



## The vesting agreement in biostartups: an analysis of the new legal framework under the prism of the principle of maximum effectiveness of fundamental rights

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**Abstract:** The purpose of this article is to examine the vesting contract in biostartups, with emphasis on the new legal framework from the perspective of the principle of maximum effectiveness of fundamental rights. The vesting contract is analyzed in relation to the effectiveness of these rights, divided into two dimensions. In the subjective dimension, the vesting contract is seen as a way to protect the fundamental rights of startup partners and investors, including the right to contractual freedom. In the objective dimension, the vesting contract is seen as a way to promote the effectiveness of fundamental rights to growth and to innovative entrepreneurship, mitigating labor and tax risks, optimizing the company's development, and bringing a strong economic and social impact on the development of a nation. The results showed that the vesting contract can generate risk reduction and legal certainty for the partners in a private environment of prior trust. Furthermore, the inclusion of the term "innovation" in Brazilian Federal Constitution reinforces the importance of scientific and technological research for the development of the country. However, the implementation of these fundamental rights is still incipient, especially in the field of biotechnology, where companies are subject to extremely high risks and a very high mortality rate due to innovative projects and the lack of administrative knowledge on the part of managers. Finally, as to the methodology employed, the study has an exploratory and descriptive character, with the conclusions derived from the qualitative analysis of information delimited with a bibliographical and documental review of books, articles, websites, jurisprudence and legislation.

**Keywords:** Dressing contract; Biostartups; Legal framework for startups; Innovation; Entrepreneurship.

### Introduction

The new legal framework for startups, established by Complementary Law No. 182/2021, brought as its main objective to improve innovative entrepreneurship in Brazil and leverage the modernization of the business environment with significant changes, especially in relation to vesting contracts, since, before the new law, there was no specific regulation for this type of contract, which generated legal uncertainties, doubts and concerns, in addition to difficulties in its application.

The importance of these instruments for the development of startups and innovative companies was recognized with the new implementation. Thus, vesting contracts become a more viable and attractive option for entrepreneurs and investors who wish to attract and retain talent in their companies, contributing to the growth of the startup ecosystem in Brazil.

With these considerations in mind, this article aims to analyze the vesting contract in biostartups through the prism of the principle of maximum effectiveness of fundamental rights, with the purpose of investigating the application of this new contractual modality and its benefits for the biostartup's partners and investors.

The methodology used was exploratory and descriptive, with qualitative analysis of information delimited by the bibliographic and documental review of books, articles, websites, jurisprudence, and legislation. Constitutional Amendment No. 85/2015 was analyzed regarding the

inclusion of the word "innovation" in the Federal Constitution and its relationship with art. 218, which discusses the encouragement of scientific and technological research.

The results showed that the vesting agreement can generate risk reduction and legal security for the partners in a private environment of prior trust. Furthermore, the inclusion of the term "innovation" in the Federal Constitution reinforces the importance of scientific and technological research for the country's development.

After the analysis, it was verified that the vesting contract was received by our legal system, especially with the principles included by the Economic Freedom Law and by the Legal Framework for Startups, enshrining the goal of fostering the startup ecosystem in Brazil, by creating a regulatory environment that is more favorable to entrepreneurship and innovation, and by encouraging the creation of new businesses and innovative solutions, always effective and strengthening biostartups.

The conclusion is that the vesting agreement can be an important tool for biostartups, as it allows partners to have greater control over their stakes in the company, encouraging innovation in the industry. However, it is important that this type of contract be drawn up carefully to avoid future conflicts between partners.

In summary, this paper presents a detailed analysis of the new legal framework through the prism of the principle of maximum effectiveness of fundamental rights. It also highlights the importance of the vesting agreement

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for biostartups and how it can generate benefits for partners and investors. In addition, the article discusses the inclusion of the term “innovation” in the Federal Constitution and its relation to the encouragement of scientific and technological research.

