

## INTERGENERATIONAL JUSTICE, RESPONSIBILITY AND SUSTAINABILITY: CONSEQUENTIALISM IN LABOR AND SOCIAL SECURITY MATTER\*

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RECEIVED:	NOV. 20 <sup>th</sup> , 2022
ACCEPTED:	DEC. 14 <sup>th</sup> , 2022

### GIUSTIZIA INTERGENERAZIONALE, RESPONSABILITÀ E SOSTENIBILITÀ: IL CONSEQUENZIALISMO IN MATERIA DI LAVORO E PREVIDENZA SOCIALE

- **ASTRATTO:** Il problema di ricerca di questo lavoro è il noto deficit del dibattito giuridico sulle questioni intergenerazionali, relativamente ai processi riguardanti questioni responsabilità intergenerazionale e sostenibilità. Si sostiene l'obbligo delle parti e del giudice di occuparsi delle conseguenze future delle decisioni prese nelle cause che coinvolgono diritti a prestazioni sociali (in particolare lavoro e welfare) di natura individuale, collettiva o diffusa (in particolare con efficacia *erga omnes*), soprattutto a seguito del rafforzamento apportato dal "consequenzialismo" di cui all'articolo 20 del Lindb (nella riformulato dalla legge n. 13.655/2018). Il lavoro utilizza il metodo induttivo e fa ricorso a fonti bibliografiche, documentali e normative.
- **PAROLE CHIAVE:** Responsabilità intergenerazionale; sostenibilità; consequenzialismo.

\* Article arising from research developed under the Research Group "Cidadania, Constituição e Estado Democrático de Direito" financed by MackPesquisa for project nº 221031 under the title: "Uma análise dos impactos da segurança jurídica sob a perspectiva de interesses difusos e coletivos", between Feb./2022 and Jan./2023.

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- **ABSTRACT:** Having as a research problem the notorious deficit of the legal debate on intergenerational issues in lawsuits that involve questions about justice, intergenerational responsibility and sustainability, this study affirms the obligation of the parties and the judge to address the future consequences of decisions issued in lawsuits that involve benefiting social rights (notably work and social security) with individual, collective or diffuse effects (especially with *erga omnes* effectiveness), especially after the reinforcement brought by consequentialism positivized in art. 20 of LINDB (in the wording of Law No. 13.655/2018). The work uses the inductive method and, as research techniques, the bibliographical, documental and normative review.
- **KEYWORDS:** Responsibility between generations; sustainability; consequentialism.

## JUSTIÇA INTERGERACIONAL, RESPONSABILIDADE E SUSTENTABILIDADE: CONSEQUENCIALISMO EM MATÉRIA TRABALHISTA E PREVIDENCIÁRIA

- **RESUMO:** Tendo como problema de pesquisa o notório deficit do debate jurídico sobre temas intergeracionais em ações judiciais que envolvem questões sobre justiça, responsabilidade entre gerações e sustentabilidade, este estudo afirma a obrigação de as partes e o juiz abordarem as consequências futuras de decisões lançadas em processos que envolvam direitos sociais prestacionais (notadamente trabalho e previdência) com efeitos individuais, coletivos ou difusos (especialmente com eficácia *erga omnes*), sobretudo após o reforço trazido pelo consequentialismo positivado no art. 20 da LINDB (na redação incluída pela Lei nº 13.655/2018). O trabalho utiliza o método indutivo e, como técnicas de pesquisa, a revisão bibliográfica, documental e normativa.
- **PALAVRAS-CHAVE:** Responsabilidade entre gerações; sustentabilidade; consequentialismo.

## 1. Introduction

There is a notorious deficit of legal debate on intergenerational issues, especially in lawsuits involving issues of justice and responsibility between generations, as well as sustainability in the relations between past, present and future. This is the research problem of this study, for which it is hypothesized that the legal system requires reflections (of the parties and the judge) on the future consequences of decisions launched in cases with individual, collective or diffuse effects (especially effectively *erga omnes*).

The intergenerational approach is admittedly difficult due to the complexity in the projection of the sense of direction of socioeconomic issues, which is why the judicial decision does not need to be mathematically correct when its future effects, but this does not remove the obligation of argumentation (especially in the field of employment and labor law and social security) to consider intergenerational justice, joint liability and sustainability in the interpretive horizon, especially with the reinforcement brought by the positive consequentialism in art. 20 of Law of Introduction to Brazilian Law, the LINDB (in the wording included by Law 13.655/2018).

