

Mandatory use of a face mask to contain COVID-19 in Brazil: legitimate limitation to the fundamental right of self-determination

Uso obrigatório de máscara facial para conter a COVID-19 no Brasil: limitação legítima ao direito fundamental de autodeterminação

ABSTRACT

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Introduction: The autonomy of the individual's will aiming at the exercise of individual freedom by refusing the use of a face mask as a means of protection can have serious collective consequences in relation to the prevention and spread of the contagious infectious disease caused by SARS-CoV-2. **Objective:** To analyze whether the individual's freedom of self-determination against collective interest in cases of compulsory use of a face mask will prevail. **Method:** The study was developed through documentary and bibliographic collection, with descriptive bias. **Results:** The official data and guidelines of the World Health Organization in joint analysis with the existing Brazilian legislation and the constitutional commandments of fundamental rights, allowed us to reach the result of the proposed objective. **Conclusions:** The published normative acts are based on validity in a federal standard with the status of a law in a formal sense, with the provision for the adoption of prophylaxis measures, including the mandatory use of the mask, to combat the pandemic. The prevalence of the collective interest in favor of public health and the fundamental right to life and health of others is legitimate given the individual's freedom of self-determination.

KEYWORDS: Right to Health; Coronavirus Infections; Disease Transmissions Infectious; Public Health; Prevention and Control

RESUMO

Introdução: A autonomia da vontade do indivíduo visando o exercício de liberdade individual ao recusar a utilização de máscara facial como meio de proteção pode trazer sérias consequências coletivas em relação à prevenção e à propagação de doença infectocontagiosa causada pelo SARS-CoV-2. **Objetivo:** Analisar se a liberdade de autodeterminação do indivíduo em confronto com o interesse coletivo nos casos de utilização compulsória de máscara facial irá prevalecer. **Método:** O estudo foi elaborado por meio de coleta documental e bibliográfica, com viés descritivo. **Resultados:** Os dados oficiais e as orientações da Organização Mundial de Saúde em análise conjunta com a legislação brasileira existente e os mandamentos constitucionais dos direitos fundamentais nos permitiram chegar ao objetivo proposto. **Conclusões:** Os atos normativos editados têm fundamento de validade em norma federal com *status* de lei em sentido formal, havendo nelas a previsão de adoção de medidas de profilaxia, dentre elas o uso obrigatório da máscara, no combate à pandemia. A prevalência do interesse coletivo em prol da saúde pública e do direito fundamental à vida e à saúde de outrem são legítimas frente à liberdade de autodeterminação do indivíduo.

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INTRODUCTION

The whole world is experiencing a health crisis caused by the new coronavirus (SARS-CoV-2), which causes COVID-19 (2019-nCoV). Its reach and spread have brought about behavioral changes everywhere. Some of these changes were driven by the individuals' own awareness and attitudes, and others were motivated by the rules that came into force in various countries in the hope of preventing the spread of the virus and protecting local populations.

It was no different in Brazil. The number of infected people and the death toll of COVID-19 indicated a rapid increase in the spread of the disease. The significant increase and the fast spread were pointed out by a study on the Evolution of the Prevalence of COVID-19 Infection in Brazil (Epicovid-19-BR),¹ carried out by the Federal University of Pelotas.

Because of the severity of the disease, new laws, provisional measures, decrees, resolutions, and all sorts of regulations from various sources have become part of the Brazilian regulatory framework. The new rules were reflected in criminal laws, the General Data Protection Act, labor laws, the Health Insurance Act, consumer laws, the Rental Act, and several other laws, acts, and regulations in force in Brazil. The number of new rules and norms was so high that, to enable easier search and research, the federal government's website² keeps a constant update of ordinances, provisional measures, decrees, and other acts related to the coronavirus pandemic.

One of the most far-reaching measures was the mandatory use of face masks, not only as Personal Protective Equipment (PPE) for professionals,^{3,4,5} but as a form of protection for all individuals.^{6,7}

Acting in a preventive manner, the Brazilian Ministry of Health (MS) launched its first guidance, on a non-compulsory basis, with Informative Note n. 3/2020-CGGAP/DESF/SAPS/MS, suggesting the production of homemade masks for general use by the population,⁷ with the exception of people suffering from flu symptoms in home isolation and their caregivers (for these, the use of surgical masks is recommended). The ministerial note suggests that the population produce and wear homemade masks and recommends that other prevention and control measures be maintained.

The guidance aims to reduce the risk of spreading the disease by eliminating or decreasing the spread of droplets expelled from our noses and mouths. This measure guarantees an auxiliary physical barrier that can reduce the number of cases, as long as there is massive compliance of the population.^{8,9}

Some social and economic characteristics of the population, the denial of the disease,¹⁰ the lack of effective information¹¹, the shortage of surgical masks (proven effective), the fear caused by the unknown disease, and several problems in public healthcare services, combined with the political problems that plague Brazil¹² and the *politicization* around two forms of behavior (isolation/social distancing with limited activities vs. free movement

in public spaces with immediate resumption of economic activities) are factors that may be contributing to the despair, confusion, and mistrust¹³ of many people regarding compliance with prophylactic measures. Consequently, these measures are not achieving their objective of curbing the spread of the disease.

The number of detected COVID-19 cases in Brazil¹⁴ rose from one positive case and no deaths on March 4, 2020, to 1,032,913 confirmed cases and 54,771 deaths on June 19, 2020. The last 30 days of this period also witnessed the greatest spread of the disease.

