

## The crime of violating health emergency rule during a pandemic in Brazil<sup>1</sup>

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**Summary:** 1. Introduction; 2. International public health emergency caused by COVID-19 and the preventive health measures adopted by the Brazilian government; 3. Violation of health emergency rules criminal elements; 4. Do crimes of abstract danger violate the harm principle?; 5. Blank criminal norms and the principle of legality; 6. Conclusion; 7. References.

**Abstract:** This article analyzes the misdemeanor of violating public authorities' rule aimed at preventing the spread of contagious disease, as provided in the Brazilian Penal Code, Article 268. Using the hermeneutic method, this article demonstrates that although being a crime of abstract danger, this criminal offense does not violate the harm principle, for principles are commandments of optimization and cannot prevent Criminal Law from anticipating facts in order to avoid or reduce damage to public safety, which, in this case, is the spread of an epidemic. Finally, it demonstrates that the criminal norm is described in an objective and determinable way, allowing anyone to clearly identify the conduct that is prohibited. Therefore, there is no need to discuss any violation to the legality principle.

**Keywords:** Abstract danger crime; heterogeneous blank criminal norm; legality principle; harm principle; COVID-19.

### 1. Introduction

The massive increase of greenhouse gas emissions and deforestation have contributed not only to global warming but also to the rising of many zoonotic pandemics worldwide. The equation is very simple: wild animals, carriers of unknown viruses, pulled out from their natural habitats, roam to urban centers and contaminate domestic animals. Humans consume these animals and, therefore, get also contaminated. Many of these wild animals, mice and mosquitoes, for example, may also transmit the virus directly to humans.

COVID-19 is an example of a zoonotic pandemic that became a global threat. The disease is forcing governments to adopt health emergency measures such as quarantine, isolation, social distancing, and the mandatory use of face masks. Governments have been adopting many other actions in order to try to contain this sanitary tragedy that has already killed thousands of people around the world.

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Criminal Law contributes to the enforcement of these measures by imposing a legal punishment to those who disobey the sanitary rules. The goal is to slow down the spread of a contagious disease.

Guided by the legality and harm principles, we use the hermeneutic method to analyze the criminal infraction related to the health emergency measures adopted by the Brazilian federal government during the COVID-19 pandemic.

At first, we review the health emergency measures adopted in Brazil – after the World Health Organization (WHO) declared global health emergency – in order to reduce transmission and avoid the health system collapse. After that, we analyze the features and elements of the criminal offense provided in article 268, of the Brazilian Penal Code and the crime of abstract danger, which is an offense that does not require a measurable result for its consummation. Then, we examine if this crime violates the harm principle.

Finally, we investigate if there is a possible violation of the constitutional principle of legality, *nullum crimen, nulla poena sine lege*, especially since this is a blank criminal norm, which requires complementation by an inferior norm.

## 2. International public health emergency caused by COVID-19 and the preventive health measures adopted by the Brazilian government

In 2016, the United Nations Environment Programme (UNEP) released a report<sup>4</sup> stating that 75% of the emerging infectious diseases, such as Ebola, Aids, Avian Influenza, SARS, Malaria, Zika and Dengue, are directly associated to land-use change, climate changes and the illegal consumption and traffic of wild animals.

The World Health Organization (WHO) has presented scientific evidences indicating that the COVID-19 outbreak, caused by the new coronavirus Sars-Cov-2, probably originated from the consumption of wild animals meat, possibly bats and pangolins, at the wet market in the city of Wuhan, a Hubei province, in China.<sup>5</sup>

On January 30, 2020, WHO declared the COVID-19 outbreak a Public Health Emergency of International Concern (PHEIC), the highest level of alert of the Organization. On March 30, in the same year, WHO declared it a pandemic and advised countries to adopt immediate preventive measures in order to avoid the spread of the disease among the population and to other nations.<sup>6</sup>

As soon as the first COVID-19 case was confirmed in the country, Brazil's government passed bill number 13.979, 03/11/2020. According to it, administrative authorities were allowed to enforce measures, such as social distancing and quarantine; compulsory examinations; administration of vaccines; *goods* and services requests; among others, in order to face the current health emergency.<sup>7</sup>

Later, the Ministry of Health passed the ordinance, number 356/20, regulating law number 13.979/20. The ordinance specified all preventive measures

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<sup>4</sup> UNEP. "Frontiers 2016 Report", *Emerging Issues of Environmental Concern*. Available on: [https://environmentlive.unep.org/media/docs/assessments/UNEP\\_Frontiers\\_2016\\_report\\_emerging\\_issues\\_of\\_environmental\\_concern.pdf](https://environmentlive.unep.org/media/docs/assessments/UNEP_Frontiers_2016_report_emerging_issues_of_environmental_concern.pdf). Accessed on April 24, 2020.

