



THE SANITARY MEASURE OF SOCIAL DISTANCING: REFLECTIONS ON THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS

A MEDIDA SANITÁRIA DE DISTANCIAMENTO SOCIAL: REFLEXOS SOBRE À EFICÁCIA DOS DIREITOS FUNDAMENTAIS

ABSTRACT¹

Contextualization: The pandemic, understood as an expansion in the world of an epidemiological process once located that has become uncontrolled, has been causing a worldwide change in human habits in every sense of existence.

Objective: The objective of this article is to analyze the restrictive sanitary measure of social distance, edited by the Ministry of Health as a form of prevention and epidemiological control of COVID-19 and its reflexes regarding the intensity in the sense of horizontal effectiveness of fundamental rights to health and freedom individual and economical.

Method: The research will be analyzed through bibliographic research.

Results: The measure of social distance, although formally illegal and unconstitutional, can be considered materially constitutional as the only restrictive non-pharmacological sanitary measure useful to guarantee the reduction of epidemiological risk in order to guarantee both the right to health on an individual and collective basis and to ensure a minimum realization of the right to individual and economic freedom, even in its most severe version of total blockade or lockdown.

Conclusions: From the study it is concluded that there is a horizontal effectiveness of fundamental rights both to individual and economic freedom and to the right to health, when considered the restrictive sanitary measure of social distance.

Keywords: Fundamental rights; Horizontal effectiveness; Health. Freedom; Social distancing.

RESUMO

Contextualização. A pandemia, entendida como uma ampliação em termos mundiais de um processo epidemiológico outrora localizado que se tornou descontrolado, vem causando uma mudança mundial nos hábitos humanos em todos os sentidos da existência.

1 Structure of the expanded summary as SILVA, et al. (2020).





Objetivo: O objetivo do artigo é analisar a medida sanitária restritiva de distanciamento social, editada pelo Ministério da Saúde como forma de prevenção e controle epidemiológico da COVID-19 e seus reflexos quanto à intensidade no sentido de eficácia horizontal de direitos fundamentais à saúde e à liberdade individual e econômica.

Método: A pesquisa será analisada por meio da pesquisa bibliográfica.

Resultados: A medida de distanciamento social embora seja formalmente ilegal e inconstitucional, pode ser considerada materialmente constitucional a única medida sanitária restritiva não farmacológica útil à garantia da diminuição do risco epidemiológico de modo a garantir tanto o direito à saúde em caráter individual e coletivo quanto a assegurar um mínimo de realização do direito à liberdade individual e econômica, mesmo em sua versão mais severa de bloqueio total ou lockdown.

Conclusões: Conclui-se que existe eficácia horizontal dos direitos fundamentais tanto à liberdade individual e econômica quanto do direito à saúde, quando considerada a medida sanitária restritiva de distanciamento social.

Palavras-chave: Direitos fundamentais; Eficácia horizontal; Saúde; Liberdade; Distanciamento social.

1 INTRODUCTION

This article aims to analyze the restrictive sanitary measure of social distancing, edited by the Ministry of Health as a form of prevention and epidemiological control of COVID-19 and its reflections on the intensity towards horizontal efficacy of fundamental rights to health and individual and economic freedom.

The theme is important due to its timeliness and relevance, due to the current moment in which Brazilian society lives and also the global panorama affected by the pandemic process by COVID-19 viruses not yet fully known for science, of prophylaxis not yet sufficiently studied and achieved. It considers the discussions on restrictive sanitary measures that have been adopted at the planetary level as a possible hypothesis to combat the COVID-19 virus, consistent in the social distancing and the perspective of its application, under the constitutional focus of the rights to health and individual and economic freedom.





The theme will be analyzed through the literature review. The construction of the article is, at first, through the analysis of the horizontal effectiveness of fundamental rights; in a second moment, it advances to the examination of the social right to health and the individual right to freedom as fundamental rights, quickly incursion into the theory of fundamental rights, with presentation of some of its characteristics, from the aspect of its functions, content, and scope. The third part scans the restrictive health measure of social distancing; finally, it is about the intensity effectiveness between the fundamental rights to individual and economic freedom and health before the application of the measure of social distancing, analyzing the preponderance of fundamental rights.

2 HORIZONTAL EFFECTIVENESS OF FUNDAMENTAL RIGHTS

The theme of the horizontal effectiveness of fundamental rights has been dealt with for some time by constitutional doctrine not only in Brazil, but especially in foreign literature, having been initially observed by German constitutional theory, during the period from 1951 to 1960, being emblematic the case in which the German Constitutional Court ruled on the Lüth case (SARMENTO; GOMES, 2011), from the perspective that fundamental rights could be opposed or would be effective between third parties or between individuals, reaching their particular sphere, no longer only with vertical efficacy between individual and State.

