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UNCONSTITUTIONAL STATE OF AFFAIRS AND THE PROTECTION OF MINIMUM RIGHTS IN BRAZIL

ESTADO DE COISAS INCONSTITUCIONAL E A PROTEÇÃO A DIREITOS MÍNIMOS NO BRASIL

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ABSTRACT

This article aims to examine whether there is a widespread violation of minimum human rights in Brazil, including an unconstitutional state of affairs in relation to some rights. By the deductive analytical method, the article continued a previous research and problematized the issue of the costs of rights and its relation with the protection of minimum rights that depend on budget choices to achieve. In view of this, it was first presented the economic dimension of human rights. In the second moment, the problem of scarcity was demonstrated and how these matters must be confronted in the face of the basic needs. Finally, he argued that the ineffectiveness of public policies capable of guaranteeing minimum rights entails what doctrine and jurisprudence call unconstitutional state of affairs.

KEYWORDS: human rights; minimum rights; unconstitutional state of affairs.

RESUMO

Este artigo tem por objetivo examinar se há no Brasil uma violação generalizada a direitos humanos mínimos, compreendendo um estado de coisas inconstitucional em relação a alguns direitos. Por meio do método analítico dedutivo, o artigo deu continuidade a pesquisas anteriores e problematizou a questão dos custos dos direitos e sua relação com a tutela de direitos mínimos que dependem de escolhas orçamentarias para concretização. Diante disso, foi apresentada, em primeiro lugar, a dimensão econômica dos direitos humanos. No segundo momento demonstrou-se o problema da escassez e como essa questão deve ser enfrentada em face do mínimo existencial. Por fim, sustentou que a inefetividade de políticas públicas aptas a garantir direitos mínimos acarreta no que a doutrina e jurisprudência denominam de estado de coisas inconstitucional.

PALAVRAS-CHAVE: direitos humanos; direitos mínimos; estado de coisas inconstitucional.

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INTRODUCTION

This article aims to examine whether there is a general violation of minimum human rights in Brazil, including an unconstitutional state of affairs in relation to some rights. Starting from the understanding of Joaquim Herrera Flores that speaking about human rights is talking about the "opening of processes of fight for human dignity" (2009, p.21), the research sought to examine whether there is a general violation of minimum human rights in Brazil, including a true unconstitutional state of affairs in relation to some rights.

The article problematized the question of the costs of the rights and their relationship with the protection of minimum rights that depend on budget choices for their realization by the deductive analytical method. The material used was bibliographical and jurisprudential, considering that it is essential to perform a factual analysis for the proposed objectives, which consists of opposing theoretical-conceptual paradigms and to examine how the Judiciary has been acting to fulfill the minimum rights.

Therefore, the economic dimension of human rights was presented on the basis of critical theory and the perception of the costs of the rights of Cass Sustein and Stephen Holmes. In the second moment, the problem of scarcity was demonstrated and how this issue must be confronted in the face of minimum human rights. Finally, he maintained that the ineffectiveness of public policies capable of guaranteeing minimum rights in times of crisis entails what doctrine and jurisprudence call unconstitutional state of affairs.

2 CONSIDERATIONS ON THE ECONOMIC DIMENSION OF HUMAN RIGHTS

Before discussing the protection of minimum rights in Brazil in times of crisis, some comments must be made on the economic issue of human rights with the purpose of understanding how the public power must deal with the scarcity of resources in the protection of minimum human rights, and, as a result, to verify if there is a general violation of these rights in Brazil in times of crisis.

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At the outset, it is important to emphasize the relevance of the economic perspective for understanding human rights, since, as products of the culture, they cannot depart from reality.

Based on the teachings of Amartya Sen (2010), which links the perspective of freedom as development and adds to the concept of social rights and living with dignity, it's possible to come to the conclusion that the economic dimension of rights is inseparable. Thus, the discourse of human rights must be attentive to the economic system and the feasibility of the right, so as to guarantee the protection of all human rights.

However, the economic complexity of human rights accompanied State models and their specificities. The Liberal State, for example, constructed the idea that the economy served to justify the struggle for rights with the aim of achieving the greatest individual benefit, within an environment of scarce means and resources required.