<sup>5</sup> Art. 3º - § 4º - *As pessoas deverão sujeitar-se ao cumprimento das medidas previstas neste artigo, e o descumprimento delas acarretará responsabilização, nos termos previstos em lei*. BRAZIL. "Measures to face Public Health Emergency of International Concern due to coronavirus boom in 2019", *Law 13.979/2020, from February 6, 2020*. Available on: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/lei/L13979.htm](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L13979.htm). Accessed on March 20, 2020.

<sup>6</sup> World Health Organization. R&D Blueprint and COVID-19. Available on: <<https://www.who.int/teams/blueprint/covid-19>>. Accessed on April 26, 2020.

<sup>7</sup> BRAZIL. "Measures to face Public Health Emergency of International Concern due to coronavirus boom in 2019", *Law 13.979/2020, from February 6, 2020*. Available on <[http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/lei/L13979.html](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L13979.html)>. Accessed on March 20, 2020.

that could be adopted to contain the spread of the virus, especially since community transmission made contact tracing impossible.<sup>8</sup>

Social distancing is one of the measures established by law 13.979/20, and also by the Ministry of Health ordinance number 356/20. It can be done at home or at hospitals. Its goal is to separate people who are sick with a contagious disease from people who are not sick.<sup>9</sup> This measure can only be determined with medical prescription or by recommendation of an epidemiological surveillance agent. It has a 14-day limit, and it may be extended for the same period.<sup>10</sup>

When social distancing is determined by medical prescription, patients need to sign a free and informed consent form. When it is an epidemiological surveillance agent recommendation, patients, symptomatic or asymptomatic, must isolate themselves at their homes.<sup>11</sup>

Quarantine is another preventive measure used against COVID-19. It can be defined as the restriction of activities or isolation of people who were supposedly exposed to the disease, even if they are not infected. This measure can be adopted at an individual or collective level, in a neighborhood or in a city, for example.<sup>12</sup>

Quarantine can be enforced extensively and not limited to certain groups of people. In this case, it includes the suspension of classes, of outdoor activities, and the cancelation of events and all in-office work. Quarantine, however, can also be limited to certain high-risk groups of people such as those who are already contaminated, the elder and people with chronic diseases.<sup>13</sup>

Finally, there is also the community quarantine, or lockdown, which is enforced when the goal is to restrict all interactions among people and all economic activities, except for those considered essential, for a predetermined period.<sup>14</sup>

Quarantine can also be spontaneous or mandatory. It is mandatory when determined in the form of an administrative act issued by a competent authority, published in the official press and widely publicized.<sup>15</sup>

Initially, the quarantine lasts for 40 days, but it may be extended for the necessary period of time in order to avoid community transmission and assure the regular well-functioning of the country's health system. Quarantine must end when the Public Health Emergency of International Concern is ceased.

In the face of a public health emergency, the government can also require – temporary seizure – services and private property, with or without permission, for public use. The requisition must be ordered by a competent government official with the provision of a just compensation.<sup>16</sup>

Isolation and quarantine measures must follow medical protocol and the guidelines stated in the Human Infection National Prevention Plan. This Plan is

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<sup>8</sup> BRAZIL. Health Ministry. *Ordinance #356*, from March 11, 2020. Available on: <<http://www.in.gov.br/en/web/dou/-/portaria-n-356-de-11-de-marco-de-202-247538346>>. Accessed April 23, 2020.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> BRAZIL. "Measures to face Public Health Emergency of International Concern due to coronavirus boom in 2019", *Law 13.979/2020*, from February 6, 2020. (our translation). Available on: <[http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/lei/L13979.html](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L13979.html)>. Accessed on March 20, 2020.

