

# RIGHT TO HEALTH AND THE PROBLEMS OF CONSEQUENTIALIST DISCOURSE

DIREITO À SAÚDE E OS PROBLEMAS DO  
DISCURSO CONSEQUENCIALISTA

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## ABSTRACT

The right to health is guaranteed in the Brazilian Constitution of the Republic of 1988 as one of the fundamental rights of the human being, and it is the duty of the State to ensure it through the implementation of public policies, embodied in the so-called vital minimum. However, the erroneous application of the principle of reserve for contingencies, for this purpose, produces a bond between the enforcement of rights and the financial capacity of the State. The constitutional amendment number 95 (2016) implemented a new fiscal regime popularly known as "expenditure caps". As if the improper adoption of the aforementioned theory and the budget issue was not enough, the recent legislative alteration to the law that introduces the Brazilian rules, known as "LINDB", now requires, in the judicial sphere, that the magistrate points out the practical consequences of his decision. As a result, the present study, through the dialectical method, started from the following problem: is the judges given a full range of possible consequences resulting from their decision, making a real exercise in futurology? It can be concluded that there was, in fact, a flagrant attempt to mitigate the normative force of the principles, with the unavoidable objective of curbing judicial activism.

**KEY WORDS:** Right to health. vital minimum. Reservation for contingences. LINDB. Consequentialism.

## RESUMO

*O direito à saúde está assegurado na Constituição da República de 1988 como um dos direitos fundamentais do ser humano, sendo dever do Estado garanti-lo através da execução de políticas públicas, consub-*

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*stanciadas no denominado mínimo vital. Todavia, a aplicação, errônea, da teoria da reserva do possível, para esse fim, produz um vínculo entre a efetivação dos direitos e a capacidade financeira do Estado. A EC 95/2016 implementou o denominado teto de gastos. Não bastasse a adoção enviesada da mencionada teoria e da questão orçamentária, a recente alteração legislativa à LINDB passou a exigir, na esfera judicial, que o magistrado aponte as consequências práticas de sua decisão. Em razão disso, o presente estudo, através do método dialético, partiu do seguinte problema: é dado aos juízes entrever um leque completo das consequências possíveis resultantes de sua decisão, perfazendo-se um verdadeiro exercício de futurologia? Conclui-se que houve, a bem da verdade, uma flagrante tentativa de mitigação da força normativa dos princípios, com o objetivo inconfessável de frear o ativismo judicial.*

**PALAVRAS-CHAVE:** Direito à saúde. Mínimo existencial. Reserva do possível. LINDB. Consequencialismo.

## 1 INTRODUCTION

The Brazilian Federal Constitution of 1988 has as one of its fundamental principles the dignity of the human person (Art. 1, III). When dealing with fundamental rights and guarantees, it is provided in the Brazilian Constitution that the right to health is, among others, a social right (art. 6). It further says that health is a right of all and a duty of the State (art. 196 and 197) (BRASIL, 1988).

The three-dimensional structure of the constitutional norms is arranged in three concentric circles. In the first, there is the so-called "essential core" which consists in the principle of immediate applicability (Art. 5, §1º, Brazilian Constitution/88). Then, the so-called "ponderable part" – which encompasses the principle of practical concordance or proportionality. Finally, the "meta-jurisdictional area" – characterized by the principle of separation of powers.

It is observed that weighting is the process by which the conflict between opposing principles will be resolved. Strictly speaking, there are two very well defined paths as a result of a ponderous process, being: a) the harmonization weighting, which seeks to conciliate the principles in conflict, through the application of practical agreement (reciprocal concessions of the values in conflict); (b) the exclusionary weighting which chooses a winning principle, with sacrifice of the other principles at conflict, by applying the principle of proportionality.

With regard to this exclusionary weighting, one must apply a sub-main triad, which involves the appropriateness, necessity and proportionality in the strict sense. In a collision of rights, the application of this triad would observe the following terms: i) Analyze the possibility of the action leading to the intended achievement (adequacy); (ii) The action must be the least restrictive of the rights and interests involved (necessity); and, iii) The public purpose seeks to justify the imposed restriction (proportionality in the strict sense).

