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THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS IN PRIVATE RELATIONS IN ACCORDANCE WITH THE BRAZILIAN NORMATIVE, DOCTRINAL AND JURISPRUDENTIAL LEGAL SYSTEM

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Abstract: The Federal Constitution established categorically that fundamental rights are directly effective and apply immediately in the state's relations with private individuals, but it did not expressly state that these rights are effective in private legal relations. Thus, some theorists do not accept that fundamental rights are binding in private relations. However, there are others who consider that fundamental rights are binding on inter-private relations, but they differ as to how these rights radiate into these relations. So, what is the theoretical understanding that underpins the issue in the Portuguese legal system? In order to answer this question, this study compiled a set of normative, doctrinal and jurisprudential data on the subject under study and compared them with the hypotheses adopted in the research, then, using the inductive theoretical bibliographic method, it was possible to answer the above question.
Keywords: Fundamental rights; theoretical; effectiveness; irradiation; legal-private.

INTRODUCTION

Fundamental rights and guarantees are enshrined in Title II of the Federal Constitution of 1988 (CF/88), but they are also set out sparsely in the constitutional text. In the aforementioned Title II, Chapter I, it is ensured - art. 5, *caput*, *of* the CF/88 - that everyone is equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in Brazil the inviolability of the right to life, liberty, equality, security and property. However, both doctrine and case law understand that these fundamental rights and guarantees also apply to foreigners - visitors or in transit - who are not resident in Brazil, legal entities, bankrupt estates and condominiums. In addition, there are other fundamental rights sparse in the constitutional text, as well as implicit rights arising from the regime and principles adopted by the 1988 Federal Constitution.

As is well known, article 60, paragraph 4, item IV, of the Federal Constitution of 1988 establishes that a proposed amendment to the Constitution that intends to abolish the individual rights and guarantees laid down in the Federal Constitution of 1988 shall not be subject to deliberation. However, although these provisions are considered to be permanent clauses, which cannot be abolished or altered by constitutional amendments, in some cases, the state or private individuals themselves, by omission or commission, fail to fulfill their duties and obligations and violate these fundamental rights, thus giving rise to conflicts of interest.

As stated above, the constitutional text establishes that fundamental rights are binding on the state . They must therefore be observed and complied with by the public authorities, and are therefore directly effective in state relations. However, when it comes to linking these rights to legal relations between private individuals, the Constitution has been silent and has not expressly enshrined them. So the question is, based on the case law of the Federal Supreme Court, are fundamental rights binding or not on relations between private individuals in the Brazilian legal system? There are four hypotheses: the first, because of the constitutional principles of free enterprise and private autonomy, considers that fundamental rights are not binding on legal relations between private individuals; the second believes that yes, fundamental rights are binding on relations between private individuals in an - immediate - direct way; the third also understands that yes, these fundamental rights are binding on relations between private individuals, but in a - mediated - indirect way; the fourth, likewise, believes that fundamental rights are binding on inter-private relations, but is not concerned with the - direct or indirect -

subjective effectiveness of these rights. Thus, in order to decide which of the *prima facie* fundamental rights should prevail in the specific case, in the event of a collision of these rights, the rule of proportionality should be used and the intrinsic values of the respective fundamental rights weighed up. To support and substantiate the research, a database of normative, jurisprudential and doctrinal data on the subject was compiled and then, using the inductive bibliographic theoretical method, starting from the micro-analytical to the macro-analytical, it was possible to answer the above question, the object of this study.

THE IRRADIATION OF FUNDAMENTAL RIGHTS AND GUARANTEES IN STATE LEGAL RELATIONS AND BETWEEN PRIVATE INDIVIDUALS

In the Brazilian legal system, the fundamental rights and guarantees established in the 1988 Federal Constitution are directly binding on state relations. Art. 5, § 1 of the 1988 Federal Constitution expressly states that the rules defining fundamental rights and guarantees are immediately effective. However, there is some controversy on this subject, with some jurists considering that the fundamental right to freedom should be understood differently from fundamental social rights. However, as we will see below, in the Social State of Law, this understanding is not appropriate. This is because fundamental rights are systematically inseparable values within the Federal Constitution.

> There is no shortage of authors who only consider freedoms to be fundamental rights and who relegate social rights to the area of impositions on legislators or institutional guarantees. Just as there are those who do not accept true freedoms apart from the achievement of the factors of exercise, only acquired through the realization of social rights. However, from the point of view of the Social Rule of Law, whatever the interpretations and conceptual distinctions, both categories of rights cannot be denied qualification as fundamental rights. [...]. Inseparable, then, from each other, the rights of freedom and social rights are part of an axiological and systematic unity within the Constitution and the legal order as a whole. This is a basic postulate. Nevertheless, there are differences in structure, realization and, consequently, in regimes that cannot be overlooked.[1]

In the Brazilian legal system, the rights to freedom, social and economic rights and fundamental guarantees have a specific legal regime (art. 5, § 1, of the CF/88) and there is no hierarchy between them. They are all directly binding on the decisions of public authorities.

> It should also be noted that, in order to reinforce the imperative nature of the rules that translate fundamental rights and guarantees, the 1988 Constitution establishes the principle of the immediate applicability of these rules, under the terms of Article 5, § 1. This principle highlights the normative force of all constitutional precepts referring to fundamental rights, freedoms and guarantees, providing for a specific legal regime addressed to such rights. In other words, it is up to the public authorities to give maximum and immediate effectiveness to any and all precepts defining fundamental rights and guarantees. This principle aims to ensure that rights and guarantees of a fundamental nature have a direct and binding force, in other words, it aims to make these rights prerogatives directly applicable by the Legislative, Executive and Judicial Powers.[2]

As mentioned, by virtue of art. 5, § 1, of the CF/88 fundamental rights and guarantees are binding and must be adhered to by the

1. MIRANDA, Jorge. **Fundamental rights**. 2. ed. Coimbra: Almedina, 2017, p. 113-115.

2. PIOVESAN, Flávia. **Human rights and international constitutional law**. 18. ed., rev. and updated. São Paulo: Saraiva Educação, 2018, p. 113-114.