In the development of this study, initially will be delimited the concepts employed, considering the word generation by the chronological criterion (reaching natural people both in the temporal and intertemporal sense) then present the search for the materialization of impartial intergenerational justice (beyond the intragenerational) represented in fundamental objectives (especially in social, economic and ecological issues), whose face of duties is the joint and several responsibilities between generations, whereas sustainability (formal or procedural) consists of the balanced and proportional means used. Because we compose the same historic march, the legal liability between generations is solidary, transmitted by succession, can be individual, homogeneous individual rights, collective or diffuse, and is present in several legal areas.

The study is dedicated to the observation of intergenerational challenges in the dynamics of fundamental social rights, requiring attention not only in the initial formulation of public policies but also in its permanent monitoring, control and re-assessment given budget resources often scarce in systematically increasing demands, contextualized with an extremely complex, dynamic and global risk socioeconomic environment.

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Within its thematic cut, the interdependence of social rights to work and social security is pointed out, an aspect that must be understood in juridical interpretations that impose consequences on intergenerational issues. Workers of the past, present and future have reciprocal duties because all are responsible for the social security system.

In the end, consequentialism is presented as a reinforcement to the obligation of legal argumentation to face intergenerational issues (especially after art. 20 has been included in LINDB by Law nº 13.655/2018) at least for the minimum projection of future effects of judicial decisions in individual, collective or diffuse actions (and, with greater reason, in actions in *erga omnes* effectiveness).

This study uses the inductive method and, as a research technique, the bibliographic review, in addition to the documentary and normative, with research in books, magazines and legislation related to the themes addressed.

## 2. Juridical meaning of justice between the generations and intergenerational responsibility

Justice and responsibility between different generations of individuals are inherent to logical reasoning and, therefore, have been the subject of reflections since time immemorial.<sup>1</sup> Tremmel compares attempts to systematize the conception of justice among contemporaries and states that his theorization occurred 2,600 years after the first records, indicating the work of the philosopher Hans Jonas (published in Germany in 1979, dealing with the imperative of responsibility) as the milestone of intergenerational justice (TREMMELE, 2009).<sup>2</sup> According to Schroder, references to the modern analysis of the theme date back to the eighteenth century under the conception of generational sovereignty, on which Thomas Jefferson considered the national public debt a problem of intergenerational ethics (SCHRÖDER, 2011).

Currently, it is a notorious fact that the speed of socioeconomic transformations, pointed out by Bauman (2001) in his notion of liquid modernity and indicated by Beck (2011) as a factor that converges to his concept of risk society, which gives even more

- 1 On the cultural basis of the ancient Judeo-Christian civilization (still influential in Western culture today), his oldest patriarch Abraham welcomed the commands of the God of Israel for the benefit of his future generations. In Genesis, chapter 12, verse 3 (HOLY BIBLE, 2016, p. 13).
- 2 In Portuguese, read Hans Jonas (2006) on the imperative of said responsibility.



weight to intergenerational responsibility. Carvalho says that a problem “as old as humanity” (to treat fairly any generation) has taken on a whole new issue (public issue) because “they have completely changed the context and meaning of the problem, as well as the ways to define it and find solutions” (CARVALHO, 2017, p. 429). An example of the importance of this theme is the potentiation of irreversible environmental damage resulting from technological development, requiring predictability of the consequences of acts and the responsibility of society (BIRNBACHER, 2006).

From the juridical point of view, the equivalence of fundamental rights between generations of natural persons is a consequence of rational thinking, based on various interdependent primacies such as legal certainty, solidarity, equality, freedom and popular sovereignty, so that future generations can maintain, modify or repeal normative acts produced by present and past generations, observing certain limits. However, precisely by the same primacies, fundamental duties arise to the extent that the characters of the present must always consider those who have passed and those who will come, within a single permanent march, not always at the same pace or direction, but inevitably related to each other, so that no generation can be neglected.

