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THE PRINCIPLE OF THE RESERVATION OF THE POSSIBLE AND THE RIGHT TO HEALTH: CONFLICTS AND CONVERGENCES

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ABSTRACT

The general objective of the research is to discuss the relationship between the reserve of the possible and the fundamental right to health. To carry out the research, the methodological procedure of bibliographic and documentary review with a qualitative approach was used, in which the scientific articles, theses and dissertations consulted in the construction of the work were found in digital repositories, such as Google Scholar, Scielo and BDTD. In the documentary part, jurisprudential documents relevant to the object of the research were analyzed. The deductive method was used. Through the research it was possible to understand that The reserve of the possible, although legitimate for the preservation of public resources, cannot be invoked in an unrestricted way to justify state omissions that compromise the health of citizens. Brazilian jurisprudence reaffirms that the existential minimum, by encompassing the right to health, configures an insurmountable limit to public policies, making setbacks that affect already consolidated rights unfeasible.

Keywords: Right to Health. Booking the Possible. Existential minimum. Fundamental Rights.

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INTRODUCTION

In Brazilian history, the recognition of health as a fundamental right emerges from the literal interpretation of the text written in the Constitution of the Federative Republic of Brazil, promulgated in 1988, where we read, in article 196, the heroic achievement of health as 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.

The definition of health, according to the WHO, is diffuse and difficult to reach by States, constituting a "complete state of physical, mental and social well-being" and not only the absence of diseases (WHO, 1978, p. 1). However, all modern constitutions have the Right to health as a basic principle of social rights, which in Brazil, by virtue of the 1988 Charter, is affirmed in articles 196 to 200, in addition to an unspecific way throughout the Constitution, such as article 6.

Although it is a constitutionally guaranteed fundamental right, the provision by the State is sometimes insufficient, which requires the judicialization of health, that is, the citizen is forced to go to the judiciary to receive the material benefits necessary for the recovery or maintenance of health (Sarlet; Figueredo, 2008).

In such cases, it is common for the State to defend itself, arguing that financial unavailability prevents material provision, invoking the principle of reservation of the possible, which determines that the State should only materially provide social rights, through budget availability (Pimenta, 2012).

In view of this, the present work intends to answer the following question: Is it possible for the State to fulfill the duty to materially provide health to citizens in a limited way, with the fulcrum in the clause of the reservation of the possible?

It is hypothesized that such a situation is complex and requires consideration by the Judiciary, in order to understand which right should prevail over the other, since health is a fundamental right of the citizen, therefore, it is the duty of the State, however, given the finiteness of resources, unlimited provision is unfeasible. It is understood that the performance of the Judiciary should guide the positive provision by the State as far as possible, however, without disrespecting the existential minimum.

The general objective of the research is to discuss the relationship between the reserve of the possible and the fundamental right to health. As specific objectives, it is intended to present health as a fundamental right; To discuss the role of the Judiciary in the

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context of the mastering of this right and to reflect on the limits between the reserve of the possible and the existential minimum within the scope of the right to health.

To carry out the research, the methodological procedure of bibliographic and documentary review with a qualitative approach was used, in which the scientific articles, theses and dissertations consulted in the construction of the work were found in digital repositories, such as Google Scholar, Scielo and BDTD. In the documentary part, jurisprudential documents relevant to the object of the research were analyzed.

The deductive method was used. The deductive method, according to Prodanov; Freitas (2013), starts from the general and later addresses the particularities of the question, that is, he initially researches the principles, laws and theories considered indisputable of the issue and from the logical understanding generated by the research of the general principles, he issues purely formal conclusions,

CONSTITUTIONAL PRINCIPLES

Within legal science, the principles serve as guiding elements, inspiration and solid basis for the current legal system, which elaborates a structure of norms to be observed by society, containing specific guidelines on the rights of citizens, in a preventive and coercive way for the relations of civil life.