Legislative, Executive and Judicial Powers. Ingo Wolfgang Sarlet (extract below) points out that the 1988 Federal Constitution did not establish - nor does the case law of the Federal Supreme Court - any differentiation between fundamental rights and guarantees, so they must all be considered and applied directly by the public authorities.

> If, however, we choose not to settle for an argument based on an interpretation limited to the letter of the constitutional text, we will see that a systematic and teleological interpretation will also lead to the same results. In this sense, we can see from the outset that the Constituent certainly did not intend to exclude political rights, nationality rights and social rights from the scope of Article 5, Paragraph 1 of our Charter, whose fundamentality - at least in the formal sense - seems unquestionable. Nor is it possible to sustain, in Portuguese law, the Lusitanian conception (expressly provided for there in the Constitution) according to which the rule that enshrines the immediate applicability of fundamental rights covers only the rights, freedoms and guarantees (Title II of the CRP) which, in principle, correspond to the rights of defense, excluding from this reinforced regime (and not only in this respect) the economic, social and cultural rights of Title III of the Portuguese Constitution. Clearly, our Constitution has not established a distinction of this nature between the rights of freedom and social rights, with all categories of fundamental rights being subject, in principle, to the same legal regime, which also seems to correspond (at least with regard to the provisions of art. 5, § 1, CF) to the prevailing understanding of the Federal Supreme Court.[3]

However, according to art. 5, § 2, of the CF/88, the fundamental rights and guarantees expressly set out in the constitutional text do not exclude others arising from the regime and principles adopted by the Federal Constitution of 1988. Thus, all the fundamental rights and guarantees provided for in the Constitution, whether those in Title II, the sparse ones or the implicit ones (art. 5, § 2, of the CF/88) in the aforementioned Political Charter, are binding on state action. The absence of a normative provision expressly establishing this link between fundamental rights and inter-private legal relations in the CF/88 does not hinder or prevent the effects of these rights from spreading to relations between private individuals. This is because the impossibility of an immediate link, taken directly from the constitutional text, in no way restricts or prevents the formation of a mediated foundation, which can be structured through the hermeneutic use of the rules and principles laid down in the 1988 Federal Constitution.[4] Daniel Sarmento observes that the principle of human dignity is an important criterion for weighing up conflicting constitutional interests.[5] However, the effectiveness of fundamental rights in legal-private relations does not materialize in the same way as in legal relations between the state and private individuals, because in the former it is vertical, while in the latter it is horizontal, given that both subjects are recipients of fundamental rights.[6] Although fundamental rights and guarantees have a special legal regime, are inalienable and imprescriptible, they are not absolute, including the rights to free enterprise and private autonomy. This is because the right to self-determination and individual

3. SARLET, Ingo Wolfgang. **The effectiveness of fundamental rights**: a general theory of fundamental rights from a constitutional perspective. 13. ed., rev. and updated. Porto Alegre: Livraria do Advogado, 2018, p. 270-271.

4. MARTINS, Thiago Penido. **Health plan contracts**: the right to health in legal relations between health care plan operators and their beneficiaries. Curitiba: Juruá, 2016, p. 66.

5. SARMENTO, Daniel. **Dignity of the human person**: content, trajectory and methodology. 2. ed. Belo Horizonte: Fórum, 2016, p. 81.

6. MARTINS, Thiago Penido. **Discrimination in contractual relations**. Belo Horizonte: D'Plácido, 2016, p. 17.

freedom is limited by the effectiveness of other fundamental rights involved in the specific relationship.

> However, after the Second World War, it became clear that not only the state could violate fundamental rights. Private individuals could also violate the fundamental rights of other private individuals under the excuse of exercising private autonomy. From that moment on, mainly in Europe, discussions began about the possibility of applying fundamental rights not only when one side of the relationship was the state, i.e. in vertical, asymmetrical relationships, but also in a legal relationship involving private individuals, i.e. in relationships of supposed symmetry of power, in horizontal relationships. [...]. There is no need to talk about private autonomy, since private autonomy cannot be used to breach rights, whatever they may be. Private autonomy here is being distorted into private egoism.[7]

The aforementioned criticisms of private autonomy refer to the abuse of this fundamental right by private individuals. This is because the right to private autonomy stems from the right to free enterprise, a cardinal principle of private law, protected by the CF/88.

> The constitutional protection of private autonomy in the Brazilian legal system stems from the interpretation of the general right to freedom, the right to property, the right to free exercise of any work, trade or profession, the principle of free initiative, the right to inherit, the protection of the family, marriage and stable unions and the recognition of collective bargaining agreements or conventions signed, as these rights have the content of self-determination and self-binding of people that is intrinsic to private autonomy. Particularly with regard to the right to property and the principle of free enterprise, it is worth clarifying that the exercise of a business activity is linked to the right to property and is instrumentalized through contracts, the basis of which is the autonomy of will, so the Constitution protects private autonomy. [8]

However, it is important to note that not all fundamental rights are directly binding on relations between private individuals. This is because some of these rights have only the state as their final recipient.

> Thus, all fundamental rights which, by their nature, are aimed solely and exclusively at state bodies are excluded from the discussion, especially in terms of direct effectiveness. As an example, we could mention political rights, some fundamental guarantees in the procedural sphere (such as *habeas corpus* and the writ of mandamus). As far as social rights are concerned, the example of the subjective right to compulsory and free (public) primary education (art. 208, item I, of the Federal Constitution) illustrates the fact that the direct and immediate addressee - passive subject - of this right is the public authority, and not the private individual, which does not rule out the effects on private individuals or the existence of fundamental duties, in this case, for example, the duty of the family (parents or guardians) to ensure that their child has a minimum level of schooling. In any case, the direct binding of private individuals to social rights has also been the subject of controversy in Brazilian law.[9]

By virtue of their normative formulation, certain fundamental rights are bidirectional, as they radiate their effects to both the state and private individuals, since both are their final recipients. According to Ingo Wolfgang Sarlet[10] , among others, examples of fundamental rights that are directly binding

7. OMMATI, José Emílio Medauar. **A theory of fundamental rights**. 5. ed. Rio de Janeiro: Lumen Juris, 2018, p.45-50.

8. MENDONÇA, Ana Paula Nunes. **Fundamental rights in relations between private individuals**: discrimination in the pre-contractual phase of the employment relationship. Curitiba: Juruá, 2013, p. 90-91.