In the perspective of Joaquim Herrera Flores (2009), "the dogma of scarcity transforms into a ‘rational’ strategic action of appropriation of the necessary means to ‘play’ in the market, relegating to the irrational, or to the uneconomical, any effort to create conditions worthy of life for all”. Despite the criticism that the universal belief that there are not enough resources for all, in a realistic and critical theory of human rights the economic dimension cannot be separated.

Cass R. Sustein and Stephen Holmes (1999), in the work The Cost of Rights, argue that all rights, from the ones traditionally called rights to benefits, to rights of defense (liberty), generate costs for the public machine. In this sense, all the rights are positive and depend on some kind of state provision for its effectiveness, a fact that implies expenses to the public treasure.

The authors' theory is based on the premise of the syndicability of rights, since there is a structure permanently made available by the State (Judiciary, fire brigade, public security, etc.) to guarantee them. Therefore, any rights, without distinction, represent expenses to be supported by the State and, ultimately, by the society (SUSTEIN; HOLMES, 1999).

In considering that the application and enforcement of rights, be they individual or social, depends on a positive action of the State which lacks economic and financial

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resources, collected from individual taxpayers, in order to function, "one arrives at the conclusion that rights exist only where there is a budget flow that allows" (GALDINO, 2005, P.204).

Inevitably, there is no way to protect or enable the exercise of a right, in its entirety, without public or private funding[1].

Bearing in mind that the effectiveness of rights depends on economic means, financed by taxpayers and administered by the State, the logical conclusion is reached that there are no absolute rights and that the question of costs must be taken into account in the concept of subjective right. That is, economic and financial conditions are important for the definition of human rights (SUSTEIN; HOLMES, 1999, P.123).

This assertion is evident when it is assumed that public resources are scarce, a circumstance that makes it impossible for all citizens to exercise their full rights (SUSTEIN; HOLMES, 1999, P.97). Consequently, implementing rights implies making resource allocation choices, so that some rights will be realized, while others will not.

In the perception of Cass R. Sustein and Stephen Holmes, the recognition of the costs of rights allows legal theory to be more realistic to the point of examining in an open manner the competition for scarce resources that inevitably generate reflections on human rights (1999, P.98).

However, the dogma of scarcity cannot achieve the protection of minimum human rights, under penalty of subverting the domestic and international order, which advocate the development of the economy with respect for dignity.

[1] It should be noted that the State, despite being the largest funder, is not alone responsible for the viability of exercising fundamental rights, hence the third sector also invests resources, with the intention of concretizing these rights for the community.

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3 COSTS OF HUMAN RIGHTS AND THE DOGMA OF SCARCITY

As has been shown, the economic dimension of rights is irrefragable reality that cannot be neglected, under penalty of turning human rights into rhetorical valves, into mere symbolic discourses of manipulation of the masses, alibi in favor of the dominant political agents[2].

Certainly, there is no denying the necessary linkage between the effectiveness of certain human rights and the existence of public or private resources to provide them. When looking at the national reality, it is verified that, for the most part, social rights advocate regulation through public policies which depend substantially on the financial possibilities of the Union, the State, the Federal District or the Municipality to be implemented.

In Brazil, the planning of financial activity occurs through the budget, which consists of the State's instrument of action that sets the objectives to be achieved. Regis Fernandes de Oliveira conceptualizes budget as: "[…] periodic law containing revenue forecasting and fixing of expenses, scheduling the economic and financial life of the State, of mandatory compliance, binding to the public agent" (OLIVEIRA, 2008, p.318).

Unquestionably, the budget is the way by which public policies can be carried out, essential to the realization of social rights. Consequently, there is a clear connection between social rights and the budget.

It is not too much to recall that the cost problem is not restricted to social rights. It should be emphasized, however, that expenditure with rights of freedom or defense does not function in the same way as those arising from the implementation of social rights. Obviously, the expense of the judicial or police machine exists independently of individual needs, as opposed to spending on public policies for the realization of social rights which depend on the needs of the case[3].

