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EXISTENTIAL MINIMUM AND RESERVATION OF THE POSSIBLE: CONSTITUTIONALITY CONTROL AND SOCIAL INCLUSION FROM THE PERSPECTIVE FINANCIAL/BUDGETARY

MINIMUM EXISTENTIAL AND RESERVE OF THE POSSIBLE: CONTROL OF CONSTITUTIONALITY AND SOCIAL INCLUSION FROM A FINANCIAL/BUDGETARY PERSPECTIVE

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Summary

This article sought to discuss constitutionality control in the financial and budgetary sphere, highlighting the appropriate applicability of constitutional principles and nuances. Demonstrating legal, political and historical aspects regarding state resources that flow into fundamental rights, linked to the existential minimum, clarifying the need for the objectives proposed by the Public Power to be in line with the constitutional plan, under penalty of social degradation and direct injury the dignity of the human person. This study had the general objective of discussing the reservation of what is possible and existential minimum with an emphasis on constitutionality control and social inclusion from a financial/budgetary perspective. The methodology used was a literature review in which materials already published on the subject were searched in databases. Thus, this study concludes by making clear the importance of the topic and suggesting that more research should be done in order to delve deeper into the subject.
Key words: Constitutional right. Existential Minimum. Reservation of the Possible. Control of Constitutionality.

Abstract

This article sought to discuss the control of constitutionality in financial and budgetary terms, highlighting the applicability of constitutional principles and nuances. The correct allocation of resources that flow into fundamental rights, linked to the existential minimum, are only possible when the objectives proposed by the Public Power are developed in accordance with the constitutional plan. This study had as general objective to discuss the reservation of the possible and minimum existential with emphasis on constitutionality control and social inclusion under

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the financial/budgetary perspective. The methodology used was a literature review, which searched for material databases already published on the subject. Thus, this study concludes by making clear the importance of the theme and suggesting that more research should be done in order to go deeper into the subject.

Keywords: Constitutional Law. Existential Minimum. Reservation of the Possible. Constitutional Control.

1. Introduction

The judicial issue of fundamental rights is an extremely important and complex topic that needs to be discussed before society, the State and other branches of Law, especially Public Law. Fundamental rights are directly connected to the dignity of the human person, possible negligence exposes social, moral and economic fragility. The State's role in these fundamental rights costs more than the financial aspect; real and effective public policies are necessary, as well as communication and collaboration between classes. Currently, the participation of private legal entities, both for-profit and non-profit, in maintaining and guaranteeing the basic needs of society is well known. Reserving what is possible has taken away the minimum of subsistence.

Thus, this study has the general objective of discussing the reserve of the possible and existential minimum with an emphasis on constitutionality control and social inclusion from a financial/budgetary perspective and for specific objectives: a) Conceptualize reserve of the possible; b) understand the existential minimum and c) discuss fundamental existential rights.

Taking into account the objectives of the present study, a qualitative approach was chosen, considering that aspects of reality that cannot be quantified are analyzed. In this sense, it is understood that this research fits into this type of approach.

The idea of qualitative research, according to the study by Minayo (2000) is that: It works with the universe of meanings, motives, aspirations, beliefs, values and attitudes, which corresponds to a more productive space of relationships, processes and phenomena that cannot be reduced to the operationalization of variables (p. 21)

In this way, it is understood that research means analyzing causes and effects, contextualizing them in their time and space, within a systematic conception. According to Gil (2007), the bibliographical research study methodology is: Developed from material already prepared

consisting of books and scientific articles. Although almost all studies require some type of work of this nature, there is research developed exclusively from bibliographic sources (p. 65).

Specific methodological procedures were used, seeking to achieve possible answers to the object of study. Therefore, due to the nature of the study, this investigation carried out a bibliographical survey of articles that deal with the topic under analysis.

2 Theoretical framework

2.1 Principle of reserving the possible

The concept of possible reservation first appeared in Germany in 1972, in a case called numerus clausus, involving access to higher medical education courses, the number of which was restricted by the State. In this case, the German court understood that although there are no places available for all interested parties, the State is working hard to expand the capacity of the courses, therefore, citizens will be limited to offering places to the extent reasonably possible (PEREIRA, 2014).

Pereira (2014) also highlighted that the conception of the reserve of possibilities theory clearly intends to legitimize the absence of the State in the face of citizens' demands. This is because the needs of the people who should be covered exceed the resources available to the country, making it impossible to fully meet all needs at the same time.

