

**VACCINATION AND SCARCITY: ETHICAL AND LEGAL CRITERIA FOR
RESOURCES ALLOCATION IN THE NEW CORONAVIRUS PANDEMIC CONTEXT**

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SUMMARY

Contextualization: Severe shortage of vaccines in Brazil in the pandemic context and critical investigation of ethical and legal parameters for the allocation of immunizers. Objective: This research seeks to investigate the ethic and the legality of the National Immunization Plan against Covid-19 (PNI) and propose criteria for obtaining justice in the vaccine distribution. **Method:** The study uses the theoretical-deductive method to conduct a qualitative research with analytical and propositional approach, through the use of indirect sources of research as scientific texts and normative frameworks. **Results:** The study concluded that the criterion of special responsibilities was partially adequate, which would imply the priority availability of immunizations to health professionals, since that they are limited to those who work in the fight against the pandemic or in actions in defense of life. It was the base for the prioritization of sanitaryly or socially vulnerable groups, which corresponds to the criterion of imminent death. It led to the perception of the validity of the protection of some professional groups, to the criticism of the lack of specification of criteria for the preference of others, and it criticized the lack of priority of some categories. Finally, it was proposed the organization of the vaccination calendar, after the immunization of the groups contemplated in the PNI, in decreasing order to the perception of income *per capita*, due to the greater risk inherent to the financially neediest classes. **Conclusions:** The PNI meets some criteria of equity in accordance with Law and the values potentially profiled by Brazilian society, but lacks improvement in the vaccine distributive process to fully achieve health justice. **Keywords:** Vaccine. Severe scarcity. Right to life. Right to health. Fairness.

1 INTRODUCTION

The criteria to be used for the distribution of vaccines against COVID-19 characterize one of the most controversial points in the current scenario³⁸ of the pandemic in Brazil, due to

³⁸ This research report was written in March 2021, at a time when the number of vaccines available to the population was not yet sufficient for immunizing priority groups (BRASIL, 2021). The discussions carried out in this paper, therefore, are extremely adherent to the present context of severe scarcity of resources essential for saving human lives.

the fact that the immunizing resources are severely scarce³⁹. By potentially implying decisions about who may live or die, referred to as tragic⁴¹, the distributive parameters invoke legal and ethical discussions⁴² which reverberate in the notion of equity of access to the necessary means for life⁴³ and health preservation, rights provided in the Constitution (BRASIL, 1988).

Considering the factors set out, this investigation will reflexively analyze criteria for vaccines distribution at the national level, having as a cut out the National Immunization Plan against COVID-19 – PNI (BRASIL, 2021), recently implemented by the Federal Government.

The investigation will adopt as a premise, from the perspective of Alexy's Theories of Legal Argumentation and Fundamental Rights (2005; 2011), the statement that, in the Democratic Rule of Law, the criteria adopted for resources allocation requires intense public debate⁴⁴, which absence requires an even greater analytical and argumentative effort from scientific community, which must be anchored in discursive rationality with the scope of building legitimate proposals for some groups prioritization.

³⁹ The scarcity consists of the lack of sufficient resources for complete satisfaction of all human needs, and it can manifest itself at different levels, according to the possibilities of suffering human interference in favor of its elimination or reduction. It is considered *almost natural* when its supply can be raised to levels capable of meeting the needs of almost all people or almost all human needs. It is considered *natural* when, although feasible, human action is not observed to reduce it, and the supply of human needs occurs in accordance with the supply of resources made by nature. When human interference is not possible and affects resources that are essential to human life, scarcity is qualified as *severe* (DUARTE, 2020).

⁴⁰ Health resources can be considered severely scarce when they are insufficient to satisfy basic health needs, defined by Duarte (2020b) as those essential for the survival of man or for human life in minimum standards of dignity. This is due to the belonging of these benefits to the content of the essential core of this right, which, according to the Theory of Fundamental Rights (ALEXY, 2011), must be fully implemented, with the cogency of the rule that conveys it being absolute due to its nature. rule of law. Thus, limits to the full effectiveness of a rule are considered to be exception clauses, which must have their normative foundation in the protection of a legal asset of the same hierarchical status as the restricted legal asset, which will require the demonstration of constitutional backing for the allocation criteria of resources. severely scarce. When, however, the health resources are unsatisfactory to satisfy health needs of second necessity, so those inherent in intermediate or soft levels of dignity and members of the legal content of a norm-principle are qualified, recognized as a commandment of optimization to be implemented in a timely manner. according to the factual or legal possibilities (DUARTE, 2020b), the scarcity will not be considered severe, but a factual limit to the effectiveness of the principle that conveys health benefits outside the essential core of the right to health.

⁴¹ According to Bobbit and Calabresi (1978), tragic choices are those that necessarily follow the perishing of high importance goods and whose preservation would be desired if there was the possibility of guaranteeing it. However, the authors state that if such choices were guided by the community's moral values, they would not be considered moral contradictions.

⁴² The ethical dimension concerns the conformation of the parameters that guided the definition of the priority order of vaccination to the values adopted by society (BITTAR, 2018); the legal dimension implies examining the conformity of these criteria to the precepts of law in force and existing in the dynamic context in which the discussion takes place (BITTAR, 2018). The discussion about the shortage of vaccines implies ethical discussions because it challenges relevant social values, such as life and health, which must be guaranteed, in accordance with the Constitution (BRAZIL, 1988), in an isonomic way. The demand for equal access to the protection of these values, therefore, triggers the legal analysis, especially considering that, since universal preservation is not possible, the criteria for priority allocation of necessary inputs for this must be defined discursively, in order to if to try to achieve an ideal sanitary democracy.

