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WEIGHTING PRINCIPLES IN CIVIL PROCEDURE AND THE GUARANTEE OF PROTECTION TO FUNDAMENTAL RIGHTS RELATED TO THE EXISTENTIAL MINIMUM

PONDERAÇÃO DE PRINCÍPIOS NO PROCESSO CIVIL E A GARANTIA DA PROTEÇÃO À DIREITOS FUNDAMENTAIS RELACIONADOS AO MÍNIMO EXISTENCIAL

PRINCIPIOS DE PONDERACIÓN EN EL PROCESO CIVIL Y LA GARANTÍA DE PROTECCIÓN A LOS DERECHOS FUNDAMENTALES RELACIONADOS CON EL MÍNIMO EXISTENCIAL

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RESUMO

Objetivo: Esse artigo objetiva examinar e estudar as disposições normativas concernentes a ponderação principiológica no Direito Processual Civil visando a garantia e proteção dos Direitos Fundamentais concernentes ao mínimo existencial. Com as inovações trazidas pelo Código de Processo Civil de 2015, no qual o legislador buscou redigi-lo à luz dos preceitos da normativa Constituição Federal de 1988, houve nítida influência constitucional nas disposições processuais civis, fazendo com que as Cortes de Justiça e seus magistrados, no exercício de suas atribuições, desempenhassem obrigações e responsabilidades diversas daquelas até então realizadas.

Metodologia: Para tanto, se vale de análise bibliográfico-documental, a partir do método dedutivo, para inferir as conclusões. Examina-se, assim, as funções do Poder Judiciário que de aplicador das leis, passa em suas atribuições e decisões a observar o ordenamento jurídico como um todo, através de uma análise normativa e principiológica, reconhecendo novos direitos e pondo em prática efetivamente direitos fundamentais com fundamento direto no texto constitucional.

Resultados: Conclui-se que na ausência normativa ou no conflito de normas, especialmente na figura dos princípios, ao se proporcionar a efetiva aplicação dos Direitos Fundamentais, sob a baliza de assegurar e promover condições materiais mínimas para a sobrevivência humana, essa se dará sob o prisma do sopesamento dos princípios constitucionais, como o Mínimo Existencial, influindo essa ponderação não na dimensão da validade dos princípios, mas em seu peso nos casos concretos, que tendem a pender no resguardo à proteção da dignidade da pessoa humana como vetor dos direitos fundamentais e fundamento da República.

Palavras-chave: Processo Civil; Ponderação de princípios; Direitos Fundamentais; Mínimo Existencial.

ABSTRACT

Objectives: This article aims to examine and study the normative provisions concerning the weighting of principles in Civil Procedural Law aiming at the guarantee and protection of Fundamental Rights concerning the existential minimum. With the innovations brought by the Civil Procedure Code of 2015, in which the legislator sought to write it in the light of the precepts of the normative Federal Constitution of 1988, there was a clear constitutional influence on civil procedural provisions, making the Courts of Justice and their magistrates, in the exercise of their attributions, to perform obligations and responsibilities different from those performed until then.

Methodology: For that, it uses bibliographic-documentary analysis, from the deductive method, to infer the conclusions. It examines, therefore, the attributions of the Judiciary, which from applying the laws, passes in its attributions and decisions to observe the legal system as a whole, through a normative and principled analysis, recognizing new rights and effectively putting into practice fundamental rights with direct foundation in the constitutional text.

Results: It is concluded that in the normative absence or in the conflict of norms, especially in the figure of the principles, when providing the effective application of Fundamental Rights, under the goal of ensuring and promoting minimum material conditions for human survival, this will take place under the prism of

balancing constitutional principles, such as the Existential Minimum, influencing this weighting not in the dimension of the validity of the principles, but in their weight in concrete cases, which tend to lean towards the protection of the dignity of the human person as a vector of fundamental rights and foundation of the Republic.

KEYWORDS: Civil Procedure; Weighting of principles; Fundamental rights; Existential Minimum.

RESUMEN

Objetivos: Este artículo tiene por objeto examinar y estudiar las disposiciones normativas relativas a la ponderación de principios en el Derecho Procesal Civil tendientes a la garantía y protección de los Derechos Fundamentales en cuanto al mínimo existencial. Con las novedades traídas por el Código Procesal Civil de 2015, en el que el legislador buscó redactarlo a la luz de los preceptos normativos de la Constitución Federal de 1988, hubo una clara influencia constitucional en las disposiciones procesales civiles, tornando los Tribunales de Justicia y sus magistrados, en el ejercicio de sus atribuciones, para cumplir obligaciones y responsabilidades distintas de las desempeñadas hasta entonces.