In Brazil, the first judicial application of this concept occurred in 2003. In the judgment of Federal Intervention nº 2,915 (0001552-34.2001.0.01.0000), Minister Gilmar Mendes acted as rapporteur.

The case referred to the State of São Paulo for compliance with court orders, however the Minister paid attention to fiscal restrictions and state obligations, in addition to emphasizing the financial possibilities of reserves, remembering that the exercise of certain rights depends on premises based on facts .

However, this topic has been discussed since the mid-1990s and has been gaining ground over the years. The case of the State of Santa Catarina, which gave rise to petition no. 1,246 SC, is an example of this issue.

It deals with the need for high-cost treatment for children and discusses operations performed on patients with Duchenne syndrome in the United States. This disease was considered rare, and the cost of treatment at the time was around R$85,500.00 (PEREIRA, 2014).

In this case, the right to health prevailed, and three aspects were highlighted in Minister Celso de Mello's vote: I) diseases are rare; II) the treatment is essential to the author; III) “It is impossible to postpone compliance with the country’s constitutional obligations regarding health. This is everyone's right."

However, only in 2004, among the reports of non-compliance with basic precepts no. 45 (ADPF 45), the reporting minister Celso de Mello (Celso de Mello) laid the foundations for the use of possible reserves in a limited way, stating that the State cannot invoke it without an objectively measurable justification. The responsibility for proving that any reservations must be applied lies exclusively with the State, and there is no possibility of reversing this dynamic (LAZARI, 2016).

As for the acceptance of the possible reservation theory, it must comply with the court's requirements, whether it is about satisfying human or basic needs. According to rapporteur Minister Celso de Mello of ADPF 45, the State is unlawful:

> [...] exempt itself from fulfilling its constitutional obligations, notably when, such negative governmental conduct, could result in the nullification or even annihilation of constitutional rights imbued with an essential sense of fundamentality. (BRAZIL, 2004)

On the other hand, applying the reserve of possibility theory means understanding that what the State is doing is reasonably expected to satisfy constitutionally strict social rights. In this sense, in ideal circumstances, the state entity's responsibility for legal requirements is eliminated, as it will make every effort to fulfill its constitutional obligations without having to speak about the government's negligence.

Therefore, it must be considered that social rights are the right to “gradual satisfaction”, and that although their full realization is impractical, the State must work hard to plan the continuous and gradual realization of benefits (PEREIRA, 2014).

It should be noted that this progressive effort and the consequent adoption of the theory of reserve of possibilities can be seen in the Federal Constitution itself (BRASIL, 1988), according to the articles below:

> Art. 195. Social security will be financed by the entire society, directly and indirectly, in accordance with the law, through resources coming from the budgets of the Union, the States, the Federal District and the Municipalities, and the following social contributions: [...]
> Art. 198. Public health actions and services are part of a regionalized and hierarchical network and constitute a single system, organized in accordance with the following guidelines: I - in the case of the Union, the net current revenue of the respective financial year, which cannot be less than 15% (fifteen percent); [...]
> Art. 212. The Union will apply, annually, never less than eighteen, and the States, the Federal District and the Municipalities twenty-five percent, at least, of the revenue resulting from taxes, including that arising from transfers, in the maintenance and development of teaching. [...] \Aq

According to article 198, § 3 of the Federal Constitution, the percentage of health resources required by states and municipalities is stipulated by complementary laws, and currently the effective rate for states is 12% and the effective rate for municipalities is 15%.

What is possible must be discovered realistically and cannot be determined in advance. Therefore, on the surface, the State must make every effort to implement constitutional guarantees, but only when the facts do not apply can this be impossible.

The theory of retainability is supported by the constitution and can be invoked, but its application is limited to proof of measurable harm caused to the community, and the responsibility of the community is borne entirely by the State.

In fact, when demand is related to health, the concept of minimum and possible reserves is often heavy on the dialectic.

2.2 Existential minimum

The Brazilian Constitution has three guarantees: social, political and legal. Because this thesis deals with social law, it is important here to address and clarify the interpretation and application of social rights in connection with the existential minimum. According to Alexy (2008, p. 435):

> The construction of the existential minimum took place in Germany. The jurisprudence of the German Constitutional Court has handed down three particularly

> important in terms of social benefit rights that ended up generating the foundation of the existential minimum.

