

Parental authority and child vaccination: vulnerability and the best interest of the child and adolescent*

Autoridade parental e vacinação infantil: vulnerabilidade e superior interesse da criança e do adolescente

Ana Carolina Brochado Teixeira**

Joyceane Bezerra de Menezes***

Abstract

The text seeks to reflect on whether parents have a legal duty to vaccinate their children or whether this decision is in the sphere of family autonomy. Doctrinal and jurisprudential research was carried out, with a special focus on the STF decision that, in 2020, defined the mandatory vaccination of underage children by parents. Regardless of the parents' personal, philosophical and religious issues, the best interests of children and public health are the most relevant values that must be met in this conflict.

Keywords: mandatory vaccination; parental authority; family privacy; child and teenager.

Resumo

O texto busca refletir se os pais têm o dever jurídico de vacinar seus filhos ou se essa decisão está na esfera de uma autonomia familiar. Para tal, foi realizada pesquisa doutrinária e jurisprudencial, com especial enfoque à decisão do STF que, em 2020, definiu pela obrigatoriedade da vacinação dos filhos menores de idade pelos pais. Independentemente das questões pessoais, filosóficas e religiosas dos pais, o melhor interesse dos filhos e a saúde pública são os valores mais relevantes que devem ser atendidos nesse conflito.

Palavras-chave: vacinação obrigatória; autoridade parental; privacidade familiar; criança e adolescente.

1 Introduction

A debate that already existed and intensified in the times of the Covid-19 pandemic was the mandatory vaccination of children by parents. Many argue that this is a domestic deliberation that should follow the philosophy of life of the parents, family values and that they cannot be forced to act contrary to what they believe. On the other hand, there are those who argue that parents cannot compromise on the health of their children, and must follow government vaccination standards and

*Artigo traduzido por Inteligência Artificial.

**Doutora em Direito Civil pela UERJ. Mestre em Direito Privado pela PUC Minas. Especialista em Direito Civil pela Escuela di Diritto Civile – Camerino, Itália. Professora do Centro Universitário UNA. Coordenadora editorial da Revista Brasileira de Direito Civil – RBDCivil. Advogada. E-mail: anacarolina@tmg.adv.br. ORCID: <https://orcid.org/0000-0002-3684-8439> Lattes: <http://lattes.cnpq.br/6241012885069666>

***Doutora em Direito pela Universidade Federal de Pernambuco. Mestre em Direito pela Universidade Federal do Ceará. Professora titular da Universidade de Fortaleza - Programa de Pós-Graduação Stricto Sensu em Direito (Mestrado/Doutorado) da Universidade de Fortaleza, na Disciplina de Direitos de Personalidade. Professora associada da Universidade Federal do Ceará. Coordenadora do Grupo de Pesquisa CNPQ: Direito civil na legalidade constitucional. Fortaleza, Ceará, Brasil. Editora da Pensar, Revista de Ciências Jurídicas – Universidade de Fortaleza. E-mail: joyceane@unifor.br. ORCID: <https://orcid.org/0000-0002-5710-9977> Lattes: <http://lattes.cnpq.br/0894332127324044>

immunizers tested and approved by the National Health Surveillance Agency (Anvisa). In view of the polarization of positions, the following questions are asked: *Is the decision to vaccinate underage children within the scope of parental authority or is it a matter of public order and, therefore, heteronomous to the family?*

The clash becomes more complex when vaccination coverage aims to protect not only the individual health of the child, but to prevent the transmission of infectious diseases that threaten public health, in protection of the collective interest of the entire community¹. In 2016, Brazil received from the World Health Organization (WHO)², the certificate of elimination of measles, but two years later, the disease has again caused outbreaks in the country as a likely result of low vaccination coverage³ that has been recorded in the last five years⁴. Therefore, it is of fundamental importance to discuss the limits of parents' privacy regarding decisions that impact the physiopsychological integrity of their children, such as refusal to the vaccine.

¹"The vaccine is a preventive intervention recognized for its impact on reducing the morbidity and mortality of vaccine-preventable diseases. The practice of mass vaccination is based on the herd immunity characteristic of vaccines, in which vaccinated immune individuals indirectly protect unvaccinated individuals, which can generate the elimination of the circulation of the infectious agent in the environment and, consequently, the protection of the community and vulnerable individuals." (BARBIERI, Carolina Luisa Alves; COUTO, Márcia Thereza; AITH, Fernando Mussa Abujamra. Childhood (non) vaccination between culture and the law: the meanings attributed by middle-class couples in São Paulo, Brazil. *Cad. Saúde Pública* 2017; 33(2): e00173315. Available at <https://www.scielo.br/j/csp/a/NDSjRVCpw95WS4xCpxB5NPw/?lang=pt&format=pdf>. Accessed on 11.1.2021)

²According to news published on the Federal Government portal, Ministry of Health, Brazil receives a certificate of elimination of measles. Available at: <https://antigo.saude.gov.br/noticias/svs/25841-brasil-recebe-certificado-de-eliminacao-do-sarampo>. Accessed in: 11 jan. 2021.

³After being eliminated from the Americas in 2016 according to the World Health Organization (WHO), measles has once again become a Brazilian concern with the occurrence of two outbreaks in 2018 in the states of Roraima and Amazonas, in addition to confirmed cases so far in São Paulo, Rio Grande do Sul, Rondônia and Rio de Janeiro.

⁴According to Agência Brasil, "The last immunization goals for children achieved in the country, in 2018, were 99.72% of the target audience for BCG, and 91.33% for the vaccine against human rotavirus. For both, the goal is to exceed 90%, a level that was not reached in 2019, although they remained above 80%. By October 2, 2020, the immunization rate of the BCG target audience reached 63.88%, and the rotavirus vaccine, 68.46%. The highest coverage achieved in the children's calendar until October 2020 was in the Pneumococcal vaccine, with 71.98%. Last year, this same vaccine reached 88.59% of the target audience. Among the 15 vaccines in the children's calendar, which includes the second dose of the MMR, half have not met the targets since 2015, which includes the polio vaccine." Available at: <https://agenciabrasil.ebc.com.br/saude/noticia/2020-10/em-queda-ha-5-anos-coberturas-vacinais-preocupam-ministerio-da-saude>. Accessed in: 11 feb. 021.

2 Parental authority functionalized to the best interests of the child

In addition to filiation, the legal bond that binds parents to their minor children is called family power by the Civil Code. However, the term authority is preferred, which, because it better translates the idea of function or *function*, bases its legitimacy on the search for the realization of the interest of the other, while also maintaining the idea of hierarchical ascendancy.⁵

According to Maria Celina Bodin de Moraes, the word *responsibility* would better translate this bundle of legal positions closed by the parents⁶. In the same sense, Jean-Pierre Lebrun argues in his book *A World Without Limits*⁷. Argentine and Portuguese⁸ legislation, on the other hand⁹, have opted for the phrase *parental responsibility*.

The fact is that, within the democratic family, established on the basis of equality, mutual respect, autonomy and the dialogical relationship, parental interaction is not imposed by hierarchy¹⁰, despite the duty of obedience that children have in relation to their parents (Art. 1.634, IX, CC). Under the terms of the Federal Constitution, the parental authority has the duties of raising, educating and assisting their minor children (Art. 229), in order to promote their personality development. In the early years, heteronomous care is given prestige and, gradually, with the

⁵ LOBO, Paulo. Civil Law, Families. Vol. 5, São Paulo: Saraiva, 2019, p. 304. In the same sense: "New designations for the classic institute of paternal power seek to express the dominant commitment with its effective content. French Law No. 70-459, of June 4, 1970, is in this respect truly paradigmatic: it replaces the old expression *puissance paternelle* of the *Code Napoléon*, literal translation of *Patria potestas* of Roman law, by *autorité parentale*. Here not only is the double attribution of function in the adjective parental, common of father and mother, as opposed to *Paternel*, only relative to father-man. The term power is also deposited in favor of authority. Now, authority is a concept dominated by the idea of function and in its evangelical lineage it takes on the deepest meaning of gift and service." (VILLELA, João Baptista. Freedom and family. Belo Horizonte: Revista da Faculdade de Direito da UFMG, 1980, p. 29).

⁶ "The term 'responsibility' is the one that best defines the parenting relationship today. It is an asymmetrical relationship between people who are in different positions, one of them being endowed with effective vulnerability (even if temporary)" (Moraes, Maria Celina. The new family, again – Structures and function of contemporary families. Pensar, Fortaleza, v. 18, n. 2, p. 587-628, mai./ago. 2013, p. 601).

