

COVID-19 THE DUTY TO PROVIDE ACCESS TO HEALTH IN MERCOSUR

COVID-19 O DEVER DE REALIZAR O ACESSO À SAÚDE NO MERCOSUL

NECESIDAD DE REDEFINIR EL ACCESO A LA SALUD EN EL MERCOSUR EN TIEMPOS COVID 19

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ABSTRACT:

In the global pandemic environment caused by COVID-19, the fulfillment of the duty of providing access to health becomes a challenge, especially for the developing countries in Mercosur. The unpredictability spread of the disease, associated with the costs of providing access to health make the task even more difficult to be implemented individually. This reinforces the need for a joint effort by Mercosur member states in order to face the pandemic. Thereafter, the hypothetical deductive method and bibliographic review will be used in this article. The conclusion is that, especially at the present moment when the problems are global, Mercosur institutions cannot fail to act on behalf of the needy.

KEYWORDS: Mercosur, COVID 19, Right to Health, Right to access to health.

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Introduction

Facing the global pandemic caused by Covid-19 is an even greater challenge for Mercosur member states, which already had difficulties in implementing access to health care even before this health crisis. The Covid-19 problem does not only affect this region, the whole planet is working to minimize the lethality of this disease, which, at high speed, it proliferates every day.

So far, there are millions of infected people, hundreds of thousands of dead¹ and this number is growing rapidly, especially among the most vulnerable social classes. On

¹ Data from John Hopkins University on May 25, 2020 pointed to the presence of 5,121,639 confirmed cases of covid-19 in the world, in addition to 333,323 deaths from the disease. Data available at: <<https://coronavirus.jhu.edu/map.html>>.

the other hand, also due to the coronavirus, the world economy is in decline and millions of individuals are unable to perform their daily work activities so that there is no further proliferation of the disease.

Also as a result of Covid-19, individuals, different sectors of society, States and international organizations are constantly looking for ways to fight the global pandemic and restore some degree of normality in personal, social and labor relations, as is perceived with the actions of the World Health Organization (WHO).

The crisis caused by the coronavirus has rekindled interest in themes that have been put on the back burner, such as the erosion of the Social Security protection network and the conditions of employment and work, which were further weakened by the event.

The global economy is already being affected, but at this moment, to save lives and prevent the spread of contamination is the most important thing and it is therefore essential that the State assume its role of guaranteeing access to health. There are several legal instruments that mention the engagement of States in relation to such access, be it in a less cogent way as in Article 25 of the Universal Declaration of Human Rights, either programmatically as in Article 12 of the International Covenant on Economic, Social and Cultural Rights or in Article 10 of the San Salvador Protocol. For this reason, in this academic effort, it is intended to demonstrate that there is a legal duty to effect access to health by state bodies, through the use of the hypothetical deductive method and the use of bibliographic review techniques and analysis of current cases linked protection and health promotion.

The central point of the analysis will be Mercosul, which evolved from a regional economic bloc, to an international body with a social bias (RIBEIRO; PINCHEMEL, 2012) and, therefore, inducing the establishment of public policies in areas of protection of society, such as health.

The processes of globalization and globalization made it possible for the circulation of people to potentially expose everyone to global risks, generating the need for structural changes, called by Ulrich Beck (2018) the "world metamorphosis".

The option to study Mercosur's actions in view of the international obligation to promote health is due to the problems experienced today, brought by Covid-19 that overflows state borders and must be perceived, at least, in regional dimensions.

To this end, the path of creation and evolution of Mercosul from an idea of economic integration to an agent with global dimensions of effective social protection will be demonstrated, mainly due to the fact that Latin America is the most unequal urban area on the entire planet (CEPAL, 2020). Due to the pandemic and the loss of working

conditions, there are millions of people in the Mercosur countries who are vulnerable to the lethality of the coronavirus for several reasons, for example, deficits in essential areas such as basic sanitation and access to drinking water.

Then, the main international legal instruments that impose the state and international duty to protect health will be analyzed, urging States and international bodies to comply with the legal obligation to realize the right to access to health.

It will be highlighted in the text that the countries that make up Mercosur include in their legal systems - including at the constitutional level - the essential right to health, present in important international instruments such as the International Declaration of Human Rights and the San Salvador Pact. Therefore, everyone has an obligation to provide conditions for this right to be realized, especially at the moment when the greatest epidemic of the 21st century occurs.

Finally, the academic pretense set out below is that Mercosur will assume the role of inducing public policies in the health area; which can put in place conditions for fighting the pandemic and its side effects for the Southern Cone.

Mercosur: Between the head and the heart

In 2020, the world is witnessing a global scale pandemic, individuals, cities, countries and regional blocs are being challenged to take quick measures to contain the loss of human lives, mainly through health actions. As Andrés Malamud (2020) pointed out, even the processes of globalization are in danger from the coronavirus. At the same States seek to minimize financial losses, which are creating even more problems for social stability, mainly due to the degradation of the employment and income conditions of citizens, especially of the most vulnerable classes, such as workers who do not have social security protection.

