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At the eye of the pandemic hurricane: What have we learned about the control of the public administration in Brazil?

No turbilhão da pandemia: O que qprendemos sobre controle da administração no Brasil?

En el ojo del huracán pandémico: ¿Qué hemos aprendido sobre el control de la administración pública en Brasil?

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ABSTRACT: the scope of this essay is to analyze some decisions of the Brazilian federal administration concerning actions to minimize the current pandemic of COVID-19 to understand to which extent such discretionary decisions could be subject to a judicial review.

KEYWORDS: public administration, law, legal rule, judicial review of the administration, administrative court.

RESUMO: o objeto deste estudo é analisar algumas ações empreendidas pelo Estado brasileiro como resposta à atual pandemia de COVID-19 e verificar se haveria ou não para a atuação dos órgãos de controle sobre as escolhas discricionárias realizadas.

PALAVRAS-CHAVE: administração pública, direito, norma legal, revisão judicial da administração, tribunal administrativo.

RESUMEN: el alcance de este ensayo es analizar algunas decisiones de la administración federal brasileña sobre acciones para minimizar la actual pandemia de COVID-19 para comprender en qué medida tales decisiones discrecionales podrían estar sujetas a revisión judicial.

PALABRAS CLAVE: administración pública, ley, norma jurídica, control judicial de la administración, tribunal administrativo.

INTRODUCTION

The current situation of the pandemic of the new coronavirus is modifying innumerable paradigms of contemporary society is a complete cliché. At the level of integration that we have today in the world and with the dimensions that social relations have acquired (many of which even have a global reach), a period with so many restrictions on circulation and assembly was almost unimaginable. The consequences are not yet fully known and will, to a large extent, be quite profound.

In this research article, we do not intend to present great sociological reflections on the current moment - we are not even qualified to do so. However, a precise cutout seems to be very relevant to be made and analyzed: how to delineate the control of the Public Administration in discretionary acts that institute programs and public policies.

As it is a commonplace in several works on public law that have come to light in recent decades, the relationship of the legality of the Public Administration has changed. From a mechanism to protect the individual, intended to offer predictability from the authoritarian interventions of the State, legality started to embrace a more open vision of compatibility between a competence rule provided by law and the act produced by the Public Administration. The polysemy of the

term legality became even more flagrant than it was in its origin, as Charles Eisenmann (1982) states.

What is more: the constitutionalization of the legal system [1], resulting from specific changes in the content and purposes of contemporary constitutional texts, has also brought about a new challenge: the demarcation of the spaces of control of constitutionality and control of legality, insofar as the former control is no longer exclusively applicable to the verification of the compatibility of the content of an abstract legal rule (notably parliamentary law) with the Constitutional Text, and has *also* become the mark of direct control of the constitutionality of acts of the Public Administration. [2]

In other words, the classic structure of control of the Public Administration, created in the 19th century to test the adherence of an administrative act to the content previously determined by law, is today complemented by a series of means of control. In other words, in theory, it is no longer only the compatibility of the act with its legislative framework that is controlled, but also the compatibility of the act with the competencies of the public agent and with the contours given by the Constitutional text to certain rights of citizens concerning the State.

Furthermore, this expansion of the Public Administration scope is mainly due to the spectrum of administrative discretion. If, in the XIX Century, the law could

1 Here, the idea of constitutionalization of law is used to designate the fact that the root of the legal treatment of countless themes becomes constitutional instead of legal. Constitution starts to contemplate the fundamental precepts of almost every legal matrix of society, restricting the freedom of the infra-constitutional legislator and creating state bases that cannot be easily changed (Silva, 2008, p. 46-49).

2 A clear example here is the constitutional claims (Verfassungsbeschwerde) of German law, which consist of legal actions brought directly before the Constitutional Court to challenge a state act (including administrative acts) in the face of subjective public rights arising from fundamental rights (Pieroth y Schlink, 2009, p. 316).

foresee all the competencies of the Public Administration (or, at least, most of them), clearly delimiting its purposes and limits, the State of the XX Century became too complex to allow such a broad scope of the law, considering that other competencies for the Public Administration appeared, such as those concerning the fulfilment of social rights and the direct intervention in the economic domain. Thus, today, the legal system (not only parliamentary law, therefore) often endows public agents with powers, with the imposition of specific purposes, ensuring them a considerable margin of discretion.

