



## THE UNCONSTITUTIONAL STATE OF AFFAIRS AND THE RIGHT TO HEALTH, AN ANALYSIS BASED ON PUBLIC HEALTH PROMOTION POLICIES<sup>1</sup>

 <https://doi.org/10.56238/levv16n47-061>

Submitted on: 17/03/2025

Publication date: 17/04/2025

**Maria Janeth de Sousa Soriano Sirqueira<sup>2</sup>, Denisson Gonçalves Chaves<sup>3</sup>**

### ABSTRACT

This article analyzes the Unconstitutional State of Things (ECI) in the Brazilian context and the right to health from public health promotion policies. Brazil has consecrated the process of caring for the human being to be the responsibility of the State, the right to health is widely recognized and enshrined by the Federal Constitution of 1988 according to art.196. However, it is worth mentioning that the guarantee of the right to health of Brazilians goes through the three spheres of management. When approaching health from the perspective of the ECI, there is an urgent need for more effective, planned policies aimed at promoting the dignity of the human person and strengthening the SUS, and respect for constitutional principles and the accountability of the State, as the State omissions were evidenced. The recognition of the ECI, although recent in the Brazilian legal system, is a relevant instrument to pressure the State to comply with its constitutional obligations, breaking with administrative inertia and promoting integrated structural responses for health in Brazil.

**Keywords:** Unconstitutional State of Affairs. Right to Health. Public Policies. Federal Constitution. Civil Liability of the State.

<sup>1</sup> Article presented to the Bachelor's Degree in Law by the Higher Education Unit of Southern Maranhão – UNISULMA.

<sup>2</sup> Graduating in Law at the Higher Education Unit of Southern Maranhão – UNISULMA.  
Email: janethsorianosirqueira@gmail.com

<sup>3</sup> Master in Law and Institutions of the Justice System (UFMA). He holds a degree in Law from the Federal University of Maranhão (UFMA). Professor at the Higher Education Unit of Southern Maranhão – UNISULMA.  
E-mail: denisson.chaves@unisulma.edu.br

## INTRODUCTION

Health is a fundamental right guaranteed by the Brazilian Constitution. Understanding the Unconstitutional State of Things (ECI) in health policies is crucial to ensure that citizens have access to quality services. Applying this institute is pertinent to evaluate the effectiveness of government actions. Therefore, the ineffectiveness of health policies due to financial and governmental issues has a direct impact on the lives and well-being of citizens, increasing vulnerability and hindering access to essential treatments and services.

The present research aims to analyze the recognition of the Unconstitutional State of Things in Brazil and its impacts on public policies for health promotion, identifying the challenges faced within the scope of the Unified Health System (SUS). It seeks to understand, in the light of constitutional principles, how the configuration of the ECI can reveal the State's omission in guaranteeing the right to health and how this correlates with the State's civil liability.

The relevance of the theme is justified in view of the chronicity of the precariousness of public health policies in several regions of the country, especially in contexts marked by social inequality. The critical analysis of the ECI, associated with the doctrinal and jurisprudential debate, in which it allows shedding light on possible ways to overcome the structural crisis experienced by the Brazilian health system

In this sense, this article seeks to study and analyze the mechanism and how the Unconstitutional State of Things occurs, identifying its causes, consequences and possible legal solutions and state responsibilities. It is a theoretical-legal and constitutional approach, in which possible answers were sought that aim to confer the legitimacy of the institute. proposes an analysis of the ECI based on the right to health, especially with regard to public policies for health promotion.

The methodology used is qualitative in nature and consists of documentary and bibliographic analysis of legal works, constitutionalist doctrine, national legislation and jurisprudence of the Federal Supreme Court (STF), with emphasis on ADPF 347/DF. The approach adopted is exploratory and descriptive, based on the deductive method, seeking to understand how the ECI can act as an instrument for restructuring public health policies in the face of repeated state omissions. The choice for the qualitative methodology aims to deepen the critical analysis of the State's performance and the legal mechanisms available for the realization of the fundamental rights to health. The work proposes to understand the concept, characteristics, requirements and dogmatic efforts built to justify structural political intervention in the deviations from the conduct of public health policies, considered

unconstitutional, finally, to carry out a comparative study between constitutional theory and possible legal and normative instruments for its effectiveness (Barcelos, 2015).