[2] The Constitution alibi is one of the types of symbolic constitutionalization described by Marcelo Neves. "There is no real change in the process of power. At the very least, there is a rhetorical advance of the realization of the constitutional model for a remote future, as if it were possible without radical transformations in power relations and social structure." (NEVES, 2007, p. 105).

[3] José Reinaldo de Lima Lopes highlights: "Those who need to defend their rights of freedom or even their traditional property rights, spend public resources that served to pay and maintain the state infrastructure. But there is no necessary relation between the cost of a particular court case and the benefit that the interested party obtains from that process. An action for the disposal of small amounts

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Ingo Wolfgang Sarlet (2008, p.28) states that the "cost factor" is not an impediment to the effective exercise of rights by the judicial process, thus admitting the economic-financial "neutrality" of the rights of the defense. *Contrario sensu,* the realization of the social rights of benefit is inexorably subject to the economic situation in which they are inserted.

Despite these considerations, it is important at this moment to understand the repercussions of the finiteness of public resources to the realization of social rights. In fact, there is a great disproportion between the (infinite) social needs and the scarcity of public resources to supply them. As a result of this scenario, the realization of social rights presupposes the choice of the Legislative and the Executive over the instruments of deliberation of funds for attendance and implementation of public policies.

It is possible to see, then, that there will be conflict over scarce resources, even though the full and unconditional realization of all social rights lies only in the utopian and symbolic planes.

From this perspective, the principles of morality and efficiency of the Public Administration will be indispensable to optimize social rights and guarantee justice, given that "the waste of public resources, in a universe of scarcity, creates injustice with those potential recipients that they should attend to" (SARLET et al, 2008, P.65).

In order to clarify the understanding of scarcity, it is worth reproducing the concepts outlined by sociologist Jon Elster[4]:

is worth exactly the same resources as an act of great legal complexity, or an action involving large resources for the parties involved. The cost of the judicial apparatus does not seem directly proportional to the interests at stake and does not, in this aspect, play a distributive role.". On the other hand, "the cost of social rights varies according to the needs of each individual. In these terms, the health service (...) has a cost that depends directly on the kind of interest that is wanted to meet in the concrete case. Not everyone will get sick and not all will cost more or less the same to be treated". (LOPES, 2008, p. 176 -177).

[4] "That a good is scarce means that there is not enough of it to satiate all individuals. Scarcity can be (weakly or strongly) natural, quasi-natural, or artificial. Strong natural scarcity arises when there is nothing anyone could do to increase the supply. Paintings by Rembrandt are an example. Weak natural scarcity arises when there is nothing anyone could do to increase the supply to the point of satiating everybody. The provision of oil is an example; the supply of cadaver organs is another. Quasi-natural scarcity arises when the supply could be increased, possibly to the point of satiation, only by the uncoerced actions of citizens. The supply of children for adoption and sperm for artificial insemination are examples. Artificial scarcity arises when the government could if it so decided, make the good available to everyone to the level of satiation. Exemption from military service and provision of places in kindergarten are an example". (ELSTER, 1992. p. 21-22).

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> To say that a commodity is scarce means that there is not enough to satisfy everyone. The shortage can be natural-weak or natural-strong, near-natural, or artificial. Natural-strong scarcity occurs when there is nothing that can be done to increase supply. Rembrandt paintings are an example. Natural-weak scarcity occurs when there is nothing that can be done to satisfy everyone. The supply of oil is an example; the supply of organs for transplantation is another example. A near-natural shortage occurs when the supply can be fostered, possibly to the point where there is general satisfaction, only by the spontaneous action of the citizens. The provision of children for adoption and sperm for artificial insemination are examples. Artificial scarcity occurs when the government can if it so chooses, make the good accessible to everyone to the point of universal satisfaction. Exemption from military service and places in day-care centers are examples (ELSTER, 1992, P.21-22).

Based on the classification proposed by Jon Elster it can be affirmed that the question of the financial availability must be framed in the artificial shortage by two evident reasons. Initially, because the State can extract more resources from society through taxation, since consistent with constitutional precepts, given the duty of citizens to contribute to the maintenance of public expenditures (CHULVI, 2001). Moreover, scarcity is artificial because it is the result of an allocative policy decision, that is, there are not enough resources to promote an end because they have been managed for another purpose.

