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The impact of judicialization of the Unified Health System

El impacto de la judicialización del Sistema Único de Salud

O impacto da judicialização do Sistema Único de Saúde

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Abstract

The aim was to discuss the right to health, opposing collective health to individual health and analyzing the impact of judicialization on the Unified Health System (SUS). To this end, it addresses the right to health, presenting its concept and minimum content; discusses the principle of integrality; discusses the judicial control of public policies, carrying out a balance between the reserve of the possible and the existential minimum; and defends the prioritization of public policies that benefit the community. As a methodology, bibliographic research was adopted from the literary review in books, articles and legislation that are dedicated to the theme in order to seek solutions to reduce expenses with judicialization.

Descriptors: Right to Health; Health's Judicialization; Public Health; Health Policy; Nursing.

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Resumén

El objetivo fue discutir el derecho a la salud, oponiendo la salud colectiva a la salud individual y analizando el impacto de la judicialización en el Sistema Único de Salud (SUS). Para ello, aborda el derecho a la salud, presentando su concepto y contenido mínimo; discute el principio de integralidad; discute el control judicial de las políticas públicas, realizando un balance entre la reserva de lo posible y el mínimo existencial; y defiende la priorización de políticas públicas que beneficien a la comunidad. Como metodología se adoptó la investigación bibliográfica a partir de la revisión literaria en libros, artículos y legislación que se dedican al tema con el fin de buscar soluciones para reducir gastos con la judicialización.

Descriptores: Derecho a la Salud; Judicialización de la Salud; Salud Pública; Política de Salud; Enfermería.

Resumo

Objetivou-se discutir o direito à saúde, contrapondo a saúde coletiva à individual e analisando o impacto da judicialização sobre o Sistema Único de Saúde (SUS). Para tanto, aborda o direito à saúde, apresentando seu conceito e conteúdo mínimo; discute o princípio da integralidade; discorre sobre o controle judicial das políticas públicas procedendo a uma ponderação entre a reserva do possível e o mínimo existencial; e defende a priorização de políticas públicas que beneficiem a coletividade. Como metodologia adotou-se a pesquisa bibliográfica a partir da revisão literária em livros, artigos e legislações que se dedicam à temática com o intuito de buscar soluções para reduzir os gastos com a judicialização.

Descritores: Direito à Saúde; Judicialização da Saúde; Saúde Pública; Política de Saúde; Enfermagem.

Introduction

Among the social rights guaranteed by the 1988 Charter, public health can be considered inserted in the most ambitious project of the programmatic guidelines of the new constitutional structure: the universalization of access to health, with full funding by the public power, never before guaranteed in Brazil.

However, what has been observed is that given the inefficiency of the public power in providing the services, procedures and medicines that the population needs to enforce their right to health guaranteed by the CRFB/1988, a high number of lawsuits have been proposed demanding the satisfaction of individual citizens' needs.

The objective is to discuss the right to health, opposing collective versus individual health and analyzing the impact of judicialization on the SUS. The study is justified in view of the need to clarify still obscure points in the debate on judicialization as well as to understand how the universalization of the health system can negatively impact collective health, when individual lawsuits compromise the global resource dedicated to SUS. As a methodology, a bibliographic research was carried out in books, articles and legislation that are dedicated to the study of the subject under analysis.

Right to health

The concept of fundamental rights goes back to the need found, on the part of citizens, to impose limits regarding the abuses committed by the State in the face of the indiscriminate use of its powers, through its constituted authorities. In this way, fundamental rights arise in a context in which the guarantee of rights to citizens was sought to the detriment of the exacerbated power of the State, based on guiding principles such as equality and legality, founders of the Constitutional State. In this sense, despite the existence of scholars who defended that the origins of fundamental rights date back more than 2000 years before Christ, in ancient and medieval civilizations, it is certain that we can only talk about fundamental rights from the existence of a State, in modern meaning of the term[1].

The modern conception of fundamental rights originates with the consolidation of the Democratic State of Law, with the expansion of liberal ideals, implying control and limitation of state action. Although government services can certainly be identified in older communities, the struggle for rights to be guaranteed by the State is clearly identified with modern constitutionalism, understood here as the movement that, from the 18th century onwards, dedicated to agree on the delegation of power to the sovereign, while limits were established for state action[2].

