Social Rights in Comparative Constitutional Law: Right to Health in the Perspective of the Brazilian and German Constitutional Courts

By *Italo Roberto Fuhrmann*[*]

Abstract: This article deals specifically with the current phenomenon of the judicialisation of social rights in Brazilian and German Constitutional Courts, taking as practical example the right to health. A progressive increase in the number of lawsuits in Brazil involving health insurance plans, expensive and experimental medicines and hospital admissions has been noted in the last years. The main obstacles to the judicial realization of social rights in Brazil are the alleged violation of the principle of separation of powers – branches of state – for decisions regarding the allocation of public financial resources, the absence of a previously prepared public policy and the impossibility of universalizing social demands due to economic-financial limitations. Nevertheless, the legal categories of the 'existential minimum' and the 'duty of progressivity' have been used in the most recent decisions of the Brazilian Supreme Court as a way of realising social rights under strong influence of the German Federal Constitutional Court and international human rights law. Finally, the situation of Brazil before the Inter-American Court of Human Rights regarding the implementation of social rights in a structural context of exclusion and poverty is analysed.

Keywords: Justiciability of Social Rights; Right to Health; Comparative Constitutional Law

***

A. Introduction

In historical retrospective, two international treaties on human rights were drawn up in New York: the International Covenant on Civil and Political Rights (ICCPR) [1], and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.[2] The ratio essendi of this dichotomy was the existence at the time of tension between the

* PhD student in Law at the Pontifical Catholic University of Rio Grande do Sul (PUCRS), Brazil. Attorney at Law. Email: italofuhrmann@outlook.com.

1 International Covenant on Civil and Political Rights, adopted on December 16, 1966, by General Assembly Resolution 2200A(XXI), ratified by Brazil in 1992.

2 International Covenant on Economic, Social and Cultural Rights, adopted on December 16, 1966, by General Assembly Resolution 2200A(XXI), ratified by Brazil in 1992.

antagonist geopolitical blocs led by the United States and the Soviet Union.[3] The primary objective of the United Nations was to expand the recognition and binding of the human rights in the widest possible spectrum of countries, even if two international protection pacts were necessary for that purpose.[4]

More than two decades later, at the current stage of the development of public international law and the global political configuration, the distinction between categories of human rights has become obsolete, since all human rights have acquired the same legal importance and have deserved the same legal responsibility of international protection.[5] Since then, the interdependence and indivisibility of human rights have contributed to the individual freedom, the strengthening of democracy and the rule of law. A fortiori, the most recent and important treaties protecting human rights indistinctly encompass both civil and political rights, as well as economic, social and cultural rights, such as ad exemplum the Charter of the Fundamental Rights of the European Union[6],and the Additional Protocol to the American Convention on Human Rights on economic, social and cultural rights[7], as well as the African Charter on Human and Peoples' Rights.[8]

In Brazil, by virtue of its constitutional structure, the theme concerning the justiciability of economic, social, and cultural rights acquired peculiar legal and dogmatic contours, which is the object of an introductory analysis of this article by way of contextualization.[9] Ab initio, it is important to highlight that the current Constitution of the Federative Republic of Brazil was enacted on October 5th, 1988, that is, more than two decades after the

3 *Barbara Keys / Roland Burke,* Human Rights, in: Richard H. Immerman / Petra Goedde (eds.), The Oxford Handbook of the Cold War, Oxford 2013, p. 486.

4 *Henry J. Steiner / Philip Alston / Ryan Goodman*, International Human Rights in Context: Law, Politics, Morals, Oxford 2008, p. 264.

5 In its art. 14, the Nice Charter guarantees the right to education and access to professional training, as well as in its art. 22 it guarantees the right to cultural diversity. Furthermore, it recognizes the rights of children and the elderly to a dignified existence and to participate in social and cultural life. Also in art. 34, the Treaty guarantees the right to social assistance and housing assistance, so as to ensure a dignified existence for all those who do not have sufficient economic resources, see Charter of the Fundamental Rights of the European Union, Nice/France, signed on February 26, 2001.

6 In its art. 14, the Nice Charter guarantees the right to education and access to professional training, as well as in its art. 22 it guarantees the right to cultural diversity. Furthermore, it recognizes the rights of children and the elderly to a dignified existence and to participate in social and cultural life. Also in art. 34, the Treaty guarantees the right to social assistance and housing assistance, so as to ensure a dignified existence for all those who do not have sufficient economic resources.

7 Protocol of San Salvador (1988), adopted during the XVIII General Assembly of the Organization of American States (OAS), in San Salvador, on November 17, 1988, ratified by Brazil in 1999.

8 African Charter on Human and Peoples' Rights, adopted by the XVIII Assembly of Heads of State and Government of the Organization of African Unity (OAU) in Nairobi, Kenya, on July 27, 1981. The Banjul Charter ensures in its articles 16 and 17 the right to health and education, respectively.