The issue is also addressed from the perspective of U.S. constitutional law, but, in reverse, in the understanding that it is not possible that fundamental rights can be applied among individuals, with the adoption of *the state action theory*, in the sense that they would impose only limitations on the public power and would not assign to individuals rights before other individuals, so that any private action would be equated to state action in order to link it to the provisions of fundamental rights (SARMENTO; GOMES, 2011. p. 63).

In Brazil, the vast doctrine means the horizontal effectiveness of fundamental rights, much of it in the sense that this effectiveness is direct/immediate, without





intervention of the Public Authorities, as intermediaries of these effects (SARMENTO; GOMES, 2011. p. 70). In this way, fundamental rights could have effects from the out then between individuals in a horizontal sense and not only in relation to the State (vertically).

What permeates the theme of the horizontal effectiveness of fundamental rights is that such rights have historically been conceived as regulators of relations between the State and individuals, imposing limits on the action of the State against or in favor of them, questioning whether possible effects, either in the sense of limiting the state's action, or in the sense of obtaining positive benefits in face of it (negative and positive effectiveness of fundamental rights respectively) could also be imputed in relations between individuals. What is more, if they could, what those effects would be and how they could be implemented.

There is also discussion about the direct/immediate or indirect/mediate efficacy of fundamental rights in the private sphere, with Brazilian authors who lean towards the direct effectiveness of fundamental rights, including Ingo Wolfgang Sarlet, Luís Roberto Barroso, Gustavo Tepedino, Wilson Steinmetz and Daniel Sarmento (SARMENTO; GOMES, 2011. p. 72). While others lean towards indirect effectiveness, such as Luís Afonso Heck, Dimitri Dimoulis Leonardo Martins, who advocate the Germanic solution to the problem of the horizontal effectiveness of fundamental rights (SARMENTO; GOMES, 2011. p. 70).

Both theories conceive effectiveness and linking fundamental rights to individuals, unlike the American state *action theory mentioned* above. However, while for the theory of indirect efficacy – adopted by the majority currents of German doctrine and jurisprudence – it would be necessary to intermediation either the Judiciary, or the Legislature to effect the fundamental right, since they would not generate subjective private rights directly operable against individuals; for the theory of direct efficacy, by the nature of fundamental rights, they could be invoked, regardless of any mediation by the legislator or the judge, coating themselves on *erga omnes oponibility*.

3 SOCIAL RIGHT TO HEALTH AND INDIVIDUAL RIGHT TO FREEDOM





Fundamental rights are historically recognized as rights conquered throughout the process of social development (generational), first, with a negative face, when it sought to restrict the intervention of the State in relation to individuals (resistance or opposition to the State) and, secondly, restrict the intervention of the State in relations between individuals (guaranteeing private autonomy between the subjects), the so-called rights of freedom and formal equality or first generation/dimension. Subsequently, with a positive face, in order to demand from the State benefits and services that were within its reach (of the individual in face of the State in order to guarantee material equality) and in order to intervene in the relations between individuals (intervening in social relations as guarantor of material equality), considering the rights of equality or second generation/dimension.

There are other fundamental rights, such as those of third dimension/generation whose recipient would not be exactly the individual or groups of individuals – such as the first and second generation – but the human being itself and its existence and perpetuity on the planet, such as the right to the environment, to peace, to property over the common heritage of humanity, the right of communication (BONAVIDES, 2006, p. 569). However, what matters to this study is related to the first two dimensions/generations of rights.

The nature of such rights is based on human existence with minimum standards of dignity for the development of the potential of subjects in society and before the State. Due to this nature, fundamental rights reach prominence as essential values for maintaining this minimum level of dignity, which must be guaranteed to each, and every subject by the simple fact of their humanity, hence universality. Thus, in order for such minimum foundations of human dignity to be guaranteed to all subjects in the same condition, the need for objectification arises, through standardization, especially in constitutional security, in a process of constitutionalizing resulting from this fundamentality.

Thus, the fundamental rights of the first and second generation/dimension, assume for this article evident relevance, in that they represent the rights of freedom of the individual in resistance to the State, guaranteeing him, including freedom to hire and to produce economically (within the very scope of the autonomy of the will) and also the





rights of the individual in the face of the State, requiring him to guarantee him materially worthy conditions of existence, in this case, the right to health not only of the subject himself, but collectively considered.

It is important to highlight the functions that fundamental rights perform not only because they are constitutionalized rights, but because of this eminently jusnaturalist nature they exercise under the constitutional bias. In this context, the Canotilho (2003) approach is adopted.

The first function, of defense or freedom, according to which the human person and his dignity would be protected in two perspectives, one in the legal-objective sense, meaning a negative competence for the public powers of prohibition of interference in the individual sphere, and the other, in the legal-subjective sphere, in the sense of being able to positively exercise fundamental rights (CANOTILHO, 2003).