Brazilian law encompasses the notion of natural law, which varies from the universal idea of justice. It is the Law based on common sense, rationality, equity, justice and pragmatism, which understands that man is born with rights incorporated into him. Natural law is based on principles that are used to guide the interpretation of the norm and support decisions (Alvarenga, 2018).

The meaning of the term comes from the Latin terms *principium, principii*, which are defined as beginning, base. Therefore, principles constitute the basic source for all branches of law, in their formation and application. Terméa (2002) states that these are main points that are used to guide the elaboration and application of the law.

Also for the author, the principle is the soul of the norm, and being affirmed in the Federal Constitution, it becomes the key to the legal system:

> In this way, the importance of the principles is perceived, since they are the main beams of the entire legal system, especially the Constitution, they are considered the "heart" of this normative apparatus, configuring the source of its legitimacy. Thus, it is the principles that provide the foundation for the other norms of the legal system (Treméa, 2002, p. 182).

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Trajano (2010) states that there is a clear distinction between principles and the legal norm. The legal norm constitutes a rule of an imposing nature, and as such it must or must not be obeyed. Of course, the rules can be changed through due process, but once imposed, they must be obeyed. The principles, on the other hand, have a different nature:

> [...]The principles allow for various degrees of concreteness, linked to factual and legal conditioning. The principles coexist harmoniously, and it is necessary to balance values and interests between divergent principles, while the antinomic rules exclude each other. The rules obey the logic of all or nothing. In the application of the principles, other conflicting principles and their weight in the concrete case must be weighed (Trajano. 2010, p. 26).

Nery Júnior; Nery (2019) state that the main distinctions between principle and norm are in the determinability and abstraction of the principles; Thus, the principles have a higher degree of abstraction, and require the intervention of the legislator or magistrate to be applied to the concrete case, as they are vague and undefined, while the rules do not need mediation, since they already have direct application.

In addition, they have a character of foundation, as already discussed and proximity to the idea of law, approaching the evidential standards used in common law countries, as well as exercising a normogenetic function, therefore, the principles are considered a source of Law, norms of nature (Nery Júnior; Nery, 2019).

The principles that currently guide the State and the Law were established in the CF/88, which defines in its article 1 the fundamental principles of the State:

> The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, is constituted as a Democratic State of Law and has as its foundations: I - sovereignty; II - citizenship III - the dignity of the human person; IV - the social values of work and free enterprise V - political pluralism (Brasil, 1988, art. 1)

Such principles will be discussed individually in the following section, they are considered superior norms within the legal system, so that Robert Alexy, author of the work "*Teoria de los Derechos Fundamentales*" (theory of fundamental rights) states that the principles would be norms that have a commandment of optimization, being complied with in different degrees, according to the legal and factual characteristics. The above-mentioned criteria to define the principles: normogenetic function; substantiality; proximity to the idea of law; determinability and abstraction are not static and predetermined, since, depending on the criterion used, there may be different conclusions about the concept of principles (Alexy, 1993).

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Also according to the author, the principles are not necessarily presented as core commandments of the legal system, but as models of optimization. As much as Alexy's ideas are criticized, especially when it comes to the distinction between rules and principles, the author has significant relevance in the conceptualization of fundamental principles.

HEALTH AS A FUNDAMENTAL RIGHT

The awareness of the right to health, whether as a primitive instinct for the self-preservation of life, or as a permanent order to maintain the dignity of the subject, or as a fundamental right inspired by the historical set of human rights, has always been present in societies, as a founding element of religious, philosophical and political constructions (Silva; Vita, 2014).

In Brazil, the realization of the right to health as a fundamental social right has triggered skillful procedures to demand positive provision from the State, through the elaboration of policies, and no longer just that it refrains from intervening, at its discretion, in the individual freedoms of citizens (Silva, 2011).