## THE UNCONSTITUTIONAL STATE OF AFFAIRS: THEORETICAL FOUNDATIONS AND APPLICATION IN BRAZIL

The Unconstitutional State of Things (ECI), *a priori*, the origin of this legal instrument was coined at the end of the 20th century in decisions of the Court of Colombia, in the unification sentence SU 559 (COLOMBIA, 1997). In this action, the special distribution of educators and budgetary resources related to education was discussed. The sentence did not declare the unconstitutionality of the laws or normative acts requested, but rather the unconstitutional state of affairs that violated the Constitution. From this position, the Court granted itself the duty to collaborate with the other branches and organs of the State in achieving the purposes proposed by the Colombian Constitution, as well as to communicate the state of violation to the competent authorities.

Therefore, unconstitutionality occurs when a legal norm violates the Constitution or when, due to its absence, it violates the Constitution. For Canotilho, while unconstitutionality by action presupposes the existence of unconstitutional norms, unconstitutionality by omission presupposes the "violation of constitutional law by legislative silence (violation by omission) (Canotilho apud Lenza, 2017. p.982).

In this sense, the conquests of fundamental rights, anywhere in the world, were made at the cost of struggles, demands, and they are not all born at once. Rights are transformed and improved, generally following the evolutionary and dynamic character of society. Because they are very similar realities referring to Colombia, Brazil imported this theory by recognizing it through the Federal Supreme Court in the Action for Non-Compliance with a Fundamental Precept No. 347, filed by the Socialism and Liberty Party - PSOL. the theory of the Unconstitutional State of Things seeks to try to minimize social ills in the face of serious violations of fundamental rights.

In Comparative Constitutional Law, there are interesting examples of intervention by constitutional jurisdiction in the face of serious and structural flaws in public policies that threaten the enjoyment of social rights. Undoubtedly, one of the most fruitful essays in this field comes from the Constitutional Court of Colombia itself, perhaps one of the most active and outstanding constitutional courts in the defense of fundamental rights (Lenza, 2017).

Since the late 1990s, the Colombian Court has made use of the theory of the "Unconstitutional State of Affairs" when it recognizes the presence of a massive violation of the fundamental rights of a significant number of people, whose resolution depends on a

complex and coordinated set of measures to be adopted by numerous entities. In these cases, the Court may even retain its jurisdiction to monitor, in a public procedure, compliance with the measures it establishes (Santos; Pereira, 2017).

In this context, also for Santos and Pereira (2017), the deepening and improvement of judicial control of public policies, due to the influence of a structural dimension of judicial activism of the Constitutional Courts, draws attention to the theories, instruments and limits that justify an atypical role of the Judiciary, as an institutional coordinator of public policies in the area of health. The diagnosis that is made is that the individual litigation model that prevails in the Brazilian scenario of judicial health protection overloads our courts and generates all kinds of inefficiency, lack of control and disproportionality. Therefore, a new paradigm must be imposed, based, above all, on coordination and dialogue between the different organs of the State and on more flexible decisions, able to respect the space of deliberation of the Executive and Legislative Branches.

The Federal Supreme Court (STF) recognized for the first time the existence of an Unconstitutional State of Things in Brazil when judging the Allegation of Non-Compliance with a Fundamental Precept (ADPF) No. 347, in 2015. In this case, the STF declared the (ECI) in the national penitentiary system, in view of the alarming situation of prison overcrowding, unsanitary conditions and violation of the dignity of prisoners. In addition to the prison system, academic investigations and judicial decisions have pointed to the possibility of considering the state of affairs unconstitutional in other areas, such as public health and education, considering the structural precariousness, the constant violation of rights and the historical inability of the State to offer effective solutions. (Barcelos, 2015).

Personal freedom is one of the most precious rights of human beings, but in certain circumstances it can be suppressed for a certain time, due to actions that lead individuals to be accused and convicted of committing crimes. However, prisoners in Brazil are not only deprived of their right to freedom, but also have their dignity and a series of other rights violated (for example, the right to life, physical and psychological integrity, not to be subjected to inhuman or degrading punishment or treatment, etc.) that should be protected and guaranteed by the State inside prisons. All due to the precariousness of the country's prison system (Pereira, 2017).