The conception of intergenerational justice and the consequent intergenerational responsibility acquired the status of the customary norm of international law with the notion of posterity, expressly provided for in several treaties, the Declaration on the Responsibilities of Present Generations for Future Generations, adopted on 12 November 1997 by the UNESCO General Conference at its 29th session.

According to Botelho, although no provision is expressed in constitutional texts, intergenerational responsibility is configured from the combined understanding of several constitutional provisions that are open to the future (BOTELHO, 2015, p. 372). However, some ordinances expressly bring general clauses taking care of fundamental rights and duties conferred both to present and future generations, such as art. 11 of the Japanese Constitution of 1946.<sup>3</sup>

In the Brazilian Constitution of 1988, justice and intergenerational responsibility must be understood implicitly in the primacies of legal certainty (art. 1º, caput), popular sovereignty (art. 1º, I and sole paragraph), solidarity (art. 3º, I) and equality (with

3 This precept states that the fundamental prerogatives guaranteed to the people by this Constitution will also be conferred on the people of this and future generations as eternal and inviolable rights, in the original, *Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights*” (JAPAN’S CONSTITUTION OF 1946).

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several forecasts), which is why they are much earlier than the present regulatory system. Reaching various themes of law (strengthened by other areas of knowledge, such as ethics, biology and mathematics), justice and responsibility between generations are not restricted to environmental matter, although there is a reference expressed in art. 225 of the constitutional order of 1988, according to which everyone has the right to an ecologically balanced environment, a good of common use of the people and essential to the healthy quality of life, imposing the duty to defend the public power and the collectivity and preserve it for present and future generations.<sup>4</sup>

The juridical understanding of these ideas goes to the conjugation of the meaning of generation, justice and responsibility, for which the studies of Joerg Chet Tremmel will be used as a theoretical reference.<sup>5</sup>

## 2.1 Meanings of “Generation”

According to Tremmel, the sign “generation” is assigned three senses, according to the domain to which it is associated: familiar, social and chronological, which is subdivided into temporal and intertemporal (TREMMELE, 2009).

Family (or genealogical) generations derive from the successive degrees of filiation of the same lineage (corresponding to kinship), in which the parents are the first generation, the second children, the third grandchildren, and so on. Generation in a social sense (socio-cultural or sociological) refers to a group of people associated with similar political, economic or cultural experiences within a given period, such as “baby boomers”, “generation X” and “generation Y”. In a chronological-temporal sense, generation refers to groups of individuals with the same age in a given society and living in the same space of time, for which Tremmel uses the thirty-year cut (TREMMELE, 2009, p. 20).<sup>6</sup> Finally, generation in a chronological-intertemporal sense designates individuals at certain but distinct times, a notion that distinguishes past, present, and future generations.

<sup>4</sup> It is understood as an argumentative reinforcement of the statement of Gilson Jacobse in the sense that, for the first time in the history of Brazilian constitutional law, the Constitution guarantees a certain right not only to present generations but also to future generations (JACOBSEN, 2019, p. 199).

<sup>5</sup> The main work used in this study for this conceptual delimitation is “A Theory of Intergenerational Justice” (TREMMELE, 2009).

<sup>6</sup> Published in 2009, Tremmel’s work adopts the then-acceptable 30-year standard. However, the present time is marked by the speed of transformations, being credible that this time interval can be reduced to 25 or even to 10 years, segments most affected by the accelerated socioeconomic dynamics.

The author employs the term temporal justice between generations to refer to the relationship between the living people at a given time (young, middle-aged and elderly), and intertemporal justice caring for people who lived in the past, those who live in the present and those who will live in the future.

Thus, in this study, the meanings of justice between generations and intergenerational responsibility refer to the chronological aspect and reach natural people, both in the temporal and intertemporal sense.<sup>7</sup>

## 2.2 Intergenerational justice or justice between generation

The concept of intergenerational justice is politically and ideologically eclectic, with conflicting agendas even on subjects delimited by significantly safe scientific standards (such as deforestation and global warming).<sup>8</sup> Moreover, more is needed; the area of Law is full of definitions and theories of justice in Civil Law systems of Common Law, an aspect *that is* reflected in intergenerational themes.