The inclusion of the right to health among the fundamental rights currently provided for in the 1988 Constitution occurs, in the first place, through the inclusion of the dignity of the human person as the foundation of the Republic, in Title I "of the fundamental principles" (art. 1, III). Secondly, by the prevalence of human rights as a principle of the Republic to be observed in its international relations (art. 4, II), thirdly, by the inclusion of the inviolability of the right to life as a guarantee, in Title II "of fundamental rights and guarantees" (art. 5, *caput*), and, also, by the inclusion of health as a social right, in Title VIII, "of the social order", Section II "of health" (arts.196 to 200), rights that, although fundamental, are inserted in the same legal quadrant as collective, economic and cultural rights.

From the above analysis, the term *health* reveals at least two interpretative variants. First, it is presented as a fundamental human right, of the first generation, directly linked to the maintenance of the human species on earth, and, secondly, as a guarantee right, of the second generation, requiring the elaboration of economic and social policies for its concrete implementation (Silva, 2011)

And it is in the context of this second variant that the ideal landscape for the exercise of the rights to health as a social right emerges, based on the positive benefits

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that are imposed on the State and impossible to be implemented immediately. In this way, once the autonomy of these social rights is questioned , they are ordered as guidelines or goals of programs to be fulfilled, therefore, they are dependent or mediate. This conclusion follows the constitutional norm, which determines that health is a duty of the State, guaranteed through public policies (Brasil, 1988, art. 196).

CASE LAW OF THE SUPREME COURT AND THE RIGHT TO HEALTH

The first judgment to be analyzed in this section is REsp No. 855.178/SE, judged by the Plenary of the STF, with the rapporteurship of Justice Luiz Fux, published in the DJe on 03/05/2015. The court dealt with the constitutional right and adequate medical treatment, with subsidiary responsibility of the federative entities. The appeal in question was filed by the Federal Government, rebelling against the decisions of judicial instances that granted the supply of a drug that is not supplied by the SUS, called BOSENTANA, which has a high cost. The initial action was carried out against the State of Sergipe, and was determined by the acquisition of the drug, with co-financing of 50% by the federal government (BRASIL. Brasilia. Federal Supreme Court. Plenary. Special Appeal No. 855.178/SE. Rel.: Min. Luiz Fux. DJe: 05/03/2015).

Although the plaintiff's demand was initially granted, the obligation to do so was terminated, due to the death of the original plaintiff of the action, and the matter reached the STF due to the Union's disagreement with the decision to be co-financing the obligation of the State of Sergipe, which gave rise to the judgment analyzed here, which ruled on the possibility of subsidiary liability of federative entities in the provision of the right to health:

> The right to health is established by article 196 of the Federal Constitution as (1) a right of all and (2) a duty of the State, (3) guaranteed through social and economic policies (4) aimed at reducing the risk of diseases and other problems, (5) governed by the principle of universal and equal access (6) to actions and services for its promotion, protection and recovery (BRASIL. Brasilia. Federal Supreme Court. Plenary. Special Appeal No. 855.178/SE. Rel.: Min. Luiz Fux. DJe: 05/03/2015, p. 4).

The argument of the federal government, on appeal, is that the SUS is governed by the principle of decentralization and that the responsibility of supplying the requested medicines would be the responsibility of the local bodies, therefore, the Union appearing as the passive pole of the demand would be illegal. However, the matter already had ample jurisprudence of the Court:

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> Having well delimited the subject, it can be seen that the Court of origin, in establishing the joint and several liability of the Union, did not disagree with the jurisprudence established by the Plenary of this Court, in the judgment of Suspension of Security 3.355, Rel. Min. Gilmar Mendes, in the sense that adequate medical treatment for the needy is included in the list of duties of the State, being joint and several liability of the federated entities, any of them may appear in the passive pole jointly or separately (BRASIL. Brasilia. Federal Supreme Court. Plenary. Special Appeal No. 855.178/SE. Rel.: Min. Luiz Fux. DJe: 05/03/2015, p. 3).

The decision was upheld and the STF recognized the constitutionality of the subsidiary liability between federative entities in the provision of adequate medical treatment. As the aforementioned judgment has general repercussion, Thesis No. 793 was signed, which determines: "Adequate medical treatment for the needy is included in the list of duties of the State, being the joint responsibility of the federated entities, and any of them may appear in the passive pole jointly or separately".