Another fact that reveals the precariousness of the prison system is the absence or inefficiency of organization, integration and intercommunication between prison bodies and establishments, as well as the lack of effective management in penitentiary units and control of files related to the execution of sentences. Official data indicate that more than

60% of prison units have no control over the time prisoners are deprived of liberty, although there are absurd annual expenses for maintenance and personnel costs (CNJ, 2017).

In addition to the prison system, other situations in Brazil have been discussed as potential examples of the Unconstitutional State of Affairs, especially in the areas of health and education. In public health, there are recurrent reports of precariousness in hospitals, lack of essential medicines, delays in carrying out procedures and absence of minimum infrastructure to ensure dignified care for citizens. These deficiencies are not only punctual failures, but true structural and permanent evident failures of the fundamental rights to life and health, provided for in the Federal Constitution of 1988. Similarly, in the educational field, the insufficiency of resources, the poor quality of teaching and the lack of access to basic and higher education in a universal and egalitarian way demonstrate the persistence of evidence that compromises the full development of children and young people, generating profound impacts on the constitutional project of social justice (Barcelos, 2015).

## **THE RIGHT TO HEALTH IN THE BRAZILIAN LEGAL SYSTEM**

Historically, Brazilian society, especially during the decade that began in 1980, has become aware of its right to health. Both those millions of people who are still completely on the margins of the consumer market, as well as the economic and social elites, have claimed the guarantee of the right to health. No one has any doubt that Article 25 of the Universal Declaration of Human Rights, of the United Nations, signed by Brazil, when it lists health as one of the necessary conditions for a dignified life, is recognizing the fundamental human right to health. Professionals linked to the health area have also been demanding from the Brazilian government the protection, promotion and recovery of health as a guarantee of the essential right of the people. However, for this right to be truly guaranteed, it is necessary to clearly understand the meaning of the term "right to health" (Santos E Pereira, 2017).

The right to health is widely recognized in the Brazilian legal system, being enshrined in the Federal Constitution of 1988, which, in its article 196, establishes that "health is a right of all and a duty of the State", ensuring its promotion through the Unified Health System (SUS). This constitutional provision reflects the commitment of the Brazilian State to the universalization of access to health and to the promotion of equity in the care of the population, regardless of their social, economic or geographical condition. However, in addition to the constitutional norm, the right to health is detailed in several infra-constitutional legislations, such as Law No. 8,080/1990 (Organic Health Law) and Law No. 8,142/1990, which regulate the organization, financing, and management of the SUS, in

addition to establishing the rights of users of the health system. These norms form a legal basis for the implementation of public health policies in Brazil, but, despite the robustness of the normative framework, the realization of this right faces significant structural and financial challenges (Giovanella, 2020).

Article 196 of the CF/88 makes it very clear that the right to health is a right of all and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other health problems and universal and equal access to actions and services for its promotion, protection and recovery. It is clear that even in 2018, that is, 30 years after the enactment of CF/88, the right to health was not fully guaranteed by the public authorities. Even though our Constitution is defined, in the classical concept, as a leader – that is, characterized by the existence, in its scope, of programmatic norms, directing, imposing that the powers act in a certain way in the future – there is currently no efficient protection of this right (Costa, 2019)

The Organic Health Law (LOS) aims to regulate, "throughout the national territory, the health actions and services performed, alone or jointly, on a permanent or occasional basis, by natural or legal persons of public or private law" (Law No. 8,080, art. 1) and clarifies that the Unified Health System (SUS), constituted, in the constitutional diction, by public health actions and services, involves "the set of health actions and services, provided by federal, state and municipal public bodies and institutions, of direct and indirect administration and of foundations maintained by the Government and the private initiative and on a complementary basis" (Law n. 8.080, art. 4) (Dallari, 2009).