Metodología: Para ello utiliza el análisis bibliográfico-documental, empleando el método deductivo, para inferir las conclusiones. Examina, por tanto, las atribuciones del Poder Judicial, que de aplicar las leyes, pasa en sus atribuciones y decisiones a observar el ordenamiento jurídico en su conjunto, a través de un análisis normativo y principista, reconociendo nuevos derechos y poniendo en práctica efectivamente los derechos fundamentales con fundamento directo en el texto constitucional.

Resultados: Se concluye que en la ausencia normativa o en el conflicto de normas, especialmente en la figura de los principios, al procurar la aplicación efectiva de los Derechos Fundamentales, bajo el fin de asegurar y promover condiciones materiales mínimas para la supervivencia humana, ésta tienen lugar bajo el prisma de la ponderación de principios constitucionales, como el Mínimo Existencial, incidiendo esta ponderación no en la dimensión de la vigencia de los principios, sino en su peso en los casos concretos, que tienden a inclinarse hacia la protección de la dignidad de las personas. persona humana como vector de derechos fundamentales y fundamento de la República.

PALABRAS CLAVE: Procedimiento Civil; Ponderación de principios; Derechos fundamentales; Mínimo existencial.

INTRODUCTION

The scientific work seeks to research the means of applying the weighting of principles in the scope of Civil Procedural Law, considering its use as one of the instruments guaranteeing the protection of fundamental rights.

Through Law 13.105 of 2015, the New Code of Civil Procedure, there was a rehearsal of the Legislative Power, in disciplining within the parameters of legality,

the criteria to be used in judgments and decisions by the Judiciary, establishing the duty of reasoning, with the objective too, setting of beacons for the ponderous exercise of the norm when conflicts occur in your application.

Through the new procedural rules, the Legislative Power chose to legitimize by law the weighting of norms, seeking to link Judiciary Power to duly substantiate the normative application chosen for the factual context, when faced with other solutions considered adequate to the case, seeking to overcome the conception of judicial activities established fixed in the first half of the 20th century.

With the implementation of the ponderous exercise of principles in Brazil, sought to implement an effective method of resolving the apparent conflict of principles, applying it when judging complex cases, looking for that way, an effective and satisfactory response, when the norms are apparently conflicting in the de facto situations.

It is considered essential to take into account the purely principled nature of the Brazilian constitutional text of 1988, that shelters and disciplines fundamental rights, allowing according to the peculiarities of each factual circumstances, even for those considered similar, they could receive different jurisdictional responses, based on the light of principles, balanced in their weight and dimension to concrete case.

The conception of a Judiciary Power that only applies laws is revolutionized, establishing itself as an attribution of the magistrates to the normative and principiological analysis of the legal system as a whole, recognizing and making it possible to effectively put fundamental rights into practice based directly on the text of the Constitution.

In addition, the present study is fundamentally based on analyzing the exercise of balancing principles guided by Civil Procedural Law, together with the analysis of the balancing technique and the prevalence of fundamental rights guaranteeing the existential minimum, considering the composition of the Law by the legal norms that delimit a definitive duty through the rules in which the hypothesis is subsumed to the precept or not, and through the principles applicable in the widest feasible range, weighing up with the dimension and evaluation of its weight in each concrete case, respecting the essential core of law.

It is emphasized that the legal system is based on the Principles that govern it, among them the Principle of Legality that delimits the performance of the State, as well as by a universality of principles contained in the legal system, worth mentioning in this study, the Principles of the Minimum Existential and Human Dignity, which through the exercise of principiological consideration, together with the Procedural Instruments achievers, which will aim at the realization of these Fundamental Rights, contained in the constitutional text.

It seeks to consider the lessons of doctrine, which teaches in the sense that the Federal Constitution is the foundation of validity of the entire legal system, although, with regard to the principles of a constitutional nature, these do not have the nature of an autonomous legal norm, acting in the irradiation of the legal system in its understanding and outline, delimiting the validity of the rules and ordering the correct performance of the State.

In parallel, a thorough analysis of the normative framework and the doctrinal proposal is carried out under the prism of balancing the constitutional principles, respect for the dignity of the human person as a vector of fundamental rights, establishing an equality of material order for individuals.

Weighing the Principle of the Existential Minimum with other principles contained in the legal system, this consideration influences not the dimension of the validity of these principles, but their weight in concrete cases, which tend to lean towards the protection of the dignity of the human person as a vector of the fundamental rights and reasoning of the Republic.

The development of this research does not aim to exhaust the matter related to the subject, but to make some specific considerations focusing on the provisions of neoconstitutionalism, in the light of the guidelines and regulation contained in the constitutional normativity, considering the balancing of principles in the effectiveness, implementation or restriction of said rights, from the perspective of weighting the activity of the legislator and the judge, who are responsible for fulfilling the role of the State in serving the public interest, with the consequent materialization of Fundamental Rights in their essential core.