The number of deaths in the months following the first case revealed the exponential growth of the disease in Brazil. In just over 100 days, the disease spread at a lightning speed and sparked discussion about whether or not wearing face masks should be mandatory to improve individual protection and curtail the pandemic.

Does the compulsory use of protective face masks (even if homemade) by everyone in collective or private environments with significant traffic of people limit individuals' freedom of choice or is their use reasonable considering the risk of contamination and the primacy of public and collective interests in the health and epidemiological control of COVID-19?

The present study analyzed whether or not self-determination regarding the refusal to wear face masks will prevail over the State's ability to demand this compliance from everyone.

This problem is a legal matter. It consists of knowing whether the decrees and rulings issued by the heads of the executive branch in the units of the Brazilian federation (states, Federal District and municipalities) are valid to oblige people to wear face masks under the law in force in Brazil.

The question arises because article 5, item II, of the 1988 Federal Constitution (CF/88) determines that "no one shall be obliged to do or stop doing anything except under the law", law meaning a legal (coercive) precept (rule of conduct) derived from the competent branch of government. However, some claim that, strictly speaking, the competent body to create laws is the legislative and not the executive branch, as seen in the decrees questioned in this paper.

Furthermore, in order for a provision to be legally binding, being required by a law is not enough. It must not be contrary to legal provisions of a higher level, under the penalty of being declared null and void due to unconstitutionality or because it is contrary to human rights treaties incorporated into the Brazilian legal system.

METHOD

To address the problem, we adopted a technical-legal method that basically consists of interpreting the text of legal norms, classifying and systematizing rules, and defining principles.¹⁵



The procedure consisted of finding out whether or not the obligation to wear face masks imposed by the decrees is supported by the law, as required by the Federal Constitution.

To this end, we interpreted the text of Law n. 13.979, of February 6, 2020. It “provides for measures to deal with the public health emergency of international concern resulting from the coronavirus”.¹⁶ We sought to verify whether the use of face masks is provided for, even if generically, in the wording of said law.

In particular, through grammatical interpretation, we sought to extract the legal meaning from the text of article 3 of the law, which establishes that, in order to manage this public health emergency, “the authorities may adopt, within the scope of their competences, among others, the following measures [...] vaccination and other prophylactic measures”.

We used deductive reasoning: if the law obliges its addressees to comply with the prophylactic measures adopted by the government, and since the use of face masks is one of those prophylactic measures, then these executive authorities can lawfully and legally impose the use of face masks, as long as other legal requirements are respected.

Therefore, the decrees in question only clarify or explain the generic content of the law and do not innovate the legal order by creating obligations without legal support.

Then, we sought to verify whether or not the generic or express legal obligation to wear masks as a prophylactic measure was contrary to any supralegal or constitutional norm because it would limit the fundamental right to freedom and self-determination (art. 5, II, CF/88).

For this purpose, we conducted a balance or weighting judgment of the interests at play, namely the right to individual freedom and self-determination vs. the collective right to public health, epidemiologic aspects, and the individual right to health.

This judgment used an axiological or evaluative criterion that may be questionable but that produces results that can be refuted or distorted, given the methodological procedure adopted.

In the scale of values obtained from the relevance of the interest involved (collective vs. private), our preliminary finding is that the collective interest in public health in an emergency state, recognized by the law, as well as the individual right to health and life, would lawfully warrant State intervention in the sphere of individual freedom to impose the use of face masks as a preventive measure to curtail the disease. The technique we adopted was bibliographic and documental research of texts and data published on official websites.

The data, numbers, and rules analyzed are from the period between March 1, 2020, and June 19, 2020.

RESULTS AND DISCUSSION

On January 30, 2020, the World Health Organization (WHO) declared that the outbreak of the disease caused by the new

coronavirus, called COVID-19, was a Public Health Emergency of International Concern (PHEIC). Shortly thereafter, on March 11, 2020, the WHO declared that COVID-19 could be characterized as a pandemic. Since then, several countries on all continents have started to fight the disease, always receiving technical support from the WHO.¹⁷

The 196 countries that are legally bound to the International Health Regulations took on several obligations with a view to preventing, protecting, controlling, and providing a public health response to the international spread of COVID-19. These regulations establish measures to reduce risks to public health, avoiding unnecessary interference with international traffic and trade.¹⁸

Some of the main obligations include the maintenance of a relationship center with the WHO (National Focal Point), the provision of information, the permanent assessment of health risks in accordance with WHO guidelines, the development of capabilities, health surveillance, and response services.

Therefore, the work of the Brazilian State during this disastrous event must also be guided by the rules to which Brazil has agreed with other sovereign States and international organizations. It is also reasonable for Brazil to cooperate with the WHO and follow its guidelines to carry out internal measures to fight the virus.

While countries try to comply with the Health Regulation agreement, several studies are underway to find out how the virus that causes COVID-19 spreads, the possibilities of treatment, and the means of immunization. What we know so far is that the new coronavirus (SARS-CoV-2) is transmitted mainly by contact with respiratory droplets and that there is no vaccine or safe and effective treatment scientifically proven against the disease.

Since the disease can be transmitted from an infected person to others mainly through droplets from the nose or mouth that spread with coughing, sneezing or even as the person speaks, this transmission can be avoided when a minimum distance is maintained between people and face masks are worn correctly,^{19,20} in addition to other rules of *respiratory etiquette*, meaning respect and care for the others.