### **The fundamental rights applicable to biostartups**

Before we go on to study the infraconstitutional legislation and regulations for biostartups, this first section will briefly describe the trajectory of biostartups in Brazil, based on the characteristics and formalization of these companies. Startups are involved in the constant transformations arising from the multidisciplinary area of biotechnology, in a still unexplored universe that will certainly bring significant advances for the future of mankind, and that has a great lack of legal regulation.

In this context, when we use the concept of biostartup, we refer to biotechnology companies applied in the technological field, with major discoveries already developed and employed in various industrial and market segments. It is an emerging field that is on the rise, generating high value-added products and services, and skilled jobs. As an example, we highlight the positive impacts on health, which brought, consequently, an excellent improvement in the population’s quality of life, with beneficial results not only in the local economy, but also in the national economy.<sup>1</sup>

One of the great advantages of biostartups, which differentiates them from any other traditional business model, is the effective ability to work with “replicable” and “scalable” product through the use of technology. The doctrine itself highlights the existence of applications that must be created, which, once put into circulation, become distributed to millions of people, in an economy of scale that biostartups can easily achieve.<sup>2</sup>

It is evident that the application of technology has a strong impact on the quality of life, and especially on the dignity of the human person and the citizen. Thus, we are facing a circumstance that brings consequences to fundamental rights, and our study seeks precisely the analysis of the principle of maximum effectiveness of fundamental rights together with the examination of the new legal framework of startups. We emphasize that our research has as its main premise an analysis of individual freedom and is not focused only on the economic area and the obtaining of profits by companies.

Our interpretation of the law is based on formal and material norms as to the fundamental principles established by the Constitution, with an extensive interpretation of the constitutional text, supported by the valorization of human dignity and other fundamental rights, based on ethical and moral criteria that value justice and equality among all.<sup>3</sup>

This understanding is supported by Tavares,<sup>4</sup> who points out that there is no way to ignore the economic context in the right to development; however, it is worth noting that the Constitution covers an extensive interpretation and

embraces development in various spheres, including social, moral, political, and others. The author also highlights the following: “It is of interest here to emphasize the development of the country as one of the fundamental objectives (not just a means to another principle)”.<sup>4(p750)</sup> Also along these lines, there are the works of Nogami and Passos,<sup>5</sup> and Kane and Sand.<sup>6</sup>

This understanding is intrinsically linked to the human rights established by the United Nations, in particular the Declaration on the Right to Development. This declaration defines guidelines for the interpretation of fundamental rights, based on the premise that development is a comprehensive process, involving economic, social, cultural, and political aspects, with the aim of promoting the well-being of the entire population, through the active, free, and meaningful participation of individuals and the fair distribution of the benefits resulting from this process.<sup>7</sup>

Thus, we assume that our study will adopt a broad interpretation, never limited to the economic field, but linked to our freedom and the economic growth of the collectivity, with the purpose of improving our living conditions and promoting, consequently, the principle of human dignity.

The globalization of information, together with the broad access to social networks and the internet, has brought new challenges not only to the business world, but also to the field of law. This phenomenon is so intense that, according to Azevedo’s doctrine,<sup>8</sup> it breaks with the paradigm of the old economy, bringing a true reconfiguration to the business world.

The social interest as well as the technological and economic development of the country are fundamental rights assured by the Federal Constitution in its 5th art. According to the Magna Carta: “XXIX – the law will ensure to the authors of industrial inventions a temporary privilege for their use, as well as protection for industrial creations, the ownership of trademarks, company names, and other distinctive signs, considering the social interest and the technological and economic development of the country”.<sup>9</sup>

This provision must be analyzed in accordance with Constitutional Amendment No. 85/2015, bringing as one of the great novelties the inclusion of the word “innovation” in our Magna Carta and giving new wording to the constitutional provision. Thus, art. 218 states that the “State will promote and encourage scientific development, research, scientific and technological training, and innovation”.<sup>9</sup>

In this regard, the doctrine states that: “Along the same lines, art. 218 of the CF/88 establishes that the State will promote and encourage scientific development, research, and technological capacity building, and Law 10,973/2004 was edited to regulate the incentives to innovation and scientific research and technology in the productive environment”.<sup>10</sup>