The XXI Century Jurist challenge is precisely to provide scientific theories of legal arguments to support the judgments that innovate the legal system. Therefore, the big dilemma today is always the structure of its decision rule: essential core, weighting zone values or meta-jurisdictional regulatory space (GOES, 2018, p. 166).

The article aims to discuss the principles of immediate applicability (vital minimum) and practical agreement or proportionality (reservation for contingences), before the possibilities

and limitation of the State's action in the fulfillment of the right to health and in the supply of medicaments. The medicine supply is "subordinated" to the existence of public resources available, including the action of the Judiciary, in view of constitutional amendment no. 95 (2016) and the recent modification of the LINDB. The law nº 13.655, of April 25, 2018, establishes in its article 20 that the magistrate is obliged, in the judicial sphere, to consider the "practical consequences" of his decision.

## 2 THE VITAL MINIMUM

Theories of the essential core involve the ability to generate a subjective right in itself, without relying on a process of weighting values, nor supervening performance of the democratic legislator, and may all overcome, including the reservation for contingences, factual and legal, and the very counter-majority difficulty of the judiciary.

The theory of fundamental social rights currently hosts a growing discussion around what has been called the vital minimum. This theory imposes the material preservation of the human being, ensuring minimum conditions for the preservation of life and for the integration of society as a harmful issue to public policies to be developed by state governance. The constitutional text is clearly oriented in this sense, for example: by setting citizenship, the eradication of poverty and the reduction of social inequalities as one of its objectives. (NUNES JUNIOR, 2009, p. 71)

Providential transcription of Ingo Wolfgang Sarlet's statements about fundamental social rights:

[...]we believe it is possible to affirm that fundamental rights - in particular social rights - are not mere whim, caprice, privilege or liberality (...) in the context of a "failed and overcome" ruling constitutionalism, but rather, an urgent need, since disregard and lack of implementation hurts to death the most basic values of life and human dignity in all its manifestations, as well as conducting - as lucidly warns Paul Bonavides - an unfortunate, each time less insurmountable and controllable, transformation of many Democratic States of Law into true "neo-colonial states. (SARLET, 2010, p. 315)

The attendance to rights such as education, health, food, work, housing, leisure, security, social security, protection of maternity and childhood and assistance to the homeless (Brazilian Constitution art. 6) requires, in most cases, positive benefits (rights of promotion or benefits rights).

The implementation of such rights occurs through public policies that are the embodiment of certain individual and/or collective prerogatives aimed to reduce social inequalities and ensuring a dignified human existence (NOVELINO, 2011, p. 459).

It is important to note that the Brazilian Supreme Court, known as "STF", after the advent of the citizen constitution, has positioned itself in the sense that the Judiciary should intervene in public policies, which can be seen in the explanations of RUSSO and LEHFELD (2016, p. 324):

The Supreme Federal Court has been consolidating the understanding, mainly after the promulgation of the 1988 Federal Constitution, in the sense that the Judiciary must intervene in public policies with a view to the realization of the right to health, with supedaneous in Articles 6 and 196 of the Constitution, in the basic constitutional nucleus that qualifies the minimum existential and ordinary laws in line with the reservation for contingences. (RUSSO; LEHFELD, 2016, p. 324).

Following the same line of thought, the sayings of Bruna Geovana Fagá Tiessi and Ilton Garcia da Costa:

In this context, the vital minimum began to be studied taking in consideration the very issue of poverty and the minimum conditions of dignified existence. It is therefore understood that there is no possibility of effective fundamental rights without, at the same time, protecting the minimum necessary for each individual (TIESSI; COSTA, 2013, p. 174).

### 3 RESERVATION FOR CONTINGENCES

In Brazil, the reservation for contingences was originated in 1972, through a trial carried out by the German Federal Court, in a decision known as "*numerus clausus*", establishing that the right postulated by the citizen must be subject to the reservation for contingences, concerning the society.