To help respond to and curb the pandemic, non-pharmacological interventions (NPIs) are indicated by the MS²¹ both under individual and community scopes. We highlight some of them: hand washing, social distancing, respiratory etiquette, proper cleaning of environments, and closing of places of intense people traffic.

If properly conducted and in conjunction with the use of face masks, NPIs can be effective to reduce the spread of the disease.²²

The initial WHO guidance on the use of masks was that surgical masks should be worn by: i) people with respiratory symptoms, such as coughing or difficulty breathing, including when seeking medical attention; ii) healthcare professionals and people who



provide care to individuals with respiratory symptoms; and iii) healthcare professionals, when entering a room with patients or treating an individual with respiratory symptoms.²³

The guidance, therefore, was related to the use of surgical masks only by healthcare professionals in general or people with respiratory symptoms and, depending on the situation and the characteristics of each country, it could be analyzed and used in addition to the three options described above.

The growing number of cases and deaths, however, revealed the need to review the guidelines for personal and community prevention. At the same time, the pandemic also brought about another crisis: the lack of material and adequate professional equipment, including surgical masks.

Thus, a new vision emerged on the measures of protection and use of masks.

The Pan American Health Organization (PAHO), which works to combat the disease together with the WHO, addressed the topic during an online press conference and clarified that the use of homemade masks does not have strong scientific evidence to support that these masks can reduce transmission. It also clarified that countries that decide to recommend the use of masks for people without symptoms, including homemade masks, must also inform the population that this measure alone will not effectively protect against COVID-19 infection, and that the other guidelines must be maintained:^{24,25} coughing etiquette, avoiding physical proximity to other people, frequent hand hygiene etc.

Based on the lack of technical and specific knowledge about COVID-19 and considering the scarcity of “weapons” in the fight against this disease, the WHO started to accept the recommendation to wear face masks in an attempt to curtail the spread. On June 5, 2020, the WHO reinforced the previous recommendation and released new guidelines on how to make homemade masks, suggesting their use to the entire population.²³

In addition to surgical masks, the use of homemade masks associated with other preventive measures is therefore recommended by international health organizations, but it is not mandatory according to the guidelines mentioned above.

In preparing for and responding to the outbreak of COVID-19, Brazil established certain initial measures, which, over a short period, have been modified and adapted to the local reality.

The use of masks by the population in general was the guideline proposed by the MS⁷ through Informative Note 3/2020-CGGAP/DESF/SAPS/MS, which, although official, did not make the use mandatory. However, in view of the rapid increase in contagion and the number of infected people, wearing protective face masks (even homemade) has come to be considered an important measure in the fight against the coronavirus.

The measures recommended by the Ministry of Health, like social distancing, frequent hand hygiene, use of 70% ethyl

alcohol, in addition to wearing a mask and other guidelines, like proper cough etiquette, may have effective potential for protection^{8,19,20,21} against COVID-19. The Ministry of Health also stressed the necessary participation and awareness of the entire population to interrupt the transmission chain.

In the Informative Note, the ministry calls on society to join the initiative, called “Masks for All” (#Masks4All), which reinforces the “I protect you and you protect me” motto.

The Brazilian Society of Infectious Diseases (SBI) released a Clarification Note²⁶ on the use of masks in the COVID-19 pandemic on April 2, 2020. It was updated on April 8, 2020, and stated that surgical masks should be worn by patients with respiratory symptoms (coughing, sneezing, difficulty breathing), healthcare professionals, and support professionals who assist suspected or confirmed COVID-19 patients. Considering the shortage of masks in the consumer market, homemade masks can also be used by the population as a form of mechanical barrier. These documents highlight the importance of maintaining other preventive measures, such as social distancing, avoiding touching your eyes, nose and mouth, in addition to hand hygiene with water and soap or 70% ethyl alcohol.

The SBI clarifies that cloth masks can reduce the spread of the virus by asymptomatic or pre-symptomatic people who may be transmitting the virus without knowing it. However, the SBI also remarks that cloth masks do not protect those who wear them because of these masks’ low filtration effectiveness.

Finally, the various guidelines provided by health-related agencies, including the guidelines provided by the WHO, PAHO, MS, and SBI, had similar recommendations on the positive need to wear face masks as a means of protection for the entire population, including the possibility of wearing homemade masks.

To overcome the health crisis, despite the limited number of “weapons”, several governments began to follow the updated guidelines and declared the mandatory use of masks, either homemade or professional, as a public policy of necessary and urgent implementation, in an attempt to protect their populations from the spread of the disease.

And so it was done in several places. Municipal and state governments issued decrees²⁷ and regulations, each with its own particularities, but all aimed at imposing the use of masks in public or collective environments.

In the state of São Paulo, state decree n. 64.959, of May 4, 2020, provided for the general and mandatory use of face protection masks, preferably of non-professional use, in public spaces and inside establishments.

In the state of Rio de Janeiro, state decree n. 47.060, of May 5, 2020, determined that users and employees of rail, intercity and interstate road, metro, and waterway transportation under the responsibility of the state of Rio de Janeiro must wear protection.



In the state of Ceará, state decree n. 33.608, of May 30, 2020, established that people in the COVID-19 risk group are subject to a special duty of protection and cannot circulate in public spaces and roads, or private spaces and roads similar to public roads, unless they are wearing masks.