For Sarlet (2007, p. 19):

> There are no typical social rights of a benefit nature in the fundamental law of Germany (1949), exceptionally there is provision for the protection of motherhood and children, compensation for factual inequalities with regard to discrimination against women and those with special needs.

An example of this connection is the principle of human dignity, given that it can only be considered a positive guarantee of freedom, it is a minimum resource for a dignified existence.

Sarlet (2007, p. 33) mentions the need to protect and collaborate in the promotion of human dignity:

> This protection is spatially and temporally conditioned by the socioeconomic standard in force in each State. [...]
> As a fundamental principle, the dignity of the human person constitutes a guiding value not only of fundamental rights, but of the entire constitutional order, which is why it qualifies as a constitutional principle with the highest axiological hierarchy.

It is important to highlight that the existential minimum cannot be confused with the vital minimum, since the latter refers to the guarantee of the right to life, but the existential minimum must be guaranteed, given that it arises from the protection of life and human dignity.

2.3 Fundamental social rights

Regarding fundamental social rights, Miranda apud Ingo Sarlet (2001, p. 12) states:

> They came to be understood as a specific dimension of fundamental rights, insofar as they intend to provide factual resources for the effective enjoyment of freedoms, in such a way that they aim to guarantee real equality and freedom, which can only be achieved by compensation for social inequalities.

The original Constituent legislator gave the norms that involve fundamental rights, constitutional rigidity, thus generating the fullness of their effects. According to Sarlet (2002, p. 21):

> Fundamental social rights are protected not only against the ordinary legislator, but even against the action of the constituent power

> reformer, since they are part of the list of "immutable clauses" of art. 60, paragraph 4, item IV, of the CF.

Ingo Sarlet (2001, p. 13) once again contributes with his understandings, highlighting that the norms of fundamental rights cannot lose their normative force, being limited to only good intentions, as the principle that imposes the maximization of efficacy and effectiveness of all fundamental rights.

Rights such as education, health and assistance are considered social rights and as such cannot fail to be considered fundamental rights, however, they require actions to make them effective, with the State having the duty to provide them.

As mentioned in the previous paragraph, in the case of health, despite the advances and achievements of the SUS, there are still large gaps in the models of care and management of services with regard to access and the way in which the user is received in health services. public health. In health, with emphasis on hospitals, there must be collective and cooperative work between subjects, which requires permanent interaction and dialogue.

On the subject, Fortes (1998, p. 85) highlights that:

> Daily observation of the media seems to confirm what they claim to be about health services, especially hospitals, institutions where violations of citizens' rights are most prevalent. Citizens who, due to health care needs, require assistance from institutions and professionals, to whom society has delegated the role of "taking care of the health" of the human person, and who, often, lose their citizenship status and are required as passive, dependent beings, submissive to paternalistic or authoritarian behavior.

Within the scope of social rights there is minimum effectiveness, and basic social assistance must be guaranteed. This minimum effectiveness of social rights can be exemplified by the right to health. To guarantee the minimum effectiveness of this right, the State must provide hospitals and doctors with the capacity to serve the population that needs the service.

Materials and equipment must be made available to doctors so that they are capable of providing services to citizens. By failing to meet the basic needs for a dignified life, the State violates the Federal Constitution precisely at its intangible core.

Once rights are violated, constitutional guarantees serve as instruments for their repair. The defenses set out in the Constitution regarding the special rights of the individual are constitutional guarantees.

In this context, many guarantees end up being considered fundamental rights and can be exercised by way of exception, through the filing of a direct action of unconstitutionality, as well as other actions of concentrated control or on the initiative of the judge in the procedural course.

Another salutary point worth mentioning is related to the political interference that the teams face, in which some politicians use the health program teams as electoral strongholds and sometimes harass the professionals.

These attitudes are unfair and negatively influence the work of social workers who aim to achieve social control through the work carried out in communities.