On how well-being can be distributed among generations in a fair way, Tremmel proposes the examination of three conceptions of justice: equality, reciprocity and impartiality (TREMMELE 2009, p. 166). The author considers that justice as equality is not a realistic option because the equivalence of opportunities is not possible, since no generation has exactly the same initial opportunities as others, because the past cannot be changed and time is unidirectional. Justice in the sense of “reciprocity as a balance of deterrence” is also impractical, since future generations cannot threaten the current one, and agreement is possible only for family and overlapping generations. He considers justice as the most appropriate impartiality for the intergenerational context and uses the allegory of the original position, developed by John Rawls (with his “veil of ignorance”), as an efficient way to produce impartial decisions, since it creates a situation of choice (not negotiation) in circumstances of moderate scarcity (without presupposing altruism) and identifies a universalizable point of view to be defined.

In Tremmel’s understanding, the present generation should avoid anything that may reverse or disturb the historical upward trend of the Human Development Index (HDI), and proposes the following statement: “Intergenerational justice is achieved if

7 Justice and responsibility have distinct meanings (as shown below), but “between generation” and “intergenerational” complements are employed as synonyms.

8 On the subject read Carvalho (2017, p. 453).



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the opportunities of future generation members to meet their needs are at least the same as those of the previous generation”.<sup>9</sup>

### 2.3 Intergenerational responsibility, solidarity, legal certainty and sustainability

Insofar as the concept of intergenerational justice concerns the standard of impartial legal treatment among people distributed in time (chronological sense, both temporal and intertemporal), the notion of intergenerational responsibility corresponds to the obligation arising from the acceptance of a criterion of justice between generations. This means that intergenerational responsibility is the face of the fundamental duty that all (individuals, society, the National State and, alternatively, international systems) have with the various generations understood chronologically.

The duties towards other generations (especially future ones) are immanent to human nature and the concerns of national and international institutions, considered in the context of the primacy of solidarity, models of intersocial and intergovernmental cooperation in the evolution of modern society. Solidarity is the vector that induces formulations in the conformation of national mechanisms (e.g., social security regimes, integration between society and state in the third sector and cooperative federalism) and regional or global international structuring (as the European Union and the World Trade Organization), so much so that it is a fundamental objective indicated in the Brazilian Constitution of 1988 (internally, art. 3º, I) and the principle of international relations (art. 4º, IX, in particular, of the same constitutional text). The rule of law and legal certainty (resulting from it) also require stability concerning the legal effects of past acts and facts, certainty concerning the present and predictability concerning the future, consolidating the duty between generations.

Facing the problem as to the existence of synalagma or counterpart between generations, Botelho quotes Birnbacher, for whom future generations will honor past generations, taking care of their memory and the individuals who most marked them, in a gesture of “recognition and retrospective gratitude” (BOTELHO, 2015, p. 394).

<sup>9</sup> In the original: “Generational justice is achieved if the opportunities of future generations to satisfy their needs are at least as good as those of today’s Generation” (TREMMELE, 2009, p. 231).



However, generations succeed each other in history and transmit legacies in the advance of civilization, so there is a legal duty of impartial treatment of those who composed the past, who integrate the present and who will come. The responsibility of those present for future generations' destiny and quality of life has content of legal obligation (assumption of "duties of care") and Accountability, as well as ethical, moral and emotional commitment.

The ideas of justice and intergenerational responsibility are complemented by the notion of sustainability that, according to Tremmel, absorbed the discussions in the 1990s. According to the author, although related, the concepts are not confused because sustainability covers both intragenerational justice (taking care of international, social and gender issues) and intergenerational justice (dealing with ecology and finance) and places them at the same normative level (TREMMELE 2009, p. 7 and 8).

Botelho says that sustainability is a procedural way of acting and not a goal in itself, referring to the option (balanced and proportional) of social, economic and ecological goals (among others), which does not focus exclusively on the present generation but also serves the interests of future generations. In contrast, intergenerational justice is a goal that must be achieved through sustainable behaviour, so that present generations cannot live at the expense of future generations (BOTELHO, 2015, p. 395).

Thus, the notion of sustainability has formal or procedural content that, by balanced and proportional means, seeks the materialization of impartial intergenerational justice (in addition to the intragenerational), represented in fundamental objectives (especially in social, economic and ecological themes), whose face of duties is the joint responsibility between generations in a chronological (temporal and intertemporal) sense.