2. THE EXERCISE OF WEIGHTING IN CIVIL PROCEDURAL LAW

When faced with factual circumstances not disciplined by law, characterized by the finitude or omission of the Legislative Power, in the light of the Law of Introduction to the norms of Brazilian Law[4], it will be up to the magistrate to decide in a reasoned manner, technically justifying its inclination and precedence, through "*analogy, customs and general principles of law*".

Seeking to remedy this gap caused by the absence of law, the legislator tested a kind of legislative regulation, opting for the institution within the legality of benchmark parameters for the decisions of the Judiciary Power, as demonstrated in the Civil Procedural Law, 13.105 of 2015[5], in the provisions of §2 of article 489, *in verbis*:

> In the event of a collision between norms, the judge must justify the object and the general criteria of the weighting carried out, stating the reasons that authorize the interference in the removed norm and the factual premises that support the conclusion.

For Dantas[6], in the existence of more than one rule, if they conflict with each other, although, subsumable to concrete cases with different and discordant resolutions, there will be only one legal rule admissible to the factual context under analysis, being necessary to disregard the other remaining rules, for not be reliable for solving the hypothesis, applying the classic validation rules.

In circumstances where there is no legislation applicable to certain factual situations, in the lessons of Ronald Dworkin[7], known as the *hard cases*, characterized by the absence of resolution within the parameters contained in the normative framework, it will be up to the magistrate to fundamentally develop a satisfactory and properly based response, primarily on principles elements, as well as on premises based on political reasons.

In the teachings of Medina[8], the Judiciary must act with great caution and care in the reasoning and motivation of its manifestations, seeking in its task, an authentic

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[4] BRASIL. **Lei de Introdução às normas do Direito Brasileiro de 1942**.
[5] BRASIL. **Código de Processo Civil de 2015.**
[6] DANTAS, David Diniz. **Interpretação constitucional no pós-positivismo**: teoria e casos práticos. São Paulo: WVC, 2004. Page 63.
[7] DWORKIN, Ronald. **Levando os direitos a sério**. 2. ed. São Paulo: Martins Fontes, 2007. Page 131.
[8] MEDINA, José Miguel Garcia. **Curso de Direito Processual Civil Moderno**, 5. ed. São Paulo:

and well-founded responsibility in its decisions when applying the provisions of article 489, §2, of the Code of Civil Procedure. In your words:

> CPC/2015 gave special emphasis to this aspect (cf. art. 489, § 2 of CPC/2015). In any case, there must be a real commitment by the jurisdictional body to democratic values, which must be concretely translated into the process of creating the legal solution (under penalty of the decision being only formally substantiated, and such reasoning, therefore, fictitious).

At this point, the doctrinal lessons in part argue that those norms of fundamental rights are structured as principles, arguing that the ponderous analysis of the principles would not be within the parameters of rationality, which would bring a significant risk of the judges deciding in a way that arbitrary and subjective. As a safeguard against these risks, it will be up to the magistrates, fundamentally and imperatively, to motivate their decisions in a unique way:

> Decision-making based on legal principles must consider the following factors: (a) integrity, predictability and stability of orientation; (b) construction of the legal solution in an interactional and dialectical system, in which the jurisdictional body and the addressees of the solution participate; (c) social understanding of the specific problem, by the body in charge of exercising constitutional jurisdiction[9].

The method of balancing principles needs to be exercised based on these factors, in a rational way, to lead to a resolution supported by the dictates of the Constitution, under penalty of distorting legal certainty, emptying and ineffectiveness of fundamental rights, which would be subjected in their realization the mere personality and understanding of the judge[10].

In the materialization of Fundamental Rights related to the civil process contained in the constitutional text, the matters concerning the process must be carried out in the light of the Constitution, which is the foundation of validity of the Democratic State of Law, applying under this conception, the principiological weighting , which from the perspective of the Procedural Law contained in the New CPC, would be

Revista dos Tribunais, 2020. Page 42.

[9] MEDINA, José Miguel Garcia. **Curso de Direito Processual Civil Moderno**, 5. ed. São Paulo: Revista dos Tribunais, 2020. Page 42.

[10] MEDINA, José Miguel Garcia. **Curso de Direito Processual Civil Moderno**, 5. ed. São Paulo: Revista dos Tribunais, 2020. Page 42.

subject to certain obstacles compromising the effectiveness of the constitutional principle of the reasonable duration of the process[11].

The exercise of weighting in the parameters taught by the German jurist Robert Alexy, in the vision of Marinoni, Arenhart e Mitidiero[12], would bring obstacles to the legal and constitutional compliance of the reasonable duration of the process, in view of the peculiarities of the Judiciary Power in Brazil, also evidenced in the presumption of superiority of this Power.