Exactly for noting the material impossibility of giving full service to all the obligations inherent to the State exudes allocative decisions, often amalgamated in tragic choices, because they are distributions of scarce goods. From the conflict between social needs and scarce resources society is called upon to face tragic choices[5].

Guido Calabresi and Philip Bobbit clarify the question of tragic choices, with a focus on the argument that the distribution of certain goods entails great suffering or can even cause death. In view of this, they advocate that the allocative methods adopted take into account, by one hand, the values by which society determined the beneficiaries of scarce goods, and, on the other, moral values that exalt life and well-being (CALABRESI; BOBBIT, 2006, P. 8-9).

[5] “In tali conflitti (...) devono infatti tentare di operare delle allocazioni in modo da preservare i fondamenti morali della collaborazione sociale e, se ci riescono, ta scelta tragica si tranformerà in uma allocazione, che no sembra implicare alcuna contraddizione morale, evitando cosi conseguenze moralmente riprovevoli”. “In such conflicts (...) one must, in fact, try to execute divisions in order to preserve the moral foundations of social and, being such an arduous choice will be transformed into an award, which does not imply in any moral contradiction, thus avoiding reprehensible moral consequences.” (our translation). (CALABRESI, 2006, p. 9).

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It is ineluctable to realize that, given the existing options, there should be an election of priorities by the public authority. This does not mean that the delayed options are not necessary, but they will be accepted at another time, according to the entry of new resources and the valuation of needs, as will be demonstrated throughout this study.

In any case, it seems reasonable to conclude that the question of costs, resource scarcity, and budget choices directly influences the realization of human rights. When judicialized, the resource scarcity argument as a restriction on the recognition of social law is generically termed the 'clause of the reserve of the possible'.

However, it is imperative to point out that this was not the sense originally constructed to designate the theory of the reserve of the possible. Indeed, the aforementioned theory was invoked for the first time by the German Constitutional Court in the judgment of the decision known as *numerus clausus*, which dealt with the right of access to higher education. In deciding the question, the Court has established jurisprudence that the claimed benefit must correspond to what the individual may reasonably require from society, so that, even if the State has the resources and has the power of disposal, it is not possible to speak of an obligation to provide something that does not remain within the limits of the reasonable[6].

As far as possible, it was referred to by the case law of the German Constitutional Court on the basis of the proportionality and reasonableness. In this way, it is possible to affirm that the reservation of the possible, as a restriction to a fundamental right, has to observe a standard of reasonableness. In other words, one

[6] Check up the passage of the judgment: Even to the extent that the social rights of participation in state benefits are not restricted from the outset to what exists in each case. They are under the reserve of the possible, in the sense of establishing what can the individual, rationally speaking, the demand of the collective. This must be assessed first and foremost by the legislator on its own responsibility. In the administration of its budget, it must also attend to other interests of the collectivity, considering, according to the express prescription of art. 109, II GG, the requirements of general economic harmonization. (...) As the Federal Constitutional Court has repeatedly emphasized in relation to the fundamental right of general freedom of action (...) *Grundgesetz* decided the individual-collective tension in the sense of dependence of the bond with the collective of the person (*Gemeinschaftsbezogenheit und Gemeinschaftsbezogenhei*); the individual must, therefore, tolerate those limits to his freedom of action that the legislator prescribes for the care and promotion of collective social life within the limits of the generally required, provided that the individuality of the person remains protected. These considerations are valid mainly in the field of guarantee of participation in state benefits. To make only limited public resources available to only a privileged part of the population, by neglecting other important interests of the community, would rightly confront the commandment of social justice, which is embodied in the principle of equality. BVerfGE 33, 303, of June 18, 1972. In: SCHWABE, 2005, p. 663-664.

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can not demand from the state and society something unreasonable and disproportionate.