Also for Santos and Pereira (2017), it is public policies that systematize the State's action to promote the fundamental rights enshrined in the Constitution. The failure in the spontaneous provision of these public policies by the competent bodies or institutions, either due to their inertia or the low quality of the services provided, opens space for the control operated by the Judiciary, in order to safeguard the social rights entitled by the target public of the public policies. The courts assume a posture of judicial activism, which Luís Roberto Barroso teaches is "associated with a broader and more intense participation of the Judiciary in the realization of constitutional values and purposes, with greater interference in the space of action of the other two Powers"

Dealing specifically with health, as part of social security (art. 194), the Constitution embraced the current conception of health, which is not limited to the absence of diseases and other problems, requiring the implementation of public policies that aim at "reducing the risk of disease and other problems" and "universal equal access to actions for its promotion, protection and recovery" (art. 196). It also organized the public health system, requiring that

all health actions and services be part of a network that has only one direction in each sphere of government. The Constitution also requires that this network, providing comprehensive care for health needs, be organized considering the different levels of complexity of health actions and services, hierarchically. And, above all, in coherence with the requirements of the Democratic Rule of Law, it provided that all health actions and services must be carried out with the effective participation of the community (art. 198) (Giovanella, 2020).

## IMPACTS OF ECI RECOGNITION ON HEALTH PROMOTION POLICIES

For Trovão (2019) it can be defined that the Unconstitutional State of Things is a set of acts, actions and omissions, coming from the public powers that give rise to a massive violation of fundamental rights, a Colombian theory that was recognized by our national system in 2015, by an injunction of an Allegation of Non-Compliance with Fundamental Precepts (347). Considering that the application of this theory aims to overcome the massive violations of fundamental rights and that it covers the whole of society.

Considering this, it is worth remembering that the constitutional system is not only made up of the Federal Constitution, but also of complementary laws and ordinary laws, since, from a material point of view, they are considered constitutional and are expressly provided for in the CRFB/1988 (Trovão, 2019)

The Unconstitutional State of Things (ECI) is a legal concept that refers to a situation of massive and persistent violation of fundamental rights, which stems from structural flaws in the functioning of public power. In Brazil, this concept has been recognized by the Federal Supreme Court (STF) in lawsuits related to the prison system, but it can also be applied to other areas, such as public health (Pereira, 2017)

Brazil, through the Citizen Constitution, consecrated the process of caring for the human being to be the responsibility of the State, according to article 196 of the Federal Constitution. It is worth mentioning that the guarantee of the right to health of Brazilians goes through the three spheres of management, which we call the tripartition of management: Union, States and the Municipality, the latter being the object of study in this work (Trovão, 2019)

Unfortunately, because this right has not been put into effect, what is legally designated as the Unconstitutional State of Affairs, or rather, the violation of the Constitution in an aggressive way, since there is an injury to the State's guarantee to promote the right to health, exemplified by the inaccessibility to health services according to the complexity of services that the citizen needs, due to the limitations that the SUS

presents, the Judiciary has been overloaded with demands and, sometimes, exercises actions that are not within its competence.

The right to health is guaranteed by the Federal Constitution of 1988, which determines that it is a duty of the State to guarantee universal and equal access to actions and services for its promotion, protection and recovery. However, reality shows that, in several Brazilian cities, there is a deficit in the effectiveness of public health policies, leading to a scenario of precariousness in the care of the population (Barcellos, 2015).

Therefore, public health promotion policies aim to expand access and improve the quality of life of the population, as provided for in Law No. 8,080/1990. However, its implementation has been marked by regional inequalities, lack of adequate funding, and mismanagement. For Giovanella et al. (2020), health promotion still faces obstacles to being fully integrated into SUS practices.

And so, the recognition of the ECI in the field of public health can represent an important mechanism for correcting the structural flaws of the system, allowing the Judiciary to demand from the Executive the adoption of effective and planned policies. In addition, it allows the joint action of the three federative entities, with a view to overcoming a state of omission, we can say chronic. In this sense, Sarlet and Fensterseifer (2016) argue that the ECI expands the possibilities of judicial action in the realization of social rights.

Given this scenario, it is possible to question whether the public health situation in Brazil can be recognized as an Unconstitutional State of Affairs. This is because the systematic violation of the right to health affects a large number of people, becoming a structural failure of the State that cannot be solved only by individual measures, requiring a coordinated and comprehensive intervention by the competent bodies (Costa, 2019).