⁴³ The PNI (BRASIL, 2021) confirms the understanding that vaccines against Covid-19 would need, to eliminate the disease, to be applied to approximately 70% of the population, and that, as there is not, at the moment, sufficient quantity of resources to do so, reducing mortality becomes the goal of immunization, as well preserving health system functioning. See: "Considering the transmissibility of COVID-19 (R0 between 2.5 and 3), about 60 to 70% of population would need to be immune (assuming a population with homogeneous interaction 25) to interrupt virus circulation. Thus, it would be necessary to vaccinate 70% or more of population to eliminate the disease, depending on the effectiveness of the vaccine in preventing transmission. Therefore, in an initial moment, when vaccines are not widely available on the world market, the main objective of vaccination is to focus on reducing the morbidity and mortality caused by COVID-19, as well as protecting the workforce to maintain functioning health services and essential services" (BRAZIL, 2021, p. 24-25).

⁴⁴ According to Aith (2015) and in accordance with the precepts of the Constitution (BRAZIL, 1988) on popular participation in SUS, allocative decisions in matters of public health must be integrated with health democracy.

The article will use the deductive investigation method to carry out a qualitative research of the analytical-propositive type, based on the use of indirect sources. This is a theoretical-critical investigation, which, in addition to being based on bibliographic sources, also explores documental analysis of national legal norms, as well as empirical data related to the evolution of the pandemic and the amount of immunizing resources available in Brazil, focusing on achieving equity and promoting vaccine distributive justice. Based on in these action strategies, the INP (BRASIL, 2021) will be analyzed, in a way that will confirm the plausibility of some elected parameters, refuted that of others and also criticized the absence of other criteria, through the elaboration of the proposal to be included and, thus, greater respect to the health foundations of a Democratic State of Law.

2 CONSIDERATIONS ABOUT THE CONSTITUTIONAL COMMITMENT TO HEALTH PROTECTION AND THE PERFORMANCE OF THE BRAZILIAN PUBLIC HEALTH NETWORK

Health is defined in the Constitution of the World Health Organization as "the state of complete physical, mental and social well-being and not only the absence of disease" (WHO, 1946), and the services that implement it, according to Bodra and Dallari (2020, p. 255), should be based on the cooperation and efforts of institutions and civil society in favor of optimizing the conditions of human well-being⁴⁵⁴⁶. These precepts guided the incorporation into Brazilian Universal Healthcare Program (SUS) of two principles relevant to this discussion, namely, universality and integrality, provided in Article 196 of the Constitution (BRAZIL, 1988).

Although the exercise of the right to health through services and private goods is admitted, the SUS integrates a model that reflects "a conception of nation to be built" (BODRA; DALLARI, 2020, p. 249), based on the conceptions of equity and solidarity, so that any action that distances itself from the ideal of equality must pass constitutional muster (DUARTE; MAGALHÃES, 2018).

Having as scope the rationalization of legal discourse, it is stated the rule inherent in Alexy's Theory of Legal Argumentation (2005, p. 197), which is based on the sense that "whoever intends to treat a person A differently from a person B is obliged to found it". Rawls'

⁴⁵ It is, as Dallari (2009) points out, the recognition that "Health depends, then, at the same time, on individual, physical and psychological characteristics, but also on social and economic environment, as much that individual, as the one which conditions the life of States". As a consensus of this statement, there is the fact that "Nobody can, therefore, be individually responsible for their health" (DALLARI, 2009, p. 12).

⁴⁶ The supra-individual and equitable aspects inherent to the right to health are reinforced by the International Covenant on Economic, Social and Cultural Rights (1966). In Article 12, in addition to emphasizing, in a manner compatible with the ideas of the Constitution of the World Health Organization (UN, 1946), that state actions must be aimed at optimizing the physical and mental well-being of all human beings, the Covenant presents goals to be achieved by signatory countries that clearly manifest the collective nature of right to health. Among these goals, the following stand out: development of activities of a prophylactic nature, improvement in terms of hygiene conditions at work, environment protection and reduction of infant mortality (WHO, 1946).



Theory of Justice (2008) is centered on similar arguments, arguing that unequal treatment is only admitted when seeking to benefit those who are in less favored conditions in society. These theories refer to this research, and will guide the results arising from the analysis of the INP (BRAZIL, 2021) to which it will proceed.

According to Article 196 of the Constitution (BRASIL, 1988), it is the role of the State, through the development of public policies, the "reduction of the risk of disease and other injuries". This constitutional statute is complemented by article 198 item II, which, when dealing with the principle of integrality, states the "priority for preventive activities" (BRAZIL, 1988). Through specific provisions, items I and II of Article 200 of the Constitution (BRAZIL, 1988) still have other attributions of the public health system regarding the role of state coordination in relation to preventive activities. According to the first item, it is up to the SUS to control and supervise procedures, products and substances of high importance for health, such as vaccines.