In the state of Pernambuco, state decree n. 48.969, of April 23, 2020, recommended the use of masks, even if handcrafted, by the general population in the state of Pernambuco, notably by people who have to leave home and circulate on public roads to work or purchase essential products or services, including when using mass transportation.

In the state of Amazonas, state decree n. 42.278, of May 13, 2020, established the use of face masks, preferably non-professional, in areas of public access and common use by the population.

In the state of Pará, state law n. 9.051, of May 7, 2020, provided that all citizens within the state are required to wear protective masks when on the streets and in public spaces, and even on buses and other forms of passenger transportation.

In the Federal District, decree n. 40.648, of April 23, 2020, determined the mandatory use of face masks, according to the guidelines of the State Department of Health of the Federal District, in all public spaces, public roads, mass transportation, commercial, industrial and service establishments, and in areas of common use in residential and commercial buildings.

In the municipality of São Paulo, municipal decree n. 59.396, of May 5, 2020, determined the mandatory use of masks in public spaces and public areas according to the state rule.

In the municipality of Santos, municipal decree n. 8.944, of April 23, 2020, considered the use of non-professional face masks mandatory in the public areas of the municipality, in the establishments that were authorized to operate, in public or private means of transportation, and for working in shared environments, in both public and private sectors.

In the municipality of Rio de Janeiro, municipal decree n. 47.375, of April 18, 2020, made the use of face protection masks mandatory as a complementary measure to reduce contagion by SARS-CoV-2.

In the municipality of Manaus, municipal decrees n. 4.821 and n. 4.822, of May 8, 2020, determined the use of protective masks for access and permanence in mass, private, and individual public transportation for passengers, and in commercial establishments in the municipality of Manaus.

There are many other municipalities and states, which, through decrees and regulations, have determined a similar obligation to wear masks in public environments, in mass transportation, and in all environments of heavy people traffic.

Therefore, these rules have a common instruction to make the use of masks mandatory, each with its local particularities, but all with the same purpose of containing the spread of the new virus.

In addition to all these rules, we have extensive regulation on the health crisis. The problem can be dealt with at the federal, state or even municipal level, along the lines of what was enshrined by the Brazilian Supreme Court (STF) in the Direct Action of Unconstitutionality (ADI) 6341/DF.²⁸

The STF Plenary endorsed the preliminary decision by Justice Marco Aurélio, reaffirming that the measures adopted by the President of the Republic in Provisional Measure n. 926, of March 20, 2020, do not exclude the overlapping jurisdiction of the other federated entities to fight the pandemic, nor do they prevent the adoption of administrative and normative measures within the scope of these units of the federation. However, the possibility that the Federal Executive branch could determine what public services are essential was limited in favor of the autonomy of local jurisdictions. The sentence validates compliance with the measures adopted by the states, municipalities, and the Federal District to fight the new virus.

There could be some conflict between regulations and the constitution. This is because one could argue that these regulations contradict the constitutional fundamental right that guarantees that no one shall be obliged to do or stop doing anything, except if required by the law.

Legally, the executive branch could not issue this type of rule of conduct. *A priori*, this is the responsibility of the legislative branch. However, for such regulations to be valid, the required conduct must be provided for by the law and cannot be contrary to supralegal or constitutional rules and human rights treaties to which Brazil is a signatory.

Making an interpretive and deductive analysis, not only the ruling of the supreme court, but also Law n. 13.979/20, of federal scope, which outlines general rules on the conduct and fight against the coronavirus,¹⁶ provides legal support to the measures enacted by municipalities, states, and the Federal District.

Still in terms of legislation that can support coercive measures for the use of masks as a means of protection, we have Bill n. 1.562/2020, which, if approved, will amend and add texts to Federal Law n. 13.979/2020.

The bill had already been approved by the Chamber of Deputies on May 19, 2020, and finally passed on June 4, 2020, in the Federal Senate, with unanimous approval.²⁹ On June 28, 2020, it was still waiting for the President's approval.

The bill provides for the mandatory use of protective masks in public places, public agencies, places with heavy people traffic etc., except in some specific situations, like in the case of children under three years of age, people with disabilities, and other situations listed in the document. The bill provides for penalties and liability for noncompliance, use of law enforcement bodies, and the application of fines to offenders. It is expected to last as long as the public health emergency arising from COVID-19 persists.



If approved by the President, soon the obligation that today is valid in some states and some municipalities will be enforced with greater federal legislative reach in the entire country, for as long as the new coronavirus pandemic lasts.

This compulsory use of masks leads us to the conflictive analysis proposed in this study: the individual's right to self-determination in the face of the obligation imposed by new legislation.

As a particularity to be considered, recent events that have occurred throughout Brazil may indicate some resistance to the compulsory use of protective masks.