⁷ LEBRUN, Jean-Pierre. *A world without limits*: Essay for a psychoanalytic clinic of the social. Rio de Janeiro: Companhia de Freud, 2004.

⁸ Argentine Civil Code. Title VII. Parental responsibility Chapter 1. *Principios generales de la responsabilidad parental* Artículo 638. Parental responsibility. Parental responsibility is the set of rights and rights that correspond to parents on the person and children of the child, for their protection, development and integral training when they are younger and not emancipated.

⁹ Portuguese Civil Code. Article 1877 of the (DurationOfparental responsibilities). Children are subject to *Toparental responsibilities* until the age of majority or emancipation.

¹⁰ BODIN DE MORAES, Maria Celina. The new family, again – Structures and function of contemporary families. Pensar, Fortaleza, v. 18, n. 2, p. 587-628, mai./ago. 2013, p. 587-628. Available at <https://periodicos.unifor.br/rpen/article/view/2705/pdf>. Accessed on 11. jan.2021.

expansion of the child's maturity and autonomy, greater space is given to his freedom. Care is taken to emancipate¹¹. Throughout this process, however, parents have a peremptory duty not to cause harm to their children who are not only the object of protection, but also vulnerable people in the development phase. During childhood and adolescence, when maturity is progressively attained, lived experiences must be protected under a special tutelage.

Special addressees of the International Convention on the Rights of the Child (UN Resolution No. 44/25) of 1989, children and adolescents are protected at the international level and in domestic law by the principles that inform the doctrine of full protection: the principle of best interest and that of absolute priority. In Brazil, the doctrine of full protection is based on the above Convention, to which the country is a signatory, on the Constitution of the Republic (Art. 227) and on the Statute of the Child and Adolescent (Articles 3 and 4).

Under this preference, the State, private individuals and the family, notably the parents, will be bound by the duty to serve the best interest of the child/adolescent, when they have to make decisions that impact their legal sphere, in order to guarantee them maximum well-being (Art.3). The correlation and subjection of parental authority to the doctrine of full protection, notably to the principle of best interest, in the discharge of its attributions, is inexorable.

In the early stages of the child's life and even in early adolescence, heteronomous parental intervention, in the diction of what this best interest is, will be much more intense and will consequently highlight a greater responsibility for oneself; because the vulnerability of the child/adolescent, common to this stage of life, will not allow him to understand what is best for his healthy development. However, even if immaturity does not allow him to make an independent decision, respecting the degree of development achieved, this child should be involved in decisions on issues that are pertinent to him, given his right to be heard.

After all, upbringing and education must enable children to achieve responsible autonomy, through a dynamic and dialogical educational process that evokes their participation, allows gradations and adaptation of freedom to the vicissitudes and peculiarities of their personality, so as to verify the need for the intensification or retreat of parental heteronomy. Encouraging the child

¹¹ BODIN DE MORAES, Maria Celina; MENEZES, Joyceane Bezerra de. Parental authority and privacy of the minor child: the challenge of caring to emancipate. *New Legal Studies Journal – Eletrônica*, v. 20, n. 2, May./Aug. 2015, p. 501-532.

to develop responsible autonomy is equivalent to respecting his process of achieving maturity so that he can make his own choices.

As the process of independence of the child/adolescent intensifies, the personal exercise of fundamental rights becomes broader, proportionally reducing the radius of intervention of parental authority. In short, under the influence of constitutional norms, parental authority is more necessary when the child is not able to take responsibility for his or her actions.

A priori, it is considered that children and adolescents have not developed broad autonomy and, for this reason, parental authority is entrusted with the role of leading them along paths that they are still unaware of, while they are building their maturity. At this stage, they cannot yet fully enjoy their fundamental right to freedom, as they do not yet have the full psychic conditions to do so. For their own well-being, they live in a phase of "oriented freedom", whose radius of amplitude increases as they mature.

As long as they cannot manage their own lives, parents will be called not only to the daily care of food, health and education, but also to the duty of providing them with the general conditions for their full development, providing them with care for their body, mind and sociability. Studies in psychology are eloquent in stating that the treatment we receive during early childhood has decisive consequences for the rest of life¹².

Unfortunately, however, there is no preparatory course for the exercise of such a *complex munus* as parental authority. Even if there were, it would certainly not account for the many surrounding variables. Hence the common sense that the exercise of this parental authority or responsibility continues to be a "challenge full of problems, difficulties, fears and doubts"; and that, sometimes, parents carry marks of abuse and neglect that will negatively interfere with their way of caring (or not caring). There are other situations in which the choice of the paths to be followed, in the best interest of the child, involve more complex ethical clashes that divide the parents' opinion among themselves and/or raise questions on the part of society and the State, as in

¹² According to Winnicott, the importance of the care and attention given to the child, including in the prenatal phase, for the person he will become in adult life is more than proven (Winnicott, Donald W. *It all starts at home*. São Paulo: Martins Fontes, 1999). In the same vein, Neufeld and others (Neufeld, George; MATÉ, Gabor. *Hold On to Your Kids. Why parents must matter more than peers*. Toronto: Vintage Canada, 2005).

the example of the clash over *homeschooling*¹³, the refusal of blood transfusion and the vaccine, theme of this chapter.

The tension arises, in many cases, between the parents' right to privacy regarding the choice of what is best for their children, their fundamental rights and, not infrequently, the State's understanding of what is of superior interest. Parents' choice as to what they think is best for their children is not always the objective and unquestionable representation of the child/adolescent's best interests in the specific situation. It is not simple to establish the choice compatible with the child's best interests because this principle, due to its abstraction, does not have a pre-established content. In any case, it is possible to establish markers that can guide, in the casuistry, the identification of its conceptual contours. The most elementary premise is that the realization of the best interest is intertwined with respect for the fundamental rights of children and adolescents, provided for in Article 227 of the Federal Constitution and detailed in the Statute of the Child and Adolescent (ECA).

Since the child is a subject of rights, the care that parents dedicate to him cannot take place in a space of absolute discretion. Everyone lives under the influence of norms that direct their conduct, sometimes to allow coexistence in society, through respect for the rights of others; sometimes to, under some legal paternalism, protect everyone from themselves. Despite the legitimate presumption that parents are the ones who can best understand what is best for their children, this is not inexorable. Recent statistics show that children suffer more abuse from their family members, in the environment of their own home, than from strangers, on the street¹⁴. Those who should take care are, in many cases, the ones who end up unprotecting and offending.

¹³ BODIN DE MORAES, Maria Celina; SOUZA, Eduardo Nunes de. Education and culture in Brazil: the issue of homeschooling. In: Ana Carolina Brochado Teixeira; Luciana Dadalto (Org.). *Parental authority: contemporary dilemmas and challenges*. Indaiatuba: Foco, 2019, pp. 93-124.

¹⁴ Most of the aggressions happen in the family environment, which makes it difficult for them to be identified. According to a survey by the Brazilian Society of Pediatrics (SBP), 60% of aggressions happen inside the home" (Invisible violence: 11 children are assaulted or neglected per hour in Brazil. Available in <https://www.correiobrasiliense.com.br/brasil/2021/05/4925518-violencia-invisivel-criancas-sofrem-dentro-de-casa-e-pandemia-ajuda-a-encobrir-casos.html>. Accessed on 23.10.2021).

3 Vulnerability of the child in the face of parents/guardians

Parents cannot be negligent in the discharge of the parental *role*, nor incur in abuse in the performance of these duties. On the one hand, they have the freedom to choose what is best for themselves and their children, according to their own moral, religious and ideological values; but on the other hand, they will not be able to superimpose these same values on the set of fundamental rights of the child/adolescent, risking their life or putting their health at risk. Even fewer will be able to subject their children to a serious risk of harm.

To avoid this *appropriation* of the unequivocal *power-to-say* of what is the best interest of the minor child, parental heteronomy coexists with state heteronomy, since it will also be the duty of the State to care for children and adolescents, as required by the doctrine of full protection, especially in situations in which the parents' decision potentially implies risks of irreversible damage. When the Constitution entrusts parents with the primary task of caring for their children, allowing them to make choices in their favor, it does not give them permission for abuse. For this reason, it is also up to society and the State, especially the State, to intervene in favor of the child/adolescent.