In this context, the INP (BRAZIL, 2021) is inserted, consistent in public policy implemented by the Federal Government in the 1970s, that is, even before the advent of the SUS⁴⁷. In view of the directive for supply to all citizens of vaccines⁴⁸ of a mandatory nature in line with guidelines of the World Health Organization (MELLO, 2020), the aforementioned epidemiological system was approved by the constitutional order after 1988, its norms are based on the general competence of the Union, through Health Ministry, for control and execution of activities of interest to public health, according to item II of Article 23 (BRAZIL, 1988), and on cooperation with States and Municipalities, as defined in the single paragraphs of Articles 1 and 3 of Law No. 6,259 (BRAZIL, 1975).

3 ANALYSIS OF ETHICAL AND LEGAL CRITERIA FOR VACCINES ALLOCATION AGAINST COVID-19 USED IN NATIONAL IMMUNIZATION PLAN (BRASIL, 2021)

The need for vaccines rational allocation against COVID-19 will be achieved by prioritizing groups more exposed to contamination and lethality, in order to contain virus spread and

⁴⁷ It should be noted, according to Mello (2020), that Immunization Program, although prior to the formation of SUS, is included in this regime, as defined by Subitem b, Item I, Article 6, of Law no. 8.080 (BRAZIL, 1990).

⁴⁸ However, it should be noted that, as recognized by the Federal Supreme Court in an injunction issued in Direct Action for the Declaration of Unconstitutionality No. 6.586 of the Federal District proposed by Democratic Labor Party and which had the report of Supreme-Court Justice Ricardo Lewandowski, vaccination is a right and not a duty, being compulsoriness forbidden, due to the inviolability of human body and the principle of autonomy derived from dignity. At that time, it was considered that such principles would override the right to life and health of community because it would still lack security and proof of vaccine efficacy against COVID-19. This understanding is based on the principle of adequacy inherent to proportionality (ALEXY, 2011), which requires proof that a means that restricts a fundamental right is, in fact, able to promote another one so that the limitation is assessed as legally viable.

preserve, as much as possible, the rights to life and health⁴⁹ threatened by it. In view of these premises, INP examination is departed (BRAZIL, 2021)⁵⁰, taking into account the latest version published when this analysis was elaborated⁵².

⁴⁹ These objectives can be extracted from the PNI text (BRAZIL, 2021): “Considering what was exposed in the analysis of risk groups (item 1 of this document) and in view of the main objective of vaccination against covid-19, it was defined as a priority preserving the functioning of health services; the protection of individuals most at risk of developing severe forms of the disease; the protection of other individuals vulnerable to the greatest impacts of the pandemic; followed by the preservation of the functioning of essential services.

⁵⁰ The criteria analyzed through the present investigation were those present in the PNI (BRAZIL, 2021, p.26) in force at the time of the preparation of this research report, although it was highlighted in its text the possibility of changing the parameters for the definition of preferential groups for receiving immunizers due to changes in the epidemiological scenario, in the evidence of Covid-19 disease and in the information regarding the respective vaccines.

⁵¹ Recently, came into force Law No. 14.125 (BRAZIL, 2021), which has the possibility of the private sector acquiring immunizations for free distribution after the immunization of all priority groups defined in the PNI (BRAZIL, 2021) and provided that half of the doses acquired are directed to the SUS. At first, it is envisaged, in view of the impossibility of commercialization, that the acquisition of immunizations by the private sector by subsequent donation, in whole or in part, to the public sector, would be a humanistic and collaborative action, since the doses acquired should be distributed free of charge and, after, forwarded to the SUS, in order to increase public vaccination coverage. Nevertheless, the measure presents itself as a major gap to the escape from the necessary equitable system to allocate severely scarce resources, since individuals may acquire vaccines because of their financial capacity to do so, and to detain them according to the criteria they elect, in the absence of the legality and ethic required by the State for such action. Thus, it would be taken a decision on the life or the death of people according to economic reasons, and this criterion is alluded to in the bioethics and legal literature as "the ability to pay" (KILNER, 1990; DUARTE, 2020). Ultimately, this results in the denial of the right to life to those dependent on the public health sector. The ability to pay argument is even more fragile in a country where 71% of the population has the only means of accessing health services to those offered by the public health system (BRAZIL, 2015). Certainly, the legal determination contained in art. 2 of Law nº 14.125 (BRAZIL, 2021) that the acquisition of such inputs by legal entities of private law for compulsory destination to SUS until the priority groups defined in the PNI (BRAZIL, 2021) are fully vaccinated, as well as the requirement of that, after the satisfaction of these groups, given the destination of at least half of the immunizations they acquired for SUS, partially mitigate these violations. However, in the case of allocative decisions that imply the life or death of human beings, any ethical and legal distortions are intolerable. Although insufficient to prevent the use of the criterion of the ability to pay in the allocation of vaccines against Covid-19 considered scarce, the donation to SUS of an equal amount to that acquired for application to beneficiaries elected by a private law legal entity required by Law No. 14.125 (BRAZIL, 2021) was judged unconstitutional by a federal judge, who considered the requirement to discourage private collaboration to immunize and usurp private property (JUIZ ..., 2021). However, this understanding cannot subsist to the arguments presented in this research report, which demonstrate the absence of constitutionality, for violation of the principle of isonomy, in the definition of the life or death of a human being based on his financial capacity to acquire certain input. The possibility of private action in the health sector provided for in the Constitution (BRAZIL, 1988) is not recognized in face of severely scarce health resources. The principle of human dignity, the ethical and legal foundation of the requirement for equal treatment in matters related to survival and health, prevails as an axiological grounding for all Law. Consider, for example, the attempt to purchase vaccines by companies for the immunization, even if free of charge, for their employees. First, it will be possible to observe the possibility of adopting this initiative by companies with greater availability to make investments, to the detriment, therefore, of smaller companies. Such a measure, however, may make it possible to resume the operation of some face-to-face and profitable activities that would be suspended or reduced due to the need for social isolation required to contain contagion by the new coronavirus. Smaller companies, however, will continue to need to maintain the contingency of such activities, to the detriment of the resumption of their activities, which may lead to the retraction of their presence in the market as opposed to the feasibility of resuming operations of those that were able to invest in immunizing their employees, who will thus have the opportunity to expand their presence in their segment. Furthermore, even if the distinction between the capacity of such investments due to the different economic size of the companies is not considered, it will be seen that the fact that they have access to severely scarce vaccines and target them to their workers, by itself, already represents the allocation of such resources to economically active individuals, to the detriment of others not included in that category for reasons beyond their control, such as insufficient age for work or old age, which implies retirement, lack of qualification