9 As well formulated by Robert Alexy, "Under a written catalog of fundamental rights, the legal problem of fundamental rights is first a problem of interpreting authoritative formulations of positive law. See *Robert Alexy,* Theorie der Grundrechte, Berlin 2015.

adoption of the ICESCR in 1966, resulting in the fact that the fundamental social rights have broad constitutional provision in the country, influenced by the existing international normative archetype and even, to some extent, expanding the list of rights beyond those already enshrined in international law. Consequently, the justiciability of the designated economic, social and cultural rights in Brazil largely dispenses with a direct and immediate application of international treaties, since judicial protection can be requested as a result of the constitutional text itself. The most characteristic example is indeed the fundamental right to health, enshrined in Article 196 of the Brazilian Constitution in an almost unlimited way, which sometimes causes some perplexity in the context of its judicial implementation, especially in view of the budgetary and financial limits of the State.[10]

Per summa capita, there is sometimes a methodological misrepresentation of economic, social and cultural rights, reducing them to mere prima facie objective duties of the State, to the detriment of their configuration as authentic subjective rights.[11] This is because the dependence on economic resources for the implementation of social rights would presuppose the adoption of distributive criteria (macro justice), since expenses vary according to the specific and individual needs of each citizen or group of people. Thus, the dimension of granting benefits of social rights would inevitably result in equitable choices, since there is no financial support for the satisfaction of all social needs, appearing as the main argument against justiciability, under penalty of violating the principle of separation of powers and the principle of reserve of the financially possible ("Vorbehalt des Möglichen").

The dogmatic category of the 'existential minimum' has contributed to the judicialization of social claims in German constitutional law[12], since the Basic Law for the Federal Republic of Germany, through a conscious and deliberate fundamental political decision in 1949[13], does not have fundamental social rights as a rule.[14] This does not mean that the German state does not care about social rights. On the contrary, social rights are provided for in state constitutions, in infra-constitutional legislation, and in the structure of the judi-

10 In article 196 of the Brazilian Constitution, the right to health is thus foreseen: "Health is a right of all and a duty of the State, guaranteed through social and economic policies that aim to reduce the risk of disease and other illnesses and to provide universal and equal access to actions and services for its promotion, protection, and recovery."

11 *José Joaquim Gomes Canotilho,* O Direito Constitucional como Ciência de Direcção – O Núcleo Essencial de Prestações Sociais ou a Localização Incerta da Socialidade (Contributo para a Reabilitação da Força Normativa da "Constituição Social"), in: José Joaquim Gomes Canotilho / Marcus Orione Gonçalves Correia / Érica Paula Barcha Correias (eds.), Direitos Fundamentais Sociais, São Paulo 2015. p. 4.

12 BVerfGE 125, 175.

13 On the 1949 Basic Law, see *Christoph Möllers*. Grundgesetz: Geschichte und Inhalt, Munich2019. p. 22.

14 *Josef Isensee*, Verfassung Ohne Soziale Grundrechte: Ein Wesenszug des Grundgesetzes, Der Staat 19 (1980).

ciary, including a specific social jurisdiction[15], not to mention the principles of the welfare state ("sozialer Bundesstaat"), the social binding of property, and the intangibility of human dignity provided for in the Basic Law. It can be noted that the implicit fundamental right to the existential minimum, created by the jurisprudence of Germany's Constitutional Court, has influenced the judicial realization of social rights in Brazil in recent years, especially in the field of the right to health.

B. The Judicial Implementation of Social Rights in Comparative Perspective

In the Brazilian legal-constitutional context, fundamental social rights[16] are widely provided for in several articles throughout the constitutional text. Notwithstanding, art. 6º of the Constitution solemnly inaugurates the list of the main social rights guaranteed, ad litteram: "Social rights include education, health, food, work, housing, transportation, leisure, security, social security, maternity and childhood protection, and assistance to the homeless." In 2021, through Constitutional Amendment n. 114, the right to a basic income was assured at the constitutional level to all Brazilians in a situation of social vulnerability, ipsis verbis: "Every Brazilian in a situation of social vulnerability will be entitled to a basic family income, guaranteed by the government in a permanent income transfer program, whose rules access requirements will be determined by law in compliance with fiscal and budgetary legislation."[17] At the moment, the basic income offered to low-income Brazilians, fixed by the previous government and maintained by the current one, is R$ 600,00, which corresponds to approximately US$ 115,00.

In view of the spatial limitations of this article and the scope of the phenomenon of the justiciability of social rights in Brazil, especially due to the various fundamental social rights that can be sued in court, a methodological approach is necessary in order to describe feasibly the main dogmatic aspects of the justiciability of social rights in Brazil based on the analysis of concrete cases. Therefore, the investigation will be largely directed to the judicial implementation of the fundamental right to health, especially within the scope of

15 The so-called *Sozialgerichtsbarkeit* includes the jurisdiction of the Courts and the Federal Social Court, which is regulated by Law. The courts are primarily responsible for the following subject areas, which can be summarized as "social security matters": Statutory pension insurance; Statutory accident insurance; Statutory health insurance; Nursing care insurance (statutory and private); Artists' social insurance, Contract (dental) physician law; Tasks of the Federal Employment Agency; Basic security for job seekers; Social assistance and asylum seeker benefits; Social compensation in the event of health damage, including war victims' benefits, soldiers' benefits, vaccination damage law, compensation for victims of violence and certain matters under the Severely Disabled Persons' Act; Other state transfer payments (child-raising allowance/parental allowance).