9. SARLET, Ingo Wolfgang. **The effectiveness of fundamental rights**: a general theory of fundamental rights from a constitutional perspective. 13. ed., rev. and updated. Porto Alegre: Livraria do Advogado, 2018, p. 395.

10. SARLET, Ingo Wolfgang. **The effectiveness of fundamental rights**: a general theory of fundamental rights from a constitutional perspective. 13. ed., rev. and current. Porto Alegre: Livraria do Advogado, 2018, p. 395 .

on both state and inter-private relations are: the right to compensation for moral or material damage, in the event of a violation of the fundamental right to free expression of thought (art. 5, items IV and V, of the CF/88), the right to inviolability of the home (Art. 5, item XI, of the CF/88) and the right to secrecy of correspondence and telematic communications (Art. 5, item XII, of the CF/88). In addition to these, several other social rights can be mentioned, especially those governing labor rights, which are addressed to employers, as a rule, private individuals (art. 7, *caput* and subsections, CF/88). Thus, in these cases, fundamental rights rules will be directly effective in both state and inter-private relations. Therefore, there is no need to question the fact that they are directly binding and immediately effective in both cases.

However, in addition to the aforementioned fundamental rights, which are notoriously immediately and directly binding on state and inter-private relations, there are other fundamental social rights which, to the detriment of their hazy normative wording, do not clearly show the respective link between these rights and the final recipient in legal relations between private individuals. As a result, doctrinal understandings are not totally convergent when it comes to the - irradiation - effectiveness of fundamental social rights in legal relations between private individuals.

Antonio Enrique Pérez Luño[11], when talking about the main theoretical positions in relation to fundamental rights, states that the positivist thesis believes that these rights are not effective vis-à-vis third parties, as they are only instruments of defense against the state. However, for the values theory, the institutional theory or the critical jusnaturalist theory, which are based on the foundations of the Social Rule of Law, the system of fundamental rights has binding normative force *erga omnes*, and is therefore fully applicable to legal-private relations. Under the influence of the above-mentioned theories, values and institutions, which conceive of the - binding - irradiation of fundamental rights to third-party relations, German jurisprudence and doctrine have developed in recent years the thesis that fundamental rights affect not only the relations of subordination between the state and private individuals, but also the relations of coordination arising in the legal relations of private individuals themselves. Among those who accept the effectiveness of fundamental rights in private-legal relations, there has been controversy over how these rights affect these legal relations. Some consider that it occurs immediately, which implies the requirement that private individuals submit directly and necessarily to the constitutional system of rights and freedoms, while others believe that this effectiveness occurs mediately, which requires the prior action of public authorities to determine compliance with fundamental rights in accordance with constitutional mandates.

Thus, the theory of the immediate effectiveness of fundamental rights defends the direct irradiation of fundamental rights in legal relations between private individuals. This theory was first postulated in Germany by Hans Carl Nipperdey.

> The theory of direct effectiveness was pioneered by Hans Carl Nipperdey, applied in the German Federal Labor Court, with the concept that fundamental rights have direct applicability to inter-private relations, with absolute effects, that is, without the intermediation of the state through legislative production or the need for the interpreter to make interpretative tricks so that fundamental rights radiate effects in relations between private individuals. In

11. PÉREZ LUÑO, Antonio Enrique. **Rule of law and constitution**. Translation by Paulo Roberto Leite. Revision of the translation by Silvana Cobucci Leite. São Paulo: WMF Martins Fontes, 2021, p. 304-305.

> this line of reasoning, fundamental rights generate subjective rights for citizens to oppose both public authorities and private individuals, without the latter being dependent on legislative regulation or legal interpretation. [12]

The theoretical concept of the immediate effectiveness of fundamental rights in legal relations between private individuals has been criticized by some jurists. According to Thiago Penido Martins,[13] questions about the theory of immediate effectiveness stem from the lack of constitutional precepts that expressly bind private individuals to fundamental rights rules, the risks of suppression or undue and exaggerated restrictions on private autonomy and legal uncertainty, especially with regard to freedom of contract and free enterprise. Nonetheless, proponents of the theory of mediated effectiveness consider that the effects of fundamental rights are indirectly binding on relations between private individuals. This theory of indirect effectiveness was first advocated in Germany by Günther Dürig.

> The theory of indirect effectiveness was pioneered by Günther Dürig , arguing that the social values expressed in fundamental rights have an impact on the entire legal system, but cannot be applied in an absolute way to inter-private relations, as suggested by the advocates of the theory of direct effectiveness, because it is up to the legislator to apply them to legal-private relations, within the scope of his freedom of choice and as the primary recipient of fundamental rights norms. The foundations of the concept of indirect effectiveness were applied in the famous German case of Lüth, judged by the German Constitutional Court (1958), and this theory has been mostly accepted by the doctrine and jurisprudence that deals with the horizontal effectiveness of fundamental rights. [14]

Proponents of the theory of mediate efficacy consider that fundamental rights have their effects throughout the legal system, but that this will depend on the interference of public authorities to reconcile these rights with private interests.

> The starting point for the model of the indirect effects of fundamental rights on relations between private individuals is the recognition of a general right to freedom, enshrined in the vast majority of the constitutions of Western democracies. [...]. But, contrary to what a first reading might suggest, the freedom of individuals and the autonomy of private law are not absolute, otherwise we would be faced with a total separation between the spheres of fundamental rights and private law (or other branches of law) and, consequently, with a model of non-effects of the former in the sphere of the latter. In order to reconcile fundamental rights and private law without one dominating the other, the proposed solution is for fundamental rights to influence private relations through the normative material of private law itself. This is the basis of indirect effects. [...]. The main link between fundamental rights as value systems and private law, according to the indirect effects model, are the so-called general clauses.[15]

The mediate theory has also been criticized, for example by Jürgen Habermas, who questioned the decision of the German Constitutional Court, which based the aforementioned theory, defended by Günther Dürig, in the Lüth case.