Thus, as explained in a study, in order to talk about fundamental rights, the coexistence of three elements becomes necessary: the State, individuals and the normative text that regulates the relationship between the State and individuals[3].

Such conditions were only met in the middle of the 18th century, when they took the form of important historical documents, such as the Magna Carta (1215), in England; the Petition of Rights (1628); the Habeas Corpus Act (1679); the Bill of Rights (1689) and the Act of Settlement (1701). In addition, the Virginia Bill of Rights already expressly proclaimed some kinds of fundamental rights, such as the right to life, liberty, and property. Moving in the same direction, the Constitution of the United States of America (1791), by guaranteeing rights such as religious freedom, home inviolability, due process of law, judgment by the Jury Court, among others[1].

Despite this evolution found in the face of the promulgation of several state documents in defense of fundamental rights, it is considered that it was in France, in 1789, that the normative consecration of these rights took place, with the promulgation of the Declaration of the Rights of Man and of the Citizen, since as an expanding framework for the list of legally protected rights. This document highlights, for example, the protection of the right to security, resistance, oppression, political association, the principle of presumption of innocence, free expression of thought, among others[1].

At that time, rights were considered negative, as they prohibited the State from intervening in the freedom of citizens to act – and to contract, possess and dispose of goods. Public liberties, therefore, are subjective rights, enforceable against the State, which, before 1789, was unknown in positive law[4].

Fundamental rights are limitations imposed on the powers of the State, included in universal declarations and recognized by civilized societies, having, as a basis of validity, the consensus of men about them.

In the Brazilian scenario, the Constitution of 1824 and, later, that of 1891 already contained provisions of several fundamental rights in its constitutional text, and the list was expanded with the Constitution of 1937 - in which rights were added such as the impossibility of applying perpetual sentences. , security, the integrity of the State, the guarding and employment of the popular economy. The 1946 Constitution, on the other hand, innovated by establishing several social rights related to workers and employees, followed by the 1967 Constitution and Constitutional Amendment 1, of 1969, which, on the other hand, established a wide range of restrictions on fundamental rights and guarantees. . Finally, the CRFB/1988, known as the Citizen Constitution, expanded the scope and relevance given to the fundamental rights protected[1].

The location, after the preamble and the constitutional principles, its inclusion in the list of stony clauses and its immediate applicability are examples of the constitutional relevance given to fundamental rights by the CRFB/1988. As the study asserts, this relevance attributed to fundamental rights, in our current Magna Carta, concerns the fact that it was preceded by an authoritarian period, given that "the relevance of fundamental rights, the reinforcement of its legal regime and the configuration of its content are the result of the reaction of the Constituent Assembly, and of the social and political forces represented in it, to the regime of restriction of fundamental freedoms"[5].

Fundamental right to health: concept and minimum content

The conceptualization of the right to health cannot be understood in a static way, being a process in permanent evolution; of a systemic character, interrelated with a variety of other rights and constantly changing, with the historical evolution itself[6].

The first historical notion of the theme relates health as the absence of disease, and, at the end of the 19th century, this concept gained a liberal bias, when understanding this state of illness of the individual as a harmful element to the functioning of industries, since the worker could not participate in the production process[7].

The development of this concept starts to add the notion of preventive health, as a way of avoiding diseases through assistance measures, mainly sanitary. In this theme, one must have, as a matrix, the concept given by the WHO about health, claiming that "health is complete physical, mental and social well-being and not just the absence of disease", encompassing a balance between the man, in a physical and psychological dimension, and encompassing the environment in which he is inserted[8].

In fact, the conceptualization of the right to health encounters several difficulties, ranging from the definition of the criteria to be used, through the choice of means to reach it and the relationship with other branches of law, in addition to having an individual and a collective dimension. .

The right to health thus has two facets: one related to its preservation and the other to its recovery. The right to health preservation has, on the other hand, policies aimed at reducing the risk of illness, through a generic, non-individualized prevention of illness, while the right to health recovery aims to provide a positive state benefit, of assistentialist nature, in order to restore the health of the individual[9].

The modern conception of health has a collective dimension, allowing the dissemination and dissemination of preventive, corrective and care practices in the most diverse locations, encompassing the largest possible number of recipients, through the premise of universality that guides the guarantee of this right. The contemporary care model no longer prioritizes individual actions, but instead focuses on society and its public health needs.