The doctrine of Tavares<sup>4</sup> expressly recognizes the importance of national development and the inclusion of

the term “innovation” in the Constitution, for promoting the appreciation of original projects, by bringing the “idea of original achievements and projects, intending also to improve the articulation of the States with research institutions, aiming to encourage technological and scientific development in Brazil”.<sup>4</sup>

This incentive only came to be disciplined with the timid public policies implemented with the publication of Law No. 10,973, of December 2, 2004 (“Innovation Law”), and with the approval of Law No. 13,246, of January 11, 2016, which expanded references to business incubators, further stimulating their development in Brazil, since art. 2 provides for the public policy of business incubators, with clear interest in accelerating the organization or structure that aims to stimulate or provide logistical, managerial and technological support to innovative and knowledge-intensive entrepreneurship, with the objective of facilitating the creation and development of companies that have as a differential the performance of activities focused on innovation.<sup>11</sup>

Despite these measures, the implementation of these fundamental rights was timid, especially when we verify, in the biotechnology field, the object of this study, an extremely challenging situation, with high risk and a very high company mortality rate, arising from innovative projects and the lack of administrative knowledge on the part of the managers, especially with regard to market management, financial resources, and commercial competence.<sup>12</sup>

Furthermore, Drucker<sup>13</sup> affirms that, because it is a science-based renewal, in addition to temporary difficulties in decision making during projects that integrate the transmutation of products and services into markets, there is a great reflection on innovation, which, because

it is connected to many factors and countless scientific and technological knowledge, exposes the company to unpredictable limits and high market risk.

According to the doctrine of Burtet et al.,<sup>14</sup> one of the major advances stems from item II of art. 2 of Complementary Law No. 182/2021, which provides for the experimental regulatory environment or regulatory sandbox, which are the forms of debureaucratization so that these companies can receive authorization, even if temporary, for the management of agencies or entity as a way to enable the development of innovative business and experimental techniques with criteria and limits specified in fast and accessible procedures. In their words, what we see is the “intention of the law to create specific regulatory environments, free from the incidence of regulatory rules, in order to create business models and test, within parameters defined by the regulatory agencies, new technologies”.<sup>14</sup>

Now we will have a look at the principles and guidelines of the Legal Framework of Startups:

Art. 3 – This Complementary Law is guided by the following principles and guidelines: I – recognition of innovative entrepreneurship as a vector of economic, social and environmental development; II – incentive to the constitution of environments favorable to innovative entrepreneurship, with valorization of legal security and contractual freedom as premises for the promotion of investment and the increase in the offer of capital directed to innovative initiatives.<sup>15</sup>

Hence, based on the need for favorable environments, the legislator has sought to apply as public policy the creation of several methodologies that optimize and ensure the effectiveness of startups, as we can see in Table 1.

**Table 1** – Highlight of the main innovative environments based on the Legal Framework for Startups.

Innovative environment	Characteristics
Technology-based startups	Companies that have as their main product or service a technological innovation, usually with global scale potential. They can work in areas such as software, hardware, biotechnology, artificial intelligence, among others.
Startup incubators and accelerators	Physical spaces or programs that offer support, mentoring, connections, and investments for early-stage startups. They can be maintained by private companies, universities, business accelerators, or governments.
Innovation ecosystems	Set of organizations and players that make up the innovation environment in a region, such as universities, companies, investors, government, associations, startup communities, among others. The goal is to create a network of collaboration and synergy to foster the development of new companies and technologies.
Angel investors and investment funds	Individuals or companies that invest capital in early-stage startups, usually in exchange for an equity stake or future royalties. They can be individuals, investment funds, or corporations seeking innovation in specific areas.
Entrepreneurial communities	Groups of people who come together to share knowledge, experiences, and resources related to entrepreneurship and innovation. They can be trained online or in person, and aim to stimulate the creation and development of new businesses.

Source: Elaborated by the authors (2023).