These are circumstances that we observed and that suggest the population's non-compliance with the rules, like on April 25, 2020, when a report of the *Semanário* newspaper revealed that, in the Serra Gaúcha region, there was substantial resistance to masks despite the obligation imposed in more than 20 municipalities in that area.³⁰

Another occurrence was reported in the municipality of Santos, where the city administration imposed several fines on residents who refused to wear masks (mandatory in the city).³¹ In that same municipality, a citizen filed a lawsuit seeking personal exemption from the obligation to wear a mask. The preliminary injunction was granted by a lower court but suspended by the São Paulo State Court of Appeals (TJSP), which maintained the obligation to wear a mask, considering the situation of public calamity and the possibility of exceptional measures in favor of the health and life of the population.³²

Resistance was also perceived in the state of Amazonas. The *A Crítica* newspaper reported resistance to masks in an article published on May 13, 2020, noting that a large portion of the population of Manaus failed to comply with the municipal decree that determined mandatory use.³³

In the municipality of Juiz de Fora, on April 20, 2020, a report from the *Tribuna de Minas* newspaper exposed the population's resistance to wearing masks, which are also mandatory in that municipality.³⁴ In Belo Horizonte, the *Estado de Minas* newspaper, in a report from June 25, 2020, found that part of the population "carelessly and stubbornly" still resisted to wearing masks, despite their mandatory nature.³⁵

In Brasília, the Federal District government imposed a fine on the then Minister of Education, Abraham Weintraub, for circulating in a public environment on June 14, 2020, without a face mask—mandatory by local decree.³⁶

As the ultimate demonstration of resistance to the use of protection, the very leader of the Brazilian nation, who often appears in public without a face mask, had his conduct legally conditioned by Citizen Suit n. 1032760-04.2020.4.01.3400, which is being judged in the 9th Federal Civil Court of the Federal District. Federal judge Renato Coelho Borelli granted an injunction obliging President Jair Messias Bolsonaro to wear a protective mask under penalty of a daily fine in case of non-compliance.³⁷

The lawsuit is still pending and there was an appeal by the General Counsel for the Federal Government.

In this explanation, we found some human behaviors that show individuals possibly acting to defend their own interests and their right to self-determination.

To analyze this right, first we have to consider the individual, whose notion is debated by scholars who associate this right to his or her freedom of choice (considered by these scholars to be the cornerstone of the autonomy of the will, in the sense of self-determination).³⁸ For self-determination, the right to choose, the expression of the will, and freedom are taken into account, recognizing the individual's prerogative to establish his or her own rules of conduct, within an empty space delimited only by the law.

The Federal Constitution of 1988 expressly recognizes the right to freedom and individuality when dealing with fundamental rights and instrumental guarantees to protect those rights. The autonomy of the private will is, therefore, supported by the power of individuals to choose what suits them, provided that, for this, they do not infringe the law or the rights of others.

When we analyze the precepts of fundamental rights, centered on the inviolable dimension of the rights to life and health, considering that everyone is equal before the law (art. 5, CF/88), we see that individual interests and self-determination are undeniably guaranteed.

This is because fundamental rights ensure a series of guarantees to citizens, as if they were rights that cannot be questioned by the power of the State or by other individuals.³⁹

Since these rights are unquestionable and immediately enforced—for they are bound to the positive constitutional norm—in a democratic State ruled by law, the right of the individual over the public interest will prevail.

In a joint analysis of the principle of broad legality in light of the individual freedom provided for in the constitution, in which no one shall be obliged to do or stop doing anything except under the law (art. 5, II, CF/88), individual reasons are greater than State reasons, since general laws condition and bind fundamental rights.

The autonomy of the will, in contemporary law, however, arises not only as a form of individuality for each human being, but as an individuality that cannot override the collective social interest, due to the latter's broader social function.

Considering these arguments, individual freedom may be restricted when confronted with collective well-being and the mandatory protection of health that is guaranteed to all and a responsibility of the State (art. 196, CF/88).

The colliding position of these rights is clear: on the one hand, the free individual who has the will and freedom of individual choice, on the other hand, the State, in support of the



community, responsible for the physical integrity and health (constitutional requirement of health guarantees).

If we uphold only one of these rights, does that mean we are violating the other?

In cases of conflict of rights, is State interference in the autonomy of the individual's will legally supported?

The principle of proportionality casts light on these issues and helps us weigh up and resolve the conflicting rights. This weighting considers the encumbrance and the benefit enabled⁴⁰ by the coercive measure for the use of masks.

It is true that if individuals refuse to wear protective face masks in the manner established by the law, they will be fined according to the appropriate regulations. It is also certain that wearing a mask is one of the ways to create a barrier against the spread of COVID-19, reducing the possibility of contamination. Masks do not immunize the individual, however, they can check the proliferation of the disease and enhance the protection of the community as a whole.

It is easy to draw a parallel with the obligation to vaccinate for other diseases. The understanding is the same. The obligation is intended not only to protect an individual's health, but mainly to protect the health of the population from infectious diseases. In vaccination, the autonomy of the will yields to the public and collective interest.

Individual interest cannot take precedence over collective interest when it comes to something as serious and important. The interest in defending society and the community by imposing the use of face masks in situations like this overrides an individual's interest and autonomy.

Since no one is obliged to do or stop doing anything except under the law, it is necessary to find the validity basis of state, district, and municipal decrees, in a legal hierarchy, so that there is no conflict with the freedom of self-determination. In this case, the basis was confirmed by art. 3, III, of Law n. 13.979/2020, which provides for the compulsory implementation¹⁶ of prophylactic measures.

Among the prophylactic measures, defined as measures employed to prevent diseases,⁴¹ we can include the use of face masks in public places, places that are open to the public (establishments), mass transportation, and public services, since it is a preventive measure to contain the virus and curb the spread of the disease.

The question, therefore, admits State intervention, as an exception, and provided that some requirements are demonstrated, as in the case we analyzed.