## **CONSTITUTIONALIST PRINCIPLES OF VALUING AND PROTECTING FUNDAMENTAL RIGHTS TO HEALTH**

Health is a social right enshrined in Article 6 of the Federal Constitution and regulated by Article 196, which establishes that health is everyone's right and the State's duty. The systematic interpretation of the Constitution, combined with the principles of human dignity, equality and solidarity, underpins the state's obligation to guarantee universal and equal access to health services (Pinto, 2016).

The Federal Constitution of 1988 established the foundations of a Democratic State of Law committed to the realization of fundamental rights, including the right to health. However, the distance between what is provided for in the constitutional norm and the concrete reality

faced by millions of Brazilians challenges the effectiveness of these rights. In this context, the concept of the Unconstitutional State of Things (ECI), consolidated in the jurisprudence of the Colombian Constitutional Court and later adopted by the Federal Supreme Court (STF), emerges as a legal and political instrument to denounce and confront situations of massive, continuous, and structural violation of fundamental rights (Silva, 2020)

Furthermore, the systematic interpretation of the constitutional text, based on the theory of constitutional principles, imposes the observance of fundamental axiological guidelines, such as the dignity of the human person (art. 1, III), material equality (art. 5, caput) and the structuring principles of the Unified Health System – universality, integrality and equity (art. 198). These principles constitute true hermeneutic vectors for the formulation, execution, and inspection of public health policies according to the CRFB 1988 (Ferrarini, 2020).

Overcoming the Unconstitutional State of Things in public health requires the adoption of strategies that go beyond the simple expansion of the care network. Integrated planning is necessary between the different levels of government as well as the municipal, state and federal levels, ensuring the efficient allocation of resources and the implementation of public policies that prioritize primary care, prevention and adequate treatment of the diseases that most affect the population in general (Silva, 2020).

In view of the above, the analysis of the right to health at the national level, from the perspective of the Unconstitutional State of Affairs, highlights the urgency of structuring measures to ensure the realization of this fundamental right. Overcoming this situation requires not only greater efficiency in public management, but also a real commitment to the dignity and well-being of the population.

In this sense, in order to break with this precarious situation and ensure the fundamental right to health, a joint effort between government and society is needed. The implementation of structuring measures and the continuous inspection of public policies can be the way to ensure dignified, efficient and accessible care for all. Otherwise, there is a risk of health treatment remaining in a cycle of inefficiency and neglect, perpetuating a true Unconstitutional State of Things that violates the basic principles of the Constitution and compromises the dignity of the population, is what Dallari (2019) has been corroborating, according to his studies on the ECI.

## THE DOCTRINAL CONTROVERSIES SURROUNDING THE ECI AND THE BRAZILIAN HEALTH SYSTEM

Despite its transformative potential, the ECI is the target of doctrinal criticism that questions its legitimacy and effectiveness. Barroso (2017) warns of the risk of hypertrophy of the Judiciary and consequent emptying of the autonomy of the other branches. Streck (2019) points out that the ECI can reinforce the judicialization of politics, weakening the democratic channels of deliberation.

For Silva (2012), the 1988 Constitution operated a true "constitutionalization of social rights", which imposes on the State not only the abstention of harmful conducts, but also the positive action aimed at the realization of these rights, especially in contexts of social vulnerability. This implies that the right to health cannot be interpreted as a merely programmatic norm, but as a binding command, endowed with full effectiveness.

In the same sense, The effectiveness of the right to health depends on the adoption of consistent, well-structured, adequately funded public policies based on technical and ethical criteria. In his study, Sarlet (2008) reinforces that the principle of prohibition of social regression should focus on public health policy, prohibiting measures that imply an unjustified reduction in the level of protection already achieved.

Furthermore, with regard to the principle of the reservation of the possible, which is often invoked to justify state omission, it must be balanced by the principle of maximum effectiveness of fundamental rights, as recommended by the Federal Supreme Court. In this sense, for Barroso (2017) he warns that "the scarcity of resources cannot serve as an absolute shield for non-compliance with constitutional obligations, especially when it comes to fundamental rights linked to the dignified existence of human life".