It is evident that a new fundamental right has been included in our legal system, when we see “innovative entrepreneurship” aligned with the already existing fundamental right of economic development, now legally complemented with the need for social and environmental care, thus causing a great impact on the already existing legislative interpretation and on the ways of applying public policies to biostartups.

We can see that this new fundamental right justifies “economic, social, and environmental development, the construction of favorable environments for innovative entrepreneurship, based on legal security and freedom, the modernization of the Brazilian business environment, with the valorization of emerging businesses”.<sup>14</sup>

We understand that, in this way, our law reaches a new stage, with more relationship and cooperation between the public and private sectors, debureaucratization, and the creation of facilitators for innovative development, which will certainly have a great impact on biostartups, which suffer from the absence of efficient regulations and public policies.

With these considerations, it is clear that biostartups, due to their extreme vulnerability, should be fostered and developed in innovative environments, contributing to the effectiveness of the fundamental right to development, especially if they can make use of vesting contracts, which are a new compensation and incentive model for founders and employees of biostartups.

### **The principles and infraconstitutional legislation that have received the vesting contract and its relevance in the current context**

It is already widely recognized that one of the main challenges of contemporary law is to reconcile the guarantee of contractual freedom with the protection of society. In this context, it is important to consider that individual freedom is a fundamental value in a democratic society and, therefore, should be examined in the light of the effectiveness of constitutional rights. Toss<sup>16</sup> points out that the fact that the fundamental rights to individual freedom are protected does not justify that freedom of contract, which is a subdivision of this freedom, be exercised in an absolute manner, disregarding the other fundamental rights and guarantees provided for in the Constitution. To the extent that Toss<sup>16</sup> understands that state intervention in contractual relations is necessary to guarantee the effectiveness of the fundamental rights provided for in the Constitution, without violating the individual rights of the contracting parties.

To understand the matter, it is necessary to understand the effectiveness of fundamental rights, because, according to Martins,<sup>17</sup> the subjective dimension comprises the subjective public rights, which imply the possibility for the citizen to use fundamental rights for protection against the advances of the state, both of the first-dimension rights, that is, the negative ones, and

of the second-generation rights that are the positive rights that the state must provide to individuals. In this sense, the doctrine complements: “when we refer to fundamental rights as subjective rights, we have in mind the notion that the holder of a fundamental right has the possibility of judicially imposing the interests legally protected against the addressee (obligee)”.<sup>18</sup>

The objective dimension, according to Martins,<sup>17</sup> is a radiating effectiveness, or also: “[...] irradiation effect of fundamental rights, according to which the rights, as objectives and values to be followed, guide the entire application and interpretation of infraconstitutional norms (generating an interpretation in conformity with the Constitution)”. According to Canotilho,<sup>19</sup> “one speaks of objective grounds of a norm consecrating a fundamental right when its meaning for the collectivity, for the public interest, for community life, is in view”.

With this assumption, we verify that the fundamental rights irradiate values, while they outline a constitutional premise for the legislative, judiciary, and executive bodies to be governed. Therefore, the doctrine understands that: “the radiating efficacy gives rise to the ‘humanization’ of the legal order, by requiring that all its norms be, at the moment of application, reexamined by the law enforcer with new lenses, which will have the colors of human dignity, substantive equality, and social justice, imprinted on the constitutional fabric”.<sup>20</sup>

The effectiveness of fundamental rights, both subjective and objective, appears in a positivized form in the Civil Code, when we see that freedom is restricted by the social function of the contract, as stated in art. 421 of the civil statute: “Art. 421. Contractual freedom will be exercised within the limits of the contract’s social function”; and, still in an attempt to maintain the fundamental rights of freedom and, in a certain way, preserve them, it raises to the category of rule the principle of minimum intervention, which can be verified in the sole paragraph of the referred provision: “Sole paragraph: In private contractual relations, the principle of minimum intervention and the exceptionality of contractual revision will prevail”.<sup>21</sup>

Hence, according to Gaggini,<sup>22</sup> this contractual freedom must obey the legal provisions applicable to contracts, also ensuring their legitimacy and hygiene. In other words, one cannot agree here in an unlimited manner, but must observe, however, that the rule is minimal state intervention and protection of the collectivity and of the fundamental rights of one of the parties.