The second, of social benefit, would imply the right of the individual to obtain something from the State, according to which, the author notes three problems: a) the original social rights, that is, whether individuals could derive benefiting claims directly from constitutional norms; b) the derived social rights, which would return to the right to demand legislative action that would implement constitutional rules under penalty of unconstitutional omission; (c) the problem of whether the established norms of fundamental social rights would have an objective and binding dimension of public authorities in order to oblige them to active public policies leading to the creation of institutions, services and services. The author concludes that the first two problems would be debatable, but the third would be certain in the sense that constitutional norms prescribing social fundamental rights individualize and impose active public policies (CANOTILHO, 2003).

The third function, of protection before third parties, would indicate the need for the State to have a duty to protect the holders of fundamental rights before third parties, in order to adopt positive measures to protect the exercise of fundamental rights in face of disruptive or harmful activities' third parties (CANOTILHO, 2003).





After these general observations on fundamental rights, the analysis of the rights at stake in this study is exceeded.

About the right to health, is clearly incorporated into the 1988 Constitution, through Art. 6, and guaranteed through an institutional guarantee called the *Sistema Único de Saúde* (SUS), as observed in Art. 196 (BRASIL, 1988), as a fundamental and social right.

What does it mean to say that the right to health is a fundamental social right for the perspective of this article? Firstly, it means that it is a right formally endowed with normative effectiveness in the founding of the Brazilian legal order and, therefore, binding on the entire legal system and its institutions. Moreover, it also means to say that it is materially assured, since it is pointed out as a standing clause, that is, as a material limit of revision, implying, moreover, because it is a fundamental right structuring the constitutional order, interpretative openness in the sense of concretization of the plurality of the constitutional system. Secondly, it should be noted that, as a social right, its implementation and implementation will import realization of the principle of human dignity and, with this, realization of the Democratic and Social State of Law (SARLET, 2004).

Therefore, the right to health as a fundamental social right, in addition to a right of the subject, eminently linked to his own right to life, is consistent with the very existence of the individual in society, in collectivity, in the sense that it guarantees minimal material conditions to the exercise of other rights and of the democratic experience itself.

As such, it is guaranteed to all, therefore of a universally egalitarian nature, making the State in charge of its guarantee through public policies (social and economic) in the sense of its promotion, protection, and recovery, being considered, even constitutionally, as of public relevance (Art. 197), that is, having primacy when weighted with other social rights on the same level of equivalence (BRASIL, 1988).

Attention should be given to the constitutional provision, regarding the institutional guarantee of the SUS in the sense that it is responsible to carry out, in addition to other attributions, to perform epidemiological surveillance actions (Art. 200), understood as a set of actions that provide knowledge, detection or prevention of any change in determinant and conditioning factors of individual or collective health, in order to





recommend and adopt measures to prevent and control diseases or injuries (Art. 6) (BRAZIL, 1988).

Therefore, it is extracted from the constitutional provisions that the right to health should be implemented in a priority preventive manner and that epidemiological surveillance is one of the instruments of the SUS to achieve the reduction of the risk of diseases and preventive action. It is interesting to note that the policy of preventive action in the scope of health actions was encouraged for reasons much more of an economic nature than related to human dignity itself (TEIXEIRA, COSTA, 2012, p. 687-688).

Regarding the right to freedom, in its most intrinsic object, that of coming and going, of which economic freedom, including as autonomy of the will and disposition of private property, it is important to emphasize that it is one of the most elementary fundamental rights, being paramount and inherent to human existence, especially to a dignified existence.

In this sense, it is important to verify that freedom is expressed in the Constitution of the Federative Republic of Brazil in various provisions, especially in Art. 5, in competition with the principle of legality in its item II, the freedoms related to the person as freedom of work, office and profession (item XIII), of locomotion in the national territory in peacetime (item XV), of peaceful meeting (item XVI), of association, noting that there are guarantees related to such freedoms, such as that no one will be deprived of freedom without due process (liv item), being possible the *granting of habeas corpus* whenever someone finds themselves threatened or suffer violence or coercion in their freedom of locomotion (item LXVIII) (BRASIL, 1988).

Also relevant to mention about economic freedom, equally relevant to this article, when later, in Art. 170 (BRASIL, 1988), the constituent dealt with the economic order, mentioning that it was founded on the valorization of human labor and free initiative, with the purpose of ensuring that all lives are worthy, according to the dictates of social justice, also establishing the guarantee to all of the free exercise of any economic activity, regardless of authorization from public agency.





As mentioned, for the purposes of this article, considerable note of personal freedoms and economic freedom. Understood that as the legal possibility that is recognized to all people to be owner of their own will – autonomy of will, therefore – and to move untangledly without being hindered; and this, as the freedom to exercise any work, office, or profession (CHIMENTI *et al.*, 2005, p.77-80).

According to Alexy (2017), there would be a protection structure for fundamental freedoms with two projections, one of a negative nature, another of positive nature. While one would require the state to abstain, in the sense of not violating such freedoms, the other would require action of that same State, in order to make possible the enjoyment and enjoyment of freedom.