3.1 The criterion of special responsibilities and the group of health professionals

INP (BRASIL, 2021) contemplates, as one of the groups of preference for receiving the vaccine against COVID-19, that of health professionals, a category that includes professionals who work as much in promoting first health care needs as those linked to health needs of second necessity⁵³. The plan did not make the necessary distinction between the two groups, having limited itself to registering, as a recommendation, that priority should be given to those workers involved in fighting against pandemic. These, in fact, should have preference due to the greater exposure to risk of contagion, which may require, due to the worsening of their health conditions, the absence from work or lead them to death and, thus, imply the retraction of the quantity of professionals able to work to contain the disease. This priority is based on the criterion of special responsibilities⁵⁴, to be applied in exceptional situations in which "some people have special responsibilities to others or to society in general, and the lives of many may even depend on theirs" (DUARTE, 2020, p. 232)⁵⁵. In order to the criterion is

for the job. performance of labor activities etc. In this way, tragic decisions will be taken in accordance with the utilitarian criterion of productive capacity or with the criterion of social value.

⁵² It should be clarified that, in view of the discussions related to the absence of precise criteria regarding the definition of priority groups, as well as the order established between them, the first plan, published on December 16, 2020, went through changes, and a second one was published (version on January 25, 2020). Other versions of the program were published later, the fourth version being the most recent available. Despite the reformulation, the insufficiency of objective guidelines has been the subject of discussions, as reported in Noncompliance with Fundamental Precept Action n° 754 (BRASIL, 2021), which is being processed at the Supreme Federal Court.

⁵³ Based on the distinction between rules and principles developed especially by Alexy (2015), the rules that define fundamental rights are subject to different treatments. In this sense, it fits the fundamental right to health, which is sometimes cast by a rule in the field of rules, which constitutes its essential core, sometimes by principles, being subject to consideration, in the latter case. Doctrinally, the assumptions under examination reflect the health needs of the first and the second needs. According to Duarte and Castro (2020), the first consist of health benefits closely related to the protection of life and also of minimum conditions of dignity, corresponding, therefore, to benefits of high essentiality. Given its indispensability and its nature as a norm in the field of rules, such benefits cannot be excluded by the public authorities, and the possibility of reserving the possible is not even applicable. In turn, the second category involves benefits that only protect dignity at medium and light levels. Given their principled conception, such benefits are subject to weighting in comparison with the other principles guaranteeing other fundamental rights, thus not integrating the essential nucleus of the right at issue (DUARTE; CASTRO, 2020).

⁵⁴ The INP text (BRASIL, 2021) denotes the adoption of the criterion of special responsibilities when communicating that the prioritization of health professionals has the scope of preserving the functioning of the health system.

⁵⁵ It is possible that some consider that the priority given to health professionals who work on the front lines of combating the pandemic represents a social retribution for the work they have done for the benefit of the community in saving the lives of many and in recognition of the nobility of this work as a result of their exposure to high contamination risks. This understanding would represent, however, the adoption of the social value criterion, through which it seeks to reward the individual who presents the greatest value to society due to the contribution offered to it (DUARTE, 2020, p. 222). However, Kilner (1990) questions the validity of this criterion, since, through it, moral values related to each individual are not considered, such as their kindness or solidarity, or the opportunities that each individual had to assume the position in the society that enables one to provide relevant services to the community, such as access to courses in the medical fields, or the autonomy to choose

accepted, only those people on whom it is possible to verify, in fact, dependence on the lives of others must be prioritized (DUARTE, 2020)⁵⁶.

The preference of health professionals is justified, as well, as a strategy to virus spread, in view of the transmission potential⁵⁷ to their patients, family members or people who have another type of contact with them. Identical reasons argue in favor of prioritizing immunization of dentists, whose work performance occurs necessarily in front of the unprotected oral cavity, implying a high exposure to contagion⁵⁸.