Here is what Vidal Serrano Nunes Junior teaches:

The theory under analysis assumes that state installments are subject to connatural material limits, arising from the scarcity of financial resources by the Government. Therefore, the expansion of the social protection network would depend on the availability of budgetary resources for this purpose. (NUNES JUNIOR, 2009, p. 172)

As for this scarcity, Ingo Wolfgang Sarlet points out that:

It has been established for some time that the State has limited capacity to dispose of the object of installments recognized by the rules defining fundamental social rights (...) It is precisely because of these aspects that the support of social rights to benefits has been sustained under what has been called a "reservation for contingences", which, understood in a broad sense, encompasses both the possibility and the power of disposition on the part of the recipient of the standard. (SARLET, 2010, p. 254)

As can be seen, the theory of the reservation for contingences refers to budgets and resources, besides observing reasonably, requirements that the administrator must consider within what is economically possible, respecting the principles of public administration.

One can see that the existence of the principle of the vital minimum, combined with the reservation for contingences, requires balance, in situations where the State has the duty to guarantee the minimum necessary, *exempli gratia*, the health of the citizen, but on the other hand, there are not sufficient financial resources.

With the scarcity of resources, the State proposes to accomplish only what is within its budgetary limits and when it encounters a fundamental right that has the support of the minimum existential, it claims that the available resources are finite.

Under the understanding that the excuse is unacceptable, it remains to the harmed to take the appropriate actions to guarantee its constitutionally assured right, once the State cannot only shies away from its duty, before the lack of resources.

## 4 THE CONFLICT BETWEEN THE PRINCIPLES OF THE MINIMUM VITAL AND THE RESERVATION FOR CONTINGENCIES, WHEN APPLIED ON THE RIGHT TO HEALTH

There is no doubt that the right to health is one of the social rights guaranteed by the Brazilian Federal Constitution (art. 6, 196 and 197), which means that it must be made effective in a broad and unrestricted manner by the State.

Following the same line of thought, the sayings of Marcelo Novelino:

The care of law such as **education, health**, food, work, housing, leisure, security, social security, protection of maternity and childhood and assistance to the homeless (BFC, art. 6) requires, in most cases, positive benefits (*promotion rights or installment rights*). The implementation of such rights takes place through public policies that are the embodiment of certain individual and/or collective prerogatives aimed at **reducing existing social inequalities and ensuring a dignified human existence.**" (NOVELINO, 2011. p. 525, with added highlights)

The vital minimum encompasses the social rights, necessary for a life permeated by the fundamental rights inherent to the dignity of the human person, constitutionally and internationally, recognized.

In face of the principles of the vital minimum and the reservation for contingences, and the financial situation of the State, conflicts occur in situations where the citizen needs assistance to ensure his health, such as, e.g., in the supply of medicines. This citizen, based on the refusal of the State to provide care to him, turns to the judiciary, seeking the satisfaction of his right.

From there, questions arise about a possible violation of the principle of separation of powers, under the argument that the judiciary would be meddling in matters related to the Executive. This, however, does not seem to be a feasible argument, in view of the application of the doctrine of effectiveness. In the case of programmatic norms not having full success in its application, it is indoubtful that they lend themselves to guaranteeing the vital minimum, there including the duty to "provide" health. Nevertheless, if the right to health cannot find its fullness, on the other hand, it is a job for the State to draw up the guidelines for achieving the common good, which means that it has a duty to guarantee its core – read, the right to life. For this reason, the Judiciary would be authorized to determine to the Executive the fulfill-

ment of this job, since the Brazilian Constitution of the Republic, in this regard, has sufficient normative density to do so.

It is up to the Judge, when provoked, to provide solid meaning to the law and to restrain the jurisdiction of the administrative act in order to it does not to impugn the consummation of the social order.

However, it is imperative to look into the origin of the principle of reservation as possible, so that you can observe most clearly that there is serious distortion in the import and application of the German model in our legal order, notably when it comes to fundamental rights.

