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A CRISE DA COVID-19 NO BRASIL E SEUS REFLEXOS

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DISTRIBUTION OF ADMINISTRATIVE COMPETENCES BETWEEN NATIONAL AUTHORITIES IN BRAZILIAN FEDERATIVE HEALTH SYSTEM: INTERNATIONAL VACCINE PURSHASE CONTRACTS AND PARADIPLOMACY

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1 INTRODUCTION

On January 20, 2020, the World Health Organization declared that the world was facing a"public health emergency of international interest", which led Brazil to enact Law No. 13,979, of February 6, 2020, which was later modified on March 20, 2020, after a new WHO declaration that reclassified that current moment as a global pandemic, caused by the advance of the new coronavirus that causes a disease called COVID-19.

The legislation guides coordinated actions by all entities of federation, highlighting measures that may be adopted by the authorities in health issues only provided if they are within limites of their competence. Citizens shall be subject to compliance with sanitary measures and their non-compliance will lead to liability and all system should assure full respect for dignity, human rights and fundamental freedoms.

In order to face the public health crises, the authorities may adopt, within the scope of their competences, the following measures, among others: isolation; quarantine; determination of compulsory performance of: a) medical exams; b)

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laboratory tests; c) collection of clinical samples; d) vaccination and other prophylactic measures; or e) specific medical treatments; epidemiological study or investigation; exhumation, necropsy, cremation and handling of corpses; exceptional and temporary restriction, according to the technical and substantiated recommendation of the National Health Surveillance Agency, by highways, ports or airports from: a) entry and exit from the country; b) interstate and intercity transportation; c) requisition of goods and services from natural and legal persons, in which case the subsequent payment of fair compensation will be guaranteed; and exceptional and temporary authorization for the import of products subject to sanitary surveillance without registration with Anvisa, provided that: a) registered by a foreign sanitary authority; and b) provided for in an act of the Ministry of Health.

To compose the hole legislative framework, in addition to Law No. 13,979, already explained, we should be mentioned Law No. 14,121, Law No. 14,124 and Law No 14,125 all of them published in March 2021 and that guide actions to combat and prevent COVID-19. First one provides for exceptional measures related to the acquisition of vaccines, authorizes the federal executive branch to adhere to the Covid-19 Global Access to Vaccines Instrument (Covax Facility) and establishes guidelines for the immunization of the population.

Second one also provides for exceptional measures relating to the acquisition of vaccines, but also for supplies and the contracting of goods and services in logistics, information and communication technology, social and public communication and technical training for vaccination against covid-19 and on the Covid-19 National Immunization Operational Plan. In this legislation, there is an exemption from bidding of contracts or similar instruments, but it does not remove the need for an administrative process that contains the technical elements required to choose the contracting option and to justify the applicable price.

The third of them is the most important for the subject of this paper. According to Law 14,125, entities of federation (the Federal, Member-States and Municipalities) are authorized to acquire vaccines and to assume the risks related to civil liability, under the terms of the instrument of acquisition or supply of vaccines.

This guidance is consistent with the understanding that the coordination of all federative entities is one of the premises underlying Law No. 13,979.

The coherence of coordination also exists within the National Immunization Program (NIP), established by Law No. 6.259/1975. The NIP began its first National Vaccination Campaign against Poliomyelitis in 1980, with the goal of vaccinating all children under the age of 05 in one day. This program have been internationally known as part of the World Health Organization Program, with technical, operational and financial support from UNICEF, and contributions from Rotary International and the United Nations Development Program (UNDP).

The problem that arises in this paper discussion is that even facing a unified health system in Brazil, which covers the entire national territory and is coordinated by a central unit, there is inequality in the health universe, highlighting regional differences, that reveal marked disparities between member states with regard to equipment and human resources in the area of health.

Additionally, the pace of vaccination was not the same for all federation entities. There were advances and setbacks when considering member states. Although the public policy on vaccination is considered broad and covers the entire national territory, member states have their own public budgets and the forms of decentralization of material, personal and administrative resources and it leds to greater advances in vaccination in richer states and a delay in poorest states.