For these authors, the positive points of such a mechanism, contribute in a beneficial and efficient way to the civil procedure as a whole, when analyzing the provisions of the procedural law under the irradiation of the constitutional precepts, thus determining the task of protecting the rights in a global way, supporting the whole society, consolidating in this way, effective jurisprudence in the legal system, as well as providing a satisfactory performance in the individual form, therefore, justice will be provided for those cases considered as controversial, allowing judges to decide more effectively in each specific case[13].

Furthermore, the provisions contained in article 489 of the Code of Civil Procedure, are shown to be a new legal framework that determines the Judiciary to base and motivate its decisions, breaking with the system hitherto used of motivated sufficiency, implementing the method exhaustion of substantiating judicial manifestations, which developed and attributed value to national jurisprudence in a more effective and qualitative way, also strengthening the performance of judicial bodies through precedents, which were consolidated through the essential weighting effectively grounded[14].

In the description and analysis of the characteristics and differences between the rules and principles, Robert Alexy[15], emphasizes that the principles need to be

[11] MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **Curso de Processo Civil**. v.1. São Paulo: Editora Revista dos Tribunais. 3. ed. rev. atual. E-book. 2017. Page 454.
[12] MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **Curso de Processo Civil**. v.1. São Paulo: Editora Revista dos Tribunais. 3. ed. rev. atual. E-book. 2017. Page 455.
[13] MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **Curso de Processo Civil**. v.1. São Paulo: Editora Revista dos Tribunais. 3. ed. rev. atual. E-book. 2017. Page 455.
[14] NEVES, Daniel Amorim Assumpção. **Novo Código de Processo Civil** – Lei 13.105/2015 – Inovações, Alterações, Supressões Comentadas. Rio de Janeiro: Forense; São Paulo: Método, 2015. Pages 28-30.
[15] ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.

understood as optimization mandates, having their application in the widest feasible range, since the rules need to be implemented and used in the exact terms described by the legislator.

In phatic situations in which the principles are colliding, it becomes essential for an effective resolution, to carry out the valuation exercise, which is understood in the concrete analysis of the phatic context, and then, in this way, to delimit the dimensioning and weight of each principle that can be applied, attesting to the preponderance of one over the other by the effective weighting, which will be marked out according to the constitutional precepts and the fundamental rights involved[16].

In the teachings of Ricardo Martins[17], the Brazilian constitutional model is similar to the one defended by the German doctrine and used in its constitutional text, in view of the constitutional principle definition, delimiting legality as a principle, starting from the perspective that in the understanding and practical applicability of the legal system, it is necessary to balance principles, in which the State in its decisions will adopt the principled legal theory, which will have guiding effects on the serviceability of the norms issued by the Legislative Power, to be applied within the parameters of proportionality, serving as a delimiting instrument in the search of public interest.

In the understanding of the aforementioned author, it is emphasized that this imposition of law provided for in the 1988 constitutional text, demands a principled understanding of legality as a principle, especially in specific circumstances, which will require from the Public Power, the consideration of principles in the application of the constitutional norms, weighing the principle of legality together with other principles of a constitutional nature[18].

In this conception, in attention to what was considered by Silva[19], as the law of normative competences, which is inferred from the combined use of formal and

[16] ALEXY, Robert. **Teoria dos direitos fundamentais**. 2. ed. São Paulo: Malheiros, 2011.
[17] MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo**. 1ª ed. São Paulo: Malheiros, 2008.

[18] MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo**. 1ª ed. São Paulo: Malheiros, 2008.
[19] SILVA, Virgílio Afonso da. **Direitos fundamentais: conteúdo essencial, restrições e eficácia**, 2ª ed. São Paulo: Malheiros, 2010.

material principles, the weighting performed by the State through its normative agents, will invariably have to pay attention to what was previously when the higher hierarchical Constitutional Norms were edited, serving as guidance to the State in the performance of its attributions of realizing Fundamental Rights.

Robert Alexy[20], in its theory of principles, in compliance with the methodology that implements legal norms, establishes that the provisions of the principle of legality, together with other principles of a constitutional order, may, through the powers of the State: Legislative, Executive and Judiciary, to be submitted to an assessment of the dimension of their weights for each determined factual circumstance, and these principles will be carried out to the greatest possible extent, through the exercise of balancing, when they collide with each other, through proportionality subdivided into successive and supplementary tests of adequacy, necessity and proportionality in the strict sense.

For Luis Manuel Fonseca Pires[21], in the exercise of discretion, a judgment of weighting the principles of the legal system must be exercised in the search for the most adequate resolution and response to each problem submitted to the public power, which will provide an authentic foundation of state action, after a deep analysis of the normative apparatus which will enable a suitable solution for each case.

In this conception, it will be up to the public agent to carry out the weighting judgment, which will lead to an outcome on how many measures may or may not be taken in the specific case according to the normative framework, and at the end of this analysis it is understood that there are various measures that can be taken, the state agent will exercise its discretion and choose the most appropriate option that is in accordance with the public interest. If there is an understanding that there is only one solution for the factual context under analysis, competence will be linked and the acts resulting therefrom will bind the state representative[22].