The protection of life and collective interest is a legitimate cause for the supremacy of public interest over private interest. This conclusion does not limit the individual's fundamental right. This limitation can be imposed, however, provided that: i) it is justified, ii) it is a proportional limitation, and iii) it

meets social interests. The prevailing interest cannot be public or private, but social, so as to benefit and protect the community as a whole.

In this sense, with proven social interest and laws and regulations that support the proportionality of the most relevant interests (the life and health of the community), for epidemiological surveillance and public health purposes, the public interest is axiologically greater than people's right to self-determination.

Morally speaking, wearing a mask should simply be an act of consciousness by the individual, without the need for legislative intervention. Legally, we have a human conduct that has become mandated by the State, which sets rules about behavior and collective coexistence.

Not only does the mandatory use of face masks as a means of protection find support in the fundamental rule of maintaining the health and life of the community, but also in other legal instruments that guarantee enforced compliance, under penalty of fines and other sanctions. This is the case of non-compliance on the part of commercial establishments, which are also subject to the rules of the Federal Health Code (Law n. 6.437, of August 20, 1977), and non-compliance with the rules of the Brazilian Penal Code, whose content and consequences could yield another study.

Thus, the autonomy of the will is morally conditioned to the achievement of the common good. Legally, following the judgment of proportionality, an individual's sacrifice is small compared to the extremely serious sacrifice of exposing oneself and others to the risk of diseases and their spread to the detriment of public health.⁴² The individual exercise of autonomous will, therefore, is limited by the interest of the community in achieving the social good.⁴³

Failure to comply with the use of masks may leave the individual vulnerable to the disease and make him or her a risk factor and a vector of COVID-19 spread, especially if he or she is asymptomatic or during the pre-symptomatic phase of the disease.

The protection measure is also supported by the question asked by the WHO: "What can I do to protect myself and avoid transmitting it to others?"

CONCLUSIONS

It is well known that, to date, there is still no vaccine available for COVID-19. Studies are being carried out all over the planet in a tireless search for an effective solution. Most likely, when a vaccine finally becomes available, it will be mandatory in Brazil, as it happens with other diseases.

However, since there is still no drug or vaccine that can help us stop COVID-19, the few existing protection measures must be taken seriously. The refusal to wear masks may increase the number of people exposed to contagion and the rates of spread of the disease.



Failure to comply or refusal to wear face masks as a means of protection against the new coronavirus reveals the current tension and the conflicts within the population and may be worsening this public health emergency.

This situation is being experienced by everyone in this pandemic, so individuals are obliged to comply with measures that can help reduce the spread of COVID-19. The controversy that could be questioned is related to the mandatory use of masks in public or

collective environments as a violation of the citizens' fundamental rights to freedom.

The individual interest, although supported by fundamental rights, may be limited by the collective interest in the present context. The law is much more than the protection of an interest, it is the interest properly protected. Therefore, the State has more than enough support to demand individual compliance with the use of masks.