In short, implementing impartial intergenerational justice is the goal, joint liability is the legal duty imposed on all (with their time cuts), and sustainability is the procedural means of realization, aspects that permeate continuous generations in the sequence of the civilization advance.

Furthermore, adjusting these ideas to Brazilian law, since this legal responsibility between generations stems from the fact that we compose the same historical march, it is solidary and transmitted by succession and can be individual, individual homogeneous, collective (when dealing with indivisible interests but ownership of persons linked to each other by a basic legal relationship) or diffuse (when involving transitional rights, indivisible, and ownership of indeterminate persons linked by factual circumstances). Present and relevant in several legal areas, intergenerational responsibility needs to

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be considered in the tasks of elaboration, interpretation and application of the legal system, especially in matters of social welfare rights.

### 3. The problem of financing positive social rights

Frequent revisions of public policies are imperatives of our dynamic and complex reality, in which the new is replaced by the newest in the face of the high speed of the social process, demanding efforts of deliberative democracy, for which free and equal citizens (by their representatives) take decisions for acceptable reasons. However, the conclusions obtained are open for future re-evaluation. The mark of deliberative democracy is the need to justify decisions about mutual coexistence taken by agents or rulers, whose reasons should be understood by all and extracted by mechanisms of fair cooperation (or solidarity) acceptable because they express mutual respect, keeping open the possibility of continuous dialogue. In deliberative democracy, the decision in public policies should be seen as provisional, since its mechanisms and its own content are imperfect, because part of the choices is not consensual and the disagreeers can accept an early stage if they have the opportunity to change them in the future.

Criteria of justice, intergenerational responsibility and sustainability have been claimed in the dynamics of fundamental social rights, requiring attention not only in the initial formulation of public policies but also in their permanent monitoring, control and reassessment.<sup>10</sup> The financing challenges are great because implementing public social policies depends on budgetary resources, often scarce in systematically increasing demands, contextualized with an extremely complex socioeconomic environment, dynamic and global risk.

Having as a background the Portuguese economic crisis at the beginning of this millennium, Botelho emphasizes the interdependence between the enjoyment of social rights and economic stability, stating that both go hand in hand and, with debts and inflation, increases the “risk of intergenerational poverty”, concluding that “there will hardly be a healthy welfare state and there may not even be a genuine welfare state” (BOTELHO, 2015, p. 403).

<sup>10</sup> This juridical nature is clear because of Title II, Chapter II, of the Brazilian Constitution of 1988, but this fundamentality is not only formal but also material. Novais formulates legal theory regarding the material fundamentality of social rights, proposing a unique legal-constitutional regime among them with freedom (NOVAIS, 2016, p. 9).

Analysing Italy's legal system and case law, and considering European Community rules (in particular, the Treaty on Stability, Coordination and Governance of the Economic and Monetary Union), Ludovico and Weintraub affirm the need for the constitutional interpretation to consider the budget balance inserted in the Italian Constitution in 2012. This is because the enjoyment of social rights requires the implementation of legislation, as well as the availability of the necessary resources, and it is unrealistic to think that the implementation of these economic and social prerogatives is insensitive to its economic viability. The authors warn that the balance between revenue and expenditure is more flexible than parity, allowing new indebtedness to enable the realization of social rights, conditioned social and economic rights are closely related to the budget balance. They conclude by emphasizing the need for a balance and affirm that "the financial sustainability of protection is an indispensable condition for ensuring the continuation in the future of the same protection" (LUDOVICO; WEINTRAUB, 2017, p. 42).

The link between budget balance and social welfare rights is the keynote of intergenerational responsibility, highlighted by Persiani when stating that the protection of future generations is a criterion of constitutional rationality, requiring consideration between the interests of the current generation and those of future generations, since it is evident that the irrational use of today's resources puts at risk the protection of future generations (illustrated with the financing of the Italian social security) (PERSIANI, 2013).

Botelho leans on Peter Haberle when addressing the same problem by comparing countries, concluding that constitutional texts "should not be overloaded like supermarket shelves", nor should they "promise the impossible (as in Portugal or Brazil) "under penalty of losing their essential character of "fundamental legal order" of a particular political community (BOTELHO, 2015, p. 374).