[20] ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.
[21] PIRES, Luis Manuel Fonseca. **Controle judicial da discricionariedade administrativa: dos conceitos jurídicos indeterminados às políticas públicas**. 2. ed., Belo Horizonte: Fórum, 2007.
[22] MARTINS, Ricardo Marcondes. **Estudos de Direito Administrativo neoconstitucional**. São Paulo: Malheiros, 2015.

By the way, in the execution of the principled weighting mechanism, which gives reasonable grounds and justifiability to the exercise of the judicial activity, it is that the state agent will give effectiveness to the acts of the Public Power, taking into account that this weighting exercise that gives legal validity to discretion, is delimited and restricted to the limits already established by the Legislative Power and also by the constituent legislator, which in their attributions carried out the weighting system when enacting laws and the Constitution and their respective reforms[23].

In these scenarios, it is up to the State powers, always paying attention to and complying with the exercise of weighting already carried out by the legislator, to exercise its competence, which will be in cases of law considered complete, bound, with the public agent being strictly subject to the content delimited by law. In cases of law considered incomplete in its entirety, it will be up to the state agent to regulate and complement the matter, now in the case of laws classified as partially incomplete, it will be up to the public agent, in consideration and service to the public interest, to choose and define the best alternative to the specific case[24].

It should be noted that the Legislative Power will be responsible for complying with the boundaries brought by the constituent legislator in its principiological consideration undertaken, whether in the edition of the original text of the Constitution, as well as in the constitutional reforms carried out, primarily incumbent upon the exercise of legislating, the balancing of the principles provided for in the legal system, for the exercise of possible discretion, when faced with various possible options to be carried out in compliance with the normative framework[25].

Also, in the exercise of weighting, the legal requirements and the factual context must be observed, evaluating the weight measures and restrictions that each

[23] PIRES, Luis Manuel Fonseca. **Controle judicial da discricionariedade administrativa: dos conceitos jurídicos indeterminados às políticas públicas**. 2. ed., Belo Horizonte: Fórum, 2007.
[24] MARTINS, Ricardo Marcondes. **Teoria dos princípios formais.** Interesse público-IP: Belo Horizonte, ano 18, nº 98, julho – agosto, 2016.
[25] BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional**. São Paulo: Malheiros. 2. ed., 9 tir. São Paulo: Malheiros, 2010.

principle imposes on the other, preserving its essential core, under the dictates of proportionality in the strict sense, in its suitability and need[26].

In the author's conception, it is emphasized that in the factual analysis, applying the principled weighting, it will be possible to reach the result that the material principles that will eventually be ensured, have a higher weight than the colliding principles, be of a material nature according to legislation or formal order, which ensures the precedence of the Legislative Power, and the Public Power may, essentially when it comes to the materialization of Fundamental Rights, work on the edition of the discipline and regulation that guarantee the fulfillment and implementation of these constitutional norms not disciplined by law[27].

Understanding the constitutional dictates irradiated by justice in its principled meaning is to extend its disseminating action in the intellection and materialization of the entire legal system, while this principle of justice must complement the meaning and application of each fundamental precept, showing itself as a constant proportionality point to compose the core of the entire normative framework, establishing a challenging duty to the Public Power in the exercise of weighting and circumspection[28].

In consideration of the precepts of the Constitution of the Federative Republic of Brazil of 1988, the prevailing thought of the imperative and cogency of its fundamental rights norms is reaffirmed, which have an essential core of objective nature and materiality, which must be guaranteed and implemented by the State, there being no prohibition or impediment in the constitutional text to mitigate this understanding[29].

Starting from these premises, Robert Alexy[30], emphasizes that the discovery of Fundamental Social Rights that indispensably lack protection will take place through principiological consideration, gauging the weight of material principles,

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[26] MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo**. 1ª ed. São Paulo: Malheiros, 2008.
[27] MARTINS, Ricardo Marcondes. **Proporcionalidade e boa administração**. In: CAMMAROSANO, Flávia; ESTEFAM, Felipe Faiwichow. Direito Público em debate. Rio de Janeiro: Lumen Juris, 2014.
[28] FERRAZ JÚNIOR, Tércio Sampaio. **Direito Constitucional**. São Paulo: Manole, 2007.
[29] SARLET, Ingo Wolfgang. **A Eficácia dos Direitos Fundamentais:** uma Teoria Geral dos Direitos Fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012.
[30] ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.

such as freedom in fact, in opposition to other colliding material principles, added to the formal principles of independence and harmony between the powers and the legitimacy of the Legislative Power.