12. MENDONÇA, Ana Paula Nunes. **Fundamental rights in relations between private individuals**: discrimination in the pre-contractual phase of the employment relationship. Curitiba: Juruá, 2013, p. 37-41.

13. MARTINS, Thiago Penido. **Health plan contracts**: the right to health in legal relations between health care plan operators and their beneficiaries. Curitiba: Juruá, 2016, p. 88.

14. MENDONÇA, Ana Paula Nunes. **Fundamental rights in relations between private individuals**: discrimination in the pre-contractual phase of the employment relationship. Curitiba: Juruá, 2013, p. 40-41.

15. SILVA, Virgílio Afonso da. **A constitucionalização do direito**: os direitos fundamentais nas relações entre particulares. São Paulo: Malheiros, 2014 , p. 75-78.

> By ceasing to be driven by the idea of the realization of material values, constitutional law becomes an authoritarian body. In the event of a collision, all the reasons can take on the character of goal-setting arguments, which undermines the mainstay introduced into legal discourse by the deontological understanding of the rules and principles of law. From the moment that individual rights are transformed into goods and values, they begin to compete on an equal footing, trying to achieve primacy in each individual case. [...]. Norms and principles have a greater force of justification than values, since they can claim, in addition to a special dignity of preference, a general obligation, due to their deontological sense of validity; values have to be inserted, case by case, into a transitive order of values. And since there are no rational measures for this, the evaluation takes place arbitrarily or unthinkingly, following orders of precedence and customary standards. To the extent that the constitutional court adopts the doctrine of the order of values and takes it as the basis of its decision-making practice, the danger of irrational judges increases, because in this case functionalist arguments prevail over normative ones. [16]

The theory of imputation or *state* convergence, defended by Jürgen Schwabe, and the theory of equalization, also known as *State Action*, of American origin, despite having different conceptions, understand that the discussion about the effectiveness of fundamental rights in legal-private relations is irrelevant, since, regardless of the type of relationship, protection will always be granted by the state.

> The theories of statist convergence and *State Action* are not equivalent, but they have in common the fact that they deny the relevance of the discussion on (in)direct effectiveness by arguing that, even in private relations, protection will always be granted by the state, either through regulation by the infra-constitutional legislature or through interpretation by the judiciary. The doctrinal conception known as statist convergence was pioneered by Jürgen Schwabe , in Germany, when he denied the relevance of the discussion on the horizontal effectiveness of fundamental rights, believing it to be an apparent problem, since there will always be state action in inter-private relations. [...]. For adherents of this theory, the state would exercise the defensive function of fundamental rights by regulating them in the event of inter-private relations, so there would be no need to talk about the horizontal effectiveness of fundamental rights. The issue is resolved with the concept of the State's rights of defense. [...]. The *State Action* theory, based in the United States, is based on the liberal theory that only the state is bound by fundamental rights, which can only be invoked or opposed in the event of *state* action, with inter-private actions being excluded from the control of fundamental guarantees.[17]

However, both the theory of imputation or state convergence and the theory of equivalence - of private acts to state acts - also known as *State Action*, have been criticized by legal scholars. The former is questioned as a state subterfuge to curb certain private acts that violate fundamental rights, while the latter is criticized because, according to some theorists, adopting this theory would cause legislative inflation. This is because it would require disciplining all possible private-legal relationships.

> An analysis of the decisions handed down by the US Supreme Court [...] allows us to infer that when it comes to curbing private acts that violate fundamental rights, without abandoning its liberal vision, that Constitutional Court has used the theory of equivalence to equate them with public acts. This is a case-by-case subterfuge adopted by the US Supreme Court that

16. HABERMAS, Jürgen. **Law and democracy**: between facticity and validity. Translated by Flávio Beno Siebeneichler. V. I. Rio de Janeiro: Tempo Brasileiro, 1997 , p. 321-322.

17. MENDONÇA, Ana Paula Nunes. **Fundamental rights in relations between private individuals**: discrimination in the pre-contractual phase of the employment relationship. Curitiba: Juruá, 2013, p. 44-45.

> contributes little to the development of the theory of fundamental rights, by keeping it untouched and imprisoned in a classical, liberal conception. [...]. Schwabe's theory of imputation has been harshly criticized by various theorists. [...]. The adoption of the imputation theory would result in legislative inflation, due to the state's duty and need to regulate all possible legal-private relations, in order to avoid being held responsible for injuries to fundamental rights in the context of private relations. It should be noted that the theory of imputation is clearly incompatible with the principle of private autonomy, given that it would not be possible for the state to guarantee private individuals even the exercise of private autonomy, since by doing so it could be held responsible for any and all restrictions or violations of fundamental rights that occur within the scope of private relations, due to the exercise of private autonomy.[18]

But then Virgílio Afonso da Silva warns that, unlike the German Constitution, the 1988 Federal Constitution enshrined fundamental rights without expressing any restrictions on the scope of their effects. As a result, these rights can bind both state and inter-private relations.

> Article 1, III of the German constitution expressly states that fundamental rights "bind the legislative, executive and judicial branches of government". [...]. It so happens that the express designation of the state powers as the only recipients of fundamental rights norms is not repeated in the Brazilian Constitution. There is nothing in the Brazilian constitutional text to suggest that this is the case and that, consequently, would require recourse to an order of values in order to extrapolate a textual constitutional limitation, as occurred in the German case. And the non-recourse to this order of values exempts a model that extends the effects of fundamental rights to relations between private individuals, in the Brazilian case, from the main criticisms made of this type of thesis in Germany and other countries, which are those criticisms directed precisely against the idea of fundamental rights as an objective order of values. [...]. Given what has been briefly explained [...] and the lack of an article similar to the one mentioned in the Brazilian Constitution, it is perfectly possible that the direct applicability model plays a role in the Brazilian case that is not viable in the German case, since the main criticism of the model, well summarized in the passage above, would not apply here.[19]

Therefore, the fact that the application of fundamental rights and guarantees between private individuals is not expressly stated in art. 5, § 1, of the CF/88 does not exclude these rights, which are implicit in the constitutional text. Given that it would be strange, to say the least, for a Democratic State of Law to apply fundamental rights and guarantees only in relations between the state and private individuals, when it is clear that violations of such rights can also occur in inter-private relations. Fundamental rights and guarantees must therefore be applied in all situations, including conflicts between private individuals. In view of this, failure to comply with the implicit principles and normative force of the Federal Constitution would be an inversion of values, since the constitutional norm binds both infra-constitutional legislation and the jurisdiction itself. [20]

Fundamental rights are institutes with the axiological load of principles and must be adhered to by both the state and private individuals, but they are not absolute, so they should not be understood in the abstract, so if they are in collision, the judge, before deciding which of them should prevail in the specific case, must weigh up the intrinsic values of the

18. MARTINS, Thiago Penido. **Health plan contracts**: the right to health in legal relations between health care plan operators and their beneficiaries. Curitiba: Juruá, 2016, p. 101-103.