La pandemia ha demostrado ser un problema que puede impactar profundamente la economía global: se han evaporado trillones de dólares de las bolsas de valores de todo el mundo, antes que cerraran sus puertas para evitar el colapso absoluto, sea porque sus operadores cayesen enfermos, sea por la caída de sus activos financieros; millones de personas perdieron sus empleos, por lo menos temporalmente, y otros tantos trabajadores informales, excluidos de los esquemas de protección social, fueron abocados -por gobiernos omisos- a una trágica elección: o salen de sus casas para ganar el pan y se exponen al virus o se quedan en el aislamiento social y mueren de hambre. (BUSS, TOBAR, 2020, p. 56).

The coronavirus pandemic has affected virtually all countries in the world, and according to the World Health Organization and John Hopkins University, by May 22, 2020, the world had already registered 5,121,639 cases of contamination by the new coronavirus. Until then, Brazil was the 3rd country with the most records - with more than 310 thousand cases – and, unfortunately, it was rapidly advancing to the top positions. Argentina was 43rd, Paraguay 114th and Uruguay 117th. Across the planet, until May of this year, according to official data, more than 300 thousand people had already died from the disease and the number grows on a geometric scale, generating constant and intense concerns in everyone.

The perception is that, due to the processes of globalization, a moment of two speeds is being experienced: one with rapid pandemic progression and the other with slow and pachydermal protection by governments. This situation has been generating even more dissatisfaction on the part of different social groups with the processes of approximation of countries, as exemplified by Milton Blay (2019).

In this sense, it is necessary to promptly reframe personal, social and governmental actions in all its instances, even the role of commercial or regional blocs, such as Mercosur. The bloc has more comprehensive areas of activity than merely commercial integration, encompassing, in its instances, bodies of a social nature, whose objective should be to promote the well-being of society. The absence of a reframing of actions, at a time like this, can bring dire results, the changes that need to occur are critical and, according to the current lessons of Giorgio Agamben (2020, p. 1), “fear is a bad advisor, but it makes many things appear that until then pretended not to see”. For example, in Brazil, the lack of understanding of the deficiencies caused by the erosion of social security² rights. In Latin America, too, access to health, public assistance and social security has been restricted, in a region where there are millions of people in the extreme poverty range, that is, citizens who do not have access to the most essential rights, surviving on less than one hundred and seventy-six dollars a month (CEPAL, 2020).

A summary is that both people and the academic community and state and supranational bodies need to adapt to the “Cruel Pedagogy of the Virus” described by Boaventura de Souza Santos (2020), which presents the following doubts that will need to be answered shortly:

² SUS is one of the largest public health systems in the world and is linked to the Ministry of Health - MS, currently serving more than 190 million people. In addition, considering the constitutional precepts presented above, it is important to note that the country's unique system is a tool through which the Brazilian State fulfills its constitutional obligation to ensure the right to health for all Brazilians and foreigners residing in the country. (BRASILd, 2017, p. 20).

No entanto, o regresso à «normalidade» não será igualmente fácil para todos. Quando se reconstituirão os rendimentos anteriores? Estarão os empregos e os salários à espera e à disposição? Quando se recuperarão os atrasos na educação e nas carreiras? Desaparecerá o Estado de excepção que foi criado para responder à pandemia tão rapidamente quanto a pandemia? Nos casos em que se adoptaram medidas de protecção para defender a vida acima dos interesses da economia, o regresso à normalidade implicará deixar de dar prioridade à defesa da vida? Haverá vontade de pensar em alternativas quando a alternativa que se busca é a normalidade que se tinha antes da quarentena? Pensar-se-á que esta normalidade foi a que conduziu à pandemia e conduzirá a outras no futuro? (SANTOS, 2020, p. 29).

Aggravating this situation, which sometimes goes beyond governmental discussions, it must be realized that Latin America is the most unequal urban region on the planet as the Economic Commission for Latin America and the Caribbean (ECLAC) has repeatedly demonstrated, confirming what:

A erradicação da pobreza e da pobreza extrema e a redução da desigualdade em todas as suas dimensões continuam sendo desafios centrais para os países da América Latina e um dos principais nós críticos que a região enfrenta para avançar rumo ao desenvolvimento sustentável. (ECLAC, 2019, p. 12).

Regarding the problem of urban inequality, the academic construction of Haroldo Torres, Thais Pavez and Renata Gonçalves is recalled (2008) on the problems arising from social segregation, both in the context of building public policies for housing as in the realization that it is also a possible health problem, since the concentration of people in small spaces - as in low-income communities - favors the spread of pathogens, especially in cases of deficit in basic sanitation services, such as sewage and drinking water.