3. THE REFLECTION TECHNIQUE AND PREVALENCE OF FUNDAMENTAL RIGHTS GUARANTEEING THE MINIMUM EXISTENTIAL

Fundamental Social Rights in their essential core are the minimum guarantee of the Dignity of the Human Person to individuals in a Democratic State of Law, composing the "Existential Minimum", which is the subjective right of every human being, and must guide the functioning of the State in its public and budgetary policies.

The foundations that support and ensure the subsistence of the Existential Minimum in the Brazilian Legal System, have an enlightened philosophical character and guided by democratic and humanitarian assumptions, founded on essential precepts, as well as integrated in its legais aspects, by the Dignity of the Human Person, which was introduced in the constitutional text, as the foundation of the Federative Republic of Brazil, serving as a guiding vector for state action[31].

In the Constitution of the Federative Republic of Brazil of 1988, there is not expressly the figure of the "*Existential Minimum*", however, the essential core of the Social Fundamental Rights by the interpretation of the express constitutional framework, by the structuring principles that underlie the Republic, such as the Dignity of the Person Humanity, the singular conclusion is reached that these essential benefits that make up the existential minimum, are implicitly found in the text of the Constitution, which, due to its protective bias of the individual, has the delimitation of a fundamental right, being therefore, a stony clause[32].

The constitutional text itself, in a disciplined way, brings the competences of the Federal Supreme Court for the interpretation and application of norms composed of rules and principles, when of a constitutional nature, and likewise determines

[31] BARCELLOS, Ana Paula de. **A eficácia jurídica dos princípios constitucionais**: o princípio da dignidade da pessoa humana. Rio de Janeiro: Renovar, 2002.
[32] SARLET, Ingo Wolfgang. **A Eficácia dos Direitos Fundamentais:** uma Teoria Geral dos Direitos Fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012.

the competences for the Superior Court of Justice, when it comes to infraconstitutional norms[33].

For the authors, the repetitive judgments issued in the Extraordinary and Special Appeals, determine a link to the lower courts and to the magistrates, considering the hierarchical order of the Judiciary and the normative imposition for the observance of such determination, binding in the same way the Public Administration in the figure of the Executive Power, who will observe in public management the determinations contained in these decisions, citing as an example, state policies related to health.

> The observance of theses serves for the Federative Republic of Brazil to be able to demonstrate one of its foundations (dignity of the human person - art. 1, III, of the CRFB) and achieve one of its fundamental objectives (promoting the good of all - art. 3, IV, of the CRFB).[34]

Concerning the provision of Fundamental Rights, Robert Alexy[35], teaches in the sense that when the State is faced with provisions pertinent to the existential minimum, constitutional principles of a material nature must incorporate the precepts that make up the content of the formal principle of precedence to legislative power decisions, while the matters contained in these principles and constitutional norms guaranteeing minimum conditions of existence for the individual, in the balancing of principles, their weight will always be greater than the eventual opposing principles.

For the author, in view of the constitutional norms of Fundamental Social Rights, which ensure the maintenance, survival and dignity of the human being, it becomes indispensable as a single solution, the evaluation of the dimension of the weight of the colliding principles by the weighting, which will provide individuals

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[33] DIAS, Bruno Smolerek. SOUZA, Leonardo Fratini Xavier de. SIMAS, Silvonei. **A Efetivação do Direito Fundamental à Saúde por meio de Decisões do Poder Judiciário no Estado Contemporâneo**. Revista Brasileira de Direitos e Garantias Fundamentais. V.6, n.2, p. 01-21, Jul/Dez. 2020. Pages 17-18.

[34] DIAS, Bruno Smolerek. SOUZA, Leonardo Fratini Xavier de. SIMAS, Silvonei. **A Efetivação do Direito Fundamental à Saúde por meio de Decisões do Poder Judiciário no Estado Contemporâneo**. Revista Brasileira de Direitos e Garantias Fundamentais. V.6, n.2, p. 01-21, Jul/Dez. 2020. Pages 18.

[35] ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.

with the reach what is conceptualized as the existential minimum, given the prevalence in the dimension of its weight on the principles that are in opposition[36].

Therefore, the constituent exercised the judgment of principiological weighting delimiting the state action, noting that in the cases of Fundamental Social Rights, it is recommended to observe the premise of the existence of a disciplinary law when not confronted with the essential core of social rights that ensure the minimum subsistence of the individual, which would legitimize a positive behavior by the state even in the face of legislative omission[37].

Inspired by the doctrinal lessons from German scholars, Brazilian scholars and Courts, guided by the dictates of the Federal Constitution of 1988, in the Principle of Human Dignity, foundation of the Republic, substrate for the Fundamental Social Rights explicit in the Constitution, based on There is an important understanding regarding the Existential Minimum, in the sense that it has a negative character, preventing any constraints or attempts aimed at its suppression or abrogation, as well as a positive character, which imposes a provisional obligation on the Public Power[38].