If there is a tension between parental heteronomy and state heteronomy, the casuistic solution will require great zeal. Although the courts do not have a ready-made concept for what is the principle in the *best interest of the child and adolescent*, they use some guidelines to guide their assessment in the case. In the case of blood transfusions, for example, the life and health of the child prevailed before the religious dogmas of the parents, arguing that, in most cases, the child or adolescent does not have the complete psychic development to make irreversible choices¹⁵. In the case of *homeschooling*, the need to ensure social coexistence often prevailed. More recently, however, the Federal Supreme Court ruled on the constitutionality of homeschooling, noting the need for specific regulation to control its practice¹⁶. Regarding the refusal of vaccination, there

¹⁵ On the subject, see: SÊCO, Thais Fernanda Tenório. For a new hermeneutic of the rights of children and adolescents. *civilistica.com*, v. 3, n. 2, p. 1-26, 10 dez. 2014.

¹⁶ Summary: Constitutional. Education. Fundamental Right Related To The Dignity Of The Human Person And The Effectiveness of Citizenship. Joint Duty of the State and the Family in the Provision of Elementary Education. Need For a Formal Law, Enacted by the National Congress, to Regulate Homeschooling. Appeal Dismissed. 1. Education is a fundamental right related to the dignity of the human person and to citizenship itself, as it performs a double function: on the one hand, it qualifies the community as a whole, making it enlightened, politicized, developed (citizenship); on the other hand, it dignifies the individual, the true holder of this fundamental subjective

have already been decisions honoring the philosophical motives of parents, but the recent understanding of the Federal Supreme Court has pacified the issue, as will be seen below, to ensure mandatory immunization.

It is observed that there are still risks of unfortunate choices by parents and the State. Between one mistake and another, the case of the parents who denied blood transfusion to the young child, in the name of religious norms, compromising his life, is recalled. In 2018, when mother and daughter refused the procedure, a single judge of the childhood court, in the district of Fortaleza (Ceará), authorized the hospital to amputate the femur of the 16-year-old girl affected by serious cancer, with metastasis, causing her death, three months later¹⁷.

Following the orientation of the English doctrine, proposed by Douglas Diekema¹⁸, it is interesting to observe the legitimacy of the State's intervention in the face of parental authority.

right (dignity of the human person). In the case of compulsory basic education (FC, Art. 208, I), the holders of this unavailable right to education are school-age children and adolescents. 2. It is the duty of the family, society and the State to ensure that children, adolescents and young people have an absolute priority. The Federal Constitution enshrined the duty of solidarity between the family and the State as the main nucleus for the educational formation of children, young people and adolescents with the dual purpose of fully defending the rights of children and adolescents and their formation in citizenship, so that Brazil can overcome the great challenge of a better education for the new generations, essential for countries that want to see themselves developed. 3. The Federal Constitution does not absolutely prohibit homeschooling, but prohibits any of its species that does not respect the duty of solidarity between the family and the State as the main nucleus for the educational formation of children, young people and adolescents. Therefore, the types of *unschooling* radical (radical unschooling), moderate unschooling (moderate unschooling), and *homeschooling* pure, in any of its variations. 4. Homeschooling is not a subjective public right of the student or his family, but its creation is not constitutionally prohibited by means of a federal law, enacted by the National Congress, in the "utilitarian" or "for circumstantial convenience" modality, provided that the obligation is complied with, from 4 to 17 years old, and the family/State solidarity duty is respected, the basic core of academic subjects, supervision, evaluation and inspection by the Public Power; as well as the other provisions directly imposed by the constitutional text, including with regard to the purposes and objectives of education; in particular, to prevent school dropout and ensure the socialization of the individual, through extensive family and community life (FC, Art. 227). 5. Extraordinary appeal dismissed, with the establishment of the following thesis (TOPIC 822): "There is no subjective public right of the student or his family to homeschooling, which does not exist in Brazilian legislation". (RE 888815, Rapporteur: ROBERTO BARROSO, Rapporteur for Judgment: Alexandre de Moraes, Full Court, judged on 09/12/2018, Electronic Process General Repercussion – Merit DJe-055 DIVULG 03-20-2019 PUBLIC (Isn't it missing to complete these words? If yes, in addition to completing, leave only the first one in capital letters. Unless this is the standard in Law) 21-03-2019). (Does the text of the constitution come in capital letters? If not, put it in lowercase, save the first letter of the sentence).

¹⁷ Loss/suspension of family power. Applicant: Public Prosecutor's Office of the State of Ceará. Defendant: J.S.S.A and another. No0126471-89.2018.8.06.0001. 3a. Child and Youth Court. District of Fortaleza – Ceará.

¹⁸ To be used as a beacon for State intervention, "the attempt to avoid damage", Diekema says " *While there are good reasons for granting parents significant freedom in making health care decisions for their children, there are certain decisions that are sufficiently harmful that they ought not to be allowed. The best interest standard has long been used to identify the threshold at which the state is justified in interfering with parental decision-making. In practice, however, parents cannot and should not always be expected to make decisions that are in the child's best interest. Using such a standard disallows other important considerations that might conflict with the child's best interest. The harm principle provides a foundation for interfering with parental freedom that more accurately*

Their intervention is not to define what is in the best interest of the child, but to prevent parents from putting the child at significant risk of serious and avoidable harm. If a certain decision of the parents is likely to cause greater harm to the child or is not sufficient to avoid it, according to a universal judgment that may develop in a given time and place, this choice does not seem to be adequate to the best interest of the child, legitimizing state intervention¹⁹. Thus, although the proposed solution seems a little more objective, it still offers operational difficulties, as the concept of damage will not always be self-evident. Sometimes, it is decided under the belief that it is doing what is best to avoid the risk of damage, when, in fact, the possibilities of its occurrence are expanded.

At the present time, the anti-vaccine movement is growing around the world, highlighting the refusal of parents to immunize their children as a global problem that has given rise to State intervention.

4 Vaccination and freedom: between individual health and collective interest

This anti-vaccine wave that affects the whole world led the World Health Organization (WHO), in 2019, to include *vaccine hesitancy*²⁰ among the ten biggest global threats to health. In fact, the number of measles cases registered in the first half of 2019 was the highest observed since 2006: there were 364,808 cases spread across 182 countries. In the first quarter of that year alone,

describes an appropriate standard for interfering with parents who refuse to consent to medical treatment on behalf of a child. State intervention is justified not when a parental refusal is contrary to a child's best interest, but when the parental refusal places the child at significant risk of serious preventable harm". In free translation: "While there are good reasons to grant parents significant freedom in making decisions about health care for their children, there are certain decisions that are sufficiently harmful that they should not be allowed. The best interest standard has long been used to identify the limit at which the state is justified in interfering in parental decision-making. In practice, however, parents cannot and should not always be expected to make decisions that meet the interests of the child. Using such a standard does not allow for other important considerations that may conflict with the best interests of the child. The harm principle provides a basis for interfering with parental freedom that more accurately describes an appropriate standard for interfering with parents who refuse to consent to medical treatment on behalf of a child. State intervention is not justified when the parents' refusal is contrary to the best interests of the child, but when the parents' refusal puts the child at significant risk of avoidable serious harm." DIEKEMA, DS. Parental refusals of medical treatment: the harm principle as threshold for state intervention. *Theor Med Bioeth* 2004; 25:243–64. Available at: <https://philpapers.org/rec/DIEPRO>. Accessed in: 11/02/2021.

¹⁹ BIRCHLEY, Giles. *Harm is all you need? Best interests and disputes about parental decision-making*. *Med Ethics* 2016; 42:111–115. doi:10.1136/medethics-2015-102893, p.111.

²⁰ WHO. Ten health threats that WHO will tackle in 2019. Available: <https://www.paho.org/pt/noticias/17-1-2019-dez-ameacas-saude-que-oms-combatera-em-2019>. Accessed in: 10/30/2021.

the WHO reports, there was a 300% increase in cases of the disease, compared to the same period in 2018. In Brazil, the epidemiological bulletin of the Ministry of Health released on September 4, 2019²¹, shows that the disease was registered in 13 states, confirming a total of 2,753 cases. São Paulo was the most affected state, accumulating 98% of the cases.

In previous years, the national polio vaccination campaign, which has already reached 97% of the proposed goal, has been seriously discredited. In 2020, shortly before its closure, about 7.3 million children had not yet been immunized with this vaccine, when the goal was to reach 11.2 million. At the end of the campaign period, only 56.8% of the recipients had received the immunization, leading the Ministry of Health to determine its extension²². The multi-vaccination campaign aimed at adolescents up to 15 years old was also unsuccessful, given that it reached only 68% of the target audience.