Faced with these dilemmas, one should not forget that Mercosur (Southern Common Market), created in 1991, is a process of regional integration that, although initially instituted by Argentina, Brazil, Paraguay and Uruguay, recently incorporated Venezuela - which is suspended (Cf. RIBEIRO; GONTIJO; SANTOS, 2018) - and Bolivia - which is in the process of joining. It is underlined that, technically, Mercosur is an imperfect customs union, moving towards the completion of the first step of a regional integration process, which is the free movement of goods and services, as highlighted by Rafael Bonete (2019). However, if, in the economic sphere, Mercosur needs adjustments to integrate, there are substantial advances that cannot be forgotten, such as the constant search for democratic stability in the region.

O Mercosul é, provavelmente, o esquema de integração comercial mais exitoso na história desse tipo de experimento na América Latina. Ainda assim, no contexto regional, ele deve ser visto apenas como mais uma etapa de um longo processo, certamente ainda não concluído, e que deverá enfrentar muitos percalços antes de se poder registrar, no continente, um experimento de escala e de aprofundamento comparáveis ao observado no continente europeu, no caso da UE. (ALMEIDA, 2019, p. 72).

Mercosur is marked by constant advances and setbacks, due to the fact that the countries of the bloc maintain great cultural, economic, financial, geographical, political and social asymmetries, as taught by Marcelo Oliveira (2003). Since these situations generate constant problems in the process of improving the block, taking as an example the list of exceptions to the Common External Tariff³, that point to an extensive list of goods and services that do not have uniform treatment within the bloc, due to political issues and protection of the internal market, hindering the advance of the integration of the economies and productive networks of the region.

The difficulty of advances in Mercosur can also be observed by the lack of coordination of health actions, during the pandemic by Covid-19, in which there is the adoption of very different measures among the bloc members, as will be shown ahead.

Nevertheless, it should be noted that, in an environment of mutual distrust between countries, in the years 1950 to 1980, Mercosur became a commercial power with a global dimension. It covers approximately 72% of the territory of South America (12.8 million km², equivalent to three times the area of the European Union); 69.5% of the South American population (288.5 million inhabitants) and 76.2% of South America's GDP in 2016 (US \$ 2.79 trillion out of a total of US \$ 3.66 trillion, according to data from the World Bank in 2017).

However, this dimension of Mercosur is its greatest asset and, at the same time, its liability:

A integração econômica é o processo de amalgamação de estruturas econômicas que serve para dar escala aos mercados, dotando economias relativamente pequenas de escala para projetos mais avançados. A prática pode servir também para sustentar empreendimentos políticos, securitizando contextos litigiosos e oferecendo condições para esforços de concertação política. (PENNAFORTE, MARTINS, 2017, p. 2).

³ Recuperado de <<http://www.camex.gov.br/tarifa-externa-comum-tec/tarifa-externa-comum>>.

Currently, "taken together, MERCOSUR would be the fifth largest economy in the world, with a GDP of US \$ 2.79 trillion. This bloc is the main recipient of foreign direct investment (FDI) in the region" (BRASIL, 2020, p. 2), being a global player that must be considered on the international stage, having even tackled a trade agreement with the European Union that can leverage the development of the entire region. Its economic relevance can also be seen in the graph at the front, consolidated in an environment of financial crisis and political instability that was established in the Southern Cone.

Figure 1 Economic relevance.



Fonte: BBC Brasil/2018.

From the data presented by ECLAC (2020), in contrast to the balance of payments shown in Graph 01, it appears that there is a gap between the economic position of the bloc and the distribution of wealth, that is, the fifth largest economy in the world, coexists (almost without worrying) with millions of people in extreme poverty.

Next, graph 02 shows the official data from the Mercosur Secretary for the year 2018, which showed growth in exports, both to the bloc's countries and to other countries, showing growth potential, even in an environment of strong uncertainty international economic activity, as highlighted below.

Figure 02 Mercosur Exports - 2018.

El valor de las exportaciones del MERCOSUR en 2018 fue de US\$ 276.327 millones, mientras que en 2017 fueron US\$ 219.408 millones. Esto significa un aumento de 9% en el periodo analizado.

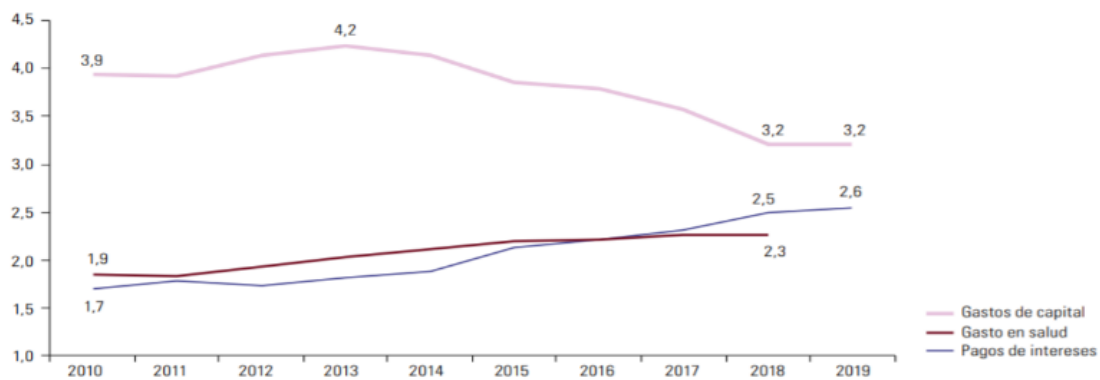


Fonte: Mercosur/2020.