<sup>13</sup> Ibid.

<sup>14</sup> BRAZIL. "Measures to face Public Health Emergency of International Concern due to coronavirus boom in 2019", *Law 13.979/2020*, from February 6, 2020. (our translation). Available on: <[http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/lei/L13979.html](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L13979.html)>. Accessed March 20, 2020.

<sup>15</sup> Ibid.

<sup>16</sup> BRAZIL. Health Ministry. *Ordinance #356*, from March 11, 2020. Available on: <<http://www.in.gov.br/en/web/dou/-/portaria-n-356-de-11-de-marco-de-202-247538346>>. Accessed April 23, 2020.

available on the Health Ministry website to ensure that preventive actions and necessary treatments are being provided.<sup>17</sup>

The Public Authorities may adopt other preventive measures, and both article 3, § 4, in Law number 13.979/2020, and article 3 in Ordinance number 356/20, state that in case of violation, those who disobey the preventive measures will be held accountable.<sup>18</sup>

### 3. Violation of health emergency rules criminal elements

Different scholars state that modern society is not able to provide real social safety to people. They believe that legislators are not able to predict and defuse new danger situations that may arise in a globalized world.<sup>19</sup>

According to Hassemer, although the Criminal Law is expected to protect life, freedom, health, property and essential goods, with the advent of the welfare state, Criminal Legislation also began to protect supra-individual rights.<sup>20</sup>

Crimes against public health were introduced in the Brazilian Penal Code in the first half of the 20<sup>th</sup> century, in a time when the notion of “risk society” was still unknown.<sup>21</sup> Besides criminalizing the act of spreading pathogenic genes, Chapter III, title VIII, from the Penal Code also criminalizes the violation of preventive sanitary measure destined to contain the spread of infectious disease.

This crime should be classified among the crimes against the public administration, but due to legislative policy and influence from the German Penal Code, it ended up included in the chapter of crimes against the public health.<sup>22</sup>

The Brazilian Penal Code, article 268, states that:

Art. 268 – To violate public authorities' resolution destined to avoid the introduction or dissemination of contagious disease.  
Penalty – one month to one year of detention, and fine.

(1) The penalty is increased by one third if the offender is a public health worker or if s/he works as a doctor, pharmacist, dentist or nurse. (our translation)

The offender can be anyone, for it is a common crime and the *fattispecie* does not demand any specific features or special conditions to the agent. The victim is always the society, since public health is a collective right.

The object of protection is the public safety and the material object of protection is the State's determination to avoid the introduction or the spread of a contagious disease.

The objective elements of the written norm are all external circumstances related to the tangible reality. They may be descriptive, when they do not require value judgment; or normative, when there is no need for legal specification (“public authorities’ rules”); or extrajudicial (“contagious disease”).

<sup>17</sup> BRAZIL. *Human Infection National Prevention Plan due to COVID-19.COE/SVS/MS*. (our translation). Brasília DF. Feb 2020. Available on: <<http://www.in.gov.br/en/web/dou/-/portaria-n-356-de-11-de-marco-de-202-247538346>>. Accessed April 23, 2020.

<sup>18</sup> BRASIL. “Portaria nº 356, de 11 de março de 2020”, *Ministério da Saúde*. Available on: <<http://www.in.gov.br/en/web/dou/-/portaria-n-356-de-11-de-marco-de-2020-247538346>>, Accessed on April 23 2020.

<sup>19</sup> BECK, U. *La Sociedad del riesgo: Hacia una nueva modernidad*. Ed. Paidós Básica, Barcelona, 2002, p. 237.

<sup>20</sup> HASSEMER, W; CONDE, F. *Introducción a la criminología y al derecho penal*, Ed. Tirant lo blanch. Valencia, 1989, p. 103.

<sup>21</sup> SILVA, J. M. S. “A expansão do direito penal: aspectos da política criminal nas sociedades pós-industriais. Tradução Luiz Otávio de Oliveira Rocha”, *Ed. Revista dos Tribunais*, 3. ed. rev. e atual, p. 27.

<sup>22</sup> LITZT, F. V. *Tratado de direito penal alemão*. Trad. José Hygino Duarte Pereira, Ed. Senado Federal, Brasília, 2006, p. 362.