Therefore, prevention, in all its forms, from the promotion of a healthy and dignified environment to citizens - with adequate conditions for survival, basic sanitation and healthy food - started to be considered in the promotion of this right.

The right to health has become a social guarantee, valuing an individual and collective concept, in addition to the understanding that it depends on several factors, such as food, housing, basic sanitation, the environment, work, income, education, transport, leisure, as well as the multiple needs of intersectoral actions that are part of the proposed plans.

It is important to highlight that the urban occupation scenario in the cities, with poles of wealth and poverty, being, on the one hand, the high economic standard, with access to all the means and resources necessary for the quality of life, and on the other, concentrations of misery and contempt for human dignity is directly related to the profile of diseases and to the contemporary concept of the right to health.

It follows, therefore, that the right to health has a broad concept, which has a social, economic, cultural and mental dimension, surpassing the biogenetic view, being, in fact, the result of the quality of life of people and the community. The analysis of this quality takes place from a preventive and repressive perspective of diseases.

In Brazil, the classification of the right to health as a fundamental right occurred with the enactment of the CRFB/1988, constituting one of the greatest advances of our Constitution, being inserted among the fundamental social rights, or benefits, requiring the State to act that provide conditions for its implementation and effectiveness.

By establishing health as a social right, the Constitution considered these rights as positive benefits provided by the State directly or indirectly, set out in constitutional norms, which enable better living conditions for the weakest, tending to equalize unequal social situations[10].

In view of this, the CRFB/1988, when proposing a system to optimize the norms of fundamental rights, imposed, on the public power, to make them effective, through the implementation of concrete public policies, being necessary that these have the maximum efficiency and effectiveness possible, so that they reach their objectives and guarantee, in fact, the protected right.

According to studies, the right to health would have two dimensions: defensive and provisional, the latter imposing a duty on the State to implement measures to effect health, and the former constituting a negative aspect of health preservation[5].

The right to health is, therefore, classified as a fundamental right of full and immediate effectiveness, universal, social and human, belonging to the list of those related to the existential minimum, of an assistentialist and preventive, universalist and guaranteeist nature, typical of a State of good -being social.

The definition and legal nature of the right to health have the main purpose of promoting decent conditions of access and quality of life for individuals, both with regard to the effective prevention of diseases, treatment or care for the environment that surrounds them, as in the provision of essential services, with the creation of the SUS a direct consequence of all doctrinal perspectives on the protection of the right to health in Brazil.

Right to health and the principle of integrality

The CRFB/1988, in addition to innovating, in the sense of inserting health as a fundamental right, created the bases for the institution of SUS in Brazil. Since its creation, its main objective was to promote universal and equal access to all who are in the national territory and need medical and hospital care, as well as medicines, surgeries, treatments and other policies related to public health to prevent or treat disease.

The SUS is the main instrument implemented by the Brazilian State to seek effectiveness to guarantee public health for individuals, providing, free of charge, citizens' access to health services. To this end, a system was designed, present in all federative entities, predominantly decentralized and active in the prevention of diseases.

The Law No. 8,080/1990, the SUS was established with the initial task of defining which health actions and services will be able to guarantee the integrality of health care, making them compatible with the needs of the population and its sources of funding.

The guiding principles of the SUS do not constitute an exhaustive list, but guide the entire performance of this system, in favor of the user-citizen. In addition to the principles that are expressly provided for in the constitutional text, there are other principles that are implicit in the national legal system.

The principle of universality is the basis of the system, resulting from a historical evolution regarding the guarantees of rights to citizens, typical of a welfare state that gained emphasis with the Sanitary Reform Movement in the 1980s and expanded the range of recipients of the SUS, in contrast to the model adopted previously, in which only a restricted group of workers had support in matters related to health[1].

The guarantee of universality, in addition to being an innovation in the Brazilian legal system, is closely related to the principle of equality, in its attempt to ensure the fundamental right to health, without any discrimination or privilege.

However, it is important to note that, within the concept of universality, the SUS established some requirements for pharmaceutical care, through Decree No. 7,508/2011. For universal access to the system, on the topic of medicines, it is essential to comply with the requirements set out therein.

Furthermore, directly related to this principle, there is the principle of equity, which has the objective of reducing existing social and regional disparities in the country, through health actions and services. Public health policies aim to provide individuals with a minimum level of guarantee, in which it is possible to establish a situation of dignity and reduction of inequalities throughout the country, expressing the idea of social justice.