Even with the global economic downturn caused by the coronavirus, Mercosur remains a potential market, whether for public or private agents, as demonstrated by ECLAC, in a survey published in April 2020 on "Dimensioning the effects of COVID-19 to think about reactivation", suggesting ways to minimize the effects of the pandemic and recover the development of the region, including, noting that government investment, for example, in the health area was falling until 2018, as shown in the graph below.

Figure 3 Government investment in health.

Gráfico 3 | América Latina (16 países): pago de intereses, gastos de capital y gasto en salud de gobiernos centrales, 2010-2019*
(En porcentajes del PIB)



Fuente: Comisión Económica para América Latina y el Caribe (CEPAL), sobre la base de cifras oficiales.
* Los datos de gasto en salud son los disponibles hasta 2018.

Fonte: ECLAC/2020.

It can be seen from the data in Graph 03 that there is a progressive and gradual growth in investment in health in the group of countries in Latin America. In the specific case of Mercosur, as a response (albeit late), the block "(...) approved an additional US \$ 16,000,000 contribution to the Plurinational project 'Research, Education and Biotechnologies Applied to Health', which will be destined entirely to the coordinated fight against COVID-19" (MERCOSUR, 2020, p. 1), seeking to present solutions to this public calamity.

However, in addition to its economic dimension, it should be noted "Mercosur was born with a vocation to be much more than a trade agreement" (MERCOSUR, 2007, p. 13). From this perspective, it should be noted that, apart from the functions of implementing trade between the countries of the Southern Cone, the right to integration and development, there is a search for the social approximation of countries and, mainly, of South American citizens.

Importante destacar que Mercosul pode ser cada vez mais democrático na medida em que os processos integracionistas sejam entendidos como projetos de coesão econômico social, capazes de diminuir as disparidades regionais e sociais dentro do bloco de conformidade com interesses dos cidadãos. Dessa maneira, a integração deve avançar de modo que influencie o cotidiano das populações envolvidas, criando condições para a mobilização delas em prol do interesse da sociedade civil. (MARTINEZ, MACHADO, 2019, p. 390).

Mercosur bodies that work in the social aspect have been striving to integrate people and organized civil society, and it can be seen that "the experience of social participation in Mercosur can also progress and improve" (BRASIL, 2007, p. 23). Progressively, in the 21st century, Mercosur has been improving the ties of the countries involved in it and seeking to solve common problems, as is happening with the current Covid-19 pandemic. Nevertheless, it should be noted that there are still many challenges in the social and democratic field that will need to be addressed by regional bodies in search of joint solutions.

Also, it cannot be forgotten that Paulo Roberto de Almeida (1999), with sufficient precedence and foresight, recommended the literature on the social dimension of integration processes, didactically demonstrating that, in addition to the concern with the narrowing of economies, links must also be established with society and the implementation of social rights such as education, culture and health. Another position that is in line with the vision of a social Mercosur was presented by Antônio Simões (2011), for whom solidarity is one of the pillars of the countries of the Southern Cone. Therefore,

market and community bodies should not be dissociated in order to promote the longed-for social development of this region.

The fact is that the Mercosur Social Summit, created in 2006 (which works in parallel with the Summit of the Presidents of the States Parties), is a political forum for debate on the direction of integration, it “[...] originated from the perception of the lack of coordination of social policies in the region” (BRASILa, 2007, p. 24). In this context, it is clear that the Mercosurian actions are not only focused on the economic approach, they also present a perception of social development as a condition for progress itself. The Social Summit gathers several actors from civil society and its results are sent to the bloc's decision-making bodies.

In this sense, “Mercosur has intended to strengthen the channels of dialogue between the different social sectors, favoring a greater participation of social movements in the elaboration of policies common to the countries of the bloc” (MARTINEZ; MACHADO, 2019, p. 390). The social dimension of Mercosur can also be perceived, according to Prá, Mendes and Mioto (2007), as the involvement of governments and civil society with the development of common public policies, as already occurs in border areas of the Mercosul countries.

The Social Participation Support Unit, currently subordinated to the Mercosur Secretariat (previously linked to the former High Representative General) is a way of maintaining the international body's contact with NGOs and social movements (RIBEIRO, 2019, p. 158- 159). In addition, Mercocidades and the Mercosur Parliament have their own capillarity in these media. Although these instruments do not have the desired effectiveness by different sectors of society, it is possible to affirm that this is a gradual and necessary movement and that it should not be stopped.

Mercosur's social position, as well as the understanding that there are problems that transcend state differences and limits, led the presidents of Mercosur countries to issue a Common Declaration, in March 2020, in which they recognize “that the pandemic caused by COVID-19 does not respect borders, requiring efficient and permanent regional coordination, based on good practices based on scientific evidence and guidelines and guidelines issued by the competent organizations” (BRASILa, 2020, p. 1).

