had already traveled to various regions of the world, a factor that helped in the spread of the virus. The dissemination was in geometric index with cyclopean manifestations of the disease throughout the world.

The World Health Organization, as of February 11, 2020, designates the new virus SARS-CoV-2 (*Severe Acute Respiratory Syndrome*), novel Coronavirus, and the diseases caused by the virus are named COVID-19 (*Coronavirus Disease of 2019*). On March 11, 2020, the WHO declared a state of pandemic, pointing out the geographical distribution, not the severity of the disease. Both in the national and international scenario, the term ESPII (Public Health Emergency of International Interest) is used, and in Brazil the terminology is ESPIN (Public Health Emergency of National Interest). These designations are based on the International Health Regulations (IHR 2005) which endorse the obligation of extreme sanitary measures such as quarantine, use of masks, vaccination and even compulsory isolation.

At the same time, it is stated that Brazil faced the Spanish Flu Pandemic in 1918 that even claimed the life of President Rodrigues Alves, at the age of 70, in 1919. The Brazilian population was around 29 million, while the world population did not exceed 2 billion. There are no precise statistics on the number of fatal cases of the H1N1 pandemic (Spanish flu), however, it is estimated that in Brazil, the number of deaths ranged from 35,000 to 300,000 deaths, while in the world it reached 100 million in the interim of two years (Neufeld, 2020).

In modern times, on January 30, 2020, the Presidency of the Republic issued Presidential Decree No. 10,212, in attention to the text revised and agreed at the 58th General Assembly of WHO



on May 23, 2005. That decree rescued the guidance on sanitary measures based on Brazilian laws proposed and approved by the National Congress to deal with the pandemic.

In fact, Law No. 13,979 of February 6, 2020, established actions to be taken in the face of the approaching pandemic, such as isolation, quarantine and even mandatory vaccination. President Jair Messias Bolsonaro, through the Ministry of Health, issued Ordinance No. 188 on February 3, 2020, seeking to prepare the country to face the virus.

In that scenario, the WHO had not yet established a pandemic condition, a circumstance that led to the denial of the possibility of viral spread by some public representatives, who claimed that the measure would cause gigantic economic damage to the states, already advertised with the carnival. Numerous governors, mayors, health professionals, including a doctor from a specific hegemonic television network - which analyzes diseases - denied the disease and stated that there was no reason to panic, because it was a "little flu", and then this same television network tried to preach the labeling to the President of the Republic as the author of the statement.

Unfortunately, there was no action in the state of emergency that would be triggered by the ordinance in question, and this occurred only because the minister of health at the time, in an orchestrated action with those who opted for the realization of the carnival, turned a deaf ear to the medical wisdom essential to adequate prevention against the virus. No case of the virus had been detected, which only occurred on February 26, 2020, in a 61-year-old male patient (Brasil, 2020). From the date of the Ministry of Health ordinance to the day of detection of the first case, 23 days were counted, in the interim sufficient for preventive measures to be taken, especially with regard to the suspension of carnival festivities.

This was not done because it was contrary to economic interests and, currently, it is conceded that there were also the interests of the big pharmaceutical companies, vaccine manufacturers. It was necessary to spread the virus to generate panic and pressure the federal government to acquire immunizers that, evidently, have not prevented the spread of the virus and have not even presented satisfactory immunization as advertised. Faced with the growing number of cases and with the carnival helping in the spread of the virus, another narrative was created, that is, it was necessary to close everything and condemn society to confinement.

Thus, the inconsequential absurdity of global closure of economic activities was established, even in desert territories and in the distant cities of the population agglomerations. This conduct, notably insane and without any technical-scientific basis, was ratified, directly and indirectly, by the Federal Supreme Court (STF) in the judgment of Direct Actions of Unconstitutionality (ADI's) No. 6341, 6362, 6586 and 6587.

The motivation of the Supreme Court granted safe conduct to governors and mayors for the imposition of notoriously serious and unconstitutional measures, such as the absolute blockade of



people or loads (*lockdown*). Obviously, this has caused real economic chaos with a 9.1% drop in Gross Domestic Product (GDP), without any repercussion on the reduction of COVID-19 cases and mortality. According to Herby, Jonung and Hanke (2022), in the United States of America and Europe, the imposition of *lockdown* has had very little or no effect on mortality, having reduced on average 0.2% of deaths caused by the coronavirus.