Also motivated by the criterion of special responsibilities, vaccination prioritization should be given to health professionals who, even if they do not work in the fight against the pandemic, act in the preservation of human life⁵⁹. INP (BRAZIL, 2021) failed to distinguish these workers, however, immediately after vaccination of those involved in the treatment and prevention of COVID-19, all health professionals were vaccinated. In both cases, reservations should be made to INP (BRASIL, 2021). First, for not recommending the preference of those

one's job. According to Kilner (1990), it is problematic, including the attempt to establish a consensus as to which people should be covered by this criterion, since this would require access to a reliable database, since the consideration of inaccurate information may imply the priority protection of lives of some to detriment of other people's lives of others, due to the lack of ethically, legally and constitutionally acceptable standards. However, the exceptional application of this criterion justifies the election for vaccination priority of some professional groups, as will be noted below.

⁵⁶ The criterion of special responsibilities receives criticism for not characterizing the allocation of severely scarce resources to the least privileged in society, as suggested by Rawls' Theory of Justice (2008), which would require the preference of immunization of the vulnerable sanitary and social people. However, this decision parameter is justified as, as the life of all individuals is of equal value, it is necessary to advocate the adoption of measures aimed at saving as many lives as possible. It appears, therefore, that, in situations of severe scarcity of health resources necessary for human survival, utilitarianism is acceptable - a philosophical conception usually rejected because it values only quantitative decision parameters and by disregarding qualitative and axiological aspects. Utilitarianism consists of a philosophical framework that adopts the precept of optimizing the happiness of a group, which is considered to be effected by the measure capable of promoting the well-being of as many people as possible (ZIPPELIUS, 2012). It is worth checking, in this regard, the fundamentals brought by Duarte and Rocha (2018): "In fact, one can observe that the criteria of social value and special responsibilities are coated with a decisive utilitarian point of view, which mostly results in the exclusion of the possibility of selecting less favored patients, that haven't yet met the prerequisites due to a determinant lack of opportunities. At this pace, the criterion stops being consistent with the theory of justice, turning to parameters opposite to those stipulated by it. Therefore, only in very special circumstances (for instance, prioritizing the treatment of medical doctors that are able to save many lives in war zones) it is possible to adopt this criterion. In these hypotheses, one should ensure that the beneficiary candidates were selected not due to subjective aspects, but due to the possibility of benefiting the largest possible number of people. If all human life has equal value of dignity, to protect in the largest possible extent will always be a legitimate choice".

⁵⁷ It becomes legitimate, being in line with Kilner's (1990) view on the criterion of special responsibilities, the PNI's complementary recommendation on the statistical survey of the number of people involved in responding to the pandemic scenario, as well as the request for proof of effective connection of the worker to the health service. The measure is in line with the guidance guide of the World Health Organization (2020), which foresees that, for countries where there remains a scenario of high proportion of contamination and low supply of inputs, priority must be given to professionals who are highly qualified. susceptible to contamination and transmission of the virus and which are essential for saving the lives of others.

⁵⁸ As many consultations are urgent or emergent due to the potential for dental injuries to evolve into infections, the work of these professionals integrates the health demand of the first need (DUARTE, 2020).

⁵⁹ According to the concepts presented, health services capable of preserving human life are among those of first healthcare needs.

who work in the field of lives of patients protection, even in circumstances beyond the prevention and treatment of COVID-19. In addition, because workers who care for second healthcare needs were given an unjustified priority, which implies the undue neglect of other risk groups (such as the elderly and those with comorbidities) and of categories involved in the promotion and defense of other services imbricated to the existential minimum⁶⁰ or the essential core of other fundamental rights of high importance⁶¹.

The inclusion of professionals working in health care at home, such as caregivers of the elderly and midwives, is also an appropriate measure, and is also associated with the criterion of special responsibilities, since their immunization aims at prevention contagion and the consequent reduction in the likelihood of disease transmission to those on whose work more vulnerable groups depend, such as the elderly and parturient women.

3.2 The social and health vulnerable and the criterion of imminent death

INP (BRASIL, 2021) also gives preference to the most vulnerable, electing, first of all, the elderly⁶², considering the decreasing order of the age groups. This priority criterion is consistent with the protection to life, dignity and well-being of elderly people⁶³ afforded by the Constitution (BRASIL, 1988), in its article 230⁶⁴, and by Law nº 10.741 (BRASIL, 2003), in its articles 3 and 9.

Considering the data referring to the incidence of higher death risks, INP (BRASIL, 2021) inserted a still preferential category in the group of elderly: individuals in a situation of

⁶⁰ According to Toledo (2017, p. 103), there is a minimum of “the set of minimum social fundamental rights to guarantee an elementary level of human dignity”. According to the author, due to the constitutional provisions, the essential core of the fundamental rights to health and education are included in it (TOLEDO, 2017).

⁶¹ In this research report, the need is pointed out that the definition of fundamental rights considered to be of high social importance is carried out through a wide public debate, the absence of which is supplied by the assumption, by the legal-scientific community, of a greater argumentative burden, in a way to give it discursive legitimacy. From the observance of the preserved labor activities, due to their indispensability, even in the opportunities of decree, by the public authorities, of restrictive measures to contain the advance of the pandemic, the rights to food, transport, health, safety, housing, education and access to information were considered relevant.

⁶² In the first version of the INP (BRASIL, 2021), the elderly occupied the second priority group. From the second version of the Program, the category, disregarding the people who are in a situation of institutionalization, occupies the fifth position.