After the paradigmatic decision of the German Court, the theory of the reserve of the possible was spread by numerous countries. In this environment, Brazilian jurisprudence adhered to the application of the institute to the national legal order. In Brazil, the clause of the reservation of the possible is constantly invoked as an insurmountable barrier to the realization of social rights, a fact that *concessa venia* should not be accepted, under penalty of tarnishing the constitutional values. Of course, following the teachings of Andreas J. Krell, it is evident that "a legal institute cannot be transported from one society to another without taking into account the socio-cultural and economic-political constraints to which all legal models are subject" (KRELL, 2002, P. 42). It is necessary, therefore, to adapt the idea of reserve of the possible to the Brazilian legal system.

From the perspective of Ingo Wolfgang Sarlet and Mariana Figueiredo Filchtiner, it is necessary to give a triple dimension to the reserve of the possible: a) the effective factual availability of resources for the realization of fundamental rights; b) the legal availability of material and human resources, which is closely linked to the distribution of revenues and tax, budgetary, legislative and administrative powers, among others; c) the proportionality of the benefit, in particular as regards its enforceability and reasonableness (SARLET; FILCHTINER, 2008).

Didactically, it can be said that reserving the possible reveals a predominantly legal perspective "of a mandate for the realization of fundamental social rights within a standard of reasonableness and proportionality, under penalty of injury to the constitutional system as a whole" and a factual dimension, "of commandment of observation of reality, of the existence of material resources and of the reasonable and proportional requirement and allocation of resources" (LOPES, 2014, P. 114).

The appreciation of the scarcity of public resources is not a condition of possibility for recognition of the right, but it is an external element, which may compromise its effectiveness. In other words, the clause in the reservation of the possible is not an immanent limit (a limit arising from the very structure and nature of

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the right)[7], determined in the abstract and aprioristically. Only in the concrete case should we consider the economic-financial reality and, thus, limit the effectiveness of social law.

It is really unacceptable that in a developing country such as Brazil, where the people lack benefits so much, there is pre-established conditioning for the guarantee of social rights.

Also, it should not be forgotten that the scarcity of resources for the realization of social rights is, in most cases, the result of allocative choices by the public authorities. Of course, it is extremely clear that, on numerous occasions, "what frustrates the realization of this or that right ... is not the exhaustion of a certain budget, it is the political option of not spending money on that right" (GALDINO, 2006).

Therefore, it is not intended to disregard the economic dimension of the right. Thus, when there is demonstrated balance, reasonableness, and observance of constitutional precepts in the process of budget choices, it is legitimate to claim the restriction of the reservation clause of the possible to relativize or even eliminate the enforceability of social law [8]. In other words, the reserve of the possible must be reasonable and proportional[9].

This seems to be the understanding of Gustavo Amaral, when analyzing the feasibility of control of the budget choices by the Judiciary to the extent that "it is for the magistrate to question the reasons given by the State for its choices, making a balance between the degree of essentiality of the claim and the degree of exceptionality of the concrete situation, whether or not to justify the State's choice" (AMARAL, 2001).

[7] It should be noted that some authors interpret the theory of immanent boundaries differently from the traditional concept. José Joaquim Gomes Canotilho, for example, tries to adapt his definition to the theory of principles, look: "the so-called immanent limits are the result of a weighting of legal-constitutional principles leading to the definitive removal, in a concrete case, of a *prima facie* dimension that was within the scope of a right, freedom, and guarantee." (CANOTILHO, 2003, p. 1282).

[8] It is also interesting to characterize the clause in the reservation of the possible as "excluding illicitness" of state conduct, proposed by Wálber Araújo Carneiro. According to the author: "the impossibility of fulfilling a certain program or of conferring a certain benefit does not necessarily constitute an illicit committed by the State. The scarcity of resources, as an inexorable fact, will serve as long as it is characterized as an excluding factor for the effectiveness of the measure which does not denature the existence of a subjective right and the related duty of the State". (CARNEIRO, 2004, p. 383).

[9] In this sense, Aline da Matta Moreira scores: "In addition to the proven scarcity of resources, arguing the reservation of what is possible by the Public Administration requires a proportional and reasonable analysis of the factual reality in which it affects. The reason is simple: no restriction on fundamental rights can take a disproportionate and abusive dimension." (MOREIRA, 2009, p. 148).