2.4 Control of constitutionality in financial and budgetary matters

First of all, there needs to be an explanation of the obligations of the Public Power in relation to fundamental rights. It is worth exposing Carbonell's (2005) ideas:

> States, in terms of economic, social and cultural rights, must: a) Protect rights without discrimination. b) Take all appropriate measures to enforce these rights within its territory. c) Demonstrate that the measures taken are the most appropriate to achieve the objectives of the Pact. d) Establish judicial channels to bring possible violations of signed rights before the courts. e) Progressively achieve the satisfaction of the rights established in the Pact, understanding by progress the obligation to carry it out immediately and continuously. f) Do not go backwards from achieved achievement levels, as regression is prohibited or severely restricted. g) Allocate the maximum available resources to comply with the Pact. h) Believe that the maximum available resources have actually been allocated. i) During periods of crisis, prioritize the protection of the most vulnerable members of society; yj) Ensure minimum levels of satisfaction of rights, which must be maintained even in periods of crisis or structural adjustments. (p. 62-63)

The obligations, in general, require the creation of public policies to be carried out by the Executive Branch, as Ana Paula de Barcellos cites Sustein (2007):

> Any and all state actions involve spending public money and public resources are limited. (...) As there are no unlimited resources, it will be necessary to prioritize and choose what public money will be invested in. These choices – she continues – receive [or should receive...] the direct influence of constitutional options regarding the ends that must be pursued as a priority. (2007:11-12)

This means that:

> choices regarding public spending are not a topic entirely reserved for political deliberation; on the contrary, the point receives important influence from constitutional legal norms. (...) In reality, the set of State expenditures is exactly the moment in which the achievement of constitutional purposes can and should

> to occur. Depending on the choices made specifically by the Public Authorities, each year, these ends may be more or less achieved, more or less efficiently. (2007:12)

Following the same reasoning, Sustein and Holmes (1999, p. 31) mention that "the amount that the community decides to spend on each of them decisively affects the extent to which each fundamental right is protected and enforced"

The author Alfredo Augusto Becker (1963, p. 225-228) explains the relationship between budgetary resources held by the State and their relevance to administrative duties, as quoted below:

> The combination of the totality of tax relations with the totality of administrative relations makes up a single and continuous relationship: the constitutional relationship. (...) the State exists in the dynamism of Revenue combined with the dynamism of Expenditure. (...) This combination is given by the law that approves the Public Budget (...) the revenues serving to obtain the funds to carry out the expenses, the latter having in the first (the revenues) the means of their own action.

Gustavo Ingrosso (1963) explains that the budget law is known as the most important of the organizational laws, since it is responsible for moving the State's activities, which are directed so that fundamental rights are preserved. In this way, the tax professional confirms that the public budget is balanced, not just the equivalence between revenue and expenditure, but mainly the balance between them.

Therefore, it is possible to state that the quote from Sandoval Alves da Silva (2007, p. 196) makes sense, following the transcription: "constitutional norms on fundamental rights oblige the legislator to create the respective laws that establish positive benefits and the administrator to offer services and benefits for the realization of constitutional rights".

Ana Paula de Barcellos (2007, p. 13-14) states that admitting that there is control due to the imperativeness of the Constitution:

> does not mean that there is no autonomous space for majority deliberation regarding the definition of public policies or the destination to be given to available resources (...) it is not about the absorption of the political by the legal, but only the limitation of the first by the second, or In other words, this deliberation will not be free from some legal-constitutional constraints (2007:13-14).

The author still considers it important to address the lack of doctrinal production on the subject, contracting directly with the large production linked to the containment of revenue, as she says: "There is a serious and legitimate concern about legally limiting the momentum

State collector; However, there is no equivalent concern with what the State will ultimately do with the resources collected." (BARCELLOS, 2007, p. 15).

According to Alexy (1999, p. 72) "tax collection directly serves (...) the production of the State's financial action capacity. The State's capacity for financial action is, in general terms, a presupposition of its capacity for action. The social state asks that it be considerably expanded."

Gilberto Bercovici (2003, p. 182) states with knowledge on the subject:

> The traditional conception of an overly strong State in Brazil, contrasting with a fragile society, is false, as it presupposes that the State can ensure that its determinations are respected. In reality, what exists is the ineffectiveness of state law. According to Marcelo NEVES, the State is blocked by private interests. The achievement and expansion of citizenship in Brazil, therefore, involves strengthening the state in the face of private interests and the equal integration of the population into society.

It is incomprehensible to claim that the Judiciary is not authorized to deal with budgetary policy due to accusations of violating the separation of powers, in addition to the incomprehension that there is compliance with judicial decisions protecting fundamental rights, thus subordinating the early existence of budgetary resources.

Following Marcos Gomes Puente (1997, p. 59):

> the principle of legality would presupuestaria, according to which the Administración cannot confront the payment of economic obligations that do not count with the corresponding credit or the consignment would presupuestaria previa, it cannot oppose the fulfillment by the Administración of the sentences in which it is condemned to payment of one liquid quantity.