16 Social fundamental rights norms can be classified by three criteria a) binding and non-binding, b) subjective and objective, c) definitive and prima-facie. *Alexy,* note 10, p. 456. According to Alexy, for example, the so-called *Teilhaberechte* are classified as non-binding, definitive and subjective rights. Social rights under the 'Vorbehalt des Möglichen' are binding, prima-facie and subjective rights. The right to the *existential minimum* is a binding, definite, and subjective right.

17 Constitutional Amendment n. 114, enacted on December 16, 2021.

the jurisdictional activity of the Brazilian Supreme Court (Supremo Tribunal Federal, STF) and the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG).[18]

I. The Fundamental Right to Health in Brazil

While this article is primarily intended for the qualitative description of the most important decisions on the justiciability of social rights, a general statistical picture on the number of demands and the economic-financial impact of lawsuits involving positive obligations in the health area becomes relevant, mainly due to the recent disclosure of empirical data by the National Council of Justice (CNJ) in partnership with the INSPER institute.[19]

Between 2008 and 2017, there was a 130% increase in the number of lawsuits involving the issue of the justiciability of the right to health in Brazil, while the total number of lawsuits grew by 50%. In 2021, there were more than 700.000 lawsuits on this topic. In 2022, more than 263.000 decisions in individual health actions were registered; and around 115.000 out of them are new cases filed in court.[20] Each year, the number of cases in the Brazilian courts related to the health area increases, surpassing 2.5 million cases between 2015 and 2020.[21] In general terms, considering all the data collected, the main issues raised in courts of first instance and courts of second instance were 'health insurance' and 'insurance', being 'insurance' more recurrent in cases in first instance. It was observed that 13%, on average, out of the decisions dealt with class actions.[22] The greatest demands found in Supreme Court decisions concerned the following items: products – inputs or materials, orthoses, prostheses -, medications, medical exams, beds and hospitals admissions. In addition, an excess of legal demands aimed at the acquisition of high-cost medications not foreseen in the official list of drugs of the Unified Health System (Sistema Único de Saúde, SUS) was found. Nevertheless, a considerable part of the demands for medications – between 25% and 30% of the total number of drugs demanded in court concerns those already provided in the official lists of SUS.[23].

According to data from the Health Law Procedural Statistics Panel, released by the CNJ, there are currently 542.000 lawsuits pending in Brazil on the justiciability of health

18 The Supreme Federal Court is the apex body of the Brazilian Judiciary Branch, responsible, among other attributions, for controlling the constitutionality of laws, judging in the last instance appeals against judicial decisions that contrast with the Constitution, and extradition requested by a foreign state.

19 Conselho Nacional de Justiça /INSPER. Judicialização da Saúde no Brasil: Perfil das Demandas, Causas e Propostas de Solução, Brasília/DF 2019.

20 Conselho Nacional de Justiça, Dados processuais de saúde podem ser monitorados em painel do CNJ, https://www.cnj.jus.br/dados-processuais-de-saude-podem-ser-monitorados-em-painel-do-cnj (last accessed on 15 November 2023).

21 Conselho Nacional de Justiça 2021.

22 Ibid, p. 17.

23 Ibid., p. 15.

(2022), especially for requests for more medicines.[24] In Brazil, for every thousand inhabitants, there are 2,54 lawsuits involving the justiciability of health.[25] According to the Brazilian Ministry of Health, in seven years there has been an increase of approximately thirteen times in expenses with legal claims, exceeding the cipher of R$ 1 billion annually (approximately US$ 200 million) from the year 2015.[26]

The first significant decision on the judicial implementation of the right to health was taken within the scope of Claim of Non-Compliance with a Fundamental Precept (ADPF)[27] n. 45, in 2004.[28] Based on this emblematic jurisprudence, which became a benchmark for the subsequent action for the Court, the STF adopted an affirmative position on the jurisdictional control of public polices with regard to the practical implementation of the fundamental right to health, conferring constitutional legitimacy to the intervention of the judicial power to implement second-generation rights, including as individual subjective rights. Although there is no structured dogmatic ballast for the mentioned criteria in decisum, it is possible to identify the characteristics attributed by the STF to the Legislative Leeway, when the State remains arbitrarily silent against the mentioned 'reserve of the possible' especially when in question the protection of the materializing core of the 'existential minimum'.