REFERENCES

1. Barros AJD, Menezes AMP, Horta BL, Victoria CG, Hartwig FP, Pellanda LC et al. Evolução da prevalência de infecção por COVID-19 no Brasil: estudo de base populacional. Pelotas: Universidade Federal de Pelotas; 2020[acesso 23 jun 2020]. Disponível em: <https://epidemiologia-ufpel.org.br>
2. Brasil. Legislação COVID-19. Portal Legis. 2020[acesso 25 jun 2020]. Disponível em: <https://www4.planalto.gov.br/legislacao/portal-legis/legislacao-covid-19>
3. Secretaria de Vigilância em Saúde - SVS. Recomendações de proteção aos trabalhadores dos serviços de saúde no atendimento de COVID-19 e outras síndromes gripais. Brasília: Ministério da Saúde; 2020[acesso 12 jun 2020]. Disponível em: <https://coronavirus.saude.gov.br/saude-e-seguranca-do-trabalhador-epi>
4. Neves J. Profissionais de saúde precisam estar protegidos, pois fazem parte da infraestrutura da resposta a esta epidemia. Epsjv/Fiocruz Entrevista. 7 abr 2020[acesso 25 jun 2020]. Disponível em: <https://epsjv.fiocruz.br/noticias/entrevista/profissionais-de-saude-precisam-estar-protetidos-pois-fazem-parte-da>
5. Luciano LS, Massaroni L. A falta de equipamentos de proteção individual (EPIs) e para além deles: a emergência do trabalho dos profissionais de saúde. Vitória: Universidade Federal do Espírito Santo; 2020[acesso 25 jun 2020]. Disponível em: <https://coronavirus.ufes.br/conteudo/falta-de-equipamentos-de-protecao-individual-epis-e-para-alem-deles-emergencia-do-trabalho>
6. Camargo MC, Martinez-Silveira MS, Lima A, Bastos BP, Santos DL, Mota SMC et al. Eficácia da máscara facial (TNT) na população para prevenção de infecções por coronavírus: revisão sistemática. Cienc Saude Coletiva. 2020.
7. Ministério da Saúde (BR). Nota informativa Nº 3 de 23 de abril de 2020. Brasília: Ministério da Saúde; 2020[acesso 28 maio 2020]. Disponível em: <https://www.saude.gov.br/images/pdf/2020/Abril/04/1586014047102-Nota-Informativa.pdf>
8. Doremalein N, Morris DH, Holbrook MG, Gamble A, Williamson BN, Tamin A et al. Aerosol and surface stability of SARS-CoV-2 as compared with SARS-CoV-1. N Engl J Med. 2020;382:1564-7. <https://doi.org/10.1056/NEJMc2004973>
9. Stutt ROJH, Retkute R, Bradley M, Gilligan CA, Colvin J. A modelling framework to assess the likely effectiveness of facemasks in combination with lock-down in managing the COVID-19 pandemic. Proc R Soc A. 2020;276(2238):1-21. <https://doi.org/10.1098/rspa.2020.0376>
10. Troi M, Quintilio W. Coronavírus: lições anti-negacionistas e o futuro do planeta. Scielo em Perspectiva. 31 mar 2020[acesso 12 jun 2020]. Disponível em: <https://blog.scielo.org/blog/2020/03/31/coronavirus-licoes-anti-negacionistas-e-o-futuro-planeta/#.XvUhgGlv8wA>
11. Souza Júnior JH, Raasch M, Soares JC, Ribeiro LVHAS. Da desinformação ao caos: uma análise das *fake news* frente à pandemia do coronavírus (COVID-19) no Brasil. Cad Prospecç. 2020;13(2):1-16. <https://doi.org/10.9771/cp.v13i2%20COVID-19.35978>
12. Ghebreyesus TA. World government summit. Geneva: World Health Organization; 2020[acesso 24 jun 2020]. Disponível em: <https://www.who.int/dg/speeches/detail/world-government-summit>
13. Dunker CIL. A arte da quarentena para principiantes. São Paulo: Boitempo, 2020.
14. Sanar Saúde. Linha do tempo de coronavírus no Brasil. Salvador: SanarMed; 2020[acesso 2 jun 2020]. Disponível em: <https://www.sanarmed.com/linha-do-tempo-do-coronavirus-no-brasil>
15. Jesus DE. Direito penal volume 1: parte geral. 30a ed. São Paulo: Saraiva; 2009.
16. Brasil. Lei Nº 13.979, de 6 de fevereiro de 2020. Dispõe sobre as medidas para enfrentamento da emergência de saúde pública de importância internacional decorrente do coronavírus responsável pelo surto de 2019. Diário Oficial União. 7 fev 2020.
17. Representação da Organização Pan-Americana de Saúde no Brasil - OPAS-Brasil. Folha informativa: COVID-19 (doença causada pelo novo coronavírus). Washington: Organização Panamericana da Saúde; 2020[acesso 28 maio 2020]. Disponível em: https://www.paho.org/bra/index.php?option=com_content&view=article&id=6101:covid19&Itemid=875
18. Agência Nacional de Vigilância Sanitária - Anvisa. Regulamento sanitário internacional RSI 2005. Brasília: Agência Nacional de Vigilância Sanitária; 2009[acesso 2 jun 2020]. Disponível em: <http://portal.anvisa.gov.br/documents/375992/4011173/Regulamento+Sanit%C3%A1rio+Internacional.pdf/42356bf1-8b68-424f-b043-ffe0da5fb7e5>



