

***The Right to Social Security from the perspective of the International System for the Protection of Human Rights and the Decisions of the Federal Supreme Court<sup>1</sup>***

***O Direito à Seguridade Social na Perspectiva do Sistema Internacional de Proteção dos Direitos Humanos e as Decisões do Supremo Tribunal Federal***

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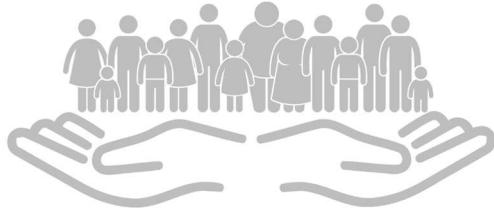
**ABSTRACT:** This article aims to underscore the Federal Supreme Court's significant role in shaping the understanding of social security as a human and fundamental right. It will delve into the concept and characterization of human and fundamental social rights, emphasizing the dignity of the human person, a principle that recognizes the inherent worth and value of every individual. The right to social security, including its perspective in the International System, will be explored. The article will argue that the right to social security must be universally recognized as a human and fundamental right. Finally, the decisions of the Federal Supreme Court, which hold immense weight in this context, will be thoroughly analyzed.

**KEYWORDS:** Human Rights; Fundamental Rights; Social Security Rights; Decisions; Federal Supreme Court.

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<sup>1</sup> The original version of this paper was first published in the book: Previdência social: em busca da justiça social. (Orgs.) Marco Aurélio Serau Jr e Melissa Folmann. São Paulo: LTr, 2015.





**RESUMO:** Este artigo tem como objetivo destacar o importante papel do Supremo Tribunal Federal na formação do entendimento da Seguridade Social como Direito Humano e como direito fundamental. Para tanto, será abordado o conceito e a caracterização dos direitos humanos e fundamentais sociais, com ênfase na dignidade da pessoa humana, princípio que reconhece o valor inerente a cada indivíduo. O direito à Seguridade Social, no contexto do Sistema Internacional, será explorado. O artigo defenderá que o direito à Seguridade Social deve ser reconhecido universalmente como um direito humano e fundamental. Por fim, serão analisadas as decisões do Supremo Tribunal Federal, que possuem grande peso nesse contexto.

**PALAVRAS-CHAVE:** Direitos Humanos; Direitos fundamentais; Seguridade Social; Decisões; Supremo Tribunal Federal.

## 1 INTRODUCTION

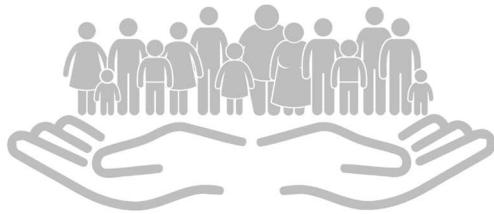
The 1988 Constitution determines that the State must achieve its fundamental objectives of building a free, fair, and supportive society, ensuring national development, eradicating poverty and social and regional inequalities, and promoting the good of all. To this end, it ensures the exercise of social and individual rights, freedom, security, well-being, development, equality, justice, and human dignity as the supreme values of a fraternal and pluralistic society founded on harmony Social.

For the Original Constituent Power, social security (an integrated set of actions initiated by public authorities and society aimed at ensuring rights relating to health, social security, and social assistance) had the objective of promoting and providing the dignity of the human person and individual well-being, as it aims to protect workers from social risks that could cause the reduction or loss of their working capacity and, consequently, the loss of their source of subsistence. The right to social security was the way that the original constituent found to reduce social inequality and provide a more just and supportive society.

However, when the organic laws regulating the social security system were approved, liberal ideology already predominated, which gave rise to several structural reforms of the system, including the status of a Constitutional Amendment. In fact, these reforms are contrary to a broad social protection system.

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Therefore, since the promulgation of the 1988 Federal Constitution, there has been an ideological conflict over the purpose and nature of Brazilian social security legislation.

The Federal Supreme Court, which should defend the Federal Constitution when resolving disputes involving social security rights, does so to subdue social security for economic security.

In this context, this article sets out to re-read the right to social security to understand it from the perspective of human and fundamental rights.

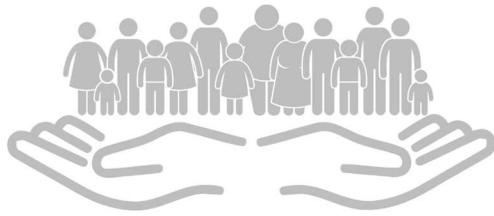
## 2 HUMAN AND FUNDAMENTAL RIGHTS

To understand the meaning and scope of "Human Rights," it is necessary to remember that it is practically impossible to give a ready-made definition for this expression.