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With these arguments in mind, the repercussions of the costs of social rights should be assessed in the concrete case and not, a priori, as an imminent limit, under penalty of languishing the protection of social rights[10].

It should be noted, however, that the restriction of social law must respect the existential minimum. Thus, in relation to the existential minimum, there is no possibility of weighting based on the scarcity of resources (reservation of the possible), since it is a guarantee of minimum protection of the social right, indispensable for the survival of the holder with dignity.

4 THE PROTECTION OF MINIMUM HUMAN RIGHTS IN BRAZIL: STATUS OF UNCONSTITUTIONAL THINGS?

In times of economic and financial crisis such as Brazil has been facing since 2014, the social rights of a benevolent character that depends on public policies and budgetary rules for their full realization are put in check in the face of the need to reduce expenses and budget choices.

However, despite recognizing the economic dimension of such rights, one cannot avoid the need for effective protection of the minimum human rights that enable the existence of the individual with dignity.

The idea of protection to the existential minimum is derived from the jurisprudence of the German Federal Constitutional Court, who, in several decisions, stressed that the State must guarantee individuals the basic conditions for a dignified human existence[11].

[10] Ana Carolina Lopes Olsen also criticizes the understanding of the clause of the reservation of the possible as immanent limit. To this end: "[...] see as far as possible an imminent limit of fundamental rights, even if it is logically acceptable creates a serious weakening of the system of protection of these rights, since those powers are entitled to describe the normative scope of a right, with its inherent limits, have full freedom to affirm what is possible and what is not. (...) In a democratic state of law, it must be acknowledged that this discretion cannot be total, but must be in line with the objectives set by the constitution itself". (LOPES, 2008, p. 191).

[11] Robert Alexy records three particularly important decisions with regard to fundamental social rights, in which the protection of the existential minimum is inferred. "The 1951 Social Assistance Decision, the first decision on *numerus clausus*, and the decision on the Provisional Law on Integrated Higher Education in Lower Saxony. (ALEXY, p. 436).

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Putting the human being as the center of the legal system, the guarantee of the existential minimum imposes the preservation of the individual, through minimum social standards. Below the minimum level, although there is survival, there is no dignity (SARLET, 2008). For the construction of the catalog of minimum conditions supported by the State, the social and economic realities of each State will be decisive. It is true that, according to article 2, paragraph 1, of the international pact of economic rights, social and cultural rights, ratified by the Brazilian legal system on January 24, 1992[12], it is the duty of the signatory States to observe a *minimum core* obligation of each social right.

The contrast between developing and developed countries is illustrative in this context. Of course, it can be said that the priority of investing in basic social services, such as health services and basic education may represent minimal social rights for developing countries and should not represent the minimum for developed countries, which have already achieved basic conditions for survival. It is not surprising, therefore, that a country should, on certain occasions, guarantee the right to health, education, housing for people with low income as a minimum threshold, and other guarantees, for example, the right to culture as a minimum existential.

At that moment, it is important to verify if minimum human rights are observed in Brazil, especially in times of financial crisis, or whether there is a general violation of human rights, understood by the doctrine as an unconstitutional state of affairs.

The concept of State of Unconstitutional Things (ECI) originates from decisions SU-559 of 1997 and T-068 from the Colombian Constitutional Court but is truly consolidated by Decision T-153/98. The Colombian jurisprudence defines that the unconstitutional State of affairs is a mechanism used for the purpose of resolving situations of human rights vulnerability of a general nature and reach several people and whose causes are of a structural nature, thus requiring a joint solution of the Public Authorities (COLOMBIA, 1998).

[12], Art. 2º, §1º of the International Covenant on Economic, Social and Cultural Rights – "Each Member State in the present Covenant undertakes to adopt measures both through their own efforts and through international assistance and cooperation, especially in the economic and technical fields up to the maximum of its available resources, aiming to ensure, progressively, by all appropriate means, the full exercise of the rights recognized in the present Covenant, including, in particular, the adoption of legislative measures".