With regard to the principle of integrality, explicit in the constitutional text, it is initially emphasized that this is not to be confused with the principle of universal access, the first meaning that the service must cover all human needs, while the second implies attribution to any person.

Thus, as stated, the principle of comprehensive care refers to the care provided by the SUS, covering, as a priority, preventive measures, as well as care behaviors. It is worth noting that this action must occur in the most comprehensive way possible, in order to provide all users with the care of their needs, acting in a harmonious and articulated way, observing the levels of SUS complexities.

Integrality, however, does not mean access to any and all health services and supplies by any citizen. The use of financial resources for the user has to be done in a proportional way, observing the equity and the proper maintenance of the system. Integrality must be understood as the existential minimum for the maintenance of SUS.

Comprehensiveness is also present in the relationship with the principles of efficiency and reasonableness, with innovation in public management and security, in the sense of prioritizing preventive activities, but it is limited to the competences of the SUS, that is, to the activities of assistance to people, with health promotion, protection and recovery actions, not being responsible for actions in other areas, even those related to quality of life.

Note, however, that this principle only applies to system users. Comprehensive care is a right of effective SUS users, that is, of those who choose to use the public health service; presupposes the will to want to use the system. Comprehensiveness also requires the involvement of the various SUS actors in a search, through democratic interaction, for consensus to achieve the realization of the right to health.

Another principle that governs the SUS is that of decentralization, understanding health as a stage for creative solutions and innovative alternatives that reflect the reality of each region, without following a single model.

The form of organization of the SUS presupposes the creation of a predominantly decentralized structure, in which the Municipalities receive the important task of implementing public, preventive or repressive policies, which meet the demands of the local population.

In this way, it can be said that the realization of the right to health occurs predominantly within the scope of Brazilian municipalities, which, through resources from the Union, the States, and even from their own revenues, invest in the necessary policies to the population. Municipalization made this entity the main channel for the flow of SUS guidelines.

In addition, as a direct result of the principle of decentralization, there is the principle of regionalization, which states that health services must be organized in levels of increasing technological complexity, arranged in a geographically delimited area, and the population that will receive them must be defined attendance. Decentralization allows for greater efficiency in public policies, by approaching the social reality of each location.

In addition, the SUS is a hierarchical network, managed by the Ministry of Health, at the federal level, based on the elaboration of guidelines and transfers of resources to other federative entities, through administrative consensus, mainly, of tripartite and bipartite intermanagement commissions[1].

Despite this decentralized action, it is noteworthy that the SUS is governed by the principle of unity, which means that it is a unitary, indivisible system, seeking to preserve and fully meet the needs of society. Thus, in each sphere of activity, the system seeks, in a homogeneous way, the implementation of public policies.

With regard to community participation, this is a guideline that determines for public agents to create means of community participation in the conduct of the SUS, whether at the stage of formulation, management or execution of health services, materializing, mainly, in the performance of Health Councils and Conferences.

Judicial control of public policies

Despite the demand level of contemporary society is increasing, in the sense of seeking to meet social demands, the public manager chooses to guarantee the maximum in collection, minimizing the realization of these postulations. Thus, for the Judiciary, the need for an active stance with the scope of solving this problem arises, mainly, in view of the relevance of social rights. In this context, one of the most intense legal discussions of today emerges the judicial control of public policies and the effectiveness of fundamental rights, in conflict with the principle of separation of powers.

The norms of social law are, as a rule, vague precepts and lacking in precision, having, as recipient, the Public Power and needing it for the execution of public policies and the provision of the stipulated services.

This supplementary action of the Judiciary, however, could not occur freely and unconditionally. There must have been a deviation from the natural course of public interest in the administration or the legislature[11].

Within this vision, among the activities of the Judiciary is the control of public policies, whether in the normative or administrative scope, allowing a broad discussion within society about decisions that interest the community as well as about the extent of control by the Judiciary[12].

The Brazilian jurisprudence, little by little, evolves with regard to the matter, recognizing the role of the Judiciary as guarantor of these rights, in the face of the omission of the Executive and Legislative Powers, but this does not remove the need for a specific debate on the subject, mainly , regarding the technical capacity of the magistrate to deal with demands as complex and with systemic effects as public policies. Perhaps this is the biggest challenge in studying the relationship between the Judiciary and public policies.