The difficulty lies in the fact that "rights" remain forever under discussion since our understanding of who has rights and what these rights are constantly changes.

Regarding the different concepts of these expressions, Antonio Enrique Pérez Luño teaches that for some, these rights suppose a historical constant whose roots go back to the institutions and thought of the classical world. Others argue that the idea of human and fundamental rights arises from the Christian affirmation of the moral dignity of man as a person. Some claim that Christianity did not imply a message of freedom but rather a conformist acceptance of the fact of human slavery. Most scholars consider that human rights emerged during the people's struggle against the feudal regime and the formation of bourgeois relations. One part considers that human rights are the fruit of the affirmation of jus-naturalist ideals. Moreover, others define them as a product of the progressive affirmation of individuality, with the defense of individual property, religious freedom, and the genesis of modern capitalism (Luño, 2010, p. 32). Given the many different positions, the fight for human rights is secular, marked by achievements and setbacks. Events such as World War II and the Cold War boosted the search for an international system capable of protecting humanity's basic rights.





For this work, the "contemporary conception of Human Rights" was adopted, introduced with the advent of the Universal Declaration of 1948, and reiterated by the Vienna Declaration of Human Rights of 1993.

In this sense, human rights are rights that seek respect for human dignity and establish the essential conditions of life and the development of the human personality. These rights are attributed to humanity in general through International Treaties and Conventions. Fundamental Rights are Human Rights incorporated and recognized by the State (Sarlet, 2011, p. 32).

## 2.1 Characterization of Human and Fundamental Rights

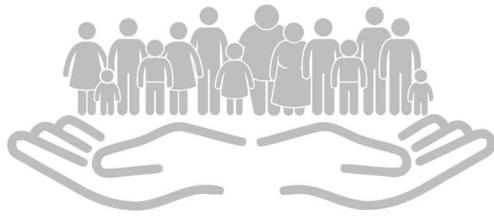
Human and Fundamental Rights are "formally fundamental" and "materially fundamental" rights.

Fundamental rights are formal and expressly provided for in the Constitution. They occupy a prominent position in the legal system, enjoying greater protection and requiring greater rigor in their application. They also have a more rigid and immutable content, making them more difficult to change or revoke (Miranda, 1998, p. 5).

The materially fundamental rights are not explicitly mentioned in the Constitution but arise from the fundamental principles that support it. They are implicitly recognized by doctrine and jurisprudence based on their relevance to human dignity and social development. They have content that is more flexible and adaptable to social needs and may change over time (Emerique; Gomes; Fonseca de Sá, 2006, p. 132).

The material dimension makes it possible to open the Constitution to other fundamental rights not included in its text (only materially fundamental) or outside the catalog, scattered but integral to the formal Constitution. It also allows the application of the legal regime specific to fundamental rights in a formal sense to these rights, which are only materially constitutional (Canotilho, 2003, p. 377).

The concept of material fundamental rights is not limited only to the rights established by the constituent power, but are the rights arising from the idea of the Constitution and



dominant Law, from collective legal sentiment, which would hardly make them completely distanced from respect for the dignity of the concrete man (Miranda, 1998, pp. 10-11).

### 2.3 Dignity of human person

Promoting the dignity of the human person is essential to its development and fulfillment in all its plenitude within a modern, civilized.

According to the lessons of Fabio K. Comparato,

As the only living being who directs his life according to evaluative preference, man plays a crucial role in promoting human dignity. He is the universal legislator in the function of the ethical values he appreciates and the subject who voluntarily submits to these evaluative norms. It is not enough for him to act in a way that does not harm anyone. Treating humanity as an end implies the duty to favor, as much as possible, the end of others. Since the subject is an end in itself, the ends of others must also be considered by him as his own (Comparato, 2013, p. 36).

Thus, state norms must regard the human person and his development as an end in themselves and never as a means to achieve a particular result.

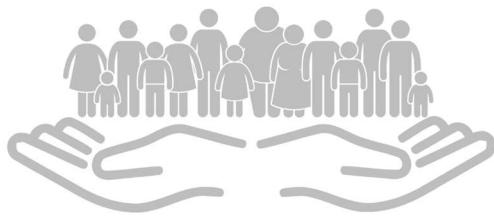
Therefore, the dignity of the human person is the essential core of the legal system, the supreme ethical value of Constitutions, Treaties, and Conventions. The purpose and reason for being of Law is the realization of the values of human beings in society. Therefore, the notions of human and fundamental rights derive from human dignity, values the Law aims to protect and promote.