Finally, it was verified that the State has the inalienable and non-transferable duty to provide health services, being a duty constitutionally provided for as a citizen's right, however, it is a subjective right, with limitations and exceptions. The jurisprudence of the STF and STJ demonstrates the role of the judiciary in the demands that involve the right to health, which is extremely important, at the same time, to confer on the citizen the social right provided for in the CF/88, without exceeding the limits and possibilities of the State.

THE SOCIAL STATE AND THE MATERIAL PROVISION OF THE RIGHT TO HEALTH

The Social State, also known as the Social Welfare State, is the model of political and economic organization that aims to ensure the quality of life and well-being of the population, through state intervention in the economy and the provision of essential services through social rights. With regard to health, the Brazilian State has the duty to guarantee the material provision of this right (Santos, 2012).

The social state establishes public health systems to ensure the materialization of the right to health. In Brazil, since the Federal Constitution of 1988, health has been affirmed as a Fundamental Right with assumptions of the guarantee of equity and integrity in the reception of the population, which requires that health be seen not only as the absence of diseases, but as the effectiveness of quality of life. Based on the assumption of the social right to health, the Unified Health System, created by the 1988 Constitution and regulated in 1990, is an important tool of the State for the implementation of Public Policies for the Right to Health (Cavalcanti, 2021).

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Among the challenges faced to make citizen accessibility to health services effective are the extension of care and maintenance of quality, in the qualification and co-responsibility of professionals in the SUS network. For quality in patient care, it is necessary that the professional team is prepared and trained. All employees inserted in the health context, at the hospital, emergency or primary level, must provide humanized care to the patient, as a way of inserting them in an active citizenship action in recognition of their fundamental rights provided by welcoming (Cavalcanti, 2021).

The principle of equity relates to the fact that the health system has the scope to address health inequalities, ensuring that people with the greatest health needs receive priority attention. Therefore, this implies directing more resources and services to more vulnerable areas and groups (Teixeira, 2011).

In the context of comprehensiveness, the system must offer comprehensive health services, ranging from prevention to rehabilitation, considering the physical and mental needs of the individual. The focus is on comprehensive health care, not only on the treatment of diseases (Farena, 1997). The principle of regionalization provides for the organization in a regional way, in order to decentralize the management and supply of health services. This aims to adapt services to the specific needs of each region of the country (Brasil, 2000).

The principle of hierarchization determines that the system should establish a hierarchy of health services, so that primary care units are the preferred gateway for patients, with referrals to more specialized levels, when necessary (Brasil, 2000). The principle of decentralization of the service determines that the management of the SUS must involve the three levels of government: federal, state and municipal. Each sphere of government has its responsibilities in the organization and financing of the system.

Social participation is related to the participation of the community in the management of the SUS, which is a fundamental principle. Citizens have the right to actively participate in the formulation, inspection and control of health policies (Silva, 2011). Finally, adequate financing provides that for the correct functioning of the system, financing must be carried out in the manner provided for by law, with the participation of the three spheres of government, ensuring sufficient resources for the maintenance and optimization of services (Brasil, 2000).

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Finally, these aforementioned principles organize and structure the functioning of the Brazilian health system, aiming to ensure universal, equitable and quality service, in accordance with the constitutional norm and infra-constitutional legislation.

THE RESERVATION OF THE POSSIBLE

The principle of the reservation of the possible emerged as a way to balance the effectiveness of social rights, such as the right to health, and the reality of limited resources for their implementation. Historically, this principle was elaborated in post-war Germany to weigh human dignity and the budgetary limitations of the State, evidencing the tension between the State's obligation to guarantee fundamental rights and the impossibility of providing unlimited resources (Silva, 2011). When explaining his concept, Silva; Vito (2014, p. 254), state that:

> The central idea of this principle is the allocation of everything possible to meet the fundamental rights of the individual, until their exhaustion, however, in order to avoid putting the public budget at risk. It is not, therefore, a question of the State's refusal to comply with rights, or to deny rights to citizens, but rather to limit what it is not able to meet.