The National Vaccination Program institutes an annual immunization calendar that is also aimed at children and adolescents up to 15 years of age, aiming to reduce the risk of contamination and transmission of vaccine-preventable diseases. The Program offers fourteen types of vaccines free of charge that protect against about 20 diseases²³, all of which are certified in their quality by health surveillance control agencies. Administered in private clinics, they would exceed the approximate total cost of five thousand reais per person. Despite all this effort and the merits of the National Vaccination Program – one of the best in the world – immunization rates have fallen in Brazil, notably those administered during the first year of age²⁴. And the reasons are the most varied.

It dates back to 1998, the historic milestone of the *anti-vaccine wave*, when an article with falsified information was published in *The Lancet*, correlating autism as an adverse effect of

²¹ BRAZIL. Ministry of Health. Epidemiological bulletin no.21. Available at:

<https://portalarquivos2.saude.gov.br/images/pdf/2019/setembro/05/BE-21-influenza-04set19.pdf>. Accessed in: 11/29/2021.

²² CONASEN: National Council of Municipal Health Secretariats. Vaccination: 7 million children have not yet been vaccinated against polio. Available at <https://www.conasems.org.br/ministerio-da-saude-inicia-campanha-de-vacinacao-de-criancas-e-adolescentes-em-todo-o-brasil/>. Accessed on 11.1.2021.

²³ BCG (tuberculosis); rotavirus (diarrhea); oral and intramuscular poliomyelitis (infantile paralysis); pentavalent (diphtheria, tetanus, pertussis, hepatitis B, Haemophilus influenza type b – Hib); Pneumococcal; Meningococcal; DTP; MMR (measles, mumps and rubella); HPV (prevents cervical cancer and genital warts); in addition to vaccines against yellow fever, chickenpox and hepatitis A.

²⁴ The Brazilian Society of Pediatrics reports the drop in immunization rates for children under 1 year of age. <https://www.sbp.com.br/imprensa/detalhe/nid/vacinacao-de-menores-de-um-ano-de-idade-atinge-menor-nivel-em-16-anos/>. Accessed on 11.1.2021.

vaccines. Although the journal recognized the error of the published research and removed the text from the journal in 2011, the damage had already been done in favor of the anti-vaccine movement that uses social networks to disseminate doubts about the safety of vaccines, through fallacious, scientifically fragile arguments or conspiracy theories that associate immunization with all kinds of biological warfare.

Fake news has also been a factor that adds up to the growing distrust of the population in relation to the efficiency and safety of immunizers, warns the pediatric infectious disease specialist at the Fernandes Figueira Institute (IFF/Fiocruz), Marcio Nehab²⁵. Together, all these factors have been effective in discouraging the vaccine for a generation that did not grow up seeing friends and relatives contract polio or measles. The famous Frida Kalo, for example, was affected by polio as a child and, as a result, suffered severe limitations that did not fall on those who had access to the polio vaccine.

In addition to misinformation, there are still cases in which parents refuse vaccination for ideological or religious reasons, under the false impression that the fate of their children is exclusively in their hands²⁶. In Brazil, these cases are less expressive, although they exist. The case judged by the Court of Justice of São Paulo that assessed the refusal of parents to vaccinate their children is cited, alleging the ideological principles associated with the vegan philosophy that, according to them, repudiates "invasive interventions".²⁷

Refusing a vaccine proven to be safe and certified by health control agencies may qualify as parental negligence, given the legal provision on mandatory vaccination (Art.14, ECA).²⁸ Law No.

²⁵ MAYAN Maria de Lourdes de Sousa, BALLALAI Isabella and NEHAB, Marcio. Anti-vaccine movement and its threats. Available at: <https://www.youtube.com/watch?v=ZkhjyQ0wBR8&feature=youtu.be>. Accessed on 10/27/2021.

²⁶ "Couples who did not vaccinate associated the act of not vaccinating as care for the child, in contrast to the legal perspective, which confers on this practice (excluding established medical contraindications) the value of neglect to the minor, since this health tool is scientifically proven to be beneficial to child health. Under the moral basis that parental responsibility and duty is to choose what is best for the child regardless of established normative impositions, parents who have not vaccinated already differ from the two groups (those who have vaccinated and selected) by not attributing a positive value to vaccination, on the contrary, it is questioned and rejected as an action favorable to the child's health." (BARBIERI, Carolina Luisa Alves; COUTO, Márcia Thereza; AITH, Fernando Mussa Abujamra. Childhood (non) vaccination between culture and the law: the meanings attributed by middle-class couples in São Paulo, Brazil. *Cad. Public health* 2017; 33(2):e00173315. Available at <https://www.scielo.br/j/cspa/a/NDSjRVcpw95WS4xCpxB5NPw/?lang=pt&format=pdf>. Accessed on 1.11.2021).

²⁷ FIOCRUZ. News: justice protects children and adolescents against anti-vaccination movement – available at: <https://portal.fiocruz.br/noticia/justica-protege-criancas-e-adolescentes-contra-movimento-antivacina>. Accessed in: 01/11/2021.

²⁸ Article 14, first paragraph of the Statute of the Child and Adolescent – ECA provides: "It is mandatory to vaccinate children in the cases recommended by the health authorities."

6,259, of 1973, which deals with the National Immunization Program and its regulation, also provides for the mandatory nature of the vaccine provided for in the annual calendar, currently defined by Ordinance No. 1,498/2013, of the Ministry of Health.

Despite the normative provision on the duty of parents to vaccinate their children, the objection based on ideological, philosophical or religious reasons has grown and reached the Judiciary, as well as the refusal to have blood transfusions on religious grounds. It is noted that the search for a more natural lifestyle, with fewer external interventions – even medical and scientific – has also gained space in the universe of those who do not intend to vaccinate their children:

In the reports of these couples who did not vaccinate, there was a predominance of support based on symbolic-practical references that value and seek humanized childbirth, a healthier life, less medical-hospital intervention in health processes (as opposed to those of disease) – such as childbirth seen as physiological and not pathological, child care in healthy children, etc. – and the autonomy of parental decisions in the face of State or biomedicine and Public Health norms in care infantile. The justifications reported by these couples, which supported the problematization of vaccination and the decision not to vaccinate – disclosed in a previous study that focused on the interface between parental care and vaccination of children – were: the argument that the disease is eliminated or that it is mild, fear of adverse events, criticism of the composition of the vaccines, its effectiveness, the vaccination schedule recommended in Brazil, the financial interest and profit of the pharmaceutical industries and the choice of other forms of health protection (with a more natural lifestyle). Vaccines were not problematized in the same way, criticism stood out for the oral poliomyelitis and measles-mumps-rubella vaccine, due to the risk of adverse events and the perception that these diseases are controlled in the country, and for rotavirus and influenza, as they are considered mild diseases²⁹.

It is important to consider that the refusal of parents to vaccinate their minor children exceeds the limits of parental authority, notably, their freedom/privacy to define the way they raise and educate them. It offends the subjective right of children and adolescents to receive immunization, failing to comply with a cogent legal rule based on Article 14, first paragraph of the ECA and compromises community health, since it favors the facilitation of the transmission of vaccine-preventable contagious diseases.

According to the medical protocol, the act of not vaccinating children in cases that do not fall within the technical contraindications is considered parental negligence or omission of care. As a result, it is up to the health professional to inform the competent authorities of the refusal.

²⁹ BARBIERI, Carolina Luiza Alves; COUTO, Maria Thereza; AITH, Fernanda Musa A. Childhood (non) vaccination between culture and law: the meanings attributed by middle-class couples in São Paulo, Brazil. Available at: <https://www.scielo.br/j/csp/a/NDSjRVcpw95WS4xCpxB5NPw/?lang=pt>. Accessed in: 09/20/2021.

In addition to the aforementioned legal norms, the manuals, protocols and technical guidelines that guide the professional practice of doctors and health professionals in the biomedical sphere attribute to the act of "not vaccinating" children, in cases that do not fit the formal contraindications of a technical nature, the value judgment of parental negligence or "omission of care". Non-vaccination becomes legally and technically understood as a refusal of a conduct proven to be beneficial to the child. For example, in a document from the Federal Council of Medicine, when the professional is faced with the refusal of childhood vaccination by the parents, "the best interest of the minor must prevail and the responsibility of the doctor and the hospital institution exists independently of that of the parents. Therefore, whether or not the parents or guardians are at fault, it is necessary to notify and make a decision in favor of the protection of this minor, who is suffering a situation of helplessness".³⁰

In this sense, Bill 3842/2019 criminally typifies the conduct of parents or guardians related to omission or opposition to the vaccination of children or adolescents, including an article in the Penal Code with the following content:

"Omission and opposition to vaccination

Article 247 - To omit or oppose, without justifiable cause, the application of the vaccines provided for in the public immunization programs in children or adolescents subject to their family power, or under their guardianship.