In Brazil, there are so many accusations of budget overload caused by social welfare rights that it is treated as a notorious fact, just exemplified by successive constitutional amendments and legislative reforms in social security (both the general regime and own regimes) under the same argument of structural revision and cyclical crisis if not the "system breaks" (as the Constitutional Amendment 103/2019).<sup>11</sup>

11 On the reasons for this reform, Pierdoná (2020). At least in the initial phase, the restrictive measures of social security benefits carried out by Constitutional Amendment 103/2019 have been effective, indicating a 78.8% greater impact, especially due to rigidity in the death pension rules, according to Tomazelli (2022).

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Within the thematic framework, this study points out the interdependence of social rights to work and social security, which must be understood in judicial interpretations that impose consequences on intergenerational issues.

#### 4. Work and public pension system

The initial conception of Brazilian social security was based on data of its time (such as life expectations and population growth), with actuarial calculations and financing rules then compatible. However, naturally, there were significant changes until the current state in which the general regime is managed by the National Institute of Social Security - INSS (funded by the pay-as-you-go system).<sup>12</sup> The general regime has presented recurring structural costing problems caused by multiple factors (e.g., increased life expectancy and change in labor and employment relations with the “Uberization”), in addition to conjunctural deficits generated by economic crises, which has led to successive reviews seeking sustainability.<sup>13</sup>

Workers of the past, present and future have reciprocal duties because all are responsible for the public pension system. There is little point in success in social security planning if the market economy is not efficient in providing satisfactory levels of right to work and labor law. These elements also depend on public policies in favor of full employment.<sup>14</sup>

The complex connection between work and social security depends on socio-economic planning involving public finances, taxation, education, health, social assistance, freedom of initiative, statistical data and variables in the scenario of liquid modernity and risk society. Structural issues were not enough, there are also the

12 In general, the pay-as-you-go system consists of active workers collecting contributions and generating revenue to pay benefits already granted.

13 Illustrating the negative experiences of European democracies led to drastic reforms with the abrupt cut in social benefits, Botelho points out that the situation of public finances prompted the Portuguese State to accept a program of economic and financial assistance that was embodied in the Memorandum of Understanding agreed with the triad European Commission, European Central Bank and International Monetary Fund (known as Troika) which, among other measures, led to the adoption of strong austerity measures, with cuts in public spending and increased taxes (BOTELHO, 2015, p. 33).

14 According to Ramos, rights related to the employment contract depend, in good measure, on state action capable of providing favorable economic conditions for full employment created by public policies so that there is a positive social right (the right of access to work) which serves as a presupposition (RAMOS, 2007).

circumstantial challenges of which the pandemic caused by the new coronavirus is the most striking example today.<sup>15</sup>

And, if it is already difficult to plan in this environment full of structural and conjunctural problems, even more, will be to execute this planning if there are interferences that do not consider the sustainability necessary for justice and intergenerational responsibility. Still, compared to discussions around Environmental Law, according to Tremmel and Wegner, intergenerational issues in the labor market and public welfare deserve reduced exposure (TREMMELE and WEGNER, 2010).

Performing a global comparative analysis within the International Labour Organization, Bronstein states that Latin American Labour Law was copied from Western Europe, so that it adopts the Keynesian model with strong state investment, protection of the internal market and aggregation of social protection to workers in exchange for their freedom (BRONSTEIN, 2009, p. 222). However, these parameters changed in the 1970s, when Carvalho identified the emergence of modern reflection on intergenerational justice, labor law and the labor market (CARVALHO, 2017, p. 427).

The economic crises that challenged the foundations of European social states since the 1970s came to Brazil in the 1990s, with the potential to achieve very challenging dimensions with the advancement of information technology, automation and artificial intelligence, as stated by Schwab (2016, pp. 35-56).

According to Carvalho, it seems that we are faced with the need to choose between two models: the North American without obstacles to labor exploitation (which generates occupation and possibility of access to paid activity) and the continental European with strict protective rules of worker dignity (but which ends up generating a high unemployment rate) (CARVALHO, 2017, p. 433).

Faced with these conceptions, Tremmel and Wegner consider that we need a new intergenerational contract between young and old workers in companies, and recognize that this is not being discussed and the new generation is not formulating this claim in collective bargaining or legislative procedures (TREMMELE and WEGNER, 2010).