In 2010, the STF judged the Suspension of Early Protection 175[29], which dealt mainly with the possibility of the State supplying drugs with a high financial cost and without provision in the government's public policies.[30] It was the case of a patient with a rare degenerative disease, which caused a series of neuropsychiatric disorders, such as progressive paralysis, involuntary movements and limitations in school progress. As a way of mitigating the effects and, consequently improving the quality of life of the applicant, and even granting an increase in survival, the Brazilian State was asked to supply the drug Zavesca (miglustat), whose effectiveness was attested by medical reports, and with

24 Conselho Nacional de Justiça, Paineis Analytics (last accessed on 16 January 2024).

25 Conselho Nacional de Justiça, Health Law Procedural Statistics Panel, 2022.

26 *Ingo Wolfgang Sarlet / Jeferson Ferreira Barbosa,* Direito à Saúde em Tempos de Pandemia e o Papel do Supremo Tribunal Federal Brasileiro in: Revista da Faculdade de Direito da Universidade de Lisboa 62 (2021), p. 219. Furthermore, *Angélica Carlini,* Judicialização da Saúde Pública e Privada. Porto Alegre 2014; *Sueli Dallari,* Aspectos particulares da chamada judicialização da saúde, Revista De Direito Sanitário 14 (2013), p. 77.

27 This is an action for direct and concentrated control of constitutionality against violations of fundamental precepts, including fundamental rights and guarantees, which may also have been committed by a municipal law or normative act, even if it was prior to the enactment of the constitutional text.

28 In short, it was decided that the judiciary has a duty to implement the right to health when a person's life and existential minimum are at risk, and that, in this case, the municipality should adopt public policies to improve the public health system.

29 This is a judicial claim in the Brazilian legal system that can suspend the granting of an injunction when there is a concrete risk of serious injury to public order, economy, health, and safety.

30 STA-AgR 175, judged on March 17, 2010, rapporteur Justice Gilmar Mendes.

registration at the Brazilian National Health Regulatory Agency (ANVISA), admitting its commercialization in the national territory.

However, the medication claimed in court was expensive, amounting to R$ 52.000.00 per month (approximately US$ 10.000.00 per month) and was not included in the pharmaceutical policy of the SUS. Some judicial parameters were established in the context of this decision, the observance of which was reflected in numerous judgements a posteriori, including in the initial instances of jurisdiction. They are:

> *a. required medications of high financial cost, by itself, is not an argument for their judicial rejection;*
> *b. all entities of the Federation, Union, States, Federal District and Cities are responsible for protecting the fundamental right to health;*
> *c. the fundamental right to health in Brazil has an individual dimension and can be sued individually before the Judiciary;*
> *d. the Brazilian Constitution does not differentiate the fundamental rights of freedom from fundamental social rights, thus, the right to health is a right of all and a duty of the State, guided by the principle of universal access to the public health system;*
> *e. as a rule, judicial intervention in the right to health in Brazil does not occur due to the absence of public policy formulation, but due to the failure to comply with policies already established by the other Powers;*
> *f. the registration of the medicine pleaded in court at the Brazilian National Health Regulatory Agency, including imported medicines, is essential;*
> *g. as a rule, the treatment provided by public health system should be privileged, however, this does not exclude the possibility that the Judiciary or the Administration itself, decides that a measure other than that paid by SUS should be provided to a certain person who, by proving that treatment in the public system is not effective in his or her case.*

The theme concerning the justiciability of the right to health in Brazil took on so much prominence, for the most part due to the massive increase in legal claims, that in 2009, the President of the Court at the time, judge Gilmar Mendes, convened a public hearing to hear specialists in the matter of public health, especially public managers, members of the judiciary, the Public Ministry, the Public Defender's Office, Advocacy-General of the Union, States and Cities, in addition to academics, entities and organizations of civil society.[31] Among the several results and conclusions, it remains established that a medicine or treatment other than those provided in the protocols and therapeutic guidelines of the public health system should be viewed with caution as it tends to contradict a scientific consensus in force in the so-called 'evidence-based medicine', adopted by the SUS. Pari passu, the procedural and organizational dimension of the right to health was emphasized ("Recht

31 STF – Public Hearing, first semester of 2009, https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=124643 (last accessed on 24 January 2024)

auf Organisation und Veratrin"), which from a legal-objective perspective depends on state measures with a view to the creation and conformation of essential organs, institutions and procedures for its effectiveness.

The vertiginous increase in lawsuits on the right to health in recent decades in Brazil undoubtedly corresponds to the corollary expanding access to the Brazilian justice system, greatly supported by the Constitution of Brazil 1988 in material and procedural terms, especially with regard to grater structuring, independence and attribution of competence to the Judiciary, the independent and autonomous institutionalization of the state and Federal Public Ministry, the state and Municipal Prosecution Office, as well as Public Defender's Office and private law. The expansion of procedural mechanisms for access to the Brazilian Supreme Court, as well as the more frequent use of class actions also contribute to the significant increase in lawsuits involving the fundamental right to health in Brazil.[32]

The legal-dogmatic concept of the so-called "existential minimum" has played a central role in the most important and central decisions of the Brazilian Supreme Court, not only concerning the right to health, but also in relation to rights in general. This concept was imported from German constitutional and administrative law, whose first decision (also known as 'Fürsorge Entscheidung') dates back to 1954, and was not rendered in Karlsruhe, but in Leipzig, within the scope of the judicature of the Federal Administrate Court.[33] Ad litteram:

> *"Within the scope of the Constitutional State (articles 20 and 28 of the Fundamental Law), the citizen's relationship with the State is fundamentally legal. Therefore, the actions of the public authority are also subject to judicial review (articles 19 § 4). It would be incompatible with the idea of a democratic state (article 20) if countless citizens, who as voters help to form the power of the State, were at the same time confronted without the right to their own existence. The idea of community, which found expression in the principles of Social Rule of Law (articles 20 and 28) and the social bonding of property (article 14, item II), is not limited to the granting of material benefits, but requires that participants in the community are recognized as holders of their own rights, which in principle relate to equal rights (article 3), and that no substantial part of this community be left without rights in regards to its existence. Finally, the fundamental rights to life and health (article 2, paragraph 2) are also an expression of this basic idea."*

The concept of "existential minimum" in German law was a posteriori developed by the Federal Constitutional Court, mostly in the decision of the First Senate judged on

32 Ibid, p. 220.

33 BVerwGE 1, 159, see also *Katharina M. Hauer*, Die "Fürsorge-Entscheidung" des Bundeverwaltungsgerichts (BVerwGE 1, 159) aus rechtshistorischer Sicht, Baden-Baden 2020.

February 9, 2010.[34] Certainly, it is worth mentioning that a methodological and dogmatic adaptation to Brazilian constitutional law is still necessary, precisely due to the Brazilian legal-constitutional configuration in relation to current fundamental social rights.[35]

II. The Fundamental Right to Health in Germany

According to the German social security code (SGB V), there are two insurance systems, the mandatory health insurance, and the private health insurance.[36] In addition, in Germany there is the subsidy, a particular form of cost coverage that is available to all persons who are civil servants and therefore servants of the state.[37] As already indicated in footnote 17, the Federal Constitutional Court decided that social rights as a rule are bound to the so-called reserve of the possible, i.e., they are biding, prima-facie, and subjective rights.[38]

Therefore, for the purposes of judicially granting the right to health, in addition to legal and contractual guarantees, it is necessary to configure in casu a violation of the existential minimum, which, for the German Constitutional Court, goes beyond what is strictly necessary for the physical survival of the individual, but includes participation in social and cultural life in society .[39] Thus, only the fundamental right to the existential minimum can be characterized as a subjective, binding, and definitive social fundamental right in the current case law of the BVerfG.[40]

In a recent decision, a state obligation was imposed on the health and welfare of a child who did not receive the necessary care from his family. Based on arts. 2º, Abs. 1, 2, and 6º (2) of the German Basic Law, when the parents are proven incapable of ensuring the child's physical and mental health, the State must ensure such rights regardless of the family relationship.[41] This includes foster care in state institutions for the protection of psychological health and the protection of bodily integrity.

In the German Basic Law, as sedimented in doctrine and jurisprudence, the claim to validity of fundamental rights is strongly pronounced: fundamental rights are directly applicable and judicially enforceable subjective rights. On the other hand, as already mentioned, the German Basic Law deliberately does not formulate any basic social rights. This is

34 BVerfGE 125, 175, note 13, see also *Maximilian Wallerath*, Zur Dogmatik eines Rechts auf Sicherung des Existenzminimuns. Ein Beitrag zur Schutzdimension des Art. 1, Abs. 1 Satz 2 GG, Juristen Zeitung 63 (2008), p. 158.

35 *Italo Roberto Fuhrmann*, "Judicialização" dos Direitos Sociais e o Direito à Saúde – Por Uma Reconstrução do Objeto do Direito à Saúde no Direito brasileiro, Brasília 2014, p. 148.

36 *Karin Henke*, Limites e Possibilidades para o Direito de Ressarcimento nos Casos de Lipossucção em Lipedema no Sistema de Seguro-Saúde da Alemanha, Revista da AJURIS 47, (2020).

37 Ibid., p. 336.

38 BVerfGE 43, 291.

39 BVerfGE 125, 175, note 13.

40 *Alexy*, note 10, p. 397.

41 BVerfG, 1 BvR 65/2.

reflected in the interpretation of fundamental rights: The effective enforcement of article 2, Paragraph 2, of the Basic Law is served by the construction of protective obligations ('Schutzpflichten'), while on the other hand their scope must not be overstretched.[42] In this way, there is no general fundamental right to all contents of the German welfare state, including general benefits related to the right to health directly from the constitution.[43]