Eros Grau (1993), in an article published before taking office as Minister of the STF, expressed his opinion on this issue, having as a characteristic the conflict between the legality of the expenditure of public resources and the subjectivity of the Administration in relation to judicial decisions. For a conflict to be resolved, it is necessary to relate the weight of each one, as per the quote below:

> I have no doubt about the prevalence of the principle of the Administration being subject to the decisions of the Judiciary in relation to the principle of legality of public expenditure", as the first constitutes a "fundamental legal principle", a true "axiom of public law". Thus, for him, "compliance with the principle of legality of public expenditure by sacrificing the Administration's subjection to the decisions of the Judiciary would be entirely unsustainable (p. 143).

However, to date, the STF attributes budgetary laws as not subject to constitutional control, as they are considered temporary laws, thus Sandoval Alves da Silva (2007) states that they:

> represent, prima facie, in a general and abstract way, the amount of public resources available to fulfill constitutional obligations to comply with constitutional rights (...) and the payment obligations to be assumed by the Administration and intended to meet defined public needs in laws of this nature (p. 228).

In other words, these are general and abstract rules because they do not specify (when published) who are the taxpayers or beneficiaries of state benefits, as the author analyzes:

> the budget, when it sets public expenditure, is imposing on public agents an obligation to carry out public policies, granting enforceability and effectiveness to fundamental social rights contained in constitutional norms and guaranteeing in abstract the payment conditions to whoever is necessary in the implementation of such rights. Now, if fundamental social rights cannot be demanded before being delimited, how can they not be the subject of legal demand for compliance after this delimitation? (SILVA, 2007, p. 231-232)

The good side is that, according to the author, "the STF has already adopted a change in interpretation in the sense of conceiving abstract and autonomous contours in budgetary laws, admitting constitutionality control through concentrated means [STF ADI 2.925/DF – Rapporteur Min. Marco Aurélio], remaining to evolve for all cases that represent an offense to the Constitution." (SILVA, 2007, p. 232-233).

The majority of Brazilian doctrine and jurisprudence is directly linked to the French model of liberal rule of law. Krell (2002, p. 90) quotes:

> to the extent that laws cease to be seen as conditional programs [imposition of sanctions on individuals and limitations on state power] and take the form of final programs [imposition of tasks on public power and rights to have them fulfilled], the classic scheme of division of powers loses its relevance.

Unfortunately, the principle of separation of powers always ends up being more important than the protection of fundamental rights, having more priority. Regarding this, Sandoval Alves da Silva states that: "the principle of separation of powers and the competence to dispose of the budget are not absolute ideas, as they suffer constitutional limitations, nor are they ends in themselves, but means for the control of State Power and guarantee of individual rights" (2007, p. 187).

There are still several authors who delve deeper into the subject, such as Krell (2002, p. 102):

> A solution to the problem of insufficient allocation of public funds to carry out social services would be to challenge and control the budgetary laws of the respective federative entity, through direct action of unconstitutionality (through the Public Prosecutor's Office, article 102, I, CF) throughout since they contradict constitutional provisions.

When it comes to the justice of social rights, Clève (2003, p. 299) states that different collective actions should be used with the aim of controlling the constitution of budgetary legislation and demanding that it be complied with, as explained below:

> A good way to demand the progressive realization of these rights (because they are progressively effective rights) is through collective actions, especially public civil actions. It would be about compelling the Public Power to adopt public policies to, within a defined time frame (five or ten years), solve the problem of housing, access to leisure, education, etc. Of course, in this case, the budgetary problem emerges. However, the State must be compelled to include specific allocations in the budget for this purpose, in order to, within a specified period, resolve the problem of citizens' access to these rights. In this way, it would be a question of compelling the Public Power to comply with the budget law that contains the necessary appropriations (thus avoiding the reallocation of resources for other purposes), as well as obliging the State to provide in the budget law the resources necessary to progressively realize social rights. And here it is necessary to demystify the idea that the budget is merely authorizing. If a budget is a program, being a program cannot be authorizing. The budget is a law that needs to be complied with by the Executive Branch.

According to Barcellos (2007), there are three important parameters for good control of the constitutionality of budget legislation, such as “concluding that a certain constitutional goal is a priority and, therefore, the public authority is obliged to adopt policies associated with it” or even “a certain public policy, although approved by the majority bodies, should not be implemented until the goals primarily established by the original constituent have been achieved” (p. 16).