This combination of coordination by a central entity and the execution of public policies by federative entities ends up generating a model that intends to be cooperative. However, what was noticed were member states taking the lead in negotiating, purchasing, and executing international contracts, including national entities, which characterizes the phenomenon of paradiplomacy.

This article intends to analyze the individual actions of the Member States of the Brazilian federation in light of the Brazilian legal system and also the jurisprudential readings of the Brazilian Supreme Court. The questions that arise are: i) are member states acting legally in the design of the distribution of administrative powers provided for in the Brazilian Constitution for Public Health issues? ii) is the

phenomenon of paradiplomacy observed in the negotiations of international contracts conducted by state governors?

To answer the questions, this article is divided into two parts, each one intended to address each of the questions. The first one proposes to describe how administrative and legislative competences are designed to deal with public health issues in the Brazilian legal system. This item is also intended to present how the Brazilian Federal Supreme Court interpreted the issues of competence distribution in the execution of public policies regarding the treatment and prevention of COVID-19.

The second part introduces the concept of paradiplomacy and justifies the negotiation of international contracts for the purchase of vaccines by governors, given the administrative vacuum that occurred in the health crisis due to the delay in approving purchases. Finally, it is concluded that it is possible to consider the legitimacy and legality of negotiation and contracting acts carried out by governors.

2 BRAZILIAN FEDERATIVE MODEL AND REPERCUSSIONS ON THE PUBLIC HEALTH POLICY AGENDA.

Brazil is a republic whose State adopts the form of federalism. Traditionally, federalist states divide power into administrative and legislative decision-making spheres that must be united for common collaboration[2]. Thus, the exercise of power is carried out jointly by the larger entity, the federal sphere, and between smaller entities, the Member States, which have a certain autonomy in relation to the latter, mainly in matters of regional characteristics.

However, Brazil is not a two-tier federation[3], like most federative models in the world. This is because, in addition to national and regional power, there is a

[2] HESSE, Konrad. *Elementos de direito constitucional da República Federal da Alemanha*. Trad. Luís Afonso Heck. Porto Alegre: Sergio Fabris, 1998, p. 178 e ss. In Hesse's traditional view, federalism is the free unification of different political totalities, fundamentally with the same rights, into regional rules that, in this way, must be united for common collaboration". Although the author considers that there is a conceptual uniformity in the theme, the distinction is due to the concrete-historical particularities and individualities of each social and legal formation.

[3] Most Federated States adopt dual or classic federalism, which has a North American origin and presents a centripetal model (which starts from the base or from the center to the ends), in which there is a decentralization of competences distributed to the Member States. In Brazil, this logic was already implemented in the Federal Constitution of 1891, which established the Union's competences expressly

division of local power, which also represents autonomy for even smaller entities, the municipalities. The division of powers in the federation, therefore, is a presumption and the forms of exercising such powers are designated by competences: whether administrative or legislative.

So, first of all, it is important to afirmm that competence, in the technical sense of the term used in Brazil, is considered as a complex of powers that are performed through attributions that limit them, so that no public authority is absolute. Assume that premisse, the division of competence in Brazilian Constitution of 1988[4] addresses the legislative competences (to legislate), and administrative competences (to manage).

In the scope of legislative competences, there are within the scope of legislative competence, there are two types that can be considered: i) private competence (art. 22) and ii) concurrent competence (art. 24). Private competence is that exclusive to the federative entity. For exemple, it is the exclusive competence of the federal sphere to legislate on sovereign issues or those matters that need homogeneous treatment throughout the national territory.

In this sense, article 21 of the Brazilian Constitution of 1988 provides that some of the following themes are legislative matters of the federal sphere: i) civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labor law; ii) expropriation; iii) civil and military requisitions, in case of imminent danger and in time of war; iv) water, energy, information technology, telecommunications and broadcasting, and much others itens, including foreign and interstate trade.