In the first case, requiring abstention or non-embarrassment or even a prohibition on the State that obscures, unjustifiedly, deliberately and arbitrarily, individual, and economic freedom, especially as to the right to come, come, meet, trade, profession and any economic activity.

In the second case, requiring the State that the right to health, as a provider, be implemented through public policies and health actions and services that can not only reduce the risk of illness and contagion of diseases, but also promote the recovery of patients affected by the most diverse diseases. It is noted here, of course, the pandemic problem of *COVID-19* or commonly known coronavirus.

Moreover, it should be clarified that all fundamental rights are binding on the legal order, both legislative, executive, and judicial functions, as well as individuals themselves in their individual or collective aspect, in the particular orbit. That is, this link also guarantees a protection structure that spreads in social fatality, due to the juridicity or normativity of fundamental rights.

4 SOCIAL DISTANCING AS A RESTRICTIVE SANITARY MEASURE

Before explaining about health measure of social distancing begins, it is important to contextualize the discussion about the current moment that society at the world level





goes through. This is a unique moment in the most recent history of humanity, in which, in global terms, the context of the daily life of all people in all countries has profoundly changed, resulting from a pandemic process, which has affected not only health, but the economic order (in macro and microeconomic terms), the social order and, in many places, as in Brazil, the political order.

The pandemic situation, understood as a worldwide expansion of a once-localized epidemiological process that has become uncontrolled, has been causing a worldwide change in human habits in every sense of existence.

According to the World Health Organization (WHO), by March 18, 2020, confirmed cases of Covid-19 had already exceeded 214,000 worldwide. There were no strategic plans ready to be applied to a coronavirus pandemic - everything is new. Who recommendations [...] and [other] national and international organizations have suggested the application of influenza contingency plans and its tools, due to the clinical and epidemiological similarities between these respiratory viruses. These contingency plans provide for different actions according to the severity of the pandemics. (FREITAS; NAPIMOGA; DONALISIO, 2020, p. 1).

In Brazil, the emergency in public health of national importance was declared by Ordinance GM/MS No. 188, 3,02/2020 (BRASIL, 2020a), in accordance with Decree No. 7,616/2011 (BRASIL, 2011), and later, Federal Law No. 13,979/2020 (BRASIL, 2020b) was issued, which had measures to combat the public health emergency of international importance due to Coronavirus.

Federal Law No. 13,979/2020 (BRASIL, 2020b) was established with the objective of protecting the collectivity, granting powers for the Health Minister, by administrative act, to have over the emergency situation, which was accomplished through Ordinance GM/MS No. 356, of 03/11/2020 (BRASIL, 2020c), which, in turn, regulated the operationalization of said legislation and established measures to combat the public health emergency.

This legislation brings some definitions on the restrictive sanitary measures that could be adopted to combat the pandemic in the national territory, in addition to indicating the need to maintain essential services, which were later regulated by Federal Decree No. 10,282/2020 (BRASIL, 2020d).





Sanitary restrictive measures can be carried out by the health authorities of the municipalities, states, and the Union, as verified by Art. 3, §7, of Law No. 13,979/20 (BRASIL, 2020b), that is, by act of the Federal Executive Power, states, and municipalities.

It happens for the adoption of restrictive sanitary measures, whatever they may be, it is necessary that they "be determined based on scientific evidence and analyses on strategic information in health and should be limited in time and space to the minimum necessary for the promotion and preservation of public health", as provided for in Art. 3, §1, of Federal Law No. 13,979/20 (BRASIL, 2020b).

Isolation, which is considered the "separation of sick or contaminated persons, or baggage, means of transport, goods or affected postal parcels, of others, to avoid contamination or the spread of coronavirus" (Art. 2 of Law 13.979/20), "is a measure aimed at separating symptomatic or asymptomatic persons, in clinical and laboratory research, to prevent the spread of infection and local transmission". (BRAZIL, 2020b). Such measure should be accompanied by a free and informed consent form from the patient. When recommended by the health surveillance agent, or, in his absence, by the Health Secretary, it will be made by express notification to the contact person, duly substantiated - Art. 3 of Ordinance GM/MS No. 356/20 (BRASIL, 2020c).

Quarantine, in turn, means "restriction of activities or separation of persons suspected of contamination of people who are not sick, or of luggage, containers, animals, means of transport or goods suspected of contamination, to avoid possible contamination or spread of coronavirus" (BRASIL, 2020b). This restriction aim to "ensure the maintenance of health services in a right and specific place [...] published in the Official Gazette and widely disseminated in the media" (BRASIL, 2020c). The two measures mentioned above aim not only to avoid the chain of transmission of the disease, but also to preserve the health system itself, with the reduction of contagion.

The two measures mentioned above aim not only to avoid the chain of transmission of the disease, but also to preserve the health system itself, with the reduction of contagion. On the other hand, there are the social isolation/social distancing/home





isolation has been mentioned, which is not confused either with the isolation of the patient affected by the disease (art. 3, item I), nor with the quarantine determined to people suspected of contamination (art. 3, item II) (BRASIL, 2020a). It is not confused because social distancing is imposed on all subjects, even if they are not affected or suspected of involvement by the virus.