Penalty – detention, from one month to one year, and fine.

Sole Paragraph. Anyone who disseminates, propagates and disseminates, by any means, false news about vaccines that are part of public immunization programs incurs the same penalties.

Since the paternal/maternal refusal to vaccinate the child can result in significant damage to the child's health, the intervention of the State to demand compliance with the duty of immunization is justified, whose interference is also anchored in the defense of collective health. As long as there is no medical recommendation to the contrary, in view of the child's personal condition, parents must immunize him/her.

5 What the case law says: mandatory vaccination by the Supreme Court

Decisions collected from the Court of Justice of São Paulo (TJSP), Court of Justice of Minas Gerais (TJMG) and Court of Justice of Santa Catarina (TJSC) show situations in which the State intervened in the face of the parents' vaccine refusal, correlating vaccination as more appropriate

³⁰ BARBIERI, Carolina Luisa Alves; COUTO, Marcia Theresa; AITH, Fernando M. Abujamra. Childhood (non) vaccination between culture and the law: the meanings attributed by middle-class couples in São Paulo, Brazil. *Cad. Public health* 2017; 33(2):e00173315. Available at: <https://www.scielo.br/j/csp/a/NDSjRVcpw95WS4xCpxB5NPw/?lang=pt&format=pdf> Accessed on 11 dez. /2021.

to the best interest of the child/adolescent. In 2019, by decision of the Court of Appeals of São Paulo, in the records of Civil Appeal No. 1003284-83.2017.8.26.0428, in an action proposed by the Public Prosecutor's Office-MP, in view of the parents' refusal to vaccinate their child under three years of age who had never taken any immunizer, it determined the update of the child's vaccination card. The parents claimed freedom of conscience and in this they were met by the sentence that dismissed the lawsuit. But in an appeal, the MP's reasons were accepted by the Court, which did not observe, in the records, any concrete reason that informed the possible risk of the immunizer to the child's health to justify the refusal.

The parents supported their claims in the aforementioned article published by the journal *The Lancet*, whose scientific credibility was rejected by the journal itself. The TJSP ruled that both the American Food and Drug Administration (FDA) and Anvisa have positioned themselves against the allegations of alleged risks caused by vaccine components and that many publications in accredited scientific journals are in favor of mandatory immunization. In the end, the TJSP ordered the vaccines to be provided within 30 days, under penalty of search and seizure of the child.

In Santa Catarina, the refusal of a couple to vaccinate their three minor children led to a lawsuit filed by the public prosecutor's office and an interlocutory decision, determining vaccination. The couple aggravated the instrument, alleging ideological reasons for the refusal, added to the alleged intolerance of the children to the immunizer. An interlocutory decision of the TJSC determined the complementation of the decision of *the lower court*, ending a prior medical consultation in order to verify the convenience of immunization. Final decision of the appeal, rendered by Des. Carlos Roberto da Silva, from the same court, ordered the couple to update the vaccination card of their three children, in July 2019. According to him, in the absence of a concrete risk to the health of minors, the decision in favor of the vaccine is based on the Constitution: "*There is the framework that begins in the Constitution, because it is the State's obligation to guarantee health and this supersedes certain personal convictions. The ECA also contemplates the obligation of parents in relation to health and education. Vaccination is the duty of parents and the right of children and adolescents*".³¹

³¹ Interlocutory Appeal. Representation for the Investigation of an Administrative Infraction Cumulated With an Obligation to Do. Intentional or Culpable Non-Compliance With a Duty Inherent to Family Power. Decision that, in Anticipation of Guardianship, Determined that the Parents Should Make Efforts so that Their Children Were Submitted to Mandatory Vaccines, Under Penalty of a Fine. Insurgency of the Represented. Theses of Inexistence

In the same period, the Minas Gerais Court ordered a couple to vaccinate their two children, despite their excuse being anchored in religious reasons. After losing the lawsuit in the first instance, they filed an appeal with the TJMG, but were dismissed. In the decision, Judge Dárcio Lopardi Mendes cited the Constitution, "*which states that health is everyone's right and it is the duty of the State to ensure it, in order to safeguard a greater good: life*".³²

The discussion reached the Federal Supreme Court – STF, based on that action promoted by the Public Prosecutor's Office of the State of São Paulo. After the TJSP granted the appeal, determining the vaccination of the children despite the ideological conviction of the parents, they continued the lawsuit under the argument that the obligation of Art.14, paragraph one of the ECA should be weighed against the privacy and freedom of the parents.

In the Extraordinary Appeal (RE No. 1267879), they argued that the child enjoys good health conditions, although he has not been vaccinated and that the choice not to vaccinate does not constitute an act of negligence, but an excess of zeal in relation to the alleged risks involved in childhood vaccination, according to ideological and informed reasons. They also claimed that the mandatory vaccination of children, provided for in Article 14, paragraph 1, of the Statute of the Child and Adolescent (ECA) and in infra-legal norms, must be weighed against freedom of conscience, philosophical conviction and intimacy, guaranteed in the Constitution.

Recognizing the general repercussion, the rapporteur Justice Luis Roberto Barroso provided, in summary, on the need to analyze the limits of private autonomy, in the face of state impositions:

of Danger of Delay to Support the Preliminary Decision of the First Degree and of Just Refusal of the Mandatory Vaccination Procedure. Loss of Object. Supervening of the Original Judgment that Extinguished the Proceeding With Assessment of the Merits. Analysis of Nonconformity Impaired. Appeal Not Known. (Tj-Sc - Ai: 40200870220198240000 Rio Do Sul 4020087-02.2019.8.24.0000, Rapporteur: Carlos Roberto Da Silva, Judgment Date: 11/21/2019, Seventh Chamber Of Civil Law).

³² Summary: Civil Appeal – Protection Measure – Right To Health – Mandatory Vaccination – Collective Right – Best Interest Of The Minor – Religious Freedom – Consideration. Vaccination consists not only of an individual right, but of a collective right, since its object is the reduction, or even the eradication of diseases. The interpretation that is made is that the rules of regency seek to guarantee the health of the individual and, consequently, of the entire population, being, therefore, something above personal choice, since it involves the reduction of exposure to risk and contagion of certain diseases and also avoids the reappearance of diseases considered eradicated. In consideration of the Constitutional Principle of Best Interest, parents cannot refuse to vaccinate their children when seeking to achieve their full development, which, of course, involves the right to health in all its forms, including prevention through vaccination. The interest of the minor overrides any particular interest of the parents. The imposition of immunization does not violate the right to religious freedom, since this is not absolute, it is subject to consideration and, thus, there is no talk of the parents' right to choose, but of the child's right to health. (TJ-MG - AC: 10518180076920001 MG, Rapporteur: Dárcio Lopardi Mendes, Judgment Date: 12/12/2019, Publication Date: 12/17/2019),

On the one hand, there is the right of parents to direct the upbringing of their children and the freedom to defend the ideological, political and religious banners of their choice. On the other hand, there is the duty of the State to protect the health of children and the community, through preventive health policies against infectious diseases, such as childhood vaccination".³³

He maintained that freedom of conscience, a constitutionally guaranteed right to allow the person to make his or her existential choices (Art.5, VI and VIII), according to what he calls "good life", is not an absolute right; it finds limits in other rights of the same stature, in this case, the defense of the life and health of all (Articles 5 and 196) and the priority protection of children and adolescents (Article 227). He recalled the old and recent laws (Law No. 6,259/1975; Law No. 8,069/90 and Law No. 13,979/2020) that establish the mandatory nature of vaccination. In short, it