The argument of the reservation for contingences, in its birth, does not comprehend rights that are part of the vital minimum, such as access to health care or basic education, but to higher public education. That is the point.

In the words of Nunes Junior (2009, p. 172), another is not the conclusion: *"the legal-positive conditions in which the theory was born do not reproduce in Brazil."*

Here is what teaches Ingo Wolfgang Sarlet (2010, p. 255) about the same matter:

[...] it does not seem correct to affirm that the reservation for contingences is an integrant element of fundamental rights, it is as if it were part of its essential core or even as if it were within the scope of what has been called immanent limits of fundamental rights. The reservation for contingences constitutes, in fact (taking in consideration all its complexity), a kind of legal and technical limit of fundamental rights, for example, in the event of conflicts of rights, when taking care of the invocation – always observed the criteria of proportionality and the guarantee of the vital minimum related to all rights – of the unavailability of resources in order to safeguard the essential core of another fundamental right. (SARLET, 2010, p. 255).

Oswaldo Canela Junior (2011), when discussing "The role of the judiciary in the fulfillment of fundamental social rights", brings to light the budget as an instrument for the enforcement of the social state. It is not too much to repeat. From his point of view, the budget must be provided for the implementation of public policies, and not the other way around. Paradoxical as it may be, this is precisely the doctrinal construction formulated by the exegete. It is the budget at the service of social welfare and not as an obstacle to fundamental rights, of immediate applicability and without delaying, thus repelling the logic of the application of the principle of reservation for contingences. Worth the transcript:

It is observed that the Judiciary has invoked the economic phenomenon to prevent the granting of fundamental social rights. It is claimed that the judiciary cannot grant rights whose satisfaction will demand revenues not available by the State. Such a plea, however, brings with it the disregard that the Brazilian State has objectives to be accomplished in a manner that the budget will serve as an instrument for its fulfillment, and not as an obstacle. Indeed, one of the strongest arguments to justify the lack of effectiveness of social rights is their economic and financial impact. The perception that the satisfaction of life's assets, protected by social rights, causes economic ties in the State budget raised the theme of "reservation for contingences" widespread in doctrine and jurisprudence, to the point of being used as justification for an eventual inertia of the Judiciary when it comes to protecting those rights. (CANELA JUNIOR, 2011, p. 102)

In addition concludes, severely criticizing the theory of the reservation for contingences, exposing that the base of the arguments of its defenders is based on the perspective of a liberal state, far from what the Brazilian Constitution of 1988 advocates:

It can be noticed, therefore, that the theory of "reservation for contingences" brings within itself the strictly liberal spirit - or neoliberal - incompatible with what the Brazilian Constitution affirms, because it seeks an unattainable budgetary stability, away from what is programmatically postulated about the social state. (...) The premise of the "reservation for contingences", when considering the budget as a key part of economic-financial balance, it misaligns itself with the principiological reality of the welfare state, causing the paralysis of the jurisdictional activity, in a conduct that goes clearly against the provisions of art. 3rd of the Federal Constitution (Ibid, p. 108-111)

In that segment, when there is a conflict of principles, one does not derogate from the other, but their weighting must be made, through the analysis of proportionality, as is extracted from Robert Alexy's notes:

Principles are commandments of optimization in face of legal and phatic possibilities. The maxim of proportionality in strict sense, i.e., the requirement of weighing, arises from relativization of legal possibilities. (...) This means, that the maxim of proportionality in the strict sense is deducible from the principle of fundamental rights norms. (ALEXY, 2008. p. 117-118)

Moreover, the Brazilian Supreme Justice Court, known as "STJ" (appeal 1.657.156-RJ) has set requirements for the Judiciary to examine the demands for the supply of medicines that are not included in Annex I of Ordinance No. 2,982/2009 of the Ministry of Health. Those requirements are: i) need of the drug, as well as the inefficacy, for the treatment of the disease, of drugs provided by the Brazilian public system of health, known as "SUS"; ii) the patient's financial incapacity; and iii) registration of the drug in the Brazilian National Health Surveillance Agency, called "Anvisa".