Still in this vein, we note that the objective dimension of the effectiveness of constitutional principles ensures the interest of the collectivity over subjective rights, with the aforementioned provision requiring, according to Gonçalves,<sup>23</sup> that contractual parties behave in a correct manner not only during negotiations, but also during the formation and fulfillment of the contract, reiterating the legal maxim that no one can benefit from their own tur-

pititude.

In addition, the legislation states: “Art. 422. The contracting parties are obliged to observe, both in the conclusion of the contract and in its execution, the principles of probity and good faith”. On the other hand, one cannot fail to note that the violation of this principle falls under the torts foreseen in art. 187 of the same civil law. As we can see: “Art. 187. The holder of a right who, by exercising it, manifestly exceeds the limits imposed by its economic or social purpose, good faith or good morals, also commits an illicit act”.<sup>21</sup>

For the doctrine of Tartuce,<sup>24</sup> whoever violates this principle commits abuse of right that has the function of control, since the civil liability arising from this abuse “is objective, that is, it does not depend on guilt, since the objective–purpose criterion was adopted by the mechanism. As a result, the breach or disregard of objective good faith leads to the dead end of liability regardless of fault”.

Within this freedom consolidated in fundamental rights, we verify that, along with the principles of autonomy of will in contracting, it is supported by the effectiveness of fundamental rights arising from the subjective dimension, and, at the same time, this effectiveness of fundamental rights is also restricted by its objective dimension, requiring a submission to constitutional principles that require the State to intervene to ensure the probity and suitability for the validity of acts, analyzed through the prism of the principle of maximum effectiveness of fundamental rights.

On the other hand, the Economic Freedom Law, through what is established in art. 3, VIII, according to Marques Neto et al.,<sup>25</sup> must be interpreted as a *pro libertatis* imposition of the rules on legal business:

Art. 3 – The following are rights of every person, natural or legal, essential for the economic development and growth of the country, observing the provisions of the sole paragraph of art. 170 of the Federal Constitution: VIII – have the guarantee that the parity corporate legal business will be subject to free stipulation of the contracting parties, in order to apply all the rules of corporate law only in a subsidiary manner to what has been agreed, except for rules of public order.<sup>26</sup>

In this manner, the hermeneutic principle set forth in § 2 of art. 1 of the same statute forces the application of economic freedom, good faith and respect for contracts, investments and property in all rules of public order on private economic activities.

Based on this legal permission, together with other constitutional understandings, we consider that the new Legal Framework for Startups, by introducing the fundamental right to entrepreneurship, ended up supporting the reception of the vesting contract in Brazil. The vesting modality appeared in the United States, with the objective of protecting the interests of great executives with common propensities of essential employees of the

company, in face of a project of innovative idea whose development depended on the interests of third parties, without hierarchy, having in view the strengthening and common purposes.

In other words, the fundamental right to development, when interpreted together with the fundamental right to entrepreneurship included in the Startups Legal Framework, due to the importance and strength it brings to this dynamic of survival of startups, and especially biostartups, given their greater vulnerability, reforms even more the reception of this contracting modality by our legal system. In this regard, Feigelson et al.<sup>2</sup> conceptualize the vesting contract as follows:

Vesting consists of a promise of equity participation established in a private contract with strategic collaborators, who aim to stimulate the expansion, success, and achievement of the startup’s social objectives. As a rule, such individuals are elected by the leaders of the society. Because of the number of employees elected to be part of such an incentive plan and because of the times at which they become part of the plan, the dates for each incentive contract granted to employees, the composition of the capital stock and the ownership interest according to each investment round made, and the granting of employee participation can be provided in the company’s chapter. Thus, different stakes and conditions can be granted to each employee, without losing the control of the partners and future partners of that company.