³³ Summary: Constitutional law. Extraordinary appeal. General repercussion. Mandatory vaccination of children and adolescents. Illegitimacy of parents' refusal to vaccinate their children for reasons of philosophical conviction. 1. Appeal against a decision of the Court of Appeals of the State of São Paulo (TJSP) that determined that vegan parents submit their minor child to vaccinations defined as mandatory by the Ministry of Health, despite their philosophical convictions. 2. The fight against epidemics is an ancient chapter in history. Despite the fact that Brazil and the world are currently experiencing the biggest pandemic in the last hundred years, that of Covid-19, other highly contagious diseases had already challenged science and public authorities. In numerous scenarios, vaccination has proven to be an effective preventive method. And, in certain cases, it was responsible for the eradication of the disease (such as smallpox and polio). Vaccines have proven to be a great invention of medicine for the benefit of humanity. 3. Freedom of conscience is constitutionally protected (Art. 5, VI and VIII) and is expressed in the right of every person to make his or her existential choices and to live his or her own ideal of the good life. It is common sense, however, that no right is absolute, finding its limits in other constitutional rights and values. In the case under examination, freedom of conscience must be balanced with the defense of the life and health of all (Articles 5 and 196), as well as with the priority protection of children and adolescents (Article 227). 4. For a long time, Brazilian law has provided for mandatory vaccination. Currently, it is provided for in several laws in force, such as Law No. 6,259/1975 (National Immunization Program) and Law No. 8,069/90 (Statute of the Child and Adolescent). Such a provision has never been considered unconstitutional. More recently, Law No. 13,979/2020 (referring to measures to combat the Covid-19 pandemic), an initiative of the Executive Branch, instituted a command along the same lines. 5. It is legitimate to impose the compulsory nature of vaccines that are registered with a health surveillance agency and in relation to which there is a medical-scientific consensus. Several grounds justify the measure, including: a) the State may, in exceptional situations, protect people even against their will (dignity as a community value); b) vaccination is important for the protection of society as a whole, and individual choices that seriously affect the rights of others (need for collective immunization) are not legitimate; and c) the family power does not authorize parents, invoking philosophical conviction, to put the health of their children at risk (CF/1988, Arts. 196, 227 and 229) (best interest of the child). 6. Dismissal of the extraordinary appeal, with the establishment of the following thesis: "It is constitutional the obligation of immunization by means of a vaccine that, registered with a health surveillance agency, (i) has been included in the National Immunization Program, or (ii) has its mandatory application determined by law or (iii) is subject to determination by the Union, State, Federal District or Municipality, based on medical-scientific consensus. In such cases, it is not characterized as a violation of the freedom of conscience and philosophical conviction of the parents or guardians, nor of the family power". (ARE 1267879, Rapporteur: Roberto Barroso, Full Court, judged on 12/17/2020, Electronic Process General Repercussion – Merit DJe-064 DIVULG (complete word and leave only the first letter in capital letters) 04-07-2021 PUBLIC (complete word and leave only the first letter in capital letters) 04-08-2021).

declared the obligation of childhood immunization legitimate when the vaccine is considered safe, according to medical-scientific consensus and is registered with the health surveillance agency.

After the extraordinary appeal was judged, with a decision published on April 8, 2021, the STF established the following thesis of general repercussion:

It is constitutional to require immunization by means of a vaccine that, registered with a health surveillance agency, (i) has been included in the National Immunization Program, or (ii) has its mandatory application determined by law or (iii) is subject to determination by the Union, State, Federal District or Municipality, based on medical-scientific consensus. In such cases, it is not characterized as a violation of the freedom of conscience and philosophical conviction of the parents or guardians, nor of the family power.

After the decision of the Constitutional Court, the courts followed it *in totum*, given the binding effect of the General Repercussion with the bodies of the Judiciary. Although they understand that mandatory vaccination does not constitute forced vaccination, under duress and intrusiveness, they deduce from the STF's decision, the constitutionality of the restriction measures, the so-called *nudges* common to legal paternalism – applicable to those who do not wish to follow, in this case, the updating of their children's vaccination card, immunizing them with the vaccines provided for in the annual vaccination calendar. Except for a specific and extraordinary circumstance, in which there is a concrete risk to the child/adolescent in question, and the use of the immunizer is not recommended by the doctor, the excuse will be considered an act of parental negligence.

As an example, the decision of the 11th Civil Chamber of the Court of Justice of Paraná in Interlocutory Appeal no. 0077041-27.2020.8.16.0000 is cited, which partially accepted the considerations of the child's mother, in order to comply with the guidance of the doctor who accompanies her and authorize the spacing between doses of the vaccine. *In verbis*,

Despite the possibility of delays and omission regarding the desideratum, it is noted that he attached pertinent documentation demonstrating that the infant showed an allergic reaction to a certain vaccine, which is why he sought medical help, and the need for spacing between doses was indicated by the professional.

In any case, exceptions must be met without forgetting the importance of immunization, in order to avoid that the common reactions to the immunizer, suffered by every child, are used as an argument for excuse.

In a decision dated August 2021, the Court of Justice of the State of Rio Grande do Sul³⁴, decided that parents are required to vaccinate their child, given the preponderance of the best interest over their personal, religious and ideological convictions.

Preponderance of the best interest of the boy, fully safeguarding his right to health, which prevents the conduct of parents who, due to personal, religious and ideology of life convictions, chose not to vaccinate their minor child. Consideration that any risk with the vaccination of the protected person would be the same as that to which all children submitted to the official vaccination schedule are subjected, preponderating, in the apparent conflict of norms, the individual right of the minor, who does not have the capacity for discernment.

³⁴ Civil Appeal. Rights Of Children and Adolescents. Protection Measure Promoted by the Public Prosecutor's Office. Right To Health. Vaccination of a Child, 01 (One) Year Old, According to the National Immunization Program of the Ministry of Health. Mandatory Vaccination. Parents' Choice Not to Vaccinate Their Minor Child for Reasons of Religion, Ideology and Lifestyle That Cannot Override the Public Health Policies Used for Many Years. Preponderance of yhe Best Interest of the Infant. Mandatory Vaccination of Children in Cases Recommended by Health Authorities. General Repercussion Recognized. Apparent Conflict of Norms That Is Resolved by The Superiority Of The Individual Right of the Child, Still Without Discernment. Matter Signed In General Repercussion In The STF: TOPIC 1. 103. It is the duty of the family, the community, society in general and the Government to ensure, with absolute priority, the realization of the rights related to life and health, to children, adolescents and young people, by constitutional provision, in accordance with the provisions of Arts. 4th; 100, sole paragraph, II; and 227 of the FC, reaffirmed by Article 3 of the ECA. Vaccines are not new, nor experimental, widely tested for years – a basic assumption – that can be distributed and applied to end users who do not have the capacity or discernment to choose not to vaccinate and suffer possible consequences of not having been vaccinated, and parents cannot fail to vaccinate their children in such circumstances. The vaccination of children is a mandatory norm, mandatory in the cases recommended by the health authorities, to those responsible, and it is necessary to observe the calendar stipulated by the Ministry of Health, whose protection begins with newborns, in the case of vaccines that have existed for many years, widely studied, observing all the relevant protocols. Absence, in the specific case, of any contraindication to the vaccination of the minor, two 2 (two) years of age, a circumstance that does not exempt the mandatory vaccination of the infant. Existence of a report from the Judicial Medical Department to the effect that it is much more likely that a person will get sick from a disease preventable by the vaccine than by the vaccine itself, far exceeding the risk of the benefits of immunization, absent reasons for not complying with the Vaccination Schedule recommended by the Ministry of Health, public policy for the eradication of diseases en masse, it is a protective action for all children born in the country. Preponderance of the best interest of the boy, fully safeguarding his right to health, which prevents the conduct of parents who, due to personal, religious and ideology of life convictions, chose not to vaccinate their minor child. Consideration that any risk with the vaccination of the protected person would be the same as that to which all children submitted to the official vaccination schedule are subjected, preponderating, in the apparent conflict of norms, the individual right of the minor, who does not have the capacity for discernment. Application of § 1 of Article 14 of the ECA; Article 3, caput and sole paragraph, of Law No. 6,259/75; and Article 29 of Decree No. 78,231/76. Precedents of the TJMG and TJSP determining the vaccination of children in analogous cases. Recognition of constitutional character and general repercussion of the theme. Analysis of the right to health of children and adolescents in line with a judgment with general repercussion, Theme 1,103, of the STF, published in the DJe, on 04-08-2021. Appeal dismissed. Appeal dismissed. (TJRS – AC: 70085193688 RS, Rapporteur: Carlos Eduardo Zietlow Duro. Judgment Date: 08/23/2021. Seventh Civil Chamber. Publication Date: 08/25/2021). In the same sense, it was the decision of this Court, in the AGT: 70085352227 RS, Rapporteur: Carlos Eduardo Zietlow Duro, of the Seventh Civil Chamber, with judgment date on: 10/20/2021, and publication date on: 10/27/2021.

The Court of Justice of Minas Gerais considered negligence of parents, subject to specific sanction, the intentional/culpable omission of the duties to educate and raise, among which the guarantee of education and vaccination³⁵.

Vaccination has had various repercussions on intrafamily relationships, as seen in the preliminary decision issued by the court of the district of Passo Fundo (RS), suspending the coexistence of a father with his one-year-old daughter, due to the fact that he himself refused vaccination³⁶.

