

PUBLIC HEALTH EMERGENCIES IN DEMOCRATIC STATES

The full effectiveness of the right to health demands permanent efforts and considerable creativity from democratic societies, to face the enormous sanitary challenges imposed by global, national and local realities. At present, the world witnesses astonished the global dissemination of another lethal virus, the new coronavirus (SARS-CoV-2)¹. Part of this perplexity lays on the perception that modern societies do not maintain appropriate legal instruments to confront, in a democratic, transparent and efficient manner, a pandemic of this magnitude. How to reconcile classic measures of control of epidemics, such as isolation, quarantine and compulsory diagnosis and treatment, with the principles and rules of a Democratic State subject to the rule of Law?

The International Health Regulations (IHR), approved by the 58^o World Health Assembly of the World Health Organization (WHO) of May 23 2005, represented a considerable advance including, among its provisions, a set of rules to be observed by the WHO and by the Member-States to strengthen and develop competences in the field of the world public health. Among its main innovations, the IHR reinforced the role of the WHO in issuing warnings about worldwide outbreaks and in the response to public health events, clearly defining the mandate of this multilateral organism in cases of public health events of international relevance.

From 2005 onwards and based on the IHR, the WHO has already declared Public Health Emergency of International Concern in six occasions: in 2009, to organize containment actions against the spread of the H1N1 virus; in May 2014, to contain an international outbreak of Ebola; in August 2014, against a new international outbreak of poliomyelitis; in 2016 to contain an international outbreak of the Zika virus, rather known for the Brazilian people for having been firstly detected in our territory in 2019;

¹The SARS-CoV-2 coronavirus, discovered on December 31, 2019 after the first recorded cases in China, is part of a family of viruses that cause respiratory infections. Covid-19 is the disease caused by this new coronavirus. (MINISTÉRIO DA SAÚDE – MS. Available at: <https://coronavirus.saude.gov.br/sobre-a-doenca#o-que-e-covid>. Accessed in: 26 Feb., 2020.

a new declaration of emergency resulting from the dissemination of Ebola, specially in the Republic of Congo; and, now, in 2020, WHO has just declared Public Health Emergency of International Concern attempting to contain the dissemination of the new coronavirus.

In fact, on January 30 this year, in its second meeting, the Emergency Committee created by WHO Director-General, Tedros Adhanom Ghebreyesus, to evaluate the situation involving Covid-2019 concluded:

It is important to note that as the situation continues to evolve, so will the strategic goals and measures to prevent and reduce spread of the infection. The Committee agreed that the outbreak now meets the criteria for a Public Health Emergency of International Concern and proposed the following advice to be issued as Temporary Recommendations².

Among WHO Emergency Committee recommendations issued for the Member States, there are measures such as containment, including active surveillance; early detection; isolation and case management; tracking of people who contacted the infected; prevention of the progressive spread of Covid-2019 infection, as well as full sharing of data with the WHO.

Complying with the Emergency Committee recommendations, the Director-General of WHO declared Covid-2019 as an Public Health Emergency of International Concern, based on the provisions of the IHR of 2005, and imposed on the Member States a set of obligations related to the contention of the disease, for example, the isolation of the people infected, quarantine, mandatory diagnosis and treatment, and also the sharing of data.

Brazil ratified the IHR through Legislative Decree 395, of 2009. Article 5.1 of the IHR deals with health surveillance, determining that

[...] each Member-State should develop, reinforce and maintain, as soon as possible, within five years at most, as of the coming into force of these Regulations for such participant State, the competences to detect, evaluate, notify and inform events in accordance with these Regulations, as specified in Annex 1³.

²WORLD HEALTH ORGANIZATION – WHO. *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*. Available at: [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)). Accessed in: 26 Feb., 2020.

³BRASIL. *Decreto Legislativo n. 395, de 2009. Regulamento Sanitário Internacional*. Available at: <https://www2.camara.leg.br/legin/fed/decleg/2009/decretolegislativo-395-9-julho-2009-589324-acordo-114307-pl.html>. Accessed in: 26 Feb., 2020.