This happens especially in the case of non-authoritarian actions of the Public Administration, such as, among others, those related to the fulfilment of social rights. In these cases, the legal system (usually preamble by the Constitution itself) creates rights for citizens without a precise circumscription of which public actions should be undertaken to ensure the effectiveness of the right constituted. There is an enormous amount of discretionary space to be filled.

Moreover, this is precisely the point of this very brief essay. As expressly stated in Articles 6 and 196 et seq. of the Federal Constitution of 1988, health is a right guaranteed to all citizens and an obligation of the State. There is a definition of the contours of the right to health, but without determining all the actions to be undertaken by the Government to guarantee it. Hence the question arises of what can be demanded and what can be controlled concerning discretionary powers by public officials.

The issue in Brazil is not new, nor did it arise with the pandemic of the new coronavirus. Since the promulgation of the Federal Constitution of 1988, there is constant litigation

about the guarantee of the right to health. However, this litigation focuses on the demand for personal benefits against the State, such as cases that refer to the right to receive a specific medicine or treatment not immediately available in the public health system.

There is constant litigation about the individual contours of the right to health. However, there is no record of a relevant case in which a *public policy* in the field of the right to health has been questioned, instituted by the Public Power within the margin of the discretion conferred upon it, that is, a state decision that gives concretion to a programmatic norm of the legal system. [3]

Nevertheless, the extreme situation currently experienced due to the pandemic of the new coronavirus has brought about some fascinating discussions, notably on the extent of discretionary power of public agents in the field of health and on the possibility of controlling allegedly erroneous state actions or omissions in the making of decisions that could put at risk the right to health of Brazilian citizens.

This is because the Brazilian Federal Government adopted - or failed to adopt - specific measures related to the fight against the pandemic, which leads to the discussion of how much interference of control is possible, given that, based on evident technical criteria, the right to health may not be realized. In other words, once again comes questioning the possibility of incidence and the eventual extension of the control of public actions based on programmatic norms and, therefore, with broad discretionary powers.

3 Here, public policy revolves around the notion of finalistic obligations created by the legal system from programmatic norms, which impose a particular purpose to be achieved, without a precise degree of binding as to the administrative decision to be taken in its fulfilment. It is a cutout of a much broader concept, but it seems to suffice for this paper.

In this context, to accomplish the proposed mission, we will follow the following path: (i) firstly, I will expose, with the maximum possible synthetic capacity, the contours of the right to health in Brazil; (ii) secondly, I will analyze three measures undertaken by the Federal Government as public policies to verify whether or not there are elements for their control; and (iii) thirdly, I will propose solutions that, in the light of the Federal Constitution of 1988, can be ventured for the case under analysis.

However, the issues addressed here are of enormous complexity, such that they would justify the existence of autonomous theses and dissertations. However, given the merely propositional nature of this article, we will not go into the details and underlying discussions that could make it impossible to conclude this article.

Finally, it is essential to emphasize that the measures chosen for exposition in this brief essay were based on the most significant possibility of discussion in the light of legal and technical criteria, disregarding discussions that might be based on personal disagreements with positions adopted by the Federal Government. [4]

1. THE RIGHT TO HEALTH

The right to health is one of the leading social rights emerging from the second half of the 20th century. In Alessandra Pioggia (2017) detailed lesson, the right to health is originally constituted from the binomial disease-health. Subsequently, the right to health comes to comprise a state of

4 Here, the Brazilian scenario of confrontation with the pandemic of COVID-19 is very complex. Due to certain decisions of the Federal Government, several more effective measures to combat the disease were taken at the level of local governments, which makes the analysis very complex and diffuse, mainly because it would also be necessary to analyze the federative conflicts brought before the Federal Supreme Court on the subject.