Another dimension of social integration is the adoption of public policies in the area of health, especially during the coronavirus pandemic, which causes danger to the whole society and establishes even more prominent duties to the Mercosul States, as will be shown below. The adoption of health policies occurs at the intergovernmental level, insofar o it takes place in decision-making bodies or through the coordination of technical

bodies (RIBEIRO, 2019, p. 148). The Meeting of Ministers of Health and the Health Working Subgroup and the Working Group are responsible for recommending joint actions at the regional level, but also for adopting, through coordination, national actions that are within their competence technicians (RIBEIRO, 2019, p. 155-157, 161-162).

Still in the field of development cooperation projects, the Mercosur Structural Convergence Fund (FOCEM) has been active in implementing the multi-annual project "Research, Education and Biotechnologies Applied to Health", which aims to strengthen national responses to fight the virus (RIBEIRO, 2019, p. 171-173).

The Multilevel Assumption of the Legal Duty to Promote Access to Health in front of the Pandemic Caused by Coronavirus

At the present moment in humanity, there is practically no doubt that the "(...) increase in global interactions brought with it a new legal framework to govern relations" (SILVA, 2016, p. 31). In this context, the main problems of today's society, as with the Covid-19 pandemic, are no longer confined to just one state. It is logical and necessary that the internal and international spheres come together to solve urgent problems, such as the localized lack of medicines, beds or health professionals, which create even more difficulties to overcome the current crisis.

We are witnessing "The metamorphosis of the world", theorized by Ulrich Beck (2018), a situation that foresees a change in global standards, whether in terms of coexistence, or even regarding production chains concentrated in specific hubs - which, as it turned out, are also susceptible to endemic problems.

Moving forward, it can be said that "the opposite of living is not dying, but letting oneself be dominated by hopelessness" (SILVA, 1999, p. 318). In the context of an increasing pandemic, a situation in which social isolation is being suggested by international organizations - mainly by WHO - and by several governments, there is more and more an environment of economic, personal and social insecurity, amplified by the vast urban social difference in Latin America⁴. It is in this tuning fork that it is necessary to rediscuss academically the internal and international extension of the duty to

⁴ Reinforcing in 2014: The asymmetry that characterizes the bloc countries, also, stands out when paying attention to the figures related to the gross domestic product (GDP) in 2012: in Brazil, the GDP is 1.6 trillion dollars and GDP per capita is \$ 6,060; in Argentina, the values are, respectively, 328 billion dollars and 6,040 dollars; in Uruguay, the GDP reaches 32.2 billion dollars and the GDP per capita, 6,620 dollars; in Paraguay, the respective values are 16 billion dollars and 1,710 dollars (MERCADO COMÚN DEL SUR, 2014).

implement the right to access to health, especially in the Mercosur environment, realizing that:

[...] a crise pela qual o Mercosul está passando não se deve apenas às diferenças na agenda comercial. Vale lembrar que, embora a parte econômica sempre ocupe um lugar central no processo de integração, o Mercosul é um projeto multidimensional, que inclui cooperação em questões de educação, meio ambiente, saúde, transporte, direitos humanos e também segurança. (FREMKE, 2020, p. 14).

It can be considered that the forecast of the commitments made in relation to the right to health is arranged on a multilevel scale from the global to the national. This reinforces the layers of protection and implementation of such precepts. To this end, a theoretical reconstruction of the need to protect individuals is proposed, especially with regard to the fundamental human right of access to health for all people, as an effective way to overcome the pandemic caused by Covid-19. It starts with the adoption of the Universal Declaration of Human Rights (UDHR), going through the International Covenant on Economic and Social Rights (ICESCR) and reaching regional and national protections on the right to access to health.

Paragraph 1 of Article 25 of the UDHR states that:

Toda a pessoa tem direito a um nível de vida suficiente para lhe assegurar e à sua família a saúde e o bem-estar, principalmente quanto à alimentação, ao vestuário, ao alojamento, à assistência médica e ainda quanto aos serviços sociais necessários, e tem direito à segurança no desemprego, na doença, na invalidez, na viuvez, na velhice ou noutros casos de perda de meios de subsistência por circunstâncias independentes da sua vontade.

By giving effect to the provisions of the UDHR, Article 12 of the ICESCR, which was received by Brazil, with a supralegal hierarchy, reads as follows: "the States Parties to the present Covenant recognize the right of every person to enjoy the highest possible level of physical health and mental." (BRASILb, 2020, p. 4).

Dessa forma, o direito à saúde foi trazido à ordem internacional de proteção aos direitos humanos como direito social e dever de todo Estado Parte garantir a qualquer ser humano o direito a ser saudável, com exemplos de medidas que os Estados devem adotar para garantir plenamente esse direito. (GREGORI, 2015, p. 203).