The Judiciary does not assume a substitutive role for the Executive and Legislative, but complementary, fulfilling its constitutional role of intervention in public policies, when the failure of the public power to act in this way is proven.

It should be noted that this performance and the growth of the Judiciary has been the object of great criticism, many of them correct, as well punctuated in a study, which highlights the restricted view of the judicial body as a harmful element to its performance in the scope of public policies, emphasizing that its supposed inability to make macrostructural assessments, since its job is to deal with intersubjective conflicts, the so-called micro-justice[13].

These restrictions do not remove or restrict the legitimacy of the Judiciary, but warn about the need for its judicious action, attentive to the roles of the other powers and observing the constitutional determinations. It is not the function of the judicial body to create or change public policies through their personal conceptions, but only to control their execution. Now, if the Executive is omitted in the function of fulfilling fundamental rights, it is up to the Judiciary to give effect to it, under penalty of making the constitutional command an integral part of a mere political discourse. The superiority of one power over another is not defended, but its performance in the event of inertia or mistaken action, provided that they are duly proven within a judicial process, contributing to the scenario of the implementation of public policies.

The reserve of the possible and the existential minimum

The second half of the last century saw a multifaceted academic questioning of legal purism, with the

emergence of diffuse research movements under the "Law and" formula. Although the most creative approaches – such as law and music, law and cinema, law and smell, and even law and magic – are still in their infancy, the submission of legal categories to methods from other areas of knowledge, such as Sociology, Anthropology and Psychology has solid literature and important bibliographic contributions. The sociology of law, legal anthropology and forensic psychology, for example, contributed to the critical assimilation of the rapid transformations of the legal phenomenon after the Second World War and, especially, after the end of the Cold War and the beginning of an uncertain new global order[1].

Reinforced by the contemporary supremacy of the economic system in times of globalization, the movement of approximation between Law and Economics, since its inception in the 1960s, has been one of the most prolific among the new methods of observing Law. Developed from texts by Profs. Ronald Coase and Richard Posner, from the University of Chicago, and Guido Calabrei, from Yale University, the economic analysis of law presupposes the submission of norms to an economic perspective, analyzing the behavior of individuals before the law and considering the advantages of certain rules for wealth maximization[2,14].

Typical economic concepts, such as prices, supply and demand, rational choices, externalities, information asymmetry and other microeconomic topics are incorporated into legal research, which, gradually, also demands an adaptation of legislative options and judicial decisions to these parameters[15].

In this way, economic analysis brings to law a logic of consequence, concerned with the relationship between cost and benefit of legal rules. Efficiency in the management of limited social resources is a concern of Economic Science. This can contribute to the planning of public spending, allowing a prioritization of scarce social spending.

In fact, the argument that social well-being, provided by the State, must be considered by economic planning, which would be restricted in times of crisis, was very successful and bordered on consensus in the political environment since the last decades of the last century[16].

With the accession of Margaret Thatcher to the British government in 1979, and the project of reinserting the UK economy at the top of world capitalism, the notion spread among several countries that the provision of services and the guarantee of social networks could no longer be supported by the Government[1].

It is worth noting that social rights demand government provision through the implementation of public policies and require more financial resources than civil and political rights. Abstaining, in simplistic reasoning, is always less costly than doing something. Thinking about the costs that a private health plan or the payment of private schools brings to a family budget also suggests that, when hospitals or colleges are offered by the State, there will be a greater expenditure on government activity. When considering the purely economic bias of these choices – that is, when considering the importance of a service and its price –, the tendency is to choose priorities, to focus resources.

In reality, civil or first-generation rights to freedom, such as voting, coming and going, demonstrating, having access to justice and even private property, prove to be as costly or more costly than social benefits. This argument is developed in the book The cost of rights: why liberty depends on taxes, published in 1999, in the United States, by political scientists Stephen Holmes and Cass Sunstein. The authors refute the classification between positive and negative rights, arguing that all rights demand resources from the treasury and are, therefore, positive. They claim that, in order to calculate the costs of guaranteeing the right to property – perhaps the most basic of classical liberal theory –, one must add the expenses for the punishment of crimes against property, as well as the resources directed to the military budget[17].