physical, psychological and social well-being, according to the act of Constitution of the World Health Organization (WHO), maintaining an evolutionary trajectory that takes the notion of the right to health from the exclusively individual sphere (i.e., the individual's state of health) to a collective sphere.[5]

In the case of Brazilian law, the right to health emerges as a universal social right with the advent of the Federal Constitution of 1988. In the first place, it is foreseen in the *heading of* article 6 as one of the fundamental social rights[6]Moreover, it is detailed in its universal content in the *heading of* article 196, also of the Federal Constitution. [7]

From the literalness of the provisions of Article 6, it is possible to identify the right to health in its most individual aspect, since there is the qualification of this right as a *fundamental right of positive status*, i.e., the one that generates in the citizen a *subjective public right*. On the other hand, in Article 196, the right to health acquires a collective tone, to the extent that there is mention of public policies that mitigate the risk of disease and ensure the promotion, protection, and recovery of health.

The central point of the right to health in Brazilian law rests on the provisions of Article 198, which provides for the creation of a *Unified Health System (SUS),* under which the

5 With particular emphasis, the following idea of the author should be highlighted: "the health of the person acquired a legal prominence only in the context of the protection of the health of the population and this translated into the subordination of the health of the individual to that of the collectivity and the possible sacrifice of the first in the name of a good considered as superior, as a community" (Pioggia, 2017, p. 19).

6 Article 6 of the Federal Constitution (1988) states: "Education, health, food, work, housing, transport, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, in the form of this Constitution".

7 Article 196 of the Federal Constitution (1988) states: "Health is a right and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other problems and the universal and equal access to actions and services for its promotion, protection and recovery".

State must perform, in a coordinated and centralized manner, at all federative levels (i.e., Union, States, Federal District and Municipalities) the necessary actions for the promotion of the right to health.

The SUS was regulated by Federal Law No. 080 of September 19, 1990 (known as the Organic Law of the SUS), according to which activities inherent to promoting the right to health are the responsibility of all federative entities different types of action. The municipalities are responsible for the most direct actions related to health care for the population, especially concerning primary care. The states are responsible for regional coordination, assistance to municipalities, and provision of health services, especially in greater complexity, in a regionalized manner. Furthermore, the Union has managerial competence, formulating public policies and coordinating action plans, to be carried out in a decentralized manner.

Notwithstanding the richness and depth of the legislative treatment of the right to health and the SUS, the applicable legal provisions have a clear *framework law.*[8] Nature, since they foresee actions to be taken and purposes to be achieved, with the delegation to the different decision-making levels of the Public Administration of the competence to establish concrete measures to guarantee the right to health.

In light of this article, it is crucial to verify whether specific actions of the Federal Government in the establishment of public policies and guidelines to fight the pandemic can be configured as acceptable discretionary choices and taken within

8 According to the doctrine of Alexandre Santos de Aragão (2013): "Most of the current laws of Administrative Law are what the doctrine calls 'framework laws' or 'frame laws', i.e., they incorporate mentions of principles, purposes and values, without exhausting, by themselves, the detailing of the subject they address. (...) The law often only indicates the public interest purpose to be achieved; the means for doing so (including the necessary rules)" (p. 32-33).

a licit sphere of decision, or whether, on the contrary, they can be considered unlawful and, therefore, controlled.

2. SOME CASES OF PUBLIC POLICIES TO ADDRESS THE COVID-19 PANDEMIC

The current Federal Public Administration is marked by an always extremist discourse, polarizing, aggressive and challenging the canons of common sense. It is a political strategy headed by the President of the Republic to stay in power, as constantly noted by political analysts. In the specific case of confronting the pandemic, it was not (and has not been) different. Since the beginning, the rhetoric of the Head of the Executive Power and several actors of the first echelon of the Federal Public Administration has been in the sense of minimizing the pandemic and the number of fatal victims through numerous manifestations aimed at a specific political militancy.

However, as is evident, political rhetoric does not have critical legal effects for Administrative Law (although it may have them for Criminal Law). Therefore, we will not deal with deliberately negationist speeches or actions by the first level of the Public Administration. We will focus on acts of a legal nature that may be questioned through the lens of Administrative Law.