⁶³ Although the constitutional legislator did not attribute the idea of “absolute priority” to the elderly in article 230, as he did for children and teenagers (art. 227), it cannot be denied the special constitutional treatment given to that group, which claims, from the perspective of material equality, differentiated treatment. However, it should be noted that the notion of “absolute priority”, with regard to the elderly, is provided in Article 3 of Law No. 10.741 (BRASIL, 2003).

⁶⁴ They do not deserve to be accepted, given the constitutional requirements provided for in articles 5 and 230, arguments such as the possible reduced survival time of the elderly compared to the younger ones or the low productive capacity of these people.

institutionalization, so that those living in nursing homes, in addition to enjoying priority due to their age⁶⁵, should receive preferential treatment due to the greater risks of contamination existing in environments where there is a high concentration of people. In order to effectively protect this group, it is necessary, with priority immunization, to include all workers, even if under the age of 60, who work in the referred places.

The scientific arguments are added as a basis for the priority given to the elderly, which skip the adoption of the criterion of imminent death, a specification of the criterion of medical benefit. According to Duarte and Vidal (2020), this parameter implies the definition of preference through the use of objective criteria: scarce health resources should be dispensed from patients whose life is at risk and when there are no other alternatives for saving it (DUARTE, 2020). As it was discussed, it appears that, given a greater proportion of fatalities among the elderly, allocating severely scarce resources to the healthiest groups in society, such as youth and adults, clearly violates the right to life of elderly people from the collective perspective.

Another protected category refers to disabled people. At the legal level, the special protection afforded to the group under examination is based on the International Convention on the Rights of Persons with Disabilities (2007)⁶⁶. Classified as a constitutional amendment, the Convention defines, in articles 10 and 25, equal rights and conditions with regard to the preservation of the life and the health of the disabled people, in addition to the prohibition of the promotion of discrimination due to their specific condition. In the infraconstitutional scope, their protection is reaffirmed by Law No. 13.146 (BRASIL, 2015), the Statute for Persons with Disabilities, which presents a series of provisions that support their prioritization in the adoption, by the government, of measures aimed at safeguarding life and health⁶⁷.

The prioritization of disabled people, due to their clear humanitarian character, is based on equal rights among people. The greatest difficulties of social insertion derived from the limitations endured by these people and the more intense care needed with their own health qualifies such individuals as “less socially favored”, in accordance with the concept of Rawls (2008), which justifies differentiated treatment to them. It should be emphasized, however, that the definition of the members of the group to be benefited would involve a more careful

⁶⁵ The election of age as a parameter of preference for vaccination is based, as demonstrated, on statistically proven and normative medical reasons.

⁶⁶ Incorporated into the national legal system by Decree No. 6,949 (BRASIL, 2009), under the special rite of §3 of article 5 of the Constitution (BRASIL, 1988).

⁶⁷ As for the elderly, among the group of disabled people, the INP (BRAZIL, 2021) still recognizes immunization preference for the disabled and in a situation of institutionalization, due to the greater risks derived from collective experience.

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evaluation; health problems actually imposed on each person due to the disability must be examined, which would justify the restriction of the benefit to those whose disability does, in fact, imply weakness in the conditions of reaction to COVID-19⁶⁸. Likewise, the priority of disabled people in nursing homes must be guaranteed, in view of the high potential for the spread of the disease in collective housing.

Also due to this criterion of imminent death, the greater immune system weakness bases the priority of patients with comorbidities, such as *diabetes mellitus*, arterial hypertension, respiratory diseases, heart conditions, among others listed in the INP (BRASIL, 2021).

Another group refers, respectively, to indigenous people living on Indian Reservations and traditional riverside and quilombola people, and is based on their social vulnerability, community life and, consequently, their greater exposure to contagion. Although there is no express constitutional norm regarding the specific preservation of the life and health of these people, the provisions on the protection of the means and ways of life of all these groups present in Articles 3 and 231 of the Constitution (BRAZIL, 1988)⁶⁹ convey the constitutional objectives referring to solidarity that justify their preference, as well as the scientific elements, indicated in the INP, which highlight the highest rates of contamination of these peoples and the aggravation of the disease among them (BRASIL, 2021). Social vulnerability and collective coexistence are also considered as a foundation of protection for homeless people and prisoners⁷⁰.

However, the lack of priority treatment by the INP is objectionable to another group in relation to which studies carried out in the Brazilian social context have shown greater susceptibility to COVID-19 contraction and higher levels of development of the severe or lethal

⁶⁸ One can consider, for example, the need for different treatment between people with Down syndrome and people who have other types of disabilities that do not directly affect the immune system. According to the Technical Opinion on vaccination against COVID-19 for people with Down syndrome, as people who have the referred health condition, as a rule, comorbidities such as respiratory diseases and obesity, priority treatment is justified in principle (FBASD, 2021).

⁶⁹ It should be noted that Article 231 refers only to indigenous people. Therefore, quilombola and traditional riverside people are not covered. There is no impediment, however, to restrict protection to the quilombola group, given the constitutional objectives of eradicating social inequalities and preserving different cultures.