In this step, the constituent's concern with ensuring human dignity and well-being is evident as an imperative of social justice.

The value of the dignity of the human person imposes itself as the essential core and informant of the entire legal system as a criterion and parameter for valuing the constitutional system's guidance, interpretation, and understanding.

Thus, by expressly consecrating the person's dignity as one of the foundations of the Federative Republic of Brazil, the original constituent legislator established the meaning, purpose, and justification for the exercise of state power and the State itself. In this sense, the





State exists as a function of the human person (to ensure political, social, economic, and legal conditions that allow human beings to achieve their ends) and not vice versa.

### 3. THE FUNDAMENTAL RIGHT TO SOCIAL SECURITY

With the liberal revolutions (French and North American), the bourgeoisie demanded the limitation of the State's (king's) powers in favor of respect for individual freedoms. It sought to establish the legal, administrative, cultural, and institutional bases to make capitalist economic development possible, always with extreme care to exclude the popular layers and workers from all centers and instances of political decision-making.

However, the prevailing political problems in the conflictive capital x labor relationship remained unchanged, resulting in social crises and revolutionary proposals defending the socialist model as an alternative to the capitalist model. Production development occurred due to the sacrifice of the population, especially the working class.

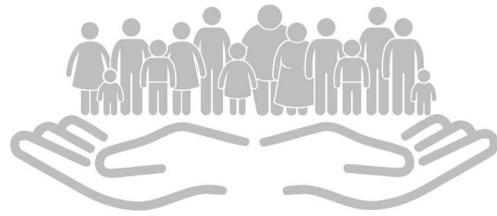
Under the influence of socialist thought, the European trade union movement questioned the enormous distance between the principles inscribed in the declarations of rights and the harsh reality experienced by workers and other segments of the population.

The idea then arises that the State, instead of abstaining and exercising a negative stance towards society, should act positively in the socioeconomic relations between individuals, guaranteeing them equality, always guided by the search for human dignity, so massacred by the exploitation of the proletariat (Theodoro, 2002, p. 29).

Therefore, it is within this scenario that the Welfare State seeks a balance between individual and social rights, having as its primary characteristics the supremacy of the Constitution, the division of Powers, respect for the principle of legality, the declaration and guarantee of individual and social rights; political participation with the democratic organization of society; and the positive action of the State to implement the Social State.

The Welfare State, by providing services in the areas of health, education, housing, and mainly social security, sought to solve many social problems (Cruz, 2004, p. 166).





Yes. Because, based on the ideal of equality of all human beings, the right to social security ensures a fair distribution of social goods and services, allowing everyone to choose their destiny freely.

However, to achieve substantive freedoms, it is essential that human beings do not suffer deprivation; that is, the basic needs of human beings (food, health, education) must be ensured by the State and by society as a whole so that this develops.

In this step, social security can be conceptualized as a set of principles and rules designed to establish a system of social protection for individuals against risks and contingencies that prevent them from providing for their basic personal needs and those of their family, integrated by initiative actions of Public Authorities and society, which aim to ensure rights relating to health, social security and social assistance (Martins, 2005, p. 22).

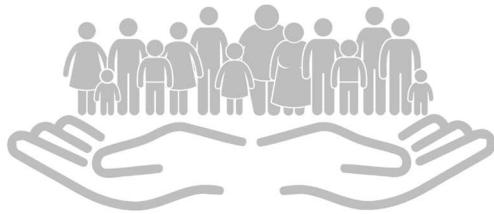
Today, social security rights are enshrined and recognized by State Constitutions such as Brazil (1988, art. 194), Chile (art. 18), Germany (1947, art. 20, I; art. 74, 12; art. 87, and; from France (1958, art. 34); of Greece (art. 1975, art. 22, item 5); from South Africa (1996, ss27), from India (1949, art. 246, Schedelu VII, List III, item 23) and from Japan (1946, art. 25) (Savaris; Strapazzon, 2014, p. 361).

## 4 THE RIGHT TO SOCIAL SECURITY FROM THE PERSPECTIVE OF THE INTERNATIONAL SYSTEM

At the international level, concern about protecting social security can be observed since the first human rights documents.