19. SILVA, Virgílio Afonso da. **The constitutionalization of law**: fundamental rights in relations between private individuals. São Paulo: Malheiros, 2014, p. 140-141.

20. OMMATI, José Emílio Medauar. **A theory of fundamental rights**. 5. ed. Rio de Janeiro: Lumen Juris, 2018, p. 47-50.

respective fundamental rights involved in the legal-private relationship.

> However, it is necessary to understand that principles should not be worked on in isolation from reality, i.e. in the abstract. The principles are not pre-established there-in-the-world to be fitted into concrete cases, in the best "choose (or find) the principle that fits your case" style, but rather must be extracted from these cases, considering their singularities and outside the judge's personal conceptions of morality about their content.[21]

With these understandings, many jurists admit the immediate effectiveness of fundamental rights in legal-private relations, but always subject to a prior analysis of the axiological load present in the fundamental social rights involved in the specific case.

> In the Brazilian legal system, it can be said that, based on the precepts contained in the first paragraph of Article 5 of the Constitution of the Republic, authors tend to recognize the effectiveness of fundamental rights in legal relations between private individuals, including admitting the direct effectiveness of fundamental rights. It should be noted, however, that not even those who subscribe to the theory of the direct effectiveness of fundamental rights do so unconditionally. It will be seen that Brazilian theorists admit, in principle, the direct effectiveness of fundamental rights in legal relations between private individuals, especially due to the recognition of the normative force of the constitutional text and the subjective and objective nature of fundamental rights. However, they condition the direct application of fundamental rights in legal relations between private individuals on the verification of certain characteristics or elements in the specific case.[22]

As mentioned above, even supporters of the theory of the direct effectiveness of fundamental rights in legal relations between private individuals do not accept the abstract application of this concept, but only if it is conditioned on an analysis of the specific case. In view of this, there has been some criticism of the theory of the immediate or mediate effectiveness of the radiation of fundamental rights in legal-private relations, claiming that it is no longer satisfactory in terms of substantive law.

> The position defended here is, to a certain extent, in opposition to the Lüth decision of the Federal Constitutional Court and the court's case law based on it, according to which one can only start from a "radiating efficacy" of fundamental rights on private law. In fact, the concept developed in the Lüth decision is currently in need of a "critical reconstruction". [...]. Rather, this is a purely constitutional procedural difficulty, which can therefore only be resolved using procedural law instruments. [...]. Furthermore, the theory of "radiating effectiveness" is no longer satisfactory today in terms of substantive law. This is because this expression is not a legal concept, but merely a metaphorical formulation taken from colloquial language and, from a dogmatic perspective, is no more than a fallback solution due to its vagueness. What's more, the theory of "radiative efficacy" is superfluous in the current state of legal-constitutional dogmatics, because all the corresponding problems can be solved more correctly and precisely by resorting to the "normal" functions of fundamental rights, such as prohibitions of intervention and imperatives of protection.[23]

The concepts defended by theorists Robert Alexy (integration theory) and José Joaquim Gomes Canotilho (differentiation theory)

21. PINHO, Ana Cláudia de; BRITO, Michelle Barbosa de. Is it possible to control motivated free will? When the talk of a theory of decision turns discretion into a "principle". *In*: OMMATI, José Emílio Medauar. (**Ronald Dworkin and Brazilian law**. Rio de Janeiro; Lumen Juris, 2016, p. 100-101.

22. MARTINS, Thiago Penido. **Health plan contracts**: the right to health in legal relations between health care plan operators and their beneficiaries. Curitiba: Juruá, 2016, p. 146.

23. CANARIS, Claus-Wilhelm. **Fundamental rights and private law**. Translated by Ingo Wolfgang Sarlet; Paulo Mota Pinto. Coimbra: Almedina, 2016, p. 131-132.

conceive that, depending on the specific case, both the direct and indirect effectiveness of fundamental rights in legal-private relations should be admitted, because they are compatible and complementary theoretical constructs. But they don't stick to them, they don't give primacy to any of them, they maintain that the original concepts of the immediate and mediate theories must be overcome.

> Contrary to what may be assumed, direct and indirect efficacy, are compatible and complementary theoretical constructions , building perspectives on the same phenomenon, to be adopted in different situations and at different times in the irradiation of fundamental rights into private legal relations, as Alexy and Canotilho point out. For this reason, a solution that claims to be adequate and aspires to contribute to the development of the effectiveness of fundamental rights in legal relations between private individuals will necessarily involve recognizing the coexistence of various forms of effectiveness, each referring to a certain aspect of the problem, without there being any claim to primacy between them.[24]

Thus, for Canotilho (excerpt below), the problem of the dichotomy of the effectiveness - direct or indirect - of fundamental rights in legal-private relations tends to be overcome and the effects of the vertical irradiation of fundamental rights in state relations should be expanded horizontally and also bind private entities.

> The binding of private entities [...] means that the effects of fundamental rights are no longer just vertical effects vis-à-vis the State, but horizontal effects vis-à-vis private entities (external effect of fundamental rights). [...]. The problem of the effectiveness of rights, freedoms and guarantees in the private legal order is today tending towards overcoming the dichotomy of mediate effectiveness/immediate effectiveness in favor of differentiated solutions. [...]. This effectiveness, in order to be understood accurately, must take into account the multifunctionality or plurality of functions of fundamental rights, so as to enable differentiated and appropriate solutions, depending on the fundamental right at stake in the specific case.[25]

As we have seen, it is not enough to overcome the dichotomy of the immediate or immediate effectiveness of the irradiation of fundamental rights, it is essential to analyze the specific case. As defended by Robert Alexy's theory of integration, the effectiveness of fundamental rights in private relations can be either direct or indirect, but these rights will always have at least a *prima facie* precedence, so these rights are subject to a weighting of their intrinsic values.