Furthermore, it seems relevant that three legal acts were issued in the specific field of administrative discretion regarding the right to health to verify if there would be means of control and their respective basis. They are the following: (i) the choice of the current minister of health; (ii) the inclusion in the SUS drug list of drugs that have no proven efficacy in the treatment against COVID-19; and (iii) the national strategies in the establishment of a national immunization policy against COVID-19.

2.1 The appointment of the Minister of Health

The formation of the cabinet of ministers is one of the most classic discretionary decisions of the Chief Executive. Persons trusted by the Chief Executive to implement his public policies are appointed as ministers of State. [9]In Brazil, it is no different: the appointment and dismissal of ministers of State is the exclusive competence of the President of the Republic (Article 84, item I of the Federal Constitution), based on discretionary criteria.

The National Congress determines the list of State Ministries through an ordinary law on the organization of the Public Administration, which is the exclusive responsibility of the President of the Republic. Once the law mentioned above of organization has been approved, the President has exclusive authority to appoint and dismiss the Ministers of State.

In the case at hand, however, the existence of the Ministry of Health is determined not only by the general law on the organization of the Public Administration but, primarily, by the Organic Law of SUS itself. Besides the standard function of all State Ministers to assist the President of the Republic at the top of the public administration, as provided in Article 1 of Decree-Law No. 200, of February 25, 1967, the Minister of Health exercises the function of commanding the SUS, and, therefore, the leadership of the entire public system to guarantee the right to health.

In this context, the question that arises is how much absolute discretion exists in the appointment of the Minister of State of Health, especially in a health emergency, as currently experienced. The central point of the discussion consists in the

9 As Aldo Sandulli (2005) rightly points out, it is inherent to the democratic system that the elected Government has the necessary instruments to put into practice the results of the electoral process. For this reason, there is a certain discretion, based on trust, for the Head of the Executive Power to appoint his ministers and direct advisors (p. 96).

fact that the Minister of Health currently in office (appointed through the Decree of June 02, 2020 [10]) is a general in the army, without any training in medicine or any branch close to public health and any experience related to the complex Brazilian health system.

It is evident, without any embargoes, that it is not necessary to have a degree in medicine or any other specific science to exercise the position of Minister of Health. So much so that there are precedents in which the occupant of the portfolio, an engineer, had his work expressly recognized by the WHO. However, there were clear justifications for the choice.

However, in a health emergency, would it be acceptable that the head of SUS and directly responsible for the formulation of public policies for confronting it could be a general who has never experienced the sector? Can the President of the Republic, under the pretext of managing a discretionary power, nominate a person without any knowledge of such a complex issue to lead the national efforts to face the current health crisis? Are there limits to this discretionary power?

Drugs included in the SUS list of medicaments.

Under the terms of item VI of Article 6 of the SUS Organic Law, it is within the scope of attributions and actions of the SUS to formulate a drug policy, whose dispensation will be free of charge, according to applicable medical protocols or under SUS therapeutic guidelines. The formulation of this list is discretionary, considering the public health conditions and the available budgets in light of the principles of proportionality and reasonableness.

10 As per press records, on June 02, 2020, Brazil recorded 31,309 deaths from COVID-19 and 558,237 confirmed cases of the disease. Precisely on this day, Brazil registered 1,262 deaths from COVID-19.

This is a clear case of[11]Since the formulation of the SUS drug list depends on complex medical, epidemiological and public health studies, technical discretion. According to studies that indicate the main demands and budgetary compatibility, medications are not included or excluded from this list on a whim or at will.

It happens that, throughout the pandemic, there was an intense movement by the Federal Public Administration to include two drugs on the SUS list as a therapeutic guideline for the treatment of COVID-19: hydroxychloroquine and ivermectin. [12]These are drugs that were speculated for the treatment of the new disease but were quickly discarded for not having had scientific proof of their efficacy in the treatment of COVID-19.