It is a new measure, hereinafter, for the purposes of this work, called only social distancing, which could be adopted by managers, since the measures mentioned in Art. 3 of the Federal Law (BRASIL, 2020a) are not close clauses.

In March 2020, the Health Ministry adopted a health measure similar to that of China, designated in Brazil as social distancing (BRASIL, 2020e)

Non-pharmacological measures aim to reduce the transmissibility of the virus in the community and therefore slow the progression of the epidemic. Actions like this, in addition to reducing the number of cases, have the potential to reduce the impact for health services, by reducing the epidemic peak. In mathematical modeling studies it is estimated that a reduction of about 50% of contacts between people would have a significant impact on the total number of cases, since they reduced covid-19 R_0 to close to 1 (one). In addition, non-pharmacological measures delay the peak of the epidemic and reduce peak height, thus allowing a better distribution of cases over time and exhaustion of health services. (BRASIL, 2020e, p. 8)

In addition, although there is no express provision of such a restrictive sanitary measure in the Brazilian legal list, there is a recommendation for its use by several entities, one of which is the World Health Organization (WHO, 2020).

In addition, Epidemiological Bulletin No. 5, of 14/03/20 (BRASIL, 2020e), of the Ministry of Health, recommended, in addition to other aspects, that quarantine declaration be promoted only when 80% of the intensive care unit (ICU) bed occupancy is reached, available for response to COVID-19, defined by the local manager according to Ordinance GM/MS no. 356/2020 (BRASIL, 2020c, p. 10-11). Therefore, until this level of ICU bed occupancy was reached, the determination of social distancing would remain in force, that is, regardless of the application or not of quarantine, the measure of social distancing would be imposed.





It means that the restrictive health measure of fundamental freedoms, called social distancing, would not be one of the measures legally provided for, but authorized by the legislation itself, even because the pandemic situation is a new situation for which there was no and still no answers, neither scientific-sanitary, nor policies, nor ready-to-end economic ones. In this sense, social distancing was adopted worldwide as a non-pharmacological way to control the transmission of the disease and try to avoid the collapse of the health system. Brazil did not exceed the practice endorsed by other countries around the globe.

Epidemiological Bulletins N°. 7 of 04/06/20 (BRASIL, 2020f) and N°. 8, of 04/09/2020 (BRASIL, 2020g), of the Health Ministry, in which the provision of social distancing was indicated for the first time, expressly, in an official document, the prediction of the non-pharmacological measure of social distancing.

Expanded Social Distancing (DSA)

Strategy not limited to specific groups, requiring all sectors of society to remain in residence for the duration of the enactment of the measure by local managers. This measure restricts contact between people as much as possible.

[...]

Selective Social Distancing (DSS)

A strategy where only a few groups are isolated, being selected the groups that present the most risk of developing the disease or those that may present a more severe condition, such as the elderly and people with chronic diseases (diabetes, heart disease, etc.) or risk conditions such as obesity and risk pregnancy. People under 60 years of age can move freely if they are asymptomatic.

[...]

Lockdown

This is the highest level of security and may be necessary in a situation of serious threat to the Health System. During a full lockdown, ALL perimeter entrances are blocked by security professionals and NO ONE can enter or leave the isolated perimeter. (BRASIL, 2020f, p. 5-7)

Such measures did not properly indicate the criteria for their adoption, but levels of implementation, among which the widened social distance, the selective social distance and the total lockdown.





5 EFFECTIVENESS OF FUNDAMENTAL RIGHTS TO INDIVIDUAL AND ECONOMIC FREEDOM AND HEALTH BEFORE THE MEASURE OF SOCIAL DISTANCING

In an attempt to identify the reasons for the possible prevalence of the right to health or restriction of the right to freedom, before the sanitary measure of social distancing, the analysis of the teachings of Canotilho (2003) about, respectively, the limits to the restrictions of fundamental rights and weighting of effectiveness are based.

For the author, there would be some limiting criteria for the restriction of fundamental rights, among which one could mention: a) existence of formal and organically constitutional law; b) existence of express authorization of the Constitution for the establishment of limits through law; c) whether the restrictive law would have a general and abstract character; d) whether the restrictive law would have retroactive effects; (e) whether the restrictive law observes the principle of the prohibition of excess, establishing restrictions necessary to safeguard other constitutionally protected fundamental rights; f) whether the restrictive law diminishes the extent and scope of the essential content of constitutional precepts (CANOTILHO, 2003, p. 451). The analysis of these criteria is made in the concrete situation of the sanitary measure of social distancing.