In addition, according to Roelfs, Shor, Davidson and Joseph Schwartz (2011), unemployment increases the risk of premature death by up to 63%, which justifies the fact that several scientists are against *lockdown*, not least because *lockdown concentrates and spreads the virus more easily* (Henderson et al., 2006). Based on this premise, the important thing is that in certain situations and circumstances vertical isolation is used for the elderly and debilitated, but still in a limited way.

SARS-CoV-2 is a virus of high infectivity and low virulence, as its ability to infect is measured by the R_0 (basic reproductive rate) which is 1.4 to 2.5, common influenza 1.5 and Measles R_0 of 18, highly contagious (CDC, 2021). The size of the virus is 0.065 μm (milli micron) or 65 nanometer, that is, 1 million times smaller than the millimeter (Chen et al., 2020). In this sense, the dust grain is 10 microns (1,000 times smaller than mm) and the coronavirus is 80 times smaller than dust. N95/PPF2 surgical masks have the obligation to filter between 90% and 98% of particles with 300 nanometers, that is, 4.5 times larger than the coronavirus (Artaxo et al., 2021).

These data demonstrate that the virus is unbeatable in terms of mechanical barrier and the most effective way to contain it is through the immune barrier, but therapeutic contamination was not allowed when the *lockdown was determined*. Once the vaccine was applied, immunization was done over a long period and, at the time of vaccination, the principle that one does not get vaccinated during the pandemic was contradicted.

This is because the virus, a living being, seeks adaptability with change of its molecular characteristics, what happened and the antibody generated by the vaccines initially, were not effective for the viral mutations that determined other outbreaks, because the vaccine, with the exception of coronavac, of low efficacy, was of certain viral segments.

Public policies were implemented to encourage the population to submit numerous booster doses without, however, presenting convincing results regarding immunization and mitigation of new cases. There is a lack of research to detect the effectiveness of the immunizer compared to those who contracted the virus in terms of recrudescence. Faced with this instability, questions, lack of answers and seriousness in the scientific approach, the narrative was established that we have to wear a mask at all times, continue vaccinating and in some places undergo the RT-PCR test.

As for masks, there is, to date, no scientific research that reports the importance of their use, however, there are sparse statements to the effect that the equipment provides safety, does not compromise blood oxygenation and does not cause carbon dioxide poisoning. These opinions are based



on the worst level of scientific evidence that is the 'C', that is, consensus of experts with weak degree of recommendation IIb, and in some cases reaches III, which means loss. There is no randomized scientific study on the topic. What is available is a meta-analysis of 172 observational studies in 16 countries on 6 continents, for a total of 25,697 patients, with the conclusion that the best outcome is obtained with social distancing (Huang *et al.*, 2020).

In view of the data, the question from a logical-rational perspective is pertinent: if masking, hand hygiene with alcohol-gel and immunization are effective, why the viral spread despite all the restrictive measures and even the enactment of *lockdown*? Everything was proposed, and extreme measures were taken in the fertile soil of ignorance and unpreparedness of most states and municipalities, armed with the vested interests of higher hierarchical leaders.

It is perceived that abuses were committed in the name of "science," but that in reality the larger purpose was to destabilize the federal government. What truly worked was scorned by the media on the grounds that there were no scientific studies. This statement is ignoble, behold, the first scientific study aimed at the treatment of the disease was carried out by the University Hospital of Marseille in France, with 36 patients, 20 of whom were treated with hydroxychloroquine (HCQ), with full recovery when added Azithromycin (Gautret *et al.*, 2020).

In another study, Italian physician Annalisa Chiusolo told *The JPost*¹ that the Italian Society of Rheumatology surveyed 1,200 rheumatologists who cared for 65,000 patients with Rheumatoid Arthritis (RA) and Systemic Lupus Erythematosus (SLE). These patients were receiving hydroxychloroquine as an immune modulator and only 20 patients tested positive for COVID-19. The drug has long been safe and there have been no deaths among those using the drug for rheumatic morbidities.

Regarding immunization, that is, vaccination, the issue is also controversial and obscure. It is noted that the credibility of vaccines is not opposed, since they have been used safely for 226 years; Likewise, the problem does not compare to the anti-vaccine movement, nor can it be understood as a form of encouragement to non-vaccination. In fact, the strong position of the media against the treatment of the virus with the antimalarial drugs repositioned in the therapeutic arsenal, such as chloroquine and hydroxychloroquine, is questioned.