> According to this conception [...], the statements of fundamental social rights give rise to *prima facie* norms and positions that allow for legislative restrictions, as long as they are proportionate. These restrictions can be justified by economic limitations and also by the requirements that arise from other fundamental social, democratic or freedom rights or other constitutional goods. From this perspective, the principle of proportionality acts as a defining criterion for the binding nature of social rights. Analysis of the proportionality of restrictions on these rights indicates whether, in specific cases, the positions in which these rights are realized are only *prima facie* valid, or whether they are also definitively valid.[26]

Thus, in the event of fundamental rights colliding - in a specific case - the judge must weigh up the intrinsic values that permeate the respective fundamental rights that clash in the judicialized legal-private relationship.

24. MARTINS, Thiago Penido. **Discrimination in contractual relations**. Belo Horizonte: D'Plácido, 2016 , p. 99.
25. CANOTILHO, J. J. Gomes. **Direito constitucional e teoria da constituição**. 7. ed. Coimbra: Almedina, 2003, p. 1.287-1.289.
26. PULIDO, Carlos Bernal. The foundation, concept and structure of social rights: a critique of "Are there social rights?" by Fernando Atria. *In*: SOUZA NETO, Cláudio Pereira de; SARMENTO, Daniel (COORD.). **Social rights**: foundations, judicialization and social rights in kind. Rio de Janeiro: Lumen Juris, 2010, p. 168.

> The model is made up of three levels: state duty, rights vis-à-vis the state and legal relations between private individuals. These levels are not related by degree, but by mutual implication. The theory of indirect effects is located at the level of state duty. [...]. The second level is that of rights vis-à-vis the state that are relevant from the point of view of effects on third parties. [...]. The third level of the model concerns the effects of fundamental rights on legal relations between private individuals. [...]. A material theory of fundamental rights as a general normative theory is only possible in the form of a theory of principles. [...]. Material theories of fundamental rights can therefore be expressed not only as theories of principles, but also as theories of values or general teleological theories of fundamental rights. [...]. This means that democratic principles are included in the principles of fundamental rights and are given at least *prima facie* precedence.[27]

According to Thiago Penido Martins[28] , when defending the theory of integration, Alexy proposes reconciling the existing theoretical understandings on the effectiveness of the irradiation of fundamental rights in inter-private relations. It is a model that allows us to visualize the ways in which the rules of fundamental law will affect legal-private relations, ultimately allowing us to recognize the effectiveness of fundamental rights in these relations.

But regardless of the theoretical conception defended, the principle enshrined in art. 5, item XXXV, of the CF/88 imposes on the Judiciary the obligation to intervene, when called upon, if fundamental rights and guarantees are harmed or threatened with harm. In addition, as Article 1 of the CPC/15 states, the process in the Brazilian legal system must observe and be subordinate to the rules and principles established in the 1988 Federal Constitution. In this way, those whose fundamental rights are threatened or violated will be able to seek the fulfillment of their rights through the judicial process.

Thus, in the middle of 2004, the issue of the effectiveness of fundamental rights in inter-private relations was submitted to the sieve of the Federal Supreme Court, through RE No. 201.819-8/RJ, questioning the link and effectiveness of fundamental rights - due process of law, adversarial proceedings and ample defense (art. 5, items LIV and LV, of CF/88) - in the legal-private relationship, composed of UBC "União Brasileira de Compositores", a non-profit civil society, and a partner excluded from UBC itself.

The aforementioned member, who had been excluded from UBC's membership, filed a legal claim for his reinstatement, alleging that his fundamental right to an adversarial proceeding, to a full defense and, consequently, to due process of law had been violated, since the exclusion had occurred summarily and he had not been given the opportunity to defend himself - by producing the appropriate evidence. The Court of Justice of the State of Rio de Janeiro ruled that fundamental rights are directly linked to the legal-private relationship and annulled the exclusion penalty imposed on the grounds that the partner's fundamental rights - adversarial proceedings, full defense and due process of law - had been violated. This decision prompted RE No. 201.819-8/RJ, judged by the Second Panel of the STF, which, by a majority, following the vote of Justice Gilmar Mendes, decided not to grant the Extraordinary Appeal, on the grounds that fundamental rights are directly and immediately effective in legal-private relations. [29]

27. ALEXY, Robert. **Theory of fundamental rights**. Translated by Virgílio Afonso da Silva. 2. ed. São Paulo: Malheiros, 2015, p. 533-562.

28. MARTINS, Thiago Penido. **Discrimination in contractual relations**. Belo Horizonte: D'Plácido, 2016, p. 67.

29. MARTINS, Thiago Penido. **Health plan contracts**: the right to health in legal relations between health care plan operators

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The winning thesis, on which the decision in RE No. 201.819-8/RJ was based, was not unanimous, with Justice Ellen Gracie and Justice Carlos Velloso voting against it, because, unlike the others, they considered that the effectiveness of fundamental rights in inter-private relations is indirect - mediately. But, as reported, the majority of the Justices - Gilmar Mendes, Joaquim Barbosa and Celso de Mello - of the Second Panel of the STF, when judging RE No. 201.819-8/RJ, decided that the effectiveness of the irradiation of fundamental rights in legal-private relations occurs immediately. Therefore, it has been consolidated (extract below) that the fundamental rights that ensure due process of law, adversarial proceedings and a broad defense (art. 5, item LIV, LV, of the CF/88) do not require an infra-constitutional rule in order to be directly and immediately effective in all legal-private relations.