For the author, it may be “time to rethink the legal theory that prevails in Brazil to this day regarding the budget, especially its role in defining public policies and their effects.” (BARCELLOS, 2007, p.29)

Thus, the first parameter aims to respect the minimum portions of expenses that the Constitution allows for certain areas, such as education (art. 212); health (art. 198, § 2); social security and education (art. 195) (BARCELLOS, 2007).

She also makes it clear that "it will be necessary to have access to information both with regard to the amounts collected by the State and with regard to the actual application of these resources". Not to mention that, "it is necessary to define what consequences can be attributed to this fact [eventual non-compliance], whether to punish the person responsible for the constitutional offense, to prevent the act carried out from producing effects or even to produce the result desired by the Constitution." (BARCELLOS, 2007, p. 20) "A second control parameter that can be constructed from the constitutional text – he continues – concerns the final result expected from state action."

As a third and final parameter, there is control over the definition of public policies that were determined to be used, such as

> of the means chosen by the Public Power to achieve constitutional goals, design control parameters in this particular in order to eliminate from the possibilities of choice available to public authorities the means proven to be inefficient for achieving constitutional goals. (BARCELLOS, 2007, p. 23).

Barcellos (2007, p. 24) also points out that the controlling parameters are: "their effective application depends on having information about: (i) available public resources; (ii) the budget forecast; and (iii) budget execution."

However, she still emphasizes that not every time this information is easily accessible. access:

> In the field of public revenue, several budgets do not distinguish between expected tax collection. In the same vein, reports on actually verified revenue, when available to the public, do not always break down revenue by tax type. (...) Several budgets, from different federative levels, approve only a general budget for expenses, without specification; others convey a generic list of topics, without it being possible to identify in the slightest which public policies are intended to be implemented. Budget execution reports do not always exist and are generally uninformative. (BARCELLOS, 2007, p. 25)

Thus, it still makes it clear that there are consequences if constitutionality is verified, such as: "it is possible to imagine some type of penalty applicable to the person responsible", which can be dealt with through art. 85 of the Constitution as a crime of responsibility, leading to loss of office.

Therefore, it is important to be clear: fundamental rights must be preserved and applied.

2.5 The constitutionalization of law and the rearticulation of democracy

In the search for understanding and explaining what neoconstitutionalism is, several theories emerge, with the expression adopted by the doctrine in different senses, as it sometimes presents itself as a new conception of the Rule of Law, sometimes as a proposal for reformulating legal theory. , an ideology or political philosophy applied to Law or, in a broad sense, as a legal philosophy that studies conceptual and methodological issues about the definition of Law, the status of knowledge and the role of the jurist (SANCHIS, 2003).

For Streck (2005, p. 161), neoconstitutionalism gives rise to "constitutionalized legal orders" characterized by the important presence of the Constitution throughout the legal system, conditioning "both legislation and jurisprudence and doctrinal style, the action of public agents and also directly influence social relations".

Therefore, we are faced with a topic that is too vast and very difficult to condense from a theoretical and conceptual point of view. According to Barroso, neoconstitutionalism is the rediscovery of legal principles, especially the dignity of the human person, the expansion of constitutional jurisdiction with an emphasis on the emergence of constitutional courts and the development of new methods and principles in constitutional hermeneutics:

> In short: neoconstitutionalism or new constitutional law, in the sense developed here, identifies a broad set of transformations that occurred in the State and in constitutional law, among which can be highlighted, (i) as a historical milestone, the formation of the constitutional State of law, whose consolidation took place throughout the final decades of the 20th century; (ii) as a philosophical framework, post-positivism, with the centrality of fundamental rights and the rapprochement between Law and ethics; and (iii) as a theoretical framework, the set of changes that include the normative force of the Constitution, the expansion of constitutional jurisdiction and the development of a new dogmatic of constitutional interpretation. This set of phenomena resulted in an extensive and profound process of constitutionalization of Law (BARROSO, 2017, p. 15).

As there is still no consensus regarding the conceptual elements of neoconstitutionalism, its characteristics remain under construction. The diversity of classifications is justified by the peculiarities of each legal system, the different possible degrees of constitutionalization as well as the diversity of possible understandings regarding which characteristics a system must have in order for it to be in accordance with neoconstitutionalism.