The author emphasizes that the Provisional Rights have a subjective character, with the State in charge of providing an Existential Minimum, as denominated by the German doctrine, including already admitted by its Federal Constitutional Court, establishing a jurisprudential understanding in the sense that these rights extract direct reasoning of the Constitutional text[39].

Sustaining the indispensability of a concrete action on the part of the State, Alexy[40], assuming that the Fundamental Social Rights in its foundation, is based on the fact that the individual can only be the holder of the rights of freedom in the legal scope, if he can exercise his real freedom in fact, which would take place through minimum and basic conditions of survival and dignity, emphasizing that

[36] ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.
[37] SARLET, Ingo Wolfgang. **A Eficácia dos Direitos Fundamentais:** uma Teoria Geral dos Direitos Fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012.
[38] SARLET, Ingo Wolfgang. **A Eficácia dos Direitos Fundamentais:** uma Teoria Geral dos Direitos Fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012.
[39] SARLET, Ingo Wolfgang. **A Eficácia dos Direitos Fundamentais:** uma Teoria Geral dos Direitos Fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012.
[40] ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.

society in its composition, has several individuals deprived of minimum material conditions of subsistence, preventing them, by themselves, from the exercise and ownership of other freedom rights, lacking public policies materializing this existential minimum.

In this pondering exercise of evaluating the dimension of the weight and eventual restrictions imposed between the principles, the specificity of the Fundamental Social Rights that will be defended and preserved in its essential nucleus through the principle of freedom in fact, ensuring at least minimum conditions for the subsistence of individuals through the existential minimum, prevailing for its weight mostly, in its degree of application when in conflict with formal principles or colliding materials[41].

For the examination and investigation of fundamental rights and guarantees, a broad interpretative investigation of fundamental rights as a whole in their protective scopes is shown to be prudent and advisable, considering the unique character of the constitutional text, respecting the superiority of the norms of the constitution comprehensively on infraconstitutional legislation[42].

Based on this interpretative exercise, in specific cases involving Fundamental Rights, performance liability is intrinsic to all state powers, and when characterizing the disciplinary legislative omission of these rights, a concrete action on the part of the State will be legitimized, which in its exercise, will carry out the principled weighting in the circumstances of facts submitted to its appreciation, regulating and disciplining these constitutional norms, in service of the public interest and its immediate application[43].

CONCLUSION

In the course of this research, through various theoretical references, mainly with neoconstitutionalism, delimiting the composition of Law by the legal norms defined in rules and principles, the Normative Constitution was developed, gradually

[41] ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.
[42] SANTOS, Achibaldo Nunes dos Santos. DIAS, Bruno Smolerek. DE PAULA, Jônatas Luiz Moreira. **A diferença ontológica entre o devido processo legal, o contraditório e a ampla defesa sob o enfoque da Constituição Federal e das leis da República Brasileira.** Research, Society and Development, v. 10, n. 15, nov. 2021. Page 8.
[43] FRANCISCO, José Carlos. **Função regulamentar e regulamentos**. São Paulo: Forense, 2009.

introducing Fundamental Rights in its text, especially those of social nature, these rights not being just guidelines for the exercise of State activity, but having a relevant programmatic effect with immediate application, consisting of an obligation of the Public Power, to implement them.

The exercise of balancing norms is shown to be closely linked to those that at their core are classified as principles. This assertion is concluded by the analysis of the composition of the law, which is given in definitive duty through the rules, in which the hypothesis is subsumed to the precept or not. Among the principles, these are applicable in the widest possible range, considering their dimension and evaluation of their weight in each specific case, respecting the essential core of the law.

Therefore, in the exercise of judicial activity, when the consideration of principles is carried out, the application of jurisprudence or precedents, must always be observed in the light of the full reasoning by the judge, who will, in an ordinary way, intrinsically demonstrate the contours and grounds of the decision, in according to the peculiarities of each factual circumstance examined.

In specific situations, through the normative conception of the constitution, irradiated by the genuine influence of neoconstitutionalism, it will be possible, through the weighting of principles, consisting in the evaluation of the dimension and weight of the constitutional principles in each determined factual circumstance, to legitimize the performance of the Judiciary in the protection of fundamental rights.

In this way, by providing the effective application of Fundamental Rights, under the aim of ensuring and promoting minimum material conditions for human survival, a constitutional imposition that compels the Public Power as a whole to act positively, even in the face of the inertia of the Legislative Power, an equality of material order is established for those administered, under the prism of principiological balance.

Based on constitutional principles, especially the Dignity of the Human Person and the Existential Minimum, these principles will have, in the balance between principles, a different and more significant weight than the other principles in their applicability to the concrete case, when it comes to the effectiveness Fundamental Social Rights, respecting the essential core of the other rights involved.