> RE No. 201.819-8/RJ - Original Rapporteur: Minister Ellen Gracie. Reporting Justice: Gilmar Mendes. Syllabus: Non-profit civil society. Brazilian Union of Composers. Execution of member without guarantee of full defense and adversarial proceedings. Effectiveness of fundamental rights in private relations. I. The effectiveness of fundamental rights in private relations. Violations of fundamental rights occur not only in relations between citizens and the state, but also in relations between individuals and legal entities governed by private law. Thus, the fundamental rights guaranteed by the Constitution are not only directly binding on public authorities, but are also aimed at protecting private individuals from private authorities. II. Constitutional principles as limits to the private autonomy of associations. The Brazilian legal-constitutional order has not given any civil association the possibility of acting in defiance of the principles enshrined in the laws and, in particular, of the postulates that are directly based on the text of the Constitution of the Republic itself, especially with regard to the protection of fundamental freedoms and guarantees. [...] The autonomy of the will does not give private individuals, in the area of their influence and action, the power to transgress or ignore the restrictions laid down and defined by the Constitution itself, whose effectiveness and normative force are also imposed on private individuals, within the scope of their private relations, in the area of fundamental freedoms. III. Non-profit civil society. Entity that is part of a public space, albeit a non-state one. Activity of a public nature. Exclusion of member without guarantee of due legal process. Direct application of the fundamental rights to full defense and adversarial proceedings. [...]. The public nature of the activity carried out by the company and the dependence on the associative bond for the professional practice of its members legitimize, in the specific case, the direct application of fundamental rights, concerning due process of law, the adversarial process and a broad defense (art. 5, LIV and LV, CF/88). IV. Extraordinary Appeal dismissed. (BRASIL. STF. RE No. 201.819-8/RJ. Original rapporteur: Justice Ellen Greice. Reporting Justice: Gilmar Mendes. Brasília, October 11, 2005, DJ 27.10.2006).[30]

As seen, in the aforementioned decision in RE No. 201.819-8/RJ, the Federal Supreme Court established its jurisprudence on the effectiveness of fundamental rights in legal-private relations, where it was established that the effectiveness of the irradiation of fundamental rights occurs immediately and directly in legal-private relations, but not in an abstract way, as the theory of immediate effectiveness defends, it will depend on the balancing of the intrinsic values of the fundamental rights in collision in the specific case.

and their beneficiaries. Curitiba: Juruá, 2016, p. 169-171.

30. BRAZIL. **Extraordinary Appeal No. 201.819-8/RJ**. Federal Supreme Court. Original Rapporteur: Justice Ellen Greice. Reporting Justice Gilmar Mendes. Brasília, October 11, 2005, DJ 27.10.2006. Available at: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=388784. Accessed on March 10, 2023.

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With regard to the direct and immediate effectiveness of fundamental labor rights in the legal relationship between private individuals, there is no question in the doctrine, not least because the direct recipients of these constitutional rights are the private individuals themselves. However, when it comes to fundamental social rights in legal-private relations, there are some differences of opinion in the doctrine, as a few theorists have yet to admit that the Supreme Court has already formed its jurisprudential understanding of the "*prima facie* direct effectiveness" of fundamental social rights - previously weighted by the judge - in legal-private relations.

However, as Ingo Wolfgang Sarlet notes[31] , while the thesis of immediate effectiveness remains dominant in German doctrine and jurisprudence, this is not the case in Brazil, since both in doctrine and in the jurisprudence of the STF, with the exception of a few isolated decisions, the thesis of non-absolute and differentiated direct effectiveness prevails. The criticism is that the final decision on weighing up fundamental rights with more or less abstract values is shifted to the Judiciary, and is therefore subject to the most varied interpretations emanating from litigation involving legal relations between private individuals. However, according to the aforementioned author, this does not prevent direct effectiveness, even more so *prima facie* direct effectiveness, as is the case in Brazil, but it does require a great deal of caution. This warning stems from the need to weigh up fundamental social rights with the right to private autonomy and free enterprise, principles of private law. In these cases, it will be necessary to weigh up the intrinsic values of the respective rights and only one of them will prevail in the specific case, but care must be taken so that neither right loses its essence or is totally sacrificed to the detriment of the other.

Despite the existence of some isolated decisions in the sense of indirect effectiveness, the jurisprudence of the Federal Supreme Court conceives the direct and immediate effectiveness of fundamental rights in private-legal relations, but does not do so abstractly, as it considers the *prima facie* direct effectiveness of fundamental rights in private relations. Thus, based on the theory of integration defended by Robert Alexy, after balancing the fundamental principles involved in the procedural dispute and deciding which of them should prevail in the specific case.

FINAL CONSIDERATIONS

As mentioned above, the fundamental rights and guarantees set out in the 1988 Federal Constitution are aimed at both Brazilians and foreigners residing or not in Brazil and are intended to protect the rights to life, liberty, equality, security and property, among others. In addition, fundamental rights and guarantees have a specific legal regime (art. 5, § 1, of the CF/88), there is no hierarchy between them and they are all directly binding on the decisions of public authorities.

However, when it comes to the effectiveness of fundamental rights in private legal relations, there are some differences of understanding about the link and the form of irradiation of these rights in state relations with private individuals. This is because in the case of legal relations between the state and private individuals, the effects of fundamental rights radiate vertically, while in legal-private relations they also radiate horizontally, because the recipients of fundamental social rights are the private individuals themselves.

Thus, for positivist theorists, fundamental rights are only binding on relations between the state and private individuals, as they consider that these rights are not binding on inter-private relations, as they are only

31. SARLET, Ingo Wolfgang. **The effectiveness of fundamental rights**: a general theory of fundamental rights from a constitutional perspective. 13. ed., rev. and updated. Porto Alegre: Livraria do Advogado, 2018, p. 401-402.

instruments of defense against the state. But for other jurists, who defend the theory of values - institutional or critical jusnaturalist - fundamental rights have binding normative force *erga omnes*, and are therefore applicable to legal-private relations. Under the influence of this theory, which sees the values of fundamental rights radiating into legal relations between private individuals, the thesis has developed which considers that fundamental rights not only affect relations between the state and private individuals, but also inter-private legal relations.