C. Social Rights in the Context of the COVID-19 Public Emergency

The outbreak of the COVID-19 pandemic broadly and abruptly impacted all spheres of social life in Brazil. Following the discovery of a new strain of coronavirus in the city of Wuhan, China, the World Health Organization declared, on January 30, 2020, a Public Health Emergency of International Concern, with the aim of improving global coordination, cooperation, and solidarity to stop the spread of the virus.[44] In this context, Brazil has taken some measures to control the virus, highlighting the enactment of Law 13.979/2020[45], whose article 3 provides for a series of measures that could be adopted, such as, the imposition of quarantine, social isolation, the mandatory use of individual masks, exhumation, necropsy, cremation, and handling of corpses, as well as the requirement of future vaccination and other prophylactic measures. The latter was interpreted by the Brazilian Supreme Court, which within the scope of ADPF 754[46], ruled that 'compulsory vaccination does not mean forced vaccination, as it always requires the consent of the user, but it may be implemented through indirect measures, which include, among others, the restriction on the exercise of certain activities or the attendance of certain places, unless they are provided for by law, or resulting from it further clarifying that "such measures, with the limitations set out above, can be implemented both by the Union and by the States, Federal District and Cities.'

In order to assert the above understanding, the Brazilian Supreme Court, in the context of Direct Action of Unconstitutionality, reporting minister, Ricardo Lewandowski, corroborated to the following guidelines:

> *"a) mass vaccination of the population has preventive nature, able to reduce morbidity and mortality from transmissible infectious diseases and to provoke herd immunity; b) the obligation of vaccination according to Brazilian health legislation cannot*

42 *Lother Michael / Martin Morlok*, Grundrechte, Baden-Baden 2008, p. 110.

43 Ibid., "Die körperliche Unversehrtheit i.S.d. art. 2º, (2) GG umfasst die Freiheit von physischer und psychischer Krankheit und die körperliche Integrität, nicht jedoch das blosse geistige oder soziale Wohlbefinden."

44 World Health Organization, WHO Director-General's opening remarks at the media briefing on COVID-19, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last accessed on 24 January 2024).

45 Law 13.979, February 6, 2020.

46 Argument of Noncompliance with a Fundamental Precept (ADPF). It is an action of direct and concentrated control of constitutionality in Brazilian law.

> *include invasive, distressing or coercive measures, as a direct result of the right to intangibility, inviolability and integrity of the human body, appearing to be flagrantly unconstitutional any legal, regulatory or administrative determination in the sense of implementing vaccination without the informed consent of people; c) the provision of mandatory vaccination, excluding the imposition of forced vaccination, seems legitimate, provided that the measures to which refractory patients are subject observe the criteria contained in Law 13.979/2020 itself, in items I, II and III from § 2º, article 3, namely the right to information, family assistance, free treatment and "full respect for dignity, human rights and fundamental freedom of people."*[47]

Ad conclusum, it is worth mentioning two important decisions of Brazilian Supreme Court on social rights and the right to integration of immigrants and refugees, mainly in view of the progressive increase in asylum and refugee applications from Venezuela in recent years.[48] In fact, the issue has taken on new legal and dogmatic contours in Brazil since the enactment of the new Migration Law under number 13.445/17 and its regulatory decree under number 9.199/17.[49]

In the context of the Original Civil Action (ACO)[50] number 3121, the State of Roraima filed a request for the closure of borders with Venezuela in the face of the massive migratory flow of Venezuelans, which would be making public services in the region unfeasible, in logistical and budgetary terms. Notwithstanding the unusual requirement of the demand, which apparently goes beyond the legal and administrative powers of the Member States, it is in casu the concrete application of cooperative federalism, since official statistical data assert the disproportionate population increase in the State of Roraima in view of the massive displacement of Venezuelans to Brazil. Furthermore, it is widely known that there are not even enough financial resources to support the basic material needs of the native population of the State of Roraima, let alone to serve adequately all Venezuelan migrants who arrive in Brazilian territory in a situation of extreme physical, economic and psychological vulnerability.

47 Direct Action of Unconstitutionality n. 6585, judged on December 17, 2020.

48 The migratory flow to northern Brazil (Roraima and Amazonas), especially of Venezuelans, has called into question an entire policy focused solely on internal affairs. Between 2011 and 2021, Brazil recognized 48.789 Venezuelans with refugee status, as well as 3.682 Syrians and 1.078 Congolese (UNHCR). According to the Organization of American States, it is estimated that there will be more than 5 million Venezuelan migrants and refugees in the coming years, a situation analogous to those caused by wars such as Syria and Afghanistan. In 2021, 72.2% of the refugee requests considered by CONARE were registered in the Federation Units that make up the northern region of Brazil, especially in the states of Acre and Roraima, see CONARE (National Committee for Refugees), Report "Refuge in Numbers", 2022.