First, as to the requirement of express restriction authorization, explains Canotilho (2003) that the Portuguese Constitution does not confer on the legislature a general authorization of restrictions on rights, freedoms and guarantees, but that there are specific predictions of situations that could be subject to restriction, with the intention that it seeks in the fundamental law the concrete basis for the exercise of its powers, in order to ensure legal certainty for individuals by serving constitutional authorization as a warning to the legislator (CANOTILHO, 2003, p. 452).

The specific restrictive criteria for the exercise of the right to individual or economic freedom and for the exercise of the right to health, in the Constitution of the Federative Republic of Brazil of 1988, remained established primarily by the necessary reserve of law, in the sense that no one will be obliged to do or fail to do anything but by virtue of law, that is, establishing legality as a criterion.





It can be further, as a limitation of an express order, the objectives, and purposes for the exercise of such rights may be further, as a limitation of an express order. For the purposes of economic freedom, the purpose of ensuring all dignified existence, according to the dictates of social justice; and for health purposes, the purpose of reducing the risk of diseases and injuries, as well as universal and equal access to actions and services for promotion, protection, and recovery. In the latter case, there is mention of the provision, by law, about the regulation, supervision and control of such health services and actions.

It means that, constitutionally, there is express authorization for the establishment of limits to said rights of individual and economic freedom and for the right to health, limits that are indicated in constitutional place, directly, according to the objectives and purposes of both fundamental rights, as well as indirect when their regulation must take place through law.

With regard to the health measure of social distancing, the question is: it was instituted by formal law, endorsed with generality and abstraction, edited by the Legislature, which aimed to achieve the sanitary purposes provided for in the provisions of Art. 196 and Art. 197, of the Constitution of 1988 (BRASIL, 1988), guaranteeing the essential core of the right to health and not exceeding or exceeding the limits of other fundamental rights (such as individual and economic freedom) , since it is expressly edited by epidemiological bulletin of the Health Ministry?

In response to such questioning, it is observed that Federal Law Nº. 13,979/2020 (BRASIL, 2020b) was effectively edited by the Legislative Power, with abstract and generic law, that is, it addresses the entire national territory and, although it deals with a specific theme of public health emergency of international importance resulting from the pandemic outbreak of COVID-19, reaches and regulates an indeterminable number of people and situations, respectively.

It occurs that, although there is no express prediction of the sanitary measure of social distancing in the respective legislation, the list indicated there is not a close clause, and there is an opening for the use of various sanitary measures, through the expression "among others", indicated in the text of its Art. 3, *caput* (BRASIL, 2020b).





According to Art. 3, §7 (BRASIL, 2020b), the authorities entitled to adopt restrictive sanitary measures would be the Health Ministry and local health managers, provided that they are authorized by the Health Ministry, in the hypotheses of items I and II, respectively, in relation to isolation and quarantine.

Furthermore, restrictive sanitary measures, according to the diction of Article 3, §1, could only be applied "through scientific evidence and analyses on strategic information in health" (epidemiological analysis), "in a limited way in time and space to the minimum necessary for the promotion and preservation of public health" (BRASIL, 2020b). In addition, it is expected that the fundamental rights and freedoms of people should be protected, with full respect for dignity, as verified in Art. 3, §2, item III (BRASIL, 2020b).

On the other hand, art. 16, in a single paragraph of the Organic Health Law (Federal Law N°. 8,080/1990) is in the sense that the Union could carry out epidemiological and sanitary surveillance actions in special circumstances, such as the occurrence of unusual health problems – as in the case of the current pandemic situation – that may escape the control of the SUS state direction or that represent a risk of national dissemination.

The Union, as a faithful law enforcement, has drafted, based on such legal prescription, Decree N°. 7,616/2011 (BRASIL, 2011), for the purpose of a public health emergency declaration of national importance (ESPIN) and, through the Health Ministry, it issued not only Ordinance GM/MS N°. 188/2020 (BRASIL, 2020a) – which declared the current emergency – but also Ordinance N°. 356/2020 (BRASIL, 2020c), which regulated Federal Law N°. 13,979/2020 (BRASIL, 2020b). That is, the infra legal rules (ordinances) issued by the Health Ministry, were issued in formal and legitimate compliance with ordinary laws that would authorize the regulation, through infra legal acts.

From the above, it can be said that the issue of sanitary measure not legally provided for, although supposedly authorized by the infra constitutional legislature, goes beyond the process of normative interpretation, making the list of restrictions be extended, through an extended interpretation, when the case should be of restrictive interpretation, especially because fundamental rights are considered.





As much as the epidemiological bulletin of some normative nature should not be appropriate, it would not be appropriate to distinguish formal treatment between sanitary measures of the same context, even if it is necessary to observe that the measures must respect fundamental rights and freedoms and should be endorsed with scientific research, although outside the supposedly exemplifying list.

So, the first conclusion researched is that there could be no expansion of restrictive norm with the adoption of sanitary measure not provided for by law, such as social distancing (at any of the three levels: expanded, selective or lockdown) from all activities of social and collective life. That is, the list determined in Art. 3, Federal Law N^o. 13,979/2020 (BRASIL, 2020b) cannot be understood as an exemplifying list, but, on the contrary, as close clause, because this specific kind of measure – social distancing – refers to a way of restricting fundamental rights of freedom.