In the same year that IHR was ratified in Brazil, the section “Argument”, of the *Journal of Health Law*, addressed the juridical challenges around the organization of health surveillance in Democratic States subject to the Rule of Law⁴. That issue of the journal, published more than ten years ago, already pointed at Brazil’s need for improving legislation regarding health surveillance in general, and specifically epidemiologic surveillance.

The current Brazilian legislation for epidemiological control is still based on Law no. 6.259/1975⁵, which does not contain adequate and detailed epidemiologic control measures and instruments to be adopted by the State in cases of public health emergencies. Approved during the Military rule in Brazil, said law does not dialog with or gives the State provisions as to how it should behave in cases of epidemic crises with respect to democratic liberties and human rights.

Although scientific evidence is pointing at the need of a new comprehensive legislation on the subject of health surveillance in Brazil, the country did not progress in this direction: the successive governments and legislative bodies have been dealing with this subject on specific points and sporadically, creating a disconnected tangle of norms that do not solve efficiently the regulatory gaps existing at the moment.

It should be remembered that, in this aspect, some of the main legislative rulings on the subject during that period in Brazil: (i) the publication of Decree of December 6 2010⁶, which established the Interdepartmental Executive Group for Public Health Emergencies of National and International Concern (GEI-ESPII)⁷; (ii) Law no. 13.301/2016, which “provides for the adoption of measures of health surveillance when a situation of imminent danger to public health is verified caused by the mosquito that transmits dengue virus, chikungunya virus and zika virus”⁸; and (iii) most recently Law no. 13.979/2020, which “stipulates the measures to confront public health emergencies of international concern caused by the coronavirus outbreak in 2019”⁹.

⁴*Revista de Direito Sanitário*, v. 1, n. 2, 2009. Available at: <http://www.revistas.usp.br/rdisan/issue/view/1053>. Accessed in: 26 Feb., 2020.

⁵BRASIL. *Lei Federal n. 6.259, de 30 de outubro de 1975*. Dispõe sobre a organização das ações de Vigilância Epidemiológica, sobre o Programa Nacional de Imunizações, estabelece normas relativas à notificação compulsória de doenças, e dá outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/L6259.htm. Accessed in: 26 Feb., 2020.

⁶Revogado pelo Decreto n. 10.211/2020 (BRASIL. *Decreto n. 10.211, de 30 de janeiro de 2020*. Dispõe sobre o Grupo Executivo Interministerial de Emergência em Saúde Pública de Importância Nacional e Internacional - GEI-ESPII. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Decreto/D10211.htm#art9. Accessed in: 26 Feb., 2020.

⁷BRASIL. *Decreto de 6 de dezembro de 2010*. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Dnn/Dnn12959.htm. Accessed in: 26 Feb., 2020.

⁸BRASIL. *Lei n. 13.301, de 27 de junho de 2016*. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13301.htm. Accessed in: 26 Feb., 2020.

⁹BRASIL. *Lei n. 13.979, 06 de fevereiro de 2020*. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Lei/L13979.htm. Accessed in: 26 Feb., 2020.

The necessary measures and instruments to contain an epidemic can be rather aggressive and limiting of individual freedom. There have already been seen in history classic examples of this: isolation, quarantine, cordon sanitaire, compulsory treatment and diagnosis, control of the sale and trade of supplies, control and banning of the provision of services, the use of private property by the government, limitation of the right to come and go, limitation of the freedom to reunite, collective burial, among other measures with the same potential to limit individual rights and liberties.

The time has come, with no more delays, for Brazil to look into this issue in a profound and responsible way, to elaborate a modern and efficient legislation that, at the same time, is capable of providing the state with the necessary instruments to control epidemics and protect the human rights, especially the right to health. Law no. 6.259/1975 is not sufficient to organize state action. It becomes necessary to elaborate and approve a new national general law of health surveillance, through the clear review of the possible measures to be taken by the State. The general law shall establish and organize the health measures that can be adopted in pandemic situations, as well as define clearly rules regarding accountability, access to public information, as well as the role of the Public Ministry, the Judicial Power, the health boards and other existing democratic and participative organisms of control.

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