Thus, the absence or ineffectiveness of public policies aimed at health can give rise to the action of the Judiciary in the defense of the essential core of the right, especially when the systemic, continuous and generalized violation is proven – a scenario that justifies the application of the Unconstitutional State of Things (ECI), which in this context represents a relevant legal tool for institutional reconstruction and protection of the fundamental principles of the Democratic Rule of Law.

As Fensterseifer (2016) observes, "the action of the Judiciary in contexts of structural omission of the State does not mean violation of the principle of separation of powers, but rather the implementation of the Constitution". The protection of the right to health, therefore, requires permanent positive actions from the State, the absence of which must be addressed based on constitutional foundations and available instruments, such as the ECI, judicial control of public policies, and state accountability.

For Trovão (2019), he emphasizes that important points need to be clarified at all times, so that they are not distorted or confused, since, as said, rights are not absolute. In the study that is fruitful, there will be an analysis of the dynamics that involve personal relationships and that makes fundamental rights be invoked at all times, and not least, they are also judicialized, in view of the principle of inalienability and access to justice, both also included in the list of fundamental rights. It is perceived, therefore, that this specific category of rights, due to its essentiality, has characteristics that function as a means of enforcing other rights of the same category, so that they can be enjoyed in harmony.

## **GENERAL ANALYSIS OF THE CIVIL LIABILITY OF THE STATE IN THE BRAZILIAN LEGAL SYSTEM AND THE ECI**

The civil liability of the State is provided for in article 37, paragraph 6, of the Federal Constitution, and is based on the theory of administrative risk. In the context of the ECI, in this sense, state responsibility gains broader contours, since structural omission can be understood as a failure in the duty to protect fundamental rights. Therefore, when the State does not ensure minimum health conditions, it incurs strict liability, which can generate reparatory obligations and strengthen judicial action in order to demand effective public policies (Silva, 2020)

In this bias, it is based on the hypothesis that the recognition of the ECI can be an effective legal tool to hold the State accountable for its omissions and to demand the implementation of structuring policies, with a view to the effectiveness of constitutional rights. In addition, the compatibility of the ECI with constitutional principles, doctrinal criticisms of the institute, and the reflections on the civil liability of the State are discussed (Ferrarini, 2020).

In the context of the ECI, this responsibility gains broader contours, as it is not only about individual damages, but also about collective losses resulting from the structural failure of public policies. In this sense, the ECI can serve as an instrument of institutional accountability, forcing the State to adopt structural measures to correct its omissions (Trovão, 2019).

In addition, it is essential that public policies for health promotion be strengthened, with preventive and educational actions that make the population aware of the importance of health care and the adoption of healthy habits. Vaccination programs, campaigns to combat endemics, and strategies to facilitate access to basic services can significantly reduce system overload and improve health indicators at all levels (Andrea, 2021)

Transparency in the application of resources allocated to health and continuous oversight by control bodies and civil society are essential to avoid the perpetuation of structural failures. The strengthening of municipal health councils, the active participation of the community in the formulation and monitoring of policies, and the adoption of technologies to optimize services are measures that can contribute to a more efficient and accessible system (Santos, 2016).

A more active supervision of the use of large amounts aimed at health, with accountability for those who manage the funds, the fight against corruption, the change of notions of what is *res* (public thing), not as something dilapidable, but as a pillar of democracy through the implementation of what is agreed upon in collegiate health bodies and legislative houses, establishing mandatory agendas to be developed with the local population, ranging from health promotion to rehabilitation, in which these are measures that are urgent (Trovão, 2019).

In the same sense, for Costa (2019) to face this reality, it is essential that the government implements effective health promotion policies, investing in primary care, improving hospital infrastructure and training professionals in the area. In addition, the strengthening of social control mechanisms and popular participation can contribute to the formulation of more efficient strategies aligned with the needs of the population

And Costa (2019) also states that another relevant aspect is the appreciation of health professionals, ensuring decent working conditions, adequate remuneration and continuous training. The shortage of doctors and nurses in basic units and hospitals overwhelms the few professionals available, compromising the quality of care and demotivating those who work in the sector.