In the same vein, Sarlet; Figueredo (2008) state that because social rights require positive provision by the State; differently, even, from first-generation rights, which require negative performance[2], it is pointed to their economically relevant dimension, so that in order to materialize such rights, the State needs financial resources, which are characterized by scarcity (Toledo, 2019), hence the need to impose a limit on such material benefits.

Also as mentioned by Sarlet; Figueredo (2008) the ordinary legislator is endowed with discretion, therefore, in view of his political plan democratically legitimized through suffrage, he may choose to allocate more resources in certain areas. In line with this, Professor Paulo Roberto Lyrio Pimenta (2012) states that if fundamental rights were absolute and the State was obliged to provide them in full, there would be no need for the existence of the Legislator.

In the Brazilian legal context, the Political Charter of 1988 enshrined the right to health as a fundamental social right, reinforced by the creation of the SUS, which assumes

[2]Such as the fundamental rights to life, liberty, property and freedom of expression/press, inspired by the Charter of Virginia (1779) and the Declaration of the Rights of Man and of the Citizen (1789), as pointed out by Souza Neto; Sarmento (2013, p. 78).

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the responsibility of offering universal and equitable health services to all citizens, however, Sarlet; Figueredo (2008) states that the scarcity of resources and the discretion of the ordinary legislator limit the full materialization of social rights. However, such an argument does not hold up to defend the weak or insufficient positive performance:

> [...] Despite this, we remain convinced that, for the purpose of admitting the immediate application by the organs of the Judiciary, the correctly pointed out "cost factor" of all fundamental rights has never constituted an impediment to the effectiveness by judicial means (Sarlet; Figueredo, 2008, p. 15).

The reservation of the possible must be interpreted within the scope of the existential minimum, that is, the State must, at least, ensure basic conditions that guarantee human dignity. In the Judiciary, the reservation of the possible is often cited to justify limitations in the enforcement of rights, however, the doctrinal position that is already widely consolidated is that this reservation cannot restrict the essential core of fundamental rights, especially in the area of health, as it is intrinsically linked to human dignity and life (Pimenta, 2012; Silva, 2011).

This time, the reservation of the possible does not exempt the State from fulfilling its constitutional obligation to guarantee access to health, being used to mediate the application of resources in a proportional manner. However, the Judiciary intervenes in various situations to ensure the right to health, imposing on the State the obligation to provide treatments and medicines even when it alleges budgetary limitations, reaffirming that the existential minimum cannot be compromised in the name of scarcity of resources (Sarlet; Figueredo, 2008).

Therefore, I can state that the reserve of the possible and the existential minimum form a relationship of balance in the right to health: while the reserve of the possible brings a practical approach to financial limits, the existential minimum requires the State to guarantee an essential level of health that does not compromise the dignity of citizens. Such a relationship will be better addressed in due course.

Frequently, the STF resolves cases in which the state entity alleges the impossibility of positive provision to guarantee social rights, due to budgetary limitations resulting from the reservation of the possible, and usually rejects this argument, which should not justify the non-compliance with its social duties, especially in cases where the right claimed by the jurisdictional party is part of the existential minimum. In this case, the decision rendered by the court ARE 639.337 AgR/SP is cited, in which the creation of preschool and daycare

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vacancies for the care of 5-year-old children was requested:

> THE CONTROVERSY PERTAINING TO THE "RESERVATION OF THE POSSIBLE" AND THE INTANGIBILITY OF THE EXISTENTIAL MINIMUM: THE QUESTION OF "TRAGIC CHOICES". - The allocation of public resources, always so dramatically scarce, leads to situations of conflict, both with the implementation of public policies defined in the constitutional text, and also with the implementation of social rights guaranteed by the Constitution of the Republic, resulting in contexts of antagonism that impose on the State the burden of overcoming them through options for certain values, to the detriment of others equally relevant, compelling the Public Power, in the face of this dilemmatic relationship, caused by the insufficiency of financial and budgetary availability, to proceed to true "tragic choices", in a governmental decision whose parameter, based on the dignity of the human person, should have in perspective the intangibility of the existential minimum (BRASIL. Federal Supreme Court. 2nd Panel. AG.REG. in the extraordinary appeal with interlocutory appeal 639.337 São Paulo. Rel.: Min. Celso de Mello. Brasília: DJ, 23/08/2011, p. 3.).

The jurisprudence of the STF understands that it is not feasible to invoke the clause of reservation of the possible to defraud or make unfeasible the implementation of constitutionally defined public policies, and therefore social regression is prohibited as a constitutional obstacle to the frustration, by the Government, of benefit rights, especially when the demand is part of the rights that are part of the existential minimum.

THE EXISTENTIAL MINIMUM AND THE RESERVE OF THE POSSIBLE

The democratic State, instituted and legitimized by the sovereign popular will, must standardize the interests and values of the people in rights, and of these, fundamental rights are the most relevant. Being a state of law, it is based on the hierarchical legal order, in which the Constitution occupies the highest place, and the constitutional norms with the most axiological weight are those that define fundamental rights.

The central elements of the existential minimum are the minimum fundamental rights and human dignity (Toledo, 2019). Among the fundamental rights provided for in the Constitution (FC, art. 6), few are related to the existential minimum, and these can be called minimum social fundamental rights, and only the fundamental core of these form the content of the existential minimum (Toledo, 2019).

The definition of what the existential minimum effectively is is broad and constitutes a doctrinal and jurisprudential stir in several democratic states, so that there are several authors in the literature who assert that the right to housing is an integral part of the existential minimum (Sarlet; Zockun, 2016).

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The existential minimum is a doctrinal and jurisprudential construction, therefore, there are no constitutional or infra-constitutional norms that address the existential minimum, its concept and set of rights that compose it, despite the fact that the CF/88 mentions that health (art. 196), education (205), sports practices (art. 217), environment (art. 225) and all other social rights are defined as a duty of the State, the Charter does not mention to what extent these rights must be fulfilled, and there is, despite the fact that it results from certain constitutional precepts by implication (FC, art. 1, III, and art. 3, III), discretion of the legislator and action according to the possibility, reserve of the possible and the need of the population.

It is not disputed that the State should provide health through the Executive in Public Policies and by the Legislative Branch through Laws that meet the Democratic Rule of Law.

It is worth mentioning that the right to health must be provided by the State, including all federative entities, and it is up to them to comply with some determinants, such as:

> [...] i) the principle of human dignity;
> ii) the right to the existential minimum, which refers to "a set of goods indispensable for the satisfaction of their primary fundamental rights";
> iii) the prohibition of social regression, which prevents a reduction in state action that has already been socially consolidated; and
> iv) the duty of progress, which concerns the qualitative and quantitative improvement of the State's positive services (Vieira, 2020, p. 11).

The existential minimum, associated with John Rawls' (2002) idea of "social minimum"[3] is the insurmountable limit that must be ensured to each individual to guarantee dignified living conditions, including access to health. This principle represents a minimum threshold that the State cannot deny, regardless of budgetary difficulties, as it is part of the essential core of human rights.

On the other hand, it was understood that the reservation of the possible is a principle that weighs the practical and financial limitations in the provision of services and implementation of public policies, assuming that the State is not obliged to provide services and goods in an unlimited way, but must respect budgetary restrictions and management priorities. However, the right to health often puts these principles in conflict, given that the

[3]The essential constitutional element in question is that, below a certain level of material and social well-being, and of training and education, people simply cannot participate in society as citizens, much less as equal citizens. It is not up to the political conception to define what determines the level of well-being and education below which this happens. It is necessary to consider the society in question (RALWS, 2002, p. 213-214).