49 Law 13.445, May 24, 2017.

50 ACO n. 3121, rapporteur Justice Rosa Weber, judged by the Brazilian Supreme Court on October 12, 2020.

The Brazilian Supreme Court rejected the request for the temporary closure of the borders between Brazil and Venezuela, namely for the flagrant violation of the minimum levels of protection of human rights, provided for in National Migration Law, in the Brazilian Constitution and in the international human rights treaties of which Brazil is part of, including the Bilateral Agreement between Brazil and Venezuela for border health cooperation.[51]

Even more emphatic was the decision taken by the Supreme Court in the Suspension of the Provisional Protection (STP) n. 705[52], which established the legal obligation of the Brazilian State to promote the fundamental social rights of Venezuelan migrants in the city of Manaus, capital of Amazonas State, ensuring the existential minimum and integration in the country; right to food, health, housing, professional training, among others. The Brazilian Supreme Court upheld the decision of the lower court that condemned the Union, the State of Amazonas and the city of Manaus to act to ensure, including in collaboration with civil society organizations, international agencies and other agencies of Operation Welcome, the continuity in the supplying of all necessary daily meals to all migrants and refugees who are assisted by the structures of the Operation Welcome[53], in the following terms: 1) Ensuring that meals are diversified, have adequate nutritional value and quantity and are adapted to eating habits of Venezuelans; 2) carrying out a survey on the existence of sick people and/or people with special food needs, so that adequate meals can be provided to this people.

D. Brazil at the Inter-American Court of Human Rights

The American Convention on Human Rights (ACHR) was adopted on November 22, 1969, and entered into force on June 18, 1978. To date, twenty-five American Nations

51 Decree n. 59, March 14th, 1991, https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0059.htm (last accessed on 24 January 2024).

52 SPT n. 705, judged by Chief Justice Luiz Fux, then President of the Court, on December 17, 2020.

53 Operation Welcome is a Brazilian state policy, created in 2018 within the scope of the Armed Forces, which aims to provide protection and humanitarian assistance to Venezuelan refugees in situations of vulnerability in the face of the political, institutional, and socioeconomic crisis occurring in the Bolivarian Republic of Venezuela, and is, in short, structured in three pillars: a) border ordering; b) sheltering of immigrants; c) internalization. In the scope of this operation, the following agencies and institutions are working in an interrelated way, especially in the city of Pacaraima/RR: (Armed Forces, Ministry of Citizenship; Federal Police; Internal Revenue Service; Public Defender's Office; Court of Justice of Roraima; International Organization for Migration; United Nations High Commissioner for Refugees; United Nations Children's Fund; United Nations Population Fund; International Committee of the Red Cross.

have ratified or acceded to the Convention.[54] Brazil formally adhered to the American Convention on Human Rights only after the end of the military dictatorship (1964 – 1985), in 1992 (Decree n. 678).[55] Likewise, Brazil voluntarily submitted to the jurisdiction of the Inter-American Court of Human Rights (IACtHR) in 1998[56] and to the jurisdiction of the Inter-American Commission on Human Rights (IACHR), making only exception regarding the automatic right of visits and inspection in loco. Although the Brazilian State has already been condemned in several cases involving the persecutory penal system, especially with regard to impunity in homicide crimes, in addition to crimes against human rights defenders, see e.g. *Sales Pimenta vs. Brazil*[57], in terms of social rights, the most emblematic the decision was taken on February 10, 2016. The *Workers at Farm Brasil Verde vs. Brazil* decision dealt with forced labor analogous to slavery and debt servitudes on the farm called Brasil Verde, located in the State of Pará.[58]

In this context, there were death threats if the workers left the farm, the prohibition to leave freely, the lack of salary or the existence of a minimum wage, the debt with the landowner, the lack of decent housing, food and health (violations of articles 4º, 5º, 6º and 19 ACHR). Furthermore, this situation could be caused by the State, as it was aware of the existence of these practices in general, and specifically at Farm Brasil Verde since 1989 and despite this knowledge, it did not adopt reasonable prevention and response measures, nor provided the victims an effective judicial mechanism to protect their rights, punish those responsible and obtain redress. In summary, the Court condemned the Brazilian State in the following terms: a) the IACtHR considered that, at the time of the facts, the general actions of the State to combat the phenomenon of slave labor had not been sufficient and effective; b) unlike the European and African Human Rights Systems, the universal and Inter-American Systems show a tendency to consider that people who are in a situation of poverty are considered as a vulnerable group and this condition is recognized as category of special protection; c) in such event, the situation of special vulnerability due to the position of

54 See OAS, Multilateral Treaties, American Convention on Human Rights, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm (last accessed on 24 January 2024). It should be noted that Trindidad and Tobago denounced the American Convention on Human Rights on May 26, 1998. Venezuela denounced the American Convention on Human Rights in a communication addressed to the Secretary General of the Organization of American States (OAS), on September 10, 2012.

55 Decree n. 678, November 6, 1992, https://www.planalto.gov.br/ccivil_03/decreto/d0678.htm (last accessed on 24 January 2024).

56 Thus, by virtue of the so-called competence *ratione temporis*, the Brazilian State can only be held responsible by the Inter-American Court of Human Rights for events that occurred after December 10, 1998, see e.g. Corte Interamericana de Direitos Humanos https://enciclopediajuridica.pucsp.br/verbete/533/edicao-1/corte-interamericana-de-direitos-humanos (last accessed on 24 January 2024).