Freedom of expression, also considered essential for liberalism, is also not, according to the authors, totally negative, because, although the State cannot intervene in individual or collective political manifestations, it must guarantee the maintenance of public spaces, such as squares and parks. , where the population can demonstrate their claims. In this context, it is noteworthy that the resources spent in these public places come from the taxation imposed on all citizens, including those who eventually disagree with the agenda of the protests held there. The same reasoning applies to the right to life[17].

In Brazil, although, among the eight Brazilian Political Charters, social rights have been enunciated since the third, the contemporary Constitution brings an extensive – and only illustrative – article for social rights, consolidating the realization of the dignity of the human person in accordance with state benefits, while preserving the free market, private property and inheritance as necessary rights in a market economy.

Despite this, the Citizen Constitution was promulgated in 1988 and, already in 1989, President Fernando Color was elected, with an explicitly neoliberal political platform, of reducing the minimal state. The implementation of the constitutional order, therefore, passed, from the beginning, by questioning the economic foundation. According to the study, it can be said that the Constitution of the Republic arrived in Brazil when a political-economic model that was absolutely incompatible with the final purposes of the new constitutional order already prevailed in Latin America. In fact, the reforms developed throughout the 1990s, in public administration, created a regulatory State that certainly changed the perspective of an originally guarantor and directive Constitution, approved with reverence and historical commotion just a decade earlier[14].

Due to the claims related to the realization of rights seen as fundamental, having, as a common characteristic, the need to make material means available - financial and budgetary - to make their implementation possible, a dependency related to state action was created for the realization of this range of rights, linked to the need to formulate public policies to become enforceable, as well as the allocation of public resources.

Thus, from the conception of this list of rights as dependent on an active state action, in the sense that, in addition to elaborating public policies, effective material means must also be made available to guarantee the population's rights, the discussion arises involving the reserve of the possible versus the existential minimum that must be guaranteed to all citizens.

According to the study, the reservation of the possible is characterized by limitations for the realization of fundamental rights from the factual and legal aspects. The factual dimension is understood as the total absence of resources for the realization of performance rights, but it can also be related to the way these resources are distributed, while the legal dimension concerns the existence of resources, without these being available or being able to be used by the addressees of the standard. The factual bias brings, as a consequence, the understanding that the absence of resources, as a means of not realizing rights, must be duly proven by the public power, while the legal one relates to the state power to dispose of resources through the constitutional provision on the budget matter[5].

It is important to highlight the existence of a negative dimension related to the reserve of the possible, in which citizens tend to deny an overly burdensome service. The Judiciary must act with proportionality and reasonableness in the face of the problem of lack of resources.

The possibility of State action, in its various facets, is inextricably linked to its budget, not being able to talk about control of public policies, without observing the budget rules, not admitting the defense of a Judiciary that imposes unlimited consequences for the expenses of the State.

The mere allegation of the existence of the reserve of the possible by the public power does not exempt it from fulfilling its constitutional obligations, it is incumbent on it to prove, objectively, the insufficiency of resources and the inexistence of budget forecast.

The origins of the concept of existential minimum took place in Germany, where the relationship was directly related to the right to life and dignity of the human person; however, with the legal maturity through which several States have passed over the decades, mainly due to the influence of the Welfare State, this understanding has taken on a sociocultural dimension, linked to the principle of equality.

In Brazilian territory, the pioneer in the study of the matter is the indoctrinator Ricardo Lobo Torres, basing himself particularly on the studies of John Rawls and Robert Alexy and understanding that the existential minimum is supported by the principle of freedom, but in a tempered way. Thus, if within the existential minimum are the rights to freedoms that depend on the realization of material conditions for their true enjoyment, then, consequently, the right to the existential minimum will only be realized as fundamental social rights are implemented. In this approach, it is understood that fundamental social rights, in the strict sense, are confused with the idea of the existential minimum. In this sense, Ricardo Lobo Torres recognizes that state benefits of a legal nature correspond to subjective rights, which aim to satisfy the existential minimum for a life with dignity[18].

According to the study, it can be clarified that not all fundamental rights are considered as existential minimum, but only those that generate rights to “dignified existential situations”, because “without the necessary minimum, existence ceases the possibility of survival” of man and the initial conditions of freedom disappear”[19].

When it is stated that a right is part of the select list of those considered to belong to the existential minimum, it is necessary to guarantee minimum conditions, in order to materialize the principle of human dignity, for the realization of this right.