In progress in the National Congress, there is the Bill (PL No. 1429/19) that determines the presentation of the child's vaccination card as a necessary document for school enrollment in the public or private network. Approved by the Social Security and Family Commission, it awaits the designation of a rapporteur in the Constitution and Justice Commission³⁷.

In Europe, vaccination laws are being tightened, especially in those countries where falling immunization has caused an increase in cases of measles, chickenpox and mumps. In early 2019, the Italian government banned school enrollment for children up to six years old who were not up

³⁵ Civil Appeal – Childhood and Youth – Representation for Administrative Infraction – Failure to Comply With Duties Inherent to Family Power by Parents – Low School Attendance of the Adolescent – Negligence – Pecuniary Penalty – Applicability. (Does the text of the constitution come in capital letters? If not, put it in lowercase, save the first letter of the sentence). 1. The mere enrollment of the adolescent in an educational institution does not exhaust the duty of parents to care for the education of their children, and it is necessary to monitor school activities and, above all, attendance at school activities. 2. Intentional or culpable non-compliance with the duties inherent to family power subjects the parents to the administrative sanction of a fine. 3. The pecuniary sanction provided for in Article 249 of the Statute of the Child and Adolescent is a measure that is of a sanctioning, coercive, disciplinary nature and aims to prevent the repetition of the censored conducts. (TJMG, Ap. Civ. AC: 10542180001936001 Resende Costa. Rapporteur: Carlos Henrique Perpétuo Braga. Judgment Date: 06/10/2021, 19th CC, DJe 06/15/2021).

³⁶ "An action by the Public Defender's Office guaranteed the suspension of the right to visit a man who refused to be vaccinated against Covid-19. The case occurred in Passo Fundo, in the north of the state. The child's parents have an agreement so that the custody of their daughter, now one year old, is exercised in a shared way, with residence in the maternal home, and the parent can live with the girl freely, by prior agreement. However, two months ago, the man contracted coronavirus and was admitted in serious condition to a hospital, having transmitted the disease to the girl. Later, after recovering, he resumed visits to his daughter, without taking the necessary precautions and stating that he would not get vaccinated. Faced with the situation, the child's mother, who is already vaccinated with the first dose of the vaccine, sought the Public Defender's Office to request the suspension of visits fearing for her daughter's health. After analyzing the case, public defender Vivian Rigo filed a lawsuit. In the request, she cited the need to suspend visits until the man is fully vaccinated. (In Rio Grande do Sul, the Public Defender's Office obtains an injunction that prohibits a father from visiting his one-year-old daughter because he does not want to be vaccinated against Covid-19). Available at: <https://www.defensoria.rs.def.br/no-rs-defensoria-obtem-liminar-que-proibe-pai-de-visitar-filha-de-um-ano-de-idade-por-nao-querer-se-vacinar-contra-a-covid-19>. Accessed in: 11/30/2021.

³⁷ BRAZIL. Chamber of Deputies. PL 1429/2019. Available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2193777>. Accessed in: 11 dez. 2021.

to date with the ten mandatory vaccinations and instituted a fine of 500 euros for parents of older children who refuse to vaccinate them³⁸. Germany, in turn, changed the legislation, making the measles vaccine mandatory, imposing a high fine on parents who fail to immunize their minor children³⁹.

In the United States, there are 17 states whose legislation allows parents to refuse immunization to their children based on personal beliefs. In light of this, in 2017, 17-year-old Ethan Lindenberger sought help on the website Reddit, with the intention of receiving the vaccination against his mother's wishes. He was advised to go to the Ohio state health department to request vaccination against hepatitis A and B, flu and HPV, but he was only able to receive the immunizers after turning 18⁴⁰. He became a young leader, advocating the risks of *anti-vaxxers* – the anti-vaxxers – including in the United States Congress. In addition to Ethan, other young Americans differ from their parents regarding vaccination and, due to Covid-19, have sought alternatives to obtain vaccines⁴¹. Research reveals that a fifth of American parents will not vaccinate their teenagers against Covid-19, while another 88% say they are unaware of the vaccine's long-term side risks and 73% said they fear the effects of the immunizer on their children's fertility⁴².

As for vaccination against Covid-19 in Brazil, many parents are still reluctant and the presidential attacks on immunization corroborate the chaos. While most state governments call on the population to vaccinate children, the President of the Republic reverberates to his sympathizers, the discourse in favor of parental freedom for such a decision. Specifically in relation to childhood vaccination against Covid-19, when the National Health Surveillance Agency approved the Pfizer

³⁸ According to news on the online platform of the Folha de São Paulo newspaper. Available at: <https://www1.folha.uol.com.br/equilibriosauda/2019/03/italia-veta-matricula-de-criancas-sem-vacina-e-medicos-debatem-regra.shtml>. Accessed on 11 apr. 2021.

³⁹ Germany passes law that makes the measles vaccine mandatory. Available at: <https://www.dw.com/pt-br/alemanha-aprova-obrigatoriedade-de-vacina-contra-sarampo/a-49631918>. Accessed on 11/01/2021.

⁴⁰ Son of anti-vaccine parents celebrates his eighteenth birthday by taking vaccines. Available at: <https://www.gazetadopovo.com.br/viver-bem/comportamento/jovem-desafia-pais-e-se-vacina-depois-de-completar-18-anos/>. Accessed in: 11/01/2021.

⁴¹ News published by the newspaper O Globo "While parents prohibit vaccines against Covid-19, adolescent children are looking for alternatives to get vaccinated". Available at: <https://oglobo.globo.com/saude/enquanto-pais-proibem-vacina-contra-covid-19-nos-eua-filhos-adolescentes-buscam-alternativa-para-se-imunizar-25079561>. Accessed in: 10/11/2021.

⁴² USA: A fifth of parents do not intend to vaccinate their children against Covid-19. Available at: <https://www.cnnbrasil.com.br/internacional/eua-um-quinto-dos-pais-nao-pretende-vacinar-os-filhos-contra-covid-19/>. Accessed on 11 dez. 2021.

immunizer for children aged five to eleven⁴³, the President of the Republic, supported by the current Minister of Health, decided to rediscuss the matter in public consultation, further delaying the measure that should be an absolute priority, according to the doctrine of full protection. With the merely delaying intention of reiterating the "pro-freedom" discourse, the head of the Federal Executive initially proclaimed that he would only authorize childhood vaccination with the express authorization of the parents accompanied by a specific medical report. Once again, the Federal Government tried to blur the urgencies in facing the pandemic, opening the door to further civil liability of the State.

To avoid further damage to the presidential speech in his attack on vaccines, Senator Randolph Frederich Rodrigues Alves (REDE-AM) submitted the case to the Federal Supreme Court, in an incidental petition to the inquiry to investigate *fake news* (Inq. 4781/DF), asking the Court to force the Federal Government to refrain from attacking childhood vaccination and Anvisa's performance, under penalty of personal liability⁴⁴. The court opened a deadline for the Government to explain itself about such a requirement, extending it at the request of the Attorney General's Office.

After the terrible social repercussions, the Ministry of Health announced the launch of the national plan for the operationalization of childhood vaccination against Covid-19⁴⁵. Without requiring a prior medical report, immunization will begin in January of this year 2022, with an eight-week interval between the first and second dose.

In short, we agree with Fernanda Shaefer's reflection:

It is not stated here that submission to mandatory immunization should be blindly obeyed by the parents or guardians of minors. It is being stated that, respecting the right to information of parents and minors, the best interest of the child, as well as the interest of the community, must prevail over conceptions based on theories without any scientific

⁴³ Anvisa authorized the Pfizer vaccine for children from 5 to 11 years of age. This immunizer has been registered in Brazil since February 23, 2021. In June of the same year, the agency had approved its use in adolescents aged 12 to 16 years. Information collected from the gov.com website. Available at: < <https://www.gov.br/anvisa/pt-br/assuntos/noticias-anvisa/2021/anvisa-aprova-vacina-da-pfizer-contra-covid-para-criancas-de-5-a-11-anos>>. Accessed in: 01 jul. 2022.

⁴⁴ The full Petition can be found on the CONJUR website. Available at: <https://www.conjur.com.br/dl/randolfe-fake-news.pdf>. Accessed on 01 out. 2022.

⁴⁵ Health includes children aged 5 to 11 in vaccination against Covid-19. Available at: <https://agenciabrasil.ebc.com.br/saude/noticia/2022-01/saude-anuncia-inclusao-de-criancas-na-vacinacao-contra-covid-19>. Accessed in: 01 out. 2022.

proof or religious beliefs. It is being stated that yes, the risks must be considered, but that parental autonomy is limited by virtue of greater principles such as social solidarity⁴⁶.