## **PUBLIC HEALTH PROMOTION POLICIES: ADVANCES AND LIMITATIONS**

Health promotion is one of the fundamental pillars of the Brazilian health system and represents a constitutional commitment established in article 196 of the Federal Constitution of 1988, which establishes health as a "right of all and a duty of the State". In this sense, public health promotion policies seek not only to intervene in the disease, but, above all, to act preventively, promoting quality of life, equity in access to services, and social justice (Costa, 2019).

Historically, Brazil has experienced a process of transformation in the health care model, moving from a hospital-centered and curative approach to a paradigm based on health promotion and disease prevention. This new model was consolidated with the

creation of the Unified Health System (SUS), in 1990, through Law No. 8,080, which institutionalized the principles of universality, integrality, and equity (Giovanella, 2020).

One of the important milestones in this transformation was the implementation of the Family Health Strategy (FHS), which replaced the old model of care centered on isolated and fragmented basic health units. The FHS proposes a territorialized and community-based logic of care, with multiprofessional teams focused on comprehensive and continuous care for families, working in partnership with the community and with an emphasis on prevention and promotion actions (Santos; Pereira, 2016).

Despite its theoretical value and its recognized advances, the effectiveness of public health promotion policies encounters several structural obstacles. Among them, the chronic underfunding of the SUS stands out, aggravated after the enactment of Constitutional Amendment No. 95/2016, which imposed a ceiling on public spending, freezing investments in health for 20 years. This measure directly impacted the capacity to expand and maintain health promotion actions, compromising the expansion of FHS teams, the acquisition of inputs, and the maintenance of strategic programs (Andréa, 2021).

Another important obstacle is regional inequality in access to and quality of services. While large urban centers tend to concentrate infrastructure and qualified health professionals, rural areas and peripheral regions face scarcity of resources, absence of fixed professionals, and logistical difficulties. This disparity compromises the principle of equity and weakens the effectiveness of health promotion policies at the national level (Costa, 2020).

In addition, there is intersectoral fragmentation, which hinders the articulation between health and other essential public policies, such as education, housing, basic sanitation and food security. Health promotion requires an integrated and multidimensional approach, which requires a coordinated effort between different spheres of government and areas of knowledge. The absence of this integration reduces the impact of actions and hinders the construction of healthy and sustainable environments (Pereira, 2017).

Another point of attention concerns professional training and the management of services. The training of health professionals to act according to the principles of promotion is often insufficient or disconnected from the concrete reality of the communities. Added to this is the turnover of teams, the precariousness of labor contracts and the overload of professionals, factors that compromise the bond with users and the continuity of care (Pinto, 2016).

Finally, it is necessary to highlight the advances achieved, even if partial. Programs such as the National Immunization Program (PNI), the National Food and Nutrition Policy,

the School Health Program (PSE) and the various health surveillance actions demonstrate the capacity of the SUS to organize efficient responses with a broad reach of the population. The Brazilian experience with the confrontation of the COVID-19 pandemic also highlighted the relevance of coordinated action between the federal, state, and municipal levels, despite the political weaknesses that made it difficult to manage the crisis (Andréa, 2021).

Thus, the analysis of public health promotion policies in Brazil reveals a complex scenario, marked by important achievements, but also by persistent challenges. The full realization of the right to health requires not only the technical improvement of policies, but above all the political commitment to social justice, the strengthening of the SUS and the overcoming of the historical inequalities that structure Brazilian society.

## FINAL CONSIDERATIONS

The Unconstitutional State of Things (ECI) in the context of the right to health clearly reveals the complexity of the realization of fundamental rights in a country marked by structural inequalities, repeated state omissions, and fragility in the implementation of public policies. Health, provided for in articles 6 and 196 of the Federal Constitution as a right of all and a duty of the State, remains far from its full implementation, especially in the most vulnerable regions of Brazil, where health promotion is often neglected or poorly planned (Andréa, 2021).