Criminal intent is the subjective element. Neither negligent nor reckless conduct are punished. The offender must be aware that his or her actions violate public authorities' resolution.

This crime may be omissive or commissive. It is consummated both by an action contrary to Public Authorities' rules or by the omission to act in accordance to them. In addition, if the offender is responsible to ensure the implementation of these resolutions, and if the offender is able to prevent someone to act contrary to them, this person will answer for the crime as a special form of omission.<sup>23</sup>

Even though the pandemic presents risks to the entire population, this crime is only classified as a misdemeanor. Its penalty is imprisonment for not less than one month and not more than one year, and the imposition of a fine. The penalty may be increased by one third if the offender works in public health services or works as a doctor, pharmacist, dentist or nurse. In these cases, penalty is extended due to the offender's scientific knowledge concerning the possible severe consequences of his or her behavior.

Article 268, from the Penal Code, describes a crime that does not admit recklessness nor criminal negligence. To constitute the crime is only necessary the non-compliance of Public Authorities' resolutions, even if the offender did not have the specific intention of introducing or spreading contagious disease.

Attempt will be considered a penal offense when the criminal norm forbids the agent of doing something. This is the case when the agent, although forbidden to leave home (social isolation, for example), tries to go outside and is arrested in the act.

This is a formal crime for its consummation happens when the norm is disobeyed, even if no one gets infected by the disease. In addition, it is a crime of abstract danger because it does not require proof of actual results, nor any harm to be done to any legally protected rights or goods. The simple non-compliance with the Authorities' rules is the crime.

#### **4. Do crimes of abstract danger violate the harm principle?**

Crimes of abstract danger, according to some scholars, do not withstand careful principle analysis<sup>24</sup>. In their opinion, punishing actions that do not cause any direct harm would violate the harm principle<sup>25</sup>.

Bitencourt (2010) says that crimes of abstract danger are unconstitutional because they violate the harm principle. To him, State intervention in criminal matters must only occur in the face of a concrete form of harm to a legal good protected by the criminal law.<sup>26</sup>

In Brazil's law, the harm principle (*nullum crimen sine injuria*) asserts that there is no crime without a conduct that inflicts harm or danger to a third-party good, hence inner behaviors such as self-harm and suicide attempts should not be criminalized.<sup>27</sup> Gomes (2002) posits that, since the crime cannot occur without concrete harm or danger, it is the judge's duty to examine the norms in light of the harm principle and analyze if the protected legal good has been affected.<sup>28</sup>

<sup>23</sup> BRAZIL. "Penal Code. Decree/Law 2.848, from December 7 1940". *Vade Mecum*. São Paulo: Saraiva, 2018, PC article 13, § 2º.

<sup>24</sup> GRECO, R. *Curso de Direito Penal: parte especial*, Ed. Impetus, Niterói, RJ, 2017, p. 297-298.

<sup>25</sup> BATISTA, N. *Introdução crítica ao direito penal brasileiro*. v.1.t.1. São Paulo: Max Limonad, 1980, p. 92.

<sup>26</sup> BITENCOURT, C. R. *Tratado de Direito Penal*, Ed. Saraiva, 2010, p. 157.

<sup>27</sup> BATISTA, N. *Introdução crítica ao direito penal brasileiro*. v.1.t.1. São Paulo: Max Limonad, 1980, p. 145.

<sup>28</sup> GOMES, Luiz Flávio. "Norma e Bem Jurídico no Direito Penal", *Revista dos Tribunais*, item n. 6, p. 145.