The legislator has already considered the right to health of children to contemplate access to immunization in the ECA itself and the STF's decision only corroborates this understanding, reaffirming the importance of vaccination against the vaccine-predictable diseases provided for in the annual calendar of the National Immunization Program. The premise is that the risk of harm due to the lack of the vaccine is much greater than the possible damage caused by it. However, the specific case may require a different solution and, in this case, it is up to the parents to present proof of the child's intolerance to a certain immunizer. In this exception, when the greatest and concrete risk is due to the use of the vaccine, the solution may be different.

6 Conclusions

Mandatory vaccination is not new in Brazil. Laws such as 6.259 of 1973 have already affirmed the duty that parents have to promote their immunization for the sake of their children's health. In the same sense is the Statute of the Child with Disabilities, in Art.14, §1.

The right to a vaccine is capitulated within the scope of the fundamental right to health. It qualifies as a subjective public right of access to immunizers listed in the annual calendar of the National Immunization Program (PNI). It is also a right that can be enforced against the parents themselves.

The preventive intervention of immunizers is indisputable, given their effectiveness in reducing the morbidity and mortality of vaccine-preventable diseases

Parents have a very relevant role in investigating what is the best interest of their children, using it as a guide for decisions that have repercussions on their existential and/or patrimonial legal sphere. However, the exercise of parental authority is not absolute in this area, since it is linked to the guarantee of the fundamental interests of the children. For this reason, it is possible to say that

⁴⁶ SCHAEFER, Fernanda. Parental autonomy and mandatory vaccination. In: TEIXEIRA, Ana Carolina Brochado; DADALTO, Luciana. **Parental authority**: contemporary dilemmas and challenges. 2nd ed. Indaiatuba: Foco, p. 270.

it is within the scope of the duty of care (Art. 229 CF), as well as the duty of parents to vaccinate their children.

Despite the primary responsibility of parental authority, it is also up to the State and society to promote the best interest of the child. State heteronomy is born when parents start to represent the risk to the interests of their children. We understand, however, that state heteronomy, in this area, is marked by the risk of damage – often irreversible – that the parents' decision or omission to decide will bring to their children.

The principle of damage brings a more appropriate standard to justify state heteronomy, to the detriment of the parents' decision. In general, the State no longer knows what is best for their children; however, in objective terms, it can be precise when the parents' decision, even if motivated by what they understand to be more appropriate, offers severe risks of harm to the child/adolescent.

Regarding the decision on whether or not to vaccinate their children, the Federal Supreme Court weighed between the parents' freedom of conscience to refuse vaccination and the child/adolescent's right to health, as well as the interest of the community in ensuring public health, deciding that parents have the duty to guarantee their children access to safe immunizers accredited by the National Health Surveillance Agency, provided for in the annual vaccination calendar.

Governments cannot make an apology for vaccine refusal, especially in a pandemic period.

In the exceptionality of the specific case, if the specific immunizer offers specific risks to the child/adolescent, the excuse may be accepted when supported by a medical opinion.

References

BARBIERI, Carolina Luisa Alves; COUTO, Márcia Thereza; AITH, Fernando Mussa Abujamra. Childhood (non) vaccination between culture and the law: the meanings attributed by middle-class couples in São Paulo, Brazil. **Cad. Saúde Pública**, Rio de Janeiro, v. 33, n. 2, p. 1-11, 2017. Available at: <https://www.scielo.br/j/csp/a/NDSjRVcpw95WS4xCpxB5NPw/?lang=pt&format=pdf>. Accessed on: 1 nov. 2021.

BIRCHLEY, Giles. Harm is all you need? Best interests and disputes about parental decision-making. **Med Ethics**, New Zealand, v. 42, p. 111-115, 2016. doi:10.1136/medethics-2015-102893. Available at: <https://jme.bmjjournals.com/content/medethics/42/2/111.full.pdf>. Accessed on: 20 nov. 2021

BRAZIL. Ministry of Health. Monitoring of cases of urban arboviruses caused by viruses transmitted by the Aedes mosquito (dengue, chikungunya and zika), epidemiological weeks 1 to 21, 2021. **Boletim epidemiológico**, Brasília, v. 52, n. 21, p. 1-11, jun. 2021. Available at: <https://portalarquivos2.saude.gov.br/images/pdf/2019/setembro/05/BE-21-influenza-04set19.pdf>. Accessed on: 29 nov. 2021.

BODIN DE MORAES, Maria Celina. The new family, again: structures and function of contemporary families. **Pensar**, Fortaleza, v. 18, n. 2, p. 587-628, maio/ago. 2013. Available at: <https://periodicos.unifor.br/rpen/article/view/2705>. Accessed on: 21 nov. 2021.

BODIN DE MORAES, Maria Celina; MENEZES, Joyceane Bezerra de. Parental authority and privacy of the minor child: the challenge of caring to emancipate. **Journal New Legal Studies - Eletrônica**, Vale do Itajaí, v. 20, n. 2, p. 501-532, May/Aug. 2015. Available at: <https://siaiap32.univali.br/seer/index.php/nej/article/view/7881/4466>. Accessed on: 20 nov. 2021

BODIN DE MORAES, Maria Celina; SOUZA, Eduardo Nunes de. Education and culture in Brazil: the issue of homeschooling. In: TEIXEIRA, Ana Carolina Brochado; Dadalto, Luciana (ed.). **Parental authority: contemporary dilemmas and challenges**. Indaiatuba: Foco, 2019. p. 93-124.

DIEKEMA, DS. Parental refusals of medical treatment: the harm principle as threshold for state intervention. **Theor Med Bioeth**, Boston, vol. 25, no. 4, p. 243-264, 2004. Available at: <https://web.p.ebscohost.com/ehost/detail/detail?vid=4&sid=fd6e9c6a-2d0e-434b-9d0a-2cc3cea21e54%40redis&bdata=Jmxhbmc9cHQtYnImc2l0ZT1laG9zdC1saXZl#AN=15637945&db=mdc>. Accessed on: 02 nov. 2021.

NEVES, Julia. Justice protects children and adolescents against anti-vaccination movement. **Fiocruz**, Rio de Janeiro, 22 Oct. 2019. Available at: <https://portal.fiocruz.br/noticia/justica-rotege-criancas-e-adolescentes-contra-movimento-antivacina>. Accessed on: 01 nov. 2021.

LEBRUN, Jean-Pierre. **A world without limits:** an essay for a psychoanalytic clinic of the social. Rio de Janeiro: Companhia de Freud, 2004.

LOBO, Paulo. **Civil law:** families. São Paulo: Saraiva, 2019. v. 5.

GUEST ROOM - anti-vaccine movement and its threats. Guests: MAIA, Maria de Lourdes de Sousa Maia; Isabella Ballalai; Marcio Nehab. Presenter: Juliana Espindola. Rio de Janeiro: Canal Saúde, 2019. 1 *Youtube* video (52 min). Available at: <https://www.youtube.com/watch?v=ZkhjyQ0wBR8&feature=youtu.be>. Accessed on: 27 out. 2021.

NEUFELD, George; MATÉ, Gabor. **Hold on to your kids.** Why parents must matter more than peers. Toronto: Vintage Canada, 2005.

PAN AMERICAN HEALTH ORGANIZATION; WORLD HEALTH ORGANIZATION. Ten health threats that WHO will tackle in 2019. **PAHO**, Brasilia, 17 Jan. 2019. Available at: <https://www.paho.org/pt/noticias/17-1-2019-dez-ameacas-saude-que-oms-combatera-em-2019>. Accessed on: 30 out. 2021.

SÊCO, Thais Fernanda Tenório. For a new hermeneutic of the rights of children and adolescents. **Civilistica.com**, Rio de Janeiro, v. 3, n. 2, p. 1-26, 10 dez. 2014. Available at: <https://civilistica.emnuvens.com.br/redc/article/view/185>. Accessed on: 10 dec. 2021

SCHAEFER, Fernanda. Parental autonomy and mandatory vaccination. In: TEIXEIRA, Ana Carolina Brochado; DADALTO, Luciana (ed.). **Parental authority: contemporary dilemmas and challenges**. 2. ed. Indaiatuba: Foco, 2021. p. 253-272.

VILLELA, João Baptista. Freedom and family. Belo Horizonte: Faculty of Law of UFMG, 1980.

WINNICOTT, Donald W. **It all starts at home**. São Paulo: Martins Fontes, 1999.

Received on: 10.01.2022
Accepted on: 14.01.2022