We verify that, with the reception of this contractual modality, this measure ended up enforcing the fundamental right to development and entrepreneurship, thus seeking to stimulate the innovation sector in Brazil and making room for the growth of biostartups, since the bureaucracies and lack of regulation have forced great ideas to be commercialized on international soil, with a flight of talent and, at the same time, irreparable damage to both the economy and evolution, maintaining our nation’s classification as an underdeveloped, third–world country.

After these legislative measures, a new scenario is already noticeable in Brazil, according to the Brazilian Association of Startups (Abstartups),<sup>27</sup> with the proliferation of more technology companies and startups, as well as a growing government investment in innovation and technology programs. Among the public policies implemented, the following measures are worth mentioning:

- Route 2030 Program: this federal government program aims to encourage innovation and technological development in the automotive industry. It offers tax incentives to companies that invest in research and development of new technologies and products.

- Program to Support Research in Companies (PIPE): is administered by the São Paulo State Research Support Foundation (FAPESP) and aims to provide financing for research and development projects carried out by

companies based in the state of São Paulo.

- BioTec–Amazon: is a federal government program that aims to promote the development of biotechnology in the Amazon region of the country. It provides funding and technical support for research and development projects in areas such as agricultural biotechnology, food biotechnology, and environmental biotechnology.

- Science without Borders Program: this program, administered by the Ministry of Education, aims to encourage the training of highly qualified human resources in science, technology, and innovation through scholarships abroad. Although the program ended in 2017, students who had already been selected continued to receive scholarships until the end of their courses.

- National Biotechnology Program: is managed by the Ministry of Science, Technology and Innovation (MCTI) and aims to strengthen biotechnology research and development in the country. It provides funding for research and development projects in areas such as agricultural biotechnology, health biotechnology, and industrial biotechnology.

- National Program to Support Technological Innovation (PNI) and Program to Support the Technological Development of the Semiconductor Industry (PADIS): these are incentive programs of the Brazilian government created to promote technological development, innovation and competitiveness of the semiconductor industry in the country. Their objective is to stimulate investments in research, development and innovation and also encourage the production of semiconductor devices in Brazil, strengthening the local production chain and promoting the technological training of Brazilian companies, aiming at the creation of products with greater added value and competitiveness in the international market.

It is important to note that biostartups are on the rise; therefore, for Oliveira and Ramalho,<sup>28</sup> attracting investors is of utmost importance to start their development, since they are startup companies operating on a cost–minimization regime called bootstrapping; moreover, their suitability is primary, since they have a business model in an uncertain, repeatable, and scalable environment.

Precisely in this legal and business context, in relation to which we brought an analysis of the constitutional principles and of the legislations that received the inclusion, the constitutionality, and the applicability of the vesting contract within our legal system, besides a sample list of the programs optimized by the current governments, we verified that the importance and the applicability of vesting in our legal system is unquestionable.

### **Analysis of biostartup's vesting contract, under the prism of maximum effectiveness of fundamental rights**

The vesting agreement is an important tool for the product development of biotechnology startups, as it allows entrepreneurs to attract new investors, minimizing risks,

ensuring legal security for those involved, and retaining qualified talent by offering equity participation based on goals and results to be achieved. This enables startups to receive the necessary financial and human resources to develop their technologies, accelerating the innovation process.

Biotechnology startups stand out as having a higher market risk, which is due to the innovation of the technology and development. Therefore, based on the seriousness of the research, each project must have reliability and accurate analysis, to the point of convincing the investor of the success of the business,<sup>2</sup> coming to fall precisely on the vesting contract the desired solidity for a biostartup, from the point of view of interpersonal relations.