Concurrent competence, in turn, is that which is attributed not to a single entity of the federation, but which can be performed by all of them, within the limits

in an exhaustive list, and, by a contrario sensu interpretation, all other undetermined competences were attributed to the Member States, who had greater political autonomy. Such was the autonomy of the Member States that it ended up generating an undesirable alternation of government polarized between São Paulo and Minas Gerais, and was baptized by historians as "República Café com Leite" (a reference to the two main economic products produced by those Member States).

[4] BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988.* Brasília, DF: Presidência da República. Avaiable in: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Conferred on 08th October of 2021.

of their territorial scope. Therefore, pursuant to article 24 of the Brazilian Constitution it is incumbent upon the Nacional Entity, the States and the Federal District to legislate concurrently on, for exemple: itax, financial, penitentiary, economic and urban law; ii) budget; iii) commercial boards; iv) costs of forensic services; vproduction and consumption; ix)education, culture, teaching, sport, science, technology, research, development, and, especially for the purposes of this paper, social security, health protection and defense. In order to preserve the state's competence, within the scope of concurrent legislation, the competence of the Nacional Entity will be limited to the establishment of general rules.

Regarding administrative competence, it is possible to perceive two types of competence: exclusive (art. 21) and common (art. 23). The exclusive administrative competence is that which cannot be delegated, that is, it cannot be performed by any entity other than the one to which the Constitution has granted powers. To exemplify this exclusive competence, it is mentioned that the national entity is in charge of matters of relevant value to the nation-state, such as maintaining relations with foreign states, declaring war, issuing currency, among others provided for in article 21, it is noteworthy that the exclusive competence of the union is undelegable, so its delegation to any other being prohibited.

Similar to the logic of concurrent legislative competences, it is the common competences of federative entities (the Federal sphere, the States sphere, the Federal District and the Municipalities). The difference between the competences is that the first is related to legislative actions, while the other is related to the administration and execution of public policies. However, in both, there is a limitation on the attributions of the federation's entities.

Concurrent and common competence, therefore, are specific words in the language of the Brazilian Constitution. And it was established that if the Constitution speaks of concurrent competence, it will be referring to the act of legislating by each of the federative entities, each in its sphere of action. Similarly, if the adoption of the term is in reference to common competence, it is talking about the attributions that fall to the Executive Power and its representatives in each of the Brazilian federative

spheres. Basically, common competences are administrative and concurrent competences are legislative.

The actions and public policies common to all federative entities and that express typical activities of the Executive Power are, among others, the safeguard and protection of the Constitution, laws and democratic institutions, in addition to the preservation of public property, and for the purposes of the article, the guarantee of public health and assistance. Health care is understood as a set of diagnostic, therapeutic and interventional services. In Brazil, it is provided both by the Public Power and by private institutions, albeit under the logic of the Unified Health System, and its guidelines are decentralization, comprehensive care and community participation.

Thus, it is the obligation of the entire Brazilian federation (common competence of the Federal Sphere, States, Federal District and Municipalities) to care for health, which is compatible with what is called the Unified Health System, created by the Constitution, in its art. 198, based on the following considerations previously seen: health is a duty of all and a duty of all brazilian entities; access to actions and services to promote prevention and recovery is universal and equal, that is, everyone has the right.

The Unified Health System is organized through the integration of the actions and health services of a federative entity with another, in the network of these actions and services. This demonstrates that federative entities, although enjoying the same federative autonomy, are interdependent within the Unified Health System, and should integrate their services with each other in the health region. The health system is composed of the services of different entities, in the health region or between health regions, which are integrated in a network.

Article 7 § II of Law nº 8.080/1990 defines the integrality of health care, saying that it is a articulated and continuous set of actions and services that must be guaranteed in the system. The integration of federative entities characterizes the unified health system and gives rise to a program with an interdependent format in which an entity of the federation does not carry out any activity on its own. He is

always helped by other entities and the actions are coordinated by the Federal Sphere, which must ensure integrity and standardization of the system.