Crimes of harm require the actual injury of a legal good. Crimes of danger, however, do not need the actual injury for their completion. It is only necessary that the agent's actions put the protected legal goods at risk of harm.<sup>29</sup>

Crimes of danger aim to protect the legal goods before they are harmed by a more serious offense. Their completion relies only on the possibility of the legal interest being harmed, in this case, public health from being put at risk. These crimes' punishments preempt behaviors that can give cause to irreparable and irreversible damages to the population.<sup>30</sup>

Heleno Fragoso (1977) adopts the normative theory of result. According to him, every crime produces a result. The harmful outcome of the criminal action, however, is not part of the legal norm, but part of the illegality of the offense. In his opinion, the result is not part of the conduct in the same way as the harmful outcome is not part of the action, but, part of the legal valuation of the action itself, as it happens in self-defense cases.<sup>31</sup>

Crimes of danger are either concrete or abstract. In concrete crimes of danger, prosecution must prove that the action created a danger to the legal good or interest. In abstract crimes of danger, however, the risk posed by the action is not an element of the criminal norm, therefore, prosecution does not need to prove that a danger was created by the action, but it is presumed that the doing of the action itself creates the required danger.<sup>32</sup>

The criminal norm, in this case, is underpinned in the common general experience which makes it possible to assume the dangerous outcome. Therefore, the risk here is not an element of the criminal norm, but only a reason for incrimination (*ratio legis*).<sup>33</sup>

Since these criminal norms do not refer to any actual result, they are also called "crimes of mere conduct". They do not require value judgment of the action's outcome, for the crime occurs regardless of any external results.

A classic example of this offense is the crime of omission to help a person, prescribed in article 135 of the Brazilian Penal Code. The mere denial of assistance already constitutes a crime (as long as the assistance will not put the agent also at risk). Another example that does not require an actual result is the crime of home invasion, prescribed in the article 150 of the Brazilian Penal Code.

According to the eclectic theory, the abstract danger is part of the reality and exists even if no one can perceive it, but it requires a value judgment of its probability of occurring.<sup>34</sup> The Brazilian Supreme Court (STF) has started to use the eclectic theory when its Justices began demanding the existence of at least the possibility of a harmful outcome, as in the case of firearm possession without ammunition.<sup>35</sup> Moreover, STF has been demanding that the risk must be relevant and is probable to occur, so the State must keep alert and act effectively to prevent it.

In the case of COVID-19 pandemic, however, a single act of non-compliance can start a large-scale transmission, contaminating a considerable part of the population and resulting in hundreds of deaths, making it impossible to trace contact.

<sup>29</sup> FRAGOSO, H. C. *Lições de Direito Penal: Parte Geral*, Bushatsky, São Paulo, 1977, p.183.

<sup>30</sup> GRECO, R. *Curso de Direito Penal: parte especial*, Ed. Impetus, Niterói, RJ, 2017, p. 297-298.

<sup>31</sup> FRAGOSO, H. C. *Lições de Direito Penal: Parte Geral*, Ed. Bushatsky, São Paulo, 1977, p. 183.

<sup>32</sup> ESTEFAM, A. *Direito Penal esquematizado: parte geral/ André Estefam e Victor Eduardo Rios Gonçalves*. Ed. Saraiva Educação, São Paulo, 2018.

<sup>33</sup> MARQUES, F. *Tratado de Direito Penal*. Ed. Millennium, Campinas, SP, 2002, p. 90-91.

<sup>34</sup> BARROS, F. M D. *Direito penal: parte geral*, Ed. Saraiva, São Paulo, 2003, p. 170.

<sup>35</sup> BRASIL. "Habeas Corpus n. 149.450", *STF, Distrito Federal. Rel. Min. Celso de Mello*. Available on: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/HC149450.pdf>. Accessed on April 23, 2020.

Modern Criminal Law focuses on incriminating the actions that pose the most danger to the community and that are able to produce large scale social damages.<sup>36</sup> The need to protect collective legal goods and interests is an increasing demand of risk societies. It is a way to anticipate and avoid crimes, or at least a way to minimize the social damages they may cause.

The harm principle is not an absolute golden rule. Like all principles, it must be optimized and adapted to the reality and to the legal possibilities of the specific case. Principles are analogous to values; they should not be interpreted as a black-or-white matter.<sup>37</sup>

Above all, the harm principle aims at removing self-harming or any inner behaviors from the criminal sphere. However, it cannot stop Criminal Law from trying to anticipate wrongdoings that are able to cause serious damage to public safety.