Fundamental rights and those relating to the existential minimum are guaranteed by the State, through the provision of public services, financial benefits and the legal certainty that is made available to individuals. In this way, the existential minimum works as an indicator of priority targets for government investment, being able to live in harmony with the legal reserve from a valid allocation − backed by the dignity of the human person − of public resources[20].

The existential minimum corresponds to an essential part in the implementation of public policies, indispensable to guarantee the dignity of the human person, being carried out.

The lack, however, of sufficient financial support to satisfy social needs leads to allocative choices to be made by managers.

In this way, it is clear that the issue is complex, since it requires the establishment of objective criteria and priorities so that it is possible to resolve case by case, according to the most urgent social needs.

The Judiciary must be a guarantor of the effectiveness of the benefits contained in the existential minimum, ensuring the requirements of life with dignity, observing, however, the existence of finite resources within the scope of public administration and, in the face of the concrete case, acting with consideration, and with on the basis of reasonableness and proportionality.

These criteria are not, however, fixed and immutable, and cannot be previously established or listed exhaustively. On the contrary, they will always be subject to the analysis of financial, legal and economic capacity, allied to the expectations and needs of the moment, making it clear that human needs cannot be confused with simple existence. Living with dignity does not mean surviving, given that the existential minimum must be analyzed in harmony with the right to life and the principle of human dignity[5].

In this sense, it can be seen that the allocation of resources should have, as a basis, the objectives adopted by the Constitution, in order to make the protected rights effective and to avoid legal uncertainty for citizens, regarding the probability of such a right being guaranteed by the government. public or not, due to economic criteria.

It is essential to establish criteria for the allocation of resources, as well as the delimitation of the content of the

essential minimum, being perhaps the most arduous task, when we talk about judicial control of public policies.

Final Considerations

The phenomenon of the judicialization of social relations reflects the growth of the Judiciary in recent decades, increasingly regulating practices and themes, which were previously distant from the daily life of this Power. The Judiciary begins to act in the realization of social, economic and cultural rights, in the excesses and omissions of the public power.

In the subject matter of this study, it was noticed that the growth of the Judiciary took place, mainly, because the Executive has not been fulfilling its constitutional role, not treating public health as a priority. The Brazilian State's agenda privileges the achievement of economic goals, to the detriment of resources for health.

In recent years, the issue has become part of the daily life of Brazilian society, which has been transferring to the Judiciary the role of guaranteeing its sanitary expectations. The number of lawsuits filed against the State claiming health services and medicines has been growing significantly and the judicialization of health creates a distorted system, which benefits those who manage to file lawsuits in court.

Excessive judicialization is far from being eradicated and its side effects remedied. The data involve the responsibility of the Executive, the Judiciary, and society, and, in this regard, even though it is not the specific object of analysis in this study, it is important to record the judicial use to protect vested interests, mainly of the pharmaceutical industry. It is an extremely organized sector, when they act in defense of their interests before the Executive, Legislative, Judiciary and regulatory agencies, seeking the insertion and redefinition of therapeutic guidelines.

The Judiciary, often, due to failures in its performance, becomes an instrument of this powerful industry, which stimulates and seeks to insert new medicines through individual actions, or camouflaged by interests in judgment of Non-Governmental Organizations.

It is understood that the individual judicialization of health, as a rule, does not produce technical discussions, nor does it analyze public policies. It is only about the general guarantee of the effectiveness of the fundamental right, without entering any specificity of the theme. This attitude undoubtedly generates flagrant distortions and contributes to the scenario of inefficiency of the SUS.

From the above, it is understood that the Judiciary has to improve its technical performance in the area of public health, understanding it in its collective, systemic and integral vision and, also, incorporating the right to health as part of a public policy of responsibility not only of the Executive, but of the Judiciary and society. It is necessary to prepare for a democratic dialogue between the actors, with mechanisms and flow able to make fair, transparent, financially advantageous and speedy choices in health demands.

With regard to municipalities, it is possible to conclude that municipalities should verify the drugs that are most requested in lawsuits and assess whether offering these drugs spontaneously to the population would be more advantageous in financial terms. Certainly, if the budget of the municipalities allows it, offering medication spontaneously to those who need it is desirable, however, all analysis must be done prioritizing collective health, which cannot be sacrificed for the benefit of the individual.

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