Therefore, when approaching health from the perspective of the ECI, there is an urgent need for more effective, planned policies aimed at promoting the dignity of the human person. The strengthening of the SUS, respect for constitutional principles and the accountability of the State for its omissions are necessary ways to overcome the structural crisis that has taken root in Brazilian society.

It is noted that it is essential that there is an articulation between constitutional principles such as the dignity of the human person, material equality, the universality and integrality of the SUS and that, together with the jurisprudence of the STF, reinforces the state's duty to act in favor of public health in an active and planned manner. Paradigmatic decisions, such as ADPF 347/DF, although related to the penitentiary system, set precedents for the expansion of the ECI to other areas of fundamental rights, including health (Costa, 2019)

From this, it is evident that the recognition of the ECI, although recent in the Brazilian legal system, proves to be a relevant instrument to pressure the State to comply with its constitutional obligations, breaking with administrative inertia and promoting integrated



structural responses. Its application to the health system requires a sensitive look at social dynamics, the collective impact of the absence of public policies and the need for joint action between the Powers of the Republic.

## REFERENCES

1. Andréa, G. F. M., & Patullo, M. P. F. (2021). The inapplicability of the theory of the unconstitutional state of affairs in the Brazilian health system. *\*Revista de Direito Sanitário*, 21\*, e-0022. <https://doi.org/10.11606/issn.2316-9044.v21i0pe-0022>
2. Barcelos, A. P. (2015). The "state of affairs" in constitutional and structural litigation: Overview and perspectives. *\*Consultor Jurídico Magazine (ConJur)\**. Retrieved from [insert URL if available]
3. Barroso, L. R. (2017). *\*O novo direito constitucional brasileiro: Contribuições para a construção teórica e prática da jurisdição constitucional no Brasil\**. Saraiva.
4. Brazil. (1988). *\*Constitution of the Federative Republic of Brazil of 1988\**. Retrieved from [insert URL if available]
5. Conselho Nacional de Justiça. (2016). *\*Code of ethics of the judiciary\**. Retrieved March 23, 2025, from <https://www.cnj.jus.br/codigo-de-etica-da-magistratura/>
6. Costa, P. V. R., & Souza, E. B. (2019). The effectiveness of the fundamental right to health in the light of the unconstitutional state of affairs. *\*Revista Campo Jurídico*, 7\*(2), 204–227.
7. Dallari, S. G. (2008/2009). [Article title not provided]. *\*Revista de Direito Sanitário*, 9\*(3), 9–34.
8. Ferrarini, L. F. P., & Sgarioni, F. (2020). The unconstitutional state of affairs: Effects and (in)effectiveness of its declaration. *\*Revista do Ministério Público do RS*, (87)\*, 1– [page range].
9. Giovanella, L., et al. (2020). Health promotion in Brazil: Scientific production 2009–2019. *\*Saúde em Debate*, 44\*(Special Issue 5), 11–28. <https://doi.org/10.1590/0103-11042020E502>
10. Pereira, L. M. (2017). The unconstitutional state of things and the violation of human rights in the Brazilian prison system. *\*RIDH | Bauru*, 5\*(1), 167–190.
11. Pinto, É. G. (2016). *\*Unconstitutional state of things in Brazilian public health policy\**. Oswaldo Cruz Foundation, Center for Strategic Studies of Fiocruz. Retrieved from [insert URL if available]
12. Santos, G. F., & Pereira, C. M. M. (2016). In search of alternatives for the judicialization of health: The unconstitutional state of affairs in Brazilian public health. *\*Journal of Social Law and Public Policies*, 2\*(1), 67–84. <https://doi.org/10.2525-9881>
13. Sarlet, I. W., & Fensterseifer, T. (2016). *\*Direito fundamental à saúde: A implementação de políticas públicas no Brasil e a realização de um direito à proteção da saúde\** (2nd ed.). Livraria do Advogado.
14. Silva, A. C. Q. (2020). Unconstitutional state of affairs as a form of protection of fundamental rights in the Brazilian penitentiary system. *\*Transgressions Journal: Criminal Sciences in Debate*, 8\*(2), [page range].



15. Trovão, L. C. S. (2019). *\*The unconstitutional state of affairs and dialogical judicial activism in the Brazilian constitutional model\**. UNIMAR.