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realization of this right involves high costs and requires a significant allocation of resources, which by their nature are scarce (Vieira, 2020; Oliveira, 2022).

In this dynamic, the Judiciary is called upon to balance these two premises when deciding on health lawsuits. To this end, it is necessary to have an understanding that respects both the existential minimum – which protects the citizen from unacceptable setbacks in living conditions – and the reserve of the possible, which aims at the sustainability of public policies and the rational use of state resources. The application of these principles in practice must seek a balance point that allows the fulfillment of fundamental health demands without compromising the financial viability of the State in meeting other equally priority needs (Silva; Vita, 2014).

Thus, the relationship between the existential minimum and the reserve of the possible in the right to health establishes a terrain of tension and balance, where the existential minimum acts as a non-negotiable minimum barrier and the reserve of the possible seeks to adapt this protection to the limits of the state's financial reality, ensuring that the right to health is implemented in a fair and sustainable manner.

RESERVATION OF THE POSSIBLE AND THE RIGHT TO HEALTH

Initially, it must be understood, based on the clause of the reservation of the possible and the budgetary limitations, that the State cannot materialize the right to health, and no other right, in an integral way, nor the legal principles should be interpreted in this way, as it would hinder the discretion of the ordinary Legislator to meet social demands as needed (Farena, 1997; Vieira, 2020)

It so happens that the realization of fundamental rights, responsible for conferring dignity and existential minimum to the underprivileged, requires costs, and given that the State is the recipient of fundamental rights and their funding is carried out by the resources available in the public treasury, whose scarcity is characteristic of it, there is a limitation to the level at which the State can guarantee the minimum for the most needy citizens.

And in this context, richer countries have larger budgets, and in many cases, less socioeconomic inequality, and can guarantee the fundamental rights of their citizens more efficiently and abundantly than the most economically vulnerable countries. Toledo (2019) recalls that although dignity is a universally accepted concept and is the object of international treaties, its effectiveness occurs through state action, therefore, each country

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has different conditions, ideology and methodology to guarantee the core of rights that make up the existential minimum.

The right to health has an essential core that is difficult to define. Luciano Moreira De Oliveira (2020) analyzes its core according to Amartya Sen's approach to capacities and defines that this right protects human life as a fundamental legal good, which enables the enjoyment of more rights. In fact, according to the capabilities approach, the right to health is guaranteed when the subject is in sufficient health conditions to participate in social life and in the definition of social policies. Obviously, human nature itself entails health conditions in which social participation is impossible.

The cost of enforcing fundamental rights is widely debated in doctrine and jurisprudence, and directly impacts their implementation. The Public Administration must make use of efficient public policies, based on the epidemiological profile of the administered region, on the budget availability for health, on the essentiality of medicines and on the current pharmaceutical policy, to ensure the realization of the right to health by the competent authority, the Executive.

FINAL CONSIDERATIONS

The Federal Constitution of 1988 enshrines the right to health as a fundamental right, integrating it into the concept of human dignity and requiring the State to implement adequate public policies for its implementation. However, the guarantee of this right is in tension with the principle of the reservation of the possible, which limits state action in the face of budget availability and fiscal balance. In this scenario, the Judiciary must intervene in situations in which the State fails to ensure the existential minimum, representing a beacon in the search for a balance between economic viability and the protection of fundamental rights.

The reserve of the possible, although legitimate for the preservation of public resources, cannot be invoked in an unrestricted way to justify state omissions that compromise the health of citizens. Brazilian jurisprudence reaffirms that the existential minimum, by encompassing the right to health, configures an insurmountable limit to public policies, making setbacks that affect already consolidated rights unfeasible.

Thus, it is concluded that the realization of the right to health requires harmonization between the powers, with a continuous dialogue between the fiscal capacity of the State and the imperative of protecting social rights, in order to preserve human dignity and

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promote the well-being of the population, without compromising the financial stability necessary to meet equally essential demands.

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