These guidelines were the object of analysis by the STF in concentrated control of the constitutionality of the legislation (ADI 6.341), in which the Court expressed its opinion, considering that the matter of public health is a concurrent administrative competence of the federative entities as per the diction of article 23, II , of the Federal Constitution, and, in an injunction for a monocratic decision (to be confirmed by the Plenary), understood that the measures of isolation, quarantine and compulsory examinations do not rule out measures taken by federative entities.

Therefore, in practical terms, measures relating to isolation, quarantine and restriction on entry and exit from the country and locomotion may be taken in different administrative spheres of the Federal Sphere and several Federated States have implemented their own measures, using the judicial authorization given by the interpretation of the STF to manage within its federative unit.

According to the Constitution, the correct interpretation of Law No. 13,979 is confirmation of the concurrent competence of the Union, States, Federal District and Municipalities over public health. The laws enacted by the Union were considered constitutional, respecting its competences, but even so this does not remove or weaken the power of each of the other federative entities. The conclusion of the paradigmatic judgment demonstrates that federative model to address the issue of public health works in a cooperative between subnational entities and coordinating role of the nacional entity.

3 COOPERATIVE FEDERALISM IN HEALTH, THE LEADING ROLE OF THE MEMBER STATES IN MANAGING THE CRISIS AND THE INEVITABLE PARADIPLOMACY

In the view of the Brazilian Federal Supreme Court, subnational entities end up acquiring greater responsibilities. As a result, the central entity would be responsible for coordinating public policies and directing assumptions and guidelines to other entities. However, what was noticed was a greater role for the Member States, which replaced more central roles in the conduct of policies to fight

the pandemic. In this regard, the Constitutional Court recognized the roles of subnational entities and reinforced their need for cooperation.

According to this context, the protagonism of some Member States in front of the health crisis is justified, which, in many cases, generated an intensification of the phenomenon of paradiplomacy, which, in Brazil, has been relatively constant over time and it encompasses time space beyond constituted governments or policy agendas.

As a rule, diplomatic activities, because they involve representation of the Sovereign Unit, are carried out by public servants who belong to their own professional careers and are admitted through a public examination for exams and titles.

The complexity and scope of the contents provided for in the public tender indicates that the occupants of this specific career are servants molded to serve the public function representing Brazil abroad, in forums of the most diverse themes and having meetings with relevant interlocutors such as Heads of State and Government, congresses of parliamentarians, business meetings, technical seminars, conferences of non-governmental organizations. This indication clarifies that international issues are of increasing interest to a greater number of representatives of society in technical matters.

However, the actors and themes of international dialogues have been diversified, and it is no longer exclusive for career diplomats or heads of state to represent sovereign interests. This decentralization of diplomatic activities has been called paradiplomacy and adding not only technical entities, academics, NGOs (non-governmental organizations) and other actors to the debates, but also subnational representatives.

Subnational government interest have been constituted by agents that, in the traditional level of Law International would not represent the State in international relations through the establishment of formal and informal, permanent or provisional contacts with entities public or private foreign companies.

This patent and irreversible movement is a logical consequence of the degree of complexity and specialization of subjects, typical of contemporary times, which raises the decision-making power of such agents and their respective institutional links, which modifies the logic of relationship structures and fields of power in international relations, with considerable limitation of the sovereignty of the National States, in view of the traditional formatting of classical international law[5].

In modeling Brazilian cooperative federalism, the intention of the constituent was to establish a cooperative federalism from which the three levels could collaborate reciprocally to guarantee the provision of quality public services and the scarcity of resources was overcome by its efficient application, allowing the realization of more with less investment.

However, this reality did not take shape in practice, as the financial and administrative capacity of the Member States is not uniform and there is a great centralization of revenues in the federal entity. For this reason, when it comes to public health policies, it is essential to have a certain centralization, which is consolidated by the Unified Health System, including the distribution of immunization agents and transfer of budget funds.

An emblematic example was the negotiation between the governor of São Paulo directly with the Chinese laboratory Sinovac, which culminated in a contract that provided for the supply of 46 million doses of CoronaVac vaccine to the São Paulo government, in addition to the technological transfer of the vaccine from Sinovac to the Butantan Institute.