Such a process would only be authorized if there were, first, an express authorization law of the measure, which does not exist to date. Nor can it be said that the measure of social distancing would be one of the forms of quarantine measure, to solve its formal problem, because the criteria for its adoption and that of the measure were differentiated, as verified in epidemiological bulletins N^o. 5, of 03/14/2020 (BRASIL, 2020e), and N^o. 11, of 04/17/2020 (BRASIL, 2020h).

Then, formally, social distancing, as a restrictive health measure, would not have, unlike other restrictive sanitary measures, been adequately introduced into the infra legal system, through epidemiological bulletin. In order to lack not only legal support, but also constitutional, since the restriction of fundamental rights, especially with the case of individual and economic freedom, must take place, by formal law, as already verified in the constitutional provisions mentioned elsewhere and also in doctrine.

However, it should be noted that worldwide there was the adoption of social distancing, prevailing understanding that it would be the most appropriate and eminently necessary measure – not only by the World Health Organization (WHO), but by several agencies scientifically involved with public and collective health – because it would





adequately guarantee the fundamental rights to health and even life, directly correlated to each other.

But this consideration alone is still not sufficient to understand that the restrictive measure of the fundamental right to individual and/or economic freedom is materially constitutional. This is because the aspect of the right to individual and/or economic freedom has not yet been taken into account. In this respect, it is important to consider the object and value of protection, as mentioned by the doctrine. And here the functions of fundamental rights, as mentioned in the previous section, should be evidenced.

According to what has been anticipated about the functions of fundamental rights, they perform functions of defense or freedom, social provision, and protection before third parties. Thus, the object of protection of the right of freedom, including economic freedom, must be attributed objectively and not only subjectively, so that it can be in harmony with the rights of public life, without, however, dispensing with the subjective dimension to annihilate the individual's own freedom itself.

At this point, it is based that the measure of social distancing at no time fails to consider the essential needs of people, even in the most rigorous version of lockdown, since even in this case, essential services related to the immediate needs of people are maintained, such as health, food, locomotion, communication, among others. Thus, the right of freedom is not completely annihilated either individually or economically considered.

As for the value of the protection of the right to individual and/or economic freedom, it is perceived that this extension of the essential nucleus will only have meaning if it constitutes a last and insurmountable stronghold by any restrictive legal measure (CANOTILHO, 2003, p. 460-461) and wants to appear that the measure of social distancing, even in the most restrictive version, still preserves the core of subjective freedom of the subjects, when it allows the maintenance of essential services that meet the immediate needs of people, due to Art. 3, §8, of Law N°. 13,979/2020 (BRASIL, 2020b).





In view of this conjuncture, it is possible to say that the measure of social distancing, while restrictive of individual and economic freedom, would be materially constitutional, because it would be the sufficient and necessary, appropriate, and proportional means to achieve the purposes proposed by the norms about the social right to health. This is because it would be a preventive measure, useful in the sense of reducing risks, making, by reducing the epidemiological contagion of the disease, universal and equal access to the protection and recovery of health be ensured, of those who may need the SUS. It is understood to be appropriate and proportional only in cases where its application is limited by the way, time, and space to the minimum indispensable for the preservation of public health.

The final question is: does the restrictive measure of social distancing, in materially constitutional terms, meet the functions of defense, social benefit and protection before third parties, when it puts in balancing the right to health and the right to individual and economic freedom?

This question can be answered affirmatively, since: a) in the context of social provision, it preserves the health system and prevents epidemic contagion, making it slower, so that the provision of health actions and services can be carried out by the State in a universal and equal way; b) in the context of defense or freedom, ensures the exercise of individual and economic freedoms at a minimum and essential level, to the extent that it ensures the operation of essential activities that immediately meet the fundamental needs of individuals in collectivity; c) in the context of protection before third parties, in the sense that it imposes on the State the adoption of measures to regulate civil relations, with the purpose of protection of life as a last resort.

To think in another way and understand that the right to individual and economic freedom can be exercised in an unlimited way, without the epidemiological and preventive considerations provided by the measure of social distancing, is to put at risk the health system, with the collapse of patient care, meaning to exclude the universality of access to health of the population.





Moreover, without sufficient functioning of the institutional guarantee, as the state health system is considered, in this case the SUS, one cannot speak of adequate or minimal provision of health services to the population and, consequently, one cannot speak of minimum attention to people's health, nor the nature of risk prevention, nor in the character of care for those already affected by the disease.

This is because the acceleration of the activities inherent to the right of individual and economic freedom causes the epidemiological process to also accelerate and the level of coverage of the health system, with limitations not only of available financial resources, but of basic material resources – lack equipment such as respirators, individual protection of health workers, laboratory tests, medicines used for sedation and to minimize the effects of the disease on patients already affected and in severe condition, limited in global terms – reduce itself greatly to the point of not being able to meet all those in need.