As can be seen, the Judiciary has also acted to ensure consistency and objectivity in granting of the good of life.

## 5 THE JUDICIALIZATION OF HEALTH

It should be noted that the separation of powers in Montesquieu's work have be analyzed by considering judicial activism and the figure of the democratic legislator. Therefore, is immediately important to clarify the discussion about the impossibility of invoking the principle of separation of powers with the aim of not enforcement of the fundamental social rights, including the right to health.

Canela Junior faces the issue, extolling the independence of the judiciary:

It is not possible to exhort the principle of separation of powers for the failure to examine the claim of the holder of fundamental social right. As already pointed out, the Judiciary, during the exercise of constitutionality control, does not interfere in the exclusive sphere of attribution of other ways to the expression of state power in which it acts exclusively in the judicial sphere. (...) On the other hand, the principle of separation of powers cannot be used to jus-

tify the violation of the objectives of the State, to which all forms of expression of the state power are bonded. (...) It is considered impartial a judiciary that, not influenced by political-party vicissitudes, is completely compromised to the objectives of the State. As one of the fundamental objectives of the State is the achievement of substantial equality, which can be confirmed by the Brazilian Federal Constitution in its art. 3, the Judiciary demonstrates all its impartiality and independence when carried out through adjudication fundamental rights especially social rights. (...) Contrary to what the logic of "reservation for contingencies" says, it is the final judgment that will compose the budget, obligating the State to readjust revenue and expenditure, so that its fundamental objectives are effectively achieved. This is, undoubtedly, the best social achievement that the judiciary could give to their decisions, according to the command contained in Art. 5 of LINDB, especially in the case of underdeveloped countries, regarding to the economic oppression and the misery of peoples reaches alarming levels. (JUNIOR CANELA, 2011, 94/95, 98, 109)

Faced with resisted pretension, regarded to the effective state provision of basic social rights, especially the right to health and the refusal by the State, the way left to meet the pleas of the citizen is to enter the judiciary, *e.g.*, for the provision of beds in hospitals, carrying out treatments or surgical interventions, or providing free medicaments. Situations that are part of the daily life of the legal operators.

Moreover, it must be recognized that the specificity of the political system lies in the kind of communication it produces, which is, the communication of power. According to the Luhmannian theory, the politics is an operationally closed, self-referential and self-productive communication system. The political system, as well as law system produce specific social operations that promotes their social differentiation, whose structural coupling between the political and legal systems occurs through the Federal Constitution.

About this matter:

From the communicative dichotomy (government/opposition), the political system can offer decision-making alternatives between the government and the opposition, in which the government takes collectively binding political decisions, while ideas about alternatives passive of possible decision are considered by the opposition (LUHMANN, 2005, p. 487). Thus, the government decides and the opposition serves as a reflexive reference about this decision, showing the other possibilities that the government could take, allowing pondering on the decision made. The opposition, contrary to what common sense believes, should not oppose to any decision taken by the government, they must show alternatives that were not taken in order to generate wonderment on the decision made by the government. (ROCK; BAHIA, 2016, p. 75/76)

From the above quotation, it can be attested that the performance of the magistrate is the most difficult, with regard to the requirements for the fulfillment of the fundamental social rights, because the actual public administrations may result in an obstacle to the solidification of the judicial decision itself. Which should not happen, for the sake of the truth.



## 6 THE BUDGET ISSUE

The Planning and Budgeting Instruments, according to the Brazilian CF/88, consists in Multiannual Plan (PPA), Budget Guidelines Law (LDO) and the Annual Budget Law (LOA).

The PPA, with validity of four years, has the role of establishing the instructions, objectives and medium-term goals of the public administration. It concerns the LDO, annually, to set out public policies and their priorities for the following financial year. The main objectives of the LOA are to estimate revenue and fix the schedule of expenses for the financial year.