In the use of discretionary power (in the thesis), the Federal Public Administration modified the list of medicines dispensed by SUS, adding to the therapeutic guidelines approved by the Ministry of Health to use drugs without any scientific evidence of effectiveness. Moreover, such providence was taken to transmit a sense of security to the population, as if it were a cure against COVID-19, with flagrantly political-ideological bias. [13]

11 According to Sabino Cassese (2005), technical discretion is distinct from other discretion cases because the decision to be taken depends on applying specialized technical knowledge of other sciences. The assessment to be made by the administration rests on technical criteria of sciences other than law (such as chemistry, medicine, engineering, and others.) (p. 213).

12 The first official act of this inclusion is Informative Note nº 9/2020-SE/GAB/SE/MS, of May 20, 2020, and the most recent, still in the same sense, is Informative Note nº 17/2020-SE/GAB/SE/MS, of July 30, 2020.

13 Here the public policy adopted oversteps any limit of reasonableness. Although it is not a binding legal act, the Ministry of Health went so far as to organize publicity campaigns and even created a mobile phone application indicating the "early treatment" of COVID-19, based on the use of the mentioned drugs. In these media, there was an indication that patients should request the use of the drugs and, if there was a refusal on the part of the doctor in charge, they should request the substitution of the professional until they found one who was willing to guarantee such "early treatment".

In this context, one must ask whether the discretion of the Minister of Health in the composition of the list of drugs to be dispensed to the population through the SUS network can be used to include drugs without any scientific evidence, as a pretext for transmitting a false idea of tranquility to citizens.

2.2. The national immunization plan for the population

The last point that deserves attention is the set of actions and omissions of the Ministry of Health regarding establishing a national plan of immunization of the population against COVID-19. Again, we will not consider public manifestations of the President of the Republic against vaccination and that have put in doubt the efficacy and safety of vaccines. The focus will be formed by a set of government actions to verify whether or not there is a possibility of control.

As is notable, from the beginning of the second half of 2020, the world began to see considerable advances in the development of vaccines against COVID-19. At that time, most countries, directly or through the WHO, began to make agreements with pharmaceutical industry players to ensure the acquisition of vaccines in the shortest possible time. Furthermore, since it was still uncertain which vaccines would be effective and safe, it was common for most countries to reach agreements with a plurality of laboratories to ensure more than one possibility.

In a country with 210 million inhabitants, like Brazil, the theme becomes especially relevant since a vaccination plan should contemplate the acquisition of at least 450 million doses for immunization of the population. This is not speculation, but simple arithmetic, based on the need to control the spread of the coronavirus.

However, what happened in Brazil was completely

different. The Ministry of Health entered into a purchase agreement with only one laboratory, among several developed vaccines. Furthermore, the agreement did not contemplate a minimum number of doses to be supplied to Brazil, but only a commitment to transfer technology to the Oswaldo Cruz Foundation (a public laboratory owned by the Federal Government and very traditional) of vaccines in Brazil) for local production.

Moreover, by an unsubstantiated decision, it was determined the prohibition of the purchase, by SUS, of a vaccine developed by the Butantan Institute in conjunction with a Chinese pharmaceutical company. This institute is a public laboratory linked to the Government of the State of São Paulo, governed by a political rival of the President of the Republic.

In this scenario, what was expected occurred: several countries that entered into multiple purchase agreements were able to start their immunization plans much earlier than Brazil. When several countries already had immunization plans in course, Brazil did not even have plans to start its own, so that currently, there is an immunization plan in course, but at a too slow pace and without any prospect of being accelerated by the lack of vaccines in the international market.

It happens, however, that the issue of vaccination and immunization of the population is not foreign to the attributions of the Ministry of Health. Unlike what happens in other countries, where the immunization of the population is not a public policy, in Brazil, there is the Federal Law No. 6259 of October 30, 1975, which establishes the National Immunization Program, prepared and managed by the Ministry of Health. [14]

14 In the context of this programme, Brazil achieved very significant results over time, such as the complete control of diseases like measles, polio and tuberculosis. These results have been recognized several times by the WHO as a world example of population immunization.

Furthermore, the fact that demands some reflection is the possibility or not of controlling the omission of the Ministry of Health. In other words, could the Ministry of Health ostensibly fail to guarantee vaccine supply contracts for a population as large as Brazil's? Is this a legally relevant issue, especially in light of Federal Law 6.259/75?