And there, the unrestricted scope of the right to individual and economic freedom dies from constitutional legitimacy, calling into question the protective function of the fundamental right of freedom, to the extent that it reaches and fails to confer sufficient protection to all in the sense of indiscriminately afflicting the health of the population. Worse, it afflicts health indiscriminately, so that it puts citizens' own lives at risk, since covid-19's morbidity and mortality rate is extremely high.

As for this third function, protection against third parties, however, special observance deserves to be given because this is the central theme of this study.

Given how much has been presented so far, it is perceived that there is horizontal efficacy of the fundamental rights of both freedom and health and that, in view of the restrictive sanitary measure of social distancing, there is harmonization between both spectrums of fundamental rights, with no prevalence of one over the other, but a weighting between both so that neither is excised or causing the other to become absolutized. However, there is a tendency to preponder the right to health due to its public relevance, due to its eminent relationship with life.

However, it would only be possible to demand compliance with the health measures restricting the fundamental right to freedom among individuals in the case of legislative





mediation, as in the case of restrictive sanitary measures of isolation and quarantine, for example. It means that it is not possible to demand, in the sense of legal duty arising from a right to reduce epidemiological risk, the social distancing of one individual against the other, or even to counter the right to health among individuals, without the existence of a law that clarifies the content and scope of the measure, in a general and abstract way. This task is entrusted to public agencies, especially the Legislature, which will be responsible, in accordance with the law, on its regulation, supervision and control, according to the reading of Art. 197, of the Constitution.

It is worth noting, finally, that although this task is the responsibility of the public authorities, still, as seen, there is no normativity or formal legal and constitutional juridicity to demand compliance with the restrictive sanitary measure of fundamental rights, consistent in social distancing. Well, with no coercive force resulting from its legality, legitimacy and formal constitutionality, there is no way to legally demand or sanction its non-compliance (enforce), in accordance with the possibility existing in relation to other restrictive sanitary measures, as verified by Art. 3, §4, of Federal Law N°. 13,979/2020 (BRASIL, 2020b).

6 FINAL CONSIDERATIONS

According to everything presented, it is concluded that the restrictive sanitary measure of social distancing should be considered illegal and unconstitutional because it does not meet the criteria of legality and constitutionality in the formal sense, given that the legal provision of Art. 3, of Federal Law N°. 13,979/2020, does not expressly mentioned, and cannot be interpreted such provision in an exemplifying way (open clause), but exhaustively (close clause), since it is a precept that restricts fundamental rights, including the right to individual and/or economic freedom.

There is, therefore, legislative omission in Law N°. 13,979/2020, before the non-predictability of the measure of social distancing, when it will be applied, in what way, by





whom, as will be carried out, circumstances, scope and coerciveness resulting from its non-compliance. Thus, it is not possible to confer juridicity and coercibility to epidemiological bulletins that deal with the sanitary measure of social distancing, in the same way as provided for the other restrictive sanitary measures allocated in the list of Art. 3, of Federal Law Nº. 13,979/2020, either in relation to the public power or in private relationship.

However, the measure of social distancing although it is formally illegal and unconstitutional, can be considered materially constitutional because it was considered, under the prohibition of excess and preservation of the essential nucleus, the only restrictive non-pharmacological sanitary measure useful to guarantee the reduction of epidemiological risk so that both the right to health on an individual and collective basis and to ensure a minimum achievement of the right to individual and economic freedom, even in its most severe version of lockdown.

In turn, the fundamental rights to health, of a social character, and to individual and economic freedom, of an individual and also social character, must be weighed among themselves, when analyzing the sanitary restrictive measure of social distancing, for the preservation of both, so that to strictly prevail the fundamental right to health, the right to freedom would be excised, resulting in unconstitutional and illegitimate arbitrariness; and, on the contrary, prevailing the right to freedom, the right to health and even life, would be illegitimately excised, in the face of serious pandemic situation experienced today, at national and global level; in both cases, disproportionate, this would lead to an excess violating the Constitution and the essential core of both rights, it is worth mentioning that there is a provision for public relevance to the right to health, which makes it preponder when compared to other rights whether social, economic and cultural, whether individual, precisely because it is connected to the right to life and dignity of the human person.

Finally, there is horizontal efficacy of fundamental rights to both individual and economic freedom and the right to health, when considering the restrictive sanitary measure of social distancing. However, in the case of the right to health this effectiveness is mediated, i.e. mediation of public authorities is required so that individuals can, from





such mediation, legally demand the preservation of the legal position, against each other, when the fundamental right is not complied with, since the right to health guaranteed to all also matters a duty of health to all, in order to impose an obligation to do/not do on the part of individuals in relation to the collectivity, especially regarding the cooperative exercise aimed at reducing the risk of diseases, of an eminently preventive nature, when it comes to epidemiological issues, as in the case of COVID-19.

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