Having that said, the *Magna Carta* indicates the path to be taken, so, the constituent legislator has established that the fundamental norms have immediate applicability and full effectiveness, so that the budget lends itself to comply with this constitutional command. Any posture different from the public administrator is pure tergiversation.

About this:

[...] the principle of human dignity is one that qualifies man as the only being endowed with non-relative value. Well, therefore, in the sphere of the vital minimum, once inherent to the sense of human dignity, there is no way to mitigate, it is worth saying, to relativize the notion of dignity based on budget forecasts. (NUNES JUNIOR, 2009, p. 190)

The Brazilian Federal Constitution is lavish when establishing provisions about the right to health. By way of exemplification, in the article 6, is established that health is a social right. In Article 7, two other items refer to health: the IV that determinates that the minimum wage should be able to meet the basic vital needs of the worker and those of his family, including health; the item XXII, on the other hand, cites the reduction of risks inherent to work through health, hygiene and safety standards. Articles 23 and 24, XII, talks about the competence that the Union, the states, the Federal District and counties hold to ensure the protection and enforcement of the right to health. Article 34, item VII, (e) and 35, item III, addresses the possibility of the Union to intervene in states and counties when the minimum required of revenue, resulting from state taxes, including those from transfers, are not applied in the maintenance and development of public health services. Article 196 shows that health is considered a right of all and duty of the State, guaranteed through social and economic policies aiming to reduce the risk of disease and other injuries, universal and equal access to actions and services for its promotion, protection and recovery.

Thus, the right to health, both physical and mental, is essential to the right to life that must be offered by all federative entities through treatment and prevention policies, medical, psychological and legal care, guaranteeing to the society the effectiveness of this right. In other words, the right to health must observe the principle of material equality, which observes the specific case, as well as the vital minimum and dignity of the human person.

However, erroneously, there is the tragic necessity to make choices so that the principle of the reservation for contingencies, based on necessity, respects the principles of reasonableness and proportionality, preventing justice from granting high-cost medication to one individual over another. Remembering that it has no connection between the imposed by the Brazilian order and the requests for universal access to the public higher education – like the Germans.

Under the Law 8.080/1990 and 8.142/1990, the Brazilian public health system (SUS) should be the guarantor of the right to health. It should, through the creation of a decentralized and solidarity policy provides hospitals, health centers, and other ways to promote population care, prioritizing preventive actions, following the provisions of the *Magna Carta* of 1988 as well to inform the population about their rights and health risks.

Once these considerations were made, it cannot be accepted that who is judging gets benevolent to the debtor – in this case, including the State. Failing condemn, because the defendant lacks equity to satisfy the obligation is, at the very least, to act out of benign feelings, as has been said.

Oswaldo Canela Junior gives a good example of what this practice would represent, emphasizing that the judiciary should interfere in the public budget:

During the declaratory phase of the law, however, it is not given to the jurisdictional body to absorb the economic-financial issue to paralyze its activity. **This would represent, in comparison with the private plan, the weird figure in which the debtor would not be condemned to the repair of the damage, because he does not have enough assets for the future performance of the judicial enforcement order.** If the state's assets are not sufficient for the complete implementation of its constitutional obligations, it paves the way for two possible solutions: a) the application of the principle of proportionality using the existing resources, in case of emergency guardianships concession; or, b) the budget adjustment for compliance with the final judgment. (...) Budget, like any state act, must be strictly bonded to the objectives set out in Art. 3 of the Federal Constitution. Such a statement is in line with the unavoidable assumption that the ends of the State can only be effectively achieved through the use of public funds. (...) From the perspective of the social state, the budget cannot be an obstacle to the granting of fundamental social rights, but its instrument of fulfillment. (...) It is concluded, therefore, that the interference of the judiciary in the public budget is not only allowed, but also mandatory in the cases of violation of fundamental social rights. (highlights added) (CANELA JUNIOR, 2011, 103, 107/108, 111)

Observe with sharpness of detail, as stated by the author, that the law enforcement should never refrain from sanctioning the defaulting State, on the unfortunate grounds that the debtor meets its unsecured liability and, therefore, does not meet the conditions to fulfill the obligation.