In this sense, in relation to certain risks to which we have referred, we highlight that there are tools and processes to reduce them and, with the correct management, it is possible to develop analyses and evaluations and subsequently apply mechanisms that will not only mitigate the risks, but will also allow the creation of an emergency plan for survival to an unforeseen event, or even the integration of preventive procedures in order to avoid the permanence of situations that present risks to the companies.<sup>13</sup> According to Judice and Baeta,<sup>1</sup> precisely the vesting contract is a tool that can be used to adorn the interests of investors and institutors, minimizing risks, as well as encouraging the commitment and permanence of employees in the project. It is governed by corporate law, which has as its main objective to ensure the organization and operation of business companies.<sup>13</sup>

Having made these considerations, it is worth pointing out that in biotechnology the risks are more accentuated, especially for startups, which need to present an efficient project to justify their reliability in the product to the point of convincing the investor of the seriousness of the research and investment, which makes it imperative that the company has the appropriate strategy for each investment. Salamzadeh<sup>29</sup> points out that the ideal innovation ecosystem has an adequate business plan, addressing the variability of the entrepreneurship indicators and even the team profile, thus strongly influencing the success of startups.

However, before the fundamental right to entrepreneurship and innovation was enshrined, there was a regulatory gap that hindered the development of biostartups. Entrepreneurs were unable to attract resources and retain talent, since they could not count on hiring mechanisms that would optimize the process. As a consequence, a large number of failures have occurred because innovative methodologies follow an extremely slow and uncertain rite.

Innovation reaches a new level with the inclusion of entrepreneurship as a fundamental right, as a result of the publication of the Legal Framework for Startups, which ensures vesting as a tool created so that entrepreneurs

can count on efficient mechanisms to overcome the difficulties faced mainly in biostartups. The doctrine of Faleiros Jr.<sup>30</sup> dealt with the inclusion of these new mechanisms, as we see below:

Finally, item VII of § 1 of Article 5 of the Legal Framework leaves open the possibility for startups and investors to agree on the investment from another type of contract/instrument. It is important to have this kind of openness in order to avoid a possible interpretation of a closed list with regard to investment contracts in startups. The market evolves and creates mechanisms from time to time, which is natural, but this open clause does not indicate the possibility, by itself, the feasibility of vesting being designed as a means of investing in the startup.<sup>30</sup>

Regarding the risks, Alves et al.<sup>12</sup> stressed that vesting is not to be confused with any capital gain arising from a taxable event with the Federal Revenue Service, much less is it capable of constituting an employment relationship to the point of justifying remuneration and reflexes in the labor sphere—on the contrary, once this institute is well done, there is prevention to any of the risks addressed.

For Judice and Baeta,<sup>1</sup> this tool came as an indispensable way to secure and stimulate investors at all levels, in order to aggregate and generate trust in the organization. It has legal validity and, in most cases, establishes the elements necessary to structure the enterprise in order to guarantee the expected development.

At this point, we emphasize that the new fundamental right to entrepreneurship incorporated in our legal system is allied to the public policy of innovation, which links several incentives for the effectiveness of Brazilian development. It is also important to analyze that, in the case in question, putting into question contractual freedom and the principles and legislation that are the basis for State intervention, especially with the irradiation of the effects of the fundamental right to entrepreneurship, there is no room to justify that the Judiciary or the State itself use any argument to rule out the principle of minimal State intervention, or seek any exceptionality of contractual revision to try to force the State to intervene in business relations.

Moreover, this understanding should be applied not only to vesting, but also to all contractual instruments that come to effect the fundamental right to entrepreneurship, admitting a comprehensive understanding that not only has applicability to innovation and technology within biostartups, but also radiates effects to new public policies in order to optimize opportunities with investors within incubators, technology parks, and other environments conducive to encouraging development.

In this sense, this understanding follows the principle of maximum effectiveness of fundamental rights, which, in this context, guarantees that the interpretations of the Judiciary, Executive or Legislative always observe the maximum realization of fundamental rights.

By analyzing all the fundamental rights studied,

we can see that vesting is a mandatory tool for the effectiveness of fundamental rights. Thus, especially in biostartups, subject to greater vulnerability, this principle must be made as effective as possible, always with an interpretation honoring the incentives, whether financial or of human talent, necessary for its development, in line with the provisions of the principles of free enterprise and free competition, in absolute harmony with the subjective and objective dimensions of the effectiveness of fundamental rights that are presented by the social function of the contract.