The initial argument was that there was no skillful scientific confirmation to justify the administration of the drugs. In fact, there was no scientific robustness, mainly because society had never experienced infection with SARS-CoV-2, however, it was found that several viruses are sensitive to these drugs, including Dengue and Chikungunya (Wang *et al.*, 2020). As the disease spread, it was

¹ Available in: < <https://www.jpost.com/health-science/italian-scientist-says-she-discovered-main-mechanism-behind-covid-19-626737>>



proven that antimalarial drugs were effective when administered in the first 5 (five) days of the first clinical manifestations, so this measure was called "Early Treatment".

The vaccines were studied and tested with the application of 2 (two) doses and immediately began the process of evaluation of efficacy. Efficacy is the ability of the immunizer to determine the synthesis of antibodies specific to the inactivated virus with little or no adverse reaction. These reactions can range from mild allergic occurrence to life-threatening manifestations.

Despite the adverse events, society longed for the release of immunizers. Thus, in record time the vaccines were made available by the National Health Surveillance Agency (ANVISA) after the end of the 3rd phase. In this phase, the purpose and safety of the immunizer is analyzed. The first dose was administered on January 17, 2021, in the State of São Paulo, and one year later, 78.8% of the Brazilian population had received the first dose and 68% the second (Brasil, 2022).

The irony is that, with practically 70% of the population vaccinated with both doses, there should be no resurgence, and this, unfortunately, happened in Brazil and in the world, with the emergence of the *omicron variant*. Considering the failure of vaccination in containing the pandemic, the narrative shifted to the discourse that, despite not guaranteeing immunization, let alone preventing contagion, the contamination of the disease promoted only mild symptoms.

The statement is fallacious and, over time, the more severe the pandemic has become, showing us total ignorance of the behavior of viral variants. In reality, the virus humiliated everyone and, over time, more propositions were offered and the vaccine booster, like a panacea, began to be defended without any scientific basis or foundation based on unscientifically proven logic.

Therefore, the last "reason" to try to justify the threat of imposition of new absolutely restrictive measures by the Government, was to decree the requirement of proof of the "certificate of immunization", also known as the "health passport" of COVID-19, as a condition for the exercise of freedoms.

With this condition, those who did not undergo the doses of the immunizer, were and continue to be prevented from attending public and private places, such as courts of justice, notary offices, ministries, municipalities, educational institutions, restaurants, bars, malls, etc. Moreover, the limitations are not exhaustive, and may affect, depending on the case, restrictions on the exercise of professional activity, dismissal for just cause and, above all, the right to come and go.

A parenthesis is opened to state that the vaccination card was instituted by the Ministry of Health to promote the organization, standardization and control of immunization protocols. Despite the laudable intention, the document has become a method of repression, since the Federative Entities, in their majority, - by infraconstitutional legislative decrees - have misrepresented the primary purpose of the certificate by using it to suppress rights and, with this, generate clear social segregation.



It is inferred from this conjuncture that the last time society had to deal with such discretion was in times of war, precisely during the Second World War, when Nazi Germany, with the tolerance of the Axis countries, restricted people's freedom to work and access to places as a form of persecution of Jews.

Therefore, like the Nazis, the health passport affronts the dignity of the human person and induces stigmatization and segregation, since not everyone could have access to immunizers, in addition to scientific studies pointing out that vaccination does not produce immunization capable of preventing the contagion and proliferation of the virus. After all, the vaccinated both transmit and are contaminated by the disease (WHO, 2021). Therefore, it is ineffective and totalitarian measure.

On the other hand, and in the worst case, it could be argued that, in the name of the collectivity, the State could even impose the requirement of proof of the vaccination cycle for free movement with public agencies, provided that it made available to citizens other forms of access to services. Unfortunately, that didn't happen.

In view of the above, it appears that the sanitary methods recommended by the Government were not satisfactory to contain the COVID-19 pandemic, on the contrary, they were dystopian with serious economic and social consequences, in addition to denying the basic foundation of medicine, which is the diagnosis followed by treatment.

3 FINAL CONSIDERATIONS

The work aimed to investigate the constitutionality of the requirement of proof of the vaccination cycle, through sanitary certification, by citizens for free access to public and private agencies.

To answer the question, which guided the entire development of the research, a brief exposition was made on the sanitary methods for the containment of the disease, both nationally and worldwide, in addition to the analysis of legislation and judgments within the scope of the Federal Supreme Court.

Finally, based on medical and legal science, it is concluded that the requirement of the health passport is an unnecessary, disproportionate and discriminatory measure, especially because the State does not provide other means of access to public and private agencies, in addition to demonstrating that immunization is not absolute, much less prevents the spread of the disease, and there are no justifications to support such arbitrariness.



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