It should also be noted that, in order to ensure the right to health, General Comment No. 14 to ICESCR was edited by the United Nations Organization's own Commission which

points out doctrinally the guidelines that must be followed when internalizing international health standards, including proposing:

O conceito "melhor estado de saúde (...) possível de atingir", a que faz referência ao artigo 12, n.º 1, tem em conta tanto as condições biológicas e socioeconômicas essenciais da pessoa como os recursos que o Estado tem disponíveis. Existem vários aspectos que não podem ser abordados unicamente do ponto de vista da relação entre o Estado e os indivíduos; em particular, um Estado não pode garantir uma boa saúde nem pode proteger contra todas as causas possíveis de má saúde do ser humano. Assim, os fatores genéticos, a propensão individual à doença e a adoção de estilos de vida doentios ou perigosos podem desempenhar um papel importante no que respeita a saúde da pessoa. (ONU, 2020, p. 150).

In General Comment No. 14, it is also possible to see that the right to health is treated in a positive way. "(...) the right to health must be understood as a right to enjoy the full range of facilities, goods, services and conditions necessary to achieve the best possible health status" (ONU, 2020, p. 150). It is emphasized that the word "should", used in this comment, determines a state action to make this right effective, therefore, the duty to promote health becomes recognized. Didactically, it is reiterated that).

O direito à saúde, tal como qualquer outro direito humano, impõe três tipos ou níveis de obrigações aos Estados Partes: as obrigações de respeitar, de proteger e de realizar. Por seu lado, a obrigação de realizar compreende a obrigação de facilitar, de proporcionar e de promover. (ONU, 2020, p.150).

In a solar way, the State and international entities must implement actions that concretize the right to health. Directly, in normal times, there is already state responsibility and, in moments like the current one, when a state of calamity is decreed, access to health is literally vital.

One last point that can be brought to light based on the General Commentary on art. 14, still, directs to the understanding of the need to "ensure the right of access to health centers, goods and services in a non-discriminatory way, especially with regard to vulnerable or marginalized groups" (UN, 2020, p. 150) and, with this information, do not lose sight of the fact that the current pandemic marginalizes a large number of citizens who are unable to carry out their work activities and, therefore, may find themselves in a situation of vulnerability.

At the regional level, there is the Inter-American System for the Protection of Human Rights. From the lesson of Varella, Monebhurrin and Gontijo (2019), that there is

a duty of protection in the inter-American system, for these authors, cases of disrespect for human rights must be investigated. As a logical consequence, this obligation extends to achieving access to hospital medical care during a crisis.

Deve-se lembrar de que um sistema de saúde reflete a concepção de igualdade e cidadania hegemônica de cada país. Mais significativo para o objetivo deste texto é a concretização efetiva das propostas expressa em alteração em indicadores de saúde, o que leva necessariamente a avaliar, negativa ou positivamente, os serviços prestados no setor da saúde. (NOGUEIRA *et al.*, 2015. p. 151).

Bernardes and Ventura (2013, p. 116-121) point out that the Inter-American Commission on Human Rights received three petitions related to cases essentially linked to health protection: Petition 12.242, Pediatric Clinic of the Lagos Region, Petition 1401-06, Lawrence Dutra da Costa and Petição 12.237, Damião Ximenes Lopes (IACHR, 2006). It is important to note that it is not possible to submit petitions to the Commission or the Inter-American Court for violations of the rights provided for in the Protocol of San Salvador, such as the right to health. However, in the three cases mentioned filed indicating the violation of other rights, present in the San José Pact of Costa Rica, the right to health was part of the fundamental issue, for this reason, we chose to mention them.

In the Damião Ximenes Lopes case, the Commission took the application to the Inter-American Court of Human Rights (IACHR) to decide whether there was a violation of the rights contained in the following articles of the San José Pact of Costa Rica: 4, 5, 8 and 25, or that is, right to life personal integrity, judicial guarantees and judicial protection. Although the IACHR has primarily used the right to life and the "prohibition against torture and cruel punishment or treatment, inhuman or degrading" (IACHR, 2006) to sentence against the Brazilian State, it can be said that it is a sentence in a health case, in a broad way⁵.

Within the framework of the Inter-American System, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights was also established (Protocol of San Salvador, accepted in Brazil by Decree No.

⁵ Although Brazil remained for a long time involved in a dictatorial government, while human rights issues were already on the international agenda, it is observed that, from the 1988 Constitution, the country gradually begins to move towards the changes depending on the parameters of the Universal Declaration of Human Rights, even because society starts to look for ways to implement a regime of personal freedom and social justice, founded on the respect of essential human rights. Three cases of omission / neglect by the State regarding the right to health were identified, including issues of right to life involving newborns, children and people with mental disorders, extreme examples of a part of society that is totally dependent on the protection of effective state policies (BERNARDES; VENTURA, 2013, p. 19).

3.321 of December 31, 1999) which, in December Article 10, regarding the right to health, states that:

- 1 Everyone has the right to health, understood as the enjoyment of the highest level of physical, mental and social well-being.
2. In order to make the right to health effective, States Parties undertake to recognize health as a public good and, in particular, to adopt the following measures to guarantee this right: (...)
 - c. Total immunization against the main infectious diseases;
 - d. Prevention and treatment of endemic, professional and other diseases (OEAb, 2020, p. 3).