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Aiming to give effect to the prevalence of human rights in its constitutional order, the Colombian court enumerated several measures to be taken actively by various State entities for problems faced in Colombia's prison system, such as, for example, (1) the ECI's communication to the presidents of the Chamber, the Republic and the Senate, the Criminal Chamber of the Supreme Court of Justice, (2) the request of a planning of the Ministry of Justice in up to three months for the reconstruction of prisons in order to give dignified conditions those who are there under view of the *Defensoria del Pueblo*, among others.

Like Colombia, Brazil has been experiencing systematic violations of human rights, especially in relation to the rights of benevolent character. Recently, the Federal Supreme Court has recognized that the Brazilian penitentiary system fits into the concept of the unconstitutional state of affairs, and it is urgent to adopt structural and joint measures by public authorities and society to reverse this situation (BRAZIL, 2015).

According to Carlos Alexandre de Azevedo Campos (CAMPOS, 2017) to recognize the unconstitutional state of affairs, it is necessary to have three assumptions:

> [...] - the finding of a framework not simply of poor protection, but of massive, widespread and systematic violation of fundamental rights, which affects a large number of people; - lack of coordination between legislative, administrative, budgetary and even judicial measures, genuine “structural failure of the State" that generates both the systematic violation of rights and the perpetuation and worsening of the situation; - the overcoming of these rights violations requires the dispatch of medicines and orders addressed not only to one [governmental] body but to a plurality of these — it is necessary structural changes, new public policies or adjusting the existing resource allocation etc.

The violation of human rights is evident in the Brazilian prison system and the decision of the Federal Supreme Court attests to this reality when portraying the decaying of the prison system, due to inefficient public policies (BRAZIL, 2015). In view of this, the Federal Supreme Court prohibited the executive power to make the contingency of funds of the National Penitentiary Fund and ordered judges and courts to hold custody hearings within ninety days, allowing the inmate to appear before the judicial authority within a maximum of 24 hours, counted from the moment of the arrest.

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In addition, the STF informed the authorities of the public power to take appropriate measures, thus establishing the understanding that the Brazilian prison system is of joint responsibility of several state organs and that the solution of these problems would only be effective before a federative pact of commitment with such problematic.

Undoubtedly, the problem of the Brazilian prison system undermines minimum human rights, since it does not guarantee the dignified survival of the people who are there.

There is also a widespread violation of minimum human rights by public authorities regarding the right to health, which is directly linked to the right to life and has been systematically and continuously evaded in Brazil, without the intention of public authorities to resolve the problem.

Although health is a priority of Brazilian society there is no stable and continuous commitment of public policies to progressively qualify its results, the reason why there is an excess of judicialization individual demands that do not solve the problem of the collective.

Along the same path, there is a massive and persistent violation of the minimum content of the right to education in Brazil with a structural failure of the public policies directed towards this end.

It is therefore urgent to adopt the technique and recognition of the State of Unconstitutional Things in relation to the protection of the essential content of the right to health and education, in order to propose an institutional dialogue between the public authorities aiming to find instruments capable of adapting the implementation of public policies and thus combat the violation of these rights. It should be emphasized that the jurisdictional interference, in this case, must be dialogical, in order to enable the promotion of a democratic state and respect for human rights.

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CONCLUSION

Effective protection of human rights is not dissociated from legal, economic or political. There is, in fact, as Herrera Flores pointed out, a legal, scientific, political and economic complexity around human rights, which must be taken into account in order to construct a critical and realistic perception.

Specifically, regarding the economic dimension, it should be noted that the costs of rights cannot serve as insurmountable barriers to the realization of minimum human rights, otherwise it will directly affect the dignity. Therefore, it is important to foster the elaboration and execution of public policies capable of guaranteeing rights that enable the existence of dignity. This search for spaces for the struggle for dignity should serve as a parameter at the time of budget choices, especially in times of economic crisis and a shortage of resources.

It is not, however, what is observed in Brazil. When analyzing the prison system and the public policies focused on health and education there is a widespread violation of minimum human rights and a rational and dialogical action of the public authorities conducted by the judiciary when contacting the existence of an unconstitutional state of affairs.

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