However, this protection only really gained strength in the 20th century with international declarations and conventions, especially the Philadelphia Declaration of 10.05.1944, which constituted the new Charter of the International Labor Organization, and the Universal Declaration of Human Rights of 10.12.1948, and with the adoption of a series of documents that made it possible to establish a legal order that aims to protect the dignity of the human person (social security, for this work)





Subsequently, the General Conference of the International Labor Organization adopted 1952 Convention 102, the Convention Concerning Minimum Standards for Social Security. Therefore, based on this Convention, the international legal community has no doubt accepted that the scope of human rights protection includes social security rights" (Savaris; Strapazzon, 2014, p. 374).

This Convention establishes that States Parties must ensure the provision of medical assistance, direct provision of periodic payments (sickness benefit), unemployment benefit, disability assistance, assistance in the event of a work accident, old age retirement, assistance for pregnant women, and death pension<sup>2</sup>.

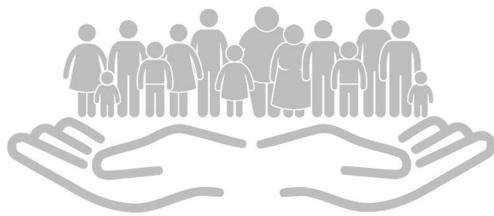
The International Covenant on Economic, Social, and Cultural Rights was signed in 1966. This treaty recognizes that human dignity can only be protected by creating conditions for the enjoyment of economic, social, and cultural rights.

It is also worth noting that the Federative Republic of Brazil ratified the International Covenant on Economic, Social, and Cultural Rights in 1992 and the San Salvador Protocol on Economic, social, and Cultural Rights in 1996.

Finally, it should also be noted that Brazil automatically incorporates the text of the treaties relating to human rights to which it becomes a party, adopting, at least about these matters, the monist theory of International Law, which conceives "Law as a unit and, consequently, international and internal norms, as an integral part of the same order" (Piovesan, 2007, p. 87).

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<sup>2</sup> Other ILO Conventions and recommendations relating to social security: • Social Security Convention (Minimum Standard), 1952 (n. 102); • Convention on equal treatment (Social Security), 1962 (n. 118); • Convention on benefits in case of accidents at work and occupational illnesses 1964; • Disability and Old Age Benefits Convention, 1967 (nº 128); Convention on medical assistance and monetary benefits for sickness, 1969 (no. 130); • Convention on the Conservation of Social Security Rights, 1982 (no. 157); • Convention on the Promotion of Employment and Protection against Unemployment, 1988 (nº 168); • Maternity Protection Convention (revised), 2000 (n. 183); and In 2001, the International Labor Conference approved Resolution and Conclusions relating to Social Security.



## 5 UNDERSTANDING THE RIGHT TO SOCIAL SECURITY AS A HUMAN AND FUNDAMENTAL RIGHT

As seen previously, social protection rights emerged as a defensive barrier for the individual against the economic domination of other individuals, interdicting members of society who economically depress or relegate other less favored individuals to abandonment.

In this step, the Federal Constitution of 1988, in its article 1, items II to IV, chose the dignity of the human person, citizenship, and the social value of work as foundations of the Democratic Rule of Law. Article 3, items I to IV, constituted the fundamental objectives of the Federative Republic of Brazil: the construction of a free, fair, and supportive society; ensuring national development; the eradication of poverty and marginalization, and reduction of social and regional inequalities; and promote the good of all. In turn, Article 6 expressly considered the right to social security as fundamental social rights. Moreover, article 193 states that the social order is based on the primacy of work, and its objectives are well-being and social justice.

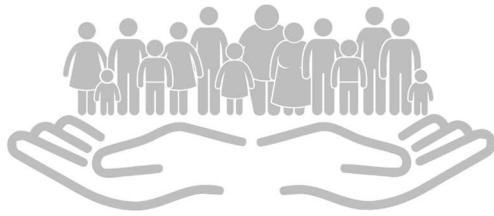
In this way, it can be said that social security is an essential pillar of the so-called welfare state, which imposes the obligation on public authorities to guarantee accurate and effective freedom and equality of the individual through fiscal and social policies that aim to contribute, on the one hand, to ensure that all citizens have equal conditions and, on the other, to place individuals who were left out of it due to risks such as illness, disability or job loss back into the job market.

Analyzing the concept and purpose of the right to social security, this right fits perfectly into the concept of human and fundamental rights and their characterizations (fundamental and material).