Crimes of danger are essentially subsidiary. They can be absorbed by a more serious offense committed by the agent. By anticipating the punishment of the crime that would lead to the damage (preventive sanitary measure violation, article 268, Penal Code), Criminal Law prevents the consummation of the main offense (to cause an epidemic by spreading pathogenic germs; ten to fifteen years of imprisonment, article 267, Penal Code)<sup>38</sup>. Crimes of danger reduce the costs of the offense both to the society and to the agent, who may be sentenced for a less serious crime, spending less time in prison. They also help protecting not only the victims of that specific crime but society in general.

## 5. Blank criminal norms and the principle of legality

The crime of violating health emergency rule is also a blank criminal norm. It needs the complementation of another normative act of equal or inferior hierarchical importance.

Deriving from Binding's doctrine, blank criminal norms refer to vague or incomplete legal rules that need to be complemented by other normative sources. If this source and the blank criminal norm are of equal hierarchical importance, the blank norm is called homogeneous; however, if the complementation is hierarchical inferior, the blank norm is called heterogeneous.<sup>39</sup>

Legislators usually choose heterogeneous blank criminal norms when faced with situations that require rapid responses. These norms are also commonly used to reduce technological risks that arise from how fast people, information, and goods move around the globe. A speed that is incompatible with the ordinary legislative process.<sup>40</sup>

<sup>36</sup> SILVA, P. R. A. "Aspectos críticos do direito penal na sociedade do risco", *Revista Brasileira de Ciências Criminais* a. 12, n. 46, jan./fev. 2004, p. 83. also in PRITTWITZ, op. cit., p. 39.

<sup>37</sup> ALEXY, R. "Sistema jurídico y razón práctica". In: *El concepto y la Validez del Derecho*. Barcelona: Gedisa, 1994, p. 19.

<sup>38</sup> "Article 267 of the Penal Code: causing an epidemic through the dissemination of pathogenic germs

Sentence: ten to fifteen years imprisonment. (Wording from Law n° 8.072, 7.25.1990)

§ 1° - If the event results in death, the penalty is increased two times.

§ 2° - If guilt is asserted, one to two years confinement penalty and if results in death, two to four years. (our translation)." *Decree-Law n° 2.848, December 7, 1940, Brazilian Penal Code, Vade Mecum*, Saraiva, São Paulo, 2018

<sup>39</sup> RIBEIRO, L. G. G.; COELHO, A. E. "Leis penais em branco no direito penal ambiental: a (in) compatibilidade entre os princípios constitucionais penais e o bem jurídico protegido". *Direito penal, processo penal e constituição III [Recurso eletrônico on-line] organização CONPEDI/UNICURITIBA; Coordinators: Felipe Augusto Forte de Negreiros Deodato, Rogério Gesta Leal*, CONPEDI, Florianópolis, 2016, Available on:

<http://conpedi.danielolr.info/publicacoes/02q8agmu/a814qh38/Bm3F5yD3SfhQ2kA6.pdf>.

Accessed on April 21, accessed on April, 2020.

<sup>40</sup> SANTANA, P. D. C. (2008). "O direito penal do risco e a proteção jurídico-penal do patrimônio cultural brasileiro". In: *XVII Encontro Preparatório para o Congresso Nacional do CONPEDI, 2008, Salvador. Anais do XVII Encontro Preparatório para o Congresso Nacional do CONPEDI,*

In risk societies, the protection of the legal good allows a quick update of criminal norms' secondary elements. The goal is to avoid or reduce damages. Therefore, the criminal violation of preventive health emergency rules needs another law, or regulatory act, listing and specifying what those rules are; measures created to force the population to adopt sanitary instructions in order to avoid the introduction or dissemination of the disease.

Many consider that the blank criminal norm violates the founding principle of legality, *nulla poena sine lege*. This is a central principle to the entire legal system. It grants both the Legislative Power exclusive rights to create laws<sup>41</sup> and the Judicial Power exclusive rights to apply such laws. Therefore, judges cannot impose sentences based on non-existing legislation.<sup>42</sup>

Heterogeneous blank criminal norms are considered a great source of instability to the legal system, since they need the complementation of an inferior norm, and they are also seen as difficult to interpret.<sup>43</sup> Some scholars, like Basileu Garcia (1972), sees these norms as unconstitutional for their vagueness and the complex deep analysis they demand from the legal interpreters.<sup>44</sup>