3. ATTEMPTS TO ANSWER THE QUESTIONS POSED: WHAT LESSONS CAN WE LEARN?

The questions posed in the previous topic of this very brief essay discuss the control of the Public Administration in Brazil. Moreover, it is especially relevant that only the vaccination plan mentioned in sub-topic III.3 is somehow at the centre of a process of control of the Public Administration so that there was no attempt at corrective or repressive control of the actions mentioned in sub-topics III.1 and III.2.

Looking at the issue of control from a strictly theoretical point of view, it seems clear that there are two essential methods: *control of legality* and *control of legality*.

The *control of legality* is the most traditional and is even regarded by many as the origin of Administrative Law itself. In general, control of legality consists in the verification, by the competent control body, of the compatibility of an administrative act with the legal command that supports it. It departs very clearly from the idea of typicality, according to which the law determines the content of the act be produced if and when the hypothesis of incidence of the normative command occurs in the real world. This is a very objective relationship of acceptability of the administrative act: compatible or incompatible with the law, with content acceptable in light of the legal rule or incompatible.

Evidently, since the first lessons on the control of legality, which date back to the early nineteenth century, many developments have occurred in the form of its realization. However, its essence remains the same: the compatibility of the act with the parliamentary law that created the administrative power to act in the specific case.

On the other hand, the *control of legality* appears to be much more complex since it does not deal only with the collision of the administrative act with parliamentary law, but rather, the act with the legal system as a whole, initiated directly by the constitutional text. The scope of the controller's analysis is much broader and, therefore, allows for much more detailed scrutiny of the activities practiced. Furthermore, the result obtained is much more than a legal-illegal binomial. The administrative act may present different levels of compatibility with the legal system, from its simple conforming interpretation to its complete invalidity.

It is evident that the control of legality and the control of legality *coexist and are complementary*. In other words, it is not because an act is subject to legality control that it cannot also be subject to legality control: an act may be perfectly legal but unconstitutional.

In this step, adopting a term very well allocated by the young doctrinaire Marco Antônio Moraes Alberto, legality and the control of legality constitute distinct *semantics*. They are analyses of the compatibility of administrative acts, but with different methods and adopting different *systems*.

Well then. Putting Brazilian administrative actions into perspective, one sees that the control of legality is unacceptable, given that public agents practiced acts within their spheres of competence, observing an existing margin of discretion expressly granted by parliamentary law.

However, when the same acts are analyzed through the lens of *legality control*, it does seem that control is possible. Moreover, this statement stems from some considerations.

In the first place, the competence of the public agents under discussion is strictly bound by a purpose expressed in articles 6, 196 and 198 of the Federal Constitution and Article 2 of the Organic Law of SUS, even if discretionary as to the means. As much as there is freedom of content and definition of the moment to act, *the purpose of protecting the right to health must be guaranteed in all its aspects*. As a consequence, when it is possible to demonstrate that there has been a lack in the guarantee of the right to health as a direct result of conscious action or omission of the public agent, control may, of course, emerge.

In the second place, it does not seem adequate that the control of the Public Administration is performed by the same methods when analyzing cases of authoritarian intervention. It counts on stricter competence rules and a more significant typicity load, and when analyzing cases of the fulfilment of fundamental rights of *positive status,* given that the normative structure of the second case is much more finalistic and programmatic, purposely extending the discretion of the public agency to provide him with instruments better to reach the imposed purposes. *They are distinct methods, and it seems essential that legality never comes unaccompanied by legality, under penalty of having the control of the Public Administration restricted to a mere formal verification, without any actual dimension.*

In light of these placements, we would have the following view on the cases described in topic III of this article:

In the case of the appointment of the current Minister of Health, there is a vice. The discretion enjoyed by the President of the Republic is not infinite, nor is it uncontrollable.