15 Some federal normative acts that took care of the emergency program of maintenance of employment and income were controversial (especially the Provisional Measure nº 936/2020, converted into Law nº 4.020/2020; the Provisional Measure 1.045/2021, which remained rejected; and, the Provisional Measure nº 1.109/2022, converted into Law nº 14.437/2022), giving rise ruling of the Supreme Court in ADI, 6363 in which we highlight the leading vote of Minister Alexandre de Moraes, anchored in the parable that the best is the tree that bends but does not break, so that sometimes it is better to interpret reasonably to survive. There was no lack of criticism of the Supreme Court's conclusions, which would have violated labor rights and guarantees (TRINDADE, ESPINDOLA, and ALMEIDA, 2020).

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Carvalho relates intergenerational justice and work, and seeking to bring together all these elements, points out that the central issue involves an evaluation of the juridical mechanisms of institutionalization of the labor market in order to ascertain whether safeguards related to access to primary goods, associated with employment, ensure adequate protection of subjects (in each economic and social context, congruent with the fundamental value matrix of the system, especially the constitutional one), without distortions arising from the position they occupy in the intergenerational procession (CARVALHO, 2017, p. 451).

Thus, intergenerational responsibility should broadly underlie the architecture of labor, employment and social security legal system with the necessary legal certainty of the labor market system.

We recognize governmental efforts to evaluate the Brazilian labor market on four axes (economy and labor; labor and employment law and legal security; labor and social security; and trade union freedom).<sup>16</sup> But this should not be a concern only of the Legislative and Executive Branches in the design, redesign, application and control of public policies, but also of the notably of Judiciary in disputes on labor and social security rights in which it must pronounce.

## 5. Consequentialism and intergenerational themes

As a result of the rationality that permeates the normative system, the conclusions resulting from interpretations of constitutional and infra-constitutional precepts have always had to be coherent, so the interpreter must consider the legal and practical consequences corresponding to his statements.

Strictly speaking, there is nothing new in art. 20 of LINDB, added by Law 13,655/2018, except for the warning about the difficulty of interpretation based on normative texts that employ linguistic expressions with a high degree of abstraction (notably juridical principles) indication of criteria for the argumentative

<sup>16</sup> We refer to the Group of High Labor Studies (GAET), with multidisciplinary training, composed of Ministers of State, judges and judges of Labor Justice, prosecutors, economists, researchers, lawyers and experts, representing workers and employers. BRAZIL, High Work Studies Group - GAET. Available at: <https://www.gov.br/Work-SocialSecurity/Pt-br/Access-Information/Participation-Social/Consensual-E-orgaos-Collegiate/Consensual-Work-Com-missions/Work-Group-Work-Study-Participants-Work-Group-Access>. Access on: Aug. 2022.

construction of the answers given to the problems analyzed. This does not remove the importance of this; art. 20 of LINDB emphasizes that the decision, based on abstract legal values, should consider its practical consequences, showing that the motivation needs to demonstrate the need and adequacy of the imposed measure or the invalidation of act, contract, adjustment, process or administrative norm, including in the face of possible alternatives.<sup>17</sup> To the evidence, the decision that violates this obligation has flawed reasoning and needs to be corrected.

That same art. 20 of LINDB brought to the debate the so-called legal consequentialism, whose object is to seek elements that help the competent authority to decide a legal issue when there are no clear normative parameters.<sup>18</sup> Argumentative methods are essential for the construction of response from normative precept written with words endowed with a high degree of abstraction (and hence with low normative density), but also, the reflection on the consequences is indispensable for the adherence of the judicial decision to reality (past, present and future) in its multiple spheres (inside and outside the order, such as economic, social and cultural).<sup>19</sup>

This problem arises in matters involving intergenerational issues judicialized: require reflections (of the parties and the judge) on the future consequences of decisions launched in judicial proceedings.<sup>20</sup> It is a great challenge, but the cause-and-effect relationship between past, present and future must be addressed because it is a line of interdependence verified by logical and rational criteria, so these reflections are optional but obligatory.