⁷⁰ In such cases, one might think that these individuals, due to adopting socially objectionable ways of life, should not be prioritized. This is reasoning that must be expressly rejected, given the violation of the principles of equality and dignity inherent in any human being. It should be noted that, with regard to prisoners, the Mandela Rules (BRAZIL, 2016), in their statement 24, provide access to the same health opportunities and resources that other people are entitled to. Mandela Rules correspond to the term by which the United Nations Minimum Rules for the Treatment of Prisoners are recognized, an international document signed in 1955 and updated in 2015 within the scope of the United Nations (BRAZIL, 2016). Through the prioritization of these groups, the INP (BRASIL, 2021) duly disregards the criterion of disposition, which would guide the preference of those who demonstrate it in greater intensity to adopt behaviors that better preserve their health and their life (DUARTE; VIDAL, 2020), denying those who adopt harmful conduct from the health aspect access to ways to save their lives and imposing the burden of responsibility for the consequences of their behavior.

form of the disease: that of blacks. In fact, ethnicity appears as a vulnerability factor not due to specificities inherent to race, but due to the coincidence, in large proportions, with the group of people with precarious financial conditions⁷¹.

The poorest represent another social category that would be worthy of vaccination preference. The surveys indicate, moreover, that they have greater subjection to contagion and to the aggravation of the disease, even until death. Poverty, of course, also includes some groups protected by the INP (BRAZIL, 2021), such as that of the indigenous people, of the homeless, of the quilombolas and riverside communities, such as that of the blacks, whose lack of immunization priority was criticized above. However, the precarious economic situation must give rise to the autonomy of this group, as it can be dissociated from the characteristics that specify the others. In the national reality, poverty implies the use of public transportation, demographic concentration, lack of conditions for access to remote work means, precarious health treatments, low food nutrition, less access to basic sanitation, lack of financial conditions for the cost of personal protective equipment (such as masks and lab coats) and sanitary supplies (such as soap, alcohol gel, bleach, etc.). These circumstances, themselves, would require, at least, the organization of the vaccination calendar from the perspective of income, prioritizing the most needy population⁷². To make this proposal feasible, electronic platforms already structured and managed by the State to provide other social benefits can be used.

3.3 Professional categories and the criterion of social value

The INP (BRAZIL, 2021) also contemplates a priority for the immunization of several professional sectors. Among the aforementioned categories, the plan includes public transport workers and various cargo workers, agents working in the public security and armed forces sectors, teachers from all levels of education, professionals in the industrial and construction sectors. Indeed, the special protection of certain corporate sectors is close to the aforementioned criterion of social value, which is extremely exceptional and guides the prioritization of

⁷¹ In this sense, research carried out by the Publica website, based on data provided on the Ministry of Health's DATASUS platform, points to the occurrence of a higher mortality rate for black people (BIANCA MUNIZ, 2021). In this sense: "The data also point out that mortality - that is, the number of people who die in relation to those who have the disease - was higher among blacks than among whites: 92 deaths per 100 thousand inhabitants in blacks, for 88 in whites. The report counted the deaths resulting from severe respiratory problems (SARS) caused by the coronavirus and registered by the Ministry of Health until February 22" (BIANCA MUNIZ, 2021).

⁷² Studies analyzing the reality of social segments less financially favored in other countries and in other epidemics, throughout history, confirm the most intense effects of contamination between them (COVID-19, 2020).

receiving severely scarce health resources from those who perform activities of high social value and which must be continuous⁷³ due to their high relevance. The maintenance of the services provided by these groups also results in greater exposure to the risk of contamination of these professionals, which implies the scope of greater social and life preservation in the criterion of the social value in question.

A relevant argument for the demarcation of the groups to be prioritized concerns the protection of those who develop activities related to the existential minimum, in order to justify the allocation of priority treatment to education professionals⁷⁴ and those who protect the essential core of the right to health, which they would already have had a preference supported by the special responsibilities criterion already discussed in section 3.1.

Other arguments can be presented to support the vaccination preference of other professional categories provided for INP (BRASIL, 2021). The protection of the population's subsistence conditions supports transport sector professionals priority due to the indispensable performance of the task of loading essential goods, such as foodstuffs and medicines. On the other hand, the public security agents preferential tutelage is also legitimate due to the performance of activities to combat natural disasters, such as that developed by firefighters; surveillance of the prison system carried out by prison officers; protection of national security by the armed forces and repression of violence, such as the activities of police officers.

The INP (BRAZIL, 2021) also prioritizes the productive sector; however, based on the social value criterion, protection should be restricted to the segment of the essential goods industry. The absence of this limitation, in the vaccination plan, denotes the priority of categories associated with the profitability of the owners of the means of production, and, thus, a distortion of the ethical parameters that should guide the social organization. The same occurs with the unrestricted protection of construction professionals by INP (BRASIL, 2021), whose protection should be restricted to those who work in the construction of homes, health care units

⁷³ The sanitary democracy provided in the Constitution (BRAZIL, 1988) guides the definition of those activities considered most important must be carried out through a wide public debate. Its absence requires a broad argumentative effort from the juridical-philosophical community to safeguard the discursive legitimacy of favored groups.

⁷⁴ Add to this argument the fact that the activities carried out in person tend to concentrate many people in the same room, which can configure the high exposure to the risk of contagion. In order to avoid greater damage to students, educational activities were, throughout Brazil and in the world (MATUOKA, 2020), moved to the virtual emergency, through the use of remote teaching technologies, due to the need to adopt social isolation measures to reduce contagion with the COVID-19 virus. Notwithstanding, several factors point to the greater convenience of using the face-to-face approach, such as the high rates of school dropout in distance learning modalities, the difficulty of accessing quality internet service providers, especially by the least privileged students and the lack of adequate pedagogical preparation of teachers for the ministry of their activities virtually (MATUOKA, 2020).