Concerning the norms of Fundamental Rights, guarantors of the Dignity of the Human Person, founding principle of the State, the existence of law or the obligatoriness of its disciplining through the legislator, by the propositions brought by neoconstitutionalism, cannot be understood as an absolute mechanism of regulation and subterfuge to deny the implementation of such rights, in view of the public power's duty to fulfill and enforce fundamental rights, requiring the combination of other elements and factors present in the legal system, such as the exercise of weighting the constitutional principles.

At this juncture, this study that ends is just an initiation and prelude to an extensive and arduous journey in search of the improvement of the technique of balancing principles within the legal system and in Civil Procedural Law, which is an instrument for the realization and protection of fundamental rights of individuals, paying attention to the constitutional principles that always act in the irradiation of the legal system, in its understanding and outline, establishing an isonomic resolution to the examined problem.

REFERENCES

ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução Virgílio Afonso da Silva. São Paulo: Malheiros, 2008.

ALEXY, Robert. **Teoria dos direitos fundamentais**. 2. ed. São Paulo: Malheiros, 2011.

BANDEIRA DE MELLO, Celso Antônio. **Discricionariedade e controle jurisdicional**. São Paulo: Malheiros. 2. ed., 9 tir. São Paulo: Malheiros, 2010.

BARCELLOS, Ana Paula de. **A eficácia jurídica dos princípios constitucionais**: o princípio da dignidade da pessoa humana. Rio de Janeiro: Renovar, 2002.

DANTAS, David Diniz. **Interpretação constitucional no pós-positivismo**: teoria e casos práticos. São Paulo: WVC, 2004.

DIAS, Bruno Smolerek. SOUZA, Leonardo Fratini Xavier de. SIMAS, Silvonei. **A Efetivação do Direito Fundamental à Saúde por meio de Decisões do Poder Judiciário no Estado Contemporâneo**. Revista Brasileira de Direitos e Garantias Fundamentais. V.6, n.2, p. 01-21, Jul/Dez. 2020, Available in: <http://dx.doi.org/10.26668/IndexLawJournals/2526-0111/2020.v6i2.6978>, Accesses in: 14 de june 2022.

DWORKIN, Ronald. **Levando os direitos a sério**. 2. ed. São Paulo: Martins Fontes, 2007.

FERRAZ JÚNIOR, Tércio Sampaio. **Direito Constitucional**. São Paulo: Manole, 2007.

FRANCISCO, José Carlos. **Função regulamentar e regulamentos**. São Paulo: Forense, 2009.

MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz; MITIDIERO, Daniel. **Curso de Processo Civil**. v.1. São Paulo: Editora Revista dos Tribunais. 3. ed. rev. atual. E-book. 2017.

MARTINS, Ricardo Marcondes. **Efeitos dos vícios do ato administrativo**. 1ª ed. São Paulo: Malheiros, 2008.

MARTINS, Ricardo Marcondes. **Estudos de Direito Administrativo neoconstitucional**. São Paulo: Malheiros, 2015.

MARTINS, Ricardo Marcondes. **Teoria dos princípios formais.** Interesse público-IP: Belo Horizonte, ano 18, nº 98, julho – agosto, 2016.

MARTINS, Ricardo Marcondes. **Proporcionalidade e boa administração**. In: CAMMAROSANO, Flávia; ESTEFAM, Felipe Faiwichow. Direito Público em debate. Rio de Janeiro: Lumen Juris, 2014.

MEDINA, José Miguel Garcia. **Curso de Direito Processual Civil Moderno**, 5. ed. São Paulo: Revista dos Tribunais, 2020.

NEVES, Daniel Amorim Assumpção. **Novo Código de Processo Civil** – Lei 13.105/2015 – Inovações, Alterações, Supressões Comentadas. Rio de Janeiro: Forense; São Paulo: Método, 2015.

PIRES, Luis Manuel Fonseca. **Controle judicial da discricionariedade administrativa: dos conceitos jurídicos indeterminados às políticas públicas**. 2. ed., Belo Horizonte: Fórum, 2007.

SANTOS, Achibaldo Nunes dos Santos. DIAS, Bruno Smolerek. DE PAULA, Jônatas Luiz Moreira. **A diferença ontológica entre o devido processo legal, o contraditório e a ampla defesa sob o enfoque da Constituição Federal e das leis da República Brasileira.** Research, Society and Development, v. 10, n. 15, nov. 2021, Available in:< http://dx.doi.org/10.33448/rsd-v10i15.23090> Accesses in: 15 june 2022.

SARLET, Ingo Wolfgang. **A Eficácia dos Direitos Fundamentais:** uma Teoria Geral dos Direitos Fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2012.

SILVA, Virgílio Afonso da. **Direitos fundamentais: conteúdo essencial, restrições e eficácia**, 2ª ed. São Paulo: Malheiros, 2010.