Despite defying the legality principle, most scholars, however, agree that blank criminal norms are constitutional. Certain offenses constantly need to be updated, and these norms, because of their openness, can be applied to new situations. This is the case, for example, of new synthetic drugs or new infectious diseases.<sup>45</sup>

Blank criminal norms are able to meet the increasing social demands that require rapid legal updates as long as legislators do not violate the legality principle. Also, administrative authorities must not be allowed to modify the core of the norm and change the conduct considered illegal.<sup>46</sup>

The possibility to update the legislation and criminalize behaviors that can potentially expose society to new dangers is of great importance. Even when these behaviors do not pose any immediate threat, such as violating a health emergency administrative rule, their criminalization helps to avoid future harmful outcomes.<sup>47</sup>

Figueiredo Dias (2007) suggests a middle ground. The illegal conduct described by the criminal norm must be written as objectively and as clearly as possible. People should be able to immediately understand what behaviors are forbidden by the law. It is necessary, though, to analyze if the norm can fix limits to the complementation that it requires, otherwise it might be considered unconstitutional.<sup>48</sup>

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Fundação Boiteux, Florianópolis, 2008, p. 1799-1819. Available on: <[http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/salvador/Patricia\\_da\\_costa\\_santana.pdf](http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/salvador/Patricia_da_costa_santana.pdf)>. Accessed on April 13, 2020.

<sup>41</sup> GORDILHO, H. *Direito Ambiental Pós-moderno*, Ed. Juruá, Curitiba, 2011, p. 65.

<sup>42</sup> According to BECCARIA, C. *Dos delitos e das penas*. Trad. Torrieri Guimarães. São Paulo: Martin Claret, 2002, p.20: "Only laws can indicate each crime's penalty and the right to make criminal laws belongs to the legislator who is bound by a social contract to represent the entire society" (our translation).

<sup>43</sup> Ibid.

<sup>44</sup> GARCIA, B. *Instituições de Direito Penal*, Ed. Max Limonand, São Paulo, 1972, p. 154.

<sup>45</sup> ZAFFARONNI, "Manual de Direito Penal Brasileiro", *Revista dos Tribunais*, v.1. 7 ed, p. 386.

<sup>46</sup> RIBEIRO, L. G. G.; COELHO, A. El. "Leis penais em branco no direito penal ambiental: a (in) compatibilidade entre os princípios constitucionais penais e o bem jurídico protegido". *Direito penal, processo penal e constituição III [Recurso eletrônico on-line] organização CONPEDI/UNICURITIBA; Coordinators: Felipe Augusto Forte de Negreiros Deodato, Rogério Gesta Leal*, CONPEDI, Florianópolis, 2016, Available on: <<http://conpedi.danilolr.info/publicacoes/02q8agmu/a814qh38/Bm3F5yD3SfhQ2kA6.pdf>>. Accessed on April 21, 2020.

<sup>47</sup> CRUZ, A. P. F. N. "Crimes de perigo e riscos ao ambiente", *Revista de direito ambiental*, 11(42), p. 15-18.

<sup>48</sup> DIAS, J. F. "Direito Penal: parte geral", *Revista dos Tribunais*, T.1, p. 186.



Finally, it is important to highlight that the criminal offense under analysis needs to be based on an imperative and general mandatory rule. Simple recommendations cannot be punishable by this norm.

## 6. Conclusion

As seen, COVID-19 is a zoonotic pandemic linked to land-use change, climate change and, mainly, illegal wildlife trade.

This pandemic forced the Brazilian government to adopt preventive emergency health measures, such as social distancing, quarantine, face masks and others. By criminalizing the violation of these measures (art. 268 of Brazilian Penal Code), Criminal Law tries to avoid the more serious offense, which is to cause an epidemic (art. 267 of Brazilian Penal Code), reducing, then, the costs of the crime both to the society and to the agent, who will be sentenced for a less serious crime, spending less time in prison.

Crimes of abstract danger do not violate the harm principle mainly because principles demand optimization. They cannot stop Criminal Law from trying to anticipate the facts and avoid, or at least reduce, the possible damages caused by the spread of an epidemic.

At last, since the behavior criminalized in the norm prescribed on article 268 of the Brazilian Penal Code is clear and easy to understand, there is no reason to argue that the crime violates the legality principle.

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