Among those who accept the effectiveness of fundamental rights in legal-private relations, there are various theoretical understandings. The theory of immediate effectiveness, defended by Hans Carl Nipperdey, admits the impact of the direct irradiation of fundamental rights in inter-private relations. The theory of mediated effectiveness, defended by Günther Dürig, considers that this effectiveness occurs indirectly in relations between private individuals. The theory of imputation or statist convergence, defended by Jürgen Schwabe, believes that in inter-private relations the state exercises the defensive function of fundamental rights, so there is no need to talk about the horizontal effectiveness of fundamental rights. The US theory of equating private acts with state acts, also known as *State Action*, believes that only legal relations with the state are linked to fundamental rights, so these rights can only be invoked or opposed in the event of state action, and therefore inter-private actions are excluded from the control of fundamental guarantees. The theory of differentiation, defended by Canotilho, considers that the dichotomy of the effectiveness - direct or indirect - of fundamental rights in inter-private relations tends to be overcome and the effects of the vertical irradiation of fundamental rights in state relations should be expanded horizontally and also bind private entities. The theory of integration, defended by Robert Alexy, conceives that the effectiveness of fundamental rights in private relations can affect both directly and indirectly, but such rights will always be constituted, at the very least, of a *prima facie* precedence, therefore, in concrete cases, in which there is a collision of these fundamental rights, the judge must weigh up the intrinsic values of the aforementioned rights that make up the contentious legal-private relationship.

As explained above, the Federal Supreme Court, when judging RE No. 201.819-8/RJ, decided and formed its jurisprudence based on the "direct *prima facie* effectiveness" of fundamental rights. Given that, in order to reach the decision on the merits of the aforementioned ruling, the ministers of the Second Panel of the STF based themselves on the theory of integration, since they were founded on the direct effectiveness of the *prima facie* precedence of the respective fundamental rights and carried out the balancing of the intrinsic values of the aforementioned rights that made up the respective judicialized legal-private relationship.

Thus, the STF's case law and, consequently, the country's legal system, based on the theory of integration, admits the *prima facie* direct effectiveness *of* fundamental rights in relations between private individuals, given that, when considering the direct effectiveness of fundamental rights in legal-private relations, the STF does not do so abstractly, as advocated by the theory of original immediate effectiveness, which defends the subjective - direct - effectiveness of these rights in inter-private relations. As mentioned above, in the theory of integration, fundamental rights have at least *prima facie* precedence, which is why, in the event of a collision of these rights, as occurred in the case - paradigm - that formed the STF's jurisprudence on the effectiveness of

fundamental rights in legal relations between private individuals, the judge, before deciding which of the rights will prevail in the specific case, must use the rule of proportionality and weigh up the respective fundamental rights that clash in the judicial process emanating from the respective contentious legal-private relationship.

REFERENCES

ALEXY, Robert. **Teoria dos direitos fundamentais**. Tradução de Virgílio Afonso da Silva. 2. ed. São Paulo: Malheiros, 2015.

BRASIL. **Recurso Extraordinário n° 201.819-8/RJ**. Supremo Tribunal Federal. Relator original: Ministra Ellen Greice. Relator do acórdão: Ministro Gilmar Mendes, Brasília, 11 de outubro de 2005, DJ 27.10.2006. Disponível em: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=388784. Aceso em 10 mar. 2023.

CANARIS, Claus-Wilhelm. **Direitos fundamentais e direito privado**. Tradução de Ingo Wolfgang Sarlet; Paulo Mota Pinto. Coimbra: Almedina, 2016.

CANOTILHO, J. J. Gomes. **Direito constitucional e teoria da constituição**. 7. ed. Coimbra: Almedina, 2003.

HABERMAS, Jürgen. **Direito e democracia**: entre facticidade e validade. Tradução de Flávio Beno Siebeneichler. V. I. Rio de Janeiro: Tempo Brasileiro, 1997.

MARTINS, Thiago Penido. **Contratos de planos de saúde**: o direito à saúde nas relações jurídicas entre as operadoras de planos de assistência à saúde e seus beneficiários. Curitiba: Juruá, 2016.

MARTINS, Thiago Penido. **Discriminação nas relações contratuais**. Belo Horizonte: D'Plácido, 2016.

MENDONÇA, Ana Paula Nunes. **Direitos fundamentais nas relações entre particulares**: discriminação na fase Pré-contratual na relação de emprego. Curitiba: Juruá, 2013.

MIRANDA, Jorge. **Direitos fundamentais**. 2. ed. Coimbra: Almedina, 2017.

OMMATI, José Emílio Medauar. **Uma teoria dos direitos fundamentais**. 5. ed. Rio de Janeiro: Lumen Juris, 2018.

PÉREZ LUÑO, Antonio Enrique. **Estado de direito e constituição**. Tradução de Paulo Roberto Leite. Revisão da tradução de Silvana Cobucci Leite. São Paulo: WMF Martins Fontes, 2021.

PINHO, Ana Cláudia de; BRITO, Michelle Barbosa de. É possível controlar o livre convencimento motivado? Quando a fala de uma teoria da decisão transforma a discricionariedade em "princípio". *In*: OMMATI, José Emílio Medauar. (Coord.). **Ronald Dworkin e o direito brasileiro**. Rio de janeiro; Lumen Juris, 2016, p. 95-124.

PIOVESAN, Flávia. **Direitos Humanos e o direito constitucional internacional**. 18. ed., rev. e atual. São Paulo: Saraiva Educação, 2018.

PULIDO, Carlos Bernal. Fundamento, conceito e estrutura dos direitos sociais: uma crítica a "existem direitos sociais?" De Fernando Atria. *In*: SOUZA NETO, Cláudio Pereira de. & SARMENTO, Daniel (COORD.). **Direitos sociais**: fundamentos, judicialização e direitos sociais em espécie. Rio de Janeiro: Lumen Juris, 2010.

SARLET, Ingo Wolfgang. **A eficácia dos direitos fundamentais**: uma teoria geral dos direitos fundamentais na perspectiva constitucional. 13. ed., rev. e atual. Porto Alegre: Livraria do Advogado, 2018.

SARMENTO, Daniel. **Dignidade da pessoa humana**: conteúdo trajetória e metodologia. 2. ed. Belo Horizonte: Fórum, 2016.

SILVA, Virgílio Afonso da. **A constitucionalização do direito**: os direitos fundamentais nas relações entre particulares. São Paulo: Malheiros, 2014.