Still from a regional point of view, there is the provision contained in the Social Charter of the Americas, which reads as follows: "the peoples of the Americas have a legitimate aspiration for social justice; and their governments, the responsibility to promote it." (OEA, 2020, p. 2).

If "the right to health ensures the promotion of an individual's physical, mental and social well-being, imposing on the State the provision of public services to all to prevent or eliminate diseases and other encumbrances" (RAMOS, 2019, p. 768), in addition to the declaratory legal act, which covers all persons, there is an effective need for continuous action by the State and, consequently, by the international health protection bodies of all people involved.

Do direito à vida (art. 5º, da Constituição) e do direito à dignidade da pessoa humana, a consequência é o direito à saúde. Não se pode falar em direito à vida, sem que se garanta o acesso ou o direito à saúde (MARTINS, 2019, p. 730).

Due to the express reception of the right to health by the legal systems of all Mercosul States, these constantly allocate, within their realities, resources for the health area, with no remaining doubts that "health, in turn, is a duty of the State" (GARCIA, 2020, p. 257) and, consequently, of Mercosur's social bodies⁶.

(...) denote-se que o direito à proteção da saúde é formulado como um direito com uma dimensão tipicamente prestacional ou positiva (que incumbe os Estados de tomarem medidas, sob a forma de políticas públicas, destinadas à prevenção da doença e seu tratamento), mas também uma dimensão negativa (traduzida na possibilidade de se exigir

⁶ "Esclarece-se que o direito à saúde está incluso no rol dos direitos sociais e, por esse motivo, é referido na legislação interamericana de forma expressa ou incorporado aos direitos econômicos, sociais e culturais. No Brasil, inclusive, é compreendido como direito fundamental, ao lado de outros direitos fundamentais individuais" (MAAS, DAROIT, 2019, p. 19).

do Estado ou de terceiros que se abstenham de praticar quaisquer atos que possam ser considerados prejudiciais à saúde) (FIGEIREDO, 2020, p. 45).

Reinforcing, it is necessary to “address the state's duty to realize, first, the right to health, as this must be preponderant over other rights, mainly of an economic nature” (FERREIRA, 2020, p. 63). This is a lesson that is in line with the Kantian lesson that all people have dignity, therefore, the human being has innate irreplaceable and immeasurable value.

Mesmo considerando as dificuldades e restrições elencadas, conclui-se pela funcionalidade e relevância da dimensão jurídico-normativa face ao que se convencionou designar, na literatura política, de Estado em ação para implementação dos acordos e normativas sociais. Alterações no quadro fronteiriço exigem a intervenção estatal, concretizando o plano discursivo formal, viabilizando a efetivação de planos, programas e projetos incidentes sobre situações a serem alteradas (FAGUNDES, NOGUEIRA & KREUTZ, 2018, p. 162).

As there are times when the obvious also needs to be said, especially in situations like the current one, “the right to health (...) constitutes the right of all and the duty of the State, based on universal and equal access to health care actions and services promotion, protection and recovery.” (FERNANDES, 2019, p. 1745). Therefore, at a time when there are hundreds of thousands of people in the Southern Cone prone to direct contact with Covid-19, state and supranational financial investments are needed to combat this disease and its side effects, such as, for example, loss of income due to the social isolation of formal and informal workers.

Es posible identificar algunas líneas de trabajo que, sin duda, aportarían a la toma de decisiones de los países, en relación a la pandemia por COVID-19, así como de otras nuevas enfermedades, inclusive virales epidémicas, que amenazan el mundo y la región (BUSS; TOBAR, 2020, p. 3.)

Another singular argument is that the determinations of international organizations, of which the State is part, in fact, due to its sovereign choice, have the competence to link internal decisions, as taught by Valério Mazzuoli (2020). In this context, both the WHO and Mercosur guidelines related to Covid-19 can assist in directing

decision-making and streamlining the implementation of public policies in the area of health, since they have a supralegal legal hierarchy⁷.

The legal duty, as pointed out by Canotilho (2019), is the State's and, consequently, Mercosur's obligation, due to its social dimension of implementing actions in favor of access to health for all the people who need it, but especially the neediest. In this sense, that, "In addition to the fundamental right, health protection implies duties" (SARLET, FIGUEIREDO, 2019, p. 2013), linking actions that must be developed by people, companies, States and International Organizations the like.

Corroborating the internal and international duty to implement access to health, it appears that all Mercosur countries recognize the right to health as fundamental. Therefore, it is essential for South American society, both internally and internationally, since all have ratified the international instruments to protect social rights. A legal synthesis is found in the jurisprudence of the Brazilian Supreme Court, which ruled as follows:

(...) o tratamento médico adequado aos necessitados se insere no rol dos deveres do Estado, porquanto responsabilidade solidária dos entes federados. O polo passivo pode ser composto por qualquer um deles, isoladamente, ou conjuntamente. [RE 855.178-ED, rel. p/ o ac. min. Edson Fachin, j. 23-5-2019, P, DJE de 16-4-2020, Tema 793.]. (BRASIL, 2020, p. 749).