For Guastini (2014), the main characteristics of neoconstitutionalism are the supremacy of the constitutional text; promotion and preservation of human rights; normative force of constitutional principles; constitutionalization of Law; expansion of constitutional jurisdiction.

Is this principled understanding the most appropriate to the paradigm of the contemporary Democratic State of Law? Such a discussion does not fit within the scope of this thesis that established the option for the teachings of Barroso (2017), as well as those of Streck (2005), notably when he points out the theoretical ambiguities embedded in the term neoconstitutionalism.

Agreeing with opposing points is possible when you are open to experiences. This is precisely what can be extracted from Gadamer's thinking, according to which the researcher must be an experienced person and not only be someone who has transformed into who they are through experiences, but also someone who is open to experiences.

According to Hans-Georg Flickinger (2000, p. 27-52), “Instead of mastering, as a connoisseur, the process of knowledge, the researcher must experiment himself, exposing himself to the risk of losing his initial certainty” . Decoding the phrase: it is the obligation of the researcher in permanent dialogue with himself and with otherness to assume that there is always the possibility and probability that his hypotheses and his first statements are wrong. This possibility of error makes research characterized as an activity that will always involve risks.

From this perspective, a dialogue taken seriously when carrying out research must presuppose that the researcher is open to changing his position and entering the dialogical game with understanding the other. This openness enables dialogue and research participants to understand that “the words that circulate in the dialogue reveal, question, configure identities and demarcate differences” (HERMANN, 2003).

When approaching the idea of*thinking about the possible*, Zagrebelsky (2011, p. 34) argues that it is necessary to avoid extremes, dogmas. The thought of possibility, according to this author, is “proper to those who reject both the arrogance of possessed truth and the renunciation of accepted reality”.

Upon discovering that the term neoconstitutionalism led to voluntarist positions, Streck (2013) began to place it in parentheses or in quotation marks, understanding “the

neoconstitutionalism as the compromising constitutionalism of the second post-war era" and "far from activism and discretionary practices". For him, "it is necessary to recognize that the characteristics of this neoconstitutionalism ended up causing pathological conditions that end up contributing to the corruption of the text of the Constitution itself".

The theoretical divergence was such in relation to the neoconstitutionalists' bet on the weighting and discretionary power of judges that, from the fourth edition of *Truth and Consensus,* Streck (2017) abandoned the thesis, going on to call post-World War II constitutionalism *contemporary constitutionalism,* for understanding that neoconstitutionalism does not surpass the other form of positivism that follows exegeticalism, although "neoconstitutionalists think it surpasses it".

In summary: neoconstitutionalism is based on the protection of human dignity and fundamental rights as normative projections of this statement, with the theoretical development and experience of constitutional democracy in the last century redefining the interactions between Law and politics in this context, in which they become bound by the supremacy of the Constitution and in particular fundamental rights, as well as by the strengthening of constitutional jurisdiction. This strengthening is fraught with consequences for the relationship between constitutionalism and democracy.

2.6 Social inclusion in the context of non-application of the existential minimum

Due to the interconnection between rights, it is clear that there is a violation of Social Inclusion through the non-applicability of the existential minimum, thus leaving without State protection, according to Eduardo Cambi (2009).

In other words, this part of society is left adrift of the law, according to Brito Alves (2010), as a result, the effectiveness of fundamental rights is compromised, thus creating social injustice.

According to the study by Ana Paula Polacchini de Oliveira (2010, p. 56) "the position of the people continues on the lower margin of independence which, with their feet on the ground or even with shoes on, remains contained or marginalized". It concludes by stating that it is necessary to ensure that inside and outside the field of abstraction there is equality and social inclusion.

Final considerations

With the demand for material resources that fundamental rights require in order for them to be universalized, it is necessary to explain how great the State's duties are in terms of collecting resources and distributing them in a budgetary manner.

With the existence of duties, the invocation of the legitimacy of the applicability of their sanctions arises. It is necessary to state that what is being addressed is the greatest reason for the State to exist: the fundamental rights of human beings.

Thus, it is possible to understand the importance of fulfilling this function, since only then will it be possible for there to be a human condition for survival and, for this, the reserve of the possible and the existential minimum plays a great role. Reserving what is possible should not cancel out the existential minimum, both institutes are complementary to the full effectiveness and applicability of rights and duties.

It is suggested that more research be done on the topic in order to make it increasingly tangible and debatable in society.

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