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and establishments for the production or trade of essential goods, while the document prioritized the sector in an unlimited way.

Argumentative rationality would also require the prioritization, by INP (BRASIL, 2021), of categories such as that of commerce workers, port workers, bank employees, funeral directors, communication professionals, social security experts and the basic sanitation system professionals. With regard to the group of traders, the preference should be recognized, but limited to those involved in the segments of essential products, whose activities remain even in the event of a lockdown. Identical fundamentals argue in favor of the port workers' priority, within the same limits suggested to traders. The activity of bank employees, especially with regard to public banks (responsible for distributing state subsidies to the poor or economically affected by restrictions resulting from the pandemic) is also essential in view of the need for access to financial resources in today's life and justifies their priority. The workers of funerary system, likewise, perform uninterrupted activities due to their high moral and sanitary essentiality, in addition to deserving protection for being exposed to high risk due to the potential contagion with contaminated corpses. With regard to communication professionals, their contributions to the information of people and social control of activities carried out by public authorities are significant, notably in the face of the pandemic scenario. Experts in social security system and social assistance must also be protected in view of the necessary preservation of the conditions of social access to such benefits. Finally, the priority of basic sanitation professionals (drinking water supply; sanitary sewage; urban cleaning and solid waste management and drainage and management of urban rainwater) is a requirement due to the high essentiality of such activities, inherent to the content of first health needs. The highlighted relevance of the above activities is recognized by Law No. 7,983 (BRAZIL, 1989), which, by regulating the right to strike by private workers, limits its exercise to essential service providers, which it lists in its art. 10, and which includes the groups mentioned in the previous paragraph, with all the others being correctly considered with the vaccination preference for the INP (BRAZIL, 2021).

Finally, considering the possible changes in the scenarios related to the pandemic, especially regarding to the supply of vaccines, the variation in the levels of contamination and the scientific development about its ways of combating, the definition of the professional categories to be prioritized needs continuous interdisciplinary approaches, which can lead to a review of INP.



FINAL CONSIDERATIONS

The present research was dedicated to the examination of the ethical and legal pertinence of the groups chosen as immunization priorities by the INP (BRASIL, 2021). Vaccination of all would be required, in view of the high transmissibility and lethality of the COVID-19 virus and the integrality and universality principles that govern the SUS, as provided in the Constitution (BRAZIL, 1988). Notwithstanding, despite public efforts to acquire immunizers, the limits to their production in sufficient quantity to qualify them as severely scarce health resources, thus understood as whose human action in satisfactory availability increase is not feasible and those essential to the satisfaction of first healthcare needs.

The severe scarcity implies allocative choices that demand the adoption of criteria rationally and consensually accepted by the community that will support them due to the potential of life risk exposure of some resulting from such decisions. Considering the legal and ethical nature of the “life” asset exposed to risk by such decisions, there is a need for the presence of the same predicates in the criteria on which they are based.

However, the preference given by the INP (BRAZIL, 1988) was considered valid, social and health vulnerable, thus understood those belonging to groups of elderly people in a situation of institutionalization or not; to people with debilitating disabilities; to the indigenous people who live on demarcated land; riverside or quilombola people; to homeless people and prisoners. The greatest health and social vulnerability of these categories is recognized in several statutes and is supported by the criterion of imminent death and the Rawls’ principle of justice (2008), which guides the possibility of unequal allocation of scarce resources only by prioritizing the least favored in a society. The preference of blacks and the organization of the vaccination calendar according to income, giving priority to the most financially needy, due to their greater propensity to contagion and the development of serious or lethal forms of COVID-19, were also suggested.

Furthermore, the preference given to health professionals working in fighting in the pandemic scenario or in the treatment of other health problems that expose human life to risk was approved, based on the criterion of special responsibilities. This criterion is based on the utilitarian philosophical conception, usually refuted for relegating the moral values inherent in a conduct to enhance the amount of social welfare generated by another, regardless of the aspect neglected by it. In view of the severe scarcity of saving human lives necessary resources, the utilitarian criteria become valid, since, if all lives are of equal value, the measure capable of saving as many lives as possible is rationally sustainable.

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The same criterion of special responsibilities justifies the priority selection for vaccination of professionals who work in institutions that host individuals belonging to other vulnerable groups; public security system workers (prison officers, members of the police and fire brigades) and cargo transportation professionals, who are responsible for providing the population with access to essential assets for human survival, such as food and medicines.

The criterion of social value, on the other hand, because it gives priority to groups that carry out activities of high importance in society, would demand a wide public debate for its definition. In any case, due to the continuous need for essential services provided by some professional groups, the inclusion of some categories was approved and the reservations for the priority of others was suggested.

Based on the reported analysis, it can be seen that the INP (BRASIL, 2021) was prepared under ethical and legally valid criteria, with regard to most of the preferences dispensed by them. Nevertheless, the inclusion of other categories and some specifications of the categories already prioritized would still be necessary for the more fully satisfaction of the ideals of distributive justice inherent in a Democratic State.

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