According to Sarlet,<sup>31</sup> the principle of maximum effectiveness of fundamental rights requires that the interpreter always seek to effectuate as many fundamental rights as possible. And, as presented in this study, the vesting contract fulfills the role of precisely enforcing a large number of fundamental rights, especially considering the vulnerability of biostartups.

The harmonization of fundamental rights understandings, according to Sarlet,<sup>31</sup> should be carried out not only from the constitutional point of view, making use of the coexistence of other rights that are also constitutional in nature, but also by applying the principle of maximum effectiveness of these fundamental rights to the concrete case, in order to achieve the objectives of the democratic rule of law.

Finally, even if there is a possible collision of two or more fundamental rights, this is a topic that, despite its extreme complexity, must be analyzed by seeking the applicability of weighting, which, according to Figueiredo,<sup>32</sup> consists of a careful analysis of the specific circumstances of the concrete case to identify which right should be protected in detriment of another. Steinmetz<sup>33</sup> emphasizes that “weighting takes place on three planes. In the first, the intensity of the intervention must be defined. In the second, it is a question of the importance of the grounds justifying the intervention. In the third level, then, weighting in the specific and strict sense takes place”.

It is evident that biotechnology, in the use of tools such as the vesting agreement, has opened a new horizon, as an ally of innovation and entrepreneurship, since it is interconnected to new ideas, and is a precursor to the economic development of developed and underdeveloped countries. So much so that some of the characteristics of the biostartup company movement in the world are intertwined with innovation, entrepreneurship, and rapid economic growth.

## Conclusion

Based on this study, we understand that the fundamental right to development is of utmost importance for startups, especially biostartups, which operate in an area of great importance to society. This right is recognized by the Brazilian Federal Constitution of 1988. With the entry into force of the new Legal Framework for Startups,

the fundamental right to innovative entrepreneurship was included, which complements the fundamental right to economic development. This new right has a major impact on existing legislative interpretation and ways of applying public policies to biostartups.

Considering the premises mentioned above, the aim of this study was to analyze the vesting contract in relation to the effectiveness of fundamental rights, which are divided into two dimensions. In the subjective dimension, the vesting agreement is seen as a way to protect the fundamental rights of partners and investors in startups, including the right to freedom of contract. In addition, the contract may contain clauses that encourage the development, entrepreneurship, and innovation of the projects, adopting sustainable and responsible practices in relation to the environment and society, providing security and transparency for all parties involved. In the objective dimension, the vesting agreement is seen as a way to promote the effectiveness of the fundamental rights to development and innovative entrepreneurship, mitigating labor and tax risks and optimizing the company's development to meet goals with strong economic and social impact on the nation's development.

As a complement to the effectiveness of fundamental rights, the study analyzed the vesting contract through the prism of the Civil Code, more specifically in relation to the principles of good faith, contractual freedom, social function, probity, and minimal state intervention. This analysis is based on contractual freedom, according to which the parties have autonomy to establish the conditions of the vesting agreement, provided that this freedom is exercised within the limits of the social function of the contract, that is, taking into consideration the interests of society as a whole.

After the analysis, it was verified that the vesting contract was received by our legal system, especially with the principles included by the Economic Freedom Law and by the Legal Framework for Startups, enshrining the goal of fostering the startup ecosystem in Brazil by creating a regulatory environment that is more favorable to entrepreneurship and innovation, and encouraging the creation of new businesses and innovative solutions, always in search of effecting and strengthening biostartups.

This study further demonstrated that biostartups are companies operating in an area of great importance to society, developing innovative solutions that can have a significant impact on health, food, and the environment, among other areas. However, these companies are also subject to risks and vulnerabilities, such as lack of financial resources and difficulty in obtaining financing.

In this context, the use of the vesting agreement in biostartups can be an effective tool for the achievement of fundamental rights, since it encourages partners and investors, besides contributing significantly to the development of the company through clear and objective

goals. This results in a promotion of the fundamental rights to entrepreneurship and innovation, thus fulfilling the objective of the Republic, elected by the legislator, to foster national development, as established in our Magna Carta.

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