The judicial decision is not expected to be mathematically accurate regarding its future effects, but rather that intergenerational aspects (especially in the field of work and social security) are part of the interpretative horizon. The magistrate cannot know the direction of socioeconomic evolution, but he is obliged to project the future effects of his decisions on intergenerational issues minimally. In this sense, Giacomini recalls that Resolution of National Council of Justice CNJ n° 75/2009 (after the validity of Resolution CNJ n° 423/2021, which provides for competitions for entry into the

17 Although associated with consequentialism, the language employed by art. 20 of LINDB also has a direct relationship with external theory for identifying limits to the exercise of fundamental rights, on which we suggest Sarlet (2009, p. 384-460).

18 Regarding consequentialism, Santolim (2019), Schuartz (2008), and Vidal (2020).

19 In this regard, Aragão (2009), Gabardo and Souza (2020), Pargendler and Salama (2013), Torres, (2010, p. 20).

20 It is true that consequentialism must be understood in the judicial provision. In this regard, Brandão e Farah (2020), Salgado (2017).



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Judiciary of all branches of the Judiciary), by including the points pragmatism, economic analysis of law and behavioral economics, offers an indication of change in the cultural paradigms of the Judiciary and the new theoretical influences that project on the activity of reasoning judicial decisions, compatible with the changes introduced by LINDB (GIACOMINI).

This mandatory analysis occurs in lawsuits with individual, collective or diffuse effects (and, with greater reason, in actions in *erga omnes* effectiveness). The consequence of an individual decision cannot be underestimated when it comes to intergenerational liability, as if the practical effect were restricted to a single case in which a procedural party could invoke a safe-conduct or preference over equality, solidarity and legal certainty between generations. Moreover, there is invariably a multiplier effect when it comes to labor and social security issues, so that an individual action is reproduced in several others with homogeneous individual interests, sometimes potentiated in collective actions and that, in one way or another, usually result in *erga omnes* effectiveness (often by the mechanism of precedents).

If intergenerational justice, solidarity, responsibility between generations, sustainability and related themes have always been necessary elements for understanding the normative system, with equal reason, the motivation of the judicial decision should refer to them given the reinforcement brought by the consequentialism in art. 20 of LINDB (in the wording included by Law n<sup>o</sup> 13.655/2018).

## 6. Conclusion

In the end, given the deficit of legal debate on intergenerational issues, especially in lawsuits, we are sure that the legal system requires reflections (of the parties and the judge) on the future consequences of decisions launched in cases with individual effects, collective or diffuse (especially effectively *erga omnes*). It is not optional to analyze questions about justice and responsibility between generations, as well as about sustainability in the relations between past, present and future, when these problems permeate decisions made in lawsuits.

Although the intergenerational approach is admittedly difficult, due to the complexity of the projection of the sense of direction of socioeconomic issues, and even though it is not required that the judicial decision is mathematically accurate in assessing its future effects, the argumentation must consider aspects of intergenerational



justice, responsibility and sustainability, even more after the reinforcement brought by the positivation of consequentialism in art. 20 of LINDB (in the wording included by Law n° 13.655/2018).

Taking as parameter the chronological criterion (covering natural people in the temporal and intertemporal sense), we show that the search for the materialization of impartial intergenerational justice (beyond the intragenerational one), represented in fundamental objectives (especially in social, economic and ecological issues), imposes duties proper to the joint responsibility between generations, in the face of which sustainability (formal or procedural) consists of the balanced and proportional means used. Having the achievement of impartial intergenerational justice as a goal, joint and several liability as a legal duty imposed on all (observing their time cuts) and sustainability as a procedural means of realization, the interpretive work must have on the horizon each of the roles we play in the same historical march.

This responsibility is solidary and, by succession, may be individual, individual homogeneous, collective or diffuse, and requires special attention to positive social rights (labor, employment and social security, notably) both at the time of initial formulation of public policies and during their implementation, imposing permanent monitoring, control and re-evaluation because of budgetary resources often scarce in systematically increasing demands, contextualized with an extremely complex, dynamic and global risk socioeconomic environment.

Therefore, intergenerational issues about positive social rights should be addressed in judicial interpretations through juridical argumentation that projects (at least elementary) the future effects of judicial decisions rendered in individual actions, collective or diffuse (and, with greater reason, in actions with *erga omnes* effectiveness).

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