Certainly the most unwary will defend the opposite position, on the grounds that the budget would serve precisely to delimitate public spending. However, the Constitution of the Republic of 1988 in this regard, that is, in the case of fundamental rights, leaves no room for discretions. In other words: The Major Law be fulfilled without delay. The rest is the rest.

However, it should be noted that the constituent legislator, under the discourse of a strict fiscal adjustment, culminated in the constitutional amendment, "EC", 95/2016 – the infamous "PEC of expenditure caps", how is known in Brazil – bringing harmful restrains to fundamental rights, which cannot (or should not) be at the mercy of political and economic contingencies, notably those of health, so sublime and expressly enshrined in art. 196 of the constitutional text.

Ricardo Antunes (2018, p. 293) gives us the exact dimension of the actual reason of being of the norm: "to guarantee the primary surplus necessary for the remuneration of the

financial system through the interest of public debt, which is one of the real scourges that plague the country". Naturally, it is not intended to look into the economic issue surrounding the amendment, but only to approach it with the purpose of demonstrating how taint constitutional management has been taint.

As can be seen, the imposition of a spending limit regarding to health and the seal of the breach in the Constitution, based on the Germanic model, under the heading of the "reservation for contingencies" which has already been said, has nothing to do with the situation exposed and debated here, is at the very least, infidelity to the options of the constituent legislator. It would be the equivalent of guaranteeing fundamental social rights, "as long as the dumb is full", which means, in practice, without any legal bond.

## 7 THE SETBACKS OF CONSEQUENTIAL DISCOURSE

Thirty years after the promulgation of the Brazilian Constitution of 1988, as if the elements that surrounds fundamental rights was not enough, it is urgent to bring up the recent publication of Law No. 13.655/2018, which, among other legislative changes to LINDB, imposed on the magistrate (art. 20, LINDB)[1] – excerpt that interests us in this study – the obligatoriness to consider the "practical consequences" when making their decision, which leads us to ask questions about this matter: i) what would be this prior analysis for the practical legal consequences of the decision? ii) would the judge be obligated to evaluate, e.g., what is the impact of the decision on the public system, the Brazilian "SUS"? It would be an actual futurology exercise, after all.

This new provision does not prohibit decision being made based of abstract legal values. However, every time it is decided on the grounds of abstract legal values, must be made a prior analysis of what the practical consequences of this decision will be, in other words, Art. 20 of the LINDB introduces the need of the judging body to consider a meta-legal argument when deciding.

Undoubtedly, there is a glaring attempt to mitigate the normative force of the principles. Well, the Constitution of the Republic itself is full of "abstract values". There are countless examples, here are some of them: "dignity of the human person" (Art. 1, III); "social values of work and free enterprise" (art. 1º, IV); "morality" (art. 37, caput); "social well-being and justice" (art. 193); "ecologically balanced environment" (art. 225).

Based on the normative force of constitutional principles, the Judiciary, in recent years, condemned the Public Power to implement a series of acts aimed at ensuring rights that were being disrespected, as can be seen from the appeal "RE" 429.903/RJ, which ordered the Public Administration to keep a minimum stock of determined medications, in order to avoid further interruptions in the treatment of serious diseases. Similarly, by the appeal "RE" 592.581/RS, the Government was ordered to carry out emergency works in prison facilities.

As can be seen, these decisions were uttered based on constitutional principles, that are all, in fact, "abstract legal values". What the legislator intended, therefore, was, indirectly, to try to prevent judicial activism in matters involving the implementation of rights.

It is as if the legislature introduces a condition for the normative force of the principles: they can only be used to substantiate a decision if the judge considers “the practical consequences of the decision”. It is, therefore, a retrograde reaction to the normative force of constitutional principles.