Moreover, in the Constitutional Democratic State of Law, there is no unlimited discretion. All discretion must meet a purpose. Furthermore, in the case at hand, there is no connection whatsoever between the qualifications of the Minister of Health and the purposes imposed on the Ministry of Health. It is a capricious choice that potentially put at risk the right to health of the Brazilian people. The appointment under discussion would only be appropriate if it were possible to prove the minister's aptitude for the position, he occupies using detailed grounds for the act of appointment. However, this never occurred.

Similarly, including hydroxychloroquine and ivermectin in the list of medications dispensable by SUS in the case of COVID-19 as a therapeutic guideline is vitiated. Here, it is a case of *technical discretion in which* impositions of other sciences bind the choice of the public agent. Therefore, from the moment which medicine and other biological sciences prove the inexistence of efficacy of these drugs for the treatment of COVID-19, the presence of these drugs in the list of medications of SUS as a treatment therapy for COVID-19 is entirely unacceptable. The technical knowledge that could ground the management of discretion in the concrete case grounds a decision in diametrically the opposite direction: the impossibility of including the drugs in question on the SUS list.

Finally, the case of the national immunization plan does not reflect another reality. By not seeking to ensure the supply of vaccine doses necessary for the immunization of the population, there is a clear violation of the duties of reducing the risk of disease, protection and recovery mentioned in Article 196 of the Federal Constitution. Then, there is a clear case of *discretionary power reduced to zero* built on German Administrative Law, according to which:

> In certain concrete cases, a claim of an excellent discretionary decision may be replaced by a claim of a single specific discretionary decision, especially in the hypothesis where the conditions of the concrete case or other legally acceptable grounds for any other decision do not exist or where any other decision that would be taken would be unlawful in consideration of fundamental rights or European Union law. (Kluth, 2017, p. 359)

That is, in light of the provisions of Articles 6 and 196 of the Federal Constitution, the jurisdiction provided in Article 3 of Law 6.259/75 could not generate any other action by the Minister of Health that was not solely and exclusively the most excellent possible search for suppliers of vaccines with the potential to interrupt the contagion and spread of the new coronavirus. There is an omission that could be subject to control, through the imposition of an obligation to do so by the control organs (a mechanism that, by the way, is widely used in the sphere of control of the administration in other spheres, notably in the sphere of local Public Administrations).

Once again, of the three cases mentioned, only the third is the object of an act of control, namely ADPF. [15]No. 756-DF, currently in progress before the Supreme Court and proposed by political parties in the act of social control and not by the organs of control of the Public Administration. Analyzing the content of interlocutory decisions issued so far, it appears that the Constitutional Court limited itself to request information and request the submission of a vaccination plan, which seems very little given the factual impossibility of acquiring more doses of

15 ADPF is the Argument of Noncompliance with a Fundamental Precept, a constitutional action aimed at challenging, directly before the Supreme Court, the constitutionality of certain normative acts not subject to control by the Direct Action of Unconstitutionality or acts of the Executive Branch.

vaccine at this time. There is no imposition of any obligation to do or act of accountability of the public officials involved.

Against this backdrop, what lessons can we draw? One and simple: although much of Brazilian doctrine already accepts the control of legality as a method of control of the Public Administration, the control agencies - especially when it comes to controlling the federal public administration - are still very attached to the idea of *strict control of legality*, respecting a sphere of discretion that has very directed management in light of the Federal Constitution.

CONCLUSIONS

The strict control of legality is, once again, a valid and existing method. However, when the underlying normative framework is directive, finalistic and programmatic (framework norms), the control of legality is insufficient, opening a dangerous space for authoritarian excesses and suppressing control effectiveness.

Including, it should be mentioned that control by juridicity is already commonplace in individual conflicts that seek specific health benefits, as can be apprehended from the first instance and state court decisions. What is still missing is that this method is transplanted to the national sphere, in the analysis of broad public policies, in diffuse relations. There is still an inexplicable deference to administrative decisions in these cases, which end up not being subject to review based on the traditional idea of control of legality.

Thus, if the pandemic may have brought a lesson to Brazilian Administrative Law, it seems clear that it is a need for better tuning of methods (or semantics) between the control and the type of administrative action controlled. There are

points to be adjusted, under penalty of putting very dangerously at risk the survival of the Democratic State of Law.

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