Despite negotiations and final contracting by São Paulo, the National Health Surveillance Agency (Anvisa) had to approve the use of the vaccine and make it available for vaccination throughout Brazil.

[5] CASTELO BRANCO, Álvaro Chagas. *Paradiplomacia e entes não-centrais no cenário internacional.* Curitiba: Juruá, 2008. PIETRO, Noé Cornago. *O outro lado do novo regionalismo pós-soviético e da Ásia Pacífico*. In: VEGEVANI, Tullo (Org.) *A dimensão subnacional e as relações internacionais*. São Paulo: UNESP, 2004, p, 251; MAIA, José Nelson Bessa. SARAIVA, José Flávio Sombra. *A paradiplomacia financeira no Brasil da República Velha*, 1890-1930. In Revista Brasileira de Política Internacional. N. 55

According to the National Immunization Program of the Unified Health System, despite the individual actions of Member States, the distribution of immunizing agents does not fail to indicate the centralization of activities in agreements at the federal level.

Along with paradiplomacy, it should be noted that Brazil adhered to some instruments, especially the COVAX facility consortium through Provisional Measure nº 1003 of 2020, later converted into Law nº 14,121, of March 1, 2021. Provisional Measure No. 1026 was edited, which provided for exceptional measures related to the acquisition of vaccines, converted into Law 14,124, of March 10, 2021. The then Minister of Health consulted the TCU on the exegesis of some of the articles in these regulations. The analysis of the Provisional Measures and the resulting Laws are necessary to understand the instrument and the contracts signed through them.

COVAX Facility's financing mechanism is the International Finance Facility for Immunization (IFFIm) and is built on the partnership between donor countries, private investors, the World Bank and the Gavi Alliance. Donor countries contribute long-term, legally binding pledges from donor countries, and the World Bank turns them into vaccine bonds, which promote immediate financing for the Gavi Alliance's immunization programs.

The administrator of this fund is the World Bank and with the pledges of donation from the countries, it managed to raise approximately 6.9 billion dollars from 2006 to 2020. Brazil has become one of the countries that contribute to the Gavi Alliance, linking to a donation from US$ 20,000,000.00 (twenty million US dollars) in equal and subsequent installments over 20 years, being an example of a pledge of contribution that will be converted into vaccine titles, even before the IFFIm actually receives these features.

The pace of public contracts for the acquisition of vaccines was not the same for all Member States and even centralized purchases by the National State were not sufficient. After long political differences, a Parliamentary Inquiry Commission indicted national authorities in 80 crimes, the long and apprehensive year of 2021 seems to be heading to an end. Number of admissions and deaths dropped with most

of the adult population vaccinated and some member states are already planning to stop forcing people to wear masks in open spaces.

In September, during a meeting with the ministers of health of the countries that make up the G20, in Rome, Italy, the director general of the World Health Organization (WHO), and the country will begin to appear as an exporter of vaccines.

4 CONCLUSION

Brazilian federalism is established on the premise of 03 levels of decision-making spheres both at the legislative and administrative: a central entity, which is not only responsible for taking its own administrative decisions with national coverage (especially when public policy needs to be uniform in all of country) or when even with regional differences in administrative and legislative treatment, some minimum guidance is essential as to the premises to be adopted by other national entities.

Unlike other federative systems, which generally have 02 levels, the Brazilian system adds the municipality and also an entity such as the Federal District, which brings together powers of the States and Municipalities.With regard to public health policies, cooperative and coordinated action is very relevant for the effectiveness of constitutional instruments and the existing model.

The COVID-19 crisis added some complexities to this scenario, in addition to the urgency of action. In this sense, given the population and financial inequality and organizational and administrative capacity of federative entities, the contribution of the sovereign central entity is essential. Contrary to what was expected from the normative model, what was observed was that the Member States played a leading role in the negotiation, purchase and application of immunizing agents (vaccines).

When observing that Member States took the lead in the implementation of health policies, it was noticed a densification of the phenomenon of paradiplomacy, which is not new in the Brazilian scenario, but which was widely used as a political instrument in the COVID-19 crisis.

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