Therefore, it can be said that the right to social security is an authentic human and fundamental right, actionable, enforceable, and demands solemn and responsible observance, and must be claimed as rights and not as charity<sup>3</sup>.

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<sup>3</sup> In this sense, Asbjorn Eide and Allan Rosas: "Taking economic, social and cultural rights seriously implies, at the same time, a commitment to social integration, solidarity and equality, including the issue of income distribution. Social, economic and cultural rights include the protection of vulnerable groups as a central concern.



## 6 DECISIONS OF THE FEDERAL SUPREME COURT RELATED TO SOCIAL SECURITY

After analyzing human and fundamental rights, including the right to social security, and concluding that the right to social security is a human and fundamental right, it is appropriate to observe some decisions of the Federal Supreme Court related to the topic.

In the judgment of the Direct Unconstitutionality Action 3105/DF, concluded on 08/18/2004, the Federal Supreme Court, when examining the constitutionality of the contribution institution for inactive public servants and pensioners established by Constitutional Amendment 41/03, understood (a) such taxation is legitimate, as the principle of social solidarity would require the participation of inactive employees and pensioners in the funding of social security; (b) that social security benefits did not enjoy tax immunity; (c) that a tax requirement would not imply a violation of acquired rights or the irreducibility of the value of benefits; and (d) that it was possible to create new contributions without corresponding compensation in terms of benefits, without any violation of the actuarial balance<sup>4</sup>.

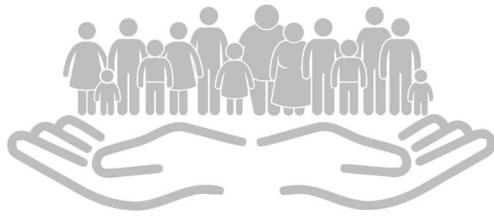
Unfortunately, following this decision, the STF jurisprudence adopted the constitutional principle of actuarial balance, according to which it is not possible to create, increase, or extend the provision of social security without a prior indication of the corresponding cost, as can be seen from the judgment of Extraordinary Appeal No. 415.454/SC<sup>5</sup>. In this case, the Supreme Court accepted the principle of cost precedence. It endorsed the understanding that this principle applies to the ordinary legislator and the judge.

[...] Fundamental needs should not be conditioned on the charity of state programs and policies, but should be defined as rights.” (EIDE, Asbjorn; ROSAS, Allan. Economic, Social and Cultural Rights: A Universal Challenge. In: EIDE, Asbjorn; KRAUSE, Catarina; ROSA, Allan. **Economic, Social and Cultural Rights**. Martinus Nijhoff Publishers, Dordrecht, Boston e Londres, 1995, p. 17-18, citados por PIOVESAN, Flávia. Direitos Sociais: Proteção Internacional e Perspectivas do Constitucionalismo Latini-American. In: SAVARIS, José Antonio; STRAPAZZON, Carlos Luiz (Coords.). **Direitos fundamentais da pessoa humana: um diálogo latino-americano**. Curitiba: Alteridade, 2012. p. 223-247, p. 230. Nota técnica n. 13)

<sup>4</sup> Supremo Tribunal Federal, Plenário, ADI 3105/DF, Rel. p/ Acórdão Min. Cezar Peluso, j. em 18.08.2004, DJ 18.02.2005.

<sup>5</sup> Supremo Tribunal Federal, RE 415.454/SC, Plenário, Relator Ministro Gilmar Mendes, j. 08/02/2007, DJ 26/10/2007. Vote: 10. Likewise, by extending the application of the new calculation criteria to all beneficiaries under the regime of the previous laws, the appealed ruling neglected the constitutional requirement that a law that increases social security benefits must, necessarily and expressly, indicate the source of total funding (CF, art. 195, § 5º). Precedente citado: RE 92.312/SP, 2ª Turma, unânime, Rel. Min. Moreira Alves, julgado em 11.04.1980. [...]





It is essential to highlight that, when observing the vote of the Minister Rapporteur, it is clear that at no time was it proven that there was no sufficient contributory basis to guarantee the application of the rule to all benefits without distinction.

Another judgment that discredits the Supreme Court's understanding (RE 626.489) refers to applying the statute of limitations in disputes involving the human and fundamental right to social security.

In this judgment, the Supreme Court, when facing the issue, preferred to ignore the facts that the application of the statute of limitations can: (a) separate the person from the social protection to which they are entitled, subjecting them to a perpetual condition of necessity; (b) circumvent the fundamental right to social security and, consequently, the fundamental principle of human dignity; (c) prevent the construction of a free, fair and supportive society; national development; the eradication of poverty and marginalization; the reduction of social and regional inequalities; and promoting the good of all.