Souza (2018, p. 126/127) makes severe criticism about the innovations brought by the Law No. 13.655, of April 25, 2018, because he understands that the rule postulated in art. 20 of LINDB barely hides some form of idealism, as if the judge were given to see a complete range of the possible consequences resulting from his decision, which means to say that he would have to do a real exercise of futurology:

When it is said that the judge should not decide based on abstract values (Article 20), it seeks to put an end on rhetorical argumentation, speech that uses common places and formulas established by its use. This explains, moreover, the recent changes of the Brazilian Civil Procedure Code (federal law “LF” no 13.105/15), particularly the reason for the norm of Article 489, § 1, I to III (SOUZA, 2016). (...) it is certain that each judge has his worldview, so that the person responsible for the “judicial control of administrative control” will make estimates that are in accordance with his worldview, while the person responsible for administrative control will value the need and adequacy of the invalidation of acts, contracts, adjustments, processes or administrative norms, as well as the measures imposed, according to a worldview of its own. (SOUZA, 2018, 126/127)

Morais and Zolet shows concern about the matter of the changes inserted in LINDB, notably in relation to legal (in)certainty:

It is known, based on the regulatory provisions of LINDB, the possibility of decision-making by considering the practical consequences of the decision. However, it remains to be seen what the right amount, necessary or sufficient volume of considerations should be accounted by the judges in the context of their decisions. Because of this, it is expected that consequentialism is not just a new costume to dress an old habit: arbitrariness. (MORALS; ZOLET, 2018, p. 518)

Marçal Justen Filho, On the other hand, makes a mea-culpa:

Every decision based on general and abstract norms presupposes a weighting process inextricably linked to the existing factual universe. This requires the consideration of practical consequences of a decision, including to avoid the consummation of irreparable damage to the values considered the basis for deciding. (JUSTEN FILHO, 2018, p. 23)

Despite the contrary understanding, it would not be excessive to point out that the new LINDB implicitly provides scope for rights to be removed, based on economic consequences, called “practical consequences”. Long story short, a real attack on fundamental rights.

## 8 FINAL CONSIDERATIONS

Health rights remain precarious and fragile. They are the target of a constant attack – in the perspective of the erroneous application of the theory of the reservation for contingencies, whose German model resembles the fundamental rights discussed here.

The constitutional amendment, "EC" 95/2016, instituted a new fiscal regime, impacting directly and negatively the public health actions and services. Not only that, the legislature, in a recent legislative amendment to LINDB – notably with the inclusion of Art. 20 – made a new attempt against fundamental rights, by establishing that it will not be made decisions without accounting the practical consequences of the decision, in a glaring attempt to mitigate the normative force of the principles, with the uncontested objective of stopping judicial activism. However, it cannot be overlooked that the area of failed effectiveness by the Judiciary is only the meta-jurisdiction, which is in the spotlight of the Legislative and Executive Branches, whose role of the Judiciary is to establish [or not] legal validity to the norm. On the other hand, the essential core – including fundamental rights to health – is precisely that area in which the judiciary acts for the effective fulfillment of the right, aiming the social effectiveness of the norm.

The effectiveness of fundamental rights, with regard to the right to health, in the paradigms of the Brazilian Constitution of the Republic of 1988, must be ensured by the State, being the Public Power responsible for implementing the norm.

In the attempts to find solutions for these impasses between the right to health, life, the dignity of the human person and the actual financial capacity of the State, there is a conflict between constitutional norms, making it necessary to resort to the principles established in the Federal Constitution.

It can be stated, this way, that the legal imposition to the judges to predict a range of consequences resulting from their decisions also decreases the normative force of the principles. It is to stop the action of the judge when, in fact, the constitution itself determines and expects that the opposite be done.

It is up to the interpreter, in an accurate manner, to validate the foundations inherent to the theory of the vital minimum, that is, whatever is related to the nuclear part of rights – by immediate application – as well as the weighting between the principles, observing the specific matter to the current social needs, the constitution dictates and the pressing needs of those who postulate for the fulfillment of their essential rights.

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