It is emphasized that, in addition to recognizing the right to health, the jurisprudence of the Brazilian Supreme Court and the literature on this subject are unanimous in pointing out the state's duty to promote access to health. Being this responsibility passed on to international organizations that have social objectives, as in the case of Mercosur.

In this way, there is a wide range of international legal instruments that impose state action to protect health, including, in a coordinated manner among countries so that there is effectiveness in combating the current pandemic. However, until now, coordination within the Mercosur framework is still very timid, recognizing that "a diferencia de entonces, actualmente prevalece una total ausencia de coordinación, lo que — ante el impacto del coronavirus — afecta a los sistemas de salud pública y a la economía" (RIGGIROZZI, 2020, p. 6).

⁷ MARINONI, Luiz Guilherme; MAZZUOLI, Valério de Oliveira. Controle de Convencionalidade: Um panorama latino-americano Brasil, Argentina, Chile, México, Peru, Uruguai. Brasília, Gazeta Jurídica, 2013.

Thus, it is up to Mercosur, which already has a set of norms and successful experiences of health actions together, the legal duty to carry out "planned and integrated actions for regional intra-block development can represent a very useful tool to reduce a gap that today separates the most developed countries from the least developed so visibly."(GALLO; *et al.*, 2004, p. 21).

Final Considerations

The 21st century witnesses its biggest health crisis. Covid-19 is a disease that has spread around the world, causing hundreds of thousands of deaths, millions of infected. The most basic finding is that no country was fully prepared to face a pandemic like the one caused by Covid-19 alone, because, in addition to the nefarious death toll (which keeps rising), there is a crisis in the international economic and financial systems, generating losses for millions of people who are losing income due to restrictions on circulation.

Another proof, carried out through the hypothetical deductive method and the techniques of bibliographic review and case studies, is that there is a duty of the state and international organizations to enforce the right and access to health, which is a human achievement, protected by instruments national and international legal

In summary, it was demonstrated that Mercosur lives with two objectives: a self-imposed one, to establish a common market for the countries of the Southern Cone, and another that has been added to it, which is to disseminate social protection to the citizens of that region, which was pointed out repeatedly by ECLAC as the most unequal urban region in the world.

The key point of this work is to demonstrate that there is a duty of the state and of international organizations to promote the legal duty of recognition, promotion and realization of the right to access to health, logically with the concatenation of human and financial resources for the development of public policies, above all, in the case of the current world pandemic.

So far, Mercosur has allocated US \$ 16,000,000 to the Plurinational project "Research, Education and Biotechnologies applied to Health", as well as a joint demonstration by the heads of state of the bloc's members, distinguishing that, although both appear as good initial actions, Mercosul Social needs to do much more, because millions of people are in a situation of vulnerability, such as the citizens of the Southern Cone who are in conditions of extreme poverty.

The right to access to health is not contested by any of the member states of Mercosur, on the contrary, they have all elevated it to fundamental status. What is needed is that there are acts of coordination of the Mercosur bodies so that effective sanitary actions can be applied, together, against a disease that crosses national or regional borders.

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RESUMO:

No ambiente de pandemia mundial causada pela Covid-19, o cumprimento do dever de acesso à saúde apresenta-se como um desafio, sobretudo, para os países em desenvolvimento que compõem o Mercosul. A imprevisibilidade no avanço da doença, associada aos custos do oferecimento do acesso à saúde pelo Estado tornam a tarefa ainda mais difícil de ser implementada de modo individual, o que reforça a necessidade de um esforço conjunto dos Estados membros do Mercosul para o enfrentamento da pandemia. Para tanto, serão utilizados o método hipotético dedutivo e as técnicas de revisão bibliográfica. A conclusão é que, principalmente no atual momento em que os problemas são globais, as instituições mercosulinas não podem deixar de atuar em prol dos necessitados.

PALAVRAS-CHAVE: Mercosul, COVID 19, Direito à Saúde, Direito ao acesso à saúde.

RESUMEN:

En el entorno de la pandemia mundial provocada por el Covid-19, cumplir con el deber de acceso a la salud se presenta como un desafío, especialmente para los países en desarrollo que conforman el Mercosur. La imprevisibilidad en el avance de la enfermedad, junto con los costos de proveer acceso a la atención médica por parte del estado, hacen que la tarea sea aún más difícil de implementar individualmente, lo que refuerza la necesidad de un esfuerzo conjunto de los estados miembros del Mercosur para enfrentar la pandemia. Para ello se utilizará el método deductivo hipotético y las técnicas de revisión bibliográfica. La conclusión es que, especialmente en la actualidad, cuando los problemas son de carácter mundial, las instituciones de la Mercosulina no pueden dejar de actuar en nombre de los necesitados.

PALABRAS-CLAVES: Mercosur, COVID 19, Derecho a la Salud, Derecho al Acceso a la Salud.