19. Chu DK, Akl EA, Duda S, Solo K, Yaacoub S, Schünemann HJ et al. Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-Cov-2 and COVID-19: a systematic review and meta-analysis. *Lancet*. 2020;395(10242):1973-87. [https://doi.org/10.1016/S0140-6736\(20\)31142-9](https://doi.org/10.1016/S0140-6736(20)31142-9)
20. Oliveira WK, Duarte E, França GVA, Garcia LP. Como o Brasil pode deter a COVID-19. *Epidemiol Serv Saude*. 2020;29(2):1-8. <https://doi.org/10.5123/s1679-49742020000200023>
21. Ministério da Saúde (BR). Medidas não farmacológicas. Brasília: Ministério da Saúde; 2020[acesso 20 jun 2020]. Disponível em: <https://coronavirus.saude.gov.br/medidas-nao-farmacologicas>
22. Garcia LP. Uso de máscara facial para limitar a transmissão da COVID-19. *Epidemiol Serv Saude*. 2020;29(2):1-4. <https://doi.org/10.5123/s1679-49742020000200021>
23. World Health Organization - WHO. When and how to use masks. Geneva: World Health Organization; 2020[acesso 6 jun 2020]. Disponível em: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks>
24. Organização Pan-Americana de Saúde - OPAS. Orientação sobre o uso de máscaras no contexto da COVID-19: orientação provisória, 6 de abril de 2020. Washington: Organização Panamericana de Saúde; 2020[acesso 28 maio 2020]. Disponível em: <https://iris.paho.org/handle/10665.2/51994>
25. Organização Pan-Americana de Saúde - OPAS. COVID-19: OMS atualiza guia com recomendações sobre uso de máscaras. Washington: Organização Panamericana de Saúde; 2020[acesso 28 maio 2020]. Disponível em: https://www.paho.org/bra/index.php?option=com_content&view=article&id=6138:covid-19-oms-atualiza-guia-com-recomendacoes-sobre-uso-de-mascaras&Itemid=812
26. Sociedade Brasileira de Infectologia - SBI. Nota de esclarecimento sobre o uso de máscaras na pandemia de COVID-19. São Paulo: Sociedade Brasileira de Infectologia; 2020[acesso 29 maio 2020]. Disponível em: <https://www.infectologia.org.br/admin/zcloud/125/2020/04/c5365ba12b69b32bec977138d3cb97ce1e8d84acf183c034ad31a34a84c64817.pdf>
27. Brasil. Legislações estaduais. Portal Legis. 2020[acesso 4 jun 2020]. Disponível em: <http://legisweb.com.br/legislação>
28. Supremo Tribunal Federal - STF. Notícias e textos. Brasília: Supremo Tribunal Federal; 2020[acesso 2 jun 2020]. Disponível em: <http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=441447&ori=1>
29. Câmara dos Deputados. Projeto de lei N° 1.562, de 2020. Altera a lei N° 13.979, de 6 de fevereiro de 2020, para dispor sobre a obrigatoriedade do uso de máscaras de proteção individual para circulação em espaços públicos e privados acessíveis ao público, em vias públicas e em transportes públicos durante a vigência das medidas para enfrentamento da emergência de saúde pública de importância internacional decorrente da pandemia da COVID-19. Atividade Legislativa. 2020[acesso 20 jun 2020]. Disponível em: <https://www25.senado.leg.br/web/atividade/materias/-/materia/142022>
30. Redação. A resistência ao uso de máscaras. *Semanário*. 25 abr 2020[acesso 25 jun 2020]. Disponível em: <https://jornalsemanario.com.br/a-resistencia-ao-uso-de-mascaras/>
31. Prefeitura de Santos. Guarda municipal multa 14 e faz 168 abordagens na orla de Santos. *Notícia*. 22 jun 2020[acesso 25 jun 2020]. Disponível em: <https://www.santos.sp.gov.br/?q=noticia/guarda-municipal-multa-14-e-faz-168-abordagens-na-orla-de-santos>
32. Prefeitura de Santos. Justiça suspende liminar que isentava municípe de usar máscara facial em Santos. *Notícia*. 1 maio 2020[acesso 25 jun 2020]. Disponível em: <https://www.santos.sp.gov.br/?q=noticia/justica-suspende-liminar-que-isentava-municepe-de-usar-mascara-facial-em-santos#:~:text=Uma%20decis%C3%A3o%20judicial%20suspendeu%20o,utilizar%20m%C3%A1scara%20facial%20em%20Santos.&text=A%20partir%20dele%2C%20o%20autor,facial%20conforme%20determina%20do%20decreto>
33. Amorim D. Mesmo com decreto, uso obrigatório de máscaras encontra resistência em Manaus. *A Crítica*. 13 maio 2020[acesso 25 jun 2020]. Disponível em: <https://www.acritica.com/channels/manaus/news/mesmo-com-decreto-uso-obrigatorio-de-mascaras-encontra-resistencia-em-manaus>
34. Bernadete L, Lima V. Uso de máscaras encontra resistência na população. *Tribuna de Minas*. 20 abr 2020[acesso 24 jun 2020]. Disponível em: <https://tribunademinas.com.br/noticias/cidade/20-04-2020/obrigatoriedade-de-uso-de-mascaras-passa-a-valer-em-jf.html>
35. Emiliana C. Uso de máscara: teimosos e relapsos desafiam fiscalização da polícia militar em Belo Horizonte. *Estado de Minas*. 25 jun 2020[acesso 26 jun 2020]. Disponível em: https://www.em.com.br/app/noticia/gerais/2020/06/25/interna_gerais,1159931/uso-de-mascara-teimosos-e-relapsos-desafiam-fiscalizacao-da-pm-em-bh.shtml
36. Matos W. GDF pune Abraham Weintraub por andar sem máscara: veja a multa. *Jornal de Brasília Cidades*. 15 jun 2020[acesso 25 jun 2020]. Disponível em: <https://jornaldebrasil.com.br/cidades/gdf-pune-abraham-weintraub-por-andar-sem-mascara-veja-a-mult/>
37. Alves MS. Liminar obriga Jair Bolsonaro a usar máscara de proteção contra a COVID-19. *Conjur*. 23 jun 2020[acesso em 24 jun 2020]. Disponível em: <https://www.conjur.com.br/dl/decisao-liminar-jair-bolsonaro-mascara.pdf>
38. Kant I. *Fundamentação da metafísica dos costumes*. São Paulo: Abril Cultural; 1974.
39. Steinmetz W. *Vinculação dos particulares a direitos fundamentais*. São Paulo: Malheiros; 2004.
40. Sako ESA, Silva CL. *A aplicação do princípio da proporcionalidade na solução dos hard cases*. São Paulo: Revista dos Tribunais; 2005.



41. Ministério da Saúde (BR). Medidas profiláticas. Brasília: Ministério da Saúde; 2020[acesso 16 jun 2020]. Disponível em: <http://bvsm2.saude.gov.br/cgi-bin/multites/mtwdk.exe?k=default&l=60&w=1013&n=1&s=5&t=2>

42. Barcellos AP. Ponderação, racionalidade e atividade jurisdicional. Rio de Janeiro: Renovar; 2005.

43. Sarmiento D. A ponderação de interesses na constituição federal. Rio de Janeiro: Lumen Juris; 2003.

Authors' Contribution

Abud CO, Souza LP - Conception, planning (study design), data acquisition, analysis and interpretation and writing of the paper. All authors approved the final draft of the paper.

Conflict of Interest

Authors have no potential conflict of interest to declare, related to this study's political or financial peers and institutions.



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