57 IACtHR decision Sales Pimenta v. Brazil, June 30, 2022.

58 In the specific context of the right to health and protection of bodily and psychological integrity, it is worth noting the IACtHR decision Ximenes Lopes vs. Brasil, July 4, 2006.

poverty in which 85 workers found themselves, made them victims of human trafficking as a consequence of the existing modus operandi in the region of Pará State, leaving them prone to accept, by deceiving them, job offers at Farm Brasil Verde; d) poverty "is the main factor in contemporary slavery in Brazil, as it increases the vulnerability of a significant part of the population, making them easy for recruiters for slave labor". Poverty, in the sub judice case, does not fit as phenomenon, but as an expression of special vulnerability, in which the situation of exclusion and marginalization, added to the structural and systemic denial of rights caused the violation in 85 workers rescued from Farm Brasil Verde; e) it cannot go unnoticed by an Inter-American judge that slavery, in its analogous and contemporary forms, has its origin and consequences in poverty, inequality and social exclusion, with repercussions on the substantive democracies of the countries in the regions. Thereby, the analysis of the Inter-American experience of protection of human rights (civil, political, economic, social, cultural and environmental) demands that the peculiarities of the region be considered, since Latin America is the region with the highest degree of inequality in the world. In view of this, the States in the region must be consistent with what the Social Charter of the Americas (2012) and its Plan of Action (2015) proclaim, in order to progressively seek to achieve the full implementation of social justice in our continent.[59] The duty of progressivity is also provided for in the ICESCR (1966), article 2ª, § 1º, which Brazil joined in 1992.[60]

The case of the *Farm Brasil Verde workers v. Brazil* constitutes the first time in which the Court recognized the existence of a historical and structural discrimination, on account of the context in which human rights violations occurred. In an emblematic way, it also constitutes the first judicial case in which the IACtHR clearly determined international responsibility against a State for perpetuating a historical and structural situation of social exclusion.

E. Conclusions

Since 1993, specifically within the framework of the World Conference on Human Rights [61], which was the first international conference on human rights after the Cold War, public international law has given the same normative, axiological and political importance to civil and political rights as well as to economic, social and cultural rights.

59 Social Charter of the Americas. Article 2º, II.

60 See above footnote 2. "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

61 Vienna Declaration and Programme of Action – VDPA, art. 5º: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

The most recent Constitutions, such as the Brazilian one, equally give the same status of legal importance to the two categories of human rights, especially due to their inherent connection to the dignity of the human person. Certainly, the justiciability subject of social rights is largely conditioned by the normative spectrum of each Constitution, that is to say, the theme assumes different dogmatic and idiosyncratic contours, as occurs verbi gratia in the German or even Austrian context, in which there was not even the provision of fundamental social rights[62].

The justiciability of economic, social and cultural rights in Brazil occurs both before the Brazilian Supreme Court as well as the Inter-American Court of Human Rights. Internally, the list of bundled arguments that support the justiciability of social rights is strictly linked to the degree of importance and fundamentality that these rights have in the Brazilian constitutional text. The judicial implementation of the fundamental right to health is undoubtedly the most eloquent example of this phenomenon in Brazilian law. In Germany, due to the peculiarities of the Basic Law, the right to health is related to the right to life and bodily integrity (art. 2, Abs. 1, 2), in particular, it can be judicially realized through the guarantee of the so-called existential minimum, as a binding and subjective social fundamental right implicitly taken from the Constitution.

With respect to the Inter-American Court of Human Rights, although there is no provision for direct and individual access, the action of the Inter-American Commission on Human Rights has culminated in the announcement of many court judgements also in the area of economic, social and cultural rights in Brazil[63] that, in addition to cases involving judicial guarantees in criminal proceedings, excessive length of the process, poor prison conditions[64], it has already been convicted of violating minimum standards of decent working conditions (forced labor) and the right to health (physical and mental integrity).

It is important to mention that in Brazil there is a very clear phenomenon of jurisprudential and interpretative construction of social rights as fundamental rights subject to judicial implementation by the Brazilian Supreme Court and even within the judicial scope of the Inter-American human rights system. The legal concepts "vulnerability"[65] and "minimum existential" increasingly play a central role in legitimizing and justifying the Judiciary

62 *Stephan Kirste / Rosana Helena Maas / Mônia Clarissa Hennig Leal,* Direitos (Fundamentais) Sociais e sua Justiciabilidade: Brasil, Alemanha, Áustria, Curitiba 2021. p. 56.

63 Currently, there are ten cases pending against Brazil, seventeen sentences handed down, and forty-seven provisional measures, see https://www.corteidh.or.cr/mapa_casos_pais.cfm?lang=pt (last accessed on 28 December 2023).

64 Resolution of the Inter-American Court of Human Rights November 14, 2014, Provisional Measures Regarding the Pedrinhas Penitentiary Complex.

65 *Mariana Canotilho,* A Vulnerabilidade como Conceito Constitucional: Um Elemento para a Construção de um Constitucionalismo Comum, Oñati Socio-legal Series 12 (2022). p. 138.

in the implementation of economic, social and cultural rights, even if in part due to the omission of the other public authorities.