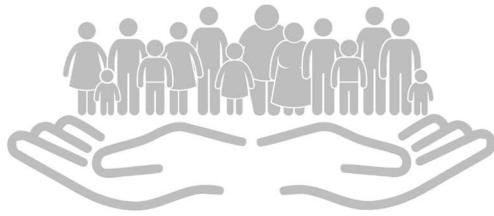
In truth, the STF's decision disregarded the nature and characteristics of the social security right - of which the social security right is a species.

When analyzing disputes related to the rights to social security, he prefers to subordinate constitutional reality to circumstantial reality, replacing "social security with economic security".

This is a total inversion of values since social security cannot be subservient to economic security, which does not even, as it is understood, have the same constitutional status as the first, which is a legal-constitutional concept (Savaris; Strapazzon, 2014, p. 261).

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13. Compliance with public social security policies, precisely because it is based on the principle of solidarity (CF, art. 3º, I), must be based on the fact that it is not possible to dissociate the contribution bases of collection from the prior legislative indication of the required budgetary allocation (CF, art. 195, § 5º). Precedente citado: julgamento conjunto das ADIs 3.105/DF e 3.128/DF, Rel<sup>a</sup>. Min<sup>a</sup>. Ellen Gracie, Rel. p/ o acórdão, Min. Cezar Peluso, Plenário, maioria, DJ 18.02.2005. 14. Considering the actions of the appellant authority, the principle of preserving financial and actuarial balance also applies (CF, art. 201, caput), which is demonstrated to be in line with the guiding principles of Public Administration (CF, art. 37) . 15. Unless there is an express legislative provision that meets the prior indication of the source of total funding, the social security benefit must be calculated in the manner provided for in the legislation in force at the date of its granting. Law no. 9,032/1995 can only be applied to concessions occurring after its entry into force.



## 7 FINAL CONSIDERATIONS

In this article, we have endeavored to underscore the significance of social security as a human and fundamental right. This right imposes a duty on public authorities to ensure the real and effective freedom and equality of individuals. It does so through fiscal and social policies designed to shield individuals from social risks such as illness, disability, or job loss.

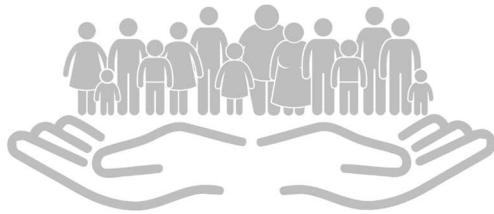
Our aim was also to highlight the crucial role of the Judiciary in interpreting the right to social security. This interpretation must align with the fundamental principles enshrined in articles 1 to 4 of the Federal Constitution. It is a means of realizing citizenship and the dignity of society and the human person. Moreover, it is essential to recognize that social security, when acknowledged as a human and fundamental right, must be imbued with the characteristics of these rights, such as inalienability, interdependence, and imprescriptibility.

It is crucial to restate that in adjudicating disputes related to social security, the judge must assume the role of a guarantor of the promotion of the human person. This entails implementing essential values for their dignified survival and fostering a sense of belonging to the society of which they are a part.

Unfortunately, the decisions brought in this article showed that the Judiciary, when providing the jurisdictional function, turns its back on the Greater Law and to judicial guarantees, which contribute so much to the consolidation of the Democratic State of Law.

This demonstrated that the Brazilian Supreme Court, instead of protecting the human and fundamental right to social security, chooses to adopt judgment criteria of a utilitarian nature—of concern with the results (consequentialism, not legal and moral—as it should be—but of an economic nature).

The criticism of economic consequentialism in judicial decisions is that it prevents the interpreter of the norm from acting beyond the legal text, making it impossible for them to adopt



a more active position as protagonists in guaranteeing and implementing human and fundamental rights.

Therefore, the Supreme Court faces a great challenge in overcoming the utilitarian ethics of maximizing well-being and replacing means-values with the economic consequences of results.

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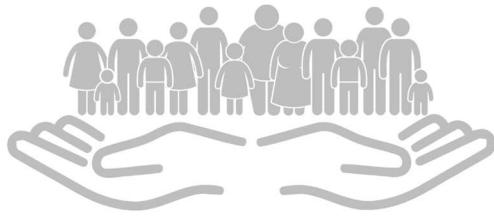
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